

LEGAL GUIDE FOR THE FOREIGN INVESTOR IN BRAZIL

Introduction

It was a great satisfaction for **CESA - CENTRO DE ESTUDOS DAS SOCIEDADES DE ADVOGADOS** to sponsor and collaborate with the first Legal Guide for the Foreign Investor in São Paulo. This project was launched in the second half of 1991 at the request of the **Special Assistance Office for International Affairs of the State of São Paulo Government**, and all **CESA** associates were invited to partake.

After choosing the topics, defining the chapters and distributing the tasks involved, in September 1992 we concluded the first edition of the guide, in both Portuguese and English. This was then printed and distributed by the State Government whenever possible at official events with international ramifications. Our members throughout Brazil received copies of the guide, which was distributed at various group meetings in São Paulo, Rio de Janeiro and Belo Horizonte.

The success attained and the significant positive feedback on this project made us at **CESA** think of expanding and improving both its structure and scope. This was the seed for a second edition, a Portuguese/English domestic and international project, undertaken by **CESA** for exclusive distribution among its members, class entities and Brazilian development and promotional organizations abroad. In August 1994 a new edition was prepared at the request of the Department of Commercial Promotion of the Ministry of Foreign Affairs. This guide was distributed at all international events sponsored by the Ministry. Starting in 1996, this guide was attached to the Ministry of Foreign Affairs page on Internet, and can be accessed by all bodies on diplomatic missions interested in foreign investment in Brazil (<http://www.mre.gov.br>).

The fifth edition of this guide was thoroughly updated and expanded by the various **CESA** law firms that participated in this project. From December 1998, all of the 1000 copies of this edition were distributed and therefore we decided to review and republish the same edition to meet the ongoing demand of our members, other entities and interested parties.

The consolidated success of the Guide and consequent demand for a more up-to-date version made us at **CESA** to start the sixth edition publication process at the beginning of 2001. Once again, we counted on the contribution of several **CESA** law firms for updating the chapters

Finally, we should mention that **CESA** was founded in January 1982, and today includes some 410 Brazilian law firms, with the objectives of furtherance of legal careers, professional betterment, and institutionalization of law firms throughout Brazil.

São Paulo, April, 2001

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1. THE BRAZILIAN LEGAL SYSTEM

Brazil is organized as a federative republic, constituting the indissoluble union of the states, municipalities and the Federal District.

The legal system adopted in Brazil is codified, and laws are issued by the federal government, the states and municipalities, with due regard for their individual spheres of authority. Court decisions are based on the correct application of the laws prevailing in Brazil. When there is no specific legal provision, the court decides on the basis of analogy, customs and general legal principles. Judicial precedents do not bear the force of law in Brazil, although they do exercise an important role supporting the court's decision.

The Federal Constitution establishes the legislative authority of the federal government, the states and the municipalities, thereby avoiding the issuance of laws that are redundant or conflicting with those in the other spheres. The legislative authority of the federal government, with due regard for the principles of the Federal Constitution, is hierarchically superior to the authority of the states and municipalities.

The federal government is therefore vested with exclusive authority to legislate on civil, commercial, penal, procedural, electoral, agrarian, maritime, aeronautical, space and labor law; expropriation, bodies of water, power, computer science, telecommunications, radio broadcasting, the monetary system, exchange, credit policy, insurance, foreign trade, mining deposits, nationality, citizenship, and other matters.

The Federal Constitution allows the federal government, states and the Federal District to legislate concurrently regarding certain matters, such as, tax, financial, economic and prison law; production and consumption; liability for damages to the environment and the consumer; education and teaching; and social security, protection and defense of health. In this case, the authority of the federal government is limited to the issuance of general guidelines on these matters, with the states and the Federal District being charged with supplementary legislation on these matters, with due regard for the general guidelines of federal legislation.

The legislative authority of the municipalities is restricted to matters of local interest.

The Federal Constitution is at the head of the Brazilian legislative system, and ensures the fundamental rights and guarantees of the citizen; governs the political/administrative organization of the Federative Republic of Brazil; defines the individual spheres of authority of the Executive, Legislative and Judicial Branches; regulates the tax system; and provides for socioeconomic and financial policy. The states are organized and governed by their own constitutions and laws, with due regard for the principles mentioned in the Federal Constitution.

The main legal documents in Brazil are the codes, which contain the basic legislation on the matters dealt with thereunder. Some of the more important of these codes are the Civil Code, the Tax Code, the Penal Code, and the Commercial Code. None of these codes supersedes the Federal Constitution, which is the supreme law of Brazil.

2. INSTITUTIONS FOR ECONOMIC DEVELOPMENT

2.1. Government Ministries and Secretaries

The Statute for Administrative Reform (Decree-Law No. 200/67 and its subsequent alterations), classified the Federal Administration into two categories, Direct and Indirect Administration. The first deals with services which are integrated with the administrative structure of the Presidency of the Republic and its Ministries. The Indirect Administration deals with matters relating to the diverse entities, public (Autarchies) or private (Societies of Mixed Economy, Public Firms and Foundations), linked to a Ministry, but administratively and financially independent.

The Federal Public Administration is directed by the President of the Republic and aided by Ministers of State.

The Ministries are independent organs at the top of the Federal Administration subordinate only to the Presidency and outlined by the 1967 Administrative Reform with later alterations (the last reform was implemented by Provisional Remedy No 2.123-28 de 26/01/2001), to wit:

- **Ministry of Justice** - deals with the following matters: defense of legal system; political rights and constitutional guarantees; judicial politics; nationality; immigration and foreigner; citizenship; narcotics; public security; traffic; federal police; prison administration; foreigners; defense of economic rules and consumer rights, children and adolescent, Indians, bearer of deficiency and minorities; publication, documentation and record of the official acts; legal aid to the pours.

- **Ministry of Foreign Affairs** - acts in the field of international politics, diplomatic relations, programs of international cooperation, also in charge of participating in bilateral commercial, financial and technical negotiations with foreign countries and entities; assistance to Brazilian committees and representation before international and multinational agencies.

- **Ministry of Transportation** - deals with matters related to rail, road and water transport; merchant navy, ports and shipping routes; participation in the coordination of air transportation.

- **Ministry of Agriculture and Proveyance** - deals with matters related to: agricultural policy, such as production, commerce, supply, storage, and minimum price guarantee; agropecuary production and promotion; animal and vegetable sanitary inspection; technological research; meteorology; rural development; co-operativism, technical assistance and rural extension; coffee, sugar and alcohol policies.

- **Ministry of Education** - is in charge of the national directives: national policy for education, such as elementary education, high-school, university, technical schools, special schools and distance teaching.

- **Ministry of Culture** - deals with cultural policy, protection of Brazilian historic and cultural patrimony, etc.

- **Ministry of Labor and Employment** - deals with policy of labor creation, policy of earnings and assistance to employee; policies of employment relationship modernization; labor inspection and penalties application; salary policies, immigration policies, formation and professional development; security and health conditions at work.

- **Ministry of Social Security and Assistant Social** - is in charge of matters related to social security and complementary pension plans; and social assistant.

- **Ministry of Health** - is in charge of national health policies; medical and paramedical matters; supervision, immunization, epidemic control, medication, drugs and food, sanitary research, and formation of human resources at the health area.

- **Ministry of Development, Industry and Foreign Commerce** - is in charge of policy of development of industry, commerce and services; industrial property and transfer of technology; metrology, normalization

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and industrial quality; foreign commerce; support to micro, small and craftsmanship companies and register of commerce.

- **Ministry of Mining and Energy** - is in charge of matters relating to geology, mineral and energy resources; improvement of hydraulic energy sources; mining and steelworks, the oil, fuel and electrical industry, including nuclear energy.

- **ANP** - is responsible for implementation of the national oil and natural gas policy, in relation with supplying of oil derivative in national territory and with the protection of consumers and users regarding price, products quality offering, etc.

- **CNPE** - is in charge to promote a logical improvement of Brazilian energy resources; insure the supplying of energetic raw material to the remotest areas in the country, etc.

- **ANEEL** - is in charge of declaring the public utility, for expropriation or creation of public easement in the areas where is need to be install concessionaire and representatives of electrical energy, etc.

- **Ministry of Communications** - has the incumbency of national policies of telecommunications, postal services and radio frequency spectrum; regulation, grant and inspection of telecommunications services; control and administration of use of postal and radio frequency spectrum.

- **ANATEL** - Promote the development of modern and efficient telecommunications, able to offer adequate services to users, diversified and in a fair price, in the national territory.

- **Ministry of Science and Technology** - is in charge of preparing and implementing scientific and technologic research; planning, coordination, supervision and control of all scientific and technological activities, as well as the preparation of a development policy for informatics and automation; national politic and biosecurity; spatial and nuclear policy, and control the export of sensible asset and services.

- **Ministry of Environment** - is in charge of planning, coordinating, supervising and controlling all actions relative to the environment and all hydric resources; preparation and execution of a national policy for environment and hydric resources; preservation and rational use of renewable material resources; implementation of international agreements in the environmental area; politic integration to the Legal Amazon; ecological-economic zoning.

- **Ministry of Defense** - deal with the following matters: national defense policy, administration of the Brazilian Navy, the Army and practice the control and coordination of the activities of the Civil Aviation.

- **Ministry of Finance** - is in charge of matters pertaining to currency, credit, financial institutions, capitalization, private insurance and savings; tributary, budgetary, financial and patrimonial administration; public accounting and auditing; administration of public internal and external debts; supervision and control of foreign trade; economic and financial negotiations with international and multilateral entities and governmental agencies; prices and taxes publics and administrative; and control of international commerce.

- **Ministry of Planning, Budget and Management** - is in charge of the national strategic planning; evaluation and impacts social and economics of the policies and programs of the Federal Govern; elaboration of especial studies for the reformulation of the policies, etc.

- **Ministry of Agrarian Development** - is in charge of the agrarian reform and the promotion of supportable development of the rural segment formed by the agricultural families.

- **Ministry of National Integration** - deal with the following matters: formulation and conduction of national development policy; formulation and conduction of the plans and regional programs of development; fix the strategies of integration of the regional economies, etc.

- **Ministry of Sport and Tourism** - is in charge of the national policy of the development of tourism and sports, etc.

2.2. National Monetary Council

One of the diverse organs of the Ministry of Finance, the National Monetary Council (NMC) is presided over by the Minister of Finance, with the objective of elaborating currency and credit policies, with a view to the economic and social progress of the country.

The functions of the National Monetary Council are to: supervise the application of resources of public or private financial institutions with the intent of providing, in different regions of the country, favorable conditions to the harmonious development of the national economy, coordinate monetary, creditary, budgetary and fiscal policies, regulate the foreign value of the currency and the balance of payment, strive for the liquidity and solvency of financial institutions, etc...

2.3. Central Bank of Brazil

The Central Bank of Brazil (BACEN) is also linked to the Ministry of Finance and its principle functions are: fulfill the norms expedited by the National Monetary Council, be a depository of official gold reserves and foreign currency reserves, control credit of all forms, control foreign capital under the Law, control check payments and other papers, represent the Brazilian Government with international financial institutions, carry out the inspection of financial institutions, put into effect buying and selling operations of federal public titles as an instrument of monetary policy, etc...

2.4. Chambers of Commerce

With a view to approximating Brazil economically to other countries, increasing the commercial and financial flow between countries, there are a series of Chambers of Commerce. Among them are the American Chamber of Commerce, the Japanese Chamber of Commerce and Industry, and the Italian-Brazilian Chamber of Commerce and Industry, Chamber of Foreign Commerce (CAMEX)

3. FOREIGN CAPITAL

3.1. General Features

Foreign capital in Brazil is governed by Laws Nos. 4131 (the Foreign Capital Law) and 4390 of September 3, 1962 and August 29, 1964, respectively. Both laws are regulated by Decree No. 55762 of February 17, 1965, and have been amended.

According to Law No. 4131, “foreign capital is considered to be any goods, machinery and equipment that enter Brazil with no initial disbursement of foreign exchange, and are intended for the production of goods and services, as well as any funds brought into the country to be used in economic activities, provided that they belong to individuals or companies resident or headquartered abroad”.

There are two official exchange markets in Brazil, both of which are subject to Central Bank regulations:

- the commercial/financial rate market, which is reserved basically for (i) trade-related transactions (import and export); (ii) foreign currency investments in Brazil; (iii) foreign currency loans to residents of Brazil; and (iv) certain other transactions involving remittances abroad that are subject to preliminary approval by the monetary authorities; and
- the tourism rate market, which was initially developed for the tourism industry, and was later expanded to cover certain other transactions, such as inbound and outbound transactions. Applicable regulations indicate the types of transactions that qualify for this market.

Both markets operate at floating rates freely negotiated between the parties, and the key distinctions between them are that (i) the commercial/financial exchange market, as a rule, is restricted to transactions that in certain cases require preliminary approval from the monetary authorities; and (ii) the tourism exchange market is open to transactions that do not require any preliminary approval from Brazilian monetary authorities.

Exchange operations are effected by means of exchange contracts entailing an inflow or outflow of foreign currency.

3.2. Registration of Foreign Capital

Circular No. 2997 of August 15, 2000, issued by the Central Bank of Brazil, introduced the electronic registration system for foreign direct investment in Brazil. This circular took effect on September 4, 2000 and brought some changes in foreign direct investment registration in Brazil and the obtaining of information on these transactions.

Since then, registration of foreign investments has been made through the RDE-IED (*Registro Declaratório Eletrônico - Investimento Externo Direto*) Mode, which is part of the Central Bank Information System (*Sistema de Informações do Banco Central - SISBACEN*).

For electronic registration purposes, foreign direct investment is defined as the permanent ownership interest held in the Brazilian investee, or, according to common market practices, the ownership interest intended to be permanently held by nonresident investors, whether individuals or legal entities, residing, domiciled or headquartered abroad, through the ownership of shares or quotas representing the corporate capital of Brazilian companies, as well as the allocated capital of foreign companies authorized to operate in Brazil.

The party responsible for the foreign direct investment must first enroll in SISBACEN, according to the rules currently in effect. When registered through the RDE-IED, foreign direct investments will be given a permanent number for the investor-investee case, and all subsequent changes and additions will be made under this same registration.

The major changes introduced by Circular 2997/00 are the following: (i) registration of foreign direct investments is now made through a statement, which means that the Brazilian investee and/or the

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representative of the foreign investor are responsible for registration of foreign investments, which will no longer be subject to preliminary review and verification by the Central Bank; and (ii) registration of foreign investments will also be made in Brazilian currency.

All foreign investments must be registered with the Central Bank of Brazil. This registration is essential for offshore remittances, capital repatriation and registration of profit reinvestment.

3.3. Currency Investments

No preliminary official authorization is required for investment in currency. The investment to subscribe for capital or to buy a stake in an existing Brazilian company can be remitted to Brazil through any banking establishment authorized to deal in foreign exchange. However, closing of the exchange contract is conditional on the existence of a RDE-IED registration number for the foreign investor and the Brazilian investee.

Registration of the investment is made through the RDE-IED System by the Brazilian company receiving the investment within 30 days of closing of the exchange contract for the remittance, together with documents reflecting capitalization of the funds.

Foreign currency investments must be registered in the original currency or, upon express request of the investor, in another currency, maintaining the exchange parity, in addition to the registration in Brazilian currency, as mentioned above.

3.4. Investment by Conversion of Foreign Credits

If the transaction is not registered in the RDE-IED System, investment by foreign credit conversion will be subject to preliminary authorization from the Department of Foreign Capital Control and Registration (*Fiscalização e Registro de Capitais Estrangeiros* - FIRCE). After authorization, a token exchange transaction must be performed, representing the purchase and sale of the foreign currency.

Pursuant to article 8 of the Annex to Circular 2997/00, *conversion into foreign direct investment* is defined as “the transaction whereby credits eligible for offshore transfer based on prevailing rules are used by nonresident creditors to acquire or pay in an ownership interest in the capital of a company in Brazil.”

Registration of foreign direct investment resulting from conversion, however, depends on receipt by the Brazilian investee of (i) a statement from the creditor and committed investor, defining exactly the due dates of the installments and respective amounts to be converted, and in the event of interest and other charges, also the period to which they refer and the respective rates and calculations, and (ii) a binding statement from the creditor, agreeing to the conversion.

The Brazilian company has 30 days to capitalize these funds and apply for registration with the Central Bank of Brazil.

3.5. Investment by Import of Goods without Exchange Cover

Investment by import of goods without exchange cover requires the preliminary approval of FIRCE and SISCOMEX.

Registration through the RDE-IED Mode requires that both tangible and intangible assets be exclusively intended for paying-up of capital.

Registration of foreign direct investments resulting from the import of intangible assets without coverage by an exchange contract requires preliminary approval of FIRCE. For tangible assets, registration requires (i) the value of the registration made through the ROF (*Registro de Operações Financeiras* - Registration of Financial Transactions) Mode of the RDE System linked to the Import Declaration (DI); and (ii) the currency stated on the corresponding ROF.

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Registration of foreign capital that enters Brazil in the form of assets must be made in the currency of the investor's country or, upon express request of the investor, in another currency, maintaining the exchange parity.

Foreign capital is considered to be any goods, machinery or equipment that enter Brazil with no initial disbursement of foreign currency, and are intended for the production or marketing of goods or rendering of services. The import of used goods or under tax incentives is conditional on the absence of similar goods in Brazil. Used goods must be used in projects that foster the country's economic development.

Once the imported goods have been cleared by customs, the Brazilian company has 180 days to incorporate them into its capital and another 30 days to apply for registration of the investment with the Central Bank of Brazil.

3.6. Investment on the Capital Market

On January 26, 2000, the Brazilian Monetary Council approved Resolution 2689, whereby any nonresident investors, whether individuals or legal entities, individually or collectively, are allowed to invest on the Brazilian financial and capital markets.

Investment Companies - Foreign Capital, Investment Funds - Foreign Capital, Annex IV Portfolios (mechanisms created by Annexes I, II and IV) and Fixed-income Funds - Foreign Capital, were replaced by a single investment mechanism through which foreign funds flowed into Brazil by nonresident investors may be invested in fixed- or variable-income instruments and investment modes offered on the financial and capital markets to resident investors.

Nonresident investors will now use the same registration to invest in the fixed- and variable-income markets, and may migrate freely from one type of investment to the other. To access these markets, the foreign investor must appoint a representative in Brazil, who will be responsible for registration of the transactions, fill out the form attached to Resolution 2689/00 and obtain a registration with the Brazilian Securities Commission (*Comissão de Valores Mobiliários* - CVM).

Pursuant to Article 6, I of Resolution 2689/00, securities belonging to foreign investors must be kept in custody by entities authorized by CVM or by the Central Bank to provide such service, or registered, if applicable, with the Special Settlement and Custody System (*Sistema Especial de Liquidação e Custódia* - SELIC) or with a registration and financial settlement system supervised by the Central Agency for Custody and Financial Settlement of Securities (*Central de Custódia e de Liquidação Financeira de Títulos* - CETIP).

In all transactions carried out in the name of a nonresident investor, the exchange contract must state the RDE registration number in the appropriate blank.

3.7. Remittance of Profits

There are normally no restrictions on the distribution and remittance of profits abroad. Profits as from January 1, 1996 are exempt from income tax withholding.

Profit remittances must be registered as such through the RDE-IED Mode, considering the ownership interest held by the investor in the total shares or quotas that make up the paid-up corporate capital of the investee.

Brazil has signed double-taxation treaties with the following countries: Sweden, Japan, Norway, Portugal, Belgium, Denmark, Spain, Germany, Austria, Luxembourg, Italy, Argentina, Canada, Ecuador, the Netherlands, the Philippines, France, South Korea, the Czech Republic and Slovakia, Finland, Hungary, India and China.

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3.8. Reinvestment of Profits

According to the Foreign Capital Law, reinvestments are “profits made by companies established in Brazil and allocated to persons or companies resident or domiciled abroad, which have been reinvested in the company that produced them or in another sector of the domestic economy”.

Reinvested earnings are registered in the currency of the country to which such earnings could have been remitted, and reinvestments derived from investments made in Brazilian currency will be registered in Brazilian currency (Article 20 of Circular 2997).

Earnings obtained by a foreign investor and further reinvested in Brazilian investees (even if such investees are different from the companies in which the earnings were obtained) for the purpose of paying up or purchasing shares and/or quotas, may be registered under Investment in the RDE-IED System. These earnings to be reinvested are registered as foreign capital (in the same manner as the original investment) thus increasing the tax base for tax assessment on any future repatriation of capital.

In the cases of reinvestment by profit capitalization, interest on net equity and profit reserves, the ownership interest held by the foreign investor vis-à-vis the total number of paid-in shares or quotas in the corporate capital of the investee in which the earnings were originated will be observed.

3.9. Repatriation

Foreign capital registered with the Central Bank of Brazil may be repatriated to its country of origin at any time without preliminary authorization.

According to article 690, II of the 1999 Income Tax Regulations, foreign currency amounts registered with the Central Bank of Brazil as nonresident investments may be repatriated without income tax assessment. In this case, the foreign currency amounts, which proportionally exceed the original investment (capital gain) will be subject to 15% withholding income tax.

Notwithstanding such provision, after enactment of Law 9249/95 and Normative Ruling 73/98, the tax authorities have questioned calculation of the capital gains earned by a nonresident based on such nonresident's original investment in reais rather than on the foreign currency amount registered with the Central Bank.

In the specific case of repatriation of capital, it should be noted that the Central Bank of Brazil will normally examine the net worth of the company involved, as shown on its balance sheet. If the net worth is negative, the Central Bank of Brazil may decide that there was dilution of the investment, and may thus deny authorization for repatriation of a part of the investment in proportion to such negative result.

3.10. Transfer Abroad of Investments in Brazil

The ownership interest owned in a Brazilian company by a foreign investor may be sold, assigned or otherwise transferred abroad, with no tax implications in Brazil, irrespective of the price paid. The foreign purchaser will be entitled to register capital in the same amount as the registration previously held by the selling company, once again regardless of the price paid for the investment abroad. In this case, the registration number in the RDE-IED Mode of the Central Bank of Brazil should be changed to reflect the name of the new foreign investor, which is essential to allow the new investor to remit/reinvest profits and to repatriate capital.

3.11. Restrictions on Remittances Abroad

Remittance of funds abroad is restricted when such funds are not registered in the RDE-IED System, since remittance of profits, repatriation of capital, and registration of reinvestment are all based on the amount of foreign investment registered.

3.12. Restrictions on Foreign Investment

According to article 52 of the Temporary Provisions Act of the Federal Constitution, the participation of foreign capital in financial institutions is subject to the approval of the Brazilian Government, which will determine if such participation is in the country's best interests.

Participation of foreign capital is prohibited or, in some cases, restricted in the following activities:

- the development of activities involving nuclear energy;
- the ownership and management of newspapers, magazines and other publications, and of television and radio networks;
- health services;
- ownership of rural areas and businesses on frontier zones;
- post office and telegraph services;
- airlines with domestic flight concessions; and
- the aerospace industry.

Brazilian companies, even when under foreign control, may request and obtain permission to operate in the mining sector.

4. The Brazilian Foreign Exchange Markets

Although the Brazilian Foreign Exchange Markets are not totally free, due to the controls imposed by the Brazilian Central Bank (“BACEN”), in recent years they have been deregulated, leading to a present situation in which almost every type of transfer from/to Brazil are permitted to be performed and find a definition in the regulation.

Under the Brazilian regulation there are two different foreign exchange markets: (i) the Free Rate Exchange Market and (ii) the Floating Rate Exchange Market. There is a third way of performing transfers from/to the country, which consists in the international transfers of *reais*.

The Free Rate Exchange Market (also known as “Commercial Market”) is the foreign exchange market in which the majority of exchange transactions related to export and import are performed. It is also in this market that transactions related to foreign investments registered with the BACEN are performed. The registration of foreign capital with the BACEN is a service established in the early 60’s that allows non residents to register their capital invested in the country with the BACEN. There is a registration certificate granted to those non-resident investors that register their capital, that allows them to remit profits, dividends and the principal invested through the same market the capital has entered.

A recent innovation in the foreign exchange and foreign investment regulation, is the electronic system of registration of transactions. Such system allows some transactions (equity and debt) investments, performed in the Free Rate Exchange Market, to be registered by means of an electronic system that can be accessed by the Internet, waiving the prior authorization requested for certain transactions.

With the growth and sophistication of transfers of funds made between different countries, there were many types of transfers of funds from/to the country not regulated by the Free Rate Exchange Market. It was under that context that the Floating Rate Exchange Market has been created. In this market, the majority of transactions that cannot be made under the Free Rate Exchange Market are regulated. Payments of services rendered abroad or acquisition of real estate property in Brazil by non-residents are examples of these transactions. Even transfers with a very broad definition, as transfers for constitution of “cash funds”, are defined by the Floating Rate Exchange Market’s regulation. Almost all investments made through an exchange transaction performed in this market cannot be registered with the BACEN.

The third possibility for performing transfers of funds from/to Brazil is through international transfers of *reais*. It is not necessary to have an exchange transaction in order to perform such transfers. The vehicle used in order to make international transfers of reais possible are non-residents accounts is *reais* maintained with a Brazilian financial institution (former “CC5 accounts”). Each debt and/or credit made on such accounts are considered an entrance of funds in the country or its remittance abroad.

5. FORMS OF ASSOCIATION

5.1. Types of Companies

Brazilian Commercial Law provides for several types of companies: Unlimited Partnership “Sociedade em Nome Coletivo”, General Partnership “Sociedade em Comandita Simples”, Unlimited Partnership between Capital and Labor “Sociedade de Capital e Indústria”, Limited Partnership “Sociedade em Comandita por Ações”, Limited Liability Companies by Quotas “Sociedade por Quotas de Responsabilidade Limitada” and Corporations “Sociedades Anônimas”.

The Law gives corporate status to such companies, which thus become legal entities separate from their participants. Apart from such company structures, Brazilian Commercial Law also foresees other forms of association such as joint ventures and consortiums which, under the law, do not have a legal status separate from their participants; the participants of such associations do not merge into one legal entity, but rather continue to contract rights and obligations individually, although for the common benefit of the group.

Brazilian Law also provides for the formation of civil societies, associations, foundations and co-operatives, forms of association which, either due to their charitable nature or because of the particular characteristics of their formation or objectives, are different from commercial organisations and accordingly receive different legal treatment.

We should mention at this point that, apart from Corporations (Sociedades Anônimas), all the corporate types foreseen under Brazilian Commercial Law may function as civil societies, insofar as this is permitted under the Brazilian Civil Code.

In Brazil the most used forms of enterprises are the “Sociedade Anônima” (S/A) and the “Sociedade por Quotas de Responsabilidade Limitada”(LTDA.). This is due to the fact that in both cases the participants have limited liability. The other forms of company are rarely used, but, sometimes, they can fulfil specific purposes.

5.1.1. Sociedade Anônima (Corporation) - S/A

An S/A or Corporation, governed by Law N. 6.404 of December 15, 1976, amended by Law N. 9.457 of June 5, 1997, is fundamentally a commercial corporation by legal definition, with its capital represented by shares. It could therefore be defined as a business corporation having as its objective the earning of profits to be distributed to the shareholders.

The S/A receives a corporate name adding the expression “Sociedade Anônima”, before or after the chosen name, extended or abridged (S/A), or by either adding the word “Companhia” or “Cia.”. It can be used in the corporate name, the name of the founder or a “fantasy” name. The corporate name can describe the corporate aims or the activity carried out, but this description is not mandatory.

There are two kinds of S/A: a publicly held company which obtains funds through public offers and subscriptions and is supervised by the Securities Commission, and a closed company which obtains capital from its own shareholders or subscribers, having a simple accounting and administration system.

The capital of an S/A is divided into shares which represent part or fractions of such share capital. Depending on the rights or advantages conferred to its holders, the shares may be common, preferred or fruition shares.

Common shares entitle the holder to the rights of common or essential shareholders. Preferred shares have special rights of a financial or policy nature, and fruition shares result from the paying off of common or preferred shares.

By means of a Shareholders’ Agreement, the shareholders can enter into an agreement between themselves as regards the purchase and sale of their shares, to establish pre-emptive rights for their acquisition, and

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also as to the manner in which they exercise their voting rights. The obligations set forth in the Shareholders Agreement are enforceable by specific performance.

The S/A may be managed by a Board of Officers and by an Administrative Council or only by a Board of Officers, depending on that which the By-laws determines.

The Administrative Council is a body which set the general policy for the company's business but is not vested with executive powers. Its existence is mandatory in publicly held and authorised capital S/As and optional in closed S.A.s. Its members must be shareholders, individuals residing or not in the country. It must be composed of, at least, three members.

The Board of Officers is the executive body of the S/A. Its responsibility is to represent the company and to practice all such acts as are necessary for its operation. It is composed of at least two officers, who may or may not be shareholders, and who must be individuals residing in the country, and who may be elected for a tenure of three years at the most.

The Fiscal Council is the body which polices the company's administration. Its operation may be permanent or temporary. Its installation is based on the need of the company to establish a rigorous control over the actions of the administration. Whenever installed, it is composed of at least three and, at most, five members, with an equal number of substitutes.

5.1.2. Sociedade por Quotas de Responsabilidade Limitada (Limited Liability Company by Quotas) - LTDA

The LTDA, which is governed by Decree N. 3.708 of January 10, 1919, is a hybrid between a partnership and a company by shares, with aspects of each type of entity.

The LTDA. can be organised as a civil or commercial company, depending on the definition of its objectives set forth in the Articles of Incorporation.

The LTDA is established by a contract and it has only one class of partner, the limited liability quotaholders. Each quotaholder is liable for the totality of the capital and not only for his quotas, until the capital is fully paid-up. From there on, the quotaholders will have no further liability to the company or third parties.

As there is only one kind of partner, any quotaholder is able to manage the company. The partners may delegate their managing powers.

The capital of the LTDA is divided into quotas. The quota represents the amount in money, credits, rights or assets by which the quotaholder contributes for the formation of the company. The quotas must be registered and are not represented by securities or certificates. As the ownership and the number of quotas are written in the Articles of Association any transfer of title over the quotas will require an amendment to such Articles, under signature of all of the quotaholders or, at least, of the quotaholders who represent the majority of the capital, but necessarily with the assignor's and the assignee's signatures.

If Decree N. 3708/19 or the Articles of Association are silent on a given matter, the rules of S/A law compatible with the LTDA. may be applied.

5.1.3. Rules Common to S.A.s and LTDA.s

Although foreseen in the Law which governs S/As, the operations involving the transformation, merger, consolidation or splitting of companies can also can be performed by LTDAs. or even by any other kind of company so permitted under Brazilian Law.

The transformation is the transaction which a given company, without dissolving it, has its corporate type transformed into another.

The merger is the transaction through which one or more companies are absorbed by another, succeeding them in all rights and liabilities.

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The consolidation, in its turn, is the transaction through which two or more companies amalgamate, with a view to forming a new company which will succeed them in all rights and liabilities.

Finally, the split up is the transaction by which the company transfers parts or the totality of its net equity to one or more companies, established for this purpose or otherwise, resulting in the extinction of the divided company, if it has passed on all of its net equity, or dividing its capital, if it has passed on only part of its net equity.

5.1.4. Other Types of Companies

As noted before, the other company types are not commonly used but may become attractive under certain circumstances. Thus, we will briefly comment on those which are sometimes used.

5.1.5. Sociedade em Nome Coletivo (General Partnership)

The relevant corporate feature of the General Partnership is the partners' unlimited liability vis-à-vis the company's debts.

Thus, all partners are jointly liable with the company for its liabilities before third parties. However, the partners' assets cannot be executed until all the company's assets have been exhausted.

Responsibility for the management of the company falls on all of the partners, as long as the Articles of Association does not specifically determine which partner will have this responsibility. If such delegation exists, this partner will have the exclusive right to represent it before third parties.

The company's name may be the full name of one or more partners, adding the expression "& Cia." if other partners' names should be omitted.

5.1.6. Sociedade em Conta de Participação (Partnership with One Ostensible and One "Hidden" Partner) - SCP

Although designated "sociedade" (company), the law does not confer upon the SCP the legal entity status. The SCP is a joint venture agreement composed of two or more persons, one of them being a merchant, the so-called ostensible partner, who shall perform in his own name all necessary acts to achieve the goals set forth in the Agreement for the formation of the SCP.

On many occasions the SCP is founded for a specific period of time, with the aim of executing certain specific transactions, such as exploiting a given commercial opportunity or to construct a building for resale, being liquidated subsequently.

Its remarkable feature is that it does not reveal to the third parties the majority of its partners, as only the ostensible partner appears and does business in his own name.

The ostensible partner is liable for the business, but the "hidden" partners, in their turn, assume responsibilities towards him as set forth in the relevant agreement for the formation of the SCP.

There are few formalities needed in order to establish an SCP and its existence may be substantiated by the same kind of proof admitted in the substantiation of a commercial contract. It is, therefore, a company existing only between the parties, but not in relation to third parties who deal exclusively with the ostensible partner.

The SCP has no corporate or trade name, as the ostensible partner deals with third parties using his own name, trade name or denomination.

5.1.7. Consórcio (Consortium)

The consortium is a form of association of companies aiming for the development of a specific project. It is governed by Law 6.404 of December 15, 1976.

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The consortium is formed by means of an agreement between two or more companies, but its formation does not bring a new legal entity into existence. The parties preserve, therefore, their corporate identity, pooling their efforts to achieve certain objectives.

The parties only bind themselves under the terms of the consortium agreement made, each party being liable for its specific obligations as established therein, without any assumption of joint liability before third parties, except if agreed otherwise.

The consortium agreement must contain the following basic covenants:

- the name of the consortium, if any;
- the objectives of the consortium;
- the duration, address and venue of the agreement;
- a determination of the participating companies liabilities, and obligations;
- the rules for the receipt and distribution of results;
- the management and accounting policies, as well as a representation of the participating companies and administrative charges, if applicable;
- the manner in which the parties' decisions will be taken, as well as the number of votes each participant will have; and
- the contribution each participant will make towards the expenses of the project, if applicable.

