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A D V O G A D O S

**A BRIEF GUIDE  
FOR DOING  
BUSINESS IN  
BRAZIL**

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## **1. INTRODUCTION**

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Especially over the past sixty years, Brazil has undergone various political and economic changes. Perhaps the most remarkable of them was the transformation from economic isolation to global integration that took place in the 1990s. The wide-ranging privatisation program, the re-negotiation of foreign debt, the signing of the Common Market for the South Treaty (Mercosul) and the extensive import tariff reductions from 1991 to 1993 are the milestones of these changes. However, even with inflation under control and a solid democracy, Brazil continues to scare many foreign companies considering to export or invest in the country.

Despite the opening of the Brazilian economy to the outside world, the stabilisation of inflation and the market-forced floating of the Brazilian Real in 2002, until recently Brazil was regarded as a highly unstable economy. However, since taking power in 2003, President Lula da Silva has taken orthodox measures to ensure that Brazil meets all of international obligations.

Excessive bureaucracy, language, cultural differences and a complex and unstable legal environment are the often key hurdles faced by the foreigner. Yet, Brazil's 180 million-strong population, its robust agribusiness, IT and mining sectors, as well as its need for finance and infrastructure, offer great opportunities to the right company.

This brief guide outlines the main issues that should be considered by the foreigner thinking of doing business in Brazil.

## **2. THE BRAZILIAN MARKET**

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To those who are yet to visit Brazil, it is easy to underestimate the strength and efficiency of the local industry and to forget the long-standing presence of multinationals manufacturing within the country's borders. Vehicle manufacturers such as Ford, General Motors, Mercedes-Bens, Volkswagen and Fiat were established in the country many decades ago. The same applies to various other sectors, such as medical and healthcare products (Johnson & Johnson, Bayer, Roche, and others), electronic equipment (Sony, Panasonic, NEC, Mitsubishi, Sanyo) and telecommunications (Siemens, Bell South) to name a few. One of the world's leading aircraft companies is Brazilian (Embraer) and so is one of the world's largest iron-ore producer (CVRD). Also Brazilian is Petrobras, one of top petroleum exploration companies in the world.

Brazil is a unique economy with many different market groups and therefore should not be compared to Asia or any other part of the globe. It has a competitive business environment and any broad statements about the works of "the Brazilian market" should be looked upon sceptically.

### 3. LANGUAGE AND CULTURAL ISSUES

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#### 3.1 Language

Brazil is the largest monolingual country in the world, with Portuguese being the sole *lingua franca*. Some English is spoken by the sophisticated elite, by senior executives of large companies and most young executives in general. Although Spanish is mostly understood and will allow the foreigner to “get by” on the streets, it is essential that businesspeople understand that speaking Brazilian-accented Portuguese, or having a suitably qualified translator (preferably a native speaker)<sup>1</sup> is a definite advantage. Foreigners are generally surprised as to how little English and Spanish (or any other foreign language, for that matter) is spoken in Brazil, especially outside of São Paulo.<sup>2</sup>

Brazilian humour draws substantially from language. Slight nuances between words often carry totally different meanings. Perhaps due to the lack of contact with foreigners in most parts of the country, particularly those from outside Latin America,<sup>3</sup> Brazilians may at times make fun of a foreigner’s grammatical errors and/or mistakes in pronunciation in Portuguese – without any bad faith. No offence should be taken.

Very few government bureaucrats speak English. Any correspondence in English will almost certainly be ignored, no matter where it came from or how important the content is.

To facilitate communication, all written material should be translated to Brazilian Portuguese. Although it is not a full-proof measure, it could avoid extensive delays caused by the red tape which is part of the day-to-day routine of doing business in Brazil.

#### 3.2 Culture

Brazilians are general more informal than Anglo-Saxons. Brazilian businesspeople during business meetings will invariably chat about soccer results, their children’s schooling, or politics. Time is rarely of the essence (particularly outside the state of São Paulo), so Brazilians may arrive late for meetings. Do not be offended if a Brazilian asks you about your family or your ethnic background.

