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São Paulo, March 2023

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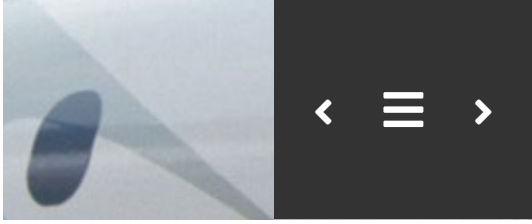

Content

CARGO



1. Introduction

Welcome to São Paulo, the best place to invest and do business in Latin America. The State of São Paulo, by itself, is the third largest economy in Latin America, after Brazil and Mexico, with 46 million people – more than 20% of the Brazilian population and a large-scale consumer market – spread over an area equivalent to the United Kingdom and with a first-world structure. Starting with the largest Brazilian port, in Santos, and the largest airport, in Guarulhos. Not to mention a complex network of regional airports and the ten best highways in the country.

The state is also home to the most prestigious Brazilian university, the University of São Paulo (USP), and various other excellent educational establishments, both public and private, thereby guaranteeing the supply of qualified labour in all sectors. This, added to important innovation hubs and technology centres, also makes São Paulo a reference in Research & Development and innovation. This is made easier with the best telecommunications network in the country, since all 645 municipalities have 4G internet coverage.

With these and other attractions, it is no surprise that São Paulo is the national leader in sectors such as industry and services. The largest banks and the major companies operating in the country have their headquarters in the state, which accounts for four of every ten exporting companies in Brazil. It received, in the last three years (2019, 2020 and 2021), R$ 208 billion in public and private investments, an increase of 22% compared to the three immediately preceding years (2016, 2017 and 2018).

São Paulo is also a leading force in agribusiness. It is the largest sugar cane producer in the world, which makes it a reference in the generation of biofuel. Not to mention that it is the state where the headquarters of the major companies are located and where the credit that sustains the Brazilian agribusiness comes from. Aware of this protagonism, São Paulo is increasingly becoming a reference, also, in the environmental area. A single programme, Agro Legal, envisages the recuperation, in partnership with the private sector, of no less than 800 thousand hectares of green area, without any burden for agricultural and cattle-raising activities.

São Paulo's strength was even more visible during the coronavirus pandemic. In 2020, when Brazil's Gross Domestic Product shrank by 4% and several economies of the world found themselves on the verge of collapse, the state, sustained by this structure and by the high concentration of business activity, grew by 0.4%. In 2021, while the Brazilian GDP advanced 4.6%, that of São Paulo grew 5.7%.

And as far as InvestSP is concerned, the state will grow even more in the coming years. Since 2019, the Agency has been working to break down borders. Even with the difficulties imposed by the pandemic, it became international and opened four offices, which cover practically the entire world, in Shanghai (China), Dubai (United Arab Emirates), New York (United States) and Munich (Germany).

The idea is not only to promote the opening of markets for São Paulo companies, which in itself makes the state's economy more competitive, but also to support foreign companies that wish to settle and do business in São Paulo. All of them can count on the advice of InvestSP, which works to ensure a favourable entrepreneurial environment and has a high-performance technical team able to provide support on issues related to infrastructure, taxation, logistics and environment, among others.

São Paulo sees the private sector as a partner in the generation of wealth, employment and income, but also in public administration. It is no coincidence that the state recently launched the 21/22 Retomada (Recovery) program, which envisages the attraction of R$ 36 billion in private, including foreign, investments, mainly in infrastructure projects. Through

1. Introduction

concessions and PPPs, various services will be managed by the private sector much more efficiently and effectively, thereby bringing gains for the entire state.

Finally, São Paulo is on its way to becoming one of the principal destinations worldwide for investments and projects focused on ESG, i.e. those focused on the adoption of the best environmental, social and governance practices. The underlying rationale is that the private sector can help the government to improve people's lives. And that the public sector can help the private sector to improve business models and become more competitive.

InvestSP benchmarked international initiatives, which were adapted to local needs and reality, in order to create an unprecedented programme in the world, with metrics that will allow the classification and guidance of ESG projects and ensure a competitive, green economy aligned with the most demanding markets.

In other words, the doors of the world are increasingly open to São Paulo. And those of São Paulo more and more open to the world.

Good reading and good business.



2. Preface – InvestSP Europe

InvestSP's international offices are part of a broader strategy of globalization of the State of São Paulo itself. With the objectives of promoting the State of São Paulo internationally, supporting the global expansion and consolidation of our companies' markets abroad, as well as attracting foreign investment to the State, the international offices seek to strengthen the insertion of São Paulo's economy in worldwide high value chains, thereby contributing to its development.

The State of São Paulo represents the largest GDP and consumer market in Brazil, with a GDP per capita well above the national average. With its world-class infrastructure, well-developed supply chain, extensive presence of multinationals and its position as the business hub of Latin America, the State offers a favorable business environment for attracting foreign investment, increasingly consolidating itself as a sustainable innovative force.

In this respect, the activities of InvestSP Europe cover the European Union plus the United Kingdom, which together represent one of the most important and dynamic regions of the globe for international trade: 2nd largest importer in the world; approximately 25% of the global consumer market; institutional and regulatory stability; a highly open and liberal market; a strategic logistical hub; and an important center of knowledge and innovation. Germany, in turn, is São Paulo's third largest trading partner. The bilateral strategic partnership is historical and goes back to the various inflows of German immigrants to Brazil that started in the 19th century, resulting in a cultural and human interaction that allowed Germany to accelerate Brazil's industrialization process. Currently, there is a substantial Germanic presence in Brazilian society, and it is notable that the largest German industrial park outside Germany is located in São Paulo.

With a lean structure, but focused on generating results and relying on the participation of the private sector to ensure a sustainable and long-term operation, the mission of InvestSP Europe's office is to aggregate value to the private sector. Supporting the decision-making process by giving advice and access to information and providing credibility and a strategic agenda to its members through institutional support and a relationship network, the office generates value for both Brazilian and European companies, promoting inbound and outbound investments.

Enormous Potential for Growth

Understanding the importance of commercial paradiplomacy, the Agency's European office occupies the position of a trusted intermediary and *one-stop shop* for the generation of business between the State of São Paulo and Europe. Although both regions historically already have a well-established strategic partnership, and Brazil is a natural destination of interest to European investors, there is still enormous potential for growth in various sectors, such as green economy and sustainability, energy transition, agribusiness, technology and innovation, digital economy, startups, traditional industries, SMEs, among others. This guide, which is an introduction and no substitute for a careful due diligence that is an essential part of any project, seeks to contribute to the realization of this potential by pointing out the basic issues that the European investor wishing to do business in São Paulo should be aware of. The InvestSP Europe team will be pleased to present all the opportunities that our State has to offer.

3. Setting up a Company in Brazil

As a general rule, foreign investors, whether private individuals or legal entities, may invest in Brazil directly or indirectly without special authorization, subject merely to the legislation applicable to foreign capital. However, certain fields of activity are restricted and specially regulated as regards foreign capital investment, such as mining, aviation, communications, among other sectors of the national economy referred to specifically in the legislation.

In any case, foreign entities or individuals wishing to invest directly in Brazil, either by incorporating a company or by acquiring or establishing a partnership with an existing local business, must appoint an attorney-in-fact resident in the country to represent them in the national territory, mainly to comply with requirements determined by the public authorities. The power of attorney must include power to accept service of process on behalf of the investor and to represent it before the Brazilian Federal Revenue in connection with its corporate interests in Brazil.

Generally speaking, all documents signed abroad, to be valid in Brazil, including the power of attorney referred to above, must observe the notarization and Hague Apostille procedures, if the foreign country involved is a signatory to the Apostille Convention; otherwise the document must be certified by the Brazilian Consulate. In order to avoid this procedure in relation to every document issued concerning the Brazilian entity, it is usual for the foreign investor to grant additional powers to the attorney in Brazil, to enable the latter to sign various types of corporate documents, thereby constituting a considerable reduction in terms of costs and time. Furthermore, foreign documents must be officially translated into Portuguese and registered at a notary's office in Brazil.

Foreign individuals and entities that hold a direct investment in a Brazilian company must be registered as taxpayers with the Brazilian Federal Revenue, with a "CPF" number for individuals and a "CNPJ" number for legal entities. For the purpose of registering a foreign entity, it is necessary to state the identity of the individual or individuals that occupy the ultimate position in the corporate chain of shareholders. The location for setting up a new operation in Brazil must be suitable for the proposed activity. Therefore, the head office and any branches will be subject to certain zoning restrictions, particularly if the activity in question involves sales or manufacturing.

The corporate structures most commonly used for establishing an operation in Brazil are the "limited liability company" (Limitada or Ltda.) and the "corporation" (Sociedade Anônima or S.A.). Brazilian law provides for other forms of entity similar to those that exist in other countries, such as a local branch of the foreign company, although this option is not recommended due to the absence of tax benefits and personal liability of the investors involved.

As a general rule, both for an S.A. and Ltda., the investment may be made in any amount, since the law does not stipulate a minimum capital for incorporation. However, the amount invested should be considered from other aspects, since a minimum capital is required in order, for example, to be entitled to import and obtain the import licence (known as RADAR, described in Chapter 7 below), take loans from public institutions or obtain visas for foreign administrators.

Except for situations which justify the choice of a different corporate structure, subsidiary companies are normally incorporated in Brazil in the form of a Ltda. or S.A., the main aspects of which are further detailed below.

Limitada – The Brazilian Limited Liability Company

The *Sociedade Limitada* (abbreviated *Ltda.*) is regulated for the most part by the Brazilian Civil Code



3. Setting up a Company in Brazil

and in a supplementary capacity by the Brazilian Corporation Law determinations once such is expressly provided in the company's incorporation documents (articles of association). This is the type of company most commonly used in Brazil, since the statutory requirements for a Limitada are much simpler and less costly than in the case of an S.A.

The articles of association (contrato social) may be freely drafted by the partner(s), since it is not necessary to involve a notary, subject to certain matters that must be included specifically, the form of which is not stipulated by law. The document must be signed by a lawyer duly admitted to the Brazilian Bar Association (OAB) and subsequently registered with the Board of Trade (Junta Comercial) of the State where the company's head office is located. The company will have one or more partners who, as already stated, may be Brazilian or foreign individuals or entities.

The equity capital of a Limitada is divided into quotas, each carrying the right to one vote at general meetings. Preferential quotas are permitted if the Brazilian Corporation Law is subsidiarily applied. Ownership of the quotas is evidenced solely by the articles of association duly registered with the Board of Trade, since Limitadas do not issue certificates of ownership.

In principle, the liability of the partner(s) is limited to the equity capital, so that, provided the capital is fully paid up, the partners are exempted from any additional liability. As regards partnership decisions and company control, the Brazilian Civil Code provides a strong protection for minority partners. For example, approval by partners representing ¾ of the capital, rather than a simple majority, is required for an amendment to the articles of association.

The Limitada will be administered by one or more individuals, whether Brazilians, foreigners or non-residents, who need not be partners in the company. The position of administrator may be held for a limited or indefinite term, as provided in the instrument of appointment.

A special visa (see Chapter 16 below) may be obtained for a foreign or non-resident administrator, granting the rights of a Brazilian resident, enabling the administrator to perform any managerial acts, subject to any restrictions that may be imposed in the articles of association.

Alternatively, the appointment of a non-resident or foreign administrator has recently been allowed without obtaining a special visa, provided that a power of attorney is granted to a resident in Brazil with specific powers, in accordance with a ruling of DREI, the administrative body responsible for business registration standards. However, this option is not yet firmly established, particularly as regards possible limitations on exercising the position. As a result, it may be safer to obtain a visa, in order to avoid any problems that may possibly hinder the management of the company in practice.

The law expressly requires that an annual partners' meeting be held in order to approve the balance sheet and financial statements of the preceding fiscal year. In general, these do not need to be published, but depending on the income assessed or the volume of the company's assets in Brazil, the Board of Trade may require prior publication for their approval by the partners.

As already stated, in view of the fewer formal requirements, and relatively lower costs, for the constitution and operation of a limitada, this type of company is usually appropriate for subsidiaries of any size, as well as small and medium-sized enterprises.

S.A. – The Brazilian Corporation

The *Sociedade Anônima* or *Sociedade por Ações* (abbreviated *S.A.*) is regulated by the Brazilian Corporation Law and, in view of the number of formal requirements for its incorporation and operation, it is normally used only for very large companies, or in specific fields of activity for which an S.A. is required

3. Setting up a Company in Brazil

by Brazilian law, such as banking, for instance. Also, it may be recommended in companies with a large number of investors.

The S.A. is governed by its By-Laws which after signature must be registered with the Board of Trade. No notarial certification or involvement is required.

An S.A. may be a privately held company or be publicly traded. In the latter case, the company is subject to strict rules concerning particularly disclosure of corporate information, including the rulings of the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários – CVM*), which are detailed and complex. For this reason, the rules governing publicly-held S.A.s will not be specifically dealt with here.

