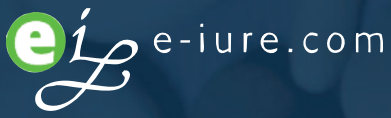
e-iure.com

International Law Alliance
COMPENDIUM 2012

"We shall make it together by walking"



"The most important investment theme for the first half of the twenty-first century will be the question of how globalization happens. **If globalization doesn't happen, then there is no future for the world.** The way it doesn't happen is that you have escalating conflicts and wars, and given where technology is today, it blows up the world. **There's no way to invest in a world where globalization fails.**"

—PETER THAIL
American entrepreneur, venture capitalist, and hedge fund manager

International Law Alliance
COMPENDIUM 2012

e-iure.com

Who we are

E-lure is a young, vibrant and expanding network of international law firms. established in 2003. Now, E-lure comprises a network of law firms from all over the world. Meant to be a link between Europe and Latin America, during the last few years, E-lure has grown to be a truly global network. Legally, E-lure has been formed as an association under Spanish law, with headquarters in Madrid, Spain.

Following the needs resulting from globalization and European integration, E-lure is facilitating the exchange of professional information, locally and globally, for the development of law, enhancing communications among its members and improving the members' abilities to serve the needs of their respective clients, which are increasingly dominated by international activities.

E-lure members are drawn from commercially-minded medium sized practices, possessing the highest professional standards, and committed to provide creative business solutions, as well as service excellence in an international surrounding.

E-lure members are not affiliated in the joint practice of law. Each member firm is an independent law firm, which renders professional services on an individual and separate basis, maintaining complete autonomy.

Practice areas & goals

- Corporate
- Litigation
- Private Equity
- Tax
- Labor & Employment
- Intellectual Property
- Real Estate
- Insolvency
- Structured & Project Finance

Our goal is to have the best service for cross border operations.
All E-lure members have been involved in cross border transactions on regular basis. We know that any of our clients will be covered, no matter the jurisdiction or the country they are at. The E-lure members will work together as a team to solve our clients' needs.

Our goals are:

1. Act as one team, giving the best service to our clients all over the world.

2. Share the knowledge between the members of the alliance and be excellent on our service.

An introduction

We all know our daily work, but we find it often difficult to understand our role in todays´s society. And the truth is, we are nowadays a key tool of the system, and therefore of society as a whole.

Society has become very demanding and dynamic, and the "old attorney" in wig and gown is now required to cover fairly complex international transactions, arbitrations, claims. Since none of us is capable to reach enough knowledge of the legal system of other countries, one of our duties as "new lawyer" is to provide our clients with a trustworthy international counsel. Large firms , given its size and fees, had become inadequate creating that bond with their clients therefore we are in the best position to fulfill that preminent role.

This Compendium is the result of a collective work, a joint effort made mainly for our clients, the ones that we have now and the ones that are yet to come. New technologies allow us to avoid spending on high printing costs, and as a consequence of that we´ll be able to integrate new countries and new materials each following years.

This Compendium is both the beginnig and the resumption of a collective work, which will benefit our clients every year, and it´s also the living proof that the authors do know and understand their everchanging role in society.

JESUS CASTELLANO
Coordinator of this work

Published by E-IURE International Law Alliance, www.e-iure.com

PHOTOGRAPHY: Leticia Claramunt Julián
COVER DESIGN AND INTERIOR LAYOUT: Cristina Mershon

Participating countries

→ Australia

The Australian income tax system is a federal system based on the Income Tax Act and other related acts. The income tax year is 12 months ending 30 June (unless substituted accounting period granted).

Income tax, which is by far the most significant tax levied in Australia, is imposed only by the Commonwealth Government. There are no separate State or Territory income taxes. Instead, the States and Territories raise some of their revenue through other taxes such as pay-roll tax, land tax, stamp duty and financial transactions tax. The balance of their revenue consists mainly of grants from the Commonwealth Government.

In addition to income tax, the Commonwealth Government also imposes a variety of other taxes including fringe benefits tax (on employee benefits), wholesale sales tax (on goods), customs and excise duties, superannuation guarantee surcharge and petroleum resource rent tax. Local authorities also raise revenue from rates and taxes imposed on landholders living or carrying on business in the local authority area.

Australia does not currently have a value added tax, and has neither wealth, death nor gift taxes.

→ Income Tax

Australia's income tax system is administered by the Australian Taxation Office (ATO), which is headed by the Commissioner of Taxation.

Australian income tax is levied on both the income and the capital gains of all individuals and companies and certain other entities such as limited partnerships and certain trusts. Unlimited partnerships are taxed at the individual partner level.

Broadly, residents of Australia are liable to income tax in respect of their worldwide income, while non-residents are liable to income tax in respect of their income from Australian sources. This broad principle is subject to the provisions of any bilateral double taxation treaty entered into between Australia and almost 40 other countries. Treaties generally follow the OECD Model Convention.

Taxable Income

Income tax is payable in respect of "taxable income," which is calculated by deducting from assessable income all allowable deductions. Taxable income is calculated on an annual basis, with the year of income being a fiscal year ending on 30 June, unless the Commissioner has given permission for the taxpayer to adopt a year of income ending on some other date, which is often the case for Australian subsidiaries of foreign-based entities.

Most expenditure incurred in deriving assessable income is deductible in calculating taxable income, either in the year in which it is incurred, or amortized over a period of years, or at the time of disposal of a capital asset in respect of which a capital gain arises.

State and local taxes are generally allowable deductions in calculating the taxable income upon which federal income tax is levied, unless they form part of the cost of a capital asset, such as stamp duty on the transfer of land.

Losses can be carried forward indefinitely but cannot be carried back. Losses incurred by companies and certain other entities are subject to satisfaction of the majority continuity of ownership rules or, failing that, the same (identical) business rules.

Income Tax Rates

Income tax is levied on both resident and non-resident individuals on a progressive basis, with the highest rate of 45%. Resident individuals also pay an additional 1.5% of taxable income by way of Medicare levy.

Resident individuals

Resident individuals whose total taxable income for the year from all sources (regardless of whether it originates in or out of Australia) exceeds the tax-free threshold of AUD 6,000 are required to file an Income Tax Return. Individuals as well as all other taxpayers must have a Tax File Number.

The net tax payable is computed by deducting from the gross tax: any rebates (e.g. for dependents, sole parent, housekeeper, pensioner, zone allowance, low income earner, net medical expenses in excess of AUD 1,250, franking credits etc.) and any other credits (e.g. for foreign taxes).

For taxable incomes over AUD $27,475 for the 2011/12 year an amount for the Medicare Levy must be added equal to 1.5% of the taxpayer's taxable income (unless an exemption or reduction applies). The levy is collected in conjunction with, and in the same way as, income tax.

To arrive at the actual tax payable, the net tax payable will generally need to be adjusted by deducting prepaid tax (whether by tax installment deductions withheld from salary by an employer or by Pay As You Go installments paid).

Individual tax rates

The following rates for 2011-12 apply from 1 July 2011. The individual rates for Residents of Australia the 2011-2012 tax year are:

TAXABLE INCOME	TAX ON THIS INCOME
0 - $6,000	Nil
$6,001 - $37,000	15c for each $1 over $6,000
$37,001 - $80,000	$4,650 plus 30c for each $1 over $37,000
$80,001 - $180,000	$17,550 plus 37c for each $1 over $80,000
$180,001 and over	$54,550 plus 45c for each $1 over $180,000

The above rates do not include the Medicare levy of 1.5% (read Guide to Medicare levy for more information).

The above rates do not include the Flood levy (read Flood levy information for individuals for more information).

Foreign residents

The following rates for 2011-12 apply from 1 July 2011. If you are a foreign resident for the full year, the following rates apply:

TAXABLE INCOME	TAX ON THIS INCOME
0 - $37,000	29c for each $1
$37,001 - $80,000	$10,730 plus 30c for each $1 over $37,000
$80,001 - $180,000	$23,630 plus 37c for each $1 over $80,000
$180,001 and over	$60,630 plus 45c for each $1 over $180,000

The above rates do not include the Flood levy (read Flood levy information for individuals for more information). Foreign residents are not required to pay the Medicare levy.

Company Tax Rate

The taxable income of most companies (resident and non-resident) is taxed at a flat rate of 30%. There is no separate branch profits tax for non-resident companies.

TREATMENT OF DIVIDENDS

Australia no longer has a classical system for corporate taxation. An imputation system for the taxation of company dividends operates in Australia, with resident individual shareholders being entitled to a credit (but no refund) for Australian tax paid by a company. Dividends which attract the credit are called "franked dividends." Other dividends are called "unfranked dividends." Excess franking credit entitlements cannot be carried forward or carried back.

WITHHOLDING TAX

Certain income (interest, dividends and royalties) paid to non-residents may be subject to Australian withholding tax, irrespective of source. Withholding tax is a first and final tax imposed on the payee but collected from the payer of the income to which it applies.

The withholding tax is subject to treaty limitations but generally ranges between 10% (interest and royalties) and 30% for dividends (15% for treaty dividends). No withholding tax is payable in respect of fully franked dividends paid by a resident company to a non-resident shareholder.

CAPITAL GAINS AND LOSSES

Capital gains derived on the disposal of assets acquired or deemed to have been acquired on or after 20 September 1985 are subject to tax in Australia. Subject to minor concessions for individual taxpayers, the capital gain is included in assessable income and taxed at the same rate as any other income derived by the taxpayer. In calculating the capital gain derived on the disposal of an asset, the cost of the asset is indexed for inflation over the period during which it has been held by the taxpayer.

Capital losses can only be offset against capital gains, either in the current year of income or in a future year of income. Capital losses cannot be carried back. For non-residents, there are special rules which limit the operation of the capital gains provisions to certain specified types of assets. Gains on other types of assets are generally not taxable. As usual, these provisions are subject to the terms of any relevant double taxation treaty.

INTRA-COMPANY GROUP RELIEF

Generally dividends paid by one resident company to another, although representing assessable income, are not taxable due to rebate provisions. Care must be exercised by the Australian dividend recipient to ensure otherwise allowable deductions are not offset against effectively tax-free dividend income.

Resident companies which are 100% related may transfer losses if they elect to do so. There is no consolidated tax return as such. Roll-over relief is available for 100% related companies (including non-resident companies in certain circumstances) whereby tax on capital gains may be deferred.

INCOME TAX ISSUES FOR FOREIGN INVESTORS

Australia has thin capitalization rules which disallow excess interest deductions where the debt to equity ratio of non-financial institutions owned by non-residents exceeds 2:1. For financial institutions, the permitted ratio is 6:1.

Australia has transfer pricing rules which apply to international transactions. The rules apply not only to related parties but also to unrelated parties. Australia has unusual rules that prevent a foreign investor replacing equity with debt in specific cases involving the sale of in-house assets. Payments to non-residents under hire-purchase agreements are treated as the payment of royalties subject to withholding tax, rather than as a sale and loan arrangement.

OTHER IMPORTANT TAXES

According to the fringe benefits tax (FBT) legislation, a fringe benefit is a benefit provided in respect of employment. This effectively means a benefit is provided to somebody because they are an employee. The 'employee' may even be a former or future employee.

FBT is imposed on a range of benefits provided by an employer to their employees. The FBT year is 12 months from 1 April and ending 31 March in the succeeding year. The rate may vary. As at 1 April, 2011 the rate is 46.5% of the grossed-up value of the benefit. Both the cost of the benefit and the fringe benefits tax are deductible in calculating taxable income. In 2006 the rate was 48.5%. A fringe benefit is a 'payment' to an employee, but in a different form to salary or wages.

An employee is a person who is entitled, or has been entitled, to receive salary or wages. Benefits provided in respect of someone who has died are not fringe benefits as a deceased person does not meet the definition of 'employee' in the FBT legislation.

The terms **benefit** and **fringe benefit** have broad meanings for FBT purposes. Benefits include rights, privileges or services. For example, a fringe benefit may be provided when an employer:

- allows an employee to use a work car for private purposes
- gives an employee a cheap loan
- pays an employee's gym membership
- provides entertainment by the way of free tickets to concerts
- reimburses an expense incurred by an employee, such as school fees business, lunches and drinks, cocktail parties and staff social functions
-providing entertainment to employees and clients by providing access to sporting or theatrical events, sightseeing tours, holidays and so on
-accommodation and travel when it is provided in connection with, or to facilitate, activities such as entertaining clients and employees over a weekend at a tourist resort, or providing them with a holiday
-gives benefits under a salary sacrifice arrangement with an employee.

Sales tax is imposed on certain goods (but not services) which are either manufactured in Australia or imported into Australia. Where applicable, the rate ranges from 12% to 45%.

Pay-roll tax is imposed by the States and Territories on wages paid by employers to employees. The rate varies between the States and Territories, but ranges between 3.95% and 7%.

Stamp duty is also imposed by the States and Territories on a range of written instruments and also on some transactions. The rate varies between the States and Territories and also depends upon the type of transaction or the type of property transferred by the written instrument. For example, in relation to transfers of land, duty of up to 5.5% of the value of the land may be imposed. Transfers of shares are taxed at lower rates (between 0.3% and 0.6%), except where the underlying assets consist primarily of land, where the land rate applies.

Land tax is imposed on the unimproved capital value of land owned in the six States and the Australian Capital Territory.

→ Corporate Law

The incorporation and regulation of corporations is governed by:

– The Corporations Act 2001 (Commonwealth);
– the common law; and
– legislation dealing with specific issues including restrictive trade practices, consumer protection, employment practices, occupational health and safety, taxation and foreign investment.

Types of Companies

Of the common forms of trading corporations there are:
– Publicly listed corporations which are also regulated by the Australian Stock Exchange (ASX) listing rules;
– Public corporations that choose not to list on the ASE; and
– Proprietary limited corporations.

The difference between the corporations is summarized in the table below:

TYPE ISSUE	PUBLICLY LISTED	PUBLIC NOT LISTED	PROPRIETARY CORP.
Minimum Number of Directors	3	3	1
Minimum Number of Shareholders	1	1	1
Maximum Number of Shareholders	None	None	50
Minimum Number of Company Secretaries	1	1	Optional
Ability to raise capital from the public	Yes	Yes	No
Auditor	Must be appointed	Must be appointed	Optional
Must Comply with ASX Listing Rules	Yes (Requirement of ASX Listing Rules)	No	No
Independent Directors	Yes (Requirement of ASX Listing Rules)	Optional	Optional

Liability of Shareholders

The liability of shareholders of the above types of company is limited in each instance to the amount paid or agreed to be paid on the shares allotted to the shareholder.

Share Capital

Companies in Australia are not required to have a minimum amount of paid-up capital. The concept of par values for shares has been removed under the Corporations Act 2001.

Classes of shares

Shares can be issued as order, preferred or bearer shares.

Corporate Governance

SHAREHOLDERS MEETINGS: Decisions reserved to the Shareholders

POWERS RESERVED TO SHAREHOLDERS	PUBLICLY LISTED	PUBLIC NOT LISTED	PROPRIETARY CORP.
Increasing Share capital	Yes	Generally Yes but depends on Constitution	Generally Yes but depends on Constitution and any Shareholders Agreement
Changing the Corporate purpose	No	No	No
Reducing share capital	Up to a point, No, but once the point is reached shareholder approval is required	Up to a point, No, but once the point is reached shareholder approval is required	Up to a point, No, but once the point is reached shareholder approval is required
Change of Name	Yes	Yes	Yes
Authority to Bind company	No	No	No
Authority to Bind or require directors to act in a particular manner or refrain from acting	No	No	No
Right to remove directors	Yes	Yes	Yes
Right to transfer shares to third parties	Yes	Yes	Only with approval of the board of directors and (also) usually the other shareholders
Change of Constitution	Yes	Yes	Yes

MINIMUM NUMBER OF SHAREHOLDERS MEETINGS/YEAR: Public companies must convene one shareholders meeting every year. Proprietary companies may have shareholders meetings as and when required; there is no minimum number to be held in any year. A Director may request convening a shareholders meeting. Shareholders may request the board to convene a shareholders meeting and if the minimum number of shareholders so request a meeting must be convened.

DIRECTORS: The Directors are appointed by the votes of shareholders.

Powers of Directors: Generally the power of day-to-day control of the company vests in the directors. The directors' power is absolute, save for the right of shareholders to remove directors who they think are not acting in the best interest of the company.

Minimum number of independent Directors: At least one.

Term of appointment: No statutory term, depends on the Constitution of the Companies. Shareholders have reserved powers to seek to remove directors at any time provided certain requirements under the law are met.

Requirements concerning directors' fees: Listed Public Companies must disclose the remuneration paid to directors. Other companies do not have to disclose and generally never disclose the remuneration paid to directors.

Directors' liability: Directors can be personally liable for the debts of companies if they allow the company to incur a debt, the company is liquidated and the court determines that the directors knew or ought reasonably to have known that the company was insolvent at the time the debt was incurred. In serious situations directors can be jailed for this offence.

Annual Accounting Procedures

NECESSARY DOCUMENTS: The Corporations Act 2001 does not specify what documents or information if any a company must have. Directors are under a general duty to ensure that the financial accounts of the company are true and correct at all times.

DEADLINE FOR DELIVERY OF DOCUMENTS: Public companies must file annual returns with copies of accounts within 6 months of the end of the company's financial year. The financial year in Australia is from 1 July each year to the following 30th June. Most listed public companies have to file and hold shareholders meetings by 31 December each year. Some companies have different financial years, as subsidiaries of foreign corporations whose year-end is different than that in Australia. Permission to have a different year-end for a company's financial year must be give by the Australian Taxation Office.

STATUTORY AUDIT: Scope: Public companies must be audited each financial year. The Auditor must report to the shareholders and to the Australian Securities and Investment Commission if any accounting irregularities are uncovered.

Competence: Auditors must be registered. An Auditor once appointed cannot be removed by the company. An Auditor may resign but cannot be removed without the approval of shareholders and then only upon the appointment of a replacement auditor.

Other Investment Structures

Besides the use of corporations as investment vehicles overseas investors can choose from other forms of investment vehicles. Below is a table of the forms of alternate investment vehicles. The choice of investment vehicle will be dependent upon tax, control and risk return considerations.

→ Foreign Investment

Foreign investment activities in Australia are regulated at the Commonwealth level by the Treasurer, as advised by the Foreign Investment Review Board (FIRB) and the Department of Treasury, pursuant to the Foreign Acquisitions and Takeovers Act, 1975 and policy guidelines.

In general foreign investment is encouraged and while notification is required rarely is the power to refuse the investment made by the Treasurer. The scheme of the Act is to require compulsory notification of certain proposed acquisitions of Australian assets, and to make other proposed or completed acquisitions and arrangements subject to prohibition or divestiture after they have been examined and found to be contrary to the National interest (without requiring notification).

The following acquisitions must be notified, irrespective of the value or the nationality of the investor:
– all vacant non-residential land;
– all residential real estate (some exemptions apply);
– all shares or units in Australian urban land corporations and trusts; and
– all direct investments by foreign governments and their related entities, and proposals by them to establish new businesses in Australia or acquire interests in Australian urban land.

All other acquisitions (including shares or assets of an Australian business) should be notified if the target is valued at or above the applicable monetary threshold set by FIRB.

As at 1 January, 2011 the monetary thresholds are:

	NON-US INVESTORS
AUD $ 5 million	Developed non-residential commercial real estate, where the property is heritage listed
AUD $ 50 million	Developed non-residential commercial real estate, where the property is not heritage listed
AUD $231 million	An interest in an Australian Business or an interest in an offshore company that holds Australian assets or conducts a business in Australia and the Australian assets or businesses of the target are valued above the threshold

Failure to notify the Treasurer before entering into an agreement to acquire these interests is an offense punishable by severe fines and, in the case of individuals, imprisonment.

Acquisitions and arrangements, whether compulsorily notifiable or not, can be prohibited by order of the Treasurer if they are considered contrary to the National interest. If they are completed they can be ordered to be unwound and divestiture to occur. For this reason many transactions which are not compulsorily notifiable are in fact submitted for prior approval.

The Treasurer is required to reach and notify his decision in the Commonwealth Gazette within 40 days of notification. There is a provision for interim prohibition orders to be made, to give the Treasurer a further 90 days to consider the position and obtain additional advice.

Note that the Foreign Investment Regulatory Scheme also covers the acquisition of shareholdings of 15% or more in Australian companies that have total assets valued at AUD 5 million or more (AUD 3 million or more if more than 40% of the assets are in form of rural land).

Section 19 of the Act provides that where an acquisition of assets would have the effect of giving a foreign person control of the business, the Treasurer may allow the acquisition, allow it only with conditions or prohibit it.

A "foreign person" under Section 19(1) is a foreign corporation in which a natural person (or two or more natural persons) not ordinarily resident in Australia hold a controlling interest (that is, 15% of the voting power of the corporation). Section 4(3) extends the scope of Section 19 so that it also applies to Australian corporations or trusts controlled by nonresidents.

Strictly, Section 19 only applies when the acquisition of assets would result in a foreign person gaining control of an Australian business carried on solely by a prescribed corporation. A prescribed corporation is defined in Section 13. However, Section 19 is extended by Sections 4(4) and 4(5) to cover an Australian business carried on by persons other than a prescribed corporation. The reason for these sections is a constitutional issue, which has not been tested. Therefore, on the face of it, in the purchase of any Australian business valued at over AUD 5 million (or AUD 3 million with land), Section 19 applies. Note that Section 13A provides for exempt corporations.

For the purposes of Section 19 an Australian business is taken to be controlled by foreign persons if the Treasurer is satisfied that the persons (with or without associates) are in a position to determine the policy of the business: Section 19(7)(a).

There is no requirement under the Act to notify the Treasurer of any acquisition of assets. However, the Act is predicated on the assumption that notification can take place, as Section 25 provides protection for notified transactions against later divestiture orders.

Approval of the sale of an asset may not be withheld unless the Treasurer is satisfied that:

(a) the person who is going to purchase the asset is foreign; and
(b) it would be against the National interests for that person to control the business concerned.

Position on interest in Australian Urban Land

Sections 21A and 21(6) apply to acquisitions of interests in Australian urban land by a foreign person. Australian urban land is land in Australia that is not used wholly or exclusively for carrying on business of primary production (see Section 5(1) and 12A).

Under Section 26A any such acquisitions are subject to compulsory notification and relate to the prohibition and divestiture powers in Section 21A. Note the threshold that under Section 13B the Act does not apply if the land value is less than AUD 3 million (about EUR 1.76 million); for the purposes of the thresholds, the consideration payable for the assets is taken to be the value of the assets.

Therefore, under Section 26A compulsory notification applies to a foreign person with the intention to enter into an agreement under which the person will acquire an interest in Australian urban land. It is an offense to fail to give 40 days' notice to the Treasurer of the proposal to enter into an agreement. Penalties are a fine up to AUD 250,000 (about EUR 147,059) for corporations and a fine of AUD 50,000 for individuals or imprisonment for up to 2 years or both.

Effect of Notification under Section 25

When the Treasurer is given notification of an acquisition or a proposed acquisition, Section 25 imposes time limits within which the Treasurer must act. Where notification is given of a proposal, examination will normally be carried out in two stages:

1. Preliminary examination which must be completed within 30 days of receipt of notification: Section 25(2) and (3). Preliminary examination may result in the quick clearance of the proposal. Preliminary examination may also result in an interim order prohibiting implementation of the proposal for a period of up to 90 days.

2. Detailed examination will follow an interim order and must be completed within 90 days: Section 25(3). Detailed investigation will conclude with the clearance of the proposal (possibly subject to conditions) or with a prohibition order being made under the relevant provision.

3. Conditions must be notified to the person within 10 days of the Treasurer's decision. If the Treasurer raises no objections to a proposal or if he allows it subject to conditions, the proposal can then go ahead without the potential of a later order for divestiture: Section 25(2) and (3).

Repratiation

Australia does not restrict the flow of Australian or foreign currency in or out of the country. However, certain reporting obligations must be met for amounts over AUD $10,000 or foreign currency equivalent.

REGULATORY REQUIREMENTS FOR FINANCIAL SERVICES: In addition to the reporting obligations of movements for amounts over AUD $10,000 or the foreign currency equivalent, money laundering is a criminal offence in Australia under the Ant-Money Laundering and Counter Terrorism Finance Act 2006 (Cth) (AMLCTFA).

Money laundering is where a person attempts to evade taxation obligations or attempts to smuggle funds for the purpose of funding acts of crime and/or terrorism. The heightened sense of awareness in recent years of terrorist activity and the use by criminal organizations of sophisticated financing techniques led to the enactment of the AMLCTFA in December 2006.

The AMLCTFA is intended to help reduce the risk of Australian businesses being misused for the purposes of money laundering, terrorism financing and/or tax evasion. The Act classifies entities that perform one or more of a so called 'Designated Service' as Reporting Entities.

A Designated Service can be the opening of a bank account, accepting deposits, making loans, supplying goods through a finance lease, issuing travelers' cheques, providing certain superannuation related services, issuing or accepting liability under life insurance policies, exchanging currency, placing or receiving bets and etc.

Amongst other obligations, the AMLCTFA requires a Reporting Entity to have in place an Anti-Money Laundering and Counter Terrorism Financing (AML/CTF) Program and implement processes that allow it to effectively monitor, review and update its AML/CTF Program.

Foreign Personnel

To work in Australia as opposed to invest without working, a person requires a visa. There are various forms of visa's that may be granted. The Australian government's view is that "Working in Australia is a privilege, not a right. Most temporary visa holders have work rights, although some classes of visas only allow limited work rights."

An example of the types of visa's that can be sought are:
– Employer sponsored employees
– Professional and other skilled migrants
– Business people
– Specialist Entry
– Regional employment

The rules for visa entry are in a constant state of flux. Once a visa is granted certainty is assured. However the rules for obtaining a visa change often. Further information should be sought at the relevant time.

→ Labor Law

For the most part from 1 January, 2010 the Labor laws in Australia rather than being State and Federal became solely Federal.

Employers and employees other than in Western Australia that were previously covered by state industrial relations systems because the employer is not a constitutional corporation, are now covered by the national industrial relations system established by the Fair Work Act 2009 (Cth).

Employers and employees in the national system have the same workplace rights and obligations, regardless of the state they work in. Features of the national industrial relations system include:
– a set of 10 minimum National Employment Standards (NES)
– modern awards that apply nationally for specific industries and occupations
– a national minimum wage order (where it applies)
– enterprise bargaining, and
– protection from unfair dismissal.

Modern awards, together with the NES and the national minimum wage order, make up a new safety net for employees covered by the national workplace relations system. In summary, the NES involve the following minimum entitlements:

MAXIMUM WEEKLY HOURS OF WORK - 38 hours per week, plus reasonable additional hours.

REQUESTS FOR FLEXIBLE WORKING ARRANGEMENTS - allows parents or carers of a child under school age or of a child under 18 with a disability, to request a change in working arrangements to assist with the child's care.

PARENTAL LEAVE AND RELATED ENTITLEMENTS - up to 12 months unpaid leave for every employee, plus a right to request an additional 12 months unpaid leave, and other forms of maternity, paternity and adoption related leave.

ANNUAL LEAVE - 4 weeks paid leave per year, plus an additional week for certain shift workers. Personal / carer's leave and compassionate leave - 10 days paid personal / carer's leave, two days unpaid carer's leave as required, and two days compassionate leave (unpaid for casuals) as required.

COMMUNITY SERVICE LEAVE - unpaid leave for voluntary emergency activities and leave for jury service, with an entitlement to be paid for up to 10 days for jury service.

LONG SERVICE LEAVE - a transitional entitlement for employees who had certain LSL entitlements before 1/1/10 pending the development of a uniform national long service leave standard.

PUBLIC HOLIDAYS - a paid day off on a public holiday, except where reasonably requested to work.

NOTICE OF TERMINATION AND REDUNDANCY PAY - up to 4 weeks notice of termination (5 weeks if the employee is over 45 and has at least 2 years of continuous service) and up to 16 weeks redundancy pay, both based on length of service.

PROVISION OF A FAIR WORK INFORMATION STATEMENT - employers must provide this statement to all new employees. It contains information about the NES, modern awards, agreement-making, the right to freedom of association, termination of employment, individual flexibility arrangements, right of entry, transfer of business, and the respective roles of Fair Work Australia and the Fair Work Ombudsman.

The laws in Australia have some unusual protections, for instance concerning holiday pay. In many States, employees are paid a bonus ("loading") while on leave to compensate them for the additional costs incurred while being on holidays!

When considering establishing a business in Australia, it is essential to obtain detailed advice on the employment practices in the particular industry and location in which the business is to operate.

Employment Contracts

CLASSES: Employees under employed under individual contracts although there are State and Federal Awards which specify that employees in particular industries are entitled to and MUST receive minimum standards of pay, hours of employment, health care, and periods of leave.

COST OF DISMISSAL AND WRONGFUL DISMISSAL: Fair Work Australia deals with two main types of dismissal applications:
– unfair dismissal
– dismissal where there has been a breach of the 'general protections'.

In general, an employee cannot pursue more than one type of dismissal application at the same time. An unfair dismissal occurs where an employee makes an unfair dismissal remedy application and Fair Work Australia finds that:

– the employee was dismissed, and
– the dismissal was harsh, unjust or unreasonable, and
– the dismissal was not a case of genuine redundancy, and
– the dismissal was not consistent with the Small Business Fair Dismissal Code, where the employee was employed by a small business.

(A small business is a business that employs fewer than 15 employees.)

To make an unfair dismissal remedy application an employee must be:
– covered by the national unfair dismissal laws, and
– eligible to make an application.

The application must be lodged within 14 days of the dismissal coming into effect.

To be eligible to apply an employee must, amongst other things, have:
– completed a minimum employment period of at least six months (one year in the case of a small business employee), and
– be covered by an award or agreement if they earn more than $118,100 a year.

EMPLOYMENT CONTRACTS FOR DIRECTORS: There is no special regime for directors to be employed by the companies of which they are directors.

EMPLOYEES' REPRESENTATIVES AND UNION REPRESENTATION: Historically there has be
– Brief idea of the influence of these groups in Labor Contracts
– When a Labor Union representation becomes binding?
– Rights and Privileges of a Labor Union Representation inside a Company.

COLLECTIVE BARGAINING AGREEMENTS. OTHER AGREEMENTS (National, regional, provincial or company level...)
– Classes
– Are Collective Bargaining Agreements binding for the labor contracts?

Enterprise Bargaining Under the Fair Work Act

From the introduction of the Fair Work Act, there are two ways in which an employer can contract with the employees. The first is by way of common law contracts of employment. The other way is by way of collective bargaining. Whilst the Fair Work Act makes it much easier for employees to call upon union assistance in the process of collective bargaining, there is no requirement for union involvement. It is not compulsory. An employer can collectively bargain with its workforce and arrive at an outcome supported by its non-unionised workforce provided the Fair Work Authority (established by the new legislation) approves the collective agreement.

Australian Workplace Agreements (AWAs) were made unlawful after 27 March 2008. AWAs with terms of up to five years made and lodged before March 2008 will continue to operate. Those AWAs could continue indefinitely in circumstances where they were not replaced or terminated after its normal expiry date – i.e. on or before March 2013. Parties to the AWAs would, however, not be able to re-negotiate the terms of employment with a new or varied AWA. The ITEAs have a nominal expiry date of not later than 31 December 2009.

Under the Fair Work Act, the vast majority of work agreements will come into existence by way of collective agreements. These will be made between employers and employees. Unions can be named as a party to the agreement. If a union is a named party to an agreement, then that organisation has rights and obligations under the agreement. The union can enforce the agreement in its own name without an effective member.

There are four types of collective agreements. The first is single business collective agreements.

a) SINGLE BUSINESS COLLECTIVE AGREEMENTS
These will form the most common type of collective agreement whereby employees who fall within the scope of the agreement are covered by it and must be made only for a single business or part of a business. A 'single business' is defined to mean a 'business, project or undertaking' carried on by an employer.

For example, where two or more unrelated employers carry on a 'joint venture' they are to be treated as having a single business. It is also possible for two or more corporations that re 'related' within the meaning of the Corporations Act 2001 to be treated as a single business however it is not mandatory. Such corporations have the choice as to whether to make separate agreements or join together and make a single agreement.

Moreover, such agreements can include geographically distinct part of the 'single business' or 'a distinct operational or organisational unit within the single business'. Thus it is possible for an employer to have different agreements at different locations or indeed for different divisions at the same locations.

Such agreements face potential oversight by Fair Work Australia for the majority of orders. Protected action is available during the bargaining process by the parties to it. Noticeably, the Fair Work Act does not alter the concept of "protected action" vis a vis "unprotected action", three days notice of industrial action to be given by a party, and an application for a secret strike ballot to approve industrial action.

This can be formed as part of a union collective agreement as long as the relevant union (s) has one or more members at the company. It is open to an employer as to whom to choose to bargain with.

Conversely, an employee collective agreement can be made and be drawn up by employers and employees and as with union collective agreements must also be approved by a majority of employees to be registered.

Nevertheless, such an agreement must be approved by a 'valid majority' of all the workers who are covered by it.

b) SINGLE INTEREST EMPLOYER REGISTERED COLLECTIVE AGREEMENTS
Collective agreements are also available for employers who have franchisees involved and or integrated into their service. Protected action is also available in these types of agreements. For instance, employers under the direction of a single entity like a franchisor can be covered by a single agreement.

c) LOW PAID MULTI-BUSINESS COLLECTIVE AGREEMENTS
This is an agreement that covers one or more single businesses.

Employees who fall within the scope of the agreement are covered by it, they facilitate multi-employer bargaining including an order from the independent umpire that a relevant third party such as a contractor can be brought to the bargaining table and workplace determination in the event of a stalemate can occur where the parties consent. Note, there is no legislative provision for protected action to be taken by employees in such instances.

d) GREENFIELDS COLLECTIVE AGREEMENTS
This is an agreement where it can be made where an employer is in the process of setting up a new business.

It may cover any category of employee provided that no employee has been engaged before the agreement is made. The advantage in doing such an agreement is that it will set the terms and conditions of employment which will cover employees who are subsequently hired.

There are two types of greenfields agreements. First, a union agreement can be made with one or more unions who are entitled to represent the industrial interest of the workers likely to be covered by the agreement. Secondly, an employer greenfields agreement is essentially an agreement made by one part, that being the employer.

Following the enactment of the Fair Work Act new requirements regarding enterprise bargaining came into effect. Employers are required to issue a written notice to employees as soon as practical, but not later than 14 days after the employer initiates bargaining or agrees to bargain. This written notice is known as a 'Notice of Employee Representational Rights'. Amongst the mandatory content, this notice must contain information about the right of an employee to appoint a bargaining representative.

Extent of employer obligations

The extent of employer obligations under the Enterprise Bargaining requirements of the Fair Work Act are:

1. An employer is not obliged to bargain for an enterprise agreement in response to a union or other employee bargaining representative proposing an enterprise agreement.

2. An employer can refuse to bargain for an enterprise agreement or can make its agreement to bargain subject to a condition precedent as to the scope of any agreement. For instance, the employer can make it a condition that it will only bargain if the scope of the agreement is limited to a particular category or categories of employees.

3. If the union or other bargaining representative does not accept this condition, the employer is entitled to refrain from bargaining.

4. At this point, employees' bargaining representative may approach Fair Work Australia. The Fair Work Act allows for Fair Work Australia to order an employer to bargain with its employees subject to several conditions. Most importantly, Fair Work Australia must be satisfied that a majority of employees wish to bargain with the employer.

5. The employer is not required to make concessions during bargaining for the agreement nor is the employer required to reach agreement on particular terms that are to be included in the agreement.

Social Security

EMPLOYER CONTRIBUTIONS: Employers must make superannuation contributions to the employees' to a designated superannuation fund at least every three months. The superannuation contributions are invested over the period of the employees' working life and the sum of compulsory and voluntary contributions, plus earnings, less taxes and fees is paid to the person when they choose to retire. The sum most people receive is predominantly made up of compulsory employer contributions. As at 1 July, 2011 the rate of contribution is 9% of an employees ordinary salary.

Special rules apply in relation to employers providing defined benefit arrangements. There are less common traditional employer funds where benefits are determined by a formula usually based on final average salary and length of service. Essentially, instead of minimum contributions, employers need to provide a minimum level of benefit.

Superannuation Guarantee law applies to all working Australians, except those earning less than $450 per month, or aged under 18 or over 70. Individuals can choose to make extra voluntary contributions to their superannuation and receive tax benefits for doing so.

Health and Safety

The various State health and safety laws are being harmonized on a national basis. Under the Workplace Health & Safety Act employers "officers" have a positive duty to ensure that the employer (company) is complying with its health and safety obligations. In addition, people that essentially act as shadow or de facto directors of the employer, will also be considered to be "officers. Accordingly, individuals within any businesses at a managerial level will be exposed to an increased risk becoming personally liable if they fail to exercise all due diligence in respect of the health and safety in their employers company or business.

The Workplace Health & Safety Act will also introduce significant changes to the management of safety in Australia, including:

DUTY OF CARE - an expanded duty of care on all businesses and undertakings

CONSULTATION - a broader requirement to consult and co-ordinate on safety with workers, contractors and others affected by the business or undertaking

REPUTATION – an approach to enforcement through greater use of adverse publicity orders Intervention at the business – greater avenues for intervention by unions and the regulator at your business

SHIFT IN ATTITUDE – by the regulators and courts in adopting a "uniform" approach to investigation and enforcement

A summary of the more significant areas of intervention are as follows:

Regulator Intervention

Activity	Section
Failure to negotiate work groups	54, 56
Issue resolution	80 82
Direction to cease unsafe work	89
Review of Provisional Improvement Notice	100
Dispute about WHS right of entry	141
Creation of Health & Safety Committees	76
Regulations	Coming soon

Union Involvement

Activity	Section
Entry to inquire into suspected contraventions	117
Entry to consult and advise workers	121
Right of workers to be represented by union in negotiating work groups	52 (4)
Right for a HSR to request the assistance of any person (including a union official)	68 (2) (g)
Right of entry for resolution of Health and Safety issues	81 (3)

Contracting and Outsourcing of Work Services

Contracting and outsourcing is a function of business operations in Australia. Outsourcing must be genuine. The courts look at the substance of the outsourcing contract not its form. If an agreement is really one of employment though clothed as an outsourcing contract, the courts will look through the form of the contract and impose the requirements of the employment laws.

→ Real Estate

Typer of Ownership

Land may be held by individuals or companies. Provided notification is made, foreign individuals and companies can also purchase land in Australia.

Land acquired is held in fee simple. Subject to Government's having reserved the right to acquire land, land once purchased is the sole and absolute property of the purchaser.

Ownership of land by foreigners is permitted. See the section on Foreign Investment.

Land Register

Generally ownership of land in Australia is recorded by the Torrens registration system. All land has a specific lot and plan number and the name of the owner is disclosed in the register. The register is authoritative as to who the owner of land is at a given time.

Transfer Formalities

Land is transferred by sale, gift or transfer upon death. For the transfer to be valid at law, it must be noted in the appropriate State or Territory Department of Lands registry.

A tax on the transfer of land from one person to another current applies in most States and Territories of Australia. The rate of Stamp Duty as this tax is called varies between the States and Territories. Anti-avoidance provisions exist to prevent people from seeking to avoid the payment of Stamp Duty using corporate and trust vehicles.

As at 1 July, 2011 there is no estate or death duties payable upon the transfer of land from a deceased to his or her beneficiaries.

Mortgages

Mortgages are created and also recorded In the register pertaining to the land. Mortgages can also arise without being registered although the level of security in such cases can be affected by the failure of the mortgagee to register the security interest in the land. In some cases, the mortgagee's security interest could be lost due to the failure to register the mortgage.

Restrictions on Acquisition

There are notification procedures to follow but in general there are no restrictions on foreign individuals or companies purchasing or holding land in Australia.

Construction and use Restrictions

The permitted use of land is controlled by the third tier of government in Australia, the Local Council. When looking to purchase land, purchasers are advised to obtain the latest zoning certificate to ensure that the land can be used for the desired purpose of the purchaser.

Development cannot take place on land until the Local Council gives development consent to the proposal. The length of time it takes to obtain Development Consent following the lodging of a Development Application depends upon each State and Territory and each Local Council.

Leases

Land in Australia can be leased. The usual types of leases are leases for a term, leases at will and periodic leases. Leases for a term greater than 5 years (inclusive of any option to renew) should be placed upon the register of the land. No government permission is required for a land owner to grant a lease to a lessee.

KRAFT & WINTERNITZ
RECHTSANWÄLTE

→ Austria

→ Foreign Investment Law

Registration with Government, authorities and permits

There are in general no restrictions on converting or transferring funds related to foreign investments. All cross-boarder capital transactions for non-residents and residents, including the acquisition of Austrian securities, debt services, the repatriation of profits, interest payments, dividends and proceeds from the sale of investment are unrestricted.

Nevertheless the Austrian Central Bank (Nationalbank) is entitled to enact restrictions pursuant to EU-law under certain circumstances, e.g., major difficulties in international relationships, where the security of Austria is endangered, etc. In this case certain transactions require the permission of the Austrian Central Bank.

Furthermore various transactions related to foreign countries, e.g. foreign direct investments, must be notified to the Austrian Central Bank for statistical purposes.

The nine provinces have established regulations (Grundverkehrsgesetze) under which the acquisition of real estate (and certain rights related to real estate) by foreigners (in some cases also by Austrians) is subject to approval by the provincial authorities. These restrictions concern primarily real estate for agriculture use and real estate in tourist regions. The regulations differ from province to province.

Most business activities in Austria require a business license (Gewerbeberechtigung). If the business is conducted by a corporation, a partnership or a branch of a foreign company an individual person must be named who is responsible for the correct conduct of the business. This person is commonly called the "gewerberechtlicher Geschäftsführer", who must be

resident in Austria or in a country where penalties of Austrian administrative authorities can be executed. Therefore, in most cases a "gewerberechtlicher Geschäftsführer" must be nominated who is resident in Austria.

Transfer of dividends, interests and royalties abroad

Austria does, generally, not restrict the transfer of dividends, interests and royalties abroad. The exemptions are mentioned above. For the taxation of these transfers see section "Tax Law".

Repatriation procedures and restrictions

Austria applies no repatriation procedures or restrictions.

Foreign personnel

There are restrictions on employment of foreign employees. Citizens of the "old" EU member states plus Malta and Cyprus have already been entitled to work in Austria without a work permit. On May 1st, 2011 the restrictions concerning citizens of the other new member states ended. Currently, only for citizens of Bulgaria and Romania special transition rules still apply.

Employees from others countries need a work permit to work legally in Austria. The work permit is valid for a certain job in a certain company for a maximum period of one year; a prolongation is possible. There are stipulated maximum numbers for foreign employees (without citizens of the EU) for Austria as a whole and for the individual provinces. For highly qualified workers (Schlüsselarbeitskräfte) it is possible to obtain an exemption (even if the quota of foreign employees is completed), if there is a lack of such personnel in Austria.

Besides of a work permit foreign employees may under certain circumstances obtain a certificate of exemption (Befreiungsschein) which allows them to work generally in Austria (not only in a certain job as at the work permit) for a period of 5 years. This is possible for employees who worked legally for 5 years in the last 8 years in Austria or juvenile employees if at least one parent lived legally for 5 years and worked legally for 3 years in Austria and the juvenile spent at least his whole last school year in Austria.

Foreign companies who perform services in Austria with foreign personnel have to consider that some rules of Austrian labour law apply, e.g., the minimum salaries stipulated in collective bargaining agreements, restrictions of working time etc.

→ Corporate Law

Regulations and Rules

The main statutes in corporate law are the Code of Enterprises (Unternehmensgesetzbuch, UGB), which entered into force on January 1st, 2007, the Law on Limited Liability Companies (Gesetz über Gesellschaften mit beschränkter Haftung, GmbHG) and the Stock Corporation Act (Aktiengesetz, AktG).

Other relevant statutes are the General Civil Code (Allgemeines Bürgerliches Gesetzbuch, ABGB), the Law on Co-operative Societies (Genossenschaftsgesetz), the Law on the Commercial Register (Firmenbuchgesetz), the Law on Private Foundations (Privatstiftungsgesetz), the Insurance Companies Supervision Act (Versicherungsaufsichtsgesetz) and the Act on the Statute of the Societas Europaea (SE-Gesetz).

Type of Companies

The most common types of companies in Austria are the General Partnership (Offene Gesellschaft, OG), the Limited Partnership (Kommanditgesellschaft, KG), the Company with Limited Liability (Gesellschaft mit beschränkter Haftung, GmbH), the Stock Company (Aktiengesellschaft, AG) and the Private Foundation (Privatstiftung).

The so-called liberal professions („freie Berufe"), as for example lawyers, accountants or architects, and small businesses, who suffered from restrictions concerning the foundation of Partnerships under the regime of the former Commercial Code (Handelsgesetzbuch, HGB), being replaced by the Code of Enterprises at the beginning of the year 2007, may now also found a Partnership (Personengesellschaft). According to the Code of Enterprises, everybody is allowed to found a General Partnership or a Limited Partnership. Therefore the Registered Partnerships (General Registered Partnership and Limited Registered Partnership) are not needed any more. By law ("ipso iure") the General Registered Partnership (Offene Erwerbsgesllschaft, OEG) was transformed into a General Partnership and the Limited Registered Partnership (Kommanditerwerbsgesellschaft, KEG) into a Limited Partnership.

Further types of companies are the Civil Law Association (Gesellschaft nach bürgerlichen Recht, GesbR), the Cooperative (Genossenschaft), the European Interest Grouping (Europäische wirtschaftliche Interessenvereinigung, EWIV), the European Company (Europäische Gesellschaft, SE) and the European Cooperative Society (Europäische Genossenschaft, SCE).

Liability of Shareholders

The liability of the shareholders of a Company with Limited Liability or a Stock Company is limited to their capital contribution. On the contrary the partners of a General Partnership are

fully and personally liable for the debts of the Partnership, the liability to creditors cannot be limited. A Limited Partnership consists of at least one general partner (Komplementär), who is liable like a partner of a General Partnership, and of at least one limited partner (Kommandidist), whose liability is restricted to the amount of his capital contribution (Einlage).

Share Capital

The minimum share capital (Stammkapital) of a Company with Limited Liability is EUR 35.000. In principle, at least one half of the capital must be paid in cash (but there are exceptions for contributions in kind). The minimum face value of one share has to be EUR 70,--.

The minimum stock capital (Grundkapital) of a Stock Company is EUR 70.000,--. At least 25 per cent of the stated capital stock (plus any premium) must be paid up prior to the registration. The minimum nominal value of the shares is EUR 1,00 unless the shares simply represent a percentage of the share capital (without a nominal value). It is possible to issue non-voting preferred shares which grant a right to a preferred dividend but do not include any voting rights.

There is no minimum share capital for General Partnerships and Limited Partnerships.

Corporate Governance

All partners of a General Partnership (and all general partners of a Limited Partnership) are entitled and obliged to manage and to represent the partnership. The partnership agreement may stipulate other regulations.

Companies with limited liability must have the following corporate bodies: (i) managing director(s) (Geschäftsführer), (ii) shareholders assembly (Generalversammlung). A supervisory board (Aufsichtsrat) is only compulsory for large Companies (e.g., more than 300 employees) and optional for the others.

The shareholders assembly must meet at least once a year and is called by the managing directors. Shareholders resolutions can also be adopted by written consent, if all shareholders agree. The following decisions - inter alia – require a resolution by the shareholders:

- the appointment and dismissal of managing directors
- approval of the annual report
- distribution of profits
- release from liability of the managing directors
- changes to the articles of association, including an increase or reduction of the share capital
- raising of claims against the managing directors
- liquidation of the company
- mergers

Generally, shareholder resolutions of a Company with Limited Liability require a simple majority of the shareholders present. Unanimous voting is required inter alia for a change of the object of business of the company. A majority of 75 per cent is required inter alia for changes to the articles of the association (with a few exceptions) or the sale of the corporate assets as a whole. The articles of association may provide other rules.

The management board of a Company with Limited Liability consists of one or more managing directors, who are appointed and dismissed by the shareholders. The managing directors represent the company and do the day-to-day business. Usually the managing directors have an employment contract with the company which stipulates the remuneration of the directors. The managing directors are personally liable towards the company for exercising the care and diligence of a prudent businessman in performing their tasks. They are not personally liable towards creditors of the company in general but only if they violate special legal rules (e.g. the requirement that they file for bankruptcy on a timely basis).

The corporate bodies of a Stock company are the board of directors (Vorstand), the shareholders meeting (Hauptversammlung) and the supervisory board (Aufsichtsrat).

A shareholders meeting is called by the board of directors and must be held at least once a year within eight month after the end of an accounting year. The following matters, inter alia, require a shareholders resolution:

- appointment of the members of the supervisory board
- appointment of the auditors
- changes to the articles of association, including an increase or reduction of the share capital
- approval of the annual report (unless the supervisory board approves it)
- distribution of profits
- release from liability of the board of directors and the supervisory board.

Shareholders resolutions are in principle adopted by a simple majority. For certain fundamental decisions, in particular changes of the articles of association a qualified majority of 75 percent of the votes is required.

The board of directors consists of one or more members, represents the company and carries out the day-to-day business. The members of the board of directors are appointed by the supervisory board for a period of 5 years (reappointment is permitted). Usually the members of the board of directors are employed with the company, and are regarded as free employees ("freie Dienstnehmer"), so they are not protected by labour laws. Profit shares are common. The members of the board of directors are personally liable towards the company for exercising the care and diligence of a prudent businessman in performing their tasks.

The supervisory board members are appointed by the shareholders meeting (except the representatives of the employees). The number of members depends on the amount of the share capital, with a minimum of three members. The supervisory board must supervise the management board. A number of transactions must be approved by the supervisory board, e.g., the acquisition, alienation and mortgaging of real estate, opening and closing of branches, determination of the general business policy etc. The liability of the members of the supervisory board is the same as the liability of the members of the management board.

Annual Account - Financial and operating results

The financial statements (Jahresabschluss) consist of the balance sheet, the profit and loss statement, an appendix and a position report.

The financial statements have to be prepared by the management within five months of the end to the accounting year. They require the approval of the shareholders assembly in the case of a Company with Limited Liability and the supervisory board in the case of a Stock Corporation. Furthermore a statutory audit is required for Stock Corporations, large or medium sized Companies with Limited Liability, banks, insurance companies and investment funds.

The financial statements must be filed with the commercial register (except Partnerships which must only register if the general partner is a corporation) within nine month of the end to the accounting year. Large Stock Corporations, companies listed on the stock exchange, banks, insurance companies and investments funds must publish the financial statements in the "Wiener Zeitung". Any delay in such filing of the financial statements is subject to a penalty which is imposed against the company and the managing director (Sec 283 UGB).

Establishing of a Company

For the foundation of a Company with Limited Liability the registration with the Commercial Register is necessary. The following documents have to be filed: (i) articles of association including at least the name and the legal seat of the company, the company purpose, the amount of the share capital and the contribution of every shareholder. The founders have to appoint managing directors, who have to sign specimen signatures, which are deposited at the Commercial Register. The Application for Registration has to include a Affidavit to be issued by the managing director that the share capital has been paid to the bank account of the company and that the managing director may dispose of it without third party rights

Liquidating a Company

For Corporations such as the Company with Limited Liability and the Stock Corporation a formal winding-up procedure is provided by law. If the shareholders agree to dissolve the company or the company is dissolved of any other reason, the company enters into a liquidation period.

During this period the company is represented by the liquidators (who may be the directors or third parties). The property of the company is sold and the debts are paid. The remaining funds are distributed to the shareholders. At the end of the procedure the company is struck from the register.

→ Corporate Taxes

Taxes on corporate income

The profits of a corporation are taxed at the company level at a flat rate, while profits of individuals (and Partnerships) are taxed at a progressive rate (exceptions see below).

Since 2005 the rate of the corporate income tax is 25 per cent (previously being 34 per cent). Therefore, the level of corporate income tax in Austria is now comparatively low.

The profits of a corporation are taxed whether the profits are paid out to the individual shareholders or retained in the company. Dividends paid to individual shareholders are subject to a withholding tax of 25 %. (Therefore, profits of a corporation which are paid to their shareholders are taxed in all with a rate of 43.75 per cent). Beginning with the second year of unlimited tax liability a Company with Limited Liability has to pay a minimum corporate income tax of EUR 1.750,--, a Stock Corporation has to pay EUR 3.500,--. The minimum corporate income tax has to be paid even if no profit is generated.

The taxation of Private foundations differs from the taxation of other legal entities: the dedication of assets to a foundation is, generally, taxed with 2.5 % (the tax rate is 25%, e.g., if the documentation is not disclosed or the foundation is not comparable to an Austrian one). Some types of incomes, e.g. income from bank deposits, debt securities or from the sale of participations are subject to a reduced tax rate of 12.5 % (interim tax) as long as they are retained. Dividends from participations in an Austrian corporation and – under certain circumstances - from a participation in a comparable foreign corporation are tax exempt. Benefits to the beneficiary from the substance are tax-free, whereas such from the proceeds are subject to the capital gains tax of 25%.

Corporate Residence

A company is resident in Austria if it has its legal seat (as designated in its statutes) or its place of effective management in Austria. A company with its residence in Austria is taxed on its worldwide income. A company with no residence in Austria is taxed on its income earned through the activities of a permanent establishment in Austria and its incomes from immovable property located in Austria, capital gains on the sale for shares in resident companies (if the

shareholding has amounted at least 1 % at any time during the last 5 years) and royalties (see below).

Other Taxes

Other relevant taxes are:

VALUE ADDED TAX: The rate is in general 20 %; 10 % are charged for leases of land and buildings for residential purposes, services rendered by theatres, museums etc, transport of passengers, foodstuff, books, etc.

REAL ESTATE TRANSFER TAX (Grunderwerbssteuer): rate 3,5 % (2 % if real estate is transferred between close relatives and/or spouses).

CAPITAL TRANSFER TAX (Kapitalverkehrssteuer): rate 1 % in particular for issuing shares in a domestic corporation (company with limited liability and stock company),

STAMP DUTIES: e.g. for lease agreements, loan and credit agreements etc.

ENERGY TAXES on natural gas, electricity, coal, petroleum

There is NO PROPERTY TAX in Austria, only the possession of real estate is taxed with an annual rate of app. 1 % of the assessed value (Einheitswert), which is regularly beneath the actual value. Since 2008 NO INHERITANCE AND GIFT TAX is imposed any longer due to a ruling of the Austrian Constitutional Court.

Branch income

A company with its residence in Austria is taxed with its worldwide income (including the incomes of a foreign branch). A company with no residence in Austria is taxed on its income earned by a branch in Austria. Austria is party to a number of tax treaties which seek to avoid double taxation.

Income determination

Inventory generally has to be valued at the lower of cost and market value. If inventory is valued according to cost, the FIFO method is generally accepted. The LIFO method is allowed only if it is in accordance with the company's actual practice. Capital gains from the sale of business assets are generally included in taxable income and are taxed at the standard rate. Capital gains (dividends) from a shareholding in Austrian or EC/EEA operating subsidiaries or intermediate holding companies are exempt from taxation (national and EC/EEA participation exemption). Capital gains from a foreign shareholding outside the EC/EEA are only tax-free (international

participation exemption), if the parent company is subject to unlimited income taxation in Austria, the subsidiary is comparable to an Austrian Company, the parent company holds at least 10 % in the capital of the subsidiary (direct or indirect) and the shareholding exists for a minimum holding period of one year prior to the disposal of the shares.

The disposal of Austrian or EC/EEA participations is taxed with the normal tax rate of 25%. Generally, the disposal of other foreign participations is not taken into account. The parent company, nevertheless, has the possibility to opt into taxability (including the possibility for depreciation to the shares' fractional value). This is also possible for EC/EEA-participations.

To avoid any misuse in connection with international participations Austrian Law changes the method: instead of the exemption method for such earnings (from either EC/EEA or other foreign participations) the credit method is applicable, if the tax rate in the foreign country does not exceed 15% or the tax is not comparable to Austrian corporate tax.

Deductions

Generally all expenses being caused by running a business are deductible. The costs for business lunches are deductible with 50% if made for promotion purposes. Costs related to passenger cars are deductible up to EUR 40,000.00.

The basis for depreciation is the cost price or production cost. Only the straight line method of depreciation is permitted by tax laws (no progressive or diminishing balance depreciation is allowed). The depreciation period is from 5 to 10 year for machines, at least 8 years for passenger cars, 15 years for the goodwill, 33 1/3 years to 66 2/3 years for buildings depending on the use of the building. Excess write down to the lower going concern value (= fraction of the total purchase price that a buyer of the whole company would pay for a certain asset assuming the buyer intends to continue the business) is only possible in case of technical or economic obsolescence. Some assets can not be depreciated, in particular real estate.

Net profit losses may be carried forward without any time limit, but loss carry forwards can only be set off against 75 % of the income of the current year (excess losses can be forwarded to the next year). To avoid misuse of losses carried forward a change in ownership of the company shares under certain circumstances, namely a substantial change of the shareholders (more than 75 per cent), a substantial change in the organization and a substantial change in the economic structure (so called "Mantelkauf"), lead to a loss of the ability to carry forward the net profit losses of the previous years.

Although there are no statutory provisions specifically dealing with transfer pricing the arm's length principle is applied in Austria because of general rules of the Austrian tax law. The income tax and the corporate income tax are not deductible.

Group taxation

Since 2005 Austrian tax law allows the building of a tax group. The group parent needs an equity participation of more than 50 per cent (directly or indirectly) including the majority in voting rights. It is also possible to build a group where one company holds at least 40% and another at least 15% (Mehrmüttergruppe). Such participation has to last for at least three years an application with the tax office has to be filed. Irrespective of the participation held, 100 % of the profits and losses of Austrian group members will be attributed to the group parent, while losses of foreign group members will be attributed according only to the ownership percentage of the participation held. Profits of any foreign group members are not attributed to the parent company.

Tax Incentives

There are several tax incentives in Austria, e.g., different forms of research tax allowances, an education allowance and an education premium, or an apprentice premium.

An invention allowance for example is granted for expenses incurred in the development or improvement of inventions valuable for the economy. The maximum invention allowance is 25 % of the research and development expenses (35 % to that portion of expenses which exceeds the average of such expenses in the last three years). An education allowance is granted for expenses incurred for the education and training of employees. It amounts to 20 % of these expenses.

Since 2010 individuals can participate from the new profit tax allowance (Gewinnfreibetrag): 13% of the profits can be deducted as notional operating expenses, up to EUR 100,000. One part can be set off without any further requirements; the other part is depending on the actual investment in securities and certain assets.

Withholding taxes

A withholding tax of 25 % is levied on dividends distributed by a resident company to its Austrian shareholders. For natural persons, generally, the taxation is final (Endbesteuerung). No withholding tax is levied if the parent company holds more than 25% of the capital, for lower participations the withholding tax is credited. Dividends of resident companies to its foreign shareholders in the EC/EEA are tax-free if the participation exceeds 10% and exists for more than one year.

Double taxation treaties can contain lower tax rates. Interest income from other sources is subject to standard corporate income tax (or individual income tax). Royalties paid to non-residents are subject to a final withholding tax of 20 % unless a reduced rate applies under a tax treaty.

Tax rate on dividends, interest and royalties according to tax treaties (selected countries):

COUNTRY	DIVIDENDS	INTEREST	ROYALTIES
Argentina	15	0	15
Australia	15	0	10
Belgium	15	0	10 (0 in some cases)
Brazil	15	0	Up to 20
Canada	5 or 15	0	10 or 0
Denmark	10	0	10 (0 in some cases)
France	0 or 15	0	0
Germany	5 or 15	0	0
Italy	15	0	10 (0 in some cases)
Japan	10 or 20	0	10
Korea	5 or 15	0	2 or 10
The Netherlands	5 o 15	0	10 (0 in some cases)
Portugal	15	0	10
Russia	5 or 15	0	0
Spain	10 or 15	0	5
Suisse	0 or 15	0	5
United Kingdom	5 or 15	0	10 (0 in some cases)
USA	5 or 15	0	0 (on films 10)

Tax administration

A company must file the annually corporate income tax return by April 30 (by June 30 when filed electronically) of the subsequent calendar year (no matter when the financial year ends). If the company is represented by a tax advisor the period for filing the return may be extended.

Prepayments of Corporate Income tax must be made in four equal payments by February 15, May 15, August 15 and November 15 in accordance with the assessment notice issued by the tax authorities (based on the previous year's tax payments). If the Corporate Income Tax is more than the prepayments the difference must be paid within a month after receiving the tax statement. Excess prepayments are refunded.

→ Individual Taxes

Different from the Corporate Income Tax the individual Income Tax is not a flat tax. The tax rate here is progressive (3 rates, maximum rate is 50 %).

Partnerships as such are not a subject of taxation, but the partners are. The profits of the partnership are first calculated for the partnership as a whole and then shared amongst the partners. The partners have to pay income tax (or Corporate income tax if the partner is as corporation) to their portion of the profit.

Territoriality and residence

Individuals who are residents of Austria are liable to Austrian Income Tax on the world wide income. A person is regarded as resident if he has a domicile (= place where he occupies a residence under circumstances, which indicates that he will retain and use it on a basis which is not merely temporarily) or his customary place of abode (= physical presence over an extended period) is in Austria. A person who remains in Austria for 183 days or more during a year in Austria is considered to have his customary place of abode.

A Person with no residence in Austria is only subject to Austrian income tax for specific income sources or assets.

Gross Income

There are seven sources of income:

- Agriculture and forestry
- Trade or business
- Independent personal service (e.g. lawyers, tax advisors)
- Employment
- Investment of capital
- Rental and royalties
- Other income sources

The income from the first three sources (so called business income) is calculated in a manner similar to the treatment of income of a corporation (see above). The taxable income from the four other sources is determined by deducting from the gross income any expenses that are incurred to acquire, safeguard and maintain this income (so called Werbungskosten).

From the employee's gross salary social security contributions, kilometre and daily allowance (up to a certain limit) or distributions of the employer to a pension funds in favour of the employee are deducted. Non-recurring payment of salaries, in particular 13th and 14th salary (vacation

and Christmas remuneration) enjoy a tax-free allowance of EUR 620,00 per year and excess amounts up to 1/6 of the current annual salaries are only taxed at a reduced flat rate of 6 %.

Capital gains from the sale transfer of non-business property are generally not taxed, but there are two exceptions:

(i) Gains for transactions seen as speculative (Spekulationsgeschäfte), i.e. real estate sold within ten years (with exceptions) or other property sold within 1 year after acquisition. The total net gains of such speculative transaction are taxed at the ordinary rates if their amount exceeds EUR 440,00.

(ii) Gain on the sale of a qualified participation in an Austrian corporation (at least 1 % of the share capital was held at any time in the last five years).

As a consequence of the restricted taxation of capital gains, capital losses reduce the taxable income only if from speculative transactions or the sale of such qualified participation. Furthermore they can only be offset against gains from speculative transactions or sale of a qualified participation (not against profits from other sources of income; horizontaler Verlustausgleich)

Deductions

As mentioned above expenses that are incurred to acquire, safeguard and maintain this income are deductible. Furthermore taxable income is reduced by:

SPECIAL PERSONAL EXPENSES (Sonderausgaben), e.g. premiums paid into voluntary health, accident and life insurance programs, payments incurred to finance private house building and improvement, purchase of newly issued shares or profit sharing certificates. The maximum amount being deductable, generally, is EUR 2,920; only 25 % of the payments made are deductible with limitation); contribution to churches, contributions to charitable organisations, tax losses carried forward from previous years etc.

EXTRAORDINARY EXPENSES (außergewöhnliche Belastungen): Payments incurred by a taxpayer because of extraordinary circumstances (e.g. natural catastrophes, children's tuition away from home, etc.).

SEVERAL DEDUCTIBLE AMOUNTS stipulated by law (Absetzbeträge), e.g.:
– Sole earners: EUR 364, -- + additional amount depending on the number of children)
– Sole earners with children and no spouse or partner: EUR 494, -- + additional amount depending on the number of children)
– Employees: EUR 54,--.

Tax credits

Some of the deductible amounts stipulated by law reduce the income tax even if they exceed the tax. Therefore a negative income tax is possible and the taxpayer is granted a tax credit which is paid to him.

Other taxes

Social security distributions are mandatory, but these are not regarded as taxes in Austria. There are no local taxes on income, but the employer has to pay a local tax (Kommunalsteuer) on basis of the sum of wages he pays to his employees (tax rate is 3 %).

→ Real Estate Law

Statutes regulating real estate in Austria

- General Civil Code (Allgemeines Bürgerliches Gesetzbuch - ABGB);
- General Land Register Act (Allgemeines Grundbuchsgesetz);
- Real Estate Transaction Laws (Grundverkehrsgesetze) of the nine provinces of Austria;
- Rent Control Act (Mietrechtsgesetz).

Types of ownership

OWNERSHIP – CO-OWNERSHIP – CONDOMINIUM: Ownership in the sense of Austrian law is generally defined in § 354 ABGB. Consequently ownership on a piece of real estate means, as in all states of Central Europe, the right on the one hand to make use of the substance and the proceeds from a property, principally without any restriction, and on the other hand to exclude other people therefrom.

It is also possible, that more than one person is owner. In the case of joint ownership (Miteigentum) each owner has the right to participate proportionately on the earnings of the property and to request dissolution of the co-ownership. This is however not allowed, if the dissolution would be detrimental to at least one other co-owner.

Condominium is a special form of the co-ownership and means, that each co-owner has the exclusive right to use a certain apartment in a building, existing on the purported property.

"USUS FRUCTUS": "Usus fructus" means the right to use a certain piece of real estate whose owner is someone else and consume all earnings of this property.

CONSTRUCTION RIGHT (Baurecht): A construction right principally means the right to construct a building on the surface of a property owned by another one. This right is transferable and has to be constituted by a contract with the owner of the real estate. Further more it is limited for certain time.

Closely related with the Construction Right is the "superaedifikat".

Land Register

In Austria rights according to real estate, especially the ownership, "usus fructus", mortgages (Hypotheken), easements (Dienstbarkeiten) and Construction Rights (Baurecht) are recorded in the Land Register, administrated by the District Courts (Bezirksgerichte).

The Land Register is divided into in the main register (Hauptbuch) and the document collection (Urkundensammlung). Each piece of real estate has a lot number (Einlagezahl). This register maintains three schedules of each lot number:

– Schedule A is the schedule of estate (Gutbestandsblatt)
– Schedule B is the schedule of the ownership (Eigentumsblatt)
– Schedule C is the Schedule of encumbrances (Lastenblatt). This schedule especially shows mortgages and easements.

The Austrian land register is a public data bank, so everyone is entitled to inspect all documents. Furthermore the Land Register is subject to the principle of priority, which means that a right registered first prevails over all rights which have been registered subsequently, and the principle of confidence, which means, that everyone can rely on the assumption that the registered information concerning the ownership and especially the schedule of encumbrances is right and complete.

Transfer formalities

It is not necessary that a contract to establish rights and encumbrances on real estates is constituted in the form of a notary deed. Only the declaration of the registered owner that he agrees to the registration of the right which is subject matter of the concerning contract in the Land Register (Aufsandungserklärung) needs a certification by a notary public.

Mortgages

A mortgage is the right of a creditor to obtain satisfaction of a debt from a certain piece of real estate if the obligation is not fulfilled as agreed. The mortgage depends on the existence of the secured debt and comes into existence with its registration in Land Register schedule C.

A registration is only allowed in case that the document, which is the basis for the mortgage, contains a certain sum of money or a reference to a maximum amount of money (Höchstbetragshypothek). Furthermore it is possible that more than one mortgage is registered on one piece of real estate. In this case the ranking between the mortgages depends on the day of registration in the Land Register (principle of priority).

Where the secured debt is not repaid as agreed, the creditor has the right to initiate a public sale of the property by order.

Restrictions on acquisition

All nine provinces of Austria have enacted Real Estate Transaction Laws (Grundverkehrsgesetze) which contain various restrictions. Since Austria became member of the EU many restrictive provisions in these laws have been liberalized, so that all EU-citizens are equally treated.

The existing restrictions are to be split up in two parts: On the one hand there are constraints for real estates used for agricultural purpose and on the other hand there are restrictions on properties in certain areas which are of special interest for tourism. In both cases the acquisition of real estate and other certain rights is subject to approval by the Land Transfer Authorities (Grundverkehrsbehörden).

Special legal protections for parties

In case a consumer concludes an agreement to become owner or tenant of a property, he has the special right to withdraw from this contract within one week, if the contract was signed on the day of the first examination of the subject matter of the contract.

Construction and use restrictions

A number of restrictions concerning the use of real estate law can be found in public law. Not all of them can be mentioned here. The most important are:

– If it is planned to build a house or another building on a certain property, it is necessary to obtain a building license (Baubewilligung);
– It is not possible to obtain a building permit on every piece of real estate. It is important to know that there is a land development plan (Flächenwidmungsplan) for every piece of Austria. This plan divides the concerning area in different zones. For example you can find there agricultural or building land. It is forbidden to construct buildings on agricultural land.

Leasehold types

The Austrian civil law differentiates between two kinds of leases. One is named "Miete" and the other "Pacht". The difference is very important, as legal consequences differ. In a "Miete" the lessee (Mieter) has the right to use the object of lease. In case of "Pacht" the lessee (Pächter) has not only the right to use but also to participate in the earnings of the concerning property.

In case of "Miete" the lessee is highly protected by the provisions of the Rent Control Act (Mietrechtsgesetz, MRG). Especially restricted is the right of the lessor (Vermieter) to terminate the lease contract of land and to determine the amount of rent. Of certain interest are the following limitations of the lessor:

TEMPORAL LIMITATIONS: It is only possible to place a contract of lease under temporal limitation, if this agreement was settled in written form. Moreover not every temporal limitation is possible, as the Rent Control Act appoints minimum respites.

REASONS FOR THE LESSOR TO TERMINATE THE CONTRACT: Generally the lessor is only allowed to terminate the contract for important reasons. The Rent Control Act enumerates several important reasons. It is for example possible to terminate the contract, if the lessee does not use the property for the purpose under the contract or does not pay the rent punctually.

