

# DOING BUSINESS

IN BRAZIL

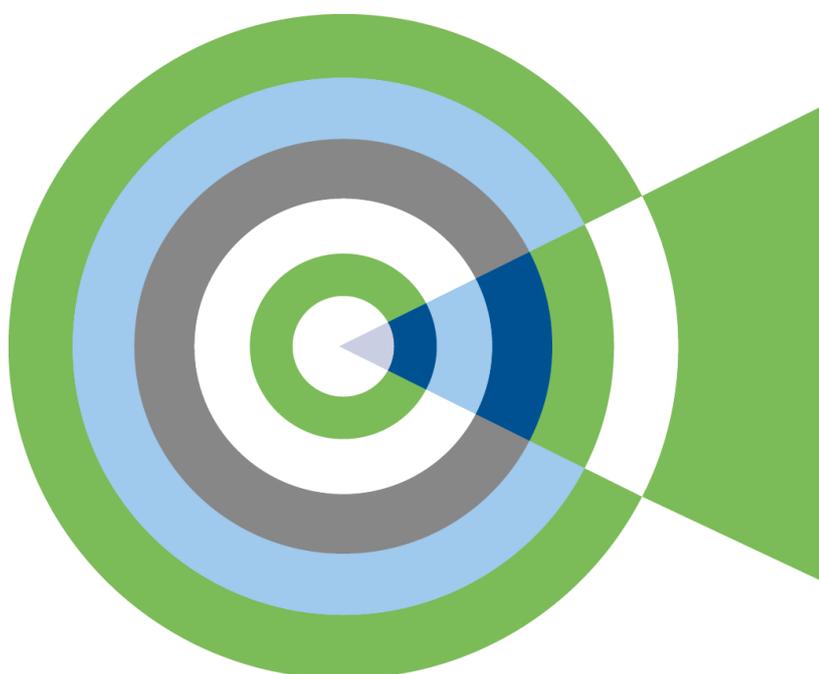


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# 1 – INTRODUCTION

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UHY is an international organisation providing accountancy, business management and consultancy services through financial business centres in around 90 countries throughout the world.

Business partners work together through the network to conduct transnational operations for clients as well as offering specialist knowledge and experience within their own national borders. Global specialists in various industry and market sectors are also available for consultation.

This detailed report providing key issues and information for investors considering business operations in Brazil has been provided by the office of UHY representatives:

## UHY MOREIRA – AUDITORES

Rua General João Manoel, 200,  
Centro Porto Alegre, RS,  
CEP 90010-000, Brazil

Phone        +55 51 3210 8000  
Website     [www.uhymoreira.com.br](http://www.uhymoreira.com.br)  
Email        [contato@auditoria.srv.br](mailto:contato@auditoria.srv.br)

You are welcome to contact [Diego Moreira \(moreira@auditoria.srv.br\)](mailto:moreira@auditoria.srv.br) for any inquiries you may have.

Information in the following pages has been updated so that they are effective at the date shown, but inevitably they are both general and subject to change and should be used for guidance only. For specific matters, investors are strongly advised to obtain further information and take professional advice before making any decisions. This publication is current at November 2013.

We look forward to helping you do business in Brazil.

## 2 – BUSINESS ENVIRONMENT

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### POLITICAL AND LEGAL

Since 1985, Brazil has been a federal republic, formed by the union of 27 political units: 26 states and a federal district (Brasília, capital of the country).

The 27 political units are divided into five regions:

- North: Acre, Amapá, Amazonas, Pará, Rondônia, Roraima, Tocantins
- North-east: Alagoas, Bahia, Ceará, Maranhão, Paraíba, Pernambuco, Piauí, Rio Grande do Norte, Sergipe
- Centre-west: Goiás, Mato Grosso, Mato Grosso do Sul, Federal District
- South-east: Espírito Santo, Minas Gerais, Rio de Janeiro, São Paulo
- South: Paraná, Santa Catarina, Rio Grande do Sul.

Being a republic, supreme political power is shared by an executive, a legislative and the judiciary. Executive power is held by a president whose term of office is four years, with a maximum of two terms. Federal legislative power is held by a chamber of deputies (513 seats) and a senate (81 seats). The Brazilian legal system is based on civil law tradition.

The federal constitution, in force since 5 October 1988, is the supreme law of the country. The 26 states have powers to adopt their own constitutions and laws, but their autonomy is limited by the principles established in the federal constitution. Federal laws take precedence and are hierarchically superior to any state or municipal law. The federal government has the exclusive authority to legislate on civil, commercial, penal, procedural, labour, electoral, agrarian, maritime, aeronautical and space matters. Federal law also has the exclusive authority to rule on matters such as expropriation, energy, telecommunications, insurance, foreign trade, nationality and citizenship, among others.

The federal government, states and the federal district have concurrent authority to legislate on certain matters such as taxation, finance, education, environment and consumer issues. In these cases, the federal government provides general guidelines which outline main issues and rules, while the states and the federal district supplement legislation according to their own specific needs, but always with due regard for the prescriptions of the generic federal law. Municipalities' legislative authority is restricted to matters of local interest and municipal taxes.

Besides the federal constitution, the main legal documents in Brazil are the Codes. The most important are the Civil Code, the Tax Code, the Penal Code and the Civil Procedure Code. The Civil Code comprises over 2,000 articles regulating matters such as obligations, contracts, businesses, corporations, real estate, property rights and many others. The Tax Code defines the main Brazilian tax regulations, which are complemented by many federal, state and municipal laws. The Penal Code defines crimes and punishments. The Civil Procedure Code defines the due process of law.

### ECONOMY

Brazil has a market economy with substantial state regulation and participation.

In the World Bank's "Doing business" 2014 ranking, Brazil ranks 116 out of 189 economies, up from 118<sup>th</sup> in 2013. In the World Economic Forum's '2012–2013 Global Competitiveness Index', Brazil ranks 48 out of 144, with a score of 4.4 out of 7, up from 53<sup>rd</sup> in 2011-2012. According to this study, the most problematic factors for doing business in Brazil are tax rates, tax regulations, inadequate supply of infrastructure, restrictive labour regulations, inefficient government bureaucracy and an inadequately educated workforce.

The Brazilian currency is the Real (ISO currency code BRL) or Reais (plural in Portuguese), which was implemented in 1994 as part of a plan ('Plano Real') to stabilise the Brazilian economy and substituted the short-lived 'cruzeiro' real. The plan worked well and since 1994 Brazil has enjoyed relatively low inflation, steady growth and currency valuation stability. As of November 2013, one dollar bought BRL 2.30.

### KEY INDICATORS

All value figures in the economic overview below are in US dollars:

- Gross domestic product (GDP) at purchasing power parity (PPP) in 2012 – USD 2.394 trillion
- GDP in 2012 at official exchange rate – USD 2.396 trillion
- GDP real growth rate – 0,9%
- GDP per capita, at PPP – USD 12,100
- GDP composition by sector – agriculture 5.2%, industry 26.3%, services 68,5%
- Labour force – USD 106.3 million
- Labour force by occupation – agriculture 15,7%, industry 13,3%, services 71%
- Unemployment rate – 5.5%
- Population below poverty line – 21,4%
- Taxes and other revenues – 36.5% of GDP
- Inflation rate – 5.4%
- Main agricultural products – coffee, soybeans, wheat, rice, corn, sugarcane, cocoa, citrus, beef
- Main industries – textiles, shoes, chemicals, cement, lumber, iron ore, tin, steel, aircraft, motor vehicles and parts, other machinery and equipment

### IMPORTS/EXPORTS

- Imports 2012 – USD 223.2 billion.
- Main imports – machinery, electrical and transport equipment, chemical products, oil, automotive parts, electronics
- Main import partners – China 15.4%, US 14.7%, Argentina 7.4%, Germany 6.4%, South Korea 4.1% (2012)
- Exports 2012 – USD 242.6 billion.
- Main exports – transport equipment, iron ore, soybeans, footwear, coffee, autos, beef, poultry, orange juice
- Main export partners – China 17%, US 11.1%, Argentina 7.4%, Netherlands 6.2% (2012)

### BRAZIL'S POSITION IN THE WORLD

- 7th biggest economy
  - South America's and Latin America's biggest economy
- Largest producer of sugar, coffee and orange juice
- Fourth largest agricultural system in the world

## **SOCIAL AND CULTURAL**

### **POPULATION**

- Age structure – 0–14 years 24.2%, 15– 55 years 60,3%, 55 years and over 15.5%
- Ethnicities – white 47,7%, black 7,8%, mixed 44,49%, Asian 0,007% and indigenous 0.004%
- Urbanisation rate – 87%
- Illiteracy rate – 9.6%
- Human Development Index (2012) – 0.730
- Gini Index (income inequality) – 55.1

### **LANGUAGE**

Brazilian Portuguese is the official and most widely spoken language. Although it is almost identical to European Portuguese, it is different enough to be considered a separate language by many. Other languages used in Brazil are Spanish and English (taught in school), German, Italian and Japanese.

### **RELIGION**

Based on the 2010 census, the population adheres to the following religions – Roman Catholic (nominal) 64,6%, Protestant 22,2%, No religion 8% and Other 5,2%.

## 3 – FOREIGN INVESTMENT

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Investments in Brazil can be direct or indirect.

Direct investments are made by creating a new corporate entity or by acquiring an equity participation in existing Brazilian companies. Equity participation includes cash investments, investments by conversion of foreign credit and investment by importation of goods without exchange cover. Indirect investments are made by investing in financial and securities' markets where there is no requirement to create or acquire participation in a Brazilian company.

Foreign capital is defined as “any goods, machinery, equipment, cash and financial resources that enter Brazil for production of goods or services, or for investment in economic activities, provided that in either case they belong to individuals or legal entities resident, domiciled or headquartered abroad.”

Foreign investments are registered and monitored by the Brazilian Central Bank (BACEN).

### **REGISTRATION OF FOREIGN INVESTMENTS AND TRANSACTIONS**

Registration of foreign capital is done through the Central Bank's Electronic Declaratory Registry for Foreign Direct Investments (SISBACEN RDE-IED).

To do so, a SISBACEN access code must first be obtained, allowing use of the SISBACEN RDE-IED. Information on the Brazilian company, the foreign investor and their legal representatives must then be entered into the system. Once all the information is recorded, an RDE-IED number for each foreign investor and for the Brazilian company will be issued. This number allows these parties to sign the exchange contract converting the foreign currency to Brazilian reais. Once the parties have signed the exchange contract, they must then register the investment within 30 days, using the SISBACEN RDE-IED.

This registration allows foreign investors to remit profits, dividends and capital initially invested abroad through the same exchange market it used to bring capital into Brazil. If parties do not register the investment, it will be treated as if it were a domestic investment. Furthermore, foreign investors may be subject to heavy fines for not having registered the investment with BACEN within the prescribed period. Registering foreign investment with BACEN allows the Brazilian government to control the entry and outflow of foreign currencies and keep reliable statistics on foreign investments. The government uses these statistics to set foreign investment policies and assess their contribution to Brazil's social and economic development.

Non-resident individuals holding assets or rights located in Brazil, the title to which is subject to registration with public bodies (such as real estate, vehicles, vessels, aircraft, equity interests, current accounts or investments in the financial and capital markets) must enrol with the Natural Persons' Registry (CPF) through the Brazilian diplomatic representation in their country of residence. CPF suspension and cancellation applications must also be filed with Brazilian diplomatic representations. Non-resident individuals enrolled with the CPF must file an Annual Exemption Declaration every year. They can do so by accessing the Federal Revenue Secretariat (SRF) website at: [www.receita.fazenda.gov.br](http://www.receita.fazenda.gov.br)

Similarly, foreign corporate entities holding assets or rights located in Brazil, the title to which is subject to registration with public bodies, must enrol with the National Juridical Persons' Registry (CNPJ). For the following transactions entered into by foreign corporate entities, a provisional enrolment with the CNPJ will be generated through the Central Bank's system:

- Acquisition of intangible assets with payment periods longer than 360 days
- Financing
- Financed importation
- Leasing transactions
- Rental of equipment and chartering
- Importation of goods (which have not yet been paid for) as capital investments in Brazilian companies
- Loans granted to Brazilian residents
- Foreign investments in Brazil.

Foreign corporate entities holding industrial property rights (trademarks and patents) in Brazil and foreign investments made in depositary receipts issued abroad and representing securities under custody in Brazil, are not required to enrol with the CNPJ.

Foreign corporate entities must appoint a Brazilian resident individual to act as an attorney-in-fact in relation to the CNPJ. This person must also be enrolled with the CPF. The attorney-in-fact must also have the power to administer property belonging to the foreign corporate entity. Every year, foreign corporate entities enrolled with the CNPJ must file an Annual Exemption Declaration and an Annual Declaration of Information relating to the foreign corporate entity, which are still pending specific regulation.

#### REGISTRATION OF DIRECT INVESTMENTS

All foreign direct investments must be registered with the Central Bank. The registration is essential for offshore remittances, capital repatriation and registration of profit reinvestment. In order to allow remittance of dividends and to assure eventual repatriation of original capital and subsequent reinvestment, foreign investors must comply with foreign capital registration rules associated with entrance of funds. Registration of foreign capital must be made within a maximum 30-day period through SISBACEN RDE-IED. Some information must also be kept updated in the system, such as accounting information of the Brazilian entity, shareholding, etc.

According to provisions of Circular 2,997/00, foreign investments to be performed and registered are not subject to preliminary review and verification by the Central Bank. Being a declaratory registration, the Brazilian investee and/or the representative of the foreign investor are responsible, themselves, for registration of foreign investments. To be registered as foreign capital investment, the amount contributed must originate from persons resident, domiciled, or with a head office outside Brazil. The capital contribution must be effectively brought into the country and must be invested in the acquisition of shares or quotas. Provided the foreign capital is properly registered in the RDE-IED, foreign investors should have no foreign exchange difficulties in receiving dividends or interest on equity from their Brazilian subsidiary.

BACEN's prior approval is not required with respect to direct investments that are destined for equity purchases or capital subscription in a Brazilian company. Investors can send their funds through the Free Rate Exchange Market to any bank BACEN has authorised to operate with foreign exchange. There is generally no minimum value for foreign capital investments. Investment amounts will depend on the Brazilian company's financial needs and the foreign investor's ability and willingness to invest. There is also no deadline within which foreign or Brazilian shareholders must pay up their subscribed shares.

Investments by means of the import of goods that have not yet been paid for must also be registered through the RDE-IED. Goods, machinery or equipment must be intended for manufacturing purposes or providing services. Used goods and those imported under tax incentives must not be similar to goods produced in Brazil. Once Brazilian customs clears the imported goods, the Brazilian company must capitalise them. The company or the foreign investor's legal representative must then register the investment through the RDE-IED within 90 days.

#### REGISTRATION OF FINANCIAL TRANSACTIONS

To enable remittances abroad, most cross-border financial transactions, such as loans, rental and lease payments, and agreements involving transfer of technology (royalties, know-how, technical assistance, etc.) must be registered with the Central Bank electronic registration system for cross-border financial transactions (RDE-ROF). Private financial institutions responsible for foreign exchange contracts normally assist companies with RDE-ROF registrations. With regards to cross-border loans, it should be noted that the system indicates the acceptable level of interest to be charged. As loans registered with the Central Bank are not subject to transfer pricing rules, interest rates accepted by the Central Bank are also accepted for tax deductibility purposes, even when the loan is executed between related parties.

#### REGISTRATION OF PORTFOLIO INVESTMENTS

Non-resident individuals or juridical entities (including foreign funds or financial institutions) who make certain financial investments in the Brazilian market are also required to register such investments in an electronic Central Bank registration system called RDE-Portfolio. The investor must observe Central Bank and CVM (Brazilian Securities Commission) rules. It is necessary, for instance, to appoint a legal representative in the country and to open an individual or collective bank account.

## REGISTRATION OF CONVERSION OF DEBT INTO DIRECT INVESTMENTS

Conversion of debt from foreign loans and industrial property rights (such as technology transfer, know-how or trademark and patent licence agreements) into direct investments must be registered on SISBACEN. When a foreign loan is converted into a capital investment, the lender becomes an investor and so becomes entitled to receive dividends in respect to the investment after the conversion is made. The conversion of the loan proceeds into a capital investment and will not limit the foreign investor's right to repatriate capital at any time.

## RESTRICTIONS ON FOREIGN INVESTMENTS

Participation of foreign capital is prohibited in a number of specific areas.

Foreign investment is prohibited in health services, post office and telegraph services, domestic flight routes, nuclear energy, businesses abutting international borders and the aerospace industry (encompassing the launch and orbital positioning of satellites, vehicles, aircraft and related activities, excluding the manufacture or marketing of these items and their accessories).

Some restrictions apply to foreign investment in the ownership and management of mass media and rental or ownership of countryside real estate properties. There are also limitations on foreign capital in financial institutions. A potential investor should consult the government agencies that would most likely hold an interest in a proposed project. This process can sometimes yield significant benefits to the foreign investor, since the government generally prefers to grant incentives, rather than restrictions, to encourage investors to modify their plans. In general terms, any incentives granted are associated with tax, rental or funding costs.

## SENDING PROFITS ABROAD, REPATRIATING AND REINVESTING FUNDS

### SENDING PROFITS ABROAD

There are normally no restrictions on distributing and sending abroad profits, dividends and interest on capital investments. When sending money abroad, investors must present the RDE-IED number to banks in Brazil authorised to operate in foreign exchange markets.

Payments of profits and dividends from results accrued after 1 January 1996 are no longer subject to withholding income tax, but the payment of interest on capital investments is 15%. Sending profits abroad, repatriating capital and registering reinvestments are all based on the amount of foreign investment previously registered with the Central Bank through RDE-IED. If the amount is proportional to the equity participation of the respective shareholders, there are normally no other restrictions on sending abroad profits relating to capital, nor on how long funds must remain in Brazil.

### REPATRIATING FUNDS

Investors may repatriate BACEN-registered foreign capital investments to their country of origin at any time without authorisation. If investors attempt to repatriate more than the registered amount, tax authorities will consider the sum to be a capital gain and will levy withholding income tax at 15%. For capital repatriation purposes, BACEN will examine companies' balance sheets or financial statements to find their net worth. If that value is negative, the bank sending the money abroad may consider that the investment has been diluted, in which case BACEN could deny repatriation.

### REINVESTING PROFITS

According to Brazilian law, reinvestments are ‘profits made by companies established in Brazil and assigned to individuals or companies resident or domiciled abroad, which have been reinvested in the company that generated them or in another sector of the domestic economy’. If foreign investors decide to reinvest profits rather than send them abroad, they may register them as foreign capital along with the original investment.

### TRANSFER ABROAD OF INVESTMENTS

Foreign investors owning equity interest in Brazilian companies may sell, assign or transfer it abroad, subject to taxation on capital gains. The Brazilian company or the new foreign investor must update the earlier RDE-IED registration reflecting the change of foreign investor. Without this, the new investor cannot send profits abroad, reinvest or repatriate capital.

### CAPITAL CONTRIBUTIONS

The Brazilian concept of capital covers economic assets in any form, and accordingly, foreign capital contributions include cash, goods, services and intangibles.

In practice, investments in cash are the simplest and most common form of initial investment, but investments in the form of assets and the capitalisation of balances payable for goods supplied by foreign parent firms are often used when making subsequent investments.

Capital contributions in productive assets, such as plant and equipment, are subject to rigorous controls that are similar to those placed on the import of capital equipment when domestic suppliers are able to provide similar equipment. The import of used equipment as a capital contribution is also subject to restrictions. In order to receive an import licence, the equipment must contribute to Brazilian capital, the importer must demonstrate that the equipment cannot be purchased in Brazil and explain the technological and economic benefits it will bring to the economy in general, as well as a justification of the foreign currency value attributed to the equipment. Capital contributions in intangibles are in principle allowed, but the Central Bank is very reluctant to accept them. Proper valuations are required and discussions with the Central Bank are recommended.

### CONVERSION OF FOREIGN DEBT INTO SHARE CAPITAL

The conversion into investment of foreign credits duly registered in the RDE-ROF does not require prior approval from the Central Bank.

According to Circular 2,997/00, the conversion of debt into foreign direct investment is defined as ‘the transaction whereby credits eligible for offshore transfer based on prevailing rules are used by non-resident creditors to acquire or pay in an ownership interest in the capital of a company in Brazil’. However, registration of foreign direct investment resulting from conversion depends on receipt by the Brazilian entity of:

- A binding statement from the creditor, agreeing to the conversion
- A statement from the creditor and committed investor, defining exactly the due dates of the instalments and respective amounts to be converted, and in the event of interest and other charges, also the period to which they refer and the respective rates and calculations.

## FOREIGN EXCHANGE CONTROLS

### FOREIGN EXCHANGE POLICY

The balance of payments status is one of the most critical elements of the government's economic policy. Accordingly, maintenance of the exchange rate at an appropriate level has been, and still is, an important objective of economic policy. Exports are encouraged in order to offset a large bill for raw materials and capital equipment, as well as more recently all kinds of consumer goods. The government also needs a positive current account to provide hard currency funds for servicing and amortising the foreign debt.