The agreement and its subsequent amendments must be filed before the Commercial Registry with jurisdiction over the territory in which its head office is located. When the documents are filed, the Commercial Registry issues a certificate which must be published in the Official Gazette, and in a widely circulated newspaper.

5.2. Registration Process

Brazil has two kinds of public registers for companies: the commercial registry service performed by the 27 Brazilian States Commercial Registries and the Civil Registries service which is performed by the Civil Registries of Deeds and Documents usually found in the Brazilian cities. In the most developed regions of Brazil, these registries are usually well organised with highly trained personnel and modern equipment, which contribute to making the registry service efficient and cheap.

5.2.1. The Commercial Registry

To determine if a company should be registered with the Commercial or Civil Registries, one must examine its type and its objectives. Should the objectives indicate a commercial activity, the corporate type must be one of those available to commercial companies.

Since it is legally defined as a commercial company, an S/A must have its acts of incorporation submitted for filing to the Commercial Registry. Such filing should be requested to the Commercial Registry in the Brazilian State where the company is headquartered, through a request dated and signed by any company's manager or attorney in fact.

The request for the filing of the Articles of Association of the S/A must be accompanied, by the following documents:

- Acts of Incorporation (Public Deed or the Minutes of a General Incorporation Meeting), listing the particulars of the subscribers.

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- the bank (Banco do Brasil S.A.) deposit slip proving that an amount equivalent to at least 10% of the capital to be paid in cash has been paid by the subscribers.
- By-Laws signed by every subscriber. If the By-Laws are included in the Minutes of the General Meeting for the Incorporation the presence of all of the subscribers is mandatory.
- a Subscription Chart certified by the founders or by the Secretary of the General Meeting, mentioning full name, nationality, marital status, profession, residence and the place of domicile of subscribers, in addition to the number of subscribed shares and the amount paid.
- a power-of-attorney granted by a foreign resident shareholder, signed before a Public Notary in his country of origin, legalised at the Brazilian Consulate, translated by a public translator and registered at the Public Notary's Office.
- documents proving the existence of the partners resident or headquartered abroad, duly legalised at the Brazilian Consulate with jurisdiction;
- a photocopy of the Identity documents of the directors and council members.
- forms with data on the company and its shareholders, duly filled out, accompanied by proof of payment of filing fees.

The filing of the Incorporation documents and subsequent amendments of other commercial companies must, in the same manner, be presented to the President of the Commercial Registry with jurisdiction over the place of the company's head office, by way of a petition signed and dated by any partner, by an attorney or a person duly authorised.

Generally the request to file the acts of incorporation of other commercial companies must be accompanied by the following documents:

- three original counterparts of the Articles of Association signed by all the partners and two witnesses. If the document consists of more than one page, each page should be initialled by the partners.
- a photocopy of each partner's identity card. In the case of a partner who is a foreign individual, a copy of his/her foreign identification document issued by the competent authority in his/her country of origin, duly legalised by the Brazilian Consulate with jurisdiction.
- a power-of-attorney granted by the foreign resident partners signed before a Public Notary in their country of origin, legalised at the Brazilian Consulate, translated by a public translator in Brazil and registered at any Brazilian Deeds and Documents Registry Office.
- a document as a proof of existence of the foreign legal entity partner in its country of origin duly legalised at the Brazilian Consulate;
- a personal declaration by each partner or manager of the society that he is not prevented from engaging in commercial activities in Brazil.
- forms with data on the company and its partners, duly filled out, accompanied by proof of payment of filing fees.

5.2.2. The Civil Registry

The Civil company, defined as that company which has not adopted the structure of an S.A. and does not engage in commercial activities, comes into existence upon the registration of its Articles of Association or By-Laws at the Civil Registry with jurisdiction over the place of the company's head office.

To accomplish its registration, the civil company, duly represented by its managing partner, or attorney-in-fact or manager, must file a petition with the Civil Registry accompanied by the following documents:

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- the Articles of Association or By-Laws duly signed by its founding partners.
- photocopies of the Identity documents of the partners.
- a proxy granted by foreign resident partners, signed before the Public Notary of his country of origin, legalised at the Brazilian Consulate, translated by a public translator and registered at the Public Notary's Office.
- documents proving the existence of the partners domiciled or headquartered abroad, duly legalized at the Brazilian Consulate with jurisdiction;
- a copy of the full or summarised official publication of the Articles of Association, contract or By-laws.

The civil companies' contracts, Articles of Association or By-laws may only be filed at the Civil Registry, if they have been certified by a lawyer and the signatures of all the partners have been notarised.

The actual act of registration of a civil company consists of a declaration by a public officer, registered in a proper book at the Civil Registry, of the presentation and registration of the incorporation act.

6. PUBLICLY-HELD COMPANIES

6.1. General

The Law no. 6.404/76 (“Brazilian Corporations Law”) makes a distinction between “closed” and “open” companies. Open (or publicly-held) companies must necessarily take the form of a corporation and their securities are traded on stock exchanges or the over-the-counter market.

Because publicly-held companies are permitted to raise funds through public offerings of their securities, they are subject to a series of specific obligations imposed by law and by regulations issued principally by the Brazilian Securities Exchange Commission, aimed at protecting the investor. The Brazilian Securities Exchange Commission (*Comissão de Valores Mobiliários* - the “CVM”), which was created by Law no. 6.385 of December 7, 1986, is a federal agency linked to the Ministry of Revenue. The purpose of the CVM is to regulate, develop, control and supervise securities markets in Brazil.

Thus, while in closed companies there is great freedom to establish rules for the operation of the company that will best serve the shareholders’ interests, publicly-held companies are subject to a number of restrictions that reduce the shareholders’ flexibility in establishing the bylaws that will govern the company.

In addition to complying with the provisions of the Brazilian Corporations Law, publicly-held companies must also fulfill various registration requirements in order to have their securities traded on the stock exchange or on the over-the-counter market.

It is also worth noting that only publicly-held companies may issue depositary receipts (DRs), which are certificates representing shares in the company. DRs are traded on foreign markets, enabling the company to raise funds outside Brazil.

6.2. Securities Market

The sector of the Brazilian financial system referred to as the “Securities Market” encompasses a variety of transactions involving securities issued by publicly-held companies, such as shares, debentures, subscription bonuses, promissory notes for distribution and founder’s shares (*partes beneficiárias*).

As mentioned above, transactions involving securities issued by publicly-held companies may be carried out on the stock exchanges or in the over-the-counter markets, and are regulated principally by the CVM.

Stock exchanges, which are governed by the Resolution no. 2.690/00 of the National Monetary Counsel, may be formed as association or corporations and shall, as a principal purpose, establish a place or system appropriate for the buying and selling of bonds and/or securities in a free and open market, especially organized and supervised by the stock exchange itself, its members and regulatory authorities.

Over-the-counter markets trade in securities issued by publicly-held companies that are not registered on the stock exchanges.

Although the members of the organized over-the-counter market are subject to supervision and inspection by the CVM, they are considered to be self-regulating and must, as agents of the CVM, monitor market participants and transactions carried out in the market.

CVM Instruction no. 243/96, which governs the operation of the organized over-the-counter market, establishes, between other related activities, as a principal purpose for the organized over-the-counter market, the establishment of a system appropriate for the buying and selling of variable income bonds and/or securities, as defined in applicable regulations, in a free and open market, especially formed and supervised by the over-the-counter market itself, brokers, participants and regulatory authorities.

6.3. Administration

Publicly-held companies are required to have a two-tiered management structure, composed of an executive committee and a board of directors, unlike closed companies, in which a board of directors is optional.

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The board of directors, which has a decision-making function, must have at least three members, all elected at the general annual meeting of the shareholders of the company. Directors may be non-residents, but must be shareholders of the company.

The officers of the company, who have executive and representative functions, need not be shareholders but must be residents in Brazil.

In order to register securities with the CVM for trading on the stock exchanges or over-the-counter market, publicly-held companies must have, in addition to a board of directors, an investor relations officer who is responsible for providing information to investors, the CVM and to the stock exchanges, if applicable, in accordance with CVM Instruction no. 202 of December, 1993. The requirement for an investor relations officer is related to publicly-held companies' obligations to disclose and/or communicate various information related to their business.

6.4. Periodic Filing Requirements and Other Information

In addition to the publication requirements applicable to all corporations under the Brazilian Corporations Law, once a publicly-held company's securities have been registered with the CVM, the company must provide information on a periodic basis to the CVM, the stock exchange on which its securities were first admitted for trading, the stock exchange on which its securities were most traded in the last fiscal year and to any other stock exchange that requests such information (CVM Instruction 202).

The information that must be submitted on a regular basis, at the times and in the form established by regulation, consists mainly in:

- (i) financial statements and, if applicable, consolidated financial statements, drawn up in accordance with the Brazilian Corporations Law and CVM regulations, together with a report by the management of the company and the opinion of an independent auditor;
- (ii) Standardized Financial Statements ("DFP") form;
- (iii) notice of the call to the annual general shareholders' meeting;
- (iv) Annual Information ("IAN") form;
- (v) summary of decisions taken at the annual general shareholders' meeting;
- (vi) minutes of the annual general shareholders' meeting;
- (vii) facsimile of the securities certificates issued by the company, if there has been any change in the certificates; and
- (viii) Quarterly Information form, together with a Special Review Report issued by the independent auditor.

In addition to the information listed above, certain events or facts can trigger an obligation to submit information, again at the times and in the form established by regulation, such as:

- (i) notice of the call to an extraordinary general shareholders' meeting;
- (ii) summary of decisions taken at the extraordinary general shareholders' meeting;
- (iii) minutes of the extraordinary general shareholders' meeting;
- (iv) shareholders' agreement;
- (v) Corporate Group convention (agreement to form a Corporate Group);
- (vi) statement of material fact or act;

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- (vii) information regarding any petition for protection from creditors, including the grounds for the petition, the financial statements drawn up especially for the purpose of obtaining protection from creditors and, if applicable, the situation of debenture holders with respect to recovery of their investment;
- (viii) judgment granting protection from creditors;
- (ix) information on any petition or confession of bankruptcy;
- (x) judgment declaring bankruptcy; and
- (xi) any other information that may be requested by CVM.

With respect to item (vi) above, an act or fact related to the business of a company will be considered to be material if it could influence (i) the quoted price of securities issued by the company; (ii) the decision by investors to trade in the company's securities; (iii) the decision by investors to exercise any rights attached to their ownership of the company's securities.

Material acts and facts must also be disclosed through publication in the same widely-circulated newspaper in which the company generally publishes other required information.

Under CVM Instruction no. 69 issued in September, 1987, any natural or legal person, or group of persons acting jointly or representing the same interest, that attains a shareholding in a publicly-held group equal to or greater than ten percent of any type or class of voting shares, must disclose the following information: (i) name and particulars of the shareholder(s); (ii) the reason for acquiring the shareholding and the number of shares expected to be acquired; (iii) the number of shares, as well as rights to subscribe for voting shares of any type or class, already held directly or indirectly by the shareholder(s) or related person(s); (iv) the number of debentures convertible into voting shares already held directly or indirectly by the shareholder(s) or related person(s); (v) information on any contract(s) or agreement(s) regarding the exercise of voting rights, purchase and sale of shares or of debentures convertible into common or preferred shares, even if such contracts or agreements have not been filed at the headquarters of the company.

Likewise, any time the persons or group of persons referred to in the preceding paragraph increase their shareholdings by five percent or more, they must disclose the information listed above. Initially, the information must be submitted to the CVM and, if applicable, published in the press and submitted to the stock exchanges.

In addition to any requirement to publish a statement of material fact or disclose the information under CVM Instruction no. 69 that may be applicable, the following transactions must also be communicated to the CVM and to the stock markets or brokers in the over-the-counter market through which the company's shares are traded (CVM Instruction no. 299 of February, 1999):

- (i) transactions resulting in the sale of control of a publicly-traded company, which must be communicated by the party acquiring control and disclosed to the press;
- (ii) the execution of an agreement or contract that contemplates the transfer of control of the company or the grant of an option or powers to that end, which must be communicated and disclosed by the controlling shareholders;
- (iii) any increase, either actual or potential, by five percent or more in the holdings of any class or type of share of a controlling shareholder of a publicly-traded company, which must be communicated by the controlling shareholder; the CVM may disclose the acquisition to the press;
- (iv) any increase, either actual or potential, by five percent or more in the holdings of any class or type of share of the directors, officers or members of the audit committee of a publicly-traded company, which must be communicated by the controlling shareholder; the CVM may disclose the acquisition to the press.

Furthermore, the basic information contained in the company's registration with the CVM must be kept up to date and the CVM must be informed of any change in that information.

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Such information must not only be submitted to the CVM but also be kept available to security holders at the investor relations department of the company. The CVM also makes the information available to the public, with the exception of information classified as confidential by the company.

However, if disclosure of periodical or transaction-related information would affect the legitimate interests of the company, the company may elect not to disclose such information, provided that it submits to the CVM the reasons that lead it to believe the disclosure would place the company's interests at risk.

The means of publication of required information by publicly-held companies are also regulated. The information must be published in a widely-circulated newspaper issued either in the same city as the stock market on which the securities of the company were most traded in the last two fiscal years, or in the city in which the headquarters of the company is located. The company must use the same newspaper for all publications.

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7. REGULATORY FRAMEWORK OF LOCAL CAPITAL MARKETS

7.1. Relevant Laws Affecting Local Capital Markets

The key law dealing with securities markets in Brazil is Law No. 6,385 (the “Securities Law”). Additionally, Law No. 6,404 (the “Corporation Law”) contains relevant provisions for the regulation of the capital markets.

The Securities Law creates the Brazilian securities and exchange commission (Comissão de Valores Mobiliários - “CVM”) and regulates the overall operation of the capital markets, the public distribution of securities, the listing of securities on exchanges, disclosure requirements, activities of brokers and intermediaries, types of securities negotiated and the types of companies which can be traded on the capital markets. The Securities Law grants regulatory and police powers to CVM.

The regulation of the Securities Law is made through resolutions, circulars, instructions, opinions, deliberations and other administrative rules issued from time to time by the National Monetary Council (“CMN”), the Central Bank of Brazil (the “Central Bank”), CVM, the stock exchanges and the organized over-the-counter markets (“Organized OTC”).

7.2. Local Regulatory and Supervisory Authorities

7.2.1. The National Monetary Council

Pursuant to the Securities Law, CMN has the following powers with respect to the securities market: (i) to define the general policy relating to the organization and operation of the capital markets, (ii) to issue regulations on the extension of credit in the market, and (iii) to determine general rules to be followed by CVM for the performance of its functions; and (iv) to define the activities which CVM must perform in cooperation with the Central Bank.

7.2.2. The CVM

CVM is the governmental agency responsible for regulating and supervising compliance with the Securities Law and all other aspects of the local capital markets.

CVM is governed by a president and four board members appointed for an indefinite period by the President of Brazil, each of whom must have expertise in the securities market.

CVM also has police powers over all participants in the local security markets. These participants include brokers, dealers, financial institutions, stock exchanges, Organized OTC, publicly-held companies, investment funds and companies, portfolios and custodians, independent auditors, consultants and market analysts.

CVM may take actions and impose administrative sanctions on any persons and entities which fail to comply with the Securities Law, the Corporations Law and with other regulations which CVM is responsible for enforcing. The primary sanctions that CVM may impose include: (i) issuance of warnings; (ii) pecuniary penalties; (iii) suspension of the registration or authorization to participate in the securities market; (iv) temporary prohibition to participate in the securities market; and (v) suspension and removal of directors and officers of breaching companies, including companies participants of the securities distribution system.

Civil and criminal liabilities of the breaching party of the securities regulation is not affect due to the imposition of any penalty on such breaching party.

Brazil has been a member of the Council of Securities Regulators of the Americas (COSRA), International Organization of Securities Commissioners (IOSCO) and Mercosul since the execution of these agreements.

To date CVM has entered into memoranda of understanding concerning information-sharing and legal assistance with the securities regulators in the following countries: United States (the SEC and the Commodities Future Trading Corporation), Germany, Argentina, Australia, Bolivia, Canada/Quebec, Chile,

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China, Equator, Spain, France, Hong Kong, Italy, Malaysia, Mexico, Paraguay, Peru, Portugal, Thailand and Taiwan.

7.2.3. The Central Bank

According to Law Nr. 4.595, the Central Bank is responsible for implementing policies of CMN related to monetary policy, exchange controls, regulations of financial institutions (including brokers and dealers), control of foreign investment (including investment in the securities markets) and such other matters regarding the securities markets which CMN determines that fall under Central Bank regulatory powers.

The President of the Central Bank is appointed by the President of Brazil for an indefinite term and this appointment is subject to ratification by the National Congress.

7.2.4. Self-Regulation

Self-regulatory organizations in the Brazilian securities markets, typically stock exchanges and the Organized OTC, act as ancillary institutions to CVM, being subject to the supervision of such agency. It is incumbent on such entities to police their members and to ensure compliance with applicable rules and regulations. There are, as well, pure self-regulatory entities, which are not subject to any scrutiny by CVM, as the Brazilian association of investment banks (Associação Nacional dos Bancos de Investimento - ANBID).

7.2.4.1. The Stock Exchanges

The main Brazilian stock exchanges are located in São Paulo ("Bovespa") and Rio de Janeiro ("BVRJ").

Securities, such as shares, commercial papers, debentures and derivatives, are traded on Bovespa. Government bonds are traded on BVRJ.

The functions of the stock exchanges are to organize, maintain, register and supervise the transactions of securities. For such purposes, the stock exchanges may issue a regulation to complement the one enacted by CVM.

Currently, the following negotiable instruments may be traded on Brazil's stock exchanges (i) securities duly registered with CVM, (ii) rights arising therefrom, (iii) stock indexes and (iv) derivative instruments and, (v) upon previous authorization of the Central Bank and CVM, government bonds and other negotiable instruments issued by private entities.

Recently, Bovespa implemented the "home-broker" system, whereby investors can deliver orders to their brokers through the internet, which, in turn, are linked to the electronic systems of Bovespa.

On December 11, 2000, Bovespa launched a new trading market (the "New Market") designed exclusively for the listing and trading of shares issued by companies, which accepts to be bound by corporate governance and disclosure standards higher than those imposed by Brazilian law.

On the New Market, the company must (i) issue common shares only; (ii) keep a free float of at least 25% of its outstanding shares; (iii) extend to all shareholders the same terms and conditions obtained by the controlling shareholders in the event of a sale of control (tag along rights); and (iv) disclose any self-dealing transactions.

Clearance for and settlement of securities transactions are carried out by a local clearing entity controlled by the stock exchanges and are done, as a general rule, on the 2nd and on the 3rd business days following the relevant closing date (financial and physical settlement, respectively).

There is currently one clearing house in Brazil: Companhia Brasileira de Liquidação e Custódia ("CBLC"), a private company based in São Paulo, which provides custody and settlement services to Bovespa, BVRJ and SOMA (Organized OTC entity).

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7.2.4.2. The Organized OTC¹

The Organized OTC comprises partnerships or commercial companies specifically incorporated with the purpose of trading securities, in accordance with CVM rules and subject to CVM's prior approval.

The following securities may be traded on the Organized OTC: (i) securities registered with CVM for trade in the Organized OTC; (ii) certificates of investments in film production (certificado de audiovisual); (iii) quotas of closed-end investment funds, which were subject to a public distribution (such as, e.g., stock mutual investment funds, real estate mutual investment funds and others); and (iv) other securities expressly permitted by CVM.

Currently, there is only one Organized OTC operating in Brazil: the Sociedade Operadora do Mercado de Ativos ("SOMA"), in Rio de Janeiro. Central de Custódia e Liquidação Financeira de Títulos ("CETIP"), a clearing system, has also received an authorization to operate as an Organized OTC, but has not started to operate under this authorization yet.

For the admission of a specific security in SOMA, a market maker specialized in the trading with such security must be appointed.

7.2.4.3. Associação Nacional dos Bancos de Investimento - ANBID

On December 09, 1998, the National Association of Investment Banks (Associação Nacional dos Bancos de Investimentos - ANBID) approved a self-regulatory code (the "ANBID Code"), establishing certain disclosure standards which should be followed by the members of ANBID while coordinating public offerings of securities in the Brazilian market.

The ANBID Code sets forth disclosure rules for the public distribution of both debt and equity securities in the primary and the secondary market in Brazil. Pursuant to its provisions, the financial institutions acting as coordinators of the underwriting syndicate ("underwriters") are responsible for the preparation of the prospectus. Such entities shall conduct independent due diligence to obtain all material information concerning the issuer's business, properties and financial conditions, the relevant securities and other facts which may have a bearing on the investor's decision with regard to the offered or solicited investment. The ANBID Code also establishes comprehensive rules for the minimum content of the offering prospectus., which must contain, at least, (i) information regarding the risk factors, (ii) description of the business of the issuer, (iii) management's discussion and analysis of financial condition and results of operations of the issuer based on the three preceding fiscal years, (iv) information about outstanding securities of the issuer, and (v) relevant litigation affecting the issuer and transactions with related parties.

7.3. Definition of Securities

In Brazil, the concept of securities is formal and is statutorily defined. According to the Securities Law and regulations thereof issued from time to time, the following are deemed as securities: (i) shares, founders shares (partes beneficiárias), debentures, warrants and coupons of the aforesaid securities; (ii) stock indexes; (iii) commercial papers; (iv) subscription rights; (v) subscription receipts; (vi) options; (vii) share deposit certificates; (viii) certificates of investments in film production; (ix) certificates representing mercantile contracts for deferred purchase of energy; (x) collective investment contracts; and (xi) real estate receivable certificates. The CMN is vested in powers to create other securities.

The following negotiable instruments are expressly excluded by the Securities Law from the definition of securities: (i) federal, state and municipal public bills; and (ii) negotiable instruments issued by financial institutions. Negotiable instruments that are not deemed as securities are subject to the control and monitoring of the Central Bank of Brazil.

¹ The non organized OTC is defined by Article 3 of Instruction CVM No. 202 as comprising all trades conducted outside the stock exchanges through the intermediation of members of the securities market. Shares which are traded on a stock exchange cannot be traded over-the-counter, except in case of a public distribution. OTC transactions are usually executed over the telephone by broker/dealers in their offices and are not coordinated by CVM, although they are subject to the supervision of such agency. The price and volume of completed OTC transactions are not regularly published.

7.4. Offer and Distribution of Securities in Brazil

7.4.1. Concept of Public and Private Offer and Distribution of Securities

The offering and distribution of securities in Brazil are subject to the restrictions imposed by the Securities Law. Any offering or distribution of securities to the public at large is subject to prior registration with CVM.

The Securities Law defines public offerings as those conducted by means of (i) the use of lists or bulletins of sales or subscription, offering circulars, prospectuses or advertisements made to the public; (ii) the search for subscribers or buyers for the securities, by means of employees, agents or brokers; and (iii) the negotiation in stores, offices or any other places accessible to the public, or through the use of any instrument of public communication.

Registration is intended to provide adequate and accurate disclosure of facts concerning the issuer and the securities it proposes to sell. The registration, however, does not judge the risk inherent in investing in the securities. Therefore, it does not preclude the sale of securities in poorly managed or unprofitable companies.

Issuance and distribution of debt securities outside Brazil by Brazilian companies are not subject to registration with CVM.

7.4.2. Registration Process

The public distribution of securities in Brazil may only be made by companies which are registered with CVM as publicly-held companies. In addition to the registration with CVM prior to their distribution to the public, the company must also be accepted for trading on a stock exchange or on the Organized OTC where the relevant securities will be traded.

7.4.2.1. Registration of the Issuer as a Publicly-Held Company

The documents and information required for the registration with CVM include by-laws, minutes of the meeting appointing an investor relations officer and audited financial statements of the three preceding fiscal years. The registration of a company with CVM usually takes from 30 to 120 days. The stock exchanges and the Organized OTC usually require the filing of the same documentation submitted to CVM in order to approve the trading of securities on such entities.

7.4.2.2. Requirements for a Public Distribution of Securities

The public offer or distribution of securities, either on the primary or on the secondary market, must be previously authorized by CVM. For such purposes, the coordinator of the transaction shall file with CVM the documentation required in the applicable regulations, which includes: (i) minutes of the meetings of the corporate body, approving the issuance of the securities; (ii) a copy of the agreement for the distribution or underwriting of the securities; (iii) a draft of the agreement entered into between the members of the syndicate for the distribution of the securities; (iv) a copy of the stabilization contract, if any (stabilization is not permitted without such contract); (v) a draft of the prospectus, in accordance with the guidelines of the ANBID Code;

The registration for public distribution has the same characteristics of the one related to the securities' distribution by publicly-held companies.

7.4.3. Issue of Depositary Receipts: Access to the Foreign Capital Markets

Brazilian companies may access foreign capital markets to raise funds through the issuance of equity securities by establishing a depositary receipt program.

Depositary Receipts ("DRs") are certificates evidencing shares or other stock-related securities issued by a Brazilian publicly-held company.

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The implementation of such program requires the appointment of a non-Brazilian depository, which will issue the depository receipts abroad based on the shares custodied in its name in Brazil, in another Brazilian custodian, which will be designated by the depository to custody the shares underlying the DR.

The DR program may or may not be sponsored by the Brazilian issuer of the underlying securities.

The establishment and operation of a DR program requires the prior approval of CVM and the Central Bank. Registration with CVM is required to ensure the same level of disclosure to the holders of both DRs and the underlying securities. Registration with the Central Bank is required for the transfer of funds from and to Brazil.

After the registration of the program with CVM and the Central Bank, shares held by Brazilians or foreigners may be at any time deposited with the custodian for the issuance of the corresponding DRs abroad. Foreign investors may sell the DRs abroad or request the cancellation of the DR and sell the underlying shares in Brazil.

7.4.4. Access to the Brazilian market by Foreign Companies through BDR Programs

Foreign corporations may trade their securities in the Brazilian stock markets through the issuance of securities deposit certificates issued by Brazilian institutions, representing securities issued by foreign publicly-held companies ("BDRs"). The establishment of BDR Programs must be previously approved by CVM and the Central Bank.

BDRs may be issued either in a sponsored program, which has three different levels, or in a non-sponsored program. In either case, the issuer of the underlying securities must be subject, in its country of origin, to the supervision of an agency with function similar to that of CVM and which has executed a cooperation agreement with CVM.

7.5. Tender Offers for Shares of Brazilian Companies

7.5.1. Take-Overs through Tender Offer

According to the Corporation Law, the acquisition of control of a Brazilian publicly-held company by means of a tender offer may be made in cash or through exchange with shares.

The offer must be made for a number of voting shares sufficient to ensure the control of the company and must be made through, and guaranteed by, a financial institution.

The tender notice (edital) shall disclose, among others, the identity of the acquirer, the number of shares it proposes to acquire, the price and other payment conditions, the procedure for the tendering of the shares, and other terms and conditions of the tender offer.

7.5.2. Going Private - Delisting Tender Offer

The controlling shareholder may at any time make a tender offer for the acquisition of all voting and non-voting shares held by minority shareholders, for the purpose of delisting the corporation.

Under a delisting tender offer, the minority shareholders are called to (i) sell their shares to the controlling shareholder; and (ii) express their opinion in favor of or against the delisting.

The delisting is subject to the cumulative fulfillment of two conditions, namely: (i) shareholders representing at least 51% of all outstanding shares of the corporation (voting and non voting shares) must approve the delisting in a shareholders' meeting called for such purpose; and (ii) shareholders representing at least 67% among the shareholders who had agreed to sell shares, vote in favor of or against the delisting must either sell their shares at the offer or approve the delisting.

If the 67% limit is not reached, the company is not delisted, the controlling shareholder (i) may acquire only up to 1/3 of the free float and (ii) may not launch a new tender offer during the two years following the settlement of the first offer..

7.5.3. Voluntary Tender Offer

The acquisition of shares by a controlling shareholder of a Brazilian publicly-held company, without making a tender offer, is limited to 10 % of each class or type of shares.

The tender offer must be approved in advanced by CVM and may be conditioned upon the acceptance of a maximum or minimum number of shares. The tender notice (edital) must contain the following information, among others: (i) terms and conditions of the offer, (ii) if the tender offer is a condition of any transfer of control transaction and the kind of such condition, (iii) reasons and goals of the offer and (v) if the controlling shareholder has the intention to delist the company.

Furthermore, if the controlling shareholder makes a new purchase offer within two years at a price higher than the one paid to those who accepted the first offer, such earlier sellers must be reimbursed for the balance of the prices.

Lastly, if within one year of the offer any event occurs that leads to exercise of the withdrawal right, the shareholders who sold their shares in the tender offer, but would have the right to withdrawal, if they had not sold their shares, will be entitled to any positive difference between the withdrawal price and the price paid at the time of acceptance of the offer.

In the event the tender offer has the purpose of acquiring more than 1/3 of the free float or result on the acquisition of more than 1/3 of the free float, the rules established for delisting tender offer must be followed.

7.6. Investor Protection Rules

7.6.1. Disclosure by Publicly-Traded Companies

Publicly held companies must divulge quarterly financial statements (Informações Trimestrais - ITRs) and annual reports (Demonstrações Financeiras Padronizadas - DFP and Informações Anuais - IAN, which is equivalent to an SEC F-20 form).

The reporting company must also publish notices of certain facts (Fato Relevante) whenever any act of fact which may materially affect the trading of securities takes place.

7.6.2. Disclosure by Shareholders of Publicly-Traded Companies

Controlling shareholders, officers, and managers of a publicly-traded company must notify CVM and the stock exchange or Organized OTC where the securities of such company are traded whenever there is a 5% increase in their holdings of any class or type of shares in the company. The information to be furnished includes the number of shares purchased, the price at which the securities were acquired, the reasons and the objectives related to the acquisition and a statement by the purchaser regarding the existence of any agreement related to the exercise of voting right or to the transfer of securities issued by the company.

Non-controlling shareholders are required to inform to CVM and to disclose to the market whenever their direct or indirect participation in the voting capital of publicly-held companies increases by 10%. Such information must contain, at least, the identity of the acquirer, the purpose of the acquisition(s), the number of shares acquired, the total participation in the voting capital of the company, if the acquirer owns debentures convertible into voting shares and the existence of any agreement related to the exercise of voting rights or to the transfer of securities issued by the company. Thereafter, any increase of 5% in the voting capital must be equally informed and disclosed.

7.6.3. Market Manipulation and other Fraudulent Practices in the Securities Market

CVM rules also addresses (a) market manipulation, (b) creation of artificial demand, supply or price conditions, (c) adoption of unfair practices and (d) fraudulent transactions.

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Price Manipulation in the securities market is the use of any process or means to, directly or indirectly, increase, maintain or decrease prices of securities, inducing third parties to buy or sell such securities.

Artificial demand, supply or price conditions, in the securities market, are created by transactions in which the participants or broker, by willful misconduct or omission, alter, directly or indirectly, the flow of purchasing and selling orders.

Fraudulent transactions in the securities market are those transactions which use any mechanism or device intended to mislead third parties, aimed at obtaining illicit economic advantages for the parties involved in the transaction or for any other party.

Unfair practices, in the securities market, are those which result in an unfair dominant position of one party vis-à-vis the other market participants in the trading with securities

Breach of such rules is deemed a serious offense by CVM regulations, and may subject the participants to penalties ranging from admonition to 20-year suspension of the license to operate in the capital markets. Furthermore, an investor who is damaged by such prohibited conduct has the right to an indemnification for losses and damages suffered.

There have been few cases brought before the courts and, therefore, it is not possible to establish a definite trend of judicial interpretation with respect to market manipulation.

7.6.4. Insider Trading

“Insiders” are defined as controlling shareholders and managers (directors and officers) of the company. Pursuant to CVM rules, insiders may not use information relating to a material act or fact to which they had privileged access due to their position to obtain for themselves or other persons any advantage through the trading of securities.

Although not defined as insiders, the following persons are subject to the same restrictions: brokers, dealers and other members of the distribution system and whoever, due to his/her position or function or for any other reason, has knowledge of material information prior to its disclosure to the market. Family relationships are taken into account in determining insider status.

Insider trading is also considered a serious offense by CVM regulations, subjecting the participants to penalties. Furthermore, where an investor has been injured by insider trading in the purchase or sale of securities, such investor has the right to indemnification for the losses and damages suffered.

7.7. Money Laundering Law

Law No. 9,613 of March 3, 1998, provides for criminal offenses of money laundering or concealment of assets, rights and valuables (the “Money Laundering Law”).

The Money Laundering Law presents several obligations for legal entities engaged in the securities industry, including stock and commodities exchanges, Organized OTCs, banks, brokers, dealers, asset management companies, branches and representatives of foreign financial institutions.

The obligations imposed on such entities by the Money Laundering Law include: (a) to identify and maintain data on all clients; (b) to keep for a 5-year period a file on all transactions performed by such clients which exceed certain established limits; (c) to comply with all requests of the Financial Activities Controlling Council (“COAF”), as determined by the relevant courts; and (d) to develop and implement internal controlling systems to monitor and detect transactions which may constitute money laundering such as operations involving amounts not in consistency with the financial situation of the parties, tradings which repeatedly cause losses or profits to one of the involved parties and negotiations involving amounts substantially above market conditions.

7.8. Civil Remedies

7.8.1. Securities sold in Violation of the Registration and/or Prospectus Requirements

Where an investor has purchased a security which was sold in violation of the registration and/or prospectus requirements of the Securities Law, the following remedies are available: (i) an action for the recovery of damages based on the Corporations Law which may be commenced by the Office of the Public Prosecutor ex officio or upon the request of CVM; and (ii) an action for the recovery of damages based on Article 159 of the Brazilian Civil Code which may be commenced by a person who has been injured by any action or omission of an individual or company.

Investors may also recover damages against anyone who has been engaged in fraudulent transactions or transactions involving artificial conditions of demand, price manipulation or inequitable practices.