UPPER LIMIT FOR THE RENT: Generally the lessee and the lessor can stipulate an adequate rent. For certain kinds of apartments, especially if they are of a lower category, the Rent Control Act provides low upper limits for the rent.

The whole provisions of the Rent Control Act (Mietrechtsgesetz) are mandatory (ius cogens) and cannot be (with some exceptions) changed by contract to the disadvantage of the lessee. Where a contract includes some less favourable passages, the lessee is not bound by these contractual obligations and can rely on the provisions of law.

§ 1 MRG regulates the appliance of the Rent Control Act. Not all leases are subject to the Rent Control Act. In particular, leases which fall under the category of "Pacht" are not regulated by Rent Control Act. In this case the lessee consequently cannot rely on the protections of the Rent Control Act.

Lease formalities

Generally there are no formalities for lease contracts in the Austrian law, albeit there are several exceptions to this tenet. Most of these exceptions are provided in the above mentioned Rent Control Act.

→ Labour Law

Austrian labour law is characterized by high standards of protection of the employees rights and the importance of collective bargaining (company agreements are less important). Therefore, the possibility to govern the labour conditions by individual contracting is restricted.

Employment Contracts

The most important distinction is drawn between white-collar workers (Angestellte) and blue-collar workers (Arbeiter). White-collar workers are employed in commercial, higher non-commercial or clerk services, all other employees are blue-collar workers. Since this distinction is commonly seen as antiquated, in recent years the legal rules for white-collar workers and blue-collar workers have been adjusted, but there are still some differences, e.g. the periods of termination still differ. Furthermore, in many sectors there are different collective bargaining agreements for white-collar workers and blue-collar workers.

In addition to the usual labour contract, there is the possibility to enter into a free labour contract (freier Dienstvertrag). In a free labour contract the "employee" is not personally dependent on the "employer" (e.g., he can set his working time by himself, he works with his own equipment etc.). Only a few labour laws apply to free labour contracts.

A labour contract may be concluded for a definite or indefinite period of time. A contract for indefinite time can always be terminated by an ordinary termination (Kündigung) by both of the parties, provided they comply with certain notice requirements (termination periods and dates). The termination period the employer must comply with depends on the years of service: in case of white-collar workers, it may run from 6 weeks (in the first two years of service) to 5 months (after 25 years of service). A white-collar worker must comply with a termination period of one month. The statutory termination period may be lengthened but not shortened by the individual contract. The period the employee has to comply with must not be longer as the period the employer has to comply with. The employer of a white collar worker may terminate the contract to the end of each quarter, the white-collar employee may terminate employment to the end of each month. This rule can be changed by contract, so that both parties may terminate the contract on 15th or the last day of the month. In the case of bluecollar workers, the applicable termination period is two weeks for both parties, there are no certain termination dates. The period may be lengthened or shortened by collective bargaining or by contract. In enterprises where a work council is actually established the work council must be informed by the employer before giving notice to the employee of the termination.

An ordinary termination may be challenged by the employee if he works in a plant where establishment of a work council is required (see below). A termination can be challenged because of a proscribed reason of the termination (e.g. union activity, activities in organizing the election of a work council) or because it was socially unjustified (important for elder

employees). For some protected groups as members of the work council, pregnant employees, handicapped people or apprentices terminations are restricted.

Beside ordinary termination contracts (whether for a definite or indefinite period of time) may be terminated with immediate effect if there are important reasons that make the continuation of the employment unacceptable for one of the parties. The employer may immediately terminate the labour contract if the employee is disloyal in his service, incapable of performing his services, refuses to comply with order of the employer etc. If the dismissal is not justifiable because there is no important reason the employment nevertheless ends immediately, but the employee will be entitled to full pay as if the employer would have ordinarily terminated the employment.

An employee, whose employment has lasted for at least three years, is entitled to severance payment (Abfertigung) in the event of ordinary termination by the employer, termination by mutual consent, justified immediate resignation by the employee and unjustified dismissal by the employer. The severance payment depends upon the time of service and ranges from 2 months salary to 12 months salary. The new Act on Statutory Corporate Employment Retirement Scheme (Betriebliches Mitarbeiterversorgungsgesetz) applies to contracts beginning after December 31, 2002 (there is an opt-in-possibility for older contracts). Under this new legislation the employer has to pay 1,53 % of the monthly remuneration to a fund which pays the severance payment.

The members of the managing board of a Stock Corporation are excluded from the protective provisions of the labour law. However, labour law may apply to managing directors of a Company with Limited Liability depending on the rights and duties they have. Shareholders holding a majority or a blocking minority of shares will not be regarded as employees if they serve as managing directors of that company.

Employees Representatives and union representation

In Austria there is only one trade union, the Austrian Trade Union Federation (Österreichischer Gewerkschaftsbund, ÖGB). The influence of the trade union is traditionally big but has declined in the last years in particular since the inauguration of the former conservative government and a scandal involving the trade union-owned Labour and Economics Bank (Bawag). The influence of the trade union is still significant since the Austrian Trade Union Federation conclude collective bargaining agreements (see below).

Members of the staff of companies having at least five employees are entitled to establish a work council (Betriebsrat). The number of members depends on the number of employees. The members of the work council need not to be members of the trade union. The work councils therefore are formally independent from the trade unions although in fact there are often connections. A work council may conclude company agreements with the owner of the company (see below).

The members of the work council enjoy certain privileges and the law provides them specific protection (e.g. protection against termination). If their duties as members of the work council requires them to perform such activities during normal working hours their salary must not been reduced. In companies with a great number of employees (more than 150) one or more members (2 if there are more than 700 employees, 3 if there are more than 3000 employees) of the work council are entitled to be totally released from their duty under their employment contract. Members of the work council must not be discriminated against.

There are no specific privileges for members of the Trade Union but a termination because of union activities is not justified (see above).

Collective Bargaining Agreements, Company Agreements

The parties of collective bargaining agreements are the Austrian Trade Union Federation and statutory employer organisations, in particular the chamber of commerce (Wirtschaftkammer) and its sub-organizations. Generally collective bargaining agreements are concluded for a specific sector or branch, in most of the cases they apply to the whole territory of Austria, but there are also collective bargaining agreements applicable only in a certain province. The collective bargaining agreements apply to all employees in the specific branch, no matter if they are members of the trade union or not. Collective bargaining agreements govern the main aspects of the employment like wages, working conditions, working time etc. They apply to all employment relations, overriding the individual contract, except where the terms of the individual contract are more favourable to the employee. Collective bargaining agreements are thus of great significance in Austria.

Company Agreements are concluded between the management of the company and the work council (if there is no work council, no company agreement can be concluded). Only specified matters can be governed by a company agreement, e.g., establishing of piece-work system, regulation of the daily work time etc. Company Agreements are less important than collective bargaining agreements.

Wages and other types of compensation

There is no statutory minimum salary in Austria, but minimum salaries are stipulated in the collective bargaining agreements. The minimum salaries depend on the duties and the years on service. It is important that usually collective bargaining agreements grant 14 payments a year (so called 13th and 14th salary or Christmas and vacation pay, these payments are subject to a reduced income tax at a 6 per cent rate).

Other types of compensation common in Austria are the provision of a company housing or a company car, contributions to a pension funds or meals at a reduced price. Since collective bargaining agreements usually stipulate a salary paid in cash (transferred to the bank account

of the employee) remuneration in kind is not of great importance in Austria. If an employer repeatedly grants additional benefits (e.g. a bonus at the end of the year) the employee is entitled to receive these benefits in the future. The employer can avoid this by explicitly reserving the right to terminate the practice at will.

The normal statutory working time is eight hours a day and 40 hours a week. Many collective bargaining agreements stipulate shorter working-times (38 hours a week are common). Overtime hours have to be paid at the normal hourly rate plus 50 % (collective bargaining agreements may stipulate higher extra pays in particular for overtime hours on Sundays). It is permissible to agree on a lump-sum for overtime hours or an all-in- salary as long as the lump-sum or the all-in-salary exceeds the minimum payment for overtime hours set by the applicable collective bargaining agreement. Besides payment for overtime hours it is also possible that the employee takes a compensatory time off whereby one overtime hour is equal to at least one and a half hours of extra free-time.

Employment regulations

Austrian labour law is split up to many different Statutes. For white-collar workers the Act on white-collar workers (Angestelltengesetz) is of great importance. Other important acts are the Labour Relations Act (Arbeitsverfassungsgesetz), the Vacation Act (Urlaubsgesetz) and the Working Time Act (Arbeitszeitgesetz).

Social Security costs

The employer must notify the beginning and the end of an employment to the social insurance agency. The employer is liable for the payment of the social security costs. The contributions must be paid monthly by the last day of the month. The social security contributions consist of an employee's contribution which is deducted from the salary and an employer's contribution which must be paid in addition to the salary. The employer is liable for the payment of the employer's contribution and the employee's contribution.

The employees contribution is currently (2011) 18.07 per cent of the salary for white collar-workers and 18.20 per cent of the salary for blue-collar workers

The employers contribution is currently (2011) 21.83 per cent of the salary for white collar workers and 21.70 per cent of the salary for blue collar workers.

There is a ceiling on the basis for contribution (Höchstbeitragsgrundlage) of EUR 4,200 a month (in the year 2011) which means no social insurance contributions have to be paid for the part of the salary exceeding this ceiling.

Generally all parts of the remuneration (including remuneration in kind and overtime payments) are the basis for the social insurance contribution, but there are a few exceptions, e.g. work clothes, meals at a reduced price, contributions to a pensions fund.

Health and Safety

Austrian labour law includes detailed provisions on occupational safety and health which the employer has to comply with. The employer has the duty to take measures to protect the life, the health and the morality of his employees at their work place. These regulations cover the size, lightning and ventilation of rooms, fire prevention, first aid, compulsory safety instructions etc. Compliance with these provisions is monitored by the Work Inspection Authority (Arbeitsinspektorat). Depending on the numbers of employees one or more person responsible for safety (Sicherheitsvertrauensperson) have to be appointed.

Important statutes in this field are the Act on Safety and Protection of Health at work (ArbeitnehmerInnenschutzgesetz) and the Act on Work Inspection (Arbeitsinspektionsgesetz).

Contracting and outsourcing of work or services

If work is outsourced this may be deemed as transfer of business (Betriebsübergang) and the corresponding regulations apply (liability of the old owner, position of the employee must not deteriorate). According to the Austrian provisions any transfer of business, generally, has no consequence for the employees being affected – any purchaser enters into their unchanged contracts. An important exception exists for the transfer of a business by share deal: since the employer (being the company itself) is still the same, no transfer of business is made and the above mentioned protection provisions are not applicable.

If freelancers are engaged it is important to formulate a contract which is not deemed as illegal avoidance of labour law. Therefore the freelancer must not be personally dependent on the employer (see above). If the contract is deemed as illegal avoidance of labour law, labour law nevertheless applies.

→ Brazil

→ Introduction

Brazil is a Federative Republic, comprising the Federal Government, States, Federal District and Municipalities. The system of government is presidential.

To begin with, it is important to mention the relevant role that foreign capital has played in this Country. Brazil is a prominent emerging capitalist economy in today's world, with a population of over 190 million inhabitants, i.e., more than double the population of 35 years ago, making it the 5th most populous nation on the planet. However, considering its territorial extension of 8,514,872 km2, it can be said that Brazil is still a sparsely populated nation.

Furthermore, Brazil's Gross Domestic Product (GDP), which was estimated at R$ 3,14 trillion (approximately US$ 1,82 trillion) at 31 December 2009[1] grew significantly in 2010, at an estimated 7.5%, according to the National Confederation of Industry (CNI – Confederação Nacional da Indústria), up to an expected R$ 3,37 trillion on 31 December 2010, equivalent to US$ 2,04 trillion[2]. For 2011 the projections, including of the IMF, are for an increase of 4.5%[3], Brazil then becoming the 7th nation among the greatest economies of the world.

Brazilian foreign capital companies account for foreign direct investment and reinvestment stock (FDI) in production activities of goods and services (excluding investments in the Stock Exchange) registered at Central Bank of Brazil (BACEN), of roughly US$ 455,56 billion, the estimated historical value at December/2010. In 2010 alone, direct investments amounted to US$ 48,4 billion, the highest since the start of the Central Bank of Brazil – BACEN historical data series[4]. Brazil is currently the 6th major destination for foreign direct investment, after the

1 Source: www.bbc.co.uk and www.estadão.com.br, Economia e Negócios de 07.10.2010.

2 In this work, whenever a relationship is established between the R$ and US$, the rate of R$ 1.65 per US$ 1.00 that was effective on 02 February 2011 was used, for all conversions.

3 Source: Jornal Brasil Econômico of 16 January 2011, page 8.

4 Source: Jornal Brasil Econômico of 26 January 2011, page 3, Editorial.

USA, China, Hong Kong, France and Belgium. The forecast for entries in 2011 is a figure similar to that of 2010, taking into account operations linked to the exploration of pre-salt oil, the Football World Cup of 2014 and the 2016 Olympic Games.

Some major changes that have taken place in recent years in the Brazilian scenario that are of interest to foreign capital, include:

– Opening of the Country's economy, including in the import field, with a marked reduction of the respective tariffs and of the red tape;

– End of the market reserve (protection of domestic industry) in various sectors of the Brazilian economy, including in the information technology field;

– Extinction of the withholding income tax levied on profits and dividends remitted abroad;

– Permission for Brazilian subsidiaries of foreign companies to make payments to their parent companies, in the way of royalties for the use of patents and trademarks and the provision of technical support, in addition to permission for the tax deductibility of such payments, with due regard to Brazilian legal provisions;

– Significant simplification of the regulations for registering technology transfer contracts with the Brazilian Patent and Trademark Office (INPI);

– Regulation of the rules relating to franchise contracts;

– Industrial Property Code, introducing protective provisions for the foreign investor;

– Less red tape in the BACEN regulations relating to the registration of foreign capital, profit and dividend remittances abroad, and in connection with the contracting of foreign loans, with the introduction of an efficient electronic system;

– Greater opening for the participation of foreign companies in public invitations to bid;

– Regulation of the rules relating to private sector participation in the provision of public services, through concessions and public-private partnerships;

– Implementation of State Privatization Programs by the States of the Federation, which are still in progress, whereas the Brazilian privatization program, which got off the ground notably in the 1990s, is the largest in the world (almost US$ 100 billion in resources, according to the amounts at that time);

– Reform of the Federal Constitution in 1995, through Constitutional Amendments that permitted:

- elimination of the distinction between Brazilian companies of domestic and of foreign capital;
- greater flexibility of the state petroleum monopoly, including with the break-up of the Petrobrás monopoly in fuel imports;
- greater flexibility of the state monopoly in the telecommunications sector;
- end of the market reserve for Brazilian vessels in coastal navigation;
- greater flexibility of the States of the Federation monopoly for the distribution of piped gas;
- participation of foreign capital companies in the mining sector;

– Opening of the Brazilian Stock Exchanges to foreign capital, whereas the São Paulo Stock Exchange is considered the 4th in the world in IPO operations[5];

– Regulation of the telecommunications, electric power, oil and coastal navigation sectors;

– Consolidation of MERCOSUR;

– Greater flexibility for the participation of foreign capital in journalistic and radio broadcasting companies;

– New Civil Code.

– Brazil's adhesion to the Vienna Convention on the Law of Treaties.

More recently, new laws were enacted, introducing great advances in Brazilian legislation, namely:

– Judiciary Reform, modernizing the Brazilian judiciary system;

– Law of Innovation, creating incentives for innovation and technological research;

– Biosafety Law, allowing for the planting of transgenics and stem cell research;

– Law establishing general rules for the bidding and contracting of Public-Private Partnerships, to be established chiefly in the infrastructure sector, an excellent opportunity for foreign capital (please refer to Chapter 16 below);

5 *According to Thomas Financial, in the Valor newspaper of 8 January 2008, page C-8.*

– Bankruptcy and Company Reorganization Law, allowing for the recovery of companies that are in financial difficulties and, at the same time, modernizing bankruptcy procedures;

– Foreign exchange reform, with the unification and simplification of the foreign exchange market, concomitantly with the new export regulation;

– Fiscal Responsibility Law, recognized as exemplary and the most modern among the emerging countries;

– Economic Acceleration Program (PAC), aimed notably at infrastructure, health and education, providing for substantial public and private investments (www.planejamento.gov.br).

Clearly the innovations recently introduced into the legislation and the greater facilities extended to foreign capital in recent years have greatly contributed toward the foreigner investor viewing the Country as a more open market for its investments. In this aspect, the elimination of the distinction between Brazilian companies of domestic and foreign capital from the Constitution, allowing for the participation of foreign capital, including on a majority basis, in various sectors in which its access was previously restricted, notably mining, telecommunications, electric power, oil, natural gas, and others, deserves mention. There is talk of a forthcoming limitation on foreign capital in mining, due to China's appetite for the extraction of iron ore, the main commodity imported from Brazil by that country, but so far there is nothing concrete,

Special mention should also be made of the financial institution and insurance sectors, for which, in practice, the rules were significantly relaxed. Foreign investors interested in establishing operations in Brazil or acquiring Brazilian companies in these sectors now simply need to obtain authorization from the competent authorities and formulate their petitions, which will be examined on a case-by-case basis. These petitions are being extensively approved by the authorities.

In spite of the advancement of the constitutional reform implemented in the Country, through constitutional amendments that permitted the liberalization of various sectors of the economy and the greater flexibility of others, with regards to foreign capital, as mentioned above, a few restrictions on foreign capital still persist, namely:

– activities relating to nuclear energy;
– commercial air transport;
– ownership and management of journalistic companies, except those exclusively engaged in publications of proven scientific, technical, cultural and artistic content; in this respect, please refer to Chapter 12 below;
– telecommunications (cable television);
– ownership and management of radio broadcasting companies (open television and radio); in this regard please refer to Chapter 12 below;

– postal and telegraph services;
– ownership rights in rural areas and of activities in international borderline regions (please refer to Chapter 5 below); and
– health.

It is important to mention the fact that Brazil is being transformed into a large mass market, thanks to its large population and the control of national inflation. The inflation rate in 2010, according to the official index (IPCA – Broad Consumer Price Index) was 5.91% and BACEN is adopting 5.42% as the target for 2011.

In spite of the world economic crisis, Brazil has been suffering the effects of this situation less than other countries, especially among the emerging countries, as recently informed by the OECD. In this context, the federal government has been adopting measures since October/2008 with the aim of adapting the economy to the new scenario and guaranteeing economic growth in the current year. These measures include:

– the continued control of the compulsory reserve deposit requirement ("empréstimo compulsório") amounts by the banks with BACEN, in order to better manage substantial amounts in economic and loans turnover;

– tax incentives and the exoneration of taxes, as well as the release of credit to certain industrial sectors and to exporters;

– extension of the terms for the payment of taxes by companies from some sectors;

– relevant investments made by Petrobrás in the oil sector in 2009, with others planned, up to 2013, of an estimated sum of US$ 174 billion; it is worth noting that Petrobrás investments during 2008 exceeded those of the federal government itself, indicating the potential of this gigantic state company;

– new housing program for low-income families, with tax and financial incentives, with BNDES (State Development Bank) resources;

– reorganization of the PAC (Growth Acceleration Program), which is expected to receive more resources for works and new infrastructure projects;

Economic analysts highlight the significant leap in Brazilian exports, from US$ 12 billion in 1977, to US$ 60 billion in 2002, US$ 118 billion in 2005, US$ 160 billion in 2007 and US$ 197.94 billion for 2008, and an estimated absolute record in 2010, of US$ 201,9[6]. Nevertheless, there was a decrease in exports in 2009, resulting from the international crisis. In spite of this, the

6 *Source: Folha on-line of 3 January 2011.*

opening of new markets for exports helped to boost the sector in 2010, with emphasis on the intensification of trade operations with China, India and Russia, within a pragmatic policy instituted by the Brazilian Government, in coordination with the private sector, preferably seeking bilateral trade agreements. In this context, China became Brazil's main trading partner, supplanting the USA that had maintained this position since 1930. Brazil today exports aircraft, paper and pulp, vehicles, machinery, special steels and, notably, agricultural products and mineral ore. Brazilian imports also broke records, reaching US$ 181,6 billion in 2010, representing an increase of 42.2% over 2009. It is also relevant to mention that the better part of these imports concentrated on inputs by the manufacturing and capital goods sector, demonstrating that they refer to truly productive investments.

Moreover, industrial production ended 2010 in a very positive manner, with an increase in production and sales: the need of replenishing stocks, heated domestic demand, increase in the minimum wage and infrastructure works are among the reasons that explain the average growth of 10.5% of Brazilian industry[7], pushed by automotive vehicles, with 3,638,000 units produced and an increase of 24.6% and by machines and equipment, with a 26.5% growth, both over the previous year. In the oil sector, Petrobrás continues breaking daily oil production records, reaching an average of 2,121,584 barrels/day.

The Brazilian economic sector that, despite the global crisis, presents growth rates and prospects of substantial development is agribusiness, which, on its own, accounts for more than 20% of Brazil's total export value, having established its export record in 2005, with the amount of US$ 43,6 billion. In this context, it is worth remembering that Brazil is the world's largest producer of sugar and coffee, 2nd largest producer of soybean, beef and chicken and 3rd largest producer of corn and pulp.

It is also relevant to mention (i) the breaking of the record of mergers and acquisitions (M&A) in Brazil in 2010, with a growth rate of 22% over 2009 and (ii) the decreasing unemployment rate, which is the lowest in the last 8 years: 6.7%[8] and the creation of 2,500,000 new jobs[9].

At the end of December/2010, the Country's foreign currency reserves touched the mark of US$ 300 billion, and shortly afterwards, in February 2011, exceeded this sum, demonstrating its sound economic situation within the international context.

The Brazilian infrastructure sectors, with emphasis on concessions for the exploitation of ports, mining, aircraft production, agribusiness, pharmaceutical products and medical equipment, oil and microelectronic equipment, especially for the production of chips, and shipbuilding and tourism are some of the sectors that offer the greatest prospects and that are of interest to foreign capital. Special mention should be made of the exploration of oil in the pre-salt layer,

7 *Source: Jornal Valor Econômico of 10 February 2011, page A4.*
8 *Source: Newspaper O Estado de S.Paulo of 28 January 2010, page A1.*
9 *Source: Jornal Brasil Econômico of 19 January 2011, page 14.*

on the Brazilian coast, which is already attracting the largest international groups from the sector. Foreign investments totaled R$ 3,8 billion in 2008, in infrastructure alone, corresponding to approximately US$ 2,30 billion. Special mention should also be made to the State of São Paulo, the richest and most developed State of Brazil, indicated in 13th place amongst the most competitive regions of the world, according to the annual ranking published by IMD, from Switzerland, which classifies countries and regions with more than 20 million inhabitants. The USA leads the ranking and the State of São Paulo appears in front of Korea, Italy, Mexico, Russia, and even Brazil itself[10]. In this context, it is worth remembering that Brazil, specifically the City of Rio de Janeiro, was chosen to host the next World Football Cup, to be held in 2014, and also the 2016 Olympic Games. These events will result in fabulous investments, especially in the fields of infrastructure, construction and tourism, providing excellent opportunities for foreign capital.

It is relevant to note, as determined at the end of 2004, that foreign investments in Brazil are again concentrated in the industrial area (52.8%), exceeding investments in services (41.9%), as opposed to the trend verified theretofore. This new scenario, which is maintained, shows a highly positive picture for the Country, with impacts on the increase in exports of goods that are tradable internationally, that is to say, with a positive impact on the Brazilian trade balance. Still on the subject of foreign capital in the Country, it is relevant to inform that China has become the largest foreign investor of capital in the production sector.
The existing government and market goals for year 2011 are for the maintenance of stability in the foreign exchange situation, an inflation rate of 4.5% and continued economic recovery, all this allied with continued political stability in the Country. The tax and social security reforms that are currently moving through National Congress, will undoubtedly greatly contribute to these forecasts.

In accordance with the ABDI website, of 4 February 2010:

"Brazil presents the highest economic internationalization rates, among the emerging countries that make up the BRIC (Brazil, Russia, India and China), considering the FDI stock in relation to the size of the GDP. Although the foreign capital and trade flows are higher in China, it is through the stock, which takes into consideration the capital accumulated over time, in relation to the GDP, that Brazil emerges as the leader. In this account, the FDI stock in 2009 was equivalent to 18% of the GDP, as against 13% of the Russian and only 9% of the Chinese GDPs.

Among the countries that make up the BRIC, Brazil is the country with the most developed productive structure.

A report recently released by the University of Colombia (USA), concludes that the emerging countries, including Brazil, should for the first time receive more FDI than the developed countries."

10 According to the newspapers O Valor of 9 December 2005, page C-8, O Estado de São Paulo of 9 December 2005, page B-7 and Gazeta Mercantil of 9 December 2005, page A-1.

Indeed, Brazil is among the preferred destinations of FDI, according to an UNCTAD report on the outlook for global investment from 2007 to 2009 published in Geneva in October 2007. This prediction was recently emphasized by the Institute of International Finance – IIF, known as the "club of banks", which met on the eve of the opening of the World Economic Forum, in Davos, Switzerland, when it pointed out that the global economy is experiencing the most propitious moment in the last 50 years for the international flow of capital in the direction of the emerging countries, and the protagonists of this phenomenon are Brazil, China and India. The IIF predicts an increase of 66% in the movement of investments in the emerging countries in question.

As proof of the great interest of FDI in Brazil, mention should be made of the notable growth in the number of companies with foreign capital in the Country: according to Central Bank of Brazil, from 1990 to 2000 the number of these companies grew by 80.4%, while the number of companies with majority foreign ownership interests grew by 98.1%11.

Notwithstanding the economic turbulence and adverse scenario prevailing in the world, the Brazilian citizen is one of the most optimistic in relation to the crisis. A study conducted by the Worldwide Independent Network of Market (WIN) in 17 countries shows that 49% of the individuals interviewed in this group of countries believe that the economic situation of the respective country is going to get worse over the next few months, while in Brazil only 19% think this way and 34% believe in an improvement. Going along with this optimism, major Brazilian companies consolidate their internationalization tendency, establishing an increasing number of subsidiaries and acquiring companies abroad.

To end, the cover headline of a British economic magazine, focusing on Brazil: "BRAZIL TAKES OFF" well captures this moment.

→ 2014 FIFA World Cup and 2016 Olympic Games in Brazil: Excellent investment opportunities

Brazil is going to be the host country for the 2014 FIFA World Cup and 2016 Olympic Games.

By virtue of the World Cup, FIFA – Fédération Internationale de Football Association selected the following cities to stage the tournament games: São Paulo, Rio de Janeiro, Belo Horizonte, Porto Alegre, Curitiba, Brasília, Cuiabá, Salvador, Recife, Natal, Fortaleza and Manaus. Besides these twelve capitals, some Brazilian cities will be chosen as sub-hosts, where part of the 32 football teams will be installed for fitness training and accommodated.

The International Olympic Committee – IOC chose the City of Rio de Janeiro, which surpassed the rivals Madrid, Chicago and Tokyo. Considering the wide geographical distribution of the

World Cup hosts and the tourism potential of Rio de Janeiro as the sports capital in 2016, it is possible to anticipate the impact on the economy, due, primarily, to the infrastructure works.

Irrespective of these events, Brazil still needs to invest in the modernization and expansion of its airports, public transport, tourist infrastructure, security and even the stadiums. With the holding of the two sporting events, this fact becomes urgent and at a high cost.

Investments

According to information posted on the Ministry of Sports' site, total investments for staging the 2014 World Cup and 2016 Olympic Games are not yet defined. However, estimates indicate that the cost may range from US$ 5 billion to US$ 15 billion.

These costs include public investments, chiefly in infrastructure, as well as private investments, with emphasis on the expansion of the system of hotels and the refurbishment and/or construction of stadiums, for example. Indeed, these measures are part of a list of requirements established by FIFA and also by the International Olympic Committee – IOC to guarantee quality in the staging of both events.

The importance of obtaining the desired investments is due to the need of guaranteeing the reception of approximately 500 thousand foreign tourists (estimate for the World Cup and that in part will apply to Rio de Janeiro in 2016), as well as the Brazilians who may wish to circulate between the various places that are hosting the sporting event or who go to Rio.

For Brazil, obviously the 2014 World Cup and 2016 Olympics are factors that facilitate the attraction of investments, that is to say, there is a cause to invest here, which will provide an immediate or future return. In view of the need of attracting investments to the country, the Brazilian government forwarded to National Congress a bill of law that provides for the exemption of federal taxes for Brazilian or foreign companies that provide services or supply products to FIFA for the holding of the 2014 World Cup.

If the bill submitted by the government is transformed into law, FIFA will be exempt from all federal taxes during the preparation and conduct of the World Cup in 2014, as will the providers of the services and products that are purchased by FIFA, whether based in Brazil or not. The list of products and services has not been drawn up yet though.

There is no similar project for the Olympics yet, but it is likely that this happens in the near future. Another incentive measure presented by the Brazilian government, also for the 2014 World Cup was offered by BNDES, which extended credit facilities of R$ 1 billion for the refurbishment, expansion and construction of new hotels and of R$ 400 million for the stadiums.

Another initiative proposed by the government, but that is not as yet official, would be the exemption of 30% for the purchase of construction material to be used in infrastructure projects for the sporting events.

In addition to the federal initiatives, the states are also adopting measures to stimulate and attract new investments, particularly through public-private partnerships – PPPs for the transport area (monorail in São Paulo and light rail vehicle in Brasília) and the construction of stadiums, as well as the town planning of the areas surrounding same.

Mobility Growth Acceleration Program (PAC)

The federal government and the mayors and governors of the 12 host cities of the 2014 World Cup have defined the priority public transport works for the event. Moreover, other infrastructure works will be conducted and should be contemplated in other projects that have not yet been finalized.

On the subject of the Mobility PAC, the projects are virtually all for the construction of Bus Rapid Transit – BRT, light rail vehicle – LRV or monorail lines, in addition to the expansion and duplication of access roads, particularly to the stadiums.

The amounts earmarked for each host city vary and depend on the size of the works to be conducted. However, the federal government will be allocating roughly R$ 3,5 billion, equivalent to US$ 2.12 billion, for the construction of BRT lines, R$ 1,5 billion, corresponding to US$ 909 million for the monorail and R$ 1 billion, equivalent to US$ 606 million for the transport works.

A major part of these undertakings depend on resources from the public authorities. However, there is a need of support from private enterprise, essentially via the performance of PPPs.

Conclusion

Although the infrastructure works play an important role in this preparation phase, it is not possible to make reference to just one area or sector that will receive more or fewer investments. After all, various sectors of the Brazilian economy will directly or indirectly be receiving substantial funding both a public and private nature.

So, to mention some, but not excluding other possibilities, companies from the areas of civil construction, metallurgy, tourism, transport, clothing and foodstuffs, etc. will play a strong role in the Brazilian economy before and during the sporting events. And, at the end of both, what the government and Brazilian society hope, is that the installed infrastructure will continue to be of use for the next twenty years.

→ Foreign Investment Capital and Central Bank of Brazil

Foreign Direct Investment

Assets, machinery and equipment brought into the Country without an initial outlay of foreign currency, to be employed in the production of goods or services, and financial or monetary resources admitted into the Country for investment in business activities, are considered foreign capital, provided that in both cases they belong to individuals or corporate entities residing, domiciled or based abroad, and must be registered electronically with Central Bank of Brazil (BACEN), through an investor-recipient related code called RDE-IED, which was initially instituted through the repealed BACEN Circular 2,997 of 11 August 2000, and is currently regulated by BACEN Resolution 3,844 of 24 March 2010, and by the RMCCI – Regulamento do Mercado de Câmbio e Capitais Internacionais (International Capital and Foreign Exchange Market Regulation).

Registration at BACEN is a condition for the remittance abroad of profits and dividends, and interest on owners' equity, obtained by means of investments made in the Country and guarantees the investor the possibility of repatriating the resources invested.

The investor can also invest in Brazilian companies through the conveyance of tangible goods (machinery and equipment), provided that such goods are imported, without the obligation of a payment to a nonresident. In this case, the registration must be made, firstly, in the ROF – Registro de Operação Financeira (Financial Operation Registration) module of the RDE, and, subsequently, in the IED module of the RDE as foreign direct investment. This Registration in the RDE-ROF module must be linked to the cleared Import Declaration (Declaração de Importação – DI).

In addition to investments in corporeal property to be employed in the production of goods and services, BACEN also accepts such intangible goods as trademarks, patents and know-how, as the subject of investment as foreign capital. The registration of intangible goods in BACEN should also be done through the RDE-ROF module, linked to an invoice or equivalent document that characterizes the importation of the intangible goods, provided that approved by the agency responsible for the registration and control of industrial property rights in the Country, namely the INPI (Brazilian Patent and Trademark Office). Finally, the registration is conducted in the RDE-IED module.

According to the RMCCI rules, the technology transfer subject to INPI registration does not characterize an intangible good for the purposes of the financial operation registration designed for the payment of the capital of Brazilian companies.

The foreign investor may also make investments through the conversion of credits that are capable of generating transfers abroad, such as foreign loan principal and interest duly

registered in the RDE-ROF Module, profits or dividends, interest on owners' equity and other amounts remittable abroad.

On the basis of the declarations and data informed electronically to the Electronic Central Bank System – SISBACEN, by companies or their representatives, a Consolidated Foreign Direct Investment Registration Statement will be generated. This statement is the appropriate document to evidence the investment made by the foreign investor before third parties.

The investment registration procedure shall be formalized within 30 days from the investment's entry into Brazil. In relation to foreign investments through tangible goods, the registration period is 30 days from the customs clearance date of the goods, on pain of submitting the recipient company of the investment to the application of a fine of up to R$ 250 thousand, in conformity with the provisions of BACEN Resolution 2,883, of 30 August 2001.

The aforesaid registration will be made in the foreign currency actually brought into the Country or in the amount declared in the import document of the goods.

Profits distributed by companies established in Brazil and allocated to residents and individuals or corporate entities domiciled abroad, but that are reinvested in the same companies from which they originated or in another sector of the Brazilian economy, are also subject to registration as foreign capital, with BACEN.

Foreign investors with ownership interests in Brazilian companies may transfer these interests to third parties abroad. The foreign purchaser, notwithstanding the price paid for the acquisition, must alter the Consolidated Foreign Direct Investment in Brazil Registration Statement, obtaining a new RDE-IED registration number, which will identify its investment in substitution of the assigning investor, in order to permit future remittances, profit reinvestment registrations and any repatriation of the investment.

Lastly, it is important to mention that individuals or companies domiciled or based abroad, that have ownership interests and other assets in Brazil are obliged to register in the CPF (Federal Register of Individual Taxpayers) and CNPJ (Federal Register of Corporate Taxpayers), respectively.

Foreign Investment in Local Currency

In 2007, BACEN published new foreign exchange rules permitting the registration in local currency of ownership interests held by a foreign partner, which, up to that time, could not be made at BACEN, due to there being no evidence of the regular entry of the resources into the Country (via the contracting of foreign exchange, as determined in the prevailing foreign exchange regulations). This situation was known as "tainted capital" (capital contaminado). The consequence of this situation, among others, was that of not permitting the remittance of profits

and dividends abroad on the unregistered portion of the capital/investment.

In accordance with the new rules, foreign capital should only be registered with BACEN, in local currency, if the respective amount is stated in the accounting records of the Brazilian recipient company of the foreign capital, and if there is documentary evidence with respect to the ownership of the foreign capital.

Once the registrations are regularized with BACEN, the foreign investor is authorized to return abroad the total computed profits and dividends, among others, up to the limit of the holdings held in the company.

Lastly, the capitalization of profits and dividends, interest on owners' equity and profit reserves, originating from the portion of the capital registered in local currency, are subject to the same registration modality.

Foreign Loans

FOREIGN LOANS VIA THE FOREIGN EXCHANGE MARKET

The foreign loan contracting process is conducted through the electronic declaratory registration, by means of the Financial Operation Registration Module (ROF) of SISBACEN, which dispenses with the presentation of documents to BACEN, prior to the receipt of the loan resources. The electronic registration is thus prepared through the declarations and data informed electronically in SISBACEN, in two phases: (i) prior registration, relating to the general conditions of the operation, to allow for the entry of resources into the Country and (ii) registration of the payment scheme, done after the closing of the foreign exchange and entry of the resources into the country, enabling remittances to be made abroad as payment, both of the principal and interest.

It is important to mention that the aforementioned prior registration may be denied by the system, if the costs of the operation are not compatible with normal market conditions and practices or if the proposed structure of the operation is not compatible with the standards of the system.

BACEN does not currently call for any minimum or maximum average term for the debt amortization and repayment of the loan principal, or for the renewal and extension of loans. However, such terms may be fixed by BACEN in accordance with the Country's current foreign exchange and monetary policy. The interest varies in accordance with the term contracted, and may be fixed or variable, or even non-applicable, provided that, as previously mentioned, they are within the parameters prevailing in the international market. Spreads are also permitted.

Still in relation to the interest, the term for its calculation will begin to run on the date that the funds enter the Country, namely, the settlement date of the foreign exchange contract. However, when the disbursement of the funds abroad occurs up to five (5) consecutive days before their entry into the Country, the disbursement date may be used as the initial date for the reckoning of the term.

After the entry of the funds into the Country, the payment scheme must be registered, in order to permit remittances of the payments of the interest and principal abroad.

As a general rule, the interest will be taxed by withholding income tax, at the rate of 15%.

The rate of the Tax on Financial Operations (IOF) for loans contracted for terms of over 90 days is 0.38%. However, for loan operations contracted for shorter terms (less than 90 days) the IOF rate is 5.38%.

Loans (principal and interest) may, as a general rule, be converted into foreign direct investment, after their registration in the ROF, by means of the performance of simultaneous foreign currency purchase and sale operations.

The accelerated payment of the loan principal (either total or partial) is permitted, it being sufficient to include, in the ROF, the payment date of the principal and interest, and the sum of the interest due up to the payment date.

FOREIGN LOANS VIA THE ISSUANCE OF SECURITIES

Resolution 3,844 of 2 March 2010 regulates the electronic declaratory registration, by means of the Financial Operation Registration Module (ROF), of foreign loan operations obtained by means of the placement of convertible securities (issued by an institution based in the Country and placed abroad, which represent rights over shares or quotas of its own issuance) and securities exchangeable into shares or quotas (issued by an institution based in the Country and placed abroad, which represent rights over shares or quotas issued by another institution based in the Country) or also warrants (purchase options of shares or quotas, placed abroad by institutions based in the Country).

Moreover, BACEN legislation also establishes that, prior to the date of the conversion, exchange or exercise of the purchase option by the holders of warrants, the distribution of dividends and exercise of subscription will constitute rights of the issuer institution of the securities abroad.

Promissory notes issued for placement in the international market, whether under the private placement regime or otherwise, are known as Floating Rate Notes or Fixed Rate Notes, depending on whether their remuneration is stipulated in variable or fixed interest.

The entity issuing the notes does not require a specific legal form or special registration for their issuance, and BACEN is directly and exclusively responsible for their control, in the same format as loan registrations. However, the difference lies in the existence of an issuing agent figure of the notes, which shall necessarily be an authorized financial institution, responsible for issuing and obtaining funds from entities abroad.

LOCAL CURRENCY LOANS

In 2007, BACEN published new foreign exchange rules permitting the registration in local currency of foreign loans, which, until that time, could not be registered at BACEN, due to the non-existence of evidence of the regular entry of the resources into the Country (via the contracting of foreign exchange, as determined in the prevailing foreign exchange regulations). The direct consequence of this situation was that the borrower of the resources in Brazil was precluded from remitting to the foreign creditor the interest due on the loan or the principal itself.

Nevertheless, in accordance with the new rules, as long as documentary evidence exists with respect to the ownership of the foreign capital (i.e., in the name of the foreign creditor) and the indication of the number of the operation conducted via International Transfer in Reais ("TIR") through which the resources were remitted to the country, the same may be registered with BACEN, in the local currency loan registration modality, according to the terms and criteria established by BACEN. Thus, once the registrations are regularized, the borrower of the resources may remit abroad the respective interest due or the principal itself.

Foreign Exchange Market

In 2005, BACEN published new rules with a view to simplifying foreign exchange operations in Brazil, indicating the probability of a future complete foreign exchange opening. Additionally, the measures in question are designed to combat illegal transfers linked to drug and armament traffic, and terrorism. The main rules currently in force are:

– unification of the free and floating rate markets;

– individuals and corporate entities may purchase and sell foreign currency or make transfers of any nature, without limitation of value, though transfers on behalf of third parties are prohibited;

– Brazilian investment abroad does not depend on authorization and/or any kind of prior communication to/from BACEN and is not subject to any limitation of value;

– nonresident individuals or corporate entities in Brazil may maintain accounts in the Country called "nonresident accounts", with financial institutions authorized to operate in Brazil by BACEN, though the use of such accounts to make transfers on behalf of third parties is, however, forbidden.

→ Abuse of Economic Power (Antitrust Law)

The legislation that deals with the prevention and repression of violations against the economic order (Law 8884/94) is based on the constitutional principle of free competition and applies, without prejudice to conventions and treaties to which Brazil is a signatory, to the practices occurring totally or partially in the Brazilian territory or that can produce effects therein.

Hence, investors should be cautious when entering into agreements, in any way manifested that can possibly limit or impair free competition or result in the domination of relevant markets of goods and services. These cases include agreements aimed at any type of economic concentration, whether through a consolidation or merger by incorporation of companies, acquisition of companies or equity, through the organization of a company to exercise control over other companies or by any other type of corporate grouping or economic concentration in a relevant market of goods or services.

Any operation in which at least one of the participants (i) has attained an annual gross turnover in the last balance sheet, in Brazil[12], of R$ 400 million or over (equivalent to approximately US$ 232 million) or (ii) holds a market share of 20% or over of a given relevant market, must be submitted to the analysis of the agencies that make up the Brazilian Competition Defense System (SBDC)[13]. It is incumbent on the Administrative Economic Defense Council (CADE) to render the final decision on a notified act, approving it fully or with restrictions, and also to determine its undoing within a given term, depending on the level of concentration resulting from the act. It is important to mention that, in certain situations, the parties may apply to CADE for the reconsideration of its decision, and also enter into Performance Agreement documents ("Termo de Compromisso de Desempenho – TCD").

The notification to SBDC may be done prior to the operation or within the non-deferrable term of 15 business days from its performance date. With respect to the initial term for the reckoning of said term, i.e. the moment that the operation actually takes place, the legislation determines that the respective term shall begin to run as from the date of the first binding document signed between the parties. The absence of pre-established criteria concerning the precise definition of what the authorities consider to be the first binding document can occasion losses for the petitioning parties, since the non-observance of the legal term at the time of notification will be punished with a minimum fine of R$ 63 thousand (roughly US$ 36 thousand) and maximum fine of R$ 6.3 million (roughly US$ 3.6 million) to be arbitrated by CADE, in conformity with the criteria established in a special law[14].

12 CADE Precedent 01, published in the Official Federal Gazette of 10/10/2005 nr. 200, Section 1, page 49, modified the understanding theretofore in force with respect to annual gross turnover, which aggregated the gross turnover in Brazil and/or in the world, and then proceeded to consider only the annual gross turnover in Brazil.

13 The SDE (Economic Law Secretariat) of the Ministry of Justice, SEAE (Economic Supervisory Secretariat), of the Ministry of Finance and CADE (Administrative Economic Defense Council) of the Ministry of Justice.

14 Criteria defined by CADE RESOLUTION 44, of 14 February 2007.

Simpler operations may be analyzed by a "summary procedure" ("rito sumário"), which guarantees a quicker analysis of less complex economic concentration acts submitted to the SBDC. With the purpose of securing greater swiftness in the analyses, SDE/MJ also signed an agreement with CADE's Attorneys' Office, in August 2007. It is important to note though that any party that is interested in having its act analyzed via the summary procedure must request this treatment through a petition.

Considering the mergers and acquisitions that have taken place in the international and local markets, countless operations have been notified to SBDC, concerning various sectors, such as the air transport, chemical, retail, foodstuffs, automotive, information technology, telecommunications, construction and insurance sectors, among others. For certain sectors of the economy that are regulated by such agencies as the Brazilian Telecommunications Agency (ANATEL), Brazilian Electricity Agency (ANEEL) and Brazilian Oil Agency (ANP), the role of the SBDC authorities occurs in a joint and coordinated manner with such agencies, according to the rules and agreements entered into between them.

The authorities may also grant confidential treatment for information and documents, bearing in mind the need to protect company secrets, established in the Brazilian legal system. Documents and information considered confidential are entered in restricted-access records. Confidentiality may also be granted in relation to information provided by third parties that are not directly involved in the economic concentration act but are consulted by any SBDC body.

Operations that are submitted prior to their consummation may receive complete confidential treatment, in order not to compromise negotiations between the parties. In these cases, the full analysis of the operation by SBDC is impaired, until such time as the operation ceases to be totally confidential and the consultation and obtainment of information with the market becomes possible.

It is important to note that any economic agent or natural person may opine about the competitive aspects of an operation until the end of the analysis by the authorities. Opinions and objections from third parties are accepted by SDE/MJ at any time, without the need to observe any specific formality.

The powers of the SBDC authorities are not limited to the aforementioned economic concentration acts. These authorities are also legally authorized to suppress anticompetitive conducts, such as the adoption of uniform commercial conduct between competitors[15], the prior arrangement of prices or advantages in public bids, tying arrangements, the fixing of resale prices in some cases, and other conducts, acting through the institution of administrative proceedings and preliminary investigations. Owing to the hardening of investigations of

15 Year 2010 continued with the campaign of the Brazilian authorities in the combat of anticompetitive conducts, especially cartels. In Brazil it is estimated that there are more than 300 cartel investigations in progress involving companies and executives from various different market sectors.

anticompetitive conducts, many companies are now adopting antitrust compliance programs. These programs are especially developed to meet company targets and avoid actions (administrative and judicial proceedings) that tarnish the image of the company.

It is important to remember that, in accordance with the Federal Constitution, any party that deems that it has been adversely affected by a decision rendered by CADE may apply for its review with the Brazilian Judiciary.

On the subject of the competition defense law, in December 2010, the Senate approved Complementary Law Bill 6/2009. The bill in question is aimed at restructuring the SBDC, through the unification of the structure and modification of certain criteria adopted by the current law. The bill was forwarded to the House of Representatives at the end of 2010 and a new voting is still to be held regarding the final text.

Finally, by reason of consolidation and acquisition transactions and other forms of economic grouping, investors should carry our an in-depth analysis of possible contingencies that exist in the competition sphere, and evaluate the possibility of obtaining approval for the transaction that it is intended to notify SBDC about, in order to measure the risk of a possible approval with restrictions or even of non-approval.

→ Companies

Brazilian law provides for different forms of association for the conduct of economic activities geared to the production or circulation of goods and services.

Among the corporate entity types of companies, the most recommendable are the corporation ("sociedade anônima – S/A") and the limited business company ("limitada - LTDA."), which may be transformed from one type to the other, as set forth in law.

Companies that develop business activities are subject to registration at the Commercial Board ("Junta Comercial")

Corporation (S/A)

S/As are governed by their corporate bylaws and regulated by Law 6,404/76.

COST: A S/A involves more formalities than a LTDA. for its organization and operation, notably by virtue of the mandatory publication of certain corporate acts and documents; consequently, its cost is higher than that of a LTDA. As an example of this cost, a S/A will currently spend a minimum amount of approximately R$ 30 thousand (US$ 18 thousand) annually, on publications

alone. However, S/As of the closely held kind, with shareholders' equity, on the balance sheet date, of less than R$ 2 million (equivalent to approximately US$ 1,200 million), are not required to draw up and publish cash flows, which considerably reduces the cost of publications.

NAME: A S/A operates under the indicative name of the corporate purpose, with the addition of the expressions "sociedade anônima" or "companhia", in full or in abbreviated form.

TYPES: S/As may be of two types:

– Publicly held ("open"): when their issued securities are admitted for trading on the stock market. Publicly held companies involve a greater number of formalities, and are also subject to the specific legislation of the capital market, which has as its main supervisory body the Brazilian Securities Commission (Comissão de Valores Mobiliários - CVM), corresponding to the U.S. Security Exchange Commission (SEC);

– Closely held ("closed") when their issued securities are not admitted for trading on the stock market. Their operation is less formal and several requirements that are obligatory in relation to publicly held companies are optional in the case of closely held companies.

CAPITAL: There is no minimum capital requirement, except in special cases (financial institutions, trading companies, obtainment of permanent residence visa, etc.). S/As may be organized with "authorized capital" and with less subscribed capital than that authorized by the bylaws: in this case, the increase of the subscribed capital, up to the authorized limit, will not depend on a bylaws reform.

The capital stock may consist of cash assets or any kind of assets with a monetary worth. At least 10% of the cash-subscribed capital (or 50% in the case of financial institutions) must be paid-up at the time of the company's incorporation and the remainder, in up to 5 years.

LIABILITY OF SHAREHOLDERS: The liability of shareholders is limited to the issue price of the subscribed or acquired shares, except in case of proven violation of the law or of the corporate bylaws. A corporation has a distinct existence from that of its shareholders, hence the capital autonomy in relation to the partners. It is the assets of the corporation that serve as security for creditors for debts incurred on its behalf. However, this rule is not absolute. For the protection of third parties, Brazilian legislation sets forth some cases where the shareholders are exceptionally accountable for the debts of the corporation. Examples: liability of the controlling shareholder for abuse of power; in certain situations, the liability of the shareholders for labor, tax and social security debts, liability for damages caused to consumers, liability for violations against the economic order (Antitrust Law), all resulting from the application of the 'piercing the corporate veil' theory. These are exceptions established by law that cannot be quashed by a contractual or bylaw provision.

SHARES: The capital stock is divided into shares, which may have a face value or not. The minimum number of shareholders is 2.

The shares may be common, preferred or usufructuary, depending on the nature of the rights or advantages that they grant to their holders.

The common shares of closely held companies and preferred shares of publicly held companies may be of one or more classes, according, among other particularities, to the policy-related advantages that they confer for the election of administrators.

The number of nonvoting preferred shares may not exceed 50% of the total shares of the company. This rule, however, is only binding on companies incorporated as of 01 November 2001. Thus, publicly and closely held companies existing prior to that date can continue under the former regime, which permits the issuance of up to 2/3 of preferred shares, in relation to the total shares issued by the company. The law regulates the way in which non-voting preferred shares shall enjoy this right.

For preferred shares issued by closely held companies, the advantages may consist of: (i) priority in the distribution of fixed or minimum dividends; (ii) priority in the reimbursement of capital, with or without a premium, or (iii) the accumulation of the advantages indicated in items (i) and (ii).

Additional asset advantages shall be conferred on preferred shares traded on the stock market, in comparison to those conferred on preferred shares issued by closely held companies.

As to form, the shares will always be registered.

The shares may be freely transferred and assigned without the need of a bylaws amendment, operating through a term entered in the "Transfer of Registered Shares" book, dated and signed by the transferor and transferee, or their lawful representatives. However, the corporate bylaws of closely held companies may impose limitations on the transfer of shares, as long as they regulate such limitations in detail and do not impede their trading.

MANDATORY DIVIDEND: The corporate bylaws of a S/A shall fix the mandatory dividend to be paid to the shareholders; if the bylaws are imperfect or incomplete in this respect, the shareholders are entitled to receive as a mandatory dividend, for each year, the amount determined pursuant to law.

SHAREHOLDERS' AGREEMENTS: Shareholders' agreements are allowed to deal with such matters as the purchase and sale of shares, the preemptive right to acquire them, the exercise of voting rights or of the control power; however, for such agreements to be observed by the company, they must be filed in its registered office.

MINORITY SHAREHOLDERS: The protection of minority shareholders is provided for by law, and may be extended through provisions in the corporate bylaws and shareholders' agreements.

SHAREHOLDERS' MEETING: The Shareholders' Meeting is the supreme body of the company, with due regard to the law and any bylaw and contractual provisions.

In the first call, the Shareholders' Meeting shall convene with the presence of shareholders representing, at least ¼ of the voting capital. In the second call, it will be called together with any number. The voting quorum is, as a general rule, more than half of the voting shares ("maioria absoluta"). Shareholders' Meetings may be annual (AGO) or special (AGE).

The AGO has the powers to: (i) receive the administrator accounts and resolve on the financial statements; (ii) decide on the appropriation of net profits for the year and the distribution of dividends; (iii) elect the administrators and members of the Audit Committee, if applicable. The AGO shall be held annually, in the first 4 months subsequent to the end of the fiscal year.

The AGE has the powers to: (i) reform the corporate bylaws; (ii) authorize the issue of debentures; (iii) suspend the exercise of shareholder rights; (iv) resolve on the valuation of assets contributed by shareholders for the formation of the capital stock; (v) authorize the issue of participation certificates; (vi) resolve on the transformation, merger and spin-off of the company or its absorption into another; (vii) its dissolution and liquidation, elect and depose liquidators and decide on their accounts; (viii) authorize the administrators to confess bankruptcy and petition for judicial reorganization.

For the voting of the following matters a qualified quorum is necessary (approval of shareholders representing at least half the voting shares, if a larger quorum is not prescribed by the corporate by-laws): a) creation of preferred shares or increase of existing classes of preferred shares, without maintaining a proportion with the other classes of preferred shares; b) alteration in the preferences, advantages and conditions of the redemption or amortization of one or more classes of preferred shares, or creation of a new more privileged class; c) reduction of the mandatory dividend; d) spin-off, merger by or of the company; e) participation in a group of companies; f) alteration of the corporate purpose; g) suspension of the state of liquidation of the company; h) creation of participation certificates and (i) dissolution of the company. The AGE may be held at any time, whenever the need arises.

Special attention should be given to a reform of the bylaws with the aim of increasing or decreasing the capital.

A capital increase may take place in any of the following ways: a) by capitalization of profits or reserves, which implies the alteration of the par value of the shares or distribution to the shareholders of the new shares corresponding to the increase; b) by the public or private

underwriting of shares. A condition for this type of increase is that at least ¾ of the capital stock have been paid up. The shareholders have the preemptive right for the subscription of the increase, in proportion to the number of shares held thereby.

A capital decrease may occur in one of the following situations: a) loss up to the sum of accumulated losses; b) if excessive. In order to protect any creditors, the law determines that the decrease will only become effective 60 days after the publication of the AGE minutes that decided same.

ADMINISTRATION: The administrative bodies of S/As are the Board of Directors (mandatory for publicly held companies and authorized capital companies) and the Board of Executive Officers. The Board of Directors is responsible for determining the company's general business orientation. The Board of Executive Officers is the company's executive body, with exclusive responsibility for representing the S/A before third parties.

The members of the Board of Executive Officers will be individuals residing in the Country, whereas the Board of Directors may be made up of individuals residing and domiciled abroad also, provided that they have attorneys-in-fact residing in Brazil, duly empowered to receive summons. The Board of Directors shall be composed of at least 3 members, who shall necessarily be shareholders, whereas the Board of Executive Officers shall be composed of at least 2 officers, who may be shareholders or otherwise. Up to 1/3 of the members of the Board of Directors may be elected to the Board of Executive Officers.

The term of office of administrators may not exceed 3 years, re-election being permitted. The Board of Directors is elected and deposable at any time by the Shareholders' Meeting and the Board of Executive Officers is elected and deposable at any time by the Board of Directors (when there is one) or by the Shareholders' Meeting (when there is no Board of Directors). There is no minimum or maximum limit for the remuneration of administrators.

Administrators are not personally liable for the obligations they incur on behalf of the corporation and by virtue of regular management acts. However, they are civilly liable for the losses they cause, when they act: I – with fault or fraud or deceit, within their duties or powers; II – with violation of the law or of the bylaws. Moreover, the same exceptions determined in connection with the liability of shareholders, detailed in the paragraph "Liability of Shareholders" above apply to administrators.

ADVISORY COMMITTEE: S/As may optionally have an Advisory Committee, whose members may reside abroad and be remunerated by the Brazilian company.

AUDIT COMMITTEE: A corporation will have an Audit Committee, whose constitution, when its operation is not permanent, may occur in any shareholders' meeting, as provided by law. The duties of the Audit Committee include: (i) supervise the acts of the administrators and verify

the fulfillment of their legal and bylaw obligations; (ii) opine on the annual management report; (iii) opine on proposals from the administrative bodies to be submitted to the Shareholders' Meeting concerning, among other matters, the modification of the capital stock, distribution of dividends, transformation, merger by incorporation, merger and spin-off; (iv) report to the administrative bodies or the Shareholders' Meeting any errors, frauds or crimes that it discovers and suggest courses of action that are useful to the company; (v) analyze, at least quarterly, the trial balance and other interim financial statements drawn up by the company, and (vi) examine the financial statements for the fiscal year and opine thereon. The Audit Committee shall be composed of a minimum of 3 and maximum of 5 members and alternates in an equal number, who may be shareholders or otherwise, elected by the Shareholders' Meeting.

FINANCIAL STATEMENTS: At the end of the fiscal year, the Board of Executive Officers shall have the following financial statements drawn up: I- balance sheet; II- profit and loss statement; III- income statement, and IV- the statement of changes in financial position. The financial statements shall be available to the shareholders at least one (1) month before the date scheduled for the AGO. The statements must be published in the Official Gazette and in a newspaper of general circulation at least 5 days before the date scheduled for the AGO. They shall be the subject of an opinion of the Audit Committee, if in operation and shall be submitted to the decision of the Shareholders' Meeting and subsequently filed in the Commercial Registry, along with the AGO minutes that approved them.

PUBLICLY HELD COMPANIES: Publicly held companies are subject to specific rules, in addition to the general rules applicable to closely held companies. These companies are supervised by the CVM. The public distribution of securities cannot occur without prior registration at CVM. The sale of the control of a publicly held company is subject to the approval of CVM. Moreover, such companies shall have independent auditors and comply with a series of disclosures determined in the rules issued by CVM.

Law 6,404/76, which regulates corporations, was amended in 2001, with the aim of increasing transparency and increasing the rights of minority shareholders. Therefore, at least theoretically, the reform privileged the inclusion of rules that may be classified as being of corporate governance, including the following: (i) reduction, in the capital of the company, of the number of preferred shares without voting rights or subject to restriction in the exercise of this right; (ii) increased advantages of the preferred shares of publicly held companies (iii) tag along: in the event of the sale of the direct or indirect control of a publicly held company, the acquirer will be required to conduct a public offering for the acquisition of the voting shares held by the other shareholders, at the amount equivalent to at least 80% of that paid per voting share of the control block; (iv) increase in the period of time preceding the publication of the Shareholders' Meeting to 15 days in the 1st call and 8 days in the 2nd call (the time for closely held companies is 8 and 5 days, respectively); (v) right to elect and depose one member and one alternate for the Board of Directors to shareholders with more than 15% of the total voting shares and to holders of preferred shares without the right to vote or with restricted voting

rights that represent 10% of the capital stock; (vi) inclusion of the spin-off among the cases that entail the right of withdrawal, if the spin-off implies the reduction of the mandatory dividend, participation in groups of companies or changes in the corporate purpose; (vii) obligation of the controller of a publicly held company, of the shareholders and group of shareholders that elect a member of the Audit Committee to immediately apprise CVM, the Stock Exchange and organized over-the-counter entities of modifications to their shareholder statuses in the company; (viii) in the event of the going private of the company, the obligation of the controlling shareholder or of the company itself to make a public offering for the acquisition of all the shares at a fair price; (ix) increased independence of the Audit Committee, permitting any member to supervise the acts of the administrators, verify compliance with legal and bylaw obligations, and report any errors, frauds or crimes to the administrative bodies, and in case of failure to carry out the necessary measures, by such bodies, to the Shareholders' Meeting, suggesting courses of action that are useful to the company.

NEW RULES: New rules for large-sized companies, whether S/As or LTDAs, were introduced by Law 11,638/07, requiring them to adopt a series of measures, with a view to the modernization and harmonization of the corporation law with the fundamental principles and best international accounting practices, in order to correct imperfections of the law theretofore in force, adapt the law to the social and economic changes in the market and strengthen the capital market itself. These measures include (i) alterations concerning the recording and drawing up of financial statements, based on international standards (IFRS – International Financial Reporting Standards) and (ii) the requirement of an independent audit. For the purposes of the new law, a large-sized S/A shall be construed as any S/A that had total assets, in the previous year, in excess of R$ 240 million (US$ 145 million) or an annual gross turnover of more than R$ 300 million (US$ 181 million).

Limited Company (LTDA)

The lives of LTDAs, which were previously regulated in a somewhat flexible and relatively simple manner by the provisions of Decree 3,708/19, are now disciplined in detail by the new Brazilian Civil Code, approved by Law 10,406/02, which came into force on 11 January 2003.

COST: In accordance with the new Civil Code, the organization and operation of LTDAs are less flexible and more burdensome than before, also requiring publications in certain cases. Nevertheless, the cost of LTDAs continues to be lower than that of S/As (see item 3.2.12 below).

ARTICLES OF ASSOCIATION: The bylaws of LTDAs are called "articles of association" in Brazil. The articles of association allow for a series of provisions established between the partners and can be very flexible.

NME: A LTDA may adopt a firm (name of partners) or name (fictitious name), but must always be accompanied, at the end, by the expression "limitada" or its abbreviation ("Ltda"). The company name shall inform the purpose of the company in a summarized manner.

CAPITAL AND QUOTAS: The minimum number of partners is likewise 2 in this type of company. Similarly to the S/A, the capital of a LTDA may consist of cash assets or assets with monetary worth. However, there is no need for the initial payment of any minimum capital subscribed in cash.

The capital of LTDAs is divided into ideal parts (quotas), which are divided among the partners in percentages and are not physically represented by certificates. As the number of quotas held by each partner is established by the articles of association, any transfer or assignment of ownership over the quotas depends on an amendment to the articles of association.

The quota capital may only be increased after all the quotas have been paid up, observing the preemptive right of the partners to participate in the increase, in proportion to their quota holdings. The capital may be decreased by means of a corresponding amendment of the articles of association: (i) after its payment, if there are irreparable losses and (ii) if excessive in relation to the nature of business of the company.

Unless otherwise provided in the articles of association, the transfer to third parties of the quotas or preemptive right to participate in a capital increase, among partners, is not subject to the consent thereof; however, when involving a transfer to third parties, the approval of partners representing at least ¼ of the quota capital is required.

LIABILITY OF PARTNERS: Once the capital of a LTDA has been fully paid up, the partners are, in principle, no longer personally liable for the company's obligations before third parties, except in the cases of violation of law or of the articles of association. The same provisions contained in the paragraph "Liability of Shareholders" under the heading S/A above, apply to LTDAs as regards the liability of the partners. However, if the capital has not been fully paid up, each partner is personally and jointly liable for the company's corporate obligations, though limited to the total missing amount for the full payment of the quota capital.

Moreover, the partners are jointly and severally liable for debts with the social security authorities, as well as for labor credits, as a result of the application, in these specific cases, of the 'disregarding the corporate entity' theory.

ADMINISTRATION: LTDAs are administered by one or more administrators, who may be Brazilian or foreign individuals, residing in Brazil, and not necessarily partners. If the articles of association allow the administration to be exercised by a non-partner, the designation of the latter will require the unanimous approval of the partners, when the quota capital is not fully paid up, or the resolution of the partners representing at least 2/3 of the quota capital, when the capital has been paid up. In addition, the deposal of an administrator who is a partner of

the LTDA, duly nominated in the articles of association, requires the approval of partners representing at least 2/3 of the quota capital, unless the articles of association determine otherwise.

The responsibility of the administrator of a LTDA before third parties, in principle follows the previously made comments applicable to administrators of S/As. In practice the administrators of LTDAs are being held to answer in the labor and social security fields, jointly with the company, regardless of the cause of the event.

The new Civil Code permits the creation of a Board of Directors and Audit Committee for LTDAs, whose respective duties and operation shall be regulated in the articles of association.

The remuneration of the administrators of a LTDA is not subject to a minimum amount or limit.

PROFIT: It is not necessary to determine the minimum profits to be distributed to the partners in this type of company. The participation of partners in the company profits, in a different proportion to such partners' interests in the quota capital is permitted. However, no rule that excludes a partner from profit sharing is permitted.

RESOLUTIONS: The law stipulates some minimum quorums for the approval of certain matters, such as: (i) the amendment of the articles of association, and the merger by incorporation, merger, spin-off or dissolution of the company (3/4 of the quota capital); (ii) designation of an administrator by a separate instrument to the articles of association, deposal of non-partner administrators, fixing of the remuneration of administrators and petition for judicial reorganization (more than half the quota capital); (iii) other cases provided for in law or in the articles of association, if the latter does not call for a higher quorum (majority vote of those present).

Partner resolutions shall be passed in a partners' meeting (for companies with up to 10 partners) or in a general meeting (for companies with more than 10 partners). If the articles of association are silent on the subject, the rules of the law that disciplines general meetings will apply, which are very similar to the rules applicable to the shareholders' meetings of S/As.

A general or partners' meeting shall be held annually during the first 4 months subsequent to the end of the annual accounting period for the approval of the administrator accounts and distribution of profits for the year.

EXCLUSION OF PARTNERS: The law provides for the possibility of the non-judicial exclusion of any partner who is jeopardizing the company's continuity, by virtue of acts of undeniable gravity, as resolved by the partners representing more than half the quota capital, as long as the articles of association provide for exclusion for good cause and with due regard to the legal procedures.

PARTNERS' AGREEMENT: The execution of Partners' Agreements in LTDAs is also possible, similarly to S/As.

SUPPLEMENTARY REGULATION: In accordance with the new Civil Code, Law 6,404/76 (Corporation Act) no longer subsidiarily applies to LTDAs, except when so determined in the articles of association. In cases where the new Code and articles of association are imperfect and incomplete, the general rules provided in the new Civil Code for so-called simple companies (companies designed to perform an intellectual activity, of a scientific, literary or artistic nature) will, in principle, be applied.

NEW RULES: Law 11,638/07 determines the application of the aforesaid Law 6,404/76 to large-sized LTDAs, in respect of matters concerning the recording and preparation of financial statements and the requirement of an independent audit; see the explanation on this matter in the New Rules paragraph of item 3.1. Corporation (S/A). In this context, among the new determinations for large-sized LTDAs, there is some discussion going on as to whether these companies are also required to publish their financial statements, there being conflicting opinions with regards to the interpretation of the rule. For the purposes of this new law, large-sized LTDAs are those companies that have total assets, in the previous year, in excess of R$ 240 million (US$ 145 million) or annual gross turnover of over R$ 300 million (US$ 181 million).

ADAPTATION OF THE ARTICLES OF ASSOCIATION: With the provisions brought by the new Civil Code, many of the advantages that previously existed for LTDAs have disappeared, notably their structuring flexibility. This should lead to greater reflection with regards to the choice of company type: LTDA or S/A. The choice will depend on each specific case, but by and large, one may say that LTDAs work very well for the operation of subsidiaries whose total quota capital is held by foreign companies, whereas possible joint ventures in Brazil should elect for the adoption of a S/A, owing, among other things, to the legal security conferred by the already officially accepted interpretation of the rules that govern this type of company.

Branch Offices of Foreign Companies

A foreign company may directly operate in Brazil through a branch office, i.e, through an extension of the foreign corporate entity itself. However, this procedure presents some disadvantages in comparison with the establishment of a business concern in Brazil through ownership interests, for the following reasons:

– the need of prior authorization, through an act of the Federal Executive Branch;
– prohibition of the remittance of royalties to the head office abroad for the use of trademarks and exploitation of patents, and
– tax disadvantages, as indicated in item 6.1.1.2 below.

Corporate Reorganization Operations and Sale of Establishments

Corporate reorganization operations involving the transformation, spin-off, merger and merger by incorporation of companies may be conducted both by S/As and by LTDAs.

In a transformation, the company is transformed from one type of company to another, without the dissolution or interruption of its activities.

In a spin-off, the company transfers portions of or even its total equity (assets and liabilities) to one or more companies, with the continuation of the spun-off company, if its equity has been partially transferred, or with its extinction, if all its equity has been transferred. The law stipulates specific succession rules for the obligations of the spun off or extinguished company.

In a merger, two or more companies are combined to form a new company, which succeeds them to all their original rights and obligations.

In a merger by incorporation, one or more companies will be absorbed by another company, which succeeds them to all their rights and obligations.

S/As and LTDAs may further sell their industrial or commercial establishments, in which case the acquirer will succeed to all their respective rights and obligations. In this regard, please refer to the notes contained in chapter 17 below, notably as regards the new Bankruptcy Law.

Consortium

Different organizations, S/As or LTDAs, under the same control or otherwise, may set-up a consortium to carry out a specific undertaking.

Through a consortium several companies, by mutually associating, are able to assume certain activities, which could not be carried out individually by each company, due, in most cases, to technical or economic financial conditions.

As a general rule, a consortium is not a corporate entity and its members, in principle, are only bound under the conditions provided for in its incorporation agreement. Each member company is accountable for its own obligations, without the presumption of joint and several liability. However, exceptionally, just for federal tax purposes, this rule does not apply, since in operations in the consortium's own name, the consortium will satisfy the respective tax obligations and the member companies will be jointly responsible for these obligations. In the labor, tax and consumer fields, however, such joint and several liability may also be constituted, as applicable.

This type of association is common for participation in procurement processes and in the sectors responsible for the concession of public and private works and services, and imports and exports.

The consortium incorporation agreement and its amendments must be filed at the Commercial Board (Junta Comercial) of the venue of its headquarters.

Undisclosed joint venture partnership (SCP)

This type of association does not appear to third parties, for it consists merely of a private agreement, entered into by two or more participants, with the purpose of permitting the exploitation of a business opportunity or specific business activity. SCPs do not have a distinct legal identity from that of their participants.

The law differentiates two types of participants: (i) the visible partner: develops the component activities of the company purposes in his individual name and assumes responsibility for the company obligations in an exclusive manner, and (ii) the secret partner: appears merely as an investor, not appearing to third parties; assumes responsibility towards the visible partner within the limit provided in the company's formation instrument.

The formation of an SCP is not subject to any formality, and may be proved by means of any evidence permitted by Brazilian law. It is most commonly used in particular operations, such as import, export, and participation in transactions, procurements and others.

