Doing Business in Brazil

2016

Hogan Lovells

Claudette M. Christian
Partner, Rio de Janeiro and São Paulo
T +55 21 3550 6672 **Rio de Janeiro**
T +55 11 3074 3500 **São Paulo**
claudette.christian@hoganlovells.com

Isabel Costa Carvalho
Partner, São Paulo
T +55 11 3074 3501
isabel.carvalho@hoganlovells.com

Wylie H. Levone
Counsel, Washington, D.C. and Rio de Janeiro
T +1 202 637 5730 **Washington, D.C.**
T + 55 21 3550 6674 **Rio de Janeiro**
wylie.levone@hoganlovells.com

I. Country and Economic Overview

Basic facts about Brazil

The Federative Republic of Brazil (República Federativa do Brasil) is Latin America's largest economy.

Size: In both geographic size (8,515,767.049 km2) and population (approximately 200 million people) Brazil is the fifth largest country in the world. Brazil shares a border with every country in South America except for Ecuador and Chile.

Official language: Portuguese; English is the most commonly used foreign language.

Currency: Brazilian Real (R$; plural Reais).

Economic facts, forecasts and opportunities

After a growth of 7.5% in 2010, Brazil's GDP in 2014 grew by only 0.1% to US$2.347 trillion, making it the seventh largest economy in the world. 2014 GDP per capita was approximately US$11,384. Over the past decade, the Brazilian economy has shown substantial overall macroeconomic stability and a substantial increase in domestic demand bolstered by a growing middle class. Inflation was 6.6% in 2011 and reduced to 6.4% in 2014. According to the Brazilian Institute of Geography and Statistics (IBGE), unemployment dropped from the 2003 level of 12.4% to 4.9% in 2014.

Due to recent economic and political challenges, at the end of 2015 Brazil lost its investment-grade rating, even though it was the largest target of Foreign Direct Investment (FDI) in Latin America in 2015, receiving approximately US$58 billion, compared to US$62.5 billion in 2014 (OECD estimate). Countries whose nationals provide the vast majority of FDI into Brazil include the United States, China, Netherlands, and Spain.

Between 2003 and 2014, over 50 million Brazilians moved into the middle class of Brazil's economy (which now represents 55% of the total population), driving substantial growth in retail and e-commerce. The main drivers of economic growth in Brazil are:

— Oil & gas discoveries in the "pre-salt" areas off the coast of Rio de Janeiro, estimated at between 50-80 billion barrels;

— Expansive government investment in infrastructure projects; and

— The 2014 FIFA World Cup (hosted by Brazil nationwide in 12 separate cities) and 2016 Olympics and Paralympics (in Rio de Janeiro). It is estimated that investments in Brazil in preparation for and during these events could reach over US$70 billion and impact 55 different sectors of the economy.

Most financial and commercial activity takes place in the southeast region, where São Paulo and Rio de Janeiro are located, but other states have seen an increase in commercial activities and are increasingly offering incentives to entice foreign and domestic companies to locate in their states.

II. Market Entry

Entry Options

Foreign investors or companies that want to do business in Brazil have the same range of options as are typically available in other jurisdictions, ranging from simple contractual engagements of a local distributor or sales agent, to licensing of production in Brazil, and through increasing levels of engagement, including direct (minority) investment, joint ventures (or consortia), acquiring ownership (or majority control) of a Brazilian company and establishment of a branch or subsidiary in Brazil. We review each of these options below.

1. Distributor/Sales Agent

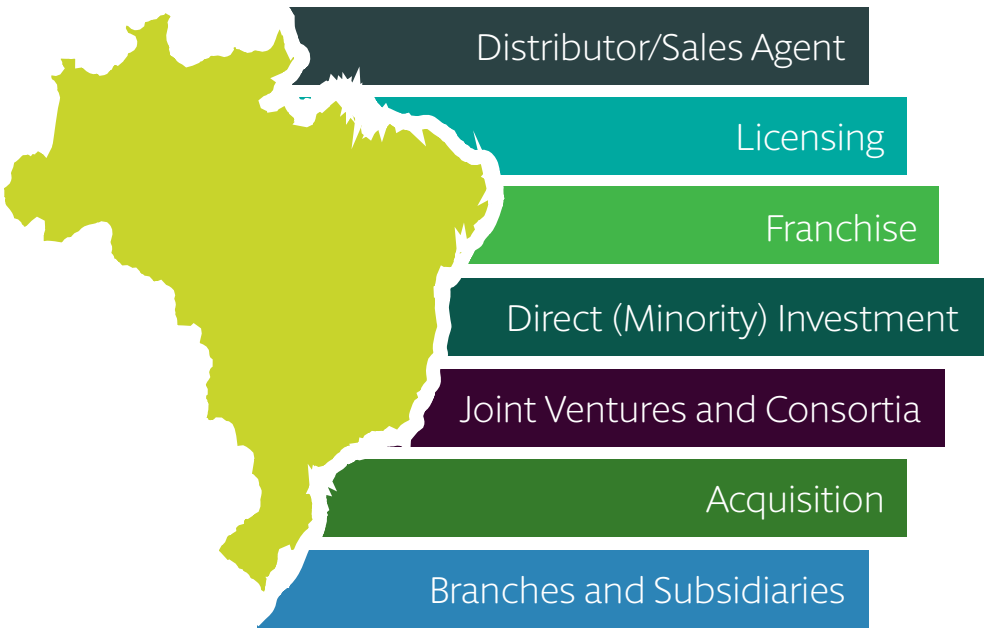
The simplest manner for a foreign company to enter Brazil is to contract with a local Brazilian representative to distribute, market, and/or sell the foreign company's products in Brazil. These relationships are generally confined to specific contractual terms, which dictate the scope of the services to be provided, compensation, and other provisions, but do not create any formal presence of the foreign company in Brazil. Foreign companies may encounter certain tax or foreign exchange issues related to compensation of sales agents and the export of goods to Brazil. Distributorship and sales agent agreements may be in any language and are often done in a dual-language, two-column format (with Portuguese and the chosen language of the contract parties, with a provision indicating which language controls in the event of a conflict of interpretation). If drafted in a language other than Portuguese, the agreement must be translated into Portuguese by a sworn translator before any disputes in connection with the agreement may be submitted to a Brazilian court.[1] For entry-level engagements of this nature, it is most common for the agreements to be governed by Brazilian law. These agreements typically provide that disputes will be resolved through litigation in Brazilian courts or by arbitration, with a growing trend towards arbitration to avoid the delays associated with litigation (as discussed in Section IX below).

In Brazil, the role of a sales agent as a commercial representative is expressly governed by Law no. 4.886/1965 as well as the Civil Code (Law no. 10.406/2002). The agency relationship is defined as an intermediation activity, in which an agent or sales representative (either an entity or an individual) negotiates proposals and commercial orders and transmits them to the principal for fulfillment. The sales agent's activities are performed on a continual and independent basis and without any employment ties to the principal. If the principal accepts a purchase order negotiated by the sales agent, the sales agent will be entitled to a commission, typically as a percentage of the transaction

1 Enforcement of contracts is discussed below in Section IX.

proceeds. All sales agents in Brazil must be registered before the Regional Council of Commercial Representatives (*Conselho de Representantes Comerciais* – "CORE") of each state in which the sales agent will operate.

A principal may choose to have certain business activities performed in Brazil on its behalf by a local legal representative pursuant to a power of attorney. It is common in Brazil, mostly as a matter of convenience, for a principal to engage a single individual to act as both a sales agent as well as its legal representative (attorney-in-fact). While there is no legal prohibition on having the same individual serve in this dual capacity, it is generally preferable to separate these roles, both to avoid over-reliance on a single individual and to differentiate between these two different roles: the sales agent should pursue business opportunities and facilitate sales, while the legal representative should be responsible for executing agreements and making other corporate decisions on behalf of (or at the instruction of) the principal.



2. Licensing

Foreign companies that want to have their products manufactured locally in Brazil or to otherwise authorize a Brazilian entity to use, manufacture, or distribute its goods, services, or proprietary information in Brazil would typically enter into a licensing agreement, a technology transfer agreement, or some similar contractual arrangement. Many of these agreements must be registered with the National Institute of Industrial Property (INPI), such as patent or trademark licenses, technology supply or transfer agreements, and technical services agreements, and the recordation at INPI is required in order to remit payments of license fees abroad. On the other hand, INPI does not require registration of purchase or sales agency agreements, financial, commercial or marketing consulting agreements, training on computer software or hardware that does not include technology transfer for manufacture or development, or off-the-shelf software licenses.

It is important to emphasize that licenses or assignments of patents or trademarks in Brazil may only be entered into after a registration application has been filed with INPI for the underlying patent or trademark.

The role of INPI is typically limited to recordation of intellectual property licensing or assignment agreements and registration of agreements involving technology transfer (and franchise agreements, as described in the following section). Licenses are only considered enforceable against third parties if they have been registered with INPI; this is of particular significance where the licensed right is exclusive to the licensee. As a general rule, trademark licensors retain the right to protect the integrity and reputation of their licensed trademarks in Brazil, and typically license agreements will explicitly state the obligation of the licensee to maintain and protect this integrity and reputation.

3. Franchise

In 2014, Brazil was ranked sixth in the world for the number of franchises and fourth in the number of franchise chains. According to the Brazilian Association of Franchising, in the past 10 years the franchising sector has grown by an average of 10-13% annually. Franchising has consistently grown faster than Brazil's economy overall and has become one of the economy's main growth engines.

Franchises in Brazil are regulated by Franchise Law No. 8,955/94, which provides a definition of "commercial franchise"[2] and requires the delivery of a franchise disclosure document (FDD) to prospective franchisees at least 10 days prior to the execution of any binding document related to the franchise or payment by the franchisee of any amounts in connection thereto.[3] Failure to comply with this requirement renders the franchise agreement voidable by franchisee and penalizes the franchisor with the refund of all amounts paid by a franchisee in connection with the franchise, plus recovery of damages.

Prior to registering a franchise agreement, the franchisor must file its trademark with INPI (see Section VIII.B regarding trademark registrations). Registration of the franchise agreement with INPI is mandatory (the FDD does not have to be registered, but a Statement of Delivery confirming that the franchisee has received an FDD must be submitted to INPI). All documents submitted to INPI must be in Portuguese; if they are in English, certified translations must

2 A franchise is defined as "a system whereby a franchisor licenses to a franchisee the right to use a trademark or patent, along with the right to distribute products or services on an exclusive or semi-exclusive basis and, possibly, the right to use the know-how related to the establishment and management of a business or operating system developed or used by the franchisor, in exchange for direct or indirect compensation, without, however, an employment relationship."

3 Brazil's franchise law identifies 15 mandatory elements of the FDD, including financial statements of the franchisor for the past two years, identification of the proposed franchise territory, clear descriptions of franchisee's rights and obligations, a summary of the status of the franchisor's trademark applications in Brazil, and consequences of termination of the franchise agreement.

Due Diligence – What To Look For

Performing due diligence in Brazil is an important precondition to making an equity investment in Brazil, particularly given the potential risk of "piercing the corporate veil" in certain circumstances (as noted elsewhere in this guide) and the foreign investor's unfamiliarity with Brazil's regulatory environment, which is often different from what foreign investors are familiar with. Working with experienced international and Brazilian counsel, foreign investors should take the following key issues into account in due diligence:

- pending litigation
- labor and employment issues
- environmental issues (including any licensing requirements)
- protested credit
- potential tax liabilities
- successor liability issues (especially with regard to tax and labor liabilities)
- intellectual property rights
- anti-corruption compliance
- the terms of any outstanding financings
- ownership or leasehold interests in real property
- adequacy of accounting books and records
- validity of necessary licenses or permits
- antitrust or anti-competition issues

be filed with INPI. The FDD can be in English only if the franchisee has a high level of English fluency and expressly confirms this fact. By law, the INPI must issue a decision of whether or not it will record the franchise agreement within 30 days from the filing date, although in practice it takes approximately 40 days. Registration with the INPI:

— Makes the franchise agreement effective against third parties;

— Permits remittance of franchise fees to the foreign franchisor;

— Qualifies the franchisee for tax deductions; and

— Once approved, constitutes prima facie evidence that the franchise agreement is in compliance with Brazilian antitrust regulations.

After the certificate of registration by the INPI is issued, the franchise agreement must be registered with the Brazilian Central Bank for remittance of payments. This process takes approximately two days.

