The Foreign Investment Regulation Review

Third Edition

Editor
Brian A Facey

Law Business Research
The Foreign Investment Regulation Review
Reproduced with permission from Law Business Research Ltd.

This article was first published in The Foreign Investment Regulation Review - Edition 3
(published in August 2015 – editor Brian Facey)

For further information please email
Nick.Barette@lbresearch.com
THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW
THE RESTRUCTURING REVIEW
THE PRIVATE COMPETITION ENFORCEMENT REVIEW
THE DISPUTE RESOLUTION REVIEW
THE EMPLOYMENT LAW REVIEW
THE PUBLIC COMPETITION ENFORCEMENT REVIEW
THE BANKING REGULATION REVIEW
THE INTERNATIONAL ARBITRATION REVIEW
THE MERGER CONTROL REVIEW
THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW
THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW
THE CORPORATE GOVERNANCE REVIEW
THE CORPORATE IMMIGRATION REVIEW
THE INTERNATIONAL INVESTIGATIONS REVIEW
THE PROJECTS AND CONSTRUCTION REVIEW
THE INTERNATIONAL CAPITAL MARKETS REVIEW
THE REAL ESTATE LAW REVIEW
THE PRIVATE EQUITY REVIEW
THE ENERGY REGULATION AND MARKETS REVIEW
THE INTELLECTUAL PROPERTY REVIEW
THE ASSET MANAGEMENT REVIEW
THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW
ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ALI BUDIARDJO, NUGROHO, REKSODIPUTRO
ALRUD
ATSUMI & SAKAI
BENTSI-ENCHILL, LETSA & ANKOMAH
BLAKE, CASSELS & GRAYDON LLP
CLEARY GOTTLIEB STEEN & HAMILTON LLP
CONSORTIUM LEGAL – EL SALVADOR
DARROIS VILLEY MAILLOT BROCHIER
ENGLING, STRITTER AND PARTNERS
ESTUDIO BECCAR VARELA
FRESHFIELDS BRUCKHAUS DERINGER
HENGELER MUELLER PARTNERSCHAFT
VON RECHTSANWÄLTEN MBB
KING & WOOD MALLESONS
MATHESON
MJLA LEGAL
PINHEIRO NETO ADVOGADOS
RAJAH & TANN SINGAPORE LLP
SHARDUL AMARCHAND MANGALDAS & CO
Acknowledgements