In any case, at least two shareholders, Brazilian or foreign individuals or entities, are necessary to incorporate an S.A., and their liability is restricted to their equity holding in the company, unlike a limitada, in which all partners are jointly responsible for payment of the entire sum of the subscribed capital. The capital of an S.A. is divided into shares, which in general terms may be ordinary or preferred, each one representing a fraction of the corporate capital and determined rights, which may vary depending on the type and class of shares, including voting or financial advantages.

Recently the attribution of multiple votes to ordinary shares has been admitted, allowing their holder to use the maximum of 10 votes per ordinary share, similar to the practice in other countries, which may prevent the sole economic control of companies, subject to certain specific requirements and restrictions.

As regards decisions, special obligations are imposed on the controlling shareholder or shareholders, that is, the individuals or entities that hold the majority of the voting shares, or the groups of shareholders that jointly approve certain matters, who may be held liable if they fail to observe their duty to serve the company's best interests, notably as regards the results of their decision in relation to the minority shareholders.

The administration of an S.A. may consist of two bodies, namely a Board of Directors (*Conselho de Administração*) and an Executive Board (*Diretoria*), or just an Executive Board.

A Board of Directors is mandatory in the case of publicly held corporations and optional for closely held companies. The Board of Directors is a collective decision-making and controlling body, that is, it acts as a management council consisting of at least 3 members for a mandate limited to 3 years, reelection being allowed.

The Executive Board, on the other hand, is responsible for the performance of administrative acts, being solely responsible for representation of the company, including the signature of documents. The Executive Board is obligatory for all S.A.s and consists of at least one member elected for a mandate limited to 3 years, reelection being permitted.

Members of the Board of Directors and the Executive Board may be Brazilian, foreign or non-residents, but non-residents must appoint an attorney-in-fact in Brazil to represent them. Note that, as in the case of the administrator of a Limitada, the possibility of appointing a non-resident as a member of the Executive Board, that is, Executive Directors, has been introduced only recently, for which reason the option of obtaining a visa for the appointee should be considered, as the measure has not yet met with general acceptance.

It is also mandatory for a corporation to hold an Ordinary General Meeting each year for the approval of its annual accounts. The statutory obligations concerning the accounts of an S.A. are very strict and detailed and include the necessity to publish the balance sheet and financial statements in local newspapers prior to their approval by the shareholders. An Audit Committee (*Conselho Fiscal*) must also be



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appointed, functioning permanently or periodically at the shareholders' request. The Audit Committee is responsible for controlling and monitoring administrative acts, as well as the provision of a report to the shareholders at the Ordinary General Meeting. In view of the long list of obligations to which they are subject by law, corporations tend to be more expensive to maintain, especially considering the necessity to publish documents on a routine basis. For that reason, they are used mainly for specific economic sectors and in special and strategic situations.

4. M&A and Joint Ventures

Counting with the advantage of a previous and likely consolidated market insertion, the acquisition of an existing Brazilian company may also be a possibility for foreign investors. A previous, detailed technical analysis concerning the financial health, operational risks and entire business structure of a target local company is a key for the success of such strategy, since it will allow the interested party to mitigate or at least consider and strategically address possible risks to be assumed.

The target company should ideally be subjected, prior to acquisition, to a Due Diligence procedure, which includes the analysis of its financial, tax, legal and other relevant aspects depending on its field of activity.

Mergers and Acquisitions – M&A

The Due Diligence procedure allows the prospective purchaser to choose whether the best alternative would be to acquire the company as a whole ("Share Deal") or only part of the company or its assets ("Asset Deal"), and to determine the warranties to be requested from the vendor to protect the foreign investor's interests. A Share Deal refers to the sale of the totality or part of the shares of a target company, resulting in a transfer of the target company's entire business from seller to purchaser, including assets, liabilities, rights, contracts, and employees. In this kind of transaction, the existence of the target company is preserved, but with the change of the controlling shareholder, who may be a foreign individual or entity directly, as explained in Chapter 3 above, subject to the requirements referred to therein.

Since the target company is acquired as a whole, including its assets and rights, this alternative may be beneficial if the company's business involves an activity in which licences or registration of products are of crucial importance, ensuring that all rights related thereto are included in the succession, thereby avoiding assignment proceedings with the public authorities which can be time-consuming and costly.

In specific cases, share deals may also involve the segregation or spin-off of certain assets and liabilities of the target company into a separate corporate vehicle, followed by the transfer of the ownership of such vehicle to the purchaser.

An Asset Deal, on the other hand, is restricted to the transfer of title over the totality or part of the tangible and/or intangible assets of a company and involves the incorporation of a new company by the foreign investor to receive the assets acquired. Typically, these would include relevant operational assets of the target company's business such as working capital, equipment, production site, customer lists, patents, selected contracts, among others. The sale of assets that comprise groups of assets that are vital to a business may be subject to special treatment under Brazilian law and cause effects that are comparable to those of a share sale with respect to a lack of protection for existing debts and liabilities related to the transferred assets, especially regarding labour and tax related liabilities.

An asset deal could be more suitable for a restructuring case, for instance, where the purchaser would only take over the healthy operating business related to certain assets of value, and not all liabilities of the target company, or where the purchaser is only acquiring a certain specific part of the company's business.

Moreover, an asset deal presents no material advantages or disadvantages compared to a share deal when it comes to purchaser's protection for debts and liabilities existing prior to the completion of the transaction as regards the ones of labour and tax nature.

In any case, liability for pre-existing debts and liabilities related to the assets may be mitigated in the



4. M&A and Joint Ventures

asset purchase agreement, in clauses relating to representations and warranties and indemnification by the seller, since Brazilian law provides no protection in either case, except in specific circumstances. Thus, the Due Diligence procedure is of the utmost importance, as it will assess existing liabilities of a business that may be specifically addressed in the agreement.

Joint Venture – JV

A *Joint Venture* (or *JV*) is a type of partnership backed by an agreement for the establishment of an association or cooperation between the contracting parties concerning a specific project or business, based ultimately on a joint effort, and sharing of know-how. A JV is an alternative for the foreign investor to access the Brazilian market, which is not specifically addressed in legislation. It is therefore governed by the general rules set forth in the Brazilian Civil and Corporate law. The benefit of a JV usually resides in the mitigation of risks and a likely extended production range, without affecting the individual corporate and institutional structure of the companies or individuals involved.

The JV may take one of two Forms, as follows

I. Contractual JV: The partnership is governed by a private agreement executed by the parties, usually through what is called a cooperation agreement or association agreement. Such agreements set out the conditions and purposes agreed by the parties in relation to a defined business or project, with specific rights, responsibilities and obligations forming the basis for their relationship and standards for the joint business implementation and realization. The parties are connected, and work together based on a partnership relationship, sharing the profits and losses in accordance with the provisions agreed and stipulated in the agreement.

II. Corporate JV: The relationship between the parties is created by the incorporation of a new company, with its own legal personality. The parties are therefore partners in such company and contribute with assets, jointly deciding the basis for the business development and administration. The participation of foreign investors is commonly structured through Brazilian subsidiaries incorporated for this purpose, acting as partner in the JV, mainly for practical and tax purposes.

In any case, based on clear and objective agreements establishing protection of interests and defining liabilities, a JV may be an interesting way of entering the Brazilian market, since it is based on mutual advantages resulting from the exchange of technology and expertise, as well as local business particularities between foreign investors and local companies/individuals directed to a specific and common purpose, allowing the possible scaling up of production and increasing the profitability of a jointly structured business.

5. Antitrust

In 2012, the new Brazilian Antitrust Law (Law no. 12.529/2011) came into effect, which established a new structure for the Brazilian Competition Defence System, allowing more effective action by the Administrative Council for Economic Defence ("CADE") and introduced the system of prior control of operations. With the new law, the antitrust policy has changed significantly and introduced the obligation to obtain prior approval from CADE for operations that may lead to excessive market domination through mergers, acquisitions, takeovers, joint ventures, etc.

CADE performs functions of preventive control in relation to acts of "economic concentration" that may harm free competition, and repressive control in relation to conduct that infringes free competition.

In accordance with the Brazilian Antitrust Law, an operation is considered an act of economic concentration when:

I. 2 (two) or more previously independent companies merge;

II. 1 (one) or more companies acquire, directly or indirectly, by purchase or exchange of shares, quotas, bonds or securities convertible into shares, or assets, tangible or intangible, by contract or by any other means or form, the control or part of another company or companies;

III. 1 (one) or more companies acquire another company or companies or

IV. 2 (two) or more companies enter into an agreement to form an association, consortium or joint venture (except when related to participation in bidding procedures).

Therefore, the parties involved in the operation must submit to CADE the economic concentration agreements in which, cumulatively:

I. At least one of the groups involved in the operation recorded, in its last balance sheet, gross annual sales or total turnover in Brazil, in the year prior to the operation, equivalent to or greater than R$ 750 million.

II. And at least one other group involved in the operation recorded, in its last balance sheet, grossannual sales or total turnover in Brazil, in the year prior to the operation, equivalent to or greater than R$ 75 million.

The so-called "acts of concentration" are subject to prior scrutiny, carried out within a maximum of 240 (two hundred and forty) days. Such acts cannot be concluded before they are analyzed, on penalty of nullity; a fine of not less than R$ 60 thousand nor more than R$ 60 million is also imposed, without prejudice to the opening of administrative proceedings. Acts of concentration are prohibited if they result in the elimination of competition in a substantial part of an important market, or if they may create or enhance a dominant position or result in domination of an important market for goods or services.

Exceptions to this rule are cases in which a relevant part of the resulting benefits is passed on to consumers and the following are observed, cumulatively or alternatively:
a) an increase in productivity or competitiveness;
b) an improvement of goods or services or
c) increased efficiency and technological or economic development. Accordingly, transactions that are subject to mandatory notification to CADE cannot be concluded until CADE renders a final decision, under penalty of legal infringement and the practice of so-called *gun jumping*.



6. Means of Funding a Subsidiary

The funding of a subsidiary must be established in accordance with the company's organizational structure, as well as the form and scope of its operations in the country in relation to its parent company. In any case, the transfer pricing and under-capitalization rules must necessarily be observed in any form of financing adopted. The Central Bank of Brazil is responsible for the control and registration of foreign capital. Foreign capital is defined as assets in cash and/or goods owned by individuals or legal entities domiciled abroad and brought to Brazil for investment in economic activities.

Cash investments need to be registered with the Central Bank and must be transferred to Brazil through a locally-based financial institution. Investments in real property, on the other hand, are subject to certain restrictions to be observed on a case-by-case basis.

Direct investments made in Brazilian companies must be updated with the Central Bank within 30 days of receipt in Brazil. The updates take place online and the capital will be registered in the value in Reais equivalent to the currency in which it was transferred, in accordance with the exchange contract signed.

Foreign loans may be granted to the Brazilian company by foreigners, whether partners or not. Furthermore, the loans may easily be converted into direct investment, if this is a better strategy financially.

Foreign loans are a form of financing allowed by Brazilian law and frequently used in practice, and may be registered in Reais or other currencies, such as Euro and Dollar. All foreign loans must be registered in advance with the Brazilian Central Bank. If there is an agreement as to interest, this must be adequate to the currency in which the loan is registered.

Interest on foreign loans is subject to income tax withheld at source at the rate of 15%. This is either deducted from the amount paid (if the tax is borne by the creditor) or paid separately by the debtor (if the latter is liable for payment). Interest-free loans are possible. Furthermore, any double taxation or tax reciprocal agreements will have an impact on the taxation of these operations.

In specific cases, particularly when the purpose of the Brazilian subsidiary is the intermediation or representation of the foreign investor's interests in the country, the financing may also occur by means of billing for services rendered by the subsidiary to the parent company or other companies in the group, with remuneration being paid against the invoices issued. In this case, however, the tax impacts shall also be analyzed.

Finally, besides the alternatives mentioned above, it is also usual to finance the operations in Brazil through financed imports, with longer payment terms. The foreign credits arising from exports to the country, as well as the loans, may also be the object of future capitalization, conversion into investment (through an increase of capital), the operation being structured on a case-by-case basis to minimize the impact of tax.

Distribution of Profits and Dividends

Registration with the Central Bank is the basis for the repatriation of capital and the transfer of profits abroad. The repatriation of capital in the amount registered is possible at any time, does not require a separate licence and is exempt from tax under current legislation. Reinvested profits must also be registered. Profit distributions are also possible, in principle, in any amount and are currently exempt from taxation.

As an alternative to dividends, it is also possible, under certain conditions, to pay interest on equity (*juros sobre capital próprio - JCP*). This alternative may be interesting from the tax point of view, but should always be discussed with a specialist.


7. Importation and Exportation

Among the calculable complexities we may highlight the Brazilian tariff structure, with taxes calculated directly and indirectly, import quotas for certain products and origins and tax reclassification.

As for the non-tariff barriers, which require special attention, the most important are: the RADAR qualification (to be dealt with below), as well as obtaining licences to operate from the regulatory agencies (ANVISA, MAPA, Army Ministry, IBAMA, Federal Police), pre- and post-shipment import licences.