Brazilians can become quite “close friends” very shortly after meeting someone. This is, however, largely a superficial friendship and several hurdles may still have to be faced prior to a deal being finalised. While a deal may be done in minutes or hours in developed countries, Brazilians may take months or years to make a final

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<sup>1</sup> At least for establishing the first contacts, making initial introductions and negotiating the most complex parts of a deal.

<sup>2</sup> Spanish is widely spoken in the areas close to the Brazilian western border. However, all Brazilian business centres, with the exception of Belo Horizonte (located in the centre-western region), are located in the eastern part of Brazil.

<sup>3</sup> Perhaps with the exception of Italians and Germans, especially in the southern part of the country.

decision, but they will hug you (if you are a male) and kiss you twice/three times on the cheek (if you are a female) when saying “hello” or “goodbye”.

Personal connections, “name-dropping” and recommendations are common and encouraged. Even though this can be an advantage in any country, in Brazil it is especially important. Brazilian businesspeople are more susceptible to such tactics than their western counterparts.

Sarcasm, although present, is much less prevalent than in Australia, New Zealand, Ireland or England. Due to cultural differences, sarcasm should be avoided at all times as it could dangerously backfire against the person using it.

Brazilians gesticulate a lot during speech and are generally quite loud. Brazilians speak louder than New Yorkers, and much louder than Britons, the Irish, Australians and New Zealanders. What may look like a frantic discussion ready to explode into physical contact, is probably simply an argument as to who was last year’s best soccer player in the state’s soccer league.

## **4. LEGAL ISSUES**

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### **4.1 Generally**

Brazil is a *civil law* country – that is, it follows the Franco-German (also called “European”) legal tradition. The Brazilian legal system relies heavily on government bureaucrats – getting rubber stamps and making trips to Notaries Public are part of everyday life for all doing business in Brazil.

Laws are codified and court decisions *per se* do not have the force of law. Brazil has a far-reaching and detailed Constitution and various codes, presidential decrees and regulations that comprise the total body of law.

### **4.2 Contract Issues**

For courts to automatically recognise the validity of a person’s signature or a copy of a document, the document must generally be notarised. Notarisation is obtained by attending offices called *cartórios* or *tabelionatos*.

Where trans-national deals are being conducted, the foreigner should keep in mind that Brazil is not a signatory to the Vienna Convention for the Sale of Goods. This means that different rules may in relation to transfer of risk and title.

Contracts drafted by Brazilian lawyers are generally very formal, short and general in nature. To avoid problems with enforceability of such contracts, in many cases it is recommended that the laws of England or New York be deemed as governing the contract. There are various technical issues regarding the choice of law for contracts, so legal advice should be obtained even where the parties have chosen a foreign law to govern the contract.

It is strongly recommended that the foreigner avoid having Brazilian courts decide any disputes between the parties, as they are slow and generally inept to deal with cross-border disputes. One of the best alternatives now available under Brazilian law is the use of arbitration, which allows parties to choose any person or chamber (such as the International Chamber of Commerce, the London Court of International Arbitration and the American Arbitration Association) to arbitrate disputes which may arise between them.

### 4.3 Using Agents and Distributors

Generally, before the foreign businessperson decides to set up a company in Brazil he/she will consider choosing an agent or distributor. There are various ways of structuring these arrangements, however, some basic points tend to apply to every transaction. Usually, the following factors should be taken into account:

- the honesty, skills and professionalism of the agent/distributor;
- the level of English fluency of the agent/distributor (the less English spoken by the agent/distributor, the higher the costs of communication);
- the agent's/distributor's financial situation;
- whether the proposed arrangement will be exclusive or not;
- what the sales and other targets of the agent/distributor will be;
- what criteria will be used for renewing the agreement;
- whether the agent's/distributor's obligations can be delegated to another party;
- the geographical area to be covered by the agent/distributor and whether the agent/distributor will be able to exclude other agents/distributors from selling to clients in that area, including the right of the principal to sell in that area;
- how the product or service will be marketed and to what extent the principal will have the right to control the marketing activities of the agent/distributor;
- whether warranties will be offered (keeping in mind those which by law cannot be excluded) and who will be responsible for providing technical services and support;
- the agent's/distributor's liability on the sale of the products (whether the agent/distributor will indemnify the principal for any damages suffered as a consequence of the products supplied or services provided);
- what insurance coverage will be required and which party will be responsible for obtaining it;
- how the products will be brought into the country and who will be responsible for clearing customs (this will be a major issue, as customs delays are very common in Brazil);
- when will the legal title and the insurable risk pass to the agent/distributor;
- the term of the agreement and options for renewal;
- payment methods (this can also be a major issue in Brazil, as there are several bureaucratic steps involved in remitting money abroad as well as important tax issues);
- payment terms.

There are technical differences between agents that act as a company's employee, representative or distributor. Most of Brazil's Representatives Law provisions are mandatory in nature and offer many protections to agents, including the right to be compensated where the agency relationship is terminated by the principal.

There are also issues relating to the maximum level of control to be exerted by the principal over its Brazilian agent – depending on the level of control the principal may be deemed an employee and be liable for taxes and wage claims that could easily run into hundreds of thousands of reais.

It is advisable that the foreign company seek suitable legal advice prior to making any agency arrangements with Brazilian parties.

#### 4.4 Corporate Structures

##### (a) Limited Liability Partnerships (*Sociedades Limitadas*)

Unlike the procedure for registering companies in England, Canada, Ireland, Australia, New Zealand or the US, registering a company in Brazil and obtaining all relevant licences is a very time-consuming process. From the time the decision to register the company is made, until the company commences its operations, some three to six months may pass. A careful analysis should be undertaken in regards to corporate structure. Any mistakes in the way the company is set up can be very costly.

There are various types of companies which can be registered pursuant to Brazilian law, but the most often-used entity is a Limited Liability Company *Sociedade Limitada* (abbreviated in Portuguese to "*Ltda*").

The *limitada* is a mixture between a common partnership and a company – a *limitada* is somewhat akin to an English Limited Liability Partnership and a Delaware Limited Liability Company.

The "partners" are shareholders of the company and have the benefit of their personal liability being limited to the amount of unpaid capital. However, this "limited liability" is much less limited than that offered that afforded to shareholders in common law companies. Partners (even those who are not directors) may still be held personally liable for many things, such as for some debts under the Brazilian Labour Law, the Consumer Defence Code, environmental damage and, in many circumstances, for any unpaid company taxes.

A *limitada* requires more than one partner, though branches of foreign companies are now allowed to be registered (strict requirements apply). There is no restriction on the *limitada* in relation to having one or more Brazilian individuals or companies as equity holders – the partners may all be foreign entities. However, all foreign partners must appoint a Brazilian resident as their attorney to represent them before tax authorities and to be served with legal proceedings.

Further, *limitadas* must appoint at least one director (*administrador*). All *administradores* must hold a permanent resident's visa.<sup>4</sup>

### (b) Corporations (*Sociedades Anônimas*)

*Sociedades Anônimas*, or *SAs* operate much in the same as English companies or US corporations. *SAs* are divided by shares and, insofar as personal liability is concerned, offer much greater protection to shareholders.

*SAs*, even if privately held, are heavily regulated. They must be audited and must have their balance sheet published yearly in newspapers of wide circulation. Also, *SAs* must have an executive and an advisory board. All directors of *SAs* must reside permanently in Brazil, yet members who are only on the advisory board do not.

*SAs* may be publicly held, being subject to the Brazilian Securities Exchange Commission (*Comissão de Valores Mobiliários* or *CVM*) rules. They may have their shares exchanged in the “over-the-counter” market or listed in the Brazilian Stock Exchange (*Bovespa*). *Bovespa* is a very sophisticated stock market, operating much in the same as the stock markets in developed nations.

### (c) Other Structures

There are various types of business structures. These should be analysed on a case by case basis.