Keeping domestic interest rates higher than interest rates overseas produced obvious long-term disadvantages for a country that is historically a net foreign debtor. However, over shorter periods, this has been successful in attracting foreign capital. More recently, interest rates have decreased, although they continue to be very high by international standards.

Until 2005, there were two official foreign exchange markets in Brazil, both of which were subject to Central Bank regulation and operated at floating exchange rates. However, following the trend for the liberalisation of exchange markets, the Central Bank issued new foreign exchange provisions, which were effective from March 2005 (Resolução 3,265/05 and Circular 3,280/05). In essence, the new legislation ('Regulamento do Mercado de Câmbio e Capitais Internacionais' / RMCCI) unified the foreign exchange market in the country, integrating the regulations in connection with the free exchange rate market ('mercado de câmbio de taxas livres'), floating exchange rate market ('mercado de câmbio de taxas flutuantes') and transactions known as international transfer of reais.

The RMCCI introduced flexibility in terms of foreign exchange transactions, reducing the burdensome requirements to implement certain operations. In this context, legal entities and individuals may purchase foreign currency without direct or prior Central Bank approval. According to the new RMCCI, cross-border obligations contracted in local currency between a resident and a non-resident party may be liquidated in foreign currency if appropriate documentation is presented. Such transactions were not allowed or authorised by previous regulations.

According to the RMCCI, Brazilian entities or individuals are now allowed to make foreign direct investments abroad without prior approval from the Central Bank or quantitative limitations. (Under the previous regime, investments abroad higher than USD 5 million were subject to the Central Bank's prior approval.) All foreign exchange transactions must be contracted with an authorised agent (normally a private financial institution authorised by the Central Bank to operate in the exchange market). Most foreign exchange transactions do not depend on the pre-approval of the Central Bank. Private financial institutions may implement remittances provided appropriate supporting documentation and proof of applicable tax payments is presented.

Proper registration of foreign direct investments with the Central Bank in the RDE-IED system is very important to enable future repatriation of capital and remittance of dividends, interest on equity and capital gains. Lack of proper registration may generate so-called 'tainted capital' (not-registered foreign capital). An illegal but organised parallel (black) market exists and the daily rate is openly quoted in the media. The spread between the official exchange rate and the parallel exchange rate is relatively small.

#### INTERNATIONAL TRANSFER OF REAIS (CC-5)

Brazilian bank accounts owned by non-residents used to be utilised to remit local currency abroad. This was especially useful when remittances in foreign currency were not allowed due to foreign exchange restrictions. This was known as international transfer of reais or CC-5 transactions (due to the fact that they used to be regulated by a Central Bank rule named Carta-circular nº 5, now revoked).

In the past, the non-resident company could open its own 'CC-5' account (a non-resident Brazilian bank account in local currency). Payments in reais received into this account were then exchanged abroad for another currency. However, over time, this type of account was heavily used for the remittance abroad of illegal funds and, therefore, because of the associated bureaucracy and close Central Bank scrutiny, it became very difficult in practice to open new accounts.

It should be noted that the international transfer of reais is permitted and legal, provided the funds also have a legal origin. Nevertheless, the RMCCI prohibited the use of 'CC-5' accounts of third parties (i.e., companies cannot use a 'CC-5' account of private banks anymore, if they do not have their own accounts).

#### ACQUISITION OF REAL ESTATE

Issues regarding real estate property situated in Brazil are governed primarily by the New Brazilian Civil Code (NBCC).

There are special restrictions on foreigners' ownership of properties located near the coast, at frontiers or at certain specific areas considered of national security. Non-resident individuals or entities that hold real estate located in Brazil must have an individual or corporate taxpayer registration number (CPF or CNPJ). Procedures have recently been established to regulate the purchase and lease of rural property in Brazil by foreign individuals and juridical entities, as well as by a Brazilian juridical entity equated to a foreign juridical entity. Brazilian juridical entities equated to foreign juridical entities are companies in which there is participation, in any capacity, of foreign natural or juridical persons which have a majority of the capital and reside or have their headquarters abroad. In this case, requirements for the acquisition or lease of rural land by foreigners include:

- Foreign natural persons must have permanent residence in Brazil and be enrolled in the National Foreigners Registry (RNE) as a permanent resident
- Foreign juridical entities must be authorised to operate in Brazil and must have approval for their related business project, which must be linked to their statutory or contractual objectives, as appropriate
- Brazilian juridical entities equated to foreign juridical entities must have proof of registration with the Trade Board of the state in which its headquarters are located, and approval for their related business project, which must be linked to their statutory or contractual objectives, as appropriate.

There are also other requirements related to the extension of any area of land whose trading is sought, as well as related to the percentage of rural properties in the county that are already under foreign ownership or lease.

To the extent that titles to large areas of Brazilian land have been in dispute since colonial land grants were made, it is very important to ascertain that any seller has a good title to the area in question. This verification can be made at the real estate registry. If the seller has been in possession for many years, and in the absence of on-going lawsuits, purchase of the land is reasonably safe. In all cases, buyers should seek legal advice.

Upon the purchase of freehold property, buyers should follow steps to register the change of title at the real estate registry. It is also recommended that long and short leaseholds be registered with real estate registries in order to minimise potential disputes with landlords. Law 5,709/71 establishes that foreign individuals who have permanent residence in Brazil, foreign companies authorised to operate in Brazil and Brazilian companies controlled by foreigners are authorised to acquire rural properties, under certain conditions and limits. On the other hand, foreign entities not authorised to operate in Brazil and foreign individuals who do not have permanent residence in Brazilian territory cannot acquire rural properties. Here, acquisition of rural property due to inheritance rights is an exception.

## **TRADE & CUSTOMS**

### **OVERVIEW**

Concerning operational import and export chains, Brazilian importers and exporters are required to obtain specific registrations, but in practice most imports are not subject to pre-licences, while exports are in general tax-free.

Brazilian foreign exchange regulations play a significant role in the operational side due to the requirement for registrations – currency exchange contracts associated with imports and exports are linked to federal tax and customs systems. Penalties may be imposed in cases where a Brazilian importer or exporter fails to liquidate such contracts in due time.

### **EXPORTS**

Trade policy is conducted by the chamber of foreign trade (CAMEX), which is subordinate to the ministry of development, industry and commerce. To be able to carry out export transactions, exporters must be registered with SECEX, a governmental agency responsible for controlling imports and exports. Export transactions must be registered in an electronic system called SISCOMEX, under which an export registration ('Registro de Exportação' / RE) must be obtained prior to product shipment. After the registration is obtained, the exporter must ship the products within a 60-day period, otherwise the RE is automatically cancelled.

Because export transactions imply executing a corresponding currency exchange contract (for the exchange of foreign currency into reais or vice-versa), exporters must also register transactions with the Central Bank of Brazil, responsible for controlling the country's inflow and outflow of foreign currency. In practice, each foreign exchange contract is linked to a specific customs transaction through the interconnected electronic systems of SISCOMEX and SISBACEN.

From the Central Bank's perspective, Brazilian exporters are generally required to close the corresponding foreign exchange contract and settle currency exchange within a certain period as of the date of the export transaction. In general, export transactions do not require pre-approvals, except for transactions involving certain listed products. This list includes animals or products of animal origin, oil, gas, goods containing nuclear and radioactive materials and weapons, among others. Certain exports are also forbidden or restricted, or subject to specific regulations or pre-authorisation from Brazilian government or specific governmental agencies (this would apply, for instance, to animals or products of animal origin).

## IMPORTS

Considering a surplus of foreign trade balance is one of the main objectives of federal economic policy, imports have been of critical importance and played a significant role in the last decade in Brazil. Since the opening of the Brazilian economy at the beginning of the 90s, when a strong spike in imports ensued which would become the trademark of the last decade, this adverse condition has been largely reversed in recent years by historical improvements on exports. This is largely due to the development, modernisation and increased competitiveness of Brazilian industries exposed to the global economy.

While import restrictions have been a major element of Brazilian trade policies, import tariffs across the board have been reduced in recent years. The negotiation of a Mercosul Common External Tariff has not only made Brazil one of the major players in the region but also demanded the simplification of import regulations to the extent that imports, with some exceptions, do not require pre-licences. Besides this, the introduction of the electronic system for the registration of imports and exports (SISCOMEX) has contributed to speeding up registrations and customs clearance generally.

Brazilian importers must be registered with SECEX prior to carrying out import transactions. Import transactions must be also registered in the SISCOMEX electronic system, under which an import declaration ('Declaração de Importação' / DI) must be obtained to clear customs. In cases where a pre-licence is necessary (which varies according to the type of product imported and the import regime adopted), this must be obtained prior to the shipment of the products to Brazil and is generally valid for a 90-day period as from the date of issuance. This is also obtained through SISCOMEX.

Certain products, such as petrochemicals, human blood, weapons, herbicides and pesticides, and leather, among others, require pre-approval from certain government agencies before an import licence is issued. The import of used products requires pre-licences, normally only granted if a similar product with Brazilian origin is not readily available.

From a Central Bank perspective, Brazilian importers are required to close corresponding foreign exchange contracts to settle import transactions within a certain period, otherwise high penalties can be imposed.

## TRADING COMPANIES

Trading companies generally play a very active role in import and export of products due to their practical experience and knowledge of operational and documentation aspects. Trading companies may work as outsourced customs brokers, preparing import and export paperwork and customs clearance, and may import products on behalf of Brazilian companies.

## EXPORT FINANCING

Banks provide financing for exporters against forward sales contracts and by discounting drafts accepted by foreign importers. This financing is also made available for 'indirect exporters' or manufacturing companies, which export through trading companies. Exporters may use these funds to buy raw materials for the manufacture of finished products to be exported.

The National Development Bank (BNDES) provides the following types of financing on exports through authorised financial institutions:

- Pre-Shipping – finance production of goods to be exported in specific shipments
- Fast Pre-Shipping – finance production of goods to be exported within six to 12 months
- Special Pre-Shipping – finance domestic production of goods to be exported, not tied to specific shipments but with a pre-set time period
- Pre-Shipping anchor companies – finance commerce of goods produced by small and medium sized companies through an export company (*empresa âncora*)
- Post-Shipping – finance commercialisation of goods and services abroad, through refinancing to the exporter or through the use of a buyer's credit facility.

## TRADE TREATIES

### MERCOSUL

In general terms, Mercosul is a customs free trade zone comprising four founding member-countries: Argentina, Brazil, Paraguay and Uruguay. Recently, Venezuela also signed this trade agreement but it is yet to be approved by the Paraguayan congress.

Created in 1991, Mercosul currently represents a very attractive market with a population of approximately 250 million people and a total Gross National Product (GNP) of approximately USD 1 trillion, which turns it into one of the four largest economies, after the United States, the European Union and Japan.

Mercosul's main objectives include the total elimination of import tariffs between members, increasing the free trade agreements' framework and diversification of the current import and export table of products. Another important goal is to eliminate exceptions to the list of products included in the free trade agreement (mainly automobiles, household appliances and certain agricultural products, varying by country), which were scheduled to be extinguished in 2008 but are still currently under negotiation.

Although import taxes have been a significant instrument in the past to protect local industry and to regulate trade of products, even between member countries, a program of convergence which has covered Mercosul's Common External Tariff has led to an average import tax rate of 14%, turning Mercosul into a very open trade market.

Import tariffs remain applicable to non-Mercosul member countries which are, in general, subject to the same import tax rate among all Mercosul countries. Therefore, products traded between Mercosul member countries are exempted from import tariffs, provided products have a Mercosul origin. Mercosul origin rules are generally based on minimum local added value and changes in the classification of the product. However, each member country may include certain products in an 'exception list', under which listed products are not necessarily subject to the common rate applicable to non-Mercosul members, but to a higher or lower rate, depending on the case. This list is generally driven by political or economic factors (i.e., the protection of local industry, the essential nature of the product to the importer country, among others).

Mercosul also has economic agreements with Bolivia, Chile, Colombia, Ecuador and Peru (associated countries). Products originated in these countries and imported by a Mercosul member generally benefit from a reduced or even a zero import tax rate, depending on the tax classification of the product. Efforts have also been made to expand the number of country-members and to enter into agreements with other blocks. Such agreements include:

- Mercosul and the Andean Community (Bolivia, Chile, Colombia, Ecuador and Venezuela), with whom a free trade agreement has been in force since 2005
- An agreement between Mercosul and the European Union is under negotiation but is pending final approval
- Mercosul has agreements with Mexico, Peru, Colombia, Ecuador, Venezuela, Cuba, India, Israel and Bolivia
- A draft Mercosul-India agreement has been under negotiation since 2004.
  - The general rules have already been agreed upon, however in practical terms, origin rules and import tax benefits associated therewith are pending final negotiations.

#### OTHER TRADE TREATIES

Brazil also belongs to the Latin American Integration Association (ALADI), a trade integration association that provides for reduced rates and other benefits. Member countries include Argentina, Bolivia, Chile, Colombia, Cuba, Ecuador, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela.

Brazil is a member of the World Trade Organization (WTO) and plays a very active role in it, being involved in several cases under WTO dispute settlement, either as a plaintiff or a defendant.

Brazil also has bilateral trade agreements with Mexico, Argentina, Uruguay, Chile, Bolivia, Guyana, and Surinam.

#### ORIGIN RULES

In general, imports covered by trade treaties benefit from import tax rate reductions or exemptions, provided certain conditions are met, which essentially relate to compliance with origin rules. It is important to mention that origin rules are intrinsically associated with the country where the products are manufactured, regardless of the country that hosts the seller of the products. Origin rules basically require a minimum local added value in the country of the manufacturer or a change in the tax classification with respect to the product exported when compared to its components, or both, depending on the product traded and the countries involved.

Imports of products originating from Mercosul member-countries (Argentina, Paraguay and Uruguay) generally benefit from a reduction of 100% of import tax, provided there was a minimum local added value of 60% in the country of export. A different local added value percentage may apply depending on the traded product and also the specific trade agreement.

#### CUSTOMS VALUATION

Brazilian customs rules provide for a customs valuation policy based on the 1994 General Agreement on Tariffs and Trade (GATT), effectively introduced into Brazil in 1996. In general terms, the main purpose of the methods provided by Brazilian customs rules is to demonstrate the fair market value of the import transaction when compared to an actual transaction. This is made by means of using the methods foreseen under Brazilian customs valuation rules, which are generally based on:

- a) The value of the transaction
- b) Comparables
- c) Resale
- d) Cost methodologies.

The import price is verified for customs valuation purposes at the moment an import declaration is registered in the SISCOMEX system, based on internal lists of prices that are not publicly available and are used by Brazilian customs authorities as the initial basis for comparison. To the extent that the customs value is within these parameters, there should be no customs valuation issue.

In case the import price does not comply with such rules, proving the import price base is required and the importer must then fill out a customs valuation form and present proper documentation which demonstrates that the customs value adopted reflects the actual value of the transaction at fair market conditions, using one of the six methods provided in the customs legislation. Transaction value is the most acceptable and used method, and basically consists of adding to the cost of the product certain costs and expenses associated with the product imported, in order to determine a real value which should be (as much as possible) close to the value of an import transaction at arms' length conditions. It is important to mention that the relationship between the exporter and the Brazilian importer is a key factor for Brazilian customs authorities when applying customs valuation rules.

#### TAX ASPECTS – EXPORTS

Except for Brazilian corporate taxes, export revenues are generally tax-exempt in Brazil.

In theory, an export tax exists, but it is currently applied to a very restricted list of products, such as cigarettes, certain types of furs, cowhide, weapons and ammunitions.

Generally speaking, exports are not subject to IPI (a federal type of VAT), ICMS (a state type of VAT), PIS or COFINS (federal gross revenue taxes). A credit mechanism is allowed for these taxes paid on inputs used in the manufacture of exported products. Credits related to federal taxes (IPI, PIS and COFINS) are normally easily spent by exporters because, in general, they may be used to offset any federal tax payable. However, several restrictions and associated bureaucracy make the utilisation of ICMS tax credits very difficult for companies with high levels of exports.

Certain payments abroad related to export, such as agent commissions and interest related to export financing, also benefit from a zero-rate withholding tax. Under certain specific customs regimes (see below), certain tax exemptions may also be granted to imported raw material or parts that are to be used in the manufacture of products to be exported.

## IMPORTS

Brazil imposes federal, state and sometimes municipal taxes on the import of goods and services.

In general terms, the import of goods are subject to II (import tax or custom duty) and other miscellaneous customs duties (IPI, ICMS, PIS and COFINS). The classification of products under the TEC (Mercosul's common external tariff) is crucial to determine the applicable rate for most taxes. The TEC is based on the Brussels Harmonised Code.

### IMPORT TAX (II) AND OTHER MISCELLANEOUS FEES

Import tax applies to the CIF (cost, insurance and freight) value of imported products at variable rates. This is a final tax, meaning that no credits are granted. Specific rates depend on the classification of imported products in the TEC. The taxable event is customs clearance. Other customs fees include minor customs fees such as a processing fee for import licences, when necessary, a freight duty which funds the merchant marine fleet (levied at 25% on the freight cost), as well as miscellaneous port charges.

### IPI (FEDERAL TYPE OF VAT)

IPI applicable rates also vary according to the tax classification of the product in the TIPI (IPI tax products list, based on the TEC). Average rates are between 10% and 20%. IPI is levied on direct imports and subsequent domestic transactions with imported products or manufactured goods. As a general rule, an IPI tax credit for the amount of the tax paid on an import is granted in cases where a subsequent transaction with the same product or another where the imported product was used in manufacturing is subject to IPI. The taxable base is the CIF value added to the import tax.

### PIS AND COFINS – IMPORTS

PIS and COFINS are imposed on the import of products and apply at a combined rate of 9.25% (1.65% and 7.6% individually). PIS and COFINS paid on imports may in general produce a tax credit to be offset with PIS and COFINS due on domestic transactions, provided the importer is subject to the non-cumulative PIS and COFINS regime. The tax base is the CIF value added to the ICMS and the PIS and COFINS. Certain products may be subject to different tax rates.

### ICMS (FEDERAL TYPE OF VAT)

ICMS is also charged on imports. Importers are in general entitled to recognise a tax credit in the amount of tax paid to be used to offset future ICMS liabilities. Applicable rates are normally 17% to 19%. The tax base is the CIF value plus import tax, IPI, ICMS itself and PIS and COFINS.

## SPECIAL CUSTOMS REGIMES

Brazilian customs regulations provide several special customs regimes under which certain tax and customs benefits apply. In order to verify whether a Brazilian company can benefit from more efficient structures and regimes, careful planning of the supply chain by international groups of companies with activities in Brazil is recommended before importing and exporting.