Derivative actions for misleading information or omissions may be brought against the issuer's administrators (directors and officers) based on Articles 155 and 157 of the Corporations Law. Any shareholder may initiate a derivative action if the board remains inactive for more than three months after a decision taken by the shareholders' meeting. Shareholders representing 5% or more of the company's capital may initiate a derivative action, despite a decision of the shareholders' meeting to the contrary.

Any investor may also sue issuers, underwriters and intermediaries if their concurrence in the act which inflicted damage on, such investor can be proven.

7.8.2. Insider Trading

Where an investor has been injured by insider trading in the purchase or sale of securities, the remedy available is an action based on. CVM Instruction No. 8 and Article 94, 158 e 159 of the Civil Code.

7.8.3. Fraudulent Brokerage Activities and Handling of Brokerage Accounts

7.8.3.1. Excessive or Unfair Profits or Commission

Where an investor has been injured by fraudulent brokerage practices in the purchase or sale of securities, such as the undertaking of excessive or unfair profits or commissions, the remedies available include an action for injuries based on Article 159 of the Civil Code or Articles 18 et. seq. of the Brazilian Consumer Protection Code. While actions under the Civil Code are nominally subject to a statute of limitations period of 20 years, actions under the Consumer Protection Code are normally subject to a period of 5 years.

7.8.3.2. Operating While Insolvent or Not in Sound Financial Condition and Other Losses Caused by Intermediaries

If an investor has been injured by a broker who was operating while insolvent or otherwise not in sound financial condition and other losses caused by intermediaries, the remedies available include an ordinary action under Article 159 of the Civil Code.

7.8.4. Class Actions

Class actions in Brazil are restricted to environmental matters and certain other specific situations which do not include securities matters. However, the Public Prosecutor may commence actions on behalf of and for the benefit of investors under Law No. 7913.

7.8.5. Waiver of Rights

Investors acquiring a security may, in principle, waive their rights under the securities laws, rules and regulations. However, such waivers may be disregarded by a judge if not conspicuously communicated to investors or if such waiver is deemed to contravene fundamental principles of investor protection. Consumer protection provisions are considered a matter of public order and, accordingly, nominally may not be

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waived. For the same reasons, private agreements will not preclude actions brought by CVM or any stock exchange.

7.8.6. Procedural Requirements

7.8.6.1. Jurisdiction

The state courts generally have jurisdiction over civil suits seeking a remedy for a securities violation. The statutory basis of jurisdiction is found in the Brazilian Code of Civil Procedure.

7.8.6.2. Venue

Except as otherwise provided by the parties, the courts of the domicile of the defendant are competent to hear any case.

7.8.6.3. Statute of Limitations on Actions and When It Begins to Run

Under Article 177 of the Brazilian Civil Code an action in personam (against a person involving personal rights) is subject to a 20-year statute, of limitation and an action in rem (against, property) to a period of 10 years. There are various exceptions to this basic rule.

8. TAX SYSTEM

8.1. General Features

8.1.1. The current Federal Constitution, which was promulgated on October 5, 1988, allocates taxing power between the Union, the States and Municipalities, granting unto each of them the power to levy tributes.

8.1.2. Tributes in Brazil are divided into taxes, betterment fees, social contributions, other contributions and compulsory loans. Each level of government is allotted specific taxes which are listed in the Constitution.

8.1.3. Fees are levied based on police power (regulatory fees) or they are the counterpart of specific and divisible public services actually rendered or made available to the citizens (service fees).

8.1.4. Betterment fees (which are not commonly levied) are collected from the owners of real state that benefits from public works.

8.1.5. Contributions can only be levied by the Federal government. These contributions are: (a) social contributions; (b) to intervene in the economic domain, (c) in the interest of professional or economic categories and (d) to finance social security.

8.1.6. Compulsory loans can also be levied, but only by the Federal government. Compulsory loans can only be collected in case of urgent public investment and in case of relevant national interest or to defray extraordinary expenses resulting from public calamity, war or imminence thereof.

8.1.7. Unless otherwise expressly specified in the Constitution, the creation and collection of tributes must obey some fundamental constitutional rules, among which deserve to be mentioned:

- the rule of legality - (in accordance with which a tribute may only be levied or have its rate increased by a law voted by Congress);
- the rule of equality - (in accordance with which taxpayers who are in an equivalent situation must be treated on the same footing taxwise);
- the rule of irretroactivity - (in accordance with which tributes cannot be levied on events that occurred before enactment of the law that created new tributes or increased the rates or base of computation of existing ones.
- the rule of previousness - (in accordance with which tributes cannot be collected in the same fiscal year in which the law that created them or increased their rates was published);
- the rule of non-confiscation - (in accordance with which tributes cannot be confiscatory).

8.2. Federal Taxes

The following taxes may only be levied by the Federal government: Import duties; Export duties; Income and capital gains tax; Tax on industrialized goods; Tax on credit and exchange transactions, on insurance and on securities; Tax on rural land and Tax on large fortunes.

8.2.1. Income Tax:

(a) Income tax is assessed on income and capital gains earned by resident individuals from domestic or foreign sources at the rates of 15% and 25% (depending on the level of income); corporate income tax is assessed on profits and capital gains generated by operations carried out within Brazil or abroad.

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(b) corporate income tax is normally assessed on net profits generated by operations carried out by the company. Taxable income is equal to net profits (ascertained in quarterly or annual balance sheets) adjusted by additions and deductions set forth in income tax legislation.

(c) Corporations required to calculate their income tax on net profits adjusted by additions and deductions set forth in income tax legislation may opt to estimate it in accordance with special rules set forth in income tax law.

(d) Current corporate income tax rate is 15% regardless of the corporation's business. There is a 10% supplementary tax on the portion of net profits which exceeds R\$ 20.000,00 per month.

(e) Dividends based on profits ascertained as of January 1, 1996 paid out or credited by corporations are no longer subject to income tax (either at the source or as part of the taxpayer's return), whether paid out to individuals or corporations domiciled in Brazil or abroad.

(f) Withholding income tax (IRF) is imposed on income paid, credited, remitted or delivered to non-residents, at the rate of 15% or 25% according to the nature of the income (as of 01.01.2001, a regulatory fee will be also imposed on the remittances of royalties or any compensation deriving from transfer of technology, at the rate of 10%, cases in which the withholding income tax rate is 15%). As noted above, dividends are not taxed.

(g) As of January 1, 1997 a number of rules were introduced in income tax law to regulate transfer pricing in deals carried out by resident individuals or corporations with non-resident parties regarding importation and exportation, and payment of interest abroad. These rules apply to deals which involve the following situations: (i) a domiciled corporation that carries out business with non-domiciled related parties; (ii) a domiciled individual or corporation which carries out business with a related or unrelated party domiciled in a country where income tax is assessed at a rate lower than 20% or non-existent.

8.2.2. The tax on industrialized goods (IPI) is levied on the output and on the importation of industrialized goods. IPI is a value-added tax; the amount of tax due may be off- set by the credits arising from the tax imposed on the purchase of raw materials, intermediary products and packaging materials. However, such mechanism is not applicable to credits related to fixed assets. Rates are assessed on the value of industrialized goods as they are imported or output from domestic plants, and vary in accordance with the nature of goods; the average rate is 10% which may be increased or lowered by the tax administration. IPI is not levied on exports.

8.2.3. The Tax on credit and exchange transactions, insurance and securities (IOF) is assessed on the amount of bank loans and similar transactions, on the amount of foreign currency purchased or sold, on insurance premiums and the price of securities sold or purchased. The Tax rate depends on the kind of the operation.

8.2.4. The Tax on large fortunes (IGF) has not been created yet.

8.3. State and the Federal District Taxes

States and the Federal District are allocated the following taxes:

- inheritance and gifts tax (ITD);
- tax on transactions related to the circulation of goods, interstate and intermunicipal transportation, and on communication (ICMS);
- tax on the ownership of motor vehicles (IPVA);

8.3.1. ICMS is the main State tax and is imposed on operations regarding the circulation of goods, including importation, and on interstate and intermunicipal transportation and on communications services. ICMS is a value-added tax which allows the taxpayer to record input tax credits from the ICMS paid on the purchase of raw materials, intermediary products, packaging materials. Credits related to fixed assets are admitted

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with restrictions. Interstate rates vary from 7% to 25% (average rates are 18% for RJ, SP, MG and RS and 17% for other states and DF); in interstate operations applicable rates are 7% or 12% depending on destination. ICMS is not levied on exports.

8.4. Municipal Taxes

8.4.1. Municipalities and the Federal District are granted the following taxes:

- urban property tax (IPTU);
- tax on disposal of real state (ITBI);
- services tax (ISS)

8.4.2. ISS is levied on the rendering of certain services listed in federal law. As a rule, the average rate is 5%.

8.5. Social Contributions

8.5.1. The Federal government may levy the following social contributions to fund social programs:

- Contribution for the Social Integration Program - PIS (it is levied monthly on the gross operational revenue of corporations at the rate of 0,65%;

- Social contribution on corporate profits - CSL (it is levied on profits before income tax ascertained in accordance with commercial law, adjusted as set forth in the law); current rate is 8%; however, until December 31, 2002, there is an additional of 1% over this rate, adding up to 9%.

- Social security contribution - COFINS (it is levied monthly on the gross income from the sale of goods and services; current rate is 3%).

- Social security contribution on payroll - CINSS (employees are subject to it at the rates of 8% and 10%, self-employed workers pay 20%; in both cases the basis for computation of this Contribution is limited to 10 minimum wages. Corporations pay it at the rate of 20% on payments made to individuals for services rendered with no ceiling).

- The Provisional Contribution on Financial Operations (CPMF) was established in accordance with Constitutional Amendment no. 3/93 is collected as from January 1997 to January 1999 and was extended to June 2002 by Constitutional Amendment no. 21/99. The rate is 0,3%.

9. ANTI-TRUST LEGISLATION

For almost thirty years, Brazil had an antitrust law that although greatly inspired by the U.S. regulatory model was in fact inoperative. The mechanisms created to enforce Law no. 4,137, of September 10, 1962, were swept in the bureaucratic system of the government.

In 1990 and 1991, however, Laws nos. 8,002 and 8,158 helped to focus on a new set of issues such as the establishment of a new economic order, as well as the protection of free competition and of the consumers' rights. It was in this scenario that Law no. 8,884 was enacted on June 11, 1994.

The powers of the antitrust enforcement agency CADE (Administrative Council of the Economic Defense), formed in 1962, were strengthened. As a government agency under the Ministry of Justice, CADE is now better equipped to carry out its constitutional duties. CADE, assisted by the Secretary of Economic (SDE) and the Secretary of Economical Follow-up (SEAE) Law of the same Ministry of Justice, exerts its powers on behalf of the community, and as such considers to have jurisdiction over any acts performed outside the country which may have any consequences in Brazil. The Law deems it a domestic company any foreign company which has any subsidiary, branch, agency, office, representative or the like in Brazil (article 2, § 1º, modified by Law no. 10.149, dated 21/12/00). Therefore, as provided in § 2º of the same article, the foreign company shall be notified of all procedural acts, independently of any power of attorney or any contractual or statutory provisions, in the person responsible for its branch, agency, subsidiary or any other establishment in Brazil.

Law no. 8,884/94 specifically states these authorities' jurisdiction over any and all individuals and legal entities, whether public or private, organizations and joint ventures, including those of a temporary nature, or without legal personality. The new antitrust Law also sets forth the instances where there will be individual liability of the officers, severally or jointly with the company itself. In addition, Section 18 admits, under limited circumstances, the theory of disregard of the legal entity (piercing the corporate veil).

Among those acts contrary to the economic order and therefore prohibited by the antitrust law are, for instance, to limit or impair any free competition; to control any relevant market of goods and services; arbitrary increase of profits and the abusive exercise of economic power. Furthermore, the following acts are contrary to the Brazilian legal system now in force: any price fixing agreements between competitors; market sharing covenants; any obstacles created to new competitors attempting to enter the market; dumping; restraints on the trade of certain goods to increase prices; and fixing of any excessive prices. The Law also lists at least twenty-four different kinds of infringement to be carefully examined, whenever considering any business association or combination of efforts. The penalties can be, based on the nature of the infringement, the number of times it has occurred, and the economic situation of the infringer. They may reach thirty percent of the company's total gross sales in the preceding year, together with fines ranging from 10% to 50% of the amount of the transactions, that can be charged in double in case of recurrence. Moreover, it is worth mentioning that there are other penalties which could be imposed such as prohibition to do business, to enter contracts or request fiscal or legal incentives from government-owned companies.

The unexcused non appearance of the defendant or third parties, when notified to render oral explanations, in the course of preliminary investigations or of administrative procedures, shall subject the absentee to a fine from R\$ 500,00 (five hundred reais) to 10.700,00, (ten thousand and seven hundred reais), taking into consideration his financial situation (article 26, § 5º, wording given by Law no. 10.149/2000). Moreover, the defendant may be subject to a penalty from R\$ 21.200,00 (twenty-one thousand and two hundred reais) to R\$ 425.700,00, (four hundred and twenty five thousand and seven hundred reais), taking into consideration his financial situation, in case he may impede, obstruct or in any other way raise difficulties to the accomplishment of any investigation, be it in the administrative procedure or in its preliminary phase (article 26 - A, introduced by Law no. 10.149/2000).

Another innovation created by Law no. 10.149/2000, relating to the above mentioned penalties, is the possibility to obtain and execute a lenient settlement with authorities, through which individuals or the legal entities responsible for the violation to the economic order will be exonerated from any punitive action by the public administration or at least obtain a reduction from one to two thirds of applicable fine, should they decide to collaborate with the investigations and the administrative procedure (article 35-B).

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We should also note that CADE, SDE and SEAE procedures may be initiated based on any third-party claim. CADE's decisions are, from an administrative standpoint, unappealable, which means that the aggrieved party may refer only to the judiciary power if it wishes to pursue further legal actions.

Law no. 8.884/94 also provides for the obligation to submit to CADE's approval any transactions that may hinder any free competition or result in dominance of a certain market. Submission may be effected prior to completion of the transaction or within a maximum term of 15 (fifteen) working days immediately thereafter (from January 1st the fee shall be R\$ 45.000,00)². CADE's prior approval is usually preferable if we take into account the complexities and undesirable consequences of an "a posteriori" submission, including a potential unwind of an action or series of actions already implemented.

It is important to note that, for article 54 purposes, one must consider acts that may prejudice free competition or result in market domination, and so must be submitted to CADE for approval, the amalgamation of companies or group of companies resulting in a market share of over twenty percent, or if any of its participants has registered an annual gross invoicing equivalent to R\$ 400.000,00³ (four hundred thousand reais).

Article 54 evidences that many acts of amalgamation may be approved, once certain circumstances of fact and law are duly justified (increase of productivity, better quality, technology improvement, no direct damage to the existing competition, and above all, clear benefits to consumers as a result of price reduction). At last, CADE may condition its consent to certain undertakings by the interested parties which shall otherwise incur penalties for non-compliance.

On August 19, 1998, CADE issued Resolution no. 15, which details the information and documents required to be attached to an application, be it made before or after the judicial act. The list of required data is very comprehensive and may present some difficulties to the submitting party, since some documents refer to international levels.

On its final part, Law no. 8884/94 provides for, under certain circumstances, the possibility of taking over violating companies, by means of a judicial order, and thereafter nominating an intervenor to manage them.

At last, we wish to point out the existence of a draft law, which foresees the creation of the National Agency of Consumers and Competition Defense (ANC), which shall substitute CADE, SDE and SEAE. The main changes suggested by this draft law, which shall still be approved by the National Congress, are the following: (a) the general director of ANC shall have powers to take decisions without submitting them to the Competition Court (CADE's substitute), (b) there shall be a reduction in relation to the level of companies's invoicing obliging them to submit any acts to CADE's consent, from annual R\$ 400.000.000,00 (four hundred million reais) to annual R\$ 150.000.000,00 (one hundred and fifty million reais), (c) the term for acts presentation to CADE shall be reduced.

² Article 3º of Law 10.149/2000

³ Article 53, § 3º, of Law 10.149/2000

10. LABOR LAW IN BRAZIL

Labor Law in Brazil was influenced by transformations in Europe, the various countries concern in creating law to protect workers, and particularly the commitment made by the country with the International Work Organization, which combined with important domestic factors - such as the government labor policy and the industrial upsurge - triggered the creation of a series of laws.

Only in 1943, the Consolidation of the Brazilian Labor Laws (CLT) was created to group the few laws existing at that time in addition to the institutes developed by legal scholars.

The Consolidation of the Brazilian Labor Laws (CLT), the primary legal system that rules labor relationships, accounts for more than 900 articles.

Among the chapters forming this system there are important norms relating to:

Labor Safety General Norms,
Working Hours Duration, Minimal Salary and Vacations Norms,
Medicine and Occupational Safety Norms,
Special Work Tutorship Norms,
Work Nationalization Norms,
Woman Work Protection Norms,
Underage Work Protection Norms,
Individual Employment Contract Norms,
Workers 'Union and Trade Association Norms and Classification,
Workers' Union and Trade Association Contribution Norms.

Besides, the CLT has the whole legal system concerning Labor Court, such as applications and related agencies, also stating the norms that rule labor proceedings in Brazil.

Although the CLT was enacted in 1943, with the passing of time the Brazilian legal system was modernized with the creation of a number of laws ruling certain issues such as the Law concerning Strikes, or the laws that brought new wording to CLT's articles.

With the enactment of the Federal Constitution in 1988, in addition to the labor norms duly consolidated, new labor rights were created or improved in the body of the final version.

The labor rights provided for by labor laws stemming from either the CLT, specific laws or from the Federal Constitution are the following:

- (1) minimal salary;
- (2) 44-hour weekly working hours;
- (3) salaries not decreased;
- (4) unemployment insurance;
- (5) 13th salary;
- (6) profit sharing;
- (7) additional pay for overtime;
- (8) annual vacations;
- (9) maternity leave;
- (10) paternity leave;
- (11) prior notice;
- (12) retirement;
- (13) approval of collective norms;
- (14) employment-related accident insurance;
- (15) Workers ' Compensation Fund;
- (16) right to strike;
- (17) provisional tenure for members of Internal Commission for Accident Prevention, employees victims of employment-related accident and the pregnant employee;
- (18) tips;

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- (19) commission;
- (20) family allowance;
- (21) education allowance;
- (22) transport pass;
- (23) food pass;
- (24) children's aid;
- (25) unhealth premium;
- (26) risk premium;
- (27) night premium;
- (28) transference premium;
- (29) funeral aid;
- (30) weekly paid rest;
- (31) unemployment insurance;
- (32) signed social card.

Finally it is important to emphasize other sources of law existing and which are respected by the Brazilian legal system.

- (a) Collective Bargaining and Collective Labor Agreements;
- (b) Superior Labor Court Jurisprudence Statements;
- (c) Norms issued by the Ministry of Labor; and
- (d) some Agreements developed by the International Employment Organization.

As a consequence of the high cost borne by companies related to the so-called labor charges, the number of companies adopting outsourcing and the flexibilization of labor rights resulting Collective Bargaining/Agreement grew substantially.

There is a clear tendency in recent decisions rendered by the Superior Labor Court towards accepting flexibility as an important fact in the current phase of development of employment relationships.

In fact, Brazil has been undergoing an important historic moment where large changes are expected to occur.

11. FOREIGN WORK IN BRAZIL

The Ministry of Labor, through the Immigration General Coordination (CGI), has the specific competence of being responsible for the work authorization for foreign nationals, to issue a concession of visas, according to the Law NR. 6.815 dated of 19 August of 1980.

There are different sorts of visas defined by the Brazilian Laws, whose eligibility depends on each specific situation and purpose of the trip. Therefore, not all of them allow foreigners to work in Brazil. Generally, there are no restrictions about the nationality of the applicant and spouse or children under 21 years old.

The law establishes 7 (seven) categories of visas:

- Transit
- Tourist
- Temporary
- Permanent
- Courtesy
- Official and
- Diplomat

The most commonly used types of visas are the tourist, temporary and permanent visas.

11.1. Visas for Short-Term Business Visitors and Tourists

Persons from some countries will require a visa to travel to Brazil on short-term business or for tourism. Business visitors or tourists traveling on these types of visas must not work or render any kind of technical assistance, nor receive remuneration for services from any source in Brazil.

The Business visa may be obtained at the Brazilian Consulate having jurisdiction over the place of residence of the applicant, and the application generally consists of the following:

- Letter from the company that is requesting the business trips (either the foreign or the Brazilian company) stating the following:
 - The purpose of the trip
 - Names, addresses and telephone numbers of business contacts in Brazil
 - Date of arrival and anticipated departure
 - Guarantee of financial and moral responsibility for the applicant for the duration of the visit

The Business visa allows the foreigner to participate in meetings, conferences, fairs, and seminars, to visit potential clients, to research the market and to perform similar activities. Foreigners holding this visa shall not work in Brazil, subject to the application of a fine to the company employing foreigners bearer of the inappropriate visa, as well as to deportation of the foreigner.

Tourists' visa applications usually only requires a round-trip airline ticket. This type of visa only supports tourism purpose trips, subjecting the company that employs foreigners holding this visa to the application of a fine and to the deportation of the foreigner.

If a visa is required for the country to which the applicant is going after Brazil, that visa must already be included in the passport, prior to requesting the Brazilian visa.

The visa is generally issued within 24 hours. This type of visa may be valid for a period up to 90 (ninety) days from the date of first arrival in Brazil. It may be utilized for multiple entries during that period. An extension for a further period up to three months may be obtained from the Immigration Authorities in

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Brazil, prior to expiration of the visa. In any case, the foreigner may only remain in the country for 180 days within a 365-day period (not calendar year).

11.2. Temporary Work Visas

For persons coming to Brazil on a temporary basis for working purposes, there are other categories of visas:

(1) **Professionals.** This visa is eligible to individuals coming to Brazil to work for a temporary period no longer than 2 years initially, and may be renewed for an additional 2 year period. This type of visa is available to foreign nationals who will be temporarily employed at a Brazilian company in a position requiring special knowledge. The candidate shall receive at least part of his/her salary in Brazil. This type of visa will also require proof that the candidate has at least a 2 year experience in the activity he/she will perform in Brazil, if he/she has a college degree, or 3 year experience if he/she does not have a college degree. The company shall present also information regarding the Brazilian company's salary structure, as well as regarding the candidate's salary abroad and in Brazil, which shall be approximately 25% higher than his/her last salary abroad.

(2) **Technicians.** This visa is eligible to individuals coming to Brazil to render technical assistance according to a Technical Assistance Agreement executed by a foreign company and a Brazilian company. This Agreement shall be registered before the INPI - Industrial Property National Institute prior to the visa applications. In this case, the technicians shall not be employed by the Brazilian company and shall receive his/her entire remuneration exclusively from a source abroad,

(3) **Artist and Sports persons.** The request for this visa must be submitted to the Brazilian Labor Ministry by the Brazilian organization, which is sponsoring the event for which the individual's services will be required. Visa application requires information about the event and respective labor contract.

(4) **Foreign Journalist.** This visa is eligible for foreign journalist working on a temporary basis in Brazil as the correspondent of a foreign communication company, which will support the visa application. The candidate must not receive his/her salary in Brazil.

(5) **Crew Members under charter, service rendering contracts and lease agreements.** Visa application requires authorization of the ship to operate under national waters, and report from the Marine Department. Copy of the respective contract. Part of the crew shall be Brazilian nationals

(6) **Research Scientists:** This visa is eligible to foreign professors, technicians, scientists and researchers that intend to perform its activities in a public or private school or university or a research entity. A letter of support from the entity who is sponsoring the visa will be required upon application. Visa application requires Admission Term or Labor Contract with the school, university or research entity

The applicant for any of these types of visa shall previously obtain a Work Authorization from the Brazilian authorities. It is an administrative act, which comes under the competence of the Ministry of Labor, as an exigency of the Brazilian Consular Authorities, according to the national legislation, to obtain a concession of permanent and/or temporary visas, for foreign nationals wishing to work in Brazil. Upon approval, the work authorization shall be published on the Federal Official Gazette, and the designated Consulate shall be notified, so that the foreign national may apply for the visa issuance.

11.3 Other Temporary Visas

The visas listed below do not allow its bearer to work in Brazil or receive any remuneration from a Brazilian source:

(1) **Mission of Studies and Religious Mission:** The candidate must not receive any compensation in Brazil. This visa may be granted to religious persons for specific mission in Brazil for up to one year.

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(2) **Student.** This visa is obtained by students at the Brazilian Consulate having jurisdiction over the place of residence of the applicant. The student must not work or receive any compensation in Brazil. Foreign students under exchange program are required to present documents from the school and foreign exchange students program.

(3) **Trainees.** This visa is eligible to foreigners who intend to come to Brazil for a trainee program during the 12 month period after graduation, with no labor relation to any Brazilian entity. Visa application requires proof of graduation within the last 12 months, as well as proof that any kind of remuneration shall be paid exclusively from abroad. This visa may be granted for a maximum period of 1 year.

(4) **Internship Programs.** This visa is eligible to foreign individuals admitted to an internship program, including employees of foreign companies in internship program in the Brazilian subsidiary, with no labor relation to any Brazilian entity. Visa application requires Commitment Term executed between the intern, the Brazilian institution and responsible control entity. This visa may be granted for a maximum period of 1 year.

(5) **Health Treatment.** This visa is eligible to foreign individuals who intend to come to Brazil for health treatment purposes. Visa application requires medical recommendation and proof of the means for payment of the health treatment

11.4. Permanent Employment Visa

The Permanent visa may be issued, basically, under two circumstances: (i) family relation to a Brazilian national (marriage, children); or (ii) appointment to the representation and managing position of a Brazilian company (Statutory Director).

In case the candidate is married to a Brazilian citizen or has a Brazilian child he/she shall be eligible for applying for a permanent visa at the Brazilian Consulate abroad, before coming into the country, or at the Ministry of Justice if the candidate is already in the country. In this case, the candidate shall be allowed to work in Brazil.

The permanent visa may also be issued in the case of a foreign company that has a branch or subsidiary in Brazil, and wishes to transfer a statutory director or manager to the Brazilian company. Therefore, individuals who will be permanently transferred to Brazil to work for a subsidiary or branch of a foreign-owned company in the capacity of director or manager may apply for a permanent employment visa. To apply for a permanent visa for its director or manager, the company must have, at least, US\$ 200,000 invested in Brazil and registered within Central Bank of Brazil.

In addition, persons who have been employed in Brazil in a temporary capacity (regardless of whether the company is Brazilian or foreign owned) for a period of four years, may apply to convert their status to permanent. To obtain permanent employment authorization for an individual working in Brazil on a temporary basis for four years, application must first be made to the Ministry of Justice at least 30 (thirty) days prior to the completion of the four year term.

11.5. Registration upon Entry into Brazil

All foreign who enter in Brazil holding a Temporary Work visa or a Permanent visa must register with the Federal Police/Ministry of Justice and obtain the foreigners ID card within 30 (thirty) days of arriving in Brazil. This rule applies only to alien residents in Brazil, immigrants, and temporary residents coming for employment. Artists, sportspersons, tourists or short-term businesspersons are not required to register.

Temporary work visa and permanent visa holders shall also register before the taxpayer registry office (Federal Revenue) for taxation purposes, provided that the worldwide remuneration shall be taxed according to the Brazilian tax legislation. Upon definitive exit from Brazil and repatriation, the foreigner shall present to the Federal Revenue the so-called "Declaration of Final Departure" and request the cancellation of the taxpayer registration in order to cease levy on the individual remuneration.

Furthermore, professionals employed by a Brazilian company shall also obtain the so-called "Labor Card" in order to comply with Brazilian labor legislation.

<http://www.braziltradenet.gov.br>

11.6. Travel in Advance of Permanent or Temporary Employment

Persons needing to conduct business in Brazil prior to obtaining employment authorization and the appropriate visa, may do so by obtaining a short-term business visa. However, they shall not work in Brazil or receive any remuneration locally until the employment authorization and visa are issued. Furthermore, the individual must obtain the permanent or temporary visa outside of Brazil.

11.7. Employment of Spouses/Children

Accompanying spouses and children are allowed to remain in the country as a dependent of the visa holder for as long as his/her visa is valid. However, spouses and children are not permitted to engage in employment or any work activity while residing temporarily in Brazil, but they shall be authorized for employment if converted to permanent resident status.

12. ACQUISITION OF REAL ESTATE IN BRAZIL

12.1. Introduction

Under Brazilian law, questions relating to property are governed by the law of the place where the property is located. Thus, issues regarding real estate property situated in Brazil are governed primarily by the Brazilian Civil Code (“BCC”).

Pursuant to the Brazilian Civil Code, assets are divided into two broad categories: movable and immovable. Movable are those assets which can be moved by external forces or by themselves, without causing their own destruction or devaluation.

Immovable assets are those which are by nature immovable or fixed in the land, and can not be partially or totally removed without causing their own destruction or devaluation. The category of immovable property comprises land together with its surface, and all things attached to or forming part of the land, the air space above the land and the subsoil, except for the mines and products from the subsoil, as well as waterfalls, which constitute, for the purposes of exploitation and usage, separate assets from the land. In this sense, according to the Brazilian Federal Constitution (“Federal Constitution”), the exploitation of mineral resources and hydroelectric power requires federal authorization or license. Some assets, however physically movable, are considered immovable by the law, by reason of the use to which they are put by the owner, i.e., industrial machines and equipments. Likewise, property rights are also treated as immovable property, such as rights *in rem* over immovable property, government stock incorporating an inalienability clause, and the right of an heir to inherit property.

Foreigners individuals or foreign-owned companies can acquire real estate property in Brazil in the same conditions applied to national individuals or companies. However, special conditions may apply to foreigners or to foreign-owned companies, referring to the purchase of property located near the coast or frontiers or certain specific areas designated as being of national security. Rural areas can be acquired by foreigners or foreign-owned companies, according to specific law dispositions, which will be discussed in item 3.2. Foreigners or foreign-owned companies can also acquire rights *in rem* related to immovable property.

12.2. Possession and Ownership

With respect to real estate properties, two broad categories of rights emerge: the right of possession and the right of ownership:

(i) The right of possession is a personal right to exercise certain powers of ownership such as: the right to claim, maintain or recover the possession of property; the right to receive its fruits (including rents and other income from the property), the right to be indemnified for necessary improvements carried out, and the right to retain the object.

The possession of property is forfeited by abandonment, by transference, by the loss or destruction of the property, by its becoming ineligible for purchase or sale, by a third party taking possession of the property, by the non institution, in due time, by the possessor, of the applicable claim to maintain or reinstate the possession, and by *constituto possessorio*.

(ii) The right of ownership is the most important of all property rights and is defined by the Brazilian Civil Code as the right of an individual to use, enjoy and dispose of his goods, and to recover them from whoever may have taken possession of them unlawfully. It is an absolute and exclusive right, which may, however, belong to several persons at the same time, in relation to the same property, as in a co-ownership or *condominium*, which is when each of the co-owners of an asset has all the property rights in relation to an ideal part of such asset.

The right of ownership may be restricted in view of public interest or in respect for the property rights of third parties, as in the following situations: **(i)** the expropriation of real estate properties by the government (ownership of private property is transferred to the expropriating authority against payment of an indemnity); **(ii)** the restrictions relating to the division of urban land as, for example, those restrictions to buildings construction, establishing of industrial plants in critical pollution zones, etc, imposed by the law of the

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municipality where the property is located; **(iii)** the restrictions imposed in the interest of national security, such as the restrictions on the sale of private land in the coast or within 150 kilometers of the national frontier; and **(iv)** the restrictions to the right of the proprietor to freely dispose of his goods, arising from the status of insolvency, bankruptcy or “*concordata*” of the proprietor, in order to protect the creditor’s rights.

12.3. Acquisition and Loss of Ownership

12.3.1. General Provisions

According to Brazilian law, ownership of real estate property is constituted upon the registration of the public or private instrument through which the sale was accomplished at the appropriate Real Estate Registry of the location where the property is situated. The execution of an instrument involving real estate property that was not registered at the respective Real Estate Registry will only become a binding instrument between the parties involved in the sale agreement and, thus, will not be enforceable against third parties. Real estate property is acquired by the registration of the act which have transferred the property, due to any cause, such as: **(i)** by the sale and purchase agreement signed by the parties; **(ii)** by accession (which is the enlargement of the land caused by the incorporation of parcel of the soil, dislocated by natural forces); **(iii)** by prescription (which is the acquisition of ownership by the possessor who, although not being the owner, has had the possession of the property during a certain period of time, stipulated by law); and **(iv)** by inheritance.

Likewise, any act which modifies, extinguishes, transmit or create rights related to immovable properties must be registered with the competent Real Estate Registry, such as: **(i)** court orders by which undivided land is divided among different owners; **(ii)** court orders in the winding-up of an estate of a deceased person or the division of property, awarding immovable property to creditors in payment of the debt of the estate; **(iii)** public auctions and adjudications; and **(iv)** orders of separation, divorce and nullity which involves the settlement of property or rights *in rem* related to immovable properties.

The main grounds for extinguishing real estate ownership are: **(i)** expropriation, which is the unilateral act of public law by which individual ownership is transferred to the relevant government authority, upon payment of fair compensation by said authority, due to public interest; **(ii)** transfer; **(iii)** waiver (for example, when the heir renounces his rights of inheritance); and **(iv)** abandonment or destruction of the property.

12.3.2. Acquisition of Rural Property by Foreign Person or Foreign Legal Entity

The acquisition of rural property by foreigners who have permanent residence in Brazil or by foreign companies authorized to operate in Brazil is regulated by Law No. 5.709 (“Law No. 5.709/72”). This law provides that individual foreigners with residence in Brazil cannot acquire more than an area equivalent to 50 (fifty) units of rural property called “*módulos rurais*”. The area of each “*módulo rural*” is determined by the law of the unit of the Federation where the land is located, according to the specific economics and environmental characteristics of the region where the property is situated and to the kind of agricultural activity to be developed in such area. Foreigners who do not have permanent residence in Brazil cannot acquire rural properties in Brazil, except if such acquisition is due to inheritance rights. On the other hand, the restrictions to the acquisition of rural properties by Brazilian companies with foreign equity control are now being questioned because of the 1995 amendment to the Federal Constitution which removed the distinction between Brazilian companies and Brazilian companies with foreign equity control. However, the restrictions on foreign individuals and foreign corporate entities authorized to operate in Brazil remain in force.

