Doing Business in Brazil

A guide prepared by the
French Desk of BMA Advogados

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This publication presents some of the legal aspects to be taken into consideration by companies interested in doing business in Brazil, for information and debate only. The application and impact of laws can vary widely based on the facts involved. The information contained in this publication is not legal advice and may not be treated as an opinion on any specific transaction. Readers interested in investing or doing business in Brazil can consult our team at FrenchDesk@bmalaw.com.br

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GLOSSARY

BACEN: Central Bank of Brazil

Brazilian Civil Code: Law 10,406, enacted in 2002

BRL: Brazilian currency, the *real*

CADE: Administrative Council for Economic Defense, Brazil's antitrust regulator

CLT: Consolidation of Labor Laws

CONAMA: Brazilian National Environmental Council

CVM: Brazilian Securities Commission

FIP: private equity fund

DOING BUSINESS IN BRAZIL

GENERAL ASPECTS OF BRAZILIAN LAW

1. CORPORATE ASPECTS

Brazilian law provides for several types of corporate entities, the most common of which are the limited liability company (*sociedade limitada*) and the corporation (*sociedade anônima*). Limited liability companies having only one quotaholder are called *Sociedade Limitada Unipessoal*.

1.1 Limited Liability Company (*Sociedade Limitada*)

Sociedades limitadas are governed by the Brazilian Civil Code. They are incorporated by means of Articles of Incorporation, which after incorporation is complete are referred to as Articles of Association (*Contrato Social*). The Articles of Association must be registered with the commercial registry for the State or territory in which the company is incorporated, if it is a business entity (*sociedade empresária*), or with the Civil Entities Registration Office if it is a simple civil partnership (*sociedade simples*).

Quotaholders of a *sociedade limitada*, with few exceptions depending on the sector of its businesses, need not be Brazilian nationals and can be either individuals or legal entities. In fact, quotaholders do not even need to be resident in Brazil, as long as they are formally represented by an individual residing in Brazil, with powers to receive service of process. The Articles of Association are a public document and therefore all the information identifying the quotaholders is also public.

In a *sociedade limitada*, the liability of each quotaholder is limited to the value of its quotas, but all quotaholders are jointly liable for paying in the company's corporate capital. This limitation of liability is not absolute and, in exceptional circumstances, the quotaholders may be exposed to liability for the company's obligations.

Sociedades limitadas are not required to publish their financial statements, which can represent not only reduced costs, but also greater confidentiality for the company's financial information, in contrast to corporations, which are required to publish their financial statements.

No minimum corporate capital is required to incorporate a *sociedade limitada*, and the corporate capital does not have to be fully paid at the time of incorporation.

A *sociedade limitada* is managed by one or more individuals referred to as "officers" (*diretores*), who may or may not reside in Brazil. Officers who reside outside of Brazil must grant a power of attorney to a representative in Brazil, granting powers to receive citations and subpoenas in lawsuits or administrative proceedings. Officers of a *sociedade limitada* are appointed by its quotaholders, either in the Articles of Association or by means of a separate resolution. Foreign nationals may be appointed as officers, as long as they have a valid permanent visa and are resident in Brazil. The quotaholders can retain control over certain resolutions regarding the company by reserving certain rights and imposing restrictions in the Articles of Association over the acts that can be performed directly by management.

1.2 Corporation or S/A (*Sociedade Anônima*)

The capital of a corporation is represented by shares, and in general a corporation must be incorporated by at least two shareholders, by means of Bylaws (*Estatuto Social*), which also serve as articles of incorporation. Exceptionally, wholly-owned subsidiaries can be incorporated by one shareholder, which must be a Brazilian company.

In order to form a corporation, a special shareholders' meeting is held, at which the corporation's Bylaws are approved. At least 10% of the issue price of the subscribed shares must be paid up immediately, in cash. If any of the shares are paid in by means other than cash, a general meeting must be called to appraise the monetary value of the assets contributed to the corporation's capital.

All incorporating documents must be filed with the commercial registry and then published in a newspaper in circulation where the corporation has its headquarters.

Common shares always have voting rights. In contrast, the voting rights of preferred shares can be limited or excluded by the corporation's Bylaws, in exchange for other advantages. Preferred shares usually do not confer voting rights, although they may have restricted voting rights conferred in the Bylaws.

According to the Brazilian Corporations Law, preferred shares with restricted or no voting rights are limited to 50% of the company's total issued shares. All preferred shares must confer either one or both of the following privileges: (i) priority on the distribution of fixed or minimum dividends, or (ii) priority on repayment of capital, with or without a premium.

In order to be traded on the securities market, preferred shares without voting rights or with restricted voting rights must carry at least one of the following rights: (i) payment of dividends representing at least 25% of the company's net profit for the year, (ii) payment of dividends at least 10% higher than those paid to common shares, or (iii) the right to tag along in a public tender offer for control, with the right to dividends at least equal to those paid to common shares.

In a corporation, the liability of shareholders is even more restricted than in a *sociedade limitada*. According to the Brazilian Corporations Law, a shareholder's liability is limited to the issue price of the shares subscribed by that shareholder. The limitation of liability is not absolute, however, and in exceptional circumstances, the shareholders may be exposed to liability for the corporation's obligations.

Corporations are required to publish their financial statements and the minutes of their shareholders' meetings. However, a closely-held corporation with annual gross revenues not greater than BRL 78,000,000.00 may publish its financial information electronically.

A corporation may be managed (i) by one or more officers, who form a management body (the Executive Management, or *Diretoria*), or (ii) by the Executive Management and a Board of Directors (*Conselho de Administração*). The officers and members of the Executive Management and Board of Directors could be Brazilian or foreign individuals and may or may not reside in Brazil.

2. FOREIGN INVESTMENT IN BRAZIL

2.1 Corporate Requirements

There are a number of rules of interest to foreign investors in Brazilian companies that apply equally to S/As and *limitadas*. Investment in Brazil by non-residents, whether legal entities or individuals, does not face many legal restrictions and is permitted in the vast majority of economic sectors. As a rule, there are no requirements regarding minimum investment or local participation in Brazilian companies.

Foreign investors in S/As or *limitadas* must be represented in Brazil by an individual who is resident and domiciled in Brazil, under a power of attorney, with powers to represent the foreign investor in Brazil and receive service of process in legal proceedings related to their holdings in the Brazilian company. The foreign investor must also obtain a Brazilian tax identification number (*Cadastro de Pessoas Físicas* – CPF, for individuals and *Cadastro Nacional de Pessoas Jurídicas* – CNPJ, for legal entities) in case of direct investment in Brazilian entities (i.e. interest, shareholding)[1].

2.2 Registration Requirements

Currently, any foreign direct investment in Brazilian companies must be registered (and kept up to date) with the Central Bank of Brazil ("BACEN"), as a prerequisite to making remittances abroad in connection with the investment, such as remittance of profits, repatriation of capital, payment of dividends and so on.

The rules and regulations applicable to foreign investment in general, including registration requirements, are currently being revised by Brazilian authorities and might suffer some changes soon.

2.3 Foreign Exchange Regulation and Requirements

As a rule, remittances to and from other countries (regardless of the amount and classification, except for specific situations) do not require authorization from BACEN, as long as the transaction (a) is legal and supported by documents evidencing the legitimacy and economic grounds for the remittance and (b) is made through an authorized agent (i.e. financial institutions, brokers, payment institutions, etc).

2.4 Local Presence Requirements

In order to direct investment be registered with BACEN, foreign investors, whether individuals or legal entities, must first be enrolled with BACEN and appoint and maintain a representative (attorney-in-fact) in Brazil, with specific powers to manage assets and receive service of process in proceedings before Brazilian courts and Brazilian tax authorities on behalf of the foreign investor.

[1] For facilities and loan transactions entered with Brazilian entities, the tax identification number is not mandatory.

3. PRIVATE EQUITY FUNDS

Private equity funds ("FIPs" – *Fundo de Investimento em Participações*), which are governed by Instruction 578/2016 (as amended) issued by Brazil's securities and exchange commission, the *Comissão de Valores Mobiliários* (the "CVM"), are equity investment vehicles that can be used to invest in Brazilian companies, through the acquisition of quotas in *limitadas* or shares, subscription bonuses, debentures or other securities convertible into or exchangeable for shares issued by listed or closely-held S/As. FIPs may also invest in simple debentures, so long as the fund participates in the decision-making process of the issuer and the minimum corporate governance requirements (as mentioned below) are complied with.

FIPs are formed by their fiduciary administrators, which also approve the fund's initial bylaws (*regulamento*). Only legal entities authorized by the CVM can administer FIPs and manage their portfolios. In addition, a FIP's financial statements must be audited annually.

Only "qualified" investors can invest in FIPs. Qualified investors include Brazilian residents having financial investments exceeding BRL 1 million and "professional investors", a category that includes all foreign investors and Brazilian residents having financial investments worth more than BRL 10 million.

3.1 FIP Portfolios

At least 90% of a FIP's net assets must be invested in securities issued by its invested companies (as described above) or in units of other FIPs. In addition, FIPs may directly or indirectly invest up to 20% of their subscribed capital in securities, with the same economic nature of the assets mentioned above, issued by foreign companies; provided that, in the case of FIPs targeted exclusively at professional investors and registered as "multi-strategy foreign investment", this limit is raised to 100%.

Investment in simple debentures is, generally, limited to 33% of the FIP's subscribed capital.

The fund must participate in the decision-making process of its invested companies (with certain exceptions), effectively influencing its strategic policy and its management. The effective influence can be attained by:

(a) holding shares that are part of the respective controlling shareholder group;
(b) entering into a shareholders' agreement; or
(c) adopting a procedure that ensures the fund an effective influence on the definition of its strategic policy and management.

The invested companies must follow certain minimum corporate governance practices (exceptions apply to smaller companies) and investment in *limitadas* is subject to specific requirements.

In the case of investments in closely-held S/As, the relevant bylaws must be adapted, to the extent necessary, in order to comply with the following corporate governance practices set forth in CVM Instruction 578/2016 (as amended): (i) prohibition of the issuance of founders' shares (*partes beneficiárias*), as well as cancellation of any existing founders' shares; (ii) define an unified term of

office of 2 years for the entire board of directors (when in exists); (iii) disclosure of (a) any agreements entered with related parties, (b) any shareholders agreements, (c) stock option programs or any issuer's security option program; (iv) if it decides to become a publicly held corporation, it must undertake, before the fund, to adhere to a stock exchange's or organized over-the-counter market's special corporate governance segment; (v) adopt arbitration as the conflict/dispute resolution mechanism; and (vi) annually audit its financial statements by an independent auditor registered with CVM.

In general, FIPs cannot lend or borrow money. However, FIPs that obtain direct financial support from development agencies may borrow directly from the development agencies, in an amount equal to up to 30% of the fund's assets.

3.2Types of FIPs

FIPs are classified in five categories, according to the composition of their portfolios:

(a) Seed Capital (*FIP – Capital Semente*): this type of FIP was created to encourage investment in startups and small entrepreneurs on different fields. The investment may be made in companies or *limitadas* whose annual gross income do not exceed R$16,000,000 (as long as their controlling companies do not have more than R$80,000,000 in assets or annual gross income greater than R$100,000,000), calculated in the fiscal year ended in the year prior to the first investment and regarding any of the last three fiscal years. The investees of these FIPs are exempt from the corporate governance rules set forth in CVM Instruction 578/2016, until they reach a certain size;

(b) Emerging Companies (*FIP – Empresas Emergentes*): these FIPs are meant to invest in companies that are in a more advanced stage than the FIP Seed Capital's investees. Its investees may have up to R$300,000,000 in annual gross income (as long as their controlling companies do not have more than R$240,000,000 in assets or annual gross income greater than R$300,000,000), calculated in the fiscal year ended in the year prior to the first investment and without having presented revenues exceeding this limit in the last three fiscal year. These FIPs' investees are subject to some, but not all, of the corporate governance rules set forth in CVM Instruction 578/2016, until they reach the annual gross income threshold mentioned herein;

(c) Infrastructure (*FIP – Infraestrutura*, also known as *FIP-IE)* and (d) Intensive Economic Production in Research, Development and Innovation (FIP-PD & I): these two types of FIPs were created to invest only in corporations (*sociedades anônimas*) that develop new infrastructure projects (FIP-IE) or invest in the production of economic research and innovation (FIP-PD & I) within the Brazilian territory in the following areas: (1) energy, (2) transportation, (3) water and basic sanitation, (4) irrigation, and (5) other areas defined as a priority by Brazilian federal government[2]. These FIPs must have, at least, 5 unitholders, none of which may own more than 40% of the total units issued by the FIP, or receive more than 40% of the FIP's results. In addition, FIP-IE and FIP-PD&I must make their investments within 180 days of obtaining registration with the CVM. Infrastructure FIPs enjoy special tax benefits; and

[2] New projects are those implemented after January 22, 2007, and include the expansion of existing projects, and projects that have been implemented or are in the process of being implemented, as long as the investments and the results of the expansion are segregated by forming a special purpose company.

(e) Multistrategy (*FIP – Multiestratégia*): this category admits the investment in different types and sizes of invested companies, including up to 100% of the FIP's subscribed capital in assets issued or traded abroad, if ownership of the FIP units are limited solely to professional investors (including, among others, all foreign investors and Brazilian resident individuals or legal entities whose financial investments are in excess of R$10 million). Multistrategy is the broadest FIP category and allows for investment in different types and sizes of companies, including both S/As and *limitadas*.

3.3Taxation of FIPs – an overview[3]

FIPs are not subject to taxation on income (earnings and capital gains) generated by their portfolios. As a rule, income earned by Brazilian residents and foreign investors on their investment in a FIP, and their capital gains from the sale of FIP units, are subject to 15% withholding tax ("WHT").

Exceptionally, a zero-rate WHT applies to foreign investors that pass all three of the following tests:

- Portfolio Test: the FIP cannot hold debt securities representing more than 5% of its net assets (excepting Brazilian government bonds, convertible debentures and/or subscription warrants);
- Tax Haven Test: the foreign investor cannot be domiciled in a "low tax jurisdiction"; and
- 40% Test: the foreign investor (i) cannot own, individually or together with "related parties", more than 40% of the FIP's units; and (ii) cannot be entitled, individually or together with "related parties", to more than 40% of the FIP's results.

3.4FIPs and public offering

FIP units may be offered pursuant to a registered public offering (targeting an unlimited number of qualified investors) or an exempt offering (targeting a limited number of professional investors).

A registered public offering must comply with the regular procedure set forth in CVM Instruction 400/2003, which would include the basic materials necessary for any public offering in the Brazilian market (such as a prospectus and marketing materials for the underwriters, for instance).

However, must FIPs raise funds under exempt offerings, carried out with restricted placement efforts, which are subject to CVM Instruction 476/2009 and are not subject to registration with CVM ("restricted offerings").

Restricted offerings of FIP units may target up to 75 professional investors in Brazil, from which only 50 can actually subscribe or acquire the units. There is no limitation on the number of foreign investors participating in the offering.

In addition, restricted offerings are subject to the following requirements:

[3] Currently, there are bills to reform the tax rules applicable to FIPs, including a general tax reform, which are under analysis before the Brazilian Congress. It is not possible at this time to foresee if or when they might be approved and made into law, and they are still subject to changes.

- 4-month black-out period applies (FIP may not conduct another restricted offering of units within that period, unless the new offering is targeted exclusively to the FIP's unitholders);
- 90-day lock-up period for the units' trading in stock exchange / over-the-counter markets;
- Restrictions on publicity and marketing of the offering;
- Hiring of a financial institution to act as underwriter; and
- Underwriter must send information regarding the commencement and completion of the restricted offering to CVM.

4. TAXES IN BRAZIL

The Brazilian Constitution sets out the federal, state and municipal governments' powers to impose taxes. The main taxes that companies are subject to in Brazil are outlined below.

4.1Federal Taxes Levied on Profits and Revenues

4.1.1 Corporate Income Taxes

Brazilian tax-resident companies are subject to the corporate income taxes IRPJ (*Imposto de Renda da Pessoa Jurídica*) and CSLL (*Contribuição Social sobre o Lucro Líquido*) on their worldwide income. IRPJ is levied at a 15% rate, plus a 10% surcharge on taxable profits above BRL 240,000 per year. The CSLL rate is 9% in most cases. The combined IRPJ-CSLL rate is 34%.

There are two methods for calculating IRPJ and CSLL:

- *Actual profit method*. Taxable income is based on the company's book income, adjusted for non-taxable revenues, non-deductible expenses and deductions or additions provided for by law. Tax losses incurred in a given year can be carried forward indefinitely. Any tax losses carried forward can offset up to 30% of taxable income in a given year.
- *Presumed profit method*. Taxable income is calculated by applying a presumed profit margin (from 1.6% to 32%) to the company's gross operating revenue plus other types of income. All financial income and other qualified income (such as capital gains) must be included in taxable income (i.e., taxed at 34%). No deductions, loss carry-forward or carry-back are allowed.

Entities that perform certain activities (e.g., investment banks) and entities that have gross revenues exceeding BRL 78 million per year or BRL 6.5 million per month in the previous fiscal year cannot elect the presumed profit method. Changing the calculation method is not allowed during a given fiscal year. Brazil has rules on transfer pricing, thin capitalization and controlled foreign corporations (CFCs).

Currently, Bill 2,337/21 (*Proposta de Reforma Tributária*) is under analysis by the Brazilian Senate. This Bill modifies several income tax aspects (such as corporate income tax rate and tax on dividends).

4.1.2 Taxes on Gross Revenue

PIS (*Contribuição ao Programa de Integração Social*) and COFINS (*Contribuição para o Financiamento da Seguridade Social*) are calculated based on the company´s gross revenue. The rates vary depending on

the method adopted by the company, as follows:

- *Cumulative method*. PIS and COFINS are levied on gross revenue at a combined rate of 3.65%. Entities subject to the presumed profit method for IRPJ and CSLL purposes (see above) are generally required to use the cumulative method.
- *Non-cumulative method*. PIS and COFINS are levied on total revenue at a combined rate of 9.25% (except for financial income, which is subject to a 4.65% rate). Taxpayers can record credits for PIS and COFINS paid on certain inputs, which are then offset against the amount of PIS and COFINS payable on products sold.

There are other special PIS and COFINS regimes for companies engaged in certain industries, such as the pharmaceutical industry, and some machines and vehicles, under which products are subject to the "single-phase" regime (regime monofásico), with different rates and treatments.

Among the several tax reforms projects under the appreciation of the House of Representatives, we highlight Bill 45/19 and Bill 110/19, which seek to unify taxes on consumption; and Bill 3,887/20, which intend to unify PIS and COFINS into a single contribution called CBS.

4.2Taxes Levied on Consumption, Sales and Services

4.2.1 Federal Excise Tax

The federal excise tax IPI (*Imposto Sobre Produtos Industrializados*) is levied on the sale of domestic and imported manufactured products, based on the value of the transaction. IPI rates vary according to the product's Harmonized System classification code and can vary from zero to 300% (tobacco). As a rule, IPI is a non-cumulative tax, so the tax paid by the taxpayer on purchases can be offset against the amount of IPI tax collected on sales.