## 4.5 Restrictions on Foreign Investment

Brazil is open to foreign investment. However, foreign investment may require approval (or be altogether restricted) in the following sectors:

- media;
- banking;
- health services;
- land ownership (in rural areas and areas close to borders – yet some exceptions apply);
- postal services;
- airlines;
- nuclear energy;
- mining; and
- aerospace.

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<sup>4</sup> An argument may be made that this does not apply to Portuguese citizens. It is beyond the scope of this guide to analyse this issue in detail.

Except for these specific sectors, Brazil offers no restrictions on foreign direct investment.

#### 4.6 Remittance of Profits and Repatriation of Capital

Where the capital investment has been registered with the Brazilian Central Bank, profits may be freely repatriated to the shareholder's country. The Central Bank will often assess the amount of profit in light of the company's net worth, as stated in the company's balance sheet.

If the company has a negative net worth, the Central Bank is likely to regard the proposed repatriation as a dilution of the investment and disallow repatriation of the whole or part of the profits.

There are major consequences for companies that do not register the inbound or outbound transfers of capital. These include fines of up to 100% of the unregistered capital and even criminal penalties.

#### 4.7 Industrial Relations Issues

Brazilian Industrial Relations laws are protective of workers to the extreme. Economists estimate that on average the actual cost of hiring an employee is up to 100-120% over the employee's actual take-home salary. It is quite common to find companies having employees' entitlements as the greatest component of their balance sheet liability.

Foreign investors should take utmost care with potential liability from hiring employees. Termination of employment can be extremely difficult, and a very large number of employees choose to sue their former employers for unpaid entitlements – and they generally win, given the wide-ranging protection given under the Labour Law.

There are also various prohibitions on changing the employee's place of employment or even the entity which employs the employee. Careful analysis is required, particularly in restructures and takeovers.

#### 4.8 Intellectual Property Issues

Brazil is a member of the major intellectual property conventions,<sup>5</sup> but piracy is rife. Laws are tough, providing for criminal as well as civil penalties,<sup>6</sup> but enforcement is sporadic and ineffective. All matters relating to intellectual property registration are dealt with by the National Institute of Industrial Property (“INPI”).

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<sup>5</sup> Such as the Paris Convention and the Berne Convention, as well as the Stockholm Convention.

<sup>6</sup> Industrial Property Code (Law number 9,279 of May 14, 1996); Brazilian Copyright Law number 9,618 of February 19, 1998 and Brazilian Software Law number 9,609 of February 19, 1998. Data *per se* and business methods are not afforded any protection.

**(a) Trade Marks**

Brazilian laws adhere to the priority principle as provided in the Paris Convention – that is, the owner of a foreign trade mark has six months from the time of registration being obtained abroad to file for registration in Brazil. Otherwise, the “first to file” rule controls: the first person to file the trade mark application will have priority for registration.

Royalties for trade mark use can only be charged if the trade mark is registered in Brazil.

Trade mark registration is slow, yet in recent times registration has been successfully sped up and now can be obtained within a two to three year period. Protection is given to the trade mark for a period of 10 years, which can be subsequently extended for periods of 10 years, perpetually.

**(b) Patents, Designs and Models of Invention<sup>7</sup>**

As with other countries, patent registration in Brazil not a simple process and a very time consuming task. This is especially true in Brazil: currently, the INPI was taking approximately five to seven years to effect the registration of a patent. Processing times are quicker for designs and models of invention.

Brazil is a member of the Patent Cooperation Treaty (PCT) so parties may choose to have applications filed pursuant to this treaty, via their own country’s registration body. Priorities are also afforded to foreign applicants under the Paris Convention. Patent and design rights are protected pursuant to the Law of Intellectual Property.<sup>8</sup>

**(c) Copyright**

Brazil is a member of the Berne Convention, so copyright does not require registration for protection. The Copyright Law<sup>9</sup> provides protection for authors of literary, artistic and scientific works. Protection extends to dramatic and musical works, performance and broadcast rights.