Below is an overview of some available customs regimes:

- Drawback is a special customs regime that grants the beneficiary exemption of import tax, IPI, PIS and COFINS on imports of raw materials to be used in the manufacturing process of products to be exported. A minimum level of local manufacturing is required. ICMS benefits may be also available
- The temporary admission regime is a special customs regime that allows the import of goods that will stay in the country on a temporary basis with a total or partial exemption of taxes levied. This may benefit, for instance, goods which enter the country under a lease or rental transaction and those related to sports and cultural events, or commercial fairs and exhibitions
- The special temporary admission regime for manufacturing purposes ('admissão temporária para aperfeiçoamento ativo') is similar to the regular temporary admission regime but here the tax exemption is granted to the import of goods where certain restricted manufacturing processes of products to be exported applies. In principle it does not apply in cases where manufactured goods are sold locally
- The temporary export regime is a special customs regime which allows the export of goods out of the country on a temporary basis, where there is a total or partial exemption of taxes levied on export, if any, and on subsequent re-import. This may benefit, for instance, goods which leave the country for sports and cultural events and commercial fairs and exhibitions
- The special temporary export regime for manufacturing purposes ('admissão temporária para aperfeiçoamento passivo') is similar to the regular temporary export regime and allows the export and re-import of goods which will be subject to certain restricted manufacturing processes abroad. Import taxes are due, however, on foreign products aggregated to the re-imported goods
- A bonded warehouse ('Entrepósito aduaneiro') is a special import regime whereby the Brazilian party may defer the payment of taxes due on import by keeping the imported goods stored in a bonded warehouse. The taxes are due only upon customs clearance (ie the removal of goods from the bonded warehouse). It may also benefit goods sent to Brazil for commercial fairs and exhibitions. In the case of exports, under this regime the Brazilian exporter may benefit from export tax incentives before the actual shipment of the products out of the country (available as the so-called 'comerciais-exportadoras')
- 'Depósito Alfandegado Certificado' (DAC) is a regime under which products are presumed exported but physically remain in a bonded warehouse in Brazil. Beneficiaries are companies allowed by tax authorities to operate under this regime

- Manaus Free Trade Zone – companies located in the Manaus Free Trade Zone (‘Zona Franca de Manaus’) may benefit from an exemption of IPI, PIS and COFINS for products to be consumed and/or manufactured within the ‘Zona Franca de Manaus’. The set-up project has to be pre-approved by the administration council of SUFRAMA and must comply with a minimum local production process (‘processo produtivo básico’ / PPB). An import tax reduction may be also granted depending on the level of local content and the labour force to be utilised. ICMS tax incentives may also be available on import of raw material, intermediate and secondary products to be used in the manufacturing process within the Manaus Free Trade Zone, as well as a reimbursement of ICMS due on sales of goods, varying from 55% to 100%
- Presumed export (‘exportação ficta’) occurs when goods are sold to non-residents but do not physically leave the country, but where the transaction is still considered an export for customs, foreign exchange and tax purposes. This benefit only applies in certain specific cases, such as:
  - a) sales to a foreign government (or an international agency to which Brazil is also a member country) to be delivered in Brazil on behalf of the foreign party
  - b) the goods are to be totally incorporated in Brazil in a finished product to be exported
  - c) the goods are to be totally incorporated into goods owned by the non-resident buyer already physically located in Brazil under a temporary admission regime, among others
- FUNDAP is a special state incentive which consists of a deferral of ICMS due on imports performed by qualified companies located in the state of Espírito Santo which, in practice, result in a significant financial benefit
- Tariff-ex (‘ex-tarifário’) is another import tax benefit available for imports of equipment in cases where there is no similar equipment in the country. The tax benefit consists of an exemption or reduction of import tax and is granted after the importer submits and obtains approval from authorities
- ‘Linha Azul’ (Blue Line) is a special customs regime that allows the benefiting company to speed up the customs clearance process. In order to benefit from this regime, companies must comply with several requirements, which include, for instance, an audit of external controls over customs processes
- ‘Regime de Entrepasto Industrial sob Controle Aduaneiro Informatizado’ (RECOF) and ‘Regime Aduaneiro Especial de Importação de Insumos’ (RECOM) are special regimes under which certain products may be imported (and sometimes acquired in the local market) without taxes (import tax, IPI, PIS and COFINS), if they will be used to manufacture products to be exported. The benefit may also apply to ICMS. There is a list of products that may be imported under such regimes (mainly parts for vehicles, aircrafts and electronics). There are several requirements that must be met and these include rigid control over the imported inventory. The main advantage of these regimes is that products may be imported without foreign exchange coverage (ie the foreign party may keep title over the products and contract the Brazilian importer for the manufacturing function).

## 4 – SETTING UP A BUSINESS

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### THE CIVIL CODE

The Civil Code states that companies become corporate entities with separate legal personality from their owners once registered with trade boards ('juntas comerciais').

Other forms of association, such as consortia, must also be registered with trade boards but these do not have their own legal personality.

Creditors generally cannot seize partners' assets to pay a company's debts. However, the New Brazilian Civil Code (NBCC) states that creditors can 'lift the corporate veil' if there has been an abuse of legal personality by disrespecting the company's purposes or if the company's assets are indistinguishable from those of its partners.

The most common type of company is the corporation (SA) and limited liability quota companies ('limitadas') because shareholders enjoy limited liability.

### STRUCTURING THE BUSINESS

Foreign investors may enter the Brazilian market directly – through a branch or a subsidiary – or through third parties by means of distribution and sales representation activities.

Distribution and sales representation are, in most cases, cost saving when compared with the incorporation of a local branch or subsidiary. However, these alternatives may mean a lack of control for foreign investors over the way third parties distribute or sell their products in Brazil or deal with their trademarks. Both distribution and sales representation activities must be governed by written agreements to be entered into between foreign investors and local third parties. Before entering into such agreements, it is recommended that foreign investors register their trademarks with the National Intellectual Property Institute ('Instituto Nacional da Propriedade Industrial' / INPI).

### DISTRIBUTION & SALES

The New Brazilian Civil Code (NBCC - Law 10,406/02) introduced relevant rules to distribution and agency activities.

Distribution and agency activities are very similar. The difference, according to the NBCC, is that under distribution activities the distributor possesses the products that are the object of such activity.

### DISTRIBUTION ACTIVITIES

Before the NBCC was enacted, agreements on distribution activities were freely regulated by the parties and governed by the general provisions of the former Brazilian Civil Code related to contractual issues. In fact, only automotive vehicles and parts' distribution was regulated by a specific law (Law 6,729/79 further amended by Law 8,132/90).

Under a distribution agreement, an individual or an entity becomes committed to do business on behalf of another party (the manufacturer of the products to be distributed) in a designated area for a specific remuneration, not on a sporadic basis and without an employment bond. It is recommended that distribution agreements define in detail their object (description of the products involved), the exclusive sales territory, duration of the agreement, purchase obligations, advertising issues and the licensed use of any trademarks involved. Pursuant to the NBCC, if the term (duration) of the agreement is not formally established, it shall be considered as undetermined and its termination would require a 90-day prior notice.

### **SALES REPRESENTATION**

Differing from distribution arrangements, sales representation is governed by a specific law (Law 4,886/65 further amended by Law 8,420/92), and in a supplementary way by the general provisions of the NBCC that are applicable to contractual issues.

Sales representation may be understood as an intermediation activity, in which the sales representative (entity or individual), not on a sporadic basis and without employment ties, is a client prospector for the represented entity or individual, negotiating proposals or requirements in order to submit them to the latter. In exchange, when proposed deals are closed between the purchaser and the represented party, the sales representative becomes entitled to a fee that is usually based on the value of sold products.

These sales activities must also be formalised by written agreements. Special care must be taken when drafting a sales representation agreement in order to avoid the characterisation of labour relationship between contracting parties, or a permanent establishment of the foreign represented party. It is recommended that sales representation agreements comprise, among other provisions:

- A description of the products which are the object of representation
- The period or term of representation
- An indication of the territory, such as a state or region
- A total or partial guarantee of exclusivity for the representation territory, if applicable
- Conditions for payment of commissions
- Exclusivity, or not, in the given territory
- Indemnification payable to the sales representative for the termination of the agreement without just cause, which cannot be lower than one-twelfth of the total remuneration earned during the period when the representation was performed.

### **BRANCHES & SUBSIDIARIES**

As mentioned previously, foreign investors may enter the Brazilian market directly, through a branch or subsidiary.

Although some multinational corporations originally set up their Brazilian operations through a branch (especially commercial aviation businesses), the most commonly used entity is now the 'limitada' as a controlled subsidiary.

## BRANCHES

The formation of a branch requires prior approval from the federal government by means of a presidential decree, which is a very lengthy process. The federal government must also authorise any amendments to the branch's articles of incorporation. The company must develop its activities within twelve months of the publication of the authorisation. If not, then the authorisation will expire automatically. Furthermore, the government may cancel the authorisation if the company breaches public policy or acts outside its corporate purposes. The power to grant authorisations may be delegated. Currently, authorisations are issued by the ministry of development, industry and commerce.

Unless the parent company is not a business company, such as an association, it must allocate capital to the branch office.

Different from a subsidiary, the branch is theoretically considered an extension of the foreign entity in Brazil. In this sense, the branch's foreign parent company may have unlimited liability for its debts.

It is important to bear in mind that a branch is subject to Brazilian law and courts with regards to its business and transactions carried out in Brazil.

In order to set up a branch in Brazil, foreign parent companies must first apply to the Federal Department of Trade Boards. The President can, by decree, give the government's approval for incorporation. The company must support its application by sending the following, amongst other information:

- Evidence of its regular incorporation in its country of origin
- The company's articles of association or bylaws
- List of members of all administrative bodies
- The company act which approves the opening of a branch in Brazil
- The company act which defines the share capital in Brazilian currency which the parent company assigns to its Brazilian operations, unless the parent company is not a business company
- Proof that the company has appointed a representative in Brazil with express powers to accept the conditions required for the authorisation
- The latest financial statements.

The foreign company must have a permanent representative in Brazil. That person must have the power to deal with all matters, and receive legal and official documents, including judicial summonses, on behalf of the parent company. The branch must share the same shareholders as its parent company and adopt the same corporate structure.

Once the president has given approval, the company must file all documents with the Federal Department of Trade Boards and the tax authorities. To maintain its operating authorisation, the branch and foreign company must publish financial statements. The branch must publish its financial statements in the Official Gazette and a widely circulated newspaper. The parent company must publish all financial statements required in the country of origin and its administration acts in the Official Gazette and a widely circulated newspaper. The Brazilian federal government must approve any amendments to the foreign company's articles of association or by-laws that may have an effect in Brazil.

Foreign companies with a branch in Brazil may become a Brazilian company by means of the transfer of head offices to the Brazilian territory.

### SUBSIDIARIES

For most foreign investors in Brazil, incorporation of a subsidiary is more popular than setting up a branch because:

- Shareholders are not responsible for the Brazilian subsidiary's debts, except for specific provisions set forth by corporate, tax, labour and bankruptcy rules
- The process of setting up a subsidiary in Brazil is fairly simple and much less time-consuming when compared with the establishment of a branch.

Laws regulating the formation of legal entities in Brazil are applicable to foreign and Brazilian entities or individuals substantially in the same manner.

Non-resident individuals or legal entities may adopt any type of legal entity recognised by Brazilian legislation, such as – but not limited to – limited liability companies ('limitadas') or corporations (SAs). The selection of the most appropriate type of legal entity for any particular business may depend on various considerations, such as the nature of the business and the desired capital structure. However, foreign investments are normally conducted through a subsidiary under the form of either a limited liability company or a corporation.

According to the NBCC, legal entities may be classified as 'sociedades simples' and 'sociedades empresárias'. In general, entities that perform business activities are considered 'sociedades empresárias', while those involved with intellectual, artistic, scientific, and literary professions would be considered 'sociedades simples'.

In practice, 'sociedades empresárias', regardless of the type of legal entity adopted and their type of activity (services, sales or manufacturing) must be registered with Trade Boards ('Juntas Comerciais'). In addition, such entities must be registered with federal tax authorities, state tax authorities (depending on the activities to be performed), municipal tax authorities and the social security system. Separate registrations are required for each branch of the subsidiary established in Brazilian territory.

Both 'sociedades simples' and 'sociedades empresárias' can adopt different types of legal vehicles. Both can choose, for instance, the legal form of a 'limitada', which is normally preferred because of more flexible provisions with respect to limitations on liability and, to some extent, a simplified level of administrative formalities when compared with SAs. However, the appropriate type of entity for a structure or activity depends on various factors, including the nature of the business, the desired capital structure and shareholding relationships. For instance, only a SA is able to issue public shares/debt.

'Limitadas' and SAs are required to have at least two shareholders. Sole ownership is generally not allowed but the second shareholder can hold a minimal interest. Under normal circumstances, it takes around 45 to 60 working days to have a subsidiary duly incorporated in Brazil, as a 'limitada' or as a SA.

From a tax perspective, there is no difference between the branch of a non-resident company and a local subsidiary (whether in the form of a 'limitada' or of a SA).

## INDIVIDUAL LIMITED LIABILITY COMPANIES

Law 12,441, which entered into force on 9 January 2012, instituted in Brazil the individual limited liability company ('Empresa individual de responsabilidade limitada' / EIRELI), which in many countries is known as a sole proprietorship company.

Individual limited liability companies consist of a single person holding the entire fully paid capital, which must be not be less than 100 times the highest minimum wage in force in the country. The company's name must have the addition of the term EIRELI. The natural person establishing an individual limited liability company can only participate in one such type of company. Individual limited liability companies are regulated by regulations governing 'limitadas', where applicable.

## LIMITED LIABILITY COMPANIES (LIMITADAS)

### STRUCTURE

Due to the flexibility offered by previous Brazilian legislation, 'sociedades por quotas de responsabilidade limitada', commonly referred to as 'limitadas', used to be the most convenient form of incorporation for the subsidiaries of foreign investors.

However, in 2003, new civil law provisions related to the structure of 'limitadas' were introduced by the NBCC. These new rules approximated even further the corporate requirements applicable to a 'limitada' to those applicable to a SA. The articles of incorporation of a 'limitada' follow the form of a partnership contract. Nevertheless, it is considered an entity separate from its quota holders.

A 'limitada' must have at least two quota holders, regardless of citizenship or residency. Companies, as well as individuals, may be quota holders of a 'limitada'. Non-resident quota holders must grant a power of attorney to a representative in Brazil (who must be a lawyer or another quota holder) to receive summons and act on their behalf at quota holders meetings. Local representation is also required by federal tax authorities.

### CORPORATE CAPITAL

No minimum capital requirements are imposed, except in specific situations such as obtaining a permanent visa for a non-resident to manage the company or applying for import/export licences or registrations. The corporate capital of a 'limitada', which must be denominated in Brazilian currency, is divided into quotas with fixed or different unit values as specified in the articles of incorporation. Capital is divided into quotas representing the amount in money, credits, rights or assets the quota-holder contributed when forming the company. Quotas are not represented by securities or certificates and the company will record the ownership and number of quotas in the Articles of Association.

Quota-holders' liability is limited to the value of their quotas, but it will extend to the value of the company's entire capital until the company's capital is fully paid-up. 'Limitadas' may have their corporate capital increased any time after subscribed capital is fully paid-up by quota-holders. Existing quota-holders have pre-emptive rights in buying newly issued quotas. If quota capital is fully paid in, companies may reduce their quota capital if they suffer irreparable losses or if the company's quota capital is too high for the company's purposes. Reduction of corporate capital is only accepted when certain specific conditions are met (such as the offset of accumulated losses).

## ADMINISTRATION

Administration or management of a 'limitada' must be performed by a resident individual (quota-holder or not), who can be a foreigner with a permanent visa and a work permit (commonly referred to as a delegate-manager). Because all quota-holders share the same liabilities and form only one class, each can manage the company. However, the Articles of Association will normally appoint a manager, who is usually a quota-holder.

Even though all quota-holders can have powers to manage the company if such is decided by the partners, the company cannot extend those powers automatically to quota-holders who join the company later. For new partners to participate in the company's management, there has to be a deliberation in a partners' assembly or alteration of the Articles of Association. New partners must also participate in that decision. If the Articles of Association allow it, the company may delegate managing powers to a third person, which need not be a quota-holder.

The manager may be removed at any time. However, if the company appoints a quota-holder as manager under its Articles of Association, it may only remove him by a resolution passed by quota-holders representing two-thirds of quota capital. The manager must be a Brazilian resident. Therefore, the quota-holder may manage the company directly if resident in Brazil, or delegate its management powers to another resident in Brazil. For example, this may happen when the quota-holder is a non-resident party or a legal entity with a foreign head office.

Limited liability quota companies may now have an Audit Committee. They must have general meetings of quota-holders at least once a year within the first four months of the beginning of the financial year. Meetings must examine and approve managers' accounts and financial statements for the past year and elect directors, if necessary. The company must publish notice of a meeting three times in the Official Gazette and in a widely circulated newspaper, unless all quota-holders are present at the meeting or declare in writing they know where and when the meeting will take place, as well as its agenda.

Quota-holders will make their decisions either in a simple meeting or, if there are more than ten quota-holders, in a general meeting. However, if quota-holders unanimously decide the issue of the meeting in writing, they need not hold the meeting. Quota-holders must also decide matters listed by law besides those listed under the Articles of Association. The table below shows the subject and majority needed to pass a resolution.

**TABLE 1**

*Quota-holders needed for company resolutions*

RESOLUTIONS	MAJORITY
Approve managers' accounts	Majority of quota-holders present
Elect and remove managers	Majority of quota capital
Set managers' remuneration	Majority of quota capital
Amend the Articles of Association	3/4 of quota capital
Takeover, merge, dissolve or liquidate a company	3/4 of quota capital
Appoint or remove liquidators, approve accounts	Majority of quota-holders present
Request debt rehabilitation	Majority of quota capital

If a company decides to amend its Articles of Association, to merge or conduct a takeover, dissenting quota-holders may leave the company within 30 days of the meeting. A majority of quota-holders may exclude minority quota-holders by amending the Articles of Association if minority shareholders are a risk to the company's activities and if the Articles of Association expressly allow exclusion with just cause.

#### QUOTA HOLDERS' RIGHTS

Voting rights of the quota holders are proportional to their capital holdings, unless the quota holders' agreement disposes them otherwise. In general, one quota equals one voting right. Other rights legally guaranteed to quota holders of a 'limitada' are:

- Participation in corporate profits
- Participation in net assets in the event of liquidation
- Supervision of the conduct of business
- Preference in subscribing new quotas
- Withdrawal from the company under certain circumstances, with reimbursement for the value of their quotas as ascertained by a balance sheet drawn up for this purpose.

#### PROFIT PARTICIPATION

Distribution of profits is usually stated in the articles of incorporation or subsequent amendments. Although a non-proportional distribution of profits is accepted under the NBCC, there can only be unequal profit distribution if it is expressly provided for in the Articles of Association. When profit distribution among partners is done disproportionately to partners' capital participation, it must be approved unanimously by partners. Foreign investors may find problems with the Central Bank of Brazil when trying to implement this in practice.

#### OTHER ISSUES RELATED TO LIMITADAS

The articles of incorporation of 'limitadas' must be filed with a trade board for due registration. Transformation of a 'limitada' into a SA or vice versa may be effected through a simple legal procedure. Applicable laws state that all shareholders/quota-holders must agree to the transformation, unless the articles of incorporation provide otherwise. In general terms, the Corporations' Law (Law 6,404/76) is also applicable to 'limitadas'.

#### CORPORATIONS ('SOCIEDADES ANÔNIMAS' / SA)

Organisation and operation of SAs is governed by Law 6,404/76 –Corporations' Law, amended by Laws 9,457/97 and 10,303/01.

The Corporations' Law was designed to stimulate the development of the Brazilian capital market and to provide additional protection for minority shareholders.

SAs may be publicly held (in this case supervised by the Brazilian Securities Commission (CVM) or privately-held, depending on whether their securities are accepted for trading in the securities market. An inaugural meeting of prospective shareholders must be held to approve the articles of incorporation and to elect the board of directors and administrative councils, if applicable. The incorporation process depends on compliance with the following preliminary requirements:

- Subscription of all shares by at least two persons

- Initial payment of at least 10% of the issue price of shares subscribed in cash unless specific legislation requires a higher percentage. This payment must be kept on deposit with an authorised bank until approved by a Trade Board. There are SAs for which the initial payment of most of the capital is required, such as financial institutions (where the initial capital payment cannot be less than 50%).

Formation by public subscription is subject to previous registration of share issuance with the CVM and requires mediation of a financial institution.

#### CORPORATE CAPITAL

SA's corporate capital is divided into negotiable shares which are indivisible in relation to the company. No minimum capital requirements are imposed for the SA, except in specific cases such as obtaining a permanent visa for a non-resident to manage the company, applying for import/export licences or registrations, or incorporation of a financial institution (for which the SA form is mandatory).

SAs may issue shares with or without par value. If the corporation establishes a par value for any of its shares, this must be the same for all other shares. Issuance of shares at prices lower than their par value is prohibited. Shares can be ordinary or preferred. Companies must call a general meeting to approve the valuation of shares if, instead of money, they are paid-up using assets, goods, technology transfer, trademark licensing or services, etc.

Preferred shares grant holders preferential rights with respect to dividends and/or reimbursement of capital, with or without a premium. Normally, depending on the privileges which they enjoy, preferred shares are subject to certain restrictions. Concerning SA's capital, law 6404 of 1976 (Law of 'Sociedades Anônimas') provides that the number of preferred shares without voting rights cannot exceed 66% of total shares issued. However, Law 10303 of 2001 changed that limit, so that preferred shares without voting rights (or with restrictions to voting rights) cannot exceed 50% of total shares issued. The new limit applies to new companies, closed-capital companies which had not opened their capital stock by November 2001, and open capital corporations which had not issued preferred shares by November 2001.

Therefore, open capital corporations that issued preferred shares by November 2001, and closed capital corporations which issued preferred shares but did not open their capital stock by November 2001, can use the previous 66% limit or follow the new 50% limit voluntarily. Preferred shares have special financial and policy rights. Besides other advantages or preferences which may be established in the company's bylaws, preferred shares which are not negotiated on stock exchanges have priority in the distribution of fixed or minimum dividends, and priority in reimbursement of capital, with or without premium, or both.

Companies can negotiate preferred shares on stock exchanges if they have at least one of the following advantages:

- The right to participate in dividends of at least 25% of net profits for a fiscal year
- The right to receive dividends at least 10% greater than those paid to each common share
- The right to be included in a public offer to assign control. In this case, they have the right to receive dividends at least equal to those paid to common shareholders.

Privatised companies may create a special class of preferred share. These are known as 'golden shares' and are owned by the government entity that privatised the company. Bylaws may grant that entity specific powers such as the right to veto. Bylaws may also grant shareholders of one or more classes of preferred shares the right to elect one or more members of the company's administrative body by separate ballot. They may also state that shareholders of one or more classes of preferred shares must approve specific statutory amendments by a special shareholders' meeting.