4.2.2 State VAT

The state VAT, ICMS (*Imposto sobre Operações relativas à Circulação de Mercadorias e Prestação de Serviços de Transporte Interestadual e Intermunicipal e de Comunicação)* is levied on the circulation of goods and certain services, such as interstate transportation and communication services. Like IPI, it is a non-cumulative tax, so that tax paid on previous transactions can be offset against the tax collected on subsequent transactions. The tax is calculated based on the value of the transaction. The tax rates vary depending on the state and the type of transaction, but the main rates usually vary from 17% – 20% for transactions between parties within a single state.

4.2.3 Municipal Tax on Services

The municipal tax on services, ISS (*Imposto sobre Serviços*), is levied on certain services listed in federal legislation. In principle, ISS is payable to the municipality where the service provider is located, but in certain cases it is payable to the municipality where the service is performed. The rates can vary from 2% to 5%, and the tax is calculated on the price of the service.

4.3Tax on Financial Transactions

IOF (*Imposto sobre Operações Financeiras*), which is a federal tax levied on credit (domestic and outbound loans), exchange, insurance, and financial transactions, has a particularly important function as an instrument of federal economic and industrial policy. The tax attaches to five types of financial transactions, depending on their nature and maturity terms. The legislation provides for the maximum tax rate, which can be reduced by Presidential decree. The current rates are as follows:

- Credit transactions – tax rate: statutory maximum rate of 1.5% per day. The general daily rate is 0.0041% when the loan is made between legal entities and 0.0082% when the loan is made from entities to individuals, plus an additional 0.38%, limited to 365 days, for a maximum of 1.88% and 3,37%, respectively;
- Securities transactions – tax rate: statutory maximum rate of 1.5% per day. Currently, the tax is zero for most transactions;
- Insurance transactions – tax rate: from 0% to 25%;
- Currency exchange transactions – tax rate: from 0% to 25%. Currently, the rate for most currency exchange transactions is 0.38%and the rate for international credit card transactions is 6.38%. Until March 18, 2022, loans made by foreign entities were subject to IOF on the inflow of funds at 6% when the average maturity term of the loan was lower than 181 days. This rate was reduced to zero. As of January 2nd, 2029, all the currency exchange transactions will be subject to a zero rate.

4.4Taxes on Importation of Goods

4.4.1 Federal Customs Duties

II (*Imposto de Importação*) is a federal tax levied when foreign goods entering Brazilian territory clear customs. The tax is owed by the importer.

As a rule, II attaches to the customs value of the imported goods. The tax rate varies according to the tax code of the imported goods under the Harmonized System. II does not generate credits for the importer and is not refundable.

4.4.2 Excise Tax on Imports (IPI)

IPI, the federal excise tax (see item 4.2.1 above), is also levied on the importation of goods. The tax is calculated based on the customs value of the goods plus the II. In principle, IPI on imports does not generate tax credits.

4.4.3 PIS and COFINS on Imports

The importation of goods is also subject to PIS and COFINS (see item 4.1.2 above) at the rate of 2.1% and 9.65%, respectively, due when the imported goods are paid for. Importers that calculate PIS/COFINS-Imports and collect PIS/COFINS under the non-cumulative system may be able to offset PIS/COFINS credits. Moreover, if the amount of PIS and COFINS paid on importation is higher than the PIS and COFINS owed by the importer on its gross revenues under the non-cumulative method, the importer can offset the PIS/COFINS credits against other federal taxes, such as corporate income taxes. For importers that calculate PIS/COFINS on gross revenues under the cumulative method, the amounts of PIS/COFINS paid on the importation of goods do not generate credits, and simply represent a cost for the importer.

4.4.4 ICMS on Imports

The state VAT, ICMS (see 4.2.2 above), is also levied on imports of goods. The tax is calculated based on the customs value plus II, IPI, PIS/COFINS-Imports and customs expenses.

4.5Taxes on Importation of Services

4.5.1 WHT for Non-Residents

Amounts remitted by Brazilian sources to non-Brazilian residents as payment for services are subject to withholding tax (WHT). As a rule, the WHT rate is 25% for "pure" services and 15% for technical services. If the beneficiary is located in a favorable tax jurisdiction, the WHT rate will be 25%, irrespective of the nature of the service provided.

4.5.2 PIS and COFINS on Imports

Similar to the importation of goods, PIS/COFINS-Imports is levied on the importation of services at a combined rate of 9.25% when the services are performed in Brazil or when they are performed abroad but the services produce effects in Brazil. PIS/COFINS-Imports is calculated based on the amount paid for the service, plus ISS and the amount of PIS/COFINS-Imports itself.

4.5.3 CIDE – Royalties

The Economic Intervention Contribution ("CIDE" – *Contribuição de Intervenção no Domínio Econômico*, an economic policy tax) is levied at a 10% rate on royalties and compensation for technical and assistance services remitted to either individuals or legal entities domiciled abroad. When CIDE is levied on technical services, the WHT tax rate is reduced from 25% to 15%.

4.5.4 CIDE – Fuels

CIDE-Fuels applies to imports and domestic sales of gasoline, the various types of diesel, kerosene, combustible oils, liquefied petroleum gas, and combustible ethyl ethanol, but not to exports of these products. As a rule, CIDE-Fuels rates are fixed according to the product, although currently the rate is zero for most fuels, except gasoline, which is taxed at BRL 100.00 per cubic meter. However, until 31st December 2022, gasoline is also subject to a zero rate.

4.5.5 ISS on Imports

The municipal tax on services, ISS (see item 4.2.3 above), is levied on listed services that meet any of the following criteria: (i) they are rendered within Brazil, or (ii) they are imported by Brazilian residents, or (iii) they are exported by Brazilian service providers if the exported services produce effects in Brazil.

In principle, ISS on imports is owed to the municipality where the beneficiary or intermediary of the service is located. The rate can vary from 2% to 5% and applies to the price of the service.

ISS is also owed on services rendered from abroad and on services that are begun abroad but concluded in Brazil. The amount of the tax must be withheld by the Brazilian recipient of the service and remitted to the municipality where it is located.

4.6 Taxation of Income and Gains of Non-Residents

4.6.1 Dividends

Currently, dividends are exempt from tax even if the beneficiary is located in a favorable tax jurisdiction. The payment of dividends may generate a tax sparing credit for the beneficiary, if the beneficiary is located in a country with which Brazil has a treaty to avoid double taxation.
However, if Bill 2,337/21 is approved (currently under analysis by the Brazilian Senate), payment of dividends would be subject to withholding income tax at a 15% rate (exemption would only be applicable in specific cases).

4.6.2 Interest on Capital – JCP

Interest on Capital ("JCP" – *Juros sobre Capital Próprio*) is remuneration paid to shareholders, which is calculated by multiplying the long-term interest rate (known as the TJLP) by the sum of the Brazilian company's equity accounts. JCP is deductible as an expense for the company, but the payment of JCP to foreign shareholders is subject to WHT of 15%, if the foreign investor is not located in a favorable tax jurisdiction, and 25% otherwise.

If Bill 2,337/21 is approved, payment of JCP would no longer be possible (Bill 2,337/21 is currently under analysis by the Brazilian Senate).

4.6.3 Interest Payments

Interest paid by a Brazilian resident to a non-resident is subject to WHT at 15% (or 25% if the resident is located in a favorable tax jurisdiction). Thin capitalization rules and transfer pricing may apply.

4.6.4 Royalties

Royalty remittances for the use of trademarks, formulations and manufacturing processes are generally subject to WHT at 15% (or 25% if the resident is located in a favorable tax jurisdiction). There are some specific deductibility requirements for the Brazilian beneficiary. Registration with Brazilian PTO, the National Institute of Industrial Property (INPI), and the Central Bank of Brazil (BACEN) may be required.

4.6.5 Capital Gains

Capital gains made by foreign investors on the sale of assets located in Brazil are subject to WHT in Brazil, regardless of whether the buyer is a Brazilian tax resident or not.

As a rule, the taxpayer for WHT purposes (i.e., the party that is actually subject to the tax) is the non-Brazilian resident that accrues the capital gain. Nevertheless, the party liable for collecting the WHT to the Brazilian government is (a) the buyer, when the buyer is a Brazilian resident, or (b) the buyer's

attorney-in-fact resident in Brazil, when the buyer is not a Brazilian resident.

Capital gains realized by foreign investors are taxed according to the same rules applicable to Brazilian residents. Rates vary from 15% to 22.5%, depending on the amount of the capital gain, unless: (i) a lower rate is provided for under a tax treaty between Brazil and the country where the seller is resident or domiciled, or (ii) the seller is resident or domiciled in a favorable tax jurisdiction, in which case the WHT rate is 25%.

4.7Tax Treaty Network

Most of Brazil's tax treaties (with 36 countries[4]) are based on the Organization for Economic Cooperation and Development's Model Tax Convention on Income and on Capital (OECD Model Convention). Depending on the tax treaty and the type of income, a reduced WHT rate may be available to foreign investors.

Brazil has not signed the OECD's Multilateral Convention to Implement Tax Related Measures to Prevent Base Erosion and Profit Shifting ("MLI").

5 LABOR AND EMPLOYMENT LAW IN BRAZIL

5.1Introduction

The Consolidated Labor Laws (*Consolidação das Leis do Trabalho* – CLT) were enacted in 1943 (and recently reformed, at the end of 2017), systematizing the sparse existing labor legislation and adding new provisions to protect workers. The CLT is the main source of labor and employment law in Brazil. In addition to the CLT, the Federal Constitution protects certain work-related social rights, and there is some ordinary legislation resulting from more recent developments in labor and employment law.

Labor relations are also governed by collective labor bargaining agreements and conventions, which often establish rights and benefits that are not provided for in the CLT and other labor legislation. Unlike many countries, Brazil has adopted a system under which all employees and all employers are mandatorily represented by associations known as *sindicatos*, or unions. Generally speaking, labor unions are established by economic sector or subsector and by territory, and represent all employees within their respective sectors and territories. As in the case of employees, companies are also represented by "employer unions" or associations.

Collective bargaining between a labor union and an employer union results in a collective convention, which is binding on all employees and employers represented by the unions engaged in the negotiation, regardless of whether the employee or employer is formally a member of the respective union. Collective bargaining between one or more employers and a labor union results in a collective agreement, which binds only the employer(s) and the workers employed by the employer(s) that are party to the agreement.

[4] Argentina, Austria, Belgium, Canada, Chile, China, Czech Republic, Denmark, Ecuador, Finland, France, Hungary, India, Israel, Italy, Japan, Luxembourg, Mexico, Norway, Netherlands, Peru, Philippines, Portugal, Russia, Singapore, Slovakia, South Africa, South Korea, Spain, Sweden, Switzerland, Trinidad and Tobago, Turkey, Ukraine, United Arab Emirates, Venezuela.

There are also the Restatements of Precedents (*Súmulas* and *Orientações Jurisprudenciais*) issued by the Superior Labor Court, Brazil's highest court on employment-related matters, which establish interpretations of the law, as well as its application.

The CLT has more than 900 articles, organized in Chapters and Titles which address the employment of urban workers, occupational health and safety, employment of foreigners, collective labor relations and procedural rules related to labor lawsuits, among other matters.

5.2Persons entitled to the protection of Brazilian labor laws

Not every person who provides services in exchange for remuneration is entitled to the benefits and rights established under Brazilian labor laws. In order for the labor legislation to apply, the relationship between the person providing the services and the person who pays for them must be personal, onerous, habitual and subordinate. Each of these four essential elements of an employment relationship is explained below.

Because the employment relationship must be personal, only individuals can be employees. The identity of the person must be important to the services to be provided, such that the person cannot send another to perform the work in his or her place.

An employment relationship must also be onerous or, in other words, the work performed by the individual must be paid. Those who work on a voluntary basis, or without remuneration, are not considered to be employees and are therefore not entitled to the protection conferred by Brazilian labor legislation.

The services must also be performed on a regular and on-going (habitual) basis in order for the worker to be considered an employee. Occasional work falls outside the scope of Brazilian labor law (except from intermittent work which is a type of work created for specific situations in which the employee provide services on a sporadic basis, being remunerated proportionally to such period).

Lastly, the worker must be subordinated to the employer in order to be an employee. The characteristics of subordination are, for example, fixed working hours, the possibility of disciplinary sanctions if the worker fails to comply with instructions and orders, and the requirement to use the work tools and resources provided by the employer.

It is this element of subordination which generally distinguishes an employee - who is subject to labor laws - from an independent or freelance worker, who is subject to the general rules governing contracts for services. Only employees are entitled to the rights and benefits under Brazilian labor legislation.

5.3Employment Agreements

Under Brazilian law, it is not necessary for an employer and an employee to enter into an express or written contract. Employment will exist whenever a person provides services to another in circumstances that are characterized by the essential elements of employment discussed above (personal, habitual, onerous and subordinated).

This informality arises out of the so-called "reality-agreement" principle, according to which in employment the factual circumstances prevail over the formal aspects of the relationship between the parties, with the result that an employment relationship will be formed if in fact services are provided in circumstances that constitute employment.

Although the law does not require a written employment agreement, the CLT provides that employment, whether formally contracted or not, must be recorded in the employee's work and social security card (*Carteira de Trabalho e Previdência Social* - CTPS).[5] The employer must also maintain a Register of Employees (*Livro de Registro de Empregados*) to record the essential information related to all its employees. The registration of employees and the entries in the CTPS will be carried out by the employer through the governmental Digital Bookkeeping System for Tax, Social Security and Labor Obligations (e-Social).

If an employee's CTPS is not properly completed and signed, the employer is subject to administrative sanctions, although the failure to sign the CTPS does not affect the existence of employment, due to the reality-agreement principle. Likewise, the information entered in a CTPS establishes only a presumption of truth, which can be challenged by the employee in a judicial action if the information is not consistent with the actual terms and conditions of employment.

Although there is no requirement to enter into a written contract of employment, a written agreement is recommended particularly in cases where the employer intends to grant benefits other than those provided for by law, or to impose certain obligations on the employee, such as the obligation not to solicit, to reimburse the employer for damage caused to third parties, or to accept a transfer to another municipality or the offset of overtime by the corresponding period of time-off.[6]

In Brazil, special provisions may be included in an employment agreement, such as provisions to authorize the employer to monitor the use of computers, work tools and e-mails, to establish confidentiality obligations or to transfer ownership to the employer of any inventions created by the employee during the course of employment.

If a written employment agreement is made, the employee's position must be stated in the agreement, but it is not necessary to detail the employee's duties. Under article 456 of the CLT, an employee is required to provide any and all services compatible with his or her personal condition,

[5] The CTPS is a booklet issued without charge by the Ministry of Economy to all persons who intend to obtain employment. Since September 2019, the CTPS will be issued preferably in the electronic form (Law n. 13,874). It serves as evidence that the employee is covered by the public social security system administered by the National Social Security Institute (*Instituto Nacional do Seguro Social* – INSS). Certain terms and conditions of employment must be recorded in the CTPS, such as (i) date of hire; (ii) salary and any changes to salary; (iii) vacations granted; and (iv) special terms and conditions of employment.

[6] These two obligations require the employee's express consent. It is also necessary to obtain the employee's consent to compensate overtime by time off on another day in the same work week, in lieu of pay.

unless otherwise agreed between the employer and the employee.

5.4 Apprentices

All establishments are required to have a number of apprentices equal to at least 5% and no more than 15% of the total number of positions for which technical training is required. Apprentices must be attending courses established by the National Apprenticeship Services (*Serviços Nacionais de Aprendizagem*). At work, the apprentice will be assigned tasks that contribute to his or her training.

5.5 Interns

Brazilian labor legislation allows companies to hire students as interns, providing an opportunity for students to acquire practical experience to complement their academic education. Interns are not employees and are not entitled to all the rights and benefits that law provides for employees.

5.6 Disabled individuals

As part of the social inclusion policy for persons with disabilities, Brazilian federal law requires companies with more than 100 employees to include a certain percentage of workers rehabilitated by the Brazilian Social Security Institute (INSS) or persons with disabilities among their personnel, as follows: (i) up to 200 employees: 2%; (ii) 201 to 500 employees: 3%; (iii) 501 to 1,000 employees: 4%; and (iv) more than 1,000 employees: 5%.

5.7 Outsourcing

According to Brazilian labor legislation, companies are authorized to outsource any activity that is part of their business, regardless the activity is related to their core business. If activities are **outsourced, the outsourcing company is responsible for guaranteeing compliance with the service** providers' employment rights, if the outsourced company fails to perform its obligations to its workers. The outsourcing company must also ensure the safety of the work environment, and so must comply with all legal occupational health requirements.

5.8 Employment Rights and Charges

Employees have various rights under Brazilian law. The main rights are described below:

5.8.1 Salary

There is no limit on the amount of salary paid to employees in Brazil, as long as it is greater than the minimum salary established by law or in the applicable collective bargaining convention or agreement. Salaries are usually paid monthly, although they can be paid on a more frequent basis (weekly, for instance). Once an employee's salary has been fixed, it cannot be reduced, except in exceptional circumstances, through collective bargaining with the labor union that represents the employee's professional category and with a compensation clause protecting employees from dismissals without cause during the term of validity of the collective instrument.

5.8.2 Vacation

Employees acquire the right to 30 calendar days' paid vacation for each 12 months of work.[7] Employees have the right to convert 1/3 of their vacation into money, in which case they work during the converted period and are paid for their work, in addition to their vacation pay.

As long as the employee agrees, vacations may be divided into up to three periods, one of which cannot be less than 14 consecutive days and the others may not be less than 5 consecutive days, each.

In addition to the regular salary and other employment benefits falling due during the vacation period, employees are entitled to a "vacation bonus" equal to 1/3 of their monthly salary. The vacation bonus must be paid at least two days prior to the beginning of the vacation period.

5.8.3 13th Salary

Every employee is entitled to an additional month's salary at the end of each year, referred to as the "13th salary". Half of the 13th salary must be paid no later than the end of November; the remainder is paid in the following month.

5.8.4 Working Hours

Under Brazilian law, the workday of regular employees must not exceed eight hours and the workweek must not be longer than 44 hours. Any work in excess of these limits is considered to be overtime and must be paid at 150% of the normal rate, if performed on a regular working day, or 200%, if on a rest day (usually Sundays and holidays). Labor unions usually negotiate higher overtime rates in collective bargaining agreements. Employer must ensure that employees have a break of at least one hour per 8-hour work day and another of at least 11 consecutive hours off work between two work days.

Employers with more than 20 employees must record the time worked by their regular employees, by manual, mechanical or electronic means.

Employees "of trust" (high-level employees who occupy managerial positions), employees whose activities are carried out entirely off the company's premises and employees in teleworking system who provide services by production or task are exceptions to the overtime rule. These employees' working hours are not subject to control by the employer and thus they are not entitled to overtime.