Wholly owned subsidiary

The Corporation Law also provides for the wholly owned subsidiary, which is a strictly unipersonal corporation, whose only shareholder shall necessarily be a Brazilian company. Its creation can be originated or derived. In the former case, it will be incorporated by public deed. Its creation will be derived when the company is converted into a wholly owned subsidiary through the acquisition, by a Brazilian company, of all its shares or through the incorporation of all the shares of the capital stock into the net equity of another Brazilian company.

→ Industrial Property

Industrial Property is regulated by Law 9,279/96, the Industrial Property Act (Lei da Propriedade Industrial - LPI), which was drawn up with the purpose of adapting Brazilian legislation to the requirements established by the World Trade Organization (WTO) in relation to the protection of the rights of patent and trademark owners located abroad, and combating piracy.

Invention patents are valid for a period of 20 years and the utility model type, for the period of 15 years, as from the date of the respective filing. The validity period cannot be shorter than 10 years for the invention patent and 7 years for the utility model patent.

The LPI permits the compulsory license of patents when their owner exercises the rights resulting therefrom in an abusive manner, commits abuse of economic power through them, when there is no exploitation of the patent's subject matter in the Brazilian territory or the incomplete manufacture thereof. In these cases, the license may only be applied for by an interested party with a legitimate interest in and the technical capacity for the efficient exploitation of its subject matter, three years after the patent granting date.

It is important to point out that though pharmaceutical products and processes have been patentable since the enactment of the LPI, the granting of patents in this segment is contingent on prior approval from the Brazilian Sanitary Surveillance Agency (Agência Nacional de Vigilância Sanitária – ANVISA).

With respect to trademarks, the Law permits the forfeiture of the respective registration, at the request of third parties with legitimate interests, if its use has not been commenced in Brazil after the passage of 5 years from its granting date or if its use has been interrupted for more than 5 consecutive years or, further, if during this period, the trademark has been used with a modification altering its primitive distinctive characteristics.

Following the Paris Union Convention for the Protection of Industrial Property (art. 6 bis 1), Law 9,279/96 left it clear that well-known trademarks, including service trademarks, enjoy special protection, regardless of whether they have been previously applied for or registered in Brazil.

The law also provides for the punishability of crimes against industrial property, including patents, industrial designs, trademarks, geographical and other designations, and against unfair competition, also consolidating the dispersed rules on the subject.

Trademarks, patents and industrial designs shall be registered at the Brazilian Patent and Trademark Office (INPI).

Moreover, the acts and contracts related to the licensing of industrial property (use of trademarks and exploitation of patents), technology transfer, franchise, technical, scientific and other support services are subject to registration with INPI. The said registration is a condition for:

– the publicity, i.e., the validity of the acts or contracts before third parties;
– the remittance abroad of payments due, within the legal limits;
– the tax deductibility of the amounts paid, within the limits of the law.

Trademark and patent royalty payments are only permitted in the cases of invention or registration of trademarks granted by INPI. Trademarks or patents that have merely been applied for, but are not registered, entitle their holders to enter into licensing agreements, but do not make the receipt of remuneration as a result of the license established lawful. The privilege or registration of an extinct trademark, or trademark in the process of annulment or

cancellation, or privilege or registration of a trademark whose owner is not eligible for remuneration, will not qualify for royalties.

The deductibility of royalty expenses (for the use of trademarks, patents or industrial designs) and with remuneration for technology transfer and the provision of technical support by a subsidiary, is limited to a maximum of 5% of net sales revenue, with due regard to the specific limits for each industrial activity sector (art. 355 of the RIR). The tax deductibility for the use of trademarks is in all cases limited to 1%.

The tax deductibility of the remittances to the licensor or grantor overseas depends not only on the registration of the respective contracts with INPI, but also their registration with BACEN, today done electronically by the commercial bank responsible for the payment remittance, through the Electronic Declaratory Registration (Registro Declaratório Eletrônico – RDE), in which the conditions registered and authorized by INPI are checked online, at the time of the remittance.

Controlled companies established in Brazil may also remit royalties for the exploitation of invention patents, use of trademarks and remuneration for technology transfer and the provision of technical, scientific or similar support services to their parent companies abroad.

INPI, based on its own interpretation of the federal tax legislation, understands that the amount to be remitted in cases of control relations may also not exceed the maximum annual limit of up to 5% of net sales revenue of the product manufactured or sold.

At the time of the remittance of royalties, remuneration for technical support and similar services or payment for technology transfer, there is withholding of Income Tax at Source (IRF), at the rate of 15%, except when there is an international agreement to avoid double taxation determining a lower rate (art. 710 of the RIR and art. 2A of Law 10,168/00). However, if the royalty remittance is made in favor of a person domiciled in a Tax Haven, the aforesaid rate rises to 25% (art. 685 of the RIR).

In addition to IRF, the remittance will also be subject to the payment of the economic domain intervention contribution (CIDE) at the rate of 10%, which is earmarked for funding technological development and interaction programs between Brazilian universities and research centers and private enterprise (art. 2 paragraph 4 of Law 10,168/00).

Remittances abroad for the payment of technical, management and similar support services that do not imply technology transfer are also subject to the payment of IRF and CIDE (art. 2 paragraph 2 of Law 10,168/00).

If Brazil has signed an agreement to avoid double taxation with the country licensing the technology, then income tax deduction and credit mechanisms may be applied in that country,

but only in relation to remuneration for the use of trademarks, patent exploitation, rendering of technical support services, specialized technical services and technology transfer and with respect to the portion withheld as IRF, excluding the possibility of the set off of amounts withheld in the way of CIDE.

There is a possibility of the Municipality of São Paulo additionally exacting ISS (Service Tax) at the rate of 5% for "The assignment of the right of use of trademarks and advertising signs" or of 2% for "The licensing or assignment of the right of use of computer programs", since such operations are currently listed as service by the São Paulo Municipal Tax Administration (art. 1, item 1.05 and item 3.01, respectively, of Municipal Decree 44,540/04).

→ Real Estate

Acquisition of real property

The most common method of acquiring real property between living persons is the registration of the title deed at the Real Estate Registry Office.

Another method of acquiring real property is usucaption: those who, for 15 years, without interruption, or opposition, possess a property as their own, acquire its ownership, regardless of title and good faith; and may request that the judge declares as much by a judgment, which will serve as the title for registration in the Real Estate Registry Office. This period may be reduced in certain cases. It may be reduced to 10 years, for example, if the possessor has established his habitual residence on the property, or carried out works or services of a productive nature on it. There are other cases of usucaption provided for in law.

The purchase of urban properties can be freely made by:

– a foreign individual or corporate entity residing or domiciled abroad, whereas the investment made in the property purchase is not subject to registration as foreign capital with Central Bank (BACEN), and

– by a corporate entity based in Brazil but controlled by foreign capital, whereas the investment made in the property purchase is subject to registration with BACEN, as foreign capital invested in the Brazilian company.

There are restrictions in statutory law with respect to the acquisition of real property located in national security and rural areas, by foreign individuals or corporate entities, or by Brazilian corporate entities controlled by foreigners residing or based abroad.

Rural real property is subject to the following basic rules:

– the total sum of the rural areas owned by foreigners cannot exceed 1/4 of the surface area of the Municipalities and persons of the same nationality cannot own more than 40% of the said limit;

– the surface areas are divided into module units, whose areas, depending on the locality, vary between 5 ha. (in the Greater São Paulo region) and 100 ha. (according to the region of the Country);

– foreign individuals residing in Brazil may freely purchase areas of up to 3 module units for undefined exploitation, provided that the above surface area restrictions are observed and it is the foreign individual's first purchase (in practice, it is recommended that the National Land Development Agency (Instituto Nacional de Colonização e Reforma Agrária – INCRA) is consulted to ensure that the purchase complies with the surface area restrictions); for areas in excess of 3 and up to 50 module units, and for the operation of a second purchase, authorization from INCRA must be obtained, whereas for areas of between 20 and 50 module units, a land use project will also have to be submitted; for areas of 50 to 100 module units, approval needs to be obtained from the President of the Republic, and it will have to be evidenced that the project is of national interest and approved by the National Defense Council; for the purchase of areas in excess of 100 module units authorization from Congress will have to be obtained;

– foreign corporate entities authorized to operate in Brazil or corporate entities based in Brazil but controlled by individuals or corporate entities residing or based abroad, must obtain authorization from the Ministry of Land Development, through the competent agency, in this case INCRA;

– a foreign individual that has Brazilian children or is married under the partial or community property system with a Brazilian person are free to purchase rural property.

Recently, there was a significant change in the understanding that was being applied to item "d" above.

Until July 2010, the understanding that prevailed was that of the former AGU (Office of the Federal Attorney General) opinion in the sense that there was no distinction between the Brazilian company of national capital and the Brazilian company of foreign capital. Therefore, a company based in Brazil, whose capital was controlled by a foreign corporate entity, did not suffer any type of restriction, either to purchase or lease rural property in Brazilian territory, provided that the property was not located in the Country's frontier strip.

After August 2010, through a new AGU opinion, signed by the then President of the Republic Luiz Inácio Lula da Silva, Brazilian companies whose capital is controlled by a foreign corporate

entity received the same treatment as a foreign company, and began to suffer the restrictions set forth in Law 5.709, of 7 October 1971, namely: (i) cannot acquire a rural area that has more than 50 modules of undefined exploitation; (ii) only rural real property to be used for the implementation of cattle breeding, agricultural and industrial projects and that are linked to the corporate purposes set forth in their corporate bylaws or articles of association and approved by the Ministry of Land Development and INCRA may be acquired or leased.

Furthermore, it is important to remember that a determination exists whereby the sum of the rural areas belonging to foreign persons or Brazilian companies controlled by foreign companies shall not exceed 25% of a municipality.

Special restrictions are also imposed on rural properties located in areas known as frontier strips, which are considered indispensable to national security. This area is defined as the 150 kilometer-wide internal strip (equivalent to 93 miles), running parallel to the borderline of the national territory.

The purchase of rural land within the frontier strip, by a foreign individual or corporate entity, or by a company that has any foreign ownership interest (whether majority or minority, as a shareholder or member of the Board), will depend on prior approval from the National Defense Council (Conselho de Defesa Nacional).

Prior approval from the National Defense Council will also be required for the establishment or operation, within the frontier strip, of industries that are of interest to national security, listed as such in an Official Decree, and for the establishment, in this same strip, of companies engaged in the following activities:

– prospecting, extraction, exploitation and utilization of mineral resources, except for those of immediate application in civil construction, as classified in the Mining Code, and

– land settlement and rural developments.

The companies listed in the foregoing paragraph shall, necessarily, satisfy the following conditions:

– at least 51% of the capital must be held by Brazilians;

– at least 2/3 of the employees must be Brazilians, and

– the majority of the administrators and managers shall be Brazilians, who shall be guaranteed predominant powers.

Rural real property is subject to the Rural Land Tax (ITR), levied pursuant to the respective Tax Table. The rate ranges between 0.03% and 20%, in accordance with the size of the property, its utilization and the efficiency of its exploitation and is applicable on the "bare land" value, which is construed as the total worth of the property, minus the value of its buildings, facilities, improvements, permanent and temporary crop cultures, cultivated and improved pastures and planted forests. The respective rates and other legal provisions concerning the ITR are set forth in IN/SRF (Normative Instruction/Federal Revenue Department) 256, of 11 December 2002. An increase in the Rural Land Tax rate may occur, in accordance with the utilization ratio of the land and efficiency of the property's exploitation; this increase is a penalization factor, aimed at discouraging the maintenance of unproductive properties.

Moreover, city properties are subject to a land tax levied on plots of land, and to a building tax - for buildings. In the City of São Paulo, the rates of this tax for 2006 vary between 0.8% and 1.6%, for residential properties and 1.2% to 1.8% for commercial property and land, calculated on the fair market value of the property, as determined by the Local Government Authority.

Mortgage

A real property may be given in mortgage as security for the debts or obligations of its owner or of third parties. The mortgaged property is subject, by a real relationship, to the performance of the obligation.

Deed of Trust Form of Mortgage ("Alienação Fiduciária")

Law 9,514, of 20 November 1997, which disciplines the Real Estate Financing system, instituted the deed of trust form of mortgage ("alienação fiduciária") of real property. Prior to this law, this guaranty was only permitted to finance the purchase of movables. As in a mortgage, the assets given in "alienação fiduciária" are subject, by real relationship, to the performance of the obligation.

Construction Right

Owners may erect constructions on their land as they deem convenient, respecting the right of neighbors and administrative regulations. The neighborhood right is regulated in the Civil Code. The administrative regulations (construction rules and zoning restrictions) are mainly set forth in municipal laws. Special attention should be paid with respect to the location and authorization for the establishment of manufacturing plants, which require the approval of the zoning and pollution control agencies.

→ Tax System

Main Federal Taxes:

Income Tax

Corporate entities taxed by Actual Taxable Income may determine their income on the basis of the annual balance sheet at 31 December of each year or by quarterly trial balance sheets (arts. 220 and 221 of the Income Tax Regulation - RIR).

Corporate entities that have profits, earnings and capital gains from abroad, are obliged to determine Actual Taxable Income (art. 246, III and 394 of the RIR).

Income tax is levied at the rate of 15% on the Actual Taxable Income calculated annually (annual Actual Taxable Income) or quarterly (quarterly Actual Taxable Income) by corporate entities, in accordance with their accounting records, prepared pursuant to the commercial and tax laws (art. 541 of the RIR). The portion of the tax base computed monthly that exceeds R$ 20 thousand (US$ 12.12 thousand), will be subject to the imposition of a 10% surtax (art. 228 of the RIR). However, the tax administration may arbitrate or presume the income amount, provided that the legal requirements for these regimes are observed (art. 530 of the RIR); the applicable rate on taxable income for these cases is also 15%, with due regard to the comments made further on relating to the tax base of the tax.

Corporate entities with partners or shareholders resident or domiciled abroad may calculate income tax by Presumed Income, providing that total income in the previous calendar year does not exceed R$ 48 million, equivalent to approximately US$ 29.09 million, or R$ 4 million, equivalent to approximately US$ 2.4 million, multiplied by the number of months of activity in the preceding calendar year, when less than 12 months (art. 516 of the RIR, with the wording introduced by Law 10,637, of 30 December 2002).

Actual Taxable Income is the net income (considered as the algebraic sum of operating income, non-operating results and ownership interests) corresponding to the base period, adjusted by the additions, exclusions or offsets determined by law.

The Presumed Income, on which income tax is levied, corresponds to the result of the application of the percentages established by the tax administration on gross income, of between 1.6% and 32%, according to the type of activity performed by the corporate entity (art. 519, paragraph 1 of the RIR).

Companies, including branch and representative offices or agencies of foreign corporate entities in Brazil with their main offices abroad that present monthly taxable, presumed or arbitrated income in excess of R$ 20 thousand, equivalent to approximately US$ 12.12 thousand, will be

subject to an income tax surtax levied at the rate of 10%. For quarterly Actual Taxable Income, the exemption limit will be R$ 60 thousand, equivalent to approximately US$ 36.36 thousand, whereas for annual taxable income said exemption limit will be R$ 240 thousand, equivalent to approximately US$ 144.45 thousand (art. 542 of the RIR).

Corporate entities that pay income tax on the basis of Actual Taxable Income or on the basis of quarterly Presumed Income may exclude, from this tax, the amount corresponding to the income tax withheld at source in advance and levied on the earnings computed in the tax base of this tax (art. 540 of the RIR).

For companies electing for the annual Actual Taxable Income calculation system, the tax losses and negative basis for Social Contribution on Net Profits (CSLL) may be offset up to the maximum limit of 30% of net income adjusted by the additions and exclusions permitted by the income tax and CSLL legislations. For quarterly Actual Taxable Income, the tax loss of a quarter can only be carried forward up to the limit of 30% of the Actual Taxable Income of the subsequent quarters. In the case of Presumed Income, it is not possible to offset tax losses (art. 510 of the RIR).

Remittances Abroad

Remittances of profits and dividends abroad, on the basis of the results determined as from 1 January 1996, are not subject to taxation (art. 692 of the RIR).

Remittances of interest are subject to withholding income tax at the rate of 15% (art. 1 of Law 9,959/00). This rate is increased to 25% if the recipient of the remittances resides in a tax haven or tax favorable jurisdiction.

Interest remitted abroad may be deducted from the calculation of taxable profit of a corporate entity in Brazil, with limitations.

In the case of the payment of interest to related persons residing abroad in an other than tax haven, the deduction of the interest will be permitted, on proportional terms, as long as the debt does not exceed up to twice the amount of the related party's (creditor) interest in the net worth of the legal entity residing in Brazil.

In the case of remittances of interest to a beneficiary that is not a related party, but that is a resident in a tax haven, the interest will only be deductible, on proportional terms, as long as the debt does not exceed 30% of the net worth amount of the corporate entity residing in Brazil.

In both cases, the total amount of the aggregate indebtedness of the corporate entity resident in Brazil, cannot be higher than these limits (twice and 30% of the net worth, respectively.

Remittances of royalties, or of remuneration for technical support or similar services or the payment of technology transfer, are subject to withholding income tax, at the rate of 15%, except when there is an international agreement to avoid double taxation, providing for a lower rate (art. 710 of the RIR and art. 3 of Provisional Measure (Medida Provisória - MP) 2,159-70/01). It is important to note that such remittances are also subject to the levy of the Economic Domain Intervention Contribution (CIDE), at the rate of 10% (see comments in item 6.1.6.5).

Earnings from labor, with or without an employment relationship, and income from the provision of services of a personal nature paid, credited, delivered, employed or remitted to persons resident or domiciled abroad, are subject to the levy of withholding income tax at the rate of 25%, with due regard to the cases of agreements to avoid double taxation (art. 685, II, "a" of the RIR).

The income tax rate levied on any amounts that constitute remuneration of invested capital, including the remuneration produced by variable income securities, such as interest, bonuses, commissions, premiums, discounts and profit sharing, and positive results received on investments in investment funds and clubs, produced by federal government securities, purchased as of 16 February 2006, when paid, credited, delivered or remitted to beneficiaries resident or domiciled abroad is reduced to zero, except in countries that do not tax income or that tax it at a maximum rate of under 20% (art. 1 of Law 11,312/06).

Income received on the redemption of quotas of Equity Holding Funds, Equity Holding Fund Quota Investment Funds and Emerging Company Investment Funds, including when derived from the settlement of the fund, are subject to withholding income tax at the rate of 15% levied on the positive difference between the redemption amount and the purchase cost of the quotas (art. 2 of Law 11,312/06).

The income tax rate levied on income received on investments in the aforementioned investment funds when paid, credited, delivered or remitted to individual or institutional beneficiaries resident or domiciled abroad that conduct financial transactions in the Country in accordance with the rules and conditions established by the National Monetary Council (art. 3 of Law 11,312/06) is reduced to zero.

Any amounts paid, credited, delivered, employed or remitted for any reason, either directly or indirectly, to individuals or corporate entities resident or established abroad and residents of tax havens will only be deductible from the taxable income of a corporate entity in Brazil if the effective beneficiary of the entity abroad and recipient of such amounts is identified, if there is proof of the operating capacity of the individual or entity abroad to carry out the operation, and documentary proof of the payment of the respective price and receipt of the goods, rights or use of the service.

Branch Office of a Foreign Company

As previously indicated in item 3.3 above, the establishment of a branch office produces the following, among other disadvantages of a tax nature: impossibility of deducting expenses paid or credited to the head office, in the way of royalties, technical and administrative support or similar services (art. 353, III, "a", of the RIR).

Capital Gains on Financial Investments

Earnings and capital gains derived from financial investments by corporate entities with their principal place of business and administration in Brazil, of Brazilian or foreign capital, for fixed income or variable income funds are subject to the levy of withholding income tax at the following rates: 22.5% on investments with terms of up to 180 days; 20% on investments with terms of 181 to 360 days; 17.5% on investments with terms of 361 to 720 days; 15% on investments with terms of over 720 days (art. 1 of Law 11,033/04 and art. 3 of IN SRF (Normative Instruction of the Brazilian IRS) 487/04).

Earnings from financial loan operations between corporate entities or between corporate entities and natural persons are subject to the same tax as fixed-income investments (SRF IN 25/01, arts. 18, III and paragraph 2, and 19, sole paragraph, II). In the case of intercompany loans, the tax levy also occurs when the operation is conducted between parent companies and subsidiary, associated or related companies. The tax is also levied on predetermined income earned by means of combined operations, conducted in or out of the stock exchanges (art. 730, I of the RIR).

The tax is not levied on earnings (fixed or variable income) owned by financial institutions in general and from investment fund portfolios (art. 4, I and 35, I and II of IN 25/01).

These earnings and gains shall constitute the Actual Taxable or Presumed Income and the tax withheld or paid may be offset against the tax due in the monthly or annual calculation of Actual Taxable Income, or quarterly calculation, in the case of Presumed Income (art. 526 of the RIR).

Earnings and capital gains derived from financial investments by individual or institutional investors resident or domiciled abroad suffer the levy of withholding income tax, at the rate of 15% for fixed income funds, and at rates of between 10% and 15% for variable income funds (MP 2,158-35/01, art. 29, MP 2,189-49/01, art. 16, and IN 25/01, art. 39).

Capital gains received by foreign investors from operations conducted in stock, commodity, futures and similar exchanges are not subject to the levy of income tax, with the exception of capital gains from combined operations in the put and call option markets in the stock, commodity and futures exchanges ("box"), in the forward market in the stock, commodity and futures exchanges, in sales operations with guaranty and without daily adjustments, in the over-

the-counter market, and also in operations with gold (financial asset) outside the exchanges, which are taxed as fixed-income financial investments at the rate of 15% (art. 684 of the RIR and IN 25/01, art. 40 and paragraph 1).

The tax system relating to foreign fixed and variable-income investments, transcribed above, does not apply to investments originating from a country that does not tax income or that taxes it at a rate of under 20%, i.e. the "Tax Havens", which will be subject to the same rules established for persons resident or domiciled in the Country (Law 9,959/00, art. 7).

Treaties to Avoid Double Taxation

It is important to mention that Brazil has signed treaties to avoid double taxation of income tax that are currently effective, with the following countries: South Africa, Argentina, Austria, Belgium, Canada, Chile, China, Korea, Denmark, Ecuador, Spain, the Philippines, Finland, France, Hungary, India, Israel, Italy, Japan, Luxembourg, Mexico, Norway, Peru, Portugal, the Netherlands (Holland), Sweden, the Czech Republic, Slovakia, Ukraine and Venezuela (the latter only for taxes relating to air transport – Decree 86,354/81) (art. 997 of the RIR).

Import Duty on Foreign Products *(Imposto sobre a Importação de Produtos Estrangeiros - I.I.)*

As a general rule and unless otherwise provided for by law, products imported into the Brazilian territory are subject to duties at rates of between 0% and 35% (the latter with regards to automobiles) on the CIF value. However, most taxed products are subject to rates of between 10% and 20%. See also paragraph 23.2 below.

Export Duty on National or Nationalized Products *(Imposto sobre a Exportação de Produtos Nacionais ou Nacionalizados - I.E)*

Unless otherwise provided by law, exports of national or nationalized products from the Brazilian territory are subject to export duty at rates of between 0% and 150%.

Tax on Industrialized Products or Excise Tax *(Imposto sobre Produtos Industrializados– IPI)*

IPI is levied on the manufacture and importation of products. It is a tax on consumption, the mechanics of which obey the product selectivity principle, in accordance with the product's essentiality. Products deemed to be superfluous are subject to a higher tax burden, whereas those with a higher degree of essentiality are treated differently.

IPI rates currently range between 0% and 330%, the latter applicable to cigarettes (Decree 4,542/02, chapter 24, section IV). Most products are subject to rates of between 10% and 20%.

IPI is a noncumulative tax; this mechanism consists of offsetting what is due in each operation, by the credit system, against the tax charged on the previous operation.

We should point out that, in addition to industrialized products destined for export, books, newspapers, periodicals and the paper used for their printing; gold, when defined by law as a financial asset or exchange instrument; electric power, petroleum by-products, fuels and minerals of the Country are not subject to IPI (article 18 and items of the IPI Regulation - RIPI).

Tax on Credit, Insurance and Foreign Exchange Operations, or on Operations relating to Negotiable Instruments and Securities *(Imposto sobre Operações de Crédito, Seguro e Câmbio, ou sobre Operações relativas a Títulos e Valores Mobiliários – IOF)*

CREDIT OPERATIONS

IOF is levied on credit operations at the time of the total or partial delivery of the sum or of the amount that constitutes the subject matter of the obligation, or its availability to the interested party (art. 3, Decree 6,306/07).

The taxpayers are the borrowers of the credit. IOF is charged at the maximum rate of 1.5% per day on the credit operation amount, corresponding to the principal sum that constitutes the subject matter of the obligation, or the amount made available to the interested party, and may be reduced to zero in express cases provided for in the legislation (arts. 6 and 8, Decree 6,306/07).

Currently, the generally applied rate is 0.0041% per day in the aforementioned operations.

Moreover, IOF has an additional rate that is levied on credit operations, of 0.38%, regardless of the term of the transaction and of whether the borrower is an individual or corporate entity.

FOREIGN EXCHANGE OPERATIONS

In this case, the IOF is levied on the delivery of the local or foreign currency, or of the document representing the same, or its availability to the interested party, in a sum corresponding to the foreign or local currency delivered or made available thereby, at the time of the settlement of the foreign exchange operation (art. 11, Decree 6,306/07).

IOF taxpayers are the buyers or sellers of foreign currency in operations concerning financial transfers to or from abroad, respectively, including manual foreign exchange operations and the foreign exchange operator companies are responsible for the payment (art. 13, Decree 6,306/07).

The tax base for the calculation of IOF is the sum in local currency received, delivered or made available, corresponding to the sum, in foreign currency, of the foreign exchange operation, and the maximum rate is 25%, subject to the reductions set forth in law (arts. 14 and 15, Decree 6,306/07):

– on the amount brought into the Country derived from or intended for currency loans with minimum average terms of up to 90 days: 5.38%;

– on foreign exchange operations designed for the fulfillment of the obligations of credit card managers or of commercial or multiple service banks in the capacity of issuers of credit cards resulting from the purchase of goods and services from abroad made by their users, with due regard to the provision in item "c" below: 2.38%;

– on foreign exchange operations for the fulfillment of the obligations of credit card managers or of commercial or multiple service banks in the capacity of issuers of credit cards resulting from the purchase of goods and services from abroad when the card users are the Federal Government (União), States, Municipalities, Federal District, their foundations and autonomous government entities: 0%;

– on foreign exchange operations related to exports of goods and services: 0%;

– on foreign exchange operations, conducted by foreign investors, for investments in the financial and capital markets as regulated by the National Monetary Council: 2%;

– on foreign exchange operations of an interbank nature between institutions that make up the National Financial System authorized to operate in the foreign exchange market and between the latter and financial institutions overseas: 0%;
▫on other foreign exchange operations: 0.38%

INSURANCE OPERATIONS

The taxable event of IOF is the receipt of the premium. The expression "insurance operations" includes life and related insurance, personal and occupational accident insurance, and insurance covering property, values, things and other non-specified insurance. The taxpayers are the insured persons and the persons responsible for the collection and payment are the insurance companies or financial institutions that make the payment of the premium (arts. 18, 19 and 20 of Decree 6,306/07).

The tax base for the calculation of IOF is the sum of the premiums paid. The IOF rate is 25%, but is reduced (arts. 21 and 22, Decree 6,306/07):

– on the following operations: reinsurance; mandatory insurance, related to the financing of housing, conducted by an agent of the Financial Housing System; export credit insurance and international transport of goods insurance; insurance taken out in Brazil, relating to the coverage of risks in connection with the launching and operation of the Brasilsat I and II satellites; in which the sum of the premiums is earmarked for funding life insurance plans with coverage for survival; aeronautical insurance and civil liability insurance paid to air carriers: 0%;

– on life and related insurance, personal and occupational accident insurance operations, including the mandatory insurance for personal injuries caused by overland automotive vehicles and by vessels, or by their cargo, to persons transported or otherwise and excluding those dealt with in item "f" of sub-section I: 0.38%;

– on private health care insurance operations: 2.38%, and

– on other insurance operations: 7.38%.

OPERATIONS RELATING TO NOTES AND SECURITIES

The taxable event of IOF is the purchase, assignment, redemption, renegotiation or payment for settlement of notes and securities. Its taxpayers are: (a) the purchasers, in the case of the purchase of notes and securities and the holders of financial investments, in cases of redemption, assignment or renegotiation; (b) the financial institutions and other institutions authorized to operate by Central Bank of Brazil (arts. 25 and 26, Decree 6,306/07).

The tax base for the calculation of the tax is the operation amount (of the purchase, redemption, assignment or renegotiation) and the maximum rate is 1.5% per day (arts. 28 and 29, Decree 6,306/07).

Gold, as a financial asset or foreign exchange instrument, is currently also subject to IOF at the rate of 1%, on the first purchase by a financial institution (art. 4 of Law 7,766/89, Decree 6,306/07, art. 39).

Social and other Contributions...

Social Integration Program - PIS

The objective of the PIS contribution is to finance the Unemployment Insurance Program and the Annual Bonus of one minimum wage. The purpose of unemployment insurance is to provide temporary financial aid to jobless workers, whether dismissed without cause or owing to the partial or total stoppage of the employer's activities.

The contribution is made by companies from the private sector, including financial institutions, with their own funds, on the basis of monthly turnover, thus considered the gross revenue, i.e. all the revenue earned by the corporate entity. The type of activity performed by such corporate entity and the accounting classification adopted for such revenue is irrelevant, and some deductions from the gross revenue are permitted. (art. 1 of Law 10,637/02).

It is relevant to note that Law 10,637/02 introduced a new PIS calculation mechanism for corporate entities taxed by actual taxable income. The said Law instituted the rate of 1.65%, but allows companies to deduct from the PIS payable, credits relating to the PIS paid on prior operations, such as: goods purchased for resale; goods and services, used as inputs for the provision of services and for the production or manufacture of goods or products intended for sale, including fuels and lubricants; rents of buildings, machinery and equipment, paid to a corporate entity, used for the company's business activity; electric power consumed in the company's establishments, and other cases (arts. 2 and 3 of Law 10,637/02, Law 10,684/03, Law 10,865/04 and Law 11,196/05).

Moreover, it is important to mention that the former PIS calculation method, i.e., the application of the rate of 0.65%, without the right to the aforementioned credits, is still valid for corporate entities taxed by income tax on the basis of presumed or arbitrated income, tax-immune corporate entities, the revenues derived from the provision of telecommunication and information technology services, and other cases (art. 8 of Law 10,637/02).

The PIS contribution is not imposed on income from exports of goods abroad and services rendered to individuals or companies resident or domiciled abroad, on sales to trading companies with the specific purpose of exportation (art. 5 of Law 10,637/02 and Law 10,865/04) and on issues of goods destined for the Manaus Free Trade Zone for sale or industrialization (Law 10,996/04, art. 2).

National Social Security Institute *(Instituto Nacional de Seguro Social – INSS)*

Business concerns generally contribute monthly to the INSS, with their own funds. These companies are required to pay 20% of the total compensations paid or credited in any way to employees, during the month; 20% to insured executives, self-employed workers, free lancers and other individuals (insured individual taxpayers, art. 201, I and II of Decree 3,048/99); for the financing of the benefit relating to occupational accidents, companies pay: 1%, if the risk of an occupational accident is considered slight, 2% if the risk is average and 3% if the risk is serious (art. 22, II, of Law 8,212/91); and, lastly, 5.8% of the compensation paid to employees and allocated to other sectors. Some corporate entities, among which financial institutions and insurance companies, in addition to the contributions mentioned above, are subject to a surcharge of 2.75% assessed on the same tax base on which the rate of 20% applies (art. 22, paragraph 1 of Law 8,212/91, altered by Provisional Measure (Medida Provisória - MP) 2,158-35/01).

Companies are also required to make the discounts and payments of the social security contributions of their employees. These contributions range from 8% to 11%, of the respective compensation, observing the ceiling established by law (art. 20 of Law 8,212/91).

Contribution for the Funding of Social Security *(Contribuição para Financiamento da Seguridade Social – COFINS)*

COFINS is entirely allocated for the maintenance of Social Security and is levied at the rate of 3% (art. 8 of Law 9,718/98) on the monthly turnover of all companies. The definition of this contribution can be found in item 6.1.6.1 relating to PIS, and some deductions provided in law are permitted (art. 3, paragraph 2 of Law 9,718/98).

For financial institutions, the contribution is imposed at the rate of 4% (art. 18, of Law 10,684/03).

Companies engaged in the sale of goods or services destined for the foreign market are exempt from the above-mentioned contribution (art. 14, I and II of MP 2,158-35/01), and also the issues of goods destined for the Manaus Free Trade Zone for sale or industrialization in that area (Law 10,996/04).

It is important to mention that Law 10,833/03 introduced a new COFINS calculation mechanism for corporate entities taxed by actual income. This Law instituted the rate of 7.6%, but permitting that companies discount from the due amount of the contribution, credits relating to the COFINS paid in previous operations, such as: goods purchased for resale; goods and services, used as inputs for the provision of services and in the production or manufacture of goods or products intended for sale, including fuels and lubricants; rents of buildings, machinery and equipment, paid to a corporate entity, used in the company's business activity; electric power consumed in the company's establishments, and other cases (Law 10,833/03, Law 10,865, Law 10,925/04 and Law 11,196/05).

In addition, it is important to mention that the former COFINS calculation mechanism, i.e., the application of the rate of 3%, without the right to the aforesaid credits, is still valid for corporate entities taxed by income tax on the basis of presumed or arbitrated income, tax-immune corporate entities and the revenues derived from the provision of telecommunication and information technology services, and other cases.

COFINS is not imposed on income from exports of goods abroad and services rendered to individuals or companies resident or domiciled abroad, on sales to trading companies with the specific purpose of exportation and on issues of goods destined for the Manaus Free Trade Zone for sale or industrialization

Social Contribution on Net Income of Corporate Entities *(Contribuição Social sobre o Lucro Líquido da Pessoa Jurídica – CSLL)*

This contribution is levied at the rate of 9%, on the basis of taxable events occurring from 1 January 2003 onwards, on the net income of corporate entities, before the deduction of the contribution itself, with due regard to certain adjustments provided by law.

Provisional Measure 413/08, which was converted into Law 11,727/08, raised the CSLL rate of financial institutions, private insurance and special savings companies to 15%, which began to be applied as of 1 May 2008. The verification of its tax base follows practically the same income determination method used for Corporate Income Tax - IRPJ (actual, presumed or arbitrated), the only difference being some express deductions set forth in specific legislation.

Economic Domain Intervention Contribution *(Contribuição de Intervenção no Domínio Econômico –CIDE) - Technology*

The economic domain intervention contribution (CIDE) was instituted on 29 December 2000, through Law 10,168/00, as a means of funding technological development and interaction programs between Brazilian universities and research centers and private enterprise. This contribution, which was established at a rate of 10%, has as its tax base the payment, credit, delivery or remittance to persons residing or domiciled abroad, of remuneration derived from the license of use or acquisition of technological know-how, as well as agreements that imply technology transfer (defined by the law as those relating to the exploitation of patents or use of trademarks and the supply of technology and technical support).

Moreover, Law 10,332 of 19 December 2001 extended the coverage of CIDE, as of 1 January 2002, to include remittances abroad as payment for technical and administrative support and similar services that do not imply technology transfer.

Of the total resources collected by CIDE, 50%, at least, are invested in programs to foster technological qualification and support scientific research and technological development (arts. 1 and 2 of Law 10,332/01).

Economic Domain Intervention Contribution - *CIDE - Fuels*

Moving ahead with the alterations in the tax legislation by virtue of the opening of the fuel market to foreign investors, the CIDE was created, which is levied on the importation and sale of oil and its by-products, natural gas and its by-products and ethyl alcohol fuel.

CIDE taxpayers include the producer, formulator and importer of the fuels mentioned above. The tax base of the contribution is the unit of measure defined in law, which varies for each type of fuel. The rates are also specific for each type of product (Law 10,336/01).

Main Taxes Levied by the States and Federal District

– Tax on Operations Involving the Distribution of Goods and Interstate and Inter-municipal
– Transportation and Communication Service Renderings or State VAT – (Imposto sobre
– Operações Relativas à Circulação de Mercadorias e sobre a Prestação de Serviços de
– Transporte Interestadual e Intermunicipal e de Comunicação – ICMS)

ICMS is a state tax levied on the distribution of goods by industrial, commercial, manufacturing or producer establishments, as well as on the entry of merchandise imported from abroad, and also on the provision of interstate or intermunicipal transportation and communication services, even when the respective distribution or service rendering are originated abroad.

Similarly to IPI, ICMS is a noncumulative tax. It can also be a selective tax, depending on the essentiality of the goods and services.

In operations entailing distribution from one State to another and destined to taxpayers of the tax, the applicable rate is 12% (RICMS, art. 52, III). If these operations are conducted in the Southern and Southeast regions and are bound for the North, Northeast or Central West, or to the State of Espírito Santo, the rate is 7% (RICMS, art. 52, II).

The rates are variable for operations and service renderings within the territory of a State, reaching a maximum applicable rate of 25% (RICMS, art. 55). As an example, in the State of São Paulo rates range between 4% and 25%, and in most cases, the applicable rate is 18%. For the onerous provision of communication services, ICMS is levied at the rate of 25% (RICMS, art. 55, I).

Among the cases in which ICMS is not due, by express constitutional or legal provision, the following are of general interest to the foreign investor:

– on transactions transferring industrialized products abroad, and renderings sending services abroad (art. 155, paragraph 2, X, "a" of the Federal Constitution);

– on transactions transferring oil, including lubricants, liquid and gaseous fuels derived therefrom and electric power to other States (art. 155, paragraph 2, X, "b" of the Federal Constitution);

– on gold, when it is considered a financial asset or foreign exchange instrument (art. 155, paragraph 2, X, "c" of the Federal Constitution);

– on the exportation of merchandise and renderings that send services abroad (via an exporting company, including trading companies, or other establishment of the same company) (RICMS, art. 7, V and paragraph 1).

The enactment of Constitutional Amendment 33 of 1 December 2001 modified the fiscal scenario for the fuel and lubricant sector in relation to ICMS.

According to the respective Amendment, it is possible to define through a Complementary Law the fuels and lubricants on which ICMS will be imposed only once, regardless of its purpose (art. 155, paragraph 2, XII, "h" of the Federal Constitution).

It is important to note that some States of the Federation, including Rio de Janeiro, Espírito Santo, Minas Gerais, Rio Grande do Sul, Santa Catarina, Pará, Paraná and Amazonas, grant tax incentives in the way of exemption in the amount corresponding to up to 50% of the ICMS due, for the average period of 5 to 10 years, with subsidized price-level restatement and interest, with the aim of attracting the establishment of industrial projects. In the midst of this tax battle between the States, São Paulo State also enacted rules on the incentives that it will be offering to investors.

The Governor of the State of São Paulo, through Decree 44,596/99 created safeguards against the tax incentives granted by other States of the Federation, the so-called "tax war". It so happens that these incentives are contrary to the ICMS legislation. Through this Decree, for instance, the state tax administration may forbid the use of ICMS credit at the time of entry of products with subsidized tax rates; break arrangements with States whose ICMS rates are lower than those of São Paulo and that have been used by companies as a competitive edge to operate in the São Paulo State market, among other safeguards.

This so-called "tax war" is currently at its peak in the confrontation that exists between the State Governments before the Judiciary Branch. The unilateral concession of benefits, to the detriment of the National Public Finance Policy Council (Conselho Nacional de Política Fazendária - CONFAZ), originated the contumacious practice of appealing to the Supreme Federal Court (Supremo Tribunal Federal - STF) to protect the rights of the States that feel they have been adversely affected. In view of this, news of in limine decisions granted through Direct Unconstitutionality Actions, suspending the benefits and incentives granted outside of the scope of CONFAZ have become common.

Inheritance and Gift Tax *(Imposto sobre transmissão causa mortis e doação de quaisquer bens ou direitos – ITCMD)*

ITCMD is levied on the transfer of property or rights (shares, quotas, local or foreign currency, deposits, etc.) taking place by legal or testate succession, including provisional succession, and by gift.

This tax is only levied by some States. In the State of São Paulo this tax only began to be collected in year 2001. The tax base of the tax is the market value of the property or right transferred, expressed in local currency or UFESP (Tax Reference Index for the State of São Paulo). The

calculation of the tax is carried out by applying the rate of 4% on the amount established as the tax base.

The following operations are exempt from the tax: a) the causa mortis transfer: (i) of residential, urban or rural property, whose amounts do not exceed 5,000 UFESPs and whose benefitted family members reside therein and have no other real estate; (ii) on the extinguishment of usufruct, when the tenant was the institutor; (iii) of a sum due by the employer to the employee, by official or private Social Security and Welfare Institutes; (iv) of amounts and payments of an alimony or maintenance nature resulting from court decisions in the competent proceedings and the sum of individual FGTS (Unemployment Compensation Fund) and PIS-PASEP Participation Fund accounts, not received during the lifetime of the respective participant; (v) of real estate not exceeding the amount of 2,500 UFESPs, provided that it is the only real estate transferred; (vi) of tools and agricultural equipment of manual use, wearing apparel, household appliances and other movable goods of a low value that furnish the respective properties, whose amounts do not exceed 1,500 UFESPs, and (vii) bank deposits and financial investments whose total amounts do not exceed 1,000 UFESPs, and b) transfer by gift: (i) amounting to the limit of 2,500 UFESPs; (ii) of real property for the construction of dwellings associated with a popular housing program and, (iii) of real property donated by an individual to the Public Authorities (Law 10,705/00, altered by Law 10,992/01).

Main Municipal Taxes

SERVICE TAX - ISS

ISS is a municipal tax levied on service renderings of any nature specified by law and not included in the services mentioned in item 6.2.1 above. In the case of services rendered by a corporate entity, the rate ranges between 2% and 5% (SF Ordinance 14/04 - New Service Code Tables), calculated on the price of said services. Among the services subject to the tax are technical advisory services, plans, drawings and dealerships, among others. At this time each municipality establishes its rates for the services taxed. Given the diversity of rates, it will be up to the investor to decide where to set up its establishment, always taking into consideration the place of the service rendering and that of the company's head office.

Moreover, although of questionable constitutionality, it is important to mention that the Municipality of São Paulo has been requiring the registration, in its Taxpayers Register, of companies located in other Brazilian municipalities that render services to recipients based in São Paulo, on pain of the recipient of the service being required to carry out the withholding and payment of this tax in favor of the Municipality of São Paulo. ISS is currently being charged on certain imports of services. Hence, the legal provisions of each Municipality should be analyzed for specific cases (in São Paulo, Law 13,701/03, article 1, paragraph 1).

Summary of the Tax Burden on Corporate Entity Profits and Labor and Social Security Charges of Companies:

TAX BURDEN ON PROFITS

In summary, the tax burden incurred on company profits, up to their final distribution to partners or shareholders abroad, amounts to approximately 34%.

Specifically in the case of the payment of Interest on Owners' Equity (Juros sobre Capital Próprio – JCP) Withholding Income Tax (IRRF) will be levied at the rate of 15% upon payment to the partners. However, these amounts paid are deductible for the purposes of Corporate Income Tax (IRPJ) and Social Contribution on Net Income (CSLL), which reduces the tax burden of corporate entities to 19% with respect to the amounts paid as Interest on Owners' Equity.

LABOR AND SOCIAL SECURITY CHARGES

These charges, including employee labor rights, amount to an average of approximately 100% of the payroll amount.

SERVICE IMPORTS

When involving the importation of services, this activity will be subject to the levy of ISS, IRF, PIS, COFINS and CIDE-Technology and IOF, totaling approximately 48.24% of the service amount.

→ Labor Law and Social Security

Brazil has a complex and costly system of laws that regulate relations between employers and employees. This system of laws is the Consolidation of Labor Laws (Consolidação das Leis de Trabalho - CLT), of 1943, which is unreservedly protective of employees.

Employee

Is a natural person who personally renders non-casual, subordinate and salaried services to another person. The following criteria must be observed for the hiring of employees in Brazil:

– minimum age of 16;
– from 14 to 16 only as an apprentice and provided that the employee is studying in the natural sciences area that he or she intends to work;
– over the age of 18 for night, unhealthy and hazardous work.

Employer

Is an entity, with or without a legal personality, with the purpose of generating profit or otherwise, and that has employees. The employer, in the majority of cases, is the company, and the employer by correlation refers to liberal professionals, associations, etc.

Individual Employment Contract

Is the tacit or express agreement, corresponding to the employment relationship. The adoption of a written contract is more advisable. Contracts may be for an indeterminate or determinate period, though contracts for indeterminate periods are more common, for the determinate period only applies to certain situations set forth in law.

Work and Social Security Booklet (CTPS)

The work and social security booklet is obligatory and proves the existence of a written or verbal employment contract.

Rights of employees

Employee rights include:

WORKING HOURS: Ordinary working hours are 8 hours a day and 44 hours a week. The law provides for shorter working hours, depending on the special condition of the worker (e.g. minors and women) or of the profession (e.g.: railroad workers, physicians, telephone operators, journalists, bank workers, etc).

The working day will be diurnal, when it is between 5:00 a.m. and 10:00 p.m., in urban centers, with other criteria for rural areas; nocturnal, when between 10:00 p.m. of one day and 5:00 a.m. of the following day or their extensions.

Overtime refers to the hours worked beyond the normal limits fixed by law, collective bargaining agreements, normative sentence or individual employment contracts. Overtime is classified into 5 types:

– overtime resulting from an extension agreement, not exceeding 2;
– compensation of hours system;

– for the purpose of the conclusion of non-postponable services or the execution of which may cause losses to the employer;
– rendered to recover work stoppage hours;
– time worked in case of *force majeure*.

REMUNERATED WEEKLY REST PERIOD: Is the remunerated weekly rest period of 24 consecutive hours, preferably on Sundays and, within the limits of the technical requirements of companies, on public and religious holidays, in accordance with local tradition. The employee's full attendance at work during the week is a condition for the maintenance of the remunerated weekly rest period.

REST BREAK: Employees who work eight (8) hours daily are ensured a break for a meal and rest of at least one hour.

VACATION: All employees will have the right to vacation, after each 12-month period of a valid employment contract, without prejudice to the remuneration. Its duration depends on the assiduity of the employee, suffering a reduction in proportion to the employee's unjustified absences (maximum of 30 and minimum of 12 days' vacation).

It is forbidden to discount the employee's absences at work from the vacation period. The employer shall grant vacation during the 12 months subsequent to the acquisition period; if it fails to do so within this period, it will be required to pay the vacation twice. The employee's remuneration will be the same during the vacation period, as though he or she were at work, coinciding with that of the concession date, plus 1/3. The law does not permit the total conversion of the vacation period into payment in cash, but only 1/3 thereof.

WAGES: The law does not define wages, but indicates its components and fixes the rules for its payment and protection.

The Government establishes the minimum wage amount annually. In March 2011, it was fixed at R$ 545.00 (equivalent to approximately US$ 330), which will continue valid until January 2012.

Severance pay, profit sharing, pension plan benefits and their supplements, and intellectual rights are not regarded as wages.

Wages may be paid in cash, check or via bank deposit and in fringe benefits. The law requires the payment to be made in Brazil's local currency and considers payment in foreign currency as not made, though the latter may serve as the calculation basis for conversion into national currency, at the time of payment.

Payment in fringe benefits is the payment method whereby the employee receives such economic goods as food, housing, the use of an automobile, credit card, payment of household

bills, etc, as payment of part of his or her wage, though it should be pointed out that at least 30% of the total wage amount shall necessarily be paid in money.

The wage amount may be freely stipulated, provided that such stipulation is not conflicting with the labor protection provisions, collective bargaining agreements and judicial rulings.

The following constitute special types of wage:

– advances: advance in money, and a wage advance established as a result of temporary needs. In time, with the ceasing of the cause, its effects cease or its absorption by the wage occurs;

– additional overtime pay: is at least 50% and is incorporated into the base compensation for the calculations that are made, and is imposed on the wage;

– additional night pay: is 20% of the contractual wage, due for services rendered after 10:00 p.m., in urban centers; it is incorporated into the base compensation for the calculation of the 13th wage, vacation, etc;

– health hazard allowance: is due to employees that render service in an environment that is considered unhealthy and is 10%, 20% or 40%, according to the degree of health hazard - minimum, average and maximum; it is incorporated into the employee's base compensation for all purposes;

– hazard pay: is due to employees that render services under highly risky conditions. It is 30% of the contractual wage and is incorporated into the employee's compensation, except for the purposes of bonuses, gratuities and profit sharing;

– additional transfer pay: is due to any employee that is transferred by the employer to another locality and its amount is 25% of the contractual wage; it is not due in definitive transfers;

– others: commissions, bonuses, gratuities and premium bonuses.

THIRTEENTH WAGE: Is a mandatory bonus in compliance with the law, is of a wage nature and is also known as the Christmas bonus. It corresponds to one wage of the employee and must be paid in two installments, the first of which on or before November 20 and the second on or before December 20 of each year. For employees that do not work the whole year, its amount is proportional to the months of service, in the order of 1/12 per month, considering a fraction of 15 days or over as a full month and disregarding smaller fractions.

UNEMPLOYMENT COMPENSATION FUND (FGTS): The FGTS is a bank account that the worker can use on the occasions provided by law, which is formed by deposits made by the employer. Every month, the company has to deposit, with its own resources, in a specific account on behalf

of each employee, the equivalent of 8.0% of the employees' compensation. For employment contracts for a determinate period the rate is 2%. The sums deposited will be the property of the employee and withdrawals shall be made in the situations set forth in law, such as in the case of unfair dismissal. In the latter case, the company is also obligated to pay the employee an indemnity of 40% of the FGTS account balance and pay the sum of 10% of the same balance, as social contribution. The said contribution may be extended to non-employee directors, at the discretion of the companies that are submitted to the labor regime, pursuant to law.

TENURE: Is the right of an employee to remain in the job, even against the employer's wish, while there is no relevant cause expressed in law and that permits the employee's discharge.

The law sets forth the cases of job tenure, which persist while the cause by reason of which it was instituted exists, namely: the tenure of union leaders and representatives, victims of accidents, committee representatives, expectant mothers, and employees' representatives in the CIPA (Internal Commission for the Prevention of Accidents).

COLLECTIVE BARGAINING AGREEMENTS: In addition to the previously described benefits, companies must observe the collective bargaining agreements of the unions that represent the professional category, considering that these instruments normally contain provisions of other benefits that shall be granted by the employer.

Termination of employees

An employee may be dismissed for reasons that are fair or unfair. Fair dismissal is based on reasons pertaining to the worker's sphere, almost always in an action or inaction liable of compromising discipline. It permits the employer to dismiss without cost (payment of severance pay, or the percentage on FGTS deposits, 13th wage and vacation, the latter two proportional). The general rule is unfair dismissal, that is, the free discharge of the employee, whereby the law acknowledges the employer the right to terminate the employment contract, merely bearing the financial cost, with the exception of the cases of job tenure. When unfairly dismissed, the employee will have the right, among other things, to the following amounts: notice period (30 days), proportional 13th wage, vacations due, proportional vacations, 40% of the FGTS deposits and withdrawal of the FGTS.

The termination of employment contracts with a duration period of more than one year shall be homologated by the Labor Ministry or by the employees' Union of the category to which the employee belongs.

Labor Union / Trade Association Law

The core business activity of the company and the number of trade associations existing in its geographical area are what will determine the trade association to which a given company will belong. The respective employees' labor union will represent all the employees of the company, with the exception of those belonging to officially recognized professional categories, such as secretaries, drivers, economists and journalists, who will be represented by their own particular unions.

Both the employees and the companies shall, necessarily, pay the union contributions to the respective labor union/trade association.

Negotiations are held at least annually between the trade association of the company and the labor union of the employees of the same category. The collective bargaining agreements resulting from these negotiations are filed at the Labor Court and have force of law.

Social security

There is more than one social security regime in Brazil:

– the general one of the INSS (Brazilian Social Security Institute) for the private sector;

– the public sector regime instituted by the Federal Government, the States and Municipalities; and

– the supplementary regime, both in the public and private sectors, with the purpose of supplementing the pensions from the official social security regime.

The contribution to social security for which the company is responsible, is:

– 20% of the total compensation paid, due or credited, for any reason, during the course of the month, to insured employees and free-lancers;

– 20% of the total remunerations or compensations paid or credited during the course of the month to the insured individual taxpayer;

– 5% of the gross amount of the tax invoice or service bill, with respect to the services rendered thereto by cooperative members through workers' cooperatives;

– 2.5% of the total gross revenue derived from the sale of rural production, in substitution for the contribution set forth in item (i), when involving a corporate entity that has only the rural production activity as its corporate purpose (please refer to paragraph 6.1.6.2).

There are also other contributions that must be paid on the total compensations paid or credited to employees, namely:

– Contribution for the financing of occupational accidents: consists of the degree that the company provides for the event of incapacity for work resulting from the environmental risks of the work. The percentage of this contribution varies from 1% to 3%.

– Third party contribution: are obligatory contributions imposed on the payroll that are earmarked for private social service and professional training entities linked to the union system, whose rates vary from 0.2% to 5.8%;

– Education salary contribution: consists of a contribution to the Federal Government (União Federal) for the financing of elementary and middle school (ensino básico). The education salary rate is 2.5%.

The total charges for the Company correspond, on average, to 35.8% (the index for industry). These contributions are paid directly to the INSS, which transfers the contributions that do not pertain thereto to other entities.

Occupational safety and hygiene

Refers to the application of systems and principles established by medicine to protect the worker, actively foreseeing the hazards that, for physical and psychic health, originate from work. The elimination of harmful agents in relation to the worker constitutes the prime purpose of occupational hygiene.

The establishment of an Internal Commission for the Prevention of Accidents (CIPA) is obligatory for companies with more than 20 employees.

A medical exam is obligatory, both at the time of hiring and upon termination, which shall be at the expense of the employer.

Unhealthy activities or operations are those activities that, due to their nature, condition or methods of work, expose employees to agents that are harmful to health, beyond the tolerance limits fixed in accordance with the nature and intensity of the agent and of the length of time that the employee is exposed to such agents. Hazardous activities or dangerous operations are those that, due to their nature or method of work, imply permanent contact with inflammable products or explosives, under highly risky conditions.

All companies are required to maintain their occupational medicine and safety programs renewed, annually, especially those determined by the Ministry of Labor and Employment, namely:

– Environmental Risk Prevention Program (Programa de Prevenção de Riscos Ambientais – PPRA);

– Occupational Health Medical Control Program (Programa de Controle Médico de Saúde Ocupacional – PCMSO);

– Technical Report on the Environmental Conditions at the Workplace (Laudo Técnico de Condições Ambientais no Trabalho – LTCAT).

Law 7,347/85 disciplines the public civil action for liability for damages caused to the environment, the consumer, assets and rights of an artistic, esthetic, historical, and tourist value, with which the Public Prosecution Service ("Ministério Público") has been promoting the protection of the environment and work environment, in cases where it considers that any violation of law is characterized.

Outsourcing

Is the act of transferring the responsibility for the service from one company to another.

Notwithstanding the absence of specific legislation on the matter, the practice of outsourcing in Brazil is steadily on the rise. Its great attraction is that of transferring to third parties the activities that do not conform to the corporate purposes of companies, enabling them to concentrate on their core businesses.

Companies are adopting outsourcing as a means of cutting costs and enhancing performance in the short and medium term. Moreover, outsourcing eliminates direct labor, social security and tax liability, although these liabilities are indirectly passed on to the company by the service provider. Nevertheless, companies that outsource their atividades meio (activities that are unrelated to their corporate purposes), are secondarily liable for the labor and social security obligations of the employees of the company that renders the respective service.

→ Information Technology

General Information

The Brazilian Government has been developing numerous actions, especially since the 90s, with a view to the competitive insertion of the Brazilian information technology industry in the competitive market. The policy for the sector is based on three development fronts: (i) hardware, seeking technological innovation; (ii) software, and (iii) the microelectronics sector.

The past history of changes in the information technology policy relates directly to the preoccupation with providing support to the industry established in the Country and the requirement of creating an attractive climate for foreign capital, culminating in the approval of Law 8,248, of 23 October 1991 ("Information Technology Act"), concerning information technology tax incentives.

The Information Technology Tax Incentives Policy, in particular for the development of hardware is provided for in the Information Technology Act, and in the legislation concerning the Manaus Free Trade Zone (Law 8,387/91 and Decree Law 288/67), which have undergone various alterations over the years (latest alterations: Laws 11,452/2007 and 11,482/2007). As a general rule, information technology goods and services produced in the Country are benefited with the gradual reduction of the IPI (Excise Tax) due up to December 2019, when the benefit will be extinguished, in accordance with the table below and their fiscal classification:

REDUCTION OF IPI DUE	DATE
95%	1.1. to 31.12.01
90%	1.1. to 31.12.02
85%	1.1. to 31.12.03
80%	1.1.04 to 31.12.14
75%	1.1. to 31.12.15
70%	1.1.16 to 31.12.19

For information technology and automation goods produced in the Mid-West Region and in the regions of influence of ADA – Agência de Desenvolvimento da Amazônia (Amazon Development Agency) and ADENE – Agência de Desenvolvimento do Nordeste (Northeast Development Agency), there is an IPI reduction, as shown in the table below (art. 3 of Law 11,077/04):

REDUCTION OF IPI DUE	DATE
95%	1.1.04 to 31.12.14
90%	1.1. to 31.12,15
85%	1.1.16 to 31.12.19

The maintenance and use of IPI credit relating to raw materials, intermediary products and packaging material employed in the industrialization of goods that enjoy the benefit is guaranteed.

The above percentages do not apply to portable microcomputers and to small-capacity digital processing units based on microprocessors, priced at up to R$ 11 thousand, equivalent to US$ 6.40 thousand, and to magnetic and optical disk units, printed circuits with electric and

electronic assembled components, cabinets and power supplies, recognizable as exclusively or mainly designed for such equipment, which have a specific IPI reduction, but also with the planned extinguishment of the benefit in 2019.

The tax benefits of the Information Technology Act are not granted to a company generically, but rather to certain products manufactured locally by the company. The list of information technology and automation goods that may enjoy the tax benefits is contained in Decree 5,906/06 (amended by Decree 6,405/08), which regulates Law 10,176/01, which also alters the Information Technology Act.

Moreover, the granting of the tax benefits of the Law is contingent on the satisfaction of the following requirements – set forth in the Law and regulated by Decree 5,906/06:

– the information technology and automation goods shall be manufactured in Brazil, in accordance with a basic production process (processo produtivo básico) established product-by-product by the Executive Branch;

– there must be investment, on the part of the applicant company, in Research and Development (R&D), specifically in the information technology field, as mentioned below;

– the applicant company is required to institute a quality program, to be defined by the Executive Branch;

– the applicant company is required to adopt an employee profit or income sharing program.

The qualification of a company applying for the enjoyment of tax benefits occurs by means of the publication of a Joint Administrative Rule (Portaria Conjunta) of the State Ministers of Science and Technology, Development, Industry and Foreign Trade and Finance, following an analysis process of the proposed project at the Ministry of Science and Technology. Decree 5,906/06 establishes, among other provisions, the rules relating to the submission of the project, the obligations relating to R&D in information technology and the procedures for fixing and complying with the basic production process of products eligible for incentives. In addition, it contains the appropriate instructions and a roadmap to be followed, in accordance with an Administrative Rule of the Science and Technology Ministry and Development, Industry and Foreign Trade Ministry, for submitting the application and proposed R&D project.

The consideration for the benefit is annual investment in R&D in information technology. This research shall occur in the Country, in a minimum sum of 5% of the gross revenues of the company applying for the benefit, derived from the sale, in the domestic market, of information technology and automation goods. For the purpose of the calculation of gross revenues, the taxes imposed on the said sale, and the purchase cost of the products eligible for the incentive shall be deducted, pursuant to law.

The law and its regulation stipulate in detail the method of allocating resources to be invested in R&D by the applicant company of the benefit, including establishing minimum percentages to be earmarked for agreements with official or accredited research and teaching centers and entities.

The investment percentage in R&D will be reduced progressively, as shown in the table below:

REDUCTION OF INVESTMENTS IN R&D	YEAR
5%	1.1 to 31.12.01
10%	1.1 to 31.12.02
15%	1.1 to 31.12.03
20%	1.1.04 to 31.12.14
25%	1.1 to 31.12.15
30%	1.1.16 to 31.12.19

When involving investments related to information technology goods produced in the Mid-West Region and regions of influence of ADA and ADENE, the reduction of the investment percentage in R&D will observe the following criteria:

REDUCTION OF INVESTMENTS IN R&D	YEAR
3%	1.1 to 31.12.02
8%	1.1 to 31.12.03
13%	1.1.04 to 31.12.14
18%	1.1 to 31.12.15
23%	1.1.16 to.31.12.19

The beneficiary companies of the incentives shall submit to the Science and Technology Ministry, on an annual basis, descriptive reports to evidence observance of the investment percentages required by law. If the beneficiary company fails to observe the legal requirements, the benefit may be suspended, without prejudice to the reimbursement of already enjoyed benefits, adjusted and increased by arrears interest and fines.

The producer companies of information technology and automation goods, whose plants are located in the Manaus Free Trade Zone, shall also invest at least 5% of their gross revenues in R&D annually, in exchange for the tax incentives granted. The funds shall be earmarked for research in the Amazon, in accordance with the project to be submitted by each company to SUFRAMA and to the Science and Technology Ministry. The granting of tax benefits for the information technology sector in the Manaus Free Trade Zone is currently regulated by Decree 5,906/06.

CATI – *Comitê da Área de Tecnologia da Informação* (Information Technology Area Committee) was set up in February 2002 with the mission of managing the resources collected with the companies benefited by the information technology legislation. These resources are earmarked for Information Technology research and development activities.

Digital inclusion program

In addition to the above benefits, Law 11,196, of 21 November 2005, which was regulated by Decree 5,602/05 and amended by Laws 11,482/07, 11,487/07, 11,488/07 and 11,727/08, brought the Digital Inclusion Program, which reduces to zero the PIS/Pasep and COFINS rates levied on the gross revenue derived from the retail sale of:

– digital processing units classified under code 8471.50.10 of the IPI Table (TIPI), up to the amount of R$ 2 thousand, equivalent to US$ 1.16 thousand;

– portable, digital, automatic data processing machines, weighing less than three and a half kilograms (3.5 Kg), with a screen (ecran) area of more than one hundred and forty square centimeters (140cm2), classified under codes 8471.30.12, 8471.30.19 or 8471.30.90 of the TIPI, up to the amount of R$ 4 thousand, equivalent to US$ 2.32 thousand;

– automatic data processing machines, presented in the form of systems, classified under code 8471.49 of the TIPI, containing exclusively one (1) digital processing unit, one (1) video output unit (monitor), one (1) keyboard (input unit), and one (1) mouse (input unit), classified under codes 8471.50.10, 8471.60.7, 8471.60.52 and 8471.60.53 of the TIPI, up to the amount of R$ 4 thousand, equivalent to US$ 2.32 thousand.

– keyboard (input unit) and mouse (input unit) classified under codes 8471.60.52 and 8471.60.53 of the TIPI, respectively, when they accompany the digital processing unit classified under code 8471.50.10 of the TIPI in the maximum amount of R$ 2.1 thousand, equivalent to US$ 1.22 thousand.

These products are also subject to the terms and conditions set forth in the regulations.

These benefits are extended to the purchases made by corporate entities and entities of the public administration, except companies opting for the SIMPLES (Integrated System for the Payment of Taxes and Contributions by Small and Very Small-sized Companies) and apply to sales made on or before 31 December 2014 (MP 472/09).

Software

Law 9,609, of 19 February 1998, protects computer program-related rights, such as the copyright, for a period of 50 years, reckoned from January 1 of the year subsequent to the computer program's release year, or, in the absence thereof, of its creation. This protection does not depend on the registration of the program, which can, however, at the owner's discretion, be registered with INPI (Brazilian Patent and Trademark Office).

The aforesaid rights are also guaranteed to foreigners domiciled abroad, provided that the program's country of origin grants Brazilians and foreigners domiciled in Brazil equivalent rights.

A foreign company may license a program directly for the exclusive use of the end user in the Country or may license it to a company that will distribute it in the market. Moreover, the remuneration for the use or distribution of the software may be freely established by the parties.

With respect to the marketing of software in Brazil, the law merely establishes that the use of computer programs in the Country shall be the subject of a licensing contract. However, in the event of the absence of such license, the tax document relating to the acquisition or licensing of the program copy will be sufficient to prove the regularity of its use. In the case of licensing agreements for the rights to market computer programs of foreign origin, such agreements shall establish the responsibility for the payment of imposed taxes and charges. These acts and agreements will also establish the remuneration of the owner of the computer program rights residing or domiciled abroad. The entity remitting the foreign currency amount, in payment of the said remuneration, shall keep in its possession, for a period of 5 years, all the necessary documents to evidence the lawfulness of the remittances.

In the cases of the transfer of computer program technology (specifically in cases involving the delivery of source codes), the Brazilian Patent and Trademark Office will register the respective agreements, in order for them to produce effects in relation to third parties

The matter currently in hand, in the software area, is the free software versus proprietary software controversy, taking into consideration the licensing issues through the payment of royalties and liberties (or their restriction) with respect to the use, modification and access of source codes. There are many controversial issues surrounding the use of free software in Brazil, especially on account of the fact that certain measures have privileged the use of this type of computer program by the Public Administration entities. Nevertheless, the advantages and disadvantages of its use, including from the legal standpoint, are issues that continue under intense discussion.

In the fiscal sphere, there are many doubts with respect to the applicable taxation, which is an issue that needs to be analyzed on a case-by-case basis.

→ Invitations to Bid — Public Authority Contracts

General Information

According to a provision of the Brazilian Constitution, as a rule, public works, services, purchases, sales and leases, on the part of the Public Authorities, must be procured by an invitation to bid, to ensure that the most advantageous proposal for the Public Administration is selected. Within the federal sphere, the matter is disciplined by Law 8,666 of 21 June 1993, which also establishes the general rules for the direct and indirect public administration, spanning all governmental spheres.

Invitations to bid for the concession of public services and works are also regulated by the Concession Acts - Laws 8,987 of 13 February 1995 and 9,074 of 7 July 1995, in accordance with their particularities, and high relevance for the execution of the public policies of the Brazilian Government.

Nevertheless, in accordance with the Constitution and Bidding Law, there are some situations where the invitation to bid is dispensed with or not required, such as when the bidding process is objectively inconvenient to public interest, owing to the singularity of the intended object - i.e. without equivalents in the market or because of the uniqueness of the offerors, or further, on account of an emergency situation of the Public Administration.

Invitations to bid shall, in general, abide by the following informative principles: a formal procedure, equal conditions for all bidders, publicity of the acts, administrative integrity, compliance with the notice or invitation to bid (which is the internal law of each invitation to bid), confidentiality at the time of the submission of proposals, objective judgment criteria and compulsory award to the successful bidder.

An invitation to bid may be of distinct kinds: competitive bidding, auction, price quotation, invitation, contest type and live floor auction17. The price quotation, invitation and contest types have simplified procedures, due to the limitation of the value of the subject matter to be put up for bid.

The live floor auction type applies solely to invitations to bid organized by the Public Administration for the purchase of common goods and services, i.e., goods with objectively established quality and performance standards practiced in the market, regardless of the estimated contracting value.

Law 8,666/93 also determines that purchases made by the Public Administration should, whenever possible, be processed through a Price Registration System (Sistema Registro de Preços – SRP), which permits the rapid and immediate operation of the Public Administration, with due regard to the isonomy principle and guaranteeing the objective pursuit of the most

advantageous contracting. The SRP is currently regulated by Decrees 3,931, of 19 September 2001 and 4,342 of 23 August 2002.

International invitations to bid, thus defined in the notice itself, permit the participation of Brazilian and/or foreign companies either individually or in a consortium, as established in the document. In order for foreign companies without operations in Brazil to qualify, they must submit documents that are as equivalent as possible to the documents required from Brazilian companies, duly certified and authenticated by the respective consulates, when necessary, and translated by a certified translator. Furthermore, they must have a legal representative in Brazil, with express powers to receive service of process and answer administratively and judicially for the principal.

The purpose of the invitation to bid is to guarantee, among other things, the observance of the constitutional principal of isonomy, the selection of the most advantageous proposal for the administration and the promotion of sustainable national development.

The judgment of the proposals shall be objective, having as its criteria the lowest price, the best technique or the combination of technique and price, according to the type of invitation to bid.

It is prohibited to establish differentiated treatment of a commercial, legal, labor, social security or any other nature, between Brazilian and foreign companies, including as regards the currency, modality and place of the payments, even when the financing of international agencies is involved.

As a tiebreaker criterion, under equal conditions, preference will be ensured, successively, to the goods and services: produced in the Country, produced or rendered by Brazilian companies and produced or rendered by companies that invest in technology research and development in the Country.

In invitation to bid processes a margin of preference may be established for manufactured products and for domestic services that meet Brazilian technical standards.

The margin of preference will be established on the basis of studies reviewed periodically, at intervals of no more than five (5) years, which take into consideration: the generation of jobs and income, the effect on the collection of federal, state and municipal taxes, technological development and innovation conducted in the Country, additional cost of products and services, and, in their reviews, the retrospective analysis of results.

For the manufactured products and domestic services resulting from the technological development and innovation carried out in the Country, an additional margin of preference to the one provided on the basis of the criteria listed above, may be established.

The preference margins by product, service, group of products or group of services, will be defined by the federal Executive Branch. The sum of the margins cannot exceed the sum of 25% of the price of the foreign manufactured products and services.

The above provisions do not apply to the goods and services whose production or rendering capacity in the Country is less than: the quantity to be purchased or contracted.

The margin of preference may be extended, totally of partially, to the goods and services originating from the Member States of Mercosur – Southern Cone Common Market.

In the case of a consortium between a foreign company and Brazilian company, the Brazilian company will necessarily assume leadership, regardless of the origin of its capital (national or foreign).