Preferred shareholders with restricted voting rights and without voting rights will acquire full voting rights if the corporation does not distribute fixed or minimum dividends within the period stipulated in bylaws. This right continues until the company pays those dividends. Bearer shares are not allowed. After payment of at least 75% of the capital, the company can increase it through public or private share subscription.

#### ADMINISTRATION

The articles of incorporation attribute responsibility for management duties solely to the board of directors or to the administrative council in conjunction with the board of directors. The election of an administrative council is mandatory only for publicly held companies and SAs where articles of incorporation provide for future capital increases up to authorised limits. The council must have a minimum of three members who must be individuals. The decisions must always be made under majority voting. Members of the administration council may be non-residents as long as a resident in Brazil is elected as legal representative with powers to receive summons. The administrative council defines policy guidelines for the SA's business activities, including elections and dismissals, and the indication of responsibilities and supervision of the board of directors. It is also responsible for appointing independent auditors.

The council does not have any executive function and representation of the company is restricted to directors. The board of directors is responsible for executing policies defined by the administrative council or by shareholders' meetings and may represent the company in relations with third parties. It must be formed by two or more resident individuals (shareholders or not) elected by the administrative council or, in the absence of a council, by a shareholders' meeting. Up to a third of council members may also be board members. In the absence of any specific provision in the articles of incorporation and of any restriction imposed by the administrative council, each director is responsible for achieving the SA's business objectives.

The fiscal council is responsible for overseeing the performance of the administrative council and the board of directors. Its authority and powers are wide and not restricted to the periodic review of financial statements and certain administrative acts. The Corporations' Law allows the articles of incorporation to determine whether the fiscal council shall have permanent status or whether it will be appointed only when requested by shareholders.

Remuneration of directors, as well as of administrative and fiscal council members, must be determined by shareholders in accordance with consistent criteria. Management, especially of open capital corporations, have duties of diligence and loyalty. They must publicly disclose any information arising from the normal course of business, which is relevant to the company's activities. Examples include information that may significantly affect the price of company-issued securities, or an investor's decision to negotiate them or to exercise their rights as security-holder.

If an open capital corporation's control is to be directly or indirectly transferred, a public offer must be made to buy the other shareholders' voting stock. That offer must be worth at least 80% of the price paid for each share of the controlling block.

Depending on what bylaws state, the management board will manage the corporation on its own or with the board of directors. Four bodies manage a corporation: General Meetings, a Board of Directors, a Management Board and an Audit Committee.

General meetings are the company's highest authority. They may decide almost any company matter. The meeting may be annual ('Assembléia-Geral Ordinária' / AGO) or extraordinary ('Assembléia-Geral Extraordinária' / AGE). Corporations must hold AGOs within four months of the closing of the fiscal year. AGOs examine and approve matters on directors' accounts and financial statements for the past year, payment of net profits and dividends for each financial year, as well as the election of directors and members of the Audit Committee. AGEs decide upon amending bylaws and matters falling outside the scope of the AGO. Corporations must publish notice of the meeting in the Official Gazette and local newspapers. The meeting must have a quorum before the company can call it to order. A quorum is 25% of shareholders for the first call and any number for the second. Depending on the subject, a qualified quorum may sometimes be required.

The board of directors is the collective decision-making body. All open and authorised capital corporations must have a board of directors, which sets the company's business and its administrative and financial policies, and elects management board members, whom it also supervises. The board must have at least three members and, until recently, Brazilian residents. The requirement that members of the board of directors must be shareholders of the company is no longer valid (under Law 12431 of 2011). Directors can be elected and removed by a general meeting at any time. The above-mentioned law allows shareholders to participate in general meetings at a distance and allows books of minutes of general meetings and attendance of shareholders to be replaced by mechanised or electronic records.

The management board is the corporation's executive body. It represents the company before third parties and does whatever is necessary for the normal functioning of the company. Its members are elected and removed by the board of directors or, if the company does not have a board, by a general meeting. The board is composed of at least two managers who do not have to be shareholders. They must reside in Brazil and their term of office cannot exceed three years.

The audit committee is formed to supervise management and to police the company. It operates permanently or temporarily. If it does not operate permanently, shareholders holding at least 10% of the voting capital or 5% of the non-voting capital may convene it. Such a committee continues to operate until the next AGO. The committee must have between three and five members and an equal number of substitutes who must be elected by general meeting. Its members do not have to be shareholders.

The bylaws may stipulate that any dispute between shareholders and the company or between controlling shareholders and minority shareholders is to be resolved by arbitration.

### SHAREHOLDERS' RIGHTS

The following are fundamental rights of shareholders:

- Participation in corporate profits
- Participation in net assets in the event of liquidation
- Supervision of the conduct of the business
- Preference in subscription of new share issues, subscription rights and debentures and profit participation certificates
- Withdrawal from the company under certain circumstances with reimbursement of the value of shares if shareholders disagree with a shareholders' resolution that fundamentally affects the company.

The foregoing rights cannot be denied by either the articles of incorporation or shareholders' resolutions. The articles of incorporation may confer additional rights that can be different for each type, form and class of share, but all shares of the same class must confer equal rights to their owners. Shareholders' agreements with regards to the purchase and sale of shares, pre-emption rights or voting rights must be filed with the company and are then valid in relation to third parties.

### PROFIT PARTICIPATION

Dividends may be paid out of accumulated earnings, profits and unrestricted reserves. Preferred dividends may also be paid out of certain capital reserves subject to authorisation in the articles of incorporation. Shareholders have the right to receive a compulsory minimum dividend as established in the articles of incorporation. If the articles of incorporation are silent on the matter, a compulsory dividend must be paid, calculated as follows:

- 50% of net profits increased or decreased by the legal reserve and contingency reserve or reversal of this reserve created in prior years
- Payment of dividend in accordance with the previous item may be limited to realised net profits, provided the difference is posted as profits to be realised
- Profits to be realised, when realised and not absorbed by losses in subsequent periods, must be included in the first dividend declared after their realisation.

When the articles of incorporation are silent about the matter and the general meeting resolves to change them to regulate it, the compulsory dividend may not correspond to less than 25% of net profits. Despite legal requirements, the compulsory dividend may not be paid if payment of dividends would be incompatible with the company's financial situation.

Profits not distributed because of financial difficulties must be transferred to a special reserve and, if not absorbed by subsequent losses, are to be paid out as dividends as soon as the company's financial situation allows such a payment. Normally, dividends are paid out once a year. However, companies authorised or required by law or their articles of incorporation may prepare financial statements each semester as the basis for distribution of an interim dividend out of current year profits.

#### OTHER ISSUES RELATED TO SAS

Shareholders may be represented at shareholders' general meetings by another shareholder, by a lawyer or by a company's officer, provided that this individual was appointed as the shareholder's representative at least one year before. Corporations must publish the notice of shareholders' general meetings, financial statements and resolutions adopted by shareholders, the administrative council, the board of directors and the fiscal council.

#### LIMITED PARTNERSHIPS ('SOCIEDADES EM COMANDITA SIMPLES')

In limited partnerships ('sociedades em comandita simples'), general partners ('sócios comanditados'), who can only be individuals, are responsible for the company's management and are jointly and without limit, liable for corporate obligations.

Limited partners ('sócios comanditários') may be individuals or legal entities and their responsibility is limited to their capital contributions.

#### LIMITED PARTNERSHIPS BY SHARES

The same provisions relating to corporations apply to limited partnerships by shares, with some restrictions, especially concerning the board of directors, any statutory authorisation of capital increase and the issuance of warrants.

Capital of this type of entity is also divided into shares and has as its main characteristics the unlimited, subsidiary and supportive liability of directors or managers. The positions of director or manager can only be exercised by shareholders and their removal requires the decision of two thirds of the capital. For this reason, it is prohibited to change the entity's essential objective, its term, capital and other aspects without the consent of the directors or managers.

#### PARTNERSHIPS WITH OSTENSIVE OR SILENT PARTICIPATION

Partnerships with Ostensive or Silent Participation ('Sociedades em Conta de Participação' / SCPs) are joint venture agreements which create partnerships.

Partnerships can have two types of partners:

- Ostensive partners, who may be sole traders or commercial partnerships, assume joint and unlimited liability on their own behalf. They are solely responsible for management and they must dedicate themselves to the business. All business is to be done on their behalf. Bankruptcy of ostensive partners will cause the dissolution of the company.
- Silent or hidden partners are not liable to third parties but are liable to ostensive partners as provided in the partnership's articles of association. Their liability is limited to the same amount as that of the managing partner for the business' operations.

Such partnerships are unincorporated (ie they have no corporate status, even if registered at trade boards) as the law does not confer on them corporate identity distinct from that of their partners. However, for tax purposes they are treated as having a corporate identity.

The partnerships' distinguishing characteristic is that they are companies which exist only between partners, but not towards third parties. Third parties deal exclusively with ostensive partners. These partnerships have no corporate or trade name because ostensive partners deal with third parties using their own name. This kind of company does not reveal the identity of most of their partners because only ostensive partners' names appear. These partnerships are usually set up for a specific period and commercial objective.

### **CONSORTIA**

Consortia are associations of any type of company under common control or not, which operate without the loss of the juridical personality of each party.

Consortia are set up for the achievement of common goals or for specific projects, usually large or high-cost, and often requiring specialised technical expertise and high-standard technical equipment for their implementation. Consortia have no legal personality and their parties are bound only by their respective contract, so that each party is responsible for its obligations, without presumption of solidarity. Bankruptcy of a party does not extend to other parties in a consortium, so it can continue with other parties. Credits belonging to the bankrupted party are to be calculated and paid as provided in the consortium contract.

### **SPECIFIC PURPOSE COMPANIES**

Specific Purpose Companies ('Sociedades de propósito específico' / SPE) are business companies whose activity is fairly restricted. In some cases, they have a determined period of existence and are typically used to isolate the financial risk of an activity.

SPEs don't have a legal personality and must therefore take form under company models provided by law. The particular model adopted will give the SPE a certain legal personality and it will be governed by rules which refer to the type of company chosen.

Brazilian law also gives legal personality to associations (unions of people for not-for-profit purposes), foundations (intended for religious, moral, cultural or assistance purposes) and cooperatives (formed to provide services to their members, without aiming for profit and with their own particularities).

### **BRAZILIAN TRANSFER PRICING RULES**

As in most developed tax systems, there are provisions under Brazilian law to prevent multinationals from 'moving' profits.

Since their inception in 1996, Brazilian transfer pricing regulations for import transactions have prescribed the use of the following methods:

- Comparable independent prices method (Preços Independentes Comparados / PIC) – this is defined as the weighted arithmetic mean of prices of identical or similar products, services, or rights in Brazil or in other countries, in purchase and sale operations under similar payment conditions
- Resale price minus profit method (Preço de Revenda Menos Lucro / RPL) – this is defined as the weighted arithmetic mean of resale prices of products, services or rights, minus:
  - Unconditional discounts granted
  - Taxes and contributions levied on sales
  - Commissions and brokerage fees paid
  - A profit margin of 20% when no value is added in Brazil to the cost of imported products, services, or rights (known as the PRL-20 Method); or a profit margin of 60% when imported products, services or rights are used in production in Brazil (known as the PRL-60 Method)
- Production cost plus profit method (Custo de Produção Mais Lucro / CPL) – this is defined as the average cost of production of identical or similar products, services, or rights in the country where they have been originally produced, plus taxes and other charges imposed by the same country on exports, and a 20% profit margin on the determined cost.

Rules applicable from 1 January 2010 under Measure 478 (MP 478) replace PRL-20 and PRL 60 methods with the sales price minus profit method (Preço de venda menos lucro / PVL), which requires a profit margin of 35%.

In addition, the new rules introduce a change to the implementation of the PIC method. The PVL method is defined as the weighted arithmetic mean of resale prices of products, services, or rights, according to the following methodology:

- a) Net sales price – weighted average sales price of product, right, or service produced, minus unconditional discounts granted, taxes and contributions on sales, and commissions and brokerage fees paid
- b) Share of imported products, rights, or services in the total cost of sold products, rights, or services – the ratio between the weighted average cost of the imported product, right, or service and the total weighted average of the sold product, right, or service, calculated in accordance with the company's costs chart
- c) Share of imported products, rights, or services in the sales price of sold products, rights, or services – share of imported products, rights, or services in the total cost, calculated according to point b) multiplied by the net sales price, calculated according to point a)
- d) Profit margin – multiply 35% by the share of imported products, rights, or services in the sales price of sold products, rights or services, calculated according to point c)
- e) Benchmark price – difference between the share of the imported products, rights, or services in the sales price of sold products, rights or services, calculated according to point c) and the profit margin, calculated according to point d).

For application of the PIC method, Brazilian taxpayers are now allowed to include data from their own transactions when calculating the benchmark price, as long as these transactions represent at least 10% of import transactions subject to Brazilian transfer pricing rules. MP 478 empowers the finance ministry to set different profit margins from the fixed margins established by regulations for different sectors or economic activities and requires taxpayers to indicate in annual tax returns the transfer pricing method used during the taxable year.

## 5 – LABOUR

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The Labour Law Consolidation encompasses the Labour Law Code and amendments introduced by the Federal Constitution of 1988.

The following is a summary of the principal items of general interest. Labour inspectors regularly enforce the numerous detailed requirements covering such matters as record-keeping and payment of overtime and benefits. It is essential that personnel department staff are sufficiently knowledgeable about labour laws to deal with these matters.

### DEFINITION OF EMPLOYEE

An employee is a person who provides services permanently to an employer, under its direction and in exchange for a salary. Subordination is essential in an employment relationship.

Companies belonging to a group of corporate entities under the same control, direction or management are jointly liable for the employment obligations and liabilities of any of the group's companies.

### TERMS OF EMPLOYMENT

Since the law establishes most provisions of employment contracts, it is not common to have extensive written contracts with lower-level employees.

Employees have a work and welfare booklet ('Carteira de Trabalho e Previdência Social' / CTPS) which the employer signs, stating the position and salary, and thus establishing a formal labour contract (see the section below on documentation).

Special terms of employment for a variety of occupations are set forth in the law. Individual employment contracts may be in writing or implied from the relationship between the individual and the company to which services are provided.

### DOCUMENTATION

Terms of employment must be recorded in employees' work booklets and in a company's official employee register.

Employers must file an annual return with the local office of the Ministry of Labour, reporting the total number of employees and specifying the number of foreigners and minors employed.

### EMPLOYEE HIRING PROCEDURES

Companies incorporated in Brazil do not need prior authorisation to contract Brazilian nationals as employees. However, employees must have an employee work and social security booklet (CTPS).

On admission, employees must complete a medical examination and present the CTPS to employers. Employers must record the content of the employment contract in employees' CTPS, which must include:

- The company's name, tax registration number, address and activities

- The number of the employment registration card or page of the employment registration book where the employee was registered
- The employee's position, date of admission and form of payment
- The company representative's signature.

Companies must also register each individual's employment in an employment register and must update such registration throughout the employee's employment, recording details such as holidays taken, work accidents and illnesses, and termination of employment.

A regional office of the Ministry of Employment must authenticate a company's first employment registration book or batch of employment registration cards. Hiring practices which discriminate against potential employees upon the bases of sex, ethnic origin/ race/colour, marital status, family situation or age are prohibited. Discrimination against those with criminal records is not expressly forbidden and companies can check potential employees' criminal records. However, employers must treat that information confidentially.

#### DURATION OF INDIVIDUAL EMPLOYMENT CONTRACTS

Employment contracts normally last indefinitely and fixed terms are allowed only in specific circumstances.

Terms are indefinite when the contract states so, when the contract does not stipulate a term, when a fixed-term contract is renewed more than once, and when an existing fixed term contract is terminated but the same parties contract again for a fixed term within 6 months (this does not apply where termination is connected with the rendering of specific services or the occurrence of certain events).

For companies, the main advantages of having fixed-term contracts are that they are more flexible and require lower benefit contributions and severance payments. Fixed-term contracts are allowed for the first 90-day trial-employment period. If employment continues, the contract will be valid indefinitely or for a maximum two-year term if the nature of the services justifies a temporary term, if the services are related to business in transition or upon collective negotiation.

#### WORKING CONDITIONS

Employers are required to make reasonable provisions for the comfort and convenience of employees. Appropriate dining facilities must be provided on premises where more than 300 employees work. Industrial companies may not begin operations until working conditions have been inspected and approved by authorities.

#### WORKING HOURS

The work day is eight hours and the standard working week is 44 hours. Shifts are limited to six-hour periods, which means employees must have at least a one-hour break after every six-hour shift. If the shift doesn't exceed six hours, employees have the right to at least a 15-minute break. Employees have the right to a weekly rest period of 24 consecutive hours.

### TRANSFER OF EMPLOYEES

Employees may be transferred to a new location if the arrangement is justified by company requirements. If assignments are temporary, employees must receive an increase in payment of at least 25%. Moving expenses must be paid by employers.

### EXPERIMENTAL PERIOD

Employees may be hired for an experimental period, which may not exceed 90 days.

### TERMINATION OF EMPLOYMENT

Employment contracts may be terminated by employers (with or without just cause) by resignation, by expiry of the term of a fixed-term contract and by constructive dismissal. Notice and redundancy payments depend on the type of termination:

- Termination by employers without just cause – the law does not distinguish between terminating employment without just cause and redundancy. The law does not oblige employers to tell employees the reasons for terminating their contract. If employers terminate the contract, employees are entitled to:
  - Unused holidays and holiday pay proportionate to the number of months employees worked in the previous 12 months plus one third of that amount
  - Christmas bonus proportionate to the number of months worked during the calendar year
  - Employee's dismissal fund (FGTS) contributions plus a 40% fine
  - Employers must give employees at last 30 days' notice or dismiss them immediately and pay salary instead of notice
- Termination by employers with just cause – the law defines 'just cause'. If employees are dismissed with just cause they are only entitled to pay for unused holidays (after 12 months' work) plus one third of that amount. Employees will not receive the 40% fine on their balance
- Resignation – employees may resign with at last 30 days' notice to the employer. Employers may release employees from their obligation to work in the notice period. In cases of resignation, employees are entitled to:
  - a) Pay for unused holiday plus a third of that amount (after one year in employment)
  - b) A proportionate Christmas bonus equivalent to the number of months worked during the calendar year
- Expiry of fixed-term employment contracts – in such cases employees are entitled to:
  - a) Holiday pay proportionate to the number of months worked in the previous 12 months plus one third of that amount
  - b) A Christmas bonus equivalent to the number of months worked during the calendar year
  - c) FGTS contributions
    - Any party who terminates fixed-term contracts without just cause must pay damages to the other party. Those damages are 50% of the amount of compensation employees should have received until expiry of the contract. If employers terminate the contract they will also have to pay the 40% FGTS fine.
- Constructive dismissal – employees may terminate their employment for just cause and claim indirect or constructive dismissal. In such cases, employees can receive the same termination amounts payable as if the termination were without just cause.

### JOB SECURITY

The following employees have protected stability rights:

- Pregnant employees and for up to five months after delivery
- Union leaders, for 1 year after their mandate
- Members of the Internal Commission for Accident Prevention ('Comissão Interna de Prevenção de Acidentes' / CIPA), for one year after their mandate
- Employees injured while carrying out their professional activities, for one year after their return to work
- Other employees provided for in collective bargaining agreements (including pre-retirement periods).

Employers may not dismiss employees who have work stability except with just cause. If employers dismiss employees for gross misconduct and employees take the employer to the employment tribunal, the employer must then prove the grounds for their dismissal. If the employer fails to do so, it may have to rehire the employee or treat the dismissal as one without just cause. This would subject the employer to payment of all past employment indemnities.

#### LITIGATION

A culture of labour litigation in Brazil and a rigid labour law framework creates potential problems for companies with employees or outside service providers. Brazilian labour courts admit oral evidence to prove the existence of an employment relationship and favour settlements as a means of resolving disputes. The statute of limitations to claim rights under employment contracts is five years; however, suits must be filed within two years of severance.

#### OUTSOURCING

The Brazilian Labor Laws doesn't have a specific regulation in regards to outsourcing. The jurisprudence admits outsourcing only for specific areas and activities of one's company and only if that activity is not considered a part of the core business of the company.

This current situation can be altered by a bill that is being discussed in a rather advanced stage in the Brazilian Federal Congress.

#### EMPLOYEE REMUNERATION

##### REMUNERATION PERIODICITY

Employees must be paid in Brazilian currency on a monthly basis or for a shorter time period (such as an hourly basis) if stipulated in the employment contract. Salaries are generally referred to in terms of monthly salaries as opposed to annual salaries. Salary amounts are paid 13 times during the year (see details below).

##### FRINGE BENEFITS

Besides health insurance, the only non-salary benefits commonly encountered are programs which grant tax incentives to companies that pay part or all of their employees' cost of meals or transportation. In addition, large companies normally have pension plans and life insurance policies.