According to Law No. 5.709/72 foreign companies can only acquire rural property if the purpose is the implementation of agricultural, cattle-raising, industrialization or colonization projects, and that such projects must be linked to their respective statutes. Such projects must be approved by either the Brazilian Agriculture Ministry or the Department of Trade and Industry, as the case may be. The President of Brazil may, upon specific decree, authorize the acquisition of rural property beyond the provisions of the current law, in cases where such property is the object of priority projects involving the country’s development plans.

12.3.3. General Remarks and Requirements Upon Purchase

The acquisition of a real estate property in Brazil due to *inter vivos* transactions is generally agreed between the purchaser and the seller by means of a sale agreement. If a property is acquired by a single buyer (not in a *condominium* situation), then the buyer has absolute title to that area of ground. In case of multiple ownership (as it is the case of condominium), each owner can exercise all the rights of ownership, except those incompatible with the indivisibility of the property (for example, the property can not be sold without the approval of all owners, and the price paid must be divided among them).

Besides the specific requirements related to transactions involving immovable property, Brazilian law requires, as for any other type of contract, that the parties of a sale and purchase contract be capable to perform such a transaction. They must have full legal age (majority), be mentally healthy, or, if not capable, they must be duly represented to perform such a transaction.

12.4. Taxation

12.4.1. Inter-Vivos Transfer Tax - ITBI

Inter-Vivos Transfer Tax ("ITBI") is a tax assessed by the municipalities which is due when real estate property or rights *in rem* to any real estate property (except those in guarantee), and also assignment of rights for the acquisition of property is transferred, for any reason whatsoever, and on a remunerated basis. For example, the rate established to the Municipality of São Paulo, according to São Paulo Municipal Law No. 11.154, varies from 2% to 6%, depending on the property's value.

ITBI is not assessed when the transfer of real estate property or rights to any such property takes place to pay up the capital of a company or when resulting from any merger, consolidation, spin-off or liquidation of the legal entity, except if in any of the above mentioned cases, the acquirer's chief activity is the purchase and sale of such assets and rights, lease or commercial lease of real estate property.

12.5. Real Estate Investment Funds - Financial Instrument

Real Estate Investment Funds were established to provide funds for developing real estate ventures for subsequent sale, letting or leasing. The Brazilian Securities Exchange Commission must authorize, regulate and inspect Real Estate Investment Funds operations and administration.

Property Investment funds are currently being used for the purposes of raising funds for the construction of several Shopping Centers throughout Brazil. Previously, pension funds were direct investors of real estate projects but currently they are investing indirectly, by purchasing shares of property investment funds.

Both individuals and corporations resident or domiciled abroad are entitled to acquire such shares, provided that the funds resulting from the investment are duly registered with the Central Bank of Brazil, thereby enabling the return abroad of the respective investment and the gains resulting therefrom. Capital gains resulting from investments on property investment funds are subject to withholding tax (IR) at a rate of up to 20% upon disposal or drawing of Real Estate Investment Funds quotas.

13. ENVIRONMENTAL LAW IN BRAZIL

13.1. Constitutional Basis

Environmental protection in Brazil is foreseen in the Federal Constitution, Article 225, which states that “every person has the right to an ecologically well-balanced environment.”

The federal, state and municipal governments have competence on environmental matters in Brazil. The common material competence to protect the environment, combat pollution and preserve forests, animal and plant life is established in Article 23 of the Constitution.

The competence to legislate on environmental matters in Brazil is established by Article 24 of the Constitution. It sets forth the concurrent legislative competence of the federal government, the states and Federal District. The federal government is competent to issue general rules and the states and the Federal District have complementary legislative competence.

Therefore, the states and Federal District can legislate on environmental protection aspects through specific laws and take measures to apply federal environmental laws.

In the absence of a general federal law, the states and the Federal District have full legislative competence. The supervenience of a general federal law suspends the effects of state law in case of a discrepancy since these must not oppose federal laws.

On the other hand, in cases where general federal law already exists, states, Federal District and municipalities only have competence to supplement the federal law.

Municipalities only have competence to supplement federal and state legislation if they have local interest. This means that the municipalities cannot abolish the federal and state requirements, but can demand additional measures focusing on local interest.

In short, the states and the Federal District are allowed to create more severe laws than those established by the federal government. Municipalities, despite not being able to legislate on environmental protection, are entitled to issue supplementary laws and rules establishing penalties to polluters.

There are many laws regarding the environment under constitutional provisions. Federal Law 6.938/81, which established the National Environmental Policy in Brazil, is the most important law on this matter, bringing many legal instruments, such as: environmental standards; environmental zoning; environmental licensing, environmental impact evaluation, among others.

Considering that the environmental licensing process may cause delay or block the establishment and operation of a new enterprise, the environmental licensing is the first legal instrument that we will comment on.

13.2. Licensing of effectively or potentially polluting activities

Environmental licensing is an administrative process through the competent environmental body that grants licenses for the location/design, construction (or expansion) and operation of undertakings and activities which use environmental resources considered effective or potential polluters, and enterprises which may cause environmental damages, according to Article 10 of Federal Law no 6.938/81.

In the environmental licenses, the environmental bodies establish the conditions, restrictions and standard controls that the venture must obey.

The following licenses must be obtained:

- **Previous License - LP**, necessary for the preliminary phase of planning of the activity, containing prescriptions to be followed during location, construction and operational phases, according to federal, state and municipal standards;

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- **Installation License - LI**, authorizing the beginning of implantation of the enterprise, according to specifications of the approved Previous License;

- **Operational License - LO**, authorizing, after due inspections, the beginning of licensed activity and the functioning of the pollution control equipment, according to the Previous and Installation licenses.

According to Article 225, IV, of the Federal Constitution, in order to obtain the first license for projects or activities considered to be potentially or effectively polluting, an environmental impact study and associated report must be carried out. This is further described in CONAMA (National Environmental Council) Resolution no. 001/86 and is part of the environmental licensing process. Granting of the referred license depends on its approval.

CONAMA Resolution no. 237/97 amended and complemented some aspects of CONAMA Resolution no. 001/86, and also describes the licensing process.

13.3. Liabilities for environmental damages

Article 225, Paragraph 3 of the Federal Constitution, establishes that “*conduct and activities considered harmful to the environment shall subject infractors, whether natural persons or legal entities, to penal and administrative penalties, notwithstanding the obligation to repair any damage caused.*”

Thus, the Brazilian Constitution foresees three types of environmental liabilities: civil, administrative and criminal, each one with its respective penalties.

13.3.1. Civil liability for environmental damages - In Brazilian law, civil liability for environmental damages is a strict liability, based on the risk of the activity, regardless of the existence of culpability, not being necessary to prove any intention or guilt. This strict liability is also set forth in Article 14 of Federal Law no 6938/81.

It is only necessary to impose to the one who carries out the activity to repair the damages caused if the existing link between the activity and the environmental damage brought on has been proved.

This means that the risk involved in the exercise of the activity, whether or not outwardly dangerous, and whether or not for profit, is the basis for assessing responsibility for repairing the damage caused, regardless of blame.

Aiming to reestablish the situation closest possible to the existing prior to the damage, measures capable of recomposing the damages brought on are frequently prioritized. Only the damages which are not capable of been repaired shall be converted on the payment of damages

13.3.2. Administrative Liability - Administrative liability occurs when by action or omission, there is a violation of the rules regarding use, enjoyment, promotion, protection or recovery of the environment.

The administrative penalties, at the federal sphere, are set forth in Chapter VI of Federal Law no. 9.605, which took effect on February 12 1998, and in Decree no. 3.179, which took effect on September 21 1999.

Administrative penalties are foreseen in case of non compliance with the mentioned legislation, such as: fine (once or ongoing daily), temporary interdiction of the establishment or activity, forbiddance to contract with the Public Authority; loss or suspension of eligibility for credit lines from official financing institutions, and total or partial suspension of the activity that resulted in the damage.

13.3.3. Criminal Liability - In accordance with Article 3 of Federal Law no. 9.605/98, the penalties stipulated are applicable to natural persons and legal entities.

The penalties can be applied separately, together or alternatively, to legal entities are: pecuniary fines, restriction rights and service rendered to the community, in accordance with Article 21 of Federal Law no. 9.605/98, depending on the criterion of the jurisdictional body.

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Penalties applicable to natural persons are: incarceration, house arrest, service rendered to the community, temporary loss of rights, total or partial suspension of the activity, pecuniary installment and/or fine.

It is important to consider that as per Federal Law no. 9.605/98, it is possible to disregard a corporate entity if the personality of the corporation will represent an obstacle to recovery of the damages caused to the environment.

14. PRIVATIZATION

14.1. National Privatization Program

The Brazilian privatization program favors the transfer of activities which could be better handled by the private sector out of the hands of government and into that sector. Such a reorganization frees the State from the burden of losses incurred by these business ventures and enables public administrators to focus on other issues important to the Brazilian economy.

Brazil's national privatization program was instituted by Law No. 8.031, of April 12, 1990 (replaced by Law No. 9.491, of September 9, 1997 and subsequent amendments thereof) and is regulated by Decree No. 2.594, of May 15, 1998 (as amended). The statute applies to the sale of certain assets owned and/or companies controlled by the federal government. The concession of public services to private entities was also defined by Law 9.491 as one type of privatization. The National Privatization Board ("Conselho Nacional de Desestatização - CND", formed by State Ministers), which reports directly to the President of Republic, is the highest authority responsible for conducting the privatization process according to said statute. The National Bank for Economic and Social Development (BNDES) also has an active role as the Privatization Fund Manager, supplying administrative and operational support to the CND, retaining consultants and specialized services as necessary for carrying out the privatization, contact the securities systems and stock exchanges, among others. Recent measures have given new impulse to the program and brought within its framework concessions of government-controlled enterprises.

14.2. Public Services Concession

Law No. 8.987, of February 13, 1995, regulates Article 175 of the Federal Constitution of 1988 and establishes the rules for concessions of public services. This so-called Concessions Act expressly excluded radio and television transmission services. This statute was later amended by Law No. 9.074, of July 7, 1995, and regulated (among others) by Decree No. 2003, of September 10, 1996, and Decree No. 1.717, of November 24, 1995, which established new rules and regulations for the approval and extension of public service concessions, including the extension of certain electrical energy concessions. Law 8.987 expressly requires that concessions be granted after a public bidding process. Law No. 9.074 makes it clear that, with certain exceptions, federal, state and municipal governments are forbidden to perform public services by means of concessions or licenses in the absence of a law specifically authorizing and defining such services.

Nevertheless, prior laws limiting the areas of economic activity eligible for privatization have now been replaced by laws that more broadly define the types of entities, regardless of activity, that may be privatized. For instance, above-mentioned Law No. 9.491 defines most of the companies, including financial institutions, directly or indirectly controlled by the federal government, as well as most public services concessionaires, as being eligible for privatization. Meanwhile, various industry-specific pieces of legislation have been adopted or proposed to eliminate or limit the government monopolies over certain industries. For instance, the General Telecommunications Act (Law No. 9.472, of July 16, 1997) regulates Constitutional Amendment No. 8, of August 15, 1995, to allow private sector competition in the telecommunications industry.

Also by way of Constitutional Amendment No. 8, the Brazilian Congress approved Law No. 9.295/96, which stated that concessions for the exploitation of cellular telephony, classified as a "restricted public service", must be granted, through a public bidding procedure, to Brazilian companies, with at least 51% of their voting capital belonging, directly or indirectly, to Brazilian nationals. The public bidding procedure was aimed at the granting of the so-called "B Band" license, for which a secret bid equal to or above a certain minimum amount was offered by the bidders.

14.3. Sectors Subject to Privatization

Economic activities that were first authorized to be conceded to the private sector and are either already privatized or currently undergoing privatization in Brazil include the following:

- the generation, transmission and distribution of electrical energy and gas;
- petrochemicals;

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- municipal, highway, railroad, sea and air transportation;
- telecommunications;
- ports, airports, aerospace infrastructure, road construction, dams, canal locks, dry docks and containers;
- sanitation, water treatment and supply, and waste treatment; and
- mining and metallurgy.

14.4. Evolution and Results of the Privatization Program

Since the enactment of Law No. 8.031, in 1990, as many as 128 State-controlled companies have been privatized by federal and state governments through September 2000, totaling more than US\$ 95 billion. Among them are CSN (the national steel mill); Mafersa (a manufacturer of railroad equipment); Escelsa, Light, CERJ, CEEE (partial), CPFL, Eletropaulo, Gerasul, COELBA, CESP (partial)(major companies in the electricity sector); CRT (the state telephone company of Rio Grande do Sul); COMGÁS, CEG (gas distribution companies) and RFF (the national railway line). In addition, all of the major steel (i.e. Usiminas, Cosipa, Acesita and CST), petrochemical (i.e. Polietelinas) and fertilizer (i.e. Ultrafertil) companies have also been privatized. The most controversial privatization was that of the Federal Government's sale of its controlling stake in Brazil's largest mining and transportation company, Companhia Vale do Rio Doce ("CVRD").

Until now, most privatizations have been achieved through auctions on the Brazilian stock exchanges. Law No. 8.666, of June 21, 1993, regulates Article 37, XXI, of the Federal Constitution and establishes the rules for the public bidding process. This federal act was later amended by Law No. 8.883, of June 8, 1994, and Law No. 9.648, of May 27, 1998, which established requirements for, *inter alia*, bid invitations, methods, payment, and guarantee forms. The Administration has already submitted for public comment, prior to sending it to Congress, a new Bill ("Preliminary Proposal for New Bidding Law") which would reform the bidding process, including new requirements for bidding entities to post a surety bond in connection with bids.

The privatization program has been extended not only concessions for public services controlled by the Federal Government, but those of states and municipalities as well. Each state and municipality has powers to establish the rules for its own program and, therefore, the privatization of state- or city-owned companies is made pursuant to specific local rules. In this regard, the State of São Paulo has carried out one of the most successful privatization programs in Brazil. Since the publication of the state privatization act, São Paulo has transferred to the private investors, among others, the exploration of public services of distribution of piped gas (both in the metropolitan, performed by COMGÁS, and country areas, performed by recently created Gas Brasileiro and Gas Natural), as well as generation (Paranapanema and Tietê, which resulted from CESP's partial spin-off) and distribution of electricity (CPFL and Eletropaulo, two of the largest Brazilian distributors). Following such trend, the State of Paraná is about to transfer to private investors the controlling interest of COPEL, deemed to be the Brazilian best state-owned electricity company. Other States, such as Bahia, intend to privatize their water treatment/sanitation and gas distribution companies.

Finally, there have been amendments to other areas of Brazilian law to facilitate the privatization process and attract foreign participation. The Brazilian Company Law (No. 6.404/76) has been amended to alter dissenter rights of minority shareholders to allow more flexibility in cases of mergers or split-ups commonly deployed in connection with privatizations. In addition, President Cardoso has signed Decree No. 2.233/97, allowing companies directly or indirectly controlled by foreign capital to have access to financing from public financial institutions. This decree defines those priority areas of economic activity within the meaning of Law No. 4.131/62 to be allowed such financing, thus benefiting recently privatized companies in such sectors.

Despite inevitable delays and obstacles, the privatization program in Brazil has had a good decade. The Cardoso Administration estimates that the federal government has received as much as US\$ 70 billion in the past three years through privatizations in the electricity and telecommunications industries alone. The

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participation of foreign capital has reached approximately 40% of such amount. In summary, the Brazilian privatization program, including the sell-off of mining and transportation giant CVRD and, in 1998, that of Telebrás, the holding of the telecommunications system, the largest privatizations ever in Latin America, has attracted worldwide interest and has significantly contributed to boost foreign investment in Brazil.

15. PUBLIC BIDDING AT CONCESSION AND PERMISSION FOR PUBLIC WORKS AND SERVICES

15.1. Introduction

The Brazilian Federal Constitution, in article 37, insert XXI and article 175 establishes that apart from exceptions foreseen by law, works, services, purchases and alienations, will be contracted by direct, indirect or foundational public administration of any of the Departments of the Union, the States, Federal District and Municipalities, through process of public bidding - by one of these manners: competition, price inquiring, invitation, contest, auction and recently, by a form denominated "bid" promoted exclusively for the Union and regulated by provisional order n. 2026 of 21.12.2000.

As a rule, for the adequate choice of each modality of bid, the value of the contract has to be considered, however it is important to recall that there are hypotheses in which due to the complexity of the object the value of contracting isn't predominant. Whatever modality is adopted, the supremacy of the public interest will rule over the private interest in order to obtain the most efficient result for the public administration.

15.2. Modalities

The Bid is the adequate modality for purchases or alienation of realty, usage grantee, rendering of services or construction of public work. Normally it is destined for transactions of great sums, while the Price Inquiry is for medium prices; the Invitation, on all of the bidding modalities involves services of lesser amounts.

The Contest is destined to select technical and artistic works, while the Auction is reserved for the alienation of goods for, the best price for the administration to whoever offers the best bid after the minimum value of evaluation.

The bid was established to regulate the contracting that involves the supply of goods or common services, done in a public session, by the means of written and verbal proposals, attempting to make the most economic, safe and efficient purchase. However, for this modality the contracting of works and engineering services, rentals or alienation are excluded by law.

Whatever the procedure of bidding, the principles of isonomy, legality, impersonality, morality, publicity, administrative probity, objective judgement must be obeyed in order to choose the proposal which is most advantageous to Public Administration to assure equal conditions to all the participants before the calling instrument, as well as fixing demands of technical and economic qualification, and maintaining the bidding conditions effective.

In this context, with the intention of regularizing the constitutional provisions, instituting norms for public bidden and Public Administration contracts and other measures, the Federal Laws n. 8666 of 21.06.1993 and n. 8883 of 08.06.1994 and also the Federal Law n. 8987 of 13.02.1995 recently updated by the laws n. 9648/98 and 9791/99 were published, which specifically deal with the system of concession and permission for the rendering of public services, as well as Constitutional Amendments n. 8/95 and 19/98 which altered respectively the inserts XI and XII of the article 21 and insert XXVII of article 22 of the Brazilian Federal Constitution.

15.3. Concession and Permission for Public Service

At Federal level, article 21, XII of the Federal Constitution foresees the sectors which can be exploited by the Federal Union, directly or through authorization, concession or permission, which are: services of radiodiffusion, of sounds and images and other telecommunication services; services and installation of electric energy and the energetic use of water courses in articulation with the States where the potential hydroenergetic stations are situated; air and space navigation and airport infrastructure; the services of rail and water transport between Brazilian ports and national frontiers or which transpose the limits of the State or Territory; interstate and international road passenger transport services; and sea, river and lacustrine ports.

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The concession of public service is basically the formal administrative contract, signed through public bid through competition. The objective is the legalization of the delegation of the execution of a service of the Public Authority to the private which will assume risks for the period of the contract. It aims primarily to satisfy the conditions of regulation in the rendering of services, its continuity, efficiency, the modernity of equipment and installation, the expansion of the range of coverage, and mainly, the courtesy in the rendering and market fees.

On the other hand, the Permission for public service is a simple, discretionary and precarious act of unilateral delegation of Public Authority, made by an adhesion contract which may, at any time, revoke or establish new conditions to the permittee.

15.4. Enabling

The Public Authority, with a view to triggering the process which has as its objective the concession or permission, will publish a deed justifying the respective granting and defining the objective, field and time period. Subsequently, it will publish the invitation to the bid, being that in case of concession, this is through competition.

To those interested in taking part of any bidding modality, besides having to achieve the specific requirements for each modality, the documentation required by law which looks for guarantees in the judicial, economical, financial application and tax regulation, must be presented, except legal exceptions for some modalities which are exempt from presenting such documentation.

With the presentation of the documentation relative to judicial application, technical and economic-financial qualification and tax regularity, and if the bid's invitation so permits, the formation of consortium for participation in the public bidding will be allowed.

Being qualified, the bidders will present their proposals attending the requirements pre-established in the bid's invitation and any person can obtain certificates as to the contracts, acts, decisions or reports related to the public bidding or to the actual concessions or permissions.

Judgement will adopt the criteria of the smallest price for the tariff of the service to be rendered or the biggest offer, for the granting of concession, in the cases of payment to the conceding power or both criteria jointly. When there is equality of conditions between the participants, preference will be given to the Brazilian company, exclusiveness in the rendering of services, except in impracticable technical and economic cases, will not be conceded.

15.5. Dispensing and Ineligibility of Public Bidding

There are three situations in which the law concedes the exemption of the discharge of the public bidding process: when the object represents a small sum, in case of emergency to solve public calamity, war or intense disorder, or, for the purchase or rental of real estate, which for relevant reasons in its selection - for example the geography positioning of the estate - would remove the need for a bidding; these reasons are expressly listed in article 24 of the Law 8666/93.

The cases where bidding is not obligatory occur when there is the impossibility to fulfill a public bidding due to the incapacity of having competition among the competitors due to the nature of the professionals or companies with notorious specialization among other circumstances described in the article 25 of the Law 8666/93 as, acquisition of equipments or such things that may only be supplied by producers, companies or exclusive commercial representative or even, for the reinstatement of artistic pieces or objects of historical value (Law n. 8666, article 13).

15.6. Administrative Contract

The concession will be formalized through a contract which will contain clauses which define the parts, the objective, area and period; manner, form and conditions for the rendering of the services; criteria, indicators, formulas and parameters which define the quality of the service; the price of the service and criteria for readjustment; rights, guarantees and obligations of the users; future projections for amplification and modernization; form of inspection; contractual penalties and others. Building and financial schedules can

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be demanded of the execution of the work connected to the concession and guarantee of the true fulfillment of the obligation related to the concession, in contracts related to the concession of public service preceding the execution of public work.

The concessionaire will be able to contract third parties for the development of activities which are inherent, accessory or complementary to the conceded services, being that this relationship will be ruled by private law and will not affect the responsibility of the first for all damage caused to the conceding power, to users or to third parties. Subconcession is also permitted providing it is foreseen in the contract and authorized by the conceding authority and preceded by competition.

15.7. Guarantees

If foreseen in the invitation to bid, the existence of guarantee as to the fulfillment of the contract is common. Except where foreseen by law, the guarantee will be by check bond, insurance or bail to be chosen by the contractee as long as the corresponding value of the insurance does not exceed 5% of the contract value.

15.8. Inspection and Extinction of Concession or Permission

Every concession or permission presupposes the rendering of adequate service to the full attendance to users, in a form that satisfies the conditions of regularity, continuity, efficiency, security, presently, generality, courtesy in the rendering and reasonableness of tariffs.

The concession and permission will be extinguished at the end the contractual term, expropriation (the taking back of the service by the conceding part for motive of public interest), or in case of incompliance of the basic fundamentals of the administrative bids forfeiture (declaration in the case of total or partial non execution of the service), rescission, annulment, bankruptcy or extinction of the company which is the concessionaire or decease or incapacity of the incumbent, in the case of an individual company.

In this process it is the responsibility of the grantor, with basis on the interest of defense of the consumers, the inspection power of the activities formed by commissions, which will have access to the data relative to the administration, accounting, technical, economical and financial resources of the grantee, being able to intervene in the concession.

In the case of non fulfillment of any contractual clause, on the party of the grantor, a special judicial action can be applied for the dissolution of the contract.

15.9. Online Auction

With a view to optimizing the public budget and the agility in the administrative contract procedures, the Government of São Paulo authorizes the direct administration offices, governmental agencies of the State, by the Decree n. 45085/2000 the use of online system of hiring or purchasing of equipments and services needed for the State. The electronic auction is allowed to any company that is enrolled in the system and providing it is within the limit of up to eight thousand Reais, which waives the need for a bidding, as established in the insert II of the Article 24, of the Federal Law of Bidding.

The procedure is an electronic auction, in which wins whoever presents the best offer. It may also be applied to the modality of public invitation, in which the object will be purchased with immediate delivery.

The objective is to improve the quality of information in the State through a system in which anyone interested has access to the governmental procedures.

16. TELECOMMUNICATIONS

16.1. Telecommunications in Brazil - Brief Overview

Law 4117/62 edited the Brazilian Telecommunication Code which, for more than 35 years, regulated telecommunications services throughout the country and authorized the constitution of the Brazilian Telecommunications Company *Empresa Brasileira de Telecomunicações S.A.*, known as EMBRATEL.

In 1972, Law 5792 established the policy for the exploitation of public telecommunications services and created the public company TELEBRÁS (*Telecomunicações Brasileiras S.A.*) to promote, among other activities, through its subsidiaries and associated companies, the exploitation of public telecommunication services in Brazil and abroad.

TELEBRÁS was named a “general concessionaire” for exploiting public telecommunications services, and its subsidiaries and associated companies were designated “delegate concessionaires”. Thus, TELEBRÁS, its subsidiaries and associated companies formed the TELEBRÁS System which eventually included EMBRATEL as well.

In mid-1998, the TELEBRÁS System underwent a complete restructuring process that included the privatization of the companies that were part of the group. The great investment flow was steered toward expanding telecommunications services in light of new technologies.

The telecommunications sector - today basically under private enterprise - is investing heavily against the accumulated lag brought by nearly two decades of state monopoly, represented by the old TELEBRÁS System. Currently, the main targets of the sector are to: (i) expand and universalize the nation’s telecommunications network; (ii) technologically modernize the structure and operation of the system; (iii) diversify and multiply the number of products and services and (iv) increase competition to attract and maintain customers.

Much criticism has been made about the quality of the services rendered to customers following privatization. This criticism that can be attributed, among other reasons, to: (i) the massive investments that have been required to modernize the technical systems and which have yet to produce all the results initially expected, as well as (ii) the lack of qualified personnel since the offer of employment in this sector has practically doubled in Brazil in the last three years following privatization.

In point, this apparent delay in promoting changes in the telecommunications sector has brought losses and wear to the system. On the other hand, it provided the country with the opportunity to carry out an ambitious and well-planned project, conceived through the observation of the privatization experiences of the sector in other nations and of Brazil’s own experience with privatizations in other sectors. The Government was able to avoid many of the mistakes that occurred in other countries. In Mexico, for example, the privatization model was concentrated and one sole company took over the whole market. In Chile, in a diametrically opposed experience, the market was opened to so many separate companies that it, together with a total lack of restrictions, caused a price war that led to many companies going bankrupt and generating a tremendous drop in the quality of the services. The compromise model adopted by Brazil sought, instead, to stimulate gradual transition with the intent of having the consumer, and the market itself, become used to the new system and adapt to the competition.

A marked characteristic of the first phase of the opening of the telecommunications sector was the creation of duopolies in the area of telephony in order to grant companies time to establish and consolidate themselves in the market before free competition begins to be permitted, in the year 2002. For the time being, competition can be said to be restricted to the dispute between concessionaire companies and mirror-companies in the fixed telephony market and between Band A and Band B in mobile telephony. The duopoly proved that it is possible to implement a mechanism of competition in a short time whereby the consumer benefits and the operators are preserved from market uncertainties.

The year 2002 shall be the year of the second phase for Brazilian telecommunications. With the sector completely deregulated, new companies may join the market while the existing companies shall be permitted to operate in any region, in any service and in any band as well as acquire equity interest in other companies,

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thus making the market conditions even more advantageous for the consumer. However, considering the marked trend in Europe and the United States toward the formation of oligopolies in this sector, ANATEL shall certainly have difficulties in avoiding the increase of concentration in the Brazilian market. In the long term, the greatest challenges for the restructuring process of Brazilian telecommunications shall be to avoid as much as possible the possibility of concentration and protect the competitive environment.

Considering the deregulation expected as of January, 2002, fixed telephony companies will only be permitted to exploit new services if they are able to meet, by December, 2001, the universalization commitments established by ANATEL. Applicable legislation has determined December, 2003, as the target date for completion of these commitments but companies have been working to make themselves ready earlier so as to accelerate their entry into the free market, since ANATEL will grant new services to be exploited as soon as the referred targets have been duly met.

Hence, and in spite of the delay in completing the reforms, the magnitude of the expansion and improvement goals reached so far is quite astonishing. The average premium obtained with the privatization of the extinct TELEBRÁS System and the concessions for exploitation of Band B cellular telephony carried out in 1998 were nothing short of spectacular. The total amount collected was approximately US\$ 28 billion, equivalent to a fifth of the amount collected in all the privatizations that took place in the sector between 1984 and 1996 - worldwide - according to data of the International Telecommunications Union - ITU.

Truly, this comparison with the past is impressive: in the last four years of privatization, more telephones have been installed than in all of the previous 25 years. With regard to cellular telephony, the expected growth will be even higher. While the fixed telephony network has grown more than 60% since 1998, the expansion of cellular telephony reached 80.2% between June, 1999 and June, 2000.

16.2. Development of Cellular Telephony

Currently Brazil operates bands A and B. However, bands C, D and E that constitute the Personal Mobile Service - SMP, are today being licensed and will compete with the providers of mobile cellular telephony service - SMC that operate in bands A and B.

Sales growth and the development of the cellular telephony sector in Brazil has been impressive. The original goals were exceeded by far. While the number of cellular phones grows at a rate of 51% worldwide, growth in Latin America has been 105% on average, and the accelerated growth of cellular telephony services has contributed to the ever-increasing expansion of the supplementary market of telephone accessories. Further, the development of the roaming national network in Brazil represents, today, one of the highest in the world.

Though the majority of existing cellular services are still within the traditional system, sales of pre-paid cellular calls, which began more recently, already represent, according to ANATEL, more than 50% of the market.

16.3. Regulatory Agency for Telecommunications (ANATEL)

The regulatory agency for telecommunications is the National Telecommunications Agency - ANATEL, which has administrative independence, absence of hierarchical subordination and financial autonomy.

Basically, ANATEL is empowered to: (i) issue rules on the licensing, rendering and use of the telecommunication services in the public sector; (ii) establish, control and follow the rate structure regarding each type of service rendered in the public sector; (iii) sign and manage concession contracts; (iv) issue rules of procedure for providing telecommunications services in the private sector; (v) monitor, advise of and repress legal infractions against the economic order regarding telecommunications, without prejudice to the competence of the Administrative Council for Economic Defense (CADE); (vi) administrate the field of radio broadcasting and the use of satellite orbits; (vii) define the types of services based on their objectives, scope of rendering, form, means of transmission, technology employed and other attributes; (viii) inspect the rendering of the services and apply administrative sanctions to transgressors of the telecommunications rules and regulations.

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16.4. General Telecommunications Law

The Telecommunications Code was revoked by General Telecommunications Law no. 9472 of July 16, 1997 (LGT) which provides, basically, on the following institutional aspects: (i) fundamental principles that regulate the exploitation of telecommunications in Brazil; (ii) creation, operation and competence of the regulatory agency; and (iii) general organization of telecommunications services.

Telecommunications services are organized to provide free, wide and fair competition among companies exploiting such services, being subject to the general protection rules of economic order. Acts carried out by the service provider that can affect, in any way or form, free competition and free initiative are prohibited, pursuant to the provisions of article 19, XIX of LGT and according to the regulation established by Resolution no. 195 and its Annex. With this purpose, ANATEL set forth in said law a defined set of rules for interconnection, infra-structure sharing and unbundling that the agency considered necessary.

Under the LGT, interconnection is the link between telecommunications networks that are operationally compatible, whereby users of the services of one network may communicate with the users of the services of another or access available services. The LGT deems the interconnection - implemented as of January, 1999 - a legal obligation reciprocal between providers of services of public interest. As a consequence, the sharing of the available assets for purposes of interconnection is mandatory in Brazil, and is carried out through freely negotiated contracts, provided that applicable regulation is observed.

Infra-structure sharing is basically regulated by article 73 of the LGT, whereby *“providers of telecommunications services of public interest shall be entitled to use the posts, ducts, conduits and rights of way belonging or controlled by providers of telecommunications services.”* Furthermore, Public Consultation no. 239 set forth the rules on the time frame for the installation, customers' requirements, environmental protection, optimization of resources and social purpose of the property.

Unbundling, in turn, under the General Regulation for Interconnection - *RGI*, consists of untwining pairs of copper wires or their respective functions, that make up the external network of local access of the Local Switched Fixed Telephony (*“STFC-L”*) thus allowing a third party to use such wires for independent access to the customer. In Brazil, the juridical problem of unbundling is the non-existence of express legal provision that imposes on the operators - owners of the twined pair - the obligation to negotiate the assignment of the use of the elements or functions separated from the twined pair.

16.5. Use of Revenues from the Telecommunications Sector

Law no. 9.998 of August 17, 2000 created the Fund for Universalization of Telecommunications Services - *“FUST”*, the purpose of which is to provide funds to defray the portion of costs that are attributed exclusively for meeting the obligations of universalization of telecommunications services that cannot be recovered with the efficient exploitation of the service. As of the year 2001, the operators began paying over 1% of their gross revenues to finance said fund. The resources of FUST shall also serve to exempt or subsidize rates for certain users such as schools, libraries and hospitals. Furthermore, the funds shall be used to install telecommunications services in isolated places and establishments which operators are usually not interested in for commercial reasons.

Law no. 10.052 of November 28, 2000, instituted, in its turn, the Fund for Technological Development of Telecommunications (*“Funttel”*). This fund was created with an initial budget of R\$ 100 million originating from the earlier Fund for Inspection of Telecommunications (*“Fistel”*). FUNTTEL shall be allocated 0.5% of the gross revenues of the providers of telecommunications services plus 1% of the amount collected for services rendered through telephony. Its purpose is to finance technological research in the areas of telecommunications developed by small and average-size companies so as to increase the competitiveness of the Brazilian telecommunications industry.