SPECHT & PARTNER RECHTSANWALT GMBH
URÍA MENÉNDEZ
VIETNAM INTERNATIONAL LAW FIRM (VILAF)
# CONTENTS

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Country</th>
<th>Authors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Editor’s Preface</td>
<td></td>
<td>Brian A Facey</td>
</tr>
<tr>
<td>Chapter 1</td>
<td>ARGENTINA</td>
<td>Ricardo V Seeber</td>
</tr>
<tr>
<td>Chapter 2</td>
<td>AUSTRIA</td>
<td>Ingo Braun and Philipp Baubin</td>
</tr>
<tr>
<td>Chapter 3</td>
<td>BRAZIL</td>
<td>Ricardo Russo and Gabriel Dias Teixeira de Oliveira</td>
</tr>
<tr>
<td>Chapter 4</td>
<td>CANADA</td>
<td>Jason Gudofsky, Navin Joneja, Julie Soloway and Cassandra Brown</td>
</tr>
<tr>
<td>Chapter 5</td>
<td>CHINA</td>
<td>Jianwen Huang</td>
</tr>
<tr>
<td>Chapter 6</td>
<td>EL SALVADOR</td>
<td>Diego Martín Menjívar</td>
</tr>
<tr>
<td>Chapter 7</td>
<td>FRANCE</td>
<td>Didier Théophile and Olivia Chriqui</td>
</tr>
<tr>
<td>Chapter 8</td>
<td>GERMANY</td>
<td>Jan Bonhage and Vera Jungkind</td>
</tr>
<tr>
<td>Chapter 9</td>
<td>GHANA</td>
<td>Rosa Kudoadzi and Daniel Imadi</td>
</tr>
<tr>
<td>Chapter 10</td>
<td>INDIA</td>
<td>Shardul Shroff, Amit Kumar and Ambarish</td>
</tr>
<tr>
<td>Chapter</td>
<td>Country</td>
<td>Page</td>
</tr>
<tr>
<td>---------</td>
<td>-----------------</td>
<td>--------</td>
</tr>
<tr>
<td>11</td>
<td>INDONESIA</td>
<td>138</td>
</tr>
<tr>
<td>12</td>
<td>IRELAND</td>
<td>151</td>
</tr>
<tr>
<td>13</td>
<td>ITALY</td>
<td>166</td>
</tr>
<tr>
<td>14</td>
<td>JAPAN</td>
<td>183</td>
</tr>
<tr>
<td>15</td>
<td>NAMIBIA</td>
<td>196</td>
</tr>
<tr>
<td>16</td>
<td>PAKISTAN</td>
<td>219</td>
</tr>
<tr>
<td>17</td>
<td>PORTUGAL</td>
<td>232</td>
</tr>
<tr>
<td>18</td>
<td>RUSSIA</td>
<td>247</td>
</tr>
<tr>
<td>19</td>
<td>SINGAPORE</td>
<td>259</td>
</tr>
<tr>
<td>20</td>
<td>SPAIN</td>
<td>272</td>
</tr>
<tr>
<td>21</td>
<td>UNITED KINGDOM</td>
<td>286</td>
</tr>
<tr>
<td>22</td>
<td>UNITED STATES</td>
<td>308</td>
</tr>
</tbody>
</table>
## Contents

<table>
<thead>
<tr>
<th>Chapter 23</th>
<th>VIETNAM ............................................................................. 327</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Nguyen Truc Hien And Kevin B Hawkins</td>
</tr>
</tbody>
</table>

| Appendix 1         | ABOUT THE AUTHORS................................................................... 343 |

| Appendix 2         | CONTRIBUTING LAW FIRMS’ CONTACT DETAILS ... 361                    |
EDITOR’S PREFACE

I am pleased to present the third edition of *The Foreign Investment Regulation Review*. Building on our most recent publication of last year, this edition provides insight into the national regulatory framework for foreign investment review in major jurisdictions around the world, as well as an overview of current trends and developments in this field.

Over the past few years, foreign investment has grown to match levels that were attained during the pre-economic crisis era of the mid-2000s. Relatedly, national economies have continued their recovery from the global financial crisis; on 19 May 2015, the Dow Jones Industrial Average reached a new all-time high. Within this environment, foreign investment often constitutes a source of capital that is key to promoting and sustaining domestic economic growth. From the perspective of investors, it can represent an important opportunity to expand into new markets or to implement efficiency-enhancing improvements to a supply chain. Legislators and regulators operating within this framework frequently face the challenge of attracting sufficient capital to develop the local economy while at the same time protecting national interests, including national security.

The diversity among foreign investment regimes reflects the fact that each nation has a unique set of goals and priorities to consider. Some countries, such as China and Saudi Arabia, have recently introduced reforms aimed at attracting greater foreign investment. At the same time, the experience of jurisdictions such as Canada highlights that foreign investment review remains a balancing act between attracting foreign capital and protecting domestic interests in certain sectors of the economy. One common theme across jurisdictions is that foreign investment reviews continue to present complex issues for businesses, regulatory authorities and legal counsel alike.

Both legal practitioners and companies seeking to do business internationally will benefit by familiarising themselves with the regulatory frameworks outlined in this treatise. Of particular importance, this edition provides readers with practical guidance to navigate investments in major jurisdictions by anticipating key timing and substantive issues. We hope that it allows investors and businesses being acquired to better evaluate
and manage risks associated with investments that may be subject to foreign investment review, ultimately reducing transaction uncertainty and delay.

This edition contains contributions from leading experts practising in 23 jurisdictions around the world. I would like to express my gratitude to each author and law firm involved in this project for their commitment of both their expertise and time. Please note that the views expressed in this book are those of the authors, and not those of their firms, any specific clients, the editor or the publisher.