##### ADDITIONAL SALARY

The following jobs require additional salary:

- Overtime – when overtime is governed by collective bargaining or private agreement, the overtime rate must be stipulated at 50% over regular pay

- Night shift work – night work must be remunerated at a rate at least 20% higher than equivalent daytime work
- Hazardous work – employees subject to a hazardous work environment may claim a salary increase of 30%
- Unhealthy work – if the work environment is considered unhealthy, depending on the level of potential harm to health and well being, the salary may be increased by 40% (maximum), 20% (medium) or 10% (minimum).

#### MINIMUM WAGE

The minimum monthly salary is currently equivalent to BRL 678. Apprentices who are less than 18 years old may not earn less than half of the minimum wage salary during the first half of the apprenticeship and two-thirds during the second half. Minors who are not registered as apprentices are entitled to the full minimum wage salary.

#### DEDUCTIONS AND REDUCTIONS

Employers are not permitted to make any deductions from employees' compensation other than for salary advances given or deductions prescribed by law and collective bargaining agreements, such as withholding taxes, social security contributions and union dues. Employers may not reduce salaries except under extraordinary circumstances.

#### EQUAL OPPORTUNITY

There are general provisions in Brazilian law prohibiting employment discrimination based on gender, religion, race or other non-material factors. The only affirmative action programs relate to the employment of individuals with physical handicaps.

Labour law provides that all work of equal value must be remunerated at the same rate regardless of the nationality, age, gender or marital status of the employee who performs identical functions. However, differences in length of service (if over two years) may be taken into account to justify different salary levels. Companies which have a career-track plan may have differences in salary levels in accordance with seniority and merit.

#### LABOUR RIGHTS

##### VACATION

Upon completion of each 12-month work period, employees are entitled to a paid vacation of up to 30 calendar days, of which at most 10 days may be indemnified in cash. In addition, a vacation bonus equivalent to one-third of the employee's monthly salary must be paid.

Employees should not accumulate two or more years of vacation entitlement, otherwise the excess must be compensated at twice the normal rate of pay. If an employee is dismissed (other than for just cause, he/she must be compensated for unused vacation time.

##### MATERNITY/PATERNITY LEAVE

Maternity leave is 120 days, during which the employee's job and salary are secured. During maternity leave the National Social Security Institute ('Instituto Nacional do Seguro Social' / INSS) pays the employee's salary. Fathers are entitled to 5 days of paternity leave.

### THIRTEENTH MONTH'S SALARY (CHRISTMAS BONUS)

In December of every year, employers are required to pay a bonus equal to one-twelfth of the salary earned (plus an average of the variable allowances paid during the year) for each month of service during that calendar year. This bonus must be included in the basis for calculating retirement fund (FGTS) and social security (INSS) contributions. 50% of the bonus must be paid by November 30th (normally when vacations are taken) and the remainder must be paid by December 20th.

### FAMILY ALLOWANCE

For each child or qualifying dependent under 14 years of age, employees are granted a supplementary monthly allowance, which is dependent on the salary level. This supplement is not subject to either social security contributions (INSS) or income taxes. To receive the family allowance, Social Security does not require a minimum period of contribution. For workers who receive from BRL 608.81–915.05, the value of the family allowance per child under 14 years of age or for a disabled child of any age is BRL 22.

### TRAVELLING COSTS

Employees are entitled to public transport vouchers for commuting between home and the workplace. Travel money is not compensation for legal purposes as long as employers respect certain legal requirements. Employers can deduct the paid amount from income tax.

### PROFIT SHARING

Profit sharing agreements are not mandatory. If implemented in compliance with formalities of the corresponding law (Law 10,101/00), profit-sharing payments are not subject to payroll taxes, but attract personal withholding income tax. These payments are also not included in any labour rights calculation basis. For corporate tax purposes, the payments are fully tax deductible.

The abovementioned law states that: 'Each company is to settle with its employees, through a commission formed by their elected representatives and a union representative or by direct collective negotiation, the form of participation in either the company's profits or results. The guidelines for and conditions of such participation are to be established freely and be clearly defined in a separate document that must be filed with the union with the power to represent the company's employees. Among other factors, the company's productivity, type, profitability and its previously agreed programs for achieving its goals, results and deadlines, as previously agreed, are to be considered. Amounts paid as employee's participation cannot replace or supplement employee's compensation and do not form a tax base for any employment or social security charges.'

### HEALTH AND SAFETY AT WORK

There are several compulsory programs on health and safety standards, which include:

- Medical Control and Occupational Health Program ('Programa de Controle Médico de Saúde Ocupacional' / PCMSO) or Medical Records – this program includes the compulsory submission of employees to a medical examination before admission, periodically during employment and upon dismissal. Pre-admission medical examinations are to discover if individuals suffer from health problems which might prevent them from performing their duties. Periodical examinations determine if employees' health has deteriorated or if there are signs of work-related diseases. A medical examination on dismissal is intended to determine if employees suffer from any health problems or are pregnant, as both conditions would prevent employers from dismissing them
- Environmental Risk Prevention Program ('Programa de Prevenção de Riscos Ambientais' / PPRA) – this program is designed to protect employees' health and integrity by anticipating, recognising, evaluating and controlling environmental risks in the workplace, while respecting the environment and natural resources
- Internal Commission for Accident prevention ('Comissão Interna de Prevenção de Acidentes' / CIPA) – Brazilian companies must have an internal commission for accident prevention, made up of employees and company representatives, who remain in the office for one year. The number of CIPA members depends on the company's number of employees and the level of danger involved. Those elected by employees to the company's CIPA (either as current or substitute members), cannot be removed from their position from the date of their registration as candidates until one year after their term in office.

#### HEALTH HAZARD ALLOWANCE

Employees working under hazardous health conditions receive an added monthly 10%, 20% or 40% of the current minimum salary, according to the degree of danger (which is to be appraised by experts). Companies must provide employees with satisfactory Individual Protective Equipment ('Equipamento de Proteção Individual' / EPI) and do not have to pay health hazard allowances if there is satisfactory equipment to neutralise or remove the agents causing the hazard.

#### ON-THE-JOB RISK ALLOWANCE

Employees working in dangerous conditions (ie those in contact with explosives, inflammable materials or electricity, work with asset protection or run the risk of other life threatening situations) have the right to an added 30% to their base pay.

#### TRADE UNION LAW

Members of a particular profession or a group of employers may form trade and professional associations. These associations aim to defend their members' common economic or employment interests and to ensure their representation and defence in administrative and legal proceedings. Either employees or employers may form such associations.

Employees in different professions or jobs may form a union when allowed by statute. Only one union may represent members in a given category in each municipality. The federal constitution also guarantees employees the right to strike.

The federal constitution guarantees the free creation and organisation of trade and professional associations, which have the right to represent their members, carry out collective bargaining agreements, collaborate on technical matters with the state, elect their own representatives and levy membership fees. Trade and professional associations are recognised as private organisations.

Certain employment arrangements beneficial to employers can only be implemented through negotiations with employees' associations, including the establishment of a 'bank of hours' and salary reductions.

## PAYROLL TAXES

### RETIREMENT FUND (FGTS)

Each month employers must contribute the equivalent of 8% of employees' total salary for FGTS purposes. Such a contribution is not deducted from employees' salary, as it is an obligation on employers. Employees may use this fund only under special conditions, such as dismissal without just cause or retirement. FGTS is not applicable for payments to independent professionals and is not mandatory for directors who are not employees.

### SOCIAL SECURITY (INSS)

Employers' contribution – an employer's contribution rate applied on gross salaries is 20%, increased by minor charges which may raise the total rate to approximately 29%.

Employers' contribution rates are applied to gross salaries without limit. Principal rates are shown in Table 2 below.

Employees' contributions must be collected and deducted by employers. All contributions must be paid to the appropriate government agencies during the following month. Payments in arrears are subject to interest and fines which can be as high as 50% of any amounts due. Companies in arrears with social security contributions are prohibited from making bonus payments or dividend distributions to shareholders, or distributing participation in profits to partners, shareholders or directors. Such companies are also barred from bidding for government contracts.

An employers' total contribution is limited to 28.8%, as the maximum extra funds contribution is 6.3% (items 3–8 in Table 2 below). Such contributions vary according to the entity's activities. Contributions for apprenticeship programs and for social work are not cumulative.

TABLE 2

#### *Social security contributions*

ITEM	% OF SALARY
1) General INSS contribution	20%
2) Worker's compensation insurance*	3%
3) Education contribution	2.5%
4) Rural fund contribution (INCRA)	0.2%
5) Apprenticeship program contribution (SENAI/SENAC/SENAT)	1%
6) Social work contribution (SESI/SESC/SEST/SENAR)	1.5%
7) Social contribution	0.5%
8) SEBRAE (Small Business Adm.)	0.6%

\*Employers are obliged to provide accident insurance for employees contracted with the INSS. The size of premiums is based on total payroll in the same manner as social security contributions are calculated and are paid together with social security contributions. Monthly premium rates range from 1% to 3%, depending on the risk of a company's activities. Benefits under worker's compensation insurance include survivor's benefits, sickness insurance and disability pensions.

#### SOCIAL SECURITY (INSS) – EMPLOYEES' CONTRIBUTION

An employee's contribution (from 8–11%) is subject to a cap (only the first BRL 3,916.29 is taxable) and this must be withheld at source each month by employers.

The employees' contribution paid by directors of corporations is calculated on a 'base salary'. Self-employed workers are subject to the same rules. Companies are required to withhold a flat rate of 20% on these payments.

#### SOCIAL SECURITY BENEFITS

Brazil's social security system provides only minimal benefits. In fact, the absence of an adequate 'safety net' of social benefits to help employers in general is one of the major sources of social problems.

There is no regular unemployment insurance other than unemployment pay, which is restricted to a maximum of three minimum wage salaries over the first six months of unemployment. Sickness benefits, disability and senior pensions are very small for the vast majority of Brazilians. In addition, a significant proportion of the population is engaged in occupations for which access to the social security system is limited. The state health care system is fairly rudimentary and is generally overloaded. Accordingly, the majority of employees require access to private health insurance plans provided by corporate employers or trade unions.

#### BASIS FOR CALCULATION

Benefits paid by the state to the insured are calculated on a 'benefit wage' ('salário de benefício'). This is the part of an employee's salary on which employers' social security contributions are calculated. The rules for calculation depend on the nature of the benefits.

#### SICKNESS INSURANCE

Employers pay for an employee's salary during the first 15 days of sick leave. If the insured is unable to work after a 15-day absence, the benefit wage is paid to the insured by the INSS for the duration of the sick leave. This insurance may be converted into a disability pension.

#### OLD-AGE PENSION

This benefit is paid to men over 65 and women over 60, provided they have made at least 180 monthly contributions. For farm-workers, the age threshold drops to 60 years for males and 55 years for female workers.

#### RETIREMENT PENSION

Early retirement pension is granted if male employees have worked for 30 years or if female employees have done so for 25 years. The maximum pension is available after 35 years of service for men and 30 years for women.

### OTHER BENEFITS

Benefits include, among others, maternity, paternity, family-assistance for workers earning less than BRL 608.08, disability pension (calculated in a similar manner to the 13th month salary) and funeral insurance (only for workers under collective agreement).

### GOVERNMENT INSPECTION

Upon request, employers must submit to government inspectors all accounting records and other documentation to demonstrate compliance with social security rules.

### LABOUR UNION CONTRIBUTIONS

Employers' contributions are paid in January and are calculated on the basis of the registered capital of the company as per a progressive chart prepared by the labour union. Union contributions, amounting to one day's wages, are paid by all employees once a year; they are deducted from employees' salary in March.

### FOREIGN WORKERS

#### IMMIGRATION AND VISA REQUIREMENTS

All foreigners coming to work in Brazil must obtain a valid visa.

Generally, visas are issued to directors and employees of foreign companies, individuals establishing significant new investments in Brazil or to new transferees of foreign companies with existing operations in Brazil, where transferees have skills which are not available in the Brazilian labour market. In practice, the latter requirement is not rigidly applied. Therefore, sponsoring companies must obtain residence visas and work permits for expatriate personnel. Experience varies depending on the type of job position, the industry in which the company operates and the current labour policy.

Spouses of employees who enter on a temporary visa are not automatically entitled to a work permit. Work visas issued to foreigners are either temporary visas (valid for up to two years) or permanent visas (with no time restriction on residence). Temporary visas can be renewed for a further two years.

Permanent visas may be issued to directors of entities with at least BRL 600,000 (around USD 234,000) in equity investments or BRL 150,000 (around USD 58,500) and forming the creation of at least ten new jobs within two years of the company's establishment or entry of the foreign executive. These conditions apply for each single visa.

Some of the documents and information to be provided to the Ministry of Labour by companies established in Brazil who are wishing to employ foreigners include:

- The amount of registered capital of the local company
- Number of Brazilian and foreign employees in the local company
- Justification for the foreigner's employment
- Salary and benefits which are to be received by the foreign employee
- An employment contract
- Documents of the foreigner's academic and professional history (e.g., diplomas, proof of labour experience, CV)
- The foreigner's health certificate.

Two-thirds of employees of all companies must be Brazilian citizens, both in terms of numbers and total payroll. Exceptions may be made for skilled professionals and technicians in the event that Brazilians are not available for a particular position. Portuguese citizens as well as foreigners residing in Brazil for over ten years, who have a Brazilian spouse or child born in the country, qualify as Brazilian citizens for the above purposes. There is a debate as to whether this provision of the Labour Law Consolidation has been revoked by the federal constitution of 1988.

#### PERMANENT VISAS

Permanent working visas are generally granted only to applicants who will perform management activities as business-administrators, general managers or directors of Brazilian professional or business companies duly appointed as such in the company's articles of incorporation.

Brazilian companies basically have two options to formalise the recruitment of a foreigner with a permanent visa:

- 1) With an employment contract in which the company pays a monthly salary and will incur other labour charges derived from the inclusion of the foreigner in the Brazilian company's payroll
- 2) Without an employment contract, where the company will pay a 'pro labore' remuneration in Brazil.

#### TEMPORARY VISAS

Foreigners can work in Brazil with a temporary visa, either under an employment contract with a Brazilian entity or under a technical assistance agreement between a foreign entity and Brazilian company through which technical assistance is rendered in Brazil by foreign individuals who remain employees of the foreign company.

#### BUSINESS VISAS

Business visa holders are allowed to remain in Brazil for 90 days (renewable) and are only able to conduct business purposes which do not involve remuneration from a Brazilian entity.

#### SPLIT PAYROLL

Foreign employees who work for foreign corporations may receive part of their remuneration abroad. Brazilian income tax must be paid on total income on a worldwide basis. Visa issuance consequences must also be considered.

## 6 – TAXATION

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The Brazilian tax system is based on the principle of strict legality and its main principles are defined by the Federal Tax Code of 1966 and by the Federal Constitution of 1988.

Three jurisdictions and tax collection levels are defined by the tax legislation – the federal, state and municipal governments. There is a separation of jurisdictions and powers between the judiciary and administrative boards for the judgment of controversies. In this sense, a tax matter is usually analysed at the administrative level before the judiciary.

The federal tax system is managed by the Federal Revenue Secretariat ('Secretaria da Receita Federal' / SRF), which is part of the Ministry of the Exchequer ('Ministério da Fazenda'). States and municipalities have similar agencies.

### WORLD-WIDE SCOPE OF BRAZILIAN TAXATION

Brazilian companies are taxable on their worldwide profits and capital gains.

The origin of the capital is irrelevant, as is whether the investor is foreign or domestic. Foreign branches must pay tax in the same manner as resident entities.

### TAX YEAR

The Brazilian tax year is the calendar year, irrespective of the corporate year.

Annual income tax returns must be filed by the last business day of June. Income tax returns must also be filed in certain special events such as mergers, liquidations and spin-offs.

### FEDERAL CORPORATE INCOME TAXES

There are two federal income taxes in Brazil – a corporate income tax (IRPJ) and a social contribution tax on corporate profits (CSLL). They are charged on similar bases.

Profits, income and capital gains earned worldwide are subject to Brazilian corporate income taxes. There is no distinction made as to the origin of the capital (whether the investors are foreign or domestic).

Branches of foreign companies are in general taxed in the same manner as stand-alone subsidiaries. In principle, a company is considered resident in Brazil if it has been incorporated under Brazilian corporate law and is domiciled in Brazilian territory.

### CORPORATE INCOME TAX – 'IMPOSTO DE RENDA DE PESSOA JURÍDICA' / IRPJ

Brazilian corporate income tax is a federal tax charged on net taxable income. It applies a basic rate of 15% plus a surtax of 10% on annual income which exceeds BRL 240,000 per year or BRL 20,000 per month.

Income tax regulations in force are consolidated under Decree 3,000 of 26 March 1999. These regulations apply to all taxpayers. Only the federal government may charge income tax. Part of this tax is transferred to states and municipalities.

## SOCIAL CONTRIBUTION TAX ON PROFITS – ‘CONTRIBUIÇÃO SOCIAL SOBRE O LUCRO LÍQUIDO DAS PESSOAS JURÍDICAS’ / CSLL

This tax was introduced to fund social and welfare programs and is paid in addition to corporate income tax. It is also a federal tax levied on net taxable income and is applied at 9%. It is not deductible for corporate income tax purposes. Its base is similar to that of corporate income tax although some specific adjustments may be applicable to one tax and not to the other.

### METHODS OF CALCULATION

There are three methods to calculate corporate income tax and social contribution tax due on profits:

- 1) Actual profit
- 2) Presumed profit
- 3) Arbitrated profit.

### ACTUAL PROFIT SYSTEM

Under the actual profit system, the net taxable income corresponds to the company's net book profit, arrived at by applying Brazilian GAAP, adjusted by some inclusions and deductions as per Brazilian corporate taxes legislation. In this sense, under the actual profit system, companies are required to keep appropriate accounting records, an income tax book (LALUR) and supporting documentation and calculations in order to demonstrate the amount of taxes due.

Taxpayers on the actual profit system may choose to calculate taxes on a quarterly basis or on an annual basis. Such choice is made at the beginning of each calendar year and is valid for the entire fiscal year. Under the annual actual system, the taxable income is computed on an annual basis, but monthly advances during the year are required to be made on an estimated basis or an actual basis. The estimated base corresponds to the presumed profit tax base (commented on below).

The main exclusions from taxable income include dividends received from other Brazilian entities and related to profits generated as of 1996, and equity pick-up revenue from relevant investments in other companies (see ‘Accounting Practices’ in Brazil, below). The main inclusions relate to non-deductible accounting provisions and non-deductible expenses. Deductible expenses are generally all properly documented items relating to the ordinary business of the company and which are necessary to maintain its source of income. The following are some examples of rules related to deductibility of expenses for income tax purposes:

- Depreciation may be charged based on the useful life of related assets. There is a detailed list of assets published by tax authorities which contain accepted depreciation rates. Higher rates may be accepted if certain requirements are met. In cases where the company functions with two or three shifts, these rates may be increased by 50% and 100% respectively. Additionally, assets acquired under approved projects or eligible under certain income tax incentive programs may be depreciated at higher rates
- Deferred expenses – expenses which will benefit future years such as interest paid during the construction and pre-operational phase of a new plant, and expenditure on company reorganisation, should be deferred for future amortisation
- Start-up expenses should be deferred until the project is operational, at which time these expenses should be amortised over at least five years

- Technical assistance and royalty payments are tax-deductible subject to specific conditions and limits established by law, which among other things require the approval of the Federal Intellectual Property Agency (INPI)
- Fines are, in principle, not tax deductible.

#### TAX LOSSES

- Tax losses may be carried forward indefinitely. There is no statute of limitations
- Any offset is limited to a maximum of 30% of the annual taxable income
- No carry back of losses is allowed
- Non-operational losses may be carried forward, but they may only be utilised to offset non-operational profits (eg capital gains)
- Tax losses are lost if between their generation and their utilisation, cumulatively, there is a change in control and change in the type of activity performed by the taxpayer.

#### PRESUMED PROFIT SYSTEM

This system is available to many corporate entities. It has two advantages: firstly bookkeeping requirements are less stringent and secondly, if the actual profits of an entity are higher than calculated under the system, the company saves tax.

Corporate entities which may not choose to pay under the presumed profits system are:

- Those with annual income above BRL 48,000,000 (BRL 78,000,000 from January 2014)
- Commercial banks, investment banks, development banks, savings and lending organisations, credit, financing and investment organisations, real estate credit entities, securities or currency exchange houses, leasing companies, credit co-operatives, insurance companies and retirement plan bodies open to the public
- Those which receive profits, capital gains or income from abroad
- Those which benefit from tax incentives
- Those which paid tax under the estimated system during the same tax year
- Factoring entities.

Under the presumed system, tax authorities will presume the company made a profit of between 1.6% and 32%. The company's actual profit is irrelevant. Presumed profits are taxed at normal rates of 15% plus 10% on profits above BRL 240,000.