At the discretion of the Public Administration, guarantees may be required for the contracting of works, services and purchases, which shall not exceed 5% of the contract value, with the exception of cases involving sizeable contracts, of a highly technical complexity and considerable financial risks, for which this percentage may reach 10%. The guarantees may be:

– escrow in money or public debt securities;
– insurance guarantee;
– bank guarantee.

Laws 11,972/09 and 12,188/10 altered the conditions for the sale of goods of the Public Administration (subject to the existence of duly justified public interest) and cases of the waiver of invitations to bid.

Concessions

Brazilian Law allows the State to delegate the provision of public services to third parties by means of concessions, conducted via invitation to bid procedures, whereby the Public Authority awards to private enterprise the right to build or reform the necessary structure to be able to provide the service, exploit it commercially and receive remuneration for the direct supply of the service to the consumer public.

Hence, the concessionaire invests in place of the State, at its own expense and risk under the conditions established and unilaterally modifiable by the Granting Power, but under the contractual guaranty of economic-financial equilibrium, receiving remuneration from the exploitation of the service, in general by means of rates charged directly from its users.

Law 8,987/95 fixes the policies for the delegation of the provision of public services at the federal, state and municipal levels, establishing that any corporate entity or consortium of companies

may be a concessionaire of public services, with due observance, however, of the specific regulations of each sector.

It should be noted that, in the event of a tie between Brazilian and foreign companies, and without prejudice to the application of the provisions of the Bidding Act, preference will be given to the Brazilian company, which may be of foreign capital.

The following criteria will be taken into consideration for the judgment of proposals:

– the lowest rate value of the public service to be rendered;
– the highest offer, in cases involving payment to the granting power for the concession grant;
– the two-by-two combination of the criteria described in items a, b and g;
– the best technical proposal, with its price established in the bid notice;
– the best proposal in relation to the combination of the best rate value of the public service to be provided and best technique criteria;
– the best proposal in relation to the combination of the best offer for the concession grant and the best technique criteria; or
– the best payment offer for the grant following the qualification of technical proposals.

On the subject of PPPs, further details can be found in the following chapter 10 of this study.

→ Public-Private Partnerships in Brazil (PPP)

Public-Private Partnerships (PPPs) are designed for undertakings that would not be otherwise economically attractive, i.e., projects that do not have a natural cash flow that directly permits the structuring of Project Finance, or other form of conventional financial structure.

The general invitation to bid and procurement rules for PPPs within the ambit of the direct and indirect public administration, of the three spheres of government are established in Law 11,079/04 (the PPP Act), which structures the PPP as a new form of concession, which are substantially more dynamic when compared with those provided in the Bidding Act and Public Service Concession and Permission Acts.

The PPP Act innovated with respect to guarantees and other provisions. The main aspects of this act are:

Definition and Object

A public-private partnership is construed as an administrative agreement with the purpose of:

– the concession of public services or public works referred to in Law 8,987/95, when they necessarily involve, in addition to the rate charged from the users, also pecuniary remuneration from the public partner to the private partner; it is the so-called Sponsored Concession;

– the rendering of services of which the Public Administration is the direct or indirect user, even when involving the execution of works or supply and installation of property; it is the so-called Administrative Concession.

The following PPPs are prohibited: (i) in amounts of less than R$ 20 million (equivalent to approximately US$ 11.12 million), (ii) whose service rendering term is less than 5 years or (iii) when intended solely for the supply of labor, the supply and installation of equipment or the execution of public works.

The following guidelines shall be observed in the contracting of PPPs: (i) efficiency; (ii) respect of the interests and rights of the end users of the services and of the private entities in charge of their execution; (iii) non-delegability of the regulation and jurisdictional functions, of the exercise of policing power and of other activities that are exclusive to the State; (iv) tax liability; (v) transparency; (vi) objective sharing of risks between the parties; (vii) financial sustainability and social-economic advantages of the partnership project.

Agreements

In addition to the essential clauses set forth in Law 8,987/95, PPP agreements shall also determine:

– a validity term that is compatible with the amortization of the investments made, which shall not be less than 5 years or more than 35; this provision solved the problem of the term established in the bidding act, which cannot exceed 5 years;

– the penalties applicable to the Public Administration and private partner in case of breach of contract, established in a manner that is proportionate to the seriousness of the fault committed and to the obligations assumed;

– the sharing of risks between the parties, including those concerning acts of God, force majeure, factum principes and an area beyond extraordinary economic control;

– the types of remuneration and adjustment of contractual amounts;

– the mechanisms for the preservation of the modernity of the service rendering;

– the facts that characterize the monetary default of the public partner, the regularization methods and term and the method of enforcement of guarantees, when applicable;

– the objective evaluation criteria of the performance of the private partner;

– the offering, by the private partner, of execution guarantees that are sufficient and compatible with the onus and risks involved, with due regard to the pertinent legal provisions;

– the sharing, with the Public Administration, of the effective economic gains of the private partner, resulting from the reduction of the credit risk of the financing used by the private partner; this provision demonstrates the real partnership, in which, in the case in question, both parties will benefit from any gains that the private partner obtains from its financing entity;

– the inspection of reversible property, in which the public partner may retain payments to the private partner, in the amount necessary to cure any detected irregularities.

Optionally, the agreements may additionally determine:

– the requirements and conditions concerning the transfer of control of a special purpose company (SPC) to its financing entities, with the objective of promoting its financial restructuring and ensuring the continuity of the service rendering;

– the possibility of the issuance of a pledge on behalf of the financing entities of the project in relation to the pecuniary obligations of the Public Administration, which procedure is of great interest to the financing entities;

– the legality of the financing entities of the project to receive compensation for the early extinguishment of the agreement, as well as payments made by the guarantor funds and state owned companies of PPPs, which provision is also of interest to the financing entities.

It is relevant to mention that, at the end of the agreement, the ownership of the property, as set forth in the notice with invitation to bid and agreement, shall be of the Public Administration.

Remuneration

The PPP Act determines that the agreements may establish the payment, to the private partner, of variable remuneration, related to its performance in the execution of the agreement, according to the quality and availability goals and standards defined in the agreement. This procedure is a stimulant for the private partner.

The remuneration of the Public Administration will necessarily be preceded by the availability or the receipt of the service subject of the agreement. The remuneration may also be related to the partial availability or receipt of the subject matter of the agreement, in cases where the respective portion may be utilized by the user of the public service or by the administration. This fact benefits the private partner.

These provisions represent a significant benefit for the Public Administration, since, according to the present invitation to bid system, there is an immediate or short-term cash outlay by the administration. Should the Government lack resources, the consequence will be the interruption of the works, which will not occur in the PPP program.

The payment of the Public Administration's remuneration may be made by bank order, the assignment of non-tax credits, grant of rights before the Public Administration and grant of rights over public property, as well as other means permitted by legislation.

Guarantees

Without prejudice to other guarantees contemplated in legislation, such as the surety insurance, the Law determines the following guarantees for PPP agreements, to be granted by the Public Administration in favor of the private partner:

– lien of revenues, with due regard to the legal exceptions;
– institution or use of special funds provided in law.

It is relevant to mention the existence of the Guarantor Fund (Fundo Garantidor - FG), which is of a private nature and will have separate assets to those of its quota holders and is formed by the contribution of assets and rights made by the quota holders, consisting of cash, government securities, immovable property of public domain, movable property, including shares of federal government-controlled (private) companies or other rights with an asset value.

The FG was formalized by Decree 5,411/05, which authorized the initial transfer, to the said Fund, of the blue chip shares of 15 state or private companies, which were in the possession of the Federal Union, representing approximately R$ 4 billion (US$ 2.42 billion). Banco do Brasil S.A., which is controlled by the Federal Union, was designated to manage and represent the FG.

The guarantees to be granted by FG, whether to the private partner, or to insurance companies, financial institutions and international organizations, may be classified into the following types, considering the assets of the FG:

– surety, without a benefit of order to the surety;
– pledge of immovable property or of rights;
– mortgage of immovable property;

– chattel mortgage;
– other agreements that produce a guarantee effect;
– secured or personal guarantee.

Moreover, bearing in mind that, in principle, it will be up to the private partner to obtain the most significant portion of the resources to finance the PPP project, the agreement may provide for the issuance of pledges relating to the obligations of the Public Administration, in favor of the financing entity, that is to say, the remuneration, directly in the name of the financing entity, and the legality of the financing entity to receive payments through said funds. It is a true subrogation, since, once the private partner has received its remuneration directly from the administration, the financing entity succeeds to this receipt. This innovative procedure, which is unprecedented in the current Bidding Act, will give the financial entity a greater guarantee for the amortization of the amounts financed to the private partner.

The private partner may also grant guarantees to the financing entity, without prejudice to others, represented by receivables, i.e., rate revenues and remuneration originating from the public authority, as the case may be.

Furthermore, the Public Administration may require from the private partner, in guarantee of its performance, the guarantees set forth in the Bidding Act, comprising an escrow in cash or government securities, surety insurance or a bank guarantee, limited to 10% of the agreement amount, when involving works, services or substantial volume supplies, or to five percent (5%), for smaller volume agreements. It may also request a performance bond guarantee.

With the enactment of Law 12,024/2009, it was determined that the Union shall not grant guarantees and make voluntary transfers to the States, Federal District and Municipalities if the sum of expenses of an ongoing nature incurred by the series of partnerships already contracted by such entities has, in the previous year, exceeded three percent (3%) of net current revenue for the year or if the annual expenses of the contracts in force during the ten (10) subsequent years exceed three percent (3%) of the net current revenues projected for the respective years.

SPC – Special Purpose Company

Prior to signing the agreement, the private partner shall incorporate a SPC, which may be publicly or closely held, with the purpose of implementing and managing the PPP object. The SPC will be the owner of the property arising from the investment that the private partner makes during the agreement term, and shall abide by the standards of corporate governance and adopt standard accounting and financial statements, according to regulations.
It is prohibited for the Public Administration to hold the majority of the voting capital of a SPC, except when involving a financial institution controlled by the Government, in case of default of financing agreements.

Invitation to bid

The invitation to bid process shall be preceded by the administrative procedures set forth in Law, among which authorization from the competent authority, based on a technical study, a budgetary forecast for the project during the years of its execution, its inclusion in the Government's multiyear plan, a public consultation for the supply of information and receipt of suggestions and, finally, a prior environmental license or issue of rules for the environmental licensing of the undertaking. The fulfillment of these requirements will strengthen the security, for the private partner, of the effective performance of the PPP agreements by the Public Administration.

Sponsored concessions in which more than 70% of the remuneration of the private partner is paid by the Public Administration will depend on specific legislative authorization.

The contracting of PPPs will be the subject of an invitation to bid of the competitive type, with the pre-qualification of bidders.

The notice with invitation to bid may establish:

– the agreement proposal and execution guarantees, to be offered by the bidder;
– the remuneration guarantees of the public partner to be offered to the private partner;
– the use of arbitration, to be held in Brazil, in Portuguese;

The bidding process for the contracting of PPPs will abide by the current legislation on invitations to bid and administrative contracts and also the following.

– the judgment may be preceded by a qualification phase of the technical proposals, disqualifying bidders that do not attain minimum points scores;

– the judgment may adopt as criteria, (i) the lowest rate amount of the public service to be rendered, (ii) the best proposal by reason of the combination of the technical proposals and offer of payment for the grant, (iii) the lowest remuneration amount to be paid by the Public Administration, (iv) the best proposal by reason of the combination of the criterion of item (iii) with that of the best technique, in accordance with the weights established in the notice.

The notice will define the submission method of economic proposals, permitting written proposals in sealed envelopes or written proposals, followed by open outcry bids.

Management Committee

As provided in Law 11,079/04, a collegium Management Committee was instituted by Decree 5,385/05. This Committee is formed by representatives from the Planning, Budget and

Management Ministry, the Finance Ministry and Cabinet of the President of the Republic and will be responsible, within the sphere of the federal Public Administration, for establishing the procedures for the contracting of PPPs, defining the services considered top priority to be performed under the partnership regime, authorizing the opening of an invitation to bid process for the contracting and examination of the execution reports of the agreements. Other prerogatives of the State, Federal District and Municipality will not be confined to this body, inasmuch as they shall legislate to that effect.

It will be incumbent on the Ministries and Regulatory Agencies, in their respective areas of authority, to submit the notice with invitation to bid to the Management Committee, conduct the bidding procedure, and monitor and supervise the PPP agreements.

It will be incumbent on the Brazilian Monetary Council to establish the rules for the extension of loans to finance PPP agreements.

Financing – Project Finance

The Law that instituted the PPP established a set of rules for the regulation of project finance operations, which are carried out with some frequency in Brazil and abroad.

Project Finance is very common in infrastructure works. It comprises a series of financial structures that are designed to facilitate the implementation of undertakings, whose financing is not primarily supported by the entrepreneurs and that do not depend on the value of the physical assets involved in the undertaking. In any project finance operation, the main source of funds for the repayment of interest and capital is the cash flow of the project itself.

The funding entities shall have at their disposal elements that transmit confidence in the sense that the project is capable of generating sufficient resources to reimburse the amounts expended. To this end, the performance of technical and economic evaluations that previously demonstrate the feasibility of the project, as well as its capacity to generate adequate levels of revenue for repayment and, subsequently, prove to be profitable for the entrepreneurs, is a fundamental phase of project finance.

In view of the various phases, project finance is undoubtedly more costly and demands more preparation time than conventional financing through a loan, for example. The time and resources involved in the evaluations of the project and in the preparation of the legal documentation, during its pre-operating phase, as well as the project control and supervision costs during the repayment period, limit its use to major undertakings, such as infrastructure works, in their various sectors, notably telecommunications, electric power, sanitation, hospitals, mineral exploration and even penitentiaries, in which the amortization of costs can be diluted more easily.

However, the main advantage of Project Finance is the possibility of the mitigation and division of the risks involved. The financing of the project is normally contracted by a Special Purpose Company – SPC, whereas the responsibility of the private investor is limited to its interest in the capital stock of the SPC and to the obligations assumed by it in the project. Therefore, the private investor will respond with its personal assets up to the said limit. Consequently, part of the risks arising from the incapacity of the vector company of the project to produce the expected cash flow is transferred to the financing entity. Other risks are shared among other participants of the project, namely the constructors, service provider companies, insurance companies and future customers. All legal relations in this group of participants will necessarily be governed by solid contracts.

Another significant advantage for the investors is that the debt relating to the financing does not appear in their financial statements, since the indebtedness is contracted by a distinct legal entity, created with the sole purpose of serving as a vector of the investment. Consequently, the contracting of project finance does not affect the investors' indebtedness level and is not subject to possible statutory restrictions on financing operations either.

Project finance may be divided into two distinct phases.

The pre-operating phase of the project covers the period between the notice with invitation to bid and delivery of the project, including the formation of the Special Purpose Company - SPC), feasibility studies and the performance of adequacy tests of the project. In this phase the payment guarantees are also provided, for the finalization and satisfactory operation of the undertaking.

During the aforesaid period, capital amortization of the financing and the payment of interest are suspended.

Following the conversion, an expression meaning the confirmatory mark implemented by the tests that determine that the project is ready to operate, the operational phase begins, during which the vector company will start to receive resources generated by the project's commissioning and, therefore, will also begin to repay the interest and capital of the financing received.

In infrastructure works, the project is executed on the basis of a concession from the government for the construction and operation of the works for a limited period of time, during which the project shall generate the necessary funds to repay the financing and earn profits for its investors. After the passage of the respective period of time, the vector company is normally required by the terms of the concession to transfer the title and ownership of the project back to the State.

This is the most common type of project finance, known by the abbreviation BOT (Build, Operate and Transfer), which represents the obligations of the concessionaire to build, operate and

transfer the property to the granting power. This structure can present small variables, depending on whether the obligation is to modernize the already existing infrastructure, or further, in case the property on which the project is located has had its use granted under a rent.

To date, project finance does not have specific legislation regulating its use in Brazil, being regulated in a subsidiary way by the laws that discipline contracting with the State (the Bidding Act – and the Concession Act), as well as corporate laws and other legislation applicable to the specific segments regulated by their own laws, such as the telecommunications, electric power and sanitation sectors.

With the enactment of the PPP Act, whose primary lines have been analyzed above, a new chapter is opened for the use of project finance for the execution and operation of infrastructure works, with clear rules on the granting of the respective concessions. On the subject of Financing, it is relevant to mention the possible financing of PPPs by the BNDES.

It is also important to mention the program created by the Inter-American Development Bank - IDB, in the sense of funding and financing projects in the infrastructure area, through (i) direct loans or via a consortium with financial institutions to SPCs or (ii) the offering of guarantees for political risks, breach of contract and business risks. The advantage of IDB operations is that they do not require approval from the National Treasury. It is a private risk.

Note also that BNDES determines that, to be able to use its financial collaboration, structured in the form of project finance, the credit operation shall, cumulatively, present the following characteristics:

– the beneficiary is a Joint Stock Company with the specific purpose of implementing the financed and established project to segregate the cash flows, equity and risks of the project;

– the estimated cash flows of the project are sufficient to pay back the financing, and (iii) the future revenues of the project are bound, or assigned in favor of the financing entities18.

For the approval of a project finance operation, the risk classification takes into account the following factors, in addition to those that are normally considered:

– the risk classification of the beneficiary's controllers, in accordance with the dependence of the project and of the financing in relation to same;
– the implementation risk of the project and the respective mitigating factors;
– the beneficiary's degree of leverage;
– the sufficiency, predictability and stability of the cash flows of the project;
– the operating risk of the project and respective mitigating factors, and
– the amount, liquidity and security of the guarantees offered by the beneficiary19.

The project finance operations must satisfy the following requirements:

– the Debt Service Coverage Index (Índice de Cobertura do Serviço da Dívida – ICSD) projected for each year of the project's operating phase shall be at least 1.3. The minimum ICSD may be 1.2 as long as the project presents an Internal Rate of Return (Taxa Interna de Retorno) of 8% per year in real terms.

– the shareholders' own capital shall be at least 20% of the project's total investment, excluding, for the purpose of this calculation, any BNDESPAR equity interests. At the discretion of BNDES, the generation of the project's cash may be considered part of the shareholders' own capital, and

– the operating agreements shall prohibit the granting of loans from the beneficiary to the shareholders and further establish conditions and restrictions on the other payments made by the beneficiary to its partners, for any reason.

In the implementation phase of the project, the requirement of a personal guaranty of the beneficiary's controllers may be waived, as long as the following is observed:

– commitment of the beneficiary's controlling shareholders to complement the company's capital in a sum that is sufficient to finalize the project's implementation;

– execution of agreements that require the contractors and/or suppliers of equipment to conclude the project within the pre-determined budget, on a previously specified date and in accordance with technical specifications designed to guarantee the satisfactory operation and efficient performance of the project, and

– contracting of an insurance guarantee, to the benefit of the financing entities, against risks relating to the pre-operating phase of the project.

BNDES clarifies that in case of doubt regarding the capacity of the shareholders to make their financial contribution to the project, an advance contribution of the own capital will be required as a prior condition for the release of the financing.

In the operating phase of the project, the requirement of the personal guarantee of the beneficiary's controllers may be waived by the cumulative granting of the following:

– pledge or chattel mortgage, in favor of the principal financing entities, of the shares representing the beneficiary's control;

– pledge, in favor of the principal financing entities, of the emerging rights of the concession contract, if any, and

– grant, to the principal financing entities, of the right to assume the beneficiary's control, when permitted by legislation.

The requirement of the index of 130% of secured guaranties may be waived if the beneficiary undertakes:

– not to offer as a guarantee to third parties the assets and receivables of the project without authorization from the principal financing entities, and

– to offer any supervening assets and receivables of the project as a guarantee to the principal financing entities, on their request.

The terms, still according to BNDES, will be determined in accordance with the characteristics of the undertaking, and of the revenues and payment capacity of the SPC, on a case by case basis.

It points out, however, that BNDES's maximum exposure limit will be 75% of the projected total assets of the beneficiary (except project finance for the acquisition of aircraft manufactured in the Country, which will be 85%, and the shareholders' own capital shall be, at least, 15% of the project's total investment, excluding, for the purpose of this calculation, any equity interests of BNDESPAR).

Furthermore, resources originating from the Incentive Program for the Implementation of Social Interest Projects (Programa de Incentivo à Implementação de Projetos de Interesse Social - PIPS) (Law 10,735/03) may also be allocated to the development and expansion of infrastructure in the basic sanitation, electric power, gas, telecommunications and highway sectors, and for irrigation systems, drainage, ports and transport services in general, with the objective of providing for universal access and increasing the efficiency of the products and services rendered.

PPPs in the States of the Federation

The São Paulo State Legislature approved the state PPP program, even before the aforesaid federal law, following the same lines adopted thereby; the São Paulo State Law presents the innovation of the creation of a company – Companhia Paulista de Parcerias – which is fully owned by the State of São Paulo Treasury, though not dependent on it, so that the aforesaid company may incur debts, without impacts on the Fiscal Responsibility Law (Lei de Responsabilidade Fiscal).

Other States like Minas Gerais, Goiás and Santa Catarina and the City of Porto Alegre also already have their respective PPP legislations.

Numerous works are already underway or have been indicated to be the subject of state PPPs.

Final Considerations

It is important to clarify that PPPs are not always the most advantageous solutions for all situations. For example, the contracting of a simple execution of a works, without the provision of the future undertaking's management by private enterprise, does not justify a PPP. Furthermore, the PPP cannot be considered a cure-all for all Brazilian infrastructure problems. The PPP is chiefly designed for long-term and low-profitability projects.

Risks for the private partner certainly exist and should be analyzed on a case-by-case basis. However, it is advisable that, after analyzing the risks, entrepreneurs protect themselves with well-planned operations, are assisted by competent consultants, establish robust agreements and safeguard themselves with solid guaranties and insurance.

→ Telecommunications

General Information

Any entity may apply for a license to provide any telecommunication service in Brazil, provided that it is established in Brazil. The legal framework of this sector establishes an open environment and broad competition. There is no state or private legal monopoly in any service.

Telecommunication services may be rendered by private entities under the public or private regimes. Public services are subject to the principles of universality (shall be provided throughout the territory, regardless of social-economic or geographic conditions) and continuity (the service cannot be discontinued, even if this calls for the intervention of the State). Only Fixed Telephone Service is currently rendered under the public regime.

Licenses for the provision of telecommunication services in Brazil are specific and each type of service requires a license. Technology convergence has made these granting procedures completely obsolete. The intention is to grant one license that can cover all the services, instead of one license for each type. Services rendered under the public regime are the subject of a concession contract, while services rendered under the private regime are exploited through an authorization. By and large, concessions contain more rigid and restrictive clauses, submitting the concessionaire to the strict control of the State, in addition to being granted for a determinate period of time (20 years, renewable). Authorizations are regulated by the principles of free enterprise and minimum intervention. Moreover, concessions shall

necessarily be granted through an invitation to bid process, whereas authorizations may be granted without this process.

Regulatory Agency of the Sector

The telecommunications sector is regulated and supervised by the Brazilian Telecommunications Agency (Agência Nacional de Telecomunicações - ANATEL), which is an autonomous government entity with administrative independence, an absence of hierarchical control, a fixed term of office of its officers, a specialized technical body and financial autonomy. Its prerogatives include the issuance of rules that regulate the services, relationship between users and providers, sanctions, and others. In addition, it supervises the sector, applying sanctions, settling conflicts between providers and users, and exercising certain prerogatives relating to the protection of competition in the sector.

Main Telecommunication Services

FIXED TELEPHONE SERVICE: This service is used primarily for voice communication. As a result of the greater flexibility of the General Grants Plan, there was a merger of two large concessionaires. With this, a total of 3 concessionaires (subject to the public regime) are currently in operation and various companies authorized to provide services under the private regime. It is the most basic telecommunication service and is available in all areas of the country. Concessionaires are required to offer this service in all Brazilian localities. Any entity may apply for a grant for new fixed telephony authorizations, under the private regime, which are not subject to an invitation to bid process, or the universalization goals.

PERSONAL MOBILE SERVICE (Serviço Móvel Pessoal – SMP): This service is rendered exclusively under the private regime. Since the licenses for this service involve the assignment of radio frequencies, they are granted through an invitation to bid process. There is predominance in Brazil for pre-paid SMP services, which, contrary to what was imagined, were the services really responsible for the universalization of telecommunication services in Brazil. Third generation (3G) cellular telephony services (broadband, internet, data, voice and image transmission, among other conveniences) are currently in the consolidation phase in the Country. As in the advanced countries, access to broadband internet by SMP is the great tendency for the coming years.

MULTIMEDIA COMMUNICATION SERVICE (Serviço de Comunicação Multimídia): This service permits the provision of audio, video and data signals, at the national and international levels. Any entity may apply for this authorization and its granting is not subject to an invitation to bid process (except if there is an application for radio frequency). It is a more generic license, especially adapted for the provision of corporate services that need the transfer of data, voice and images between various points.

MASS COMMUNICATION SERVICES (Serviços de Comunicação de Massa): These services are divided into Radio broadcast Services (including Radio and Television services) and Pay Television. The Radio broadcast Services are not subject to ANATEL jurisdiction, and are regulated by their own rules, under the jurisdiction of the Communications Ministry. The pay Television Services, however, fall under the regulatory control of ANATEL. There are four types of Pay Television Services, each of which is regulated by distinct rules: (i) Cable TV, which is the transmission of audio and video signals by physical medium, (ii) Multichannel Multipoint Signal Distribution Service, which carries out the distribution of signals via terrestrial microwaves; (iii) DTH, which is pay television by satellite, and (iv) Special Pay Television Service, which is practically obsolete, and the characteristic of which is the emission of codified signals by the radio frequency spectrum, with the possibility of the decodified emission of signals during certain periods.

Other relevant regulatory aspects

INTERCONNECTION: Interconnection is obligatory between community interest service providers. The conditions and prices paid for interconnection are freely negotiated by the parties, though there are regulated maximum prices for each type of interconnection. ANATEL maintains a rigid control over the matter, obligating interconnection, guaranteeing fair practices in the market and also arbitrating contractual conditions, when the parties do not reach an agreement.

RADIO FREQUENCY USE: The use of Radio frequencies in Brazil is subject to an onerous authorization granted by ANATEL, associated with a given telecommunications license. In case there is more than one party interested in a given radio frequency in one same locality, the grant will take place via an invitation to bid process; otherwise, only the public price for the use of the radio frequency is due. Some licenses, such as those for SMP, already include in the invitation to bid procedure the right of use of radio frequencies, for they are inherent to this type of telecommunications system.

SATELLITES: The provision of space segment capacity in Brazil may be done by Brazilian satellites (that use orbital resources notified by Brazil) or foreign satellites (that use other orbital resources). The grant for the right to exploit Brazilian satellites is awarded on an onerous basis, including the corresponding radio frequencies and is generally the subject of an invitation to bid process. The right to the exploitation of Brazilian satellites for the transport of telecommunication signals is granted for a period of up to fifteen years, which may be renewed only once.

The provision of foreign satellite capacity in the Country may only be conducted through a representative agent established in Brazil, pursuant to the regulations. It is interesting to note that the law gives preference to the contracting of telecommunication services via Brazilian satellites, when the commercial conditions are equal to the foreign satellite services.

ABSENCE OF LIMITS ON FOREIGN CAPITAL: Overall, there are no impediments to the presence of foreign capital in telecommunication companies in Brazil. However, the telecommunication services provider company must be established in Brazil and the majority of its capital shall be held by a company with its principal place of business and administration in the Country. Consequently, it is necessary to incorporate a holding company in Brazil, which in its turn holds the majority of the capital of the telecommunication service provider entity. The Cable TV law, however, limits the grant of this license to entities incorporated in Brazil in which at least 51% of the voting capital is owned by native Brazilians or persons naturalized Brazilian for more than 10 years. Hence, the participation of foreign capital in Cable TV companies is limited to 49% of the voting capital. These restrictions tend to disappear in the short term.

Without prejudice to the foregoing considerations, it is relevant to mention Law 12,349/2010, which upon modifying the above mentioned Bidding Act, established that in the procurement for the deployment, maintenance and enhancement of information technology and communication systems, considered strategic by an act of the federal Executive Power, the invitation to bid may be limited to goods and services with technology developed in the Country and produced in accordance with the basic production process referred to in Law 10,176, of 11 January 2001.

→ Electric Power Sector

Structuring of the Sector

SEGREGATION: In accordance with the Federal Constitution, it is incumbent on the Federal Union to exploit, either directly or through authorizations, concessions or permits, electric power services and facilities and the utilization of water courses for energy purposes, in articulation with the States in which the hydro-energy potential is located. It is, thus, a public service.

Through Law 9,074/95, the electric power generation, transmission and distribution activities were segregated and became the objects of distinct grants.

COMPETITION: Following the separation of the generation, transmission and distribution activities, competition was deployed in each of these segments via the granting of concessions, permits and authorizations granted by the competent regulatory agency: the Brazilian Electricity Regulatory Agency (Agência Nacional de Energia Elétrica - ANEEL).

HYDROELECTRIC GENERATION AND ALTERNATIVE SOURCES: Brazil has a very particular power generation situation, inasmuch as it has the largest hydrographic basin of the planet and a great unexploited hydroelectric potential in the Country.

Moreover, alternative electric power generation sources are being exploited more and more, be it to minimize the impacts of irregular rain patterns, or to protect the environment. Examples of such sources include: thermal, wind, biomass and solar.

According to Decree 2,003/06, such plants may be isolated (i.e., not connected to the National Interconnected System – Sistema Interligado Nacional - SIN), integrated (electrically interconnected to the System and with power dispatched by the National System Operator (Operador Nacional do Sistema - ONS) and interconnected (interconnected to the system, without dispatch by the ONS).

The feasibility of the construction of new plants is managed by ANEEL, which avails itself of the grants disciplined by the country's Administrative Law for this purpose, which can be summarized as follows:

– exemption of grants for small-scale activities;
– need of an authorization grant for medium-scale activities, and
– need of a concession grant for large-scale activities.

The agents that operate in the electric power generation sector include the (i) Independent Electric Power Producer (PIE) figure, which can be both a corporate entity or a group of companies united in a consortium that receives a concession or authorization from the Granting Power to produce electric power to be partially or fully commercialized, at its expense and risk and the (i) Electric Power Self-producer figure, which is a corporate entity or individual or companies united in a consortium that receives a concession or authorization to produce electric power for its own exclusive use.

Also concerning generation, it is relevant to mention: (i) the existence of mechanisms for the optimization of the system's operation, by means of the guaranteed and secondary electric power of the plants, and (ii) the existence of the Electric Power Reallocation Mechanism (Mecanismo de Realocação de Energia - MRE), which operates in the compensation of electric power among the generators, and also, the strong growth in the generation of alternative electric power sources, notably co-generation, principally from biomass, and wind generation.

Co-generation is an example of this growth. This activity consists of a heat and electric power production process, along with another undertaking, from one single fuel that is common to or a sub-product of the latter. For example, the burning of natural gas or organic waste (biomass) generates thermal energy (heat) and, at the same time, drives the generators.

This activity allows companies to become self-sufficient in the production of energy with the help of gas or of the industrial waste itself. The material that was previously discarded by the pulp industry, for example, is now used as fuel to heat the boilers.

Companies that wish to invest in co-generation must obtain qualification from ANEEL for the implementation of their projects, as regulated by Resolution 235, of 14 November 2006.

Recently, ANEEL approved the installation of an additional nine wind farms and the board of directors of BNDES approved financing of R$ 790.3 million (corresponding to US$ 479 million) for their installation. With this, Brazil currently has 51 wind farms in operation and that have an installed capacity of 937 MW.

In addition to these, another 18 projects are under construction, with a further 500.8 MW to go into operation during 2011.

TRANSMISSION: Transmission is the movement of the electric power generated in high current/voltage by means of conductors.

This and the generation activities are regulated by the Granting Power (Poder Concedente), since they involve a public service.

Essentially, it is possible to affirm that the transmission facilities may be: (i) those that are designed to form the basic network of the interconnected systems, (ii) those that are of the distribution concessionaire's own scope, (iii) those of the exclusive interest of the free consumer, (iv) those that are of the exclusive interest of the generating centers, and (v) those whose voltage is below 230 kV.

These definitions are relevant, since only the transmission facilities that make up the basic network of interconnected electric systems are the object of a concession, granted through an invitation to bid (Law 9,074/95). The transmission facilities of the distribution concessionaire's own scope, for example, may be considered an integral part of the distribution concession by the Granting Power. And the transmission facilities of the restricted interest of generating centers are considered component elements of the respective concessions, licenses or authorizations.

Likewise, the transmission lines of the restricted interest of the development of independent production may be granted or authorized, simultaneously or supplementarily to the respective agreements for the use of public property.

With the increase in the number of generation plants in various regions of the Country the tendendy is for the number of transmission lines put up for bid by ANEEL to grow, so as to guarantee their movement in the SIN, which will result in the increase of investments in this sector.

It is relevant to mention, also, that the annual revenue of the concessionaires is obtained through the payment of the tariff of use of the transmission system (tarifa de uso do sistema de transmissão - TUST)

DISTRIBUTION: The transmission lines convey the electric power to the distribution lines, which receive the power after the transformation of its voltage. The final objective is the delivery of the electricity to the end consumers.

The provision of public electric power distribution service depends on the granting of a concession by the Granting Power. The suppliers and respective free consumers are guaranteed access to the distribution systems of public service concessionaires and permit holders, subject to the reimbursement of the transport cost involved (TUSD), calculated on the basis of the criteria laid down by the granting power.

A relevant issue involving the distribution market is the universalization of services to isolated communities in the Country.

According to information provided by ANEEL, the electricity distribution market is serviced by more than 64 state or private concessionaires. The presence of national, North American, Spanish and Portuguese companies, in the control groups of various private concessionaires can be verified. A total of roughly 47 million consumer units are served, of which 85% are residential consumers, in more than 99% of Brazil's municipalities.

It is undeniable that, in addition to the satisfaction of the universalization goals by up to 2015 (Light for Everyone Program – Programa Luz Para Todos), the main business opportunities in the national electric power market relate to the offer of new generation plants for exploitation by private enterprise and construction of transmission lines.

Lastly, it is relevant to mention the holding of the 2nd Periodical Tariff Review Cycle of the Electric Power Distributors (2o Ciclo de Revisão Tarifária Periódica das Distribuidoras de Energia Elétrica – RTP), which started in 2007 and will extend to 2010, according to the timeline announced by ANEEL.

Relevant Market Information

There are no regulatory restrictions in Brazil that prevent free foreign ownership in the capital of electric power companies. However, one of the great challenges facing ANEEL, in the regulation of the electric power sector, is the restriction of the concentration of economic groups that might jeopardize the country's competitive environment.

It is relevant to mention that in spite of proposals to amend the Federal Constitution, the restriction remains for private foreign or Brazilian capital in the exploitation of nuclear services and facilities, which is a direct prerogative of the Federal Government.

Investment opportunities

To begin with, the recent crisis and slowdown in the world economy affected the electric power sector in a more positive than negative way, since the growth in the demand for power was signalling a possible collapse in supply due to the absence of available power for sale.

In spite of this, there are already signs indicating that the generation, transmission and distribution activities will be expanding in the next few years, as well as the energy efficiency goals and diversification of the Brazilian energy mix, in order to keep pace with the growth that is expected from the Country and avoid a power supply crisis.

One of the main challenges facing the sector will be to come up with a solution that promotes the development of Brazilian industry and, at the same time, permits the entry of Brazilian and foreign investors to add knowledge and technology to industry-related services.

This solution should be based on clear rules, security in the performance of signed contracts, guarantee of alternative dispute resolution methods and, above all, on the strengthening of partnerships that can enhance the benefits obtained both by Brazilian and foreign investors.

The attrativeness of the power sector stems, fundamentally, from the following factors: (i) an expanding free and captive consumer market; (ii) new policies designed to diversify the Brazilian power mix; (iii) unexploited or underexploited natural potentials and technological divides (example: nuclear energy); (iv) Brazilian industry with a solid base; (v) the existence of incentive programs for investors such as PROINFA, PAC, REIDI, and others, and (vi) other factors, including foreign exchange stability, and the outlook of the Country's growth over the coming years, etc.

Financing

BNDES has played an important role in financing the expansion and modernization of the electric power sector. This has allowed for the execution of projects that call for long maturation periods and substantial investments. The Bank's activities in this sector are aimed at guaranteeing the supply of electric power with quality, security and affordable rates, meeting the needs of the economy and of society as a whole.

Important aspects in the generation segment are not only the financing extended to the hydroelectric power plants, but also the pursuit for the development of alternative sources of energy – Small Hydroelectric Centers (Pequenas Centrais Hidrelétricas – PCHs) and energy efficiency projects (PROESCO). It is important to mention also the special financing lines for such projects as the Plants located on Rio Madeira.

According to information contained on the BNDES site (www.bndes.gov.br), as part of the Growth Acceleration Program (Programa de Aceleração do Crescimento – PAC), on 25 January 2007, BNDES approved a reduction in the interest rate for the power generation, transmission and distribution, gas production and distribution, and railroad, port, airport, highway, sanitation and urban transport sectors.

In addition to the BNDES, other domestic financing sources may be used, such as the regional fostering agencies, the commercial banks and investment and equity funds.

Lastly, it is relevant to mention, among the foreign loan and financing sources without governmental guaranties, the Interamerican Development Bank (IDB) and World Bank (IBRD), both of which are already operating in Brazil in the electric power sector.

→ Basic Sanitation

Law 11,445, which was enacted on 5 January 2007, established the national guidelines and federal policy for basic sanitation in the Country.

In the first place, the aforesaid Law defines basic sanitation as the group of services, infrastructure and operating facilities for the supply of drinking water, sanitary sewer collection, urban garbage collection and disposal, solid waste management and drainage, and the management of urban rainwater.

The public basic sanitation service shall be provided on the basis of the following principles:

– universalization of access;

– integrality, construed as all the activities and components of each of the various basic sanitation services, providing the population with access in conformity with its needs and maximizing the effectiveness of actions and results;

– water supply, sanitary sewer collection, urban garbage collection and disposal and solid waste management carried out in a manner that is in keeping with public health and the protection of the environment;

– availability, in all urban areas, of rainwater drainage and management services that are in keeping with public health and the safety of life and public and private property;

– adoption of methods, techniques and processes that consider local and regional peculiarities;

– articulation with urban and regional, housing, combat and eradication of poverty, environmental protection, health promotion and other development policies of relevant social interest geared to the enhancement of the quality of life, for which basic sanitation is a determinant factor;

– economic efficiency and sustainability;

– use of appropriate technologies, considering the payment capacity of users and the adoption of gradual and progressive solutions;

– transparency of actions, based on institutionalized information systems and decision making processes;

– social control;

– safety, quality and regularity;

– integration of infrastructures and services with the efficient management of water resources.

It is important to mention that the use of water resources for the provision of public basic sanitation services is subject to a right of use grant, under Law 9,433/97.

The delegation of the organization, regulation, inspection and provision of public basic sanitation services is possible. However, it will be the responsibility of the owner of the services to formulate the respective basic public sanitation policy.

As a rule, the participation of entities that do not belong to the Public Administration is not forbidden, provided that a contract is signed.

The economic-financial sustainability of the provision of public basic sanitation services should, as a rule be conducted by means of remuneration for the payment of the services. Public prices, rates and tariffs may be established for this purpose. The adoption of tariff and non-tariff subsidies to the benefit of users and places that do not have the payment capacity or sufficient economic scale to cover the full cost of the services (low income concept) is possible. Evidently and pursuant to law, the public prices, fees and tariffs will be adjusted and reviewed periodically.

Thus, as occurs in the electric power sector, the possibility of the cut of supply of the service due to the default of its users (provided that preceded by prior notice), was established, except in cases of default of sectors considered essential (health, education, collective admission of people) and of low income users, where minimum conditions for the maintenance of the health of the affected persons must be preserved.

The Law created the National System of Information on Basic Sanitation (Sistema Nacional de Informações em Saneamento Básico – SINSA) with the objectives of: (i) collecting and systematizing data relating to the conditions for the provision of the public service; (ii) providing statistics, indicators and other relevant information for the characterization of supply and demand, and (iii) permitting and facilitating the monitoring and evaluation of the efficiency and effectiveness of the services provided.

The establishment of the Federal Basic Sanitation Policy was reserved for the Federal Government, which determined its guidelines. The objectives of the Policy were also listed, which included "minimizing the environmental impacts related to the implementation and development of basic sanitation actions, works and services and ensuring that they are executed in accordance with the environmental protection rules, the use and occupation of the soil and health."

The federal government announced that, in 2010, more than R$ 6 billion, corresponding to US$ 3,63 billion, wouldl be spent on basic sanitation in the Country, within the works and services of the Growth Acceleration Program (PAC), creating opportunities for the private sector – albeit in the form of consortiums or partnerships with the public sector.

→ Environmental Issues

In a ranking of countries, prepared by the universities of Yale and Columbia in 2005, concerning the measure of the environmental sustainability index, Brazil occupied 11th place, in front of some developed Nations. The result was due, on the one hand, to the privilege of having a large biodiversity, abundant forests, and fresh water supplies; and on the other, to governmental action, which has developed a severe system for controlling, preventing and punishing those who are guilty of environmental damage. In this context, environmental awareness and compliance with the environmental protection laws have guided the foreign investor that intends to set up operations in Brazil.

The environmental area has generated excellent investment opportunities in the Country. Among the various environmental projects currently in progress in Brazil, mention is made of the experiences in the deployment of Clean Development Mechanisms (CDM), provided for in the Kyoto Protocol, which was ratified in Brazil by Legislative Rule 144, published on 21 June 2002, such as the already implemented carbon sequestration projects and others that are in the process of implementation.

It is relevant to mention that Brazil is an attractive investment target for projects related to the reduction of greenhouse gas emissions, as is the case of biodiesel. The country has 477 CDM projects, behind only China and India. In accordance with estimates of the Ministry of Science

and Technology, Brazil is responsible for the reduction of 398,867,673 tons of CO2e, which corresponds to 5% of the world total, for the first obtainment of credits period, which can be of a maximum of 10 years for fixed-period projects or 7 years for renewable-period projects (the projects are renewable for a maximum of three 7-year periods, giving a total of 21 years).

The growing concern with the environment has also generated impacts in the energy sector, increasing the interest for the implementation of alternative and less polluting sources of energy such as biodiesel, small hydroelectric power centers ("PCH") aeolian energy and natural gas, the same occurring in various other sectors, in pursuit of viable environmental solutions.

All this growing demand for "clean" technologies and production processes and the correct discard of waste, in its turn, increases interest in the supply of correlate goods and services, necessary for the implementation of environmental sustainability. On this aspect, it is relevant to mention the promulgation of Law 12.305/10, which instituted the National Solid Waste Policy ("Política Nacional de Resíduos Sólidos"). This law determined the extinguishment of all open dumps ("lixões") existing in the country. This fact could bring excellent opportunities of investment in sanitary landfills or solid waste reutilization plants, to the extent that economic incentive mechanisms were determined to accelerate investments.

This law also brought obligations, the principal of which refers to the need to implement reverse logistics systems for some sectors. Producers of agrochemicals, consumer electronics, tires, batteries, lamps and lubricant oils are immediately required to implement these systems. In the future all sectors of the Brazilian economy will have to adapt to this new reality.

In addition to the investment opportunities related directly to the environment, it is important that the foreign investor conducts its operations in Brazil with caution, analyzing environmental liabilities in operations involving company acquisitions, observing the need to undertake prior evaluation of the prevailing licensing system when directly establishing operations in the Country (types of licenses to be obtained, need of the preparation of an Environmental Impact Study, identification of the impacts, and others), or, further, making the necessary adaptations to the licenses granted as a result of amendments in the environmental legislation, even if the company has already received authorization to operate from the licensing authority.

The reason being, that Brazilian environmental legislation is complex, since in addition to the federal rules established in the Federal Constitution of 1988 and in laws of a national scope, the States and Municipalities also have authority to legislate on environmental issues, on an improper concurrent basis, though in the event of a conflict of laws, the most protective rule to the environment prevails.

The environmental legislation is also supplemented by various rules of an infra-legal nature, such as normative ordinances and instructions enacted by the agencies in charge of environmental management that make up the National Environmental System (Government

Council, CONAMA, Environmental Ministry, IBAMA, state and local environmental agencies).

Moreover, liability by succession, in the case of the acquisition of a company (whether by acquisition of control or purchase of assets) that presents an environmental liability makes it essential to conduct an environmental audit prior to concluding the transaction, both from the legal and technical points of view, including as regards the possible transfer of environmental licenses in the cases of the purchase of assets.

In other words, it is highly recommendable that the foreign investor is knowledgeable about this legal framework and takes the necessary precautions to avoid the application of penalties that can also render the undertaking in the country impracticable and result in the criminal condemnation of the entrepreneurs, the need to repair the environmental damage and indemnify the damage caused to third parties. Moreover, it is important for the investor to be familiar with some of the existing legal mechanisms to try and minimize the losses of any undertaking that has perhaps failed to abide by the legal precepts.

→ Journalistic and Radio Broadcasting Companies

The Federal Constitution of 1988 originally closed the doors to the participation of foreign capital in newspapers and broadcasting stations.

However, in May 2002 Constitutional Amendment 36/02 was approved, which modified the constitutional text, with the purpose of:

– authorizing corporate entities organized under Brazilian laws and based in the Country to control journalistic and broadcasting companies, with an ownership interest of up to 100% of the capital, and

– authorizing the participation of foreign capital in journalistic and broadcasting companies up to the limit of 30% of the total and voting capital; this participation may only occur in an indirect manner, i.e., through a corporate entity organized under Brazilian laws and based in Brazil.

In an attempt to reserve to Brazilians the control over the content published or broadcast by newspapers and radio and television broadcasting stations, Constitutional Amendment 36/02, and subsequently, Law 10,610/02, determined that:

– the management of journalistic or broadcasting company activities and the responsibility for establishing the content of their programming shall directly or indirectly belong to native Brazilians or persons naturalized Brazilian for more than 10 years; and

– the editorial responsibility and the activities involving the selection and direction of the programming aired in any social communication media are limited to native Brazilians or persons naturalized Brazil for more than 10 years.

Without prejudice to the observance of the aforesaid 30% limit for foreign capital participation, the law permits the participation of share portfolio investments in broadcasting companies, without observing the concentration limits of Brazilian legislation, provided that their owner does not indicate an administrator in more than one company provider of broadcasting services, or in its respective controllers, or holds more than one ownership interest constituting the control of or joint venture with such companies.

Share portfolio investments are construed as the resources invested in the shares of publicly held companies, by individual and institutional investors, the latter defined as investors, based or domiciled in Brazil or abroad, who invest resources in the securities market, in a diversified manner, in compliance with legal or regulatory provisions or provisions of their incorporation acts, in which each share shall be nominally identified.

Lastly, it should be clarified that for Brazilian law, broadcasting service is characterized as the wireless terrestrial transmission of sounds (radio) or images and sounds (television), and is designed to be received directly and freely by the general public. The various pay television services (Cable TV, MMDS and DTH) are considered telecommunication services by Brazilian legislation and are submitted to a different legal regime from the one that applies to broadcasting services.

→ Acquisitions of Companies

The total or partial acquisition of a Brazilian company by foreign capital may occur especially through:

– the acquisition of shares or quotas corresponding to the respective capital;
– the subscription of a capital increase in the company involved;
– the acquisition or subrogation of an establishment;
– other means involving those listed above, but within a tax planning or corporate reorganization.

There is also the leasing of an establishment figure. Though this figure does not constitute the acquisition of an establishment or activity, it presents implications of a legal order, as indicated further on.

An acquisition may be conducted directly by a company domiciled abroad or by its duly established subsidiary in Brazil, in most cases involving the payment of a premium. For the

purpose of the possible tax benefit of the premium paid by the acquirer, with a view to its amortization and allocation as deductible expense, in strict observance of the applicable legislation, it is in general more advantageous for the acquisition to be made by the Brazilian subsidiary or by a company incorporated by the latter.

Whatever method is adopted for the acquisition, special care should be taken by the foreign investor, with respect to the following:

– choice of a prospective local partner (in the case of a joint venture), based on an in-depth analysis of its financial conditions;

– analysis of the financial, market and legal status of the company involved;

– appraisal of the intended transaction, especially in relation to any premium to be paid;

– analysis of the company's legal and accounting situation, particularly: tax registrations, licenses for opening and operating establishments, environmental licenses, possible special authorizations, depending on the company's area of activity and its corporate, tax, labor and fixed asset status, and its situation in relation to judicial proceedings, contracts, environmental requirements, real estate (owned and leased), trademarks, patents, technology, the consumer protection code and sanitary surveillance legislation;

– analysis of the transaction's compliance with the Brazilian antitrust legislation.

Among the issues listed above, the prior study of the financial situation of the company and prospective partner, and analysis of the company's position in the market, and appraisal of the transaction are generally carried out by a local bank with experience in this type of transaction. The other conditions are analyzed by lawyers and auditors, through a due diligence to be conducted in their respective sectors of expertise. In the environmental area, the work of the lawyers can be accompanied by specialized technical consultants who will analyze the industrial practices of the target company, in order to determine the existence of any environmental liability of the company that it is intended to acquire. Note that various cases recently verified in Brazil, relating to contamination generated several decades ago and that have only now started to produce direct consequences, indicate the need for a rigorous environmental audit prior to an acquisition. These professionals will issue reports presenting the results of their respective interventions.

With respect to due diligences in the field of competition law, special attention should be given to the study of any administrative proceedings involving the target company that are pending with the Brazilian Competition Defense System (Sistema Brasileiro de Defesa da Concorrência – SBDC), as well as the existence of distribution contracts and any contracts or agreements entered into with competitors of the company, and other issues.

Depending on the transaction, letters of intent, acquisition instruments, shareholder or partnership agreements and other documents will have to be established between the parties to contract, possibly involving the creation of new companies and/or the transformation of the existing company into a different type of company.

It is customary in such operations to obtain guaranties from the sellers of the company for contingent concealed liabilities and asset inconsistencies, among which the most common are: mortgage, bank, pledge of shares, and personal guaranties and the retention of a portion of the price through an escrow agreement (depósito) with a bank with experience in the matter in question.

All the foregoing precautions are important, especially in tax planning and corporate reorganization operations conducted by company sellers, in view of the tax succession and succession of operations issues, with a view to avoiding the occurrence of capital gain by the sellers. These structures may have a negative impact on the acquirer, especially after the coming into effect of the National Tax Code reform, aimed at preventing tax avoidance.

The new Brazilian Civil Code brought various important provisions on the subject of acquisition or subrogation, and on the leasing of establishments, which will have a direct impact on operations between companies, regulating certain commercial aspects that did not previously receive legal treatment or that were the object of free negotiation between the Parties.

Among these, we may mention some innovations with respect to the negotiation of a business establishment under the aegis of said Civil Code: a) the need for the publication of contracts, as well as the registration of their terms alongside the Commercial Registration of the transferor company, in order for them to produce effects against third parties; b) the requirement of the payment of all creditors or the express or tacit consent thereof in case the seller is left with insufficient assets to settle all of its liabilities; c) the responsibility of the acquirer for the debts prior to the transfer, with the joint and several liability of the transferor for one year, and d) the prohibition of competition on the part of the transferor for the period of five years, unless there is express authorization for such.

Moreover, certain provisions of the new Bankruptcy and Company Reorganization Act (Law 11,101/05) and Complementary Law 118/05, with respect to the acquisition of branches and production units and the joint or separate acquisition of assets, belonging to companies undergoing judicial reorganization or even to the debtor companies, deserve mention.

Indeed, in either of these cases, the subject of the transfer during the course of the judicial proceeding will be free of any encumbrance and there will be no succession of the buyer to the obligations of the debtor, including those of a tax, labor and occupational accident nature.

→ Manaus Free Trade Zone and Export Processing Zones, and Areas of Former Sudene and Sudam

Manaus Free Trade Zone (ZFM)

ZFM is a free trade area for imports and exports, located in the Western Amazon Region, with three activity centers, applying to both the domestic and international markets: commercial, industrial and agribusiness (DL 288/67, art. 1). The legal lifetime determined for the ZFM is until 31 December 2023 (EC 42/03 and article 94 of Decree 7,212/2010).

The industries established in ZFM enjoy the following fiscal benefits (with the exclusion of firearms and ammunition, tobacco, alcoholic beverages, passenger cars, perfumery products and toiletries and, with some exceptions, cosmetic compounds and preparations), in accordance with art. 3, paragraph 1 of DL 288/67, with the alterations of Law 8,387/91, with a view to the substitution of imported goods for nationally manufactured goods:

IMPORT DUTY: exemption (art. 3 of DL 288/67), whereas the goods brought into ZFM may, even if used, be subsequently exported overseas, with the maintenance of the exemption of the duties assessed on the importation (art. 127 of Law 11,196/05). For some sectors the exemption is partial, of 88% of the Import Duty.

EXPORT DUTY: exemption (art. 5 of DL 288/67);

EXCISE TAX (IPI): exemption for imported products consumed in ZFM and for products that though industrialized in ZFM are to be sold in another point of the Brazilian territory, except for products that are industrialized through packing or repacking, in which case they will be subject to IPI and also to the import duty related to raw materials (RIPI – Excise Tax Regulation, art. 81, II), intermediary products and the imported packaging materials employed therein (art. 7 of DL 288/67 with the alterations of Law 8,387/91).

STATE VAT (ICMS): exemption, barring a few exceptions, on the issue operations of industrialized products of domestic origin for sale or industrialization in the Municipalities of Manaus, Rio Preto da Eva and Presidente Figueiredo in ZFM, provided that the goods are consumed locally and satisfy other legal requirements (RICMS – State VAT Regulation, art. 84 of Annex I).

NON-REBATABLE CORPORATE INCOME TAX (IRPJ) and surtaxes levied on the profit of the exploitation of the undertaking: for the projects approved as of 1 January 1998 a reduction is granted, observing the following percentages: 75% from 1 January 1998 to 31 December 2003, 50% from 1 January 2004 to 31 December 2008 and 25% from 1 January 2009 to 31 December 2013, providing that the provisions of the labor and social security legislation and the environmental protection and control legislation is observed by the beneficiary company (RIR – Income Tax Regulation, art. 554, paragraph 4). These benefits do not apply in relation to tax

periods ending as of 1 January 2014 (RIR, art. 554, paragraph 5). This fiscal benefit may be used for up to ten (10) years from the tax period in which the undertaking enters into the operating phase (art. 557 of the RIR).

PIS (Contribution to the Social Integration Program) and COFINS (Contribution for Funding of Social Welfare Programs): the rates imposed on sales revenue from goods intended for consumption or industrialization in the Manaus Free Trade Zone – ZFM, by a corporate entity established outside the ZFM are reduced to zero (0), barring the exceptions set forth in Law 10,996/04.

Law 11,196/05 brought the reduction to zero (0) of the PIS and COFINS rates imposed on sales made by producers, manufacturers or importers established outside of the ZFM, of products subject to differentiated taxation designed for consumption or industrialization in ZFM (art. 65). The law also instituted tax substitution on the resale of products within the ZFM.

The suspension of PIS and COFINS was also introduced on imports, by establishment located in the ZFM, of goods intended for industrialization, such as raw material, intermediary products and packing material, as well as new machines, apparatus, instruments and equipment for incorporation into the fixed assets of the importer corporate entity (art. 50 of Law 11,196 and paragraph 1 of art. 14 of Law 10,865/04).

A considerable number of foreign capital companies are established in the ZFM, on account of the numerous incentives granted and the absence of restrictions on foreign capital (except for those indicated in this study). There are also other incentives, such as the exemption of IPTU (Municipal Property Tax), some financial credits and similar incentives, which vary in accordance with the venue of the company's registered office, industrial production sector and other items.

Processing Zones (ZPEs)

ZPEs receive tax, foreign exchange and administrative benefits, with terms of up to 20 years (art. 8 and sole paragraph of Law 11,508/07). There are no restrictions on foreign capital, or foreign exchange or customs barriers in the ZPEs.

There are, however, some limitations: prohibition of the establishment, in an ZPE, of companies whose projects evidence the simple transfer of industrial plants already established in the Country (art. 5 of Law 11,508/07), and the prohibition of the sale and manufacture of certain products (firearms and others) (art. 5, sole paragraph of Law 11,508/07).

The creation, in the Country, of 14 Export Processing Zones was authorized: Cáceres (MT); Rio Grande (RS); João Pessoa (PB); Corumbá (MS); Barcarena (PA); São Luís (MA); Maracanaú (CE); Parnaíba (PI); Macaíba (RN); Suape (PE); Araguaína (TO); Itacoatiara (AM); Nossa Senhora do Socorro (SE) and Ilhéus (BA) (Law 7,993/90 and Law 8,015/90).

Former Sudene and Sudam Areas (Law 11,196/05, art. 31)

With the extinguishment of the former SUDAM and SUDENE, the rules contained in this paragraph shall now apply for the companies located in those areas.

For the goods purchased as of calendar year 2006 and up to 31 December 2013, the corporate entities that have approved installation, expansion, modernization or diversification projects in economic sectors that are considered priority for regional development, in less developed micro-regions located in the operating areas of the extinct Sudene and Sudam, will be entitled to:

– accelerated depreciation incentive, for purposes of the calculation of income tax;

– discount, during the period of twelve (12) months from the acquisition, of certain PIS/PASEP and COFINS credits, in the event of the purchase of new machines, apparatus, instruments and equipment, listed in regulations, to be incorporated into their fixed assets.

The applicable micro-regions, as well as the limits and conditions for the enjoyment of the aforesaid benefit, will be defined by regulation. The enjoyment of this benefit is contingent on the enjoyment of the benefit referred to in art. 1 of Provisional Measure 2,199-14, of 24 August 2001.

The accelerated depreciation incentive consists of full depreciation, during the actual year of purchase. The accelerated depreciation quota, corresponding to the benefit, will constitute exclusion from net income for purposes of the determination of taxable income and will be written up in the tax accounting ledger.

Total accumulated depreciation, including normal and accelerated, may not exceed the purchase cost of the asset. As from the tax period in which this limit is attained, the normal depreciation amount, posted in the accounting records, will be added to net income for the purpose of the determination of taxable income.

The credits will be calculated through the application, each month, of the PIS and COFINS rates of 1.65% and 7.6%, respectively, on the amount corresponding to one twelfth (1/12) of the purchase cost of the asset.

Except as expressly authorized by law, these tax benefits cannot be enjoyed cumulatively with others of the same nature.

→ Fiscal Incentives

Technological Innovation Incentives

Law 11,196/05 provides for technological innovation incentives. This law repealed Law 8,661/93, as of 1 January 2006, which previously provided for the fiscal incentives for the technological capacitation of industry and agriculture.

The Industrial Technological Development Programs (Programas de Desenvolvimento Tecnológico Industrial – PDTI) and Agribusiness Technological Development Programs (Programas de Desenvolvimento Tecnológico Agropecuário – PDTA), and the projects approved on or before 31 December 2005 will continue to be regulated by the legislation in force on the publication date of Provisional Measure 252/05, though migration to the regime set forth in Law 11,196/05 is authorized, as disciplined in the regulations.

Currently, corporate entities can benefit from the following fiscal incentives:

– deduction, for the purpose of the calculation of net income, of the amount corresponding to the sum of expenditures incurred during the tax period with technological research and the development of technological innovation classifiable as operating expenses by the Corporate Income Tax (IRPJ) legislation or as payment to universities and educational institutions, as set forth in paragraph 2 of article 17 of the law;

– reduction of fifty percent (50%) of the Excise Tax (IPI) levied on equipment, machines, apparatus and instruments, as well as spare accessories and tools that accompany these products, to be used in technological research and development;

– full depreciation, calculated by the application of the usually permitted depreciation rate, multiplied by 2, without prejudice to the normal depreciation of new machines, equipment, apparatus and instruments to be used in technological research and the development of technological innovation, for purposes of the calculation of IRPJ;

– accelerated amortization, via the deduction as cost or operating expense, during the tax period in which they are incurred, of expenditures relating to the purchase of intangible goods, related exclusively to technological research and technological innovation development activities, classifiable in the beneficiary's deferred charges, for the purposes of the determination of IRPJ;

– reduction to zero (0) of the withholding income tax rate on remittances made overseas for the registration and maintenance of trademarks, patents and cultivars.

In addition, as of calendar year 2006, corporate entities may exclude from net income, for the determination of actual profit and of the tax base for the calculation of Social Contribution on

Net Income (CSLL), the amount corresponding to up to 60% of the sum of expenditures incurred during the tax period with technological research and the development of technological innovation, classifiable as expense by the IRPJ legislation, as determined in item I of the main provision of art. 17 of the Law.

The Law also defines the concept of technological innovation and the benefit conditions (art. 17, paragraph 1 of law 11,196/05).

These benefits do not apply to corporate entities that use the benefits dealt with in Laws 8,248/91, 8,387/91 and 10,176/01, studied in paragraph 8 of this work.

Export incentive programs

Law 11,196/05 created the Special Taxation Regime for the Information Technology Service Export Platform (Regime Especial de Tributação para a Plataforma de Exportação de Serviços de Tecnologia de Informação – REPES) and the Special Regime for the Purchase of Capital Goods for Exporter Companies (Regime Especial de Aquisição de Bens de Capital para Empresas Exportadoras – RECAP), with the objective of fostering exports through the granting of fiscal benefits.

REPES benefits corporate entities that execute predominantly software development activities or provide information technology services, cumulatively or otherwise, provided that they assume an export commitment of more than or equal to 60% of their annual gross revenues derived from the sale of goods and services, excluding the taxes and contributions assessed on the sale (art. 4 of law 11,774/08).

Information technology service companies that elect for inclusion in the REPES may both determine the PIS (Contribution to the Social Integration Program) and COFINS (Contribution for Funding of Social Welfare Programs) by the non-cumulative and cumulative regimes (art. 4, Law 11,774/08). Companies that opt for the SIMPLES (Integrated System for the Payment of Taxes and Contributions by Small and Very Small-sized Companies) are excluded from the benefit (art. 10 of Law 11,196/05).

The benefits granted through REPES are:

– in the case of the sale or importation of new goods to be used for the development, in the Country, of software and information technology services, the following exactments are suspended: (i) of PIS/PASEP and COFINS imposed on the gross revenue derived from sales in the domestic market, when the respective goods are purchased by a corporate entity, beneficiary of REPES for incorporation into its fixed assets, and (ii) of PIS/PASEP-Import and COFINS-Import, when said goods are imported directly by a corporate entity, beneficiary of REPES for incorporation into its fixed assets, subject to the terms and conditions set forth in law;

– in the case of the sale or importation of services to be employed for the development of software and information technology services in the Country, the following exactments are suspended: (i) of PIS/PASEP and COFINS imposed on the gross revenue received by the service provider, when the recipient is a corporate entity, beneficiary of REPES, and (ii) of PIS/PASEP-Import and COFINS-Import, for services imported directly by a corporate entity, beneficiary of REPES, subject to the legal terms and conditions.

In accordance with the annex of Decree 5713, of 2 March 2006, the goods and services benefited by the suspension are: data storage, management, processing and transmission; software development; technical support in information technology equipment, communication systems and software; maintenance and update of information technology equipment, communication systems and software; digital certification and network management.

The above suspensions will be converted into a zero rate after the company attains 60% of its annual gross revenue in exports within the legal term (3 years maintaining an average 60% of the annual gross revenues derived from exports).

RECAP benefits the same corporate entities as REPES, differing only in the term for the compulsory maintenance of the export percentage (2 years) and in the percentage of exports which, instead of being 60% of the annual gross revenue as occurs in the REPES, is 70% for the RECAP (art. 4 of Law 11,774/08) and in the benefits, which, in the case of sales or imports of new machines, apparatus, instruments and equipment provide for the suspension of the following exactments: (i) of PIS/PASEP and COFINS imposed on gross revenues derived from sales in the domestic market, when the said products are purchased by a corporate entity, beneficiary of RECAP for incorporation into its fixed assets, and (ii) of PISPASEP-Import and COFINS-Import, when the said products are imported directly by corporate entities, beneficiaries of RECAP for incorporation into their fixed assets.

This benefit is regulated by Decree 5,649, of 29 December 2005 and may be enjoyed for up to 3 years from its authorization.

REIDI

The General Infrastructure Development Regime (Regime Geral de Desenvolvimento da Infra-Estrutura REIDI) was instituted by Provisional Measure 351/07, which was converted into Law 11,488/2007 and is regulated by Decree 6,144/2007 (amended by Decree 6,416/08) and SRF Normative Instruction 758/2007 (amended by SRF Normative Instruction 778/07).

It is a PIS/COFINS suspension regime, including on imports, and has the following essential characteristics: (i) the requirement of the total transfer of the benefit to the end consumer, in order to benefit the entire production chain, (ii) the limited duration of the fiscal benefit in time, in order not to create permanent imbalances and (iii) a temporary methodology, so as not to

create distortions in relation to the projects already underway and accelerate the arrival of the benefits to the end consumer. From this angle, it can be noted that REIDI was well thought out and should become an obligatory element of competitiveness in the market.

Nevertheless, there are important precautions that should be observed in its implementation. The great vertical integration of modern industrial structures causes distinct activities to share infrastructure and, it is not uncommon for one of them not to be benefitted by REIDI, or further to be classified in distinct tax regimes.

The total percentage of 9.25% of the possible benefit under the REIDI, notably in competitive markets, can be decisive for the success of the undertaking. If undervalued, the benefits will become competitive disadvantages; if overvalued, possible time bombs in the form of tax contingencies: on the one hand, the forced payment of improperly transferred benefits, increased by fines and, on the other, the impossibility of recovering them from the end consumers.

The difference between one and the other case may be in the planning and coordination between corporation and association structures, principally in industries where more than one activity co-exists, as is the case of electricity co-generation in the sugar-alcohol and paper and pulp industries.

Therefore, the coordination of the corporate and tax planning is a maximization measure of results, competitiveness and legal security, so that, more than before, after the REIDI, the correct and adequate corporation and association structuring should be one of the main precautions to be taken.

The main sectors that have been enjoying the REIDE benefits are: (i) electric power; (ii) transports; (iii) ports, and (iv) basic sanitation. For each sector there is a specific administrative rule from the competent Ministry establishing the procedures for the approval of the projects that are subject to the REIDI benefit.

REPENEC

The Special Incentive Regime for the Development of the Oil Industry Infrastructure in the Northern, Northeast and Central West Regions (REPENEC - Regime Especial de Incentivos para o Desenvolvimento de Infraestrutura da Indústria Petrolífera nas Regiões Norte, Nordeste e Centro-Oeste) was instituted by Provisional Measure 472/09, converted into Law 12,249/10. This fiscal incentive is intended for corporate entities established and domiciled in the Northern, Northeast and Central West regions that have approved projects for the implementation of infrastructure works in the petrochemical, oil refinement and natural gas-based ammonia and urea production sectors.

Corporate entities benefited by REPENEC will be entitled to the suspension of PIS/PASEP, COFINS, PIS/PASEP-Import, COFINS-Import, Excise Tax (IPI) and Import Duty, at the time of the sale in the domestic market or importation of new machines, apparatus, instruments and equipment, and construction materials for use or incorporation in infrastructure works intended for property, plant and equipment.

RETAERO

The Special Tax Incentive Regime for the Brazilian Aeronautical Industry (RETAERO - Regime Especial de Incentivos Tributários para a Indústria Aeronáutica Brasileira) was instituted by Provisional Measure 472/09, which was converted into Law 12,249/10, and is designed to stimulate the expansion of the Country's aeronautical sector and the greater nationalization of aircraft. In accordance with this special tax regime the collection of various taxes on the sale in the domestic market and importation of parts and equipment and other materials to be employed in the maintenance and manufacture of aircraft are suspended.

This regime includes the suspension of PIS and COFINS levied on the revenue of corporate entities that sell in the domestic market and of the IPI levied on the issue from the industrial establishment. In the case of imports, the suspension applies to the IPI and PIS/COFINS import.

PROUCA and RECOMPE

The One Computer per Student Program (PROUCA - Programa Um Computador por Aluno) and Special Regime for the Acquisition of Computers for Educational Use (RECOMPE - Regime Especial para Aquisição de Computadores para uso Educacional) were also instituted by Provisional Measure 472/09, which was converted into Law 12,249/10.

The objective of the PROUCA program is to promote the inclusion, in state schools, of computers, software and technical assistance in information technology. To help lay the groundwork for this program, RECOMPE was created, with the purpose of granting fiscal benefits to those who wish to supply the mentioned information technology products and services.

Companies interested in obtaining the aforesaid benefits need to first qualify for the RECOMPE, which guarantees the suspension of such taxes as IPI, PIS and COFINS on the sale of raw materials, intermediary products, equipment and services related to the information technology sector that are designed for the system of state schools. RECOMPE also includes the suspension of IPI, PIS/COFINS-import, Import Duty and Cide-royalties, levied on the import operations of the respective raw materials, intermediary products, equipment and services.

→ Internet and E-Commerce

By and large, Brazilian legislation allows for the determination of the legal validity or invalidity of most transactions conducted through or by the use of the Internet.

In the case of electronic contracts, for example, one may say that the general rule of the current Brazilian Civil Code (Law 10,406/02) applies, which guarantees validity to legal transactions that are, simultaneously, lawful, conducted by a capable agent and in a manner prescribed in or not prohibited by law. Nevertheless, the specificity of the electronic medium calls for specific rules that can resolve such issues as those pertaining to the certainty of the capacity of the contracting agent or, further, to the evidence of the electronically signed contract.

In this respect, it is important to note that Provisional Measure (Medida Provisória - MP) 2,200-2/0120, with the purpose of guaranteeing the authenticity, integrity and legal validity of electronic documents and digital signatures, instituted the Brazilian Public Keys Infrastructure ("ICP-Brasil"). In accordance with the MP, public or private electronic documents will be valid and the declarations contained therein that use ICP-Brasil will be presumed genuine in relation to the signatories. However, the MP does not prohibit the certification of documents that use other electronic signatures or certification methods that are not part of ICP-Brasil. In this case, however, the parties or the person for whom the document is intended shall consent to the adoption of such other method.