Importation with RADAR

Any company established in Brazil that wishes to import products must necessarily be registered under the RADAR regime with the Federal Revenue Service of Brazil. The RADAR regime is subdivided into three distinct modalities: Express, Limited and Unlimited.

- RADAR Express – Volume of imports limited to US$ 50 thousand FOB every six months;
- RADAR Limited – Volume of imports limited to US$ 150 thousand FOB every six months;
- RADAR Unlimited – Volume of imports in excess of US$ 150 thousand FOB every six months.

The analysis by the Federal Revenue Service for granting the RADAR is based on the company's history and financial capacity. One of the methods used by the Revenue to analyze financial capacity is the assessment of the amount of taxes paid by the company. Hence most newly established companies are directed towards the Express modality. This does not mean that the company must remain in this modality until it has a history, since it is possible to request a more detailed analysis, clearly presenting its financial capacity through other parameters such as cash resources.

There currently exist three Importation Models in Brazil

I. Direct importation: Under this model, the company established in Brazil and registered under the RADAR scheme imports the goods in its own name and with its own resources. This model meets the needs of industrial and commercial enterprises and is the model most commonly used.

II. Importation by order: Under this model, established in 2006 by Normative Instruction IN/SRF 634/06 and regulated on December 27, 2018 by SRF Normative Instruction 1.861, the company, established in Brazil and registered under the RADAR scheme, uses a trading company as its importer. The trading company imports the products in its own name, in accordance with a prior order from its customer (the encomendante).

III. Importation on behalf of third parties: In this operation model, established by Provisional Measure 2158-35/01 and regulated by Normative Instruction IN/SRF 247/02 and IN/SRF 225/02 in 2002 and IN/SRF 1.861/18 in 2018, the company also uses a trading company as importer. The company established in Brazil must also be registered with RADAR. Under this model, the buyer of the goods has ownership of the goods throughout the process, the trading company acting as a service provider that will have temporary ownership of the products during the nationalization process. In this modality, the customer is responsible for paying the exporter.

Importation of Products from Mercosur Countries

Imports from countries belonging to Mercosur are subject to the same operational procedure as those from other countries, without suffering any kind of differentiation in their clearance. The main advantages in these imports are the benefits on the rate of import duty and AFRMM (Freight Surcharge for Renewal of the Brazilian Merchant Marine).



7. Importation and Exportation

Products originating from Mercosur countries, with a certificate of origin from a country participating in this economic bloc, are exempt from import duty. To obtain the certificate of origin, it is necessary for the product to have at least a 60% nationalization index in the country of origin, a member of the economic bloc.

As for the AFRMM, which represents a surcharge of 25% of the ocean freight value, there is also an exemption from this charge when the cargo is loaded in a port located in a country participating in the economic bloc.

Besides the ALADI countries (Argentina, Bolivia, Chile, Colombia, Cuba, Ecuador, Mexico, Paraguay, Panama, Peru, Uruguay and Venezuela), Brazil also has trade agreements with Guyana, India, Israel, Saint Kitts and Nevis, Suriname, SACU (Botswana, Lesotho Namibia, South Africa and Swaziland) and Egypt.

"Ex tarifário"

Capital goods, machines as well as telecom and IT products, including its parts and components, which have not equivalent production in Brazil may be entitled to tax incentives for the purposes of improving the productive investment in the country. In this sense, upon request and further approval after a public consultation for the confirmation of inexistence of local production by the Ministry of Foreign Trade and Economy, those goods may be subjected to tax reductions related to the import duty, which normally is reduced to zero, under the condition of the named "Ex tarifário".

The advantage shall be applied in relation to the products and not the company itself. Therefore, once the tax incentives are granted in relation to the goods herein, other companies may also be advantaged with the tax reduction for the importation.

Dry Ports

The EADIs (Inland Customs Station) or dry ports, are bonded enclosures, in secondary zones and of public use, outside the ports, used for the handling, storage and customs clearance of goods under customs control. Dry ports may operate with import and export cargo.

Located in the main centres of the country, including the State of São Paulo, dry ports are an excellent alternative for the storage of products at very competitive costs, in addition to handling operations and customs clearance.

Dry ports have received substantial investments in the search for specialization in the most varied sectors, with excellent infrastructure and service.

Among the sectors with specialization in the provision of services, we would mention bonded warehouses with areas for food products, finished products and pharmaceutical raw materials, machinery and equipment, as well as PDIs (pre-delivery inspection) for automobiles and rolling stock.

Many dry ports in Brazil also offer labeling, kitting and packaging services.

Bonded Warehouse

The Bonded Warehouse Regime allows companies to store their products in a secondary zone in Brazil without nationalizing them.

Goods sent to a dry port may be stored under a bonded warehouse regime for a period of one year, renewable for a further year. Accordingly, the goods remain the property of the exporter, and are the responsibility of a Brazilian company.

This model is very interesting because of the following aspects:

- Reduced lead time for placement of goods on the domestic market;
- Creation of a hub to serve the South American market;
- Postponement of the payment of taxes;
- The merchandise may be nationalized in its entirety or partially.

8. Taxation

The Brazilian tax system consists of various kinds of levies, in relation to which regulation and jurisdiction are divided among the Federal Government, the 26 member states and the Federal District, in addition to the municipalities. Among the levies that may be demanded, there are taxes, which are the most representative, rates, that may be demanded for the provision of services by the public authorities, contributions (assessments for improvements are seldom demanded), as well as compulsory loans.

Taxation in Brazil also varies depending on whether the taxpayer is an individual or a legal entity. Although both are subject to certain levies, such as income tax, wealth/property tax, and even taxes on the provision of services and social contributions, there are levies that are only demanded of legal entities, especially those related to production activities.

Considering the complexity of the tax legislation, especially for legal entities, advice from tax experts may identify alternatives that provide higher efficiency and lower costs. Certain activities and revenue levels may benefit from simplified taxation systems.

Several variables must be considered, such as the calculation basis and tax rates that change frequently, as well as the possibility of deducting expenses and using various credits.

In the event of possible double payment of tax, the agreements to avoid double taxation or tax reciprocal agreements signed between Brazil and many other countries will apply.

FEDERAL TAXES

Corporate Income Tax – IRPJ

Legal entities in general are subject to IRPJ, the calculation of which is determined on the basis of actual, presumptive or estimated profit, assessed quarterly. Annual assessment is possible at the taxpayer's option in the case of actual profit.

The actual profit is the net profit of the period of assessment adjusted by the additions, exclusions or set-offs authorized by the Income Tax legislation. In certain cases determination of the actual profit is mandatory. As regards presumptive profit, any expenses or costs that the company may have are disregarded, and the tax is calculated according to a presumption of profit on revenues by applying a percentage that may vary from 8% to 32% depending on the business activity. In this case, even if the company is operating at a loss, the tax will be due.

Estimated profit, on the other hand, is used when the taxpayer does not furnish secure means to determine the tax calculated on the basis of actual or presumptive profit. The amount of the company's revenue is therefore determined by means of an estimate.

The IRPJ is calculated by applying a rate of 15% on the assessed profit, subject to an additional tax rate of 10% if the annual profit exceeds R$ 240.000,00.

If the beneficiary of any income, whether a legal entity or an individual, is based or resident abroad, the income is subject to withholding tax at the rate of 15%. Note that profits or dividends are not subject to income tax, nor do they form part of the tax base of the beneficiary, whether the latter is an individual or legal entity, domiciled in the country or abroad.

The tax is due on the payment, credit, delivery or remittance of amounts abroad, whether as consideration for the provision of services, or by way of royalties or interest. The tax rate may be increased to 25% if the beneficiary is resident in a country with favoured taxation or a privileged tax regime ("tax haven"). Furthermore, if tax is due both in Brazil and abroad in relation to the same income, the applicability of any agreements to avoid double taxation or tax reciprocal agreements should be taken into account.



8. Taxation

Individual Income Tax – IRPF (levied on earnings)

In the case of individuals, the distinction between residents and non-residents in the national territory is of utmost importance to define the extent of their tax obligations. While non-residents are subject to income tax only in relation to income from sources located in Brazil, residents are subject to income tax in relation to their entire worldwide income.

An individual is considered a resident in Brazil for tax purposes, among other specific situations, if they

I. reside in Brazil on a permanent basis;
II. leave Brazil on a temporary basis, or leave the country permanently without communicating their definitive departure, during the first twelve consecutive months of absence;
III. enter Brazil with a permanent visa (indefinite term), on the date of arrival;
IV. enter Brazil with a temporary visa on the date they complete 184 days, consecutive or not, of their stay in Brazil, within a period of up to twelve months or
V. enter Brazil with a temporary visa on the date they obtain a permanent visa (indefinite term) or employment, if this occurs before completing 184 days, consecutive or not, of their stay in Brazil, within a period of up to twelve months.

Individuals residing in Brazil are subject to IRPF on their income (such as salaries, benefits and remuneration for services rendered), capital gains, interest and other revenue (such as rents and copyright fees) or earnings (such as retirement).

Depending on how the income is received, the tax may be withheld by the paying source as payment in advance. In the case of salaries, for example, the tax is withheld by the paying source and paid in progressive percentages of 0%, 7.5%, 15%, 22.5% or 27.5%, according to the amount of income received, as per values defined in a specific table. Additionally, capital gain is attributable to the positive difference between the acquisition amount and the selling price of assets and rights. IRPF shall be levied to the amount assessed at the progressive percentages of 15% (up to R$ 5 million), 17.5% (between R$ 5 million and R$ 10 million), 20% (between R$ 10 million and R$ 30 million) and 22.5% (over R$ 30 million).

Incomes perceived in relation to assets or rights owned by individuals, including rents related to Real Estates or interest received under loan operations, shall also be subjected to IRPF varying according to the income assessed in the rate of 0%, 7.5%, 15%, 22.5% or 27.5%.

In turn, non-residents with income in Brazil are subject to tax at the generic rate of 15%, which must be paid by the paying source, or in some cases, by an attorney-in-fact appointed in Brazil. The rate may be increased to 25% if the beneficiary is resident in a country with favoured taxation or a privileged tax regime ("tax haven"), subject to any agreements that may be applicable to avoid double taxation, as well as tax reciprocal agreements, as in the case of legal entities.

Social Contribution on Net Profit – CSLL (levied on profit)

In addition to IRPJ, the legal entity must pay CSLL, in accordance with the same system of assessment adopted for IRPJ (actual, presumptive or estimated profit), the same rules for assessment and payment being applicable.

The standard CSLL rate is 9% for legal entities in general, and 15% in the case of legal entities considered to be financial, private insurance and capitalization institutions.

Social Contributions – COFINS and PIS (levied on sales)

Private legal entities in general are subject to COFINS (*Contribuição para o Financiamento da Seguridade Social*) and PIS (*Programa de Integração Social*). For companies opting for the actual profit regime, with specific exceptions, the non-cumulative contri-

8. Taxation

butions regime is currently applicable, allowing the appropriation of credits on certain costs and expenses. The adoption of the system is an option of the legal entity.

PIS is levied at the rate of 1.65% under the non-cumulative system, that allows the use of credits, or at the rate of 0.65% under the cumulative system. COFINS, on the other hand, is levied at the rate of 7.6% under the non-cumulative system, or 3% under the cumulative system.

For certain operations the contribution rates are differentiated, as in the case of fuels and beverages, and a given taxpayer may be assigned responsibility for the tax owed throughout the whole production or distribution chain (single-phase regime), applicable to pharmaceutical and hygiene products, for example.

COFINS and PIS – Importation
(levied on imports)

PIS and COFINS are also levied on the importation of goods or services and are payable by the importer, the service contractor domiciled abroad, or the beneficiary, whether an individual or legal entity.

The services subject to the contributions are those originating from abroad provided by an individual or legal entity residing or domiciled abroad, when performed in Brazil, or, if performed abroad, with results in Brazil.

The rates applicable to most services and the provision of services is 1.65% for PIS and 7.6% for COFINS, and these contributions may be used as a credit in the non-cumulative assessment regime of the contributions levied on sales.

Contribution of Intervention in the Economic Domain – CID
(levied on remittances abroad for technical services, royalties)

CIDE is payable by legal entities in general on the payment, credit, delivery or remittance of money abroad for the acquisition of a licence for use or technological knowledge (royalties), or any technical or other services involving the transfer of technology. The rate is 10% and results in the reduction of the rate of income tax withheld at source on remittances abroad from 25% to 15%.

Import Duty – II
(levied on imports)

Import duty is payable on the entry of foreign goods into the country and its function is more to regulate economic activity than to collect revenue, the rate being defined in the TEC (Common External Tariff) table (on average between zero and 35%).

Tax on Manufactured Products – IPI
(levied on importation and circulation)

IPI is levied on domestic and foreign "industrialized" (manufactured) products. An industrialized product is the result of any operation defined as industrialization, i.e. an operation that modifies the nature, operation, finish, presentation or purpose of the product, or improves it for consumption.

The tax is payable by the importer upon customs clearance of the product coming from abroad, or on the exit of the industrialized product from the establishment in Brazil.