4. Direct (Minority) Investment

In general, except as noted in Section II.B below, there are few restrictions to foreign companies making minority equity investments in Brazilian companies. While certain minority protections are provided for as a matter of law (as described in Section X.A below), for the most part these protections are applicable only to publicly traded companies. Accordingly, direct investors in Brazilian private companies (as opposed to market purchases of publicly traded securities) often enter into shareholders' agreements to ensure appropriate qualified minority protections, decision-making, information disclosure, conflict of interest and exit rights, and dispute resolution mechanisms. Although shareholders' agreements relating to Brazilian companies are not required to be governed by Brazilian law, because the shareholders' rights generally need to be enforced in Brazil, it is common – at least for a shareholders' agreement in which one or more of the shareholders are Brazilian – to use Brazilian law. The Brazilian company to which the shareholders' agreement applies must observe the terms and conditions of the shareholders' agreement once it has been filed with the company – for example, a corporate secretary may not count votes in violation of a duly filed shareholders' agreement. Similarly, a shareholders' agreement is only enforceable against third parties after it has been registered in the books of the company and is noted on the company's share certificates (if any). Shares subject to shareholders' agreements may not be publicly traded unless they are first separated from (i.e., no longer subject to) the shareholders' agreement.

5. Joint ventures and consortia

The next level of engagement of a foreign company in Brazil, and one that is commonly employed by foreign companies that desire to enter the Brazilian market in cooperation with a local partner, is to form a joint venture between the foreign investor and a Brazilian counterpart. As in other jurisdictions, joint ventures can be either contractual commitments or can be embodied in a shareholders' agreement governing a joint venture entity, typically either a Limitada or an S.A. (described more fully in Section III below). The terms and conditions of these joint venture agreements are similar to what would be included in other jurisdictions, covering issues such as financing commitments, the relative contributions of each party, management and decision-making, restrictions on transfer, exit options, and dispute resolution. As noted above, because one of the joint venture parties (and the joint venture entity, if created) is located in Brazil, it is common for these joint venture agreements to be governed by Brazilian law but with arbitration as a dispute resolution mechanism instead of litigation. Brazilian law requires certain basic minority protections and certain restrictions on transferability, as noted above, but for the most part the parties to a joint venture in Brazil are free to contractually determine the terms and conditions of their relationship.

One particular subset of joint ventures bears special attention: consortia. Foreign companies participating in public bidding processes, for example to obtain concessions for natural resource exploitation, are generally allowed to bid together with other companies in an unincorporated (contractual) consortium. Contractual consortia are not recognized as legal entities in Brazil, but the consortium agreement must be recorded before a Junta Comercial (Commercial Registry Board) and will be assigned a distinct tax ID number (CNPJ). Prior to participating in a bid process, consortium members must enter into a consortium agreement or a commitment agreement governing the relations between the parties for purposes of the bid, in which the consortium members commit to establish a special purpose company if the consortium is selected as the winning bidder. Public procurement awards can only be awarded to the same bidder that submitted the bid, so if a consortium is awarded a concession it will be initially granted to each consortium member on a joint and several basis, and then after the consortium entity is formed as a Brazilian special purpose company, the concession agreement may be assigned by the consortium members to the special purpose company.

6. Acquisition

Foreign companies that wish to enter the Brazilian market by acquisition often do so by either exercising takeover rights in an existing joint venture agreement or purchasing 100% ownership of an existing company. Share purchase agreements (or quota purchase agreements, for Limitadas) must be governed by Brazilian law, but they may be drafted in English. If drafted in English, the agreement must be translated into Portuguese by a sworn translator before any disputes in connection with the agreement may be submitted to a Brazilian court. The terms and conditions of share purchase agreements in Brazil do not differ substantially from similar agreements that foreign investors are generally familiar with, and will generally contain the same types of representations, warranties, covenants, conditions to closing (including obtaining regulatory approvals), and remedies.

A key challenge for foreign investors making equity investments in Brazilian companies – whether as a minority investor or in the context of an acquisition – is to adequately perform due diligence before acquiring the equity interest in the target company. A sizeable number of Brazilian companies, including large companies, are owned by industrialist families, and only in recent years has corporate governance been of

concern to these family-owned companies. Accordingly, a foreign investor must pay close attention to the adequacy and thoroughness of the company's books and records. In addition, although equity investment transactions in Brazil may follow a familiar form, structure, and substance for foreign investors, there may be significant regulatory issues under Brazilian law that the foreign investor must be aware of, and, as noted elsewhere in this guide, these regulatory issues may be significantly different in Brazil than in other countries. In summary, it is important for foreign investors to perform early and thorough due diligence of a target Brazilian company to have a clear understanding of any potential outstanding issues (see insert).

7. Branches and subsidiaries

The final form of entry into Brazil that many foreign companies undertake is to establish a local presence in the form of a branch office or a local subsidiary. Branch offices of foreign companies are permitted under Brazilian law; however, they require the approval of the President of Brazil. Although approval is generally granted, the process can take as long as six months or more, and utilizing a branch in Brazil instead of a subsidiary is often less desirable from an international tax planning perspective. It is therefore uncommon for foreign companies to establish stand-alone branches in Brazil.

The most common choice for establishing a permanent presence in Brazil is for foreign companies to form a local subsidiary in Brazil. The process for doing so, and considerations regarding the form of entity and related issues, is described more fully in Section III below.

B. Foreign Direct Investment – Regulated Sectors

In general, there are few restrictions on foreign investment into Brazil. However, certain regulated sectors of the economy still maintain restrictions on foreign ownership or control. With few exceptions, foreign ownership is prohibited in the aerospace (defense) industry, nuclear energy, and mail or telegraph services. There are also certain restrictions on foreign ownership of rural property or border lands, media companies (for example, newspaper and broadcasting companies are limited to 30% foreign ownership), domestic airlines (Brazilians must have at least 80% voting control), financial institutions, and hospitals and healthcare services.

III. Entity Formation

There are two basic types of Brazilian entities that are commonly formed by foreign investors, the *Sociedade Limitada* (**Limitada**) and the *Sociedade Anônima* (**S.A.**).[4] The Limitada is generally considered the equivalent of a limited liability company, and the S.A. is more closely associated with a corporation. The following chart demonstrates some of the basic characteristics and differences between these two entity types:

	Limitada	S.A.
Securities	Ownership divided into quotas; non-Brazilian persons or entities can be quotaholders; cannot be publicly issued or traded	Ownership divided into shares; non-Brazilian persons or entities can be shareholders; can (upon satisfaction of certain conditions) be publicly issued and traded
Ownership and Capitalization	Must have at least two quotaholders; no minimum capitalization requirement (except for certain regulated industries such as finance or insurance), but see Section V below regarding capitalization requirements for obtaining visas	Must have at least two shareholders; no minimum capitalization requirement (except for certain regulated industries such as finance or insurance), but see Section V below regarding capitalization requirements for obtaining visas
Formalities and Disclosure Requirements	More flexible, less required formalities; no requirement to publish financial statements[5]	More formalities required, especially if publicly traded; must publish annual financial statements in a local newspaper and the official gazette
Independent Audit	No audit requirement for the limitada's financial statements[6]	Public S.A.s must have their financial statements audited[7]
Management	Managed by one or more individual executive officers (*Administradores*) that have certain mandatory minimum powers established in the Articles of Association; foreigners serving as officers must have Brazilian residency visas	Managed by a board of senior officers (*Diretoria*), sometimes referred to as an Executive Board; foreigners serving as officers must have Brazilian residency visas; publicly traded companies must also have a board of directors (*Conselho de Administração*) with broad powers, including supervision of overall corporate strategy and appointment (and removal) of officers

4 Law No. 12,441/11 (effective in 2012) authorized a new entity type called "EIRELI" (*Empresa Individual de Responsabilidade Limitada*), but this is not yet in common use and is only applicable to individuals, so is not discussed further in this guide. An EIRELI must be owned by a single individual, Brazilian or non-Brazilian, and must have a capitalization of at least 100 times the statutory minimum salary (equal to R$78,800 in 2015).

5 The publication of a limitada's financial statements is required only if (a) the limitada is considered a "large company" or (b) the limitada belongs to a "large group." Law No. 11,638/07 defines "large company" or "large group" as an entity or group with either (i) total assets in an amount equal or higher than R$240,000,000 in the previous financial year or (ii) or gross revenues in an amount equal to or higher than R$300,000,000 in the previous financial year.

6 Unless the limitada is considered a "large company" or if it belongs to a "large group," as defined in Law No. 11,638/07 and described in the footnote above.

7 A privately held S.A. must have its financial statements audited only if it is considered a "large company" or if it belongs to a "large group," as defined in Law No. 11,638/07 and described in the footnote above.

A. Limitadas

The Limitada is commonly selected by foreign investors as the preferred entity form due to its greater flexibility, fewer formalities, and lower disclosure requirements.

1. Formation

The formation of a Limitada is achieved by the adoption of an organizational document (Contrato Social, commonly referred to in English as the equivalent to Articles of Association) and filing it with the Junta Comercial in the state where the Limitada has its headquarters. The *Contrato Social* must indicate, at minimum, the name of the Limitada, its corporate purpose, term of existence, principal place of business, capitalization, quota ownership of each quotaholder, the *Administradores*, the relationship of the quotaholders, and basic governance provisions. A foreign quotaholder of a Limitada must appoint a Quotaholder Representative in Brazil. The Quotaholder Representative is appointed through a power of attorney and must reside in Brazil.

Validity of Foreign Documents in Brazil

In order to be legally valid in Brazil, some documents need to pass through a process of authentication by a Brazilian consulate in the jurisdiction where the document originated. This authentication process, also referred to as "consularization," is a certification by the local Brazilian diplomatic authority of that jurisdiction that the documents are legitimate. The authentication process can take from a few hours to a few days, depending on the consulate.

Sworn Translation

In order for a foreign document to have legal effect in Brazil, the document must be translated by a "sworn translator." A sworn translator is a professional that has been duly certified by the Brazilian government to provide certified translations of foreign documents.

Once a foreign document has been notarized and authenticated ("consularized"), it can then be translated by a sworn translator in Brazil. Typically the translator can start the process with an electronic (PDF) version, but only a hard copy of the authenticated document with the sworn translation attached can be filed before any Brazilian government office or agency. The sworn translation process does not take longer than a regular translation, and depends on the length and complexity of the document.

Step by Step

Document must be:

- Notarized by a duly registered Notary Public;
- In certain jurisdictions, the document must be sent to the department of state for confirmation of the notary's signature;
- Authenticated by a Brazilian consulate;
- Sent to Brazil; and
- Translated in Brazil by a sworn translator;
- In certain cases, the document must be registered before a Brazilian Notary Public (cartório).

2. Management

The executive officer of a Limitada is called the *Administrador*; there can be more than one *Administrador*, but all Administradores must be Brazilian residents (including foreigners with residency visas). Accordingly, it is common for foreign investors to utilize third-party service providers or request that the Quotaholder Representative act as the initial *Administrador* of the Limitada, pursuant to a power of attorney, until Brazilian residency visas have been obtained for expatriate employees of the foreign investor who can serve as officers of the Limitada. Such third-party providers can also provide temporary physical addresses for service of process and other necessary initial formation services such as accounting, all on a fee basis.

3. Filing Requirements

After adoption of the Articles of Association and registration before the *Junta* Comercial for the state of formation, the Limitada must file additional incorporation forms with federal, state, and municipal tax, social security and licensing authorities, and possibly also with other Brazilian government agencies depending on the location, business type, and whether it is a regulated industry. Each quotaholder, including foreign quotaholders, must obtain a personal Brazilian tax identification number (CPF for individuals, CNPJ for entities), and both the quotaholders and the Limitada itself must register with the Brazilian Central Bank's *Cadastro de Empresas* (CADEMP) system. On an ongoing basis, all formal resolutions of the Limitada must be filed with the *Junta Comercial* in order to be enforceable against third parties.

4. Capitalization

As noted above, there is no minimum capital requirement for a Limitada, but for purposes of obtaining residency visas there are certain capitalization requirements, as discussed in Section V below.[8] Opening a Brazilian bank account for the Limitada (a process that requires each quotaholder to satisfy Brazil's "know your clients" requirements) and doing an international wire transfer to fund any capitalization of the Limitada are themselves subject to certain regulatory and documentary requirements and must be taken into account in the planning process. Once a capital investment has been made in a Limitada, the funds may be used for any corporate purpose; other than certain regulated industries such as banking or insurance, there is no requirement to maintain any minimum capital in reserve, but records must be maintained to demonstrate the Limitada's use of funds.