Furthermore, the country's legal system does not as yet have specific rules in place that permit the resolution of the various controversial issues.21

In view of the mobility and internationalization inherent to electronic relationships, it is essential to determine the law that is applicable to international electronic contracts. In accordance with the Introductory Law to the Brazilian Civil Code (Decree Law 4,657/42), the law of the country in which the obligations are established will apply thereto, and an obligation is established in the place of residence of the proponent. Thus, the determination of the place and moment of the establishment of the obligation is essential for the determination of the applicable law. In the virtual environment, this implies analyzing the type of negotiation (e-mail, chats, virtual auctions, online service, etc.), to determine the characteristics of the contracting (it may be between parties absent/present, a public offer, etc.) and, hence, the applicable law.

Apart from the general provisions of a contracting between private persons regulated by the Civil Code, consumer relations conducted in the virtual environment guarantee consumers all the rights conferred thereon by the Consumer Protection Code (Law 8,078/90 – "CPC"), such as the strict liability of the supplier, the reversal of the burden of proof, the joint and several liability of the suppliers, the right to security and to information and retraction. Even in relations between Brazilian consumers and foreign suppliers, the application of the CPC before the Brazilian court is sustainable, especially because it involves a rule of a public order. Added to

this is the fact that Brazilian jurisprudence normally guarantees ample protection to the rights of consumers, and its interpretation is normally favorable to the consumer.

Matters of global interest, and the privacy and secrecy of communications on the Internet are also provoking a great deal of discussion in Brazil. Although there is no specific regulation on Internet privacy, to date22, the Federal Constitution and various dispersed laws, including the legislation applicable to the banking sector and, particularly, the CPC (in respect to the protection of databases), generally establish explicit privacy protection principles, encompassing the intimacy, private life, honor and image of persons.

With respect to the domain name registration functions, Decree 4,829/03 assigned to the Internet Management Committee in Brazil ("CGI.br") the function, among others, of establishing the rules for the organization of relationships between the Government and society for the execution of the registration of Domain Names, the allocation of the IP (Internet Protocol) Addresses and the administration pertaining to the Top Level Domain (ccTLD-Country Code Top Level Domain) – ".br" – in the interest of the development of Internet in the Country23. The purpose of CGI.br is to coordinate and integrate all Internet service initiatives in Brazil. It is important to note that the domain names registered under the Country-code Top-Level Domain ".br" are not subject to the Uniform Directive for the Resolution of Disputes of the Internet Corporation for Assigned Names and Numbers ICANN.

The topic Internet and Taxation, which excites controversy worldwide, is the subject of intense discussion when considering Brazilian tax laws. One of the major discussions is in relation to the tax that is levied on the provision of Internet access, i.e., whether it is the ICMS (State VAT), the ISS (Service Tax) or neither of these taxes. Though the Brazilian Judiciary Branch has already pronounced itself on the issue, there is no final consensus or official position on the subject as yet.

The issue of undesirable electronic messages is a major concern, since Brazil is already ranked as the fourth country in the world in the volume of spam24. Spam regulation measures have been the subject of various discussion forums, especially among the private sector, interested in mobilizing society in the sense of the adoption of ethical standards for communications on the Internet. With this purpose, entities that congregate representatives from Internet communication-related companies united and released the "Anti-Spam Code of Ethics and Best Practices for the Use of Electronic Messages" in November 2003 (http://brasilantispam.com.br). Although it does not intend to solve the issue – insofar as there is no authority for sanctions, except from the moral point of view – the initiative aims to educate representatives from industry and commerce and self-regulate commercial activity conducted via e-mail.

The combat of spam drew government attention in early 2006, when CGI.br developed the site www.antispam.br, where it posts a list of good practices that users and marketing companies should adopt to avoid the sending of spam, in order to conduct "the good use of e-mail"25.

In relation to the use of the Internet for security offerings and brokerage activities, on 30 September 2005 the Brazilian Securities Commission ("CVM") published two Orientation Opinions, numbered 32 and 33, which, though not constituting specific regulations, indicate a possible understanding of the body on the subject. These opinions emphasize that this medium for the announcement of security offerings constitutes a public offering26 which, accordingly, must be registered with the CVM.

It is also relevant to mention that important Internet-related issues are being debated in the Judiciary Branch. As an example, a criminal sentence for on-line fraud has already been issued27; moreover, there are reports of decisions in electronic commerce-related cases.

Furthermore, in October 2010, the Constitution and Justice Committee of the House of Representatives gave a favorable opinion to the approval of the Bill on Information Technology Crimes (Lei sobre Crimes de Informática – PL 84/99), which may come into force still in 2011 and, among other things, deals with crimes against intellectual property, racism and pedophilia.

→ Foreign Investment in the Financial Market

Foreign investments in the financial market include: (i) the establishment of securities portfolios; (ii) the use of the depository receipts mechanism, and (iii) the execution of forward, futures and option contracts of agricultural products. The aforesaid operations depend on the prior authorization of the Brazilian Securities Commission (Comissão de Valores Mobiliários – CVM) and permit free migration from one type of investment to the other.

The foreign investor - corporate entities, natural persons, funds or other collective investment entities, resident, based or domiciled abroad – may invest in the same instruments and modalities of the financial and capital markets that are available to investors residing in Brazil. It is important to note that financial movements with foreign countries, resulting from such investments, may only be conducted through the contracting of foreign exchange. Since 2005 the foreign exchange rules have suffered considerable alterations, and as a result of the unification of the floating and free exchange rate markets, today there is one single market for foreign exchange operations.

However, this investment system calls for the satisfaction of three prerequisites by the investor: (i) the establishment of at least one representative in the Country, pursuant to the prevailing

legislation; (ii) the completion of a form to be submitted to CVM and BACEN, and (iii) the obtainment of the investor's registration with CVM.

All the foreign investments in question must be submitted to declaratory registration via electronic means at BACEN, which is obligatory for any financial movements with foreign countries, there being no minimum time limit for the permanence of said investments in Brazil.

The method of adaptation to the new system has not yet been defined for (i) Conversion Funds - Foreign Capital, (ii) Privatization Funds - Foreign Capital, (iii) Mutual Investment Funds in Emerging Companies - Foreign Capital, and (iv) Capital investments made between the MERCOSUR signatory countries.

In addition, all natural persons and corporate entities domiciled, resident or based abroad that have investments in the Brazilian financial and capital markets are required to register in the Federal Register of Individual Taxpayers - CPF (in the case of individuals) or Federal Register of Corporate Taxpayers - CNPJ (when involving corporate entities). With respect to the taxation applicable to investments in the financial market please refer to paragraph 6.1.1.3 above.

→ Remittance of Profits and Dividens to Investors Domiciled Abroad

Once the foreign capital has been registered with Central Bank of Brazil (BACEN), profits may be freely remitted to the foreign investor abroad, in proportion to its holdings in the paid-up capital of the Brazilian company and always limited to the stake registered with SISBACEN, RDE-IED Module. Remittances must also have their movement registered with BACEN and will be exempt from any taxation, except the rate of 0,38% corresponding to the IOF – Tax on Financial Operations levied on the amount to be remitted abroad.

→ Repatriation of Investment

Capital and reinvestments registered with BACEN may be repatriated to the investor's country without incurring income tax, up to the total foreign currency amount stipulated in the Consolidated Investment Statement available on the BACEN RDE-IED System.

Therefore, with due observance of the ownership interest of the foreign investor in the capital stock of the Brazilian company, the allocation of resources determined in the sale of ownership interests, reduction of capital for the reinstatement of shareholders or liquidation of companies, shall be registered with BACEN.

The differences in excess of amounts registered as brought into the Country such as the case of a premium verified on the sale of shares or quotas - will be considered "capital gain" and, as a rule, be subject to the levy of income tax at the rate of 15%.

BACEN may, if it deems necessary, ask for the presentation of an appraisal report, as well as other elements it considers relevant for the perfect characterization of the operation and verification of the reasonability of the amounts involved.

→ International Treaties

Among the most important international treaties signed by Brazil in the trade area, and in addition to those mentioned in item 6.1.1.4 above, we may mention:

Latin American Integration Association (ALADI)

ESTABLISHMENT: Montevideo Treaty, of 1980.

MEMBERS: Argentina, Bolivia, Brazil, Colombia, Chile, Ecuador, Mexico, Peru, Paraguay, Uruguay, Venezuela and Cuba.

OBJECTIVE: formation of a Latin American common market, favoring the creation of an economic preference area in the region, which is achieved through 3 mechanisms:

–area of regional tariff preference in relation to non-member countries;
–agreements of a regional scope with the participation of all member countries;
–agreements of a partial scope with the participation of some countries from the area.

Southern Cone Common Market MERCOSUR

ESTABLISHMENT: Asunción Treaty, of 1991.

MEMBERS: Argentina, Brazil, Paraguay and Uruguay. In July 2006 the Protocol of Venezuela's Adhesion to MERCOSUR was signed. Considering Brazil's approval in 2009, only Paraguay's approval is required for it to be effective.

ASSOCIATES: Bolivia, Chile, Peru, Colombia, Ecuador and Venezuela.

OBJECTIVE: eliminate all customs tariffs and other barriers that may hinder the free circulation of goods and services originating from their respective territories.

HEADQUARTERS: Montevideo, Uruguay.

INSTITUTIONAL STRUCTURE: The Protocol of Ouro Preto conferred international legal personality on MERCOSUR in 1994 and established the following bodies: Council of the Common Market (CCM); Common Market Group (CMG); MERCOSUR Trade Commission (MTC).

The CCM is responsible for the political representation. Its rulings are made by means of Decisions. CMG is the executive body of MERCOSUR and its decisions are made by means of Resolutions. The MTC chiefly monitors the application of trade policy instruments, which it does through Directives.

In addition to these bodies, mention should be made of the MERCOSUR Parliament (MP); the Economic-Social Consultative Forum (ESCF); MERCOSUR Secretariat (MS); MERCOSUR Permanent Review Tribunal (TPR); MERCOSUR Administrative-Labor Tribunal (ALT), and the MERCOSUR Center of the Promotion of the Rule of Law (CPRL).

The Presidency of MERCOSUR is exercised on a rotating basis by the Member Countries and in alphabetical order, for six-month periods. It is the responsibility of the country that occupies the presidency pro tempore to determine, in coordination with the other delegations, the agenda of Meetings, among others, of the CMG and CCM, organize the meetings of other MERCOSUR bodies, and perform the role of spokesperson in international meetings and forums in which MERCOSUR participates. Brazil held the presidency pro tempore in the second half of 2010.

CHARACTERISTICS: Today MERCOSUR represents the world's 4th largest economic bloc, uniting more than 360 million people and presenting significant figures, such as a total GDP of its member countries of approximately US$ 4 trillion.

In January 1995 the first stage of the integration process was carried to completion: the institution of a free trade area between the four countries. With respect to imports from non-member countries, the Common External Tariff (CET) came into force, with a basic tariff ranging from zero to 20%, but with the maintenance of a list of exceptions whereby the countries have the right to apply the national tariff. Nevertheless, there is a convergence mechanism up to the levels of the CET, in a linear and automatic manner.

MERCOSUR negotiations are currently focused on strengthening ties with other countries and economic groups, such as the resumption of negotiations with the European Union.

MERCOSUR signed various agreements with non-member countries, economic blocs and international organizations with a view to laying the groundwork for investments and the establishment of free trade, namely: the Andean Community, India, Southern African Customs Union (SACU), Egypt, Morocco, Gulf Cooperation Council (GCC), European Free Trade

Association (EFTA) States (Island, Liechtenstein, Norway and Switzerland), Trinidad, Tobago, Guyana, Singapore, Canada, Russian Federation, Mexico and Israel.

Within the ambit of MERCOSUR two treaties were also signed regarding the protection of investments: the Colony Protocol for the Reciprocal Promotion and Protection of Investments in MERCOSUR, and the Buenos Aires Protocol for the Promotion and Protection of Investments Originating from the Non-member Countries of MERCOSUR. However, these Protocols have not yet completed the necessary procedures for their internalization into the Brazilian legal system.

DISPUTE RESOLUTION: The Olivos Protocol (signed in 2002), which introduced certain modifications in the original dispute resolution system in MERCOSUR established by the Brasília Protocol (signed in December 1991), came into force in 2004. These modifications included the creation of the aforementioned MERCOSUR Permanent Review Tribunal, with its headquarters in Asunción, Paraguay.

During the validity period of the Brasília Protocol (from 1992 to 2003), 10 arbitral awards were issued. As of 2004, with the advent of the Olivos Protocol, 5 awards were issued, 3 of which concerning retreaded tires.28

DEVELOPMENTS: In August 2010, The Customs Code (Código Aduaneiro) and end of the double collection of the Common External Tariff (CET) were approved. The aforesaid code aims to harmonize and standardize the methods and legislations of the four countries in relation to the free circulation of goods through their territories. Its implementation is scheduled for January 2012. As of that date, the trade of finished products – those that have received no other components – will be taxed only at origin. Today, it is taxed at the time of the export and at the time of the sale in the country of destination.

In practice, this means that a product imported by Brazil, for example, pays a charge per operation. If this same product is resold to Uruguay, it is taxed again. The code puts an end to this double taxation. In December 2010, trade negotiations between the developing economies, launched more than six years ago with 43 countries were concluded. The round was finalized with only 11 participants, namely the four members of MERCOSUR and also South Korea, Cuba, Egypt, India, Indonesia, Malaysia and Morocco.

The concessions offered by the 11 participants involve 47 thousand products, whereas, to have an idea, the MERCOSUR concessions are valid for 6.7 thousand. However, the opening is limited. The commitments involve 70% of the goods imported and the tariff preference is 20% on the rates effectively applied by the participants. Moreover, each country was authorized to maintain 30% protected. The MERCOSUR list includes the textile, automobile, consumer electronics and capital goods industries. Within two years there will be a review of the agreement and the concessions may be expanded.

Union of South American Nations – UNASUR

UNASUR is formed by twelve countries of South America. The treaty that formed the organization was approved during the Extraordinary Meeting of Heads of State and Government, held in Brasília, on 23 May 2008. Nine countries have already deposited their ratification instruments (Argentina, Bolivia, Chile, Ecuador, Guiana, Peru, Suriname, Uruguay and Venezuela), completing the minimum number of necessary ratifications for the entry into force of the Treaty on 11 March 2011.

The main objectives of UNASUR are the political, economic and social coordination of the region. UNASUR has proved to be a particularly useful instrument for the pacific solution of regional controversies and for the strengthening of the protection of democracy in South America.

Brazil's adhesion to UNASUR depends on the solution of a political impasse in National Congress. The legislative decree bill that submits the treaty to the Legislative (PDC 1669/09) has been pending voting in the plenary sitting of the House of Representatives for more than one year and, after its approval, will still be submitted to the Federal Senate.

World Trade Organization - WTO

ESTABLISHMENT: the WTO was created in 1995, during the Uruguay Round, under the form of a secretariat to administer the General Agreement on Tariffs and Trade (GATT).

MEMBERS: 153 members29, including Brazil and other MERCOSUR member countries.

HEADQUARTERS: Geneva, Switzerland.

BUDGET: approximately 194 million Swiss francs for year 2010.

OBJECTIVES: regulate multilateral trade relations between the members. The functions of WTO are: to administer trade rules, discuss them, negotiate them, resolve trade disputes, monitor the trade policies of each of the members, provide technical assistance and cooperate with other international organizations. One of its chief functions is that of operating as a tribunal for international trade disputes, through the Dispute Resolution Body, in which conflicts are resolved through consultations between the members. The decisions are made by a panel of experts and, in a second instance, by an Appeal Body. The great importance of this body is that its decisions require obligatory obedience, on pain of the application of retaliatory measures, which makes WTO the most efficient tribunal among the international organizations.

AGREEMENTS COVERED: The WTO countries assumed the commitments set forth in the following multilateral agreements: General Agreement on Tariffs and Trade – GATT, General Agreement on Trade and Services – GATS, Trade Related Aspects of Intellectual Property Rights

– TRIPS, and also agreements on Agriculture, Sanitary and Phytosanitary Measures, Textiles and Wearing Apparel, Technical Trade Barriers, Trade-Related Investment Measures - TRIMs, Anti-dumping, Customs Value, Pre-shipment Inspection, Rules of Origin, Import License, Subsidies and Countervailing Measures, Safeguards, Understanding on Dispute Resolution and Trade Policy Review Agreement.

CHARACTERISTICS: among the changes introduced by the WTO in relation to the GATT system of 1947, we may highlight the inclusion of agriculture, the commitment regarding the elimination of all non-tariff barriers, maintaining the import tariff as the only market defense instrument (which is also expected to be gradually reduced), and the regulation (i) of trade-related intellectual property rights by means of the TRIPS, and (ii) trade in services by means of the GATS (for a wide range of sectors, including: merchant marine, telecommunications and labor).

DISPUTE RESOLUTION: To date a total of 420 disputes have been taken to WTO's dispute resolution body. The majority of the disputes are resolved at the initial phase of the procedures (consultations), approximately 35% are finalized at the panel phase and roughly 25% reach the appeal phase.

TRADE LIBERALIZATION TALKS: Unfortunately the WTO members have not managed to reach a consensus to finalize the Doha Round (launched in 2001, in which alterations in the agreements covered, and other subjects are discussed).

BRAZIL'S ROLE: Brazil has worked in a broad and dedicated manner within the ambit of the WTO, not only in multilateral negotiations, but also as a party in various disputes as claimant, respondent or interested party before the Dispute Resolution Body. Brazil's activities in the WTO dispute resolution system have been preponderantly active. With the submission of various trade litigations to the Dispute Resolution Body, Brazil aims, above all, to confer greater effectiveness on international trade agreements, furthering and defending the interests of the national economy. Up to February 2011, Brazil has participated in a total of 100 litigations, 25 of which initiated by Brazil. The most recent is DS409, regarding generic medicines in transit seized by the customs authorities of a European Union Member State. In 14 Brazil was a respondent and in 61 the Country appears in the capacity of third interested party30, as in the recent cases DS405 and DS406, concerning antidumping measures applied by the European Union on certain footwear from China and measures imposed on clove cigarettes from Indonesia, respectively.

In 2009, Brazil emerged victorious in the cotton dispute against the United States, when it received from the WTO the right to retaliate the country in US$ 294.7 million. A Memorandum of Understanding was signed between Brazil and the United States to avoid retaliation acts, whereby the United States assumes the commitment of providing funds for Brazilian cotton production and removing sanitary barriers against exports originating from Brazil.

In February 2011, Brazil received the final report of the WTO panel that examined the legality of the antidumping measures applied by the United States on the importation of Brazilian orange juice. In this dispute, Brazil challenged the use of the methodology known as zeroing in antidumping procedures relating to Brazilian orange juice conducted by the United States Department of Commerce (USDOC).

The circulation of the final report to the other WTO members and to the public will occur when the text is available in the three official languages of the Organization. As of the publication, the parties will be able to lodge resources to the WTO Appeals Body within the period of 60 days. If there is no appeal, the report will be adopted by the Dispute Resolution Body of the WTO.

The report represents a significant victory for Brazil.

Thus, taking into consideration Brazil's strong participation in this forum, it has become increasingly more important to be well informed about Brazil's positions in the international trade area, not only at the time of making investments in Brazil in specific sectors, but also to expand its trade flow, delegitimize barriers that affect its exports or even impose barriers that are admissible under the WTO rules for the protection of its domestic industry.

Multilateral Investment Guarantee Agency MIGA

The purpose of this Agency, which was created by a Convention within the sphere of the World Bank, is to encourage foreign investment and increase the flow of capital from the developed countries to the lesser-developed countries in a secure manner, complementing the activity developed by the International Bank for Reconstruction and Development and the International Finance Corporation. The aforesaid Convention was formalized in 1985, in Seoul, came into force in Brazil in 1992 and today has 175 member countries.

MIGA promotes foreign direct investments in developing countries, guaranteeing investors against political risks, advising governments to attract investment, sharing information through on-line investment information services, and the mediation of disputes between investors and governments.

MIGA offers guarantees against noncommercial risks to protect the transborder investment of member developing countries. The organization aims to protect investors against the risks of currency inconvertibility and transfer restrictions, and expropriation, war, civil commotion and terrorism.

Among the guarantees granted by MIGA are those concerning coinsurance and reinsurance against noncommercial risks, related to investments made by one member country in another member country. To this effect, the investing country and the recipient country of the investment may jointly request non-commercial risk coverage, with the exception of monetary devaluation or depreciation.

This includes new investments, and the investments associated with expansion, modernization or financial restructuring of existing projects, or when the investor demonstrates the benefits of development, and a long-term commitment to the project. Acquisitions of new investors, including the privatization of state-owned companies can also be eligible. The projects that MIGA cannot guarantee are described in the MIGA exclusion list.

With due regard to certain requirements, both individuals and corporate entities may benefit from the guarantees granted by the Agency31. It can be noted that the holder of a guarantee granted by MIGA shall, prior to seeking indemnification from the Agency, try other pertinent administrative remedies that are permitted by the laws of the recipient country of the investment, though said entity cannot guarantee a sum in excess of 150% of its subscribed capital and available reserves.

In addition to operating in the area of the mitigation of risks for investments in lesser-developed countries, MIGA has sectors for the mediation of disputes, technical assistance and disclosure of information.

Agreements on the Reciprocal Promotion and Protection of Investments

Brazil has signed 15 agreements on the promotion and protection of investments with the following countries: France, Germany, Italy, Finland, Venezuela, the Belgian-Luxembourg Union, Chile, Cuba, Denmark, the Netherlands, Portugal, Great Britain and Northern Ireland, Switzerland, and the Republic of Korea. However, none of them are currently in force. The agreements signed with the Netherlands in November 1998 and January 2007, Cuba in June 1997, Germany in September 1995 and France in March 1995 were withdrawn from National Congress, pending ratification, on 13 November 2003, at the request of the Executive Branch.

Treaty for International Legal Cooperation in Civil, Commercial, Labor and Administrative Matters

Brazil has various Treaties for Legal Cooperation in Civil, Commercial, Labor and Administrative Matters with MERCOSUR countries, Spain, France, Italy, Japan Belgium and Portugal32. Among them, we may mention the treaty between Brazil and France, promulgated through Decree 3.598/00. The most important point of this treaty is the abolishment of the legalization or analogous formalities of all public acts issued in the territory of either signatory State, defining such as documents that emanate from judicial or notary entities, marital status certificates and official certificates, such as registration transcriptions, visas with definite dates and the certification of signatures affixed on private documents. The legalization of the respective documents with the diplomatic authorities of each signatory country is thus dispensed with in such cases.

Treaty for Legal Cooperation in Criminal Matters

On 12 May 2004, Brazil and Switzerland signed a Treaty for Legal Cooperation in Criminal Matters, with the objective of facilitating the exchange of information about suspects of financial crimes and corruption. The treaty excluded the cases of tax evasion. This treaty was promulgated by Decree 6.974 of 7 October 2009. The treaty provides a rapid channel between the Courts of the two countries enabling them to exchange information and bank data about cases of fraud and corruption, in addition to the repatriation of resources.

Multilateral International Treaties Signed by Brazil about Intellectual Property

We list below some of the principal multilateral international treaties regarding Intellectual Property to which Brazilian is a signatory, followed by their execution and ratification dates by Brazil before the international order33:

– Paris Union Convention for the protection of industrial property, of 1883, in effect in Brazil through Decree 9.233, of 28 June 1884.

– Berne Convention for the protection of literary and artistic works, of 1886, in effect in Brazil through Decree 15.530, of 21 June 1922.

– Rome Convention for the protection of interpreter artists or executors, of phonogram producers and radio broadcasting organizations, of 1961, in effect in Brazil through Decree 57.125, of 19 October 1965.

– Geneva Convention for the protection of phonogram producers against the non-authorized reproduction of their phonograms, of 1971, in effect in Brazil through Decree 76.906, of 24 December 1975.

– Madrid Agreement on the repression of false indications of the origin of merchandise, of 1891, in effect in Brazil through Decree 19.056, of 31 December 1929.

– Patent Cooperation Treaty (PCT), of 1970, in effect in Brazil through Decree 81.742, of 31 May 1978.

– Strasbourg Agreement on the international classification of patents, of 1971, in effect in Brazil through Decree 76.472, of 17 October 1975.

– WIPO (World Intellectual Property Organization) Convention, which Brazil became a party of on 20 December 1974, and which came into force in the Brazilian legal system as of 20 March 1975.

– Film Register Treaty signed on 7 December 1989, ratified on 26 March 1993 and in effect since 26 June 1993.

– Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), in effect in Brazil through Decree 1.355, of 30 December 1994.

– UPOV (International Union for the Protection of New Varieties of Plants) Convention. Brazil became a party of this organization on 23 April 1999 and the terms of the Convention became effective in Brazil as of 23 May of the same year.

Although Brazil signed the Vienna Convention on the classification of figurative elements of marks (on 11 December 1973), the Brussels Convention on transmission via satellite (on 21 May 1974) and the PLT (Patent Law Treaty) Convention on 2 June 2000, it did not ratify them.

Other International Agreements signed by Brazil in the Trade and Environmental Law Areas

In 2008 Brazil signed agreements34 with South Africa for assistance between customs administrations, with Germany for financial cooperation for the renewable energy credit program and for cooperation in public security, with Canada for cooperation in science, technology and innovation, with Singapore for aerial services, with Colombia on unlawful traffic, with France for the sustainable development of the Amazon biome, with India regarding extradition, with Peru concerning environmental issues, with the Czech Republic on trade issues, and other agreements that depend on approval from the Brazilian Congress to take effect.

In 2009, Brazil signed an agreement with Bolivia for the construction of the international bridge over Rio Mamoré, with Greece for cooperation in economic, scientific, technological and innovation matters, and with Peru for scientific and technical cooperation.

In 2010, Brazil and Peru signed an agreement for electric power trading. The agreement provides for the supply of electric power produced in Brazil to Peru and the exportation of excess power by the Andean country to Brazil, laying the groundwork for the interconnection process of the electrical grids of the two countries.

Conference of the Members of the United Nations on Biological Diversity (COP 10) and Climate Change (COP 16)

COP-10 AGREEMENT: COP-10 was held in Nagoya, Japan, in October 2010. As a result, the 193 signatory countries adopted a strategic plan to stem the rate of the disappearance of species that live both on land and in the sea. The signatories also approved the Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization under the Convention on Biological Diversity (ABS Protocol), and the mobilization of financial resources.

The protocol recognizes the sovereignty of the countries with regards to the right over the use of their genetic resources and creates mechanisms on how the access and division of the benefits arising from biodiversity should be established.

To meet the need for the protection of biological diversity, mandatory targets were discussed for reducing the destruction of biodiversity, through the establishment of a strategic plan for the period 2011 to 2020. And to achieve the sustainable use of natural resources, the creation of market mechanisms were discussed based on the protection or restoration of biodiversity, either through the institution of protected areas, or by combating deforestation. The outcome of the meeting was to increase from 10% to 17% the land areas that countries will have to allocate as protected areas – in the marine areas, this rate is 10%.

Finally, it was agreed that a significant increase should occur in the financial resources allocated to conservation actions in developing countries.

COP-16 AGREEMENT: COP-16 was held in Cancun, Mexico, in December 2010. More than 190 countries participated, though Bolivia was the only country to express disagreement against the decisions of COP-16, arguing that the plan is not sufficient to combat climate changes.

Although the countries have been unable to agree on targets for a new phase of the Kyoto Protocol, important progress has been made under the ad-hoc Working Group of long-term cooperative action (AWG-LCA). The result is that this group will have its term of office extended for another year (until COP-17) with the aim of presenting results for the unresolved issues of COP-16.

Among the most significant developments was the creation of the Green Climate Fund with the objective of helping developing countries to find ways to reduce their emissions and adapt to the adverse effects of climate change.

The creation of the green climate fund was considered an important victory for the developing countries. The fund will be administered by the United Nations, with the World Bank as interim administrator for the first three years. Furthermore, the fund will be governed by a committee of representatives from 24 countries, being proportionate to the number of developing and developed countries.

The agreement does not yet specifically establish how the resources will be obtained or disbursed, but the goal is to raise US$30 billion by 2012 and US$ 100 billion per year until 2020 from various sources. Although there was discussion on what some of these mechanisms would be, such as carbon credit auctions or fees for international aviation and navigation, nothing was agreed.

Also, among the developments of COP-16, we may mention (i) the establishment of a technological executive committee that will facilitate the implementation of actions with the objective of increasing the research, development and transfer of technologies to the developing countries in order to provide support to these countries for climate change mitigation and adaptation actions, and (ii) the implementation of key elements to compensate countries for protecting their forests.

In addition to the international agreements mentioned above, Brazil has signed several other agreements with numerous countries regarding specific matters.

The Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties was formalized on 23 May 1969 and has been in effect since 27 January 1980, when it received the adhesion of the 35th State. It ratifies accepted and clearly and demonstrably effective customary laws, and harmonizes procedures for the drafting, ratification, cancellation and termination of treaties. In other words, it organizes and describes reiterated practices that are already well established among nations.

Its text is divided into eight parts, which, among other topics, address the formalization and entering into force, application, interpretation, and amendment of a treaty, with the principles of good faith, pacta sunt servanda and free consent always as a basis.

Up until February 2011, the Convention had been ratified by 11135 States.

On 14 December 2009, the Vienna Convention on the Law of Treaties was finally promulgated in Brazil by Decree 7.030, with reservation to articles 25 and 66, which deal with the provisional application and observance of the treaty, respectively. The Convention had already been approved by National Congress (Legislative Rule 496, of 17 July 2009), and its ratification instrument deposited with the United Nations Secretary-General (25 September 2009).

→ Entry of Foreign Workers into Brazil

Law 6,815/80, regulated by Decree 86,715/81, defines the legal status of the foreigner in Brazil and creates the National Immigration Council.

There are different types of visas for foreigners, their spouses and economically dependent children, the most common of which are:

Visa for Business Travelers

The visa for business travelers, which can be obtained from any Brazilian Consulate, enables the foreigner to come to Brazil for acts of commerce, the dissemination of products and market research. This modality also permits participation in trade shows, events, meetings, seminars, conferences and the like.

The business visa is normally granted for up to five years, permitting multiple entries for citizens of countries that offer, on a reciprocity basis, similar conditions to Brazilian citizens. This period, however, refers to the validity of the visa.

The first entry in the Country should occur within up to 90 days of the issuance of the visa and the maximum permitted stay in the Country is for up to 90 days, extendible for an equal period. However, the foreigner's total stay cannot exceed 180 days per year, as from the date of first entry into Brazil. Remuneration of the visitor is forbidden. This type of visa is not required for certain countries that maintain reciprocity agreements with Brazil, such as those of the European Union and Mercosur.

Foreigners who are not required to take out a visa for a business trip may enter Brazil by presenting their passports and informing the business purpose on the immigration card distributed during international flights to the Country.

Temporary Work Visa

Temporary work visas will be granted to foreigners who come to Brazil to work for a Brazilian company in the capacity of employees, i.e., with an employment relationship, but without representation powers of the company. This visa will be granted for a maximum period of 2 years and may be extended for an equal period. After 4 years, the temporary visa may be transformed into a permanent visa, provided that the necessary requirements are met.

In accordance with Normative Resolution 80/88, of the National Immigration Council (Conselho Nacional de Imigração), to apply for a temporary visa, the foreigner shall evidence professional qualification and experience compatible with the activity he or she will be performing, by presenting diplomas, certificates or declarations from entities in which the employee performed his or her activities, evidencing the satisfaction of one of the following requirements:

– 1 year's experience in the practice of a high level profession; counted from the completion of the first academic degree that qualified the professional for this practice, or

– 2 years' experience in the practice of a mid level profession, with minimum schooling of 9 years, or

– conclusion of graduate studies, with a minimum of 360 hours, or completion of a master's or higher degree course that is compatible with the activity that the professional will be performing.

Until 31 December 2012 the requirements set out in items (a) to (c) above shall not apply to applications for work permits for nationals of countries of South America.

As determined by labor legislation, the Brazilian company shall justify the use of foreign labor and observe the required proportion of 2/3 of Brazilian employees both in relation to the total staff and the corresponding payroll. This rule suffers criticism on the part of some legal scholars, who consider it unconstitutional due to violating the isonomy principle.

The temporary visa will also be granted to foreigners who come to Brazil to render services to a Brazilian company, without an employment relationship, through a service contract or technical cooperation contract between companies of the same Group. In this case, the validity term of the visa is one year, which may be extended for an equal period, provided that the need is evidenced. Its transformation into a permanent visa is forbidden.

Permanent Work Visa

The permanent work visa will be granted to the employee of a foreign company who is to be transferred to a company of the same Group, based in Brazil, to hold the position of officer or administrator of such company, with administration and representation powers, as long as the position is provided for in the company's bylaws or charter documents.

A Brazilian company wishing to indicate a foreigner to discharge the duties of administrator must, in addition to the documents evidencing its regularity before the tax, labor and social security authorities, present the following to the Labor Ministry:

– minimum investment: proof of foreign direct investment (in currency, transfer of technology or of other capital goods), by the foreign company that wishes to indicate a foreigner for the position of administrator of the Brazilian company, in the minimum amount of (i) US$ 200 thousand, for each foreign administrator, by means of a copy of the Consolidated Foreign Direct Investment Statement, obtained directly from Sisbacen (Central Bank of Brazil Information System) following registration of such investment, or of the Foreign Exchange Contract and respective contractual or bylaw amendment, duly registered at the competent agency, in order to evidence payment of the investment in the recipient company; or (ii) US$ 50 thousand for each foreign administrator, with due regard to the aforesaid documentation,whereas, in this case, evidence shall be produced of the generation of, at least, 10 new jobs, during the two years subsequent to the administrator's entry into the country, observing, in both the aforesaid situations, the proportion of 2/3 of Brazilian employees set forth in Brazilian labor legislation;

– salary structure: the present salary of the foreigner appointed to occupy the administrator position in the Brazilian company shall be informed, and also the salary that this person will receive once he or she has taken office. Finally, there must also be indication of whether the foreigner will continue receiving any remuneration from abroad, in addition to receiving a salary in Brazil.

The permanent visa is contingent on the holding, for the period of 5 years in the event of item 25.3, "a", (i) and for the period of 2 years in the event of item 25.3 "a", (ii), of the position for which the visa was applied. Any failure to comply with these obligations will result in the cancellation of the permanent visa.

The possible transfer of the foreigner to another company of the same business group shall be communicated and justified with the Labor Ministry. For a change of job and/or addition of other new functions to those already discharged by the foreigner, the local company shall present justification and an amendment to the contract to the General Immigration Coordination Department of the Labor Ministry. Concomitant jobs in two or more companies from the same business group must also be authorized by the pertinent authority.

The change of employment of the foreigner to another company that does not belong to the business group where the foreigner was discharging his/her duties shall be the subject of prior authorization from the competent authorities.

Permanent Visa for the Foreign Investor – Individual

The permanent visa will be granted to foreign individuals who wish to settle in Brazil by investing their own resources, of foreign origin, in productive activities. In this case, the investor should work as a partner of the Brazilian company, being also authorized (after obtaining the visa) to occupy the position of administrator of that same company.

The requirements for obtaining this type of visa are:

– evidence of foreign direct investment (in currency, foreign), in the minimum amount equivalent to R$ 150,000 (edquivalent to US$ 90,91 thousand American Dollars), through the presentation of a copy of the Consolidated Foreign Direct Investment Statement, obtained directly at Sisbacen (Central Bank Information System), and the respective contractual or bylaw amendment registered with the competent body, in order to evidence the payment of the investment in the Brazilian recipient company of the investment; ▫ submit the investment plan that attests the social interest.

The permanent visa may be granted for the period of 3 years, which is renewable, and its granting will be conditional on: ▫ the verification of the social interest in accordance with the number of jobs generated in Brazil; ▫ the amount invested and the region of the country where

it will be applied; ▫ the economic sector where the investment will occur and ▫ contribution to the increase of productivity. The renewal of a permanent visa for the Foreign Investor – Individual will be subject to evidence of the fullment of the Investment Plan submitted.

→ Arbritration

Since the effective date of Law 9,307/96 and declaration of its constitutionality by the Supreme Court of Brazil (Supremo Tribunal Federal – STF) in 2001, and the ratification of the New York Convention in 2002, foreign investors have been able to safely use arbitration to resolve their disputes. Arbitration offers the possibility of the resolution of disputes by experts, in a confidential manner, with greater celerity, within a more flexible procedure and in a more cordial atmosphere, and also overcomes language barriers and misgivings about the partiality of the state courts.

If an arbitration seat is in Brazil, the arbitral award is in itself considered an enforcement order in the Brazilian territory, and is valid as a final and unappealable judgment or court decision. If the arbitration seat is outside of Brazil, the acknowledgement and enforcement of the foreign arbitral awards will occur before the Federal Court of Appeals (Superior Tribunal de Justiça – STJ), after the fashion of the New York Convention and Brazilian Law (based on the UNCITRAL Model Law).

Arbitration has been confirmed by important rulings from the Country's various Courts. The combination of a favorable law correctly interpreted by the Judiciary Power gives Brazil the status of an important center for seating arbitrations, especially international trade arbitration procedures.

Various Brazilian Arbitration Chambers have demonstrated competence to manage national and international arbitrations, such as the Chamber of Mediation and Arbitration of São Paulo (Câmara de Mediação e Arbitragem de São Paulo), linked to the Center of Industries of the State of São Paulo (CIESP), the Arbitration Center of the Brazil-Canada Chamber of Commerce (Centro de Arbitragem da Câmara de Comércio Brasil-Canadá-CCBC), the Chamber of Mediation and Arbitration of the Amercian Chamber of Commerce AMCHAM, the EuroChambers' Mediation and Arbitration Chamber (Câmara de Mediação e Arbitragem das Eurocâmaras – CAE), and others. The Brazilian Arbitration Committee (Comitê Brasileiro de Arbitragem-CBAr36) has also played an important role, uniting some of the greatest experts on the subject, in the scientific development of arbitration.

Finally, it is important to mention that Brazil has adhered to other important International Conventions on the subject, including: the Agreement on International Trade Arbitration of Mercosur (Buenos Aires, 1998) and the Interamerican Convention on International Trade Arbitration (Panama, 1975)37.

→ Conclusion

It is important to mention the relevant role played by the lawyer in the Brazilian business world.

The modern activities of the lawyer in this sector have become more specialized, moving beyond the bar to a much wider field, where the professional is required to keep track of the dynamic developments in the complex legislation relating to the business sector and business in general.

Moreover, Brazil has comprehensive and complex legislation, including laws, provisional measures, decrees, and administrative rules, etc., which are constantly changing. Since 5 October 1988 (enactment date of the current Federal Constitution), the number of laws and regulations have totaled 150,425, in the federal sphere alone38.

In addition, the various federal agencies - such as BACEN, INPI, CADE, Government Regulatory Agencies and others - often employ their own criteria to analyze the matters submitted for their approval.

Consequently, the role of the Brazilian lawyer is of utmost importance when lending assistance to foreign businessmen, both in providing investors with guidance regarding the prevailing laws, and assisting them in their contacts with government authorities.

BAZLYANKOV, STANOEV & TAHSEV
www.bstlawyers.com

→ Bulgary

→ Foreign Investment Law

Bulgarian law has set up as a general rule complete freedom of foreign investments in Bulgaria. In the past two decades and in the present Bulgaria encourages the foreign direct investments. Public on public order in order to be defending national security may define the general rules of complete freedom of investments. In connection with the forthcoming acceptance of Bulgaria in the European Unity, Bulgarian Parliament approves some legal and administrative alleviation for the investors.

Registration with Government, authorities and permits

Investment Encouragement Act provides regulations about the investing in Bulgaria. The law does not restrict the foreign investment process although some actions in connection with the foreign investment are subject to declaration or prior authorisation. The regulation of the foreign investment projects is a serious encouragement and alleviation for the investing.

The transactions of real estate have to be registered if foreign personal or natural entities participate in the transaction.

Prior authorisation is required if:

– any foreign investment may affect public order or security;
– any foreign investment related to the national defence, arms or explosives
– any foreign investment may seriously threaten public health
– if the investment may lead to a serious presumption of criminal activity

The relevant ministry to certain period can provide prior authorization. The Ministry can of course request further information if the application is incomplete, and this extends the review period. If the companies breach of the above duties, they bear sanctions under the penal and customs codes.

Transfer of dividends, interests and royalties abroad. According to the Bulgarian legislation there are no restriction for the transfer of dividends, interest and royalties abroad. Bilateral tax treaties and double avoidance tax agreements provide withholding of taxes.

Repatriation procedures and restrictions. Bulgarian legislation does not apply any repatriation procedures or restrictions.

Foreign personnel /permits, etc. All foreign personnel require residency permits but the regime of EU citizens is much more simplified. Work permits are necessary only for the long-term work. Application for work permits is issued of the National Employment Services.

→ Corporate Law

Regulations and Rules

Bulgarian corporate law now is codified and integrated into the Commercial Law. This act contains the most of the rules of company law – incorporation of the companies, changes in the capital / increasing or decreasing/ and the decision-making bodies, insolvency and liquidation of the company, merge of companies.

In Bulgaria, as a member state of the European Union, are in force the resolutions of the EU in the area of the corporate law and several commercial directives are implemented in the corporate legislation in Bulgaria.

Types of Companies

In Bulgaria there are different legal forms to develop business. The most frequently preferred types by Bulgarian and foreign investors are:

LIMITED LIABILITY COMPANY /LTD/ - is a small and the most commonly incorporated company in Bulgaria. A company with minimum capital of 2 BGN /1 euro/. The partners can be Bulgarian legal or natural entities, as well as foreign legal or natural entities.

SINGLE LIMITED LIABILITY COMPANY - a single partner /a Bulgarian legal or natural entities, as well as foreign legal or natural entities/ possesses the whole share capital of the company, the minimum capital is 2 BGN /1 euro/.

JOINT STOCK COMPANY /JSC/ - company with a minimum capital of 50 000 BGN /around 25 000 euro/ of which at least 25 % must have been paid at the time of incorporation. The capital is divided into shares.

SINGLE SHAREHOLDER JOINT STOCK COMPANY – there is only one shareholder who possesses the whole share capital, divided into shares.

All these companies are limited liability companies.

Other less common legal forms

GENERAL PARTNERSHIP – is incorporated by two or more general partners who are unlimitedly liable.

LIMITED PARTNERSHIP – is incorporated by two or more partners, some of the partners are limited liable to the amount of capital contributed and other partners are unlimitedly liable.

The incorporation of a branch

A company, duly registered in Bulgarian Registry Agency, Commercial register can open a branch or branches in a town, different from the company's registered office. The incorporation of a branch requires to be taken a formal resolution of the decision-making body, authorising the establishment of a branch in other town in Bulgaria and appointing a representative. The branch does not have a legal personality and represents an economic structure, which is managed separately than the company but cannot have a separate balance. It is inscribed in the Commercial register and information about this separate registration should be present in the branch's correspondence.

The branch of a foreign company

The regulation regarding a branch of a foreign company in Bulgaria is provided in the Commercial Code. A foreign company duly registered under the national law of the respective country can open a branch in Bulgaria. For this purpose is necessary to be represented documents for the registration of the Company and the decision making body has to take a decision about the address of administration, representative, activity of the branch. It is provided that the branch has separate balance and should have, respectively reflecting on the tax issues – the branch of a foreign company is a different tax subject.

The Liability of Shareholders

In all of the limited liability companies /Ltd and JSC/ partners' / shareholders' liability is limited to the capital contribution. If a partner/shareholder participates actively in the management of

the company in the capacity of manager/director, the one becomes liable for corporate wrong management in the event of bankruptcy.
The shareholders are not liable for the Company's debts as the company and its shareholders are considered for company law purposes as separate legal persons.

Share Capital /minimum and minimum paid in amount

COMPANY	MINIMUM (€)	MINIMUM PAID IN AMOUNT (€)
Limited Liability Company / LTD /	1	100%
Single Limited Liability Company	1	100%
Joint Stock Company / JSC /	25 000	25%
Single Shareholder JSC	25 000	25%

Shares and Share Rights

The JSC and the Single JSC issues shares, which may be registered and bearer, ordinary or preferred. It is common a companies to issue only one class of shares, known as ordinary shares. In the articles of association of the Company are performed the rights and restrictions attaching to the shares. The shareholders who hold preferred shares would be expected to carry additional rights /for example - to receive extra dividends/. It is accepted for the shares to be freely transferable. However, it is the article of association to provide the restrictions to be transferred shares and the way of transfer. When shares are issued or transferred, details of the shareholder are registered in the company's statutory books and a share certificate is issued.

Corporate Governance

SHAREHOLDERS MEETING: Partners / Shareholders reserve the right to make certain decisions. Bulgarian Commercial Law distinguishes ordinary and extraordinary resolutions. As for the ordinary resolution the required majority is 50 % and for the extraordinary resolutions the required majority is ¾.

Ordinary resolutions, for example, are: approval the annual statement and the balance sheet, adoption of resolutions for reduction and increase of capital, appointing the manager, changing the corporate purpose, adoption resolutions for opening and closing of branch offices and for participation in other companies.

Extraordinary resolutions are: making amendments and supplements to the Articles of incorporation, admittance and dismissal of a partner/shareholder, transfer of the part of the

company to a new member, adoption resolutions for acquisition and expropriation of real estates and real rights.

The resolutions for reduction and increase of capital are adopted unanimously by all partners /shareholders.

Minimum number of broad meeting/year – Once a year. At least one shareholders meeting must be held each year in order to approve the accounts of the previous year. Both JSC and Single JSC must have a Statutory Auditor. The Board of Directors annually after the end of February composes for the previous year an annual financial statement and report for the Company's activity and presents them to the expert accountants-auditor appointed by the shareholders for examination and report.

MANAGEMENT: The General meeting of partners of a LLC made the most important decisions concerning the capital, the structure, management of the company, the admittance and expelling of shareholders, the acquisition and disposing of real estates, etc.

The ruling bodies of a JSC are the General meetings of shareholders to decide the most important issues. The other bodies depend on the system of management, which has been chosen. As there are usually a greater number of shareholders the law does not require unanimity for any decisions made by the General meeting. The General meeting is not entitled to make decision for acquisition or disposing of real estates as this issue is in the scope of the Board of directors' powers.

– *The one-level system* includes only a Board of directors consisting of 3- 9 members which is the ruling and representative body of the company. The board chooses one of its members who, in his capacity of an executive director, solely represents the company and performs the basic actions connected with the management but on the grounds of a relevant decision of the Board.

– *The two-level system* of management includes a Managing Board and a Supervisory Board which requires a well experienced method of cooperation between the two boards as some of the actions should be performed by the Managing Board with the consent of the Supervisory Board which chooses the members of the Managing Board and controls them permanently. The first system is widely used because of its larger flexibility and simplicity than the two-level system.

MANAGER AND EXECUTIVE DIRECTOR – appointment, dismissal, duties, remuneration. In the article of association of the company is provided which company body has the rights to appoint and dismiss a manager/executive director, his duties. The person who will act as a manager/ executive director must sign a declaration - consent and provide specified information to the Commercial Register. By and between the Company and the manager/executive director can be concluded a management contract and to be stipulated his duties, remuneration and liability.

The General Meeting of the partners of LLC appoints and sets a manager of the company and his remuneration. The manager it is not necessary to be a partner. The owners of the share capital have the opportunity to appoint as a manager person who represents the company and binds it in its relations with third parties. The manager carries out the current management of the company and concludes agreements on behalf of the company.

The executive directors in a JSC are appointed by resolution of the members of the Board of Directors and the Board determines their remunerations.

There are no specific rules on the level of remuneration and it will usually be a matter for negotiation.

The managers or the executive directors have to act in the Company interests and to take reasonable care for the Company action and not to accomplish some personal gains. The company is be represented by a Manager/ executive director. He shall organize and manage the Company's activities in compliance with the law and the resolutions of the General Meeting/ Board of Directors. The manager/ executive director has the rights to convene the General Meeting pursuant to Bulgarian legislation and the Article of association.

Minutes /filing with the registry of commerce and companies. Minutes must be kept in a Minute Book. They are signed by the Manager of a LLC and the executive director of the JSC and by the partners/ shareholders who are present at the General meeting. Only an authorized by the Board of Directors person can write the relevant information in the books.

In case of amendments and supplements to the Article of incorporation, changes concerning the capital, the structure and the management of the companies must notify the Commercial Register and an announcement for the convening of the General Meeting shall be done in the Commercial register.

The Commercial Register Act

The new Commercial register Act was adopted and approved by Bulgarian Parliament in 2006 and is in force on 01.01.2008. Parliamentary approval of the act fulfils a recommendation in the European Commission's Monitoring Report on Bulgaria of October 2005 to introduce electronic access to the commercial register and the requirements of Directive 2003/58 of the European Parliament and the European Council.

The enforcement of the new Commercial register Act is a step forward for creation of a central electronic register and enables cheaper and faster registration as well as simplifies and secures procedures accessible through Internet.

A new state agency was incorporated - a Registry Agency, Commercial register. This register facilitates the procedures regarding the incorporation and changes in the companies and ensures more transparency for the partners, shareholders of the companies and the connections between natural and legal persons. The applications regarding the companies are reviewed very fast which considerably helps the various business activities. If the administrator finds that the legal requirements are not met, he/she has to draw up a motivated refusal. The refusal can be claimed to the District court upon the location of the Company.

An indisputable asset of the act is the provision to introduce a standard centralized electronic registration system for companies and the direct and easy access to the company information.

The Commercial register Act provides that till 31.12.2011 is the deadline for free of charge re-registration of the existing companies in the Commercial register. The companies which do not re-register in the Commercial register will be liquidated by the Registry agency on the partners/ shareholders expense.

The provisions of the new Act are currently applied in practice with ups and downs as some issues regarding the Commercial register shall be clarified and solved /such as delays with the inscriptions.

→ Corporate Taxes

In response to the development of market attitudes Bulgaria carried out a number of changes within the last decades in its legislation including tax legislation. During that period major reforms have been put in place, which regulate the tax liabilities of economic subjects/local and foreign/ for their operation on the territory of Republic of Bulgaria. Now it is possible to say that Bulgarian tax legislation is in compliance with the legislation of the European Union.

Significant developments

The tax regulations of the European Union are applicable in Bulgaria and the intercommunity rules are implemented in the Bulgarian legislation.

Tax on corporate income.

Corporate profits are levied at 10% rate. The profits received from sale of shares and other financial instruments are not levied with tax, but only in case if the shares and the financial instruments are registered on Bulgarian Stock Exchange.

Corporate residents and objects

The Corporate Income tax Act taxes profits of Bulgarian and foreign legal entities, which have been generated on Bulgarian territory, through a place of business or permanent establishment. This law also regulates the taxation of income of foreign legal entities and individuals such as: dividends, interests, royalties.
The maximum tax rate on these sources of income is 10%. Where there is a double tax treaty between Bulgaria and the country of origin of the foreign company/individual/, the treaty rates are applicable.

Other taxes: VAT- Transfer tax- Stamp duty- Property Tax.

– VAT: VAT rate on the business turnover is 20 %. Generally all supplies are taxable with the exception of explicitly designated supplies such as: medicine, medical services, social services, financial services.

– Transfer tax /local municipal tax payable upon transfer of ownership over real estate/. In Bulgaria this tax is applied only on transfers of real estates and vehicles. From the 2011 its rate is between 0.1 – 4.5 % of the price of the real estate included in the deed. The exact percentage is determined with a decision of the Municipal council in every municipality.

– Stamp duty is paid to the Registry Agency upon the transfer of ownership over a real estate: its rate is 0.1 % of the price of the real estate included in the deed.

– Annual Municipality Property tax: This tax is levied on the property of individuals and businesses. Taxable properties are only real estates and vehicles. The tax rate depends on the value of the property, its location and type.

Branch income

Profits realized by foreign branches in Bulgaria are generally subject to taxation at a 10% rate which is withheld at their Bulgarian source. The income generated through a branch in a foreign territory, are considered as a part of the incomes of the head office. In this case if there is not a double tax treaty legal entities apply tax credit for each identical or similar tax paid in foreign territory.

Income determination

Inventory is valued in compliance with the accounting policy of the companies, worked out on the basis of IAC and IFRS. Applicable Standards give companies the opportunity to adjust the value of the inventory with the market prices, but for the tax purposes, the effect of these transactions on the net operating profit is eliminated.

CAPITAL GAINS: Gains from transfer of shares and participations are part of the operating profit of the companies.

INTERCOMPANY DOMESTIC: Dividends arising from shares or participations in Bulgarian companies and accruing to Bulgarian company or person are taxed at a 5% rate. The capitalized part of distribution of dividends is exempted from taxation. Companies or persons, which are local residents of countries of EU, are free of withholding tax on dividends if they hold at list 20% of the shares or participations and not for shorter term than a year.

FOREIGN INCOME: As mentioned above, foreign income is considered as a part of the income of the local entity. Two ways of taxation are possible – application of rules of a double tax treaty /if there is such/ or of the right to a tax credit paid for identical or similar taxes in the foreign country.

DEDUCTIONS: Necessarily entailed expenditures for the operation of the company are generally deductible, with some exceptions. These are expenses on cars used for management needs, gifts and entertainment and some social benefits received from employee for the account of employer. These expenses are deductible, but they are subject to a withholding tax at a 10 % rate. The tax paid is recognized as an expense for operation of the company.

DEPRECIATION AND DEPLETION: According to the applicable accounting standards, each company can choose a method of depreciation. But for the purposes of taxation the sum of depreciation is limited to the tax deductible depreciation rates for each group of assets.

Commercial and administrative buildings	3%
Industrial buildings and facilities	4%
Machinery, equipment and apparatus	20%
Office equipment and furniture	25%
Automobiles	20%
Other vehicles	8%
Untangible fixed assets not more than	20%

NET OPERATING LOSSES: According to the legal provisions net losses can be carried forward for five years.

Group taxation

There is no special tax regime for holding groups.

Tax incentives

Taking into consideration the low tax rate in Bulgaria, tax incentives are not such an important a factor. In spite of this, there are some tax allowances for manufacturing companies.

Tax administration

RETURNS: By March 31 of each year, companies are obliged to file a tax return accompanied by a balance sheet and some other statements for the results of its operation for the previous year. As of the same date the balance of the annual tax liability has to be paid too. Advance payments are required. Their size is calculated at the basis of the profit from the previous year and divided into 12 monthly installments. For a new company or a company that was liquidated previous year in a loss position, the advance payments are quarterly on the base of actual results.

Withholding taxes on dividends, interest and royalties

Non treaty rate 10 %. Bulgaria has signed and is a party to a number of Double Tax Treaties and Double avoidance tax agreement dealing with the withholding taxes.

→ Individual Taxes

– The maximum individual tax rate from 01.01.2008 is 10%.

– All residents, who realize income in the territory of Bulgaria, are obliged to pay tax. Bulgarian residents are taxed on their worldwide income. Sources of individual income can be labour agreements, rendering services/ lawyers, architects, etc./, or economic activities like agriculture, capital gains and others.

– For 2011 employees have to contribute 12.90 % of their gross salary to fund social security and 3.2 % to fund health benefits. All of these are deductible from the gross income to form the taxable base. The rates are changed in the beginning of every year.

– Capital gains tax is levied at the source and the tax is final. This income is not included in the taxable base of the individual.

– Personal allowances: allowances are available only for people with children up to the age of 18.

– Tax credit is possible only for Bulgarian residents for their foreign income.

Transactions

From 2011 all transactions of a total amount exceeding BGN 15,000 shall be transferred via bank account, no cash payments are permitted for amount higher than this..

→ Real Estate law

Bulgarian real estate law is regulated mainly in Bulgarian Constitution and Property Act. The legislation regulates certain restrictions on acquisition by foreigners.

A register of transactions dealing with real estate is kept in every Regional Court. The all kind of deeds and mortgages, which are drafted by and signed before a notary must be kept in the register. The register is organized by the names of the owners of real estates, not by the real estates. Costs of real estate transactions /notary's fees, taxes and other duties/ are approximately up to 3.5 % of the value for a sale, 1% for a mortgage/

Types of Ownership

The ownership in Bulgaria is absolute. The title to real property can be an absolute and entire right or can comprise three separate rights: a right to use of the property, possession of real estate and the third right is disposition with the property.

The absolute entire title to real estate can belong to a single person / legal or natural entity/ or a collection of individual owners, where each of them owns a portion of the whole with no direct and precise right over a specific part of the real estate. Bulgarian law of estate regulates some types of limited ownership:

– right of common
– right of building
– right of passing

The Land Register

Real property in Bulgaria is registered in special well-organized public land register. Each community is divided into section, each section into parcels. Sections and parcels are numbered in turn. The land register in Bulgaria is called detailed land plan.

The changes in the legal status of a parcel (transfers of title, liens, mortgages, etc.) or any lot within a parcel are booked on the registers maintained by every regional court in the country. There is no united country land register.

Transfer formalities

A transfer of title, mortgage or other change in the legal status is only enforceable against third parties as from its registration in the land register of the Regional court.

The right of ownership of real estate is transferred in the form of a notary deed. The notary deed is a type of contract which form and content are prescribed by law. In order to be registered with the land registrar of the Regional court, the deed, mortgages, etc. must be drafted by and signed in front of a notary within whose region the real estate is located. As the notary is under obligation to check the identity of the parties, their capacity, the authority of the representatives and the good title of the transferor, the process of execution of the notary deed offers considerable security. For all transactions with real estates the signing in front of a notary is compulsory. Some exceptions are provided in the law: orders issued by the administration, mortgages ordered by a court, court resolutions and orders, etc.

Payment of the price – from 01.07.2011 I new rule is in force – payments in real estate transactions of a total amount exceeding BGN 10,000 shall be transferred to a special bank account of the notary public or to a ban account held with a bank chosen by the parties.

Upon execution of the notary deed certain taxes, stamp duty and fees are due. A local tax levied upon the price agreed between the parties and included in the deed or the valuation of the property by the tax authorities, whichever is higher, is due. The notary fee is calculated according to rates specified in the law, depending on the price indicated in the title deed. Thirdly, a stamp duty need to be paid to the Registry agency.

Mortgages

A mortgage is established over real property to guarantee financial obligations. According to the Bulgarian property law the mortgages is a formal act – deed. The mortgages are registered in the land register of the Regional Court.

The mortgage has the following consequences:

– The owner of the real estates may dispose with his property without first paying his debt, the mortgage is in force for the new owner and the mortgage holder may seize the real property from the new owner and have it sold at auction.

– In case the mortgage is not paid the holder of a mortgage seizes his debtor's real property and sell it at auction.

The all kind of mortgage allows the mortgage holder to follow the property despite multiple transfers and seize it in the hands of the owner whoever that may be.

– The holder of the mortgage is preferred creditor according to the Bulgarian law - holder has a right to be paid, by preference over other creditors. This preference refers to the ordinary creditors and to the creditors whose rights are registered at a later date.

There are two types of mortgage:

– Concractual mortgage - a debtor agrees by contract to allow the holder of the mortgage to register a mortgage over his property on a deed signed by a notary.

– Mortgage by operation of law – this type of mortgage is established in absence of debtor's agreement under certain specific cases, determined in the statute.
/a debtor may agree by contract to allow his creditor to register a mortgage over his property/.

Restrictions on acquisition

– Bulgarian legislation regulates restrictions on acquisition real property in Bulgaria by foreign natural or legal entities to buy land in Bulgaria. But on the other hand foreign natural or legal entities can buy building. Bulgarian legal entities with partners /shareholders foreign persons or companies are permitted to buy land and buildings without any restrictions. Amendments in the Bulgarian Constitution were adopted providing that foreign legal and natural entities may acquire land in Bulgaria under the terms arising from the accession of the Republic of Bulgaria to the European Union.

– Pre-emptive rights arise in certain case, pointed in Bulgarian law of estate - if a co-owner decides to sell his part of the real estate, this co-owner is obliged to offer his part in the first place to the others co-owner.

– Special Legal Protections for parties - In the buyer considers that the transaction of real estate is tainted in some way, he may claim in the court the validity of his purchase. The taint – reason for petition can be:

- an error concerning the important characteristics of the property
- misrepresentation: the seller is not the owner of the property, but he acts as a owner in front of seller and tricks the buyer into purchasing;
- violence /physical or mental / voids a sale.
- lack of consent
- contradiction to the law
- breach of the required form

The buyer may claim voidance of the sale – if the property is improper for the use, restrictions to use to such an extent that the buyer cannot use his new property fully, a prohibition to build on land.

Leases

Leases agreements are frequently concluded in Bulgaria. Real property can be rented under lease agreements.

Bulgarian contracts and obligations act regulates residential and commercial leases, the maximum lease term /10 years – not applicable for all the legal entities as commercial trasaction/, obligation and rights of the tenant and lesser. The tenant may be given a right to renewal of the lease, if not the owner wishes to rent to other tenant, to sell or live in the building.

Rural leases are regulated as general in the same way: automatic renewal rights, limits to the use of the land, etc.

The notary form is not compulsory for the lease agreement.

Zoning, building permits, etc.

Every building / residential and commercial / requires a prior permit issued by the local municipal and administrative authorities in the connection with the detailed land plan, zoning rules and regulations. Land is classified in some categories / for example urban, farmland, forests or protected land.

In the last three years a major reform in the zoning of the real estate is conducted and is presently continuing. The reform represents entering into force a cadastre card where each property shall have unique for the whole country number. Leading authority is a new state agency - the Cadastre agency. All the properties in Bulgaria are supposed to be measured again in order the current information to be included in the new cadastre card and register as the information from the regulation in force is used too. The procedure of measuring the properties and filling the card is slow and is done region by region. At the moment this reform is very difficult and slow in practice which causes troubles to the legal entities and to the natural persons.

Wills

A will, signed by a foreigner before a notary public in Bulgaria is recognized in Bulgaria. A will signed abroad is recognized in Bulgaria if one of the following is met:

– The will is valid under the law of the country, where the will is executed or

– The will is valid under the law of the country, which is generally applicable to the person at the moment of the execution of the will or at the moment of his death or

– The will is valid under the law of the country, where the person has his domicile or permanent abode at the moment of the execution of the will or at the moment of his death;

A foreigner may also choose the applicable law. This shall be done in a separate statement in the will itself provided this statement is signed independently from the will statement.

→ Labour law

Bulgarian labour law and the decisions of the Bulgarian labour courts regulate the employment mainly in favour of the employees. The relationships between the employees and employer and their obligations and rights are systematized and regulated in Labour Code.

The access to the labour courts in Bulgaria is free and the employees are not required to pay any court fees. The employees frequently claim damages, obtained by wrongful dismissal.

Employment Contracts

The main classes of contracts are:

– fixed terms contract and
– indefinite terms. These types of contracts can be concluded for part time and full time job.

Cost of dismissal and wrongful dismissal.

The Labour Code regulates the reasons for employee's dismissal. The reasons can be non-execution of duties, gross misconduct or breach of the disciplinary rules in the company. If the dismissal is not based on one of the reasons, pointed in the Labour code, the employee is entitled to claim for damages. The employer can terminate a labour contract in some cases without prior notification. But in the most employment agreement is stipulated a prior notice period which period varies /from a month to three months/.

It is frequently stipulated in the employment contract the employer to pay employee a severance indemnity for the dismissal. The legal minimum of the indemnities is equal to the fourfold monthly gross salary. It is possible the work contracts provide more favorouble severance indemnities.

In addition to the payment of severance indemnity, if the dismissal is judged illegitimate, an employer can be sentenced to pay damages to the dismissed employee. The amount depends on the actual damages suffered by the employee and is determined by the court.

Employment Contracts for Directors; a Special Regime

Directors and managers can be appointed by the General meeting of the partners of Limited Liable Company or the Board of directors of Joint Stock Company. Their work contracts are concluded prior to their appointment. According to the Bulgarian commercial law this type of contracts are called contract for management. Their duties are defined in the article of incorporation of the company and the employer supervises their work process. The manager/director receives special remuneration for their specific duties.

If the manager/ director has other work contract it may be suspended for the period of their management. After the termination of their appointment as a manager/director, the employment contract begins to operate again.

Bulgarian commercial law regulates the special regime of the procurator. The General meeting or the Board of Directors appoints a procurator – special representative and manager of the company who can acts at the same time with the manager/ director.

Employees' representatives and union representation

On a national level, employees' representatives the trade unions, and employers' representatives, negotiate the provisions of new laws and the conditions of the Collective Bargaining Agreements.

In a company trade unions and employees representatives are connects employers and employees. Bulgarian labour law determines the certain obligations of the employers such as: Providing employees' representatives with information concerning the economic condition of the company, state of employment in the company, implementation of new technologies, and development of the working conditions of employees.

The employees' representatives must be consulted and announced in advanced for the future dismissals of employees and changes in the structure of the company, which may influence on the work process. The employees' representatives may have the right to give a statement for the dismissal of some persons with equal qualifications.

When a Labour Union representation becomes binding?

The employees and the labour representatives can organize the elections of employee's delegates who discuss the employment conditions and the dismissal.

Rights and Privileges of a Labour Union Representation inside a Company

Bulgarian labour law regulates certain rights for the union representatives, for example:

– right to participate in the discussion of the questions concerning the work and insurance relationship in the company.

– access to the information about the company concerning the positions of the employees

Labour Code grants the employee representatives and union representatives specific protection against dismissals. The working conditions of the employee representatives and the union representatives cannot be changed without their prior agreement. At the request of the employees the employee representatives can represent them in court cases.

Collective bargaining agreements other agreements (National, regional, provincial or company level...)

Labour Code provides different types of employment agreements:

– individual employment agreement and
– collective employment agreement.

The labour relations between employers and employees can govern at the level of each branch or field of industry by the provisions of national, regional or company collective bargaining agreement.

Collective Bargaining Agreements binding for the labour contracts?

The Collective Bargaining Agreements are binding for all employees who signed the agreement and for all labour contracts in the case the provisions of law are not more favourable to employees than the provisions of the applicable Collective Bargaining Agreement

Wages and other types of compensation (wages, Social Security contributions, remuneration in kind, insurance policies, pension plans)

Wages of employees can comprise of various elements such as:

– Fixed salary
– Incentives and Bonuses
– Remuneration "in kind" (such as - housing, car, cell phone...)

Minimum salary in 2011

Recently the Bulgarian government has accepted the minimum salary which to be paid to an employee is 240 BGN / around 120 euro/ monthly for a full time job. It is possible employees and employers have stipulated higher minimum salary in the provisions of the Collective Bargaining Agreement.

The employer has no fixed annual credit of over time hours per employee.

Cost of Overtime Hours

The additional overtime work of the employee must obtain the appropriate payment.
Labour Code provides the payment rates –

– overtime work on workday has to be extra paid with 50 % of the contract salary
– overtime work on weekends has to be extra paid with 75 % of the contract salary
– vertime work on official celebrations has to be extra paid with 100 % of the contract salary.

Some Collective Bargaining Agreements may provide for different rates.

Employment regulations

The employment regulations, collective bargaining agreements, overtime work, salaries and holidays are regulated and codifies within the Labour Code.
The Labour authorities such as Ministry of labour and social cares and Labour inspectorate exert control over the applications of the labour regulations.

Social Security

CONTRIBUTION FORMS (TERMS AND PROCEDURES): According to the Bulgarian Social Security Code social security contributions must be paid every month. Social security payment is divided between the employer and the employees as the percentage is:

– The employer must pay 60 % of the social security
– The employee must pay 40 % of the social security.

The percentage varies according the age of the employees and the branch of industry they work. The percentage may also vary every year upon a government decision.

Health and safety

The employers are obliged to provide their employees with safe and healthy work place.
The companies must protect their employees against all kind of accidents. The employers provide the employees with adequate tools and security training. The employees are insuranced against different accidents.

The Labour Inspectorate and other authorities exert regular controls over the work conditions.

The employees in some branches of industry / for example mine industry / are protected and the Labour Code provides special health and security training depending nature of their activities.

When accidents occur on the work place, the employer must declare the accident. The company is obliged to hold responsibly for the damages suffered by employees.
The health contributions are as follows:

– 3.2 % - paid by the employee
– 4.8 % - paid by the employer

Labour Code and Social Security Code comprise general regulations of health and security conditions.

Contracting and outsourcing of work or services

Upon discretion of the companies some tasks within the company may be provided by consultants, agents or sub-contractors on the base of outsourcing.

→ Chile

The Law Firm was founded by Mr. José A. Otero B. in July 21st, 1923. Upon the return of Mr. Miguel Otero L. in 1957 from the United States after having received the Degree of Master in Comparative Law, the Law Firm started to practice as counselors for international corporations and foreign investors doing business in Chile. In this activity, the Law Firm has almost 50 years of experience, not only serving foreign clients but also counseling Chilean corporations and clients doing business abroad, mainly in the United States and Europe.

Principal Areas of Practice

General Practice, Commercial, Corporate, Contracts, Financing, Securities, Banking, Mergers and Acquisitions, Foreign Investments, Mining, Energy, Environmental, Constitutional Law, Administrative Law, Antitrust and Trade Regulations, Consumer Law, Privatization, Infrastructure and Real States, Water and Sanitary Services, Labor and Employment law, Telecommunications, Information Technology, Intellectual Property, Copyright, Technology Law, Internet and Cyberspace, Licensing, Privacy, Communication and Media, Commercial Arbitration and Litigation.

Estudio Jurídico Otero is very active and well known in litigation matters, specializing in protection rights in diverse judicial levels such as the Appeal Courts, the Supreme Court of Justice of Chile, ordinary civil and labor courts, and also negotiations.

Our Culture

Every attorney working for the Estudio Jurídico Otero has been individually trained in such a way that their working system, legal approach and performance permanently reflect a highly qualified, personalized and efficient service.

Client Support

Our attorneys work exclusively for the Law Firm and therefore the client receives immediate and personal assistance from any one and all of them.

Membership

Estudio Jurídico Otero is member of ILP Global (International Lawyer Partners), an association that, to date, consists of 3 law firms in Chile, Spain and Mexico, which share and maintain a common philosophy, design and work methodology. The Association endeavors to meet the needs of clients in different jurisdictions under a uniformity of procedures, without losing the identity of the law firms that make it up or forgetting the idiosyncrasies and distinctiveness of their respective laws. It is also a member of e-lure, an expanding network of law firms with international practice.