The rates are variable and are defined in a specific table. IPI is a non-cumulative tax, and the amount paid in one operation, including importation, may be credited on the following operation as a reduction of the tax payable.

Tax on Financial Operations – IOF
(levied mainly on loans and foreign transactions)

IOF also has an extrafiscal function and may be demanded in five different situations: foreign exchange operations; insurance operations in general; loan operations; bonds and securities; and operations with gold. In credit operations, that is, when financial assets are made available between legal entities, or



8. Taxation

between individuals and legal entities, tax may be charged at a rate of between 1.5% and 3% per year on the value of the operation. The IOF on foreign exchange transactions, on the other hand, is charged, as a rule, at a rate of 0.38% and will be gradually reduced, in accordance with recent legislative changes, reaching zero by 2029.

Tax on Rural Property – ITR
(levied on January 1 of each year)

The tax is levied on January 1 of each year on the ownership, possession for any reason or right to use rural property, and is payable by the individual or legal entity that holds it. Rural property is defined as a continuous area, made up of one or more parcels of land, located in the rural zone of a municipality.

Progressive rates are applied depending on the total area of the property and the degree of its use. Under this system, the ITR rates vary between 0.03% and 20%.

STATE TAXES

State Taxes are demanded by the member-states, such as the state of São Paulo:

Tax on the Circulation of Goods – ICMS
(levied on the circulation of goods and specific transportation and communication services)

This is the tax that represents the largest portion of the revenue collected by the Brazilian federative units, and is demanded from the person who carries out, habitually or in volumes that characterize commercial activity, operations involving the circulation of goods or the provision of interstate and intercity transport and communication services, even if the operations and services start abroad.

This is a non-cumulative tax, whereby the amount due on each operation is offset against the amount charged in previous operations by the same or another state, ensuring the right to credit the tax previously charged on the actual or symbolic entry of goods into the taxpayer's establishment.

The general tax rate varies from 17% to 18% in operations within the state, with the internal rate of 18% being applied in the state of São Paulo.

In interstate operations, the rates vary depending on the state of origin and destination, and may be 7% or 12%. Also, in the event goods of foreign origin are involved, the rate will normally be 4%.

Some operations, however, require differentiated payment, by means of a specific assessment for each operation, for example, in interstate transfers to a non-taxpayer, or in the interstate movement of goods subject to the tax substitution regime, in which there is an Agreement or Protocol that attributes the liability for payment to the sender.

Tax Substitution (ST) is the system whereby liability for the tax due on an operation is transferred to another taxpayer in order to facilitate payment and monitoring of certain products.

Liability may be attributed in relation to the tax levied on one or more operations or instalments, whether antecedent, concomitant or subsequent. Thus, for example, liability for payment of ICMS is attributed to the producer in relation to the entire sales chain for a certain product, with the tax being paid on an estimated basis.

Estate and Gift Tax on Goods or Rights – ITCMD

This tax is levied on the transmission of title to movable and immovable property as a result of the death of the owner (inheritance) or free assignment (gift).

In the case of real property, the tax is levied by the state in which the property is located. As regards movable property, tax is due to the state where the probate proceedings are conducted, or where the donor is domiciled.

8. Taxation

The requirement to pay the tax, in cases where the donor is domiciled or resident abroad, or where the estate proceedings are conducted abroad, depends on regulation by a complementary law, which does not yet exist. As a result, in accordance with a decision of the Federal Supreme Court in 2021, the demand for payment by the federative units has been cancelled pending such regulation.

The taxpayers are, in the case of transmission causa mortis: the heir or legatee; in the case of donation: the donee; and on the assignment of an inheritance, of an asset or right without valuable consideration: the transferee. In São Paulo the tax rate is 4%.

MUNICIPAL TAXES

Tax on Services – ISS

ISS is levied on the provision of services by the Municipalities and the Federal District on the provision of services listed in federal legislation. The tax is payable both by individuals and legal entities.

The services are deemed to have been rendered and the tax is due at the place where the service provider is established, except in the cases listed in the federal legislation, such as: engineering work, cleaning, storage of goods, transportation, among others.

The general minimum rate was set in 2002 at 2%, with a rate of 5% being generally applicable. In the city of São Paulo, the rate broadly applied is of 5%. ISS is not levied on the export of services; note that services performed and with results in Brazil are not considered exported, even if payment is made by a person or entity domiciled abroad. The tax is due on the importation of services performed abroad.

Urban Real Property Tax – IPTU

The tax is levied on the ownership, right to use or possession of real property located in the urban area of a municipality.
The urban area is defined by municipal law. The tax is payable by the owner of the property, the holder of the right to use it or the person in possession of it for any reason. The tax rate varies from one municipality to another, and its progressive application is admissible. In the municipality of São Paulo, the rate varies between 0.7% and 1.9%, depending on the value, location and use of the property.

Real Property Conveyance Tax – ITBI

ITBI is payable on the non-gratuitous transfer of real property, excluding succession (causa mortis), which is subject to ITCMD.

The tax is not due on the transfer of goods or rights when the purpose of such transfer is their incorporation to the assets of a legal entity in payment of capital subscribed; or further, when arising from the incorporation or merger of one legal entity by or with another. In any case, the non-incidence does not apply when the main activity of the acquiring entity is the sale or renting of real property or the assignment of rights related to its acquisition.

The rate of tax varies between 2% and 8%, depending on the municipality. In São Paulo the rate is 3%.



9. Contracts – General Rules

Contracts are interpreted as law between the parties that enter into them, and must therefore comply with certain general requirements in order to be considered valid under the Brazilian legal system. In general, all contracts must be entered into by legally competent parties, and must have an object that is licit, possible, determined or determinable, as well as a form that is prescribed, or not prohibited, by law.

As for the form, many contracts have no requirements, and can be signed digitally or even made verbally, while others, such as agreements for the purchase of real property, are only valid if they are signed by means of a public deed.

It is therefore essential always to consult a lawyer regarding the specific contract it is intended to enter into, in order to ensure that all legal requirements are being complied with.

Furthermore, contracts are also governed by general principles that facilitate their interpretation and afford security to the parties, such as the social function of the contract and objective good faith.

The principle of the social function of the contract is a limitation on the freedom to contract, which must be exercised in the light and within the limits of the social good. Thus, if the autonomy of intent conflicts with the social function, the contract cannot be performed, and the social interest prevails. As for the principle of objective good faith, this concerns the establishment of ethical duties of conduct between the parties, who must act honestly and in good faith at all stages of the contractual relationship.

Another particularity is that certain contracts may require the signature of two witnesses in order to constitute an enforceable instrument, thereby making it possible to require swifter compliance with the obligations of the debtor before the courts. Even when signed digitally, the contracts have the force of an enforceable instrument.

Some contracts still have additional requirements or are subject to special rules, defined in the Civil Code itself or in special legislation, as is the case of consumer agreements, negotiated in accordance with the provisions of the Consumer Defence Code.

10. Consumer Contracts

A consumer contract is any legal agreement entered into between, on the one hand, a person who can be described as the supplier of a product or service, and, on the other hand, a person who can be described as the end consumer of the same product or service. The term supplier covers any individual or legal entity, national or foreign, engaged in the activity of production, assembly, creation, construction, transformation, importation, exportation, distribution or sale of products or provision of services.

The consumer enjoys a series of prerogatives, regulated in the Consumer Defence Code (Law no. 8.078/1990), because the law presupposes that he (the consumer) is the weaker party in the relationship, not having the same economic, technical and legal strength as the supplier.

Among such prerogatives, the Consumer Defence Code provides that the consumer is entitled to amend clauses that establish disproportionate obligations or to review them if they prove to be excessively burdensome, and that clauses considered abusive are null and void.

The clauses of a consumer contract are always interpreted in the manner most favourable to the consumer, in addition to the fact that contracts will not bind consumers if they have no prior knowledge of their contents, or if they are written in a way that makes them difficult to understand.

Furthermore, the Consumer Defence Code also regulates pre-contractual elements of the consumer relationship, providing that advertisements, announcements and estimates prepared by the supplier are binding on the latter with regard to the promises contained therein.

The Consumer Code also offers additional protection when the legal transaction between the parties is concluded through an adhesion contract, which is one in which the clauses are established unilaterally by the supplier, without the consumer having the right to discuss or substantially modify their content.

Needless to say, not every adhesion contract arises from a consumer relationship, and not every agreement regulated by consumer law is an adhesion contract. It is necessary therefore to analyze whether there is subsumption to the legal concept of each definition.



11. Commercial Representation

An independent sales agency (representação comercial) is usually the easiest and most economical way for a foreign company to gain a foothold in the Brazilian market. It can be recommended for, among others, market development or for the introduction of certain new products. However, there is a disadvantage insofar as the foreign exporter does not acquire its own legal status, and therefore depends on the commitment of its sales agent and maintenance of the relationship for the success of the business.

For these reasons, obtaining reliable information as to the reputation of the future agent, prior to signing the contract, is extremely important. The question of any necessary trademark or patent protection for the products must be clarified in advance. In principle, it is possible to engage one or more agents in Brazil, but, where there is more than one, it is necessary to pay close attention to distribution of the territory, because a subsequent reduction or division of territory is only possible upon payment of fairly substantial compensation.

The activity of the sales agent is partially regulated in the Brazilian Civil Code, but more particularly in a special law that contains numerous regulations in favour of the agent. Contractual clauses that violate these rules are invalid. For this reason, it is essential to obtain precise information on the matter before entering into the contract.

The amount of the agent‘s remuneration may be freely negotiated between the parties. Normally a commission is determined based on the business transactions concluded. Details should always be discussed with a local lawyer.

Entering into temporary contracts is possible only once. On termination, the agreement is automatically renewed for an indefinite term, and other contractual provisions to the contrary are rendered ineffective.

On termination of the contractual relationship, the agent is entitled to an indemnity that must necessarily amount to at least 1/12 of the total remuneration that the agent received during the entire period of their activity (no time limit!). This right of the agent cannot be waived contractually. The obligation to pay compensation only ceases to apply if the agreement can be terminated due to misconduct on the part of the agent. However, this is only possible under strict conditions.

Despite these restrictions, sales agencies are frequently used in Brazil, as they offer companies the opportunity to distribute their products throughout the territory without fixed costs. The expenses are limited to the agent‘s remuneration for mediated transactions and, in the event of termination of the commercial relationship, to the payment of compensation, for which appropriate financial provisions can be made.

12. Distribution

An alternative to commercial representation / sales agency is an independent distributor who imports and resells the products in its own name. Here, too, it is possible to contract with one or more distributors in Brazil, so, if there is more than one, close attention must be paid to distribution of the territory. Often a distributor is engaged exclusively for Brazil, and in turn may work with sub-distributors.

Although distribution is a very usual kind of relationship, it is considered to be an atypical contract, because it is not subject to any specific rules in the Civil Code. Precisely for this reason, there are difficult issues that require careful attention, especially with regard to indemnification rights after termination of the agreement. Legal assistance should therefore be sought in drafting the contract in every case. Antitrust issues can also play a role in individual cases, and these should be examined in advance.

Finally, it should be mentioned that distribution in the automotive sector is regulated by a special law: the "Ferrari Law".



13. Purchase and Sale Agreements

Brazilian companies constantly engage in import and export business with commercial partners located abroad, and such relations are commonly governed by international contracts for the purchase and sale of goods and/or services. Brazil is a country that values respect for international trade treaties and conventions, and has adhered to the CISG (United Nations Convention for the International Sale of Goods).

The CISG standardizes the rules for international contracts relating to the purchase and sale of goods. If the parties choose not to apply the CISG, it should be remembered that, on execution of an international contract with a party located in Brazil, Brazilian law does not allow complete freedom to define the law that will govern the transaction.

This is because the Law of Introduction to the Rules of Brazilian Law establishes as a rule that, for international contracts concluded between parties that are present, the law of the country of their formation shall prevail, while for those concluded between absent parties, the law of the country of domicile of the offeror (seller) shall prevail.

The exception to this rule is when the parties choose to resolve conflicts through arbitration, in which case the parties are free to agree on the law they wish to be applied.

It must also be borne in mind that, if there is a provision for settling conflicts in a jurisdiction outside Brazil (whether by arbitration or in the ordinary courts), decisions issued by a foreign court must be submitted to a process of ratification by the Superior Court of Justice (STJ) before they can be enforced in Brazil.

Another important aspect to be considered in an international contract concerns the guarantees that can be given in order to provide greater security for compliance with the obligations. Brazilian law has a number of guarantees that can be applied to contracts for purchase and sale, such as the clause for retention of title, secured fiduciary sale, commercial pledge, mortgage on real property, aval and surety.

Each of the guarantees above is subject to special rules, and the choice of the most appropriate guarantee, as well as their requirements and consequences, must be considered in accordance with each specific case.

In view of the numerous special features involved in international relations, it is always advisable to seek the advice of a specialized lawyer before entering into any agreement.

14. Protecting IP in Brazil

Intellectual property is always a territorial right. A foreign patent, trademark or industrial design does not support your rights automatically in Brazil. You should consider obtaining IP protection in Brazil if you plan on doing business, including selling products online or manufacturing products.