**Brian A Facey**
Blake, Cassels & Graydon LLP
Toronto
August 2015
Chapter 3

BRAZIL

Ricardo Russo and Gabriel Dias Teixeira de Oliveira

I INTRODUCTION

Brazil is a country of continental proportions, being the fifth largest country in the world and the largest country in South America. Brazil has one of the largest gross domestic product (GDP), ranked seventh in 2014 (Brazil’s GDP amounted to approximately US$1.7 trillion).

Since the early 1990s, Brazil’s economy has been facing significant growth, which, together with political stability, has created a friendly environment for foreign investments. Although such growth was recently affected by an economic crisis, in 2014 Brazil ranked sixth in terms of countries that received foreign investments, with a total amount of US$62 billion.

Foreign investment in Brazil mainly originates from the United States, Spain, the United Kingdom, Germany, Italy, France, China and Japan. The main sectors that recently received investment were agriculture, industry (beverages, chemical, automotive, food, tobacco, machinery) and services (financial services, telecoms, energy, real estate, insurance).

It is worth noting the recent efforts by local monetary agencies (namely, the Central Bank of Brazil and the Brazilian Securities Commission) to update regulations dealing with foreign investments in the local capital markets (promoting a less bureaucratic environment for offshore investors and modernising rules according to globally verified market trends). These efforts are in line with the rapid increase of investments verified in the local stock and financial markets in recent years (the local stock exchange – BM&FBovespa – is considered to be one of the biggest in the world, with a market capitalisation of approximately US$1.5 trillion).

1 Ricardo Russo is a partner and Gabriel Dias Teixeira de Oliveira is a legal assistant at Pinheiro Neto Advogados.
II FOREIGN INVESTMENT REGIME

i Registration of foreign investments
According to Law 4,131/62 (Brazilian Foreign Capital Law), foreign capital stands for ‘any goods, machinery and equipment that enter Brazil, with no initial disbursement of foreign currency, for the production of goods or services, as well as any funds brought into the country for investment in economic activities, provided that in both cases they belong to individuals or legal entities resident, domiciled or headquartered abroad’.

Foreign investments in Brazil are subject to registration with the Central Bank of Brazil, and all the investment information that is provided to this agency become part of the Central Bank Information System. Foreign capital must be registered through the Online Registration System – Foreign Direct Investment (RDE-IED) Mode.

No Central Bank preliminary approval is required for such registration. The information regarding the investment (amount, parties involved, nature, etc.) that is provided to the Central Bank of Brazil is of an informative and declaratory nature.

Currency investments
Investments to subscribe for capital or to buy an equity stake in an existing Brazilian company must be remitted to Brazil through any banking establishment authorised to deal in foreign exchange. In order to close the corresponding exchange transaction, the Brazilian investee-foreign investor identification number must be duly entered in the RDE-IED Mode. Further, the foreign investor must be enrolled with the Brazilian federal revenue office.

Foreign loans
The financial conditions underlying a foreign loan transaction must be submitted to the Central Bank for registration, as this transaction entails the inflow of foreign capital into Brazil. Registration is made through the Financial Transactions Registration (ROF) Mode. For foreign loans, the creditor must be enrolled with the local federal revenue office.

Investments in the stock market
Foreign investments in the domestic securities market are channelled through a single fixed- and variable-income investment system, where foreign funds remitted by non-resident investors can be invested in the financial and capital markets instruments and vehicles available to resident investors.

ii Restrictions on foreign investments
As a general rule, Brazilian law does not impose any specific restrictions on foreign investments in local companies. However, there are certain areas that, due to their nature, are subject to specific laws, requirements or preliminary approvals from local agencies. Below are certain limitations imposed on foreign capital in the Brazilian economy:
**Ownership of rural lands**

Current rules regarding foreign investments in rural properties impose certain restrictions on the acquisition or lease of such properties by foreign entities and individuals and also by Brazilian companies whose majority of capital is held by foreign investors or controlled by foreigners, among which, the need for prior approval by the Brazilian Institute of Agrarian Settlement and Reform or the Brazilian National Congress, depending on the size of the rural property.