Likewise, Estudio Jurídico Otero is the only Chilean firm member of the Employment Law Alliance, the largest world network of lawyers specializing in employment law and labor issues in all 50 of the United States and more than 300 cities worldwide.

→ Chile, Platform Country for the Latin American Region

Chile has specific comparative advantages that make it the best place for foreign corporations to develop new business and expand their operations and sales in Latin America. Key among them is a stable and transparent legal framework for foreign investment, characterized by clear, non-discriminatory and non-discretionary rules. These principles are embodied both in the 1980 Political Constitution and in all laws, including the Foreign Investment Statute, known as Decree Law 600 (D.L. 600).

All the rights guaranteed by Chile's legal framework are further protected by Bilateral Investment Treaties (BITs). As of January 2008, Chile had signed 52 BITs, 39 of which were in force at that time. In addition, Chile's Free Trade Agreements (FTAs) with Canada, Mexico, South Korea, China and the United States include specific chapters on investment-related issues, including dispute-settlement mechanisms that are similar to those used in BITs.

Since May 7, 2010, Chile became a member of the Organization for Economic Cooperation and Development (OECD), an international cooperation organization of 31 states, which aims to coordinate their economic and social policies. It is considered that the OECD brings together the most advanced and developed countries in the world, for its members represent 70% of the global market.

Though there are other mechanisms that can be used by foreign investors, such as Chapter XIV of the Central Bank's Compendium of Foreign Exchange Regulations, more than 81% of materialized foreign investment between 1990 and 2004 entered the country through D.L. 600, with a total of US$ 53.6 billion. Based on constitutional principles, the Foreign Investment Statute guarantees non-discriminatory and non-discretionary treatment of foreign investors. The former assures all people, regardless of their nationality, "to be treated by the State and its bodies in economic matters without arbitrary discrimination". Therefore, foreign investors enjoy the same rights and guarantees as local investors. The principle of non-discretionary treatment governs the activities in every economic sector and entails the existence of clear, well-known and transparent rules, which assure foreign investors they will be treated fairly and impartially.

Main Foreign Investors' Rights

Foreign investors in Chile can own up to 100% of a Chilean-based company, and there is no time limit on property rights. They also have access to all productive activities and sectors of the economy, except for a few restrictions in areas such as the fishing sector, air transport and mass media. In the case of fishing, restrictions are subject to the rules of international reciprocity.

The State has a very minor productive role in Chile. Only a few strategic activities - such as exploration and exploitation of lithium, liquid and gaseous hydrocarbons deposits in coastal waters under national jurisdiction or located in areas classified as important to national security, and the production of nuclear energy - are restricted to the State. However, under certain circumstances, foreign companies can invest even in these sectors.

Any foreign individual or legal entity, as well as Chileans with residence abroad, can invest through D.L. 600. Under this mechanism, investors enter into a legally binding contract with the Chilean State, which cannot be modified unilaterally by the State or by subsequent changes in the law. However, investors may, at any time, request the amendment of the contract to increase the amount of the investment, change its purpose or assign its rights to another foreign investor.

D.L. 600 guarantees investors the right to repatriate capital one year after its entry and to remit profits at any time. In practice, the one-year capital lock-in has not represented a restraint since most productive projects - in areas such as mining, forestry, fishing and infrastructure - require more than a one-year start-up period. Once all relevant taxes have been paid, investors are assured access to freely convertible foreign currency without any limits on the amount, for both capital and profit remittances. In addition, they are guaranteed the right of access to the formal exchange market. The repatriation of all capital invested is devoid of any tax, duty or charge up to the amount of the originally materialized investment. Only capital gains over that amount are subject to the general regulations contained in the tax code.

It should be noted that the Central Bank has the right to restrict access to the formal exchange market - made up by banks and other authorized dealers - if adverse macroeconomic conditions make this necessary. However, D.L. 600 investors are exempt from these restrictions and their right to access the market in order to repatriate profits or capital is not affected.

The D.L. 600 contract acknowledges as foreign investment:

– Freely convertible currency that can be exchanged at the most favorable rate that foreign investors can obtain from an entity authorized to operate in the Formal Exchange Market.

– Tangible assets, in any form or condition brought into the country according to general import regulations, without exchange coverage. The value of these goods will be determined using general procedures applied to imports. These tangible assets include, among others, machinery or equipment used in productive processes.

– Technology, in any form susceptible to be capitalized, which will be appraised by the Foreign Investment Committee according to its real international market value, within 120 days after the foreign investment application is submitted. If the appraisal is not carried out, the value assigned shall be that estimated by the investor in an affidavit. In previous cases, independent consultants have performed this task.

– Credits associated to foreign investment: The general regulations, terms, interest and other modalities of foreign credit contracts, as well as surcharges related to total costs to be paid by the debtor, including commissions, taxes and expenses, shall be those authorized by the Central Bank of Chile.

– Capitalization of foreign loans and debts, in freely convertible currency, whose contract has been duly authorized by the Central Bank Under D.L. 600. Investors can increase the capital of the company which received the investment through both the capitalization of credits made under Chapter XIV and the credits derived from current imports and pending payments.

– Capitalization of profits transferable abroad: D.L. 600 allows capital increases of the company receiving the investment through the capitalization of transferable profits.

Foreign investors may request a maximum time-limit of three years to materialize their contributions. Under article 11 bis of DL 600, investments of not less than US$ 50 million for industrial or non-mining extractive projects can request a time-limit of up to eight years. In the case of mining projects, the time-limit is eight years but, if previous exploration is required, the Foreign Investment Committee may extend it to up to twelve years.

Special Advantages for Foreign Investors

Although Chile's Constitution is based on the principle of non-discrimination, D.L. 600 offers some tax advantages for foreign investors. These are not "tax breaks" or "tax holidays", but are intended to provide a stable tax horizon, acting as a form of "tax insurance". D.L. 600 offers several different tax options, but basically allows the investor to lock into the tax regime prevailing at the time an investment is made.

Invariability of Income Tax Regime

All Chilean companies have to pay a First-Category Tax (or Corporate tax) equivalent to 17% (currently raising up to 20% onto 2014) Under Chile's Common Tax Regime, a 35% tax is currently levied on distributed or remitted profits abroad. Interest paid to non-residents is also subject to a 35% additional withholding tax, however, interest on loans granted by foreign banking or other financial institutions is subject to a 4% tax, provided that excess indebtedness provisions do not apply. Under DL 600, a foreign investor can opt to lock into an effective fixed overall tax rate of 42% on taxable income for up to ten years, or - under article 11 bis - for up to twenty years in the case of industrial and extractive investments of US$ 50 million or more. The investor, thereby, acquires immunity from any tax increases in the Common Tax Regime that may occur during that period. The lock-in can be waived at any time, but an investor cannot subsequently revert to the guaranteed 42% rate. The First-Category payment of 17% can be set against tax returns under both the Common Tax and Invariable Tax Regimes.

Invariability of Indirect Taxes

D.L. 600 states that foreign investments brought into the country in the form of tangible assets are subject to the general Value Added Tax taxation (VAT) regime and customs regulations. However, foreign investors are entitled to include a clause in their contracts giving them access to a regime that freezes VAT (currently at 19%), as well as import tariffs on capital goods for the project, at their rate at the date of the investment. This special regime applies throughout the period authorized for carrying out the investment. Additionally, imports of some of these capital goods such as machinery or equipment are exempt from VAT in the case they are not produced in Chile and are on a list compiled, prepared and published by the Ministry of Economy's Foreign Trade Department. The current list was approved by Decree 204 of the Ministry of Economy, published in the Official Gazette ("Diario Oficial") on December 12, 2002, and is available at the Ministry of Economy's website, www.economia.cl

Foreign investors who sign a D.L. 600 contract are exempted from VAT on other technology imports, providing they appear on this list compiled by the Foreign Trade Department. The products currently listed include accounting and data processing machines, TV cameras, lasers and magnetic resonance imaging diagnostic equipment (MRI), among several others.

Special Regime for Large Projects

Under article 11 bis of D.L. 600, investments in new industrial or extractive activities, including mining, are entitled to additional tax benefits, providing they have a value of at least US$ 50 million. Currently, the Foreign Investment Committee is revising its policy regarding article 11 bis, and new contracts under this regime are not being approved at this time. This policy is subject to change in the future.

New Legislation for mining projects

On 16 June, 2005, Law 20.026 was published in the Official Gazette. It establishes a specific tax on mining activities, which came into force on 1 January, 2006. The Law amends Decree Law 600 by adding a new Article 11 ter. That article establishes a regime of invariability for the aforementioned tax, for those investors that sign a new foreign investment contract related to projects with a value of no less than US$ 50 million. In order to opt into this special regime, investors with existing foreign investment contracts must not have made use of the special invariability regimes set out in articles 7 and 11 bis of DL 600, or they must renounce those regimes at the time of opting into the rights under article 11 ter. The deadline for submitting a request to opt into the regime under 11 ter for investors with existing foreign investment contracts was November 30, 2005.

Foreign Investment Procedures

A foreign investor who wishes to invest through the D.L. 600 must submit an application to the Executive Vice-Presidency of the Foreign Investment Committee. Since June 6 of 2003, the minimum investment amount for a new project is US$ 5,000,000 (five million dollars) when investments consist of foreign currency and associated credits. The minimum amount is US$ 2,500,000 (two and a half million dollars) when the investment is in the form of tangible assets, technology, and capitalization of profits or capitalization of credits. The Foreign Investment Committee retains the right to modify both figures. Projects submitted to the Committee's consideration must involve a ratio between equity and associated credits of up to 25/75.

In the case of foreign currency, investors can execute their foreign exchange operation only when the contract has been duly signed. However, when submitting the application, they can request a special authorization to exchange their currency immediately. Any other type of capital contribution requires the Foreign Investment Contract to be duly signed.

Additional information

Most investment projects require additional permits and/or must fulfill other requiements besides those set forth in D.L. 600. All investment projects, both local and foreign, must comply with the country's local and sector-specific legislation, at the national, regional and municipal levels.

It is worth noting that besides the Foreign Investment Committee's approval, some projects require additional information or authorization, which must be obtained from other competent authorities. Only as an example, we can mention that when an application for investments in the mining sector is presented under D.L. 600, the Foreign investment Committee asks the Chilean Commission of Copper (Cochilco) to issue a report on the project; the Undersecretariat of Fishing reports on activities in that sector; the Banks and Financial Institutions Regulatory Agency must authorize operations in the financial banking area; and the Securities and Exchange Commission reports on activities in the insurance and investment funds fields.

A concession granted by the Undersecretariat of Telecommunications is required in order to install, operate and run public telecommunication services; intermediate telecommunication services through physical facilities and networks designed for this purpose; and radio sound broadcasting services. Complementary services, such as telephone banking or financial data over the telephone, do not require a concession or permit, although a technical ruling is required when equipment is connected to public telecommunications networks.

In the case of the environmental assessment of projects, it is based on the Environmental Assessment Service. Its main function is to introduce the use of modern technology and manage the environmental management tool called "System of Environmental Impact Assessment" (SEIA), which is based upon the environmental assessment of projects adjusted as provided in the existing standard, promoting and facilitating citizen participation in the evaluation of projects. The role of this service is to standardize the criteria, requirements, conditions, background information, certificates, procedures, and technical requirements of an environmental nature established by relevant ministries and other state entities, by establishing processing guidelines.

The modernization of the system aims to establish common criteria to evaluate each type of project, thus ensuring the protection of the environment in an efficient and effective manner.

In line with its commitment to free-market economic policies and free trade, Chile does not use tax incentives to support productive activities or to attract new investment. However, it does provide certain inducements for investments in some isolated geographic regions and new industries, particularly those in the technology field.

Investors can, for example, tap into government schemes to promote workplace training and to increase industrial productivity. All these schemes, in the form of grants and tax rebates, are available equally to both local and foreign investors and are part of a wider government strategy designed to increase competitiveness by extending the benefits of economic growth to all areas of the country, promoting education and training and encouraging technological innovation.
*Source: Foreign Investment Committee

→ Bilateral Investment Treaties

In 1991, Chile became a signatory of the Washington Convention of 1965 that created the International Center for Settlement of Investment Disputes (ICSID). Since then, the country began to negotiate Bilateral Investment Treaties (BITs), a mechanism through which Chile provides additional protection both to inward and outward foreign investment flows. As of November 2005, Chile had negotiated 52 BITs, 39 of which were in force at that time.

In these agreements, each Contracting State commits itself to provide fair and equitable treatment to investments legally materialized in its territory by investors of the other Contracting State. They also guarantee the principles of National Treatment and Most Favored Nation status.

Moreover, BITs protect private property rights through the establishment of basic principles and minimum standards in case of expropriations. Likewise, they guarantee that any expropriation or measure with similar effect will be adopted in accordance with a law based on public good or national interest, in a non-discriminatory manner. They state that expropriatory measures must be accompanied by the provisions of prompt, adequate and effective compensation.

Through BITs, the Contracting States guarantee the free transfer of capital, of profits or interest generated by foreign investments, and, in general any transfer of funds related to investments. Some restrictions may apply, in accordance with national laws.

Additionally, these agreements establish a dispute settlement mechanism in case of disputes that might arise between an investor of a Contracting State and the other Contracting State. Basically, this mechanism assures that controversies will be settled through friendly consultations. If no agreement is reached, the investor will be entitled to submit, at his own decision, the case before the domestic jurisdiction of the host State of the investment or to international arbitration. In most BITs, this jurisdictional option is definitive.

The principle of subrogation is also included in BITs. This means that if one Contracting State - or an agency authorized by it - grants any kind of insurance against non-commercial risks to an investment in the territory of the other Contracting State, the latter shall recognize the rights of the former to subrogate for the rights of the investor in case it has paid the insurance.

The protection provided by these agreements applies both to investments made after the agreement comes into force as well as to those made before that date. These BITs, however, do not apply to disputes which arise prior to their entry into force or to disputes directly related to events which occurred prior to their entry into force. Signed treaties need to be ratified by Congress before they can be in force. Treaties are in force in Chile once they are published in the Official Gazette (the Government's Official Registry of laws and decrees).

List of investment treaties:

Americas

COUNTRY	SIGNED ON	STATUS*
Argentina	August 2,1991	In Force since February 27, 1995
Bolivia	September 22, 1994	In Force since July 21, 1999
Brazil	March 22, 1994	Not in force
Colombia	January 22, 2000	Not in force
Costa Rica	July 11, 1996	In Force since July 8, 2000
Cuba	January 10, 1996	In Force since September 30, 2000
Ecuador	October 23, 1993	In Force since February 21, 1996
El Salvador	November 8, 1996	In Force since November 18, 1999
Dominican Republic	November 28, 2000	Not in force
Guatemala	November 8, 1996	In Force since December 10, 2001
Honduras	November 11, 1996	In Force since January 10, 2002
Nicaragua	November 8, 1996	In Force since January 10, 2001
Panama	November 8, 1996	In Force since December 21, 1999
Paraguay	August 7, 1995	In Force since September 16, 1997
Peru	February 2, 2000	In Force since August 11, 2001
Uruguay	October 26,1995	In Force since April 22, 1999
Venezuela	April 2, 1993	In Force since May 17, 1994

Europe

COUNTRY	SIGNED ON	STATUS*
Austria	September 8, 1997	In Force since November 17, 2000
Belgium	July 15, 1992	In Force since August 5, 1999
Croatia	November 28, 1994	In Force since July 31, 1996
Czech Republic	April 24, 1995	In Force since December 2, 1996
Denmark	May 28, 1993	In Force since December 30, 1995
Finland	May 27, 1993	In Force since June 14, 1996
France	July 14, 1992	In Force since December 5, 1994
Germany	October 21, 1991	In Force since June 18, 1999
Greece	July 10, 1996	In Force since March 7, 2003
Hungary	March 10, 1997	Not in force
Island	June 26, 2003	In Force since May 16, 2006
Italy	March 8, 1993	In Force since June 23, 1995
The Netherlands	November 30, 1998	Not in force
Norway	June 1, 1993	In Force since November 4, 1994
Poland	July 5, 1995	In Force since September 22, 2000

Portugal	April 28, 1995	In Force since February 24, 1998
Romania	July 4, 1995	In Force since August 27, 1997
Spain	October 10, 1991	In Force since April 27, 1994
Sweden	May 24, 1993	In Force since February 13, 1996
Swiss	September 24, 1999	In Force since August 22, 2002
Turkey	August 21, 1998	Not in force
Ukraine	October 30, 1995	In Force since August 29, 1997
United Kingdom	January 8 1996	In Force since June 23, 1997

Asia, Pacific Islands and the Middle East

COUNTRY	SIGNED ON	STATUS*
Australia	July 9, 1996	In Force since November 18, 1999
China	March 23, 1994	In Force since October 14, 1995
Indonesia	April 7, 1999	Not in force
Lebanon	October 13, 1999	Not in force
Malaysia	November 11, 1992	In Force since August 4, 1995
New Zealand	July 22, 1999	Not in force
Philippines	November 20, 1995	In Force since November 6, 1997
Vietnam	September 16, 1999	Not in force

Africa

COUNTRY	SIGNED ON	STATUS*
South Africa	November 12, 1998	Not in force
Egypt	August 5, 1999	Not in force
Tunisia	October 23, 1998	Not in force

** Signed treaties need to be ratified by Congress before they can be in force. Treaties are in force in Chile after they are published in the Official Gazette (the Government´s Official Registry of laws and decrees).*

List of free trade agreements

AGREEMENT	COUNTRY(IES)	SIGNED ON	DATE OF ENTRY INTO FORCE
Canada-Chile FTA	Canada	December 5, 1996	July 5, 1997
Chile-Mexico FTA	Mexico	April 17, 1998	August 1, 1999
Chile-Central America FTA	Costa Rica	October 18, 1999	February 14, 2002
	El Salvador	June 3, 2002 (Bilateral Protocol	
	Guatemala	August 5, 2010 (Bilateral Protocol)	
	Honduras	August 28, 2008	
	Nicaragua	Bilateral protocol under negotiation	

Chile-EU EPA	European Union	November 8, 2002	February 1, 2003
Chile-US FTA	United States	June 6,2003	January 1, 2004
Chile-Korea FTA	South Korea	February 15, 2003	April 1, 2004
EFTA	Iceland	June 26, 2003	December 1, 2004
	Liechtenstein		
	Norway		
	Switzerland		
Chile-China FTA	China	November 18, 2005	October 1, 2006
Pacific-4 (P-4)	Brunei	July 18, 2005	November 8, 2006
	New Zealand		
	Singapore		
Chile-Panama FTA	Panama	June 27, 2006	March 7,2008
Chile-Colombia FTA	Colombia	November 27, 2006	May 8, 2009
Chile-Peru FTA	Peru	August 22, 2006	January 1, 2009
Chile-Japan EPA	Japan	March 27, 2007	September 3, 2007
Australia-Chile FTA	Australia	June 30, 2008	March 6, 2009
Chile-Turkey FTA	Turkey	June 14, 2009	March 1, 2011

Agreements under negotiation

– Vietnam
– Thailand
– Malaysia

Double taxation

Chile has double taxation treaties in force with several countries and a few to be eventually signed.

Status of double taxation treaties with Chile

Treaties in force:

– Argentina, March 7, 1986
– Belgium, July 17, 2010
– Brazil, October 24, 2003
– Canada, February 8, 2000
– Colombia, December 22, 2009
– Croatia, June 24, 2003
– Denmark, February 10, 2005

– Ecuador, October 24, 2003
– France, September 14, 2006
– Ireland, October 28, 2008
– Malaysia, October 2, 2008
– Mexico, February 8 2000
– New Zealand, September 4, 2006
– Norway, October 20, 2003
– Paraguay, October 2, 2008
– Peru, January 5, 2004
– Poland, March 27, 2004
– Portugal, October 28, 2008
– South Korea, October 20, 2003
– Spain, January 24, 2004
– Sweden
– Switzerland, August 6, 2010
– Thailand, August 9, 2010
– United Kingdom, February 16, 2005

Subscribed Agreements

– Russia,
– United States
– Australia

Agreements for which negotiations have been concluded

– South Africa

International transport agreements

– Germany (air and sea), September 11, 1978,
– United States of America (air), February 4, 1994,
– France (air), July 21, 1978,
– Panama (air), April 25, 2001,
– Singapore (sea), November 25, 1993,
– Switzerland (air), November 18, 2009,
– Uruguay (air), February 27, 1995,
– Venezuela (air and sea), April 18, 1994.

→ Conducting Business in Chile

In general terms, business can be conducted in Chile either through a Limited Liability Partnership, a Corporation, a branch of a foreign entity and two new forms of organization, the one-person limited liability company and the limited liability corporation.

The law requires that only some and specific kind of businesses are conducted through corporations, such as banks, mutual funds and insurances companies.

Among the types of business entities, the least recommendable is the branch of a foreign entity because the foreign parent company is fully liable for the activities of its Chilean branch. Its liability may not be limited to the capital allocated to the branch in Chile and, moreover, the local IRS is empowered to assess the branch's taxable income if it considers that the accounting records are not appropriately reflecting that income.

Finally, although the Chilean branch of a foreign company can deduct specific expenses incurred by the foreign parent company in connection with the branch's activities that are necessary to produce the local company's income, there are some IRS rulings that state that payments made abroad to cover such expenses are subject to a 35% withholding tax. General unspecified charges are not deductible.

Closed Corporations, Limited Liability Partnerships, one-person limited liability companies and Limited Liability Corporation shall be incorporated by means of a public deed, an abstract of which must be published in the Official Gazette and registered with the local Registry of Commerce. The corresponding bylaws are included in the public deed of incorporation.

In the case of corporations and limited liability partnerships, there must be at least two partners or shareholders, either natural or legal persons. One-person Limited Liability companies must be incorporated by only one natural person. This type of organization was created to allow small entrepreneurs to do business without jeopardizing all his patrimony. In the case of the limited liability company by stock, it may also start as a one person entity, with the capital divided in stocks. It was created mainly to promote investment of risk capital.

The incorporation process takes approximately two to three weeks.

Similarities

The main similarities between a Closed Corporation and a Limited Liability Company and the Limited Liability Corporation are the following:

LIABILITY: Partners and shareholders are liable only up to the amount of their contributions.

CONTROL: Neither is subject to specific control by any government agency, except for the authority of local IRS.

TAXATION: The income tax structure of corporations and limited liability companies is the same, and is divided into two stages: first, when income is accrued; and second, when profits are distributed to shareholders or partners. In the first stage, the tax rate is 17% (currently increased upon 20% for three years). In the second stage, the income is subject to a personal progressive income tax (rate from 5% up to 40%) or, in the case of non-resident shareholders or partners, to a withholding tax at the rate of 35%. A tax credit against the tax paid in the second stage is granted for taxes paid in the first stage. In the case of non-resident shareholders or partners, the overall tax rate is 35%. Nevertheless, there are some differences regarding some issues that are described hereinafter.

FOREIGN INVESTMENT: As it was explained previously, there are two suitable alternatives in making a capital contribution: the "Chapter XIV" of the Foreign Exchange Compendium and the "DL 600" (Foreign Investment Statute).

Differences

In general, we can appreciate that most of the differences between a Closed Corporation and a Limited Liability Company are due to the fact that the former emphasize capital and the latter emphasize the person as a partner. Bearing this fact in mind, we can say that the main differences between them are the following:

Managment

Closed Corporation: A Board of Directors manages it and appoints the general manager (CEO), who is the legal representative of the corporation. Certain essential matters such as merger, termination, capital increases, etcetera, must be decided upon by the Shareholders Meeting. The annual report and balance sheet must be approved by the Shareholders Meeting. The board is elected by shareholders and it must be comprised of at least three members. The directors do not need to be domiciled in Chile.

Board Meetings must be held in the place indicated in the summons or otherwise in the Corporate Bylaws and directors must assist in person. If directors live abroad it is possible to designate alternate directors with domicile in Chile. In such a case, each director must have an alternate. However, it is possible to authorize Board Meetings in which one or more directors are connected by phone or video conference. Directors are fully liable for the management of the corporation.

Limited Liability Company and Limited Liability Corporation: It is managed by its partners or by whomever they appoint for such purposes in its bylaws or in a different public deed. This attorney will have the powers expressly granted to him.

Therefore, the management of a Limited Liability Company is simpler as it does not require shareholders and/or board meetings, unless management is stipulated to be through a board.

Nevertheless, if the manager has been appointed in the company's bylaws, his removal must be done by amending such bylaws, fulfilling the same requisites required to incorporate the company (public deed which abstract must be registered and published).

Capital

The law does not require a minimum amount of capital but it must be enough to allow the business entity to finance start-up costs. In both, Limited Liability Companies and Corporations the capital can be contributed as the company needs it.

Closed Corporation and Limited Liability Company by Stock: Its capital is divided in shares and the number of shares indicates the percentage ownership of the corporation. The initial capital must be subscribed and paid in the period of 3 years; otherwise the company's capital is reduced to the paid amount, except for bonds convertible into shares, all of the aforesaid pursuant to law. No one can become a shareholder by means of providing certain work.

Limited Liability Company: Its capital is not divided into shares and the percentage ownership of the Company is represented by the percentage contribution to the company's capital. The initial capital must be paid in the period agreed in the bylaws. A partner can acquire an equity interest through his personal work for the company.

Assignment of interests

Closed Corporation: The procedure to transfer shares is simple and does not require significant formalities or an amendment of the deed of incorporation.

Limited Liability Company: Ownership interests cannot be freely assigned except under unanimous authorization of all partners. The deed of incorporation must be amended and an abstract must be published in the Official Gazette and registered with the local Registry of Commerce.

Profits

Closed Corporation: Dividends may only be distributed if there are profits. Furthermore, profits may only be distributed in proportion to the number of shares owned by each shareholder.

Limited Liability Company: Partners may withdraw money even if there are no profits. Furthermore, if agreed by partners, profits may be distributed in a proportion different than the percentage ownership interests in the company.

Reinvestment

Profits can be withdrawn from a Limited Liability Company to be reinvested in other companies without paying taxes on such withdrawal. This may be attractive if the company is going to become a holding company.

Delaying payment of personal progressive income tax or withholding tax

If a Limited Liability Company does not have profits subject to first-stage taxation, payment of personal progressive income tax or withholding tax regarding profits withdrawn from the company will be delayed until the company has profits subject to first-stage tax.

Unique Tax on non-deductible expenses

Closed Corporation: Certain transactions, such as non-deductible expenses, presumed withdrawals corresponding to utilization of the company's fixed assets and loans of the company to its shareholders who are natural persons are subject to a unique tax of 35%.

Limited Liability Company: Non-deductible expenses are subject to the personal progressive income tax or, in the case of non-resident shareholders or partners, to a withholding tax.

Duration

Closed Corporation: Its duration may be indefinite.

Limited Liability Company: Its duration may not be indefinite. Nevertheless, the partners may incorporate it for the period of time they want, with no legal limit, and it may be automatically extended.

Amendments

Closed Corporation: Amendments to the by-laws must be approved by different types of majorities at a Shareholders Meeting.

Limited Liability Company: All partners must unanimously agree to amend the by-laws in a public deed.

Miscellaneous

It is important to highlight that corporations cannot maintain or purchase their own shares except in very specific cases only regarding publicly traded companies, provided the transaction is approved by 2/3 of the shareholders.

Stock Options exist in Chile only regarding open corporations and must be limited to 10% of a capital increase plus the amount of the capital increase not subscribed by shareholders in exercise of their preemptive rights.

This is only a general approximation of the main similarities and differences between a Closed Corporation and a Limited Liability Company.

We must mention that the Limited Liability Corporation recently created offers great flexibility in its organization and operation, without many of the restrictions of the close corporations or the inconveniences of a limited liability company.

Taxation

See above. Conducting Business in Chile – Taxation.

According to "DL 600" provisions, a fixed, overall tax rate of 42% can be agreed upon for a ten-year period. This fixed tax can be waived at any moment but the investor cannot subsequently return to the guaranteed 42% rate.

Royalties are subject to a withholding tax rate of 20%. There are other rates for specific cases. The tax rate for payments done to foreigner non domiciled or no resident in Chile for engineering services or technique advices is 15%.

There are some special tax regulations for Business Platform Companies, which are not applicable regarding countries that have double taxation agreements with Chile. The purpose of this special tax regime is to avoid double taxation for those companies incorporated in Chile which purpose is to invest in Chile and abroad and provided that the requisites and conditions stated in the law are duly fulfilled.

→ Chilean Labour and Employment Law

The Chilean Constitution (article 19 Nº 16) recognizes and protects the freedom to work. It stipulates that every person has the right to choose his/her job and to a fair salary. It also forbids any form of discrimination not based on capacity or personal adaptation. No jobs can be prohibited unless they affect morality, national security or national health. Nor is it possible to condition the job to union membership or other forms of organization (or to not joining such organizations). And every employee has the right to bargain collectively.

The Constitution also recognizes the right to social security and to form unions.

Labor laws in Chile are basically contained in the Labor Code. This code regulates labor relations between employers and employees. Except in the case of matters not regulated by special laws or if a rule specifically states it, the Labor Code does not apply to people working for the State (whether centralized or decentralized agencies), for the Legislature or the Judiciary, or to any public employees subject to special rules (but only to the extent of those special rules).

The rights contained in the labor laws cannot be waived while the employment contract remains in force. Thus, each employee enjoys certain minimum inalienable rights, and any attempt to cause an employee to waive such rights is unenforceable. These rights can be complemented by the additional rights and benefits granted by the employer in the work contract, its annexes or subsequent amendments.

The general principles of the Law state that employment has a social function and every person has the freedom to contract and engage in the lawful employment he/she chooses.

The Labor Code defines the subjects of labor relations, employer and employee. It says that the employer is any natural or legal person who uses the intellectual or material services of one or more persons under an employment contract. The employee is any person who renders intellectual or material services as a dependant and subordinate under an employment contract.

As these definitions show, the basic aspects that determine whether a relationship is ruled by labor laws or is that of an independent contractor are subordination and dependency. Therefore, it is important to be careful in drafting and negotiating contracts because although the parties may have agreed to be ruled by contractual relationships, since labor rights cannot be waived, the court may determine that it is in fact a work relationship and thus subject to the rights and obligations we will refer to herein.

Hiring

DISCRETIONARY TERMINATION VS. LEGAL TERMINATION CAUSE: Employment stability is a governing principle in Chile and most of the employment relationships are permanent, unless otherwise stated.

The employment contract may be terminated only on any of the grounds set forth in articles 159, 160 and 161 of the Labor Code and the employee shall be entitled to receive compensation depending upon the reason for termination.

According to article 159, the employment contract can end by mutual agreement, by resignation of the employee, by the death of the employee, expiration of the term agreed in the contract, the conclusion of the task or work for which he/she was hired and by acts of God. In these cases,

there is no severance payment and the employer must only pay the sums due to the worker in relation to employment until the date of termination of the work relationship.

Also, according to article 161, the employer may unilaterally terminate the contracts of executive and senior officers. It can terminate other employees because of needs of the company (economic or others), which must be properly and adequately justified and authorized by the employer. In any of these cases:

– A formal written notice of the termination must be delivered to the employee not less than thirty days in advance of the effective date of termination, unless compensation is paid in lieu of such notice equivalent to the last monthly salary earned by the employee, with a maximum limit of UF 90.

– A compensation for years of service shall also be paid if the work contract has been in force for a year or more, equivalent to the last salary earned by the employee for each year of service or fraction over six months, with a ceiling of 330 days (11 years of service). The salary used in this calculation is limited by law to UF 90 monthly (90 Unidades de Fomento, an indexation unit, of approximately US$ 3,950).

The employer may choose to pay this compensation on the basis of salary actually paid to the worker in the event that this exceeds the limits established by law for the calculation.

Article 160 of the Labor Code provides grounds attributable to the conduct of the worker that can end the contract without the employer's obligation to pay compensation (only sums due to the worker in relation to employment until the date of termination of the work relationship), such as proven serious misconduct, dishonesty in the execution of the work, slander against the employer and immoral behavior that affects the company where he or she works.

If the cause alleged by the employer in the formal letter of dismissal is considered unfair or inapplicable, the employee has 60 days to file a suit against his/her employer and the severance payment and sums due to him can be increased by 30% to 100% if the court sustains the employee's claim. If the court deems that the dismissal was anti-union conduct, then the employee will be entitled to recover his job and be paid the salaries he could have received during the time he/she was separated from his/her job or be paid 3 to 11 monthly salaries, plus payments for unfair dismissal.

In any case, the employment termination of the relationship must be signed and ratified by the worker before a Notary or other Certifying Officer.

If the parties agree to pay in installments the resulting amounts for the worker corresponding to the settlement agreement, the payment must include interest and adjustments and the agreement cannot be authorized by a notary public, but by a Labor Inspector.

DISCRIMINATION: The Chilean Constitution forbids any form of discrimination not based on capacity or personal adaptation.

Article 2 of the Labor Code states that any form of discrimination violates labor rules. Discrimination consists of distinctions based on race, sex, color, age, marital status, union membership, religion, political ideas, nationality or social origin and transgresses the principles of labor laws. No employer can condition the hiring of an employee to those circumstances.

Nor can an employer condition the hiring of an employee to the absence of economic, financial, bank or commercial obligations unless the employee will have power of attorney to act on behalf of the employer that involves at least general managing powers; or he/she will be in charge of collecting, administrating or safekeeping funds or valuables of any nature.

Finally, it should be noted that the Labor Code provides a special procedure to protect workers from discriminatory conduct and any violation of their fundamental rights guaranteed by the Constitution.

EMPLOYMENT APPLICATIONS: The above-mentioned rules must be taken into account in employment applications and interviews, particularly the rules relating to nondiscrimination.

In general, there are no express rules regarding convictions, but it is not considered illegal to request a certificate of criminal record for a potential employee.

Some positions require the exclusion of those individuals who have been convicted for crimes punishable by imprisonment of more than three years and one day.

It is possible that medical examinations may be required of applicants if a particular health condition is required in the position to be filled.

EMPLOYMENT CONTRACT: According to article 7 of the Labor Code, the individual employment contract is an agreement where the employer and employee are mutually obliged, the latter to render personal services as a dependant and subordinate, and the former to pay a salary for such services.

Article 8 also stipulates that any rendering of services under such circumstances makes the existence of an employment contract presumable.

Article 9 of said code states that the employment contract can be made verbally or in writing, but a written counterpart must be signed within 15 days after the employee started work or 5 days, if he was hired for a specific task, work or job that will take less than 30 days. The absence of a written contract shall mean that the terms and conditions are the ones declared by employee, and the employer will be subject to a fine.

Article 10 of the law specifically describes the basic information that the contract should contain, such as date and place of the contract, identification of the parties, including the employee's nationality and date of birth, nature of the job, place where it must be done, salary and payment terms, work day and term of the contract.

ADVERTISING/RECRUITMENT: Any job offer made by any means, directly or through a third party, is considered in violation of labor rules if special discriminatory requirements are imposed regarding race, sex, color, age, marital status, union membership, religion, political ideas, nationality or social origin, unless it is related to the capacity of the people to perform their job.

EMPLOYMENT REFERENCES/BACKGROUND INVESTIGATIONS: Employers may verify references provided by a job applicant.

Compensation and benefits

MINIMUM WAGE: According to article 41 of the Code, wage or salary is any sum of money or kind appraisable in money that the employee receives for his work, excluding meal, transportation and travel allowances, family benefits and others. Article 42 states that it includes salary, overtime payments, commissions, and profit share.

The monthly salary that is agreed upon in the employment contract cannot be lower than the minimum salary established by law. The wages for part-time jobs cannot be lower than the minimum applicable, calculated proportional to the normal workday.

A percentage of company's annual profits must be distributed among employees in one of the following ways: (i) 30% of net taxable profits, with certain adjustments; or (ii) 25% of the annual salary, with a maximum of 4.75 minimum salaries per employee. The employer is free to decide which alternative to use every year.

The parties can also agree to additional benefits, which may or may not be imputed toward the above-mentioned legal benefits.

MINIMUM AGE: Any person older than 18 years can sign any type of employment contract. No authorization is required.

SALARY PAYMENTS: Salaries shall be paid in Chilean currency. However, expatriate employees may be paid in foreign currency.

According to article 44 of the Code, the salary can be set according to units of time, days, two weeks or month, or by piece, unit or job. In any case, the unit of time cannot exceed one month.

CHILD LABOR: Between the ages of 15 and 18, an employee needs his parents' authorization to work (maximum of 30 hours per month) and he cannot work in cabarets or places where alcoholic beverages are sold nor work at night. Persons between the ages of 15 and 16 can work only if they have the above-mentioned authorization, after finishing schoolwork and provided it is light work that does not affect their health.

HEALTH INSURANCE AND SOCIAL SECURITY BENEFITS: Employees must finance their retirement pension through the contribution of 10% of their monthly salary. Men may retire at the age of 65 and women at the age of 60. Contributions are made to pension funds managed by private entities (AFP), subject to control by government superintendence.

Death and disability pensions are financed with retirement funds and insurance plans. These contributions are paid to the same pension fund to which retirement contributions are made.

Regarding health benefits, employees may choose between a public health system, financed by a contribution of 7% of the employee's salary, or a private system under which the employee affiliates to a private health insurance company (ISAPRE). The minimum contribution is similar to that of the public health system.

All these social security benefits are withheld by employers from employees' salary and paid to the corresponding entities. Such contributions are a tax deduction for employees and are calculated against a salary that is limited to 66 Unidades de Fomento (approx. US$ 2,939). However, the employee can agree to deposit an amount above the legal limit. Work accident and occupational disease benefits are financed by employers through a basic contribution equivalent to 0.95% of monthly salaries.

Expatriates who have a professional or technical degree may obtain a waiver of social security contributions, provided they are enrolled abroad in a social security system that provides benefits at least similar to those existing in Chile. The exemption does not include work accident insurance contributions. For said exemption to operate, they will need a certificate from the social security institution abroad and placing on record in the contract or an annex that they have chosen that option.

WORKDAY, WORK WEEK AND OVERTIME: Article 22 of the Labor Code establishes a general maximum work week of 45 hours that cannot be divided into less than 5 or more than 6 days. The work day cannot exceed 10 hours. Special rules apply to special jobs such as crew on fishing ships that do not involve continuous work during the day, or drivers.

A maximum of two hours per day of overtime can be agreed, and that time must be paid with a 50% surcharge. The agreement must be in writing and for no longer than 3 months. The purpose must be solely to attend to temporary needs of the company, and may therefore not be contracted on a permanent basis.

Attendance and completion of work schedules and shifts must be controlled by means of a special book or clock.

The work day must be divided in two in order to allow at least 30 minutes for lunch. This time will not be considered time worked.

The above-mentioned time limit is not applicable to top levels of the organization, such as vice-presidents, managers, executives, administrators and others who render similar services or work without direct superior supervision.

Time off, vacation leaves of absence

DAYS OFF: Every Sunday and holiday must be a day off, except for activities for which there is special authorization to work on those days.

The work shift or work week can be divided up to include Sundays and holidays only for certain specific jobs. A shift can run for two continuous weeks only for jobs distant from urban areas.

The companies expressly authorized to work on Sundays and holidays must give the employee a day off in compensation for every Sunday and/ or holiday worked, but at least two days off in the respective month must be granted on Sunday. In case that more than one day off is accumulated in the same week, the parties can agree to payment of the days off that exceed one per week. Payment cannot be less than the overtime salary (50% surcharge).

VACATIONS: Employees with more than one year in the company have the right to a paid holiday of fifteen working days per year. Ten of these days must be taken consecutively, and the remaining five as agreed by the parties. Vacations can be accumulated only for up to two consecutive years. The employer can only compensate vacation time by a cash payment when the work relationship ends.

LEAVES OF ABSENCE: In case of illness or accident, the employee is entitled to a paid leave for the period indicated in the corresponding medical certificate.

Pregnant women have six weeks paid leave prior to delivery and twelve weeks paid leave after birth. In both cases, the employment contract remains in force, but the employer suspends payment of salary and the employee instead receives compensation from the health insurance company. Employees cannot be terminated while their leave of absence is in force.

DAY CARE AND CHILD BENEFITS: If a child younger than 1 year needs attention at home due to a sickness of concern, the working mother or father has the right to request a special leave of absence, based on the corresponding medical certificate.

Any company employing more than 20 women of any age or marital status must have a special place where mothers can feed and leave their children younger than 2 years old. The company can instead pay the expenses of day care directly to the child care service chosen by the mother. Mothers breastfeeding their babies, have the right to use an hour of their work shift to feed them.

OCCUPATIONAL HEALTH AND SAFETY: The Labor Code imposes upon the employer the obligation to observe health and safety standards in the workplace, to implant measures to prevent accidents, and others alike. Every company, establishment, job or economic unit, whether commercial or industrial, that has more than 10 employees, needs to adopt Internal Health, Safety and Hygiene Regulations that must set down the prohibitions and obligations imposed upon employees in regard to their jobs, permanence and life in the respective company or establishment.

Every employer must also pay special work accident and occupational disease insurance for each employee. The amount of the payment depends on the risks associated with the job, and the basic rate is 0.95% of the salary.

Nationality and work visa

NATIONALITY: If a company has more than 25 employees, 85% must be Chilean. If it has less than 25 employees, there is no limitation. The calculation of this percentage must consider all of the company's employees in the country and exclude technical specialists who cannot be replaced by Chilean personnel. An employee is considered Chilean if he/she has a Chilean spouse or children or is a widow or widower of a Chilean or has lived in the country for more than 5 years.

WORK VISA: In order to work in Chile, expatriates require a visa subject to an employment contract. For such purposes, an application must be filed before the Ministry of Foreign Affairs. The employee must register with the International Police and obtain a foreigner's identity card and a taxpayer identity card.

Intellectual property/fair competition/non-competition covenants

INTELLECTUAL PROPERTY: Chilean copyright law (Law No. 17.336 on Intellectual Property) provides in its Article 8, second paragraph, that in the case of computer programs, their copyright holders will be the natural or legal persons whose employees have developed them in performing their regular duties, unless otherwise stipulated in writing.

It states furthermore in its third paragraph that with respect to computer programs developed on behalf of a third party, their copyrights will be deemed as assigned to said third party, unless otherwise stipulated in writing.

Other rules regarding intellectual property must be expressly agreed upon by the parties, respecting the rules of copyright and intellectual property (regulated by Chilean law N º 17.336 on intellectual property and N º 19.039 on industrial property). Rules on intellectual property law are also protected by penalizing conducts violating said rules in the Unfair Competition Law which protects competitors, consumers and, in general, any person whose legitimate interests are affected by an act of unfair competition (Law No. 20.169).

NON-COMPETITION COVENANTS/ NO SOLICITATION OF EMPLOYEES AND CUSTOMERS: There are no express rules regarding the issue, but such covenants are not expressly prohibited and are usually set down in employment contracts. Nevertheless, their enforcement may be limited by antitrust laws and constitutional rights that grant the freedom to work, according to the specific circumstances of each particular case. In any case, a request like this is valid only during the work relationship, as later on it may be deemed as a threat to freedom to work, unless there is some financial compensation during the term of this covenant.

Personnel administration

REQUIRED POSTINGS: Except for the cases mentioned in the paragraphs above and for the Internal Health, Hygiene and Safety Regulations, as a general rule the law does not require notices to the employees to be posted or published.

REQUIRED TRAINING: Labor law does not mandate employment-related training for employees or managers, except for the specific degrees required to perform certain jobs (architects, lawyers, physicians, etc.). Nevertheless, there are various tax regulations and incentives to encourage employers to pay for employee training.

PERSONNEL RECORDS: The employer must keep folders with the data and information of his workers comprising employment documents such as employment contracts, receipts for payment of salaries and pension contributions, and vacations, among others. The law allows this kind of information to be kept by the employer on a centralized basis, off the Company's premises.

MEALS AND REST PERIODS: See paragraph 2.F.

PAYMENT UPON DISCHARGE OR RESIGNATION: An employee whose employment is terminated must be paid all wages due and owing, including all accrued and unused vacation time, and legal compensations, as appropriate in each case. This must be done simultaneous to signature of the discharge.

EMPLOYMENT REFERENCES: As has been previously mentioned, there are no rules regarding this matter. Nevertheless, it is common practice to request and give employment references.

RECORDKEEPING: Law No. 19,628 governs the treatment that public bodies and individuals give to personal data that are stored in registers or databases, whether electronic or not.

To process personal data, the individual should be authorized by: (i) Law N ° 19.628 (data issuing or collected from publicly available sources or processed by a public body), (ii) another law, or (iii) if the owner of the data expressly agrees to it (expressly, informed and in writing). Likewise, the purpose of said treatment must be permitted by law, if the information is of a commercial, financial, banking or economic nature, or is included in listings stating only the activity, occupation, education, degrees, address and date of birth.

This authorization is not necessary if the company needs the data for internal reasons.

However, the law requires employers to maintain secrecy of all information and worker's private data obtained during the employment relationship.

Privacy

Article 5 of the Labor Code expressly states that employers must exercise their rights within the limits established by the Constitution, specially observing the rights and respect for privacy of the workers.

DRUG TESTING: Although the parties may agree in the Work Contract that the Employer may conduct procedures for alcohol and drugs prevention, it is usual and recommended that everything related to these matters is duly established in the Internal Health, Safety and Hygiene Regulations.

Although there are no specific laws on the subject, the labor authority (Labor Inspection) has determined that drug testing and alcohol consumption controls can only be carried out to the extent that they respect as territorial and temporal limits, the times the employee remains within the Company.

Consequently, the employer may not intervene in any conduct that may be considered as part of the worker's private life. Additionally, procedures to take drug and alcohol tests must be done respecting the dignity, privacy and honor of the worker and with impartiality, in terms of being applicable to all workers without distinction, or to part of them, randomly chosen. The results of the controls must be kept and treated as confidential in accordance with the provisions of Law 19.628.

OFF-DUTY CONDUCT: Employers may not discharge or discriminate against an employee for engaging in lawful conduct outside of the workplace or after the workday. There are no specific rules regarding medical information, searches, lie detector tests, fingerprinting, surveillance and monitoring.

Unemployment

Chile has an unemployment insurance system: This insurance establishes benefits for employees who lose their job, and it is financed by the employee, by the employer and by the Government, depending on the duration and kind of contract. This law entered into effect October 1, 2002.

APPLICABILITY: This insurance is applicable to workers who meet the two requirements below:

1. He/she must be a worker under employment contract.
2. The worker must be subject to the Labor Code.

EMPLOYEES EXCLUDED FROM THE INSURANCE: The insurance does not apply to the following types of employment:

1. Servants (working in a private residence)
2. Employees hired under an apprenticeship agreement
3. Employees under 18 years of age
4. Independent workers.
5. Pensioners receiving a total disability or old age pension

REPORTING OBLIGATION: The employer must communicate the commencement or termination of the employee's services to the Corporation Manager of the Unemployment Insurance within 15 days of the occurrence. A breach of this duty will be fined in the amount of 0.5 UF (US$ 20 approximately).

Collective labor relations and collective bargaining

The Labor Code recognizes the right of employees to form unions, which may in turn join federations, confederations and headquarters. The law has ruled in depth on all the requirements, benefits, etc. of these unions and strongly punishes anti-union practices within the company.

The law has set down rules on collective bargaining and states that it is the procedure whereby one or more employers negotiate common working and salary terms for a fixed period of time with one or more unions or employee groups. The collective bargaining can include more than one company, but in such case, all the parties must agree on it (especially the employers).

A company must be in business for at least one year before there can be any collective bargaining. If the employer refuses to accept the collective bargaining agreement proposed by the employees, they may invoke their constitutional right to strike. Both collective bargaining

and the right to strike are ruled in depth in the Code, and, under certain circumstances, the company may replace the employees during the strike.

Collective bargaining agreements cannot last less than 2 and no more than 4 years. An impasse in collective bargaining can be submitted to mediation or arbitration if the parties decide to do so in order to try to reach an agreement.

Immunity

For employees in special, exceptional or particular circumstances, such as health conditions, positions in the unions or maternity, the law considers a special immunity by which their employment contract cannot be terminated unless a court authorizes it. The dismissal does not take effect until the authorization is granted, unless the court authorizes a provisional separation during the trial. In this case, if the authorization is denied, the employee must be reincorporated to his job and he is entitled to receive salary for the time he was separated from his job.

The following employees enjoy this privilege:

– women, from the time they become pregnant to one year after the maternity leave ends;

– employees who participated in the creation of a union, from 10 days before the respective meeting until 30 days after it was held (it cannot last more than 30 days);

– candidates to a position in the union, as of the time they report the date of the election to such election;

– members of the board of the union, from the time they are elected to six months after their position ends;

– the employees' representative on the Hygiene and Safety Committee, upon election;

– employees in collective bargaining, from 10 days before the presentation of the collective contract proposal to 30 days after it was signed or until the parties are notified of the arbitral award;

– employees who have a leave of absence for sickness, work accident or occupational disease, while it lasts, except if the termination is based on one of the causes established in article 160 of the Labor Code.

Employers must also maintain the job of any employees called to serve in the army, for the entire period of the recruitment to 1 month after they are discharged.

Settlement (resolution) of labor disputes

The Code establishes Labor Courts for the resolution of certain types of disputes and assigns the resolution of others types of disputes to the Civil Courts. In both cases, the applicable procedure is a special one described in the law, which considers a mandatory conciliation hearing. Labor disputes cannot be submitted to arbitration.

JUNGE SCHÜNGELER & PARTNER
www.jsw-law.de

→ Germany

Since its foundation some 25 years ago in Cologne, at the economic and geographical heart of Germany, JUNGE SCHÜNGELER & WENDLAND has been mainly focusing on advising enterprises and corporations and their respective operations on corporate, business, labour and trade law both in Germany and abroad. Over the years, these core competences have been consequently expanded to other fields like Bankruptcy and Creditors rights, M&A, Tax Consulting, Trademark & Patent Laws, Contracts, Family and Inheritance Law, Non-Profit Organizations, Real Estate and Construction Law.

Being strongly business-oriented from the outset, JUNGE SCHÜNGELER & WENDLAND has developed a philosophy of pragmatic "deal making" instead of "deal breaking." We consider the law to be just another tool to achieve and increase the economic success of our clients. In an increasingly complex and specialized economic environment, this approach requires profound knowledge about national and international tax systems and jurisdictions. In addition to the extensive know-how on this subject provided by the several tax advisors in our own ranks, a very close cooperation with the renowned OFM Oebel Fröhlich Michels GmbH auditors and tax consultants puts us in a position to offer tailor-made solutions to our clients' wide-ranging needs and requirements, from very specific legal advice to the elaboration of their financial statements.

Anticipating the far reaching impact of globalization and European integration, JUNGE SCHÜNGELER & WENDLAND readily responded to its clients' growing expectations of an international service by joining several international networks and developing close ties to a large number of individual correspondents worldwide and nationwide years ago. We therefore are well prepared to meet any challenge in our field, relying traditionally on cooperation on a nonexclusive basis, choosing German and international correspondents alike in response to the specific requirements of each case. Due to its international alignment and its strongly developed approach to international teamwork, JUNGE SCHÜNGELER & WENDLAND is able to provide truly international service for its clients both in Germany and abroad.

As a team of highly qualified and internationally trained lawyers, tax consultants, paralegals and professionals, we are fully committed to giving our clients outstanding care and advice and meeting their needs, expectations and objectives by providing them with the most effective, efficient and high standard of legal services.

The principal areas of the firm's practice are:
– Corporate including M&A
– Commercial and Trade Law
– Labour Law
– Trademark & Patents Law
– Tax Consulting
– Contracts
– Real Estate and Construction Law
– Non-profit organizations
– Family and Inheritance Law

→ Foreign Investment Law

Registration with Government, authorities and permits

Germany offers an attractive environment for foreign investors. At first, there are solid and strong infrastructures. Furthermore, Germany has a high degree of social stability. There are also stable political and economic conditions. Foreign investors may find the highest level of legal security, reliability and transparency there.

The German government and industry actively encourage foreign investment in Germany. There is no limit on the percent of equity foreigners may own, or on the size of their investment. There are also no real restrictions, nor are there any permanent currency or administrative controls on such investment. Furthermore, there are no special regulations on foreign takeovers of German firms. Foreign firms are generally treated as equals to national firms when building permits, obtaining licenses or applying for and receiving investment incentives.

Considering this, any business, trade, factory or industrial establishment, whether domestic or foreign, must notify the respective local administration and tax authorities about the business prior to commencing its activities.

For most types of investment, licenses are not required. Only for certain businesses, there is an obligation for the following licenses: agents and brokers for real estate, insurance, housing, investment and mutual funds; commercial banking; custody and security businesses, gambling, pawn broking and auction sales.

In case of an industrial engagement comprising activities which could be a danger for the environment, compliance to the rules of the "Federal Pollution Control Act" is required. There is a very strict and formal licensing procedure for such special business permits. Also, special attention should be paid to EC environmental restrictions.

There are no principal limits that restrict private ownership of any kind of establishment. Either German or foreign entities have the right to establish and own business enterprises, engage in all forms of remunerative activity, and to acquire and dispose of interests in business enterprises. There is no discrimination against foreign investment and foreign acquisition, ownership, control or disposal of property or equity interests.

Also intellectual property is well protected in Germany. Patents are protected by the Patents Act of 1936, as amended. Copyrights are covered under the basic laws of 1965, as amended and Trademarks are protected by the Trademark Act of 1993, as amended.

Germany has introduced various incentives and other special conditions to encourage investments in Germany. There are more than 3.000 of these incentive programs. The incentive programs exist on the following levels: EU, federal and state level. The incentive programs can be classified by target areas, which include the promotion of investment, research and development, human resource development and the promotion of the European market. Most of the programs are Tax Incentives (special depreciation allowance, capital reserve allowance), Investment Grants (Improvement of regional Economic Structures program) and various Credit Programs (Loans with below-market interest rates from the Equalization Funds Bank, Marshall Plan Funds, EU programs, loan guarantee programs and other programs for small and environmental demonstration projects). The government has placed particular emphasis on investments in eastern Germany and offered a number of incentives especially for this.

There are various possibilities of doing business in Germany. On the one hand, a foreign investor can form a strategic alliance with an already existing German business on a solely contractual basis. On the other hand, there are different forms of building up an own business. If the investor wants to incorporate a German Business unit, he could establish a German branch. Setting up a branch simply requires the registration with the commercial register and the local trade office of the municipality where the branch is to be located.

If the investor is interested in conducting an independent German business unit separated from its domestic business abroad, he can choose between varied forms of corporations and partnerships. The two major forms of corporations are the GmbH (Gesellschaft mit beschränkter Haftung) and the AG (Aktiengesellschaft). Important forms of partnerships are the OHG (offene Handelsgesellschaft) and the KG (Kommanditgesellschaft).

All business units are subject to a registration process with the commercial register at the district court (Amtsgericht), where the business is operated. The commercial register contains

all basic information about the business and its owners. All information is public domain and accessible for creditors and public authorities.

Transfer of dividends, interests and royalties abroad

The transfer of dividends, interests and royalties abroad is uncomplicated and easy for foreign investors. The Euro is freely convertible into other currencies and the import and export of capital is free, subject only to reporting requirements.

A free European capital market was introduced by EU Directive 88/36L and the implementation of former Article 67 of the EU Treaty in national law. This Directive completely abolishes all restrictions on the transfer of capital between EU member states.

Considering non-EU member states, the 1956 U.S.-FRG Treaty of Friendship, Commerce and Navigation is to mention, which provides for free movement of capital between the Unites States and Germany. Germany also subscribes to the OECD Code on Capital Movements and Invisible Transactions (CMIT). While the provisions of Germany's foreign economic law provide that restrictions can be imposed on private direct investment flows in either direction for reasons of foreign policy, foreign exchange or national security, no such restrictions have ever been imposed. There doesn't exist a broad authority to screen foreign direct investment.

Repatriation procedures and restrictions

Investments are not subject to foreign-exchange controls. Profits and dividends may be freely repatriated without restrictions of any kind.

Foreign personnel (permits, etc.)

Foreign citizens who plan to take up residence and employment in Germany must comply with certain immigration rules and regulations.

Generally, foreign citizens require a visa for entering Germany. The visa is granted for three month and can be extended once for an additional period of three month.

Citizens of EU member states, the U.S.A. Canada, Japan and various other countries are able to enter Germany without a visa, provided that their stay in Germany does not exceed three month and provided the foreign citizen is in possession of recognized travel documentation.

Foreign citizens, who have planned to work or engage in a commercial activity or trade within Germany, need a residence permit. This does not apply to people, who enter Germany for the purpose of travel for a maximum of three months and who are exempted from visa requirement.

If a foreign, non-EU citizen, who does not possess an unlimited residence permit, intends to take up gainful employment in Germany, the consent of the Labor Office is required.

The possession of a (limited) residence permit does not include the statutory right to receive a work permit. The Labor Office principally considers the application of the work permit on the basis of the prevailing labor market and the individual applicant.

In some cases, there is no work permit required. This means for example for certain executive employees and temporarily seconded specialists or instructors, whose stay does not exceed three months.

Application for permits must be filed before leaving the home country at the local German diplomatic representation. Different to this, nationals of EU member states, EFTA-States and U.S. citizens may apply for a residence permit after having legally entered Germany.

Work permits can be either issued for special types of employment in certain areas or for particular positions in named corporations. Work permits are usually linked to an employer and a new permit is therefore required for each change of employment.

→ Corporate Law

Regulations and Rules

German corporate law offers a wide range and broad variety of legal forms for conducting business, which reaches from the sole proprietorship via branches to various forms of corporations and partnerships. Unlike some other major Continental legal systems, the German corporate law is not integrated into one sole code as might be the case with the French Code de Commerce, but split into different codes.

The Civil Code (Bürgerliches Gesetzbuch - BGB) deals with company law in Articles 705 to 740, setting the legal framework for civil-law associations (Gesellschaft bürgerlichen Rechts – GbR). Regulations concerning partnerships are to be found in the Commercial Code (Handels Gesetzbuch - HGB). The two major types of corporations, the limited-liability company and the stock corporation, both have been regulated individually in their own Code, the Private Limited Company Act (Gesetz betreffend die Gesellschaften mit beschränkter Haftung - GmbHG) and the Stock Corporation Act (Aktiengesetz-AktG). The German Reorganization of Companies Act (Umwandlungsgesetz – UmwG) furthermore provides a variety of ways to transform and merge existing business without generating the necessity to either liquidate the company or transfer single assets and liabilities. Recently a Corporate Governance Code has come into force, applicable to quoted companies.

Types of Companies and Liability of Shareholders

Investors willing to set up a business in Germany are necessarily restricted in their choice of entity to the legal forms provided by the above mentioned laws, which nevertheless provide a broad range of possibilities to conduct business. A foreign individual may wish to start business as a sole proprietor (Einzelkaufmann) or as a branch of a foreign entity (Zweigniederlassung). If he prefers to set up a legally independent entity in Germany, he may instead select between several forms of partnerships (Personengesellschaften) or corporations (Kapitalgesellschaften). The legal forms most commonly adopted by foreign investors and German businesses alike are the following:

– AKTIENGESELLSCHAFT (AG) (STOCK CORPORATION): The AG is a separate legal entity with the liability of the shareholders restricted to the value of the corporation's assets including its share capital and outstanding contributions. The statutory minimum share capital is E50,000 and has to be fully subscribed. At least 25% of the share capital must be paid in by the date of application for registration in the commercial register.

This is the corporate form adopted by most of Germany's largest companies with the major advantage that its shares can be transferred rather easily and be listed on a stock exchange, making it relatively easy to raise capital from the public. Since the AG tends to enjoy a higher market reputation and its independent management is not bound by shareholder instructions, it has also been adopted by some smaller and privately owned businesses lately. On the other hand, the AG is subject to a large number of mandatory legislative regulations, which make its handling rather complex and sometimes might give little option to adapt the bylaws to specific shareholder requirements. Furthermore certain standards regarding the bylaws of listed AG's have come into practice and should be observed, at least if the AG considers being listed at the stock exchange.

– GESELLSCHAFT MIT BESCHRÄNKTER HAFTUNG (GMBH) (PRIVATE LIMITED COMPANY OR LIMITED- LIABILITY COMPANY): The second major form of corporation in German corporate law is the GmbH, which is the corporate entity most commonly used for enterprises in Germany. The German legislator lately has come up with a comprehensive reform of the GmbHG or Private Limited Company Act, which has come into effect on November 1st, 2008 and is intended to encourage business start-ups as well as to raise the attractiveness of the GmbH as a legal form in the frame of growing international competition."

The minimum share capital of a GmbH is E25,000, divided into shares (Geschäftsanteile) which may have different nominal amounts and be in cash or in kind. With a clear and stable shareholder structure and total liability protection for its shareholders – the liability is limited to the value of its assets including its share capital - the GmbH is designed to suit the necessities of private business. It is easier to establish and administer than the AG, and its bylaws (Gesellschaftsvertrag) may more easily be adapted to the requirements of the shareholders.

Unlike the AG, Shareholders retain overall control over the appointed management. Being usually closely held, the GmbH is generally not subject to as many regulations as the AG might be. It must have a minimum of 1 shareholder and is not restricted to a maximum number. Domestic and foreign corporations and partnerships as well as individuals may become shareholders. A GmbH is established by executing a deed of formation and bylaws before a German notary. The bylaws need to include the registered domicile, the purpose and its share capital. The GmbH does not come into corporate life until it is registered at the local commercial register, where the bylaws become part of the public record. Should the GmbH start its business operations before, the shareholders may incur personal liability. In the course of the recent reform of the GmbHG or Private Limited Company Act, a "limited liability entrepreneurial company" or so called "haftungsbeschränkte Unternehmergesellschaft" has been introduced as a new form of the regular GmbH, which lacks any specific minimum registered capital, but is not allowed to distribute its profits until the minimum registered capital of the common GmbH has been accrued. Furthermore, 2 model protocols liable to notarization are allocated as annex to the GmbHG or Private Limited Company Act, granting less complicated foundations in standard matters. These protocols concentrate 3 documents (bylaws, appointment of directors and shareholders' list). Shares will be registered to a minimum of EUR 1,00 and can be split, merged and transferred more flexibly. Moreover, the registration of the GmbH at the Commercial Register shall be speeded up by decoupling the registration procedure from administrative approvals. In addition to those and other minor positive changes introduced by the reform, the relocation of the administrative centre of the GmbH abroad has now been made possible. Furthermore a higher degree of transparency is provided and the shareholders' list will serve as a focal point for a bona fide purchase and transfer of shares."

– OFFENE HANDELSGESELLSCHAFT (OHG) (GENERAL PARTNERSHIP) AND KOMMANDITGESELLSCHAFT (KG) (LIMITED PARTNERSHIP): Besides AGs and GmbH's, Partnerships regulated by the German Commercial Code (HGB) continue to play an important role in German business life today.

These partnerships are divided into general partnerships (OHG) and limited partnerships (KG), the main difference being the liability of the partners. All partners of an OHG are jointly and severally liable for all of the partnership's business debts. A limited partner of a KG, however, is only liable up to its subscribed and registered contribution of minimum E1 (Kommanditist), although the KG must have at least one general partner (Komplementär); the general partners are fully liable. This is reason enough for foreign investors to frequently set up a KG when choosing a partnership structure for their business.

Partnerships have quasi-legal status and can enter into contractual relationships, own assets and incur liabilities in their own name. To set up a partnership at least two partners are required, who can be either individuals, (foreign) corporations or other partnerships. The formation of a partnership requires the execution of a partnership agreement and has to be followed by registration at the relevant commercial register. To achieve the desired liability protection for

the limited partners, the subscribed liability contribution must be properly registered to become legally effective. In principle, the partners may freely agree on their rights and obligations in the partnership agreement, leading to a great flexibility in tailoring the internal affairs to the needs of the partners.

Another advantage of partnerships compared to the AG and GmbH are the fewer publication requirements, the easier way to dissolve a partnership and to distribute its capital to the partners, direct management by the partners, and an advantageous gift and inheritance tax, making it especially attractive for smaller and family-owned businesses facing a generation shift.

The transfer of any partnership requires an agreement between the transferee and the transferor, signed with the consent of all partners, unless the partnership agreement provides otherwise.

– GMBH & CO KG (CORPORATION & CO KG): A quite common way in German corporate law of achieving the advantages of a partnership structure, without the frequent inconvenience, is to have a corporation with more or less no capital contribution as the sole general partner. The so called GmbH & Co KG grants all its partners to a certain extent security from unlimited liability, combining the advantages of a partnership with the liability limitations of a corporation.
Small wonder a significant number of family-owned and medium-sized businesses in Germany have opted to do business under the legal form of a GmbH & Co KG.

– GESELLSCHAFT BÜRGERLICHEN RECHTS (GBR) (CIVIL-LAW ASSOCIATION): A civil law association (GbR) is a partnership which has no registered business name and does not constitute a corporate entity separate from the partners. To set up a GbR, at least 2 partners are required to execute a partnership agreement. There is no registration needed. A GbR is usually used for non-commercial purposes (e.g. associations of professionals), or for individual contracts and transactions for a limited period (e.g. construction projects).

– SOLE PROPRIETORSHIP (EINZELKAUFMANN): The owner of a sole proprietorship is engaged in a typical commercial business and personally liable for all debts. His business must be registered at the commercial register (Handelsregister).

– BRANCHES (ZWEIGNIEDERLASSUNG): A foreign company not interested in doing business through a separate German legal entity may establish a branch in Germany. The branch has to be registered in the commercial register (Handelsregister) located at the local court of its registered office. Although contracts may be signed in its name, a branch is not a separate legal entity. For registration the court will request evidence of the existence of the foreign company such as copies of the articles of association, the amount of the share capital, the names of the managing directors etc. This information must be registered and kept up-to-date at the commercial register and in the German Federal Gazette (Bundesanzeiger).

Due to recent rulings of the European Court of Justice, German business is increasingly showing interest in the newly achieved possibility to establish its business in the form of a UK registered and seated Ltd or its different EU counterparts, which now is perfectly entitled to carry out business in Germany just by establishing a branch there without any form of discrimination, even if its business activities are carried out entirely in Germany. As this is a relatively new and untested approach, it remains to be seen whether the UK Ltd or similar EU corporations like the Spanish S.L. or French S.a.r.l are set to undermine or seriously replace in any way the GmbH and the AG as the two major legal forms of corporations in Germany.

Share Capital

As mentioned above, the statutory minimum share capital is E25,000 for the GmbH and E50,000 for the AG. It has to be subscribed in full. If it is contributed in cash, only E of the share capital of a GmbH, but at least a minimum contribution of E12,500, must be paid in by the date of the application for registration at the commercial register. In case of the AG, E of the share capital plus any premium must be paid in. Should either a GmbH or an AG be established by a single shareholder, either the full amount has to be paid in or security provided for the outstanding amount. Contribution in kind is possible, but must be fully effected in a way that assures that the assets are at the permanent disposal of the managing directors. German corporate law is strongly focused on ensuring that the share capital is duly paid in and maintained. A GmbH therefore is not allowed to make payments to shareholders that would reduce its net assets to a level below its stated share capital. The AG is subject to even stricter rules, which do not permit a company to repay share capital contributions to the shareholders regardless of whether such payments would reduce the AG's net assets to a level below its stated share capital or not.

The share capital of a GmbH is divided into shares (Geschäftsanteile) that can have different nominal amounts and which are not issued in the form of certificates. Each shareholder holds a share in the amount of the original contribution (Stammeinlage). The share must total at least E100. A share in a GmbH may be transferred by assignment or inheritance. The contractual transfer of shares has to be documented in notarial deeds and can be made conditional upon the consent of the GmbH, its articles or any other holder of shares. The share capital of an AG is divided into shares that may be issued either with a par value (Nennbetragsaktien) of at least E1 per share or multiples thereof, or without par value (Stückaktien).

Shares may not be divided and in general carry one vote each. They may be issued as bearer shares (Inhaberaktien), which are owned simply by the person who holds them, or registered shares (Namensaktien), in which case the name of the owner is registered in the company's share register. Additionally, shares can be issued as ordinary shares (Stammaktien) or preferred shares (Vorzugsaktien). Bearer shares enjoy free transferability. The corporation is not allowed to restrict in any way their transfer, whereas registered shares might be bound by stipulations of the articles providing that a transfer requires the consent of the company.

Corporate Governance

SHAREHOLDERS MEETINGS: Shareholders decisions are made through shareholder resolutions passed in general meetings (Hauptversammlung) in case of an AG and shareholders meetings (Gesellschafterversammlung) in case of an GmbH.

For an AG a general meeting is to be held each year within 8 months after the end of the financial year. It is convened by the management board. Additionally the management board, the advisory board or shareholders holding at least 20% of the share capital are entitled to call an extraordinary general meeting. Shareholders resolutions regularly require a simple majority of more than 50%, unless mandatory law requires a greater majority (e.g. 75% as may be the case for amendments to the bylaws or increases or decreases in capital, transfer of all assets, or change of the corporate form) or the articles provide otherwise. The statutory rights of the general meeting include among others the appointment of members of the advisory board, the distribution of profits, the formal approval of the board members (management and advisory) with respect to their activities during the preceding financial year, the amendment of the articles as well as the liquidation and the reorganization of the AG.

For a GmbH, the managing director usually convenes general meetings of the shareholders. As is the case with the AG, at least one meeting is to be held each year within 8 months after the end of the financial year. Additionally the holders of 10% of the share capital are entitled to call a general meeting. Shareholders resolutions regularly require a simple majority of more than 50% of the votes cast, unless the bylaws of the GmbH require a greater majority. In some cases a majority of 75% is required by mandatory law as may be the case for amendments to the bylaws. The statutory rights of shareholders at the shareholders general meetings include, so long as the articles/bylaws do not provide otherwise, the appointment of managing directors, the review of their activities, the distribution of profits, the amendment of the bylaws and the approval of the financial statements.