Brazil is the main economic and industrial centre in South America. Given the significance of the Brazilian market, it is important to know how to recognize, register and enforce your IP rights in Brazil. Brazil is a signatory to the main international IP treaties, hence the Brazilian system is similar to other IP systems in the world. However, it is important to recognize certain differences.

The legislation relevant to IP in Brazil consists of:

I. the Federal Constitution;
II. Treaties and Conventions, such as the Paris Convention, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Madrid Protocol and
III. the Brazilian Industrial Property Law (Law no. 9.279/96) (IP Law) concerning trademarks and patents, as well as the Brazilian Copyright Law (Law no. 9,610/98) (Copyright Law).

In Brazil, you can apply for an invention patent, utility model patent, trademark, copyright, industrial design, geographical indication, computer programme and plant breeders protection. If you wish to enter the Brazilian market or are already doing business in Brazil, you should act promptly to protect your rights.

Where should IP Rights be registered?

The Brazilian Patent and Trademark Office (INPI) is the Federal organization and relevant authority for registration of patents, trademarks, industrial design, geographic indications, topographies of semiconductors and IP agreements in Brazil.

Applications for patents, trademarks and industrial designs can be filed electronically on the INPI website (in Portuguese only). The website also has online searchable databases of patents, trademarks and industrial designs. A good first step is to search existing IP to check whether your anticipated IP use may conflict with or infringe on someone's prior rights.

Copyright does not need to be registered in Brazil although there are several non-mandatory options: for example, literary works may be registered at the National Library (*Biblioteca Nacional*), visual works at the Art School of the Federal University of Rio de Janeiro (*Escola de Belas Artes*), software at the Brazilian Patent and Trademark Office (INPI).

Trademarks

According to the Brazilian IP Law, signs that are visually perceptible, distinctive, and not included in legal prohibitions, including symbols, figures, words, emblems, three-dimensional and position marks, can be registered as trademarks.

INPI recognizes both Certification and Collective marks. Certification marks attest the conformity of a product or service with certain technical standards or specifications, particularly regarding the quality, nature, material and methodology employed. The applicant can be any individual or legal entity with no direct commercial or industrial interest in the product or service. Collective marks identify goods or services provided by members of a certain entity or association. The applicant must represent the association, which may engage in an activity apart from that pursued by its members.

Brazil is a signatory to the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks.



14. Protecting IP in Brazil

You can file your trademark application directly with the INPI in Portuguese. You may also file trademark applications in other acceptable languages through the Madrid Protocol. Although Brazil is not a signatory to the Nice Agreement, the INPI adopts the Nice International Classification of Goods and Services, the 11th edition of which came into force in 2021. When filing a new trademark application, it is possible to choose between the selection of goods or services from a pre-set list provided by the INPI or to proceed with the free description of goods or services. As a rule, class headings are accepted as specifications, except for some specific classes that are too broad, and the INPI may raise an office action to the applicant to specify the nature of certain goods or services.

Brazil applies a "first-to-file" system for trademark rights, and no evidence of use is required for trademark registrations and/or renewal purposes. Moreover, it is not necessary to submit proof of use when filing a trademark application, and non-use is not grounds to challenge a trademark, although third parties can require the forfeiture of trademark registrations after 5 years of non-use.

A Brazilian trademark must be a visually perceptive and distinctive, original sign that is not prohibited by any other law. It can be a combination of letters, words, designs or numbers. Brazil also allows three-dimensional marks, such as the shape or packaging of goods without a functional or technical effect. The only non-traditional mark categories accepted are colour marks (more than one colour combined), only if combined in a distinctive manner, three-dimensional and position marks. When filing an application for a three-dimensional mark, all views shall be represented (i.e. back, front, top, bottom and side perspectives). As for position marks, the main image must show the support (represented by dotted lines) and the representation of the exact position and proportion of the position mark. The presentation of other views of the support are allowed but are not mandatory.

Trademark applications must be filed directly with the INPI. After a preliminary examination, a mark is published and becomes open to opposition for 60 days. After this period, it is submitted for substantive examination before being granted.

The term of protection of a trademark is 10 years from the date of grant. Protection may be renewed every 10 subsequent years, indefinitely times.

Research to ensure your mark is not currently being used by a third party in Brazil. If someone has been using a similar mark in good faith for 6 months before your filing date, they may be able to challenge your claim to the trademark.

Domain Names

Any individual or legal entity may own a domain name. A local presence is required in order to own a domain name; however, a foreign entity may register a domain name by registering with the Brazilian Federal Revenue Service or by filing an affidavit with a few requirements together with a legal representation with someone able to manage, cancel and transfer the domain name.

A domain name is registered by application online to the local authority.

There is limited legal protection provided by domain name registration. The most important is the use as evidence under an unfair competition dispute.

The only ccTLD available is ".br".

There are dispute resolution procedures for ccTLDs. The Brazilian Network Information Center, NIC.br, established an administrative dispute resolution proceeding for ".br" domain names, known as SACI (based on its Portuguese acronym). There are three institutions that are homologated as responsible for this procedure: ABPI (*Associação Brasileira de Propriedade Intelectual*), CCBC (*Câmara de Comércio*

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Brasil – Canadá) and WIPO (*the World Intellectual Property Organization*).

Patents

A patent is a legal right to prevent others from making, using or selling your invention. Brazil has two classes of patents: patents of invention and utility models:

I. Patents of invention are granted when an invention is novel, involves an inventive step and is capable of industrial application.
II. Utility models are similar to patents of invention, except that they are only granted to objects of practical use that are capable of industrial application. The objects must also have a new form or disposition and involve an inventive act that results in a functional improvement in terms of its use or manufacture.

Patent fees are reduced for discounted entities (individuals, small businesses and non-profit organizations) and increased for paper applications. The examination fees also depend on the number of claims in the application.

There are two ways to file an application: send it directly to the INPI or apply through the Patent Cooperation Treaty (PCT).

Brazil applies a "first-to-file" system, which provides patent protection to the first applicant to file an application for an invention.

In general, an application for a patent must be filed before any public disclosure of the subject matter, as public disclosure puts an invention in the public domain and makes it unpatentable. However, Brazil provides a 12-month grace period for public disclosure of an invention under certain circumstances.

It is important for businesses to consider that Brazil's Patent Law has a compulsory licence provision according to which any person who has the technical and economic capacity to carry out efficient exploitation can file an application to have a compulsory licence granted to them, if the following 3 grounds are met:

I. The titleholder exercised their rights in an abusive manner.
II. The patent has not been exploited within the Brazilian territory (unless this is not economically feasible) and
III. The patent has not been commercialized in a way that satisfies the needs of the market.

Any person with legitimate interest and the technical and economic capacity to carry out efficient exploitation can apply for a licence for a patent on the third anniversary of the date of the grant.

For more information on patents and applying for patent protection in Brazil, visit the INPI website (in Portuguese only).

Industrial Designs

In Brazil, industrial designs refer to the appearance of a product in particular, the ornamental shape or the ornamental set of lines and colours applicable to a product, so long as it provides a new and original visual result that can be industrially manufactured.

The term of protection for an industrial design is 10 years from the filing date. The protection may be renewed every 5 years for a maximum of 25 years from the filing date, on payment of the applicable fees.

An inventor who publicly discloses their design has a 180-day grace period from the time of disclosure before the industrial design enters the public domain and can no longer be protected.

Industrial design protection is administered by the INPI. In Brazil, the novelty and originality of a design are not assessed before registration. The substantive



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examination of an industrial design may be performed after the registration has been granted.

Copyrights

In Brazil, copyright is the exclusive legal right to produce, reproduce, publish, or communicate an original literary, textual, spoken artistic, dramatic, choreographic, audiovisual, photographic, musical, visual, model, literary adaptation, computer programs or compilation work.

There are 2 types of rights conferred by the Brazilian copyright system:

I. economic rights, which give the holder the commercial rights to exploit the work and
II. moral rights, which are the non-economic rights of the author in relation to the work and ensure, among other things, that the author has the right to have their name attributed to the work and can control any modification to the work (they are different from economic rights as they cannot be transferred to third parties).

The main registration authority in Brazil is the Copyright Office of the National Library. The National Library is the legal authority responsible for registering literary works, including artistic and musical works. The Brazilian Copyright Law provides that other institutions, such as the School of Fine Arts and the School of Music, which are both part of the Federal University of Rio de Janeiro, can register other forms of copyrightable works.

As mentioned, copyright is automatic and requires no formal registration. Voluntary registration is possible to assist in establishing a priority date of creation and the method of filing, depending on the type of creative work. Copyright protection begins upon creation of the work.

As a rule, the term for copyright protection in Brazil is the life of the author plus 70 years after the author's death, and these rights are inherited by the author's successors. However, there are exceptions to this rule, as some forms of copyrightable works have different terms of protection.

IP Enforcement

The Brazilian Judicial system comprises the Supreme Federal Court (*Supremo Tribunal Federal*), the National Council of Justice (*Conselho Nacional de Justiça*), the Superior Court of Justice (*Superior Tribunal de Justiça*), the Regional Federal Courts of Appeal (*Tribunais Regionais Federais*) and Federal Judges. In addition, there are special courts for electoral, labour and military issues. The state-level judicial system consists of state courts and state judges with civil and criminal jurisdiction.

The enforcement of an IP right falls under the jurisdiction of state courts. An IP trademark holder may file an infringement claim against an infringer before a civil or criminal state court. Brazil does not have an evidence system such as discovery; therefore, the plaintiff has the burden of producing all evidence of infringement either before a civil or criminal state court. The burden of a criminal state court is higher as an official preliminary trademark infringement opinion by a court expert is mandatory. It usually takes between 12 and 24 months to obtain a decision at first instance.

Both preliminary and final injunctions are available. The requirements that must be met for a preliminary injunction are proof of the plaintiff's right, evidence of the infringement and elements that may demonstrate a reasonable degree of risk of damage if the infringement is not immediately ceased. Requirements for a final injunction are similar; however, as they are issued after the decision, the requirements are considered beforehand by the court.

The trademark holder may typically seek an order to cease the use of the infringing sign and an indemnification for the damage caused by the infringement.

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In addition, the trademark holder could seek additional remedies, such as the obligation of the infringer to publish information relating to the infringement (although this is not a common solution). A court order enjoining the infringer may be the subject of a preliminary injunction, as well as ex parte injunctions.

The prevailing party may recover all court fees together with attorneys' fees stipulated by the Judge. Attorneys' fees usually vary from 10% to 20% of the value attributed to the case; however, the Judge may adjust the amount according to the complexity of the case. IP infringement is considered a crime under Brazilian law.

Additional tips:

IP disputes may be brought before the state courts of Brazil, unless a federal entity is the accused infringer, in which case it will go before a federal court. Infringement of IP rights may lead to civil and/or criminal charges, depending on the type and severity of the charges.

If you suspect infringement, your lawyer can send a "cease and desist" letter to the alleged infringer informing them that you believe they have infringed on your IP rights and advising them to refrain from committing the infringement.

If you choose to enforce your rights through formal court proceedings, be aware of the costs and time associated with this adversarial route. Brazilian courts can award varying remedies in IP disputes, including monetary damages, temporary or permanent injunctions, and search and seizure orders.

IP Licensing and Assignment

The licensing of a trademark may be registered. Registration of a trademark licensing agreement is not mandatory in order to be considered evidence of use. However, it has the following important legal effects:

I. Presumption that third parties have knowledge of the existence of the agreement and
II. Payment of royalties are deductible under the limits of the law and other tax regulations.

A trademark licensee may sue third parties for infringement. Quality control clauses are typical and are usually present in trademark licence agreements; however, they are not mandatory.

Before proceeding with any of the enforcement methods outlined above, consider contacting a qualified legal practitioner to discuss options, including a "cease and desist" letter.



15. Labour Law

In general, Brazilian labour law and the decisions of the labour courts have traditionally been extremely favourable to workers. With the changes in labour legislation that came into effect in 2017, several regulations were altered in favour of the employers. A significant part of the changes have already been confirmed by the Judiciary, but some Supreme Court (STF) decisions are still pending for 2022.

For example, procedural regulations have been introduced that provide for serious legal consequences for the parties, including employees, for abuse of the Labour Courts, such as an order for payment of the other party's legal fees. The aim of these regulations is (inter alia) to manage access to the labour law in a more realistic manner from the employee's point of view and thus reduce the exceptionally high number of labour court cases in Brazil.

Since Brazilian labour law cannot, in principle, be waived to the detriment of the employee, contracts with employees are uncommon in practice. Instead, the most important data are entered on an employee's work card, which must be submitted to the employer. This can now also be managed electronically. In addition to the Labour Code (CLT), collective agreements play an important role, in which additional employee rights are often included, in addition to annual salary increases. All companies in a collective bargaining district are bound by these collective agreements. In accordance with the new labour law, collective agreements take precedence over certain (though not all) legislative issues. In addition, the employee must now expressly agree to payment of his union dues.