The Software Law<sup>10</sup> provides specific protection to holders of copyright over software. The source code may be registered with the INPI, yet only in rare cases registration is recommended. Specific rules apply relating to limitation of liability and rights to make copies of the program.

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<sup>7</sup> I will use the term “patent” to include both of these, as per the United States terminology which tends to be followed in Brazil.

<sup>8</sup> Law No. 9,279 of 1996.

<sup>9</sup> Law No. 9,279 of 1996.

<sup>10</sup> Law No. 9,609 of 1998.

**(d) Cultivars**

The Law of Protection of Cultivars<sup>11</sup> grants certain specific rights to persons who have developed a new cultivar or an “essentially derived cultivar”. Protection is afforded to those who register the cultivar.

The holder of the cultivar registration will have rights over reproduction and multiplication of the plant, among others.

**(e) Integrated Circuits**

Brazilian law grants intellectual property rights of developers of integrated circuits.

According to Law No. 11,484 of 2007, protection is given to Brazilian citizens and residents and to those who reside in countries who grant similar rights to Brazilians (under reciprocity principles). A system of registration applies.

**(f) Confidential Information**

Confidential information is protected by contract principles, including implied rules regarding good faith in dealings. It is strongly advisable that a confidentiality deed/non-disclosure agreement be signed before any information of value is released to any party in Brazil.

**(g) Know How and Technology Transfer Agreements**

INPI must approve technology transfer agreements (which generally means agreements for the transfer of know how), so that:

- it can be enforced against third parties;
- payments relating to the technology (such as royalties) can be sent to the foreign holder of the intellectual property rights; and
- royalty payments can be used as a tax deduction.

As part of the registration process, INPI will request details about:

- how the technology is being paid for;
- the reasons for which the technology is being transferred;
- what intellectual property rights are being transferred;
- how the transfer is actually being effected or is proposed to be effected (this must include any use of patents, trade marks or industrial designs relied upon in the implementation process – which must be registered and granted in Brazil, as well as details of plans and the implementation of the

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<sup>11</sup> Law No. 9,456 of 1997.

technology, as well as details about methods, research, studies and projects intended for execution or rendering of specialised services).

Registration with INPI will be deemed to be effected 30 days after the application is filed.

#### 4.9 Taxation Issues

Brazil has more than 50 different types of taxes. Below we address the most important ones with broad application on everyday transactions.

##### (a) Double Taxation Agreements

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

Double taxation agreements often change the application of some of the taxes discussed below and may offer substantial advantages.

##### (b) Taxes on Profits of Companies Registered in Brazil

###### (i) IRPJ (Income Tax on Companies)

Income tax on Companies is a federal tax levied on companies registered in Brazil. It is assessed at 15%, plus a 10% supplementary tax for income over R\$240,000 received in a given year. This tax is calculated on two bases:

- the *deemed profit* method; and
- the *actual profit* method.

The actual profit method uses the profits received by the company to calculate its income and other taxes, while the deemed profit method deems an amount of profit based on a percentage of the company's gross receipts. The actual profit method is substantially more bureaucratic than the deemed profit method.

The most tax effective method will generally depend on the level of income expected and the type of services or goods the company will be supplying. However, companies with a turnover of more than R\$48 million in a given year must adopt the actual profit method in the following year.

**(ii) CSLL (Social Contribution over Net Profits)**

CSLL is a federal tax imposed over the company's net profits (calculated in accordance with the deemed profit method or the actual profit method). It is assessed at 9%. A 1% reduction will apply where the company pays all of its taxes on time and in strict adherence to the laws and regulations for a period of 5 years. Due to the bureaucratic difficulties involved, this 1% reduction is seldom obtained by any company.

Higher rates applies to banks and other financial institutions. Please contact us if you are likely to fall within these categories.

**(iii) PIS/Pasep (Program for Social Integration and Establishment of Public Servant's Assets) and COFINS (Contribution for the Financing of Social Security)**

PIS/Pasep and COFINS are federal levies imposed over a company's gross revenue, whether or not the company has made any profit.