DECISION-MAKING BODIES: The AG is required to have a management board (Vorstand), which manages and represents the company in and out of court. The management board is appointed by the supervisory board for a term not to exceed 5 years and is independent both with regard to the shareholders and the supervisory board itself for the term of service. Neither the shareholders nor the supervisory board may issue instructions to the management board. During their term in office, the members of the management board can only be dismissed for cause. The shareholders and the supervisory board therefore lack any direct influence on the manage ment of the AG. A limitation on the statutory authority of the management board is not effective against third parties, although internal rules may subject it to certain restrictions as might be the case with specific transactions which require approval of the supervisory board.

A GmbH is managed and legally represented by its managing director (Geschäftsführer). AGmbH must necessarily have one managing director but can have as many as desired. The

principle of collective management and representation applies if the articles do not provide for some-thing else. The managing director does not need to be a shareholder, a German citizen or even resident. However he must be an individual and hence not a corporate entity. The power to appoint and remove managing directors at any time belongs to the shareholders. The power of representation towards third parties cannot be restricted. Nevertheless the management authority (Geschäftsführungsbefugnis) can be restricted internally and shareholders may exercise their right to give managing directors instructions regarding any particular issue on which they wish to exercise their influence.

German law does not provide any specific rules limiting the fees of an AG's management board(Vorstand) or a GmbH's managing directors (Geschäftsführer). Nevertheless at least as far as the GmbH is concerned, the German Supreme Court (BGH) has ruled that if the fees exceed an appropriate proportion of the after-tax profit, the company is entitled to decrease the fees unilaterally.

Both the AG's management board and the GmbH's managing directors are bound to the company by a fiduciary duty and a duty of care and skill, leading to their far reaching liability for significant violations resulting in damage to the company.

An AG is obliged by law to have a supervisory board (Aufsichtsrat) in addition to the management board, the function of which basically consists in supervising and advising the management board, appointing its members, appointing the statutory auditor, reviewing and approving the annual financial statements, as well as representation of the AG in dealings with the management board. The supervisory board is not entitled to participate in the corporation's day to day management, but may nonetheless determine that certain categories of transactions have to be subjected to its approval. In case the approval is denied, the supervisory board may appeal the decision to the shareholders. Except for special provisions regarding the participation of employee representatives, the members of the supervisory board are elected by shareholder resolutions. The special rights of employees referred to federal laws, the "Drittelbeteiligungsgesetz" and the"Mitbestimmungsgesetz" (MitbG) or "Co-Determination Act," which give employees representation on the supervisory board. The "Drittelbeteiligungsgesetz" provides that all GmbHs withmore than 500 employees as well as all AGs irrespective of their workforce, must allow employees to elect one third of the members of the supervisory board. The "Mitbestimmungsgesetz"or Co-determination Act requires that all companies with more than 2000 employees must grant their employees equal representation with shareholders on the supervisory board.

In case of a GmbH, a supervisory board is mandatory only if the GmbH has more than 500employees. Should the company not reach that size, shareholders may nonetheless form a supervisory board or alternatively an advisory board ("Beirat") and to provide for their functions in the articles.

Accounting and publication requirements

All commercial businesses in Germany are subject to a bookkeeping requirement. In addition they have to prepare financial statements as of the end of each fiscal year in accordance with German GAAP. For corporations as well as commercial partnerships with no individual as general partner (GmbH & Co KG) the following special provisions also apply: Annual financial statements as well as profit and loss accounts regularly have to be established within 3 months, in special cases exceptionally within 6 months. There are special provisions regarding the format of the balance sheet and the evaluation of the assets and liabilities. Moreover, a management report is mandatory.

Both management report and financial statement must be audited by a certified accountant (Wirtschaftsprüfer). There is an exception if the company does not exceed certain thresholds pertaining to its balance sheet total, turnover and number of employees (kleine Kapitalgesellschaft or "small company"). Corporations and partnerships with no individual as general partner are also required to file their financial statements at the commercial register and publish them in the Federal Gazette (Bundesanzeiger).

Quoted companies

German corporate law does not in principle make any distinction between quoted and unquoted corporations or impose special rules on quoted corporations. Since 2002, however, quoted companies are subject to a mandatory corporate governance code.

→ Corporate and Personal Taxes

German income tax law is regulated mainly in the German Income Tax Act ("Einkommensteuergesetz") for individuals and partnerships, the Corporate Income Tax Act ("Körperschaftsteuergesetz") for corporations, and the Trade Tax Act ("Gewerbesteuergesetz") for individuals, partnerships and corporations with respect to income generated from trade. The following overview relates to the applicable law of 2010.

Personal Income Tax

Income tax is based on an individual's worldwide income from all sources if the individual is subject to unlimited taxation (tax residence) in Germany. If an individual is not a resident for German tax purposes, limited taxation applies, on income from German sources. German tax law has seven categories of taxable income, one of which is income from trading which is subject to the trade tax as well:

- Income from agriculture and forestry
- Income from trading
- Income from professional and other independent personal services
- Income from employment
- Income from investment
- Rental and royalty income
- Other income

Taxable income allows several deductions from the gross income, especially income-related expenses. Other than the previous years, the trade tax is no longer considered a "deductible expense" starting in 2009. The tax rates are calculated on a calendar year basis with separate tax tables for single and married taxpayers. After a tax-free allowance of E7,834 for singles and E15,668 for married couples, the tax rate starts with a minimum rate of 15% and continues progressively up to 42% plus a solidarity surcharge of 5.5% of the tax liability. The maximum tax rate of 42% is reached with a taxable income higher than EUR 52,152 for singles and EUR 104,304 for married couples. 2008, the maximum tax rate is exceptionally increased to 45% for certain incomes higher than EUR 250,000 for singles or EUR 500,000 for married couples.

Since 2009 all income from investments (interests and dividends) are being taxed with a fix rate of EUR 25% plus the so called "solidarity surcharge" of 5,5 %.

Corporate Income Tax

The most common German corporate entities are the limited-liability company (GmbH) and the stock corporation (AG). Corporate entities pay a flat rate of 15% tax plus a 5.5% solidarity surcharge from the income calculated on the base of the Corporate Income Tax Act, unless the act provides otherwise. Corporate entities are subject to trade tax as well, regardless of the nature of the income.

A corporate entity which is a German resident for tax purposes is subject to corporate income tax on its worldwide income. Corporations whose seat and place of management are located outside of Germany are subject to taxation on their German source income only. Branches and permanent establishments operating from Germany are subject to German corporate income tax and trade tax on their branch profits.

Any dividends received by a German corporate entity from another corporate entity are generally exempt from corporate income tax and trade tax, (for the purpose of trade taxation in case that the participation is on of at least 15%. However, 5% of the dividends are deemed to be a non-deductible expense, so that in fact only 95% of the dividends are tax-exempt. Individuals who receive dividends from a corporate entity are tax exempt to the amount of 25 %. The corporate entity has to withheld 25% (plus 5.5 % solidarity surcharge on the withholding tax) of all dividends at source. The tax obligation thereby is satisfied conclusively.

Trade Tax

Trade tax is a tax on the trading income of an individual, a partnership or a corporate entity payable to the local municipalities. Each municipality is entitled to determine its own effective tax rate by setting a multiplier which is applied to the basic rate.
The basis for trade tax is calculated on the basis of the German Income Tax Act or the Corporate Income Tax Act with a number of adjustments. The most important adjustment are the non-deductibility of 25% of all interest paid on loans and of all expenses paid on rentals.
Trade tax ranges from about 9,5% to 15,6% depending of the municipality tax rate.
Trade tax related income generated by individuals or partnerships is subject to a certain deduction for purposes of personal income tax.

Income Taxation of Partnerships

The most common German partnerships are the general commercial partnership (oHG) and the limited partnership (KG). For purposes of German income taxation a partnership is transparent. As a first step the income of the partnership is calculated according to the German Income Tax Act and the German Trade Tax Act. The trade tax, which is non-deductable and payable by the partnership after a tax-free allowance of E24,500, the income will be allocated to the respective partners. At the level of each partner, and only there, the allocated income is subject to income tax or corporate income tax depending on whether the partner is an individual or a corporate entity. The trade tax is – from 2009 on – no longer deductable from the income tax.

Treatment of Losses

Tax losses of individuals and corporate entities are allowed to be carried back one year, up to an amount of EUR 511,500. for singles and twice that amount for couples. If the losses exceed EUR 511,500 or cannot be fully carried back into the previous year, losses will be carried forward up to an amount of EUR 1,000,000. Higher losses can only be offset against profits, up to 60% of the taxable income. No limitations exist on the use of losses carried forward.

Tax losses will be cut off completely if the economic identity of the corporation changes. This is assumed if more than 50% of the shares of the corporation are transferred within a period of 5 years. For purposes of the trade tax, losses of individuals, partnerships or corporate entities will be carried forward. Within a partnership a change in partner will lead to a loss of proportionate trade tax loss carryforwards. Trade tax losses cannot be carried back.

Value Added Tax

All individuals and entities who independently carry out an income-generating trade, business or other profession are subject to VAT. The German VAT system in general ensures that the end customer bears the VAT. VAT is charged at the rate of 19% of turnover. The reduced rate is 7%.

There are many exemptions from VAT, of which the most important are all transactions which are subject to real estate transfer tax, residential rental, all business carried out by banks and insurance companies, and export of goods.

Property Tax

Property tax is levied annually by all municipalities on land and buildings located in their region. The usual basic rate is 0.35% of the tax value of the property. The result is then multiplied by a percentage which is determined annually by each municipality.

Real Estate Transfer Tax

Real estate transfer tax is charged at a rate of (generally) 3.5 % of the tax value of real estate sales and other transactions which are considered to be a transfer of real estate, such as the transfer of at least 95% of a company owning real estate. Some federal states as Berlin and Brandenburg charge a higher tax rate.

Inheritance and Gift Tax

Inheritance and gift tax is charged on the transfer of assets as a gift or by inheritance. Tax rates vary between 7% and 50%, depending on the degree of family relation and on the value of the property inherited or bestowed. Tax allowances are available for both spouses and children and also for the transfer of business assets and shares in domestic corporations. Further tax allowances are available in case of the transferral of business assets.

Other Taxes

Other taxes that may be relevant are ecology tax (electricity tax, mineral oil tax), church tax, insurance tax and vehicle tax.

→ Real Estate Law

The German law concerning real estate covers all matters connected to immovable property. The definition of real estate includes the following aspects:

– in a factual sense, an indicated area on the earth's surface,
– in a legal sense, an indicated area on the earth's surface registered on a separate page under a certain number in the German land register,
– in the cadastral sense, a land parcel, and

– in an economic sense, an indicated area on the earth's surface which forms an economic unit, but the unit includes not only the surface of the earth, but also the airspace above and earth below the surface.

Types of Ownership

A natural or legal person may be the sole owner of real estate. In the case of joint property, all owners hold the real estate jointly. Each co-owner owns an ideal (not physical) part of the real estate. Under German real estate law, each ideal part of real estate is treated as if it were owned by a sole owner, so the co-owner can have his part to his own disposal and can, in particular, sell or encumber it unilaterally. There is an exception to this rule in the case of decisions that affect the real estate as a whole, which must be made jointly by all co-owners.

As there was a great need for residential space after World War II, it became necessary to let people take part in financing their housing and give them property equivalents for their invested money. Thus a law concerning "property in a freehold flat" ("Wohnungseigentum") was introduced, which offers the possibility of acquiring property in only a part of a residential structure. The real estate in such case includes the individually-held property of the flat or office (including constituent parts like balconies), plus an ideal part in the shared joint property in the whole building (all facilities and equipment belonging to the building and necessary to maintain it, or used by all co-owners jointly such as stairways or utility lines, laundry or storage rooms used by all proprietors) which is not part of any individually held property. The individually held property and the ideal co-ownership cannot be separated.

Another noteworthy feature of German real estate law is the "heritable building right" ("Erbbaurecht"). A basic principle of German real estate law is the unity of property of a building and the land of which the building is a permanent part. But the law authorizes an exception from that principle in case of the heritable building right, where the property of a building differs from the property of the land on which the building is built. Here the beneficiary has a property right in the building only for a limited time, and concerning the land the status is very similar to that of a full proprietor. The heritable building right is a charge on the land because it limits the rights and powers of the ultimate owner; as compensation, the beneficiary is obliged to pay ground rent to the owner. The heritable building right is a right equal to the rights to real estate, and so it is transferable and may be encumbered with a mortgage like real estate. For the beneficiary, the heritable building right provides the opportunity to put up a building without paying a great amount of money for land to build it on beforehand. For the owner, the benefit of the heritable building right lies in remaining the owner of the land (although another person has built a house on it) and obtaining ground rent. It is common to agree upon a period of validity of 99 years. If the beneficiary fails to pay the ground rent, he is obliged (under certain conditions) to reconvey the heritable building right to the owner, who must pay compensation for the building to the former beneficiary. All these issues are regulated in the heritable building contract.

Land Register ("Grundbuch")

In order to protect legal relations, the land register ("Grundbuch") discloses all legal relationships concerning a piece of real estate. Every person who claims a legitimate interest is entitled to inspect the land register, which is kept at the land registry, a department of the relevant local court ("Amtsgericht"). The land register is divided into sections by region and each piece of real estate has its own page in the land register. With a few exceptions (such as public roads and waterways), all pieces of real estate must be entered in the register. A page of the land register is made up of three sections: The first section provides information about the owner, the third section provides information about liens on real property ("Grundpfandrechte") such as mortgages ("Hypothek") or land charges ("Grundschulden"), and the second section provides information about all other land charges (such as usufruct, "Nießbrauch"), restraints on disposition (e.g. because of insolvency) or interim measures (like a priority caution). Depending on the form of property, the page of the land register may also have the special form of a "housing register" ("Wohnungsgrundbuch") or "heritable building register" ("Erbbaugrundbuch"). An entry in the land register creates a presumption of a right, but the presumption may be rebutted.

Transfer Formalities

The legal conveyance of property rights in real estate requires an agreement of the parties to the contract ("Auflassung") and the registration of the transfer of property in the land register. The agreement on transfer must be in the form of a notarial deed. This rule is valid for all types of property mentioned above.

The deed of sale for real estate includes details about the contracting parties, the subject of the sale (especially the information drawn from the land register), conditions of payment, details on the building (whether already built or to be built), regulations and agreements on liability and avoidance of contract, and on the expenses of the contract, which are usually borne by the buyer. The costs usually include fees for the notary (approximately 0.3% to 0.4% of the purchase price) plus the fees for the land register (approximately 0.1% to 0.2% of the purchase price) plus the real estate acquisition tax (approximately about 3.5%). But this tax does not accrue if, for example, parents donate the real estate to their children.

Mortgages

Mortgages ("Hypothek") and land charges ("Grundschulden") are the most important liens on real property ("Grundpfandrechte"). Their purpose is to secure creditors. The creditor of a lien on real property (in most cases a bank) is entitled to two claims, one for payment, and if the debtor will not pay, then a claim for compulsory enforcement (in this case execution on the real estate).

It is common to issue a certificate for mortgages or land charges. These documents regarding liens on real property are issued by the land registry and provide information about the serial number of the charged real estate under which it is registered in the land register, plus the amount and the content of the lien on real property. A lien on real property is transferred if the certificate is handed over and the conveyance is declared. If a certificate does not exist, a lien on real property can only be transferred if the new creditor is registered in the land register. For that reason, chartered rights may be sold much more easily than non-chartered rights.

Liens on real property generally require a notarial deed. This is based on the fact that a creditor with a lien on real property needs a title (the legal right to own something) to be able to proceed to compulsory execution against the real estate. An enforceable title includes, for example, a legally binding judgment, but to achieve such a judgment requires time and expense. A preferable solution is a title in the form of an enforceable notarial deed. The only prerequisite is that the debtor has already agreed in notarial form to immediate forced sale of the real estate.

Special Restrictions and Special Rights

In German law, there is no distinction between German and foreign buyers of real estate. Any legal or natural person, as well as a partnership, is entitled to buy real estate. But there are several legal provisions that limit this. These include, in particular, pre-emptive rights stipulated by law or contract. A pre-emptive right is the right to enter into an existing contract and take over the subject of the contract.

A municipality has pre-emptive rights in order to carry out urban building plans. In practice, municipalities only use their pre-emptive rights very restrictively.

Another application of pre-emptive rights is the right of lodgers living on real estate. If their house is supposed to become property in a freehold flat, they have a pre-emptive right to buy their own flat before it is sold to a third party. Non-commercial housing estate companies ("gemeinnützige Siedlungsunternehmen") have a pre-emptive right concerning agricultural-use areas.

Furthermore, other charges may limit the acquisition of real estate in Germany, as in principle the conveyance of real estate must be free of encumbrances. But there may be several encumbrances, such as liens on real property, right to usufruct, heritable building right or right of abode. These encumbrances must be solved before the conveyancing, or else have to be assumed by the new owner (but then are reflected in the price for the real estate).

To ensure that no acts of disposal are conducted in the time between the conclusion of the contract and the entry in the land register, the buyer's interest is protected by a priority notice of conveyance ("Auflassungsvormerkung"). This notice, which is registered in the second section of the land register, assures the buyer's right to assignment of the real estate.

If the real estate is transcribed to the buyer before the purchase price is paid, the seller bears the risk of the buyer's insolvency. In that case, if the purchase price is not paid, the claim for payment could not be enforced. To avoid this risk, it is common to agree on deposit of the purchase price with the notary. In this case, as soon as the new owner of real estate is registered in the land register, the price can be paid to the seller, who is sure of receiving his money. If this way is not chosen, the seller can safeguard his right to payment, if both parties instruct the notary only to make the application to the land register when the purchase price has been paid or secured.

As mentioned above, provisions on rescission are made between the parties in the notarial deed of sale. As a rule, this will include the right of rescission for the seller if the buyer does not pay on time. On the other hand, the buyer has the legal right to rescind the contract if the seller is guilty of willful deceit, for example in regard to the nature or quality of the real estate.

Construction and Use Restrictions

Before land can be developed with buildings, permission by the relevant authority under the corresponding public law is required. The land must be designated for construction in the applicable local land-use plan.

Contracts of tenancy

German law distinguishes between contracts of tenancy for private housing accommodation and contracts of tenancy for business premises.

Unlike in some other major European countries, most people in Germany dwell as tenants. For that reason German law tends to provide special protection for tenants. Thus, appointments of the lease contract for tenements that differ from the provisions stipulated by law, concerning for example the tentant's right of abating the rent, the right to sublet the object or the right of due cancellation of the contract are declared void. Quite often the lessor uses standard forms to draw up the contract, which must conform the requirements of the German law on "general terms and conditions". Furthermore, it is noticeable, that a flat shall not be rededicated for different use, for example as accommodation for a shop, and shall not be left permanently vacant, being the lessor obliged to hire it out. Regarding the lease price, the lessor has to realign to the local amount of rent for comparison. If a lessor demands an increased lease price of at least 20% above the average local amount of rent, he acts disorderly.

Contrary to that, appointments of lease contracts for business premises may differ from the provisions stipulated by law mentioned above (abating the rent, subletting, due cancellation). Furthermore, the lease price is not bound to the average local amount but only limited by the proscription of usury.

The German law of tenancy has undergone far reaching reformation by September 2001, but is still subject to difficult interim arrangements, applicable for contracts of tenancy that were concluded before that date.

→ Labour Law

Employment contracts / Costs of wrongful dismissal

Generally there are two types of working contracts, such as temporary contracts and non-temporary contracts. A temporary contract needs to be fixed in written form. The limitation can be up to 24 month without reason. If an initial period is shorter then 24 month, the contract can be extended up to three times, not exceeding 24 month.
The costs of wrongful dismissal are not foreseen by german labour law. The actual costs depend upon the particular case but should be considered with about 50 % of the gross salary per month for each year of the duration of the working contract.

Collective Bargaining Agreements

Collective bargaining is carried out on a national or industry-wide level as on a regional or local level. Said agreements apply only to those employers and employees who are members of the respective employer organization respectively trade union unless the agreement is declared to be generally binding by the Federal Department for Labour and Social Affairs. Some 478 collective bargaining agreements of a total of 73,900 are currently declared to be generally binding.

Works Councils and Co-determination

Works councils can be formed in all companies with five or more employees. The members are elected for four years and need not be union members.

The rights of the works council, as set forth in the Works Constitution Act (Betriebsverfassungsgesetz, BetrVG), range form information rights to codetermination rights in organizational, social and other matters. In social matters, the employer is obligated to negotiate rules with the works council on the allocation of working hours, vacation schedules, grievances and matters of safety and welfare. The works council must be informed prior to the dismissal of any employee. The employer and the works council must under certain circumstances negotiate a reconciliation of interests and a social compensation plan in the case of mass redundancies in order to compensate employees for the actual and financial disadvantages suffered as a result of dismissal.

The most important co-determination laws are currently the so called "Drittelbeteiligungsgesetz" and the Co-determination Act 1976 (Mitbestimmungsgesetz, MitbG).

The so called "Drittelbeteiligungsgesetz" , provides that all GmbHs and AGs with more than 500 employees as well as all AGs irrespective of their workforce, if registered in the commercial register prior to August 10, 1994 and not family-owned must allow employees to elect one third of the members one the supervisory board.

The Co-determination Act 1976 requires that all companies with more than 2,000 employees must give employees equal representation with shareholders on the supervisory board. Employee representatives must include at least one management employee representative. The chairman (usually a representative of the shareholders) has the deciding vote in the event of a tie.

Wages, Salaries, Bonuses, Working Hours, Holiday and Vacation

Law in Germany prescribes no minimum wage. Minimum wages are, however, often fixed by collective bargaining agreements in different industries. Equal pay legislation exists on a federal level providing equal pay for men and women. Although not a legal requirement, a thirteenth month salary/bonus is usually paid at Christmas,or split between Christmas and vacation time.

The general legal maximum is 40 hours per week (based on a five-day working-week), which can be extended up to 50 hours provided, however, within approximately six months the average will not exceed 8 hours per day. Trade unions are lobbying for a 35-hour week and collective bargaining agreements often provide for a shorter weekly working time (e.g. 38.5-hour week). Overtime is strongly opposed by unions.

All German states recognize the following public holidays: New Year´s Day (January 1), Good Friday, Easter Monday, May Day (May 1), Ascension Day, White Monday, German Unity Day (October 3), Christmas Day (December 25), December 26.

Certain religious holidays exist in addition thereto which differ from state to state.

The minimum legal vacation is 20 working days annually after completing six months of employment. Collective bargaining agreements as well as individual employment contracts usually increase the number of vacation days (often up to 30 days or more per year) while state laws provide for leave for special purposes (i.e., educational leave). An employee is entitled to receive vacation pay equal to his or her current salary during vacation. Several collective bargaining agreements as well as business practice provide for an extra vacation bonus.

Employment Regulations

The Employment Protection Act provides that giving notice without an important reason to an employee who has worked in the same company for more than six months is only legally effective to the extent it is socially justified. The Employment Protection Act only applies, however, if the plant or shop regularly employs more than ten individuals based on full-time positions. Part-time positions are only counted proportionally (up to 20 hours per week = 0,5; up to 30 hours per week = 0,75).

Social justification within the meaning of the Employment Protection Act is limited to three principal areas. Firstly, the termination of employment may be due to the personal circumstances of the employee such as a series of short-term illnesses or a long-term illness. Secondly, the behavior of the employee may constitute social justification for termination, i.e. being absent from work without excuse despite repeated warning or refusal to work. Prior to issuing a notice of termination in such cases, the employer has to give a warning to the employee with regard to his or her shortcomings. Thirdly, a dismissal may be socially justified if based on operational reasons. In particular, this can be based on changes in the employer´s business organization resulting in redundancies of the relevant job due, for example, to a plant closing or reduction of the work force due to a shortage of orders. However, the employer has to apply the so called "social factor method" considering the social data (age, seniority, maintenance obligation) in order principally to select those employees for dismissal first, who are the "least disadvantaged" by the redundancy. The employee has the right to challenge said notice and to file a cause of action for re-employment with the competent labour court within a three-week period after receiving the notice. A statutory severance payment does not exist.

The termination of an employment relationship under the Employment Protection Act is usually complicated and often results in paying off the employee through a settlement agreement. As a general and rough rule, an average severance payment amounts to about 50 % of the monthly gross salary for each year of service.

Additional employment protection exists for works council members, disabled employees, pregnant employees and employees on educational leave; said employees may not be terminated except for cause. Any termination, however, requires the prior consent of the competent authorities.

Social Security

Germany has a compulsory social security system that covers five principle areas: health and nursing care insurance, old-age-benefits, unemployment benefits and workers´ compensation. Contributions to the social security system are generally shared equally between the employer and employee.

The employer withholds the employee´ s share of the contribution to the Federal Insurance Agency.

Benefits from public health insurance include the payment of medical and hospital expenses and compensation for loss of salary. Contributions to the public health insurance system are only payable up to certain salary levels, which are usually increased annually. As of January 1, 2011, only employees with a gross salary not exceeding € 49.500 annually or € 4.125 are obligated by law to make contributions to the public health insurance system. No compulsory health insurance exists beyond these salary thresholds; employees exceeding said thresholds might therefore opt to maintain a private health insurance, to continue the participation in the public health insurance system or to have no health insurance at all (which is rare). The exact rate of public health insurance depends on the individual insurance company but usually amounts to approximately 15,5% of gross salary (above caps apply). If the employee is not subject to compulsory health insurance, the employer must contribute up to € 268,28 per month (official average premium) to the employee´ s private health insurance.

Contributions to the nursing care insurance plan amount to 1,95% of gross salary capped again at € 49.500 annually or € 4.125 monthly. Old-age contributions are currently levied at a rate of 19,9% of gross salary capped at € 66.000 annually or € 5.500 monthly (Western part of Germany) and € 57.600 annually or € 4.800 monthly (Eastern part of Germany).

Unemployment insurance contributions amount to 3 % of gross salary capped as well at € 66.000 annually or € 5.500 monthly (respectively € 57.600 annually/€ 4.800 monthly in the Eastern part of Germany).

Effects of § 613a BGB

In general the rule of § 613a BGB states, that in case of a so called "Betriebsübergang", which is the sale of a firm by legal transaction, the purchaser is stepping into the rights and obligations of the working contracts between the seller and his employees existing at the time of the transaction. This means, that all working contracts, which exist between the seller and his employees, automatically pass to the purchaser by law.

Some effects of the rule of § 613a BGB have to be considered even before the actual transaction has taken place. For instance: The employees, who will be effected by the transaction, have to be informed in detail either by the seller or the transferee about:

– The date or the planned date of the transaction;
– the reason for the transaction
– the legal, economical and social effects of the transaction for the employees and
– the planned measures (for instance further education) regarding the employees.

The time span between the information of the employees and the actual transaction depends upon the particular case, although it should be one month at least. The employees` right of protest, which is provided to the employees by law, against the transferration of their working contract onto the purchaser has to be considered thereby.

Due to the rule of § 613a paragraph 6 BGB the employees do have the right to protest against the transferration of their working contracts onto the purchaser. The protest has to be done in written form and within one month after the receipt of the above mentioned information.

The consequence of such a protest is, that the working contract of the protesting employee is not being transferred, but will furtherly exist between the seller and the protesting employee. Since the seller will not be leading the firm any more after the transaction has taken place, the purchaser is generally justified to terminate the working contract for operational reasons.

The above mentioned obligation of information must be followed in any case, because without a regular information of the employees, the time limit of the employees` right to protest will not even start to run. This leads to the fact, that the working relationship will remain between the seller and the employee until the employees have regularly been informed about the above mentioned points. Therefore, personal measures, such as the termination of a working contract, can only be done by the purchaser himself after the employees have been regularly informed.

Even if all information obligations have been fulfilled regularly and the transaction itself has taken place, it is forbidden by § 613a paragraph 4 BGB to use the transferration of the company itself as a reason for the termination of a working contract. However, a termination of a working contract, which is based upon the other reasons, which are admissible in German labour law, such as operational or personal reasons or the behaviour of the employees, is generally possible at any time and is not at all restricted by the transferration of the company.

ILP GLOBAL - BITAR & MARCÍN
www.ilpglobal.com.mx

→ Mexico

Mexico offers countless opportunities for those who wish to invest, increase their competitiveness in international markets and expand their business worldwide. Our territory enjoys a strategic geographical position, great natural wealth and the advantage of being a country primarily of young people. This, together with the plurality of its industrial sectors, solid international trade relations, economic and financial stability, as well as a notable political maturity, consolidates it as one of the best destinations for international investment.

According to a study carried out by the consulting firm AlixPartners, Mexico is the country with the lowest costs for the manufacture of industrial components among the main emerging economies (Brazil, China and India) thanks to the fact that it possesses an attractive exchange rate against the dollar, relatively low transportation costs and a large number of Free Trade Agreements.

Worldwide, Mexico is highly ranked in several areas:

– Mexico is the world's 14th largest economy, measured by the value of its GDP;
– Mexico is the 13th most important country in the world in terms of its international trade in goods;
– Mexico is the 18th most important economy in terms of its proven oil reserves, and the sixth-largest oil producer in the world as of 2006
– Mexico is the world's 10th most important tourist destination, welcoming 21.45 million tourists
– Mexico is the third recipient of Foreign Direct Investment flows, among developing economies of the world.

Mexico is the world's second country with more free trade agreements. It has 234 bilateral and 122 multilateral agreements, and it is the only country that covers two of the world's leading markets: North America and the European Union. Overall, Mexico covers 44 countries with its

network of agreements, so it has been able to significantly increase its business participation in the world in the last 15 years.

ILP GLOBAL BITAR & MARCÍN in Mexico and their partners ILP GLOBAL LR ABOGADOS in Spain and ILP GLOBAL ESTUDIO JURÍDICO OTERO in Chile have advised leading corporations and individuals on several law issues in today's integrated world market, we have a shared vision of the importance of being able to serve with quality, reliability and in an expeditious way in diverse jurisdictions.

→ Foreign Investment in Mexico

Authorities

– Comisión Nacional de Inversiones Extranjeras (National Commission of Foreign Investments)
– Registro Nacional de Inversiones Extranjeras (National Foreign Investment Registry)
– Secretaría de Economía. (Secretary of Economy)
– Dirección General de Inversiones Extranjeras (Directorate of Foreign Investments)
– Secretaría de RelacionesExteriores (Secretary if Foreign Affairs)

The Law considers as foreign investment:

– The participation of foreign investors in any proportion in shares, equity participations or rights acquired from a Mexican company.

– The assets, rights, concessions, participations or interests that Mexican companies with majority of shares acquired by foreign investors may hold.

– The participation of foreign investors may have on the activities or acts according to the Law.

According to the Mexican legislation there are three forms recognized by means of which investments projects can be carried out in Mexico, as follow:

A. THROUGH THE ESTABLISHMENT OF A FOREIGN MORAL PERSON IN THE MEXICAN TERRITORY, WHICH CAN ADOPT TWO MODALITIES:

– As a branch or office of representation able to receive income. These are companies legally constituted abroad and legally recognized in Mexico. A permit from the Secretary of Economy (Secretaría de Economía) is required, in order to register in the Public Commerce Registry (Registro Público de Comercio), moreover, these companies cannot acquire nor participate in

any activity reserved or subject to specific regulation under the Foreign Investment Law (Ley de Inversión Extranjera).

– As a branch or office of representation without income. These are foreign moral persons who do not conduct mercantile operations, they only represent foreign entities and its only purpose is to provide information, services and counseling regarding the activities, products or services provided by its holding abroad. They require a permit by the Secretary of Economy (Secretaría de Economía) to be established in the territory, however, they do not require to be registered in the Public Commerce Registry (Registro Público de Comercio), and they have to disclose its discharge in zero before the Ministry of Finance and Public Credit. (Secretaría de Hacienda y Crédito Público).

B. THROUGH THE CONSTITUTION OF A MEXICAN MERCANTILE COMPANY, IN WHICH THE FOREIGN INVESTMENT CAN PARTICIPATE UP UNTIL 100% IN ITS STOCK CAPITAL.

The general law for mercantile societies (Ley General de Sociedades Mercantiles) recognizes six kinds:

– Sociedad en Nombre Colectivo
– Sociedad en Comandita Simple
– Sociedad de Responsabilidad Limitada
– Sociedad Anónima
– Sociedad en Comandita por Acciones
– Sociedad Cooperativa (being the most common Sociedad Anónima)

According to the Foreign Investment Law, foreign investors can participate freely on a Mexican mercantile society. The only restriction is if it is a society, in which the activities are subject to a specific regulation.

C. THROUGH A MEXICAN COMPANY SUBJECT TO SPECIFIC REGULATION.

Therefore, foreign investment can participate in any proportion with shares in any Mexican Company, also can acquire property and participate in new fields of the economic activity, unless those activities what reserved for nationals according to the Foreign Investment Law.

Foreign investment can participate in any proportion with shares in any Mexican Company, also can acquire property and participate in new fields of the economic activity, unless those activities are reserved for nationals according to the Foreign Investment Law.

Maximum limits

The maximum limits for the foreign investment participation to the following economic activities are as follow:

UP TO 10%: Sociedades Cooperativas de Producción.

UP TO 25%:
– National air transportation
– Air-Taxi Transportation
– Specialized air transportation

UP TO 49%:
– Insurance institutions
– Surety institutions
– Exchange houses
– General deposit warehouse
– Financial lessor
– Financial Enterprises
– Limited object financial societies
– Corporations and civil societies
– Resources manager
– Administration retirements funds
– Any activity involved on the elaboration and dealing of explosive, guns, munitions and fireworks, without including the acquisition and usage of explosives for industrial activities
– Publication of newspapers for the exclusive local distribution.
– Shares Type "T" of Companies dedicate to agricultural, cattle or forest land activities.
– Fresh water fishing, coastal fishing and in the exclusive economic zone, excluding aquaculture.
– Port management in general.
– Harbor services of pilotage to the boats to conduct operations of inner navigations in terms of the correspondent Law.
– Shipping companies dedicated to commercial operation of boats for inner navigation and cabotage, except tourist cruises and the operation of dredges and naval devices for the construction, conservation and harbor operation.
– Fuel provision and lubricants for boats and airships and railway equipment.
– Companies with permits allowed under the terms of articles 11 and 12 of the Federal Telecommunications Law (Ley Federal de Telecomunicaciones).

Favorable resolution is required from the National Commission of Foreign Investments (Comisión Nacional de Inversiones Extranjeras) where the foreign investment tries to participate in a greater proportion to 49% in the economic activities and societies which are mentioned as follows:

– Harbor services to the boats to conduct its operations of inner navigation such as tow, mooring of ends.
– Shipping companies dedicated to the operation of boats exclusively in height traffic.
– Concessionary companies dedicated to render services of aerodromes to the public.
– Private services of pre-school, primary, secondary education, high school or above and combined services.
– Legal services
– Credit information societies
– Value institutions
– Insurance agents
– Mobile phone services.
– Oil transportation.
– Gas and oil well perforation.
– Construction, operation and exploitation of public service railroads.

Also, it is required a favorable resolution from the Commission allowing the foreign investors to participate in Mexican companies, either as a direct or indirect investment on an percentage over 49% on its corporate capital solely when the total value of assets of the societies in question, at the time of the submission of the acquisition request, exceeds the amount determined by the Commission on annual basis.

Restricted Zone

There is a two-tier corporate scheme where a holding company directly owned by foreigners and a land company held by the holding company is used in order to allow foreign investment to legally acquire property in this area without violating the constitutional mandate, therefore, the Mexican companies which articles of association include the exclusion of foreign investor's clause are allowed to acquire assets in the Mexican territory and also on the restricted zone regarding property, also permit from the Secretary of Foreign Affairs (Secretaría de Relaciones Exteriores) is necessary.

The Law allows direct ownership by a foreign held corporation through a renewable maximum 50-year trust which was created to vest title to real property in a trustee bank for the benefit of a foreigner or foreign-held business entity, where a permit from the Secretary of Foreign Affairs is necessary.

The permit is granted to credit institutions (banks) so that is required for financial institutions to acquire as trustees, rights on real property located in the restricted zone, provided the purpose of the trust is to allow the use and enjoyment of such property but without thereby creating any rights in rem thereon, and provided further that the beneficiaries of the trust are foreign individuals or corporate entities acquire as trustees, according to what is stated on articles 11 of the Foreign Investment Law and article 9 of the Statute of the Foreign Investment Law and the National Foreign Investment Registry.

Neutral Investment

Foreign Investment in Mexican companies or through authorized trusts according to the Foreign Investment Law will not be taken in account to decide on the foreign investment percentage in the Mexican companies' stock capital.

It is considered as neutral investment those shares without right to vote or with limited corporate rights, where authorization by the Secretary of Foreign Affairs and/or the National Banking Commission (Comisión Nacional Bancaria y de Valores), as the case may be, is needed.

Requirements, procedures and special provisions

The permit for the incorporation of companies to which article 15 of the Law refers shall be granted to those entities which its corporate name is not already used by a different company or in which name are included words or specific terms regulated by other specific piece of regulation. Therefore the Secretary of Foreign Affairs shall condition the permits to such regulation.

Also, it is committed before the Secretary of Foreign Affairs to be treated themselves as nationals with respect to all of the above issues and it will be understood to waive to invoke the protection of their governments under penalty otherwise of losing their rights and assets acquired in favor of the Mexican Nation, thus the foreigners exclusion clause should be included on the articles of association according to article 15 of the Foreign Investment Law.

However, when in the company by-laws the foreigner exclusion clause is not agreed, an express agreement or pact must be entered into which shall form an integral part of the by-laws, whereby the present or future foreign equity holders obligate themselves, before the Ministry of Foreign Affairs, to be considered as nationals with respect to:

– The shares, equity participations or rights acquired from said companies;
– The assets, rights, concessions, participations or interests that said companies may hold, and
– The rights and obligations derived from the contracts to which said companies may be a party.

The mentioned agreement or pact must include the waiver of invoking the protection of their governments under penalty of otherwise losing their rights and assets they acquired in favor of the Nation.

In the case of change of the corporate name, the Foreign Investment Law provides that the Secretary of Foreign Affairs shall grant the permit in compliance with article 16 of such regulation, provided always that, in addition to compliance the desire of the legal entity to carry out the change is evidenced.

Within the ninety business days following the date on which the Ministry of Foreign Affairs grants the permits for the incorporation of companies or change of corporate name or business name, the interested parties must go to execute before person vested with notarial authority, the corresponding instrument for the incorporation or the by-law amendments of the company involved. Upon expiry of such term without the execution of the corresponding public instrument, the permit shall have no further effect.

Within six (6) months following the issue of the permits for the incorporation of companies or change of corporate name or business name to which article 15 and the first paragraph of article 16 of the Law refers, the interested party must give notice of the use thereof to the Secretary of Foreign Affairs.

In the case of the permit for the incorporation of companies, the notice must specify the inclusion in the corresponding instrument of the foreigners' exclusion clause or, if applicable, the agreement provided for in article 14 of the Regulations of the Foreign Investment Law(Reglamento de la Ley de Inversiones Extranjeras).In the case of liquidation, merger or spin-off, notice must be given to the Secretary of Foreign Affairs within one (1) month following the date in which the act took place.

The interested parties may opt to present the notices through the Ministry of Finance and Public Credit, when in accordance with the fiscal provisions notices must be filed before the Federal Taxpayers Registry regarding the incorporation, change of corporate name or business name, liquidation, merger or spin-off of companies. The Ministry of Finance and Public Credit must deliver to the Ministry of Foreign Affairs the information contained therein within the three (3) months following their filing.

The Secretary of Foreign Affairs shall reserve for the companies, the exclusive use of the corporate names or business names in accordance with the permits it grants, except when the interested party breaches the provisions of the first paragraph of the 18 article of the Regulations of the Foreign Investment Law (Reglamento de la Ley de Inversiones Extranjeras) or the corresponding company is extinguished.

The notice of change of the foreigners exclusion clause to the one of admission to which the second paragraph of article 16 of the Law refers, must be accompanied by a copy of the public instrument which contains the by-law amendment and which includes the agreement to which article 14 of these Regulations refers. The company involved must state in a said notice if it is the owner of real estate in the restricted zone and the use for which they are intended.

Registration

The recordings, renewals of registration records, cancellations of registration records and notations on the Registry, shall be carried out provided that:

– The provisions set out in the Law or these Regulations are observed and, if applicable, the corresponding authorizations and permits are obtained;

– The filing with the Registry of the notices or reports provided in these Regulations has not been omitted;

– They are presented in the formats referred to in Section I of article 33 of these Regulations, complete and with all due requirements, as well as with the evidentiary documentation which, as the case may be, supports the applications and the notices that must be made to the Registry;

– The payment of the duties provided in the Federal Duties Law is previously proven, and

– The payment of the penalty which, if applicable, may have been determined in accordance with article 38 of the Law is previously proven.

→ Tax Law

Most important tax laws

– Código Fiscal de la Federación	Tax Code
– Ley del Impuesto sobre la Renta	Income Tax Law
– Ley del Impuesto Empresarial a Tasa Única	Corporation Tax Single Rate
– Ley del Impuesto al Valor Agregado	Value Added Tax Law
– Ley del Impuesto a los Depósitos en Efectivo	Law for Tax on Cash Deposits
– Ley de Impuesto Especial sobre Producción y Servicios	Excise Tax, Tax on Production and Services
– Ley de Ingresos de la Federación	Internal Revenue Law

Ley del Impuesto sobre la Renta (Income Tax Law)

Individuals and legal entities are required to pay Income Tax Law, in the following cases:

– Mexican residents: With regard to all their incomes, no matter the source.
– Residents in a foreign country with permanent establishment: With regard to the incomes coming from the permanent establishment.
– Residents in a foreign country: With regard to the incomes coming from sources inside the national territory, when there's not permanent establishment in the county, or when having it, those incomes don't come from it.

The General Tax Rate for legal entities is 30% for 2011 and 2012, for 2013 it will be 29% and for 2014 28%

Ley del Impuesto Empresarial a tasa única (Corporation Tax Single Rate)

Individuals and legal entities residing in the national territory, as well as, foreign residents having a permanent establishment in the country, are required to pay Corporation Tax Single Rate on the revenues they obtain, regardless of the place where the revenues are generated, by carrying out the following activities:

– Transfer of assets.
– Rendering of Independent Services
– he granting of temporary use or enjoyment of assets.

Foreign residents with permanent establishment in the country are required to pay Corporation Tax Single Rate, for income attributable to that establishment, derived from those activities.
In general the Corporation Tax Single Rate is calculated by applying the rate of 17.5% (There are special rules regarding this tax combined with the Income Tax Law, which one can be compensated.)

Ley del Impuesto al Valor Agregado (Value Added Tax Law)

Individuals and legal entities are required to pay Value Added Tax Law, for carrying out the following acts or activities in the national territory:

– Transfer of assets.
– Rendering of Independent Services.
– The granting of temporary use or enjoyment of assets.
– Imported assets or services

The Value Added Tax Law is calculated according to the values stipulated by applying the rate of 16%.

Ley del Impuesto a los Depósitos en Efectivo

Individuals and legal entities are obliged to pay the Law of the Tax on Cash Deposits, with respect to all deposits in cash in National or foreign currency, that they make into any type of account that they might have in their name in the institutions of the financial system. Should not be considered cash deposits, those which are made for individuals and corporations through wire transfers, account transfers, credit or any other document or system agreed with institutions of the financial system in terms of the applicable law, even thought when they are in charge of the same institution that receives them.

Entities that are not obliged to pay the Law of the Tax on Cash Deposits:

– The Federation, Federal States, Municipalities and Government Entities paraestatal, under Title III of the Income Tax Law or the Federal Revenue Law, are considered non-Income Tax Law.

– Legal entities with non-profit under Title III of the Income Tax Law.

– The individuals and legal entities, for cash deposits held in their accounts, up to an aggregate amount of $15,000.00 for each month of the fiscal year, except for cash purchases of cashier's checks. For the excess of such amount shall be paid the tax on cash deposits under the terms of Law of the Tax on Cash Deposits.

– Among others.

The Law of the Tax on Cash Deposits is calculated by applying the rate of 3% to the cash deposits on the bank accounts.

Impuesto Especial sobre Producción y Servicio (Special Tax on Production and Services)

The natural and legal entities are required to pay Tax on Production and Services, for carrying out the following acts or activities:

– The Transfer in the National Territory, definitive importation of assets
– The Act for rendering services.

Property Tax: this is a state tax and rate depends on each of the 32 states in Mexico.

Fiscal obligations for foreigners

Foreign residents who obtain an income in Mexico, and do not have a permanent establishment in the country, or if they have it, and income is not from said establishment, have the following obligations:

– Registration to the Federal Taxpayer's Registry (RFC)

– Pay income tax for the income obtained. This obligation is fulfilled when the person who makes the payments withholds the tax and pays it to the Tax Administration Service (Servicio de Administración Tributaria).

– When the person who makes the payments is not obliged to withhold the tax, the taxpayer who obtains the income must pay by means of a return filed at the banking window or through the Internet, within the next 15 days following that on which income was obtained.

– People who offer independent professional services, and obtain income from fees, must issue professional services receipts.

– People who obtain income from real property leasing, or in general from granting the temporary use or benefit of said real property, must issue receipts for the collected rents.
It is important to mention that the tax paid through withholding, or directly by the taxpayer, is considered as definitive payment, which means that there is no obligation to file a return.

Foreigners should pay the following taxes

INCOME TAX (Impuesto sobre la renta): People with Mexican or foreign nationality, who reside abroad and obtain income in Mexico, are obliged to pay income tax.

VALUE-ADDED TAX (Impuesto al valor agregado): They must pay the value-added tax if they obtain income from the disposition of property or from the lease of real property different from residential property. Value-added tax must also be paid if it has to do with leasing of furnished real property, or with hotels or boarding houses. Furthermore, the value-added tax due in accordance with the Value-added Tax Law (Ley de Impuesto al Valor Agregado), must be paid by any individual or legal person who make payments to residents abroad for rendering services in Mexico, for the use or benefit of tangible or intangible property, among other cases, since this is considered as incorporation.

TAX ON CORPORATE ASSETS (Impuesto al activo): Nonresidents are obliged to pay the tax on corporate assets (until 2007) when they have a permanent establishment in Mexico, for the property or the assets that are used in said establishment.

CORPORATION TAX SINGLE RATE. IETU (Impuesto empresarial a Tasa Única): This tax must be paid by companies and persons living in national territory, as well as foreigners with permanent business activities in Mexico. The tax will be paid according to the income obtained, no matter the place where the income was generated (specifically for: selling fix assets, independent services and temporary rent of assets). (There are special rules regarding this tax combined with the Income Tax Law, which one can be compensated.)

Foreigners

For tax purposes, foreigners are individuals or juridical persons (commercial companies, associations or civil companies, among others) who are ruled by the legislation of another country for reasons of nationality, domicile, residence or operations center, among other criteria. In order to explain the applicable tax regime, we separate foreigners as:

RESIDENTS IN MEXICO: The tax legislation considers residents in Mexico the following people:

– The national and foreigner individuals that have their house in Mexico. People can also be considered as residents when they have their house in another country if they are in the following cases:

- When more than the 50% of their annual income is obtained in Mexico.
- When the center of their professional activities is located in Mexico.

– People who are Civil servants or Mexican workers, even when the main base of its business is abroad.

– The legal entities (Business partnerships, Associations or Civil partnerships, among others) that have been established according to the Mexican Law, as well as the ones that have established the main base of its business or their working headquarters in Mexico.

RESIDENTS ABROAD: For fiscal purposes, the following are considered foreign residents:

– Individuals, nationals or foreign, who do not have their residential property in Mexico. If they do, they are considered nonresidents if their main business location is not in this country, that is to say, if more than 50% of their annual income does not proceed from a wealth source located in Mexico, or if the center of their professional activities is not located in national territory, among other reasons.

– Any legal person such as commercial companies, associations and civil companies, among others, which are not constituted in accordance to the Mexican laws, as well as those which have not established in Mexico their main business location or the seat of their bureau, but keep one or more permanent establishments in national territory.

Individuals of Mexican nationality are presumed to be residents in Mexico unless they prove that they are residents in another country.

Individuals or juridical persons who, according to what was previously mentioned, are nonresidents, must pay taxes in the following cases:

– When they obtain income from any source of wealth located in the national territory.
– When they have a permanent establishment in the country, for the income derived from said establishment.

Foreigner residents pay taxes in Mexico in the following cases

Foreign residents who obtain income in Mexico or when they have a permanent establishment in the country, they have to pay for the income obtained from such establishment.
The before mentioned people must pay taxes in Mexico when they obtain income from the following concepts:

SALARIES: Salaries are those obtained from wages and other benefits derived from a labor relation, and include overtime and additional benefits, indemnities, retirement income, retirement annuities, retirement insurance, bonus, among others, except the remunerations to members of the board of directors, of surveillance, advisory or of any other nature, as well as fees to managers, commissioners and general managers.

FEES: It is considered as income obtained from fees those received for rendering professional independent services, such as medical, administration, financial, accounting, architecture, engineering, computing, designing, artistic, sports, music, singing, among others, as long as services are not rendered in a subordinate way, that is to say, there is no work relationship.

REMUNERATIONS TO COUNCIL MEMBERS, ADMINISTRATORS, COMMISSIONERS AND MANAGERS: Inside this concept are considered the fees that are paid in Mexico or abroad, by resident companies in Mexico, to:

– Members of directive councils, of vigilance, consultative or others.
– Administrators, commissioners and managers.

REAL PROPERTY LEASING AND RENTING: Considered as income from leasing are the amounts a foreign resident obtains for leasing, and in general from granting the use or benefit, and other rights agreed, on real property even when income is obtained from the sale or transfer of the rights mentioned above, as long as said assets are located on national territory.

CONTRACTS OF TIME-SHARING TRAVEL SERVICE: In contracts of time-sharing tourist services we consider those related to real property destined to tourism, vacation, recreation or sports purposes or any other that falls into anyone of the following suppositions:

– To grant the use or benefit, or the right to occupy or enjoy, in a temporary or definitive way, one or several real properties or part of the same.

– To offer lodging or a similar service in one or several real properties, or in only a part of them, for a specific period of time, or at intervals previously established, determined or determinable.

– To transfer or other dispositions of memberships or similar titles, whichever name is used, allowing the use, benefit, enjoyment or lodging in one or several real properties or in only a part of them.

– To grant a third party the administration of one or several real properties located in national territory, to provide lodging or shelter to people different from the taxpayer.

SALE OR OTHER DISPOSITION OF SHARES: People who obtain income from sale or other disposition of shares or other bonds representing the property of assets, will consider that the source of wealth is located in Mexico when:

– The person who has issued them is a resident in the country.

– The accounting value of shares or bonds results, for more than 50%, of real property located in national territory.

Income from the sale of profits of profit sharing associations is also considered in this concept, only when business activities are carried out in Mexico through said associations.

FINANCIAL LEASING: It is considered as interest income from financial leasing, that obtained from leasing with option to buy or with the right to participate, when the asset is sold to a third party, as long as said asset is used in the country, or in case payments are made abroad, these payments be totally or partially deducted by a permanent establishment in the country. It is presumed that assets are used in the country, when whoever uses or benefits from the asset is a resident in the country, or a foreign resident with a permanent establishment in the country.

COMMISSIONS, TECHNICAL ASSISTANCE AND PUBLICITY: On the subject of income from royalties, we consider those obtained for the use or benefit of patents, invention certificates, improvement or trademarks, commercial names, copyright, as well as the quantities perceived by means of transfer of technology, or information concerning industrial, commercial or scientific, for transmission of visual images, sounds or both, or other right or similar property. Incomes for technical assistance, which should be collected by independent in providing non-patentable knowledge that do not involve the transmission of confidential information services, are considered.

Income shall be provided that the property or rights for which royalties are paid or technical assistance to be forced across Mexico, or when payments - including advertising - are made within the national territory to residents or to residents abroad with permanent establishment in the country.

PRIZE: It is considered as income obtained from prizes (in lottery, raffles, drawing, gambling or contests of any kind)those held and paid for in Mexico.

ARTISTIC ACTIVITIES, SPORTS OR PUBLIC SHOWS: It is considered as income obtained by foreign residents when sport activities, artistic or public shows are held in Mexico, and among the services rendered by a foreign resident, related to said public shows there are those destined to the promotion of such shows, as well as the activities carried out in national territory, including those caused by the foreign resident's prestige as an artist or sportsman.

Furthermore, there are also included those obtained by a foreign resident for services, leasing or disposition of property related to the presentation of public, artistic or sports shows.

DISTRIBUTABLE REMAINDER OF JURIDICAL PERSONS WITH NONPROFIT PURPOSE: Residents abroad to obtain income through a moral person non-profit, it is considered to be income recorded in Mexico where the moral person is established.

CONSTRUCTION WORK, INSTALLATION, MAINTENANCE, OR MOUNTING IN REAL ESTATE, INSPECTION OR MONITORING SERVICES: Any person providing services of construction work, installation, maintenance, or mounting in real estate, or inspection or monitoring activities relating to them, such payment is to be considered as income obtained in the country when made in national territory.

OTHER INCOME FROM A SOURCE OF WEALTH LOCATED IN MEXICO: Also Income tax must be paid when receiving the following:

– The amount of the debts released by the creditor or paid by another person. It is considered that the income is established in the country when the creditor who carries out the pardon is resident in the country or resident abroad with permanent establishment in Mexico.

– The obtained by granting the right to participate in a business, investment, or any payment to celebrate or participate in legal transactions of any nature. In this case, it is considered that the income are obtained in the country when the business, investment or legal act is carried out in the country, and it is not considered capital contributions of a moral person.

– Those arising from compensation for damages, and the income derived from criminal or conventional clauses. It is considered that the income obtained in the country when the one who makes the payment is resident in Mexico or resident abroad with permanent establishment in the country.

– Those that derive from the sale or transfer of commercial credit. It is considered that the income is obtained abroad in the country when the commercial credit is attributable to a resident in the country, or to a nonresident with a permanent establishment in Mexico.

→ Real Estate Law

In Mexico there are three classes of real estate property: Private property, social property and public property. Foreigners or legal entities, in order to acquire real estate, must follow the requirements of article 27 of the Mexican Constitution.

Land Register

In Mexico the system of real estate register works with a State Public Registry for each one of the 32 States of the Federation, and those Registers only inscribed public deeds.

Transfer Formalities

When the transfer relates to real estate, the parties must formalize the transaction before a Notary Public and the public deed has to be inscribed at the correspondent Public Registry.
In case of lease, the agreement has to be formalized by writing, the parties can ratify their signatures before a Notary Public and also inscribed before the Public Registry when the duration of the agreement is for more than six years.

Mortgages

It is a real guarantee constituted by assets that are not given to the mortgagee.
The mortgage only can be constituted on specified assets, and it extends to the following:

– The right of the owner of a property to everything produced thereby or incorporated therewith, naturally.

– The improvements done by the owner of the assets

– The objects of movable property permanently incorporated by the owner and that cannot be separated without dam age or detriment.

– The new buildings constructed by the owner over the land in mortgage, or new floors over the building in mortgage.

→ Labour Law

Employment contracts

Individual and Collective Agreements

Cost of dismissal and wrongful dismissal

If the labor relationship is for a fixed period of less than a year: The amount of the wages of half of the time worked. If the labor relationship is for a fixed period of more than a year: Six months of wages for the first year and twenty days for each of the following years. If the labor

relationship is not for a fixed period: Twenty days of salary per each year of work. In any case, three months of salary and the expired wages starting from the date of dismissal.

Employment contracts for directors; an especial regime

In Mexico , these workers are named "Trust employees" Those are ruled by Title Six "Special Works" Chapter Two, of the Ley Federal del Trabajo (Federal Labor Law) Conditions: They are set up depending on the nature and relevance of the service they render.

Employees, representatives and union representation

Brief idea of the influence of these groups in labor contracts. The law recognizes the right of coalition of workers and employers, therefore Labor Unions are essential when talking about collective bargaining agreements.

Wages and other types of compensation

MINIMUM SALARY: Set by the law after taking into account the cost of living.

REMUNERATED SALARY: More than minimum salary, according to the quality and quantity of the work.

BEATEN SALARY: The one that should be paid since the date of dismissal.

Minimum salary in 2011

$59.82 (FIFTY NINE PESOS, 82/100, LEGAL TENDER IN MEXICO), daily for the Geographic area "A".
$58.13 (FIFTY EIGHT PESOS, 12/100, LEGAL TENDER IN MEXICO), daily for the Geographic area "B".
$56.70 (FIFTY SIX PESOS, 70/100, LEGAL TENDER IN MEXICO), daily for the Geographic area "C".

Cost of overtime hours

By paying the same amount per hour in a working day, with a limit of three extra hours per day and nine extra hours per week. The extent of nine extra hours per week, will give the result of 200% of the amount paid per hour.

Employment regulations

Conditions cannot be under what is detailed by law, they should be in proportion to the importance of the services rendered, and equal for equal jobs, they cannot be different because of nationality, sex, age, politics, race, etc.

WORKING DAY: The time in which the worker is available to the employer.
DAY: Eight hours from 6 to 20 hrs.
NIGHT: Seven hours from 20 to 6 hrs.
MIX: Seven and half hours in periods in both of them.

During the working day, there should be a working break of at least half an hour. For six days of work the worker will have at least one day of rest.

OBLIGATORY DAYS OF REST: January 1st, the first Monday of February, the third Monday of March , May 1st, September 16 , the third Monday of November, December 1st just in Presidential Elections year, December 25th.

VACATIONS: The workers with more than one year service, will have 6 days of vacations. This period will increase two days per following year of service until fourteen days of vacations, and then after the fourth year it will increase two additional days for each period of five years of services.

Social security

They are the shares given by the workers and bosses, IMSS (Mexican Institute of Social Security) set the shares each year for both of them. The payment of shares is done by the SUA (Unique System for Own-Determination)

→ Portugal

→ Corporate Law

The most relevant legislation to companies in Portugal is:

– Commercial Code ("Código Comercial", dated 1888);

– Portuguese Companies Code ("Código das Sociedades Comerciais", Decree law no. 262/86, dated September 2 – , as further amendments);

– Portuguese Securities Code ("Código dos Valores Mobiliários", Decree law no. 486/99 dated November 13, as further amendments);

– Several specific laws and regulations.

Corporate Structures Available

There are four types of corporate entities available in Portugal: general partnership companies *(Sociedade em nome colectivo)*, private limited liability companies *(Sociedade por quotas)*, public limited companies *(Sociedade anónima)* and limited co-partnership companies *(Sociedade em comandita)*.

European Companies *(Societas Europaea)* may be incorporated in Portugal, provided that they have their registered office in Portugal or if they are participated by companies governed by Portuguese companies law.

Notwithstanding, the three most common legal structures that may be considered when envisaging the settlement of a business or activity in Portugal are the following:

– Representation office or branch
– Sociedade Anónima (SA)
– Sociedade por Quotas (Lda.)

Branch

A branch is merely a permanent representation of a foreign company, organized to conduct the business outside its original country. It differs from a company due to the following characteristics:

– The branch is not legally independent from the head-office, while a subsidiary company operates as a different legal entity;

– The branch shall appoint a legal representative to manage the business, while limited liability companies must appoint members of the corporate bodies (management body and an audit body).

The procedure for registering a branch in Portugal is simple and consists mostly on the submission of a resolution from the head-office and other documents evidencing the legal existence of the foreign company.

Companies

SAs and Lda.s differ from other structures available where the shareholders' liability is unlimited (sociedade em nome colectivo and sociedade em comandita), although the latter are rarely used nowadays.

When deciding what legal form the subsidiary should assume, the foreign investor must take into consideration the differences between a SA and a Lda., which may influence significantly their business operations. From a day-to-day point of view, the two can be managed in broadly similar terms, although Lda.s may in some cases be less formally managed due to the fact that they comprise a lighter corporate structure, hence being more appropriated for short-term investments. As for SAs, they are usually recommended for enduring investments, especially where a large number of investors is envisaged.

Share Capital

The minimum share capital for a SA is € 50,000.00, of which at least 30 percent must be fully paid up until the date of incorporation.

The statutory capital for a Lda. is freely set in the articles of association of the company and will correspond to the sum of the quotas subscribed by the quota holders. However, it is not

possible for this value to be below the minimum nominal value of the quota set by law, which is € 1.00 (one euro). The Portuguese Law also allows the quota holders to decide to pay the value of each quota on the date of incorporation or at the end of the first economic year.

Under general Portuguese Companies Law, a S.A. must have at least five founding shareholders. Notwithstanding, a company is entitled to incorporate a SA of which it will initially be the sole shareholder under the special regime applicable to groups of companies. Conversely, a Lda. must have at least two shareholders unless it adopts the structure of a single quota holder company (sociedade unipessoal por quotas) in which case the share capital is totally held by a sole quota holder.

Shares and quotas

The share capital of a SA is divided in shares, these can either be nominal or without nominal value (but both cannot coexist in the same SA), furthermore, all shares must have the same nominal value (of no less than € 0,01 per share). Share certificates are issued to represent one or more shares in accordance with the Company's by laws.

Shares can be nominative or bearer ("ao portador") and may be represented either by certificates or dematerialized. Bearer shares can be transferred simply by physical delivery of the certificate, whilst nominative shares are transferred by endorsement statement signed by the transferor on behalf of the transferee and the correspondent registration with the Company (or the financial institution, if applicable).

Each class of shares must have something that makes it different from the other classes and all the shares within one class must confer the same rights. Common ("ordinárias") shares are the securities that represent ownership in a corporation. Holders of common shares exercise control by electing the management board and voting on corporate policy. Preferred ("preferenciais") shares bestow some sort of rights and privileges upon common stock. The nature of these rights or privileges shall consist of patrimonial advantages (mainly concerning dividends).

The share capital of a Lda. is divided in quotas, which can have different nominal values with a minimum of € 1,00. Quotas are not materialized in a document and its transfer must be executed by written agreement, followed by the respective deposit with the Commercial Registry Office.

Liability of shareholders

In both SAs and Lda.s, the liability of each shareholder is limited to the nominal value of his interest in the company. However, the quota holders of a Lda. are joint and severally liable for any unpaid capital contributions foreseen in the company's by-laws.

Corporate Governance

SAs management and supervision bodies' composition depends on the organization system adopted, which may be organized either on (i) a traditional 2-tier structure consisting of a Board of Directors (or a sole Director, should the share capital not exceed € 200,000.00) and an Audit Board or a Single Auditor; or (ii) under a 1-tier structure consisting of a Board of Directors, which shall comprise an Audit Commission and a Chartered Accountant; and (iii) under a 3-tier structure consisting of an Executive Board of Directors, a General and Supervisory Council and a Chartered Accountant. SAs with a capital not exceeding € 200.000,00 may have only one Director instead of a Board of Directors. The corporate bodies of a Lda. are the General Meeting of Shareholders and the Management (which may be composed of one or more directors). Although a Supervisory Board is not mandatory, in some situations Lda.s are required to appoint a statutory auditor.

General Meetings of Shareholders

Although most powers to run the company are vested in the directors, the following resolutions are reserved to the Shareholders:

– Approval of financial statements and distribution of profits.
– Appointing and removal of the Directors and members of the Audit Board.
– Amendments to the Bylaws.
– Merger, spin-off, transformation or dissolution of the company.
– Transfer and encumbrance of real estate properties (only applicable to Lda.s).
– Issuance of Preferred Shares.
– Issuance of Bonds.
T– he division and consent for the transfer of quotas to third parties (only applicable to Lda.s).

Quorum Majority SAS*

	QUORUM	MAJORITY
First call	No quorum or 1/3 for matters comprising the changing of articles of by-laws, merger, spin-off, transformation or dissolution	Majority of votes cast or 2/3 for matters comprising the changing of by-laws, merger, spin-off, transformation or dissolution
Second call	No quorum	Majority of votes cast or, for changing the matters described above, 2/3 of the votes cast or simple majority if at least 50% of the share capital is present or represented

Quorum Majority LDA.S* Lda.s

	QUORUM	MAJORITY
	No quorum	Majority of the votes cast or 3/4 of the share capital for matters comprising the changing of by-laws, merger, spin-off, transformation or dissolution

**Certain resolutions may require unanimous vote or other majority according to the company's Bylaws.*

Directors

SAs are required to have a board of directors (or an Executive Board of Directors and a General and Supervisory Council, depending on the organization structure adopted).

Lda.s are managed by one or more directors ("gerente/gerência plural"), although there is not a formal management board.

Managing corporate bodies of SAs and Lda.s have very broad authority to bind the company. Although restrictions may be contained in the by-laws, these are not enforceable against third parties provided the actions of the directors are within the limits of the corporate purpose.

In a SA, the shareholders appoint the board of directors, generally for a four-year term (but the by-laws can provide for a shorter term). There are no requirements for independent directors (except for listed companies). In a Lda., the directors may be appointed for terms of office or without a definite term, in this case remaining appointed until dismissal or resignation.

The directors may be remunerated or not.

Annual Accounts

Portuguese law foresees that all companies must approve, at the annual general meeting, the respective year-end accounts within a 3-months period (as from the end of the financial year) and, in special cases, within a 5 months period (in case of companies with consolidated accounts).

The documents to be approved are: (i) the year-end financial statements (comprising a detailed balance sheet), (ii) the management report, (iii) a report issued by the audit body, and (iv) in case of SAs, a legal certification of the accounts must be issued by a Chartered Accountant.

Once approved by the general meeting, the accounting documents must be submitted, by Internet, under a new system called "Informação Empresarial Simplificada" (IES), under which

the annual financial and accounting information is sent simultaneously to all the relevant public services (tax authorities, commercial registrar, etc.).

In case of permanent representations of foreign companies in Portugal (Branches), the process is even easier, as it is only required a declaration confirming that the head-office received the supporting documents of the branch's accounts.

Incorporation of a company

The incorporation of a company (except when depending on special approvals or when the start-up capital is to be made through contributions in kind) may be fully performed in one day, if the shareholders choose to create a company under the special regime that allows a company to be incorporated "in one hour" (on the spot company – "empresa na hora"), with or without acquiring or possessing a trade mark. This process is carried out before a Commercial Registry Office or a Company Formalities Centre (CFE).

On the other hand, it is now possible to launch and set up a company throughout digital means – the so-called "online company registration".

Regarding the special regime of incorporation "on the spot company" above mentioned, in April 2008, it was also created a special regime that allows a branch from a foreign company to be dully incorporated "in one hour" (on the spot branch – "Sucursal na hora"). With this procedure it can be created, immediately and in one place, permanent representations of foreign companies in Portugal, with the simultaneous appointment of their representatives.

In 2008, some measures were approved to simplify the companies' incorporation process as well as other companies' day-to-day procedures, namely:

1. COMPANY'S CARD ("Cartão da Empresa"): as from now on, Companies shall have a sole Identification Card that evidences the three essential numbers: the Company's Tax Identification Number, the Company's number of registration at the Commercial Registry Office and the Company's Social Security number. The Company's Card may be requested online (www.empresaonline.pt) or at the Commercial Registry Office, remaining the respective issuance dependent on the enrolment of Company with the Tax Authorities and with the Social Security.

2. SICAE (Portuguese Information and Classification System of Economic Activities): this system consists on a permanent and actualized database concerning the companies "economical activity code" ("CAE"), allowing a simplified process of modification regarding this matter.

Listed companies

Listed companies have to comply both with the Portuguese Companies Code and with the Portuguese Securities Code. This act establishes cooperation, communication and publicity duties for corporations, as well as the regulation and supervision of the respective activities by the Portuguese Securities Market Commission.

Several changes in the matter of Corporate Governance have been recently approved, mainly in respect of the composition of the board of directors and remuneration of its members and the exercise of voting rights, as well as changes resulting from the implementation of the Markets in Financial Instruments Directive and of the Transparency Directive.

→ Foreign Investment

The most relevant legislation to Foreign Investment in Portugal is established on the Decree Law nr. 203/2003, of September 10th.

Foreign investment is much encouraged in Portugal throughout a non-discriminatory policy concerning the entry of foreign capital, where the national origin of the investment is overlooked.

The recent changes in domestic companies' law, while simplifying the required formalities and procedures to set-up a business (introducing the "company on the hour" and on-line registration regimes), have enhanced Portugal's attractiveness to foreign investors. According to a recent report ("Doing Business") of the World Bank, Portugal is amongst the restrict group of the ten countries worldwide where setting up a company is most quick and easy.

Authorizations and Permits

There are no requirements for foreign investors in Portugal to obtain authorizations or prior registrations with any Portuguese authorities for investing or setting-up a business.

There are no sectors barred to foreign investors. Both foreign and domestic investments are limited only in what concerns certain economic activities, such as harnessing, the treatment and distribution of water for public consumption, postal services, rail transport as a public service and the running of maritime ports. In these areas, private sector companies may only operate under a concession agreement.

Additionally, investment projects that may affect, in any way, public order, security or public health, or that involve the production of weapons, munitions or other military equipment or the exercise of public authority should be submitted to the Portuguese Investment Agency

(API – Agência Portuguesa de Investimento) for an assessment of their compliance with Portuguese law.

Transfer of Dividends, Interests and Royalties

There are no restrictions in Portugal on the transfer of dividends, interest and royalties abroad. Moreover, there may be tax exemptions applicable on the withholding tax of dividends provided certain requirements are met.

Foreign exchange control

There are no exchange control restrictions applicable to investments in Portugal and there is no restriction on outward transfers of capital for the purpose of, e.g., buying shares in a foreign company. However, the Central Bank requires the bank involved to report transfers with a value exceeding € 12,500.00 for statistical purposes.

Foreign Personnel

EU citizens may work in Portugal without having to obtain a prior work permit or any other visa. Conversely, non-EU citizens that intend to work in Portugal must obtain a prior work permit. Applications for work permits should be presented prior to leaving the home country at the Consulate or Portuguese Embassy of the place of residence of the applicant.

→ Labour Law and Social Security

This chapter provides a brief overview of the main aspects of Portuguese labour law, specially on the employment contracts and social security related matters.

Portuguese Labour Law has recently been amended by Law n. 7/2009, in force since February 17. The Labour Code has revoked the Labour Code 2003 and the Regulation of the Labour Code 2004. However, some matters of the Labour Code 2009 will only enter into force after being developed and regulated – which has already occurred in respect to some of those matters - thus, the Labour Code 2003 and the Regulation of the Labour Code are still in force regarding to few other matters.