The legal minimum wage in Brazil in 2022 is R$ 1.212,00, and may be higher in individual cases depending on the region or industry. The minimum wage plays a significant role, especially in agriculture and in the North and North-East of Brazil. In São Paulo, higher wages are usually paid due to the high cost of living, with local collective agreements playing a not insignificant role.

In the area of top management, salaries are comparable to those in Europe. Salaries for proven specialists and high-ranking managers are sometimes even higher. The new labour law expressly stipulates that contractual terms may be freely negotiated for these employees (with university degrees or salaries defined in more detail in the law). An arbitration clause can now also be agreed upon in their contracts.

The legal probationary period in Brazil is a maximum of three months, during which time the employment relationship may be terminated by either side at any time. At the end of the probationary period, a notice period of 30 days plus three days' notice per year of service must be observed. However, such termination subject to a minimum notice period does not require any justification. For the first time, the labour law provides for the possibility of terminating employment by mutual agreement (previously, the employment contract had to be terminated by either the employer or the employee).

The conclusion of fixed-term employment contracts is only possible under strict conditions.

Legal working hours are limited to a maximum of 44 hours per week. In some industrial sectors and in retail trade, work is generally done at weekends. For office workers, on the other hand, the five-day week largely prevails, with a working time of 40 to 42 hours.

Exceptions apply to managers and employees in position of trust. The new labour law also provides regulations for home office activities.

Supplementary wages are payable for overtime (50% to 100%), for work on Sunday (from 100%) and for night work (from 20%). In the case of workplace risks, the employee is entitled to a risk allowance of

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10% to 40% (usually 30%) of a minimum wage (see above). The new law allows individual agreements regarding a time account. The hourly remuneration must be paid within 6 months at the latest.

Every employee is legally entitled to the payment of a 13th month's salary. In addition, every employee must receive a vacation allowance in the amount of 1/3 of their salary at the beginning of the holiday.

The statutory vacation entitlement is 30 calendar days per year, i.e. weekends are included. In the case of high absenteeism, the number of vacation days may be reduced. The right to vacation accrues during the first year of employment, but leave can only be taken after the first year has elapsed.

Pursuant to the new labour law, the vacation no longer has to be continuous: it may now be divided into a maximum of 3 periods, in which one must be not less than 14 days and the others not less than 5 days.

Besides the salary, the employer must pay 8% of the salary each month into the Length of Service Guarantee Fund (FGTS). In the event of dismissal by the employer, the employee receives the amount accumulated in his account, plus a further 40% of the total amount that the employer has to pay, except in the event of termination without prior notice and consensual termination of the contract. In the latter case the payment is 20%.

All companies must negotiate with their employees a share of the profits or (more often in practice) in previously defined work results. This is a good opportunity for the employer to motivate employees towards certain goals. The bonus to be paid is not subject to social security contributions, and income tax is reduced.

Bonuses shall be carefully paid considering that the labour justice may recognize the usual payment as a regular payment. Pursuant to the new labour legislation, these are no longer part of the salary under labour and social security law, and are therefore not subject to accessory and social security contributions, as long as they are paid in recognition of the employee's above-average performance.

Besides the statutory social security contributions, in particular for unemployment insurance, health and welfare from the INSS, where the employer's share is about 35%, many companies voluntarily provide additional social benefits, in particular private health insurance, since the statutory health system has proved inadequate.

Depending on the wage floor, non-salary labour costs should be expected to total from 50% (in the case of higher salaries) to sometimes more than 100% (for lower salaries).

The comparatively high costs of non-salaried labour lead employers to seek alternatives to hiring employees, e.g. through the involvement of employee cooperatives or by subcontracting companies founded by employees. Considerable caution must be exercised with such alternatives. If an employee works exclusively for one customer, the Labour Courts generally recognize the existence of an employment relationship (with all attendant costs and obligations).

The new law prohibits the reinstatement of employees (directly or indirectly through outside service providers) before the expiration of a period of 8 months from termination of the employment relationship. There is an exception only for employees who retire and provide services through their own company.



16. Visas for Foreigners

Generally speaking, foreigners need a residence permit for a stay of more than 90 days in Brazil. This authorization can be obtained in the form of a temporary visa/ residence permit and based on specific situations, for which certain requirements and documents will be demanded. In principle, the Brazilian government handles the granting of the corresponding visas/residence permits in a judicious manner. Accompanying family members can also receive a visa/residence permit.

There is no provision for the automatic granting of foreign visas arising from foreign participation in the equity of a Brazilian company, which requires an investment of at least R$ 600 thousand to apply for a visa/residency for a foreign director/manager. An alternative is the investment of at least R$ 150 thousand with the simultaneous commitment to create at least ten new jobs in the two years following the granting of residence to the foreign administrator.

Foreign individuals can obtain a visa/residency permit if they make a direct investment in a Brazilian company in the minimum amount of R$ 500 thousand. In this case, the necessary number of jobs created in Brazil will be examined, among other aspects, according to the investment plan to be presented when applying for the visa. In exceptional cases (for example, investments in innovation, research and technology companies), a visa can also be issued with a reduced investment of at least R$ 150 thousand.

The visa application process is bureaucratic and is usually handled in Brazil by specialized service providers who have relevant experience and contacts with the competent authorities, and whose engagement generally pays off. The procedure itself usually takes one to two months, but at least two months should be allowed for compiling the necessary documents (which are often also requested successively during the procedure). Foreign workers who are not required to hold a management position can request a temporary visa/residency, generally for two years. The issue of this visa is linked to the existence of a work contract with a Brazilian company, which must be approved by the Ministry of Justice, Labour Division. During the procedure, it is necessary to prove, in general, professional experience and minimum schooling of twelve years, depending on the case. The holder of a visa based on an employment contract under the above terms will only be entitled to work for the company that hired them. When applying for such a visa, it is also advisable to involve the service providers referred to earlier.

With regard to hiring foreign workers, it is necessary to take into account the – legally not undisputable – "proportionality principle" (Art. 354 of the Brazilian Consolidated Labour Laws), which, in the interest of national workers, stipulates that in Brazilian companies at least 2/3 of the employees must be Brazilians. Note that, in addition to the number of employees, the respective salaries are also subject to the same rule. Especially with new companies with few employees, this can be a problem.

Apart from the hiring of employees, the Brazilian Aliens Law includes various special regulations, for example for training, as well as for foreign technical personnel that are to work in Brazil, who are not allowed to enter into an employment relationship with the Brazilian company.

Entrepreneurs who come to work in Brazil without receiving a salary here do not need a special visa. They only need to mark the "business" option on the entry form. This entitles them to a 90-day stay, which cannot be extended in the case of Europeans in general. Within 180 days from the date of first entry, re-entry is possible for a maximum period of 90 days.

Specific information in individual cases should, in any case, be obtained from one of the Brazilian consulates in Germany before entering Brazil.

17. Acquisition of Real Property

Real property in urban areas, such as land, factories, apartments and houses, can be acquired without restrictions by persons who are not residents of Brazil. However, there are restrictions on properties in rural areas, regardless of whether they are used for recreational purposes or for the production of agricultural products. The acquisition of such property is generally prohibited for foreigners who are not residents in Brazil. Foreigners residing in Brazil can only acquire such property on the following conditions:

- Properties with an area of up to three rural modules are not subject to any restrictions and are exempt from authorization from INCRA, although registration with that agency is required. Prior authorization from INCRA is mandatory as of the second acquisition, even if the sum of the areas of the properties does not exceed three modules.

- Properties with an area of three to 50 modules can only be acquired with the permission of the competent authority (depending on the type of use intended). For the acquisition of areas larger than 20 modules, a project for exploitation of the property must be submitted.

- The acquisition of land with more than 50 modules requires government approval.

The size of a rural module varies according to the region and type of use and is determined by INCRA (Nat. Institute of Colonization and Agrarian Reform).

As for the purchase of rural properties by foreign legal entities, acquisition is possible by setting up a Brazilian company the control of which remains in the hands of the foreign buyers.

Such a company may be set up whether the buyers have a permanent residence visa in Brazil or not. This leads to various consequences:

- If the foreign controlling partner that incorporates the company does not have a permanent visa, it is necessary to obtain authorization from INCRA and submit an exploitation project to enable the company to become owner of the property.

- If on the other hand the controlling partner has a permanent residence visa, there is no impediment or requirement for purchase of the rural property, since the company is treated as a typical Brazilian company. Note, however, that this matter is not entirely pacific, and there exist diverging opinions among land registry offices.

Regardless of the above rules, Law no. 13.986/2020 (also known as the New Agro Law) created an innovation for the agribusiness sector.

An important exception to the strict rules governing the ownership of real estate in rural areas is now regulated in the following manner: the law allows the provision of guarantees in favour of foreign companies or domestic companies controlled by foreigners. If the guaranteed liability is not settled by the debtor, the foreign company or the Brazilian company controlled by foreigners may now become owner of the property.

In general, it should be noted that the acquisition of real property in Brazil is fraught with legal risks that should not be underestimated. This results mainly from the fact that the significance of the registration of land is limited. The involvement of a local lawyer is therefore strongly recommended.

The involvement of real estate agents is common. Their commission, which can often be significantly higher than commission rates in other countries, is usually paid by the seller.

In practice, preliminary contracts are usually first entered into with a down payment of 5% to 10% of the purchase price. If the buyer withdraws from



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the purchase, he forfeits this deposit; and if the sale is not completed through the fault of the seller, the deposit will be returned to the buyer in double.

The rate of real estate transfer tax (ITBI) on the purchase of property ranges from 2% to 8%, depending on the municipality.

DOING BUSINESS IN SÃO PAULO

18. Natural and Business Enviroment

Brazilian environmental regulations may be considered among the world's most evolved and developed. The Brazilian Constitution of 1988 defines an ecologically balanced environment as a fundamental right to be assured to society and the government at all levels, and wide-ranging regulations address every environmental issue in detail.

For most environmental matters, the precise division of competence between the Federal, State and Municipal levels was structured in its current form in 2011 (Complementary Law 140/2011) in such a way that, apart from a relatively small group of activities of exclusive federal competence (e.g. nuclear activity), environmental issues may be the object of regulation in the three spheres, with the Federal Government being responsible for general provisions, while states and municipalities may determine the details in accordance with their particular conditions and objectives. In practice, this has resulted in a predominance of state-level regulations in the country's most developed regions, which is the case of the state of São Paulo.

Investment Project Approval: Environmental Licensing in the State of São Paulo

The State of São Paulo follows the procedure determined by National Environmental Council (CONAMA) Resolution no. 237/1997, which regulates the National Environmental Policy Act (Federal Law 6.938/1981) in respect of the licensing of potentially polluting activities. The environmental approval system is basically the same throughout the Brazilian Federation, although specific procedures and technical requirements may differ from state to state. In São Paulo, the obtaining of environmental licences is regulated in detail by state legislation following the general "triple licensing system", whereby projects must obtain a Preliminary Permit (*Licença Prévia*), followed by an Installation Permit (*Licença de Instalação*) and finally the Operation Permit (*Licença de Operação*).

The Preliminary Permit is granted during the early stage of implementation of the project, and evaluates basic requirements such as localization, project concept and technological choice. The Installation Permit authorizes effective installation pursuant to the specifications contained in the approved projects and programmes, including environmental control and risk management measures. It may be combined with the Preliminary Permit (LP) for low-impact projects. Finally, the Operation Permit is granted before the start-up of full operations by the investor company. It will be valid from 2 to 5 years and must be renewed before expiration.

Land use Planning and Environmental Approvals

All environmental licences require compliance with zoning and land use planning regulations. In Brazil, the preparation of land use plans (*Planos Diretores*) is a municipal prerogative. This results in considerable variation in terms of regulatory forms, strategies and complexity. A key feature of most land use plans is a territorially unambiguous division between urban and rural areas. Except for agro-industrial activities and other industrial projects which may be authorized in rural areas, industrial activity is considered by most municipalities as an urban activity, which may be conducted in urban areas according to each plan. In many municipalities, it is common that areas under evaluation are still zoned as rural, or have a zoning status which is incompatible with the project at that moment in time. This means that land use plans must be updated by the municipality. This can be done in accordance with the provisions of the City Statute (Federal Law 10.257/2001), alongside any existing specific municipal provisions, with a specific regulatory process involving public consultations and after City Council approval. If the change of land use plan involves urbanization of rural areas, the property documentation must be updated to reflect the new



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zoning status, and any environmental non-compliance regarding rural property obligations (e.g. "legal reserve" – 20% green areas for rural properties, a federal rule) must be addressed.

Water-related Aspects of Environmental Licensing

Under Brazilian law, water resources (both surface and groundwater) are public assets to which all persons (individuals or legal entities) have the right of access, with the public authorities being responsible for their administration and control. If a person intends to utilize surface or groundwater resources or to interfere with them, application must be made to the competent authorities, namely the National Water Agency (ANA) for water issues in the federal area and the São Paulo State Department of Water and Energy (DAEE) in the state area.