In transactions between Brazilian companies, PIS/Pasep and COFINS are generally levied at the rates of 0.65% and 3%, respectively, over gross amounts – for those companies that apply the deemed profit method. For companies which apply the actual profit method, rates are 1.65% and 7.6%, respectively. However, these companies are allowed to offset their PIS/Pasep and COFINS obligations with credits obtained from PIS/Pasep and COFINS paid on inputs.

Various exemptions may apply on the application of PIS/Pasep and COFINS. The application of these exemptions needs to be assessed on a case by case basis.

**(iv) ISS (Impost over Services)**

ISS is a municipal tax over income received from the provision of services, and applies to almost all services provided within Brazil. The ISS rate varies between 2% to 5%, calculated over the company's gross income.

Note that a company which acquires services from providers who are based abroad are likely to be liable for the tax (this will depend on the law of the relevant Brazilian municipality).

Unlike most taxes, no deductions or tax credits apply.

**(c) Taxes Levied on Sale of Goods, Services and Certain Rights**

**(i) Import Duty – levied on goods**

Import duty is created and regulated by the federal government and levied on imported goods. The import duty payable will depend on the specific type of product being imported. This is normally quite a substantial tax, yet it varies dramatically between the products being imported. Rates generally vary from 2% to 20% on the value of the goods, in the case of *ad valorem* duty. Certain goods may be subject to set amounts.

On arrival in Brazil, import duty as well as all other taxes levied on sales will need to be paid up front or else the goods will not clear customs.

Furthermore, the following levies will need to be paid:

- commercial ship fleet tax (25% over insurance costs);
- SISCOMEX fee;
- customs broker trade union levy;
- clearance fee;
- port storage fee;
- terminal handling fee;
- bill of lading clearance fee.

Note that in addition to the Import Duty, ICMS, IPI, PIS/Pasep-Importação and COFINS-Importação will be imposed.

Most goods imported from other Mercosul countries (Argentina, Uruguay and Paraguay), as well as Chile and Bolivia may be imported free of import duty. There are many exceptions to these, so care should be taken before finalising pricing decisions.

**(ii) ICMS (Impost over Transactions Related to the Commercialisation of Merchandise and over Intermunicipal and Interstate Transport Services) – levied on goods and certain services**

ICMS is a state tax levied on products and the provision of certain services, including where these are imported from abroad.

ICMS is a value added tax and, to some extent, it works like the VAT in the UK, State Sales Tax in the United States and the GST in Australia and New Zealand. ICMS is limited to the commercialisation of certain merchandise, communication services, electricity and transportation of goods. Imported merchandise is subject to ICMS.

Rates generally vary between 18% to 25%, but there are major reductions or increases depending on the type of good or service involved. Interstate rates generally vary from 7% to 12% (depending on the state and where the goods will be sold).

No ICMS is payable where goods are being exported from Brazil and any taxes paid on inputs will be credited to the exporting company.<sup>12</sup>

**(iii) IPI (Impost over Industrialised Products) – levied on goods**

IPI is a federal tax imposed on the production or importation of “industrialised goods”. Like ICMS, IPI operates like the VAT, and input tax credits may be claimed by the company (except where the credits relate to fixed assets acquired by the company).

Rates are assessed on the value of the industrialised goods, and vary in accordance with the nature of the merchandise. On average, IPI is levied at rates between 5% to 18%.

**(iv) PIS/Pasep-Importação (PIS/Pasep-Import) and COFINS-Importação (COFINS-Import) – levied on goods and services**

PIS/Pasep-Import and COFINS-Import are also federal levies imposed at a rate of 1.65% and 7.6%, respectively, assessed over the total value of imported merchandise or services. Calculation of the amounts payable takes into account the customs value of the goods as well as the ICMS, IPI, Import Duty, insurance, freight and other related costs. Complex formulas apply to the calculation of the levies payable.

As with PIS/Pasep and COFINS (see above), various exemptions apply and the application of these exemptions needs to be looked at on a case by case basis.