These rules also apply to corporate transactions that result in the direct or indirect transfer of rural properties, such as mergers and acquisitions, changes in corporate control, or if a Brazilian company becomes a foreign company. The acquisition or lease of rural properties by foreigners in violation with current rules may be considered to be null and void.

**Business in frontier areas**

Brazilian legislation also regulates the occupation of properties located within the border zone of the country (150km-wide-strip along the division line of the national territory). The prior consent of the National Security Council is required for any case of possession, ownership, rural lease or any other *in rem* right over real estate property located within this border zone. Such restriction applies to foreign entities and entities incorporated in Brazil with participation of foreigners at any stake (minority included).

**Media companies**

*TV (free-to-air) and radio broadcasting*

Only companies incorporated under the laws of Brazil with a head office in the country can engage in TV and radio broadcasting. Under Brazilian law, foreign companies or individuals who have acquired Brazilian citizenship within a period shorter than 10 years cannot hold more than 30 per cent of the total and voting capital of broadcasting companies. Equity may only be held by foreigners indirectly through a legal entity organised under Brazilian law with its head office in Brazil.

*Newspapers and magazines*

The same foreign capital restrictions applicable to TV and radio broadcasting apply to companies engaged in the business of publishing printed newspapers and magazines (regardless of their content), which are deemed ‘journalistic companies’.

**Telecommunications**

Brazilian law does not establish restrictions to the holding of equity interests in telecommunications service providers by foreign companies or individuals. The general rule is that telecom service providers must be companies incorporated under Brazilian law, with headquarters and management in Brazil, and the majority of their total and voting capital stock must be held by companies incorporated in Brazil or by Brazilian residents. This means that foreign participation is admitted, provided that the telecommunications service provider is controlled by a Brazilian company, which in turn can be controlled by foreigners.
Financial institutions
There are restrictions on participation of foreign capital in financial institutions; however, these restrictions can be lifted if the relevance of such foreign capital for the national financial system is evidenced. The national interest is attested to by presidential decree. When a foreigner intends to set up a financial institution in Brazil or acquire an equity interest in a Brazilian financial institution held by Brazilian residents, an application must be directed at the Central Bank of Brazil for further review by the Presidency of the Republic.

A presidential decree issued in 1996 already states that foreign equity investments in financial institutions in the form of non-voting stock, for financial institutions whose shares are traded on the stock market are in the national interest.

Air transportation services
Brazilian law limits the participation of foreign investors in companies offering air services. Restrictions are based on the corporate nature of the company: (1) in joint-stock companies the foreign participation is limited to 20 per cent of the company's voting shares; and (2) in the case of limited companies (sociedade limitada), corporate control must be held by Brazilians.

Health services
Under the Brazilian Federal Constitution, foreign investment of private initiative in the health-care industry is prohibited, unless otherwise expressly authorised by law in specific circumstances. Currently, such investments are only allowed in cases involving (1) private health-care plan operators; family planning-oriented actions and research; and (2) legal entities intended to set up, operate or explore general hospitals, including charitable, specialty, polyclinic, general clinics and expert clinic units; and family planning-oriented actions and research; in non-profit health-care services; and in companies, for assistance of their employees and dependants; among others.

Energy sector
The Brazilian electricity sector is founded on a regulatory framework that has been providing investors with considerable safety. The market underwent a major restructuring process in the 1990s when it was opened for private investments, being submitted to further regulatory reform in 2004. Private companies are entitled to enter the market through government delegation by concession, permission or authorisation. The governmental body responsible for formulating public policies within the energy and mines sectors is the Ministry of Mines and Energy.

III TYPICAL TRANSACTIONAL STRUCTURES

i Setting up a company in Brazil
Brazilian law provides for several forms of business organisations, with the most widely adopted being the sociedade limitada (limited company) and the sociedade anônima (joint-stock company). In both cases, the liability of shareholders is limited to the amount they contributed to pay up the company's capital; in principle, the shareholders
are not held liable for any amount in excess of such contributions, unless illicit acts are held to occur.