8 There may also be capitalization requirements for obtaining an importer's license, but this is not further addressed within the scope of this Guide.

5. Timing

Many foreign investors elect to invest in or acquire an existing "shelf" entity to avoid the new entity formation process, to proceed more quickly with the visa application process, or to start business operations in Brazil. While the use of a shelf entity previously saved as much as two months or more, due to changes in Brazil's bureaucratic processes (in particular linking the entity formation process with obtaining a tax ID number (CNPJ)), the time for formation of a new Limitada in some states, such as São Paulo and Rio de Janeiro, is now approximately 2-3 weeks once the organizational documentation has been prepared and submitted. The Brazilian government has also recently announced a federal program called "SIMPLES" through which certain "low risk" entities, specifically "Micro" and "Small Companies," may be formed within five days. [9]

B. Sociedades Anônimas (S.A.)

1. Formation

The first step for forming an S.A. is to obtain subscription commitments (public or private) for the capital of the S.A. At least 10% of the S.A.'s capital must be paid up in cash upon formation and deposited into the S.A.'s account with a financial institution.

Next, an organizational meeting of shareholders (or, for a privately held S.A., a public deed approving the incorporation) must be adopted approving the S.A.'s bylaws, the subscription for shares, the company's capital, election of the members of management (discussed below), and approval of the valuation of any assets contributed as paid-in capital. The minutes of this organizational meeting, or the public deed, must be registered with the *Junta Comercial* in the state of incorporation and published in a newspaper in the city where the company's headquarters are located.

2. Management

An S.A. is governed by a Board of Officers (sometimes referred to as an Executive Board) comprised of at least two officers (*diretores*). There may be more officers, but all of the officers must be Brazilian residents (including foreigners with residency visas). A privately held S.A. may, and a public S.A. must, also have a Board of Directors (*Conselho de Administração*); the Board of Directors is generally responsible for the strategic direction of the company, appointing and dismissing officers, approving the issuance of new shares or other securities, appointing independent auditors, and other major corporate policies and decision-making. The *Conselho de Administração* must have at least three members, and no more than one-third of its members can also hold an officer position in the company.

9 Micro Companies are defined by Law nº 123/2006 as companies with gross revenues equal to or lower than R$360,000 per year; Small Companies are defined as companies with gross revenues higher than R$360,000 but equal to or lower than R$3,600,000.

An S.A. must also establish an Audit Committee (*Conselho Fiscal*, sometimes also referred to as a Tax Council or Supervisory Council), though this does not have to be a standing body, and can instead be called into existence for each annual shareholders' meeting. The Audit Committee must have between three and five members; these members do not have to be shareholders, but they should all be Brazilian residents. The Audit Committee has authority to oversee the adequacy of the actions of the Executive Board, issue an opinion on the annual officers' report, issue an opinion on the issuance of new shares, dividends or any change to the corporate structure, analyze and issue an opinion on the company's financial statements, and call the annual general meeting if the Executive Board fails to do so.

3. Minority Protections

Brazilian law provides certain basic protections for minority shareholders. These minority rights are generally divided into two categories (i) participation rights, which allow the minority shareholder to vote during shareholder meetings and elect members of the Board of Directors; and (ii) equity rights, which entitle the shareholders to dividends, tag-along rights, right of first refusal regarding new shares, right of being bought-out in certain circumstances and to receive part of the S.A.'s equity in the event of liquidation.

4. Recordkeeping and Disclosure Requirements

With limited exceptions, all S.A.s, whether public or privately held, must publish their annual financial statements and minutes of their annual shareholders meeting in a newspaper and in the official gazette in the city in which their headquarters are located.

After formation and registration of the S.A., including obtaining a CNPJ (tax ID number), the company must file additional forms with federal, state, and municipal tax; social security and licensing authorities; and possibly also with other Brazilian government agencies depending on the location, business type, and whether it is a regulated industry.

In addition, S.A.s must keep, at minimum, the following corporate records:

- Share Ledger
- Share Transfer Book
- Minutes of Shareholders' Meetings
- Minutes of Board of Directors Meetings
- Minutes of Board of Officers Meetings
- Minutes of Audit Committee's Meetings

5. Capitalization

In general, an S.A. can have both common and preferred shares. [10] As noted above, there is no minimum capital requirement for an S.A., but for purposes of obtaining residency visas there are certain capitalization requirements, as discussed in Section V below. [11] Opening a Brazilian bank account for the S.A. and doing an international wire transfer to fund any capitalization of the S.A. are themselves subject to certain regulatory and documentary requirements and must be taken into account in the planning process. Once a capital investment has been made in an S.A., the funds may be used for any corporate purpose; other than certain regulated industries such as banking or insurance, there is no requirement to maintain any minimum capital in reserve, but records must be maintained to demonstrate the S.A.'s use of funds.

6. Timing

The process for formation of an S.A., including subscription agreements, the organizational meeting and publication of the formation of the company, typically takes approximately 1-2 months depending on the state of incorporation. Unlike with Limitadas, foreign companies do not typically purchase "shelf" S.A.s, given the publication and formation requirements for this entity type.

10 Public companies listed on the *Novo Mercado*, a special listing segment of the São Paulo BM&FBOVESPA exchange with higher corporate governance requirements, may have only common shares.

11 There are also capitalization requirements for obtaining an importer's license.

IV. Foreign Exchange Controls and Taxation

A. Foreign Exchange Controls by Central Bank

As a general rule, the Brazilian government permits entities and individuals to purchase and sell foreign currency and to perform international transfers in Brazilian Reais, irrespective of the nature of the operation and without restrictions on the transfer amounts, though transactions exceeding R$10,000 must be registered with the Brazilian Central Bank Database System – SISBACEN.

The main tool used by the Brazilian government to control the flow of foreign exchange is the IOF (*Imposto sobre Operações Financeiras*), a tax on financial operations, that is used by the Brazilian government as a strategic tool to control the flow of foreign currency transactions. [12] In addition, the government has implemented other measures to regulate foreign exchange, such as increasing the limit of dollars that the Treasury is allowed to buy in the open market and also authorizing Brazil's sovereign wealth fund to purchase currencies in the foreign exchange market.

Finally, it is important for foreign companies to be aware that all Brazilian bank accounts must be denominated in Reais; with very few exceptions, it is not possible to have a Euro- or dollar-denominated account in Brazil.

B. Taxation – General Issues

As with any jurisdiction, entry into Brazil requires careful tax planning, international tax structuring, and experienced local advisors. Brazil's tax regime is complicated and multi-tiered, with taxation at the municipal, state, and federal levels in addition to industry- or product-specific tax regimes. According to the World Bank's "Doing Business 2016" report, Brazilian companies spend approximately 2,600 hours a year dealing with tax issues, as compared with an average of 367 hours in the rest of Latin America. The federal tax system is managed by the *Receita Federal do Brasil* (analogous to the IRS in the United States), which is part of the Ministry of Finance. States and municipalities have similar agencies.

Although Brazil has a complex tax structure, it need not be a substantial impediment to investment in the country if upfront planning is sufficiently robust and informed, and depending on the nature of the business and the location of the foreign company's operations in Brazil, there may be substantial tax incentives available.

The primary sources of tax law in Brazil are the Federal Constitution and the 1966 Tax Code. There are three taxing authorities: the federal government, the 26 states (and the Federal District) and the municipalities.

Brazilian companies are taxable on their worldwide profits and capital gains; only the federal government has the authority to charge income tax. Companies may choose to pay income tax under one of two systems: presumed profits or actual profits.

- **Presumed profits**: this system is available for companies with an annual income equal to or less than R$78,000,000. The taxable income is based on a presumption of a profit margin, and is according to a fixed percentage of gross income (8% for commerce, industry and hospital services; 32% for other service providers in general).

12 The IOF rate can vary from 0% to 25% depending on the nature of the transaction; however, the rate for the majority of transactions is approximately 6%.

– **Actual profits**: under this system, the basis for calculating income taxes is the company's actual net profit after deducting operational and business expenses. The taxpayer files quarterly or annual reports. If it chooses quarterly reporting, then the company pays tax on a quarterly basis. If the company instead elects annual reporting, then it must pay monthly advance tax payments.

A company may switch from the presumed profits system to the actual profits system at any time.

The basic corporate income tax rate is 15% and there is a surcharge of 10% for all taxable income over R$240,000 annually or over R$60,000 quarterly. Companies may carry forward tax losses against future profits indefinitely; however, they can only offset 30% of the current year's taxable income. Carry-back of losses is not allowed.

Profits are exempt from withholding of income taxes, but interest and royalty payments to non-residents are generally subject to withholding at the 15% standard rate or at the applicable treaty rate. Royalty payments are subject to a 15% withholding tax and to a 10% "Economic Intervention Contribution" (CIDE). Payments for services not subject to CIDE, or to payment recipients located in tax havens, are subject to a 25% withholding tax.

Transfer pricing methodologies are applicable to transactions between subsidiaries, affiliates or branches, but do not apply to royalties or to technical, scientific, administrative assistance and similar contracts, which are subject to specific tax legislation.

The most common taxes to be taken into account in Brazil are summarized in the chart on the following page.

Tax	Tax Base	Tax Rate
Corporate Income Tax (IRPJ)	Actual or estimated profits	15%, plus an additional 10% on income that exceeds R$20,000 per month
Withholding Income Tax (IRPF)	Income and capital gains earned by nonresidents from Brazilian paying sources	15%-27.5%
Tax on Manufactured Products (IPI)	Sale price when the product leaves the industrial establishment, or upon import	Variable rates depending on the product classification
Tax on Financial Transactions (IOF)	Credit, currency, insurance, and securities transactions	0%-25% depending on the type of transaction
Social Security Financing Contribution (PIS/COFINS)	Revenue (the company's gross income)	PIS: 1.65% or 0.65% (noncumulative or cumulative taxation system, respectively) COFINS: 7.6% or 3% (noncumulative or cumulative taxation system, respectively) or 4% (for financial institutions)
Social Contribution over Corporate Revenue (CSLL)	Profits	9%, but can be 15% (depending on industry)
Economic Intervention Contribution (CIDE)	Transaction value in contracts to license, purchase or otherwise acquire "technological knowledge," or to provide technical services	10%
Tax on Distribution of Goods and Services (ICMS)	Transaction value	7%-37%
Tax on Services (ISS)	Service price	2%-5%
Import Duty (I.I.)	CIF product value for goods that enter the country	0%-35% (follows the WTO rates)
Export Duty (I.E.)	Exports of product made or cleared in Brazil	Generally 30%, but other rates may apply (capped at 150%); most products are currently taxed at 0%

Tax Treaties

Brazil has double taxation treaties with 32 countries but not with the United States. The countries that currently have tax treaties with Brazil are:

- Argentina
- Austria
- Belgium
- Canada
- Chile
- China
- Czech Republic
- Denmark
- Ecuador
- Finland
- France
- Hungary
- India
- Israel
- Italy
- Japan
- Luxembourg
- Mexico
- Netherlands
- Norway
- Peru
- Phillippines
- Portugal
- Slovakia
- South Africa
- South Korea
- Spain
- Sweden
- Trinidad and Tobago
- Turkey
- Ukraine
- Venezuela

The former tax treaty with Germany expired on 1 January 2006, and tax treaties with Paraguay and Russia are pending approval.

V. Visas and Immigration

A. Visa Requirements – General

For short-term assignments and temporary travel to Brazil, most foreigners can rely on a standard **Business Visa** for travel to Brazil, and for passport holders from many countries no visa is required for tourist or business stays in Brazil up to 90 days.[13] For longer-term assignments, there are several options for foreign investors to obtain Brazilian residency visas for themselves and their employees, but the most common visas that foreign investors apply for are the **Temporary Visa** or the **Permanent Visa**, each of which can be sponsored by the Brazilian entity formed (or acquired) by the foreign investor. An **Investment Visa** may be the best alternative in certain circumstances, though it is often neither the fastest nor most efficient option to obtain the Brazilian residency visas needed for many foreign companies. Similarly, a **Technical Visa** may also be appropriate for certain companies, but the time and effort to prepare the necessary documentation (for example, a Technical Cooperation Agreement) generally makes this an unattractive option. The following summary briefly describes the requirements for obtaining a Business Visa, Temporary Visa, Permanent Visa, or an Investment Visa.