Any employee is entitled to one day of rest during the week, which may not be deducted from their salary. The day of rest should be Sunday whenever possible.

5.8.5 Termination

As a rule, either the employer[8] or the employee can terminate the employment relationship at any

[7] Vacation may be less than 30 days, depending on the number of the employee's unjustified absences from work during the accrual period.

[8] In some situations (job-security situations/tenure), the employer's power to terminate employment is limited by law. In these cases of job tenure, employment can be terminated only for just cause or through the employee's resignation. The

time, even in the absence of cause for termination (misconduct by the employee, the employer's financial difficulties, etc.). However, the party that intends to terminate the employment relationship must give advance notice of at least 30 days to the other party, and this notice period increases by three days for each complete year of employment, limited to a maximum of 90 days. Prior notice is not required when employment is terminated for cause.

5.8.6 Severance Guarantee Fund (Fundo de Garantia por Tempo de Serviço – FGTS*)*

Upon hiring an employee, the employer is required to open an individual FGTS account with the *Caixa Econômica Federal*, a savings and loan bank controlled by the federal government. The employer must make monthly deposits equal to 8% of the employee's salary to the FGTS accounts, which serve as a type of compulsory savings or reserve fund in case the employee is dismissed.

If an employee is dismissed without cause, the employer is required to deposit an additional lump sum indemnity equal to 40% of the balance in the employee's FGTS account at the time of dismissal.

5.8.7 Premiums

Aside from the rights and benefits listed above, which are owed to all employees, Brazilian law establishes additional payments to employees who provide services in certain circumstances. These premiums are payable, for instance, in the case of work involving exposure to risk, night work and transfers.

5.8.8 Transportation Vouchers

When employees use public transportation to travel from home to work, the employer must provide transportation vouchers (*vale-transporte*). The employer is entitled to deduct up to 6% of the employee's salary as a contribution to the monthly cost of the transportation voucher. The difference is paid by the employer.

5.8.9 Meal Vouchers

Although there is no legal requirement to do so, most Brazilian companies provide their employees with vouchers that can be used to pay for meals during workdays. The employer can elect to deduct up to 25% of the minimum national salary, from its employees to support the cost of the meal vouchers.

5.9 Salary Parity

Under Brazilian law, employees who perform the same job function for the same employer in the same location must be paid the same salary.

A difference in salary is permitted only when (i) the difference in the employees' length of service is

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main tenure situations are: (i) pregnant employees, (ii) employees recovering from occupational illnesses or accidents, (iii) union officers and (iv) members of the Internal Committee for Prevention of Accidents (*Comissão Interna de Prevenção de Acidentes* – CIPA).

more than four years, (ii) the difference in the carrying out of the same job is more than two years or (iii) when there is a clear difference in the employees' productivity or technical capacity.

Brazilian legal system does not prohibit companies to create position levels with different wages to the same job, provided that productivity and technical perfection between employees occupying different levels is not the same.

5.10 Occupational Health and Safety

In addition to the individual employment rights described above, employers must comply with occupational health and safety rules established under Normative Rulings (*Normas Regulamentadoras* – NRs) issued by the Department of Labor and Employment of the Ministry of Economy. There are currently 37 NRs which must be complied with by all employers in Brazil.

5.11 Social Security Charges

In Brazil, both employers and employees are required to contribute to the public social security system. The contributions owed by each are calculated on different bases.

Employers that have employees governed by the CLT are required to pay a contribution to the INSS equal to 20% of their payroll (including salary and other salary-related benefits such as vacation pay, 13th salary and overtime).

In addition to the 20% social security contribution, employers are required to contribute to other institutions, which are called "third parties" (*terceiros*). These institutions perform social services in areas such as industry, commerce, transportation and education. The contributions are also calculated on basis of the employer's payroll and the percentage varies from 0.2% to 7.7%, according to the employer's business and the degree of risk involved.

Employees' social security contributions are deducted from their salary by the employer, which remits them to the INSS together with the employer's contributions. The following table shows the employee contributions to be deducted by the employer and remitted to the INSS:

EMPLOYEE'S SALARY	CONTRIBUTION RATES
Up to BRL 1,212,00	7,5%
From BRL 1,212.01 to BRL 2,427.35	9%
From BRL 2,427.36 to BRL 3,641.03	12%
From BRL 3,641.04 to BRL 7,087.22	14%

The progressive rates will apply to each remuneration range. Employees who receive a minimum

wage per month, for example, will have a rate of 7.5%. Employees who earn the amount of the contribution ceiling - currently BRL 7,087.22 – or more than that per month, will pay a total effective of BRL 828.49, which is, 11.69% of the ceiling amount, resulting from the sum of the different rates that will apply to each band remuneration. The contribution salaries are adjusted annually.

5.12 Employment of Foreign Nationals

Under the CLT, at least two thirds of the employees of any company that has three or more employees must be Brazilian, and this proportion applies not only to the number of workers but also to the payroll.

Portuguese nationals and foreigners who have resided in Brazil for more than 10 years and have a Brazilian spouse or child are treated as Brazilians for the purposes of the above rule.

Another exception to the "2/3 rule"9 is the hiring of foreign nationals to provide specialized technical services when there is a lack of qualified Brazilian individuals to perform the work.

6 BRAZILIAN COMPETITION LAW

6.1 Introduction

Antitrust regulation in Brazil is based on Law 12,529/11 (the Competition Statute) and a comprehensive framework of resolutions and guidelines issued by the Administrative Council for Economic Defense – CADE, Brazil's antitrust regulator. CADE exercises both investigative and enforcing powers through the Office of the General Superintendent, the Administrative Tribunal and the Department of Economic Studies.

6.2 Merger Control

Since the Competition Statute came into force in 2012, all reportable transactions must be submitted for antitrust clearance in advance, in a pre-merger notification system. Before CADE's final decision, Parties are not authorized to close the deal (or to take any other step that may affect pre-existing competitive dynamics), subject to penalties.

Under Brazil's Competition Law, a transaction is subject to mandatory merger control when it cumulatively meets the following criteria:

i. **Turnover thresholds**. The turnover threshold is a two-prong test: a transaction is reportable if (i) at least one of the economic groups involved in the transaction recorded gross turnover or business volume in Brazil in the year preceding the transaction of at least BRL 750 million and (ii) another economic group involved in the transaction recorded gross turnover or business volume in Brazil in the year preceding the transaction of at least BRL 75 million. CADE adopts a broad definition of economic group.

[9] A solid portion of employment scholars defend that this 2/3 rule was revoked in 1988, when the new Brazilian Federal Constitution was enacted.

ii. **Actual or potential effects in Brazil**. A transaction is only subject to mandatory filing in Brazil if it produces (or has the potential to produce) effects in the country.

iii. **Qualification as an 'act of concentration'**. A deal is reportable in Brazil when: (i) two or more previously independent companies merge; (ii) one or more companies acquire, directly or indirectly, control or parts of another company (including acquisitions of tangible or intangible assets, shares, and acquisitions of minority shareholdings under certain conditions) or (iii) two or more companies enter into an 'associative agreement', a consortium agreement or a joint venture agreement.

The Competition Statute gives CADE 240 days to issue its decision, which can be extended (i) for 60 days at the parties' request; or (ii) for 90 days, if CADE itself deems the transaction to be 'complex', thereby requiring additional review time. Non-complex transactions that are less likely to harm competition (pursuant to criteria set out in CADE's resolutions[10]) may qualify for a simplified fast-track procedure, in which case the Office of the General Superintendent has 30 days to issue a decision. Whenever a case is cleared at the General Superintendent's level, parties are required to wait for additional 15 days before closing. During the waiting period, authorized third parties may challenge the clearance decision, and any member of the Administrative Tribunal may formally request a review of the decision.

When reaching a final decision, CADE may decide to clear a transaction without restrictions or, if potential anticompetitive effects are identified, either block the transaction entirely or condition its approval to antitrust remedies.

6.3 Anticompetitive Conduct

According to the Competition Statute, an act or practice constitutes a violation of the economic order if it has as its object, produces or has the potential to produce any of the following effects: (i) to limit, restrain or in any other way harm competition; (ii) to dominate a relevant market; (iii) to arbitrarily increase profits; or (iv) to abuse of dominant position.

Companies that are found to have committed anticompetitive conduct are subject to penalties of both pecuniary and non-pecuniary nature.

The Competition Statute gives CADE the option of entering into a settlement agreement with the investigated party, under which, in exchange for lower penalties, the company or individual admits to have participated in the anticompetitive conduct, commits to fully cooperate with CADE's investigation, and agrees to cease its involvement in the practices under investigation.[11]

[10] The fast-track procedure applies to cases involving: (i) joint ventures between companies which are not active in markets horizontally or vertically related to the joint venture's activities; (ii) transactions where the purchaser and the target are not active in horizontally or vertically related markets; (iii) transactions resulting in vertical links where the parties and their economic groups hold a share below 30% in the vertically related markets; (iv) transactions resulting in horizontal overlaps which are deemed to be minor, either because (a) the combined market share is below 20%, or (b) the market share increment attributable to the transaction is low, provided that the combined market share does not reach 50%.

[11] Based on CADE Resolution No. 5/2013: (i) the first defendant to settle in the context of an investigation is eligible for a reduction ranging from 30% to 50% of the applicable fine; (ii) for the second settlement, the reduction ranges from 25% to 40; (iii) from the third settlement onwards, the reduction is limited to 25%; and (iv) the reduction is limited to a maximum

7 ENVIRONMENTAL REGULATION

The Brazilian legislation framework on environmental protection is comprised of many constitution provisions and federal, state and local statutes and regulations, in addition to international treaties. In general, the legislation aims to control agents that may cause environmental damage. It establishes the rules and conditions for production processes in their various aspects, including effluents and atmospheric emissions, management of solid waste, intervention in protected areas, forestry preservation, noise, use of natural resources, controlled substances, and land use.

Based on that, follows the key environmental issues in Brazil, with focus on (**i**) *National Environmental System*, considering the main requirements to run the economic activity or set up a business (**ii**) *Investment at Environmental Asset*, with some opportunities regulate by law to explore the economic potential of the natural resources conservation; and (**iii**) *Environmental Liability and Litigation*, to understand the legal consequence of the non-compliance situations.

7.1National Environmental System

The National Environmental System was designed by Federal Law 6,938/1991 (National Policy on Environment) to enforce protection and pollution control. As part of that System, the Brazilian Environmental Council (CONAMA) provides standards for pollution control, environmental licensing, follow-up and monitoring, as well as protection of fauna, flora, soil, and natural resources in general. States regulate on matters related to regional interest or to supplement federal legislation, as municipalities regulate issues of local aspect. Further, governmental agencies (federal, states and local) oversee of enforcing those regulations.

7.1.1 Environmental permit

The environmental permit is required for all activities that use natural resources and have potential to cause pollution or environmental damage. Projects and activities may be subject to environmental permitting before state, federal or local agency according to the legal criterion or standard. In general, states have a comprehensive jurisdiction over environmental permits of activities, whereas local authorities handle the permitting of activities with local impacts. Activities that may located more than one state, in federal protected areas or overseas are subject to permitting with the federal agency (IBAMA), among others specific situations listed in Complementary Law 140/2011.

The ordinary environmental permitting procedure comprises (i) a preliminary permit (which approves the location and the project conception); (ii) an installation permit (to set up the facility or activity in accordance with approved plans, programs, and designs); and (iii) an operating permit (to start the activity or operate the facility in accordance with the environmental controls and restrictions defined by the agency). Some activities may be subject to a more expedite permitting procedure, according the agency regulations. Apart from the procedure, engaging in any activity without the due environmental permit, or in non-compliance with it, may subject the entrepreneur to environmental liabilities.

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of 15% if the settlement is made at any point after the case has left the Office of the General Superintendentand has been forwarded to the Administrative Tribunal.

An environmental assessment is required during the environmental permitting (Law 6,938/1981). For instance, activities that may pose significantly risk to the environment require an Environmental Impact Assessment and Report ("EIA/ RIMA"), which must address the potential environmental impact of the activity and facility and propose preventive and control measures to reduce them, in addition some compensate measure (invest some amount in protected area, for example – Law 9,985/2000). Further, this assessment process involves a public hearing with the purpose of consulting stakeholders.

7.1.2 Traditional Communities

The development of infrastructure projects in Brazil that affect the way of life of traditional communities, indigenous or *quilombolas,* must be preceded by prior, free and informed consultation with them, under the terms of ILO Convention 169. In such cases, the entrepreneur must have a proactive and participative dialogue with the official representatives of those traditional communities, *Fundação Nacional do Índio* and Incra, during the environmental permitting procedure.

7.1.3 Forestry use and protected areas

The Forestry Code (Federal Law 12,651/2012) establishes rules for vegetation removal and prior authorization, as well as creates a Rural Environmental Registry to control and monitor the use of rural land. It is a mandatory electronic system to all rural properties. This law creates permanent preservation areas and legal reserves (part of the rural proprieties), which must be protected by the owner and its successors.

The Atlantic Forest Law (Federal Law 11,428/2006) also provides specifics rules on intervention and removal of vegetation located in the *mata atlântica* biome in Brazil, with particular standards for compensation.

According to the National System of Protected Areas (Federal Law 9,985/2000), activities that may cause significant impact to National Parks, Ecological Stations, Wildlife Refuges, Biological Reserves and other protected areas must have its permitting procedure subject to the unit's management.

7.1.4 Water use and protection

According to the National Policy on Water Resources (Federal Law 9,433/1997), which establishes instruments for the management of water resources (superficial or underground), the use of water resources must be previously granted by the federal or state water agency, in compliance with the water resources plan and rules of the river basin committees applicable.

The National Policy of Water Resources is enforced by the federal water agency (*Agência Nacional de Águas* - ANA), which is responsible for controlling and managing the use of federal waters. At state level, governments may create their own policies and agencies to grant the right to use water from water sources under their jurisdictions. Recently, the use of water resources has been becoming more complex with restrictions that has impacted all sectors of the economy, especially agriculture, energy and industry.

Regarding the discharge effluents into water bodies, CONAMA regulates the standards of pollutants and the quality of the rivers and lakes. At state level, the governments have enacted laws with more stringent discharge standards to control water pollution. Further, Federal Law 9,966/2000 (Oil Spill Act) provides for the prevention, control and monitoring of pollution caused by the release of oil in waters under national jurisdiction.

7.1.5 Air Quality

Federal and state governments regulate air quality and address air pollution from stationary sources, such as power plants, refineries, petrochemical plants and factories, mobile sources, such as cars and airplanes, and other sources. The National Air Quality Monitoring Program ("PRONAR"), regulate by National Environmental Council (CONAMA), provides for primary and secondary air quality standards and establishes primary and secondary standards for some specifics pollutants. Federal regulation provides for criteria to monitor air emissions, as well as emission standards applicable to specific stationary sources of pollution. At state level, governments may have their own policies, which may specify particularities of their jurisdictions related to air pollution.

7.1.6 Waste Management

According to National Policy on Solid Waste (Federal Law 12,305/2010), the generator is responsible for the proper final disposal of waste, mainly by the hazardous waste management. In general, federal and some state regulations require that the management, transportation, treatment and disposal of wastes must be subject to the prior approval of an environmental protection agency. At local level, governments may have their own policies on solid waste, which may specify particularities of their jurisdictions, mainly regarding the domestic waste.

The federal law obliges certain manufacturers, retail sellers and service providers to prepare a solid waste management plan to become part of the environmental permitting proceeding of the relevant activity. There are specific requirements for hazardous waste classification, inventory and disposal reporting requirements, and waste import and export, transport, storage and disposal.

The National Policy on Solid Waste also requires the implementation of a reverse logistic by manufacturers, importers, retailers and distributors of agrochemicals and pesticides packages, batteries, tires, lubricant oil, fluorescent lamps, electronics, among others. Among the instruments for implementation of the reverse logistic system, the law provides for the execution of sectorial agreements involving segments of the industry. The sectorial agreements define measures to be adopted by the company (or economic segment) involving of the production chain and the consumers toward the responsibility for the life cycle of the product until its final and environmentally appropriate destination.

7.1.7 Contaminated site

The CONAMA regulation establishes criteria and values that determine the soil quality and groundwater protection in view of the presence of chemical substances, and guidelines for the management of contaminated areas by such substances. The management measures shall observe the following phases: (i) identification - investigation of the areas based on a preliminary assessment; (ii) diagnostic - detailed investigation and risk assessment of the area; and (iii) intervention - recovery

measures to eliminate the identified risks or to reduce it to acceptable standards considering the intended use for the site. At state level, governments may have their own policies, which may mainly address the liability and co-liability among polluters, as well detailing the phases relate to the management of areas contaminated.

7.2Investment at Environmental Asset

Federal, states and municipalities have been promoting the use of economic mechanisms to comply with environmental regulation, such us, credit from invest in basin river, in order to compensate with the payment, relate to the water use or to protect some water resources; CRA – Environmental Reserve Quotas from reforestation, compliance with the Forestry Code; and carbon credit related to production of renewable energy based on the use of methane gas emission from landfill, considering the avoided burning, among others.

7.2.1 Forest and park concessions

Public Forest Concession Law (Law 11,284/2006) has allowed government authorities to grant the concession of sustainable use management of public forests to private organizations upon a bidding process, to explore in sustainable standards the forest products.

In the same direction, the Federal Government has recently promoted the concession of several National Parks to private operators aiming to attract additional investment and promote a more efficient use of such protected areas (Law 9,985/2000).

Further, states and municipalities have been promoting the concession of public parks, allowing the private sector to explore the services related to conservation and public visitation.

7.2.2 Biodiversity (genetic resources) and biosafety (GMO´s)

The Federal Law 13,123/2015 establishes the rules for access to genetic resources, associated traditional knowledge and benefit sharing. The law provides for various ways of sharing the benefits generated by products developed using genetic resources (monetary benefits and non-monetary benefits, which can involve transfer of technology, free distribution of the product under social programs, licensing the product free of charge, among other possibilities).

The Biosafety Law (Federal Law 11,105/2005) provides for the safety and inspection mechanisms for the use of genetic engineering techniques for the research, manipulation, harvesting, transportation, consumption, commerce and disposal of genetically modified organisms (GMOs). The law aims at protecting public health and the environment. This law is enforced by National Technical Commission on Biosafety (CTNBio), the authority responsible for implementing the National Biosafety Policy and enacting rules regarding GMOs.

7.2.3 Climate Change challenges, carbon credit and biofuels

The National Policy on Climate Change (Federal Law 12,187/2009) determines the necessity for creating sectorial plans for adaptation and mitigation, defines actions and measures to achieve

reduction in emissions of greenhouse gases. Federal Decree 10,075/2022 regulates the procedures for the elaboration of Sectorial Plans for Mitigation of Climate Changes and institutes the National System for the Reduction of Greenhouse Gas Emissions – Sinare.

