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Doing business in Brasil

The tenth largest economy in the world, the largest in South America and the third largest in the Americas, Brazil is an historically attractive country for investors, but the challenges are also great. To navigate the multiple questions about doing business in the country, we invited some of the best lawyers from ten different practices to discuss the Brazilian market and understand the best ways to enter it

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Doing business in Brasil

Graziano Messana
Managing Partner, GM Venture,

Introduction

Brazil is the largest country in South America. With a growing population of over 210 million, it is the sixth-largest country in the world, and it has the world's ninth-largest economy.

While most of the BRICS countries have issues with dependence on Oil&Gas, ethical or religious problems, and are not democratic, Brazil is a full democracy, is the only country in the world with a 100% electronic election system since 1996 and does not have such issues as these other emerging nations.

The country is an attractive market for international investors due to several factors: a big domestic market, a diversified economy, and international reserves totaling (USD 343.5 billion in May 2023) which are less vulnerable to international crises.

Brazil's central bank improved the 2023 GDP growth forecast to 2.0%, and the annual inflation rate in Brazil receded to 3.16% in June of 2023. This is the lowest since September 2020 and broadly in line with market forecasts. However, investment in Brazil remains risky because of some negative factors, including cumbersome and complex taxation, bureaucratic delays, and heavy and rigid labor legislation.

For this reason, it is important to understand the **rules** and the **business environment**.

Also, being an emerging country allows it to attract FDI and foreign direct investment, such as the European Union, which is the first investor with 560 Billion USD, more than China and the United States.

Brazil is a federal republic, and its legal system is based on

civil law.
The Brazilian Federation comprises the federal government, states, federal districts, and municipalities. Each entity competently legislates on matters defined by the Federal Republic of Brazil (Constitution).

Brazil offers a wide variety of federal, regional, and local **incentives** to national and foreign investors, for example:

- Tax exemptions and deductions apply to sectors the government considers strategically important.
- Incentives for developing infrastructure projects in several sectors (including energy, telecommunications, oil and gas, logistics, and transportation), for example, through public bidding processes and public-private partnerships.
- Tax incentives are applicable in Tax-Free Areas (for example, the Zona Franca de Manaus) and Export Processing Zones.
- Funding from public banks, particularly the Brazilian Development Bank.
- Lower taxation on investment by non-residents in capital markets.
- Dividends paid to foreign individuals or companies are not subject to income or withholding tax. At the same time, interest or royalties remitted abroad are generally subject to a 15% withholding tax (25% if remitted to a low-tax jurisdiction).

Regarding **resources and sectors**, Brazil is a rich country in natural resources, an important and major commodity-producing nation.
Brazil has a thriving mining industry and is also an important energy producer. Their largest commodity output being the agricultural sector, with soybeans as the top export, is understandable as the climate in Brazil puts the nation in a unique position and makes the country the largest producer in the world of several important agricultural staples. Also, it is the world's largest producer and exporter of sugar cane and the leading coffee bean producer. These are just a few of the agricultural commodities that Brazil produces. Pineapples, cashews, oranges, papayas, tobacco, beef, chicken, corn, and palm are major agricultural products.

Brazil's electricity matrix is one of the cleanest in the world, and Brazil is committed to continuing its support for renewable energy projects. Continued investments are expected in wind, solar, and hydropower capacity. Also, Brazil can become a global leader in the carbon credit market via projects associated with conservation (REDD+) and forest restoration.

But Brazil is also Latin America's top oil producer. The country owns the world's largest recoverable ultra-deep oil reserves, with 96.7% of Brazil's oil production produced offshore. It is the world's tenth-largest producer of crude oil, and, due to its position in terms of sugar production, Brazil is a significant producer of sugar-based ethanol. Most opportunities for U.S. oil and gas suppliers are related to pre-salt projects with great development potential.

The emerging sectors of Aerospace, Wellness, Pet Industry, and Fintech are interesting where European investors collect opportunities.

In a very practical way, we will detail below the main **ways to do business in Brazil** which can be summarized as using a sales representative, using a distributor, making a JV, or opening a branch.

The use of a commercial agent/representative is very common as the first approach to a foreign market. In Brazil, this practice is also frequently used by foreign companies due to the special characteristics of the market. Considering that both countries are considerably distant – flying time is around 12 hours – it is relatively complex to manage sales directly from Europe. Depending on the sector, some sales will demand several trips to Brazil per year; this could significantly increase the cost of client acquisition and require extended time for sales personnel.

Another important aspect is also related to the cultural side of Brazil: in some cases, personal contact is key for sales. Brazilians tend to prefer business relations that are constructed upon personal contact and for that, personal meetings are essential for keeping this relationship. Speaking Portuguese, in some cases, can also be a determinant for client acquisition due to the country's relatively poor level of foreign language.

These are all advantages of having a sales agent /representative in the country. On the other hand, it is essential to pay attention to some points to avoid having a bad experience with this instrument. It is necessary to align expectations in both parts. Brazilians tend to be sometimes over-optimistic and foreign will take for granted the promises of the local agents. The foreign company should provide complete technical training for the sales agent, and it is critical to align the values of the company; after all, this professional will be the face of the company in Brazil.

Having an agent/representative might bring faster commercial results with a more minor financial impact as the remuneration might be based on sales. Nevertheless, it is important to consider that the foreign company will likely have to cover the expenses of promoting the product.

Traveling costs inside Brazil can be high considering the country's continental dimensions and foreign companies should not expect the agent /representative to cover these expenses only based on sales commissions. Representation schemes can be based in a fixed monthly payment and sales commissions.

Sales representation can be a good option for smaller businesses but does not work as well on a larger scale. For large businesses unwilling to hire an entirely new sales force, distribution agreements are one of the best options. Unlike in an agency agreement, the company will sell the goods to a distributor under a **distribution agreement**. The main difference between such structures would be the fact that the agent does not purchase the title over the goods before selling them to final clients,

and the distributor's earnings are based on the difference between the purchase price from the supplier and the price for which it sells the goods to the final clients.
Agent or distributor? Often, the decision between appointing an agent or distributor will depend on the sophistication of the buyers (and their willingness to deal with the stresses of importing goods into Brazil) and the taxes applicable to the product, service, or IP right being supplied to Brazil.

Companies seek distributors that are willing to take all risks. While that may sound ideal from the supplier's viewpoint, due to the heavy taxes that apply to importing goods and services, sales volumes are invariably affected as distributors' margins generally price the products or services out of the market.

In addition to the problems involving Brazil's mandatory laws applicable to agents, appointing an agent places the commercial risk on the final customer, which they seldom welcome. Furthermore, it leaves all problems of dealing with the bureaucracy to clear customs (in the case of goods) or make foreign international payments and withhold the relevant taxes (in the case of services). Hence, appointing an agent is only suitable in specific cases, and the preferred option will be the distributor.

It is important to notice that due to the high import costs, there is always tremendous financial pressure upon the distributor as they have to commit and invest considerably in inventory, especially in a country with high-interest rates like Brazil.

When you enter a distribution agreement, you give the distributor sole rights to resell your goods in a particular territory and agree not to sell your goods to any other distributors in that area. Appointing a distributor in Brazil does not require formal steps, and parties have great freedom to decide on the terms of their distribution arrangements. Nevertheless, some precautions have to be taken to avoid problems.

Brazil has laws dictating how contracts involving parties from different countries should be interpreted. It would be best if you did not assume that because your agreement says the law of a specific country should be adopted, the Brazilian courts will automatically support such a law. While Brazilian laws allow some of the provisions to be freely chosen by the parties, other provisions will only be addressed if they contradict the rules of law related to contract performance enacted by the Brazilian legislation. Companies with agents worldwide frequently have standard contracts to appoint distributors in different jurisdictions. Due to Brazil's particular rules relating to distributorships, Brazilian lawyers must review distributorship agreements before they are presented to the distributor. Relying on a choice of law and court (including arbitration) provision will do little to avoid the mandatory nature of some Brazilian laws that will apply to the distribution relationship. Thus, having a well-drafted agreement customized to the Brazilian legal environment and following

its terms throughout the agency relationship will go a long way to minimize the exposure of the foreign company to undesired risks.

If Brazilian law governs the distribution agreement, then the Civil Code will apply to its termination and provide its rules. According to Brazilian law, this may lead to higher compensation payments as the distribution is entitled to damages if the foreign company tries to force them out of the contract. The purpose of this provision is to protect distributors where suppliers push distributors to terminate the agreement by controlling the supply of goods or services.
Using a distributor may also increase the risk of copying or counterfeiting your product. Some large agents and distributors may manage so many product lines that more attention should be given to yours.

Another business model to operate in Brazil is through Joint Ventures. Joining forces with a Brazilian partner can be beneficial if you wish to sell directly to the Brazilian domestic market. You will be able to take advantage of the Brazilian partner's contacts and local knowledge while they benefit from technology transfer or your company's expertise in other areas. However, the primary concern with joint ventures is finding a partner you can work with. Many joint ventures fail where, for example, due regard has yet to be given to Brazilians' importance to personal relationships in business.

Selecting a JV partner who complements you is often better than a potential competitor. Plan for your exit from a joint venture from the outset - joint ventures are rarely permanent, and it is better to have a "pre-nuptial agreement" than a messy divorce. If you decide to go down this route, you must conduct thorough due diligence checks on your potential partner.

While no specific Brazilian law governs JVs, they are usually classified under two types - contractual joint ventures and corporate joint ventures. The JV itself does not have a legal identity, as it is effectively only a type of association used by parties to implement the development of a new business and to combine their various interests. JVs are, broadly, agreements between parties that establish the basis on which they associate.

Opening a local subsidiary in Brazil can bring your business to a higher level because it might boost your presence in the market and optimize tax aspects caused by the heavy import taxes. Nevertheless, this action is surrounded by challenges that foreign companies have to overcome, like the famous Brazilian bureaucracy and the difficulties of managing a structure in another country, especially regarding tax compliance.

Planning the structure and the business model of the new entity is key to the project's success, and it is highly advisable to count on the professional

help of skilled consultants like lawyers, accounting firms, and tax experts. The tax issues can vary significantly according to the type of business and the operations involved, meaning that each operation should be analyzed from a case-by-case perspective.

Calculating the tax the subsidiary will pay is challenging, considering the highly sophisticated Brazilian tax system. Foreign entrepreneurs should take into account this critical step.
If this is the way chosen by the foreign company, there are some measures to be taken. Establishing a corporation to hire employees, open a bank account, and carry out several other tasks is necessary. Brazilian law doesn't allow any representative office. Therefore, there is a need to establish a company in the country.

The vast majority of investors in Brazil adopt the subsidiary model since their shareholders are not responsible for the subsidiary's debts except for specific provisions set forth by specific rules. The investor could also acquire an existing company or assets, which would require a due diligence project. The main decisions will be around incorporating or acquiring a company.

Another issue concerns which format is more appropriate for the business: Ltda. or S.A. There are other types of legal entities. However, they do not apply to companies with foreign Capital. Therefore, the majority of legal entities incorporated in the country are either Limitada" or "S.A.": the Limitada type of business (Sociedade Limitada or Ltda.) is a limited liability company, and a S.A. (Sociedade Anônima) is similar to a corporation.

The Ltda. is usually the preferred vehicle for a wholly owned subsidiary, as formally, the liability of the shareholders is limited to their capital contribution. It is recommended to use this format because a S.A. demands stricter governance rules.

The Ltda. is a legal entity under private law and is defined as Limitada because the responsibility of each partner is limited to the number of shares they own. The power of each partner is limited and bound by approvals defined in the Civil Code. Thereby, the autonomy of each partner is also limited. It is the best option for a small business owner or a startup.
In a Limited company, the costs for establishment and maintenance are generally lower; however, minority quota holders are equally financially responsible. There are no impediments regarding the nationality of the investors. A company can be 100% foreign-owned, but these owners should appoint a local representative, and the company will need a legal representative (manager) who has residency in Brazil (can be a Brazilian or a foreigner with legal residence in the country). Other option doesn't work well even if provided by law.

M&A

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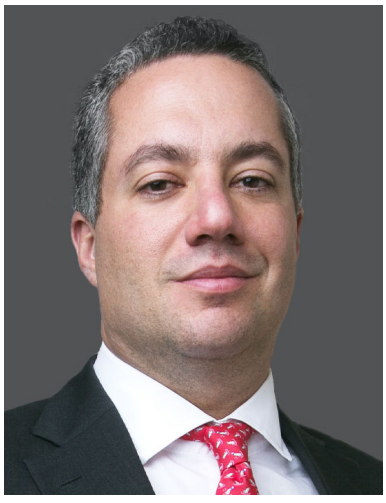
Structuring investments The proportion of voting rights and capital contributions

Tauil & Chequer Advogados associated with Mayer Brown is a full-service law firm that combines in-depth local market knowledge with a leading global platform to advise organizations on multi-jurisdictional transactions. Associated with Mayer Brown since 2009, the firm – with lawyers in Rio de Janeiro, São Paulo, Brasília and Vitória – has a full-service profile. We have experience in the most diverse economic sectors, that allows us to offer complete legal advice to national and international clients, financial institutions and government agencies in their multi-jurisdictional operations.



Bruno Werneck
Partner
bwerneck@mayerbrown.com

Sarah Ferreira
Associate
sferreira@mayerbrown.com

When structuring a new investment in Brazil, we frequently face the challenge on how to conciliate economical aspects of such investment and the intended governance structure.

It is very usual that, in a brand-new investment structure, the parties have agreed that some will make larger contributions but will be minority shareholders when it comes to voting rights. A common example are private equity investors frequently might make the largest contributions but want an experienced controlling shareholder handling day-to-day business.