16.6. Brazilian Telecommunications Sector vis-à-vis the Foreign Investor

The transfer of the controlling interest in companies that are providers of telecommunications services in Brazil is strictly regulated by ANATEL, in accordance with articles 202 and 98 of the LGT and other later applicable rules.

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One of the most important rules issued, of relevant interest to the foreign investor in Brazil, is Resolution 101/99 of ANATEL. Intending to avoid infractions to the economic order in the telecommunications sector, ANATEL adopts certain concepts and criteria to verify transfers of controlling interest that could incur in prohibition, restriction, limitation or condition.

In this sense, under the terms of said legal provision, controlling interest is the individual or legal entity who, directly or indirectly: (i) participates in, or appoints a person or member to, the Board of Directors, Board of Officers or other body with equivalent attribution, of another company or of its own controlling shareholder, (ii) holds statutory or contractual veto over any matter or decision of the other; (iii) is sufficiently empowered to block the installation of a qualified quorum or decision required by force of statutory or contractual provision, with regard to the decisions of the other, (iv) holds shares of the other, of a class which grants separate voting right.

Furthermore, this legal provision deems a company to be an affiliate of another if it holds, directly or indirectly, at least 20% of the voting capital of such other, or if at least 20% of the voting securities of both companies are held, directly or indirectly, by one same individual or legal entity.

Said Resolution also establishes that the juridical transaction resulting from the partial or total assignment by the controlling interest of the control over the provider of the telecommunication services shall represent a transfer of control.

Finally, any changes to the corporate structure of the company that could represent a transfer of control must first be submitted to ANATEL, especially when: (i) the controlling interest or one of the member of its group withdraws or comes to hold less than 5% of the voting capital of the provider or of its controlling interest, (ii) when the controlling interest ceases to hold the majority of the voting capital of the company and (iii) when the controlling interest, through any form of agreement, totally or partially assigns to a third party the powers to direct, in effect, the company's activities.

With regard to the market balance of the telecommunications sector, one can state that development has been extremely positive: between 1995 and 2000 the Gross Domestic Product increased by 15% while the telecommunications sector showed an expansion of 130%. In the year 2000, the sector concentrated 33% of all the foreign investments made in the country, with Brazil being, according to ANATEL, the country that invested by far the most, worldwide, in increasing its telecommunications base. The repressed demand for telephony has practically disappeared in Brazil and the cost of a telephone line has dropped from US\$ 2 thousand to less than US\$ 500.

16.7. Telecommunications Services Legal System

The Law differentiates between two systems for the rendering of telecommunications services: the public and the private.

The **public system** presupposes the rendering of a service of collective public interest. Its existence, universality and continuity shall be ensured by the Federal Government itself. Such services are exploited by the providers derived from the privatization of the old TELEBRÁS System, through concession.

The **concession** of services was granted by ANATEL through competitive bidding, without exclusivity. Concessionaires are subject to the business risks and their revenues come from billings. The maximum term of the concession is of 20 years with the possibility of a one-time-only renewal or extension for an equal period.

After three years from the signing of the concession contract, and should there be true and general competition among the providers of the respective telecommunications services, ANATEL may submit the concessionaires to the unrestricted rate system.

On the other hand, **permission** for exploiting telecommunications services is only granted on a temporary basis, by means of a simplified competitive bid process.

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The exploitation of the service under the **private system** is based on the constitutional principles of economic activity, its main guidelines being free and broad competition among the service providers, balance in the relations between service providers and users and the technological and industrial development of the sector. This private system is subject to the permanent supervision of ANATEL.

Rates and prices to be charged by the service providers under the private system are unrestricted. Nevertheless, any prejudicial act against competition as well as economic power abuse shall be repressed, in accordance with specific legislation.

The exploitation of the service in the private system shall depend on prior **authorization** by ANATEL and will allow for the right to use the frequency associated therewith. The authorization shall be granted through a bidding process, in the same pattern of public utility service concessions.

There is no limit to the number of authorizations to be issued by ANATEL for the exploitation of the service in the private sector, except for technical limitations or excess of competitors that can affect the rendering of the public services.

The right to the use of radio frequency, under exclusive nature or not, shall depend on prior grant by ANATEL, issued through a specific authorization, linked to the concession, permission or authorization for the exploitation of telecommunications service. The authorization for the use of radio frequency in the public sector shall be for the same term as the term of the concession or permission to which it is associated. In the case of services carried out in the private sector, the term shall be of up to 20 years, which can be extended once for an equal period, regardless of the term authorized for the exploitation of the service.

The authorization for the use of the radio frequency shall only be assigned and transferred when the corresponding transfer of the concession, permission or authorization linked to it takes place.

16.8. Incentives

The law offers the providers of telecommunications services incentives for development telecommunications-related products, through specific credit, tax and customs policy instruments.

In this sense, the Brazilian government, though having practically eliminated one of its special importation regulations - the "ex-tariff" - still maintained certain important exemptions for several different components intended for the telecommunications field, which used to be subject to import duties at a rate of up to 16%.

Recently, Law no. 10.176 of January 11, 2001, extended the earlier tax incentives, of which the most important tax benefit consists of the exemption of excise tax ("*IP*") rates on the items set forth in said Law, such rates that will be gradually increased until 2009.

16.9. The Future of Telecommunications Services

At the beginning of this new decade, the Brazilian telecommunications sector is just about to overcome - still in the year 2001 - one of its biggest challenges: wide access of the Brazilian population to fixed telephony service, the greatest objective proposed by the LGT.

Moreover, certain important regulatory developments are in course that will ease the use of accelerated technological convergence, technically more and more feasible, through the development of multimedia communications companies.

Among the many types of telecommunications services currently being exploited in Brazil, ever-expanding, are: Mobile Cellular service (Band A and B), Cable-TV Service, Multichannel Multipoint Signal Distribution Service (*MMDS*), Subscription TV and Radio Broadcasting Signal Distribution Service through Satellite (*DTH*), TV Broadcasting Retransmission Service (*RTV*), Television through Subscription, Definition of Technological Standards for Digital TV, Mobile Internet, Personal Mobile Service (*SMP*), Short Message Service (*SMS*), among others.

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The companies providing Paging Services are undergoing a server crisis because of the development of cellular telephony. The diversification of the business, as well as the entry in the call center markets and of access to internet in their own paging area may be the only way to ensure the paging companies' survival.

In this scenario, Brazil, today, can already be considered a wireless society, that is, a market where the penetration of cellular phones is much greater than the penetration of personal computers (PC). Hence, the combination of internet and this access to information with a mobility function is a natural result. In the next two years it is estimated that the number of wireless accesses to the internet will exceed the connections via PC, through one form of access does not exclude the other since the use and profile of the users are obviously different.

Broad band services, one of the alternatives for high-speed and low cost internet, will be the object of substantial investments by 2002. In this light, the corporate market will represent the new goal of the companies in the sector.

The corporate mobile communications sector (*trunking*) which aggregates the cellular phone and radio has a discreet presence, with a very specific target public, hence, with a different marketing strategy, concentrated in sending mail-orders and making visits to clients. The future of the business is directly linked to the end of restrictions. Currently, the trunking companies are prohibited from operating paging services or roaming with the use of the operational structure of common cellular telephony operators and to sell to individuals, being limited to legal entities. The Brazilian market, however, is likely to follow the North American model where trunking companies compete freely with normal telephone operators and paging companies.

The third generation of cellular (Cellular 3G) will arrive in Brazil in 2003. In the meantime, the existing companies operate with CDMA, TDMA and GSM (Global System for Mobile Communication) technologies. However, Brazil, in the next few years, can expect a predominance of voice services as a principal source of revenue of providers of telecommunications services in general.

17. ELECTRIC ENERGY

The Brazilian electric sector went through profound changes in the last decade. It is worth mentioning the redefinition of the role of the State and the massive entry of private investments in this sector, as well as the gradual definition of an economic model based on free competition, which is still under implementation.

The Constitution attributes to the Union, the owner of the hydraulic energy potentials, the competence to exploit, either directly or through concessions, permissions or authorizations 'the electric energy services and installations and the energetic utilization of watercourses' (art. 21, XII, "b").

The ruling for the grants of exploitation of electric energy was substantially renewed in 1995 by Laws 8987 and 9074, which aimed to simultaneously meet the scope of privatization of the concessionaires of public services of electric energy and the definition of the rules applicable to the new agents appeared in the electric sector⁴. The guidelines for the concession of the public services of electric energy were provided for by Law 9427/96. Subsequently, Law 9648/98 brought important precepts for the implementation of the new model of the Brazilian electric system.

The establishment of a competition based model purported to make the offer and the demand more flexible, thus resulting in the appearance of:

- (i) Trading Agents and Agents Importers of electric energy;
- (ii) a new category of offerors (producers) of electric energy, the Independent Producer, i.e., a company or a consortium of companies that receives, according to the electric potential resources to be exploited, concession or authorization for exploitation of electric energy designed for total or partial commercialization, at its own expense and risk (i.e., without the existence of a captive public, as it occurs with the concessionaires of the public service of electric energy) and without tariff fixation. The Selfproducers (i.e., an individual, or a legal entity, or a consortium of companies that receives a concession or authorization for producing electric energy designed for its own use), through a specific permission, may also commercialize, on these same bases, their excess production of electric energy in a casual and temporary way⁵;
- (iii) the so-called 'free consumers' (arts. 15 and 16 of Law 9074/95), which are able to choose the supplier of energy with which they will enter into a contract, being also provided the progressive expansion of this group of consumers.

This stimulus to competition reinforced however the need of establishment of a new model applicable to the restructuring of the electric sector, comprising the definition (i) of the agents responsible for the regulation and operation of the new Brazilian electric system; (ii) of the basic characteristics of such a system to make feasible the implementation of an efficient and competitive model, and (iii) of the contractual models applicable to the sector.

From the institutional standpoint, it shall be highlighted the creation, by Law 9427/96, of a specific regulating body for the electric sector, the National Agency of Electric Energy ('ANEEL'), as a quasi-governmental agency linked to the Ministry of Mines and Energy, however with its own competence and incomes, as well as of 'ONS' - National Operator of the Electric System, a private law entity created by Law 9648/98 and integrated by agents of the electric sector and free consumers, according to the pertinent legislation.

In summary, it is incumbent upon ANEEL 'to regulate and inspect the production, transmission, distribution and commercialization of electric energy' (Law 9427, art. 2), while ONS is basically responsible for the 'activities of coordination and control of the operation of generation and transmission of electric energy in the interconnected systems' (Decree 2655/98, art. 25).

⁴ For the Brazilian privatization process concurred Law 8031/90, which created the National Privatization Program, Law 8666/93 ('Bid Law'), which defined the applicable procedures and, in the electric system, Laws 8987 and 9074/95, which have established the general ruling for the grants, and Law 9648/98, which provides for the restructuring of the electric sector and privatization of ELETROBRÁS and its subsidiaries (ELETROSUL, ELETRONORTE, CHESF and FURNAS), which is still in course.

⁵ Law 9074/95 and Decree 2003/96 provide for the carrying out of the activities of Independent Producer and Selfproducer of electric energy.

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Further, the creation of 'MAE' - Wholesale Electric Energy Market - must also be highlighted. MAE was equally foreseen by Law 9648/98, and is supported by the Market Agreement, a multilateral adherence agreement executed by agents of the electric sector (voluntary or obligatory participants in MAE, according to the provisions of Decree 2655/98 and the applicable ANEEL Resolutions), designed for processing free transactions of purchase and sale of electric energy, with emphasis on short-term transactions (spot market).

The Brazilian electric sector is, in its large majority, *interconnected*, in which its main agents operate in a coordinated form so as to maximize the efficiency of the productive process⁶. This coordinated operation, which was implemented in the 1970s and was during a long time directed by the 'GCOI' (Coordinating Group for Interconnected Operation) is presently an attribution of ONS, carried out by means of generation dispatches.

It is the interconnected system that, from a structural standpoint, permits the free contracting of the electric energy supplier, through the assurance of free access of suppliers and free consumers to the systems of the concessionaire (or permissionaire) of transmission or distribution public services, by means of the payment of the cost of transportation involved (Law 9074, art. 15, § 6). In the model in phase of implementation, the generation, transmission, distribution and the commercialization of electric energy are considered separately, including for the effects of the granting and contracting of the respective services. The ruling on the grant for hydroelectric and thermoelectric exploitation consider the modality of generation (e.g., concessionaire of public service, independent producer, selfproducer, etc.) and the capacity of the hydraulic and thermic potential resources.

As to the contractual models applicable to the electric sector, we may promptly identify⁷:

(i) the 'initial contracts' that are characteristic of the present transition phase. In these, ANEEL establishes, regarding the assured energy of each plant, the amounts of energy and the demand of power object of the respective initial contracts, as well as the tariffs to be applied to the respective contracts, being further indicated the parties - the buyer and the seller. The annual amounts applicable to the initial contracts shall be effective in the period 1998-2002, and shall then be reduced by 25% per annum until the extinction of such contracts in 2005;

(ii) the freely negotiated bilateral contracts, by which the amounts not attained by the initial contracts may be negotiated, as well as those object of progressive release. Law 9648/96, art. 12, provides that the operations of purchase and sale of energy in the interconnected electric systems shall be made within the MAE's ambit; and

(iii) the short-term contracts (spot contracts) designed for allowing the commercialization of the energy actually produced or demanded that has not been object of bilateral contracts. MAE is primarily the ambient constituted for the processing and financial liquidation of such contracts, operating in a way somehow like that of an exchange entity. MAE adopts a series of mechanisms of price formation and a system of periodical bookkeeping and liquidation of the operations.

The operation of this short-term market is object of an extensive set of rules (MAE Rules) in process of progressive implementation according to the ANEEL Resolution 290/2000. MAE adopts a system of a double bookkeeping, generating *ex-ante* indicative prices (based on computational models and adjustment rules), which may be utilized by the contracting parties for establishing the price of the contracted energy, and an *ex-post* price, which, based on real availability and load data, reflects with a better accuracy the cost of electricity, being therefore utilized as the base for MAE payments.

Resolution 290/2000 establishes the implementation of the MAE Rules in three phases: (i) the first phase, by September 1, 2000 characterized by the definition of the *ex-ante* price of the energy on a monthly or weekly basis; (ii) the second phase, by July 1, 2001, characterized by the beginning of the double bookkeeping, with prices calculated *ex-ante* and *ex-post*; and (iii) the third phase, by January 1, 2002, characterized by the beginning of the definition of prices and quantities in intervals of at most one hour, being the double bookkeeping maintained.

⁶ Another mechanism operated in the ambit of MAE is the 'MRE' - Mechanism of Energy Reallocation, designed for mitigating the hydrological risk to which the generators of electric energy might be subject, through the reallocation, among its members, of the energy actually generated.

⁷ Law 9648/96, arts. 10 et seqs.

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MAE is therefore designed to regulate the commercial and financial aspects of the transactions of purchase and sale of electric energy, while most of the dispatch and delivery of the contracted energy are coordinated and made by ONS.

The bilateral contracts and the spot contracts are basic contractual mechanisms of a competitive electric energy market. This system of free negotiation between agents has, however, a counterpoint purporting to defend consumers: it is the system of 'normative values', which is a mechanism that limits the re-pass, for the supply tariffs, of the prices freely negotiated upon the acquisition of electric energy.

Considering the phases of transmission and distribution separately, the specific contracts should be finally summarized. As regards transmission, the lines comprised in the Basic Network Interconnected Electric System are made available to the ONS by the concessionaires of transmission, by entering into the Contracts of Provision of Transmission Services, and such entity then, as the representative of these concessionaires, enters into Contracts of Use of Transmission Systems with the respective interested parties. The other transmission installations that are not comprised in the Basic Network are made directly available to the users by the concessionaires of transmission, and the respective contracts are entered into with the ONS' intervention. In both cases, it is further necessary to enter into the Connection Contract with the respective concessionaire of transmission, establishing the responsibility for the implementation, operation and maintenance of the connection installations. As to the distribution segment, the Contract of Use of the Systems of Distribution and the respective Connection Contract must be entered into with the concessionaire or permissionaire of local distribution.

ANEEL fixes the tariffs for the use of the installations of transmission and the tariffs for the use of the systems of distribution of electric energy, according to the applicable resolutions.

ANEEL established the limits and conditions for economic agents' participation in the electric energy sector (Resolution ANEEL 278/2000), in view of the continuous entry of new economic agents in the sector as a result of the processes of unbundling and privatization of electric energy companies, bidding by new competitors for exploitation of hydraulic potential and the authorizations for new thermoelectric plants and small hydroelectric centrals, and taking into account the need of controlling the participation of economic agents in the present phase of transition of the electric energy market.

The changes introduced in the electric energy sector represent fundamental alterations in relation to the primitive model. However, the complete regulatory structure is still pending full definition. Among the themes that shall be addressed are the unbundling of the activities of generation, transmission and distribution of electric energy, the revision of tariffs and, as regards thermoelectric plants, free competition in the offer and transportation of natural gas.

We hope we have thus provided a concise preliminary introduction of the Brazilian electric system.

18. The Regulation of Financial Institutions and Leasing in Brazil

18.1. Financial Institutions

The basis for the regulation of the financial and banking sector in general is Banking Law No. 4.595/64 and subsequent regulations to such law which regulate the national financial system, which is composed of the National Monetary Council (CMN), the Central Bank, state-owned banks and private financial institutions. The CMN is the institution responsible for currency and credit policies, including matters relating to foreign exchange, interest rate policy and the regulation of the operations of financial institutions in general.

The Central Bank implements the currency and credit policies established by the CMN and supervises all financial institutions, both public and private.

18.2. Principal Financial Institutions

Public Sector

The federal and state governments of Brazil control several commercial banks and financial institutions, whose primary purpose is to foster economic development, largely in the areas of agriculture and industry. In addition to performing commercial banking activities, state development banks act as independent regional development agencies.

The Brazilian government-controlled banks include Banco do Brasil, Banco Nacional de Desenvolvimento Econômico e Social - BNDES ("BNDES") and other public sector development, commercial and multiple service banks. Banco do Brasil, a government-controlled bank, provides a full range of banking products to both the public and private sectors and is the largest commercial bank in Brazil. BNDES, a government-controlled development bank, is primarily engaged in the provision of medium-and long-term financing (either directly or indirectly through other public and private sector financial institutions) to the Brazilian private sector, largely to industry. Other federal public sector development, commercial and multiple service banks include Banco da Amazônia and Banco do Nordeste do Brasil S.A., as well as a number of commercial and multiple service banks controlled by the various state governments, the largest of which is Banespa. This last bank as well as Banestado, Banerj and Credireal have been privatized. The governments goal is to privatize all of the state owned banks.

Private Sector

The private financial sector includes commercial banks, multiple-service banks, investment, finance and credit companies, investment banks, securities dealers, brokerage firms, credit cooperatives, leasing companies, insurance companies and other entities. In Brazil, the largest participants in the financial markets are financial conglomerates involved in commercial banking, investment banking, financing, leasing, securities dealing, brokerage and insurance. There are a number of different types of private-sector financial institutions in Brazil, including the following:

(a) **Multiple-Service Banks.** Multiple-service banks, are licensed to provide a full range of commercial banking, foreign exchange transactions, investment banking, consumer finance and other services, including fund management and real estate finance.

(b) **Commercial Banks:** primarily engaged in wholesale and retail banking, and are particularly active in taking demand deposits and lending for working capital purposes, and in financing international trade related transactions.

(c) **Investment Banks.** Banks principally engaged in taking time deposits, underwriting securities, , specialized lending , and administration of investment funds.

18.3. Principal Conditions for the Functioning of Financial Institutions in Brazil

In accordance with the provisions of the Banking Law:

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(a) In order to operate in Brazil, financial institutions must have the prior approval of the Central Bank.

(b) Financial institutions may only invest in the equity of another company if they obtain the prior approval of the Central Bank, and the types of activities of the companies they may invest in are restricted under regulations established by the National Monetary Council "CMN". Such investments may, however, be made through the investment banking unit of a multiple-service bank or by an investment bank.

(c) Financial institutions may only own real estate if they occupy such property. If real estate is received in satisfaction of debt such property must be disposed of within one year.

(d) Financial institutions may not lend more than 30% of their adjusted shareholders' equity to any single person or group.

(e) Financial institutions may not grant loans to or guarantee transactions of any company which holds more than 10% of their share capital, except in certain limited circumstances and subject to the prior approval of the Central Bank.

(f) Financial institutions may not grant loans to or guarantee transactions of any company in which they hold more than 10% of the share capital, except in the case of acquisition of debt securities issued by their leasing subsidiaries.

(g) Financial institutions may not grant loans to, or guarantee obligations of, their executive officers and directors or their families, or to any company in which such executive officers and directors, including the family of such executive officers or directors, hold more than 10% of the share capital.

18.4. Rules and Measures Regarding Solvency of Financial Institutions

Resolution No. 2.099, in 1994, adapted Brazilian banking regulations to the risk-weighted capital adequacy rules of the Basle Accord, with slight modifications. At the same time it set minimum capital requirements for financial institutions, based upon the types of activity exercised. Regulations contained in Resolution 2.399 of June, 1997 established more rigorous solvency rules. These resolutions are, in general, more restrictive than the Basle Accord. The principal example of such more rigorous treatment is that only Tier 1 capital plus revaluation reserves (basically shareholders net worth) may be considered in establishing the capital adequacy ratio. In addition to this the ratio, established by Resolution no. 2.099, of 8% of capital to assets, as adjusted for certain off-balance-sheet items, under the regulations published in June, 1997 was changed to a minimum ratio of 10% for institutions established for at least 6 years.

Resolution 2.099 of August 17, 1994 established the minimum capital and net equity limits to be observed by financial institutions and other institutions authorized to operate by the Central Bank:

(a) Commercial bank or multiple service bank — R\$ 7,000,000.00;

(b) Investment bank or development bank — R\$ 6,000,000.00;

(c) Credit, financial, leasing and investment corporations — R\$ 3,000,000.00 ;

(d) Securities brokerage companies and a corporation which administers securities investments R\$ 600,000.00.

Beyond the minimum capital and net equity requirement, the financial institutions shall maintain an amount of adjusted net equity that is compatible with the degree of risk in its asset structure, in accordance with the classification of risks established in the Resolution.

In accordance with Resolution 2815, dated 01/24/2001, in the event of noncompliance with the minimum capital and net equity criteria established by the Central Bank of Brazil, information may be solicited regarding measures to be adopted for the normalization of the situation. If there is no normalization of the

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criteria established regarding the minimum capital and net equity criteria, the financial institution shall be penalized in accordance with the terms of Law 6.024, dated 03/13/74.

18.5. Foreign Investment in Brazilian Financial Institutions

Article 52 of the transitory provisions to the Federal Constitution established that any investment by foreign individuals or corporate entities in Brazilian financial institutions, including both the setting up of new foreign controlled institutions and the purchase of any interest, whether controlling or otherwise, in existing institutions, will only be permitted if duly authorized by the Brazilian Government as a consequence of international treaties, reciprocal treatment or because the investment is of interest to the Brazilian Government.

The Government delegated to the CMN the responsibility for analyzing and making recommendations on the government interest regarding applications for foreign investment in the sector. As a result of such procedure, a substantial number of investments by foreign investors in Brazilian financial institutions, most involving the control of such institutions, have been approved on a case by case basis and authorized by Presidential decree.

Once the authorization has been conceded, foreign investors and Brazilian investors shall receive equal treatment unless express provisions of applicable law determine otherwise. Foreign investments in financial institutions must be registered with the Brazilian Central Bank in the same manner as foreign investments in other sectors of the economy, pursuant to Law No. 4.131/62 and respective modifications and regulations.

18.6. Leasing

Leasing transactions are governed by Law No. 6.099 of 1974, as amended, on December 12, 1983, by Law No. 7.132 and by regulations related to these laws issued by the CMN. Leasing operations are regulated by Resolution No. 2,309 dated August 8, 1996.

Brazilian leasing companies. Only leasing companies authorized to operate by the Central Bank and, in some specific instances, other financial institutions, may enter into domestic leasing agreements. The regulations as to foreign investments in leasing companies are the same as those already described for financial institutions in general.

In order to be authorized to function as a leasing company, a company must be organized as a corporation (sociedade anônima). The company must meet minimum capital requirements determined by the National Monetary Council. The activities of leasing companies are restricted to leasing and which shall be denominated as a "companhia de arrendamento mercantil"

Leasing agreements in Brazil usually range from two to five years, with rental charges set, either in Reais that are adjusted at floating interest rates, or as per the cost variation of internal market funds, or in dollars or other hard currency for funding originating abroad.

These regulations do not apply to true or operating lease agreements. Any corporation, for example, may enter into a commercial leasing operation as lessor. The Operational Lease is mentioned in Article 6 of Resolution 2,309 dated August 1996.

Types of leasing operations in Brazil. Brazilian law authorizes the following principal types of leasing operations: domestic leasing, domestic sale and leaseback, international leasing, export sale and leasing, export sale and leaseback.

International leasing. The regulations governing the leasing of foreign-produced equipment into Brazil provide that any asset which may be imported into Brazil under existing regulations, may be the subject of an international lease in accordance with the rules established in Resolution No. 1969 dated September 30, 1992.

International leases are required to have a minimum-two year lease term and the total cost of leasing may not exceed the price of comparable import financing alternatives. The maximum term is the same as the useful life of the good.

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In accordance with Circular No. 3025, dated January 1, 2001, it was established that for the purpose of registering external leasing transactions, the manufacturer shall provide information regarding the useful life of the goods or equipment, for new and used goods or equipment, and a specialized company will provide the necessary information for real estate.

The lease terms must be submitted for approval to the Department of Control and Registration of Foreign Capital (FIRCE) of the Central Bank of Brazil, for approval of the interest rate and other financial conditions. Certain other approvals are also required depending upon the asset involved.

19. ELECTRONIC COMMERCE

19.1. General Aspects

Brazil accounts for approximately 40% of the total internet use and for more than 50% of the total revenue from e-commerce transactions in Latin America. Estimations show that the size of the Brazilian e-commerce market will grow by a geometric progression in the next years, comprising transactions business to business (“B2B”) and transactions business to consumers (“B2C”), despite the turmoil in the securities market of technology companies.

As yet, there is no statute in Brazil dealing specifically with e-commerce. Experts and government authorities are presently discussing whether the matter will require legislation to a major or a minor extent. They agree, however, on the necessity to adopt specific legislation for the sake of legal certainty to businesses carried out in the virtual world.

At the present, two bills are being reviewed in the Brazilian Congress which deal with electronic commerce: the “Projeto de Lei 1.589, of 1999, da Câmara dos Deputados” (Bill no. 1.589, of 1999, by the lower house of Congress), and the “Projeto de Lei no. 672, do Senado Federal” (Bill no. 672, by the Senate, also dated 1999). The first of these bills was prepared by the Special Committee on Computer Laws of the Brazilian Bar Association - São Paulo branch, and is inspired after the proposal for a Directive of the European Community (today enacted under no. 1999/93/CE) as well as on the suggested provisions set out in the Model Law on Electronic Commerce (1996) of the United Nations Commission on International Trade Law - UNCITRAL. The second bill, presented just a few months following the other, features nearly all of the provisions of the mentioned Model Law.

Bill no. 1.589/99, in short, addresses the following topics: (i) ruling out the need of special prior authorization for one to offer goods or services in the electronic environment; (ii) requirement of proper identification of the offeror, the host, the access provider and the security systems used for recording the electronic agreement; (iii) rules of utilization of private information; (iv) security and certification in the transactions; (v) liability of the intermediary, carriers and hosts of information; (vi) applicability of consumer protection laws to consumers; (vii) legal effect of electronic signatures and electronic documents; (viii) publicly-issued and privately-issued electronic certificates; (ix) liability of the notary public in connection with electronic certification; (x) electronic records; (xi) powers of the Court system to authorize, regulate and supervise the practice of the certification business; (xii) powers of the Ministry of Science and Technology to regulate the technical features of certifications; (xiii) administrative and criminal penalties.

Bill no. 672/99, more concise than the other, deals with the following points: (i) granting legal effect to data messages; (ii) equalizing an electronic message to a printed message; (iii) equalizing electronic authentication methods to a signature; (iv) authentication of information in the electronic environment; (v) obligations related to retaining electronic messages; (vi) lawfulness of binding statements and contracts made by electronic messages; (vii) principles applicable to identifying the sender and the addressee, and to determining the time and place of messages.

19.2. Applicability of the Brazilian rules of Law in General

Given the absence, at present, of a specific law to address the legal issues arising out of virtual transactions, electronic commerce shall be governed by the existing rules of law applicable to brick-and-mortar businesses and practices in the country, either by direct application or by resorting to analogy. The relevant parts of the Brazilian Law for the Introduction of the Civil Code also apply, in view of the international nature of electronic commerce.

(a) Rules applicable to contract formation

Just as any other legally binding promise - the enforceability of which requires but a party capable of entering into a legal obligation, a lawful object and a format which is prescribed or not barred by law - legal obligations carried out in the electronic environment may be regarded valid where such requirements are met, in light of the Brazilian Civil Code. In dealing with Evidence, Brazilian Code of Civil Procedure determines that any morally and legally acceptable means can serve to prove the truth of facts, even

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where such means have not been previously defined. Some practical difficulty exists, however, as to the utilization as written evidence if litigation arises. In Brazilian civil procedure practice, evidence with respect to information kept in electronic records generally will rely on experts' review and opinion; the issues on altering the contents of an electronic document and on the uncertainty as to the authenticity of its authorship remain unsolved by the existing laws.

(b) Rules applicable to responsibility of suppliers of goods or services

Liability in connection with goods and services sold by electronic means is subject to the same rules applicable to other methods of commerce.

In particular, where they are sold to consumers, the respective electronic transactions will be subject to the rules of the Code of Protection and Defense of Consumers - Law no. 8.078/90. The code is applicable where the matter at issue is a consumer transaction, which is determined by the presence of the so considered consumer (individual or legal entity that acquires products or services as an end user) and of the supplier of goods or services (individual, legal entity or unincorporated entity, whether national or foreign, that conducts business of, for instance, manufacturing, assembling, creation, construction, transformation, import, export, distribution or commerce of products, or performs services) in a business transaction.

The provisions of the Code of Protection and Defense of Consumers apply to consumer transactions in the virtual media, especially in connection with: (i) the right to information about the seller and the features of the offered good or service; (ii) protection against unfair business practices and misleading advertising; (iii) database and records of consumers; e (iv) the right to repudiation.

19.3. Tax Aspects of the Electronic Commerce

Like other countries, Brazil has not taken a position about taxing electronic commerce of intangible goods (software, images, sounds and other virtual utilities). On the other hand, the commerce of tangible goods done by electronic media, as well as the commerce of some intangible goods done by the usual means (e.g. "shelf software"), are subject to value added tax ("Imposto sobre Circulação de Mercadorias e Serviços de Transporte e Comunicação" - ICMS).

As to the services of Internet access providers, there exists some confusion between the States and the Municipalities as to which one of them has the competency to impose taxes on such kind of transaction. Brazilian Federal Constitution has given States the power to tax transactions related to communication services - through ICMS tax. On the other hand, Constitution empowers Municipalities to tax - through ISSQN tax - any services which are not subject to ICMS and which have been previously specified by Constitutional Laws ("Leis Complementares").

However, Constitutional Laws have not set enough rules on that matter, which has caused a debate within the Court System on whether or not providing internet access is a communication service, for tax purposes.

19.4. Intellectual Property

The provisions of the Brazilian Copyright Law (Law no. 9.610, of Feb19, 1998) and of the Brazilian software law (Law no. 9.609, of Feb 19, 1998) apply to works of authorship comprised in the electronic commerce environment (texts, sounds, drawing, photographs,

computer programs, etc.) At least four types of intellectual property work may be found in the mediums currently used for electronic commerce: (i) computer programs, (ii) multimedia works, (iii) websites, and (iv) electronic data base.

Computer programs enjoy the protection granted by the Software Law and by the Copyright Law. The Multimedia work, which encompasses several forms of expression, enjoys the protection granted by the Copyright Law, through the provisions related to each of its forms of expression. The website is also granted protection by said Law, to the extent that the Law will protect each work of authorship incorporated therein (graphic expressions, sounds, computer programs, etc.). The electronic data base is granted

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protection by the Copyright Law where, by virtue of the arrangement, selection or format of its contents, it constitutes a work of authorship; protection is not granted to a data base where such requirements are not met. Issues on whether extra protection is needed for covering other forms of creative work incorporated in the website (e.g, structure and business methods), as well as for the contents of a data base (data considered *per se*), have been the subject of discussion of specialists, and still lack adequate legal support in Brazil.

The business of registration of domain names in Brazil has been entrusted to the “Fundação de Amparo à Pesquisa do Estado de São Paulo - FAPESP”, by delegation of the Internet Managing Committee of Brazil (“Comitê Gestor Internet do Brasil”). Registration of domain names is governed by Resolution no. 1/98 of the Managing Committee.

The above referred resolution provides that the right to a domain name shall be granted on a first-come-first-serve basis (provided that the applicant meets the relevant requirements). By the terms of the act, one cannot register a domain name consisting of immoral words, or a name that belongs in the list of reserved names of the Managing Committee or FAPESP, nor a name which may mislead people, such as those name that constitute highly known or notorious marks (unless the its lawful owner is the party requesting the name).

The registration of the domain may be canceled, among other situations, for non compliance of the rules established by the Managing Committee or by a court order (Item 5 of the “Ato Normativo para a Atribuição de Nomes de Domínio na Internet no Brasil”). The matter has been discussed in several lawsuits seeking the cancellation, enjoinder or suspension of the domain name, or the assignment thereof to the plaintiff along with a prohibition of use imposed on the defendant. In most of those lawsuits, provisional remedies were granted to the plaintiff, where requested on sufficient grounds. Neither FAPESP or the Managing Committee make available to the public an administrative procedure for reviewing and deciding on the cancellation of already granted domain names, upon a mere request of an interested party.