Based on the Paris Agreement signed under the UNFCCC, Brazil presented its Nationally Determined Contribution (iNDC) committing to reduce greenhouse gas emissions by 37% by 2025. All policies, measures and actions to implement Brazil's iNDC are carried out under the national policy on climate change, the forestry code, the law on the national system of conservation units, and related legislation, instruments and planning processes.

In line with this international commitment, the National Biofuels Policy – RenovaBio (Federal Law 13,576/2017) establishes an innovation by adding an unprecedented mechanism to the current regulatory framework, in order to value fuels of lower carbon intensity, linking it proportionately to mitigation of greenhouse gases in relation to its fossil substitute to a financial asset (decarbonization credit - CBIO), traded on the stock exchange. RenovaBio imposes a mandatory acquisition of this credit on fossil fuel distributors, as a means of mitigating their emissions, according to annual targets (sector and individual) established by the federal government, thus creating conditions for the reduction of greenhouse gas emissions.

The Brazilian Government has also enacted in 2021 and 2022 public policies to foster the natural gas industry (Federal Law 14,134/2021) and to improve production and use of biogas and biomethane through the National Program for the Reduction of Methane Emissions (Methane Zero Program – Federal Decree 11,003/2022). The goals are set for achieving Brazilian iNDC taking advantage of the potential of generation obtained by the urban and rural waste.

7.3 Environmental Liability and Litigation

The Brazilian Constitution addresses civil, criminal and administrative liability in connection with environmental matters. Any activity or act performed by a legal entity or a person that is harmful to the environment will be subject to administrative (fines and suspension of the activities, for example) and criminal penalties (prison). The offender is also liable to repair the damage caused.

The National Environmental Policy (Law 6,938/1981) provides that polluters have strict and joint liability for damage caused to the environment, which means that demonstration of a cause-and-effect relationship between the damage caused and the action or inaction of the polluting agent is sufficient to trigger the obligation to repair the environmental damage, irrespective of fault. The Public Civil Action (*Ação Civil Pública* - Law 7,347/1985) provide the procedures to run a lawsuit aiming to environmental recovery, which includes the possibility to settle an agreement (*termo de ajustamento de conduta*).

In the criminal sphere, the Environmental Crimes Act (Federal Law 9,605/1998) applies to every person, whether an individual or a legal entity, that engages in conduct classified as environmental crimes. Environmental criminal infringements are set out in Federal Act, which splits environmental protection into five categories of crimes: (i) against flora; (ii) against fauna; (iii) crimes of pollution; (iv) operating without proper licenses; and (v) against cultural and social heritage.

The Environmental Crimes Act introduced the criminal liability of legal entities into the Brazilian

legal system. In addition to the legal entity, officers, members of management, members of the board of directors, managers, agents, and attorneys-in-fact will be subject to criminal charges, if it is proved that these individuals knew of the criminal offence and did nothing to avoid it.

Finally, the corporate structure of a company may be disregarded (the corporate veil pierced) if the corporate form is an obstacle to providing compensation for damages caused to the environment. Therefore, the shareholders (mainly the majority controller) of a company may be personally liable for such compensation.

8 ANTICORRUPTION: COMPLIANCE, INVESTIGATIONS AND ENFORCEMENT

Brazil ratified in the beginning of the 2000's three major international conventions against bribery and corruption: the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (ratified by Decree no. 3,678/2000), the Inter-American Convention Against Corruption (ratified by Decree no. 4,410/2002) and the United Nations Convention Against Corruption (ratified by Decree no. 5,687/2006).

Internal legislation contains several statutes that address corruption and bribery in different ways. Regarding to corporate liability, the main piece of legislation is the Anticorruption Law (Federal Law 12,846/2013), that entered into force in 2014. Its purpose is to combat the involvement of legal entities in corrupt practices by public agents and promote a new business culture in Brazil.

Regulations under the Anticorruption Law were firstly adopted by Decree 8420/2015 of March 18, 2015. Some states in Brazil, such as São Paulo and Rio de Janeiro, have issued their own decrees on administrative proceedings and leniency agreements to complement the federal legislation and regulations.

Approximately 7 years later, the Federal Regulation under the Anticorruption Law was updated by Decree 11,129/2022 that became effective as of July 18, 2022 and revoked Decree Nº 8,420/2015. Amongst its innovations, it is worth noting that the regulation amended the factors for calculating the administrative fine for cases of violation of the Anticorruption Law, addressed the effects of the preliminary investigations and the compulsory requirement to acknowledge the strict liability of the legal entity for the harmful act.

Brazil's legal framework for combating corruption is a work in progress, and while important advances have been made in the last few years, the legislation and regulations still raise a number of concerns. One of the biggest flaws – and therefore one of the most significant issues – is the lack of clear rules on enforcement powers. As the legislation currently stands, there are multiple authorities that could be considered to have jurisdiction to make and enforce leniency agreements and to bring legal proceedings involving corruption allegations. The result is that leniency agreements are less attractive than they could be because it is difficult to guarantee that cooperating companies will not be prosecuted by another government authority, which is not party to the leniency agreement, but which also has enforcement powers under Brazilian law.

Consequently, anyone doing business in Brazil should carefully assess anticorruption-related risks, looking not only at past and present perceptions and practices, but also to the signs of a much more responsive and strict enforcement environment in the near future.

8.1Domestic and Foreign Bribery: The Brazilian Legal Framework

Brazilian anticorruption legislation establishes criminal, civil, and administrative offenses that seek to punish both the public official and the private party (whether an individual or a legal entity) that participate in an act of corruption.

The concept of corruption under Brazilian law requires the participation of a government institution or a public official. In other words, Brazil has not yet formally embraced the concept of corruption in the private sector.

Although specific definitions of "public official" can be found in some legislation, such as the Criminal Code and Law 8429/1992 (also known as the Administrative Improbity Law) as amended by Law 14,230/2021, the Brazilian legal framework adopts a broad concept of "public official": in general, anyone who works for any branch or agency of government, or any company or entity owned by the government, whether federal, state or municipal, even if temporarily or without remuneration, by election, appointment, or any other form of mandate, position, job or function, is considered to be a public official. The definition of public official includes anyone who works for a private company that is hired to provide a public service.

8.1.1 Criminal offenses

Criminal offenses are established under the Brazilian Criminal Code or other specific legislation. Under the Brazilian system, legal entities have no criminal liability, except for environmental crimes. Nevertheless, members of management, employees, and representatives in general of these entities can be held criminally liable for acts of corruption or bribery involving the legal entity. The legal entity, despite not being a defendant, can have its assets seized and forfeited in a criminal proceeding if the assets are found to be instruments or proceeds of crime.

The crime of corruption is not limited to the payment of bribes, but rather any undue advantage, a concept similar to "anything of value" under the US Foreign Corrupt Practices Act. The undue advantage does not have to be actually given and received; a simple request for an undue advantage by a public official, or an offer or promise of such advantage to a public official is enough to constitute the crime of corruption. The penalties for those who are found guilty of active and passive corruption range from two to twelve years' imprisonment plus a fine.
After a legislative reform that entered into force in 2002, following the ratification of the OECD Convention, the corruption of foreign public officials also became a crime under the Brazilian Criminal Code.

8.1.2 Civil and administrative offenses

Legal entities are subject to the Anticorruption Law, which provides for the administrative and civil liability of those involved in acts against the administration of national and foreign governments. The Law establishes strict and joint civil liability for domestic and international companies doing business in Brazil for bribery of Brazilian or foreign public officials and imposes liability on companies involved in bid-rigging schemes. However, unlike the US FCPA, the Brazil's Anticorruption Law does not provide for criminal prosecution.

The primary focus of the Anticorruption Law is to prevent corrupt acts, by making it illegal to offer or pay an "undue advantage" to a public official or in any way provide funds for the commission of corrupt acts. However, the Anticorruption Law reiterates that various acts committed in the context of public bids and government contracts are illegal, regardless of whether public officials are involved. Lastly, the Anticorruption Law prohibits legal entities from hindering investigation and surveillance by government bodies, public officials, and regulatory agencies, and from interfering in their activities.

The Anticorruption Law establishes administrative and civil penalties that apply directly to legal entities' income and assets and can seriously disrupt their activities. These penalties can apply even without proof of intention on the part of the legal entity or its representatives because the Law imposes strict liability. Thus, proof that an illegal act was caused by a legal entity, through either action or omission, is sufficient grounds for legal action and sanctions.

One of the most important pieces of legislation on civil liability for corrupt practices in Brazil is the Administrative Improbity Law, which applies to both individuals and legal entities.

The Law is directed to public officials, but the courts have extended its provisions to legal entities based on article 3, which provides that it applies to anyone (whether an individual or a legal entity) who culpably induces or colludes in an act of improbity.

Another important piece of anticorruption legislation in Brazil is the Procurement Procedures and Government Contracts Law, which establishes the rules for government procurement and contracting. The Law provides for both civil and criminal penalties and establishes rules for administrative proceedings to impose administrative sanctions. The civil penalties apply to both legal entities and individuals.

8.2Compliance Programs

Companies doing business in Brazil initially adopted compliance programs primarily because of requirements under foreign laws, such the US FCPA and the UK Bribery Act. Since Brazil's Anticorruption Law came into force, however, companies established in Brazil have been adapting their programs to meet local legislation as well, particularly with respect to bid-rigging in government contracting procedures and government contracts generally.

The Anticorruption Law encourages the adoption of compliance programs, not only because it establishes severe penalties, but also because it provides that the authorities must consider the existence of compliance programs when applying penalties, with the possibility of a reduction of the amount of the penalty. The benefit, however, is only applicable when the compliance program is considered effective under the terms of Article 57 of Decree 11,129/2022.
The referred Decree increased the fine reduction factor (from 4% to 5% over the total amount) for legal entities that might demonstrate a robust compliance program duly implemented at the time of the violation, emphasizing the relevance of the program. In this context, it is worth to highlight the need to (i) demonstrate the commitment of senior management to make adequate resources available to the compliance program, (ii) have a risk management agenda with periodic analysis and efficient allocation of resources to mitigate the risks, and (iii) carry out due diligences for contracting and

monitoring third parties.

Lastly, the State-Owned Companies Law (Federal Law 13,303/2016) requires state-owned companies, including mixed-economy corporations, to adopt compliance programs and internal controls, and to carry out risk analyses.

8.3 Corporate Investigations

Corporate internal investigations cover matters such as corruption, bribery, data privacy breaches, anti-trust matters, internal fraud and deviations, and moral and sexual harassment. All these kinds of investigations require experienced attorneys and investigators.

The constant evolution of electronic investigation technologies and the new features and tools available in the global market also create a scenario where attorneys and investigators with digital and cyber law expertise have an important role, given the complexity of managing electronically-stored information in the context of corporate internal investigations. When the Brazilian Data Privacy Law came into effect in 2020, the cyber law aspects of corporate internal investigations had to be carefully assessed in order to avoid any irregularity under this perspective.

8.4 Leniency Agreements

The Anticorruption Law allows a number of government authorities to enter into leniency agreements with companies that commit offenses.

Entering into a leniency agreement can offer various benefits to companies and other entities involved in corrupt conduct. For example, it can reduce fines by up to two-thirds and mitigate or even exclude administrative and civil penalties. If the lenient company fails to comply with the terms of the agreement, however, it will lose its negotiated benefits and will be barred from entering into leniency agreements for three years, among other consequences.

Although leniency agreements are usually advantageous for companies, the major defect in the leniency agreement mechanism at present is that it does not provide sufficient safeguards against prosecution by government authorities that are not a party to the agreement, but also have jurisdictional power to enforce the Anticorruption Law.

Although it does not cover all the competent authorities for entering into agreements, the new Decree 11,129/2022 consolidates the already established practice that leniency agreements must be negotiated and entered jointly between CGU and AGU. Additionally, the Decree determines that the main objectives of the leniency agreements will be (i) to increase the investigative capacity of the public administration; (ii) enhancing the State's ability to recover assets; and (iii) fostering a culture of integrity in the private sector.

It is also important to highlight that the new Decree determines that the information and documents obtained because of the execution of leniency agreements may be shared with other authorities, subject to a commitment not to use them to sanction the legal entity itself in relation to the same facts object of the leniency agreement.

In this context, the new decree enshrines some practices viewed as necessary to ensure that the collaboration proposal is not used to the detriment of the legal entity, such as: (i) the negotiation will be conducted in a confidential process, with access restricted to the officials designated to act in the case; (ii) the eventual withdrawal of the leniency agreement proposal does not imply in recognition of the practice of the harmful act and may not be used, under any circumstances, in an unfavorable way for the legal entity; (iii) the Federal Public Administration will not be able to use any of the documents offered by the legal entity, in case the negotiation is unsuccessful; and (iv) the name of the proposing legal entity will not be publicized until the conclusion of the agreement.

8.5 Corporate Transactions

The Anticorruption Law address liability for legal entities specifically engaged in corporate transactions with companies that were somehow involved in wrongdoings.

Article 4, paragraph 1 of the Anticorruption Law states that in the event of mergers and acquisitions, the liability of the successor shall be restricted to the payment of applicable fines and to the full compensation for occasional damages, within the limit of the transferred assets. The successor is not subject to the application of other sanctions related to acts and facts that occurred before the date of the merger or acquisition, except in case of simulation or evident fraud intention, which must be duly proved.

This provision reinforces the importance of Anti-Bribery and Corruption (ABC) due diligence in transactions with Brazilian companies.

9 INTELLECTUAL PROPERTY

The Federal Constitution of 1988 includes Intellectual Property as a fundamental right, with express provisions about protection of inventions, trademarks, and copyrights. This protection is also established in various federal laws and international treaties signed and ratified by Brazil.

The main federal laws governing this matter are:

(i) Law 9,279 of May 14, 1996 (Industrial Property Law), which regulates trademarks, patents, utility models, industrial designs, geographic indications, technology transfer and unfair competition;
(ii) Law 9,610 of February 19, 1998 (Copyright Law), which regulates copyrights and neighboring rights;
(iii) Law 9,609 of February 19, 1998 (Software Law), which regulates software protection; and
(iv) Law 9,456 of April 25, 1997, which regulates plant variety protection.

Brazil is also a party to all the main international treaties regarding Intellectual Property rights, including, among others, the:

(i) Paris Convention of 1883, revised in Stockholm in 1967, which features industrial property protection;
(ii) Trade Related Aspects of Intellectual Property Rights (TRIPS), established in the agreement of the World Trade Organization (WTO);

(iii) Patent Cooperation Treaty (PCT); and
(iv) Berne Convention of 1886, revised in 1971, which features copyright protection for literary and artistic works;

Brazil's National Industrial Property Institute (INPI) is the government agency in charge of reviewing and allowing applications for trademark registration, geographical indication, letter patent, industrial design registration and recording industrial property contracts, such as transfer of technology and patent and trademark license agreements.

In accordance with the last WIPO - World Intellectual Property Indicators report of 2020[12], Brazil was listed between the world's top 20 offices with the most patent and trademark filing activity. Brazil's impressive year-on-year growth saw it move from 12th position in 2018 to rank 11th in 2019, ahead of Germany.

9.1. Patents

9.1.1. Inventions and Utility Models

A patent of invention (PI) is granted in Brazil when an invention fulfills the requirements of novelty, inventive step, and industrial applicability, while having sufficiency of disclosure. The term of protection of a PI is of 20 years counted from the filing date[13].

Certificates of addition (CA) to a patent of invention are also established in the Brazilian IP Law. The applicant or owner of a PI may request a certificate of addition to protect an improvement or development introduced in the subject matter of the invention, even if lacking inventive step in view of its own prior invention, provided that it shares the same inventive concept of the main invention. A certificate of addition is an accessory to the patent, has the same expiry date and accompanies it for all legal effects.

Further, the Brazilian IP Law also grants patents for utility models (MU) which protect an object of practical use, or parts thereof, susceptible to industrial application, that present a new shape or arrangement, and which involve an inventive act that results in a functional improvement of its use or manufacture. The term of protection differs from patents of inventions (PI): 15 years counted from the filing date. Assessment of the non-obviousness of a MU is also less strict than that of a PI, referred to as inventive act.

Discoveries, scientific theories, mathematical methods, purely abstract concepts, methods of a commercial, accounting, financial, educational, publishing, lottery or fiscal nature, scientific works or any aesthetic creation, computer programs *per se* are not considered inventions and cannot be subject to patent protection. Further, plants or part thereof are not patentable in Brazil, being subject to a different type of protection under the Brazilian Plant Variety Law.

9.1.2. Patentability Requirements

[12] https://www.wipo.int/edocs/pubdocs/en/wipo_pub_941_2020.pdf
[13] Pursuant to a recent decision of the Brazilian Supreme Federal Court (STF) on a constitutional challenge to a provision in article 40 of Brazil's Industrial Property Law, which defined a minimum patent term of 10 years counted from the grant date. Said provision is no longer valid.

a) Novelty

In Brazil, an invention is deemed new whenever it has not been made accessible to the public before the date of filing of a patent application, by written or oral description, by use or any other means, in Brazil or abroad. An exception is the disclosure during the twelve months preceding the date of filing or priority of the patent application by the inventors or third party by means of the inventors, which does represent a bar for novelty of an invention in Brazil.

b) Inventive Step

An invention has inventive step when it is not obvious for a person skilled in the art. According to the INPI's Examination Guidelines, the following are indicative of non-obviousness: comparative data showing superior results of the invention over prior art; data showing a long felt demand for the invention; prior art that teaches away from the solution of the invention; commercial success derived from technical features of the invention, not from advertising.

c) Industrial Applicability and Sufficiency of Disclosure

Industrial applicability is to be understood in a broader sense, excluding only the matter, which is purely abstract or artistic, without any practical use.

The subject matter of a patent application must be described clearly and sufficiently along the specification, so as to enable a person skilled in the art to carry it out. When applicable, the best mode of execution must be described.

9.1.3. Filing and Pendency

In order to secure a filing date in case of a national phase of a PCT application or of a Paris Convention application, the following information is mandatory: name and address of applicant and inventors and a Portuguese translation of at least claims and abstract. The priority claim must be supported by a copy of the filing receipt for the priority application and it must be filed within 60 (sixty) days counted from the date of entry into the Brazilian national phase for PCT applications, under penalty of loss of priority rights.

When priority rights are obtained by virtue of an assignment, the corresponding deed of assignment must also be presented within 60 (sixty) days counting from the date of entry into the national phase. For Paris Convention applications, the deadline for filing the document to support the priority claim, as well for presenting the corresponding deed of assignment, when applicable, is 180 (one hundred and eighty) days counting from the Brazilian filing date. The INPI also requests the filing of a power of attorney, which does not need to be notarized or legalized.

9.1.4. Prosecution

a) Filing date and annuities

Annuity fees apply from the beginning of the 3rd year counted from the date of filing. When the

Brazilian application is a national phase of PCT application, the date of filing is deemed to be the international filing date.

b) Examination proceedings

Examination of a patent application must be requested within 36 months counted from the filing date, the failure of which will result in shelving of application.