13 Currently, holders of the following passports do not need a visa for business travel to Brazil of up to 90 days: Albania, Antigua and Barbuda, Argentina, Austria, Belgium, Bolivia, Bulgaria, Czech Republic, Chile, Colombia, Costa Rica, Croatia, Cyprus, Denmark, Dominica, Ecuador, El Salvador, Estonia, Finland, France, Georgia, Germany, Greece, Grenada, Guyana, Honduras, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Jamaica, South Korea, Latvia, Lithuania, Luxembourg, Macau, Malta, Monaco, Morocco, Netherlands, New Zealand, Norway, Paraguay, Peru, the Philippines, Poland, Portugal, Romania, Russia, Saint Kitts and Nevis, San Vincent and the Grenadines, San Marino, Serbia, Slovakia, Slovenia, South Africa, South Korea, Spain, Surinam, Sweden, Switzerland, Thailand, Trinidad & Tobago, Tunisia, Turkey, Ukraine, United Kingdom, Uruguay, and the Vatican.

B. Business Visa

The Business Visa is the standard visa used for temporary or short-term assignments in Brazil for purposes such as participation in conferences, business meetings and negotiations. Under a Business Visa, an individual cannot engage in ongoing work in Brazil or receive direct compensation from a Brazilian payor (a Temporary Work Visa, Permanent Visa or Investor Visa – as discussed below – is needed for these types of services). In addition, the Business Visa only allows an individual to stay in Brazil for up to 90 days at a time, up to a maximum of 180 days in a single calendar year.

The Business Visa typically takes between 2-4 weeks to obtain and is valid for 10 years. The Business Visa must be applied for by the individual applicant; however, in some cases the individual may be required to provide a letter from his or her employer (or from an inviting entity in Brazil) as part of the application process.

C. Temporary Work Visa

In order to render services and work in Brazil on a longer-term basis, an individual must obtain either a Temporary Work Visa or a Permanent Visa (discussed in the next section). The Temporary Work Visa allows an individual to stay and work in Brazil for a period of two years, renewable for an additional two years, after which the Temporary Work Visa may be converted into a Permanent Visa. The Temporary Work Visa typically takes between 30-90 days to obtain.

In order to obtain a Temporary Work Visa, a Brazilian entity must serve as the entity sponsoring the individual for visa purposes and must demonstrate that the individual possesses certain key skills and knowledge that are not available in Brazil and which make such individual unique to the market.

An individual with a Temporary Work Visa may continue to be employed by a foreign (non-Brazilian) company and still provide services to a Brazilian entity (including a Brazilian subsidiary or joint venture in which the foreign entity has an interest). In order to do so, the Brazilian entity must file with the Brazilian government, among other documents, a copy of a technical assistance agreement between the Brazilian entity and the foreign employer, which evidences that the individual remains an

employee of the foreign entity and is only providing services to the Brazilian entity on a temporary basis. Brazilian labor law will not apply to such individual; he or she will retain an employment relationship with the foreign entity, and will continue to receive the compensation and benefits offered solely by the foreign entity.

Although an individual working in Brazil pursuant to a Temporary Work Visa is allowed to render services and work in Brazil, such individual is not allowed to hold a management position in a Brazilian entity (that is, he or she cannot be an officer, executive or manager of the Brazilian entity); a Permanent Visa is required for these positions.

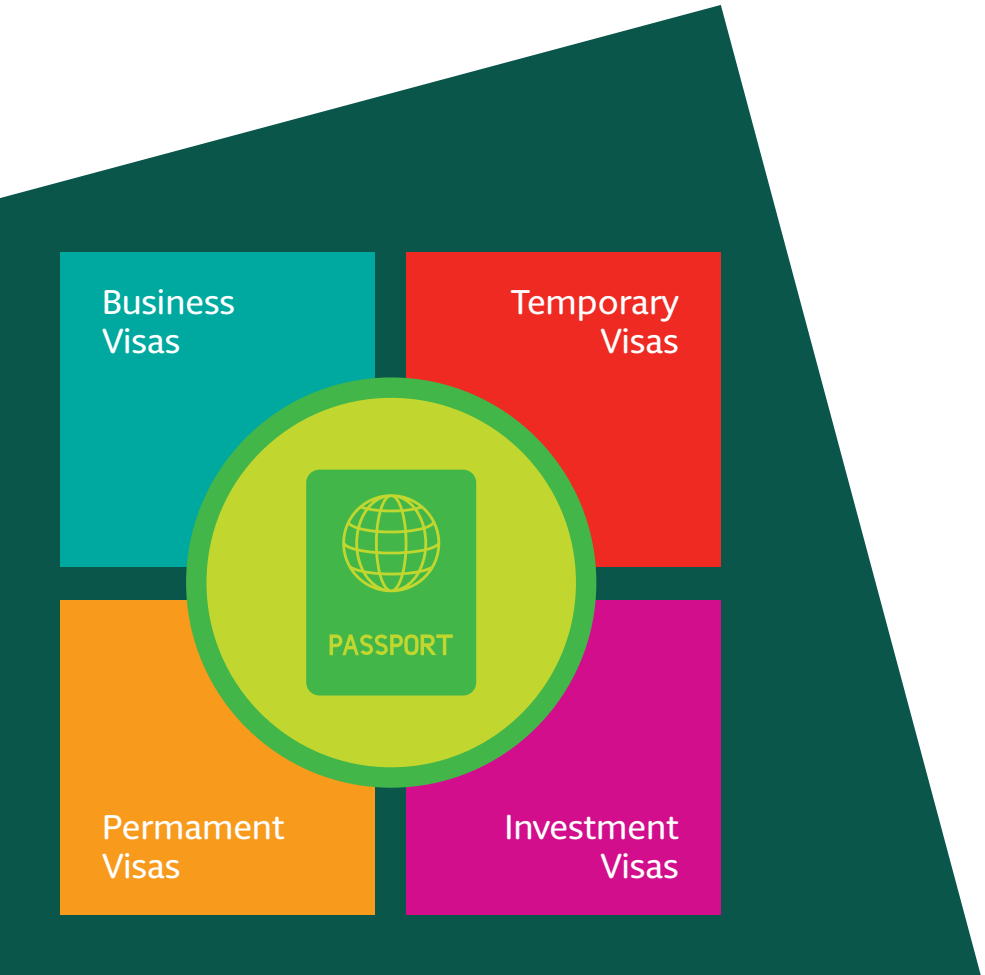
D. Permanent Visa

The Permanent Visa is available for individuals that intend to work and reside in Brazil for an indefinite period of time. Despite the moniker "permanent," these visas are valid for five years and can be renewed indefinitely for successive five-year periods, provided the individual continues to perform his or her job in Brazil. If the individual's relationship with the Brazilian entity terminates, the Permanent Visa can be immediately revoked, unless the individual transfers his or her employment to a different sponsoring Brazilian entity.

A Permanent Visa is required for an individual that is hired as an employee of a Brazilian entity or that holds a management position in a Brazilian entity.

In the first case, an individual will be hired as a direct employee of a Brazilian entity, and will work and provide services under the supervision and coordination of such entity. This type of Permanent Visa is usually used by professionals that have no employment ties with any foreign entity and that want to work and reside in Brazil. In this case, there will be a Brazilian employment relationship between the individual and the Brazilian entity.

In the second case, in order to request a Permanent Visa for a management position, the sponsoring Brazilian entity must either provide evidence that it has (1) received a foreign investment of at least R$600,000 per individual obtaining the Permanent Visa or (2) received at least R$150,000 per individual obtaining the Permanent Visa *and* committed to create at least 10 new jobs in Brazil within two years of the Permanent Visa individual's arrival into Brazil. Note that if R$600,000 has been invested per individual,



the Brazilian entity is exempt from the commercial commitment to create new jobs. The job creation requirement is carefully monitored and strictly enforced by Brazilian immigration authorities.

The Permanent Visa for management positions also requires, among other documentation, that the sponsoring Brazilian entity file an Investment Plan describing how the use of the amounts referenced in the paragraph above will generate jobs and wealth in Brazil by increasing productivity, incorporating technology, and generating revenue for specific sectors of the economy. There is no requirement that these amounts be held in reserve; they can be used for any legitimate corporate purpose (*e.g.*, investments, payment of salaries, leasing costs, etc.).

With regard to management positions, there need not be a Brazilian employment relationship between the individual and the Brazilian entity. The individual that holds a management position must be appointed for such position in the Brazilian entity's articles of association or pursuant to a shareholders' resolution. Although the individual that holds a management position is entitled to receive *pro labore* compensation for the services provided to the Brazilian entity, such individual is not considered an employee of the Brazilian entity solely by virtue of serving in the management position, and thus is not subject to the benefits of a Brazilian employment relationship.

Accordingly, if a foreign entity wants to send an individual to Brazil to hold a *management position* in the local subsidiary or joint venture, such individual would require a Permanent Visa, and would need to be hired by the Brazilian entity; however, such individual could still maintain his or her employment relationship with foreign entity. Alternatively, the individual can serve as a manager of a Brazilian entity and, in parallel, have an employment relationship with the Brazilian entity.

It is important to note that the Permanent Visa has certain tax implications. An individual that obtains a Permanent Visa will be considered a Brazilian taxpayer upon his or her first entry in Brazil. Although Brazil has tax reciprocity agreements and treaties with other countries, the individual would need to file tax returns in Brazil and, depending on his or her individual tax profile, may be required to pay taxes in Brazil.

Recent changes to Brazil's immigration rules provide for faster processing of Permanent Visa applications for certain qualified professionals, particularly systems analysts, engineers, and experts in the oil and gas industry, with less documentation required and estimated processing time of 30 days.

E. Investor Visa

The Investment Visa is granted to individuals who intend to invest and reside in Brazil in connection with a particular business enterprise. Each investor must personally make an investment (as a capital contribution) of at least R$150,000 in an existing or newly formed Brazilian company. Although it is the individual who makes a personal investment, it is the Brazilian company that actually applies for the investment visa. The Investor Visa takes approximately 2-3 months to obtain and must be renewed every three years.

VI. Labor and Employment

A. Employee Rights and Benefits During Employment

According to Brazil's labor law, an "employee" is an individual who provides services to a company or to an individual on a regular basis, under the direction of such company or individual, for compensation.[14] An "employer" is a company or sole proprietorship that takes the risk of its economic activities, hires, pays salaries, and sets out the guidelines for the services provided by the employee. Companies belonging to the same economic group, under the same control or direction, are jointly and severally liable for compliance with labor-related obligations.

It is not necessary for an employment contract to be written. However, the employer must complete and sign a "Work Card" (*Carteira de Trabalho e Previdência Social* – CTPS) for each employee within 48 hours of hiring. The CTPS, also commonly referred to as an employment booklet, is issued to all contracted employees in Brazil (so, for example, it does not include business owners or government employees whose employment is governed by statute). It is used to record the individual's work history, and to document the employee's right to, and receipt of, benefits such as vacation and maternity leave (as discussed below).

Employees are typically hired for an indefinite duration. Contracts for a fixed duration are only valid when (a) the nature of the services justifies a limited time period for the labor relationship or (b) it is a "probation" contract for a limited evaluation period prior to committing to an indefinite employment arrangement.

The inserts below summarize some of the basic rights to which an employee is entitled under Brazilian labor law; additional rights or benefits may be negotiated in an employment agreement or pursuant to a collective bargaining agreement with an employees' union. An employee does not have to be a member of a union to benefit from the protections and benefits that are reflected in that union's collective bargaining agreement; it is sufficient that the employee simply be of the applicable profession.

Given the complex nature of employers' requirements under Brazilian law and the employee-friendly character of the specialized labor courts, employment-related litigation is fairly common in Brazil. The statute of limitations period for employment-related claims is five years; upon the termination of an employment contract, claims relating to the previous five years must be initiated within two years of the contract's termination. The statute of limitations for civil actions based on labor and employment matters relating to workplace accidents and illnesses is twenty years.

14 Special care must be taken with contracts with independent contractors or sales agents, even if they are similar to what would be found in the United States or in other jurisdictions. These contractual relationships may, if brought before a Brazilian court, be deemed an employment relationship, or the burden of proof may be put on the alleged employer to prove the absence of direction or control.

Companies belonging to the same economic group, under the same control or direction, are jointly and severally liable for compliance with labor-related obligations.