However, it is just as usual that both lawyers and financial consultants see it as natural (if not necessary under the law) that there is a certain proportionality between the amount invested by and investor and the voting rights that such investor will hold.

That is so because Brazilian law contains very strict rules on voting rights, even if all shareholders are in agreement on the conditions under which the shares will be issued.

The first and probably most important rule about voting rights is the restriction of number of shares with restricted voting rights. Such shares may only represent up to half of the total shares issued by a company. Moreover, until very recently, Brazilian law adopted unwaveringly the one share one vote principle regarding voting capital stock.

Brazilian law recently allowed for multiple voting shares, an innovation seen by many as a solution to finally stray from the quasi-proportionality between voting rights and capital contributions. Nevertheless, it is important to highlight that such proportionality was never imposed by the law, which already contained some mechanisms which allowed for changing the proportionality between voting rights and capital contributions.

Moreover, the legal restrictions on multiple voting shares make it clear that they were designed for a very specific purpose: companies which have not entered the capital market and which are in the early stages of development, where the controlling shareholder is strategic, but who might lose its relevance as the companies develop.

For that reason, the multiple voting right is not eternal. The ramped up voting rights may only last up to seven years. After the end of the initial term, the shareholders who do not hold such shares would have to approve the renewal of such multiple voting right. The ephemerality of the of multiple voting right is extremely undesirable in structures which will require a stable corporate governance over a long period of time, due to its long investment cycle.

We further highlight that the Brazilian multiple voting shares do not fully stray from the proportionality principle, though. It only allows that each share grants right to up to 10 votes. In the scenario where all shares grant voting rights and issued at the same time, for the same price, this requires that an investor makes at least 9,1% of the capital contributions in order to hold control though multiple voting shares.

Although this seems reasonable, it might render impossible to achieve the aimed governance structure if the capital contributions agreed upon are extremely disproportionate to the voting rights and poses a relevant obstruction to contractual freedom of the parties.

Lastly and probably most importantly, the law imposes that the multiple voting right is automatically terminated in case the shareholder who holds such shares executes voting agreements or transfers their shares. Such limitation not only significantly reduces the

value of such shares, but also renders practically impossible to adopt the mechanism in new investment structures. After all, relevant minority investors will certainly decline not having the usual protective vetoes and appointment rights of a shareholders' agreement with the controlling shareholder.

Since the multiple voting mechanism poses such relevant limitations, as mentioned, other mechanisms should always be considered in new investments.

A strategy which has been proved as extremely flexible is what the Brazilian have coined as the "super preferred share", i.e., a preferred share which grants right to an extremely high dividend and which is issued at an equally high issuance price.

The super preferred shares mechanism was first used as a way to comply with the cap on the number of shares with restricted voting rights whilst raising an high capital contribution. By increasing the dividend rights of the super preferred share and consequently their issuance prices, it is possible to issue a much lower number of shares without limiting the amount of capital which might be raised.

If extrapolated, this shifts drastically the usual assumption that there is a proportion between voting rights and capital contributions.

After all, Brazilian law does not regulate the number of shares which might be issued by a company, only the prices for which such shares will be issued (based on their book, market or economic value). Thus, in an intended structure with extreme disproportion between aimed economic and voting rights, a simple solution is to issue shares so as to finetune the number of votes each party should have and their economic rights.

Example: Investors A, B and C intend to make 90% of all capital contributions and must have proportionate economic rights, but wish to have only 20% of the voting rights; meanwhile, investor D wishes to make 10% of the contributions and have 80% of the voting rights.

An effective way of achieving that would be creating two types of preferred shares, one to be held by A, B and C and a second one held by D. Type 1, held by investors A, B and C, would have to grant economic rights and have an issuance price equivalent to 36 times respectively of the rights and price of the type 2, held by D. That way, the number of type 1 shares - and consequently number of votes - would be shrunk significantly, while maintaining their economic aspects.

In new investment structures, this strategy might be a convenient alternative to multiple voting shares, since it does not pose the challenges addressed above, such as restrictions of voting agreements and cap on votes per share. Instead of modifying the number of votes each share grants, it uses the legal flexibility on the number of shares which might be issued so as to achieve the desired structure.

Whilst this may provide investors with intended disproportionality between voting and economic rights, the paradigm shift proposed by this strategy might face resistance of investors and consultants. Moreover, this strategy is most suitable and easily applicable in new investment structures, as mentioned above, since it might face challenges in existing structures where shareholders are not aligned.

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Tax

Doing Business in Brazil

PINHEIRO GUIMARÃES

Mastering taxation in Brazil

Rafael Xavier Vianello
Tax Partner of Pinheiro Guimarães Advogados
rvianello@pinheiroguimaraes.com.br

Rafael Xavier Vianello is a tax partner at Pinheiro Guimarães Advogados and has over 23 years of experience in international and Brazilian tax consulting, litigation, and wealth planning. He holds a law degree and an LLM in corporate law.

Estevan P. Leal

eleal@pinheiroguimaraes.com.br

Estevan P. Leal is a tax partner at Pinheiro Guimarães Advogados and has over 15 years' expertise in international and Brazilian tax consulting and litigation. He holds both law and accounting degrees as well as an specialization in international tax.

In many respects, Brazil's tax rules and structure are similar to those of other countries. However, owing to a number of factors, such as the history of inflation, the breakdown of taxes into federal, state and municipal jurisdictions, the significant role played by foreign capital, and a concern for the socio-economic issues facing the country, some of the more important tax provisions applicable in Brazil reflect a distinctly Brazilian approach.

1. Corporate Income Tax (IRPJ) and Social Contribution on Net Profits (CSLL)
In Brazil, companies (corporations and limited-liability companies) compute taxable income using one of two methods: actual profits or presumed profits. The actual-profits method consists of calculating the positive difference between gross revenues and associated costs. On the other hand, the presumed-profit method assesses a percentage ranging from 8% to 32% of gross revenues plus capital gains. Entities with substantial revenue, foreign profits, or financial activities must use the actual-profits method. The current income tax rate for companies is 25%. Tax losses may be carried forward indefinitely, offsetting up to 30% of the current year's taxable income.

Companies are also charged for the CSLL, a "social contribution on net profits", charged at a rate of 9% of a company's net profits. Exceptions are made for banks (21% of net profits) and other financial institutions (16% of net profits).

3. Social Contribution to Finance Social Security (COFINS) and Contribution to the Social Integration Program (PIS)
PIS and COFINS are federal taxes levied on gross revenues of companies. Their calculation may be determined by either of two methods: cumulative or noncumulative. Cumulative-method rates stand at 0.65% (PIS) and 3% (COFINS) of the gross revenues. Under the noncumulative method, rates are: 1.65% for PIS,and 7.6% for COFINS. The noncumulative method allows credits in respect of payments for inputs to be offset against the PIS and COFINS taxes due, while the cumulative method does not provide for this mechanism. Exports qualify for exemption from the PIS and COFINS taxes.

4. Excise Tax on Services (ISS)
The ISS is a municipal service tax targeting specific services set forth in the relevant law. The ISS is payable by any company rendering these services as a percentage of gross revenue ranging from 2% to 5%.

5. Value-Added Tax on the Manufacturing of Goods (IPI)
The IPI is a federal value-added tax that applies both to domestically manufactured products and to imported products. IPI rates vary according to each product. It is charged based on the value of the product. Exported products are exempt from paying the IPI.

6. Value-Added Tax on the Sale of Goods (ICMS)
The ICMS is a value-added tax charged by the individual states in Brazil on the circulation of goods and specific services. The ICMS is also payable on the importation of products; the exportation of products is exempt.

In general, the ICMS rates for intrastate transactions range from 17% to 19%, while rates for interstate transactions range from 7% to 12%. As a general rule, interstate transfers or sales of imported goods are subject to the ICMS at a rate of 4%.

7. Tax on Financial and Foreign-Exchange Transactions (IOF/Exchange)
The IOF/Exchange taxes the conversion of foreign currency into Brazilian currency and vice versa. The current rate for the IOF/Exchange is 0.38%. However, depending on the type of transaction, that rate may be reduced to 0%.

IOF rates may be altered by the government at any time by decree rather than by going through the standard legislative process. Accordingly, it is always advisable to confirm the rates currently in effect at the time of any transaction involving the inflow or outflow of foreign currency.

8. Special Tax Rules

8.1 Dividends

Dividend payments generated after 1996 are not subject to withholding tax, regardless of whether those dividends are payable to resident or nonresident investors.

8.2 Interest on Net Equity (INE)
Law 9,249 permits Brazilian companies to pay the INE to shareholders. Any payments of the INE may be deducted for the purposes of calculating the IRPJ and the CSLL. Withholding tax on any INE paid is generally charged at a rate of 15%.

8.3 Capital Gains Realized by a Nonresident Investor
Gains from selling Brazilian assets are subject to income tax. In any such case, the withholding-tax rate depends on the amount of the capital gain. Those rates usually range from 15% to 22,5%. The rates are increased to a flat 25% if the beneficiary is located at a tax-haven jurisdiction, as defined in Brazilian tax regulations.

8.4 Transfer pricing rules
Brazilian transfer-pricing rules were, until recently, different from the transfer-pricing rules of the Organization for Economic Cooperation and Development – OECD. However, the congress approved a new legislation which adopts the arm's length principle as practiced internationally. The new transfer pricing rules will be in effect as of 2024 for all transactions between related parties.

8.5 Thin Capitalization rules
Debt-equity ratios limit interest deductions for related parties. As a rule, the debt-to-equity ratio is 2:1 for transactions involving creditors in normal jurisdictions, and 0.3:1 for transactions involving privileged tax regime and low- or nil-tax jurisdictions, as those terms are defined in Brazilian tax regulations.

8.6 Privileged Tax Regime and Low- or Nil-Tax Jurisdictions
Tax havens or privileged tax regimes, as defined in Brazilian tax regulations, trigger special tax rules. Jurisdictions and entities coming under those definitions face unique regulations, such as stricter rules for deductibility of expenses as well as withholding taxes charged at a higher tax rate (e.g., 25%).

9. Tax Treaties
Brazil is a party to tax treaties with various nations. Nevertheless, each of those tax treaties is different. In order to ascertain the impact, if any, of any given tax treaty on certain transactions involving a Brazilian party and an entity domiciled in the country party to that tax treaty, or of possible double taxation, each situation must be analyzed on a case-by-case basis.

10. Tax Reform
In the context of Brazil's intricate tax landscape, bills of law purporting to bring about a broad reform of corporate income taxes and indirect taxes have been presented to Brazil's Congress. These reforms include unifying consumption taxes (i.e., PIS/COFINS, IPI, ICMS and ISS) into a single value-added tax. Other reforms include introducing a withholding tax on dividends, terminating the INE, effecting changes in the taxation of offshore entities held by individuals, among others.

The bills of law referred to above are currently being debated in Congress.

Conclusion
Brazil's allure as a business destination is undeniable. Nevertheless, intricacies in Brazil's tax laws and regulations require proceeding in a careful manner. Enterprises engaged in business with Brazil must constantly stay informed about evolving tax regulations and also must seek out expert guidance. This guide is intended to provide a brief understanding of the principal tax rules contained in those laws and regulations so as to permit foreign businesses to master the multifaceted Brazilian tax system and, ultimately, achieve success in this thriving market.

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Corporate

Doing Business in Brazil

BRIGANTI

Iberian investments in Brazil: Opportunities, Challenges, and Sectors of Interest

With over 15 years' experience, Carla Calzini advises on Mergers and Acquisitions (M&A) transactions, including cross-border; investment rounds in Private Equity, Venture Capital, Seed Capital, Angel Investing; structuring and implementing corporate reorganizations in general; organizing joint ventures, consortia, associations and foundations; structuring and implementing partnerships; corporate governance; corporate disputes; and implementing and negotiating contracts in the context of corporate and commercial transactions.

Carla Calzini
Corporate M&A Partner from Briganti
ccs@briganti.com.br

Brazil has long been a magnet for European investors seeking to tap into the vibrant and diverse South American market, as a strategic destination for expanding their businesses. The appeal of Brazil presents a wealth of opportunities and is evident in its sheer size, vast and dynamic market, coupled with its abundant natural resources, and rising economic landscape. However, like any international business, investing in Brazil comes with its set of opportunities and challenges.

This article will explore how European investors, particularly from Iberian countries, have been establishing businesses in Brazil, and how this experience reflects the broader landscape of European investment in the country. It will detail the advantages and disadvantages of Brazil's legal framework, identify key sectors that attract European investments, and provide insights into the overall presence of European companies in Brazil. This analysis aims to offer a comprehensive understanding of European investment in Brazil, thereby serving as a valuable resource for investors considering the Brazilian market.

Brazil has substantial potential for renewable energy projects, such as wind and solar and considering that European investors have expertise in this field, they are keen on tapping into Brazil's green energy market. In addition, Brazil is a global leader in agriculture, with vast arable land and a strong agribusiness sector, reason why European investors see opportunities in soybean, sugar, cattle, and poultry production, as well as sustainable farming practices. Brazil's technology sector, particularly fintech and e-commerce, has been growing rapidly, what has been attracting European investors, including venture capital firms. By way of example, Iberian companies are actively involved in banking, telecommunications, infrastructure, sustainable energy, and gas Brazilian´s sectors. European investors in the food sector have also established a foothold in Brazil and there is a trend towards investments in the sustainability sector.