By occasion of technical examination, a search and technical report will be issued with regard to patentability of the application, its adaptation to the nature of protection claimed, its reformulation or technical amendments, if required. When an official report is for non-patentability or for inadequacy of the application for the nature of protection claimed or requires technical amendments, the Applicant will be notified to reply within 90 days.

Any documents and information to attack the patentability requirements and assist examination may be filed by interested parties between publication of the application and completion of examination.

There is no prior art disclosure requirements at the time of filing. However, during the examination procedure the Examiner may issue an office action based on article 34 (I) of the Brazilian Industrial Property Law requesting submission of any material related to the examination of such application in any other country where a corresponding application was filed. If such an office action is issued, the applicant must submit a response within 60 days as of its publication in the Official Gazette.

Issued US, European or other Countries' patents may be presented by the Applicant as argument in favor of the patentability of the claimed matter. However, the INPI will not be bound to allow the application.

Once examination is concluded, a decision will be issued allowing or rejecting the application. After rejection, an appeal may be filed within 60 days.

A patent application is currently taking approximately 6-7 years from filing to be granted, but this timeframe is expected to decrease in view of improvements at the INPI, including the issuance of preliminary office actions for its pending patent application, which enabled a reduction of its examination backlog in approximately 80%. Particularly, the preliminary office action allows applicants to present arguments and/or amendments to attest the patentability of their applications, considering the prior art documents identified in previous examination procedures abroad.

Further, the INPI hosts a series of Patent Prosecution Highway (PPH) programs, among which one derived from a bilateral agreement between Brazil and France initially valid for 5 years. This program entered into force on May 1st, 2022 and encompasses fast-tracked prosecution of patent applications originating from one of the Patent Offices (Brazil's INPI and France's INPI) in the respective other patent office, taking advantage of the first examination particulars.

When a potential infringement is verified, accelerated examination may be requested. For this purpose, the Applicant is required to send a cease and desist letter to the potential infringer, and to present a copy of this letter together with evidence of the infringement to the INPI. Once a month an internal Committee analyzes such requests and, if approved, a first office action issues in

approximately 2-3 months.

c) Amendments

Voluntary amendments to the claims that change or broaden the scope pf protection are only allowed if made until the request of examination, and provided there is no addition of matter.

Once examination is requested, the INPI is very strict in changing the scope of the claimed matter and inclusion of a new claim category or features not previously defined on the set of claims that broaden the scope of protection is usually not accepted, even if there is support on the specification.

d) Divisional Applications

Divisional applications are allowed in Brazil and may be filed until the end of examination or in response to an Office Action, wherein the Examiner has identified two or more groups of inventions.

Divisional applications will have the filing date of the original application and must indicate in the specification the number of the original application. Addition of matter is not allowed.

e) Transfer of Ownership and Change of Applicant's Name

The recordal of ownership transfer and/or applicant name change of patents or patent applications at the INPI requires the filing of supporting documents for each of the respective patent cases. Generally, said documents (including assignment of patent rights, company bylaws, commercial register extract or equivalent documentation) require notarization and legalization or Apostille according to the Hague Convention for presenting at the INPI.

In this regard, Brazil and France have a bilateral agreement on legalization of documents, stating that certified copies of documents issued by official French authorities are sufficient to grant legal effects in Brazil, with no further need for legalization or Apostille. Finally, a sworn translation of all documents written in foreign language is also required to record an ownership transfer/applicant name change of a patent at the INPI.

f) Nullity Proceedings and Compulsory License

After granting, an administrative nullity request may be started *ex officio* or by any third party with legitimate interest, within six months counted from patent granting. A judicial nullity action can be initiated at any time during the validity of a patent, either by the INPI or by any third party having a legitimate interest.

Further, a patent might be subject to compulsory licensing if one of the following applies: (i) abusive exercise of the rights resulting from the patent; (ii) abuse of economic power; (iii) incapacity by the Applicant to supply the internal market; (iii) public interest/national emergency. Evidence thereof must be presented upon entering a compulsory licensing action. The Applicant is entitled to traverse the need for such a type of licensing before the suitable court. However, in the last 20 years, there were very few cases reviewed by the INPI, with only one case of compulsory licensing.

g) Extent of Protection

In accordance with Article 41 of the Brazilian Industrial Property Law, extension of the protection conferred by a patent will be determined by the content of the claims, interpreted in the light of the specification and drawings. In this sense, it is important to emphasize the Doctrine of Equivalents, covered by Article 186, which reads:

> *Article 186 - The acts referred to in this chapter shall also constitute infringement even if they do not affect all claims under the patent or if they are limited to the use of means equivalent to the subject matter of the patent.*

The prosecution history of the application may be used to limit the applicability of the Doctrine of Equivalents, for example, during infringement assessment.

h) Extinction

A patent shall become extinct due to the end of the patent term or due forfeiture and non-payment of the annual fee.

9.2. Industrial Designs

A design is any ornamental plastic form of an object or any ornamental arrangement of lines and colors that may be applied to a product, provides new and original visual results in its external configuration, and serves as a type for industrial manufacture.

The necessary common or ordinary shape of an object is not registrable as an industrial design. Technical or functional features of a design are not registrable as well.

9.2.1 Requirements

An industrial design is considered to be new when it is not comprised by the state of the art. It is considered original when it results in a distinctive visual configuration in relation to other prior objects. The original visual configuration may be the result of the combination of known elements. Works of a purely artistic nature are not considered to be industrial designs.

Everything made accessible to the public before the date of filing is not considered new, by written or oral description, by use or any other means, in Brazil or abroad, except when the disclosure occurs during the 180 (one hundred and eighty) days preceding the date of filing or priority of the industrial design by the authors or third party by means of the authors

9.2.2 Filing and Prosecution

The industrial design submitted to the INPI must contain information regarding the applicant and author and the drawings. The drawings must present the front, side, upper, lower, and perspective view of a tridimensional object. It is further requested that all figures consist of continuous, uniform, and firm lines (no dotted lines are allowed) and be presented in high sharpness and high resolution (at least 300 dpi).

A priority claim must be supported by an informal translation of the filing certificate or equivalent document containing data identifying the application. Such proof must be presented within 90 (ninety) days from filing. When priority rights are obtained by virtue of an assignment, the corresponding deed of assignment must be submitted within 180 (one hundred and eighty) days from filing. Failure to timely submit these documents will cause loss of priority rights.

An industrial design will be published automatically, and its registration will be simultaneously granted. The registration has a term of 10 (ten) years counted from the date of filing and will be renewable for 3 (three) successive periods of 5 (five) years each. If required by the Applicant, the application may be kept secret for a period of 180 (one hundred and eighty) days counting from the filing date, after which it will be processed.

9.2.3 Prosecution

a) Filing date and maintenance fees

To keep an Industrial Design in force, its owner is subject to payment of quinquennial maintenance fees, as of its second quinquennium counting from the filing date. Payment must be effected during registration's fifth year of validity, and the subsequent quinquennial fees must be paid together with the requests for renewal.

b) Examination proceedings

Substantial examination of an industrial design may be requested by the applicant or any interested party at any time during the term of registration, to evaluate novelty and originality of the object of the registration. In this case, the INPI will issue an opinion that will serve as the basis for an e *ex officio* nullity proceeding.

c) Nullity Proceedings

After granting, an administrative nullity proceeding of an industrial design may be started *ex officio* or by any third party with legitimate interest, within 5 (five) years counting from issuance of the Registration Certificate. In case notice of such request is published within 60 days from the granting decision, such request will suspend the registration's validity until a final decision is rendered.

A judicial nullity action can be initiated at any time during the validity of the registration, either by the INPI or by any third party having a legitimate interest.

d) Extinction

An industrial design shall become extinct due to the end of the registration term as well as due to the non-payment of the quinquennial and renewal fees.

9.3. Trademarks

In Brazil, any visually perceptive distinctive sign, when not prohibited under law, is eligible for

trademark protection. Thus, it is possible to protect as trademarks words, designs, and three-dimensional shapes. Since October 2021, the registration of position marks was regulated by INPI. However, sound and smell marks, as well as other non-traditional marks, are not subject to trademark protection, although they may be protected under unfair competition, such as in the case of trade dress.

Brazil adopts the first-to-file system. The system of protection is attributive of rights, under which proprietary rights over a trademark arise solely from registration. As member of the Paris Convention, trademarks registered abroad, in a country that is also signatory to the Convention, may claim priority rights in Brazil within 6 (six) months of the foreign filing date.

However, as an exception to the first-to-file system, any person (in the broad sense of natural person or legal entity) in good faith that at the date of priority or of the application was using an identical or similar mark for at least six months in the country, to distinguish or certify a product or service that is identical, similar, or akin, will have preferential rights to apply for registration. These preferential rights must be enforced either through the INPI or by means of a court action.

Well-known marks in their field of activity, under article 6 *bis* (1) of the Paris Convention, enjoy special protection, whether they have been previously filed or registered in Brazil.

The Industrial Property Law also establishes special protection in all fields of activity to the so-called "highly renowned" marks registered in Brazil. These trademarks are those renowned beyond the boundaries of their respective activities. To obtain a declaration of "highly renowned", one must request a special examination proceeding with the INPI to recognize that a certain trademark registration is highly renowned.

Multiclass applications are not available in Brazil, so that a separate application is required for each class of goods and services. We currently adopt the 11th version of Nice International Classification of goods and services.

Private legal entities may only request registration of a mark related to the activity they effectively and licitly exercise, either directly or through enterprises they control directly or indirectly, such condition having to be declared when applying for registration.

Before applying for registration of a trademark in Brazil, it is advisable to run a trademark availability search of the INPI database to check availability of the mark for registration.

When applying for trademark registration in Brazil, the applicant is required to present a Power of Attorney, including express powers to receive service of process against the owner of the trademark as well as a simple copy of the original application filing receipt, in case of priority claim. If not filed together with the application, the Power of Attorney must be presented within 60 days and the priority documents e in 4 months, counting from the trademark filing date.

Use or intent to use is not required to obtain and to renew a trademark registration. It may be, however, a requirement to keep a registration alive. Upon granting of registration, the owner will be required to initiate use of the mark within five years and to not interrupt said use for a period of more than five consecutive years, under penalty of forfeiture to be declared upon request of the INPI

or any third party with a legitimate interest.

Upon grant, a registration will be valid for ten years and may be renewed for successive periods without limitation.

9.4. Domain Names – Top Level Domain ".br"

Registro.br is the department of Brazilian Network Information Center ("Núcleo de Informação e Coordenação do Ponto BR - NIC.br") responsible for the registration and maintenance of domain names that use ".br".

Brazil also adopts the first-to-file system in relation to domain names and the applicant must declare awareness that the name chosen does not violate any legislation, mislead the public, violate other parties' rights, represent concepts already defined on the Internet, contain vulgar or abusive words or expressions or use the initials or acronyms of states, government ministries/agencies or any other word or expression prohibited by the Brazilian Internet Management Committee ("Comitê Gestor de Internet – CGI.br").

Domain names may be registered by natural Brazilian persons or regularly constituted legal entities (holders of CPF or CNPJ). Foreign companies will be granted provisional registration upon naming an attorney-in-fact in the country and declaring the commitment to establish an enterprise in Brazil within the following 12 months.

On September 30, 2010, the NIC.br adopted a mandatory administrative dispute resolution process for all ".br" domain names registered from that date forward. Any party can initiate a proceeding against an eligible ".br" domain name holder by filing a complaint with an approved dispute resolution organization (at this time, the entities approved for dispute resolution are the Brazilian Intellectual Property Association – ABPI, the Brazil-Canada Chamber of Commerce – CCBC, and the World Intellectual Property Organization - WIPO).

In addition to the dispute resolution proceeding, one may also claim remedy against a registration of domain names in bad faith, such as cybersquatting, by suing for unfair competition and/or trademark infringement. Preliminary injunctions and indemnifications are commonly awarded.

9.5. Trade Names

The Brazilian legal system also confers protection on company trade names. Law 8,434/94, Decree 1,800/96, and the Civil Code contain several provisions regulating the registration and protection of trade names.

As a rule, this protection results from the filing of the company's acts of incorporation with the competent body and avoids the incorporation of different companies with identical trade names within the same state. Furthermore, Article 8 of the Paris Convention establishes that company trade names shall be protected in all countries of the Union, irrespective of registration.

An injured party may, at any time, bring action to cancel the registration of a trade name made in discordance with the law.

Reproductions or imitations of the main element of a trade name, likely to cause confusion or association, are not registrable as trademarks.

9.6. Technology Transfer, Patent and Trademark License Agreements

Agreements involving transfer of technology, scientific and technical assistance services, patent or trademark license agreements, franchising and remunerated patent or trademark assignment must be recorded by the INPI, to:

(i) become enforceable against third parties;
(ii) enable the remittance of royalties and any other remuneration abroad; and
(iii) allow the tax deductibility of the amounts paid by the recipient company within the limits established in the law.

Before 2017, although limited by law to restrict the analysis of the agreements exclusively to a formal aspect of the documents submitted and evaluation of compliance with tax and unfair competition rules, the INPI used to interfere in the conditions agreed upon by the parties whenever it deemed appropriate.

According to INPI Normative Instruction No. 70/17 (NI No. 70/17), in force since July 1, 2017, issues related to the limits for remittance and deductibility of payments, contractual terms, among other matters of fiscal, tax and exchange rate nature, are **no** longer analyzed by INPI. In this sense, the certificates of recordal are issued with the following remark: "The INPI did not examine the contract in light of tax laws, fiscal laws and remittance of capital abroad."

a) Transfer of Technology and Technical Services

Before the NI No. 70/17, INPI did not accept the concept of license of unpatented technology, it only used to admit transfer of technology agreements. The INPI used to understand that there can be no limitation on the use of the technology by the recipient company after the agreement expires.

It is worth mentioning that it was a mere internal understanding and there is no law prohibiting this practice. Therefore, as from the NI No. 70/17, the INPI does not analyze such aspect anymore and, therefore, it is possible to celebrate and record license of unpatented technology.

Also, before NI No. 70/17, through an interpretation of a law that stablishes limits of deductibility, INPI used to only record agreements with a maximum term of five years, renewable for additional five years. However, after the NI No. 70/17 the INPI will no longer make this restriction and will record for the period stated by the parties in the agreement.

As a rule, technology transfer agreements must indicate the subject matter being transferred and describe in detail the method to be adopted to be transferred. The technology to be transferred may be compensated at a preset overall fee; at a price per item sold; at a percentage of profits; or at a percentage of net revenues less taxes, duties and other charges agreed between the parties.

A software license agreement that includes the provision or transfer of the source code to the

licensee is considered a transfer of technology agreement and will need to be recorded with the INPI as well.

Agreements regarding provision of scientific and technical assistance are required to contemplate the conditions for obtaining techniques, planning, and scheduling methods, as well as research, studies and projects for the implementation or provision of specialized services. The services related to the company's core business can be registered at INPI, as well as services for assembling equipment and/or machines abroad, when accompanied by a Brazilian technician and/or when they generate any kind of document, for example, a report.

Technical and scientific assistance service agreements must specify the period during which specialized services will be provided; the number of technicians involved; the degree of expertise and training programs; and the agreed compensation on a man-hour or man-day basis.

b) Patent and Trademark License Agreements

For a trademark or a patent to be licensed in Brazil, they must at least be filed here. The agreement must include not only the details on the applications, patents, or registrations, but also information on whether is granted on an exclusive basis, the remuneration, whether sublicensing is permissible, the currency of the agreement under which the payments will be made, the term and which party will be responsible for the payment of the relevant taxes.

The effective term of such agreements cannot exceed the validity of the patent or trademark registration.

Remittance of payments abroad will only be allowed for validly granted patents and registered trademarks. Specifically, for patent license agreements royalties can be accrued from the date the application was filed, but remittance will only be allowed after the grant of the patent. In relation to trademarks, royalties can only be accrued after the registration is issued.

c) Franchising

A Franchising Agreement must be recorded before the INPI and shall indicate the trademark and patent applications, and/or trademark and patents registered involved, the conditions of exclusivity and sub-franchising (if any), territory, parties, obligations, quality control, supply chain, intellectual property policies, among others. Also, it is necessary to present the Offering Circular or an affidavit demonstrating the Offering Circular receipt 10 (ten) days before the agreement signature.

9.7. Software

Software is regulated by Law 9,609 (Software Law) and protected under Brazil copyright system. This law contemplates, among other matters: (a) protection of software as intellectual property; (b) rules regarding liability to commercial exploitation of the software; (c) rules on ownership in view of the software development; and (d) the criminal penalties for copyright infringement.

Software rights are protected for 50 (fifty) years as of January 1st of the year following publication of the software or, in the absence of such publication, from creation of the software. As in copyrights,

foreign-based owners of software are also entitled to protection in Brazil, provided that the country of origin offers reciprocal treatment to Brazilians and foreigners domiciled in Brazil.

Software registration in Brazil is not a requirement for local protection. Nevertheless, registration with the INPI may be advisable in order to create *prima facie* evidence of creation and ownership.

The concept of "work-for-hire" is generally applicable to software. In this sense, unless otherwise agreed between the parties to an employment or service provision relationship, the employer/contractor will be the owner of rights to the software developed by an employee/service provider, as long as the nature of the agreement was related to software development.

It is important to note that this is not true in relation to any other copyright, where the express and formal assignment is the only alternative of assignment of rights. There is no concept of a work-made-for-hire in relation to copyrights, except in relation to software.

Protection over software contemplates its source code, when original and distinctive. This means that software violation occurs when there is a reproduction of the original and distinctive parts of the source code. Interface and other visual elements of the software are protected under copyright.

According to the Software Law, the following events do not characterize an offense against software copyrights:

(i) reproduction of a copy that was legally acquired, whenever indispensable for proper use of the software;
(ii) partial citation for educational purposes, provided that the respective software and author are mentioned;
(iii) similarity between one program and another, if resulting from functional application characteristics, from compliance with legal and regulatory precepts or technical standards, or from limitation of alternative forms of expression; and
(iv) integration of software and its basic characteristics into an application or operating system, if technically indispensable for user needs, and provided that it is used exclusively by the person that carried out the integration.

The disclosure of the software's source code along with descriptive memorial, internal functional specifications, diagrams, flowcharts, and other technical data related to the program's operation and functionality will be regarded as transfer of technology, subject to registration with the INPI.

Software can also be subject to a license agreement, which does not have to be recorded at the INPI, except in the case of the above paragraph. In the absence of a formal license agreement, an invoice related to the purchase or license of a copy of the program will suffice to demonstrate regular use.

9.8. Trade Secrets

The Brazilian Federal Constitution declares the privacy and secrecy to be essential civil rights, not making any difference between individuals or entities and therefore serving as an umbrella legal frame for all specific legislation and norms that in some form deal with the protection of trade secrets.