19.5. Initiatives of the Government

At the Government level, it is worth mentioning the enactment of the Rules on Public Keys Infrastructure of the Federal Government - ICP-Gov (Decree no. 3587/2000) and also an act of the Brazilian internal revenue service (“Secretaria da Receita Federal”), the “Instrução Normativa” no. 156/99, which established the use of electronic certificates by individuals and entities in their electronic transactions with such federal agency.

On August 2000, the Federal Government created the Executive Committee on Electronic Commerce (“Comitê Executivo de Comércio Eletrônico”), designed to foster the development of electronic commerce and related technologies and infrastructure. The Committee consists of representatives from the Government, from the business community and from the scientific community.

The Federal Government submitted to public consultation a proposed Bill on authenticity and evidentiary value of documents issued, executed or received by Federal, State or City public bodies by electronic media. Since the period for submitting suggestions has lapsed as of January 2001, the proposed Bill shall be forwarded to Congress.

19.6. Electronic Documents As Probative Material In Court

The purpose of the present paper is to briefly evaluate the citizen’s ability to use technological developments to demonstrate facts in court. Does the constitutional principle of Right of Defense allow the party to use the newly created contract techniques deriving from telematics? The answer to this question shall be the main concern of this paper.

19.7. General Theory of Proof

The proof is the means used by litigators to convince the judges of a certain fact in his or her favor, in the course of a court dispute. Most of the litigation cases require decision on questions of fact. As a rule the

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judge's access to such facts depends on evidence. At least on a theoretical level, the probability to reach a fair trial is proportional to the availability of probative mechanisms.

The final addressee of the evidence is the judge. The decision must be made in accordance with the evidence presented in the process (art. 128 of the Brazilian Code of Civil Procedure). The judge shall decide according to the “formal truth” principle and not the “real truth”. The purpose of this rule is to avoid arbitrary decisions.

During the probative phase of the procedure, the judge's action must be extremely careful and seek for broad access to every means necessary to a clear and grounded analysis and formation of his decision. The Brazilian Constitution might be invoked, should the judge deny the litigator's right to produce evidence (art. 5, LV). The judge, based on legal criteria (rational persuasion), is supposed to reconstruct the facts discussed, in order to qualify the manner of their witnessing. The judge is free to analyze facts. However, such liberty does not mean that the judge may act arbitrarily.

With regard to the means of evidence, the Brazilian legal system does not present a limited number of allowed evidence, but admits “*all legal means, as well as those morally acceptable, even if not particularly specified in this Code*” (Art. 332 of Brazilian Code of Civil Procedure). Brazilian regulations accept even the so-called “non-typical” or “nameless” evidence. It does, however, repudiate the “illegitimate” evidence, that is, illegally produced or contrary to the law.

The documentary proof is defined as the thing it represents, reproducing a certain expressed idea or a past event. As ideas and facts are both regarded as facts in court, a document is the representation of a fact. As a representative thing, the document does not exist in the natural state - it is formed necessarily from its author's work, and therefore takes a certain material form or means.

Documents may be written or not, may be public or private. They can also be grouped according to their origin, authenticity, means of formation (direct or indirect; written or graphic), content (descriptive or constitutive) and form (formal or not), etc. A document is deemed to be “*ad solemnitatem*” whenever its form is of the essence of the act, and “*ad probationem*” when it works as a mere evidence of the act or of its effects. Public documents, provided that they are signed by public officials (to whose acts faith is given), are assumed authentic (*juris tantum*), unless their falsity is proven.

As far as private documents are concerned, it is controversial whether they are fully enforceable, due to the diversity of forms in which they appear, for instance, a private document written and signed or merely signed. The law assumes that the representations it contains are true. However if its signature is questioned in court this assumption must be removed (art. 388, I of Brazilian Code of Civil Procedure), until the interested party proves its authenticity. Litigators may argue the falsity of a public or private document, with the purpose to have it judicially declared. The private document may be written by the party who signed it or by others. Occasionally the document is not signed. Traditional legal authors regard the signatory as the writer of the document. The signature is not required only in documents which, by nature, are not normally signed, such as commercial books.

A number of questions about “electronic documents” and their enforceability as evidence arise from this analysis. The use of electronic means in the constitution of legal acts represents the progressive replacement of handwritten signatures by electronic pulses or transmissions. The author's signature does not necessarily follow the document. It is replaced by codes or confidential passwords.

19.8. Types of Documentary Evidence

The traditional concept of documentary proof has to give room to a **new form of expression**, which is neither oral nor written, but digital⁸. A document stands for a declaration, a representation of a present or past event. Digital documents are not different, except with regard to the form of perception by the viewer/addressee, which **is not immediate**. In other words: for the representation to become understandable, it is necessary to resort to an electronic device, an intermediary that allows the analyst to understand the declaration contained in the document.⁹ Within the wide range of documents, the electronic one ranks

⁸ Cf. Graziosi, Andrea, “*Premesse ad una teoria probatoria del documento informático*”, in *Rivista Trimestrale di Diritto e Procedura Civile*, Anno LII, n. 2, junho/98, Milano, Giuffrè, p. 487.

⁹ Graziosi, Andrea, *op. cit.*, p. 491.

among the **indirectly representative documents**. A digital document is therefore any object which is able to transmit the representation of a present or past event, by means of interaction with an electronic device¹⁰.

19.9. Representative Support

The content of an electronic document is dependent on a **representative support**, i.e., an object bearing the digital declaration (floppy disk, magnetic tape, compact disk, etc.). The representative support is a subject related to the legal requirements of preservation of documents.

In principle, some legal authors considered the magnetic support (representative support) to be the **original** of the document¹¹, and not the information it contained on a digital form. This position seems to be overcome by new concepts, according to which the support is a mere means of preservation of the document, whose essence lies on its content.

In the 80s¹², some Western European countries such as Belgium and France, deemed the transcription or the printing on paper of the content of the electronic document **as a copy**. Notwithstanding, this did not mean that the copies (seen here as the printed content of an electronic document on a paper support) could not be used in court. A better interpretation of the French regulations points out that the use of a "faithful and reliable copy" is allowed, provided that the original is lost or not recoverable (art. 1.348, "a", French Civil Code).

From the 80s on, European authors and legislation have been through a number of important transformations. Today, the support is no longer deemed to be the original of the document. The Directive 97/7 of the European Union for the distance commerce regulates contracts between consumers and suppliers through **means of communication and in the absence of the party or of the parties**¹³. The Directive, considering the lack of security in the preservation of data in magnetic support, and aiming at the protection of the contracting parties, requires that the declarations made in distance marketing contracts be **confirmed in writing or any other durable means (art. 5)**. Preservation of electronic documents is a subject of concern to both the European Union regulations and legal authors. In 1.998, the *Prospective UCC (Uniform Commercial Code)*, Bill of the Uniform Commercial Code for the EU, already mentioned the word *record* instead of *writing* (art. 2B). For the purposes of the UCC, the term *record* means the information printed on a tangible means or filed on an electronic means or any other recoverable in an intelligible way¹⁴.

19.9.1. Procedural Issues of Proof

The analysis of the probative value of the electronic document - and its acceptability in Court - is divided into three main aspects: **proof of existence of the document; proof of the origin of the declaration therein contained; proof of the content thereof**.

19.9.2. Evidence of Existence of an Electronic Document

If telematics advantage lies on speed, it may be said that its inconvenience is **fugacity**. Proof of existence of the document may be sometimes hard to produce. And Brazilian regulations determine that proving the **existence** of the document is a burden to the one who claims it (art. 333, I and II of Brazilian Code of Civil Procedure - CPC).

In some Civil Law countries such as Belgium and France there is a distinction between legal acts and legal facts. A legal fact may be proven by any means admitted by law (assumptions, witnesses, confessions, etc.), while the legal acts, as a rule, must be proven by means of written document.

¹⁰ Graziosi, Andrea, *op. cit.*, pp. 491 and 492.

¹¹ Cf. Amory, Bernard e Pouillet, Yves, "Le droit de la preuve face a l'informatique et a la télématicque", in *Revue Internationale de Droit Comparé*, n. 2, abril/junho 1.985, pp. 340/341.

¹² Cf. Amory, Bernard e Pouillet, Yves, *op. cit.*, p. 341.

¹³ Cf. Silva, Ricardo Barretto Ferreira da e Paulino, Valéria in "Relevant issues in conducting commerce on the Internet", paper presented on the 10th Annual Conference on Legal Aspects of Doing Business in Latin America, 1.998, pp.10/11.

¹⁴ Selected Provisions and Comments from Proposed Article 2B - September, 1997, p. 14, apud Silva, Ricardo Barretto Ferreira da e Paulino, Valéria, *op. cit.*, p. 15.

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In Brazil, the general rule is the liberty in the use of the different methods of producing evidence, either listed or not in the statutory law (art. 332, CPC). However, this rule admits a few exceptions, for instance the agreements involving a certain amount.

Italian legal authors usually accept for probative purposes the declarative document (which encompasses the electronic document) as equivalent to the private document (art. 2.702 of the Italian Civil Code)¹⁵. The cases in which the private document has probative effects are listed in the same article.

Common Law countries recognize, at their turn, two fundamental rules that seem to represent a barrier to the proof of existence of an electronic document: the rule of the indirect witness (*hearsay rule*) and the rule of the *original (best evidence rule)*¹⁶. The examination of these two rules will allow us to understand how this legal system deals with the issue.

Due to the **hearsay rule**, witness proof is only accepted if it arises from a direct and personal contact of the witness with the facts he or she states. In the application of this rule to written documents, a document could not be deemed a proper means of proof, if the author is not present to witness to it. As in electronic documents several individuals handle the original information, it is clear that such rule is an obstacle to the proof of existence of the document.

According to the **best evidence rule**, a document is in principle valid as a means of proof only if presented in its original version. The electronic document takes a digital form and its representative support alone is materialized. As a consequence the original rule hinders the proof of existence of the electronic document, since it is non-material.

There are however a number of exceptions to the *hearsay rule* and to the *best evidence rule*. Some samples are the British *Civil Evidence Act* of 1.968 and the North-American *Business Records Exception*, to be further analyzed.

19.9.3. Origin of Declaration and Electronic Signature

Another subject of interest is the identification of the author of the declaration. It is closely connected to the **digital signature** issue, to be further reviewed in detail. As a matter of fact, the mere insertion of a name at the end of an electronic document cannot be equal to the traditional signature. The latter has peculiarities (mainly those regarding handwriting of the signatory), which render it unique and hard to be forged.

The commercial practice has brought some solutions to the problem. A **secret code** (password) is a source of identification of the user generally adopted in electronic transactions. The weakness of the method lies on its inability to identify the individual physically. This would require the use of techniques for remote recognition of certain particular characteristics of the individual, such as fingerprints or voice.

The developments of the information technology have been followed by new and modern methods for recognition of the author of the electronic document. What is today called electronic signature is a special digital procedure of controlling the origin of electronic documents. A cryptographic system has been accepted as a proof similar to that of the traditional signature¹⁷. The user of the electronic system is provided with a couple of asymmetric keys, one of them private, and the other one public. Both have an alphanumeric code, but the private key has a secret code known only by the user. The code corresponding to the other key is of public domain and belongs to a list accessible to the other users. The two keys are compatible and reciprocally identifiable. And therefore the system of **digital signature** or **electronic signature** is rendered feasible¹⁸.

¹⁵ Graziosi, Andrea, *op. cit.*, p. 501.

¹⁶ Cf. Amory, Bernard e Pouillet, Yves, *op. cit.*, p. 335.

¹⁷ Cf. Graziosi, *op. cit.*, "l'apposizione della firma digitale integra un atto di volontà, giuridicamente rilevante, di assunzione di paternità della dichiarazione cui si riferisce".

¹⁸ Graziosi, Andrea, *op. cit.*, p. 507.

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For probative purposes, the electronic signature is deeply different from traditional signature. The latter is a directly representative documentary evidence. The judge can therefore directly assess the evidence. The digital form requires a different procedure: the verification of the origin of the declaration depends on the intervention of an electronic device. Therefore, the electronic signature is not a directly representative evidence. Consequently the proof of declaration contained in the electronic document is documentary, but the proof of its origin is *constituenda*¹⁹, i.e., it is an evidence to be made.

19.9.4. Evidence of the Content of the Document

Are the electronic documents reliable as a means of proof? Can we trust documents, which may be manipulated, knowing that such manipulation may leave no traces?

There are two kinds of risk regarding electronic documents: the errors and the frauds. The errors may have different sources: human, technical or external. Most of the human errors are due to inadequate data manipulation. Errors of an external nature are due mostly to the environment (bad weather conditions). Technical defects derive as a rule from the bad functioning of software or hardware. The fraud differs from the error because a fraud is a willful act.

Problems of frauds involving electronic commerce are not easy to solve. Some legal authors propose the creation of new crimes, with severe penalties (in Brazil, the Bill of Law no. 1.713/96 is now being examined by the Parliament). However, frauds do exist even in traditional methods of commerce, and they may be regarded as exceptions.

19.9.5. Bills of Law

In Great Britain, the above-mentioned *Civil Evidence Act* (1.968) was a pioneer statutory law. It regulated the electronically produced evidence, stating the minimum requirements for court acceptance. The requirements included a certificate of identification of the document, which should be signed by the responsible for its content before it is presented in court.

In the United States of America there is the *Uniform Business Records as Evidence Act* and the *Uniform Rules of Evidence*, also enacted in the 60s. They contemplate an exception to the hearsay rule and to the best evidence rule, according to which the electronic evidence would be acceptable in contents of commercial nature. The *Business Records Exception*, as it is named, admits electronic documents regardless of its author's witnessing.

In France, the Parliament has converted court interpretation into law, according to which a written document is not always required, in case of material impossibility. (Law dated July 12th, 1980).

One of the most complete and modern regulations on the subject is the Italian law no. 59 of 1.997. It provides a detailed discipline for the admission of electronic documents as means of proof, contemplating cryptographic signature, digital copies, etc.

Recent regulations in Brazil demonstrate regulatory improvements on electronic documents (Law 9.800, May 26th, 1.999, authorizing the litigators to send electronic documents and applications/pleadings via facsimile; and Federal Tax Agency Instruction, no. 156, December 22nd, 1.999, regulating the use of electronic documents in Tax Law acts).

Other Bills of Law in discussion are: no. 1.589/99 and 1.483/99, regulating the validity of electronic documents and digital signature. BL no. 672, 1.999, on electronic business. The Brazilian Bar Association has presented a Bill of Law in the Parliament on August 13th, 1999.

19.9.6. Final Remarks

Brazilian regulations, though in a preliminary approach, are progressively taking into account recent developments in technology. While a lot of work lies ahead to be done, it is important to stress that a certain concern to regulate the subject is already detected.

¹⁹ Graziosi, Andrea, *op. cit.*, p. 510.

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As an old saying goes, law is never up to scientific evolution. This explains why statutory laws regulating scientific issues are supposed to be broad and general, giving some room for adjustments.

The electronic document is fully acceptable as probative material, not being an exception to the rule of art. 332 of our Civil Procedure Code, as long as individual guarantees and public order principles are respected.

20. INFORMATION TECHNOLOGY

20.1. National Information Technology Policy

It was only in 1984 that Brazil first enacted legislation governing the national information technology policy, through Law 7,232/84.

With the objective of improving the Country's qualification in the information technology field, to the advantage of social, economic and cultural development, this Law provided that the principles below should be followed:

(a) governmental action in the orientation, coordination and incentive of information technology activities;

(b) supplementary participation of the State in the productive sectors in cases of national interest or in cases where private initiative was unable to act or had no interest in acting;

(c) intervention of the State to ensure appropriate protection of the national production of certain classes and types of goods and services, as well as the improvement of the country's technological qualification;

(d) prohibition of illegal or actual monopoly situations;

(e) continuous adjustment of the information technology process to the peculiarities of the Brazilian society and definition of political guidelines for information technology activities, taking into account the need to protect and improve the Country's cultural identity, the strategic nature of the sector and its influence, for the achievement of higher social welfare levels;

(f) direction of the national efforts towards programs that prioritize the economic and social development and strengthen national sovereignty in its various fields;

(g) establishment of mechanisms and legal and technical instruments for the protection of secrecy of stored, processed and disclosed data, to ensure the privacy and the security of individuals and private or public legal entities;

(h) establishment of mechanisms and instruments to ensure every citizen the right to access and to rectify existing information about him/her on public or private databases;

(i) establishment of mechanisms and instruments to ensure the balance between productivity gains and employment levels in the automation of productive processes; and

(j) governmental action to foster and protect the development of national technology and the economic, financial and commercial strengthening of national companies, as well as to foster cost reduction of products and services, thus ensuring them better opportunities for international competitiveness;

The national information technology policy would, in turn, be implemented through the following instruments:

(a) the establishment of rules regarding quality standards and official certification of information technology products and services;

(b) the use of public funds to foster information technology activities;

(c) the improvement of forms of international cooperation to enhance the country's technical qualifications in the area;

(d) the education, training and qualification of the personnel in this area;

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(e) the establishment of a special system for the concession of tax and financial incentives, in favor of national companies, aiming at the growth of information technology activities;

(f) the standardization of communication protocols between the data-processing information systems; and

(g) the establishment of specific programs to foster information technology activities by the state-owned financial institutions.

The structuring and commercial use of databases and the software protection should be subject to specific regulation.

To achieve its aims, Law 7,232/84 granted exclusive privileges to national companies, defined as those exclusively, permanently, effectively and unconditionally under the control of Brazilian individuals, resident and domiciled in the Country.

Law 7,232/84 also authorized the Executive Power to impose restriction on the import, production, operation and commercialization of information technology goods and services, thus facilitating the adoption of a market reserve in favor of the national companies as defined above.

This reality has been deeply changed since 1991. Law 7,232/84 was followed by Laws 8,191/91 and 8,248/91. Constitutional Amendment 6/95 modified the constitutional provision that authorized special treatment favoring Brazilian companies with national capital (which definition was similar to the one adopted by Law 7,232).

Under the legislation referred to above, market reserve and privileges granted to national companies engaged in the information technology field were consequently extinguished.

In line with the reality worldwide, the national information technology policy focused on seeking international competitiveness, in an open market, encouraging companies that, irrespective of the origin of their capital, were engaged in the manufacturing of information technology and automation goods with desirable levels of local aggregated value (calculated according to the rules of a predetermined basic productive process), quality production standards and research and development investment in the sector.

Currently, the incentives to the sector are laid down in Law 10,176/01. Following the directions taken by the development of the national information technology policy, Law 10,176/01 provides for incentives to any company planning to develop or produce information technology goods, irrespective of the origin of its capital, with due regard to desirable quality standards, local aggregated value and research and development investments.

Nevertheless, the provisions of Law 10,176/01 - specially those referring to the preference to be given by Public Administration for the acquisition of information technology goods and services and to the local aggregated value required for the use of the regulated incentives - indicates the simplification of the bureaucratic procedures for concession and fulfillment of requirements imposed for the use of such incentives and reveals that the governmental actions shall primarily focus on research and development investments (see 13.3 below for more details).

However, it should be pointed out that regulations of Law 10,176/01 have not yet been enacted and that the constitutionality of many of its provisions are being questioned by the State of Amazonas. According to the State of Amazonas, although Law 10,176/01 grants more favorable incentives to the companies set up in the Manaus Free-Trade Zone (*Zona Franca de Manaus - ZFM*), it violates constitutional principles that guarantee the maintenance of the ZFM until 2013 as a free-trade area for export and import and also benefited by tax incentives.

Finally, it is important to mention that the Ministry of Science and Technology and its respective Secretariats are responsible for the national information technology policy.

20.2. Tariff Policy and Mercosur

The information technology and automation goods are included on the list of exceptions to the application of import rates adopted in the Mercosur for third countries. A linear and automatic conversion of applicable rates is provided for in order to reach a maximum common tariff of 16% in 2006.

The trade of information technology goods between the Mercosur countries receives the benefit of a 100% reduction, provided that the rules of origin agreed upon between the countries involved in the negotiation are complied with.

20.3. Incentives to the Development and Local Production of Information Technology Goods and Services

As already mentioned, the incentives to the local development and production of information technology goods are currently governed by Law 10,176/01.

Pursuant to that Law, the agencies and entities of the Federal Public Administration, whether direct or indirect, the foundations established and maintained by the Public Power and other organizations under the direct or indirect control of the Union will give preference, in the acquisition of information technology and automation goods and services, with due regard to the order set below, to the following:

- (a) goods and services with technology developed in the country; and
- (b) goods and services produced according to a basic productive process, in the form to be defined by the Executive Power.

In the exercise of this preference, equivalent conditions of delivery terms, support services, quality, standardization, compatibility, and performance and price specification must be taken into account.

The companies engaged in the development or production of information technology and automation goods, which invest in information technology research and development, will be entitled to the following incentives:

- (a) reduction of the Tax on Manufactured Products (*Imposto sobre Produtos Industrializados - IPI*); and
- (b) accelerated depreciation of new machines, equipment and instruments to be used in the manufacturing.

The following percentages will be adopted for the IPI reduction:

- (a) 95% from 1/1/2001 to 12/31/2001;
- (b) 90% from 1/1/2002 to 12/31/2002;
- (c) 85% from 1/1/2003 to 12/31/2003;
- (d) 80% from 1/1/2004 to 12/31/2004;
- (e) 75% from 1/1/2005 to 12/31/2005; and
- (f) 70% from 1/1/2006 to 12/31/2009, date on which the incentive will expire.

The IPI credit is assured to raw materials, intermediary products and packaging material used in the manufacturing of information technology goods benefited by the incentives.

Such incentives will only be granted to the information technology and automation goods specified by the Executive Power according to the parameters set forth in Law 10,176/01. The Executive Power will also define the basic productive process (*Processo produtivo básico - PPB*) to be adopted for the obtainment of the incentives.

The new aspect of the law is that the PPB will be established by the Executive Power based on a project proposal (presented by the interested companies, according to current understanding) submitted to the Ministry of Science and Technology.

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Compliance with minimum research and development investment limits and with specific rules to the allotment of funds to be invested is also required for the use of the incentives.

The implementation of profit sharing programs, pursuant to the legislation in force on the matter, as well as the implementation of a quality standard in the form to be defined by the Executive Power is also required to obtain the benefits provided for in Law 10,176/01.

The companies engaged in the manufacturing of information technology goods and which operate in the ZFM, or areas under the scope of the Superintendence for the Development of the Amazon (*Superintendência do Desenvolvimento da Amazônia - SUDAM*), Superintendence for the Development of the Northeast Region (*Superintendência do Desenvolvimento do Nordeste - SUDENE*) and of the Center-West Region follow a different and more favorable system.

As an example, the companies in the ZFM are entitled to IPI exemption up to the year 2013 and to a reduction in the Import Tax (*Imposto de Importação - II*) for raw materials, intermediary products and secondary materials as well as for packaging, used in products sent to other regions of the national territory, proportional to the degree of national content of the end product manufactured in the ZFM. The companies located in areas under the scope of the SUDAM, the SUDENE and in the Center-West Region are entitled to the IPI exemption up to the year 2003 and to more favorable percentages of reduction of the taxation until 2009.

20.4. Software Legal Protection

As provided for in Law 7,232/84, the software legal protection was object of a separate regulation. Currently, the matter is governed by Law 9,609/98.

Among other aspects of this law, we emphasize the following:

(a) software is defined as the organized set of instructions in natural or codified language, contained in physical support of any nature, of necessary use in automated machines for data processing, devices, instrument or peripheral equipment, based on digital or analogical technique, to make them run in certain ways and for certain purposes;

(b) software is protected by Law 9,610/88 - Copyright Law - with due regard to provisions of its specific legislation;

(c) the employer, client of the services or public agent has the exclusive right to the software developed during the agreement term or statutory relationship, which is expressly aimed at research and development, or where such activity of the employee, contracted party or civil servant is set forth, or further results from the nature itself of the obligations undertaken under such relationships;

(d) the use of the software in the country will be object of a license agreement. In the absence of the license agreement, the tax document referring to the acquisition or licensing of copies shall be considered legal evidence of the regular use of the software;

(e) the acts and license agreements referring to the right to sell the foreign software shall set forth, regarding taxes and charges, the responsibility for the payments and shall establish the remuneration due to the software owner, resident and domiciled abroad;

(f) with regard to item (e) above, it shall be deemed null any clause which limits the production, distribution or commercialization, in violation of the rules in force, which exempts any of the contracting parties from the responsibilities for occasional claims of third parties, resulting from defects or copyright violation;

(g) the license agreement for software use, the corresponding tax document, and the physical supports or the respective packaging must legibly indicate the technical expiration date of the commercialized version;

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(h) the person who commercializes software, whether as the titleholder of software proprietary rights or as titleholder of the commercialization rights undertakes, within the national territory, during the technical validity of the respective version, to ensure to the respective users the rendering of complementary technical services in connection with the proper running of the software, taking into account its specifications, such obligation surviving also should the commercialization of the software be discontinued during its validity term;

(i) the protection of software rights is granted irrespective of registration and is assured to foreigners domiciled abroad provided that the country of origin grants equivalent rights to Brazilians and foreigners domiciled in Brazil;

(j) notwithstanding, the software may be registered with the National Institute of Industrial Property (*Instituto Nacional da Propriedade Industrial - INPI*) to facilitate the protection of the rights related thereto, being thus the secrecy of the data furnished for such purpose ensured ;

(k) the software is protected for 50 years counted as from January 1st of the year subsequent to its publication, or from the date of its creation; and

(l) violation of software copyrights subjects the infringer to detention from six months to two years or fine. If the violation consists of the reproduction for sale, the penalty shall be the imprisonment from one to four years and fine.

20.4.1. Taxes Applicable to Operations Involving Software

Pursuant to Administrative Rule 181/89, the II and the IPI are levied on the importation of software. The Tax on the Circulation of Goods (*Imposto sobre Circulação de Mercadorias e Serviços - ICMS*) has also been charged.

The II and IPI rates vary according to the tax classification of the imported products. In the State of São Paulo, the ICMS internal rate for software transactions is of 18%.

In defining the basis for calculation of the II and IPI applicable to imports, Administrative Rule 181/89 admits a separation of the value of the software from the value of its support, in such a way as to allow the II and the IPI to be paid only on the value of the support. If no separation exists the II and IPI will be levied on the total value of the transaction.

In respect of the ICMS in the State of São Paulo, article 50 of Decree 45,490/00 (ICMS Regulation) sets forth that in transactions involving software, whether personalized or not, the basis for calculation of the ICMS is twice the value of the support.

The same Administrative Rule 181/89 also sets forth that the Withholding Income Tax (*Imposto de Renda Retido na Fonte - IRRF*) is levied on payments of software copyrights to non-residents. The IRRF rate provided for the payment of royalties (a concept that covers such copyright) is of 15%. If the payment is for programming services, the rate may reach 25%.

Law 10,168/00 established the Contribution for the Intervention in the Economic Domain (*Contribuição de Intervenção no Domínio Econômico - CIDE*) due by legal entities which hold **licenses of use** or which acquire technological knowledge, or further by signatories of technology transfer agreements, levied on the relevant remunerations, which rate is of 10%.

A tax credit regarding this contribution was introduced by Provisional Measure 2,062-63 of 02.23.2001. There is a discussion whether the CIDE applies to any and all royalty payments, including those related to software, or only to payments related to technology transfer.

The rules set forth in article 50 of the ICMS/SP Regulation are also valid in regard to software sales in the market of the State of São Paulo. However, there is no specific rule for the IPI taxation on the resale of imported software.

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According to Decree-Law 406/68, with supervening amendments, the ISS applies to data processing software services, among other services. Because the ISS is levied by the Municipality administration, the effective taxation must be analyzed in the light of the legislation of the Municipality where the renderer of the services has his establishment. However, it is important to mention that some Municipalities adopt the view that the ISS is due on software sales, including “off-the-shelf” sales.

It is also important to mention that disputes of tax competence, involving the IRRF, the IPI, the ICMS and the ISS are frequent in the enforcement of the legislation object of the comments above and definition of the tax treatment to be adopted to imports and sales, in the national software market. Those disputes have as background the discussion regarding the classification of the software payment as payment of royalties, services or goods.

20.4.2. Financial Remittances for the Payment of Software

The financial remittances abroad as payment for software are governed by Circular 2,682/96 of the Central Bank of Brazil (*Banco Central do Brasil* - BACEN).

According to this Circular the following remittances in connection with software transactions, together with the required documents, are made at the floating exchange rate:

- (a) payment of sole copy software;
- (b) payments related to the updating, leasing, maintenance and customization of software when they are not subject to registration with the Brazilian Institute of Industrial Property, the INPI (payments related to technology transfer are subject to registration with the INPI); and
- (c) transfers made by companies that distribute foreign software, due as a result of the revenues obtained with such software sales in Brazil.

20.5. Internet

In addition to the Joint Ministerial Regulation 147/95 of the Ministry of Communication and of Science and Technology, which creates the Internet Management Committee in Brazil (*Comitê Gestor Internet do Brasil* - CGIB) and lists its duties, and to Resolutions 1 and 2, both of 1988, by the CGIB Coordinator, which govern the registration of domain and the assignment of IP addresses (Internet Protocol), there is no specific regulation applicable to the Internet.

20.6. Bills

As a consequence of the information technology fast development, there are numerous bills on the matter being discussed. Among the matters to be regulated, we highlight the following: crime for the undue use of computer technology, structuring and use of database, security of bank transactions carried out through electronic means, electronic commerce, electronic documentation and digital signature.

20.7. Final Comments

Significant progress has been seen in the national information technology policy over the last few years. However, the specific legislation on the matter is not significant in number, being basically restricted to the provisions that were referred to above and which need to be better systematized.

The matters and disputes that are not covered under this specific legislation, are subject to the rules of our traditional law, especially Civil, Consumer and Tax laws, which presently need to be modified in order to contemplate the relationships in the digital era, which are characterized by a high degree of dynamism, innovation and informality.

This is a current overview on the matter. Its development once again leaves the challenge of adapting the Law to the social, economic and cultural changes up to the lawmakers.

21. COMMERCIAL REPRESENTATION

Commercial Representation in Brazil is governed by Laws nos. 4.886 and 8.420, of December 09, 1965 and May 08, 1992, respectively. According to these Laws, Commercial Representation is defined as the intermediation activity, performed on a permanent basis by any person or company²⁰ committed to act in the market of products or services on the behalf of one single company or of several companies²¹.

Therefore, the Commercial Representative will perform its duties by gathering buying proposals from prospective customers and sending them for the approval of the represented company. In case of acceptance of the proposal, the Commercial Representative will be entitled to a previously and contractually agreed upon percentage of the transaction (“commission”), conditioned to the effective payment performed by the customer, except if the contract foresees the right to commission independently of the buyer’s payment.

It is also foreseen in the above mentioned Laws that every Commercial Representative is obliged to be registered before the Commercial Representatives Council of the Brazilian State where the respective activities take place, bearing in mind that these Councils have a regulation power concerning the profession.

Also, pursuant section 27 of the Law No. 8.420, the contract must be in written, and must contain, in addition to the specific provisions agreed upon by the parties, the topics foreseen in that section, such as for instance : (i) general conditions of the representation; (ii) indication and features of the products; (iii) duration of the contract; (iv) indication of the area, or areas where the representation will be performed, as well as the allowance (or not) for the represented company to perform direct sales of its own in the indicated area, or areas; (v) granting (or not) the exclusivity of the selling area (total or partial); (vi) commission in favor of the Commercial Representative and its payment schedule, conditioned (or not) to effective collection of the buyers’ payments; (vii) exclusivity (or not) on the behalf of the represented company’s products; (viii) indemnity to be paid to the Commercial Representative in case of unjustified termination of contract, which cannot be less than the equivalent of 1/12 of the total retribution paid to the Commercial Representative throughout the duration of the contractual relationship.

It is very important to emphasize that despite the provision found in section 1 of Law no. 4.886²², due to the stronger enforceability of Brazilian Labor Law, there is a serious risk that represented company should have to respond labor claims from its Commercial Representatives²³ — except if the representative is a company.

Thus, so as to avoid such claim and its heavy economic burdens, it is of crucial relevance that the represented company include the following restrictions in all its Commercial Representation Contracts : (i) Commercial Representative must always be established as a company formed by at least two partners; (ii) Represented Company must avoid giving orders directly to the partners of representative company or to its personnel also, these same orders must be restricted to the performance of the obligations of representative²⁴.

²⁰ which is named by Brazilian Law as “Representante Comercial” (in English : Commercial Representative)

²¹ The representation of just a single company would depend on whether an “exclusivity provision” is present in the contract signed by the parties.

²² that section foresees that there is no labor relationship between the contracting parties

²³ based, among other allegations, on the legal presumption of a labor relationship, which requires the concomitance of personality, salary dependence, habitualness and subordination.

²⁴ as foreseen in the contract and Laws no. 4.886 and 8.420, as well.

22. DISTRIBUTION AGREEMENTS

The Distribution Agreements in Brazil may be divided in two similar but not identical categories :

- (A) Commercial Distribution Agreements, and
- (B) Ordinary Distribution Contracts.

22.1. Commercial Distribution Agreements

The first of the above mentioned categories is governed by Law no. 6.729 of November 28, 1979 (amended by Law no. 8.132 of December 26, 1990) and is restricted to the relations maintained between the Automotive Vehicles and Spare Parts Producers (Auto Makers) and their Distributors (Dealers).

Pursuant to Section 2 of Law no. 6.729, only automobiles, trucks, buses, agricultural tractors and motorcycles are considered as ruled by its provisions, what leads us to conclude that any other sort of automotive vehicle, such as boats and non agricultural tractors, are excluded from the scope of its provisions, therefore belonging to the second category, that is to say, to the Ordinary Distribution Contracts, which will be commented opportunely.

According to Law no. 6.729 (section 3), the Commercial Distribution Agreements, concerning the Dealer's role, comprise: (i) the trade of the automotive vehicles described in section 2; (ii) their spare parts²⁵; (iii) the technical assistance to the customers; (iii) the free concession for the use of the Maker's trademark.