One of the ways European investors usually establish their capital in Brazil is by setting up limited liability companies (LLCs) or joint stock companies, as a subsidiary of the parent company. Another way to enter the Brazilian market quickly is to opt for mergers and acquisitions transactions. This latter approach allows them to acquire existing companies or to establish partnerships with local companies, leveraging their market knowledge, with a pre-established customer base locally, permitting them to navigate the unique challenges of the Brazilian market. This reflects the understanding that local insights are invaluable in navigating Brazil's unique business environment.

Investing in Brazil offers a range of advantages and disadvantages. In this sense, Brazil boasts a population of over 200 million, making it one of the world's largest consumer markets, which provides a significant customer base for a variety of products and services. Also, Brazil is rich in natural resources, including agriculture, minerals, and energy sources, which present lucrative investment opportunities, particularly for industries like agribusiness and renewable energy. Despite periodic economic challenges, Brazil has the potential for substantial growth, which make it an attractive destination for investors. In addition, Brazil's geographic location in South America provides a gateway to neighboring markets, offering opportunities for regional expansion. Lastly, many European countries have trade agreements with Brazil, reducing trade barriers and enhancing market access for European products and services.

On the other hand, Brazil's tax system is quite complex which can be a significant challenge for foreign investors, necessitating expert guidance, with meticulous planning, including but not limited to identify whether there is an international agreement or convention to avoid double taxation between the country of origin of the acquirer and Brazil to reduce the tax burden on the operations practiced. Hiring and integrating local talent is equally important - even when combined with international experience, which will also require compliance with Brazilian labor laws. Depending on the sector of the investment (e.g. agro and industrial sectors), environmental laws also apply. Furthermore, compliance with Brazil's regulatory framework is essential for safeguarding investments and ensuring long-term success, such as to be registered before the Central Bank of Brazil (BACEN), for monitoring capital of foreign origin (RDE-IED) and financial operations (ROF). Also from a regulatory point of view, the approval of The Brazilian Antitrust Enforcement Agency (CADE) may be mandatory to verify compliance with the requirements of the Law for the Defense of Free Competition / Antitrust Law, demonstrating that the intended transaction will not generate a monopoly. Finally, language barriers and cultural differences can sometimes pose challenges in communication and operations, emphasizing the importance of cultural sensitivity and effective cross-cultural management. In any case of investment in Brazil, a due diligence procedure is of high relevance to identify eventual risks that may impact the business and to ensure its longevity.

Overall, the European investment experience in Brazil underscores a well-planned and diversified approach to tap into Brazil's extensive market potential. It showcases the adaptability and strategic thinking that European investors employ to thrive in the dynamic and complex Brazilian business landscape.

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Regulatory

Doing Business in Brazil

SOUTO CORREA ADVOGADOS

Administrative Consensus in Brazil: best method for resolving administrative disputes?

Gabriella de Salvio

gabriella.salvio@soutocorrea.com.br

Gabriella de Salvio. Consultant at Public Administrative Area of Souto Correa Advogados. Mainly focused on telecom, media and technology, in addition to data protection practices. PhD in International Law and Integration Law (UERJ/Brazil); LLM in Internacional Economic Law (University of Warwick/England); Bachelor of Law at UFRJ/Brazil .

Raphel Borges Abreu

raphael.borges@soutocorrea.com.br

Raphel Borges Abreu. Jr Lawyer at Public Administrative Area of Souto Correa Advogados. Mainly focused on telecom practice. Bachelor of Law at UFRJ/Brazil .

The concept of Administrative Consensus is not new in Brazil, and put simply, it means the possibility of the Public Administration admitting the use of consensus for exercising the state punitive pretension in the administrative sanctions process. The concept involves the idea of evolution of the regulatory policy.

In Brazil, the fundamental right and guarantee of access to Justice foreseen at Article 5, XXXV, of the Federal Constitution, which guarantees the applicability of jurisdiction, has had its interpretation broadened, mainly since the establishment of the new Multi-door Justice System, foreseen at the Brazilian Code of Civil Procedure (CPC) dated of 2015.
Initially based on the CPC, the Public Administration has begun adopting alternative modes for dealing with administrative conflicts and disputes since a few years ago. This movement has been underpinned by 4 different laws: i) Law 13.140/2015, which foresees mediation and self-composition of conflicts within the scope of the Public Administration; ii) Law 13.655/2018, which amended the Introduction to Brazilian Law Rules (LINDB), allowing the commitment between the administrative authority and the interested party on the grounds to "seek a legal solution that is proportional, equitable, efficient and compatible with the general interests" (art. 26); iii) Law 14.133/2021, which sets rules on bidding and contracts with the Public Administration, and particularly Chapter XII which refers to "Alternative Means of Dispute Resolution"; iv) Law 13.129/2015, which amended the Arbitration Law, including the clear possibility of using arbitration to resolve disputes involving the public administration.

As a result, self-composition at the administrative spheres has been growing as a relevant alternative for dealing with public conflicts. This possibility has grown mainly based on three different duties of the Public Administration: (i) to effectively protect rights; (ii) to solve conflicts and (iii) to self-compose public conflicts. It has been defended that the Public Administration shall not only have the option, but above all the obligation, to use the alternative method of composition.
On this ground, regulatory consensus is gaining strength, especially considering (i) the high costs of the administrative procedure; (ii) the overload of administrative accountability systems, as well as (iii) the likely higher degree of adherence to consensual acts (spontaneous fulfilment of the decision).
In this sense, the Brazilian administrative law has been influenced by this new model through which considerable value is given to the horizontal relationship between the Public Administration and the private individual, so as fundamental rights are effectively implemented. Thus, it has been questioned whether the application of a sanction whenever a conflict arises would be the most appropriate solution so as to guarantee and protect the prevalence of the public interest, even if by a consensual manner.
As one of the main examples of the application of appropriate dispute resolution methods, we highlight the role of the Mediation and Conciliation Chamber of the Federal Public Administration (CCAF) since 2007. The CCAF "is part of the General Consultancy of the Union, a senior management body of the Federal Attorney General's Office (AGU), and has the institutional mission of acting, by means of self-composition, in the search for the prevention and consensual solution of conflicts involving federal public administration bodies, municipalities or federal foundations" .
As an example , CCAF has taken part into dispute settlement in 143 cases over the last 5 years, negotiating contracts worthing BRL 278.5 billion. According to the National Council of Justice, CCAF cases take an average of 1 year and 7 months to be solved, while at the judicial system average is of 3 years and 6 months.
The National Telecommunications Agency (ANATEL), one of Brazil's main regulatory bodies, which was set up in 1997 as a special federal authority, based on Law No. 9,472/1997, stands out as one of the forerunners at the adoption of Conduct Adjustment Terms (TAC). At ANATEL, TACs are considered as a model for negotiation between the

agency and telecom company to solve administrative procedures that have not yet reached a final administrative decision.
In general terms, TAC are agreements based on the adoption of commitments, including investment, by the private entity instead of merely having to pay for huge fines. TACs are extrajudicial executive agreements that are valid for up to 4 years.
TIM, Telefônica and Algar - 3 among the main Brazilian telecom companies - signed TACs with ANATEL between 2020 and 2022.
ANATEL also stands out in adopting the commands of the Arbitration Law (Law No. 9.307/1996). Yet, although, the telecom concession contracts have arbitration clause since their beginning, back in 1998, ANATEL's real debut in arbitration is recent. Indeed, the telecom sector has some leading cases at the Public Administration.
In 2021, the 3 fixed telecom concessionaires - Telefônica, Oi and Claro - filed arbitration proceedings at ICC regarding the financial balance of their fixed telephony concession contracts (STFC), which expire on 31 December 2025.
The adoption of arbitration procedure has been justified by the enormous complexity of the cases, involving extremely specific matters, which therefore require more accurate expertise and technical examinations. In addition, the short length of the process – 3 years in average – if compared to court justice – where cases can last up to 20 years – is a considerable advantage.
In addition, Federal Attorney General's Office (AGU) issued Normative Ordinance No. 110/2023 , which establishes the Chamber for Promoting Legal Security in the Business Environment. The Chamber´s duties include: (i) preventing and reducing litigation by encouraging the adoption of self-composition solutions and (ii) formulating diagnoses and mapping regulatory, normative and administrative challenges that could solved by inter-institutional debate, with the participation of public and private actors.
As such, the new AGU Chamber is an interesting alternative to host the negotiations between the concessionaire Oi and the Federal Government, involving a debt of approximately BRL 7 billion related to the STFC concession.
In 2023, ANATEL requested the Federal Court Account (TCU) to set up a Consensual Settlement Commission (CSC) aiming at concluding an agreement with Oi regarding conditions for the migration of its concession to the authorization regime (currently ANATEL points out to a BRL 20 billion-value). The CSC shall be composed by representatives from TCU, ANATEL, Oi and the Ministry of Communications. Deadline foreseen for negotiations´ conclusion is 120 days (TCU Normative Instruction 91/2022), which is certainly an advantage of said procedure.
Further to the Oi case, ANATEL's Board of Directors recently accepted the requests to suspend the arbitration procedures and set up other CSCs to cover Telefônica and Claro´s disputes regarding the termination of their STFC contracts, which also involve billions of Reais. As at the Oi case, ANATEL will formalize the request before TCU's Secretariat for External Control of Consensual Resolution and Conflict Prevention (SecexConsenso) to create said CSCs.
As seen, administrative consensus is a regulatory technique that has been increasingly used by the Brazilian Public Administration as an appropriate method of resolving disputes. The telecom sector has been seen as important players at these initiatives. Energy and transport sectors are also involved in similar initiatives. There is certainly more to come in the future, considering the relevance of contracts involving public administration and infrastructure sectors in Brazil.

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Litigation

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Caio Scheunemann Longhi
Partner of Pinheiro Guimarães Advogados
clonghi@pinheiroguimaraes.com.br

Caio Scheunemann Longhi is the head of the litigation and arbitration department in São Paulo. With more than 20 years of experience in the area, Caio Longhi has focused his practice on complex commercial and corporate disputes and litigation involving technology companies and start-ups.

Marco Aurélio Rangel
Associate Lawyer of Pinheiro Guimarães Advogados
eleal@pinheiroguimaraes.com.br

Marco Aurélio Rangel is a senior associate of Pinheiro Guimarães. Marco has a strong academic background, holding a LL.M from the Federal University of Espírito Santo (2015), and a PhD from the University of São Paulo (2020). He is also a professor in the postgraduate program at FGV.

Brief overview of Brazil's legal system and judiciary. The Brazilian legal system is based on civil-law principles. Accordingly, it relies heavily on written statutes and codes to regulate legal relationships and proceedings.

Enacted in 1988, Brazil's Constitution is extensive and detailed, outlining the fundamental rights and principles of its legal system. Because Brazil is a federative country, the legal structure is hierarchically organized, with federal, state, and municipal levels of government each having their own legislative and executive branches. The Brazilian judiciary, however, operates only at the state and federal levels.

Because the Brazilian legal system is founded on the civil-law tradition, one distinctive feature of that legal system is the codification of laws. Rather than relying heavily on precedents set by previous court decisions, Brazilian law is primarily based on statutory enactments.

The Brazilian Civil Code, for example, addresses the principal fields of the civil law, such as contracts, property, torts, family law, and succession, providing a comprehensive set of rules to guide legal relationships in these areas. In addition, Brazil's legal system includes specialized laws that cover areas such as labor, tax, banking, capital markets, insurance, consumer protection, and environmental matters. These specialized laws have helped to bring about an extensive regulatory framework operating throughout the country.

Delays and high number of cases in the judiciary. Despite having an extensive court structure with a variety of jurisdictional rules, the Brazilian judiciary tends to be slow. This is so primarily because of the excessive number of claims filed in the courts. The number of legal claims filed before the courts is an important aspect one should consider before engaging in a judicial dispute in Brazil. According to a report from the National Council of Justice, by the end of 2021, the Judiciary had a backlog of 77 million pending cases, with over half of these cases (53.3%) relating to executions on judgments and executions on sum-certain past-due debt instruments. Naturally, this excessive number of pending cases is reflected in the sluggish progress of cases before Brazilian courts. On average, a case takes over two years to be ruled upon in the first instance and an additional 11 months to be ruled upon at the appellate level, with the possibility – in certain specific cases – of remitting the case to yet a higher court. These numbers are even more striking when it comes to the execution of past-due debt instruments. Procedures to recover payment on these instruments may take more than six years before the creditor's claim is satisfied.

Relevant modifications to the civil procedure code. In an effort to streamline the work of the judiciary, shorten the duration of case proceedings, and enhance efficiency, a new civil procedure code ("CPC") came into effect in 2016. This new code incorporated some features of the precedent model from common-law countries, simplified procedures, and expanded mechanisms for enforcing judicial decisions and the executing upon past-due debt instruments. Coupled with the digitization of nearly all the courts in the country, there is a trend towards increased judicial efficiency in the coming years and a resulting reduction in costs that would otherwise arise from delays in case proceedings in Brazil.

LEGAL JURISDICTION AND VENUE

Jurisdiction. Within the Brazilian legal system, the principle of a unified jurisdiction prevails, whereby all jurisdiction is exercised exclusively by the courts of law making up the judiciary. There is no administrative jurisdiction as seen in other countries such as France. There is, nevertheless, the possibility of addressing certain disputes within the administrative sphere. Any resolution of those disputes at the administrative level, however, is always subject to judicial review.