General protection to trade secret is afforded under Brazil's unfair competition regulations, included in the Industrial Property Law, according to which

> *Article 195. A crime of unfair competition is perpetrated by anyone who:*
> *(...)*
> *XI. divulges, exploits, or utilizes, without authorization, confidential knowledge, information, or data that could be used in industry, commerce or rendering of services, other than that which is of public knowledge or that would be evident to a technician versed in the subject, to which he gained access by means of a contractual or employment relationship, even after the termination of the contract.*
>
> *XII. divulges, exploits, or utilizes, without authorization, the kind of knowledge or information to which the previous Item refers, when obtained by illicit means or when access was gained through fraud; or*
> *Penalty—imprisonment, for 3 (three) months to 1 (one) year, or a fine.*

There are, however, no mechanisms for registration or protection of trade secrets. Legal measures are available, which include preliminary injunctions, temporary restraining orders and search and seizure of documents and others. Although available, one must substantially evidence the infringement and the nature of trade secret in order to obtain any of these urgent measures, which is usually quite difficult in matters of trade secret violation.

Most of the definition on whether something is or is not a trade secret still comes from scholars, and although there is no formal legal definition on what can constitute a trade secret, all scholars and the few most important cases agree that to be protectable, the information must be secret or restricted to the company, must be treated as a secret, must be classified as such by its owner, and must be subject of reasonable efforts to maintain its secrecy. The owner's mere desire or intent to keep information a secret is not enough.

Since there is also no definition as to what efforts are considered "reasonable", the judges will tend to look into the companies´ practices to protect such information, generally considering whether (i) the employees were advised of the existence of a trade secret, (ii) the information was limited to a "need to know basis", (iii) employees, contractors, visitors and other people who may come into contact with trade secret information were required to sign confidentiality agreements and, (iv) secret documents were kept under lock.

In addition to the above, a certain degree of originality that provides the owner of the trade secret with some advantage in relation to its competitors, the economic value and/or the possibility of being negotiated are also taken into consideration.

Therefore, establishing a strict and formal confidentiality policy with employees is highly advisable.

9.9. Enforcement of IP rights

Brazilian legislation also provides IP owners with several and effective remedies against infringement of any intellectual property, such as temporary restraining orders, preliminary injunctions, search and seizures, adjudication of registrations made in bad faith and recovery of damages.

Infringement of a patent is subject to both criminal and civil remedies. Articles 42 and 185 of the Industrial Property Law read as follows:

> *Article 42 - A patent shall afford to its owner the right to prevent others from producing, using, offering for sale, or importing for such purposes without his consent:*
> *I - a product that is the subject matter of a patent;*
> *II - the process or product directly obtained by a patented process.*
> *Paragraph 1 - The owner of a patent shall further enjoy the right to prevent others from assisting other parties in carrying out the acts referred to in this Article.*
>
> *Article 185 - Supplying a component of a patented product, or material or equipment for carrying out a patented process, where the end use of the component, material, or equipment, necessarily, induces exploitation of the subject matter of the patent.*
> *Penalty - imprisonment, from 1 (one) to 3 (three) months, or fine.*

In addition, the patentee is guaranteed the right to obtain compensation for unauthorized exploitation of the subject matter of the patent, including exploitation that occurred between the date of publication of the application and that of grant of the patent.

Regarding trademark infringement, customs authorities may, on an *ex officio* basis or at the request of an interested party, seize any products carrying falsified, altered, or imitated marks.

Apart from the preliminary search and seizure measure, the interested party may request:

(i) the seizure of a falsified, altered, or imitated mark at its place of preparation or where it is found, prior to use for criminal purposes; or
(ii) the destruction of a falsified mark on packages or products that contain it, before they are distributed, even if the packages or even the products themselves are destroyed.

In civil claims, the judge may, to avoid irreparable or hard-to-repair damages, grant an *ex parte* injunction to suspend the infringement or illegal act if this is held necessary, but may also require the plaintiff to post a cash bond or surety to guarantee any damages that might be caused to the defendant should the final decision find that no violation occurred.

In the case of flagrant reproduction or imitation of a registered mark, the judge may determine the seizure of all the merchandise, products, objects, packages, labels, and others that carry the falsified or imitated mark.

Irrespective of the criminal action in either patent or trademark infringement, the injured party may file the civil suits deemed appropriate.

The provisions of Art. 210 establish that loss of profits will be determined by the most favorable criteria to the injured party, as follows:

- the benefits that would have been gained by the injured party if the violation had not occurred; or

- the benefits gained by the infringer; or
- the remuneration that the infringer would have paid to the proprietor of the violated rights for a granted license which would have legally permitted him to exploit the subject of the rights.

Finally, the aggrieved party is also reserved the right to receive losses and damages in compensation for violation of industrial property rights and acts of unfair competition, including acts that are not expressly covered by law but which are liable to harm the reputation or business or cause confusion between commercial or industrial establishments or services providers, or between products and services placed in the market.

10 ARBITRATION

10.1. Introduction

Arbitration is vital for international trade, as it is considered to be the favourite dispute resolution mechanism for international disputes. Compared to claims brought under national courts, arbitral proceeding offers several advantages, for example: the dispute will normally be resolved much sooner; the proceedings can be kept confidential; parties can select arbitrators best suited to resolve their dispute; and, as a general rule, the arbitration decision is final, as there is no formal appeals process available.

Since the enactment of the Brazilian Arbitration Act ("BAA" - Federal Law No. 9,307/1996, amended by Federal Law No. 13,129/ 2015), arbitration in Brazil has grown exponentially. To better understand this growth of arbitration, is important to highlight the historical background of the Brazilian legislative framework.

The BAA is based on the UNCITRAL Model Law on International Commercial Arbitration of 1985. When Brazil enacted this law, the expectation was that it would facilitate the use of arbitration as a fast and efficient alternative method of dispute settlement and, therefore, would develop national and international commerce.

The enactment of the BAA was met, nonetheless, with opposition and a lengthy constitutional challenge in the Brazilian courts. Fortunately, in December 2001, in the landmark case of *M.B.V Commercial and Export Management Est* vs. *Resil Industria e Comercio Ltda.,*the Brazilian Supreme Court ("STF") confirmed the constitutionality of the BAA, which was sufficient to boost the use of the arbitration.

Following the STF's judgment, in 2002 the Brazilian Congress ratified the New York, which has been described as the most important and successful treaty in the area of international trade law that aims to uniformize worldwide minimum requirements for recognition and enforcement of arbitration agreements and foreign awards.

Finally, on 18 March 2016, the New Brazilian Code of Civil Procedure ("BCCP" - Federal Law No. 13,129/ 2015) entered into force. The main goal of the BCCP was to reduce the number of judicial lawsuits, which at that time exceeded 105 million cases, by fostering mediation and enhancing Brazilian courts' support to arbitral proceedings. BCCP created the arbitral letters, a tool through

which arbitrators may request from judges' orders in aid of the arbitration. This may be the case when it becomes necessary to formally summon or to compel witnesses to appear at a hearing, or even to enforce interim reliefs. BCCP also recognized that any lawsuit arising from a confidential arbitration shall also be deemed confidential; as well as clarified the applicability of arbitration to certain legal relationships, such as those involving public bodies.

These were key milestones in making Brazil a more arbitration-friendly jurisdiction.

10.2. Arbitrability

Arbitrability indicates whether a dispute is "arbitrable", *i.e.* capable of being settled by arbitration. Scholars readily distinguish between subjective and objective arbitrability. Subjective arbitrability concerns certain individuals or entities that are considered to be unable to submit their disputes to arbitration due to their status or function, such as states or local authorities. The objective arbitrability focuses on whether a certain subject-matter can be settled through arbitration.

10.2.1. Subjective Arbitrability in Brazil

The BAA is technical and straightforward in defining the agents that may refer their disputes to arbitration (Article 1): 'those who are capable of entering into contracts may make use of arbitration to resolve conflicts regarding freely transferable property rights'.

The amendment of the BAA in 2015 put an end to the debate on subjective arbitrability in cases involving the public administration, by adding paragraphs 1 and 2 to article 1 of the BAA, expressly prescribing that 'direct and indirect public administration may use arbitration to resolve conflicts regarding transferable public property rights' and '[t]he competent authority or direct public administration entity that enters into arbitration agreements is the same entity that enters into agreements or transactions.'.

Certain pieces of legislation, however, have added specific requirements to arbitration agreements entered into by public entities, for example:

- article 4 of Decree No. 64,356/2019 enacted by the State of São Paulo requires that the arbitration agreement be drafted by the attorney general;
- article 2 of Decree No. 46,245/2018 enacted by the State of Rio de Janeiro prevents the use of ad hoc arbitrations, and article 4(I) requires that the City of Rio de Janeiro be the mandatory seat of the arbitration; and
- article 6 of Law No. 19,477/2011 enacted by the State of Minas Gerais forbids arbitration in equity awards.

Subjective arbitrability may be effortlessly verified because the Brazilian Civil Code ("BCC" - Federal Law No. 10,406/2002) provides a clear and direct definition of what legal capacity is. On the other hand, doctrine and case law have long discussed how judges and arbitrators could define which rights or matters could be surrendered to arbitration

10.2.2. Objective Arbitrability in Brazil

Arbitration can be chosen by the parties to settle disputes related to patrimonial and disposable rights (rights that may be assigned, transmitted, waived, or settle).

By contrast, non-patrimonial or non-disposable rights - those without immediate connection to economic realms, such as the right to life, liberty, physical integrity, name, honour and intimacy - may not be referred to arbitration. Accordingly, disputes concerning some family issues, civil status, taxes or criminal law, for example, cannot be subject to an arbitration agreement.

In 2017, Brazil enacted its reform to the Brazilian Consolidated Labour Laws ("BCLL" - Federal Law No. 5.452/1943, amended by Federal Law No. 13,467/2017), upon which it was expressly provided the possibility of submitting individual labour disputes to arbitration, in certain situations. Although this reform was a landmark, it has found its shortcomings, mainly in the case law field, where in some instances national courts have upheld the validity of the arbitration agreement and in similar situations have rejected this claim, on the basis of the alleged unavailability and non-waiver of labour rights, employee's under-sufficiency or even the offence to public policy.

10.3. Arbitration Agreement

The BAA distinguishes between two different types of arbitration agreement depending on whether the dispute has already arisen or not: the submission agreement (for conflicts that has already happened); and the arbitration clause (for future conflicts)

The arbitration agreement is independent from the main agreement, and, because of that, the inexistence, invalidity or the ineffectiveness of the main agreement does not imply in the inexistence, invalidity or the ineffectiveness of the arbitration agreement. This is called by separability presumption.

The arbitration clause shall be in writing and can be contained in the contract or in a separate document referring thereto. However, the BAA does not specify whether the arbitration agreement must be signed to be effective. Therefore, the Brazilian Superior Court ("STJ") decided that a tacit acceptance of the arbitration clause is sufficient, if the consent of both parties to submit the dispute to arbitration can be proved.

In a "*contrato de adesão*" (e.g. "adhesion", consumer and standard form contracts), the arbitration agreement will only be valid if:

- the party that did not propose the adhesion contract initiates the arbitral proceedings or agrees expressly to the commencement of proceedings;
- the arbitration agreement is written in a separate document or is marked in bold in the adhesion contract; or
- the arbitration agreement is specifically signed or endorsed by the weaker party.

10.3.1. Third Parties

Brazilian caselaw shows that a non-signatory party can be bound by an arbitration agreement whenever (*i*) it has somehow replaced the contracting party that entered into the agreement; or (*ii*) it had a relevant participation in the negotiation of such agreement, among other possibilities.

The jurisdiction over third parties is usually a very fact-intensive analysis, and therefore decided on a case-by-case basis. In this sense, there is no relevant difference between foreign or domestic third parties in this analysis.

10.3.2. Breach of an Arbitration Agreement

If the parties have concluded a valid and enforceable arbitration agreement, they are required to arbitrate all disputes that fall within the scope of that agreement and cannot submit such disputes to the Brazilian courts. If, notwithstanding the existence of a valid arbitration agreement, court proceedings are initiated, the interested party must raise such issue as a preliminary objection when presenting its response, within 15 days from either the defendant's service of process or from the preliminary hearing in court.

If the interested party, however, fails to bring the existence of the arbitration agreement to the knowledge of the state judge in the legal term, the Brazilian courts will consider that the interested party waived its right to resort its dispute to arbitration and, therefore, will proceed with the judgment on the merits.

In case the objection is raised, the Brazilian courts are required to refer the case to arbitration and dismiss the court proceedings without hearing the merits of the dispute. Brazilian courts tend to be pro-arbitration, and courts usually enforce arbitration agreements.

10.4. The Seat of Arbitration

The seat of arbitration, or in other words, where the award is officially rendered, must be determined in the arbitration agreement, which is freely chosen by the parties. As further explained below, awards rendered in Brazil are directly enforceable before local courts, whereas awards rendered outside Brazil are enforceable in Brazil according to international treaties ratified by Brazil (principally the New York Convention) and must be recognized by the STJ.

10.5. Arbitrators and Arbitral Institutions

Parties are entitled to appoint either a sole arbitrator or an arbitral tribunal composed of any odd number of arbitrators. The arbitrator can be appointed by any method agreed by the parties or in accordance with the rule of the arbitral institution. However, the most common practice is for each of the parties to nominate one arbitrator and both nominated arbitrators to mutually agree upon the presiding arbitrator.

If there is an arbitration agreement and it cannot be enforceable because it lacks certain information or a party refuse to accept the jurisdiction of the arbitral tribunal, a party can request Brazilian courts to enforce the arbitration agreement.

There is no general restriction for foreigners to be arbitrators in Brazil. However, some specific local laws may create obstacles in certain types of arbitrations involving Brazilian States, such as Minas Gerais.

Arbitrators have the duty to disclose any circumstances likely to raise justifiable doubts as to their

impartiality or independence. An arbitrator can be challenged on the grounds of impediment or suspicion.

In addition, the BAA also determines that the arbitrator have the same duties of court judges, thus the same relationships that characterize cases of impediment or suspicion of court judges may apply to arbitrators.

In case the challenge application is well succeeded, the challenged arbitrator shall be removed and replaced. The parties are generally not entitled to challenge the arbitrator if they became aware of the reasons for the challenge prior to their appointment.

As to the arbitrations institutions, the most relevant in Brazil are: the International Chamber of Commerce (ICC), which has an office in São Paulo; the Centre of Arbitration and Mediation of the Chamber of Commerce of Brazil-Canada (CAM-CCBC); the FGV Chamber of Conciliation and Arbitration (FGV); the Brazilian Center of Mediation and Arbitration (CBMA); the Mediation and Arbitration Chamber of São Paulo (CIESP-FIESP); the Market Arbitration Chamber (CAM B3); the Business Mediation and Arbitration Chamber (CAMARB); and the Arbitration Centre for the American Chamber of Commerce (AMCHAM).

It is important to notice that in Brazil, there is mandatory arbitration for companies listed on the Brazilian stock market *Novo Mercado* and, therefore, all related disputes shall be referred to arbitration administrated by CAM B3.

10.6. Arbitral Procedure

The arbitral procedure is deemed initiated when the nomination is accepted by the sole arbitrator, if there is only one, or by all members of the arbitral tribunal. However, for the purpose of statute of limitations, the arbitration is deemed to be initiated with the filing of the notice of arbitration.

Parties are free to choose their legal representatives or act on their behalf. However, foreign lawyers can represent parties in arbitration in Brazil when acting as co-counsel to Brazilian firms.

The parties are free to agree upon the procedure to be followed by the tribunal in conducting the proceedings, which can abide by the rules of an arbitral institution or be entirely decided by the parties. In conducting the proceedings, however, the arbitral tribunal must not deviate from the core principles of Brazilian law, such as fair and equal treatment between the parties, equal opportunity to be heard and the impartiality of the arbitrator.

10.6.1. Kompetenz–kompetenz principle

Brazilian law recognizes the principle of kompetenz-kompetenz and the Brazilian courts generally understand that the arbitrators are entitled to determine issues of jurisdiction, except when there is a prima facie case of lack of arbitral jurisdiction, in which case the local court will probably rule on this issue.

10.6.2. Applicable law and Language of the Proceedings

Parties are free to choose the language and the applicable (procedural and substantive) law to the arbitration. Parties may also choose to apply the general principles of law, usages and customs and international rules of commerce.

However, in cases involving state parties, specific statutes or regulations may require additional requirements (*e.g.* proceedings shall be held in Portuguese, shall apply Brazilian law or to be resolved by Brazilian arbitrators). For example, in proceedings in which the State of Minas Gerais is a party, arbitrators must be Brazilian according to the State Law n. 19.477/2011.

10.6.3. Evidence and Disclosure

The arbitral tribunal has jurisdiction over all the aspects of taking of evidence, as it may take depositions of the parties, hear witnesses, and determine expert examinations or the production of any other evidence deemed appropriate. Requests of document production may be rejected by the arbitral tribunal, if deemed to be unnecessary.

The IBA Rules on the Taking of Evidence in International Arbitration and the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration are both commonly adopted as standards of evidence production in Brazilian arbitration proceedings. However, broad discovery is not usually accepted by Brazilian arbitral tribunals, if not previously agreed by the parties.

The arbitral tribunal may issue an order, requesting the assistance of judicial courts as to obtain evidence (*e.g.* to compel a witness to attend to a hearing), by issuing arbitral letters, as further explained below.

10.7. Provisional Measures

Before the commencement of the arbitration, parties may request provisional relief before judicial courts. However, the parties must initiate the arbitration within 30 days, as to maintain the efficacy of such relief.

After the institution of the arbitration the arbitral tribunal is entitled to grant any kind of interim measure, and also to maintain, modify or cancel any interim or provisional measure issued by a court before the commencement of the arbitration.

No decision or order on interim measures by the arbitral tribunal is directly enforceable. For that, the arbitrator or arbitral tribunal may issue an arbitration letter (*carta arbitral*) directed to a court, in accordance with the court's territorial competence, requesting enforcement of the interim measures granted by the arbitral tribunal. Provided that the confidentiality of the arbitration award is verified, compliance with the arbitration letter is treated under seal.

10.8. The Arbitration Award

10.8.1. Requirements

The arbitration award must be rendered in writing and must contain: (i) a report setting out the

names of the parties and a summary of the dispute; (ii) the reasoning for the decision; (iii) the legal basis of the decision, including the time limit for the fulfilment of obligations imposed on the parties; and (iv) the date and place of the award.

In addition to the mandatory requirements mentioned above, the sole paragraph of the article 26 of the BAA determines that the award must be signed by each member of the arbitral tribunal. If one or more arbitrators cannot or does not wish to sign the award, the chair of the arbitral tribunal must certify this, and the dissenting arbitrator can issue a dissenting opinion.

The award must be issued in the timeframe agreed upon by the parties in the arbitration agreement or established by the rules of the chosen institution. However, if the agreement is silent, the arbitral award shall be made within six months from the date of the commencement of the arbitration.

10.8.2. Challenge of Arbitration Award

Arbitration awards has the same effect as a final, binding, and non-appealable court judgement, as stated by the article 18 of the BAA. However, BAA establishes that a party may file a request for the arbitrator or arbitral tribunal to correct clerical errors or clarify any obscure, doubt or contradiction or decide on an omitted issue.