**(v) ISS (Impost over Services) – levied on services**

Please refer to our comments further above.

**(d) Taxes Levied on Certain Revenues obtained from Non-Resident Individuals and Companies**

**(i) IRRF (Withholding Income Tax)**

IRRF is a federal tax imposed on income paid, credited, remitted or delivered to non-residents, at the rates of 15% or 25% according to the nature of the income and the country of destination. The IRRF is imposed on transactions such as royalty payments.

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<sup>12</sup> This is provided for in the Brazilian Constitution.

Dividends declared by corporations to foreign shareholders are **not** subject to income tax.

Interest on shareholders' equity is subject to withholding tax. The tax payable will vary between 15% for most countries and 25% for tax havens.

**(ii) CIDE (Contribution on the Intervention of the Public Domain)**

CIDE is a federal levy charged on money transferred abroad for the payment of royalties (other than for the licensing of software, unless there is a technology transfer) or technical assistance. The rate is currently 10% and is payable by the licensee.

CIDE applies to:

- the supply of technology;
- the provision of technical assistance, namely:
  - technical support;
  - specialised technical services;
- technical services and administrative and similar assistance;
- the transfer and licensing of trade marks;
- the transfer and licensing of patent explorations.

Input tax credits may be allowed as deductions of CIDE payable, depending on the particular circumstances of the payment.

**(e) IOF (Tax on Credit and Exchange Transactions, Insurance and Securities)**

IOF is a tax on credit and exchange transactions, insurance and securities and is assessed:

- on the amount of Brazilian currency purchased or sold (currently set at 0.38% for sending profits abroad);
- on the price of securities sold or purchased;
- on the amount of bank loans and similar transactions; and
- on insurance premiums.

IOF is generally a major component in relation to the last two points.

#### **4.10 Customs Issues**

Customs can be a major hurdle in Brazil. Customs laws and procedures are complex and Brazilian bureaucrats are rarely willing to deal with the matters before them, particularly when all documentation is prepared in English.

Documents should be meticulously prepared to avoid problems. Due to the intricacies of the *Mercosul Classification of Goods* (“**NCM**”), finding the right classification is often an arduous task. As an example of how harsh Brazilian Customs’ laws can be, a 1% fine will be imposed over the whole CIF value of the imported merchandise where the NCM classification is incorrect – even though the mistake may have been innocent and the total tax payable would be the same.

It is advisable that the importer consider filing for a *private ruling* with the tax office prior to the goods arriving in Brazil so as to avoid being fined. Various other fines apply on the slightest mistakes, so utmost care is required. Long delays will ensue as a consequence of the slightest mistake.

Where the goods cannot be cleared, the importer has the option of filing for a court injunction to enable the goods to clear customs. This is a measure of last resort, but an effective one, particularly where major losses would ensue. Details as to how legal proceedings would be managed should be argued to prior to the deal being finalised.

Brazil also offers a drawback and a temporary admission program for tax exemptions for imported inputs. These programs offer full tax refunds where goods are imported and re-exported where they meet certain conditions.

#### **4.11 Tariff Exemptions for Certain Capital Goods and Technology and Telecommunications Goods**

Certain capital goods, telecommunication and information technology items may be able to obtain import duty and, in some specific circumstances, ICMS reductions where no similar items are manufactured in Brazil. These are known as *ex-tarifários*.

Specific procedures for obtaining the tax reductions apply – an application must be made to the Federal Chamber of International Trade (“**CAMEX**”) and to the relevant State Chambers of Commerce where the goods are to be used.

#### **4.12 Migration Issues**

Obtaining visas in Brazil can be complex, but no more difficult or time consuming than in developed nations.

##### **(a) Investors**

Individuals who wish to migrate to Brazil may do so by investing the equivalent in Brazilian currency to US\$50,000. The investment must be made by the individual’s own funds in “productive activities”.