The Brazilian judiciary consists of five branches of justice. The first two are the state court system and the federal court system. Together, these two systems make up Brazil's ordinary courts of justice. The remaining three branches consist of the labor courts,

the electoral courts, and the military courts. These three branches constitute what are referred to as the "specialized courts", with their respective jurisdictions defined by the Federal Constitution. The jurisdiction of the ordinary courts of justice – both federal and state – is, therefore, residual. In other words, the federal and state court systems process and adjudicate all cases that do not fall under the specific jurisdiction of any of the specialized courts.

Within the ordinary courts of justice, there also exists a degree of specialization. Federal courts handle cases involving the Federal Government as a party. Federal courts also handle those cases in which the Federal Government has a direct interest, such as disputes over federal taxes, or contracts to which the Federal Government is a party. On the other hand, the state court system has jurisdiction over all remaining cases, including claims for the execution of past-due debt instruments, disputes over contracts between private parties, and non-Federal-Government-related indemnity claims.

Jurisdiction. For organizing activities among the various court systems making up the Brazilian judiciary, rules determining jurisdiction have been established to outline those circumstances under which each of the respective courts should operate. These jurisdictional rules allow one to determine in advance which court or courts will be responsible for adjudicating any given lawsuit.

Most of the rules for determining jurisdiction are set forth in the CPC. In this regard, the CPC provides that Brazilian courts have jurisdiction whenever: (i) the defendant is domiciled in Brazil; (ii) an obligation that is the object of a dispute was performed (or was required to be performed) in Brazil; (iii) a claim is based on a fact that occurred, or on an act that was performed, in Brazil; (iv) a claim arises from a consumer relationship and the consumer is domiciled or resides in Brazil; and (v) the parties explicitly or implicitly submit their dispute to the jurisdiction of Brazilian courts.

In certain cases, Brazilian courts have exclusive jurisdiction. These cases include: (i) any action related to real estate located in Brazil; (ii) testamentary succession, execution of private wills, and carrying out inventories of estate assets located in Brazil, even if the deceased person was of foreign nationality or resided outside Brazil; and (iii) divorce, judicial separation, or dissolution of a domestic partnership, including a determination as to the division of assets located in Brazil, even if one of the spouses is a foreign national or resides outside Brazil.

Whenever Brazilian courts have jurisdiction over a matter, the determination of the specific Brazilian court where the case will be adjudicated is based on various criteria. Those criteria include things such as the subject matter of the dispute, the functional attributes of a given court, the individuals involved in the case, the territory, and the amount in controversy.

Levels of jurisdiction. As mentioned above, in Brazil, jurisdiction is exercised through different levels of courts. Each court has specific functions and jurisdiction. In general terms, there are three levels of jurisdiction, namely: the first instance (trial court), the second instance (appellate court), and an extraordinary instance (superior courts). In the first instance, trial judges are responsible for examining a lawsuit in its initial phase. These judges review evidence presented by the parties and hand down judgments, applying the relevant law to that evidence. Those judgments may be appealed.

The appellate courts comprise state courts of appeal and federal regional courts. In these courts, appellate judges review decisions made in the trial court and assess appeals filed by one or both of the parties. An appellate court may review all issues discussed by the parties in the trial court as well as the

evidence presented in the case. Appellate courts may confirm judgments of the lower courts. At the same time, whenever appropriate, appellate courts may reverse a judgment and remand the case back to the trial court, especially in cases where there has been a violation of procedural rules, due process, or the right to a fair trial.

The hierarchy of trial and appellate courts is in place for the judiciaries of the various states as well as for the federal judiciary. In both cases, above the respective appellate courts, there sit in Brasília the Superior Court of Justice ("STJ") and the Federal Supreme Court ("STF"). The STJ is responsible for harmonizing the interpretation of federal laws; the STF is the highest judicial authority in Brazil, responsible for safeguarding the Constitution. Because the primary function of the STJ and the STF is not to apply the law to specific cases but, rather, to preserve and standardize the interpretation of federal or Constitutional norms, access to these higher courts is exceptional.

JUDICIAL PROCEEDINGS FOR THE ENFORCEMENT OF RIGHTS

Judicial Proceedings Initiated in Brazil. As a general rule, there are two different civil proceedings for the enforcement of rights in Brazil: (i) the execution proceeding (execução) and (ii) the ordinary proceeding (processo de conhecimento).

In addition to these two forms of civil proceedings, a creditor may also pursue a third form called an action for collection (ação monitória). Depending on the circumstances involved in the case, an action for collection will proceed either as an execution proceeding, or as an ordinary proceeding, as explained below. The procedure applicable to any given claim will depend on the type of the claim and the documentation supporting that claim.

Overview of a proceeding for execution. An instrument providing for the payment of a sum-certain debt, when the debt is past due, may be enforced through an execution proceeding (ação de execução) if the debt is evidenced in writing and has the elements necessary to constitute that instrument as an extrajudicial execution instrument (título executivo extrajudicial). Instruments constituting extrajudicial execution instruments include, among others: (i) promissory note, (ii) a trade acceptance, (iii) a check, and (iv) any agreement in which a person undertakes to pay a sum-certain debt, which agreement has been signed by two witnesses.

A debt instrument governed by foreign law may also be enforced in Brazil by means of an execution proceeding. To enforce debt instruments governed by foreign law, the creditor must provide an affidavit executed by two attorneys qualified to practice law in the place where the debt instrument was issued, stating that: (i) the debt evidenced by the instrument is valid under the governing law; and (ii) the debt instrument itself is enforceable under that governing law. At the same time, there is some degree of uncertainty under Brazilian law as to whether a debt instrument governed by foreign law must comply with each and every one of the conditions set forth in the CPC for a debt instrument governed by a foreign law to be enforceable in Brazil as an extrajudicial execution instrument. For example, if the foreign law governing a debt instrument does not recognize the concept of "extrajudicial execution instrument", one may question whether that debt instrument may be enforced in Brazil through an execution proceeding.

Foreign judgments previously confirmed by the STJ may also be enforced in Brazil by means of an execution proceeding.

In an execution proceeding, upon notification, the debtor will be summoned to pay the debt within three days. If the debtor fails to make payment, the judge may determine the attachment of any of the assets already encumbered as collateral to secure payment of the debt, along with the attachment of as many other unencumbered assets of the

debtor as may be sufficient to secure payment of the entire amount of the debt outstanding.

A debtor may defend against an execution procedure by filing a motion (embargos à execução) challenging the execution and alleging: (i) formal vices or defects in the proceeding that originally gave rise to the execution instrument (whenever the execution proceeding is based on a decision handed down by an arbitral tribunal, by a court of law, or by a foreign court after the foreign decision has been ratified by the STJ); or (ii) other issues (such as the origin and legality of the credit, whenever the execution proceeding is based on an extrajudicial execution instrument.)

In general, a debtor's motion to challenge an execution will not result in the court's ordering a stay of execution. There are cases, however, in which a debtor's motion to challenge the execution proceeding may result in a stay. Those cases include: (i) whenever carrying out the execution could result in significant harm or loss to the debtor or to a guarantor, and the debt is secured by an attachment or garnishment of assets, deposits, or other sufficient collateral; or (ii) whenever there should occur a bankruptcy event, governmental intervention, extrajudicial liquidation, insolvency, a fraudulent transfer, a judicial or an out-of-court reorganization, a moratorium, liquidation, or the imposition of provisions of other laws of general application relating to or affecting the rights of creditors.

After attachment, the assets attached in aid of execution are appraised by an appraiser appointed by the judge. Once the appraisal has been completed, the assets will be sold at a public auction. The proceeds from that sale will be applied to payment of the past-due principal of and interest on the debt as well as to judicial expenses and court-awarded legal fees. Any surplus in the proceeds generated by the sale of the attached assets, if any, is paid over to the debtor.

In some cases, the court may order the transfer of title to the assets securing payment (or to some of those assets) directly to the creditor as payment, in whole or in part, of the outstanding debt. Alternatively, the court may permit the creditor to sell those assets (or some of them), either directly or through a broker accredited by the court. In the latter case, the judge will determine the terms that should apply to the sale for the sale to be effective, the mechanism for its publicity, the minimum price, payment and security conditions, as well as the brokerage fee, if applicable. Notwithstanding the foregoing, upon debtor's express consent and after the maturity date of the debt or its acceleration, the debtor may transfer title to the assets (or to some of them) given as collateral or otherwise attached to secure payment of the debt to the creditor as payment in kind (accord and satisfaction).

Overview of the ordinary proceeding. In the absence of an extrajudicial execution instrument that qualifies for an execution proceeding as described above, the plaintiff will need to initiate an ordinary proceeding to obtain a final judgment for payment of a certain amount or performance of a certain obligation. Once any such judgment has become res judicata, the plaintiff will have a judicial execution instrument that will allow the plaintiff to enforce the judgment through a continuation of the same lawsuit and without having to file a separate new proceeding to execute upon the judgment. The process for enforcing a final judgment ("cumprimento da sentença") essentially tracks the steps involved in an execution proceeding based on an extrajudicial execution instrument, as described above.

If the plaintiff in an ordinary proceeding is not domiciled in Brazil and does not have title to property registered in Brazil, that plaintiff must post a bond to cover the payment of court costs and

court-awarded attorneys' fees in the event that that the plaintiff should lose the case. A bond, however, is not required: (i) whenever a waiver for posting such a bond is provided for in an international treaty or convention to which Brazil is a party; (ii) whenever execution proceedings are based on a judicial execution instrument or on an extrajudicial execution instrument; and (iii) whenever the nondomiciled party to the ordinary proceeding is the defendant and, as such, files a counterclaim.

Ordinary proceedings are evidentiary proceedings and are usually divided into three phases: (i) the pleading phase (fase postulatória); (ii) the evidentiary phase (fase instrutória); and (iii) the judgment phase (fase decisória).

The pleading phase comprises the filing of the complaint (petição inicial), the answer (contestação), and any additional pleadings. After the plaintiff has filed the complaint, the judge may schedule a conciliation hearing. If the parties do not reach an agreement at that hearing, the defendant must present its answer within 15 business days from the date of the hearing. The hearing will not take place in cases where both parties declare that they are not interested in settling. If the defendant does not present its answer within the 15-day term, all allegations of facts made by the plaintiff in the pleadings will be deemed true. The defendant may also present a counterclaim with its defense, in which case the plaintiff must present its answer to the counterclaim within 15 business days.

The pleading phase terminates with a pretrial order (despacho saneador), issued after the court has reviewed the pleadings to determine whether the lawsuit is legally sound to proceed. The judge will also verify whether all procedural prerequisites have been complied with, such as concluding that the plaintiff and the defendant are the real parties in interest ("partes legítimas"), and including an analysis of the plaintiff's cause of action against the defendant.

The production of evidence. In the evidentiary phase the parties are allowed to produce evidence regarding the facts discussed in the case. In Brazil, documentary evidence, testimonial evidence, and depositions of expert witnesses are admitted, as is the judicial inspection of evidence. The general rule in Brazilian procedure is that the party alleging a fact must prove the veracity of the allegation.

In principle, parties to a lawsuit may use any of several means to prove the facts they allege. Nevertheless, the Brazilian legal system imposes some restrictions that prevent the production of evidence involving trade secrets, the right to privacy and intimacy of the parties, as well as evidence originating from illegal acts.

Furthermore, the production of evidence in a specific case is limited to the facts being discussed in that case. A party may not request the production of evidence related to matters unrelated to the lawsuit or that have excessively broad scope. The production of any such evidence could constitute an abuse of the right to provide evidence.

When one compares the American discovery model to that followed in Brazil, it is clear that the production of evidence pursuant to Brazilian law is more restricted and subject to clearer limitations. On one hand, Brazilian rules on discovery ensure the preservation of the guarantees and fundamental rights of the parties to an extent greater that do the American rules. On the other hand, Brazilian rules make the substantiation of certain facts more challenging.

In Brazilian proceedings in the first instance, even if not requested to do so by one of the parties to the lawsuit, the judge has broad powers to produce evidence himself or herself, ex officio. The judge

may call for the production of evidence whenever the judge deems it necessary for a better understanding of the case. The judgment in any case must be based on the entirety of the evidence produced. It is irrelevant who produced the evidence or brought it to the judge's attention.

Judgment phase. Once the evidentiary phase has been completed, the judgment phase begins. At the end of the judgment phase, the actual award is rendered by the court. In practice, however, the last two phases tend to overlap. The court's hearing (audiência) usually encompasses both the production of evidence as well as the process leading to judgment.

The judge's decision on the claim will impose on the defeated party an obligation to pay both court costs (to the court), as well as court-awarded attorney's fees (to the opposing counsel). Court-awarded attorney's fees may vary, at the court's discretion, from 10% to 20% of the amount in controversy. According to applicable law, the amount of attorney's fees awarded by the court in this manner may be increased if any appeals are filed and rejected. However, in no event may court-awarded fees exceed a cap of 20% of the amount in controversy.

Enforcement of court judgments. If the plaintiff should recover a final favorable judgment (that is, a judgment that has become res judicata), the plaintiff may then proceed to enforce the judgment as part of the same ordinary proceeding, without any need to file a separate enforcement proceeding. The defendant will be notified to pay the amount awarded to plaintiff within 15 business days.
If the amount of the award is neither paid nor deposited in a court-controlled bank account within that period, the court will apply a penalty of 10% of the amount of the award in favor of the plaintiff, together with an additional 10% of the amount of that penalty as court-awarded attorney's fees payable to plaintiff's attorneys.