B. Interruption and Suspension of Labor Agreements

Brazilian labor law has specific rules regarding interruption (*interrupção*) and suspension (*suspensão*) of a labor relationship. A labor agreement is considered *interrupted* when the employee temporarily ceases to provide services, without prejudice to his or her compensation or benefits or the computation of the employee's length of service. Typical examples of interruptions are sick leave, maternity leave and annual vacations.

A labor agreement is *suspended* when services, compensation, computation of length of service, and other benefits cease without termination of the employment relationship. Typical examples of suspension of a labor agreement include unpaid leaves of absence and the employee's participation in strikes.

C. Termination

Brazilian employment law provides for substantial protection of employees against termination and in the event of a termination. After an initial "probation period" of up to 90 days, employees can only be terminated for "cause" (a defined set of circumstances set forth in Brazil's labor code, including disciplinary or substance abuse reasons, but not poor performance) or without cause with the payment of additional compensation.

If an employee is terminated without cause, as a minimum requirement under Brazilian law the employee is entitled to receive (1) the balance of his or her outstanding salary; (2) the payment of vacation days not taken by the employee; (3) a *pro rata* amount of the compensation the employee would receive during his or her vacation (one monthly salary plus 1/3 bonus) according to the number of months the employee has worked during the "vacation rights acquisition period"; (4) a *pro rata* amount of the thirteenth salary (Christmas Bonus) according to the number of months the employee has actually worked during the calendar year; (5) release of the severance pay that has already been deposited in the

Mandatory Employee Benefits

- compensation paid on a monthly, fortnightly, weekly or even per task basis
- annual "Christmas Bonus" (13th salary) equal to one month's compensation
- annual vacation of 30 days (in addition to official holidays) plus a vacation bonus equal to 1/3 of the employee's monthly compensation
- weekly remunerated rest period
- annual salary increase (either according to a statutory rate or as agreed in a collective bargaining agreement)
- monthly contributions by the employer into the employee's FGTS severance fund equal to 8% of the employee's monthly compensation
- monthly social security (INSS) contributions in an amount equal to 20% of the employee's gross monthly salary, plus a payment of additional "social costs" from 6-12% of the employee's monthly salary
- for most employees, overtime benefits for hours worked above 8 hours per day and/or 44 hours per week
- 1 hour per day for a meal and rest break
- transportation allowance (depending on the circumstances)
- if the company establishes a profit-sharing plan, then all employees are entitled to benefit in it as part of their compensation package
- night work premium
- hazardous or dangerous work premium (if applicable)

Common Discretionary Employee Benefits

- health benefits
- meal voucher (may be mandatory, depending on the circumstances)
- life insurance
- day care allowance

employee's FGTS (unemployment benefit fund) account; and (6) an additional payment by the employer of 40% of the total amount already deposited in the employee's FGTS account (and the employer must also pay an amount equal to 10% of the FGTS account to the Federal Government). Other termination benefits may be provided in collective bargaining agreements between the employer and the employees' union.

The employer must provide prior notice of at least 30 days of a termination without cause. Alternatively, a common practice is for the employer to pay the employee for this prior notice period and terminate the employment at once.

Finally, Brazilian labor law provides for employment protection for certain classes of employees such as for expectant mothers, members of an internal commission for accident prevention (CIPA) (when applicable), union representatives, or employees that have suffered an injury on the job or work illness, among others. Termination of any employees from this protected group, even if the employing company is itself winding up, must be only for cause and requires extra compensatory payments.

D. Unions and Collective Bargaining

The right to constitute and participate in labor unions is enshrined in Brazil's Constitution. In addition to company-specific union agreements, collective bargaining agreements exist between employers' unions and employees' unions for many economic sectors; even employees that are not members of a union may therefore be entitled to benefits granted in these collective bargaining agreements. The employer's contribution to a sector-based union is based on the number of employees and the size of the company; employee annual contributions are typically equal to one day's salary.

VII. Privacy and Data Security

A. Current Framework

In contrast to the European Union, which has established data protection legislation, Brazil has a patchwork of laws and regulations that provide general principles governing data protection and privacy. This system is similar to what is found in the United States; however, Brazil's privacy laws are less far-reaching and more narrowly applied. Brazil's current data protection framework draws on the Brazilian Federal Constitution, the Civil Code, Consumer Protection Code, Credit Information Law, Right to Information Law, the Internet Law (recently enacted and effective as of June 23, 2014) and other sector-specific and professional regulations; however, these multiple authorities do not provide a commonly accepted, statutory or regulatory definition for "personal information." Court decisions and other legal proceedings have interpreted "personal information" to encompass any particularized individual information, including name, gender, birth date, profession, taxpayer identification number, and address, as well as the content of private personal communications such as personal emails and text messages.

Furthermore, to the extent that the concept of "sensitive personal information" exists in Brazil, its legal definition derives from the Credit Information Law. It is important to note that in Brazil, a person's age, taxpayer identification number, and profession are not considered "sensitive personal information" (taxpayer identification numbers, for example, are quite freely used and provided in commerce in Brazil). Brazilian privacy rules do not impose a legal requirement to obtain consent prior to collecting general personal information, but "sensitive personal information" should not be collected without consent or for any discriminatory use. Discrimination claims are the most common form of legal claims arising from the use of sensitive personal information.

Moreover, Brazil does not impose any specific restrictions on cross-border data transfer; however, interpretation of some legal provisions and principles may suggest that the cross-border transfer of certain personal information, especially certain sector-specific data such as clinical trials and medical information, may be limited. In the absence of clear regulatory guidance on

safeguarding personal information, companies that collect and process personal information in Brazil must take reasonable measures to avoid negligence-type tort claims. Security breach notifications are neither addressed nor required in Brazil's current legal framework.

Given that Brazil does not have a Data Protection Authority to enforce privacy and information security, companies that collect personal information are not required to register their databases or files with a government agency or to appoint a data protection officer. Nonetheless, an aggrieved person, a public prosecutor, or an association that defends collective interests can bring a private lawsuit. Damage awards are frequently based on a concept of "moral" damages as opposed to actual economic harm, but, even at the high end, awards considered significant in Brazil do not come close to those obtained in the United States. Maximum awards are typically in the $8,000 range for individual consumer claims and $1 million for class action claims. In administrative consumer protection proceedings where a violation is found, public authorities may revoke licenses and permits and/or impose monetary sanctions that can reach up to $1.5 million. Privacy and data security claims generally involve consumer rights (not business-related personal information) under consumer protection laws while, as previously noted, discrimination claims relating to the use of personal information are increasingly common.

B. Brazilian Internet Law

On 24 April 2014, Brazilian President Dilma Rousseff approved the enactment of Law No. 12,965/2014, the Brazilian Internet Law, also known as *Marco Civil da Internet*, establishing for the first time in Brazil express legal rights and obligations of Internet users and providers alike.

The new law draws on the principles of freedom of speech, freedom of information, and the right to privacy by instituting certain guarantees for the protection of private information and the secrecy of information exchanged or stored online, and by restricting the liability of Internet service providers (ISPs) and Internet application providers (IAPs), such as social media websites and search engines for third-party content.

Under the Brazilian Internet Law a user's "private information", including personal information, the contents of private communications, connectivity, and Internet application access logs cannot be shared or disclosed by ISPs or IAPs unless required by a judicial order or as authorized by law; however, this restriction does not prohibit certain administrative authorities from accessing certain user data, including names and IP addresses. The Brazilian Internet Law also requires certain Internet companies to retain information on Internet users for minimum periods of time. When required to retain information, such ISPs and IAPs must do so in a secure environment and confidential manner and are

prohibited from collecting and storing private information than was not authorized by the user.

The Brazilian Internet Law also incorporates an approach to liability for Internet companies hosting third-party user-generated content that is analogous to section 230 of the Communications Decency Act in the United States (47 U.S.C. sec. 230). Specifically, under the Brazilian Internet Law, an Internet company will not be liable for user-generated content posted on its service unless it ignores a judicial order to remove content.

Notably missing from the Brazilian Internet Law is a controversial provision, which had been introduced in the original bill in the wake of the Edward Snowden disclosures, which would have required ISPs and IAPs to store all information regarding Brazilian users on servers physically located in Brazil. After strong objection from major IT companies, this provision was eventually dropped from the final draft of the bill. The Brazilian Internet Law instead provides for "long-arm" jurisdiction allowing the Brazilian government to enforce the Brazilian Internet Law against any ISPs or IAPs outside of Brazil that collect, maintain, treat, or store data from Brazilian users, as long as they provide services to Brazilian users or at least one member of their economic group maintains offices in Brazil

The Brazilian Internet Law adopts the concept of "net neutrality," meaning that every data transmission must be treated the same regardless of its content, origin, destination, service, terminal, or application. Moreover, ISPs and IAPs are prohibited under the new law from blocking, monitoring, filtering, or analyzing any data transmissions

While Brazil still does not have a comprehensive privacy law, the Brazilian Internet Law contains privacy requirements that broadly restrict these companies from the sharing of users' personal information, their communications, and certain online logging data. Any ISPs, IAPs, or other companies operating online, whether located in Brazil or otherwise, that collect, store, or maintain online user information of Brazilians should familiarize themselves with the Brazilian Internet Law for its privacy and security obligations.

The Brazilian Internet Law adopts the concept of *net neutrality*

C. Proposed Data Protection Law

The Brazilian National Congress is currently analyzing a bill that addresses data privacy and information security. As of 2016, Brazil still lacks specific and detailed legislation concerning the collection, processing, and use of personal information.

The Data Protection Law was submitted to Congress in 2011 but is still under consideration. In December 2015 the Brazilian Ministry of Justice submitted a new version of the Draft Bill on Data Protection. The Draft Bill will be sent directly to the President's Chief of Staff for approval before beginning its legislative process. The current draft is substantially based on European data protection law and would (1) create a Data Protection Authority with broad powers to impose sanctions, monitor compliance, and enforce the law on an administrative basis; (2) introduce general notice and choice principles and establish specific rules applicable to sensitive personal information; (3) establish specific rules regarding data security breaches, which could create an obligation to notify data subjects as well as the Data Protection Authority of any incidents involving breaches; and (4) address the cross-border transfer of personal information, establishing that transfers outside of Brazil will be subject to consent from data subjects.

VIII. Intellectual Property

Brazil has a well-developed framework for the protection of intellectual property rights. On an international level, Brazil is a long-term member of the Paris Convention for the Protection of Industrial Property, TRIPs (Agreement on Trade-Related Aspects of Intellectual Property Rights), the Berne Convention for the Protection of Literary and Artistic Works, the Universal Copyright Convention, and the Patent Cooperation Treaty (PCT). The Paris Convention and the latter two multilateral agreements provide for a certain level of worldwide protection of copyrights and patents when filed in another member country. Specific intellectual property rights in Brazil are covered in the following sections.[15]

A. Patents

Brazil recognizes two types of patents, for inventions and for utility models. Inventions are new products or processes, while utility models are new practical uses or improvements of existing objects or processes. The fundamental requirements of patentability in Brazil are novelty, inventiveness (non-obviousness), and industrial applicability.

As noted above, Brazil has been a party to the Paris Convention since its origin in 1883 and has also acceded to the 1967 Stockholm Act. Accordingly, the filing of a patent in a treaty member country will afford the patent holder with a right of priority in Brazil (one year for inventions and utility models counted as of filing in the country of origin). A claim of priority must be made on the date of the patent application. Patents for inventions are valid for 20 years, and patents for utility models are valid for 15 years, in each case counted from the date of filing; however, because the process for granting patents may be substantially delayed, there is a minimum term of 10 years for invention patents and seven years for utility model patents, counted from the date of the patent's grant. Patents can be relinquished or forfeited before the end of this validity period, and forfeiture can also be deemed to occur if the patent holder fails to pay the annual statutory fee applicable as of the third year of filing or, for a foreign patent holder, fails to maintain an attorney-in-fact in Brazil. Patent license agreements in Brazil must be filed with INPI in order to be effective vis-à-vis third parties and to remit royalties abroad.

Notwithstanding the Paris Convention priority period, applicants may also use the PCT system to have their patent of invention or utility model filed in Brazil.

B. Trademarks

Unlike in some other jurisdictions, trademarks in Brazil may only be registered if they can be rendered graphically – there is no trademark protection for tastes, scents, or sounds. Trademarks must be registered with INPI; this process can take as long as two years or more to complete,[16] but a restricted level of protection for the mark attaches from the time of filing.