The award may be challenged before the competent court in specific circumstances. For set aside proceedings, a party has 90 days from the date the award is rendered or modified to apply for an order annulling the award.

The award may be challenged before the competent court and set aside for any one or more of the following reasons: if (i) the arbitration agreement is null; (ii) the award is issued by one or more individuals who are not capable of acting as an arbitrator; (iii) the award does not comply with the requirements provided in the BAA; (iv) the award extends to issues that fall outside the scope of the arbitration agreement; (v) the award was rendered under prevarication, extortion or as a result of corruption; (vi) the award was issued after the agreed time limit; or (vii) an arbitrator failed to act impartially or independently when rendering the award; or ignored the obligation to treat parties fairly.

10.8.3. Enforcement of Award

<u>Domestic Awards</u>

The determining factor as to whether an arbitral award is *foreign* or *domestic* is the geographic location where the award was rendered,. In this sense, domestic awards are defined as awards rendered in Brazil. Thus, even if the parties have decided to adopt foreign law to the merits of the case, the respective award would still be considered domestic if it was rendered inside the Brazilian territory.

Domestic awards are automatically enforceable, entitling the interested party to enforce under local courts as soon as the decision is definitely rendered by the tribunal. The enforcement procedure of domestic awards is structured to be fast and cost-efficient.

<u>Foreign Awards</u>

The sole paragraph of article 34 of the BAA provides a criterion for "internationality" of an award by stating that "*A foreign award is considered to be an award rendered* ***outside*** *the national territory*".

In accordance with the BAA, foreign awards are only enforceable in Brazil after the recognition by the STJ, which verifies the validity and conformity of the award[14] before deciding whether to grant an *exequatur* required by the interested party. An award that is deemed to be contrary to Brazilian core principles of law will not be recognized and enforced in Brazil.

A study conducted in 2016 by two Brazilian private institutions, CBAr and ABEArb, revealed that the enforcement proceedings in Brazil take on average 20.5 months (1.7 years). In the past few years, the STJ has repeatedly positioned itself in a manner favorable to the development of arbitration, enforcing foreign awards exactly as they were rendered, with very specific exceptions. The 2016 CBAr and ABEArb research analyzed 37 decisions on enforcement of foreign awards issued by the STJ and STF and concluded that none of the decisions annulled arbitral awards, while 31 of the enforcement requests were granted or partially granted.

It is important to note that public policy is a ground often invoked or examined *sua sponte* by the STJ, but it is rarely accepted by the Court. The Abengoa case of 2017 is an example of the position adopted by the STJ to deny the recognition of a foreign arbitral award on the grounds of public policy. The Court concluded that the presiding arbitrator's law firm had a significant commercial relationship with an affiliate of one of the parties. In the opinion rendered by Justice Noronha (one of the members of STJ's Special Court), it was pointed out that under Brazilian law, damages could not have been set under the criteria adopted by the tribunal and, therefore, it also constituted a ground for denial of enforcement of the award.

10.9. Confidentiality

Confidentiality is not expressly ensured by the BAA, but such a provision is commonly inserted into the arbitration agreement. Similarly, many arbitration institutions' rules contain a confidentiality duty that applies to both the parties and the arbitrators. On the other hand, arbitrations involving state must always be subject to the principle of publicity.

The BCCP ensures confidentiality to judicial proceedings for enforcement of an arbitral decision or award, and also for recognition or nullity of the latter, provided that the interested party demonstrates before the state court that the arbitral proceedings are confidential. However, there is case law denying such confidentiality on the grounds that it would be contrary to the publicity

[14] The articles 38 and 39 of the BAA stablish that the grounds for refusing the recognition of a foreign award are: (i) lack of capacity of the parties to enter into the arbitration agreement; (ii) invalidity of the arbitration agreement according to the governing law or, in the absence of an express choice of law, according to the law of the seat where the award was issued; (iii) improper notice of the arbitration procedure being given to the respondent, including not being afforded the right to submit its defense; (iv) the award exceeding the scope of the arbitration agreement (unless it is possible to sever the excess part(s) from the valid part of the award); (v) failure to comply with the arbitral process envisaged in the arbitration agreement; (vi) the award being unenforceable, set aside or suspended by a court of the jurisdiction in which it has been issued; (vii) the award involving a dispute which, according to Brazilian law, may not be resolved by means of arbitration; and (viii) the award being contrary to Brazilian public policy. The grounds for refusal set out above are virtually identical to those set out in the New York Convention and the Panama Convention, two treaties on the enforcement of foreign awards to which Brazil is a signatory.

principle provided in the Brazilian Federal Constitution.

10.10. Costs

As per the article 11 of the BAA, the parties can decide in the arbitration agreement how costs of the arbitration will be borne (including the arbitrators' fees and the parties' legal fees). In the absence of any prior agreement between the parties on this issue, the arbitral tribunal will determine the costs of the arbitration and allocate the responsibility for paying such costs between the parties

During the arbitral proceeding, if necessary, the tribunal may order the parties to make deposits to cover expenses and actions. As a rule, the winning party is entitled to recover its costs from the losing party. However, if the winning party is only partly successful, its recovery may be limited to those costs attributable to the extent of its success.

An arbitral tribunal is empowered to award non-contractual attorneys' fees generally as part of the reimbursement of expenses incurred by the parties (or the prevailing party) to pursue their defense. As a matter of fact, Brazilian law has a unique feature with regard to attorneys' fees. Under the BCCP and the Brazilian Bar Association Act (Federal Law 8.906 of 1994), in most litigation cases, courts will set attorneys' fees that are payable not to the prevailing party, but directly to its counsel as a separate entitlement. Such fees – denominated *honorários de sucumbência* – belong to the attorneys, who are allowed to appeal to have them raised or may enforce this portion of the judgment separately. This long-established practice in litigation brings about the discussion whether this system applies in arbitration. The arbitration agreement may either silent, exclude or expressly authorize non-contractual attorneys' fees. In this cases, Brazilian arbitrators will generally not award non-contractual attorneys' fees unless the arbitration agreement grants the tribunal powers to do so.

11. REAL ESTATE ASPECTS

11.1. Introduction

11.1.1 Main sources of law

The main sources of Real Estate Law in Brazil are the Civil Code (Law no. 10,406/2002), the Real Estate Development Law (Law no. 4,591/1964), the Land Parceling Law (Law no. 6,766/1979), the Public Register Law (Law no. 6,015/1977) and the Urban Lease Law (Law no. 8,245/1991). There are also other specific statutes.

11.1.2 Important areas of law for investors

Depending on the purpose of the investment, the main areas of law for an investor to consider when purchasing real estate in Brazil are the civil law, the zoning and urban planning laws (which vary according to the city where the property is located), environmental law and tax law.

11.1.3 Categories of property rights

The main type of property rights that can be acquired in Brazil is **ownership**, which is absolute and perpetual until disposal of the property by the owner, who is free to enjoy it and dispose of it, subject

only to third-party rights and legal restrictions. On the owner's death, ownership is transferred to the heirs.

However, there are other types of real rights, such as:

a) **Usufruct**: full right of use and enjoyment, including the right to receive income generated by the property;

b) **Acquisition right of the purchaser under a purchase and sale commitment**;

c) **Real right of use:** a type of limited usufruct, giving the right to use the property for a specific purpose;

d) **Surface right:** a specific right to build or cultivate, granted by the landowner in favor of a third party, segregating the ownership of a building or a plantation from the land;

e) **Emphyteutic lease:** the right of useful domain (*domínio útil*) over the property on a perpetual basis. Emphyteutic leases were abolished by the current Civil Code, published in 2002, but preexisting emphyteutic leases remain valid; and

f) **Occupation rights (*direito de ocupação*)** over properties held by the Federal Government, like those located in the coastal area.

11.2. Legal Restrictions on Foreign Investors

As a rule, foreign investors (individuals or companies) are free to acquire and use urban real estate properties in Brazil as owners or lessees, or under any other title. However, there are some restrictions regarding the acquisition or lease of rural properties, the acquisition of urban properties located in the coastal area, and the acquisition and possession of properties located at the borders of Brazil as below indicated.

11.2.1 Rural properties

Foreign persons or entities domiciled outside Brazil are not authorized to acquire or lease lands in rural areas; only foreign persons domiciled in Brazil and legal entities authorized to operate in Brazil are allowed to acquire or lease rural lands in Brazil, subject to restrictions related to the size of the property and its use (Law no. 5,709/71). In 2010, there was a change in the interpretation of Law no. 5709/71 and those restrictions were also extended to foreign-controlled Brazilian companies and/or to companies whose majority of the capital is held by foreign entities or persons.

11.2.2 Land near the coastline and the borders

Foreign persons or entities are not authorized to own or possess lands or have any kind of real rights over lands along the seashore or the borders of Brazil (defined as a 150-kilometer strip of land along the national border) without special governmental authorization (Law no. 6,634/79 and Decree no. 85,064/1980).

11.3. Legal requirements for acquisition of immovable property

11.3.1 Public instrument

Under article 108 of the Brazilian Civil Code, the general rule is that "a public instrument is essential to the validity of juridical transactions that are intended to constitute, transfer, modify or waive real rights in immovable property". In order to confer greater legal security to real estate transactions, Brazilian law requires that **transactions involving the acquisition of ownership or other real rights over immovable property must be made by public instrument drawn up by a notary**, except in cases where the law expressly authorizes the use of private instruments.

The law also requires that the public deed be drawn up in the Portuguese language. Under article 215, §4 of the Civil Code, if one of the parties does not understand the Portuguese language, a translator will be summoned to ensure that the party is fully aware of the terms and conditions of the instrument.

11.3.2 Registration in the property's title record

The Civil Code provides that effective transfer of the right of ownership to the acquiror occurs only on registration of the public deed or private instrument (where permitted by law) on the property's title record (*matrícula*) in the appropriate Real Estate Registry Office (*Cartório de Registro de Imóveis*). Registration of the instrument of transfer of ownership is also necessary to make it enforceable against third parties.

11.3.3 Payment in reais (BRL)

The general rule under Brazilian law is that a contract may not require payment to be made in foreign currency (see Decree-Law no. 857/69, art. 1, and Civil Code, art. 318). However, it is possible for a contract to estipulate an obligation in foreign currency "in the cases provided for by special legislation" (Civil Code, art. 318, *in fine*). One of such cases is the contract made with "person resident or domiciled abroad", except for leases of immovable properties located in Brazil (Decree-law no. 857/69, art. 2, item IV).

Thus, in principle, a French person or legal entity could validly celebrate a public deed for the purchase and sale of a property in Brazil (or a public deed of promise to buy one such property) with a price in euros, if desired. The deed should clearly indicate, however, that actual payment of the price would be made in Brazilian reais, with the net amount resulting from the exchange of the euro amount into reais on the date of payment, at the then current foreign exchange rate.

Nevertheless, in practice, it is recommendable to indicate in such public deeds the amount in Brazilian reais equivalent to the amount in euros, according to a conversion tax established by the Brazilian Central Bank on the date of its execution. This amount in Brazilian reais is normally required in order to be used by the competent authorities as bases for the calculation of transfer tax (*ITBI*) and other transfer costs (as *laudêmio* and fees due to Notary Public Office and Real Estate Registry Office).

11.3.4 Mandatory certificates

Various pieces of legislation in Brazil require that the parties of transactions involving immovable property present a series of certificates and documents related to the property and to its owner. These documents are intended to demonstrate that the seller is the legitimate owner of the property and can sell it, and conveying title to the purchaser, as well as that the property is free and clear of liens and encumbrances. The list of required certificates varies according to the State where the public instrument is drawn up, but the following certificates are generally asked for:

a) **With respect to the property:** an up-to-date certificate of liens and encumbrances against the property, issued by the Real Estate Registry Office where the property is registered; a certificate as to the property's tax status (clearance certificate), issued by the Municipality; and, in some cases, a certificate of tax collection proceedings.

b) **With respect to the sellers, granted that said certificates must be obtained in the district where the property is located and in the district where the sellers have their domicile or registered office:** certificates issued by the State Courts or its associated distributors, regarding civil proceedings, family law proceedings, tax proceedings, business law proceedings and interdictions and tutorships; certificate issued by the Federal Courts, regarding civil and criminal proceedings; certificate issued by the Supreme Labor Court, regarding labor debts; clearance certificate issued jointly by the Federal Revenue Service and the Social Security authority; and a National Asset Freezing Order Certificate, issued directly by the relevant Notary in the National Center for Asset Freezing Orders (*CNIB – Central Nacional de Indisponibilidade de Bens*).

Other certificates and documents may be required, depending on the specific conditions and situation of the property and parties involved.

11.4. Legal Due Diligence in Brazil

In addition to complying with the legal requirements described above, and any others that may apply by reason of the specific property to be purchased, the purchase of an immovable property in Brazil is usually preceded by a legal due diligence in order to determine the legal situation of the property and its current owners. In some cases, particularly when the property was recently acquired by the sellers, it is advisable to conduct a due diligence investigation with respect to all former owners of the property for at least the past 10 years, which is the limitation period for actions based on real rights.

11.4.1 Purpose

The objective of the legal due diligence investigation is to examine certificates and documents related to the property itself, such as (i) the certificates of liens and encumbrances showing the transactions involving the property for the last 20 years, (ii) certificates of tax and emphyteutic status, and other documents, depending on each case and the location of the property. Another important purpose of the legal due diligence is to review certificates and documents related to the current owners and sellers of the property, such as (i) certificates issued by the distributors of civil, tax, criminal and labor proceedings before the state and federal courts, (ii) certificates of protests, (iii) certificates of bankruptcy and judicial reorganization proceedings, and (iv) tax and social security contributions

certificates issued by the federal, state, and municipal authorities, for the place where the property is located and the sellers' domicile or registered office, if different. These certificates are issued by the distributors' offices and public authorities in each city: there is no unified system for distribution of actions for the entire country.

The due diligence investigation seeks to identify debts, claims by third parties or rights that could in any way prevent, complicate, or present significant risks for the intended acquisition. It also seeks to check that the chain of ownership is correct and without defect. This is particularly important in Brazil because under Brazilian law, a defect in a prior transaction can result in its cancellation, and the cancellation of all subsequent transactions.

11.4.2 Points to be covered

The right to private property is guaranteed by the Federal Constitution of Brazil, and ownership of immovable property is perpetual until the property is sold by its owner, expropriated by the State, or adjudicated to another person by judicial decision. When the owner of an immovable property dies, the rights of ownership pass to the owner's heirs. The owner is free to enjoy and dispose of the property, subject only to the rights of third parties and restrictions imposed by law. For this reason, the prospective purchaser of an immovable property in Brazil must check not only the legal status of the property and its chain of ownership, but also the state of solvency of the seller, in order to know and mitigate any risks associated with potential action by third parties against the property to be acquired.

11.4.3 Legal status of the property

Under the public registration system adopted in Brazil, title to immovable property is verified by obtaining and examining an up-to-date title record for the property, covering the last 20 years. The referred certificate also contains the description of the property, a history of transactions involving the property, and any encumbrances registered against the property.

Depending on the property involved (the buildings on the land, the activities conducted on the property, its location, and other factors), other checks and special approvals may be required, such as the Federal Government Land Secretariat (*SPU – Secretaria do Patrimônio da União*). Likewise, it is advisable to have an architect or engineer, as appropriate, conduct a technical inspection to ensure that the construction work to be carried out on the property will comply with zoning and construction law, and to contract a technical and legal environmental due diligence investigation to determine if there are any environmental issues that must be dealt with before finalizing the acquisition of the property.

11.4.4 Duration

The legal due diligence (covering civil, real estate, and environmental aspects) usually takes about 15 days to 30 days from the date all the documents and certificates are made available (normally certificates are issued in five business days, but this depends on the issuing office), although the amount of time needed to conclude the legal due diligence investigation can vary significantly depending on the specific case, by reason of the complexity of the property and the sellers' legal situation.

11.4.5 Liability for previous debts (found in the Legal Due Diligence)

As a rule, sellers are legally liable for any act or debt arising from any event occurring before the sale. The seller is also liable for eviction, which means that the purchaser has recourse in damages against the seller if the property is lost to a third party by judicial decision. For this reason, representations and warranties are normally made in relation to title, the seller's capacity, and the existence of any debt, restriction, or encumbrance over the property. There is also usually a representation about the status of the property's building and related conditions, including the activities carried out by the seller and previous owners on the property.

The seller must indemnify the purchaser for the losses resulting from any misrepresentation; otherwise, the purchaser can file a legal proceeding against the seller to compel it to remedy the misrepresentation.

11.5. Structures for transfer of immovable property

11.5.1 Definitive deed of purchase and sale

Usually, immovable property is acquired by means of a public deed of purchase and sale of the property: in a single act, the parties provide for transfer of ownership and possession of the property to the purchaser, and payment of the full price to the seller. When the public deed is registered in the appropriate Real Estate Registry Office, the real right of ownership (the title) is transferred to the purchaser.

11.5.2 Promise to purchase and sale

It is common, however, for the parties to sign a preliminary document, called a promise or an undertaking to purchase and sell (*promessa* or *compromisso de compra e venda*, which can be made by private or public instrument), in which the parties set out their commitment to buy and sell the property (*i.e.*, the property with its full description as recorded in the Real Estate Registry Office), the price, the form of payment, and any other terms and conditions that must be met before the purchase and sale is made final. If the instrument of promise to purchase and sell is registered in the appropriate Real Estate Registry Office, the promisor-purchaser acquires a real right to acquire the property that is enforceable against third parties.

The instrument of promise to purchase and sale, or the definitive deed of purchase and sale, as applicable, can be executed as soon as the purchaser is done with negotiations and due diligence investigations (legal, technical, and environmental, as the case may be). In order for the definitive deed to be executed, the purchaser also must present proof of payment of the property transfer tax (*ITBI – Imposto sobre a Transmissão de Bens Imóveis*) or obtain, in advance, the certificate of exemption from ITBI, conferred by any specific reason for tax exemption there may be. If the property belongs to the federal government, proof of payment of the transfer fee (*laudêmio*) by the seller must also be presented.

11.6. Registration and transfer of the property

The purchaser may take possession of the property upon signing the definitive deed of purchase thereof and immediately submit it for registration with the appropriate Real Estate Registry Office, on the same date.

11.6.1 Review of the documentation submitted

Once the application for registration is filed, the Registry Official will review the application and register the transfer within 30 days, unless the official concludes that there is a missing document or formality or that there is a flaw in the application and/or in the instrument of transfer, that renders it illegal or otherwise needs to be corrected. This is particularly tricky in the case of new pieces of land, recently divided or urbanized, because of questions that may arise as to the land and its dimensions and characteristics.

The amount of time required to complete the registration process varies considerably depending on of the complexities of each case, the Registry Official, the alleged flaws/defects (if any), the opposition of neighbors, the need to initiate a judicial process in order to overcome possible wrong objections, and innumerous other factors.