Among the provisions of section 3 of Law no. 6.729 we also find the possibility of the Commercial Distribution Agreement to foresee the prohibition of the trade of new automotive vehicles produced by other makers²⁶. On the other hand, the Dealers have the right to trade new spare parts made or furnished by third parties, taking into consideration the binding to the so called "fidelity level"²⁷. Besides, the Dealers are entitled to trading second hand automotive vehicles and original spare parts produced by any other maker, as well as other merchandises and services compatible with the Agreement.

In section 5 of Law no. 6.729 we find the basic provisions which must be present in all Commercial Distribution Agreements, enumerated such as follows : (i) definition of the operational area where the Dealer shall perform its activities²⁸; (ii) minimum distances between the different establishments of Dealers²⁹; Also, the Dealer Company commits itself to trade the maker's automotive vehicles and spare parts, as well as to give the technical assistance to customers, in accordance with the respective Commercial Distribution Agreement. Nevertheless, the Dealer is forbidden, personally or through third parties, to perform such activities outside its delimited operational area³⁰.

Despite the fact that operational area is defined in the Commercial Distribution Agreement on behalf of the Dealer, section 6 of Law no. 6.729 allows the maker to contracting a new Dealer, as long as the market in operational area shows proper conditions to do so, or when a vacancy from a terminated previous agreement occurs³¹.

²⁵ made or furnished by the respective makers

²⁶ in Brazil, it is very common to find such prohibition in agreements of this kind.

²⁷ which is defined in Section 8 of the Law no. 6.729 as the minimum quantity of the maker's spare parts which the Dealers are obliged to acquire, according to the provisions foreseen in the "Category Convention"

²⁸ which can be reserved to more than one Dealer, except in the cases of exclusivity granted to a specific Dealer

²⁹ in accordance with the criterion of marketing potentials

³⁰ In any case, the consumers should always be entitled to freely choose any Dealer in order to purchase the goods produced by the maker, whereas, on the other hand, the Dealer has the right to be reimbursed for any technical assistance given to a customer who has purchased the product from another Dealer.

³¹ But, in any of those events, Law no. 6.729 prohibits any new contracting which may jeopardize the Dealers who are already contracted, although it grants no right of preference to the Dealer which is already established in that particular operational area, once the new contracting is proved feasible in terms of market prospects in that operational area.

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The Commercial Distribution Agreement must also contemplate, in accordance with to section 7 of Law no. 6.729, a binding “Automotive Vehicles Quota” to be acquired by the Dealers and which is to be defined taking into account the following items: (i) the estimate of the maker’s production³²; (ii) the “quota” must correspond to a part of the estimated production³³; (iii) the contracting parties must agree on the Dealer’s “quota”³⁴; (iv) the quota’s definition must not take into account the Dealer’s inventory³⁵ and is to be revised annually³⁶.

Section 10 of Law no. 6.729 mentioned above opens for the contracting parties the possibility of including in their Commercial Distribution Agreement an obligation on the Dealer’s part to maintain in its inventory a previously stipulated amount of products, proportional to its new products trade flow or rotation³⁷.

In section 12 of Law no. 6.729, there is a provision prohibiting the Dealer to sell new Automotive Vehicles to others rather than the final consumers. That is due to the fact that the Law does not admit the sale for purposes of resale, except in the following cases : (i) trades between Dealers linked to the same Maker limited to 15% and 10% of the “Automotive Vehicles Quota” of Trucks and of other Automotive Vehicles, respectively; (ii) International Trading.

Furthermore, under Law no. 6.729, the Maker is bound to preserve the equality of prices and conditions of payment among all Dealers which, in turn, are free to establish their own prices to the consumers.

Despite the respect owed to the Dealers’ operational area by the Maker, the latter can perform “Direct Sales of Automotive Vehicles” in the following cases:

(1) **Independently of Dealer’s performance or request:** (i) to the Public Administration or Diplomatic Representations; (ii) to consumers considered as “Special Buyers” by the “Category Convention”.

(2) **Through the Dealers:** (i) to Public Administrations or Diplomatic Representations; (ii) to Automotive Vehicles Fleet Owners; (iii) to consumers considered as “Special Buyers” by the “Category Convention”, when so requested by a specific Dealer.

Anyway, the level of direct sales and its repercussion on the Dealers’ “Automotive Vehicles Quota” must be always foreseen by the “Category Convention” and any kind of act which may lead to the Dealers’ subordination or to an interference in their business management is expressly prohibited.

In accordance with sections 17 and 18 of Law no. 6.729, the previously mentioned “Category Convention” is inherent to the Commercial Distribution Agreement and may be defined as a General Agreement, which must be made between the civil entities representing the Makers and the respective Dealers’ National Category. Likewise, this “Category Convention” will have legal enforcement between the signing parties as well as regulation power over their relationship, in accordance with and subordinated to Law no. 6.729.

³² *per product and committed to the internal market, in the subsequent annual period, and in accordance with the prospects of the market*

³³ *composed by a diversity of different and independent products*

³⁴ *in consonance with the Dealer’s business capacity and trading performance as well as its operational area marketing possibilities*

³⁵ *as foreseen in section 10 of Law no. 6.729*

³⁶ *if no necessary adjustment has been made before then, due to eventual differences between the maker’s present production and that which was previously estimated.*

³⁷ *Nevertheless, whenever a Commercial Distribution Agreement foresees such minimum inventory obligation for the dealer, the latter is entitled to limit it such as follows:*

(a) *For Automotive vehicles in general* : 65% of the monthly correspondence to the annual quota foreseen in section 7 of Law no. 6.729 and commented above;

(b) *For Trucks*: 30% of the monthly correspondence to the annual quota;

(c) *For Tractors*: 4% of the total annual quota;

(d) *For Spare parts*:

d.1) *for Implements*:5% of all sales accomplished in the last 12 months;

d.2) *for other components*: any agreed value which cannot be superior to its acquisition price from the maker relating to the Dealer’s 3 last months retail sales.

If the Commercial Distribution Agreement contemplates a minimum inventory provision, besides the Dealer’s right to have the above mentioned limits respected, it is also foreseen under Law no. 6.729 that :

(1) *Concerning Automotive Vehicles, Trucks and Tractors*: every six months there must be a comparison between the above cited “Automotive Vehicles Quota”, foreseen in section 7 of Law no. 6.729, and the Dealer’s actual market conditions at that time as well as its trade performance for the purpose of reducing its minimum inventory limits;

(2) *In the event of products’ being altered or breaching of their deliverance, the maker shall be obliged, in a maximum period of one year from the event, to buy back the Dealer’s inventory of auto parts (except for the implements) by the present price offered to all Dealers, or, alternatively, have it replaced by new products, at the Dealer’s discretion.*

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Furthermore, pursuant to Law no. 6.729 all Commercial Distribution Agreements must always observe a standard written form and its content must be in accordance with sections 20 and 21, which foresee that the written term of the agreement will always have the following provisions : (i) specification of products; (ii) definition of the operational area; (iii) minimum distances between each dealers' establishments; (iv) dealer's quotas; (v) requirements concerning dealer's financial condition, management, equipment, specialized personnel, facilities and technical capacity; (vi) undetermined duration of the agreement which can only be terminated in accordance with Law no. 6.729 provisions, contemplating the possibility of an initial duration of at least five years³⁸.

Finally, the Commercial Distribution Agreement may be terminated in the occurrence of the following events : (i) by consensus between both parties; (ii) by the sending of the written notice mentioned above in case of an initial five-year agreement; (iii) by initiative of the innocent party, in the event of an agreement, breaching, infringement of Category Convention or of Law no. 6.729³⁹.

Still, if Maker sends to Dealer the written notice in order to terminate the initial five-year agreement about which we have already commented above, under sections 23 up to 25 of Law no. 6.729 the Maker would be binding to: (i) buy back the whole Dealer's inventory of automotive vehicles and spare parts by the price offered to Dealers on the day of such indemnity payment; (ii) buy all Dealer's equipment, machinery, tools and plant (except for the real estate), by their market price, as long as their acquisition has been either determined by the Maker or not opposed by it right after receiving a written notice from the Dealer informing about these acquisitions; (iii) pay an indemnity to the Dealer corresponding to 4% of Dealer's gross invoicing of goods and services projected for the remaining period of the prematurely terminated contract plus three months, based on the last two years previous to termination or the actual duration of the agreement if termination should come to occur before then⁴⁰.

In relation to Commercial Distribution Agreement of undetermined duration the consequences of its termination are foreseen by sections 24 up to 27 of Law no. 6.729 as follows :

(1) **Termination caused by the Maker:** (i) Maker must buy back the whole Dealer's inventory of new automotive vehicles and new spare parts by the price offered to consumers on the day of the agreement's termination; (ii) Maker must buy all Dealer's equipment, machinery, tools and plant (except for the real estate), by their market price; (iii) Maker must also pay an indemnity to the Dealer, corresponding to 4% of its last gross invoicing of goods and services projected for the next 18 months, plus three months per each five years of the agreement's duration, based on the last two years previous to termination⁴¹.

(2) **Termination caused by the Dealer:** dealer must pay an indemnity corresponding to 5% of the total value of all merchandises it has bought in the last four months previous to termination.

Regardless of which party may have caused the agreement to terminate, all values owed to the innocent party must be paid no later than 60 days from the agreement's termination day.

22.2. Ordinary Distribution Contracts

Unlike Commercial Distribution Agreements, the so called Ordinary Distribution Contracts have no specific Law governing the parties' relationship. As a matter of fact, this sort of contract is governed by the general provisions found in the Brazilian Commercial Code of 1850 and in the Brazilian Civil Code of 1916.

Because of that, the contracting parties are free to regulate their relations, almost exclusively by means of the contract, taking into account only the already mentioned general provisions on obligations, as foreseen under Commercial and Civil Codes⁴².

³⁸ after these five years' period the agreement will automatically become one of undetermined duration, unless a written termination notice is not sent to the other party within the 180 days previous to its termination.

³⁹ It is also foreseen in section 22 of Law no. 6.729 that the termination based on the events described in this item must always be preceded by gradual previous penalties. Also, in case of termination, the parties must be granted a minimum 120 days period after termination so as to fulfill any pending operations.

⁴⁰ On the other hand, if Dealer gives the termination notice foreseen in section 21 of Law no. 6.729, according to section 23 of the same Law, the Maker will not be granted any indemnity whatsoever.

⁴¹ Maker must also pay to Dealer an additional indemnity if so foreseen by the Commercial Distribution Agreement or by the Category Convention.

⁴² Therefore, if the contract does not foresee its duration, it is legally assumed that it shall be undetermined and its termination will be possible at any time by means of a simple 30 days notification.

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Also, if the contract does not foresee a form of indemnity for termination, this shall only be claimable by the innocent party in case of proven occurrence of tort. Nevertheless, it is important to notice that if the parties' distribution relationship is linked to products considered as "Automotive Vehicles" under Law no. 6.729, these parties are forbidden to regulate their contract by any Law other than this one, being null and void any provision in contrary.

Furthermore, if the parties relationship should involve an intermediation performance by the Distributor on behalf of its Contractor's products, and not of its obligation to buy the products for resale, no matter what the denomination for the contract may be, it will always be a "Commercial Representation" contract governed by Laws nos. 4.886 and 8.420 about which we have commented above.⁴³

⁴³ On the other hand, there are some eminent Brazilian Scholars, such as José Alexandre Tavares Guerreiro, who accept the possibility of Law no. 6.729 to govern Distribution Contracts, in addition to those which deal with the automotive vehicles as defined by that specific Law.

23. INTERNATIONAL CONTRACTS INTELLECTUAL PROPERTY

23.1. General Features

As a member of the Stockholm Convention of 14th July 1967 (under which the World Intellectual Property Organization - WIPO was set up), Brazil subscribes to both the Paris Convention (for protection of industrial property) and the Bern Convention (for protection of literary and artistic works).

Intellectual property comprises literary, scientific and artistic property, and is treated under civil law, as opposed to industrial property, which comes under commercial law.

In May 14, 1997 it comes to force the new Industrial Property Code - Law 9.279 from May 14, 1996, which covers inventions, utility models and industrial designs, manufacturers' marks, trade and service marks, showing the origin and source of products. It also foresees the penalties against industrial property crimes.

The National Institute of Industrial Property (INPI) is the government entity in charge of industrial property rights, and the formal examination of requests for the granting of patents and registration of trademarks.

23.2. Patents

Patents may be granted for the protection of inventions, utility models, and industrial designs. The protection granted by a patent extends for 20 years for inventions, 15 years for utility models and 10 years, extendable for three 5 year period for designs, all of them counted as from the date the request for protection is lodge at INPI. It was created the Certification of Addition, where it could be protected the improvements introduced in a patent invention. As an accessory of the patent application, it will have always the same term of it.

Proceedings for the granting of a patent are lengthy and time-consuming. An application must be submitted to INPI, containing the inventor's claims, a full description of the invention, designs of the invention (when applicable), and evidences of compliance with all legal requirements. Once the application has been presented, a preliminary formal examination takes place, and a certificate of filing is issued. The application will be considered confidential for 18 months, at the end of which the application will be officially published. The inventor may ask for an anticipated publication, avoiding, this way, this 18 months period in suspense. After the lodge of the application, there will be open a 36 months term to inventor or any interested third party to request formal examination of the application. Failure to request formal examination will cause the application to be considered withdrawn, being its object turned into public domain. It was given a 60 day extra period to claim for the restoration of the appliance through the payment of a specific tax. Until the end of the formal examination it may be presented, by the inventor or by any interested third party, information and documentation in order to give support to the examination. After the end of the formal examination a decision will be published, determining the granting, denial or shelving of the application. Should no appeal be filed, the final certificate will be issued after the payment of specific tax.

The owner of a foreign patent may file an application for the corresponding patent in Brazil within the priority claim under the Paris Convention: twelve months for patents of invention and utility models, and six months for industrial designs, as from the date of application in the country of origin.

Commercial use of the patent must be initiated within 3 years from the date of issuance of the certificate, or the patent may be object of a Compulsory License. The patent may also lapse in the following cases: (i) by the expiration of its legal term; (ii) by its caducity; (iii) if the inventor fails to pay the required annuities to INPI; (iv) if the inventor expressly waives the privilege; (v) in the event of foreigner inventor, by the absence of an attorney duly qualified and domiciled in the country; or (vi) if it is administratively cancelled or judicially annulled. Once extinguished the patent, its object falls in public domain.

23.3. Trademarks

Application for a trademark may be either as a foreign or a Brazilian trademark. A foreign trademark is registered under the terms of the Paris Convention, which establishes an exclusive priority term of six months from the date of the application in the country of origin for its owner to apply for registration of this same trademark in other countries which are signatories to this convention.

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In order to file this application in Brazil, it is necessary to submit a certified copy of the trademark application in the country of origin or the certificate of registration to INPI.

The principal objective in registering a trademark within the period of priority pursuant to the convention - apart from securing protection - is to enable the trademark to be licensed or transferred in return for a royalty payment.

Any interested party may apply for registration of a Brazilian trademark, whether Brazilian or foreign. Application and registration of this trademark must follow the provisions of the Brazilian Industrial Property Code.

If a trademark is applied for in Brazil by a foreign party without the priority claim established in the Paris Convention, it is considered a Brazilian trademark, and therefore the convention benefit will not be afforded.

Pursuant to Brazilian law and regulations, royalties cannot be charged for trademark or patent license agreements in the following cases:

- if the trademark or the patent is not duly registered/granted in Brazil;
- if the trademark or the patent was not filed in Brazil within the priority term, as mentioned above;
- if the registration of the trademark has not been renewed;
- if the trademark registration has been extinguished or is in nullity or cancellation proceedings;
- if the license agreement is executed between the foreign parent company and its Brazilian branch;

or

- in the case of transfer, if the previous owner was not entitled to remuneration.

Brazilian law requires that the owner of the trademark exercises licit and effectively the activity for which it is claimed protection for the goods or services covered by such trademark. In order to apply for registration of a trademark in Brazil, evidence that the applicant is a company in good standing under the laws of its country and of the company's field of business is required.

Trademark registration affords protection for ten years. This period may be extended for successive ten years period.

Actual use of a trademark is essential to its protection in Brazil which registration might lapse if it is not used within five years from the date of its concession or if its use is interrupted for more than five consecutive years.

The owner of the trademark in Brazil can provide proof of use, or by the licensee that actually uses it.

23.4. Technology Transfer Agreements

Transfer of technology involving Brazilian parties or industrial property rights registered in Brazil are governed by Normative Act INPI No. 120 of December 17th 1993.

Normative Act 120 embodies acts or agreements involving transfer of technology: patent use agreements, trademark license agreements, technology transfer agreements, sharing costs agreements and contracts for rendering of technical and scientific assistance services.

INPI approval of such agreements is required for purposes of enforcing third parties and remittance abroad of payments resulting from the agreements and tax deduction of such payments.

Other valid documents evidencing the transfer of technology and the conditions governing such transfers (invoices, for instance) may also be submitted to INPI for approval, thus permitting remittance of funds abroad and tax deduction of payments resulting from the transfer.

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Generally, technology transfer agreements must clearly state their object and the industrial property rights involved, and describe in detail how the transfer will take place.

The above mentioned agreements must state the conditions for the actual commercial use of patents regularly applied for and granted in Brazil; the licensing of a trademark applied for and registered in Brazil; the acquisition of know-how and technology not protected by industrial property rights; and the obtainment of techniques, planning and programming methods, research, studies and projects intended for execution or rendering of specialized services.

Trademark license and commercial patent exploitation agreements must also state whether the trademark license or commercial patent exploitation is exclusive, and whether subcontracting is permitted. The term of the agreement must not exceed the trademark registration or the patent term.

Technology transfer agreements may contain clauses regarding the confidentiality and unavailability of the technology to be transferred. Such agreements must, in addition, contain clauses providing for the liability of the parties for any tax obligations resulting from the transfer. The assignor must supply the assignee with all the relevant technical information, as well as the necessary technical assistance, so as to allow for the effective absorption of the technology.

Contracts for rendering of technical and scientific assistance services must state the time required for the specialized services, the number of technicians required, their specialization and training programs, and must specify the remuneration.

Remuneration of the technology to be transferred may be at a fixed price, a fixed price per item sold, a percentage of the profits, or a percentage of the net sale price, less taxes, fees and other charges agreed to by the parties. International and domestic price levels for similar transactions may be taken into account for purposes of INPI examination of the remuneration involved.

The request for approval must be submitted to INPI on the proper form, together with an original via of the agreement or equivalent document. INPI may request further documentation. Approval will be granted within 10, 20 or 45 days, depending on the value of the agreement; whether or not it contains clauses providing for the confidentiality or unavailability of the technology; or whether examination of the act or contract hinges on an outside opinion or information.

Should INPI request supplementary documentation, the interested party has twelve months to comply, or the case will be shelved. Once the requested documentation has been submitted, INPI will examine the request within the terms mentioned above. If INPI fails to examine during the time frame established, the agreement or equivalent document will be considered approved, the only requirement being attachment of an instrument of liability signed by the parties or their legal representatives.

INPI may suspend or annul the approval, should it conclude that it is not in conformity with prevailing legislation.

INPI may, at its own discretion, wish to follow up on the technology transfer procedure.

23.5. Franchising

In Brazil, the franchising system is ruled by the Law nº 8.955, dated December 15, 1994. Complementing the legal text the ABF (Brazilian Association of Franchising), entity which takes care of the ethics in the activity in Brazil had elaborate an Auto Regulation Code of franchising that, nowadays is also a support as a set of director rules to the implementation of the franchising system, as well as to solve the questions originated from this activity.

Beyond the definition of the franchising system the Law 8955/94 rules the relationship between franchiser and franchisee, since the preliminary negotiation until the formalization of a franchising agreement, establishing furthermore about the penalties in the event of non accomplishment of some determinations.

The key point of the Law 8955/94, without any doubt, is embodied in its article 3, that treats of obligation of the franchiser to furnishing to the potential franchisee the **Franchise Offering Circular** (adaptation of

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original Uniform Franchise Offering Circular U.F.O.C.). It is the real direction about the mandatory content of the Offering Circular that have to be given to the potential franchisee **10 days before the signature of the franchising agreement or pre-agreement or before the payment of any kind of tax by the franchisee (art. 4º).**

In its 3rd article, the Franchise Law determines that the Offering Circular contains among other information:

- summed historical, society form, complete name and tradename of the franchiser and all of the companies that it is linked in order to permit to the franchisee to have enough references about the franchiser;
- the balance sheet and financial demonstrations of the franchiser concerning to the last two exercises. It is important to stand out that the company which has less than two years is not forbidden to contract being necessary, however, the presentation of the demonstrations since its constitution;
- list all the judicial pendencies that involves the franchiser, the controller companies and owners of the trademarks, patents and copyrights concerning to the operation, which could obstruct the realization or the good process of the franchise;
- detailed description of the franchise, of the deal and the activities that will be performed by the franchisee;
- the ideal profile of the franchisee, where will be detailed the experience, scholarly level and other characteristics which will be considered mandatory or, at least, preferred, as the judgment adopted by the franchiser;
- Requirements concerning the direct involvement of the franchisee in the operation and administration of the business;
- Detailed description of the initial investment necessary to the implementation of the franchise, affiliation fees, or bond, and still estimated costs and amounts of the installations, equipment and initial supplies
- Precise information about periodic taxes (royalties, rents, insurance etc.) and other values to be paid by the franchisee to the franchiser, or to third parties indicated by the franchiser;
- Complete relation of all franchisees (name, address, telephone number...), subfranchisees and subfranchisers as well as those one that had left the net in the last twelve months;
- Model of the agreement to be executed.

The law establishes furthermore that the Offering Circular and the Franchising Agreement shall be elaborated in a clear and accessible reading avoiding, this way, confusing and uncertain texts, susceptible of several interpretation.

In the remainder the Law 8.955/94 repeats the direction which before its issue were emerging from the Brazilian Tribunals, mainly in respect to the nonexistence of employment vinculum between franchiser and franchisee or between the franchiser and the franchisee employees, except in case where exists evident dissimulation of the employment agreement with or without collusion between the parties involved.

It is important to note that it is not mandatory to register a Franchising Agreement before any governmental authority to be valid, but to be executable against third parties, it shall be registered before the National Institute for Industrial Property - INPI, according to the Normative Act no. 115/93 and if the franchiser is a foreigner party, it has to be registered in the Central Bank of Brazil in order to permit the remittance of the payments foreseen in the contract, and fax deduction of such payments.

24. INTERNATIONAL TREATIES

24.1. General Features

Treaties are legally binding written agreements between international entities that can be made between States, between States and international organizations, or between international organizations themselves, provided that the parties are represented by qualified agents. The purpose of treaties is to discipline freely agreed-upon legal relationships, with a lawful and feasible object, in order to assure the contracting parties that the provisions therein contained are duly complied with and observed.

Before an international-level ratification, these treaties and conventions, negotiated and signed by the President of the Republic, must be submitted to the National Congress: first to the House of Representatives, and subsequently to the Senate, whose President enacts a formal Legislative Decree. The treaties thus become effective and part of the internal legal system. They are then enacted and published, essential steps to make them enforceable on the internal level.

The last step is to register the Treaties with the UNO Secretariat. Once this registration is accomplished, the Treaties are presented to other countries, that is to the International Order.

24.2. Trade

From the point of view of international trade, Brazil is a member of the WTO (World Trade Organization that replaced the GATT (General Agreement on Tariffs and Trade) by virtue of the Marrakech Agreement signed in 1995. Brazil was one of the signatory States of the Bretton Woods Agreement (which created the International Monetary Fund, IMF, and the International Bank for Reconstruction and Development, IBRD); it is a founding member and a shareholder of the Interamerican Development Bank, IDB, and has State-observer status with the European Economic Community. Brazil also has a permanent Representation in Brussels. Brazil signed bilateral agreements with Austria on 03/13/ 1993, the European Economic Community, on 01/31/ 1994, Turkey, on 04/10/(1995, Uruguay, on 05/06/1997, and entered into complementary agreements with Peru, on 07/21/1999, Costa Rica, on 04/04/2000. It also signed a memorandum with Argentina on 10/29/1999.

24.3. Intellectual Property

Concerning intellectual property protection and international technology trade, Brazil was one of the founders of the Paris Union, and has been a member of the World Intellectual Property Organization, WIPO, since 1975. It is a signatory of the Convention of the Paris Union for the Protection of Industrial Property, including the Hague review of 1935 and the Stockholm review of 1967. Brazil is also signatory of the Patent Cooperation Treaty (PCT) signed in Washington in 1970, which was ratified and enacted as an internal Brazilian law. The 1971 Strasbourg Agreement referring to the International Patent Classification is effective in Brazil as an internal law. With regard to the bilateral relations as to industrial property, Brazil has signed several agreements, i.e.: with Sweden (1955) for protection of trademarks, with France (1983) regarding industrial property, with the former USSR (1982) for scientific and technological cooperation, with the USA (1957) and Italy (1963) regarding copyrights.

24.4. Taxes

With respect to Tax Laws governing international trade relations, Brazil signed, ratified and transformed several bilateral international agreements into internal laws "in order to avoid the double taxation of income (international double taxation agreements). The agreements with the following countries are noteworthy: Germany (1976), Argentina (1982), Austria (1976), Belgium (1973), Canada (1986), South Korea (1992), Denmark (1974), Ecuador (1988), Spain (1976), Finland (1974), France (1972), Hungary (1972), Italy (1981), Japan (1967 and 1978), Luxembourg (1980), Norway (1970), Portugal (1971), the Netherlands (1990), Sweden (1976 and 1986) and Czechoslovakia (1991), France (1993 and 1994), United States of America (1994) and Finland (1996). It has also signed international income tax exemption treaties for maritime navigation and airline companies with: South Africa, Germany, Chile, France, Italy, United Kingdom and Ireland, Switzerland. And Venezuela. By virtue of the agreements to avoid double taxation, Brazil applies reduced rates, as established in said agreements, to the prejudice of the rates established by the

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internal Brazilian laws referring to the projected income, including the interest on the acquisition of assets on credit. Said reduction in rates is allowed, even if the payer has assumed the tax burden, by virtue of the agreements executed in Brazil or abroad, with persons residing in Brazil or abroad.

In addition, Brazil entered into a complementary agreement with Cuba on 05/27/1998, with the objective of developing technical cooperation projects and actions related to tax management and customs management. The agreement prioritizes tax management, more specifically, tax collection, and procedures and systems for the relationship between tax management and the bank network, through the adaptation or development of an income classification system. The agreement also provides for information technology systems for tax collection management and the development of systems for information and network technology.

24.5. Latin America

After the Second World War, Brazil was one of the main agents instrumental in establishing a free trade zone in Latin America. It was one of the founders of the Latin American Free Trade Association, LAFTA, established under the Treaty of Montevideo on February 16, 1960. Brazil, Argentina, Bolivia, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela signed this Treaty.

In 1980 these States created the American Integration Association (ALADI), under the Montevideo Treaty of August 12, 1980, "in order to proceed with the integration process of promoting the region's harmonious and balanced socioeconomic development." (Treaty preamble, 1980).

It was within this time-honored tolerance of limited scope agreements (under the 1980 ALADI Treaty) that Brazil and Argentina signed important bilateral treaties, allowing, soon thereafter, for the swift creation of a bilateral common market area. These treaties are as follows: the Integration, Development Cooperation Treaty, signed in Buenos Aires on November 29, 1988; 24 protocols, followed by other bilateral accords on topical issues, including the Treaty for Establishment of the Brazilian/Argentine Binational Companies Statutes on June 6, 1990. Brazil signed the Economic Cooperation Agreement (ECA), with Venezuela (1994) and Uruguay (1997). It also signed multilateral economic agreements with Argentina, Chile, Mexico, Uruguay and Venezuela, in 1995.

24.6. MERCOSUR

The MERCOSUL Treaty, signed in Asuncion, Paraguay, in March 26, 1991, proposes the constitution of a common market between Brazil, Argentina, Uruguay and Paraguay, which entails:

- (a) the free circulation of goods, services and production factors among the nation members, by eliminating tariffs barriers between the four countries;
- (b) the establishment of a common external tariff, and the adoption of a common business policy within its regional and international economic and commercial relationship;
- (c) the coordination of a sectorial macroeconomics policies among the member nations in foreign trade, agricultural, industrial, fiscal, monetary exchange, capital, service, customs, transportation and communication matters, as well as any other issue that may be agreed upon;
- (d) the commitment of the State members to harmonize their legislation aiming at the complete integration process

As from January 1, 1995, there is no longer tariffs barriers among the participating countries. Most of the products originated from any of the four countries (there is still a list of few exceptions) are freely trade within the region with no import tariffs at all. Additionally, a Customs Union was also established to be in force as from January 1, 1995. To that effect, an instrument aimed at motivating the member States to become externally competitive was created: **The Common External Tariff ("CET")**

As with European Union, the Common External Tariff (CET) shall be one of the cornerstones of the MERCOSUL integration process. Accordingly, in order to prevent deflections in the trade flow, a tariff ranging from 0% to 20% was established.

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Such tariff will cover most of the products imported into the region from non-members States, with the exception of those products considered to be “sensible” in their respective countries, such as capital goods, informatics and telecommunications in Brazil.

According to the decision 7/94 of the Common Market Council (“CMC”), as of January 1st, 2001, a Common External Tariff (“TEC”) of fourteen percent (14%) has been implemented for capital goods in relation to Brazil and Argentina. Paraguay and Uruguay have up to January 1st, 2006 to implement such tariff. However, we must mention that the CMC decisions 20/00 and 68/00 provide for the constitution of common systems of capital goods which are not produced in the area, what would change aspects of the already consolidated TEC, upon the exercise of negotiations with term up to June 30, 2001. Within this same range, there would also be contemplated proposals to modify the TEC for capital goods produced in the area, which may be submitted by the Member States to the Trade Commission up to June 30, 2001.

In relation to the informatics and telecommunications goods, the convergence of tariffs was scheduled for January 1st, 2006. A maximum common tariff of sixteen percent (16%) was determined to start on such date. The CMC decision 68/00 provides, however, the submission, by the Common Market Group (“GMC”) of an assessment for the possible reduction of protection levels and tariff spread practiced for the production chain of capital, informatics and telecommunications goods, whether they are produced or not in the Mercosur Member States, for the purpose of making the required adjustments to the TEC.

The CMC 68/00 Decision determines that the Mercosur Member States may establish and maintain, up to December 31st, 2002, a list of one hundred (100) items of the NCM as exceptions to the TEC. The Member States shall notify, up to January 31st, 2001, the remaining States, about their TEC exceptions proposed as applicable to the above mentioned Decision, there being room for possible manifests of disagreement. The Member States may modify, every six (6) months, up to twenty (20) products of such exception lists, provided they duly obtain the prior authorization of the GMC.

There is the matter of the CMC Decision 15/97, providing for a linear increase of the TEC, in three (3) percentage points, up to December 31st, 2000. With the CMC Decision 67/00, approved in Florianópolis, the Member States have agreed to reduce only half percent (0.5%) of the previously provided increase, thus extending a two and a half percent (2.5%) increase for a maximum period of two (2) years. The CMC shall assess, however, the possibility of additional reductions on occasion of its next meeting, to be held in June, 2001.

There are five exhibits that are integral part of the MERCOSUL Treaty; I) regarding the Commercial Liberation Program; II) The General Origin Rule; III) Resolution of Disputes; IV) Safeguards Clauses and V) Common Market Group Work Subgroups. These exhibits were provided for in article 3 of the Treaty, and also establishes that a General Origin Rules, a Dispute Resolution System and Safeguard Clauses will be established.

The Institutional Structure of the MERCOSUL is established by the rules set forth in the Asuncion Treaty and the Ouro Preto Protocol, until the formation of the common market.

The institutional bodies of MERCOSUL are the following:

(a) Common Market Council (“CMC”) - It is composed by the Ministers of Foreign Affairs and Economy (or equivalent) of the State members and, being the highest-level and decision-making institutional entity of MERCOSUL, CMC is responsible for the compliance with the rules established by the Treaty of Asuncion. CMC is the entity authorized to represent MERCOSUL in the negotiation and signature of agreements with non-members states, international institutions and other nations in general;

(b) Common Market Group (“GMC”) - It is composed by four permanent and four alternate members appointed by each of the State members, representing the following entities: I) Ministry of Foreign Affairs; II) Ministry of Economy (or equivalent); and Central Bank. It is the executive body of MERCOSUL in charge of implementing the decisions made by CMC, to supervise the activities of the MERCOSUL Trade Commission (“CCM”) and Administrative Agencies, to propose measures aiming at the implementation of a commercial liberalization program, to coordinate a macroeconomics policy, to participate in negotiations with international agencies and non-members nations with respect to the signature of agreements and, if

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necessary, to be present in dispute resolutions within MERCOSUL, as well as to organize and coordinate the so called Work of Subgroups;

(c) The MERCOSUL Trade Commission (“CCM”) - It is composed by four permanent and four alternate members, appointed by each of the MERCOSUL nations and coordinated by the respective Ministers of Foreign Affairs of these countries. CCM is entitled to verify that the common business mechanisms policy are being followed accordingly. CCM is also the entity entitled to speak out on behalf of the State members in connection to any claim related to the Common External Tariff, common business mechanisms and claims raised out by the private sector;

(d) Joint-Parliamentary Committee (“CPC”) - It is composed up to 64 (sixty four) permanent members, with the same number of alternate members. Each of the State members is entitled to appoint 16 (sixteen) members, who must also be members of the National Congress of their respective countries. The CPC represents the legislative bodies of the State members. Within the MERCOSUL’s structure, CPC plays a role of an advisory and decision-making entity;

(e) Administrative Secretariat (“SAM”) and Social and Economic Advisory Forum (“FCES”) - SAM is entitled to the publication of MERCOSUL Official Gazette and to keep documents. It is also responsible to make public the activities of the GMC. FCES, in its turn, is the entity that represents the social and economic areas of the State members, being an advisory body; and

(f) Subgroups of Work (“SGT”) - The Subgroups of Work are subordinated to the GMC. Their task is to carry out studies on specific matters of MERCOSUL’s interest and to first draft the decisions and resolutions to be forwarded to the appreciation of CMC. Currently, there are 10 (ten) sub groups of work formed, as follows:

- SGT N° 1 - Communication;
- SGT N° 2 - Mining;
- SGT N° 3 - Technical Guidelines;
- SGT N° 4 - Financial Matters;
- SGT N° 5 - Transport and Infrastructure;
- SGT N° 6 - Environment;
- SGT N° 7 - Industry;
- SGT N° 8 - Agriculture;
- SGT N° 9 - Energy;
- SGT N° 10- Labor, Employment and Social Security Matters

The advanced stage of MERCOSUL integration mechanisms signals that Latin America integration process, at least as far as the Southern Cone region is concerned, is no longer a mere rhetoric, but a positive action than can lead to positive and concrete results.