The tax basis for the Social Contribution on Profits (see below) is 12% of gross income or 32% in case of service companies. If a company wants to pay tax under this system, it must elect to do so by April of each tax year, only when there is payment of the due tax's first or single share relative to the first settlement period of each 'calendar-year'.

#### ARBITRATED SYSTEM

Under certain circumstances, such as inadequate or unreliable record keeping, tax authorities may arbitrate profits. This method is a type of punishment applicable in situations provided for by law. Income tax paid on arbitrated profit is definitive and cannot be offset against future payments. The arbitrated profit amount is similar to the presumed profit.

#### TAX AUDITS

Tax audits are performed by federal tax inspectors on a random basis.

The scope and frequency of auditing does not follow a set pattern. In general, the right of tax authorities to make corporate income tax assessments (statute of limitation for tax purposes) expires five years after the end of the tax year in which the tax return should have been filed. Administrative appeals against assessments must be filed within 30 days of assessment. If the assessment is upheld, the taxpayer may appeal to an administrative court. If still unsuccessful, the taxpayer can appeal to the judicial court.

### **PENALTIES AND FINES**

From 1995 onwards, tax credits and obligations are calculated in reais. The fine for overdue federal taxes is currently set at 0.33% per day up to 20% depending upon the period in arrears.

Interest on overdue federal taxes is charged at a floating rate (SELIC) plus 1%. Assessed tax deficiencies are subject to a 75% fine. If fraudulent intent is proven, the fine is increased up to 150%.

When business entities are in arrears with any federal taxes or social security contributions, they are prohibited from distributing bonus shares to their stockholders or from paying any profit participation to 'quota holders,' partners, directors, or members of the administrative council. In case of failure to comply with the restrictions, penalties apply.

### **DEDUCTIONS AND EXCLUSIONS**

There are a number of exclusions and deductions for taxable income.

Taxable income does not include:

- Dividend income from other Brazilian entities on profits earned after 1 January 1996
- Positive equity pick-up from investments in related companies.

Taxpayers may defer tax on income in some cases, such as:

- Income from the sale of fixed assets
- Income not yet received from long-term government contracts
- Income from the sale of real estate paid in instalments.

Deductible expenses are generally all items relating to the company's ordinary business, and which are necessary to maintain its source of income. The most important deductible items are:

- Credits in bankruptcy or those not honoured in a court-supervised composition with creditors
- Secured credits – after two years, if the taxpayer takes legal action to recover the credits
- Unsecured credits – these are limited to:
  - a) credits under BRL 5,000 if outstanding for over 6 months
  - b) credits between BRL 5,000–30,000, if outstanding for over one year and the taxpayer has taken administrative collection measures
  - c) credits over BRL 30,000, if outstanding for over one year and the taxpayer has taken legal action for collection

- Inventory – taxpayers must value inventory at actual cost using either ‘first in first out’ (FIFO) or average cost methods. ‘Last in first out’ (LIFO) is not acceptable, nor is standard cost unless the taxpayer adjusts it to actual cost. For companies without integrated costing systems, finished goods must be valued at 70% of the highest sales price during the year, and work in process at either 80% of the finished goods valuation or at 1.5 times the highest raw material cost during the year
- Cost of assets consumed in some production activities
- Depreciation – charged on the asset’s useful life. The annual rates are: buildings 4%, equipment 10% and passenger vehicles 20%. Where the company functions in two or three shifts, it may increase these rates by 50% and 100%, respectively. If the company bought assets under approved projects or income tax incentive programs, it may depreciate at twice the normal rates
- Fixed assets costing less than roughly USD 100
- Technical assistance and royalty payments – subject to conditions, such as INPI approval.

Non-deductible items include:

- Fines not inherent to the taxpayer’s trade or business
- Provision for estimated inventory obsolescence or price fluctuations.

Miscellaneous tax provisions include those where:

- Companies may defer and amortise expenditure benefiting future years such as for interest paid during the construction and pre-operational phase of new plants, and expenditure on company reorganisation
- Companies must capitalise taxes they have paid on buying fixed assets
- Companies may defer start-up expenses until the project is operational, when they should be amortised over at least 5 years.

## **TAXATION OF NON-CORPORATE ENTITIES**

### **PARTNERSHIPS WITH OSTENSIVE/SILENT PARTICIPATION**

These are not corporate entities. For corporate tax purposes, they have the same tax burden as any other local company.

### **CONSORTIA**

A consortium is not a taxpayer; profits are taxed in each of the participating companies.

### **GROUPS**

A parent company and its subsidiaries or affiliates may form a group by formal agreement to combine resources and efforts in order to achieve their objectives or to participate in a common enterprise. Transactions between companies in the group must be at fair market value to avoid disguised profit distribution issues.

Consolidation of accounts has no tax effect.

## **GROSS REVENUES TAXES**

### **PIS AND COFINS**

PIS and COFINS are federal taxes charged on a monthly basis on revenues, including income from financial transactions, under two regimes: cumulative and non-cumulative.

Historically, for most companies PIS and COFINS were charged at 0.65% and 3% respectively. They generated a harmful cascading effect because of the lack of a credit mechanism, thereby increasing the tax burden and the cost of products and services in Brazil.

New PIS tax provisions were implemented in December 2002 (MP 66/02 and Law 10,637/02). As a result, the PIS rate was increased from 0.65% to 1.65% and a credit mechanism was introduced. According to this new non-cumulative mechanism, in general taxpayers may recognise PIS credits corresponding to 1.65% over certain costs and expenses. Such credits may be used to offset PIS due on taxable revenue.

Later on, Law 10,833/03, enacted on 29 December 2003, introduced similar non-cumulative rules for COFINS. The tax rate also increased (from 3 to 7.6%) and COFINS tax credits corresponding to 7.6% on certain costs and expenses became available to offset tax due on monthly taxable revenue.

Thus, taxpayers under the non-cumulative system are subject to PIS at 1.65% and COFINS at 7.6% and are allowed to recognise tax credits for PIS and COFINS paid on certain inputs, which include:

- Products purchased for resale
- Goods and services used as inputs for services or manufacturing (excluding labour)
- Consumed electrical power
- Rental of real estate and fixed assets
- Acquisition of fixed assets
- Returned goods, if the corresponding revenue was included in the previous month's PIS and COFINS taxable bases.

Tax credits may be used to offset future PIS and COFINS due or other federal taxes provided certain requirements are observed.

PIS and COFINS non-cumulative regime is mandatory for companies subject to the actual profit method of computing corporate income taxes.

The former PIS and COFINS cumulative system remains applicable for certain entities, such as financial institutions and companies under the presumed profit system, among others. Entities subject to the cumulative system are subject, in general, to a 0.65% tax rate for PIS and 3% tax rate for COFINS and no credits are available. Financial institutions are subject to a 4% COFINS rate. Revenues related to export transactions are in general exempt from these taxes, as are revenues from the sale of permanent assets.

There are special PIS and COFINS regimes, where the taxes are charged at special rates. These apply only to certain industries or importers, for example, companies engaged in certain types of industries, such as automotive, auto parts, cosmetics, pharmaceutical, oil, beverages, packaging materials, energy and real estate, among others.

As of 1 May 2004, the import of goods and services became subject to PIS and COFINS at a combined rate of 9.25%. This new taxation and the 9.25% combined rate apply to taxpayers under both cumulative and non-cumulative regimes. In some cases, taxpayers may recognise PIS and COFINS credits on imports.

## INDIRECT TAXES

### IPI

IPI ('imposto sobre produtos industrializados') is a federal tax levied on the import and manufacture of goods. In many aspects, it operates like a valued-added tax and is charged on the value aggregated to the final merchandise. Each facility (branch) is considered a separate taxpayer for IPI tax purposes.

As a general rule, IPI paid on a prior transaction can be used to offset IPI liability arising from subsequent taxed operations. The applicable rate depends on the product and its classification under an IPI tax rates table (TIPI). Classification within TIPI generally follows the Brussels Harmonised Tax Codes. IPI also has a regulatory nature, because the executive powers may increase its rate at any time by decree as a way to implement financial and economic policies. Additionally, IPI rates can be higher for non-essential products such as cigarettes, perfumes, etc.

For imported products, the taxable event is customs clearance as well as the first exit of the product from the importer's facilities (generally the sale). For most products, IPI on imports is charged on the CIF (cost, insurance and freight) value to which certain customs expenses and import tax are added. For domestic transactions, in most cases, the taxable event is the exit of the manufactured product from the facility where it has been manufactured. IPI usually applies on the value of the transaction plus ICMS tax. Brazilian tax legislation defines manufacture as any process that modifies the nature, operation, finishing, presentation or purpose of a product, or that improves a product for consumption.

IPI taxpayers are entitled to an IPI tax credit equivalent to the tax paid upon acquisition of inputs to be used in the manufacturing process. This credit may be offset against IPI triggered by subsequent transactions. Under certain circumstances, excess IPI tax credits which cannot be offset against IPI due on subsequent transactions may be offset against other federal taxes. IPI does not apply on the sale of fixed assets, but some requirements must be observed.

### ICMS

ICMS is a state type of value-added tax levied on the import of products and certain transactions involving goods (including electricity), inter-municipal and inter-state transportation services and communication services.

In general, in transactions involving two different states (for the taxpayer's own tax), the rates are 7% (when the purchaser is located in the states of the North, North-east and Center-west regions or in Espírito Santo state) or 12% (for purchases located in the South-east and South regions). In the latter locations, there is an obligation always to pay the difference rate to the destination state when the operation involves an acquirer's self-use product. When the goods are intended for a non-taxpaying consumer from another state, the internal rate applies only to the goods' home state. For transactions within the same state and in the case of imports, the rates may be 17% or 18%. The 19% rate is applicable for the state of Rio de Janeiro; 18% is applicable for the states of São Paulo, Paraná and Minas Gerais; and 17% is applicable for the remaining states.

Sales of automobiles, communications services and electricity are subject to 25% ICMS. On imports, in general, the ICMS tax base is equal to the CIF value, to which the applicable import tax, IPI, certain customs expenses, the ICMS itself and the PIS and COFINS due on import are added.

ICMS is also due either when a product is resold in the domestic market or when it is physically removed from a manufacturing facility. The taxable base is equal to the value of the transaction, including the ICMS itself (gross-up), insurance, freight and conditional discounts. IPI must also be added to the ICMS tax base when the transaction is carried out between non-ICMS taxpayers or when it involves a product which will not be further manufactured or resold (eg fixed assets).

As with the IPI, each branch of a company is considered a separate taxpayer for ICMS tax purposes. In general, ICMS taxpayers are entitled to a tax credit for the amount of the tax paid in the previous transaction with the same asset (inputs), provided the purchaser is an ICMS taxpayer with respect to that product (ie that subsequent transactions with the purchased product are also subject to ICMS). The tax credit may be offset against future ICMS payables. If the purchaser is not an ICMS taxpayer, and depending on whether its sales are subject to this tax, ICMS may become a cost and will not be recoverable as a credit.

### ISS

ISS is a municipal tax levied on the revenues derived from the provision of services. Although a municipal tax, services subject to ISS are listed in a federal law ('Lei Complementar' 116/03).

The tax base is the price of the service and rates varying from 2–5% according to the municipality where the service provider is located, where the service is provided and also the type of the service.

For most services, there is a significant debate as to whether the ISS should be paid to the municipality where the service provider is located or where the service is performed. The taxpayer is, in principle, the service provider. However, municipal tax legislation may impose a withholding responsibility to the company hiring the services.

As of January 2004, ISS also applies on the import of services. Brazilian companies retaining services are obliged to withhold the tax on service fees paid to a non-resident.

'Lei Complementar' 116/03 introduced an ISS exemption to certain exports of services.

When the provision of the service also involves the provision of goods, ISS applies on the total price of the service, except when there is a specific provision determining the applicability of ICMS on the value of the goods.

## OTHER FEDERAL TAXES

### WITHHOLDING INCOME TAX

Withholding income tax applies on certain domestic transactions, such as payment of fees to some service providers, payment of salary and financial income resulting from banking investments. In most cases the withholding tax is a prepayment of the income tax on the individual or entity's final tax return. However, in some cases it is considered a final taxation. Also, withholding income tax is due on most non-residents' income which has a Brazilian source of payment (eg royalties, service fees, capital gains, interest, etc).

According to Brazilian tax law, withholding tax is due upon payment, credit, delivery, utilisation or remittance of funds, whichever occurs first. Rates depend upon the nature of the payment, on the residence of the beneficiary and on the existence of tax treaties between Brazil and the country where the beneficiary is located. Most common rates range from 15–25%. As a general rule, income paid to beneficiaries located in low tax jurisdictions is subject to 25% withholding tax.

### CIDE

CIDE is a special contribution levied on payments due to non-residents in the form of royalties, technical services and technical assistance, among others, at a rate of 10%. Note that, unlike the withholding tax, CIDE is a tax imposed on the Brazilian payer of the fees and, therefore, may not be reduced by tax treaties and does not generate a tax credit abroad.

There is a limited tax credit granted to a Brazilian entity for CIDE paid on royalties for use of trademarks or trade names which reduces the tax's effective rate.

'CIDE Combustível' is another special contribution levied on the import and sale of oil and gas-related products and ethylic alcohol. The manufacturer, the formulator and importers are taxpayers of 'CIDE Combustível' according to Law 10,336/01.

### IOF

IOF is a federal tax levied on credit, exchange, insurance and securities transactions, executed through financial institutions. The tax also applies to gold transactions and includes inter-company loans. The tax rates can be raised by the government by decree and then become effective immediately.

The tax base varies according to the taxable event and the financial nature of the transaction. On loan transactions in Brazilian currency, IOF is levied on the average daily balance or on a transaction basis, at 0.0041% a day when the lender is a legal entity, limited to 1.5% on the loan proceeds for a loan maturing in 365 days.

IOF is levied at varying rates, depending on maturity terms and the type of transaction:

TYPE OF TRANSACTION	RANGE OF TAX RATE
Credit transactions	0–1.5% per day
Securities transactions	0–1.5% per day
Insurance transactions	0–25%
Exchange transactions	0–25%
Gold transactions	1% (payable on first sale transaction)

Currently the IOF tax rate is reduced to zero on most foreign exchange transactions, but it may be increased at any time.

#### ITR

ITR is an annual federal property tax levied on ownership or possession of real estate located outside urban areas. The tax basis varies according to value, size and location of real estate, and tax rates vary in accordance with land-use.

### OTHER STATE TAXES

#### ITCMD

ITCMD ('Imposto sobre transmissão 'causa mortis' e doação de quaisquer bens ou direitos') is a state tax which applies on the transfer of ownership of goods and rights upon 'causa mortis' (succession) and donations. Tax rates vary according to state legislation.

#### IPVA

IPVA ('imposto sobre a propriedade de veículos automotores') is a state tax levied on the ownership of motorised vehicles (cars, trucks, boats etc). The tax base is the value of the vehicle and rates vary according to state legislation.

### OTHER MUNICIPAL TAXES

#### IPTU

IPTU is an urban real estate property tax charged annually by municipalities based on the assessed value of the property (which may not correspond to a fair market value). Tax rates vary according to the municipality and location of the property. The IPTU taxpayer is the owner of the real estate, or the tenant if the property is leased and the agreement provides for that.

#### ITBI

ITBI is a real estate transfer tax charged at variable rates (from 2%–6%). This tax is usually not levied if real estate is transferred under a corporate reorganisation (eg mergers, spin-offs, capital contribution in kind, etc).

### ANTI-AVOIDANCE RULES

Brazilian tax legislation currently gives tax authorities the power to disregard, for tax purposes, any acts or transactions which are intended to reduce the amount of tax due, avoid or postpone the payment of a tax, or conceal aspects of a taxable event or the true nature of elements which give rise to such an event. However, such provisions are still pending administrative regulation in order to be fully effective from a legal perspective. Without court precedents on the subject, the only certainty at this point is that the rules are vague and unclear.

### TAX INCENTIVES

A wide range of government incentives is available for start-up projects in Brazil. Generally speaking, international investors have equal access to these incentives and are given equal treatment when compared with local investors.

Use of government incentives is a significant feature of the Brazilian business environment. Usually, incentives take the form of subsidised loan financing and of tax exemptions or reductions, rather than cash grants.

#### LOCAL, STATE, AND FEDERAL INCENTIVES

Federal government incentive programs are designed to promote domestic policy objectives, including the growth of exports and capitalisation of domestic private industry, whereas state and local incentive programs are directed toward specific objectives such as increasing local employment opportunities.

State and local governments commonly use an exemption or deferral of indirect and property taxes which they are entitled to levy, and provide assistance to potential investors in obtaining access to available federal programs. Thus, a company which has decided to establish a new plant for export production and which is eligible for federal programs will seek the best available package of local incentives when deciding where to locate a plant.

#### FREQUENCY OF REVISIONS

Brazilian government incentive programs are subject to frequent revisions, both in relation to their basic approach and the specific categories and rates of tax incentives granted. Accordingly, companies planning to avail themselves of incentive programs should, as a first step, obtain the latest available information.

#### CAPITAL GRANTS

Governments do not give cash grants to reduce initial outlays on industrial buildings and equipment. Exceptionally, capital grants in the form of land can be obtained from local governments and are often provided through state development agencies.

#### LOW COST FINANCE

There are various government incentive programs providing low-cost finance. In former years, Brazil experienced chronic inflation and even presently continues to have some of the highest rates of banking interest. Under these circumstances, subsidised rate financing has for a long time been very important to certain sectors of the Brazilian economy, and has formed the basis for the expansion and modernisation of Brazilian agriculture.

#### REGIONAL AND INDUSTRY INCENTIVE PROGRAMS

Various concessions are offered to encourage economic development in Brazil, either on a regional or industry basis, by offering taxpayers the opportunity to invest part of their tax liability and also by granting the fiscal incentives for approved investments, which are subsequently listed.

#### ADA AND ADENE

Until 2023, companies located in the north-east region and the Amazon region may benefit from certain tax incentives. ADA, a federal agency formerly known as SUDAM, oversees development in the Amazon region. The region encompasses the states of Acre, Pará, Roraima, Rondônia, Amapá, Amazonas, Tocantins, Mato Grosso, Mato Grosso do Sul, Goiás and part of Maranhão.

ADENE is a federal agency, formerly known as SUDENE, which oversees development in the north-east region. The geographical definition of the north-east encompasses the states of Maranhão, Piauí, Ceará, Rio Grande do Norte, Paraíba, Pernambuco, Alagoas, Sergipe, Bahia and the semi-arid region in the north-eastern part of the state of Minas Gerais.

Eligibility for concessions depends on ADA/ADENE's approval of an industrial project or a project for the expansion of an existing industry. ADA/ADENE not only evaluate the project in terms of its technical and economic feasibility, but also verify whether the project is appropriate within the overall economic development of the region.

Benefits are available for companies which have set-up, modernisation, extension and diversification projects in the region. The main benefit is in a reduction of income tax due on tax-benefited income ('lucro da exploração') at a 25% rate up to 31 December 2008 and at a 12.5% rate from 1 January 2009 through to 31 December 2013.

Also, companies that have their projects approved for set-up, modernisation, extension and diversification of businesses and are recognised as priority for regional development may benefit from a 75% reduction of income tax during a 10-year period (the project must be presented and approved by 2013). Such companies may also benefit from up-front depreciation for certain new equipment acquired between 2006 and 2013, as well as accelerated PIS and COFINS tax credits, provided that the company is located in specific low-development regions ('micro-regiões'). It is important to note that the tax liability investments above are considered local currency investments and therefore any related profits do not qualify for remittances abroad.

'Lucro da exploração' is based on the net profit for the fiscal period before the deduction of the provision for income tax, reduced by the following main adjustments:

- The portion of financial income which exceeds financial expenses
- Revenues and losses related to shareholders' interest
- Non-operating income
- Foreign-based income.

In addition to the above, the investment incentive plan may include the following tax benefits:

- Exemption from federal taxation on imported equipment used in new industries established in the region
- Eligibility to receive tax-related investments from other companies
- Government loans or loan guarantees from the Bank of North-eastern Brazil (BNB) or the federal National Development Bank (BNDES)
- New investments may also receive a partial exemption from state taxes (normally from 15% to 100%).

#### PPB

The PPB (minimum manufacturing process) benefit is usually applicable to Brazilian companies engaged in the manufacture and sales of products and services related to specific types of technology (such as information technology and automatisation). The incentive was initially addressed to the computer industry and was later expanded to include a wider range of electronic products and telecommunication equipment.

PPB benefit is granted to Brazilian companies which have a PPB project approved by the Ministry of Technology and Science and which annually invest a percentage (limited to 5%) of their gross revenue derived from the sale of technology related goods and services into R&D in the country. The percentage varies per year. The benefits are basically related to IPI and ICMS. A reduction of IPI tax due is granted as follows:

- 75% until December 2005
- 70% January 2006–December 2009
- After 2009, the benefit is extinguished

In the case of ICMS, the benefits vary according to the state involved. The benefit may relate to a reduction of the ICMS rate for intrastate transactions, a deferral or exemption of ICMS due or a special credit ('crédito outorgado').