The defense available to the defendant at this stage is called a "challenge" (impugnação), which may be presented by the defendant within 15 business days after the 15-day deadline for payment has expired. The challenge will generally not stay the proceeding except in those cases in which: (i) allowing the enforcement to proceed could cause significant irreparable loss or harm to the debtor; and (ii) the debtor offers assets to secure payment of any damages that may be awarded to plaintiff by the judgment, up to the amount of that award. In any such case, the plaintiff could, nevertheless, proceed with the enforcement proceeding. If the plaintiff should choose so to proceed, the plaintiff may be required to post a bond to secure the payment of any possible indemnification that the plaintiff may come to owe the debtor for loss or harm that might befall the debtor by virtue of the plaintiff's having proceeded to carry out the provisional enforcement.

If the challenge of the debtor is rejected, the defeated party must comply with the final decision and pay the applicable fines. The procedure for enforcing a judgment will follow generally the steps involved in an execution proceeding based on an extrajudicial execution instrument, as described above.

Action for Collection. If a claim for a certain amount or demanding delivery of a certain piece of personal property or fungible asset is based on a contract or credit document that does not qualify as an extrajudicial execution instrument, the applicable procedure for its enforcement most likely will be an action for collection (ação monitória) rather than an ordinary proceeding.

To file an action for collection, a creditor must file a complaint attaching the same documents required for the filing of an execution proceeding. The sole difference lies in the fact that, although qualifying as a debt instrument, the

debt instrument supporting the claim in an action for collection would not, for any of several possible reasons, qualify as an extrajudicial execution instrument.

In the case of an action for collection, if the creditor is not domiciled in Brazil and does not own any real property in Brazil, the creditor must post a bond to cover the court costs and the court-awarded attorney's fees that the plaintiff would be required to pay if the plaintiff were to lose the case. The same exceptions regarding such a bond, specified above, are applicable.

In such a proceeding, the defendant will be notified to pay its debt or to file a defense against the collection within 15 business days. If the defendant does not file a defense, the proceeding will be converted into an execution proceeding and will track the steps involved in an execution proceeding based on an extrajudicial execution instrument, as described above.

If the defendant files a defense, the action for collection will thereafter follow the same steps as those followed in an ordinary proceeding, as described above.

PRELIMINARY INJUNCTIONS AND DISCOVERY

Preliminary injunction. The Brazilian legal system provides a set of procedural measures that allow the judge, perceiving the likelihood of the principal claim being granted in the end, to anticipate the effects of the judicial decision or ensure that the delay in the process does not impair the enjoyment of rights by the party that is ultimately expected to prevail. To exercise this power, a judge must conclude that any such measure is necessary because of urgency, or because of the risk of a loss of rights. Urgent measures may, therefore, be directed at the very enjoyment of rights by a party. For example, a judge may allow the immediate eviction of a defaulting tenant. At the same time, those measures may be of a precautionary nature, such as ensuring the effectiveness of a judgment likely to favor the plaintiff by blocking sufficient funds to secure payment of a future judgment. In either case, the measure is strictly of a provisional nature. These measures will not remain in effect once final judgment has been rendered.

Urgent measures are widely recognized and allowed in civil proceedings in Brazil. These measures are important tools to compensate for the many delays that occur in the processing of lawsuits in the Brazilian judicial system.

Securing the enforcement process and asset-freezing orders. The enforcement of a judgment in Brazil may be facilitated by making use of certain precautionary measures, one of the most effective of such measures being the asset-freeze order.

As a precautionary measure, an asset-freezing order plays an essential role in preventing the dissipation of assets, which dissipation could otherwise frustrate the enforcement process. A plaintiff may request an asset-freeze order before or during a lawsuit. The objective of any such asset-freezing order is to secure assets that could be required for enforcement of a judgment.

To obtain an asset-freezing order, the plaintiff must demonstrate the likelihood of success on the merits of the case and provide evidence of the risk that the assets that are the object of an asset-freezing order might be hidden or disposed of before final judgment if the order is not granted. If a plaintiff so alleges, the court may issue orders to freeze bank accounts, prevent property transfers, and preserve other valuable assets.

ARBITRATION

Arbitration is admitted in Brazil as a valid method for dispute resolution. The provisions governing arbitration proceedings are set down in the current Arbitration Law, enacted in 1996 and subsequently amended.

Arbitration is used primarily in business and contractual disputes, where there is generally no question as to whether the parties could validly choose arbitration and waive their rights to take a dispute to the judicial courts. Arbitration may be chosen either before a conflict arises (by means of an arbitration clause inserted in an agreement, the alleged violation of which agreement is the basis for the dispute), or after a conflict has been identified (by means of a separate arbitration agreement, in which the specific issue to be submitted to arbitration is stated).

After a period of adapting to the Arbitration Law, Brazil has increasingly become a pro-arbitration jurisdiction. Brazilian courts have consistently upheld choices made by parties to a dispute to submit that dispute to arbitration – either by refusing to hear cases arising under contracts with arbitration provisions, or by enforcing the respective arbitral awards. Brazil is also signatory to, and has ratified, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards – The New York Convention (1958).

In order to avoid discussion as to the validity of an arbitration clause or an arbitration agreement, it behooves the parties to include in any arbitration clause or agreement certain basic provisions, such as: (i) the choice of procedural rules (especially by reference to institutional rules of an existing chamber for arbitration or to the UNCITRAL rules for ad hoc arbitration); (ii) the number of arbitrators making up the arbitral tribunal and the method for their selection; (iii) the place where the arbitration proceeding will be conducted and where the award will be issued; (iv) the language of the arbitration proceeding; (v) the law applicable to the dispute; and (vi) the competent jurisdiction to rule upon requests for injunctive relief as well as to enforce constrictive orders and the arbitral award, if necessary.

Pre-arbitral injunctive relief. It is possible that injunctive relief may be needed prior to arbitration proceedings. If that should be the case, and so long as the arbitral tribunal has not yet been constituted, either party seeking to resolve a dispute may request injunctive relief in a state court. If the interested party does not request the commencement of the arbitration proceeding within 30 business days after the injunctive relief is granted, the effectiveness of that relief terminates.

After the tribunal is constituted, the parties may resort only to the arbitral tribunal itself for the purpose of requesting injunctive relief.

If any injunctive relief is requested in a court of law prior to the constitution of the arbitral tribunal, that tribunal (once constituted) may review and modify the decision rendered by that court. Relief requested before a court of law does not affect or concern the merits of the dispute, judgment as to which is reserved exclusively for the jurisdiction of the arbitral tribunal.

There are some chambers for arbitration, such as the International Chamber of Commerce, that entertain requests for emergency arbitration. If the parties have agreed upon or have not expressly ruled out the use of such a device (depending on what the rules provide for), emergency arbitration may be put into play by the parties following the rules of the specific chamber for arbitration regarding a hearing on a request for emergency relief that may be needed prior to the actual constitution of the arbitral tribunal. This practice is still not usual in local arbitration proceedings in Brazil, but it may be expected to develop in the near future.

Arbitration proceeding. An arbitration proceeding is considered to have commenced immediately after all arbitrators involved have accepted their appointments. Any issues related to jurisdiction; disqualification of an arbitrator; and annulment,

invalidity, or ineffectiveness of the arbitration clause or agreement; must be raised at the first opportunity after the commencement of the proceeding. Any arbitrator who is found to be disqualified to act in the proceeding must be replaced. If any challenge to jurisdiction or to the arbitration clause or agreement is accepted, the case will be forwarded to the competent court of law. Unless otherwise agreed, the final arbitral award must be issued within six months after the commencement of the arbitration or, if an arbitrator has been replaced, after the replacement has been duly designated.

Arbitral awards have the same force and effect as court judgments and are final and binding upon the parties. Domestic awards do not require any type of prior recognition or ratification for purposes of enforcement. Foreign final arbitration awards, however, must be ratified by the STJ as a condition to becoming effective in Brazil, as described below.

Once an arbitral award has been issued, if the party to the arbitration who is required to comply with the terms of the award should fail to do so, the other party may enforce the award with the assistance of a judicial court in Brazil. The arbitral award will be equal to a "judicial execution instrument," and the proceeding will be the same as that of an enforcement of a judgment, as described above – the enforcement of a judgment being, in essence, a form of execution. The merits of the arbitral award may not be reviewed by the court, and objections to the enforcement are restricted to formality issues, especially those related to the effective submission of the parties to arbitration, or to compliance with due process.

The Brazilian Arbitration Law provides that, within five days from the issuance of an arbitration award, the parties may present to the arbitral tribunal a motion for clarification seeking correction of any material aspect of the award, as well as clarification of any aspect that is obscure, contradictory, or doubtful. After the decision on any such motion for clarification has been given, the jurisdiction of the arbitral tribunal terminates, and there is no possibility of an appeal against the award. Within 90 days after the award has been issued, however, the parties are entitled to request a court of law to annul an arbitration award. Any such request must be based on one or more of a limited number of circumstances, as provided in the Arbitration Law.

Among those circumstances that may be alleged in a request to a court of law to annul an arbitration award are ones to the effect that: (i) the arbitration agreement is null and void; (ii) the arbitration award does not comply with legal requirements; and (iii) the award exceeded the scope for arbitration provided for in the arbitration agreement. If a request for annulment is granted, the court will determine that the arbitral tribunal should render another award.

Brazilian Courts have been vigilant in judging annulment requests in order not to allow any such request to become a "disguised appeal" against a validly issued arbitral award.

Finally, the parties to an arbitration proceeding may request a court of law to render a complementary award if the arbitral tribunal fails to review all the requests submitted to that arbitral proceeding.

INTERNATIONAL CONSIDERATIONS

Ratification of a Foreign Judgment. In the case of enforcement of a contract governed by foreign law and providing for submission to a foreign jurisdiction, rather than initiating a proceeding directly in Brazil, the creditor may obtain judgment in a court of competent jurisdiction outside Brazil and bring that judgment for enforcement in Brazil. In order to be enforced in Brazil, any foreign judgment must first be ratified through an exequatur proceeding before the STJ in Brazil. In

order to be ratified by the STJ, a foreign judgment must meet the following conditions: (i) it must comply with all formalities necessary for its enforcement under the laws of the place where it was issued; (ii) it must have been issued by a competent court after proper service of process on the parties; (iii) it must not be contrary to Brazilian national sovereignty, good morals, or public policy, or otherwise offend human dignity; (iv) it must not violate a final and unappealable decision issued by a Brazilian court; (v) it must not violate any Brazilian rules providing for the exclusive jurisdiction of Brazilian courts; and (vi) unless an exemption is provided for in an international treaty to which Brazil is a signatory, the judgment must be: (a) duly authenticated by a competent Brazilian consulate or, if the place where the judgment is issued is a contracting state to the Convention Abolishing the Requirement of Legalization for Foreign Public Documents, dated October 5, 1961, apostilled; and (b) accompanied by a sworn translation thereof into Portuguese. If the foregoing conditions are met, the STJ will ratify the foreign judgment for enforcement in Brazil without reviewing the merits.

The decision of the STJ ratifying the foreign judgment will itself be a judgment and, therefore, a judicial execution instrument. Such judgment will then be enforceable as part of the same procedure in the same manner described above (i.e., enforcement phase in an ordinary proceeding – or, essentially, execution on a judgment).

Ratification of a foreign arbitration award. Foreign final arbitration awards must also be ratified by the STJ as a condition to becoming effective in Brazil. As in other jurisdictions, ratification will be denied in Brazil if the subject matter is not one that could be submitted to an arbitration proceeding in Brazil, or if the award offends public policy.

Other causes that may prevent a foreign arbitral award from being ratified for enforcement in Brazil include: (i) the nullity of the arbitration proceeding, the arbitration clause, or the arbitration agreement; (ii) failure of the arbitration proceeding to comply with the provisions of the arbitration clause or the arbitration agreement; and (iii) the award having been declared null and void, or having its effects stayed by a judicial authority in the jurisdiction where it was rendered.
After the ratification process has been completed, a foreign final arbitral award will have the same force and effect in Brazil as that of any judgment handed down by a Brazilian court of law, or of any other arbitral award rendered in Brazil.

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Competition and Antitrust

Doing Business in Brazil

Tozzini Freire.
ADVOGADOS

Doing business in Brazil: compliance

Karla Lini Maeji

kmaeji@tozzinifreire.com.br

Giovanni Paolo Falcetta

gfalcetta@tozzinifreire.com.br

Brazil has undergone significant changes in all fronts related to compliance in the last decade, which directly impacted the landscape for companies interested in investing in Brazil. From the enactment of the Brazilian Clean Companies Act ("BCCA"), Law n. 12.846/2013, to the unprecedented enforcement related to Operation Car Wash and to the continuous efforts made by Brazilian authorities to foster a culture of integrity, a company's decision on whether and how to invest in Brazil should take into consideration compliance aspects. And because Brazil is still a high-risk market for corruption , conducting a risk assessment and implementing an effective compliance program are of essence for mitigating risks inherent to doing business.

Below are some answers to relevant questions companies should keep in mind before and while doing business in Brazil from a compliance perspective.

What is the BCCA and what should companies know about it?

The BCCA establishes rules for strict administrative and civil liability of companies for certain violations against national or foreign administration:

- directly or indirectly promising, offering or giving an undue advantage (which can be monetary or not – e.g., job offers) to a government agent or to a related third party;
- defrauding government procurement or contract;
- obstructing government investigations or inspections (enforcement of this violation has been increasing in the past few years);
- financing, funding, sponsoring or in any way subsidizing the practice of illegal acts.

Companies that do not operate directly in Brazil could also be sanctioned under the BCCA as it applies to violations committed: 1- by a Brazilian legal entity even if the act was committed abroad; 2- in whole or in part in Brazilian territory; 3- abroad, when committed against the Brazilian national administration; 4- by legal entities that have their headquarters, branch or representation in Brazil.