Whatever the form adopted, these two companies have some features in common. First, (except in special circumstances) there must be at least two partners, which may be individuals or legal entities that need not be domiciled in Brazil. Foreign-based partners must have an attorney-in-fact in Brazil, duly vested with powers to represent such partners with regard to their equity holder status in the Brazilian company.

**Limitadas**

*Limitadas* are similar to limited-liability companies, limited partnerships and closely held companies under the English and United States laws. *Limitadas* are governed by the Brazilian Civil Code (and, in a subsidiary manner, by the Brazilian corporation law).

All partners are held jointly and severally liable for the *limitada* quota capital until it is fully paid up. Once the capital is paid up, liability is limited to the amount of each partner's ownership interest.

Holdings in a *limitada* are reflected in the company's articles of association. The articles of association must be amended whenever there is any change in the equity interest or in the capital stock so as to accurately reflect the ownership of the *limitada*'s capital.

Except in a very few cases, there is no requirement as to the minimum capital that must be paid up on initial subscription. A limitada's quota capital can only be increased after past calls have already been paid up.

The *limitada* may be managed by all the partners; by some partners; by only one partner; or by individuals appointed by the partners in the articles of association or by separate act. The articles of association must state who will be in charge of the company's management; the appointment of senior managers will be conditioned to the unanimous consent of all partners (if the quota capital has not been fully paid up), or of partners representing at least two-thirds of the quota capital (if it has been fully paid up). Senior managers do not need to be Brazilian, but must be resident and domiciled in Brazil. Foreigners may be appointed for senior management positions, provided that they have a valid visa to stay in Brazil.

Other management bodies (such as advisory boards and fiscal boards) are not compulsory for *limitadas*, but may be set out in the articles of association. The *limitadas* do not need to publish their accounts, except in certain specific situations.

The partners must adopt a resolution in meetings over certain specific matters (in addition to others expressly set out in the articles of association), namely:

- approval of management accounts;
- appointment, dismissal and compensation of senior managers;
- amendment to the articles of association;
- merger, consolidation and winding-up of the company, or termination of the liquidation status;
- appointment and dismissal of liquidators, and a decision on their accounts; and
- the filing for debt rehabilitation.

Generally speaking, the adoption of this type of company entails less expense and ensures a certain degree of confidentiality as to company affairs. But the articles of association
Brazilian joint-stock companies

The sociedade anônima is the corporate form that most closely resembles a joint-stock company or corporation. It is governed by the Brazilian corporation law. Joint-stock companies may be publicly held or closely held (with securities traded on stock exchanges or not, respectively).

A joint-stock company must have at least two shareholders, which are liable only to the extent that the capital stock for which they have subscribed remains unpaid. Joint-stock companies may be formed by public or private subscription. In either case, at least 10 per cent of their capital stock must be paid up outright. The paid-up capital must be deposited with a commercial bank until all formalities for incorporation of the company have been completed. The formation of a company by public subscription requires: preliminary registration of the share issue with the Brazilian Securities Commission; the intermediation of a financial institution; approval of the company's incorporation by a general meeting called by the incorporators at the close of the subscription period; and appraisal of any assets contributed to the company in lieu of cash payments for the shares.

Formation by private subscription may take place at a general meeting of the incorporators, or by a public deed of incorporation drawn up simultaneously with subscription for the shares. If any of the shares are paid up other than in cash, a general meeting must be called to appraise the assets thus contributed.

All constituent documents must be filed with the commercial registry, and subsequently published in the Official Gazette and in another large newspaper circulating where the company has its principal place of business.

The company capital may be divided into different types of shares, all of which have different advantages, rights or restrictions attributed to them. Common voting shares in a closely held company may belong to different classes, depending on: (1) their non-convertibility into preferred shares; (2) the requirement that the shareholder be Brazilian; or (3) the right to vote separately for election of certain officers of the company.