15 In addition to the basic types of intellectual property rights covered in this Section, Brazil also grants protection through registration to geographical indications (indication of source and appellation of origin), industrial design, integrated circuit topography, and genetically modified organisms.

16 INPI is in the process is substantially increasing its staff with the objective of reducing this review period from over two years to just 10 months.

A six-month priority of timing is granted to marks that have already been filed in another Paris Convention country.

On 9 April 2013, the Brazilian Chamber of Foreign Trade of the Federal Government (CAMEX) approved Brazil's accession to the Madrid Protocol. Under the Madrid system, a trademark owner can obtain trademark protection in several countries simultaneously by filing one application directly with its own national trademark office. Legislation to accede to the Madrid Protocol is expected to be considered by Brazil's Congress soon, and Brazil's entry should greatly simplify the registration of trademarks in Brazil by foreign companies (and by Brazilian companies seeking trademark protection abroad).

Trademarks are generally registered in the order in which they are applied for, but INPI recognizes the rights of a bona fide previous user of a mark that actually used the mark for at least six months in Brazil prior to the application or priority date. A trademark registration is valid for 10 years and is renewable for successive 10-year terms but

The registration of the foreign company with the Registration Authority for purposes of acquiring a .com.br domain name requires the following:

- A notarized Power of Attorney granting the attorney-in-fact specific powers to register the domain name;
- A notarized "Statement of Commercial Activities" containing the company's registered name, address, telephone number, description of its commercial activity, and name and position of its legal representative;
    - A notarized "Commitment Statement" confirming that the company will establish a presence in Brazil within 12 months of the date of the statement, under penalty of having its domain name cancelled;
    - Consularization of the Power of Attorney, Statement of Commercial Activities and Commitment Statement before the Brazilian Consulate in the U.S., and translation of these documents by a sworn translator in Brazil;
        - A copy of the attorney-in-fact's CPF or CNPJ; and
        - A statement from the attorney-in-fact regarding the company's contact information.

will expire if the foreign owner of the mark fails to appoint and/or maintain an attorney-in-fact in Brazil or allows the mark to lapse from non-use for five consecutive years. In this regard, it is important to note that the use of a modified form of a trademark may cause the original trademark to lapse from non-use.

Distinct from trademarks, trade names are protected only in the state of incorporation of the company using such trade name and its branches. To obtain national protection, the articles of association must be filed in each Brazilian state separately (federal legislation is pending to make this unnecessary).

C. Copyright

Copyright protection in Brazil derives from Article 5 of Brazil's Constitution, which ensures certain rights for Brazilians and foreigners domiciled in countries that grant reciprocity to Brazilians, including the right of authors to monitor the economic exploitation of the works which they create or in which they participate. Copyright protection in Brazil does not differ significantly from the protection offered in other countries, and, as noted above, Brazil is a party to the Bern and to the Universal Copyright Conventions. Registration of copyrightable works is not necessary in order for the works to be protected, but they provide evidence of authorship and date of creation of the work. Registration of copyrightable works can be done with the public agencies in the appropriate sphere of endeavor – for example, the National Library (for texts), School of Fine Arts of the Federal University of Rio de Janeiro (for artwork) or the Music School of the Federal University of Rio de Janeiro (for musical compositions). Copyright protection lasts for 70 years from 1 January of the year following the author's death (or the last surviving co-author, if applicable).

Moral rights of authors are inalienable and unwaivable, including the right to claim authorship, to have the author's name associated with the work, and to safeguard the integrity of the work (including opposing changes that may adversely affect or harm the author's reputation). Certain moral rights do not accrue to successors of the author, such as the right to amend the work at any time or the right to withdraw the work from circulation.

Exceptions to copyright protection ("fair use" provisions) exist for uses that are not considered an offense to the copyright, such as reproduction of small excerpts for personal use and quotes in books or newspapers for purposes of criticism or study.

Copyrights are considered movable/personal property and, with the exception of moral rights as noted above, can be licensed, assigned, or transferred, including by succession. However, a copyright assignment is only valid if it is in writing, and its terms and conditions are interpreted restrictively, so it must be carefully drafted.

Computer programs are considered protectable works of authorship, but they are governed by a separate law. Protection of computer programs is similar to the protection for copyrights, but there are some notable exceptions, namely the exclusion of most of the moral rights protections and the duration of the protection, which is 50 years from 1 January of the year following the software's publication or creation. Protection of copyright for foreigners is dependent on reciprocity, that is, the country where the work or software was created must offer equivalent copyright protections to Brazilians.

D. Trade secrets

Brazilian law follows other jurisdictions in recognizing protectable trade secrets as consisting of both industrial or manufacturing secrets and commercial secrets, and is subject to Article 39(2) of the TRIPS Treaty. The company desiring to protect a trade secret must take appropriate precautions to ensure its confidentiality, including electronic measures (e.g., passwords), physical access to information, confidentiality agreements, and the like. In the event of a disclosure of a trade secret, the company must be prepared to demonstrate its novelty, the competitive advantage the company gains from the trade secret, and the benefits that have accrued to the person that violated its secrecy.

In accordance with the Paris Convention, Brazil's Industrial Property Law recognizes the crime of "unfair competition" by individuals who disclose or use confidential information to which they had access as a result of a contractual or employment relationship, or which was obtained illegally or by fraud.

E. Domain name registration

In order to register a Brazilian top-level domain name (.br), a foreign company must first appoint an attorney-in-fact in Brazil to represent it before the Registration Authority[17] (note that the attorney-in-fact must itself be registered with the Registration Authority). The company, through the attorney-in-fact, then registers with the Registration Authority to obtain an identification number as a foreign company (see insert). This ID number is then used in lieu of a CNPJ in the application for a .br domain name.

The Registration Authority grants domain names on a "first come, first served" basis and does not perform any analysis of the registrability of a domain name; availability is the only criterion for registration. As part of its application for registration, the applicant must represent to the Registration Authority that the requested domain name is not misleading and does not violate any third-party rights. Still, as a matter of practice, because there is no registrability analysis by the Registration Authority, "cybersquatting" occurs in Brazil, and a party that wishes to assert a rightful claim to a domain name must pursue injunctive relief, and in some cases indemnification, through court action or through an alternative dispute resolution mechanism called SACI-Adm, which is modeled after the ICANN dispute resolution procedure.

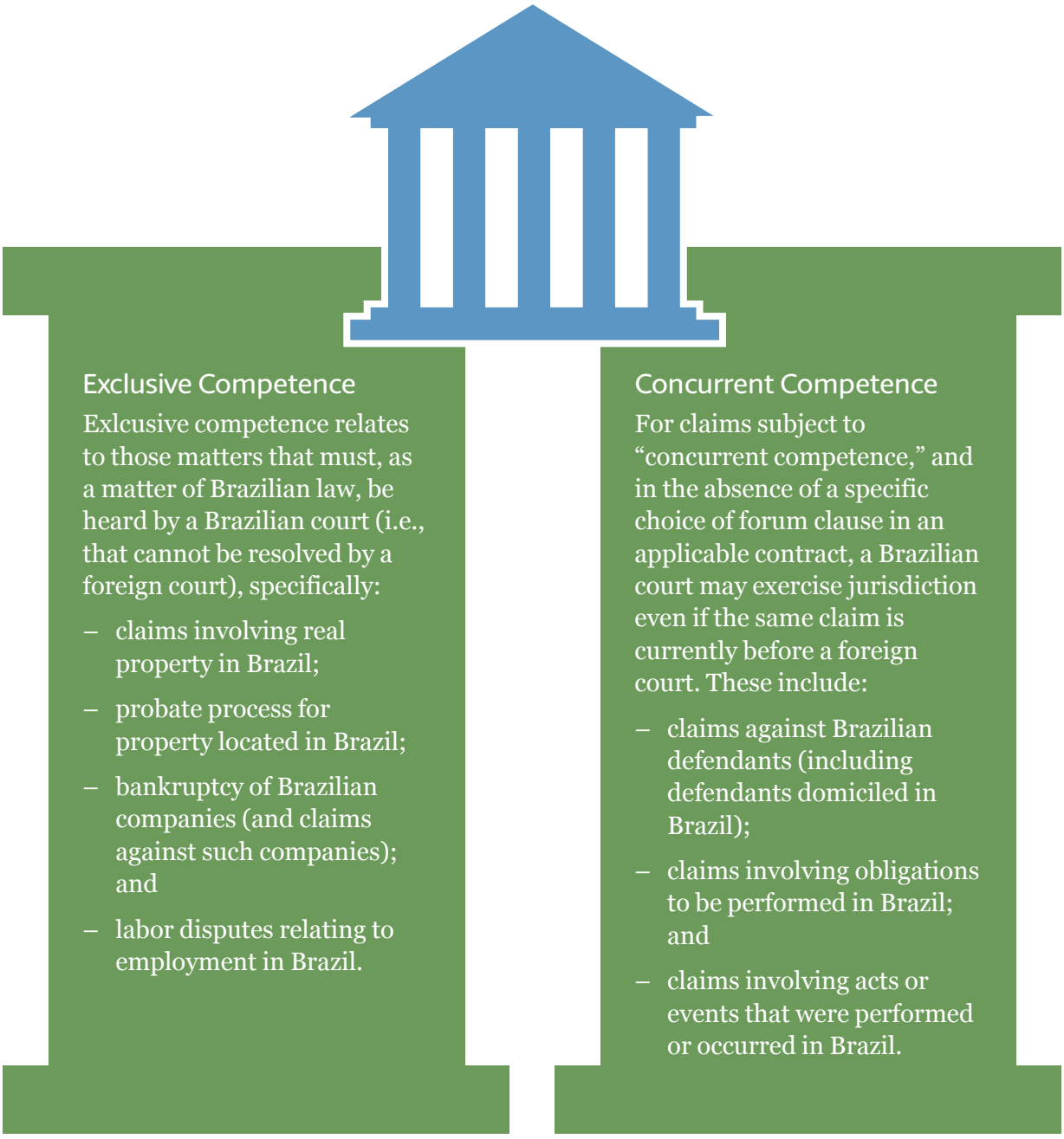
Once registered, a .br domain name can be successively renewed for periods of 1-4 years.

17 For convenience we have referred here to the Registration Authority. The agency is also referred to as Registro.br, and because it is linked to the Brazilian Internet Management Committee (*Comitê Gestor Internet do Brasil*) it is also sometimes referred to as CGI.br.

IX. Dispute Resolution

A. Choice of law

Brazil's jurisprudence regarding the jurisdiction of Brazilian courts to hear claims over matters involving foreign parties distinguishes between "exclusive competence" (*competência exclusiva*) and "concurrent competence" (*competência concorrente*).



B. Litigation v. arbitration

1. Litigation in Brazil

A significant contributing factor to Brazil's reputation as a litigious country is the lengthy periods of time that standard Brazilian cases may take. It is not uncommon for civil claims to be litigated for 10 years, and for remedies proceedings (after the merits of the case have been decided) to take an additional several years. For contractual claims, for a contract to be submitted before a Brazilian court it must be either originally drafted in Portuguese or translated into Portuguese by a sworn translator (*tradutor publico juramentado*; see Section III for a detailed explanation regarding document validity in Brazil and sworn translations).

2. Alternative Dispute Resolution in Brazil

Mediation of disputes, particularly commercial disputes, is a nascent but growing trend in Brazil. Arbitration continues to be the most popular dispute resolution mechanism for business-related disputes in Brazil, in particular because of the relative expediency of having an arbitral award issued, recognized and enforced as compared to litigation. There are several arbitral bodies in Brazil, including the Arbitration and Mediation Center of the Brazil-Canada Chamber of Commerce (*Centro de Arbitragem e Mediação da Câmara de Comércio Brasil-Canadá* – CAM/CCBC); the São Paulo Chamber of Mediation and Arbitration (*Câmara de Mediação e Arbitragem de São Paulo*, an independent organization formed by *Centro das Indústrias do Estado de São Paulo* (CIESP) and *Federação das Indústrias do Estado de São Paulo* (FIESP)); and the Conciliation and Arbitration Chamber of the Getúlio Vargas Foundation (*Câmara FGV de Conciliação e Arbitragem*).

3. Enforcement of Foreign Judgments in Brazil

In general, the judgment of a foreign court will be upheld and enforced in Brazil, barring any public policy reason such as a failure of due process or a clearly discriminatory judgment against a Brazilian defendant abroad. To be enforced in Brazil, the foreign judgment must be final and non-appealable, must be translated into Portuguese by a certified sworn translator, and must be approved by Brazil's Superior Court of Justice (*Superior Tribunal de Justiça* – STJ).