Under the BCCA's strict liability, companies can be held liable for violations committed by third parties in their interest or to their benefit. For this reason, if the company will rely on third parties of any kind, but especially with commercial agents, brokers and resellers, it is recommendable to have a compliance program that appropriately deals with third parties, including internal policies on vetting and monitoring.

BCCA sanctions include: 1- fines ranging from 0,1 to 20% of a company's gross revenue; 2- disgorgement of profits obtained from the violation; 3- suspension or partial interdiction of a company's activities; 4- forfeiture of assets and 5- prohibition to receive public funds. Controlling/ controlled companies and consortium members may be held jointly liable for paying penalties and reimbursing damages from BCCA violations. Also, liability of legal entities remains in the event of amendments to the articles of association, corporate changes, spin-offs or mergers. In the latter, liability is restricted to fines and damages, within the limit of assets transferred.

Is it mandatory to have a compliance program when doing business in Brazil?

No – in most instances. However, having a compliance program in place mitigates risks and potential penalties arising from violations (i.e., up to 5% of reduction of the BCCA fine). If the company plans on dealing with the government, is regulated by specific agencies, or is seeking financing from the government, having an integrity program may be mandatory – see examples below:

- New Government Procurement and Contracts Law – Law No. 14.133/2023 – companies participating in government procurement for large-scale projects, services, and supply (i.e. those with an estimated value exceeding BRL 200 million) must implement an integrity program within six months from the execution of the government contract.
- Resolution No. 4,595/2017 of the Brazilian Central Bank ("BACEN") – financial institutions (except for consortium administrators and payment institutions) are required to implement and maintain a compliance policy compatible with its nature, size, complexity, structure, risk profile and business model.
- National Economic and Social Development Bank ("BNDES") – Companies with a BRL 300 million revenue or over will be required to have an integrity program to

apply for financing before BNDES.

What is a compliance program under Brazilian legislation and what are its requirements?
A combination of internal mechanisms and procedures for integrity, auditing and incentives for reporting irregularities and the effective application of codes of conduct, policies, and guidelines, to detect and remedy deviations, fraud, irregularities, and violations committed against national or foreign administration. According to the Comptroller General of the Union ("CGU"), which is the federal authority enforcing the BCCA and issuing guidelines to foster a culture of integrity, integrity programs should be structured on the following five pillars: 1- tone at the top; 2- Designated responsible area; 3- Risk assessment; 4- Rules and Mechanisms and 5- Continuous monitoring. When implementing a compliance program for a company operating in Brazil, it is important to keep in mind that:

- All codes, policies, proceedings, communications, trainings and reporting channels need to be in Portuguese and with express reference to the Brazilian laws;
- If your company does business with the government, it is essential to have policies, proceedings, and trainings in place with rules for interacting with government officials and government procurement.
- Some regions and communities in Brazil have a very informal culture, which can lead to requests that are not acceptable under Brazilian laws (e.g., asking the company to draft or change an RFP to include its products or services due to lack of knowledge of the government official to procure that particular scope);
- Your company will probably deal and interact with third parties that do not have a sophisticated corporate governance (e.g., family, or local businesses), which will require appropriate risk management tools.

What are the main areas of risk and the recommended best practices if my company decides to do business in Brazil?
Government sales and interactions with government officials: Government procurement is conducted under a highly regulated process in Brazil and enforcement by authorities and scrutiny from controlling agencies are increasing. Common issues include bid rigging, undue influence in RFPs, fraud in contract performance, undue interactions with government officials (communications, meetings, gifts, hospitalities, etc.) There are different guidelines and laws applicable for each government entity depending if federal, state or municipal level and internal policies for each of the government entities should also be taken in consideration.

Third parties: Carry out appropriate risk-based due diligence, with a particular focus on PEPs, for retaining third parties – especially those that will act on behalf of the company. It is also essential to rely on specific policies, trainings and monitoring for third parties and for employees who will interact with the company's third parties.

What if things go wrong? Does Brazilian legislation allow and encourage self-reporting? Yes. Although it is not mandatory for companies to self-report to Brazilian authorities , the BCCA and its regulating decree set forth the possibility of leniency agreements.

A leniency agreement can reduce the BCCA fine in up to 2/3 and also provide exemption of some of the BCCA sanctions as long as companies fulfill its requirements, which include but are not limited to ceasing its involvement in the violation, admitting its strict liability, provide documents and leverage to the involved authorities, implement or improve its integrity program and pay the amounts established as fine, disgorgement and damages (if applicable).

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Labour

Doing Business in Brazil

SOUTO CORREA ADVOGADOS

Supreme court rulings shift the core of labor law in brazil

Senior Associate of Souto Correa, Eduardo Mascarenhas has extensive experience in labor and employment law, representing clients before the Regional Labor Courts (TRTs), the Superior Labor Court (TST) and Public Labor Ministry (MPT). He also provides consultancy services and manages client's relationship with Unions, mostly in the agribusiness, pharmaceuticals, financial services, technology, civil construction, retail, industry, and health sectors.

Eduardo Peukert Mascarenhas Lopes

eduardo.mascarenhas@soutocorrea.com.br

Head of the Labor and Employment Team of Souto Correa, Manoela is an expert in labor law and has experience in handling judicial and administrative proceedings. She provides consultancy to companies in drafting codes of conduct, human resources policies and planning variable compensation programs. She also works in collective negotiations and union relations, counseling clients in collective bargaining, mainly in economic segments, including technology, finance, retail of petroleum products and pulp and paper.

Manoela Pascal

manoela.pascal@soutocorrea.com.br

Since the implementation of the Labor Justice in Brazil as a segment of the Judiciary, in 1946, the vast majority of its decisions leaned towards one rule that seemed to be primordial and unchangeable: the labor legislation only admitted one form of relationship between the workers and the companies, which was the employment relationship.
In Brazil, an employee is any individual who personally provides services on a regular basis for compensation and is under the orders/coordination of a company's representative. If an individual meets such requirements, there is a series of mandatory labor rights that need to be respected by the employer, such as minimum wage, annual paid vacation of 30 calendar days, annual Christmas bonus, weekly paid rest, annual salary increase, worktime limited to 8 hours a day and 44 hours a week, and many others.

Despite the many changes the world has experienced since that time, mainly caused by technology and new social interactions created by it, that rule never ceased to exist, even though Brazil itself has had other two Constitutions after the one proclaimed in 1946. There is no doubt that economic progress and globalization, paired with society's gradually larger access to disruptive technologies, modified not only people's mindset, but also the ways in which the labor itself can be executed. That has direct impact on how people can work on their jobs, given the many new ways and places available to do the task.
On this new scenario, companies began to think that Brazilian labor legislation, by only accepting one type of legal relationship between the workers and themselves, was a little bit obsolete, given that the law narrowed down all new types of jobs created to a single legal experience. Thus, according to the interpretation of the law that used to be dominant on the nation's Judiciary, workers with different levels of autonomy, technical qualification, skills, or graduation background were all set to be categorized as employees. As a result, regardless of the different circumstances in which the work is executed and the distinct job experiences and activities, a same legal form (employment relationship) was applicated.
Naturally, it is not compatible with the companies' interests the existence of a single format of labor relationship, and a legislation that recognizes all sorts of contracts is usually pointed out by them as a key factor to a more efficient and wider hiring process that can lead to economic prosperity.

Due to society's changes stimulated by recent technology, political and economic elements, many companies in Brazil began to question this predominant interpretation of labor law given by the Labor Justice that the employment contract is meant to be the rule in Brazil, taking into consideration that the labor relations themselves should also change accordingly to those factors.
This discussion involving the opposition to the Labor Courts many rulings reassuring the predominance of the employment relationship ended up in the Supreme Court, where it found a different terrain.

On a series of recent judicial binding decisions , **the Supreme Court manifested a divergent approach to the interpretation of labor law. Based mainly on the current country's Constitution, proclaimed in 1988, the Court expressed that the employment relationship is not a rule that must be followed blindly by all companies, but rather a form of labor contract that coexists in harmony with other types of contracts**.
To the Supreme Court, the law does not dictate that the employment relationship is always mandatory, and other kind of relationships are not necessarily against human and social rights, even stating that this form is not

always the best option for the parties. Besides that, the Constitution itself, according to the Supreme Court, assures to the companies freedom of choice when it comes to their own organization, and that implies that the firms must have autonomy to better structure their production process.

Nevertheless, that autonomy is limited by the labor legislation regarding the requirements of the employment relationship. So, if a certain worker meets all those requirements, the employment relationship must be recognized, that did not change with the recent decisions abovementioned. What the Supreme Court stated is that for certain situations when the requirements are not clearly visible or when the contract signed between the worker and the company predicts a higher level of autonomy, the employment contract can be substituted by a different kind of contract.

This also indicates that the companies that celebrate a contract with a worker and do not formalize that relationship as an employment relationship are at a lower, but still existent, risk of being a target of The Ministry of Labor and Employment or the Labor Prosecutor, who may impose fines or file a public civil action against the company if they understand that the worker meets the essential legal requirements to be classified as an employee. Therefore, the Judiciary is not entitled to determine that the company must hire all its workforce as employees, but its role is to identify labor frauds. Contracts between companies and workers can vary according to the reality and the circumstances in which the job will be executed. That will determine whether the individual will be an employee or not. So, the Supreme Court assured that certain types of workers are in fact different from a typical employee, because they work on certain jobs or on a specific set of conditions, and those particular workers do not need to be hired as employees, considering the validity of other forms of contracts that regulate the workforce.
This new vision on labor legislation, backed by those Supreme Court decisions, stimulates a more dynamic economy, given that companies have a wider range of options to better pursue its interests, which results in higher levels of economic freedom and creates a solid environment for business to thrive and investments to be made. Moreover, the workers themselves can be benefited from those decisions, considering that they might be faced with more jobs opportunities associated with less bureaucracy.

In conclusion, the tendency prompted by the recent rulings of the Supreme Court is undoubtedly impactful, and it collides with decades of divergent court decisions from the Labor Justice. Even though that new tendency by itself is not enough to guarantee a more stable legal scenario for companies to operate in Brazil, it helps to tackle legal uncertainty on the matter.

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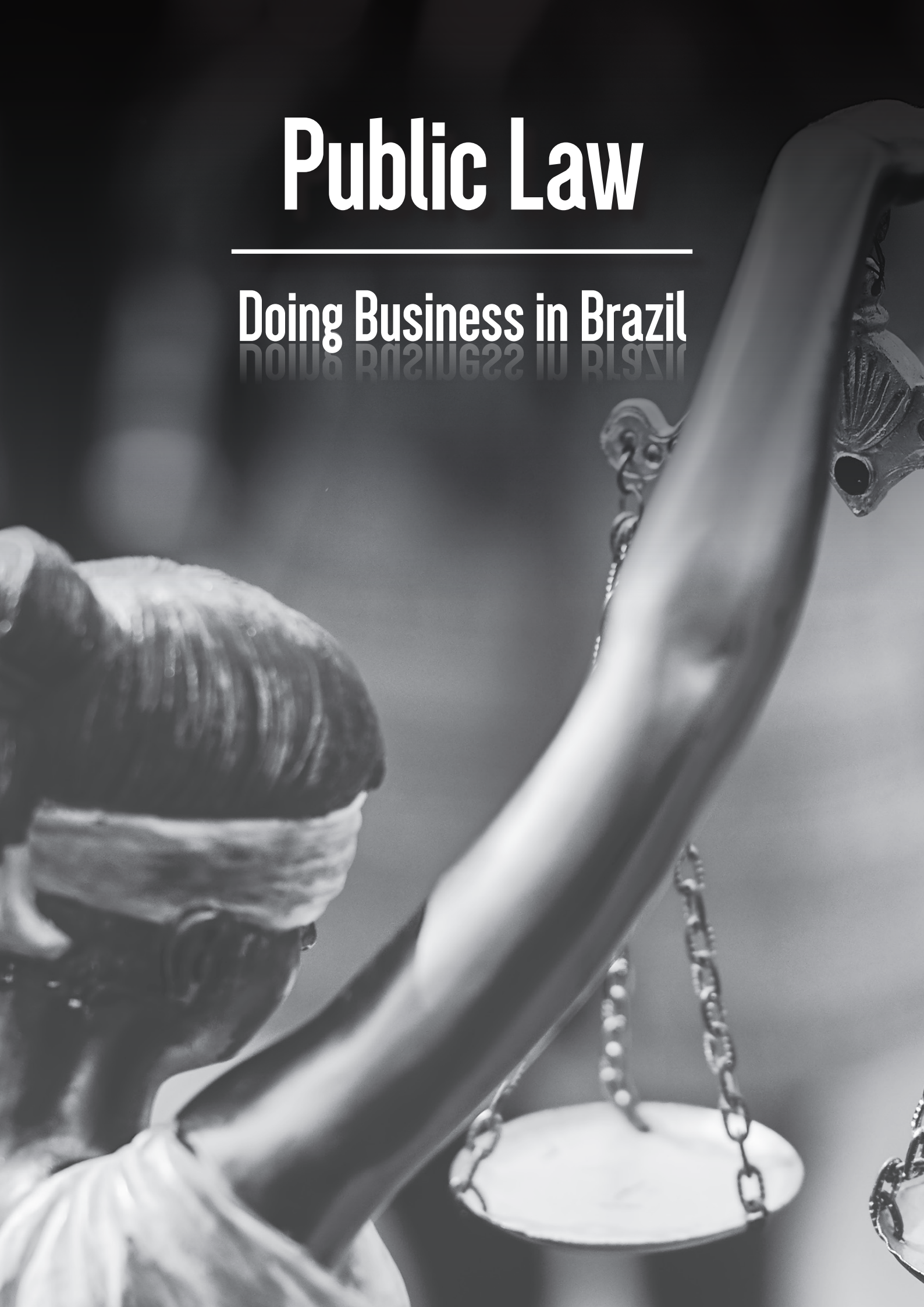
Public Law

Doing Business in Brazil



BOCATER
ADVOGADOS

Infrastructure in Brazil: going towards a new path for international investments

Thiago Araujo

taraujo@bocater.com.br

Brazil still needs help in the development of infrastructure projects. According to a monitoring conducted by the Federal Audit Court (TCU), 41% of federal infrastructure work is halted, totaling an expected R$ 32.2 billion in investments . Part of the problem is the need for more investment capacity by the Federal Government due to the scale of the projects, which makes it necessary to seek private investments, including from international players. This scenario is historical.