Preferred shares in a publicly or closely held company may belong to one or more classes, and carry rights or privileges that may include the right to elect certain members for the company's administrative bodies, even if these preferred shares are granted no other voting rights. Companies may issue non-voting preferred shares up to 50 per cent of the company's total capital stock. Holders of preferred shares must be accorded the following privileges, on a cumulative or non-cumulative basis – priority in the distribution of fixed or minimum dividends or priority in capital repayment, at or without a premium.

To be traded on the securities market, preferred shares without voting rights or with restricted voting rights must confer on their holders at least one of the following privileges: (1) payment of dividends corresponding to at least 25 per cent of the average profits at year-end; or (2) payment of dividends at least 10 per cent higher than those paid to common shares; or (3) the right to tag these shares along in a public offer for disposal of control.
Shares do not need to have a par value, and may be represented by certificates. Shares must always be issued in nominative form, and the holders of record are those stated in the registered share register. Shares may be paid up in cash or in assets capable of being valued in cash. Appraisal of the assets is mandatory, and the appraisal report must be approved by the shareholders in a general meeting.

Joint-stock companies are allowed to issue other types of securities (equity or debt) such as participation certificates, subscription warrants, and debentures. The rules relating to ownership and circulation of shares generally also apply to these securities, even though they do not form part of the capital.

IV REVIEW PROCEDURE

Transactions must be submitted to the Brazilian antitrust authority (CADE) for pre-merger review whenever the following is observed:

- they are performed wholly or partially in Brazil, or have effects in Brazil;
- qualify as a concentration act within the meaning of the local antitrust law and associated legislation; and
- the economic groups involved must meet the turnover thresholds set out in the local antitrust law.

i Performance or effects in Brazil

Brazilian antitrust law provides that transactions only need to be notified to CADE if they are wholly or partially performed within Brazil, or if they have or may have effects in Brazil. For instance, effects are verified when there are sales to Brazil or if an entity owns a Brazilian company.

ii Concentrations

Additionally, it is necessary to verify whether the envisaged transaction can be considered a concentration act. According to Brazilian antitrust laws, the following events are deemed as ‘concentration acts’:

- a consolidation involving two or more independent companies;
- a direct or indirect acquisition of the control or part of the stock of one or more companies, by means of purchase or swap of:
  - shares, quotas, securities or share convertibles, or
  - tangible or intangible assets, by operation of contract or by any other means;
- a merger of one or more companies into another company; or
- the execution of an associative agreement, a consortium agreement or a joint venture agreement.

iii Notification thresholds

Local antitrust laws provide that concentrations only need to be notified in Brazil when:

1. one of the economic groups involved in the concentration had a gross turnover in Brazil of at least 750 million reais in the preceding year (as per its accounts); and
2. one of the other economic groups involved in the transaction had a gross revenue in Brazil of at least 75 million reais in the preceding year (as per its accounts).
For the analysis of the turnover threshold, ‘economic group’ is defined as follows:
(1) companies under common control, internal or external; and (2) companies in which any of the companies referred to in item 1 directly or indirectly owns at least 20 per cent of the capital stock or voting capital.

iv Pre-merger filing
Under the Brazilian competition law, transactions submitted to the review of CADE cannot be implemented or consummated before CADE renders a final decision. If parties to such a transaction fail to comply with such non-implementation obligation (a statutory condition precedent), CADE may: (1) declare the relevant transaction contract null and void; (2) impose a fine; or (3) initiate an administrative proceeding.

Until a final decision is rendered by CADE, the competitive conditions between the parties must be preserved and they must also:
- keep the physical structures unchanged;
- keep the competition environment unchanged;
- refrain from transferring companies assets;
- avoid influencing the decision-making process in the other party; and
- refrain from exchanging sensitive competitive information, except for those strictly necessary to the performance of the agreement regulating the envisaged transaction.

V FOREIGN INVESTOR PROTECTION
Under Brazilian law, foreign capital is granted with the same treatment as that afforded to domestic capital, except in the event that restrictions are expressly set forth in specific regulations. In this regard, for instance, rules on foreign investments in the local securities markets expressly determine that foreign investors may acquire and invest in the same securities (equity, debt) as those that are available to domestic investors.