### MANAUS DUTY FREE ZONE

Manaus is the capital of the Amazon state at the junction of the Amazon River and Rio Negro. The city is home to over 600 industries, which are eligible for tax incentives offered under its duty-free zone regime, designed to foster the development of the Amazon region. A company operating in Manaus is eligible for the following tax incentives:

- Income tax – a reduction of corporate income tax (excluding the social contribution tax on profits). The tax reduction must be booked as a capital reserve ('lucro da exploração') and cannot be distributed as dividend
- Import duties – a deferral of import duties until products leave the duty free zone. If the imported product is used in a manufacturing process within the free zone, the law grants a reduction of import duties
- Excise taxes (IPI) – there is an IPI exemption on the import of products which remain in the duty free zone and for products manufactured within the duty free zone provided that companies employ local labour, incorporate new technologies into their production process, increase levels of productivity and reinvest profits in the region
- Sales tax (ICMS) – the law grants a presumed tax credit on the purchase of products from other states in Brazil and an exemption of ICMS paid on imports for some industries.

### TECHNOLOGY INCENTIVES

Law 11,196/05 and Decree 5,798/06 provide for various tax benefits for the high-tech industry with the purpose of fostering research and development and technological advances. Tax benefits include:

- Accelerated and boosted depreciation in the acquisition of new equipment
- IPI tax reduction and accelerated and boosted depreciation for certain equipment
- Accelerated amortisation for certain intangibles and R&D expenses
- Tax credits on withholding tax on royalty payments for the licence of technology until 2013
- Withholding tax exemption on fees for maintenance of trademark and patent registrations.

## RECAP – EXPORT COMPANIES

According to Law 11,196/05, under the RECAP regime ('Regime especial de aquisição de bens de capital para empresas exportadoras'), companies which pay PIS and COFINS under the non-cumulative regime, and with export revenues greater than 80% of their annual sales for the previous calendar year, may qualify for a PIS and COFINS exemption on acquired capital goods for a three-year period which begins after the approval of the benefit.

## INTERNATIONAL TAX MATTERS

### PERMANENT ESTABLISHMENT

In general, only companies incorporated in Brazil are subject to taxation as residents. In principle, Brazilian companies must register for tax purposes, but irregular companies which carry out taxable activities in the country are also subject to taxation.

Contrary to the international mainstream, Brazilian tax law does not contain the 'permanent establishment' concept and does not provide clear guidance regarding the potential tax impacts of having foreign entities carrying out business in Brazil. There is a lack of guidance from tax authorities and we are aware of only a few administrative precedents (tax assessments) on the matter. This is possibly because, in certain cases, the tax burden on a non-residents' income is even higher than that of the residents' taxation under a permanent establishment. While residents' corporate profits are taxed at a combined 34% rate, gross non-resident service fees are taxed in general at 25% (withholding income tax and CIDE, if applicable). Also, the new Brazilian civil code prohibits foreign entities operating in Brazil without authorisation. In principle, authorisation is granted by means of investment in Brazil or by setting up of a branch, which is taxable in Brazil in the same manner as a Brazilian legal entity.

Nevertheless, the following situations may potentially generate a taxable presence in Brazil and, therefore, it is recommended that an analysis is conducted on any specific activities which would be carried out in Brazil to assess eventual risks:

- De facto branch – when the foreign company has an unregistered branch or office
- Consignment – where sales are made under consignment and proper accounting records are not kept by the consignee in Brazil
- Binding agent – if sales are made in Brazil through a resident agent or representative of a foreign company who has the power to bind the company to a contract and habitually exercises it.

### THIN CAPITALISATION RULES

The main innovation of Provisional Measure 472 (MP 472, introduced in December 2009) is the introduction of so-called 'thin capitalisation' or 'sub-capitalisation rules' (articles 24 and 25), which are nothing more than the imposition of limits on companies' capitalisation by means of a loan agreement with its partners, instead of the contribution of funds in the form of equity. This puts a limit on the deduction of interest payments to related parties abroad, as defined by transfer pricing legislation.

The rules for beneficiaries established in regular tax jurisdictions are as follows:

- A debt equity ratio of 2:1
- Debt held by each related party should not exceed two times the net equity of the Brazilian company held by such a related party

- Total debt held by all related parties should not exceed the total net equity of the Brazilian company held by all related parties.

Rules for beneficiaries established in low tax jurisdictions or subject to privileged tax regimes (as defined by Articles 24 and 24-A of Law 9,430/96), regardless of any effective equity participation held by the foreign party in the Brazilian entity are as follows:

- A debt equity ratio of 0.3:1
- Debt held by each party established in a low tax jurisdiction or subject to a privileged tax regime should not exceed 30% of the net equity of the Brazilian company
- Total debt held by all parties established in a low tax jurisdiction or subject to a privileged tax regime should not exceed 30% of the net equity of the Brazilian company
- The concept of debt in principle includes all types of financing transactions and also transactions with third parties where a related party acts as guarantor, attorney in fact or as an intervening party.

Therefore, if the loan, on the date of payment of interest, exceeds the above-mentioned limits, the value of interest regarding the exceeding portion is non-deductible and must be added to the calculation basis of IRPJ and CSLL.

#### TAX TREATIES

Brazil has signed double taxation treaties with various countries. The main method of tax relief under the treaties is foreign tax credit. Existing treaties offer very limited opportunities to reduce or eliminate withholding taxes on payments abroad. Additionally, tax-sparing clauses are found in most treaties in force.

Brazil has double-taxation treaties with the following countries:

- Argentina, Austria, Belgium, Canada, Chile, China, South Korea, Denmark, Ecuador, Spain, the Philippines, Finland, France, the Netherlands, Hungary, India, Israel, Italy, Japan, Luxembourg, Norway, Portugal, Paraguay, the Czech Republic, Slovakia, Sweden and Ukraine
- Treaties with Mexico, Venezuela, South Africa and Russia have been executed but are pending final approval from the National Congress
- Brazil used to have a treaty with Germany, but it was renounced by Germany in 2006.
  - The official German reason given for the cancellation is the existence of numerous provisions which would work only on a one-sided basis and which are no longer in line with German treaty policy and treaty practice, even with regard to developing countries. The treaty would also no longer offer the necessary legal protection for the German economy.

In fact, significant debate exists on two treaty-related issues:

- 1) Whether Brazilian transfer pricing rules, which are not OECD-based, would be against Associated Enterprises provisions of the treaty
- 2) Whether the interpretation of Brazilian tax authorities is correct in the sense that Brazilian withholding tax may be imposed on service fees, because these would fall under 'Other Income' and not the 'Business Profits' article.

#### WITHHOLDING TAX RATES

The following are the main withholding tax rates applicable to payments for non-residents:

- Interest – 15%

- Interest on equity – 15%
- Royalties – 15%
- Technical service fees – 15%
- Non-technical service fees – 25%
- Lease and rental fees – 15%

The following are currently not subject to withholding tax (some requirements may apply):

- Dividends (if related to post-1995 profits)
- Interest and commission on export financing
- Interest and commission on export notes
- Export commissions
- Interest on certain government bonds
- Rental fees of aircraft and ships
- Sea and air charter, demurrage, container and freight payments to foreign companies
- International hedging
- Fees for registration and maintenance of patents and trademarks.

#### LOW-TAX JURISDICTIONS

In most cases, remittances to beneficiaries located in the listed low-tax jurisdictions are subject to a 25% withholding tax rate.

Listed jurisdictions are: Andorra, Alderney (Channel Island), American Samoa and Western Samoa, American Virgin Islands, Anguilla, Antigua and Barbuda, Aruba, Bahamas, Bahrain, Barbados, Campione d'Italia, Belize, Bermuda, British Virgin Islands, Cayman Islands, Cook Islands, Costa Rica, Cyprus, Djibouti, Dominica, Eastern Samoa, Guernsey, Gibraltar, Granada, Grenadines, Hong Kong, Isle of Man, Jersey, Labuan, Lebanon, Liberia, Liechtenstein, Luxembourg (with respect to the 1929 Holdings), Macau, Madeira Island, Maldives, Malta, Marshall Islands, Mauritius Islands, Montserrat, Monaco, Nauru, Nevis, Netherlands Antilles, Niue, Oman, Panama, Saint Kitts, Saint Vincent, San Marino, Saint Lucia, Sark, Seychelles, Singapore, Tonga, Turks and Caicos Islands, United Arab Emirates and Vanuatu. New jurisdictions may be included in the list at any time.

#### INTEREST ON EQUITY

In addition to dividends, Brazilian subsidiaries may also pay interest on equity to their shareholders. Interest on equity is a hybrid instrument, considered deductible for Brazilian tax purposes while considered as remuneration for the investor based on shareholder's net equity.

In general terms, interest on equity is calculated by applying the daily pro rata variation of the government's long-term interest rate (TJLP) on the Brazilian entity's adjusted equity, considering all equity variations which occurred during the year. Interest on any equity deduction is limited to whichever is the higher – the 50% of the payer's retained earnings or 50% of the payer's current profits, with some adjustments. Nevertheless, although not clearly stated in the law, the Central Bank does not accept remittances of interest on equity based on current profits when the company has accumulated losses in the prior year's balance sheet (to December 31). It normally requires the offset of accumulated losses first.

Interest on equity is subject to 15% withholding tax on the date it is paid or credited to the recipient. On the other hand, the local payer is allowed to deduct interest on equity paid or credited to resident or non-resident shareholders as remuneration on their capital investment for corporate income tax and social contribution tax on profits. Furthermore, when the shareholder is a resident entity, withholding tax becomes a tax credit. Therefore, consideration shall be also given to the tax treatment applicable to equity on interest in the jurisdiction of residency of the foreign beneficiary (whether the income is taxable, whether Brazilian withholding tax is creditable, etc.) as there may be significant tax opportunities in paying interest on equity.

### ROYALTIES

Withholding tax is levied on royalty payments at a standard rate of 15% or at the applicable treaty rate. Royalty payments are also subject to CIDE (contribution for intervention in the economy) at 10%. CIDE is not a withholding tax. It is charged to the entity which pays the royalties. CIDE generates a partial tax credit in the case of royalties for trademarks and patents.

There is a discussion as to whether royalties are also subject to PIS and COFINS (federal taxes on imported goods and services) and ISS (municipal tax on imported services). Royalties for trademarks, patents and know-how, as well as other agreements involving the transfer of technology (specialised technical services and technical assistance) are subject to specific requirements for both remittances abroad and deductibility. Agreements must be registered with the Central Bank and INPI (Federal Intellectual Property Agency).

Royalties are limited to certain global and individual limits based on the net revenue. For example, royalties for trademarks are limited to 1% of net revenue and royalties for patents are limited to a percentage of net revenue which varies according to the type of industry (from 1%–5%). Collectively, they may not exceed 5%. However, as there are specific tax deduction limitations, they are in principle not subject to Brazilian transfer pricing rules.

### SERVICE FEES

Different taxation rules apply to service fees depending on whether services are considered technical or non-technical. There is no clear definition in Brazilian legislation for technical and non-technical services. However, in recent withholding tax regulations, tax authorities described technical services as work or enterprise whose performance requires specialised technical knowledge and that is rendered by independent professionals ('profissionais liberais') or artists.

Non-technical services are subject to a 25% withholding tax and technical services are subject to a 15% withholding tax and also to CIDE at a 10% rate. Both technical and non-technical services are subject to PIS and COFINS (federal taxes on imported goods and services) and ISS (the municipal tax on imported services). PIS and COFINS rates are 1.65% and 7.6% respectively.

Transfer pricing rules must be observed if fees are to be paid to related parties as well as general tax deductibility requirements, such as evidence of work performed, formal agreements, etc. In cases where services involve the transfer of technology, specific requirements may apply for remittances abroad and tax deductibility as mentioned in the Royalties section above.

## CAPITAL GAINS

In cases where a non-resident sells an asset located in Brazil, including shares in a Brazilian company, capital gains will be subject to Brazilian withholding tax at 15% (25% if the seller is located in a listed low-tax jurisdiction).

Transactions between two non-residents used to be tax-free in Brazil. However, since 2001 these transactions are also taxed in Brazil if they involve assets located in the country. The representative of the non-resident buyer is responsible for withholding and paying Brazilian tax on capital gains.

Capital gains correspond to the difference between the value of a transaction (eg sales price) and the cost of an investment. However, there are two possible methods to compute the costs of shares which often lead to the determination of different costs of acquisitions and thus a different amount of capital gains. One method considers as the cost of acquisition the amount of the historical investment made in local currency, with an adjustment for inflation made up to 31 December 1995. Under the other method, the cost should be equal to the foreign capital registered with the Central Bank (RDE-IED). There is significant discussion about which method is the correct one. Therefore, proper discussions and analysis of this subject is recommended before disposing of or acquiring shares in a Brazilian entity.

## TAXATION ON FOREIGN PROFITS (CFC RULES)

Brazilian-controlled foreign company rules are relatively new, with some provisions which are distant from concepts and provisions present in the CFC legislation of other countries. Profits generated by a foreign subsidiary or branch must be included in the December 31 financial statements of the Brazilian company in the year when the profits are earned, regardless of an effective dividend or profit distribution. Profits would also be considered taxable for Brazilian tax purposes before December 31 in other circumstances (eg liquidation of the Brazilian company).

Brazilian tax law provides that the subsidiary's financial statements must be prepared according to its local commercial legislation and translated into Brazilian currency.

Consolidation of profits and losses of foreign companies, in principle, would not be authorised for Brazilian tax purposes. Foreign profits earned by the Brazilian entity through its subsidiaries must be considered on a per subsidiary basis. However, the foreign subsidiary must consolidate in its financial statements the results of its foreign subsidiaries (second and further tiers). On the other hand, the losses made by the Brazilian entity through a foreign company may not be used to offset Brazilian profits. Nevertheless, regulations allow for the offsetting of such losses against future profits of the same subsidiary, without quantitative or qualitative limitations.

Lastly, it is important to mention that in cases where foreign profits are subject to income tax in the country of the foreign company, the Brazilian parent company would be entitled to a tax credit in Brazil. However, this credit and the corresponding offsetting are subject to certain limitations. The actual profit method ('lucro real') for computing corporate taxes is mandatory for Brazilian companies which hold investments abroad.

## INVESTMENTS IN FINANCIAL AND CAPITAL MARKETS BY NON-RESIDENTS

With respect to Brazilian taxation, revenues earned by foreign investors and derived from investments in financial markets, are subject to withholding income tax. Applicable rates are:

- 10% for investments in stock funds, swap operations and future market operations performed outside stock or mercantile exchange markets
- 15% for other cases, including fixed income investments
- 0% for capital gains, defined as positive earnings associated with stock, commodities and other similar exchange market transactions, and for gold traded outside commodity exchange markets, earned and distributed by these foreign investment funds, as well as for:
  - Income from Brazilian Federal Government bonds acquired as of 16 February 2006, except for income generated by bonds with a resale clause assumed by the acquirer (locally, this operation is called a ‘Repo or repurchase operation’)
  - Mutual funds in cases where the portfolio of this mutual fund is composed of at least 98% in Federal Government bonds
  - Investments in Partnership investment funds (‘fundo de investimentos em participações’) and emerging company investment funds (‘fundo de investimentos em empresas emergentes’) and funds which invest in quotas of these funds (though the 0% rate is applicable only if the investor and funds comply with certain rules).

If the foreign investor does not invest through the provisions of ‘Resolução’ 2,690/00, or if the investor is domiciled in a low tax jurisdiction, income derived from investments in the Brazilian financial market is subject to taxation in the same way as investments by residents of Brazil and again when they are remitted abroad. An exemption is granted if the non-resident investor remits funds in order to invest exclusively in stocks traded on stock exchanges.

IOF tax on investments in fixed rated securities is due on the value of redemption of fixed income securities (including mutual funds) at a maximum rate of 1% per day, limited to the income generated by the investment. This tax is levied in accordance with a table which decreases according to the term of investment, from 96%–0% (limited to the total income earned), meaning that no IOF tax is levied on investments with a term longer than 30 days.

## TAXATION OF INDIVIDUALS

### TAX RATES

Brazilian companies making payments to individuals must withhold personal income tax on a monthly basis in accordance with a progressive tax rate table (see below).

### ALLOWANCES AND DEDUCTIONS

The following deductions from taxable income, among others, are allowed:

- Dependents – up to BRL 164.56/month per dependent
- Social security contributions (INSS)
- Alimony payments made in accordance with a divorce ruling issued by a Brazilian court
- Education expenses – up to BRL 3,091.35/per year per dependent
- Non-reimbursed medical and dental expenses
- Contributions to Brazilian private pension plans (limited to 12% of annual taxable income).

Education and medical expenses, as well as private pension plan contributions, may only be deducted from taxable income in annual income tax returns; they are not considered in monthly withholding tax calculations. When preparing annual personal income tax returns, most taxpayers elect to recognise tax deductions either:

- a) According to actual expenses, observing limitations set out in regulations
- b) Based on a presumed deduction method (deduction equivalent to 20% of taxable income limited to BRL 11,167.20).

### FOREIGN INCOME ('CARNÊ-LEÃO')

The withholding tax mechanism only applies to payments made by Brazilian companies to individuals. Tax due on foreign income is calculated in accordance with the same progressive table, but the individual (or service provider) must compute and pay the tax through a regime called 'carnê-leão'.

### PROGRESSIVE PERSONAL INCOME TAX TABLE

MONTHLY INCOME	TAX RATE
Up to BRL 1.710,78	Exempt
Between BRL 1.710,79 - 2.563,91	7.5%
Between BRL 2.563,92 - 3.418,59	15.0%
Between BRL 3.418,60 - 4.271,59	22.5%
Above BRL 4.271,59	27.5%

The deadline for reporting foreign income and for payment of the corresponding tax is the last working day of the month following the month when income was received. Foreign tax credits can in general be used to offset Brazilian tax liability.

### ANNUAL INCOME TAX RETURN

An annual income tax return must be filed by the last working day of April, reporting income earned in the previous calendar year (1 January 1 – 31 December). All Brazilian tax residents are required to disclose their worldwide personal assets and liabilities held as of 31 December of each year. Although part of the filing obligation, there is no tax assessed on the gross or net assets of a fiscal resident.

### TAXATION OF CAPITAL GAINS

Real estate capital gains are taxable at a 15% rate. For Brazilian residents, the amount of such gains is reduced 5% for each year that the property was held prior to 1989. Capital gains are exempt from taxation if a similar transaction has not occurred within the previous five years, if the residential real estate is sold for a price lower than or equal to BRL 440,000 and if the individual does not own other real estate. There is also an exemption if taxpayers use the sales proceeds to purchase another real estate within the following 6 months.

Capital gains from sale of stock negotiated on the Brazilian stock exchange are exempt from tax if proceeds are lower than BRL 20,000 in a particular month. If proceeds from sales in a particular month exceed this amount, capital gains are subject either to a 15% or a 20% tax rate.

Capital losses may be used to offset capital gains on a monthly basis. Any unused losses may be carried forward. Capital gains from stock not negotiated on the Brazilian stock exchange are subject to a tax rate of 15% if the proceeds in a particular month exceed BRL 35,000. Capital losses may not be used to offset capital gains.

Capital gains on the sale of all other personal property held inside or outside Brazil are subject to a 15% tax rate if proceeds exceed BRL 35,000 in a particular month. Tax on all type of capital gains must be paid by the last day of the month following the month of sale. Gains from sale of foreign stock or personal property acquired prior to becoming a Brazilian resident are not taxable.

#### FOREIGN NATIONALS

Foreign nationals with permanent visas and those with temporary visas with employment contracts with a Brazilian company are considered residents for tax purposes in Brazil (and thus subject to local taxation) from the moment of entry into the country. Temporary visa holders are considered residents for tax purposes from the 184th day of stay in the country within a 12-month period.

Residents of Brazil, whether a Brazilian or foreign national, are subject to tax on their worldwide income. Individuals reporting foreign income received may recognise a foreign tax credit for the respective taxes paid, provided there is a tax treaty or a reciprocity agreement in place between Brazil and the particular foreign country. The credit taken must be net of any refund and supported by original documents evidencing payment to the foreign taxing jurisdiction.

Income subject to tax includes all monetary compensation and fringe benefits. For foreigners working in Brazil this includes, among others, the cost of travel for family and allowances for housing, education, automobiles, medical care and other living expenses. In addition, any reimbursement of taxes paid is included in taxable income. Non-monetary fringe benefits, such as use of a company car or country club membership, are also included in taxable income. No distinction is made between personal expenses reimbursed by the company to the employee and personal expenses paid directly to a third party by the company. Moving allowances are generally non-taxable but in certain cases may be treated differently.