During the presidency of Fernando Collor (90-92), the National Privatization Program (PND) was initiated, marking an increase in privatizations in Brazil. This policy aimed at restructuring the strategic role of the State by transferring activities traditionally carried out by the State to the private sector. However, the most significant advancement in the country's privatization policy occurred during the presidency of Fernando Henrique Cardoso (FHC – 95-03).

Facing a backdrop of declining public investment capacity, FHC promoted, through privatizations, a greater flow of foreign investment into strategic economic sectors. This politics removed from the State the burden arising from poor management and the growing deficits inherent in state companies. During this process, the National Bank for Economic and Social Development (BNDES) played a crucial role, acting as PND's manager and leading purchasing group financier. In the second half of the 90s, the use of concessions increased as part of efforts to decentralize state power in the provision of public services. While privatizations refer to the sale of state companies to the market, concessions represent a private party's administration or management of public service temporarily and under regulation. Concessions, conversely to the State monopoly, aim to promote competition for the market of specific public service, such as sanitization, for instance, through bidding, seeking to increase the efficiency of tariffs combined with the disbursement of investments in works. This heating up resulted in the publishing of Law No. 8.987/95 ("Concessions Law").

The policies promoted by Collor and FHC are part of the consolidation of the New Public Management in the country, in which the role of the State shifts from a bureaucratic approach to a managerial focus. This shift in Brazil was materialized through Constitutional Amendment No. 19/1998, which promoted the restructuring of the Public Administration. In the matter of infrastructure, it was consolidated with the creation of regulatory agencies.

With the change of the role of the State, along with the increased presence of the private sector, the government needed to establish rights and duties for companies so that the provided public infrastructure would be managed under public interests and not for unrestrained profit. Therefore, regulatory agencies were created with administrative, financial, and asset autonomy aimed at regulating and supervising the activities provided by concessionaires, promoting primarily technical regulations.

Over the past three decades, we have witnessed both progress and setbacks. As a notable advancement, we can mention Law No. 13.848/19, which strengthened regulatory agencies through adjustments to regulatory frames and practices and through the opening to public participation through Consultations and Hearings. As a setback, we can highlight the institutional bypass, a strategy in which other institutions effectively assume functions initially

assigned to regulatory agencies. In Brazil, the TCU has a noticeable activism in this regard.

Recently, significant changes have taken place as such the discontinuation of the Long-Term Interest Rate (TJLP) by BNDES in 2018, which provided low-interest credits for long-term projects. This decision stemmed from the ripening of the market regarding long-term financing. The abolition of the TJLP reduced the financial dependence of the sector on BNDES, which lost its role as the primary financier for long-term contracts. That change naturally led to the need to seek new financiers, including international ones.
The same level of transformations the debt side has gone through was also experienced by the equity side in Brazil. The sponsor's profile has transformed since Car Wash operation. The infrastructure market was predominantly dominated by large contractors, such as Odebrecht, for a long time. However, as the Operation unfolded, these traditional players lost market share, opening space for new companies, including ones from other segments.

The confluence of the opening of the market, the loss of the centrality of BNDES, and the permanent need for voluminous investments for infrastructure development have made the concessions scenario inviting to the entry of players whose core business is the financial market. Moving away from the traditional model, nowadays there are calls for bid in which, instead of requiring technical qualifications through proven previous experience in the service, request capability through the realization of financial engineering, a credential aimed at the ability to obtain and manage financial resources . Moving away from the traditional model, nowadays there are calls for bid in which, instead of requiring technical qualifications through proven previous experience in the service, request capability through the realization of financial engineering, a credential aimed at the ability to obtain and manage financial resources .

The entry of players from the financial sector has stimulated the redesign of contractual and legal models to accommodate the new interests at stake to increase the business's legal certainty. The government, seeking to keep the concessions attractive, has recalibrated risk allocation. Therefore, it has implemented new clauses in concession contracts, such as exchange rate clauses, designed to control the risk of exchange rate variations that the private party classically bore and seeking new sources of funding, developing the Bill 2.646/2020, which aims to introduce a new fundraising mechanism for the sector - infrastructure debentures-, creating new incentives for bond issuers.

It's with great enthusiasm that we note the entry of these new international players, whether in consortium or financing debts, in the hope of providing a refresh to the development of the country's infrastructure, which yearns for a new moment in favor of advancing the works and services that are relevant to the population and economy of Brazil.

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Capital Markets

Doing Business in Brazil

VBSO ADVOGADOS

Distributed Ledgers Technologies (DLT) and Financial Markets in Brazil: Regulatory Outlook

Erik Oioli.
JD in Commercial Law, Oioli is the Managing Partner of VBSO Advogados, head of the Bank Law and Capital Market practice and partner of the firm's Corporate Law and M&A practices. Oioli is acclaimed as one of the leading experts in crypto assets, blockchain and tokenization in Brazil, with a background of over 25 years in financial and capital market deals.

Erik Oioli

vbso@vbso.com.br

Substantial progress has been made in the use of Distributed Ledger Technologies (DLT) and of crypto assets in general, in recent years, which inherently allows for great potential for disruption in the Brazilian financial and capital markets. This translates into and is also supported by material regulatory efforts made by legislators and regulatory authorities, such as the Central Bank of Brazil (BCB) and the Brazilian Securities and Exchange Commission (CVM).

The urgent demand for regulation is justified by the need to offer greater legal certainty to all parties that use these technologies and in the negotiation of emerging assets. Brazil's legislative houses have passed several Bills in response to this urgency, especially Bill 4,401/2021, which gave rise to Law 14,478/2022. Said law sets forth the terms on the regulation of virtual asset service providers. In addition to the new law, the Central Bank of Brazil has created and issued digital currency DREX, and CVM has recently issued opinions on the tokenization of receivables.

Law 14,478/22 came into effect in June 2023 and sets out the rules to be followed in the provision of virtual asset services. The law also regulates the providers of said services, and defines the list of activities that fall under the Virtual Assets Service Provision (VASP): the exchange between virtual assets and national or foreign currency, the transfer, custody or management of said assets or of instruments that allow control over them, in addition to participating in financial services and providing services related to an offer by an issuer, or in the sale of assets.

The Central Bank of Brazil (BCB) has authority to supervise and set out the terms for the operation of said service providers, as determined under Article 1 of Decree 11,563 of 2023. BCB is liable for authorizing the operation of Virtual Assets Service Providers (VASPs), stipulating the requirements to be met on the appointment to management positions, on the supervision of said providers, and on establishing governance, operational and compliance rules, including anti-money laundering crimes and anti-terrorism rules, in addition to other matters. As of now, the rules that will govern Law 14,478/22 are pending availability for public consultation.

BCB not only has authority to regulate and supervise the VASPs, but also, in the meantime, has developed the Real Digital project, generally known as DREX. DREX design first started under BCB Ordinance No. 108,092/2020, which set up an advisory Task Force that gave rise to a Permanent Forum for discussions on the matter. The efforts made resulted in the issue of the rules and DREX, as well as on the organization of a special edition of the Lift Challenge Real Digital. The special edition of this lab included focusing on new business models that would benefit from smart payments using technological innovations such as smart contracts and Internet of Things (IoT), among other initiatives.

In short, DREX covers three applications: wholesale payment, instant (or real-time) payments and, above all, the promotion of new business models. The three are feasible thanks to the use of blockchain technology, which offers transparency, speed, privacy, security and good cost-effectiveness to transactions, in addition to enabling the construction of self-executing contracts (smart contracts) and, consequently, the development of these new business models. The

project is currently in the test phase and rollout is scheduled for 2024.

The importance of DREX lies not only in the creation of a sovereign digital currency, but above all in the development of a blockchain infrastructure where several financial transactions will be carried out. There is a clear transition towards a truly tokenized economy, where assets are born and circulate digitally.

All these efforts are expected to create momentum for the issuance of digital assets in the capital market. CVM has issued several opinions and official notices to the market, in recent years, clarifying its understanding on crypto assets. In 2017, CVM set out the rules for Initial Coin Offerings, to raise funds for investors through cryptocurrencies. In 2020, CVM designed Regulatory Sandbox 21, allowing for the assessment and analysis of business risks related to crypto assets and blockchain. In turn, in 2018, CVM published Official Notice No. 1/2018/ CVM/SIN recommending the acquisition of crypto assets, by investment funds, via exchanges.

In 2022, CVM issued Opinion No. 40/2022, which determined the obligation for any securities-based crypto asset offerings to be traded according to CVM rules, both for primary or secondary offerings. In this context, depending on how the deal is structured, tokens may be defined as securities and, consequently, must be submitted to CVM regulation. Finally, in addition to Opinion 40/2022, CVM issued Resolution 175 in December 23, 2022, which comes into force in October 2023, authorizing Financial Investment Funds to invest in crypto assets, provided they are traded by CVM or BCB-approved entities; prior to the Resolution, only indirect investments in these assets were authorized.

CVM's most recent understanding on crypto assets was issued under Official Notice No. 6/2023/CVM/SSE, in which CVM set out certain requirements to classify receivables or fixed income tokens as securities, pursuant to Law 6,385 and the recently approved Securitization Law (Law 14,430). Current capital market laws still pose challenges on the registration of public offers of tokens as securities. However, while definitive rules on the matter are still pending, CVM has found a way for such offers to be made via crowdfunding platforms.

In view of the foregoing scenario, it is arguable that Brazilian regulatory authorities have made material efforts to understand and develop new technologies as infrastructure, which has placed Brazil at the forefront of this process, creating a safe and very promising environment for the disruption of the Brazilian financial and capital markets, in the near future.

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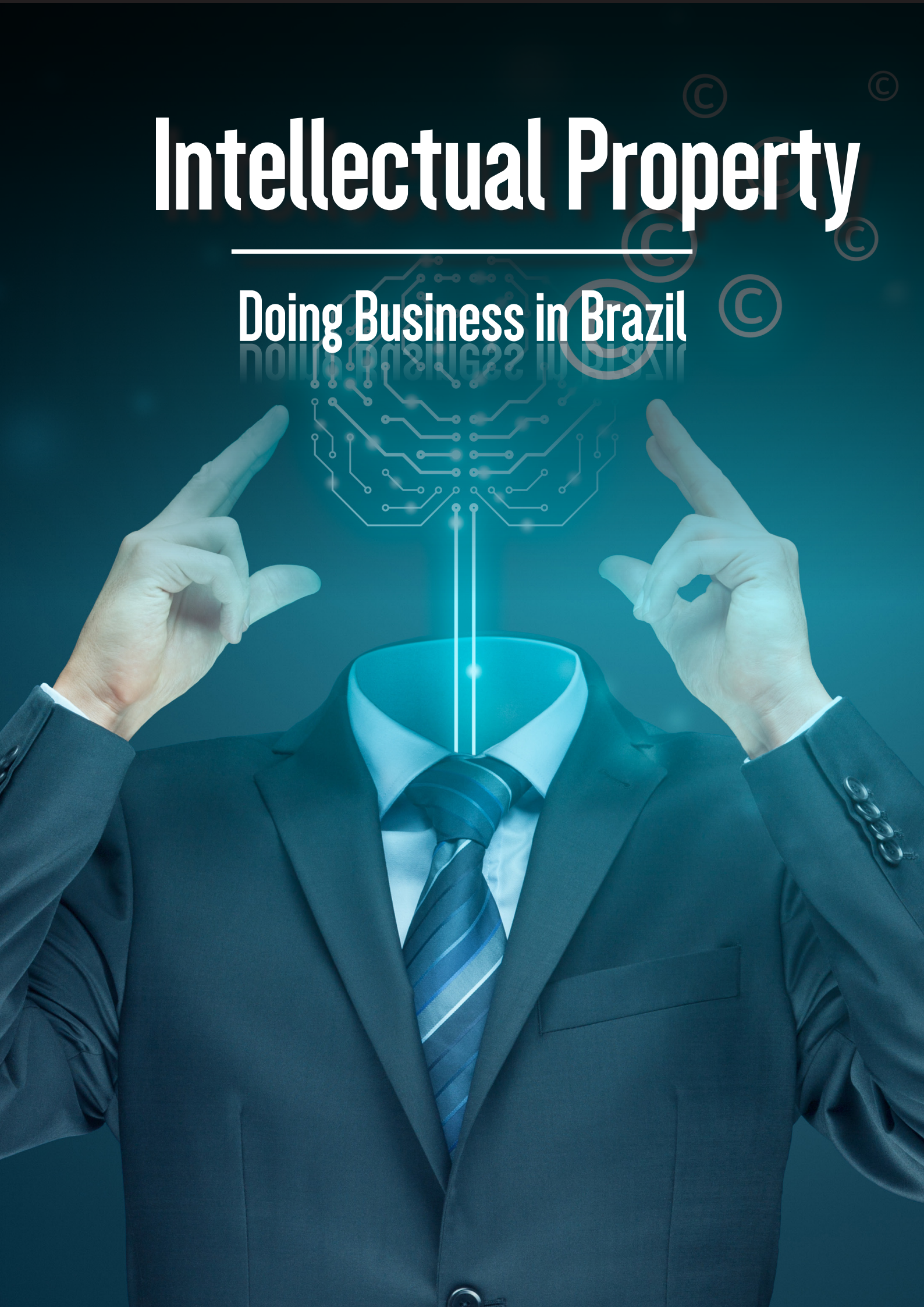
Intellectual Property

Doing Business in Brazil



ASSEFF
ZONENSCHEIN

Intellectual Property in Brasil: An overview

Before founding her own practice in partnership with Michel Asseff Filho in 2016, Mariana Zonenschein was a partner for 10 years at another prominent litigation firm. She built a solid career specializing in strategic litigation, handling cases of great significance in terms of subject matter and values involved. Among the clients she represents are medium and large-sized companies operating in various sectors of the economy, including steel manufacturing, entertainment, sports, services, and consumer goods. She also represents artists, athletes, sports organizations, cultural and social institutions.
As an expert in Corporate Law and Intellectual Property, certified by IBMEC and PUC/RJ, Mariana leads the civil law department of the firm. She manages a team of lawyers handling Intellectual Property matters,particularly trademarks, patents, and copyrights.