The grant of the right of use or interference (*outorga*) is an administrative act which allows water to be used for a certain period and purpose, and subject to certain express conditions. Considering that all potentially pollutant operations are subject to environmental licensing, aspects regarding water collection/use and effluent discharge will be verified during the authorization process. Projects will have to comply with effluent discharge conditions and emission standards, which in the State of São Paulo depends on whether the discharge is made into the local sewage system or directly into the water body. For direct water body discharges water quality standards will also have to be met and monitored, as effluents cannot be allowed to cause degradation as determined by each water body classification.

Air Emissions and Pollution Control

In the State of São Paulo, the São Paulo State Environmental Company (CETESB) is responsible for the implementation of stationary source air pollution control policy. Generally speaking, the licensing process will consider the localization, emission intensity and control measures before companies can be granted their licence to operate.

Emission standards for new stationary air pollution sources in Brazil are determined by National Environmental Council (CONAMA) Resolution no. 382/2006. State regulations contain further details regarding applicable standards and emission conditions. Depending on local particularities, including factors like pollution dispersion conditions, the competent authorities may impose more stringent standards to be decided on a case-by-case basis. Regardless of such special conditions, in São Paulo all sources of new air pollution must adopt air pollution control systems based on the Best Available Technology (BAT) concept.

The most common general requirements for stationary air pollution are that gaseous effluents from the combustion of solid, liquid or gaseous fuels must be discharged through chimneys, and all air pollution sources must have a local exhaust ventilation system. Moreover, all effluent may only be discharged into the atmosphere by means of chimneys, except when otherwise stated specifically. Additionally, CETESB will demand whenever necessary the installation and operation of automatic monitoring devices with registering capabilities.

19. Compliance

Compliance is becoming increasingly important in Brazil. Since the enactment of the Brazilian anti-corruption law, Law no. 12.846/13, in effect since January 19, 2014, as well as Decree no. 8.420, of March 18, 2015, compliance and integrity programs are practically mandatory for companies in Brazil, regardless of size and sector. The law stipulates severe penalties in the case of crimes against domestic or foreign authorities. For example, in the case of crimes such as bribery or fraud, fines of up to 20% of gross annual turnover may be imposed.

A reduction in sanctions can be achieved, in particular, through effective compliance programmes that meet the requirements of Decree no. 8.420. In practice, compliance with the rule is important for companies because their liability is independent of fault, including liability for actions by third parties that favour the company. The company's senior management may also be held personally liable.

Accordingly, the Office of the Comptroller General (CGU) has recognized the need for compliance and similar programmes. Standards of ethics and conduct will be expanded, and special policies and procedures will be put in place to provide rules for employees and their contacts in day-to-day business. The goal is to prevent crimes as far as possible from the outset or at least to mitigate their consequences.

The introduction of compliance programmes aims to reduce the risks arising from the complexity of business activities and strengthen the culture of control, in order to ensure compliance with legal regulations.



20. Public Procurement and Contracts

Brazil is a federative republic composed of 26 states, one federal district, and 5,565 municipalities. All three levels of government – federal, state and municipal – can create new legal entities, in the form of public foundations, regulatory agencies, state-owned companies and mixed-capital companies, all with administrative and financial autonomy. Every public entity can set its own budget and manage the acquisition of goods and services necessary to achieve its objectives, provided that it complies with the proper bidding procedures in advance, as required by public procurement rules.

Public procurement legislation also regulates public infrastructure projects, including concessions and public-private partnership (PPP) projects in sectors such as transport and mobility, health, sanitation, housing, parks and culture. The Federal Government is responsible for the macro definitions and general rules for bidding procedures and contracts, including legislation on concessions and PPPs. States and municipalities can also enact their own legislation, on the condition that this does not conflict with the federal regulations already established.

Public Procurement and Contracts: The Brazilian Legal System

The most important items of public procurement legislation in Brazil today are as follows:

- Federal Law 8.666/1993: establishes rules and procedures for general bidding and short-term government contracts. This statute will soon be replaced by Federal Law 14.133/2021.
- Federal Law 10.520/2002: establishes rules for reverse auctions, in which government contracts are offered to the lowest bidder.
- Federal Laws 8.987/1995 and 9.074/1995 (Concession Laws): establish rules that delegate the provision of public services to private sector companies through authorization and concessions (long-term contracts). These statutes also regulate common concessions, which involve projects in which customers pay managers directly for the provision of services.
- Federal Law 11.079/2004 (Public-Private Partnership [PPP] Law): defines and establishes rules for sponsored concessions – which involve projects in which the remuneration of the private partner comes partially from the government and partially from users – and administrative concessions – which involve projects in which the total remuneration of the private partner comes from the government.

Foreign Companies in Public Procurement Processes

In most cases, to sell to the government, one must have a local presence or partner to participate in the bidding processes. Just as in other countries, the selection of an agent requires careful consideration. Brazil permits foreign companies with legal entities established in Brazil to compete for procurement financed by loans from multilateral development banks.

Where appropriate, bids should include presentations on financing, engineering, equipment capabilities, training and after-sales service that will originate and be carried out in Brazil. Foreign companies that do not operate in Brazil must, as far as possible, fulfill the statutory requirements by submitting equivalent documents certified by Brazilian Consulates and translated by sworn public translators. Additionally, foreign companies must have an attorney-in-fact in Brazil with powers to respond administratively and judicially.

According to public procurement legislation (Federal Laws 8.666 and 14.133), during bidding processes, the government is not allowed to distinguish between domestic and foreign companies. Winning bids are chosen based on the principles of lowest price and best and/or best technical parameters (the determining criterion is defined in advance), and

20. Public Procurement and Contracts

only when there are two (or more) equally qualified bidders does the law consider the nationality aspect. In the event of a tie, preference will be given, successively, to goods and services that are: produced or supplied by companies incorporated in Brazil; produced in Brazil; and produced or supplied by companies that invest in research and technological development in Brazil.

Concessions and Private-Public Partnerships

Concession contracts are collaborative mechanisms that require the execution of works and services related to the provision of public services and public infrastructure, as well as the gradual recovery of the investments made by the private party throughout the performance of the contract. Some features of these partnerships are the supply of public services or public interest services, long-term contracts and quality control through performance indicators. In addition to these features, the PPP Law (Federal Law 11.079/2004) established some limits specifically for PPP contracts, such as the minimum contractual term of 5 years and maximum of 35 years, as well as the minimum investment amount of R$ 10 million and the maximum commitment of 5% of the Current Net Revenue (CNR) of the Public Administration.

It is important also to mention the three types of concession referred to in the legislation, which are:

I. Common Concession, in which payment for the provision of services is made directly by the end users and the projects must be viable without the direct contribution from the government;
II. Sponsored Concession, where, in addition to the fact that payment for the provision of services is made directly by the end users, the Grantor pays pecuniary compensation to the private party, supplementing the funds for expenses with investment, operation, continuation of services and works performed under the concession and
III. Administrative Concession, applied to situations where the Grantor acts as the direct or indirect user of the services and works subject to the contract, paying the private party through public funds.

The São Paulo State Partnership Program

The Partnership Program covers all concession and PPP projects carried out in São Paulo. The technical body responsible for its coordination, structuring and management is the Undersecretariat of Partnerships of the State Government.

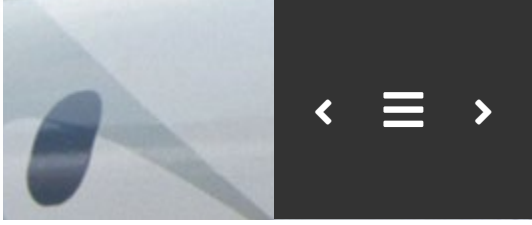
The history of the Partnership Program dates back to 1998, when guidelines were established for the concession of highways at the state level. Since then, 51 contracts have been signed – 12 PPPs and 39 (common) concessions – in different sectors such as highways, urban mobility, parks, housing and hospital, totaling R$ 112 billion in private investments (the minimum amount stipulated on the date the contracts were signed).

Combining experience and technical excellence, the Program continues to design mechanisms to increase competition and international participation and provide funding for projects, clarity in the indemnity rules and agility in risk mitigation and contractual rebalancing. The main purpose is to demonstrate the government's support and interest in continuing to promote PPPs and concessions. The São Paulo State authorities believe that such projects can result in the provision of more efficient and higher quality services, infrastructure and public utilities for the population, and therefore strive to make the process of structuring such projects more transparent, promoting a clearer and safer environment for those interested in investing in projects in the state.

Currently, the Partnership Program portfolio has 15 projects in different sectors – highways, urban mobility, airports, environment, prisons, education, among others. This amounts to a total of approximately R$ 24.8 billion in new investments.

Lastly, the principles governing the program must be observed, which include the transparency and perio-





20. Public Procurement and Contracts

dic market soundings within the dialogue with private partners, regulatory stability, as well as strong international approach and IFC (World Bank) and IDB advisory services.

The São Paulo State Partnership Program: The Partnership Digital Platform

Individuals and private legal entities willing to suggest ideas for public-private partnership projects to the State Government can make official proposals through the Digital Partnership Platform. The platform was designed for the online integration of all processes concerning public-private partnerships in São Paulo and the interaction among the agents involved in the structuring of the projects.

The proposals presented are carefully analyzed by the government team, which verifies whether the projects are in accordance with the government's priorities and fit into the types of concessions of the Partnership Program.

As determined by State Decree 61.371/2015, proposals must be submitted for registration on the Partnership Digital Platform (www.parcerias.sp.gov.br), clicking on "Proposals" and then "New Proposals" and providing the requested information.

For any questions regarding the submission of proposals in PPP or concession projects, please send an e-mail to duvidasparcerias@sp.gov.br.

Main Projects Contracted

PIPA – Piracicaba-Panorama Lot – Road Concession

The Piracicaba-Panorama Highway is a 1,273-kilometer road that connects 62 municipalities in São Paulo and is the first carbon-free highway in Brazil. The winner of the bid was a consortium formed by Brazilian asset manager Pátria Investimentos and the Singaporean sovereign wealth fund – the Government of Singapore Investment Corporation (GIC) – the first Asian investor to participate in a road auction in São Paulo, evidencing the maturity and international trust in the Partnership Program. The amount to be invested totals R$ 14 billion. The auction was held on January 8, 2020, and the contract was signed on May 15, 2020.

Metropolitan Train Lines 8 and 9

Concession of metropolitan train services (46 miles), comprising investments, operation, maintenance, modernization and supply of rolling stock. The two lines have a demand of 1 million passengers on working days (2019). The amount to be invested totals R$ 3.2 billion.

The project includes the total existing extension of 46 miles, the construction of an additional 2.8 miles for Line 9 and one new station, 38 existing stations, three of which are integrated with the subway network, as well as the renovation of João Dias Station and the modernization of the signaling system, electrical system and tracks with elimination of crossings in the construction of viaducts and ditches. The auction had the largest ever number of bidders in a Brazilian bidding procedure, thereby evidencing the interest in and magnitude of the project, in spite of the impact of the pandemic on the economy and user behaviour. Although the number of passengers on both lines was formerly stable, resilient to economic downturns, during the pandemic demand fell more than 50%. The auction was held on April 20, 2021, and the contract was signed on June 30, 2021.

Airport Concessions

Concession of up to 22 airports under state administration (DAESP), including work of expansion, operation, maintenance and exploitation of ancillary revenues. Bidding lots under study, two lots with 11 airports each. Extension of the regional aviation network will promote regional development and increase the number of commercial flights and air routes. The amount to be invested totals R$ 447 million.

Concession of 5 State Parks

- **Campos do Jordão State Park**
  Concession of the operation, maintenance and investment in the use of public areas, including

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services inherent to ecotourism. The park is an important remnant of the Atlantic Forest. Total area of 8,341 hectares. Concession area consists of 5.6% of the total area of the park.
CAPEX: R$ 8.3 million.

- **Capivari Park**
  Concession of the operation, maintenance and investment and management of recreational and leisure activities of the Capivari Park tourist complex. Total area of 4 hectares.
  CAPEX: R$ 35.5 million.

- **Caminhos do Mar Park**
  Concession of the public visitation area to promote investments, conservation, maintenance and exploitation of the Park. Area of 315 hectares that incorporates the exuberant natural beauty of Mata Atlântica. Several historical monuments date back to 1922, with restoration of nine historical monuments.
  CAPEX: R$ 18.5 million.

- **Zoo and Botanical Garden**
  Concession of the public visitation area of the Zoo, Safari Zoo and Botanical Garden, including operation, maintenance and investment in improved equipment, for the purpose of preservation of the environment and biodiversity. São Paulo Zoo: 84.3 hectares, 2,149 animals; Safari Zoo: 8 hectares; Route: 3.9 km (2.4 miles); Botanical Garden area: 40.4 hectares; Visitation area: 18 hectares.
  CAPEX: R$ 370 million.

- **Cantareira State Park and Alberto Löfgren Park**
  Concession for the improvement of the infrastructure and exploitation of ecotourism. One of the largest areas of native tropical forest located in a metropolitan region in the world. Area: 8,100 hectares; Area for the concession: 157.57 hectares.
  CAPEX: R$ 45.5 million.