Upon departure from Brazil, a fiscal resident must report his income and pay any taxes until that date. The taxpayer must file a final income tax return and obtain a tax clearance certificate (granting non-resident tax status) that will enable him to request Central Bank permission to repatriate all assets held in local currency, provided these assets have been properly reported in the annual tax returns.

## 7 – ACCOUNTING & REPORTING

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Accounting practices in Brazil are governed by the Corporation's Law (Law 6,404/76 and 11.638/07) and regulations from the Brazilian Securities Commission ('Comissão de Valores Mobiliários' / CVM) for publicly held companies.

There are two accounting frameworks in Brazil: one stated by the Corporations' Law and one stated by the Federal Council of Accountants ('Conselho Federal de Contabilidade' / CFC). The Brazilian Institute of Independent Auditors ('Instituto dos Auditores Independentes do Brasil' – IBRACON) also publishes its interpretations of generally accepted accounting principles in Brazil, which have been endorsed by the CVM and CFC. All companies are required to prepare financial statements in accordance with the Corporations' Law. CFC and IBRACON accounting principles, which represent a separate accounting framework, may also be required to be applied in the preparation of financial statements, depending on the company's specific circumstances.

Brazilian companies are required to prepare annual financial statements which include a balance sheet, income statement, statement of retained earnings (usually included in a statement of shareholders' equity), statement of changes in financial position and notes to the financial statements. For publicly-held companies and financial institutions, two-year comparative financial statements must be published in the Official Gazette and in at least one major newspaper. Publicly-held companies with investments in subsidiaries must also prepare and publish consolidated financial statements (in addition to their own financial statements). Companies subject to the supervision of the Brazilian Securities Commission (CVM) must also submit their audited financial statements to the CVM. In cases where the company is engaged in a regulated activity (such as financial institutions, pension funds, or insurance companies), audited financial statements must also be submitted to the Central Bank of Brazil, SPC (Agency of Complementary Social Benefits) or SUSEP (Superintendence of Private Insurance).

### COMPREHENSIVE ADJUSTMENT FOR INFLATION

For many years, Brazil's economy had high inflation rates and as a consequence, an adjustment for inflation was required on the contracts and financial statements of companies in order to correct financial distortions. However, since 1997, as the three-year cumulative inflation rate fell below 100%, Brazil is no longer considered a hyperinflationary country, according to international accounting standards. Therefore, in this regard, since 1996 adjustment for inflation on financial statements is no longer adopted.

### BRAZILIAN GENERALLY ACCEPTED ACCOUNTING PRACTICES (GAAP)

#### ACCRUAL BASIS

The accrual basis of accounting is mandatory, unless specific regulation states otherwise.

#### EQUITY ACCOUNTING METHOD

Equity accounting is a method of accounting whereby investment in a subsidiary is initially recognised at cost, however adjusted thereafter for post-acquisition changes in the investor's participation in the subsidiary's net equity. According to Brazilian GAAP, the following investments, if relevant, must be evaluated according to the net equity method:

- Investments in controlled entities ('controladas') – an entity is considered controlled if the controlling entity, directly or through other subsidiaries, holds ownership interest which gives it preponderance in corporate decisions and the power to elect the majority of managers.
- Investments in affiliated entities ('coligadas') – an entity is considered affiliated to another when it has management influence or holds 20% or more of the subsidiary's share capital.

An investment is relevant if the individual investment is equal to or higher than 10% of the net equity of the investor; or all investments in controlled or affiliated entities together are equal to, or higher than 15% of the net equity of the investor. It is important to mention that an affiliated company for these purposes is an investee in whom the investor holds 10% or more of the share capital, without management control. An investee is equivalent to an affiliate when:

- The investor retains 10% or more of voting shares without control, independently of participation in total capital (considered as affiliated by the CVM)
- The investor directly retains 10% of share capital, without management control.

The equity accounting method is used for the valuation of the relevant investment in each associate and/or its equivalent. In other words, the equity method is required in case the investor has effective influence in the management of the investee, or if it retains directly or indirectly more than 20% of participation in shareholding control.

#### INVESTMENTS OTHER THAN EQUITY BASIS

Investments in unrelated companies must be evaluated according to the cost method, less eventual provisions for losses in value, in cases where this is considered to be a permanent investment.

#### SPECIAL PURPOSE ENTITIES

Brazilian accounting rules determine that participation in Special Purpose Entities (SPE) should be evaluated by the equity method. The consolidated financial statements of publicly-held companies should include, in addition to the subsidiaries, individually or jointly, the SPE, when the essence of their relationship with the publicly-held company indicates that the activities of these entities are controlled, directly or indirectly, individually or jointly, by the publicly-held company. This accounting practice complies in all relevant aspects with SIC-12 as published by the IASB.

#### FIXED ASSETS AND DEPRECIATION

Fixed assets are accounted for according to acquisition or construction cost minus depreciation, amortisation or depletion. The write-down of costs by way of depreciation, amortisation or depletion must be recorded periodically. Revaluation is permitted and should be reviewed regularly if adopted.

### DEFERRED CHARGES

Deferred charges are expenses which will benefit future years, such as research and development expenses. These items should reflect costs incurred less amortisation. Amortisation is usually recorded on a straight-line basis, over a minimum five-year period and a maximum ten-year period, starting when normal operations are initiated or in the year the deferred charges begin to benefit current operations (capitalised pre-operating expenses). Deferred charges should be written off in cases where the projects or activities that gave rise to these charges are abandoned, or as soon as it is known that such activities will not produce sufficient revenues to cover their amortisation. Other items that should be included in deferred charges are leasehold improvements and the cost of any banking licences acquired.

### TAX INCENTIVE INVESTMENTS

To encourage investments in certain underdeveloped regions and selected industries, the government has created some tax incentive plans, whereby a portion of corporate income tax payable can be directed toward the purchase of an approved tax incentive investment. The full amount of the income tax liability, including the portion related to tax incentive investments, is charged as a tax expense. Upon formal receipt of the right to the tax incentive investments in a subsequent accounting period, a credit is granted directly to shareholders' equity.

### CURRENT AND LONG-TERM LIABILITIES

Payables, accrued and charged, known or calculable, including the provision for corporate tax on income for the period, must be stated at their full values as of the balance sheet date. Foreign currency liabilities must be adjusted for exchange rate fluctuations and converted into Brazilian currency at the exchange rate on the balance sheet.

### CONTINGENCIES

A provision is generally established only when the likelihood of a loss is probable. In cases where this likelihood is possible, disclosures on the notes to the financial statements are required. There are specific regulations regarding the provision of tax contingencies. Contingent assets recognition is very restrictive. Only certain contingent assets can be recognised.

### INTEREST ON EQUITY

Law 9,249/95 introduced the possibility of charging and paying interest on a company's net equity to its owners or shareholders. Calculated on shareholders' net equity accounts, with the exception of amounts credited to revaluation reserves which have not been taxed, the interest rate, based on a long-term interest rate set by the government (TJLP), is deductible for purposes of corporate income tax and social contribution tax on profits. Interest is subject to a 15% withholding tax. Payment or credit to shareholders is subject to the existence of profits or retained earnings in an amount equivalent to twice the interest charge. Pursuant to IBRACON and CVM rules, interest on equity is charged directly against retained earnings without affecting the year's results.

## DEFERRED TAXATION

Deferred tax assets should be recognised as temporary deductible differences only when they are likely to be used against future taxable profits. Such an appreciation should be based on the company's history of profitability, showing whether it has had taxable income in at least three of the last five fiscal years. Projections of future taxable income have to be provided by management. Deferred tax assets and liabilities are classified as either a long-term asset or a long-term liability and are transferred to current assets or current liabilities when appropriate.

## LEASE FINANCING AND OPERATIONAL LEASES

Brazilian accounting rules establish that:

- The lessee should record financing leases as fixed assets and these should be identified as lease financing in the balance sheet at the total amount of the lease considerations added by the residual amount, which should also be recorded in current or non-current liabilities. The lease receivable should be recorded in current or non-current assets by the lessor
- Operational leases should be recorded as rental expenses by the lessee and as fixed assets by the lessor.

However, accounting for financing leases, despite being required by CFC, is not permitted by the Corporations' Law. Thus, this accounting practice is not being applied due to a conflict in the legislation. Therefore in practice, all lease transactions are normally considered operational. Lessors are subject to specific financial institution legislation governing their accounting, which is done in two stages: first, entries required by tax legislation are stated, and second, entries designed to eliminate distortions raised by tax requirements are recorded.

## SIGNIFICANT DIFFERENCES BETWEEN BRAZILIAN AND FOREIGN GAAP

The major differences between Brazilian and foreign generally accepted accounting practices (GAAP) are as follows:

- Start-up expenses – all costs of a company that occur in the pre-operating stage, besides costs normally capitalised as fixed assets, are capitalised as deferred assets. These deferred assets are amortised over a minimum period of five years, as required by tax legislation, and a maximum of ten years, as from the start-up date. International Financial Reporting Standards (IFRS) requires that pre-operational expenses incurred by a company must be immediately accounted for in the income statement, unless they are of a nature which permits capitalisation in fixed assets
- Research activities – IFRS require that all costs associated with research activities should be expensed and sufficiently disclosed. However, this is not the general practice in Brazil
- Leases – according to adopted practices in Brazil, all leases are considered operating leases. Sales revenues originating from a sale and leaseback transaction should be recorded at nominal value, regardless of the circumstances. Certain disclosures are required in explanatory notes. However, such procedures differ from IFRS treatment, which defines that a finance lease transfers substantially all the risks and rewards related to ownership of the asset from the lessor to the lessee. All leases other than finance leases are considered operating
- Segment reporting – disclosure by segments is not required in Brazil.

- Intangible assets – amortisation of intangible assets should be in accordance with the return associated with the asset. However, it usually follows the tax legislation which requires a minimum amortisation period of five years (and a maximum of ten years, pursuant to Corporations' Law). According to IFRS, goodwill in a business combination related to intangible assets is not deductible, although subject to tests of impairment on an annual basis. Intangible assets with a determined period of life should be amortised over such a period and subject to test of impairment only when an indication of a reduction in the fair value exists
- Financial instruments – accounting practices adopted in Brazil do not require recognition of certain financial instruments and derivations at fair value, as required by IFRS. The sole requirement consists of disclosures of the market value of the financial instruments and derivations in notes to financial statements.

#### ADDITIONAL DIFFERENCES RELATED TO US GAAP

- Marketable debt and equity securities – under Brazilian GAAP, marketable debt and equity securities are generally stated at the lower value between cost and market value. Under US GAAP, in accordance with SFAS 115 ('Accounting for Certain Investments in Debt and Equity Securities'), companies engaged in sectors which do not have specialised accounting practices should register marketable securities at:
  - Amortised cost (debt securities held to maturity)
  - Market value with gains and losses reflected in income (debt and equity securities classified as trading account securities)
  - Market value with gains and losses reflected in equity (debt and equity securities classified as available for sale)
- Prior period adjustments – under Brazilian GAAP, prior period adjustments encompass corrections of errors in previously issued financial statements and the effects of changes in accounting principles. Under US-GAAP, prior period adjustments are effectively limited to the correction of errors. Brazilian GAAP does not allow the restatement of prior period financial statements to provide consistency in reporting, which is required under US GAAP in certain circumstances
- Tax incentive investments – these investments, which are approved by the government for underdeveloped regions of Brazil or for specific projects, are available without additional costs upon payment of taxes. Under Brazilian GAAP, investments should be recorded as an asset, with a corresponding credit to a reserve in shareholders' equity. Under US GAAP, credit should be registered as income, and, if the underlying value of the investment is not defined, a provision should be made accordingly
- Earnings per share – under Brazilian GAAP, earnings per share are computed based on the number of shares outstanding at the end of the year. Under US GAAP, the earnings per share calculation is based on the weighted average of shares outstanding during the period, taking into account ordinary share equivalents and may have to be prepared both on a primary and fully diluted basis
- Statement of cash flows – under Brazilian GAAP, companies should present a statement of changes in financial position that describes the sources and applications of funds in terms of the changes in working capital. Under US GAAP, a statement describing cash flows used in operating, investing, and/or financing activities, is required
- Financial instruments – under Brazilian GAAP, aside from Central Bank rules applicable only to banks, financial instruments are not marked-to-market although limited disclosure is required under pronouncements of CVM

- Revaluation of fixed assets – revaluation of historical costs of fixed assets is permitted under Brazilian GAAP. Revaluation surpluses are credited to a revaluation reserve within equity. Under US GAAP, revaluation of historical costs of fixed assets is not permitted, except in connection with business combinations accounted for by the specific use of the purchase method.

## BOOKKEEPING REQUIREMENTS

All companies and individuals engaged in commercial activities must record and maintain proper accounting books in Portuguese, apply Brazilian GAAP on a consistent basis and include appropriate disclosures.

Additionally, there is a list of legally required official books and ledgers that must be maintained by commercial and manufacturing businesses, according to the nature of their activities. The journal book ('Diário') and general ledger book ('Razão') are the basic accounting books for legal and tax purposes, in which all business transactions must be registered. Financial statements must be transcribed in the journal book at least once a year. Other auxiliary books are subsidiary to information contained in the journal and ledger (eg a book for income tax control registrations, LALUR, which is used to record adjustments to accounting profit for income tax purposes.)

Additionally, there is a general chart (COSIF) with specific codes required for accounts of financial institutions, which must be used for Central Bank reporting and financial statement preparation purposes. Other formalities must also be observed when keeping official records, such as the following:

- Official books must be kept in Portuguese and values must be recorded in Brazilian currency. There are no restrictions on showing equivalents in foreign currency, although such figures are considered merely for illustrative purposes, except for cases where the origin of transactions is in a foreign currency
- Blank lines, interlining, or alterations of any kind are prohibited, and invalidate documents as proof of a particular transaction in connection with claims or lawsuits
- Entries of all transactions in the journal book must occur in chronological order. In practice, however, this book may be used to record monthly totals of transactions entered in subsidiary journals such as cash books, sales day books, or purchase day books, provided that all subsidiary books are properly registered
- Inventory registration must be written up each year-end in order to record accurate information related to inventories of final products, raw materials and intermediary products
- Use of codes (ie use of numbers instead of headings) for accounting entries in the journal book is permitted in cases where the codes are filed with the Registry of Commerce.

Most companies generate accounting books electronically, using specific software designed to comply with legal and tax requirements. Certain minimum information should be disclosed by corporations in their balance sheet and income statements. Assets and liabilities are presented in order of liquidity. Income statements must disclose the following income and expense items:

- Gross income associated with the sale of goods and services, sales deductions, discounts and sales taxes

- Net proceeds derived from the sale of goods and services, cost of goods and services sold and gross profit
- Sales, administrative and financial expenses (less income), and any other operating expenses
- Operating income (or loss) and non-operating results
- Income for the year before income taxes
- Income taxes
- Profit sharing programs for employees and directors, contributions to employees' pension and welfare funds
- Net income
- Net income per share (outstanding at the end of the period).

For tax purposes, group consolidations are only carried out using the net equity method that does not allow for compensation of tax losses among group companies. Publicly-held companies must also issue a management report containing basic information about the company.

#### REQUIRED FINANCIAL STATEMENTS

The following annual financial statements must be prepared and published by Brazilian publicly-held companies: balance sheet, income statement, statement of retained earnings and statement of changes in financial position. Financial statements must be followed by explanatory notes and analytical exhibits in order to expose the financial position. Comparative figures for the preceding year must also be presented.

According to Corporations' Law and accounting regulations, corporations must disclose, where applicable, the following information in the notes to their financial statements:

- The main accounting policies used to prepare financial statements, including the method used to evaluate inventories and calculate depreciation, amortisation and depletion, the basis for provisions covering expenses and risks, as well as expected losses on the disposal of assets
- Basis for consolidation
- Major categories of all significant accounts, inventories and fixed assets
- Details of investments in other companies
- Increases in value of fixed assets as a result of revaluation
- Pledges of assets, guarantees given to third parties and other contingent liabilities
- Interest rates, maturity dates and guarantees for long-term loans
- The number, types and classes of the company's shares
- Dividend distribution policies
- Prior-year adjustments
- Significant events that have occurred subsequently to the balance sheet date that have or might have a material effect on the company's financial position or results.

A group of companies formally registered and a publicly-held corporation with all its subsidiaries must present consolidated financial statements. Companies not publicly-held (and which are not financial institutions or equivalent) are not required to publish their accounts or to engage auditors.

### AUDIT REQUIREMENTS

The Federal Council of Accountants (CFC) regulates the accounting profession. Accountants must register with regional agencies before beginning activities and signing audit reports. Publicly-held companies, financial institutions, insurance companies, 'large companies' (with total assets of over BRL 240 million or annual revenue of over BRL 300 million) and some other entities must contract independent auditors registered with the CVM.

Auditors should attend annual shareholders' meetings to provide information in connection with the audit performed during the year. Auditors must declare in audit reports their opinion on whether financial statements present a fair view of the company's financial position and the results of the operations.

Independent auditors, qualified by the CVM, are liable for damages incurred by third parties in cases where actions have relied on their audits. The CVM requires that publicly-held corporations re-issue financial statements and related reports if they are found to be misleading or if other changes are considered necessary.

### ROTATION OF AUDITORS

All Brazilian publicly-held companies and financial institutions are required to change their auditors once in every 5 years, following 'Instrução' CVM 308.

## 8 – UHY REPRESENTATION IN BRAZIL

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# UHY MOREIRA - AUDITORES BRAZIL



## CONTACT DETAILS

UHY Moreira - Auditores  
Rua General João Manoel, n 200- Centro  
Porto Alegre  
RS  
Brazil  
Tel: +55 51 3210 8000  
Fax: +55 51 3228 6360  
www.uhymoreira.com.br

Year established: 1965  
PCAOB registered?: Yes  
Number of partners: 4  
Total staff: 135

## CONTACTS

Liaison contact: Diego Moreira  
Position: Diretor Executivo  
Email: drmoreira@auditoria.srv.br

Liaison contact: Betina Moreira  
Position: International Business  
Director  
Email: betina@auditoria.srv.br

## OTHER IN-COUNTRY OFFICE LOCATIONS AND CONTACTS

Brasília, Curitiba, Rio de Janeiro and São Paulo.

## BRIEF DESCRIPTION OF FIRM

The firm has five offices in the cities of Porto Alegre, Curitiba, São Paulo, Rio de Janeiro and Brasília. The current staff is 120 people. UHY Moreira -Auditores ranks in Brazil's top 15 for auditing services.

## SERVICE AREAS

Audit  
Corporate and personal tax  
General business advice  
IT auditing, consulting  
Tax services  
Importation and exportation consulting  
Accounting and other business process outsourcing services

## PRINCIPAL OPERATING SECTORS

Insurance  
Non-government entities  
IT auditing  
Health care  
Hospitals

## LANGUAGES

Portuguese, English, Spanish.

## CURRENT PRINCIPAL CLIENTS

Agencia Nacional de Energia Eletrica (consulting)  
Companhia de Energia do Amazonas (power plant)  
Banco de Desenvolvimento do E.S (bank)  
Companhia de Energia Eletrica Piauí (power plant)  
Comunidade Evangélica Luterana SP (education)



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## UHY MOREIRA - AUDITORES BRAZIL



Fundação Univer. Federal do Paraná (education)  
SENAC (sovereign entity)  
SEBRAE (sovereign entity)  
Santa Casa do Rio de Janeiro (hospital)  
Hidrelétrica Itaipú (Power plant)

### **OTHER COUNTRIES IN UHY CURRENTLY WORKING WITH, OR HAVE WORKED WITH IN THE PAST**

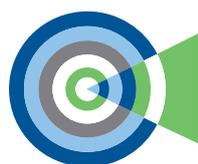
Houston, Spain, Uruguay, Argentina

### **BRIEF HISTORY OF FIRM**

Moreira & Associados–Auditores started in 1965 in the city of Porto Alegre. Over the next 40 years, substantial growth led the firm to open four additional branches in Rio de Janeiro, São Paulo, Curitiba and Brasília, while expanding the firm's service offerings to clients.

Our company does preference auditing work, but we have considerable experience in consulting, mergers and acquisitions, tax consulting and IT auditing.

The firm joined UHY in 2008, re-branding to UHY Moreira-Auditores.



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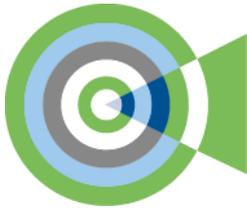
### SOURCES AND CONTRIBUTORS

The following publications were used as sources for certain chapters: 'Doing business in Brazil' – Britcham, 5<sup>th</sup> Edition; 'Brazil business guide' – UK Trade & Investment.

This guide was updated with kind assistance from Souza, Berger, Simões e Plastina Advogados law firm with competence in all areas of Brazilian corporate law. For more information please visit [www.sbsp.com.br](http://www.sbsp.com.br)



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ADVOGADOS



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## LET US HELP YOU ACHIEVE FURTHER BUSINESS SUCCESS

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