25. Dumping in Brazil

25.1. Introduction

The globalization caused the antidumping regulations to be increasingly used these last few years, being an instrument often used by national companies as a way to protect their home markets. Despite the strong economic tenor of the issue, we will approach solely the legal aspects of dumping and the “antidumping” legislation in Brazil (Law n° 9.019 and Decree n° 1.602, dated August 23, 1995), based on Article VI of the General Agreement of Tariffs and Trade (“GATT”).

Therefore, we will first of all discuss the legal concept of dumping and its core elements. It is important to underline that “antidumping” rules may be used by companies to mitigate or even prevent any dumping event from occurring, due respect being given to the fact that imposed duties may never exceed the calculated dumping margin.

Because dumping is usually mistaken for other actions for economy protection, such as subsidies and compensatory measures, ahead we will briefly describe the parameters that allows us to tell one from the other.

We will additionally present a description of the “antidumping” process and its closing or suspension, including closing by petitioners, at governmental request in the event of national interest or execution of price agreement by the company being accused of dumping.

25.2. Concept and Core Elements of Dumping

Legally speaking, dumping is the export of products at lower prices than those usually found in exporting company’s like products sold in its home market. However, although the very difference in price is regarded as an unfair business action, in order for such a difference in price to be rendered unacceptable it must be injurious or threat the national industry.

Therefore, the following are the core elements of dumping:

(a) **Export price lower than that ordinarily found in the exporter’s domestic market.**

Exportation by an exporter of products at prices lower than those found in said exporter’s home market is intrinsic to dumping, this being sufficient element to characterize the act but insufficient to render it unacceptable. The following prices are taken into account when analyzing said prices and comparing them to calculate the dumping margin: (i) “ex works” price, that is, free of taxes; and (ii) cash price.

The comparison of these two prices determines the dumping margin that is the difference between the price found in the exporting market and the export price, calculated by means of a fair comparison, i.e. any differences in marketing conditions must be eliminated with adjustments.

(a) **Like product.** Definition of like product found in relevant legislation is somewhat subjective and unclear, which make an accurate discussion about this issue rather difficult. According to legislation, like product is an “identical product, a product equal in all respects to the product under review, or, in the absence of such a product, another product that might not be exactly the same product in all respects but shows very similar characteristics to those of the product under investigation.” This excerpt from the Brazilian legislation denotes that the like product concept is a quite broad one, creating flexibility that authorities charged with the investigation of dumping actions may enjoy at this level”.

(b) **Injury to the national industry.** According to the legislation, injury is both the property damage and any threat of material injury to the domestic industry, whether as yet established or delay in its implementation. The Brazilian legislation sets some tangible parameters to determine injury, such as: (i) volume of dumped imports; (ii) effects of said imports on the like product price in Brazil; and (iii) resulting impact on the domestic industry. Said determination also includes an objective analysis of the following amounts: (i) volume of dumped imports; (ii) market share of dumped product imports in the overall import volume and consumption; (iii) price. For the determination of threatened injury, the following aspects will be taken into account: (i) significant growth of product imports; (ii) sufficient idle capacity or imminent

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substantial increase of foreign producer's productive capacity; (iii) imports at prices that cause a drop in domestic prices or prevents a price increase; (iv) stocks.

(c) **Causal connection between injury and the dumping.** In a dumping investigation, the authority seeks to determine whether or not and to what extent dumped imports are responsible for any injury caused to the domestic industry, taking into account other factors known to have possibly caused injury within the same timeframe.

It is our task here to distinguish dumping from other trade protection mechanisms, specially safeguard measures and subsidies.

As provided in GATT's Article XIX, the so-called safeguard measures are emergency tools employed to protect the Brazilian industry and avoid any damage resulting from increased import volumes. Unlike the dumping, safeguard measures aim at protecting the national industries irrespectively of any unfair business act and are usually taken when the Brazilian industry shows no competitiveness as compared to foreign products. We must underline that dumping and safeguard measures are different figures, including as far as imports of a certain product by the complainant State are concerned.

On the other hand, subsidies consist of advantages conferred by a State to certain companies or sectors that end up reducing artificially their production costs.

Another mistake commonly seen mistake is with dumping and "underselling" and predatory price. However, they are distinct insofar "underselling" consists of sale at a price lower than the cost price, which is not characteristic of dumping that, in turn, is the export at a lower price than the price found in country of origin, whether or not such prices are higher or lower than the cost prices. On the other hand, predatory price consists of sale of products at low prices for the purpose of wiping out competition; such mechanism does not exist in dumping. Additionally, the basic difference between dumping and those two other figures is that the latter should be protected by national competition laws, while dumping is a foreign trade issue.

25.3. Investigating Dumping in Brazil

A dumping investigation in Brazil is initiated by the filing of a written petition by national producers or business associations containing allegations of possible dumping behavior by a certain company or companies in their exports into Brazil.

Said petition must include sufficient evidence of dumping, injury and causal connection between these two. Should the allegations on the petition fail to be clearly substantiated, it will be cancelled.

For a petition to qualify for review, it must also include the following information: (i) petitioner's identification, indication of volume and market share in the home production (ii) estimated volume and share in national production of like product; (iii) list of known domestic producers of like product, who are not represented in the petition and, if available, indication of volume and their market share in overall production, as well as statement in support of petition; (iv) full description of product allegedly imported at dumping prices, name of country of origin or exporting country or countries, identification of each exporter or foreign producer known and list of product importers; (v) full description of product manufactured in Brazil; (vi) sale price in the exporting country (regular price); (vii) representative export price or, should it be unavailable, representative price at which product is first sold to an independent buyer located within the Brazilian territory; (viii) information on the development of volume of allegedly dumped imports, effect of such imports on like product prices in home market and negative impact of imports on the national industry.

Once accepted, the merits in the petition will be reviewed and an investigation is initiated.

The petition will be rejected and the proceeding cancelled in the following events: (i) dumping or injury caused thereby is insufficiently substantiated or no reasonable justification for investigation; (ii) petition is not prepared by the domestic industries⁴⁴ or on its behalf; or (iii) domestic producers, that expressly support the petition, represent less than 25% of the national overall production of like product.

⁴⁴ Any petition supported by producers whose aggregate production volume represents over 50% of home production of like product will be deemed to have been filed by the national industry or on its behalf. Those elements are critical to the initiation of an investigation.

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Investigations must be complete within one year from the opening date, subject to an additional six-month extension under special circumstances. The dumping period shall be the nearest twelve-month period possible to the opening date of investigation and may be, under special circumstances, be less than twelve months but never less than six months. On the other hand, time for the determination of injury shall be sufficiently long as to allow adequate assessment but never less than three years, and shall mandatorily include a dumping investigation time.

During the phase of proceeding where facts will be determined, interested parties⁴⁵ will have enough opportunity to submit, in writing, any evidence that might be relevant to the investigation. For that purpose, additional or complementary information may be requested or accepted, in writing, and hearings may be scheduled. However, appearance at such hearings is not mandatory.

Should the information required fail to be presented to the Brazilian authorities by any of the parties concerned, the preliminary or final opinion may be prepared on the basis of the best information available, i.e., data provided. Additionally, special treatment to information provided and indicated as confidential by the parties may be requested, provided that such a request is duly supported, and such information shall be kept separately.

As an important document in a dumping investigation, a dumping investigation questionnaire will be forwarded to all interested parties, who will have 40 days (subject to an additional 30-day extension) to return them duly completed. Questionnaires should be accompanied by a defense petition contesting the initial petition and the Opinion issued by DECOM notifying the opening date of an investigation.

Prior to the completion of proceeding, but never before sixty days from the starting date of investigation, national authorities may impose temporary measures on imports under investigation, provided that (i) all parties have expressed their opinions about the petition; (ii) dumping and injury to the domestic industry is affirmatively determined on a preliminary basis and authorities decide that such measures are necessary to prevent any damage in the course of investigation.

Following publication of preliminary determination of injury and dumping by the Brazilian authorities, the exporter may willfully undertake satisfactory obligations to adjust prices or cease importing at dumping prices. Should SECEX accept and the newly established CAMEX approves such an undertaking, the dumping proceeding may be closed or suspended with no imposition of duties. The investigation, however, may carry on should exporter or any authority deem desirable.

Acceptance or rejection of any price agreement is at the sole discretion of Brazilian authorities, which does not free them from the obligation to duly justify any rejection. However, although the national industry is not required to formally voice its opinion on the issue, SECEX commonly asks for it.

To date, to the best of our knowledge there is only one preliminary determination of dumping and injury published, which is included in Circular SECEX n° 47/00.

As per the review of agreements, DECOM has published none to date. This shows how new is the use of the “antidumping” legislation in Brazil and the setbacks Brazilian authorities involved in the “antidumping” process and professionals dealing with the matter come up against.

Prior to preparing the final opinion, a hearing is held by SECEX to inform the parties of critical facts supporting the opinion, and the parties will have fifteen days to voice their opinions with respect thereto. Upon expiration of said fifteen-day period, the finding of facts phase of process will end and no other information received as from such closing date will be taken into account.

Investigation may be closed and “antidumping” duties may or may not be imposed, which translates as “a rate imposed on the imports carried out at dumping prices, for the purpose of counteracting their hazardous impact on the Brazilian industry”⁴⁶. Accordingly, an investigation will be closed and “antidumping” measures will not be imposed if: (i) no sufficient evidence exists of dumping or damage resulting therefrom, (ii)

⁴⁵ Interested parties are:

(i) home producers and any association representing them; (ii) importers and any association representing them; (iii) exporters and any association representing them; (iv) the exporting country's Government..

⁴⁶ Manual of Business Protection, prepared by SECEX, page 24.

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dumping margin is “*de minimis*”, (iii) volume of imports object of actual or potential dumping is insignificant. Alternatively, investigation will be closed and “antidumping” measures will be imposed if SECEX understands that dumping, injury and causal connection between them exist.

National authorities may, then, impose “antidumping” duties and indicate the amount, which will never exceed the calculated dumping margin. We draw the attention to the fact that the Brazilian legislation allows collection of definite “antidumping” duties on products that have been shipped for consumption up to ninety days prior to the application of provisional “antidumping” measures whenever there is: (i) history of dumping causing injuries, or importer was or should have been aware that producer or exporter is engaged in dumping behavior and it could cause injuries; and (ii) damage is caused by great volumes of imports of a given product at dumping prices in the relatively short period of time.

The “antidumping” duties and price agreements proposed by exporters will remain in full force only for as long as the need to mitigate dumping and resulting damage exist. However, such duties will cease to exist five years maximum following its imposition, subject to extension provided that evidence exists that extinction of such duties could result in dumping again and injury to the national industry.

The “antidumping” process may additionally be closed by petitioner or Brazilian authorities. In fact, the petitioner may, at any time, request closing of process, however SECEX may determine the continuation of investigation. Additionally, under special circumstances, decide in view of national interests for the suspension of duties application.

25.4. Conclusion

Based on the foregoing, it is clear that the “antidumping” is new process and has been increasingly used in Brazil.

The Brazilian regulation, which is based on GATT and WTO agreements, has many details and allows the parties to dispute other parties’ opinions and voice their own on the matter and requires the submission of detailed evidence. However, the novelty of the theme brings about many surprises to authorities and professional dealing with the matter.

26. COMMERCIAL AND CIVIL LITIGATION

26.1. The Jurisdiction in Civil and Commercial Cases

Litigation in respect to commercial and civil matters is decided taking into consideration the rules of the Civil Code and of the Commercial Code, which are federal statutes. These codes have been enacted on 1916 and 1850, respectively, and have been considerably amended during the years, in many subject matters, by more recent statutes. A bill for a new Civil Code, which will regulate both civil and commercial matters, is currently under discussion in the Congress. It may be approved this year.

The civil and commercial litigation is presented to the State courts of general jurisdiction, consisting of an individual judge, and can always be reviewed, if any party so wishes, by a State Court of Appeals. Brazilian Constitution does not contemplate trial by jury in commercial and civil cases.

The procedural rules are stated in a Civil Procedure Code which is also a federal statute. By virtue of the federative system, the organization of the courts and the specific venue rules are contained in the State legislation. In general, the State courts of general jurisdiction are not specialized and bear jurisdiction regarding civil, commercial and criminal cases.

The general rule regarding the jurisdiction of a law suit is that it be brought before the court of the domicile of the defendant. This rule applies both to individuals and corporations. The consent of the parties and the election of a different jurisdiction, such as that stated in a contract, is also accepted.

All court proceedings in civil and commercial cases are public, except when they involve family matters.

26.2. Costs of Litigation

The litigating parties have to pay for the jurisdictional services, which vary from State to State. The general rule is that an initial payment be made by the plaintiff, usually calculated on a percentage of the amount disputed, and other payments in the event of appeals, by the party who presents the appeal.

Lawyers' compensation for the services rendered to their clients is usually established on the basis of a percentage of the amount disputed or to be recovered. This percentage results from an agreement between the lawyer and his client and is calculated taking into consideration a number of factors such as the amount of the expected recovery, the complexity of the work to be executed, the capacity of the client to pay and the reputation of the lawyer. In most cases a retainer is negotiated and, in case of success, is set off against the final fees.

Additionally, the Civil Procedure Code provides that all expenses incurred by a winning party be paid by the loser. This includes reimbursement of those fees charged for the jurisdictional services and the fees paid to experts, but also a payment to lawyers. The fees are arbitrated by the court according to the statutory rules and are due to the lawyer.

26.3. Initial Procedures

There are a number of different proceedings, but this paper will only describe the “**processo ordinário**” which is the most usual in contractual or tortious cases where are discussed values over 20 minimum salary.

A civil or commercial action begins when the plaintiff's lawyer files a petition before a court having jurisdiction over the case. The next step is the service of process to the defendant. This will be effected either by a court official, who will deliver personally to the defendant a copy of the complaint, or by mail, when a receipt has to be signed by the defendant in order to be valid the service. The defendant will answer the claim in a short period of time (generally 15 days).

The defendant will seek a lawyer to defend him, who will submit to the court a response to the allegations of the plaintiff. This petition may confirm or deny the facts and may also give a different interpretation to them as well as also will discuss the legal basis of the plaintiff. The plaintiff will then file another petition

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expressing his answer to the defendant's factual and legal points. The judge will then request the parties to state the evidence they wish to produce before the court. Following that, the court must hold the reconciliation hearings, when the judge will try to have the parties come to a settlement to dismiss the case.

In the event that the reconciliation is not successful and the case has conditions to proceed the judge must "sanear" the process, which is a preliminary judgment by the court of all procedural formalities and issues raised by the parties, except the merits of the case *per se*. The judge can, at this point, for instance, dismiss the case if he finds that some statutory prerequisite is not present or if he deems that the defendant is not answerable in respect of the claim. The judge will also decide on the kind of evidence he will admit to be produced by the parties.

26.4. Evidence

As will be observed, the whole process and specifically the production of evidence is entirely conducted by the judge presiding the case. In principle, documentary evidence is presented to the court together with the complaint. The plaintiff will also present his documentary evidence together with his answer. As a general rule, other documents pertaining to the case, which will become relevant during the development of the case, can always be presented by the parties at any point in time, provided the other party is given the right to comment on it.

The evidence, other than documentary, to be produced in the next place is the report or reports by experts, such as those rendered by an accountant, an engineer, an appraiser or any other specialized professional. The judge will appoint the court's expert and the parties will forward to him questions to be answered in writing. The parties have also the right to appoint assistant experts of their own choice to answer the questions and to make comments on the report of the court's expert.

The next step is the hearings, which will take place on a date determined by the presiding judge, after the parties have had the opportunity to discuss thoroughly the documentary evidence and after the expert's reports have been examined by the parties.

The parties previously submit to the judge a list of the witnesses they want to be examined. During the hearings, the judge will first examine the witnesses and then give the lawyer of the parties the right to pose questions. Referred questioning shall not be conducted directly to the witness, but rather to the judge, who may repeat, restate or refuse such questions. Also an important feature is that either party can give testimony, but in this case the party is not considered a witness. Only witnesses are under oath. All hearings are transcribed to a written form.

The decision of the case should take place immediately after the hearings if the parties do not submit a brief commenting on the testimonies and all evidence produced. The presiding judge will then re-examine all the records of the case and after sometime hand down his decision.

As one can see, in the Brazilian system, for the "**processo ordinário**", there is no trial in the sense of an uninterrupted event where all evidence is produced. In fact, the evidence is produced step by step and is progressively incorporated into the dossier of the case and the findings are focused on the formation of the conviction of the judge.

26.5. The Decision

The decision of the judge is in writing and contains a brief description of the facts, the issues involved, his opinion in respect of each of the issues and the judgment. The decision may award a party an indemnification, may order a party to take an action or may even declare which is the right interpretation of a clause of a contract.

26.6. Appeals

The Brazilian system allows many sorts of appeals to both final and interlocutory decisions, the latter ones encompass those that do not dismiss the case. The party therefore may always appeal any decision. When the decision is not final the appeal usually does not suspend the process. The same lawyer may

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proceed with the case in all superior courts. The appeals are judged by a panel of a State court composed of a presiding judge and an even number of associate judges. They may revise the decision in respect to the law and the facts.

From the decision of the State Court of Appeals the parties may appeal further to the superior federal courts, which are the Superior Justice Court and the Supreme Court. If the party claims violation of a federal law or conflicting interpretation of federal law by other State courts, he can appeal to the Superior Justice Tribunal. If it is claimed a violation of the federal constitution, he can appeal to the Supreme Court. Both these appeals can be proposed at the same time but they are very restricted and are not admitted in most of the cases.

No discussion of the facts is admitted and only the legal issues are subject to be reviewed in the superior federal courts. The superior federal courts also sit in panels. The appeal to the superior federal courts does not suspend the process and the party can initiate the enforcement proceedings.

26.7. The Enforcement of a Judgment

After the winning party has a final judgment he will have the right to start the “executory action” to enforce the judgment in his favor. This is considered a new procedure and will start when the plaintiffs lawyer files a petition before the same court of first instance who has decided the merits of the case.

The plaintiff will state the amount he claims to be paid but, in many cases, the judgment has just stated that damages have to be paid and on which basis they have to be calculated, and, therefore, the actual recovery will have to be determined by a discussion of the parties in respect to the basis of the calculation of the recovery. The executed party will then be serviced of the process, to be effected by the same methods of the initial suit.

The court will order the defendant either to pay the amount due or participate in the calculation of the recovery and then pay it. At this point, the defendant may file objections he deems necessary, but in any event he must either deposit with the court the amount due or give a property to be attached for the guaranty of the execution of the judgment.

“**Ações executivas**” (Executory actions) have very similar development to that of the initial process in the “**processo ordinário**” and also afford the same sort of appeals. If at the end the defendant is not able or is not willing to pay the recovery or to perform the action required by court, the attached property is sold in a public action and the money is used to pay the winning party.

26.8. Collection Proceedings

The collection of promissory notes, of other negotiable instruments and of documents where the plaintiff has expressly acknowledged the debt towards the creditor is made by an “executory action” (execução contra devedor solvente) and the debtor has to deposit the disputed amount in court or present property to be attached in order to be able to discuss the collection of the debt.

The “monitory action” (ação monitória) is used for the collection of credits represented by a document which does not have all legal formalities.

By mean of the same executory action the creditors can also claim the delivery of a certain asset by the debtor or the performance or non performance an obligation.

27. BUSINESS OPPORTUNITIES IN BANKRUPTCY AND REORGANIZATION PROCEEDINGS

There are several interesting business opportunities within the field of Brazilian bankruptcy law. Most people are unaware of many of the possibilities available, others, though interested, do not obtain adequate technical-legal (juridical) information indispensable to formally carry them out.

Quite often fine opportunities are lost and excellent business transactions are not carried through due to the want of a specialized attorney or even the total absence of explanatory comments. In this sense, the adage “run from the unknown” seems to hold.

Summarized below are a few business examples that can be transacted, which certainly, if well conducted, will yield short term profit: a) acquisition of companies under bankruptcy and/or reorganization process (“concordata”); b) and, even, the possibility of acquiring assets of these same companies.

In addition, other matters of bankruptcy nature that can also be advantageous to companies, corporations and even entrepreneurs (individual) refer to: 1) purchase of real estate, movable properties and livestock of companies that are a) insolvent, b) bankrupt, c) bankrupt but authorized to carry on ordinary business, or d) under business reorganization; 2) acquisition (only) of a portion of the companies’ liabilities with the purpose of, thereafter, judicially obtaining the title to the assets of these companies under bankruptcy process; 3) rent, assignment or lease of the assets owned by companies that: a) are in immediate difficulties but are financially sound, b) in bankruptcy process, c) bankrupt but authorized to carry on ordinary business, d) or in business reorganization process, with the purpose of acquiring, in the future, these same assets; 4) participation, as an offeror or bidder, in judicial sales (through offers and/or in auctions), in the bidding and purchase of real estate assets, movable properties and others of bankrupt companies; 5) sale of products and of other assets (real estate or movable properties) to other companies in financial difficulties or under business reorganization process; 6) total or partial acquisition of the controlling stock of corporations or the controlling shares of limited companies; 7) acquisition, through credit assignments, of credit rights (specifically those of preferred nature) in business reorganization proceedings and in adjudicated bankruptcy; 8) expedition of the receipt in advance (independently of the specific payment form and term) of the bankruptcy process) of pending credits of difficult or slow completion or solution, whose debtors are companies in economic-financial difficulties or under business reorganization process.

These are a few of the more conspicuous examples.

On the other hand, it should be noted that bankruptcy legislation in Brazil, in force for the last five decades (Decree-Law 7.661/1945), is currently going through a salutary reform (Bill of Law 4.376/93). The future law introduces several innovations, regulating bankruptcy (which shall be renamed judicial liquidation) and business reorganization (which shall be renamed judicial rehabilitation), in an attempt to adjust itself to modern times, providing a global focus of the corporate world and its environment. The law strives, furthermore, to protect the company itself, as a whole, rather than defending the interests and rights of the creditors and the Treasury, preserving jobs and ensuring, moreover, the continuity of the productive process and of the economic activity of the Country.

This author, who participated in the São Paulo committee in drawing up the bill of this new law, believes that the future Brazilian bankruptcy legislation shall not remove the opportunity of interesting business alternatives.

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28. CUSTOMER RIGHTS IN BRAZIL - LEGAL FRAMEWORK AND ENFORCEMENT

28.1 General Definition

In Brazil, customer rights are known as “*direito do consumidor*”, which is almost a literal translation of the Saxon name of this branch of law. However, the definition of “customer” as one that just purchases a commodity or service has a wider interpretation in Brazil, because the Brazilian constitution effectively privileges the “public” interest over “private” rights - a principle seen, for instance, in [Art. 5, XXII] of the Federal constitution of Brazil.

28.2. Development of the Law

In the past, customer rights in Brazil were protected by a diversity of laws and decrees, mainly the Commercial code (1850), Civil code (1917) and other specific statutes.

It was only in [1990] that a specific statute was issued with the purpose of encompassing the range of aspects known as “customer rights”. This is the law No. 8078 or “*Código de Proteção e Defesa ao Consumidor*” (“Consumer protection and defense code”, per literal translation) which came into effect on [March 12, 1991]. The very existence of this law is due to a constitutional springboard resulting from articles [5, XXXII], [170, V] of the Brazilian Constitution of [1988] which laid down the compulsory issuing of such bodies laws. Thus, the Brazilian law can be best described as fully statutory, with a strong emphasis on protective measures of constitutional nature.

The Brazilian “consumer code” regulates the relationship between the customer/consumer with the industry, in the commerce and render of services, and with other agents such as importers, imposing several obligations on this economic agents.

28.3. Scope

The Brazilian statute of Customer rights covers a wide range of subjects, from safety and health protection of consumers, to access on specific information regarding goods, assets and services (e.g., *validity* or *use by dates*), to the control (towards elimination) of abusive clauses in contracts, including those which may lead the consumer into excessively onerous obligations (involving the “*rebus sic stantibus*” principle). There are also included specific provisions for the recovery of damages (e.g., wrongful acts, breach of contract, infringement of general or specific public regulations related with the customers’ rights).

This statute has also swing the balance of judicial protocol in favour of unsatisfied customer. It is the “*inversion of the burden of proof*”. To put it simply, the burden is on the manufacturer to produce evidence that his goods comply with the norms, not for the customer to prove that the good were found defective or dangerous. This feature can be exercised by the presiding judge in cases he deemed appropriate.

Other new features implemented by this statute are: (a) The adoption of the doctrine commonly known as “*disregard of the legal entity*” (here even broadened, if compared with the US and European models); (b) New treatment of the civil liability in case of product failure, which now hold the producer or manufacturer liable without reference to the existence or not of specific intention of causing the damage (The principle is different in the case of services, such as dentists, engineers et al); (c) Advertising rules that are particularly strict. In all cases, it is maintained the basic constitutional principle of “due process of law”.

As a consequence of such protective regulations, now manufacturers and service providers must be very careful with their product/work output. Legal counsel is recommended and often required from the pre-plant phase to actual shelf exhibition.

28.4. Enforcement

Interpreting the Brazilian Customer law, from the point of view of foreign lawyers, can be a most intricate job. The key to understanding and mastering this statute is accepting that it brings together, all wrapped up in a package, civil, administrative and penal sanctions.

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There are indeed many behaviours that are now considered as criminal acts, but the code reaffirms the constitutional right of the defendant to due process of the law. Even the drafting of contracts is now a much more detailed job, because of the heavy penalties on abusive clauses. The advertisement was also a target of the policy-makers, and this of course leads to great care with the consequent pre-contractual commitments arising from any press or media releases.

28.5. Trends

The customer rights statute in Brazil is compatible with the most modern laws of the world. The Brazilian courts have been cautious in applying the law, so that it reaches the main objective, which is to protect consumers whilst at the same time enhancing a healthy competition between the players in the supply market. For the Brazilian industry, it means that we have the right scenario for the development of our manufacturers, so that they can outrun the competitors based out of Brazil, and at the same time interface with possible partners in Brazil and abroad. Understanding customer rights in various jurisdictions will help business people to integrate better, faster and in a profitable way.

29. ARBITRATION AND RECOGNITION AND ENFORCEMENT OF ARBITRATION AWARDS AND FOREIGN JUDGEMENTS IN BRAZIL

29.1. Subject Matter and Applicable Rules

Individuals and entities which are legally qualified to enter into agreements may resort to arbitration to settle disputes concerning their property rights. In other words, such parties may submit to arbitration any issues involving private property rights with respect to which they may compromise.

The legal rules governing arbitration may be freely established. They may include general principles of law, custom, usage and international trade rules.

The parties may subject arbitration to the rules of a given institutional arbitration organization or specialized entity. Once a provision has been included in a contract to the effect that any disputes thereunder will be resolved through arbitration (arbitration clause), an interested party may demand in court institution of arbitration, should the other party resist such course of action.

29.2. Arbitration Proceedings

The parties may by mutual agreement define the procedure for selection of arbitrators. In this regard, the rules of an institutional arbitration organization or specialized entity may also be adopted. An arbitrator is the counterpart of a court, as matter of fact and of law. His or her decision is not subject to appeal to or validation by the judiciary.

Arbitration is deemed to have been instituted when a sole arbitrator accepts his or her appointment, or when all arbitrators accept their appointments. The parties may put forward their claims through their attorneys but will be at liberty to designate other persons to represent or assist them in the arbitration proceedings.

As between the parties and their successors, an arbitration award will produce the same effect as a decision rendered by a judicial body. Therefore, an award entered against a party constitutes a legal basis for the filing of summary executive proceedings. An arbitration award must include the following requirements:

- I. a report, containing the names of the parties and a summary of the dispute;
- II. the grounds for the decision, which will review the questions of fact and of law involved and will expressly indicate that the arbitrators have ruled based on equity, should this be the case;
- III. the ruling, where the arbitrators will dispose of the issues submitted to them and will fix a time limit for compliance with their decision, if applicable; and
- IV. the date and place at which the award is issued.

29.3. Recognition and Enforcement of Foreign Arbitration Awards

Brazil is not a party to the New York Convention but has ratified the Panama Convention of 1975. Nonetheless, the Brazilian Arbitration Law (Law No. 9,307/96, dated September 23, 1996), includes a specific article addressing the recognition and enforceability of foreign arbitration decisions.

In order to be recognized or enforced in Brazil, a foreign arbitration award will be subject to the provisions set forth by the international treaty executed with the interested country, with due regard for the Brazilian legislation. In the absence of such a treaty, however, a foreign arbitration award will only be subject to confirmation by the Federal Supreme Court. Confirmation of a foreign arbitration award with a view to its recognition or enforcement is basically governed by the same rules prescribed by the Code of Civil Procedure for recognition of foreign court decisions.

Confirmation of such awards may only be denied where defendant shows that:

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- I. the parties to the arbitration agreement were incompetent;
- II. the arbitration agreement was not valid under the laws elected by the parties or, in the absence thereof, the laws of the country where the arbitration award was rendered;
- III. defendant received no notice of the appointment of the arbitrator or of the arbitration proceedings; the adversary system was contravened in that defendant was not given an opportunity for full defense;
- IV. the award was rendered beyond the scope of the arbitration agreement, and the excess portion is not severable from the portion subject to arbitration;
- V. institution of the arbitration did not abide by the arbitration clause or by the agreement to institute arbitration;
- VI. the award is not yet binding on the parties, has been rendered void or else has been suspended by a judicial body of the country where the award was issued;
- VII. if the Federal Supreme Court finds that, under Brazilian law, the subject matter of the dispute may not be resolved through arbitration;
- VIII. the award is offensive to Brazilian public policy.

29.4. Foreign Judgements

Foreign judgements may be recognized and enforced in Brazil, irrespective of the existence of reciprocity from the part of the country from which such judgement is originated or a specific international treaty or convention between the country of origin of the judgement and Brazil. In order to be enforceable in Brazil, however, a judicial award rendered in other country shall depend on confirmation by the Brazilian Judiciary.

Pursuant to the Federal Constitution of 1988, Section 102, (h), the federal organ responsible for the analysis and decision as to the confirmation of foreign judgements is the Federal Supreme Court (STF). The matter is governed by the provisions of Introductory Law to the Civil Code, which contains private international law interpretation rules, by the Brazilian Code of Civil Procedure and by the Internal Statute of STF.

In the process of confirmation of a foreign judgement, STF shall verify whether the formal procedural requisites have been fully complied with, in all instances until final judgement.

For purposes of Brazilian Law, judgement is the decision of a civil, commercial or criminal nature rendered by a judge or a court, abiding by the due process of law, and which is not subject to any further appeal.

Provided that these basic conditions have been fulfilled, STF shall verify the compliance by the foreign judgement with the following requisites, in pursuance of Section 217 of the Internal Statute of STF, ultimately based on the provisions of article 15 of Introductory Law to the Civil Code:

the foreign decision shall be rendered by a competent judge.

STF will not check the foreign judge's jurisdiction on the matter; this could result in the determination of other judge in the same country, what would mean improper interference in the country's sovereignty.

In fact, what shall be examined by STF is whether the case, in view of Brazilian Law, falls within the exclusive jurisdiction of the Brazilian Courts. By way of example, confirmation of a judgement regarding a real property located in the Brazilian Territory would not be admissible, since Section 12, paragraph 1, of Introductory Law to the Civil Code, provides that "only the courts of Brazil" shall have jurisdiction over such matters.

the parties must have been served proper notice of process.

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Service of process is the act whereby a party is called to respond to a legal suit filed against it. It is fundamental for the guaranty of the right of full defense, and shall have been made in accordance with the guidelines set forth by the laws of the place in which the judgement was rendered. Should the defendant be domiciled in Brazil, service of process shall have been made by means of a rogatory letter.

the judgement must be final, and in proper form for its execution at the place where it was rendered.

For the purposes of expediting enforcement proceedings it is advisable, insofar as possible, to produce evidence that the decision is final, by means of a certification by the relevant judge, stating that no further appeal is admissible in any degree of jurisdiction.

the foreign judgement must be authenticated by the nearest Brazilian consulate and must be submitted to STF with a sworn translation thereof.

Furthermore, the foreign judgement will not be eligible for confirmation if it is contrary to national sovereignty, public policy or good custom, in accordance with article 17 of Introductory Law to the Civil Code. This is the only aspect concerning the essence of the foreign judgement which is controlled by STF.

Confirmation is obtained by means of a legal proceeding instituted by the foreign plaintiff before STF. STF shall then issue an order directing notice of process to be served on defendant, who will be entitled to challenge the request of confirmation.

STF shall only acknowledge challenges by defendant if the same are in respect of the authenticity of the documents produced by the plaintiff, the construction of the foreign judgement, or the pertinent compliance with the statutory requirements regarding confirmation or relative to the filing of the request, in accordance with Section 221 of the Internal Statute of STF.

Once confirmation of the judgement is obtained, the foreign judgement may be enforced before the relevant Brazilian lower court, pursuant to Section 584, IV, of the Brazilian Civil Procedure Code.

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