4. Enforcement of Foreign Arbitral Awards in Brazil

Brazil became a member of the New York Convention in 2002, without reservations. Accordingly, absent public policy reasons or other justifications specifically permitted by the Convention, Brazilian courts will uphold and enforce arbitral awards issued by duly constituted international arbitral tribunals. However, it is important to note that the procedural delays and backlog of Brazilian courts may result in a substantial delay in actual enforcement. Enforcement of a foreign arbitral award in Brazil requires a process known as homologation (confirmation) by the STJ. The requirements for this confirmation are:

- the arbitral award must have been rendered by a duly authorized body;
- the parties must have been given proper notice of the proceedings (or a default must have been duly recognized);
- the arbitral award must be final and non-appealable; and
- the award must be authenticated by the Brazilian consul in the jurisdiction of its issuance and translated by a sworn translator.

After confirmation (homologation) of the award by the STJ, the prevailing party must obtain a certified copy of the decision. After receipt of this certified copy of the STJ's confirmation decision, the party may seek enforcement of the arbitral award in the federal court with appropriate jurisdiction.

Amendments to the Brazilian Arbitration Law

In July 2015 a bill amending the Brazilian Arbitration Law (the "**2015 Arbitration Amendment**") came into force, introducing several changes to the legal framework for arbitration in Brazil. One of the most controversial issues in Brazilian arbitration law was finally settled by the 2015 Arbitration Amendment, which included the possibility of public entities being party to arbitral proceedings. The 2015 Arbitration Amendment expressly allows public entities to use arbitration when the dispute relates to economic rights that can be waived. In addition, the 2015 Arbitration Amendment included the following changes:

- parties may now agree to avoid limitations imposed by the rules of arbitration institutions that restrict the choice of arbitrators only to those arbitrators listed by the institution;
- recognition and enforcement of a foreign arbitral award in Brazil is only subject to homologation by the STJ (this was common practice in Brazil and is now confirmed);
- a rule concerning the statute of limitations was created, according to which a statute of limitations may be suspended (tolled) by an arbitral institution, even if the arbitral tribunal eventually finds that it lacks jurisdiction over the claim. The arbitration is considered instituted once all arbitrators have accepted their appointment, after which the date of the request for arbitration determines the time in which the statute of limitations began to toll;
- preventative measures were introduced into the Brazilian arbitration framework, essentially consolidating the existing practice giving arbitrators the power to order preventative measures and to review preventative measures granted by courts before the constitution of the arbitral tribunal. Parties may seek preventative measures from courts while the arbitral tribunal is not yet established, but after the tribunal is constituted, the parties may only request preventative measures directly from the arbitrators. After its constitution, the arbitral tribunal may maintain, amend or revoke preventative measures granted by courts;
- improvement of the relationship between arbitral tribunals and Brazilian courts was addressed, with the introduction of the "arbitral letter," an official document of communication between state courts and arbitral tribunals, by which arbitrators may request judicial authorities to perform certain acts within their jurisdiction;
- arbitral tribunals are now permitted to render partial awards (this was already common practice in Brazilian arbitrations); and
- it is now established that an arbitral tribunal must decide all claims made by the parties to an arbitration. If the tribunal does not do so, the parties may resort to the applicable Brazilian state court, which may then order the tribunal to hear and decide the remaining claims or counterclaims.

X. Compliance, Corruption and Public Integrity Issues

A. Corporate Governance

Until recently, Brazil has been seen as having a relatively weak corporate governance system providing insufficient protection for minority shareholders as well as extensive use of non-voting shares, few outside directors, and low levels of disclosure. However, in the past decade and a half the Brazilian economy has undergone major changes and significant improvements have been implemented in these areas.

In 1995, the Brazilian Institute of Corporate Governance (IBGC) was created to encourage businesses to adopt transparent, responsible, and equitable practices. In 2000, the São Paulo Stock Exchange created three high-governance markets – *Novo Mercado*, Level I and Level II – with differentiated levels of corporate governance standards to which listed companies voluntarily adhere. Adherence by listed companies to the requisite governance levels for these markets has had a positive impact on liquidity and returns, in addition to reducing the volatility of the shares.

Inspired by the Sarbanes-Oxley Act in the U.S. and corporate governance reforms in the European Union, Brazil began to revise and improve its corporate disclosure practices. As an example, the Brazilian Securities and Exchange Commission (CVM) has instituted rules empowering shareholders to attend company meetings and to exercise their voting rights and has also required companies to disclose the average, maximum, and minimum compensation for directors and officers of listed companies as well as their compensation policies. This information is disclosed by companies on the "reference form," an important tool used to increase transparency and accountability.

Although most corporate governance requirements are still only obligatory for publicly traded companies, Brazil mandates certain fundamental protections for minority owners, including tag-along rights and pre-emptive (anti-dilution) rights.

B. Anti-Corruption

Brazil is one of the original 1997 signatories to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. However, Brazil's 2002 anti-corruption statute that implemented the OECD Anti-Bribery Convention imposed liability only on natural persons and lacked the element of corporate liability that is a cornerstone of anti-bribery enforcement in other jurisdictions.

On 1 August 2013, President Dilma Rousseff approved a new Brazilian anti-corruption law, Law no. 12,846/213. The new law was published in the Brazilian official gazette on 2 August 2013 and became effective on 28 January 2014. This new anti-corruption law is much broader in scope and establishes harsher sanctions for violations than under the existing regime.

For example, the new anti-corruption law establishes civil liability of entities for the bribery of public officials. Under the previous law, only individuals could be prosecuted for corruption. In addition, under the new law, judicial and administrative sanctions can be imposed on foreign entities doing business in Brazil that engage in bribery of Brazilian or non-Brazilian officials.

Foreign companies operating in Brazil that are subject to other anti-corruption laws (such as the Foreign Corrupt Practices Act or the UK Bribery Act) will now have an additional substantial compliance obligation under Brazilian law, similar in scope to the FCPA. Under the new law, foreign companies operating within Brazil can be subject to severe sanctions for bribery (or attempted bribery) of local officials by employees, agents or other authorized representatives

of the foreign company in Brazil, whether acting on behalf of a local Brazilian subsidiary or directly on behalf of the foreign company.

The new law imposes harsh sanctions for violations. Administrative fines may be imposed of up to 20 percent of the company's gross revenue from the previous year. If the offending company's gross revenue cannot be determined, a fine of up to R$60 million may be imposed. The new law also establishes civil penalties, including disgorgement of benefits obtained, suspension of the company's activities, prohibition from obtaining government incentives or contracting with the government for five years, and even the dissolution of the offending entity.

In addition, new the anti-corruption law establishes strict liability for all administrative and civil sanctions. Accordingly, the Brazilian enforcement authorities only need to prove that the illegal acts were committed to benefit the company or were perpetrated in the company's interest. This applies to bribery acts perpetrated by directors, officers, employees and other agents acting on behalf of the company.

The new anti-bribery law also imposes successor liability in the event of amendments to a company's articles of association, merger or acquisition of the company. With regard to acquisitions, successor liability of the acquiring entity will be limited to fines and the full restitution of the damage caused, up to the value of the transferred assets. It is also important to note that the new anti-corruption law establishes that some sanctions may be mitigated for companies that have effective compliance programs in place as well as those that self-disclose violations and cooperate with anti-corruption investigations.

C. 2015 Regulations

In March 2015 President Roussef enacted Decree no. 8.420/2015 (the "**Decree**"), providing certain regulatory rules and clarifications for application and implementation of the 2014 anti-corruption law.

The Decree establishes certain procedures to investigate and ascertain the liability of companies. According to the Decree, government agencies have the authority to initiate and conduct investigations, as well as to ascertain liability and apply sanctions. The Federal Accountability Office (*Controladoria-Geral da União* – CGU) has joint jurisdiction to investigate allegations of corruption that involve the Federal Government, as well as against foreign entities. The deadline for the completion of this procedure is 180 days, but it may be extended if needed.

In addition, the Decree establishes that the penalties for companies that have engaged in corruption may be no less than the amount of harm that resulted from the illegal conduct. The fines are calculated based on the company's gross revenue during the previous year and may range from 0.1% to 20% of such gross revenue. The Decree also establishes criteria for increasing or reducing these percentages, based on specific situations such

as repeated infringement or entry into a leniency agreement. If a company's gross revenue cannot be determined, the fine may be set between R$6,000 and R$60,000,000.

According to the Decree, a company's compliance program should be applied and updated based on the company's industry, activities and level of risk. According to the guidelines set forth in the Decree, a well-structured compliance program should have efficient mechanisms to ensure integrity, auditing, and incentives for reporting irregularities. The existence and effectiveness of compliance programs will be considered by the sanctioning authority when determining any penalties.

An important aspect of the anti-corruption law is that it establishes the possibility for the government to enter into leniency agreements with companies that assist with anti-corruption investigations. In order to benefit from a leniency agreement, a company must self-report its participation in corrupt activities, identify any other companies involved, cooperate with the investigation and provide evidence for its allegations.

Provided a company meets the requirements listed above, some benefits may apply, such as the exemption from the prohibition to receive public incentives and from the publication of the sanctioning decision. The company may also be relieved from or have reduced sanctions regarding the right to bid or contract with government entities, as well as a reduction of any monetary penalties. Regardless of entering into a leniency agreement, a company that has committed an act of corruption must fully repair the losses and damages caused by its corrupt activities.

The CGU is responsible for creating registers of all companies that have been sanctioned or suspended under the anti-corruption law. These national registers, called the National Register for Sanctioned Companies (*Cadastro Nacional das Empresas Punidas* – CNEP) and the Register for Disreputable and Suspended companies (*Cadastro Nacional de Empresas Inidôneas e Suspensas* – CEIS), may be consulted by investors and other government bodies when conducting due diligence and evaluating risks. A company found to be in violation of the anti-corruption law will be listed in these registers for a maximum period of 5 years, from the day the corrupt actions were discovered, or, in case of continuous actions, from the day they stopped.

A well-structured compliance program should have efficient mechanisms to ensure integrity, auditing, and incentives for reporting irregularities.

XI. Competition and Antitrust

A. Antitrust

On 29 May 2012, Brazil enacted a new antitrust law, which brought several changes to the country's antitrust system, most notably pre-merger analysis (and approval, as discussed below), the unification of agencies, modification of the criteria for compulsory notification, a term for analysis of mergers, modification in the list of anti-competitive conducts, and changes in penalties for anti-competitive behavior.

Before the new law was implemented, assessments of market dominance were carried out by Brazilian authorities after mergers and acquisitions had taken place. Deals were assessed in three separate instances: the Secretariat for Economic Monitoring of the Ministry of Finance (SEAE), the Secretariat of Economic Law of the Ministry of Justice (SDE), and the Administrative Council for Economic Defense (CADE) would all review a deal before a decision was reached.

The new law has restructured this assessment process and the three previous competition authorities – SEAE, SDE, and CADE – have been unified into a single enforcement agency, commonly referred to as "Super CADE" or "New CADE" (for ease of reference this will be referred to in this guide simply as CADE), which is fully responsible for the analysis of mergers and anti-competitive behavior.

CADE's structure is similar to that of the United States Federal Trade Commission; however, the Brazilian agency has a longer timeframe to issue its ruling (330 days, as opposed to 30 days in the U.S.). This extended timeframe created some initial concerns of delay in the evaluation of merger activities; however, CADE has so far been successful in meeting its deadlines. In addition, CADE now has more efficient tools for analyzing complex cartel formation cases. Corporate directors and administrators found guilty of market-rigging are now more likely to face punishment, including imprisonment, and the agency has the power to offer plea-bargains to whistleblowers.

B. Transaction Compliance and Consumer Protection

With the enactment of the new law, deals that could lead to consumer-harming market concentration will require prior approval from CADE. If one of the parties in the transaction has revenues, in Brazil, of R$750 million or more in the previous fiscal year and any other party involved in the transaction (considering its whole group) has revenues, in Brazil, of R$75 million or more in the previous year, then the deal is subject to compulsory notification to CADE.

In addition, CADE has issued a resolution establishing that (1) merger transactions that have been completed and not reported to CADE will be considered void and the parties involved will be subject to sanctions between R$60,000 and R$60 million; (2) CADE may issue a provisional authorization for a merger, before a final decision is reached; and (3) if CADE fails to reach a decision within the allotted timeframe, the deal will be considered approved.