In light of the recent growth of the Brazilian economy (which meant sophisticated transactions and investment structures being implemented and, in some cases, subject to disputes among the involved parties), local judicial courts are becoming more specialised in reviewing complex corporate matters (in some states, specific courts are being created solely to analyse corporate-related disputes).

In addition, over the past two decades, the legal framework of international commercial arbitration in Brazil has improved remarkably. The enactment of a modern arbitration law in 1996, the Federal Supreme Court’s judgment confirming the constitutionality of that new arbitration law in 2001, and the ratification of the New York Convention in 2002 were all key milestones in making Brazil a more arbitration-friendly jurisdiction.

Brazil has experienced a very rapid expansion in the use of arbitration as a method of dispute resolution and has become one of the key centres for arbitration in Latin America. One of the main drivers behind this expansion has been the growth of the Brazilian economy over this period. With it, there has been an unprecedented surge in foreign investment and foreign acquisitions made by Brazilian multinational companies. These transactions almost invariably involve arbitration agreements.
Arbitration is now perceived as the natural method of dispute resolution among private contracting parties involving complex deals in Brazil. Although the Brazilian Arbitration Act may not always have been applied uniformly by the courts in the 26 states of Brazil and the Federal District, the Brazilian judiciary has a good track record of upholding arbitration agreements and supporting the arbitral process, where called upon to do so. The Superior Court of Justice, the highest court in Brazil for non-constitutional matters, has also shown a very pro-arbitration stance.

VI OTHER STRATEGIC CONSIDERATIONS

i Tax aspects on foreign investments

Tax on Financial Transactions (IOF)
The IOF is a tax levied on foreign exchange, securities or bonds, credit and insurance transactions. The IOF is triggered on foreign exchange transactions involving the conversion of local currency into foreign currency and on the conversion of foreign currency into reais. Currently, the IOF rate is set 0.38 per cent for most foreign exchange transactions, although tax regulations provides for certain exceptions to this general rule.

Income tax – capital gain
Capital gains realised on the disposition of assets located in Brazil by a non-resident to another non-resident made outside Brazil are subject to income taxation in Brazil. As a general rule, capital gains assessed on a disposal of Brazilian assets that is not carried out on a Brazilian stock exchange are subject to income tax at the rate of 15 per cent, except for a resident in a country or location that does not impose income tax or where the maximum income tax rate is lower than 17 per cent (low or nil taxation jurisdictions) or yet where the local legislation imposes restrictions on the disclosure of the shareholding composition, of the ownership of the investment or of the identity of the effective beneficiary of the income attributed to non-residents, which, in this case, is subject to income tax at the rate of 25 per cent.

Income tax – dividends and interest on shareholders equity
Dividends paid by Brazilian legal entities, including stock dividends are not subject to withholding tax in Brazil, to the extent that such amounts are related to profits generated as from 1 January 1996. Payments of interest on shareholders’ equity to a non-Brazilian resident are subject to income tax at the rate of 15 per cent, or 25 per cent, if the investor is domiciled in a low or nil taxation jurisdiction.

Other Brazilian taxes
There are no Brazilian federal inheritance, gift or succession taxes applicable to the ownership, transfer or disposal of Brazilian assets by a non-Brazilian investor. Gift and inheritance taxes, however, may be levied by some states on gifts made or inheritances bestowed by the non-Brazilian investor to individuals or entities resident or domiciled within such states in Brazil. There is no Brazilian stamp, issue, registration or similar taxes or duties payable by a non-Brazilian investors of shares, fixed income assets or other investments available in the local markets.
Brazil

ii Brazilian Anticorruption Law

Following a global trend in the fight against corruption and unlawful acts performed by companies when dealing with public authorities, Brazil has recently issued a new law (Law 12,846/13), also known as the Anticorruption Law, which foresees corporate civil and administrative liability for injurious acts contrary to the Brazilian or foreign public administration.