The São Paulo State Partnership Program: Project Pipeline Highlights

Information concerning various projects in the pipeline, relating to roads and other modals, railways, parks, education, among others, such as the North Rodoanel, the São Sebastião Port and the CITI II – International Center for Technology and Innovation, and current status of all projects in pipeline are detailed at Priority Projects Portfolio at:

www.parcerias.sp.gov.br.



21. Data Protection – LGPD

Until a few years ago, Brazil did not have a strong data protection culture, for which reason this concept did not play an important role in the daily life of companies. Although the Civil Rights Framework of the Internet (Law no. 12.965/14) was passed in 2014, it was limited to data security in the use of the Internet and did not cover the need for the legal regulation of issues involving privacy and data protection.

This reality changed with the enactment of the General Law on Personal Data Protection (LGPD), which came into force in September 2020. The law is significantly influenced by the General Data Protection Regulation (GDPR) of the European Union.

The LGPD is applicable to all individuals and legal entities governed by public and private law that process data in any way in the course of their business. In accordance with the law, data processing is defined as any operation carried out with personal data, such as collection, reception, access, use, reproduction, transmission, storage, etc.

The Law defines personal data as all data relating to an identified or identifiable natural person.

The main purpose of the law is to ensure compliance with the rights of data subjects (i.e. the persons to whom the data being processed relates) and to ensure that companies process personal data of employees, customers, suppliers and/or third parties responsibly and in compliance with the prescribed limits.

High security standards must be applied to the processing in order to prevent incidents with personal data or minimize the damage caused by such incidents. In doing so, the relevant legal bases (such as, for example, consent of data subjects, where required) must be observed, as well as the principles set forth in the LGPD, such as specific and legitimate purposes, limitation of collection to strictly necessary data, transparency, non-discrimination and accountability. To implement the LGPD, companies need to have internal rules in place.

The implementation of a data protection compliance program is recommended. In this regard, companies need at least:

I. to know the scope of the personal data they use in the course of their activities;
II. to identify the relevant legal grounds for data processing;
III. to assess any risks with regard to the protection of the data of the subjects;
IV. to implement protection mechanisms for each individual processing, including appropriate technical and organizational security measures;
V. to review the suitability of sharing and/or transferring personal data to third parties (including international transfers) and
VI. to plan measures to deal with any incidents.

Legal and technical support is essential at the various stages of adaptation to the LGPD. Such adaptation to the new law is an ongoing and permanent process that must necessarily become part of corporate governance.

DOING BUSINESS IN SÃO PAULO

22. Digital Economy and Digital Law

For some decades now, we have witnessed and experienced the digitization of our lives. And as our lives become increasingly digital, so does the economy. The digital economy – term coined by Don Tapscott in 1995 – is the result of the transformation of traditional economic activities, services, and products into digital form. It essentially covers all social, cultural, business, and economic activities that are supported by the Internet and other digital communication technologies. Novel business models, products and services have emerged within the digital transformation of the economy, and there is no denying that digital technologies are reshaping virtually every field of law.

The massive and widespread use of Information and Communications Technologies (ICTs), big data, Artificial Intelligence (AI) is blurring the traditional legal categories and creating new requirements for protection of individuals, as well as companies and business.

The phenomenon of digitization has led to regulatory and enforcement initiatives at a global level, which is also true for Brazil. Following the steps of the European Union, Brazil has passed its General Data Protection Law (known as "LGPD") in 2018 – a legislation that came into force in 2020. However, important as the LGPD might be, it is just one piece of legislation amongst the comprehensive and evolving Brazilian regulatory framework. Matters like AI, Open Finance, cryptocurrency and non-fungible tokens (NFTs), Internet of Things (IoT), smart cities and the metaverse are either already regulated or about to be. This has direct implications on business, as we will briefly address below.

Cryptocurrency

The crypto market moved R$ 215 billion in Brazil only in the year 2021, and the use of crypto as a method of payment grew by 6% in the same period. The Brazilian Senate approved on April 26 the draft bill aimed at regulating cryptocurrency transactions in Brazil. The law aims to combat crypto-related crimes and creates mechanisms to protect investors. In addition, the bill also encourages the reduction of the environmental impact of crypto mining and removes the matter from the scope of the Brazilian Securities Commission (CVM), which would become a responsibility of the Central Bank of Brazil. The bill, however, does not encompass non-fungible tokens – a subject currently trending in Brazil.

Non-fungible Tokens

According to a recent survey by the German market and consumer data company Statisa, Brazil is the second country in the world with more NFT owners, with 4.99 million users (2.33% of the population). The country has experienced a boom in the use of NFTs, which has ranged from applications in artistic contexts to the sale of shares of real estate through tokens. Although NFTs were left out of the crypto law recently passed by the Senate, in order to keep track of digital assets, the IRS has begun to include specific codes for these items to be declared in Brazilians' income tax.

DAOs and DeFi Systems

Decentralized autonomous organizations (DAOs) and Decentralized Finance (DeFi) Systems: Research indicates that Brazil moved more than R$ 707 billion in cryptocurrencies in the year 2021, placing the country in the 11th position among the largest cryptocurrency markets in the world and the first in the region – of this total, about 44% were through Decentralized Finance protocols, even though there is no incisive regulation on the matter in Brazil. The approval of the Brazilian Cryptocurrency Law is expected to bring greater legal certainty to the market and, consequently, greater investments in Decentralized autonomous organizations and Decentralized Finance Systems in the country.



22. Digital Economy and Digital Law

Open Finance

The Brazilian National Monetary Council (CMN) approved, in March this year, a resolution that officially launches the Open Finance project in Brazil. The action will replace the Open Banking project, which foresees the sharing of data and services related to banking products, to also provide information about accreditation services, foreign exchange, investments, insurance and pension plans. With this migration, the CMN and the Central Bank of Brazil will update the regulatory treatment of the open financial system in the country. The change occurs together with the advancement of the interlocutions with the Open Insurance project, which is already in the implementation phase.

Startups

For the Brazilian innovation ecosystem, the year 2021 had a record amount of investment: Brazilian startups raised over R$ 9.7 billion in investments until November. This phenomenon led Brazil to update its list of unicorns with 10 new startups in 2021 alone, bringing the total to 16. There are at least 7 more unicorn candidate startups in 2022. The Legal Framework for Startups (Law no. 182 of 2021), which recently completed one year since its enactment, brought significant achievements: typical investment modalities of the innovation ecosystem were acknowledged, increasing legal certainty for investors, and rules for differentiated treatment were defined, in order to contribute to the growth and expansion of these companies in the Brazilian market; also, the law encourages public agents to contract with startups, simplifies the rules applicable to corporations and promotes the creation of so-called "regulatory sandboxes".

Taxation of Digital Goods & Services

Around the world, the taxation of digital goods and services is surrounded by uncertainty. In Brazil, experts and legislators have been seeking the necessary reform of the national tax system to solve the impasses in the regulation of new technologies, promoting greater legal certainty. The taxation applicable to transactions resulting from technological innovations in the country is not always easy to assess, making it essential that the operation be carefully analyzed to conclude on its correct tax framework, in order to mitigate any risks of business activity.

Due Diligence Process

Due Diligence Process for Privacy and Data Protection: Data protection due diligence is becoming increasingly relevant in Merger & Acquisition (M&A) transactions. It comprises four main steps:

I. mapping (identification of contingencies, even if not yet materialized, related to data and its treatment by the target company);
II. investigation (identification of the types of privacy risks faced by the target company);
III. analysis of previous security incidents;
IV. review of all privacy policies already made by the target company.

Although it may seem obvious that due diligence for privacy and data protection should be performed in any M&A transaction, it is becoming more and more important that specialized and experienced professionals in the subject act specifically on this step of the transaction.

Competition and Antitrust Law

Competition and Antitrust Law and Digital Markets: Brazil is the second fastest growing country in the applications market, which highlights the economic relevance of digital platforms in the country. The Brazilian Administrative Council for Economic Defense (Cade) has acted incisively in regulating digital markets, seeking to curb anticompetitive conducts.

The monitoring and enforcement of antitrust practices in this market model has become increasingly frequent, resulting in the imposition of penalties on non-compliant companies.

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22. Digital Economy and Digital Law

Cybercrime

The National Congress enacted, in December 2021, the decree that makes official Brazil's accession to the Convention on Cybercrime (Budapest Convention). The text of the convention was approved without reservations, and from now on begins the stage of evolution of domestic law to harmonize it with the Budapest Convention and enhance the cooperation instruments that allow, in fact, the full placement of Brazil in a scenario of integration in the international arena of combating cybercrime.

Metaverse

A study by Accenture, "Meet Me in the Metaverse: The Continuum of Technology and Experience Reshaping Business," which was conducted with more than 11,000 consumers in 16 countries, revealed that 83% of consumers intend to shop in the metaverse. Considering that Brazil has more than 80 million online consumers, who move almost R$ 90 billion per year, the number could reach more than 66 million individuals. Telecommunications, retail and even food companies are already doing business in the metaverse in Brazil, but the use of technology does not stop there: certain organs of the Brazilian judiciary are already planning to use the technology to hold hearings online. Certainly, the metaverse brings with it countless opportunities and implications, and Brazil seems to be the ideal environment for this kind of innovation.

Artificial Intelligence

The first step towards regulation of AI in Brazil was taken in April 2021, with the publication of the Brazilian Strategy for Artificial Intelligence (Ebia), issued by the Ministry of Science, Technology, Innovations and Communications. Aiming to promote national development in the area, the Ebia brings guidelines to the Brazilian State for the promotion of actions that encourage research, innovation and development of AI solutions, as well as its conscious, ethical use and for the benefit of society. A few months later, the House of Representatives approved the urgent voting of Bill 21/2020, which establishes the Legal Framework for AI in Brazil, determining principles, rights, duties, and governance instruments for the development of the technology. The issue is being discussed by a legal commission specifically created for this purpose, in hearings that have been attended by stakeholders representing different sectors of society. A final version of the bill will be presented to the Brazilian Senate later this year.

Brazil is indeed a fertile ground for business opportunities in the most diverse areas of the digital economy, which, in addition to those described above, include Life Sciences, Fintechs and ESG. Foreign investors or companies seeking to come to Brazil will find endless possibilities, but they should, to better leverage the potential of their business, count on specialized teams to assist in all stages of their endeavors.



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23. Arbitration

Arbitration is a private agreement, whereby the parties choose voluntarily to waive the state jurisdiction and submit their dispute to a private party for adjudication. The Brazilian law that regulates arbitration is Law no. 9.307 of 1996, which establishes that, if there is an arbitration agreement in place, the jurisdiction of the judicial system is excluded, a provision already ratified by the Federal Supreme Court.

Arbitration is used mainly to resolve issues relating to international law, since the litigants are not always subject to the same jurisdiction, and prefer to have the conflict resolved by a third party arbitrator; and in business law, since there is the benefit that the conflict may be resolved confidentially. In general, arbitration has a number of advantages over the court system, including the following:

I. It is faster, since the arbitral award must be given within the period stipulated by the parties (art. 23 of the Arbitration Law), and, in the absence of an agreement to this effect, within six months.
II. It is more technical, because the adjudicator can be engaged according to the matter to be discussed, while the judge is a generalist, who often needs to rely on expert knowledge to resolve the matter.
III. It is more discreet, since it does not have the publicity of a judicial proceeding, with publication in the official press. Note that arbitration is not necessarily confidential, since an agreement between the parties is required in this respect (art. 189, IV, CPC).

Having said that, arbitration also proves to be a more costly alternative for the parties than the court system.

The arbitration agreement may take the form of an arbitration clause, which extends to all future disputes between those parties, or an arbitration commitment, for certain existing disputes. The only requirement for an arbitration clause is that it must be in writing.

Foreign arbitral awards are fully effective in Brazil, but must first go through a process of ratification by the Superior Court of Justice (STJ), as provided in arts. 34 to 40 of the Arbitration Law and arts. 216-A et seq. of the STJ internal regulations. Thus, after ratification, the arbitration award becomes a "judicially executable instrument", and may be enforced before the Federal Courts (art. 109, X, CF).

In 2002, Brazil ratified the New York Convention on the Recognition of Foreign Arbitral Awards, provided such awards are not contrary to public policy and are recognized by the Superior Court of Justice.

Arbitration is forbidden in cases involving incapacitated parties and non-material or inalienable rights.

With regard to consumer relations, arbitration has been accepted, except when the consumer is put at a disadvantage or when the clause that institutes arbitration is mandatory for the consumer, in which situations the choice of arbitration will be considered null and void.

In the case of adhesion contracts (whether relating to consumer relations or not), art. 4, §2, of the Arbitration Law stipulates that the arbitration clause will only be effective if the adherent takes the initiative to institute arbitration, or expressly agrees with its institution, although he may change his mind during the course of the contract.

As for labour relations, in the case of collective disputes, arbitration is always possible (art. 114, §1, of the CF), while in individual disputes it will only be valid in contracts with remuneration higher than 2 minimum salaries, and provided that the employee took the initiative to request arbitration or expressly agreed to it, with the right to change his mind at any time, as in adhesion contracts.

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