Generally, if the investor becomes a shareholder of a Brazilian *limitada* or *SA*, then the visa will be granted. There may be problems where the investor is merely “passive” (for instance, if the investor simply becomes a shareholder of a company listed in the stock market).

The visa will be granted for an initial period of five years and will be automatically extended upon the expiration if the investor can show that he or she continues to have investments of US\$50,000 in the country.

**(b) Executives**

Permanent visas may be issued to executive officers, managers, directors and senior executives, when they move to Brazil work for a company, a group of companies or an “economic conglomerate”. The visa will be issued for the term of the person’s contract and will be conditional upon the person’s continuing employment with the relevant entity.

Additionally, the company must show that:

- it has invested an amount of US\$50,000 per executive in Brazil (in hard currency, technology transfer or assets, as registered with the Central Bank), and that it will create 10 new jobs within two years of the company being set up or the executive joining the company; or
- it has invested an amount of US\$200,000 per executive in Brazil (in hard currency, as shown by the Brazilian bank’s currency sale contract and company’s articles of association).

The length of permanent visas is set based on the term of the employment contract. If the executive is to change his/her employment to a company outside of the group, authorisation must be obtained from the Ministry of Justice and the Ministry for Labour and Employment.

Note that different rules apply for executives of financial institutions and to those who will be based in the Manaus’ Free Trade Zone.

**(c) Technical Staff**

Temporary visas may be issued for technical workers:

- in emergencies;
- to effect technology transfers; and/or
- to provide services of a technical nature (not including administrative, financial or managerial services).

Temporary visa may be valid for up to one year, with the possibility of a one-year extension in certain circumstances. If the temporary worker chooses remain in Brazil after the initial 12 month-period, the Brazilian company must formalise working arrangements in accordance with the applicable Brazilian labour laws.

Automatic extensions of temporary visas issued to technical workers may be obtained for a period up to 90 days. Among other requirements, the person must have one of the following:

- two years' practical experience in the field of work to be undertaken in Brazil and nine years of schooling;
- one year's practical experience in the field of work to be undertaken in Brazil and a bachelor's degree;
- a master's degree doctorate in the field of work to be undertaken in Brazil;
- three years' experience in "artistic or cultural activities" do not require formal schooling.

Temporary visas may be cancelled if sufficiently qualified staff may be found in Brazil to undertake the tasks performed by the foreign professional.

**(d) Others**

Specific rules will apply to employees of not-for-profit entities, scholars and religious workers.

**4.13 Public Private Partnerships**

With the passing of the Public-Private Partnerships Law in late 2004, public-private partnerships ("PPPs") are now an alternative for foreign investors wanting to take part in large projects in Brazil. The PPPs Law has made Brazil's strict government procurement procedures more flexible and investor-friendly.

Projects that may be subject to the PPPs Law must be worth at least R\$20 million and be for the supply and installation of equipment, construction works or the provision of services. Contracts must be for a period of between 5 to 35 years – a major increase from the maximum five year period that applied previously.

A major improvement in the PPPs Law is to allow the government to establish specific funds to ensure compliance with its contractual obligations. These funds will operate in a manner similar to the way escrow accounts/trusts operate in common law countries. The PPPs Law also gives flexibility as to the type asset to be given by the government as security/collateral. Government-owned real estate, shares in state-owned public companies and government revenues can be specifically set aside for the PPP fund. For Federal projects, the maximum amount permitted under all funds added together is R\$6 billion.

Another important change brought about by the PPPs Law is the possibility of the private partner having the government as the client, rather than offering services only on a "user-pays" basis to the public in general under a licence.

Finally, the PPPs Law allows for litigious matters that have the government as a party to go to arbitration, avoiding the notoriously slow Brazilian courts. Yet, the arbitration will need to be held in Brazil and in the Portuguese language.

Any foreign company thinking of being a party to a PPP should understand that the process of selection and negotiation will require major efforts and investment. The vast majority of tenders is won by Brazilian companies, so it is highly advisable that foreign companies consider having a Brazilian partner when bidding for any type of government work.

## **5. FURTHER INFORMATION**

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