The law originated from a bill submitted to Congress by the Executive Branch and is aimed both at fulfilling international commitments assumed by Brazil as a result of ratification of various anti-corruption treaties, as well as at meeting the population’s demands for the creation of more effective mechanisms to fight corruption at public administration level.

The Anti-corruption Law provides for a strict liability regime, meaning that the legal entity would be held liable even if the wrongdoings are attributable to a sole employee or service provider who acted despite of the company’s compliance procedures or without the company’s knowledge. In other words, the wrongful acts must merely be carried out in the company’s interest or for its benefit.

Companies belonging to the same economic group, consortium members or joint venture partners will be held jointly liable for wrongful acts under the Brazilian anti-corruption law. Such joint liability will be limited to payment of fines and full compensation of damages.

Acts of collusion and corrupt payments are contained among the examples of wrongful acts established in the Anticorruption Law. Corporations that violate the law’s provisions will be subject to heavy penalties, some of which will be imposed through administrative proceedings and others solely through judicial channels.

VII CURRENT DEVELOPMENTS

At the end of 2014, the Brazilian National Monetary Council issued Resolution No. 4,373 updating regulations regarding foreign investments in the local financial and capital markets. The changes brought by Resolution 4,373 are an attempt of the local government to simplify and clarify current rules related to foreign investments in the local market, contributing to the reduction of costs and the increase of legal security of these investments. In addition, such changes brought new mechanisms with the scope of increase the volume of foreign investments in Brazil (as an example, this resolution created the possibility of the use of depositary receipts which underlying security may be a local bond or debt instrument).

As a result of the recent economic growth verified in Brazil, and owing to the lack of investments verified in the past, there is currently a high demand for infrastructure projects in the country. Local and foreign groups have recently won public bids related to concessions or authorisations to explore ports, airports, generation or transmission of energy, roads, etc. In light of this scenario – and taking into consideration that most of the long term financing verified in Brazil was granted by governmental agencies (such as the BNDES, a local EX-IM Bank), new legislation was enacted in recent years in order to foster private infrastructure financing of local companies. Among such new laws, Brazilian authorities created mechanisms to facilitate the access of local companies to the
capital markets (even non-listed corporations have the ability to access investors in the market and issue debt instruments), and established tax incentives and exemptions for local and foreign investors or creditors that contribute with the financing of long-term infrastructure projects.

As mentioned in Section VI, supra, there is current a social demand in Brazil for the improvement (and enforcement) of laws dealing with anti-money laundering and anti-corruption matters. As a result, of this demand, new laws were recently passed increasing the standards that must be observed by local companies (and subsidiaries of foreign companies in Brazil) imposing heavy sanctions on those legal entities and individuals that perform acts in breach of said laws. As an example, Brazil has recently issued Law 12,846, also known as the Anticorruption Law, which established the responsibility of companies (and not only individuals) for wrongful acts performed when dealing with governmental authorities (pecuniary fines under this law may involve amounts representing up to 20 per cent of the annual gross income of a company).
Ricardo Russo
Pinheiro Neto Advogados
Ricardo Russo is a partner at Pinheiro Neto Advogados’ corporate department, practising in the São Paulo office. He advises corporate and investment banking clients on public and private financing transactions and securities offerings and listings, M&A transactions, with particular experience in financing and restructuring transactions. He also provides advice on corporate governance matters and corporate and securities law and regulation. Ricardo is acknowledged as having built a prominent reputation in both the capital markets and private financing and has been recognised as a leading corporate finance lawyer by several industry publications.

Gabriel Dias Teixeira de Oliveira
Pinheiro Neto Advogados
Gabriel Dias Teixeira de Oliveira is a legal assistant in Pinheiro Neto’s corporate department, practising in the São Paulo office. He advises corporate and investment banking clients on mergers and acquisitions and corporate finance transactions generally.

Pinheiro Neto Advogados
Rua Hungria, 1.100
São Paulo, SP
Brazil
Tel: +55 11 3247 8720
Fax: +55 11 3247 8600
rrusso@pn.com.br
goliveira@pn.com.br
www.pn.com.br