It is true that, if all requirements are promptly dealt with and met and the deed is ultimately registered, the date of the application for registration will continue to prevail as the date for priority of title, against all instruments filed after that date. But, for construction purposes, the purchaser needs to perfect registration of its title to obtain the relevant construction licenses.

11.7. Costs normally involved in the purchase of real estate

The costs in a normal transaction for acquisition of an immovable property in Brazil are:

a) **Cost of obtaining mandatory certificates** that must be presented when the public deed of transfer is drawn up, and obtaining other documents that may be needed to conduct a legal due diligence investigation, which are usually made available and paid by the seller of the property (for the seller's domicile and the location of the property, if they are not the same);

b) **Cost of the legal due diligence investigation and technical inspections**, which are not mandatory but are advisable for the reasons explained above; the cost of the due diligence and technical inspections is borne by the purchaser; and

c) **Cost of drawing up and registering the deed**: these are the emoluments and fees payable to the Notary (only notaries are empowered to make public instruments in Brazil) and to the Real Estate Registry Office with jurisdiction over registration of immovable property in the district where the purchased property is located. These costs are stipulated by law and vary according to the local law and the value given to the immovable property by the parties or the value assessed by the Municipality, whichever is greater. As a rule, the purchaser pays these costs, but the parties may come to a different agreement, although it is not common for them to do so.

11.7.1 Transfer Tax (ITBI)

There is also a **tax** on the transfer of real estate. If the transfer is made in exchange for value, the ITBI will be due. Usually, the ITBI tax rate ranges from 2% to 4% of the price given to the immovable property by the parties or the value assessed by the Municipality, whichever is greater. However, in March 2022, the First Panel of the Superior Court of Justice (STJ) defined, in trial of Special Appeal no. 1.937.821/SP, that the calculation basis for the Real Estate Transfer Tax (ITBI) must consider the value of the immovable property transferred in purchase and sale transactions under normal market conditions. By law, the ITBI taxpayer is the purchaser and usually the tax must be paid before the deed of purchase and sale is drawn up.

11.7.2 Transfer fee (laudêmio)

A transfer fee (*laudêmio*) may also be due if the property to be purchased is held under emphyteutic agreement from the federal government, the municipality, or private entities. The rules applicable to land held from the federal government are set out in Decree-Law no. 9.760/1946. However, land can be held from other entities, by emphyteutic lease entered into when the Civil Code of 1916 was still in effect.

The amount owed on transfer of immovable properties held under emphyteutic lease from the federal government is 5% of the appraised value of the plot of land, without taking into consideration the improvements and constructions that may exist over it. The transfer fee for properties held from the Municipality of Rio de Janeiro (for example) or other entities is usually 2.5% of the value of the property. As a rule, the seller is responsible for paying the transfer fee, but it is common for the parties to agree that the purchaser will pay the fee.

11.7.3 Overview

To summarize, in a typical acquisition of an immovable property, the **purchaser** will be subject to (i) the ITBI and (ii) the fees and emoluments owed to the notary and the Real Estate Registry Office. On the other hand, if the property purchased is held under emphyteutic lease, the **seller** will be subject to the transfer fee (unless negotiated differently).

11.8. Other rights over urban properties in Brazil

In addition to full ownership, other real rights over urban immovable properties can be acquired in Brazil. Some of those real rights are collateral rights (*e.g.*, hypothec, pledge and antichresis), rights of way or rights of access (*e.g.*, servitudes), preliminary acquisition rights (*e.g.*, promise to purchase), limited rights of use (*e.g.*, habitation and use for dwelling purposes) and others. Moreover, the occupation of an immovable property can be regulated by simple contractual rights, such as those under a lease (*locação*) – with important distinctions from real rights.

11.8.1 Lease of urban properties

The lease of urban property in Brazil is governed by Law no. 8.245/1991 (the "Lease Law"), and there are no restrictions on the lease of urban property by foreign nationals. The Lease Law establishes certain rights and obligations between the contracting parties (lessor and lessee) and, generally

speaking, gives greater protection to the lessee. A lease, however, establishes a contractual relationship only and confers virtually no real right in the leased property (except, depending on the text of the contract, the right to enforce the lease against any third party, including a purchaser of the property). The rules governing some of the main aspects of non-residential leases of urban property are summarized below:

a) **Term of the lease:** A non-residential lease may be made for very long term and such term might be mandatorily renewed, at the option of the lessee, subject to certain terms and conditions. While the term of the lease, as extended, is in effect, the lessor cannot retake possession of the property, except on very exceptional circumstances. The lessee, however, has the option of terminating the lease early, subject to the payment of the fine provided for in article 4 of the Lease Law.

b) **Right to renew the lease:** The Lease Law gives the lessee of non-residential property some special protection by reason of the nature of the lease, such as the right to renewal under article 51 of the Lease Law, which allows the lessee to bring legal proceedings to mandatorily renew the lease for the same term as first executed.

c) **Right to rent review:** Article 19 of the Lease Law gives both parties the right, after the first three years of the lease have gone by, to bring legal proceedings to have the rent reviewed.

d) **Right of first refusal:** Under article 27 of the Lease Law, the lessee has the right to acquire the leased property on the same terms offered by a third party, in the case of sale, promise to sell, grant, or promise to grant rights. The lessor must notify the lessee of the transaction so that the right of first refusal can be exercised.

e) **Right to continue with the Lease if the property is sold to third parties:** Article 8 of the Lease Law gives the lessee the right to remain in possession if the property is sold during the term of the lease, under certain terms and conditions. The purchaser of the property must respect the lease, if (i) the lease runs on a fixed term; (ii) the lease contains a clause providing for its binding effect on purchases of the leased property; and (iii) the lease is registered in the title record in the appropriate Real Estate Registry Office, thus giving knowledge thereof to prospective purchasers and making it enforceable against third parties.

11.8.2 Build-to-suit leases

The Lease Law provides for build-to-suit leases in article 54-A. Under this type of lease, the lessor, as owner of the property, constructs the facilities needed by the lessee, to its specifications, relying upon the obligations undertaken by the lessee in the Lease. Because of the peculiar nature of this contract and the investment made by the lessor to construct or modify the leased facilities, the rules applicable to build-to-suit contracts differ in part from those applicable to typical leases in general and give greater freedom of contract to the parties. For example, in order to safeguard the lessor's investment, the Lease Law does not offer as much protection to the lessee under a build-to-suit contract as it does under a normal lease. The parties may stipulate that the fine to be paid on early termination of the lease by the lessee will be equal to the amount to be paid over the unexpired portion of the term. They may also waive the right to revision of the rent.

11.8.3 Surface right

The surface right is a real right in immovable property, by which the holder of the right becomes the owner of all the accessions and improvements constructed on the property. The surface right thus suspends the principle of accession, by which the owner of land becomes the owner of everything that is added to it. During the term of the contract of surface right, the owner of the land and the owner of the accessions to the land (the holder of the surface right) co-exist. Once the contract is registered in the title record in the appropriate Real Estate Registry Office, it becomes enforceable against third parties.

A surface right may be granted without charge or in exchange for value, payable in a lump sum (which, depending on the term of the grant, would approach the value of ownership of the property) or in several installments.

Brazilian law does not establish a maximum term for a grant of surface right, requiring only that the grant have a fixed term. The grant may therefore be for a long term, especially when the grantee intends to make significant investment in constructing improvements to the land. If the land is sold during the term of the grant, the holder of the surface right has a right of first refusal to acquire the property. At the end of the term of the grant of surface right, all improvements made on the land become part of the property of the landowner. The contract of surface right may establish an indemnity to be paid by the landowner for the improvements.

11.9. Immovable property located in areas known as *"terrenos de marinha" (Sea Coast Land)*

11.9.1 Concept

As indicated above, pieces of land near the Brazilian coastline, or close to specific lakes and rivers, small as they may be, are subject to a special regime known as *"terrenos de marinha"* (Sea Coast Land). From a legal standpoint, the ownership over such lands is split between **direct ownership**, which remains the exclusive property of the Federal Government, and **useful ownership**, which may be assigned to a person or legal entity by the Federal Government, through an emphyteutic lease (*aforamento*) or the granting of an occupation right (*direito de ocupação*), subject to certain conditions set out in special legislation.

11.9.2 Comparison with lease

An emphyteutic agreement gives to the holder of the emphyteutic rights far more secure rights than a lease. In summary, an emphyteutic agreement creates a perpetual real right over the Sea Coast Land, by which the federal government grants the possession, use and enjoyment **(essentially, the useful ownership)** of the property in exchange for payment of a relatively small annual rent called *"foro"*, equal to 0.6% of the value of full ownership of the property.

11.9.3 Direct ownership vs. useful ownership

After the emphyteutic right is granted, ownership of the immovable property is formally divided between **direct ownership** and **useful ownership**. The Federal Government holds the direct

ownership and the emphyteutic holder has the useful ownership.

The direct ownership affords to the Federal Government, in essence, the right to collect the *foro*, a right of first refusal to buy-back the useful right in the event the holder thereof decides to dispose of it and the right to collect from the transferor a compensation for not exercising such right of first refusal, which is called as *laudêmio*.

The holder of the emphyteutic rights has all other rights related to the property, such as the right to use, build, lease, etc., with no time limits, very much as if it were the owner of the immovable property.

11.9.4 Occupation right

In comparison, occupation is a much more precarious right. It does not give the holder of the right of occupation any real right in the property but simply the right to use and enjoy the land and to any fruits it may produce. The Federal Government may retake possession of the property at any time, against payment of compensation to the occupant for any improvements made to the property in good faith. The occupant is also required to pay an annual fee, known as an occupation fee (*taxa de ocupação*), which can vary from 2% to 5% of the value of the property.

11.9.5 Transfer of the useful ownership

As already mentioned, there are mechanisms for the transfer of both emphyteutic and occupation rights to third parties, subject to certain rights of the Federal Government and to the payment of a transfer fee (*laudêmio*) equal to 5% of the value of the property, in addition to the transfer tax. On payment of the transfer fee, the Federal Government Land Secretariat (*SPU – Secretaria do Patrimônio da União*) will issue the Transfer Authorization Certificate (*CAT – Certidão de Autorização para Transferência*).

Differently from the transfer tax, however, the **transfer fee is legally due by the party transferring the emphyteutic rights (seller)**, even though the obligation to pay it is frequently transferred by agreement to the purchaser thereof.

11.9.6 Arrangements after the transfer

Once the transfer of useful ownership or the right of occupation is completed by registration of the transfer in the appropriate Real Estate Registry Office, the new emphyteutic right holder or occupant must also register the transfer with the SPU, within 60 days (i) from registration in the Real Estate Registry Office, in case of useful ownership; and (ii) from the execution date of the agreement which transferred the property, in case of right of occupation. In any case, the new emphyteutic right holder or occupant will be subject to a fine of 0.5% of the value of the property per month (or fraction of a month) of delay.

11.10. Other concerns applicable to real estate transactions

11.10.1 Soil pollution and environmental contamination

Under Brazilian environmental laws, all those who directly or indirectly cause damage to the environment can be held liable – jointly and severally – to repair the damage, regardless of fault. Civil environmental liability is also considered as propter rem liability, meaning that it attaches to the property and, consequently, is inherited by any new owner (*e.g.*, purchaser), who becomes jointly and severally liable for the remediation of pollution and the clean-up of contamination (duty to remediate).

According to the legislation in various states and the case law, the obligation to adopt remedial actions on contaminated or polluted areas can be imposed on the polluter and its successors, the owner of the contaminated area, the tenant, the holder of the area, and/or parties that benefit directly or indirectly from the activity carried out in the contaminated area, independently or simultaneously. This means that the obligation to remediate and compensate for environmental damage at a certain location can attach to any party that has occupied the property or benefited from activities carried out on the property at any given time.

11.10.2 Permitted uses of real estate under zoning or planning law

Generally, the municipal authorities issue a certificate containing all permitted uses of a parcel of real estate under the applicable zoning or planning laws. The purchaser can also specifically consult the competent authorities depending on the use or project that the purchaser intends to carry out or develop on the relevant property.

Some properties are part of Syndicated Urban Operations (*Operação Urbana Consorciada*), or are subject to special rules to promote urban revitalization and development in certain areas. For these properties, there is the possibility of acquiring additional authorization to construct (*outorga onerosa*), in exchange for a cash payment or the undertaking of certain obligations by the developer.

11.11. Real estate finance

11.11.1 Financing acquisitions of commercial properties

Commercial real estate acquisitions are generally financed by the Real Estate Financing System (*Sistema de Financiamento Imobiliário – SFI*), governed by Law no. 9,514/1997 and operated by banks and other financial entities. Some structured transactions through the capital markets are also used for financing the acquisition of commercial real estate, as well as large real estate portfolios or real estate companies.

11.11.2 Typical security created by commercial investors

In general, the most common securities for financing the acquisition or development of real estate are mortgages (*hipoteca*) and fiduciary alienation (*alienação fiduciária em garantia*).

Mortgages are governed by the Civil Code. In this kind of security, the ownership and possession of the real estate remain with the debtor and, upon the registration of the mortgage deed with the competent Real Estate Registry Office, the secured debt will have priority over any other unregistered claim. In a fiduciary alienation, the owner transfers fiduciary ownership to the creditor in order to guarantee payment of the debt, but the owner keeps the direct possession of the property.

The fiduciary alienation agreement can be made by a public deed or a private instrument but must be registered with the competent Real Estate Registry Office. A fiduciary alienation allows the creditor to enforce the security out of court.

Other types of security are also used, such as a pledge (or fiduciary assignment) of receivables or shares in a special purpose company created to develop a specific real estate project.

11.11.3 Restrictions on granting security over real estate to foreign lenders

Depending on the case, the same restrictions that apply to the acquisition of rural land by foreign entities will apply to security granted to foreign lenders. For example, because a fiduciary alienation results in the transfer of ownership from the debtor to the creditor, the current restrictions referred to above will also be applicable to foreign lenders. In addition, security interests (or any other property right) in rural land located at the borders of the country (*i.e.*, within 150 km of Brazil's borders) cannot be created in favor of foreign lenders without special government authorization.

Individuals and legal entities resident, domiciled or headquartered in Brazil can obtain loans from individuals or legal entities resident, domiciled, or headquartered abroad. Such loans must be registered with the Central Bank of Brazil in accordance with Law no. 4,131/62 and Law no. 11,371/2006, and the proceeds of the loan must be used in economic activity.

11.12. Recent changes in Real Estate Law

Last June occurred the publication of Law no. 14,382/2022 in the Official Federal Gazette, a new legislation which established the implementation of the "Electronic System for Public Registries" (*Sistema Eletrônico dos Registros Públicos – SERP*) by January 2023. It is expected that this new system will modernize the operation of public registry offices and bring innovations to real estate developments. Among the novelties, users will be able to issue, over the Internet, a certificate on the legal status of any property, perform unified consultation of liens and encumbrances on any persons or property, and electronically request registrations, in any registry office in Brazil.

11.12.1 New services available online

Public authorities are expecting a radical change by the beginning of next year in the services provided to the public by Real Estate Registry Offices. This is because, by January 31, 2023, SERP will be operational, thus allowing the public to access several notary public services over the Internet, which until now could only be requested in person at the notary's office - especially in notaries in smaller towns, far from the large cities. Examples of these services are (i) the issuance of certificates, (ii) consulting services, (iii) sending of documents and certificates to be registered or recorded, and (iv) visualization of acts transcribed, registered, or recorded in the registry offices.

Although many registry offices in urban centers already allow, for some years now, electronic access to these services, prior to Law no. 14,382/2022 there was no legal determination to universalize these services through the Internet. With the new Law, all public registry offices in Brazil, without exception, will be obliged to allow users to perform (i) electronic protocol, (ii) electronic viewing of filed acts and (iii) electronic issuance of certificates. The change will be felt mainly by those who need to be serviced by offices with lower public demand and may eventually mean, for these users, that

local correspondents will no longer need to be hired. On the other hand, users of notary offices that have already been computerized will notice the effects of the Law in the greater agility and reduction of bureaucracy for the execution of services.

11.12.2 Scope

It should be noted that "public registry offices" include (a) the Civil Registry of Natural Persons (*Registro Civil de Pessoas Naturais – RCPN*), (b) the Civil Registry of Legal Entities (*Registro Público de Pessoas Jurídicas – RCPJ*), (c) the Registry of Deeds and Documents (*Registro de Títulos e Documentos - RTD*) and (d) the Real Estate Registry Offices (*Registro Geral de Imóveis – RGI*). The Law affects the operation of registries of all these types.

Among the innovations of *SERP* and Law no. 14.382/2022 from the public registry point of view, we also have:

a) **The possibility of centralized consultation of liens in the name of a person, legal entity or on a given property**, including (i) the unavailability of assets decreed against the person by the Judiciary or by administrative bodies; (ii) restrictions and liens of legal, contractual or procedural origin on movable and immovable property registered or recorded in public registry offices; and (iii) acts in which the person under investigation is listed as debtor of a protested and unpaid instrument, guarantor *in rem*, conventional grantor of credit or holder of rights over an asset under procedural or administrative liens.

b) **The possibility of issuing a new certificate, which will summarize the updated legal situation of any property**. The certificate, which shall be requested through the system itself, will contain the property's current information on its description, taxpayer number, current owner, real rights, liens, and judicial and administrative restrictions on the property and on the respective owner, in addition to the other information necessary to prove ownership, transmission and constitution of other rights *in rem*.

c) **A reduction in the maximum time limits for the issuance of (electronic) certificates by Real Estate Registry Offices**, which will now be (i) four (4) hours, for the certificate of title requested within business hours, provided that the title number is supplied by the user; (ii) one (1) day, for the certificate of the updated legal status of the property mentioned above; and (iii) five (5) days, for the certificate of transcripts and for all other cases.

d) **A reduction in the maximum time limits for the conclusion of registration and annotation acts in the Real Estate Registry Offices**. The general time limit, which was equivalent to thirty (30) days counted from the protocol of the documentation by the party, will now be ten (10) days, and the time limit can be even shorter in some specific situations. The following must be carried out in five (05) days, provided that there are no additional demands (*exigências*) or pending payment of registration fees: (i) the deeds of purchase and sale without special clauses, the requests for registration of construction and the cancellation of guarantees; (ii) the electronic documents presented through SERP; and (iii) the documents that are submitted again within the timeframe of the prenotation (*prenotação*), fully complying with the additional demands previously made. Only the time limit for registration of a second mortgage will remain at thirty (30) days, if the first mortgage has not yet been registered in

the title - this period will serve as a "waiting period" for the parties of the first mortgage to promote its registration.

11.12.3 Regulation

SERP is yet to be regulated by the National Inspector General's Office (*Corregedoria Geral de Justiça*), an agency of the National Council of Justice (*Conselho Nacional de Justiça – CNJ*). Several definitions for it to start operating are still pending, such as (i) the implementation schedule to be observed - respecting the deadline of January 31, 2023 -, (ii) the form of integration between SERP and pre-existing systems, and (iii) the technological standards to be adopted by the system.

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International Financial Law Review (IFLR)
Constellation restructuring.

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