With regard to compliance, SDE, one of the agencies responsible for conducting antitrust investigations, has enhanced its investigative procedures through the use of effective tools such as inspection, search and seizure, wiretapping, and the implementation of agreements with several foreign antitrust authorities. CADE, responsible for final judgment of antitrust cases, has hardened its position, punishing more companies for anti-competitive conducts such as the formation of cartels.

XII. Product Liability

In Brazil, product liability is governed by the Consumer Defense Code (Law nº 8078/1990 – CDC). The CDC imposes strict liability regarding the supply of defective products, meaning that liability may be imposed irrespective of fault – a claimant needs only to show the existence of a defect, damages (or loss) and a cause between the defect and the damage.

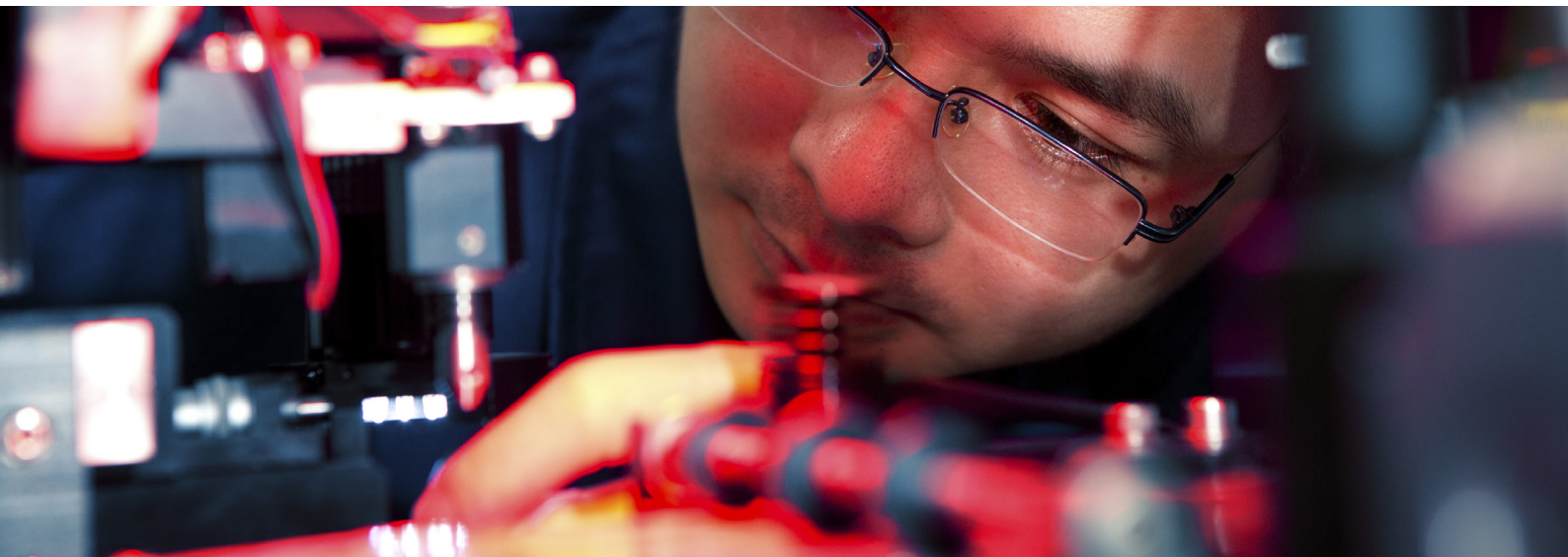
A "defective product" is defined as one that does not offer the level of safety that is legitimately expected from the consumer, taking into consideration the product's presentation, reasonably expected uses, and risks in each case, at the time the product was placed on the market. Under the CDC, a consumer may request that a supplier of a defective product: (i) replace the defective product; (ii) refund the amount paid, without prejudice to the payment of damages; or (iii) provide a proportional refund of the price.

There is no government (state or federal) compensation or indemnification to a consumer; any compensation will be owed either by the manufacturer of the defective product or by the other participants in the production chain, such as the builder (whether domestic or foreign), the distributor, or the importer. The CDC also establishes that any participant in the production chain that has contributed to the damages is jointly and severally liable, so an injured consumer may choose against whom to bring the claim and can seek full compensation from any party to the production chain that shares in the responsibility for the defect.

The retailer of a defective product will only liable to a consumer in the event: (i) the manufacturer, the builder, the producer or the importer cannot be identified; (ii) the product has been supplied without a clear identification of the manufacturer, producer, builder or importer; or (iii) it has not properly stored perishable products.

Defective products that reach several consumers may be condemned and taken off the market by regulatory agencies or through class actions initiated by entities with standing to sue under the CDC. In certain cases, such as failing to provide adequate information regarding hazardous products or failure to conduct a recall, individuals with executive or managerial authority at companies that have committed serious product safety violations may be subject to criminal charges and incarceration of up to two years.

Although these rules are clearly established in the CDC, enforcement of product liability in Brazil is still a complex task as the legal enforcement of consumer-related rights is not well-developed in Brazil.



XIII. Environmental Law

Brazil has a robust statutory and regulatory environmental law framework. Brazil's National Environmental Policy Act, Law 6,938/81 (NEPA) provides for joint and several strict liability of any "Polluter," which is defined as any person or entity that is "directly or indirectly responsible for an activity that causes environmental degradation". The potentially expansive nature of this liability for "indirect Polluters" was highlighted in the following statement of Justice Herman Benjamin of the STJ, who opined that joint and several liability as a "Polluter" should attach to the following categories of persons: "[1] whoever acts, [2] whoever fails to act when they should, [3] whoever does not mind others acting, [4] whoever remains silent when they ought to denounce an act, [5] whoever finances others to act, and [6] whoever benefits when others act." [18]

Pursuant to Article 225 of the Constitution and related environmental legislation, legal action for violations of environmental law can take three separate forms: civil claims, administrative claims, and criminal claims against companies and individuals. Civil remedies for losses arising from environmental issues may include compensation for actual losses and "moral losses." Brazilian law gives courts authority to pierce the corporate veil if the corporate form is considered to be an obstacle to compensating injured or damaged parties from a loss arising from an environmental violation.

Administrative claims are brought by environmental agencies as penalties for violations of environmental law; fines can range from R$500 up to R$50 million, depending on the nature of the activity, and can also include a suspension of a company's right to continue its business activities.

Unlike the strict liability regime of civil claims for environmental losses, criminal environmental liability requires a showing of intent. For entities, environmental criminal liability can be premised on the decision of a legal representative or a duly-constituted decision-making authority (such as a Board of Directors) made for the benefit of the entity. Significantly, Brazilian law also provides for potential individual criminal liability for environmental violations committed by entities. Criminal charges may be brought against a director, administrator, board member, auditor, manager, agent, or representative of a corporate entity who has knowledge of an environmental crime, has the power to prevent it, and fails to do so, or who in any way contributes to the commission of an environmental crime.[19]

18 STJ, 2nd panel, REsp. 1.071.741/SP (2009).

19 The Chevron offshore oil spill at the Frade field in November 2011, for example, in addition to civil, administrative and criminal claims against Chevron, criminal charges were brought against the president of Chevron's Brazil operations (a U.S. citizen) and three other Chevron employees, as well as against 13 employees of Transocean, the drilling subcontractor. The criminal charges were subsequently dropped.

XIV. Insurance

Foreign companies and individuals operating in Brazil and that want to obtain insurance coverage for their business activities (or other insurable risks, such as personal property or life insurance) must be mindful of the Brazilian prohibition on foreign insurance companies underwriting risks in Brazil. In order to legally offer insurance products in Brazil, an insurer must be authorized by and registered with the Superintendent of Private Insurance (*Superintendência de Seguros Privados* – SUSEP). As a practical matter, this means that an umbrella policy covering a foreign parent company outside of Brazil and all subsidiaries, including a Brazilian subsidiary, may be prohibited from treating the Brazilian subsidiary as a beneficiary, as doing so would be considered the illegal provision of insurance in Brazil by the umbrella insurer (but the parent company may be insured against losses incurred by the Brazilian subsidiary).

The insurance and reinsurance markets are a growth sector in Brazil, in particular since the opening of the reinsurance markets to foreign companies in 2008. The drivers for the expansion of the insurance markets are the same as the ones identified in the introduction to this guide: the expansion of the Brazilian economy and the purchasing power of the middle class has fueled a greater demand for health, property, life, and commercial insurance products.

Brazil prohibits foreign insurance companies from underwriting risks in Brazil.

When at Work in Brazil

By Denise Coronha Lima

One of the key factors in running a successful venture in Brazil is to understand the local culture and how people think and act. For those interested in maximizing business success and realizing staff potential, communication and behavioral skills will play a major role in bringing synergy to the work environment as well as social situations. The following guidelines will help new entrants make their way and take full advantage of the opportunities envisioned for their projects in Brazil:

1. Learn at least few words in Portuguese. The attempt to communicate will be much appreciated and ease interactions.
2. Personal relations make projects tick in Brazil. Whenever possible, plan, negotiate and explain important details in person or over the phone. As business often takes place beyond the office, accept invitations for lunch and drinks.
3. Contrary to other cultures, interrupting in Brazil does not necessarily mean being rude, but rather engaging. Be ready to welcome contributions and to jump in with your own considerations and questions.
4. Typically, Brazilians will not say “no”. Adjust your questions in order to elicit real information. Above all, be careful when giving negative feedback and gentle when saying no.
5. Time sense varies across cultures affecting the way things get done. In Brazil, follow up more frequently and confirm appointments and deadlines in a friendly way.
6. As lateral thinkers, Brazilians will genuinely make suggestions while you might be focused on accomplishing tasks. Do not let new ideas slip away: listen more. Diversity and open dialog together foster innovation.
7. Brazil has its own background, knowledge and tropical priorities. When planning and overseeing projects, generally reconsider your expectations, and allow ample contingency in budgets and deadlines. Overseas management should be constantly apprised of local realities.
8. Finally, remember that cultural flexibility is not a matter of choice but rather a precondition for unveiling professional and business growth opportunities and for designing appropriate strategies and action plans to suit Brazil.

Based in Rio de Janeiro, Denise Coronha Lima is a language & cross-cultural specialist and founder of Rio Total Consulting. She is the author of *Power Portuguese, Brazilian Portuguese in 5 Steps* – a self-study guide for those interested in learning Portuguese.

Glossary of Portuguese Terms

- *Administrador*: executive officer (manager) of a Limitada
- *CADEMP*: the Brazilian Central Bank's Cadastro de Empresas, registry of companies
- *Cadastro de Pessoas Físicas (CPF)*: Brazilian tax ID for individuals
- *Carteira de Trabalho e Previdência Social (CTPS)*: employee work booklet
- *Cadastro Nacional de Pessoas Jurídicas (CNPJ)*: Brazilian tax ID for entities
- *Comissão de Valores Mobiliários (CVM)*: Securities Commission of Brazil
- *Conselho de Administração*: board of directors of an S.A.
- *Diretor*: an officer of an S.A.
- *Diretoria*: management board of senior officers of an S.A.
- *Fundo de Garantia Por Tempo de Serviço (FGTS)*: mandatory employee severance fund
- *Instituto Nacional do Seguro Social (NSS)*: national social security
- *Instituto Nacional da Propriedade Industrial (NP)*: Brazilian Institute of Industrial Property, the government agency primarily responsible for registration and enforcement of intellectual property rights
- *Junta Comercial*: Commercial Registry Board
- *Superior Tribunal de Justiça (STJ)*: Superior Court of Justice
- *Tradutor publico juramentado*: certified sworn translator, a licensed translator of official documents into Portuguese

Alicante
Amsterdam
Baltimore
Beijing
Brussels
Budapest
Caracas
Colorado Springs
Denver
Dubai
Dusseldorf
Frankfurt
Hamburg
Hanoi
Ho Chi Minh City
Hong Kong
Houston
Jeddah
Johannesburg
London
Los Angeles
Luxembourg
Madrid
Mexico City
Miami
Milan
Minneapolis
Monterrey
Moscow
Munich
New York
Northern Virginia
Paris
Perth
Philadelphia
Rio de Janeiro
Riyadh
Rome
San Francisco
São Paulo
Shanghai
Silicon Valley
Singapore
Sydney
Tokyo
Ulaanbaatar
Warsaw
Washington, D.C.
Zagreb

Our offices
Associated offices

www.hoganlovells.com