Additionally, she oversees cases related to civil law, including fundamental rights such as image and honor, contractual and non-contractual issues, and succession law. She combines, whenever possible, civil procedural strategies with criminal law to ensure maximum effectiveness in delivering solutions to clients.
Mariana is a member of the Bar Associations of Portugal and Brazil. She is the only Brazilian lawyer pre-selected for the Women in Business Law Awards 2023 in the Media & Entertainment category.

Mariana Zonenschein

mariana@azlaw.com.br

Brazil, the country where our boutique firm is located, offers a number of business and investment opportunities. If you are interested in bringing your business or startup here, it is important to understand how intellectual property works in Brazil.

As you know, intellectual property is a critical aspect of any business because it protects your creations and innovations, ensuring that you reap the rewards of your work and preventing others from misappropriating your ideas. In Brazil, the protection of intellectual property is governed by specific laws and regulations.

One of the most important forms of intellectual property protection is the registration of trademarks. In Brazil, trademarks are granted by the National Institute of Industrial Property (INPI). This is a necessary and essential measure to protect your corporate identity and prevent other companies from using your name or logo. It is important to conduct a prior search to ensure that the trademark you wish to register does not conflict with other existing trademarks.

In Brazil, it is also possible to protect your artistic and literary creations by registering copyrights. Registration is done at the National Library or at the School of Fine Arts of the Federal University of Rio de Janeiro. Although registration is not mandatory to guarantee copyright protection, it provides solid legal evidence in case of future disputes.

Another business opportunity is to obtain licenses for Brazilian artists to exploit their creations abroad. In all these operations, the firm can provide the necessary business advice.

It is important to note that Brazil is a signatory to several international treaties related to intellectual property, such as the TRIPS Agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights). This means that foreign companies have the same rights and protections as domestic companies when it comes to intellectual property.

However, it is essential to have the assistance of an intellectual property lawyer to ensure that all procedures are followed correctly and that your rights are properly protected. An experienced professional will be able to advise you on the best protection strategies and help you avoid future problems.

Let your ideas and innovations flourish. Below, we will provide more information on how Copyright legislation works in Brazil.

1. Copyright in Brazil

1.1 - Current legislation. Brazilian copyright law is based on article 5, item XXVII of the Federal Constitution, which guarantees authors "the exclusive right to use, publish or reproduce their works, transferable to their heirs for as long as the law provides". Copyright is also mentioned in Article 19 of the Constitution in relation to the dignity of the human person, since intellectual work is an expression of the author's personality and bears unique traces of human originality and creativity. In the field of Brazilian federal legislation, Law 9.610/98 ("LDA") is the main reference in the legal system.

- What constitutes protected work?

In Brazil, based on the LDA, it is possible to state that an intellectual work is any manifestation of the human spirit, expressed by any means and fixed on a tangible or intangible support, in known or future technology, ideally finished, such as texts of literary, artistic or scientific works; conferences; dramatic and dramatico-musical works; choreographic and pantomimic works, the scenic execution of which

is consigned in writing or by other means; musical compositions, with or without words; audiovisual works, with or without sound accompaniment, including cinematographic works; photographic works and other works produced by a process analogous to photography; Drawings, paintings, engravings, sculptures, lithographs and works of kinetic art; illustrations, maps, architectural designs, adaptations, translations and other transformations of original works that are presented as new intellectual creations; encyclopedias, dictionaries, databases and other works that are intellectual creations by virtue of the selection, coordination or arrangement of the subject matter.

- Is there a copyright registration system in Brazil?

Registration of a copyright work is not mandatory in Brazil, since the LDA guarantees the rights and performance of the same regardless of any registration. However, in order to prove the state of the art and the originality of the work, all registrations that identify the period of creation are relevant, as well as to provide evidence against counterfeiting and/or assignment of rights to third parties.For example, registrations may be made at the National Library of Brazil, which is responsible for registering books, manuals, scripts and other written works; the School of Music of the Federal University of Rio de Janeiro, which is responsible for registering musical works; the School of Fine Arts of the Federal University of Rio de Janeiro, which is responsible for registering visual arts; and the Council of Architecture and Urbanism (CAU/BR), which is responsible for registering architectural and urban planning works.

- How long do copyrights last?

According to the general rules, an author's rights are valid for 70 years from January 1 of the year following the death of the owner.Audiovisual and photographic works, as well as anonymous or pseudonymous works, are valid for 70 years from January 1 of the year following the publication of the work. For related rights, the term is 70 years from January 1 of the year immediately following the fixation of the work in the case of phonograms, its transmission for broadcasting organizations and its public performance in other cases.

Are there overlaps between copyright and other intellectual property rights, such as trademarks?

Yes, there are different protections that can apply to the same work with different effects. For example, there may be an overlap between copyright and mixed or figurative trademark rights. In this scenario, in addition to the copyright in the work held by the author of the illustration, it is possible that the illustration has been registered as a trademark by a third party who has acquired the rights of the author of the illustration and who therefore has the right to associate that trademark with the copyright in their brand, product or service.

2. Ownership

2.1 Who owns the copyright?

The original owner of copyright is the individual who creates the work. In the case of collective works, the LDA provides that it belongs to the organizer, which guarantees the protection of an individual's participation in a collective work.In the case of a work for hire or an employment contract that

provides for the creation, the author will transfer the rights to the third party, and it is true that the law allows the transfer of copyright as long as there is a written contract signed by the parties.Finally, there is the possibility of co-authored works, in which the co-authors exercise their rights by mutual agreement, unless otherwise agreed.

2.2 Author's Rights

They are divided into moral rights and property rights.

- The first of these, the moral right, is non-transferable, non-renounceable and guaranteed:- The right of paternity - the right to be attributed as the author of the work and therefore always to be cited as the source of the creation. The right of paternity remains even after the work has entered the public domain, even if its use is economically free. The Brazilian State is obliged to defend the integrity and the paternity of the author's work. - The right to integrity - the work is preserved and cannot be modified without the author's consent; - The right to remain unpublished - includes the author's decision whether or not to publish the work, i.e. the author has the prerogative to publish his work or to keep it unpublished;- Right of withdrawal from circulation - the author has the right to withdraw the work from circulation and claim damages if the reproduction of the work is likely to damage the author's reputation or image;
- Property rights, on the other hand, are those that can be assigned and/or licensed in writing to third parties, who become the owners and are usually duly authorized by the owner to exploit, sue for infringement of copyright in a work, among other rights.

3. Research

3.1 How should the transfer of ownership of the author's rights be made?

In Brazil, the Copyright Law requires that, in order to be valid, the transfer of copyright must always be made by means of a written document. And in the case of silence, it is presumed to be onerous. If the license granted to a third party is exclusive, the agreement must be registered with the Registry of Deeds and Documents to give notice to third parties.

3.2 For what types of copyrighted works do collective licensing agencies exist?

The Central Office for the Collection and Distribution of Copyrights (ECAD) collects and distributes copyrights for the public performance of musical works. There are also INTER ARTIS BRASIL (actors/actresses), DBCA (directors), GEDAR (screenwriters), which are responsible for the collection and distribution of copyrights for the public performance of audiovisual works in their respective areas.

4. Defending copyright in court

4.1 Are there precautionary measures to prevent copyright infringement?

Yes, according to the Brazilian procedural legislation and a specific provision in the LDA, if the copyright holder proves the existence of its unequivocal right over the work, as well as the damage caused in the event of a delay in the analysis of the claim for the cessation of the illegal act - counterfeiting - until the end of the process, the preliminary injunction should be granted by the judge. At the end of the proceedings, if the asserted right is confirmed, the granted injunction becomes final.

4.2 What compensation can be claimed in case of infringement of the author's rights?

The civil penalties for copyright infringement are set forth in Articles 102 to 110 of the LDA and serve as a parameter for the judge. If the number of copies that make up the fraudulent edition is unknown, the offender must pay the sum of three thousand copies, in addition to the confiscated copies.In the case of violation of the author's moral rights, in the case of unauthorized alteration, compensation is also due.

4.3 What are the costs of infringement proceedings and how long do they usually take?

In Brazil, lawsuits have initial costs that must be paid according to the court of the Brazilian state that has jurisdiction over the case. In the case of Rio de Janeiro and São Paulo, court fees vary between 1% and 3% of the value of the case.If expert testimony is needed, there will be expenses for the expert, technical support, and travel to court hearings. In the event that the plaintiff does not prevail, they will be responsible for paying the defendant's attorney fees, which will be determined by the court and range between 10% and 20% of the claim amount.

The length of a lawsuit may differ based on the court to which it is assigned and/or the jurisdiction. In addition, the outcome of a case may be delayed due to its complexity and the required evidence. On average, these cases may take anywhere from 2 to 6 years to conclude.

4.4 What is the deadline for filing a claim?

With regard to the time limit for bringing an action, a period of three years from the date on which the breach was first discovered should be taken into account when claiming damages. In the case of contractual liability, the Superior Court of Justice has ruled that the period may be up to 10 years.

4.5 Are there any criminal offenses related to copyright infringement?

Yes, the Brazilian Penal Code has a chapter dedicated to crimes against intellectual property, including copyright infringement. The punishment includes imprisonment from three months to one year or a fine. If the conduct is considered more serious, the penalty can be increased to two to four years imprisonment and a fine.Copyright is also closely related to unfair competition, which involves the use of means to fraudulently attract customers, including the creation of trademarks, trade dress, establishments, and similar products. It may also involve related crimes such as counterfeiting and defamation of competitors.

5. Legislative developments and current events.

5.1 Will legislation be updated to align the new digital rights with author's rights?

Yes, Bill 2370 is about to undergo a vote and is currently a hot topic of debate. The bill amends the LDA and requires payment of copyright for audiovisual content published on the internet. Additionally, the bill introduces rules on digital advertising and ensures that digital platforms are required to provide remuneration to press outlets. Currently, neither the LDA nor the Marco Civil da Internet (Law 12.965/14) contain specific provisions for remunerating journalistic productions, musical compositions, or audiovisual creations, nor do they define usage regulations.

5.1.1 Legislative Update: Bill 2370 updates copyright legislation, as technological advances have created new forms of content production and distribution that require more appropriate and up-to-date legislation. For example, the bill introduces the concepts of distributors, social networks and on-demand content providers; establishes the author of the subject matter or the literary, musical or lyrical-musical script, the screenwriter and the director as co-authors of the audiovisual work; and expressly recognizes that the making available to the public by distributors of works and phonograms also constitutes a public display and performance, regardless of the other forms of use involved.

5.1.2 - Combating piracy: Piracy remains a major challenge for copyright holders. The internet has made it easy to share content, leading to unauthorized reproduction and distribution of copyrighted works. Bill 2370 aims to enhance measures to fight piracy by imposing stricter penalties on copyright violators. With the passing of this bill, it will be easier to track and penalize individuals and websites that distribute protected content without permission, reducing piracy and promoting the work of artists.

5.1.3 Encouraging culture creation: Additionally, Bill 2370 encourages cultural and artistic production by ensuring copyright protection. Creators will feel more secure investing in their works, knowing that their rights will be protected and they will be appropriately compensated for their efforts. This contributes to the growth of culture and the variety of artistic creations.

5.2 What is the relationship between NFTs and copyright?

NFTs provide a cryptographic token that certifies authenticity in the digital world. This certificate cannot be replaced by another, such as a fingerprint, and establishes the digital work as unique, legitimate, and original. As such, this functionality prevents the sale of replicated digital assets as authentic, i.e. counterfeit or falsified.In this sense, the NFT, as a novel method of authenticating ownership, has made the buying and selling of digital art safer. Its aim is to combat online piracy and enable artists to manage their finances more efficiently.

5.3 Has there been any decisions or change in legislation regarding the role of copyright in relation to artificial intelligence systems and related copyrights?

Bill 21/2020 is a legal framework for the development and use of artificial intelligence by the government, companies, entities and individuals, and establishes principles, rights and obligations for the use of artificial intelligence in Brazil. The bill has been approved by the Chamber of Deputies and is currently being processed in the Senate.

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