The Labour Code 2009 continues to provides the regulation of the several types of employment contracts and of all the other related matters, such as holidays, absences to work, professional training, gender equality, maternity rights, termination of employment contract and health and safety at work. Additionally, it now regulates the matters concerning to collective bargaining agreements and employees' representatives, which were provided in the Regulation 2004.

In general terms, the Labour Code 2009 is not very different from the Labour Code 2003 and, from the companies' standpoint, it could have gone further in respect to the flexibility of the labour relations.

Employment Contracts

Under Portuguese law, there are 3 main types of employment contracts: permanent, fixed-term and uncertain term.

Additionally, we also highlight the management employment contract, due to the wider flexibility it offers to companies when hiring top employees.

The following aspects are common to every type of employment contracts:

Retribution

Besides the base salary, employees are entitled to an annual holiday allowance and Christmas allowance, which amount is equivalent to the base salary. The minimum national wage is currently € 485,00, although the applicable collective agreement usually provide higher minimum amounts per each professional category.

Employees may also be paid other allowances, depending on the terms under which the work is performed, such as the nightshift allowance or the shift allowance.

Generally, some of these allowances - such as the shift allowance or the meal allowance - are provided in the applicable collective bargaining agreement, as its payment is not mandatory by law. Besides, the payment of the meal subsidy is a common practice, even if not provided in any collective bargaining agreement.

Working Hours

As a general rule, employees may be committed to a maximum working schedule of 8 hours per day and 40 hours per week. The parties may also agree on a part-time working schedule.

The work performed beyond these limits (and also on resting days) is considered as overtime work, which, itself, is limited to a certain number of hours per day and per year. The performance of overtime work entitles the employee to a special allowance per each hour of overtime work rendered. Depending on the type of functions, the employer and the employee may agree on a working hours exemption schedule, case where said daily and weekly limits shall not apply. Being the case, the employee is entitled to a monthly allowance, which amount is equivalent to, roughly, 20%/25% of the base salary, save if provided otherwise in the applicable collective agreement.

The Labour Code 2009 has introduced new types of scheduling the working hours in order to adapt the working schedules to the production needs, enabling the employer to concentrate a greater number of hours of work per day and per week or to manage the daily and weekly limits of hours of work in accordance with the production flows. However, the implementation of some of these schedules has to be previously agreed with the employee's representatives in the applicable collective bargaining agreements. During 2012 some legal amendments are expected in respect to these matters, namely to allow that the employer and the employees (directly of through its representatives) agree on this flexibility schedules, even if not provided in any collective regulation.

Holidays and Days-Off

Employees are entitled to a paid annual holidays period of 22 working days. This period may be increased up to 3 working days, depending on the assiduity of the employee.

In the year of admission, employees are entitled, after 6 months of execution of the contract, to 2 working days of holidays per each month of duration of the contract.

Employees are also entitled to a mandatory rest day (usually, on Sundays) and to a complementary rest day (usually, Saturdays). Additionally, there are 13 paid public holidays and 2 non-mandatory public holidays (local holiday and Mardi Gras).

Maternity and Paternity Leave

This is one of the matters that has been amended by the Labour Code 2009, extending the duration of parental leaves and allowing it to be taken jointly or alternatively by the employee and the spouse. The main difference is now between parental leave taken exclusively by the employee (whether female of male) or jointly with the spouse.

As a general rule, the parental leave is 150 or 180 days after the birth, where 6 weeks are mandatory for the female employee. The spouse (male employee) is always entitled to a leave of 10 working days (consecutive or not) after the birth.

If the parental leave is exclusively taken by one of the spouses, its duration may vary from 120 to 150 days. During the parental leave, these employees are entitled to a subsidy paid by the social security, as the salary is not due by the employer.

In some cases where parental leaves are extended by decision of the employee, the subsidy paid by the Social Security may be reduced and salary will still not be due by the employer. There are also other leaves supported by the social security, for purposes of assistance to family, which duration has also been extended by the Labour Code 2009. The employer and the employee may, at any time, agree on an unpaid leave.

Sickness and injury

Absences to work due to illness or injury are deemed as justified absences. In these cases, the salary is not due by the employer as employees are entitled to a subsidy paid by the social security.

In case of labour accidents, the insurance company shall be responsible for the payment of the salary and other compensation for any damages suffered by the employee as a result of the accident. To such extent, under the law, the employer has to enter into an insurance, otherwise it shall be liable for every costs and compensation due to the employee. Moreover, the non-compliance with this obligation constitutes a serious infringement, subject to a fine applied by the Labour Authorities. Termination: as a general rule and save in the cases of termination with cause for disciplinary reasons, the employer is absolutely prevented from unilaterally terminate the employment contract.

However, during the trial period, either party may unilaterally terminate the employment contract with immediate effects and no compensation is due, save if agreed otherwise. Should the trial period exceeds 60 days, the termination of the contract has to be communicated by the employer with 7 days prior notice and if it exceeds 120 days, said prior notice is extended to 15 days.

The employee may terminate the employment contract at any time by means of a prior written communication, which varies according to the type of contract (see below).

The employee may also terminate the employment contract with cause, if the employer has breached any legal or contractual rights, case where it shall be liable for the payment of a compensation, to be settled by the court, ranging from 15 to 45 days of base salary per each of seniority, with a minimum equivalent to 3 months of base salary.

Termination with cause

The termination with cause requires a previous internal written proceeding, where the employee may file a reply and require the hearing of witnesses and other means of proof. This internal proceeding is detailed in the law and should the company fail to comply with certain formalities the dismissal is deemed as wrongful. In the course of this proceeding, the workers' committee (if existing) and the trade union (if the employee is an union representative) have also to be consulted. Additionally, in the case of pregnant and breast feeding employees, the dismissal requires a favourable opinion from a governmental body committed to gender equality and maternity protection.

The law defines cause for termination as a serious and intentional conduct of the employee, which determines the immediate impossibility of maintenance of the employment relation, i.e., the breach of legal and contractual duties.

The employee may judicially dispute the dismissal within the year subsequent to the dismissal. The burden of proof of the existence of cause for termination relies on the employer.

Should the dismissal be ruled wrongful, the employee may opt to be reinstated in the company or to be paid a compensation, to be settled by the court, ranging from 15 to 45 days of base salary per each of seniority, with a minimum equivalent to 3 months of base salary. In the case of small companies (less than 10 employees) or management employees, the company may oppose to the reinstatement, case where the compensation shall vary from 30 to 60 days of base salary per each year of seniority.

Additionally, the company has also to pay to the employee a compensation for any moral or patrimonial damages resultant from the dismissal and also the unpaid salaries due since the date of the dismissal until the date of the court's ruling. In the case of term employment contracts, the amount of this compensation cannot be lesser than the unpaid salaries due since the date of the dismissal until the term of the contract (or until the date of the court's ruling, should it occur before the term of the contract).

Individual redundancy and collective dismissal

Besides termination with cause, the employer may only terminate the employment contract grounded on objective reasons, specifically market, financial or technological reasons. The burden of proof of the existence of these grounds for termination relies on the employer.

If, within a 3 months period, the employer intends to terminate, at least, 2 or 5 employees (whether the company has up to 50 employees or more than 50 employees, respectively) the collective dismissal shall apply, otherwise the individual redundancy procedure shall be the applicable one.

In order to terminate the employment contract, either by redundancy or in the extent of a collective dismissal, the employer has to enact a procedure, which involves the affected employee(s), the workers committee and the Ministry of Labour.

In short, the procedure comprises 3 stages: (i) initial written communication to the affected employee(s), (ii) information and consultation with the employees and their representatives and (iii) decision of the procedure, which has to be communicated with prior notice, from 15 to 75 days, depending on the seniority of the affected employee(s). The Labour Code 2009 has reduced the duration of these stages but, in some cases, has increased the prior notice period, which in the Labour Code 2003 has 60 days to every employees, irrespectively of their seniority.

The compliance with the several legal requirements foreseen for the initial communication and for the decision is most relevant, otherwise the termination shall be deemed as wrongful.

The termination by redundancy or by collective dismissal entitles the employee to a compensation equivalent to one month of base salary per each year of seniority, in a minimum equivalent to 3 months of base salary. Recently, the Government has approved significant amendments to the rules on compensation. The Government decree has not yet been ratified by the President nor published in the Official Journal, but that is expected to happen within the next few weeks. In a nutshell, these amendments will have the effect to reduce the amount of the compensation to 20 days of base salary per each year of seniority, with a maximum amount equivalent to 12 months of base salary. The referred minimum limit of 3 months of base salary shall not longer apply. Please note that the new rules on calculation of the compensation will only apply to employment contracts entered into after the publication of those rules and the "old rules" shall continue to apply to the employment contracts already in execution.

If the court rules the termination as wrongful, the terms referred above in respect to termination with cause shall apply.

Termination by agreement

The employer and the employee may, at any time, agree in written on the termination of the employment contract. The law does not provide any minimum or maximum limits for the compensation to be paid (in fact, the payment of a compensation is not mandatory).

The employee may revoke the termination agreement within the 7 days subsequent to the date of its signature, save if it is entered into before a public notary, where it shall produce its effects irrevocably as of the date of signature.

Permanent employment contracts

This is the standard type of employment contracts, as term employment contracts may only be entered into under specific conditions (see below).

The contract does not have to be executed in written, although under the law, the employer has to render to the employee information on the basic terms of the agreed employment.

The trial period for these contracts varies according to the functions to be performed: (i) 90 days for standard employees, (ii) 180 days for employees holding a trust position or committed to functions requiring high technical skills and (iii) 240 days for management and senior employees. However, the parties may agree on the reduction or exclusion of the trial period.

Save in the cases of termination during the trial period, termination with cause, individual redundancy or collective dismissal, the employer is absolutely prevented from unilaterally terminating the employment contract.

The employee may terminate the contract at any time by means of a written communication addressed to the employer with 30 or 60 days of prior notice, whether he/she has up to 2 years or more than 2 years of seniority, respectively.

Term employment contracts

This type of employment contracts may only be entered into to face a temporary need of workforce and for the period of time strictly necessary. Although the law provides an open clause to define said "temporary need of workforce", it also foresees some situations which generally enable the employer to hire term employees, from which we highlight the following: (i) replacement of employees temporarily prevented from rendering their activity, (ii) exceptional increase of the company's activity, (iii) execution of a determined work or project (e.g., a services agreement entered into by the company), (iv) start-up of a new company or activity and (v) hiring of first-job seekers or long term unemployed persons.

Failure to comply with these requirements determines that the contract shall be deemed as a permanent one. There are fixed-term employment contracts and uncertain term employment contracts, where the first are the most common.

Fixed term employment contract may be entered for a maximum of 3 years and within such period be subject to 3 renewals. Uncertain term employment contract are limited to a maximum duration of 6 years.

The employee may terminate the fixed-term contract at any time, by means of a written communication addressed to the employer with 15 or 30 days prior notice, whether the contract has been entered into for less than 6 months or for 6 or more months, respectively.

The fixed term contract terminates in the end of the agreed term (or of its renewals). To such effect, the employer has to communicate the termination to the employee by means of a written communication with 15 days notice before the said term, otherwise the contract shall be automatically renewed or converted into a permanent employment contract (if it cannot be renewed again or if it has reached its maximum duration).

The employee may also terminate the contract in these terms, by means of a written communication addressed to the employee with 8 days prior notice.

The termination of the contract by the employer entitles the employee to a compensation equivalent to 2 or 3 days of base salary per each month of duration of the contract, whether the contract has been in force for more than 6 months or up to 6 months, respectively. As referred above, new rules on the compensation are about to entry in force and shall also apply to the term employment contracts (see above the chapter on "Individual redundancy and collective dismissal".

The termination of a term employment contract by the employee does not entitle him/her to be paid any compensation.

Management employment contracts

These contracts are less common in Portugal but represent more flexibility to the employer as it may terminate it at any time. The Labour Code has extended the cases where this contract is admissible. Therefore, besides the cases of employees committed to managing (or equivalent) functions directly dependent from the board of directors, as well as to the admission of personal secretaries of employees holding such management positions, management employment contracts may now also be entered into for the so called 2nd line directors (directors dependent of the General Manager).

The main aspects of these contracts remain unaltered, as follows:

– 180 days trial period (may be reduced or suppressed by agreement of the parties);

– Either party may terminate the contract by means of a written communication addressed to the other party with 30 or 60 days of prior notice, whether the employee has up to 2 years or more than 2 years of seniority, respectively (the parties may agree on the extension of the notice period);

– Termination by the employer entitles the employee to a compensation equivalent to one month of base salary per each year of seniority (the parties may agree on the increase of the compensation). As referred above, new rules on the compensation are about to entry in force and shall also apply to the management employment contracts (see above the chapter on "Individual redundancy and collective dismissal".

Social Security

The employer and the employee have to pay contributions to social security, which are calculated over the regular salaries paid to the employee, through a 34,75% rate, where 23,75% is supported by the employer and 11% is supported by the employee under a PAYE system.

In respect to members of the board, the social security rate is 29,6%, where 20,3% relies on the company and 9,3% on the director. In this case, the rate is applied over a conventional salary, varying from €407,41 to €4.888,92 (figures for 2008). The director may opt to pay contributions over the real salary, when it exceeds said maximum limit, as long as he has, in 2010, less than 56 years old and the company authorizes it.

Unemployment subsidy

The termination of an employment contract shall entitle the employee to the unemployment subsidy whenever the unemployment has not resulted from a decision of the employee (save in the cases where the employees terminates the contract with cause).

The unemployment subsidy is granted by the social security services. Its amount is calculated in accordance with the salary of the beneficiary in the 14 months preceding the unemployment, with a maximum limit equivalent to 3 times the minimum national wage (currently, €1.455,00 = €485,00 * 3).

This subsidy is granted for a period which duration varies in accordance with the age and the contributive record of the beneficiary, from a minimum of 270 days to a maximum of 900 days. The beneficiary is prevented from cumulate the unemployment subsidy with other income resultant from a professional activity.

Retirement

The statutory age for retirement is 65 years old, with a minimum of 15 years of registered and paid contributions to social security. However, employees may require the retirement with, at least, 55 years old, but the amount of the retirement pension shall be reduced per each month of anticipation.

As a general rule, the beneficiary may cumulate the retirement pension (except in the case of anticipated retirement) with income resultant from the performance of a professional activity.

→ Real Estate Law

Types of Ownership

According to the Portuguese Civil Code, ownership consists in the full and exclusive right of use, enjoyment and disposal of a real estate property or personal property (commodities), including all direct advantages resulting there from (as revenues). Portuguese law foresees other property rights such as the right to use the property ("usufruto"), the naked property ("nua propriedade"), the surface property, the timesharing, the horizontal property, and others.

The adverse possession ("usucapião") is one method of acquiring property through actual, continuous, open occupancy of the property, for a prescribed period of time, under claim of right, and in opposition to the rights of the true owner.

Land Register

All transactions concerning real estate property must be duly registered with the Real Estate Registry Office (which may be submitted online). In order to impose that obligation the law establishes that definitive registration constitutes legal presumption of the existence of the right and its ownership by the person who is inscribed in the registry records. This means that the land certificate ("título de registo da propriedade") confers to the owner of the property the power to exclude any alien pretension over the registered right.

The onerous acquisitions of property rights made by third parties, in bona fides, from a person who appears in the Registry records as entitled to transfer such right shall be held harmless against any property claims.

All registered records are made available so as to allow the assessment of information concerning the ownership and/or any existing encumbrances on a real estate property.

Transfer formalities (Public deed)

According to Portuguese Law, the constitution, transfer, acquisition or extinction of property regarding real estate assets may be made through a Public Deed or a Simple Document duly authenticated by a Lawyer. Additionally, other documents may be required, as well as the execution of legal and prior formalities, including the payment of taxes, such as:

– Occupation or construction license issued by the city hall (for urban buildings);
– Land registry title, proving the ownership of the transferor;
– Payment of the Real Estate Transfer Tax ("IMT") - between 0% and 8%, depending on the real estate value;
– Real Estate Tax Record ("caderneta predial") issued by the competent tax services.

Additionally, all real estate properties are subject to the payment of a Property Tax which ranges between 0,2% and 0,8% of the patrimonial value of the real estate. It recently entered into force a new project of the so-called "Casa Pronta" (House on the Spot).

This regime allows purchases, encumbrances or registrations of real estate properties to be carried out immediately and by a sole entity. Thus, the public deed, the payment of the IMT and the attaining of all necessary documents (habitation license, land registry title and real estate tax record) may be all carried out simultaneously by the same authority, significantly reducing the bureaucratic procedures of the real estate transfers in Portugal.

Mortgages, main rights of mortgages

A Mortgage is a lien by virtue of law (security in rem) that confers to the creditor a preferential right over the other creditors, and that can be defined, in simple terms, as an ancillary guarantee aiming at assuring the fulfillment of contractual obligations.

The law provides for three different types of mortgages: voluntary, judicial and legal. The voluntary mortgage must be constituted by means of a public deed (or will) and must specify the mortgaged property. All kinds of mortgages should be registered, in order to have existence and to produce effects against third parties.

Pre-emption rights

There are pre-emption rights in specific cases, such as:

– The owners of confining buildings;
– The owner of real property burdened with easement of access;
– The co-owners in the case of property transfer;
– The tenant in case the leased property is sold; and
– By the owner of the right of surface, in case of transfer.

In all these cases, the person detaining that specific condition has a pre-emption right over third parties that intend to acquire the respective property. Portuguese law also foresees the so-called "sale secured by a lien on property" that confers to the buyer the possibility of reserving to himself the property of the land until the total fulfillment of the other party's obligations.

Restrictions on acquisition (e.g. by foreigners)

The Portuguese law has no restrictions to what concerns the possibility of property acquisition by foreigners.

Construction and use restrictions (e.g. permits, zoning)

The exercise of rights related to ownership is not absolute, considering that Portuguese Law determines the compliance with restrictions and boundaries imposed by the social and dynamic function of ownership.

Besides the general clause of "proibição do abuso de direito" (prohibition of abuse of right), the public expropriations and temporary requisition, we have to note on two different types of restrictions: "public law restrictions" and "private law restrictions".

As to public restrictions, we have to consider specific legislation linked to, e.g. town planning law (inspections and supervision of construction works) that covers areas like waters, environment, air quality protection, forests, industry, work licensing, natural parks, sanitation, noise, etc.

Concerning the private law restrictions, they are foreseen in the Portuguese Civil Code, and are numerous, as for example easements, excavations, water flowage, right of demarcation, right of dividing and joining rustic buildings, etc.

Lease formalities e.g. written, time limit for lease term and possible registration of lease interest

The urban lease agreement must be made in writing, provided its duration exceeds 6 months and the contract must include several essential elements, such as utilization's license, number of the cadastre in the tax services, etc.

Unless the parties decide to stipulate an effective term for the lease (minimum five years for habitation urban leases) the landlord can only prevent the automatic renewal of the contract by means of a notification of such intention sent to the tenant with one year in advance. Nevertheless, either party (tenant or landlord) may terminate the contract in case of breach or default by the other party.

ILP GLOBAL - LR LAW FIRM
www.ilpglobal.es

→ Spain

ILP GLOBAL LR ABOGADOS is an independent an entrepreneurial law firm formed by a team of attorneys with solid education in legal matters and with the singular purpose of offering the best possible service to our clients. The firm was founded on a commitment to providing trustworthy, responsive and reliable service and this commitment has proven itself to be a solid foundation for building long-term attorney client relationships. Regardless of size, each of the firm's clients receives, and benefits from, our unwavering pledge to provide quality legal services within a flexible and reasonable fee arrangement.

Our mission is to achieve excellence for our external and internal clients by providing responsive and timely services. Each member and employee of ILP GLOBAL LR ABOGADOS is asked to effectively contribute toward this mission. We commit to excel in our individual areas and to provide our clients the fullbenefit of our knowledge, enthusiasm, ability, effort and integrity. By achieving this mission, ILP GLOBAL LR ABOGADOS provides practical advice that is highly responsive to the business objectives behind the legal needs of our clients.

ILP GLOBAL LR ABOGADOS is a full-service law firm very focus in the areas of corporate law and high-stakes Litigation; since its foundation in 2000, ILP GLOBAL LR has grown significantly and is now one of the most experienced law firms in Spain with an international focus that operates on the principles of integrity, discretion, neutrality and service, representing the interests of the client first and foremost. Our primary goal is to ensure a friendly, efficient result with high professional standards.

We are confident of offering to clients, collaborators and employees a different and personalized project. In combination with our network of correspondent offices (ILP GLOBAL and ILFA E-IURE) we are able to offer our clients one of the most dedicated and focused services available today.

The Firm has grown and has extended its areas of practice to become an alternative legal service provider for companies that require top quality service and prefer the commitment, direct attention and tailored service that we are prepared to offer.

ILP LR ABOGADOS is run, above all, for and on behalf of its clients. Experience has taught us that a satisfied client is certain to bring us even more business by referral.

→ Foreign Investment Law

In the context of implementation of the European Union Maastricht Treaty, Spain made significant revisions to its legislation on foreign investment. Royal Decree 664/1999 has set up as a general rule complete freedom of capital movements, both in relation to foreign investments in Spain as well as to Spanish investments in other countries. However, this general regime does not apply to certain specific sector legislation such as the defense sector. These exceptions to the general regime of complete freedom of capital movements are only allowed on the basis of public order and security, public health, and the exercise of sovereign authority.

Foreign investments

– Participation in Spanish companies;

– Establish and increase capital allocated to branches;

– Subscription for and acquisition of marketable debt securities issued by residents;

– Participation in mutual funds recorded in the Registers of the Spanish National Securities Market Commission (CNMV)

– Acquisition by non residents of real estate located in Spain valued at more than 3.005.060,52 € (or regardless the value if the investment is originated in a tax heaven defined in Royal Decree 1080/1991 of 5 July).

– Formation or participation in joint ventures, foundations, economic interest groupings, and cooperatives if the total value of the investment exceeds 3.005.060,52 € (or regardless the value if the investment is originated in a tax heaven defined in Royal Decree 1080/1991 of 5 July).

Governmental Declarations (of capital), authorizations and permits

Order of 28th May 2001 puts into effect the guidelines from the Royal Decree 664/1999. It establishes the necessary procedures to declare foreign investments and its liquidation, as well as procedures for obtaining authorizations and annual reports. Direct foreign investments are subjected to a notification after the investment has been made. The form and the deadline of the declaration are determined by the 1st July 2010 Resolution.

Foreign investments in Spain, as well as their liquidation, must be declared to the Register of Ministry of Industry, Tourism and Trade, for administrative, statistic or economic purposes. These documents can be downloaded at http://subsede.comercio.mityc.gob.es → Proceeds and Electronic Services → Download assistance programs.

Typically, non-resident investors are required to report the investment once it has been made. The general regulation may be suspended in exceptional cases by decision of the Council of Ministers, so a prior authorization is required in the certain circumstances:

– When the declaration concerns an investment coming from a tax haven jurisdiction, the declaration must be made by the investor prior to the actual investment. This declaration is in addition to the declaration to be made subsequent to the actual investment.

No prior declaration is required in the following cases

– Investments in negotiable instruments, as well as participations in investment funds registered in the records of the "Comisión Nacional del Mercado de Valores (CNMV)" (Securities and Investments Board).

– Where the foreign participation does not exceed 50% of the capital of the Spanish company target of the investment.

• Prior declarations of investments are made by the investor on the preprinted applications DP- 1 (Previous declaration of foreign investment coming from tax havens in non listed companies, branches and other type of investment) or DP-2 (Previous declaration of foreign investment coming from tax havens in real assets). No documents are annexed to these applications.

• Foreign investments in Spain in activities directly related to national security, such as those intended for the production or sale of weapons. Except when the foreign investment does not exceed 5% of the share capital of the Spanish company and it is not allowed to be a member of the management board of the company, directly or indirectly.

– Foreign investments in Spain that affect or might affect activities related to the enforcement of the public order or which affect or might affect public security and health.

– Direct or indirect investments in Spain by non EU member states for the acquisition of property intended to be used as diplomatic and consular offices.

The prior declaration of investment is valid for six months, from its filing, so that, when the investment not materialize in that time, a new prior declaration is required. It should be pointed out that once the prior declaration has been made investors can make their investment without having to wait for prior notification from the government, even though they are still subjected to the notification after the investment has been made.

Order of 28th May 2001 establishes that the actual investment shall comply with the following rules:

– Declarations related to investment operations in privately held companies, branches, real assets and other type of investment.

The declaration (application D1-A for the declaration of foreign investment in privately held companies, branches and other types of investment) shall be addressed to the Investment Registry of the Ministry of Economy within a maximum period of one month from the actual investment, supporting documents shall be attached to the said declaration to evidence the following:

– non resident status of the investor.
– where applicable, compliance with any requirement of sector legislation.
– Having obtained an authorisation in the hypothetical cases of a suspension of the liberalization regime.

Having made a prior declaration, if required:

– For investments in real assets, a concise explicative report which states the main features of the investment.

– Declarations related to investments in real assets. The declaration shall be submitted to the Investments Registry through the printed application D- 2A (Declaration of foreign investment in real assets) within one month from the actual investment.

– Declarations related to investments in negotiable instruments. Non residents who subscribe to or purchase negotiable instruments in the Spanish market, on their own account or that of third parties, shall maintain their securities and assets in a registered account opened with an authorized market compensation and liquidation institution.

The depositary or administrator for the assets represented by account entries, shall submit to the "Dirección General de Comercio e Inversiones" (General Direction of Trade and Investments) about a report on flows in the ordinary or extraordinary market operations for non residents, subscriptions to share capital made directly with the issuing company or through the Bank, registrations and discharges of non resident deposits related to security transactions other than sales and purchases thereof.

These reports are rendered on a monthly basis between day 1 and 20 of each month for transactions during the previous month.

Likewise, the deposits and balances in accounts of non residents on the Entries Central of the depository, as at 31 December must be declared during the month of January
Transfer of dividends, interests and royalties

The acts, businesses, transactions and operations of any kind which suppose, or require, charges or payments between residents and non residents, or transfers to or from abroad, on a general basis, are free.

However, as an exception to this general rule, the Ministry of Economy, may forbid or limit certain categories of transactions with specified foreign countries or specified operations of charging, payment or transfer, whenever these dramatically affect the interests of Spain, or in application of measures adopted by international bodies of which Spain is a member.

Likewise, whenever short term capital movements are exceptionally ample and may cause significant tension in the foreign exchange market or dramatic alterations in the direction of the economic and foreign exchange policy, the Government, at the request of the Ministry of Economy, is able to adopt safeguard measures as necessary, submitting certain types of transactions to a regime of administrative authorisation.

The charges and payments between residents and non residents, as well as the transfers to or from outside of Spain, may be coded in euros or in foreign currency, and must be made through a Deposit Entity inscribed in the "Registros Oficiales del Banco de España" (Official Registrar of the Bank of Spain, "Registered Entities" hereinafter).

In any case, the resident shall declare to the "Registered Entity", his name or company name, domicile, tax identification code, name or company name and domicile of the non resident sender or beneficiary of the charge or payment, amount, currency, country of origin or destiny, and concept of the operation by which the charge, payment or transfer takes place. The "Registered Entities", in their case, shall provide, in the manner determined by the Ministry of Economy and within thirty days after each calendar month, such information.

The "Registered Entities", as well as the resident natural or corporate persons who carry out this type of operations, shall be subjected to the obligation of providing the competent bodies of the Government Administration and the Bank of Spain, in the manner established, the data required for the purposes of statistic and fiscal follow-up of the operations.

Repatriation of capital. Procedure of liquidation of investments in privately held companies, branches, real assets and other types of investment.

For the total or partial liquidation of such investments, the holder of the same, commissioner for oaths or other person obliged to declare, as the case may be, shall submit the declaration of liquidation in the printed application D- IB (Declaration of liquidation of foreign investment in non listed companies, branches and other types of investment) duly filled in and subscribed. Each holder shall fill in a single application for each liquidation referred to even if there are several documents of declarations of investment in one same Spanish company.

Procedure of liquidation of investments in real assets

For the total or partial liquidation of a foreign investment in real assets, the holder or the commissioner for oaths shall submit the declaration of liquidation in the application D-2B (Declaration of liquidation of foreign investment in real assets) duly filled in and subscribed by the non resident holder.

In case of partial disinvestments, either for the change of one or several of the holders of a property "pro indiviso", either for the transmission of a part of the real assets declared in one same instrument of declaration, such partial disinvestment shall be declared to the Registry of Investments.

In the event of the exchange of securities in a privately held company for negotiable instruments of another company, the printed application D-1B (Declaration of liquidation of foreign investment in privately held companies, branches and other types of investment) of the investment liquidation, through the intervention of the company or Securities Brokers or the member of a secondary market, official or not, of values which are part of the operation, along with the Significant Participations Communication, if deemed suitable, shall be submitted. The values acquired through the exchange shall be included as the "purchase flow"in the mandatory report by the depositary or administrator.

In those cases where the exchange of negotiable instruments for values of other privately held companies takes place, the relevant Significant Participations Communication for the securities delivered in exchange shall be submitted, if suitable, along with the printed application D-1A (Declaration of foreign investment in non listed companies, branches and other types of investment) of foreign investment declaration in non negotiable instruments, with the

intervention of the entity which orchestrated the transaction, shall be submitted. The values delivered in exchange shall be included as the "purchase flow" in the mandatory report by the depositary or administrator.

Annual Report

Spanish companies participated by non-resident must file an Annual Report on investments to the Administration in the following cases:

– Branches in Spain, in all cases

– Spanish companies with capital or shareholder´s equity of over 3.005.060,52 euro and in which 50% or more of the equity capital is held by non-resident investors.

– Spanish companies with capital or shareholder´s equity of over 3.005.060,52 euro and in which a single non-resident investor holds 10% or more of the company´s equity capital or of the total voting rights.

– Spanish companies that belong to a company group or in which 50% or more of the equity capital is held by a non-resident investor or in which a single non-resident investor holds 10% or more of the company´s equity capital or of the total voting rights. In such cases, neither the capital nor the shareholder´s equity is taken into account.

The report must be presented within 9 months from closing the accounting period. For this procedure the application D4 must be completed, and a copy of the Business Tax or the annual accounts must be attached to it.

Foreign personnel; permits and other aspects to be considered

Prior work permits are required for all foreign citizens over sixteen years of age who wish to carry out in Spain any lucrative, work-related or professional activity, on their own behalf or that of others.

This regime shall not be applied to the nationals of the member States of the European Union, to the nationals of Third States to whom, by reason of relationship, the communitarian regime can be applied, except the nationals of the new States (save for Cyprus and Malta) that joined the European Union on 1 st May 2004, for the application of a transitory period of two years from that date.

Work permits will only be delivered to new immigrants only if in Spain it is not possible to find adequate workers with the skills needed in order to perform the work as determined by the State agency which handles job offers.

The application for work and residency permits must be presented personally by the prospective immigrant to the appropriate State agency. In the event that the applicant is also an employer, the application must be submitted by the applicant or a legal representative of the employer.

Where the applicant resides outside of Spain, the application may be submitted before the Diplomatic Mission or Consular Office in the district where he may live.

The application will be processed in the following manner: Upon completion of a review of the application, the relevant authority (Government Vice Delegate or Government Delegate in the au-tonomous communities made out of one sole region) shall deliver a unique resolution by which the foreign citizen is authorised to work and live in Spain, the beginning of his work activity and carry out his membership of, registration in and quotation to the "Seguridad Social" (Social Service).

The resolution shall be notified to the businessman, indicating the amounts that need to be satisfied in concept of taxes, expiring if after a month from the date of such notice the corresponding visa was not, in its case, requested.

Once the application has been submitted to an Embassy or Spanish Consular Office, the resolution shall be notified to the interested party by the mentioned instance, through the Ministry of Foreign Affairs. The resolution and notice shall be carried out within a three month period, counting from the day after that one of the date in which the entry of the application in the registry of the competent body to handle it has taken place. After that period has expired, the initial work permit applications shall be understood as dismissed.

→ Corporate Law

The legal framework of Corporate Law in Spain consists of:

– The Code of Commerce (1885) (Articles 116 to 150; 169 to 237)
– The Joint Stock Companies or Public Limited Companies(RD 1/2010 Ley de Sociedades de Capital, LSC)
– The Private Limited Companies (RD 1/2010 Ley de Sociedades de Capital, LSC)The Rules of Mercantile Register (RD 1784/1996)
– Private Equity Act 25/2005
– Bankruptcy Act 23/2003
– The Securities Exchange Act (24/1988)

In European Law, the main sources are: Law of Mercantile Adaptation to the European Community Standards (Act 19/1989)

Types of Companies and Liability of shareholders

Joint Stock Companies (Sociedades Anónimas), Private Limited Liability Companies (Sociedades de Responsabilidad Limitada), Collective Companies (Sociedades Colectivas), Partnership Companies - both simple and with registered shares (Sociedades Comanditarias Simples o por acciones) - and other associative forms have a diverse range of commercial uses

For setting up a business in Spain there are different legal forms. The forms most commonly adopted by foreign investors are:

SOCIEDAD ANÓNIMA (S.A.) (Public Limited Company or Joint-Stock Company): Corporation with a minimum capital stock of 60,000 euros of which at least 25% must have been paid at the time of incorporation, divided into freely transferable shares (similar to: UK: PLC; Germany: A.G.; France: S.A., Italy: SpA)

Sociedad de Responsabilidad Limitada (S.L.) (Private Limited Company or Company Limited by Shares): Small sized corporations (a minimum capital of 3,000 euros, fully paid at the time of creation) which are subjected to lower reporting and auditing requirements than the S.A., and which may not issue stock (similar to UK: Ltd.; Germany: GMBH.; France: SARL., Italy: SRL)

SUCURSAL (Branch): a division of a foreign company with separated accounting.

Other less common but valid legal forms are:

EMPRESARIO INDIVIDUAL (Proprietorship): an individual manages the business, providing the capital and assuming unlimited responsibility.

COMUNIDAD DE BIENES (Co-ownership): a business is not an independent legal entity and belongs to two or several proprietors who assume unlimited responsibility.

SOCIEDAD COLECTIVA (General Partnership): an independent legal entity which is owned by two or more general partners, all assuming unlimited responsibility.

SOCIEDAD COMANDITARIA (Limited Partnership): an independent legal entity which is owned by one or more general partners assuming unlimited responsibility and by one or more limited partners whose liability is limited to the amount of capital contributed.

SOCIEDAD PROFESIONAL (Limited or Join Stock Companies): their corporate purpose is to develop the exercise of professional activities.

The establishment of a branch - amended by the Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State - requires:

– A formal resolution of the foreign head office governing authorizing the establishment of a branch in Spain and appointing a representative.

– The resolution must be duly legalized to be valid in Spain, in order to constitute the branch with a Spanish Notary.

– Application for CIF (tax identification number) in the Tax Office´s of the registered branch office with the articles of the association and the DNI or NIE of the representative agent in Spain.

– Sell off the ITP tax (Impuesto de Transmisiones Patrimoniales y Actos Jurídicos Documentados), that means the 1% of the outstanding capital.

– Registration of the public deed in the Mercantile Registry in Spain (of its register office), including a copy of the head office's corporate bylaws duly stamped with an Apostille issued under the Hague Convention and a sworn translation into Spanish.

Share Capital (minimum and minimum paid in amount)

COMPANY	MINIMUM (S)	MINIMUM PAID IN AMOUNT (S)
PLC or Joint-Stock Company (SA)	60.000	25%
Company Limited by Shares (Limited Liability Companies) (SRL)	3.000	100%
Banks	18.000.000	100%
Insurance Companies	9.015.181,57	50%
Real Estate Investment Company	9.015.181,57	100%
TV Channels	6.010.121,84	50%
Chartered Stock Brokers	4.507.590,80	100%
Sociedades de Capital Riesgo (SCR) Venture Capital (Private Equity)	1.200.000	50%
Sociedades Gestoras de Fondos de Capital Riesgo (Venture Capital Fund Management, Private Equity Management)	300.000	100%
Private Equity Funds	1650000.00	100%
Private Equity Companies	120000000	50%
Hedge Funds	3000000.00	100%

Classes of shares (registered/bearer, preferred/ordinary) Registered/Bearer

Bearer shares are corporate stock certificates which are owned simply by the person who holds them, the "Bearer". These shares are not registered on the books of the issuing corporation and are transferred by delivery. These shares are only allowed when capital stock has been fully paid up.

Registered Shares are those which are registered on the books of the issuing corporation (Libro Registro de Acciones Nominativas) and certificates the name of the owner.

Common (ordinarias o comunes) Stock and Preferred (privilegiadas o preferentes) Stock.

The shares can grant different rights. The shares that have the same content of rights constitute the same class. When inside a class several series are constituted, those that integrate a series must equal nominal value.

The preferred stocks grant some privilege out of the ordinary ones, there will be necessary to observe the formalities prescribed for the modification of By-laws.

If there is only one class of shares issued, they may be called "common shares", "capital shares", or just "shares" or "stock".

Common Stock

They represent ownerships in a corporation. Holders of common stock exercise control by of the society electing a board of directors and voting on corporate policy.

Preferred Stock

These shares bestow certain rights and privileges not accruing to common stock. These rights or privileges shall be financial (mainly concerning dividends); but never political, such as "the right of vote" or "the preferred subscription right".

After the incorporation, the issuance of Preferred Stock is an amendment to the By-Laws.

Corporate Governance

SHAREHOLDERS MEETINGS: Decisions reserved to the Shareholders (160 LSC):

– Approval of financial statements and distribution of profits and Approval/Censure of Management (Art. 160).

– Appointing and Removal of Directors (Art. 209- 252), Auditors (Art.264), Liquidators (Art. 376-382).
– Changing the By-Laws: (Art. 285-345)
– Winding-Up or Dissolution (Art. 360-370)
– Approval of the liquidating balance sheet
– Approval legal merger, spin-off, disposals of existing fixed assets
– Other matters determinated by the By-Laws or the LSC

The board members must meet minimum once a year (Annual General Meeting -AGM) in order to approve the financial statements, distribution of profits and Approval/Censure of Management.

Decision-making bodies

CLASSES AND POWER OF DIRECTORS

– Sole Director (Administrador Único)
– Sole and several Directors (Administradores Solidarios)
– Joint and several Directors (Administradores Mancomunados)
– Board of Directors (Consejo de Administración)

APPOINTMENT OF DIRECTORS

– Directors shall be appointed by the Shareholders Meeting (Art 214 LSC and Art. 142 Rules of Mercantile Register).

– When the administrative body is constituted by a board of directors, this one shall be formed by a minimum of three directors and in the SRL (Private Limited Liability Companies) shall not be more than twelve members.

MINIMUM NUMBER OF INDEPENDENT DIRECTORS: There is no binding rule. Nevertheless, "The Olivencia Report" and "The Aldama Report" - two Codes of Best Practice - provide some recommendations concerning this question.

TERM OF APPOINTMENT

– For Joint-Stock Companies (SA)
The term of appointment shall never be longer than 6 years (Art. 221.2 LSC and and 145 Rules of Mercantile Register)

– For Companies Limited by Shares (SL)
Directors may be appointed for an undetermined period of time (Art. 221.1 LSRL)

RANGE OF DIRECTORS' LIABILITIES: Does Law require an specific agreement - or disclosure - for determining the remuneration of Directors?

On the Joint stock companies, the scope of Directors' duties shall be determined by the By-Laws. On the limited liability companies, the Directors'duties are generally not remunerated, unless the By-Laws establish a remuneration and the method of calculation. Remuneration is often in the form of a percentage of after-tax profit.

Any limit? (SA) The Directors' remuneration is set only after allocating the legal and statutory reserve and at least the 4% - or other higher percentage determined in the Estatutes – of dividends in favour of shareholders.

(SRL) The aggregate amount of Directors' remuneration must not exceed 10% of the after tax profit.

LIABILITIES: (SA and SRL) Directors' liabilities, contribution to damages caused in the course of their duties and the procedure of claiming against them, are set in detail in Articles 236-241; 25LSC

Annual Accounts-Financial and operating results: Duties and Liabilities

Necessary Documents: 1) Profit and Loss Account; 2) Balance Sheet; 3) cash flow statement; 4) Statement of Changes in equity;5) Memory; 6) Management Report; 7) Auditors Report; and 8) the certification of the AGM Minutes in which the approval of Annual Accounts took place.

TIME LIMIT FOR DELIVERY OF DOCUMENTS: Directors will draft the Annual Accounts (Cuentas Anuales) no later than 3 months after the end of the corporate year (December, 31). The AGM will examine and approve or refuse these Annual Accounts no later than 6 months after the end of the corporate year. Time Limit for deposit/application/registration:No later than 30 days after the AGM approves the Annual Accounts.

AUTHENTICATION: Secretary and Chairman's signature in the certification of AGM Minutes in which the approval of Annual Accounts shall be authenticated by a Public Notary.

PUBLICATION IN A LEGAL GAZETTE/MERCANTILE REGISTER: The Legal Gazette ("Boletín Oficial del Registro Mercantil") shall publish a report on the fulfilment of corporate duties, and a notice that the Annual Accounts are publicly available in full. By-Laws are also publicly available in Mercantile Register.

PRIVATE EQUITY COMPANIES: The Private Equity Act (November 2005) regulates the so-called "Venture Capital Entities" and their Management Entities.

A Venture Capital Company is legally qualified as a Financial Entity with the purpose of investing in: (i) Non-Financial Business, or (ii) Business that are not dedicated to non-listed Real Estate businesses.

These Entities may acquire listed companies within the term of 12 months of acquisition; squeeze-out measures have not been approved yet, to facilitate taking 100% of shares.

BANKRUPTCY: The reform of the Spanish Insolvency Act (Ley Concursal) carried out in September 2003 was a very relevant change because it finished off a legal system which had finally become obsolete. The modification of credit categories and its preferences was one of the most important elements of this reform.

QUOTED COMPANIES:
The regulations are Ley de Sociedades de Capital (Arts. 495-528) and Ley 24/1988, de 28 de julio, del Mercado de Valores.

"The Olivencia Report" and "The Aldama Report" - two Codes of Best Practice - provide some recommendations concerning Quoted Companies. However, there is a new -January 2006 - specific Best Practice Blueprint for quoted Companies, known as "The Conthe Report" and properly named "Unique Code for Best Practice Corporate Governance of Quoted Companies". This Code includes the European Commission Recommendations (2005/162/EC) and (2004/913/EC).

→ Tax Law

Many changes have been introduced in the Spanish tax legislation, being effective since January 1, 2011, mainly as measures to encourage investment and job creation in Spain. For example the criterion of consideration for small and medium enterprise has been reduced, as well as allowing freedom of depreciation.

Corporate Income Tax

TAX RATE: The prevailing general rate was reduced to 30% on January 2008. For small size companies (turnover below of 10.000.000), the first 300.000 will be levied at 25%, the rest to 30%. Before the change a small or medium company where those having incomes below 8.000.000, and the first 120.000 has been levied at 25%, the rest to 30%.

CORPORATE RESIDENCE: Any company, which is considered as resident, that generates incomes in the Spanish territory is subjected to corporate income tax, through a subsidiary, branch office.

Permanent establishments opened in Spain: non-resident's tax at a 30% rate on their tax profit from 2008.

Non-established foreign entities/individuals obtaining incomes in Spain are also subjected to non-resident's tax (24%).

BRANCH INCOME: The incomes generated by a branch in a foreign territory, will be part of the incomes of the head office. Nevertheless, any income obtained in Spain through a branch of a foreign entity, will be taxable at general rate, applying the general rules for Spanish entities. Incomes remitted from the Spanish branch to the head office are subject to a 19% withholding tax. Exemption is applied to EU head offices and to those territories that signed double taxation treaties with Spain.

INCOME DETERMINATION: If the law does not say anything on the contrary (transfer pricing new policies are highly relevant in this particular area), the Spanish Accounting Rules (Plan General de Contabilidad Español - PGCE) will be applied to the income determination. If the law is applied in a different direction, two kinds of differences between the P&L financial and taxable will be generated:

– Temporal differences: They generate advance or deferred corporate tax, their appearance is conditioned to the specific moment of the deducibility of the costs

– Permanent differences: It includes the non deductible costs, such as: capital retribution, corporate tax, penalties and sanctions supported from the Tax Administration, liberalities (with the exception of PR costs with clients or suppliers, sales promotion costs, moderate costs to employees, between others).

TAX INCENTIVES: The main tax incentives (to be done on the next tax due) are the following:

TYPE OF INCENTIVE	AMOUNT	LIMIT
(1) Business incentive:		
• Full business circle in Ceuta and Melilla	50% CIT	35% (in all cases)
• Local public services provided	99% CIT	
(2) Promoting specific kind of investment:		
• Increase of number of disabled workers.	€ 6.000	
• R+D expenses(2)	30%-50%	
• Cultural assets/book publishing/films industry/coproduction (1)	5%-15%-20%	

(1) This incentive will be removed in 2014.
(2) This tax incentive will be removed in 2012.

GROUP TAXATION (TAX CONSOLIDATION): It is permitted for corporate tax effects, and the withholding on account of this tax. The decision must be taken and notified to the Tax Authorities at the beginning of the fiscal year. At this moment, the consolidated corporation should have more than the 75% of the capital of the Spanish entity, directly or indirectly.

Special tax regimes

CANARY ISLAND ZONE (ZEC): All the companies incorporated between June 2000 and December 31, 2013 can apply to this special regime, and receive the tax benefits until December 31, 2019. The registration requires: (1) a minimum investment of 100.000 (Gran Canaria y Tenerife) in the first two years of activity, (2) to create at least 5 new jobs in Gran Canaria or Tenerife or 3 in the other islands. The corporate tax is 4%, and limited to specific taxable base amount. The general rate will be applied over this base. There are exemptions regarding IGIC and transfer tax. The EU Parent-Subsidiary Directive are applie for non EU countries, with the exceptions of tax haven.

ETVE COMPANIES (SPANISH HOLDINGS OF FOREIGN ENTITIES): Main features of the ETVE: (a) Their corporate purpose must primarily be the management and administration of shares in entities that are not resident in Spain. (b) They must have the corresponding organization of human and material resources.(c) The shares (or participations) held by the ETVE must be all nominative. (d) Incompatible with the regime of fiscal transparency. (e) It is required to communicate to the Ministry of Economical Affairs about the regime going to be used:

– Dividends resulting from benefits obtained by entities not resident in Spanish territory are exempt of Corporation Tax upon fulfillment of the following conditions:

• The investment is at least 5 % and is maintained continuously during the fiscal year prior to the day when the dividends or shares become due.

• The entity that is not resident in Spanish territory must be subjected to and not exempt of a tax that has an identical or similar nature as the Spanish Corporate Tax.

• The income of the entity not resident in Spanish territory from which the dividends have been obtained must carry out business activities abroad, this condition is complied with in the event that at least 85 % of the income of the accounting period corresponds to:

– Income obtained abroad not imputed by means of the regime of international fiscal transparency (passive income).

– Dividends resulting from benefits, as well as gains resulting from the transfer of the stake in entities not resident in Spanish territory.

– Capital gains resulting from transfer of shares in entities not resident in Spanish territory,

upon fulfillment in all the cases of the following requirements, are exempt

• Those indicated in point a) above (referred to all the accounting periods during which the stake was held, except the first one, referred only to the day of the transfer).

• That the acquirer is not resident in a Tax haven.

• This regime is also applied to the rent resulting from the events of separation of a shareholder or liquidation of an entity.

The most important difference with the general tax system is the treatment of the dividends paid by the Spanish Holding to its non-resident shareholders or the capital gains obtained by the non-resident shareholders in the case of transmission of the shares of the Spanish Holding.

In this case a distinction must be made between the perception of dividends and the obtaining of capital resulting from the transfer of shares in the Spanish Holding (or in the events of separation or liquidation of the entity).

– Dividends: The distributed benefit, when it results from income not integrated in the taxable base because of its exemption, it is considered not obtained in Spain and consequently not subjected to taxation in Spain.

Capital gains resulting from transfer of shares: The capital gains corresponding to either the provisions to cover exempt rent or to the differences in value imputable to shares in entities not resident in Spanish territory are considered gained out of Spain and are consequently not taxed in Spain.

Venture capital companies and funds and collective investment institutions.

The venture capital companies, regulated under Law 25/2005 will be exempted in a 99% of the revenues generated by shares transmission of related companies, if the investment has been in their assets at least 1 year and no more than 15.

During the investment of the venture capital in the related company, at least the 85% of the buildings of the related company must have been used for the main activity of the company.

The exemption is available for dividends received from related companies, no matter how long the shares have been in the venture capital assets.

There are other special tax regimes such us:

– Temporary consortia of companies.

– Restructuring transactions.
– Fiscal transparency (international-controlled foreign corporation rules)
– Special tax regime of the Basque country

Double taxation deduction

According to the Spanish regulations, a Spanish entity should be taxable in all the incomes perceived, even when some of them were generated abroad. Nevertheless, the Corporate Tax law considers a special deduction to avoid some activities are taxable in two territories, or in other entity.

– Internal double taxation deduction: It is focused in the double taxation over a single income for two different entities (generally dividends).

– International double taxation deduction: There is a juridical double taxation, system which is applied to the same income taxed in two countries (withholding tax at source), and an economic double taxation, the same income taxed in two companies and/or in two different territories.

– The dividends or profit-sharing income from a foreign entity are exempt in Spain if:

• The Spanish entity has at least 5% of the shares of the foreign entity, during the last fiscal year,

• The foreign entity is subjected to a similar tax to the Spanish corporate tax, and it is not a tax haven country. When a double taxation treaty is signed between that country and Spain with exchange of information clause, this clause is presumed;

• The income of the dividend was generated in foreign activities of the foreign entity carried out abroad.

About the double taxation, the imputation method is used, it means, gross foreign income (including the withholding tax already paid) is considered for Spanish tax calculation purposes, and then a tax credit for the foreign withholding tax is applied, limited to the corporate tax that would be paid if such gross income (with the deduction of all associated costs), had been obtained in Spain.

Tax administration

RETURNS: If there is a tax credit, a return can be applied.

PAYMENT OF TAX: The last day of payment is 25 th of July. After the first year of activity, three advanced payment are required (Oct. 20 th , Dec 20 th , Apr 20 th). The advance payment may

be calculated according to the company size:

– Large entities: 25% of the profit at Sep30th, Nov 30 th and March 30 th

– Small entities: Can decide at the beginning of the fiscal year between the large entities system, or applying the 18% to the corporate tax paid the year before.

WITHHOLDING TAXES

COUNTRY	DIVIDENDS	INTERESTS	ROYALTIES
Algeria	5	5	7 - 14
Arab Emirates	5	0	0
Argentina	10	125	3 - 15
Australia	15	10	10
Austria	10	5	5
Belgium	15	10	5
Bolivia	10	15	15
Brazil	10	15	15
Bulgaria	5	0	0
Canada	15	15	10
Chile	5 - 10	5 - 15	5- 10
China P.R.	10	10	10
Croatia	15	8	8
Cuba	5-15	10	5
Czech Rep.	5-15	0	5
Denmark	5-10	10	6
Ecuador	15	10	10
Egypt	12	10	12
Estonia	5-15	10	5-10
Finland	10-15	10	5
France	15	10	5
Germany	10-15	10	5
Greece	5-10	8	6
Hungary	5-15	0	0
Iceland	5-15	5	5
India	15	15	10-20
Indonesia	10-15	10	10
Iran	5-10	75	5
Ireland	15	0	5-10
Israel	10	10	5-7
Italy	15	12	4-8

Japan	10-15	10	10
Korea	10-15	10	10
Latvia	5	10	5-10
Lithuania	5-15	10	5-10
Luxembourg	5-15/10-15	10	10
Macedonian	5-15	5	5
Malta	5	0	0
Mexico	5-15	10-15	10
Morocco	10-15	10	5-10
The Netherlands	15	10	6
New Zealand	15	10	10
Norway	10-15	10	15
Philippines	10-15	10-15	10-15-20
Poland	5-15	0	10
Portugal	10-15	15	5
Romania	10-15	10	10
Russian Federation	5-15	5	5
Slovakia	5-15	0	5
Slovenia	5-15	5	5
Sweden	10-15	15	10
Switzerland	10-15	10	5
Thailand	10	10-15	5-8
Tunisia	5-15	5-10	10
Turkey	5-15/5-25	10-15	10
United Kingdom	10-15	12	10
United States	10	10	10
USSR	10-15	42278	10
Venezuela	10	10	5
Vietnam	7	10	5
Non teatry	15	15	25

Other Taxes

VAT: VAT is levied in good supplies and services given and provided inside Spain, import/intra EU acquisitions of goods. There are three different rates: general at 18%, reduced at 8% and super-reduced at 4%. These rates have been changes the last July. In Canary Islands, VAT does not apply, but the IGIC (Impuesto General Indirecto Canario) with an ordinary rate of 5%.

TRANSFER TAX (TT): It is used in "inter vivos" transfers when there is no VAT. The rate can vary, depending on the Autonomous Region.

CAPITAL TAX (CT): An exemption on this tax was approved last December. Before, capital tax taxed the incorporation of companies, as well as any variation of capital and liquidation of entities. This tax was incompatible with transfer tax and stamp duty, but not always with VAT.

STAMP DUTY: Notarial documents of valuable transactions (fix rate: 0,15 per sheet, variable rate:0,5). Other documents submitted to the Public Administration, administrative documents and mercantile documents (such as a bill of exchanges), have a scale. Compatibilities between the three taxes and the VAT:

COMPATIBILITIES BETWEEN THEM			COMPATIBILITIES WITH VAT		
	COMPATIBILITY	INCOMPATIBILITY		COMPATIBILITY	INCOMPATIBILITY
TT versus CT	-	X	Transfer tax	-	X
TT vs SD (variable)	-	X	Capital Tax	-	X
TT vs SD (fix)	X	-	SD (variable)	-	X
CT vs SD (variable)	-	X	SD (fix)	X	-
CT vs SD (fix	X	-			

→ Real Estate Law

The Registry System development has stamped Real Estate in Spain

The Spanish Registry System is a mixture of the French system (where inscription is voluntary) and the German system (where inscription is compulsory). Estate transfer takes place unrelated to the Registry while estate inscription or registration is made by properties: one property per register sheet.

Other basic element that distinguishes the Spanish Registry System from other systems around the world is the Land Registrar, with professional qualifications and his/her enrolled to the office (by a Civil Service Examination).

In Spain, any property is firstly related to legal businesses, and later registration in the Registry provides a pledge to their purchasers before any third party. The Land Registry provides a secure, stable and trustworthy record of land ownership and recorded interests therein, so it promotes social and economic reliability and contributes to national development.

The protection of third party's rights by Law in Spain is so high that one of the purchaser's duties of care is to previously enquiry at the Registry about the ownership and encumbrances of the property he/she wants to purchase.

The information and protection provided by the Spanish Land Registry is basic to understand Real Estate in this country. The Spanish Registry System has replaced fiduciary and trustee systems (more frequent in Anglo-Saxon countries) in the field of Real Estate.

In fact, practice shows that it is becoming really complex to apply Directive 94/47/EC (Timesharing) through the Ley de Aprovechamiento por Turno de Bienes Inmuebles (Act 42/98), because it is very difficult to match the "Club System" with the Spanish Registry System. The situation is becoming really delicate as Spain is the second country in the world (after USA) on the number of Timesharing resorts.

Types of Ownership

In Spain there is the so-called actual right of "ownership" regardless other real property rights such as leasehold, possession - indeed or bare or bona fides ... -, accretion, easement, emphyteusis, antichresis, usufruct, mortgage, acquisitive prescription... All of them are inspired by Roman Law, on which Spanish Law is based.

Timesharing is called "Aprovechamiento por Turno de Bienes Inmuebles" in Spain; it is an atypical real property right and is regulated by Act 42/98 in Spain. Act 42/98 requires the resorts to register their structure and working in the Land Registry; it mixes thus the Anglo Saxon Fiduciary system with the Spanish Registry System, and creates some missfunctions very difficult to solve. For instance, any clause that may exonerate promotor's liability is null.

Land Register (if appropriate)

The Real Property Registration in Spain is managed by Land Registry Offices throughout the whole country which registers, stores and manages documents such as deeds, mortgages, plans of survey and a wide range of property real rights. All registered and deposited records are available to the public (for a fee) to search title or to obtain information about the ownership of any real property.

The Land Registry's object is to register the acts and contracts related to ownership and other real rights on real estate (rentals, usufructs...) However, the bare (or naked) possession can not be registered in the Land Registry.

To be registered those acts or contracts must be have been recorded as a public instrument or been acknowledged by a judicial authority or by the Government.

Moreover, any acts or contracts granted in a foreign country which are having effects in Spain (Apostille ...), have to be entered in the Spanish Land Registry.

The Land Registry attests the title against third-parties.

Those who acquire their right from a person who appears in the Registry as entitled to transfer that right, are supposed to possess the real estate according to bonas fides requirements. So their possession is going to be presumed as according to Law once that they register their right. Even though the seller's right is set aside or discharged for reasons that are not recorded in the Registry.

The third party's bona fides is presumed as long as any third party can proved that the information recorded in the Registry was not accurate.

Caution: Holders of any title acquired gratuitously do not enjoy the same protection.

The parties in a contract are not required to register the acquisition of a real right. However, the registration is highly recommended, because it implies a presumption of legality and it is a prove itself against third parties who claim a right on the same real estate. The rights that have not been recorded in the Land Registry are presumed as a "manifest negligence and a clear breach of duty of care "; it does not mean it is illegal but it may cause damages to the purchaser or the real right holder that has not entered it.

Another important question is the difference between the Land Registry and the Cadastre or Land Survey.

The Land Registry records and states real estate ownership. On the other side, the Cadastre represents real estate through a more detailed and graphical description. The Cadastre's purpose is related to its tax functions.

Reliance on register positive-negative

Registration is considered negative because once a first entrance is registered in the Land Registry, any intend of registration coming afterwards are going to be refused, until you prove the transfer. Transfer formalities e.g. notary deed

To be able to reap the benefits of the protection provided by the Land Registry, any holder must communicate the acts or contracts which can modify, transfer or extinguish any real right on any real estate. Moreover, any real estate leasehold for six or more years must always be entered in the Registry.

Mortgages. How they are created, and main rights of mortgagees

A mortgage gives a security for all kind of liabilities and does not alter the debtor's limitless responsibility.

A mortgage covers improvements and betterments as well as any compensations granted or due to the owner. However, a mortgage does not cover any personal property, proceeds or any earnings due and not paid, express agreement excepted.

Any real estate, any real property rights (save easements), any legal usufruct (save the usufruct granted by the widowed spouse) can be mortgaged.

Construction and use restrictions

The carrying out of any works or building requires a licence: Licencia de Obra Mayor (with a large budget or works on structural elements) and Licencia de Obra Menor (a sensu contrario). In any case, the Municipal Ordinances and the Local Building Code define the differences between a Licencia de Obra Mayor (Large Works Licence) and a Licencia de Obra Menor (Minor Works Licence).

Moreover, any land or underground usage (partitions, land movements, demolition ...) requires a permit that is regulated in the Local Zoning Regulations.

The Zoning Regulations ascribe different usages (residential, turistic, tertiary) to each land class (urban land, land which may be developed, or protected land that can not be urbanized). Land usage and land classes limit building rights. In addition, each type of land has a percentage of urban development permitted.

Any license is subjected to the payment of a fee called Impuesto sobre Construcciones Instalaciones y Obras which has to be paid by the owner. This tax is calculated by applying to the current costs of the building or the works, a rate that is determined by the Town Hall, and will NOT be over 4%.

The application for the permission requires a Technical project signed by an Architect and approved by the Architects Professional Association.

The Technical Project is carried out by the Work Manager -who is responsible for it- who may be or not the author of the Technical Project. Local Building Codes do not require a dateline of the works.

It is usual for the owner to keep an amount of money (a percentage) from the promotor as a guarantee for the proper completion of the works.

→ Labour Law

In Spain the Labor Jurisdiction is quite protective for workers. It's difficult to obtain a favorable ruling defending investor's rights against the worker. Likewise, there are no court costs before the Labor Jurisdiction, so suing the employer is easy in Spain because no legal costs are incurred if the worker is defeated by the Company.

Contracts

It is generally possible to form verbal contracts, when the employee is over 18 (except for freelance workers).

Contracting under Labor law in Spain is a broad subject, but can be summarized as follows:

PERMANENT CONTRACTS: unlimited in time. When we use this modality for hiring people with some specific conditions, we can benefit from reductions in Business Social Security contributions, if the firm is up to date with its tax and social security payments and has not been sanctioned for infringements. Those special workers are those aged under 30 years or over than 45 years, long-term unemployed (over 2 years), handicapped unemployed for more than 3 months, and unemployed women.

PART-TIME CONTRACTS: This is not strictly speaking a different type of contract, but rather a form of dividing the working day. There must be always a written contract and is divided into two forms: part-time and relief work. All contracts can be full-time or part-time (except for training). The part-time mode denominated 'relief' is used to hire a worker to progressively substitute a worker who is going to retire.

CONTRACTS OF DEFINED DURATION (TEMPORARY): There are three types:

– For Works: it is used for a particular work or service, always with an uncertain duration, but always subordinated to the work or service to be performed. Maximum duration limited to 3 years.

– Temporary: Serves to substitute a worker until his/her reincorporation, e.g. Forced Absence (exercise of Public Positions); must be written.

– Casual: it is used to attend to market conditions (circumstances and production) resulting from the accumulation of orders and/or an excess of tasks. Cannot exceed 6 months within a period of 12 months (Otherwise the contract must be made permanent). The contract must be in writing if the period is longer than 4 weeks.

The transformation of these contracts (Works, Temporary and Casual) to permanent contracts once that maximum duration has been completed operates automatically. In case the contract stop fulfilling all the requirements for a modality (Works, Temporary and Casual), the contract can be renamed as a permanent contract, and the worker can ask the employer or the Public Entity in change for a document to prove his/her new status.

Training Contracts

It consists on providing the worker with knowledge and techniques to develop his/her work, there are two types:

– Training: once the student has finished his education, he/she participates in a business as an intern, and the employer must provide a certificate of the training received at the end of the period. It shall last minimum 6 months, and maximum 2 years. The number of these contacts in the firm is limited depending on its size. The salary cannot be under the minimum inter-professional, and must be between the 60 and 75% of the official salary according to the applicable Collective Convention.

– Apprenticeship: This is for workers to obtain diplomas, degrees and equivalents. For professions where no higher education is required. The age of the worker must be necessary between 16 and 21 years old, in case of unemployed it may be rise to 24, and not to be in possession of the qualification required for the post. It may last minimum 6 months and maximum 3 years. It can be part-time, but the program must necessary include at least a 15% of lessons.

Other special contracts

– Group work is for a group of workers having a link with the firm and a group leader; not necessarily written.

– Working from home, without supervision by the firm, written

– Substitution, to cover anticipated premature retirements, in written.

Contracts for the handicapped

If the contract is Permanent, a 33% of disability is required and must be accredited with a certification, and the worker cannot be related to the employer more closely than the second degree. The contract must remain in force for at least three years, and in the case of a justified termination, there is an obligation of hiring for the remaining period. These contracts give access to an automatic subvention for the firm and a bonus of four monthly social security quotas.

If the contract is Temporary, it must be for at least 12 months and not more than 3 years. The rest of requirements of this modality are the same as for the permanent contract. It includes a bonus of social security quotas, and its conversion to a permanent contract generates a subvention. It can be offered for Training; the training in this case has no age limit and the firm is not limited in the number of contracts it can offer. Bonuses are paid in social security. If the contract is for Apprenticeship, the handicapped person must provide the disability certificate, as well as the education certificates. The apprenticeship period may start up to 6 years from completing the studies.

Contracting Administrative and Top Management Staff

The Authorised Employers and/or Top Manager of the business must be distinguished from the ordinary labor relation. If the employer chooses to be self-employed, he/she is inscribed in the self-employed regime and with regard to Social Security, works for him/herself. However, in the case of a limited or non-limited company, non-labour, he/she can work either as self-employed or as employed because the regime will vary depending on his/her functions and participation as capital partner of the company.

– If a partner performs management or advisory functions, or personally offers other services, and also possesses effective control of the company, either directly or indirectly, he/she should register in the self-employed regime (SELF-EMPLOYED). It is understood that effective control of the company in terms of participation is possessed when: The related parents to the second degree or less constitute more than or equal to 50%; his/her share alone is equal to or more than 33%; or he/she is the managing director of the company in possession of at least a 25% shares.

– In any other case, the inscription is made in the Social Security Offices: NORMAL REGIME for executives or persons in charge, and PROFESSIONAL REGIME for top managers with certain executive power.

As far as the General Professional Regime is concerned its main singularity is that the contract finishes it does not involve right to un-employment benefit (Worker unemployment). Top Management personnel are regulated under Real Decreto 1382/1985, 1st of August. The general characteristics of top management indicate a specific regulation in terms of previous notice of contract termination, non-simultaneity agreements, indemnification for contract termination, etc...

Contract Suspension

In specific circumstances, the worker or employer can suspend the labor contract, which involves to interrupt it without terminating it. During the suspension of the contract, the employer does not pay the salaries. The worker will continue in his/her position when the

causes that motivated the suspension are over. The contract may be suspended : a) By mutual agreement between the parties, b) For causes set out in the contract, c) For temporary incapacity . Here the employee continues to pay social security, (if the incapacity becomes total, absolute or great invalidity, the contract will be cancelled), d) For maternity of the working woman: The suspension for maternity is 16 weeks, 18 weeks in the case of multiple births. The woman can opt to take 6 weeks before childbirth. The father can use the last 4 weeks, if both work. e)For privation of freedom (in the absence of a condemning sentence), f) By temporary major force, g) Because of strike h) Due to legal closure of the workplace, i) Due to the suspension of work and salary for disciplinary measures; j) For training permission or professional development ; k) To take part in an adaptation or retraining course (maximum of 3 months), l) For adoption and fostering of minors under 5.

There are other circumstances that imply suspension of the contract :

– For leave of absence : a) Forced : In some cases, the firm is obliged to suspend the contract and maintain the job post for the employee. The period of leave in calculated according to seniority. b) Voluntary: The position is not maintained, but rather preferential treatment is given when a vacant position arise. c) For child care : With a maximum duration of 3 years, from the birth of the child. Only one of the parents can apply for it, and it doesn't leads to the conservation of the position, except during the first year. d) Circumstances stated in Collective Conventions .

– Due to economic, technical, organizational or production causes, or those derived from force majeure. The existence and temporary character of this causes must be proved and the contract suspension requires future viability. In order to obtain the suspension, the employer must undertake the same process as for an Expediente de Regulación de Empleo, in art. 51 of Worker Law. This circunstancies can also be solved with a reduction between a 10% or a 70% of the working day, week, month or year.

Permits and Holidays

The worker has the right to absence for diverse causes. The Holiday Period cannot be less than 30 natural days. Holidays cannot be compensated economically and the dates must be known two months beforehand.

Employees' Years of Service

Dismissal compensations are calculated depending specially on employee's years of service in the company that is the reason of temporary contracts lasting over their limits shall be presumed to be for an indefinite period: i.e. temporary contracts (training, relief...) or for a determined duration (a particular works or services) in which the cause is not justified or accredited.

Law 35/2010, on September 17th about the improvement of growth and employment, provided a new wording for article 15.5 of the Workers' Statute, with the following literal reading:

Without affecting the provisions set down in sections 1.a), 2 and 3 of this article, employees who have been contracted for a period over twenty-four months in a period of thirty months, with or without a continuity solution for the same or different work position with the same company, through two or more temporary contracts, whether directly or by being made available through temporary employment companies, with the same or different contracting modes, shall acquire the condition of fixed contracts.

This prevention will be also applied to those cases of fusion or combination of societies.

With regard to the peculiarities of each activity and the characteristics of the job, collective bargaining shall establish requirements aimed to prevent the abusive use of temporary contracts with different employees for performing the same job.

The provisions of this section shall not be applied to the use of training, relief or substitution contracts.

Termination of the Contract – Dismissals

Contracts can be terminated for various reasons, and in all of them the parties are obligated to notify it to the other party. The employer must calculate the appropriate quantity owed to the worker (settlement), always including the proportional part of extra pays and spear holidays, discounting to the worker the advanced payments and holidays in excess.

The causes for TERMINATION are:

– Mutual agreement between the parties.
– Causes agreed in the contract.
– End of the work or service contracted. Temporal contracts, except for temporary and training contracts, grant the employee the right to receive an indemnification of eight days of salary for every year worked. Since September 2010 this regime is being gradually changed:

- Contracts celebrated before December 2011: 8 days of salary per year of service
- Contracts celebrated after January 2012: 9 days of salary per year of service
- Contracts celebrated after January 2013: 10 days of salary per year of service
- Contracts celebrated after January 2014: 11 days of salary per year of service
- Contracts celebrated after January 2015: 12 days of salary per year of service

– Resignation of the employee.

– Permanent total incapacity, absolute or great invalidity of the employee. In case of total permanent incapacity of the worker is declared, the firm can choose to offer him/her another position more fitting with his/her capability. In case of permanent total incapacity or great invalidity, the work contract is terminated, but the position is reserved for a period of two years.

– Death, retirement, incapacity or termination of the judicial character of the contractor

– Collective dismissal. When the process affects a determined number of employees during a minimum period of 90 days. There must be economic, technical, organizational or production causes. The employer must provide proof of their existence and the character of these causes, which might be provoking negative results, or might produce a continued decrease of the incomes. It generates the right to an indemnification of 20 days of salary per year worked, to a maximum of 12 months. In order to articulate these dismissals, an Expediente de Regulación de Empleo is required, which requires a period of discussions between the employers and the representation of the workers, to try to verify the causes of the redundancies, and to set some measures of readaptation for workers that can reduce the damages.

– A unfair cause. When the dismissal is based on causes out of the Law, the judge shall declare by sentence the dismissal was unfair, so the employer will have 5 days to decide the compensation, which might be: a) the readmission of the employee and the salaries unpaid since the dismissal date; or b) 33 days for each year worked, to a maximum of 24 monthly payments and the salaries unpaid since the dismissal date. However, in order to obtain the indemnification, it is necessary to apply for it in the Social Court of Law. (i) Substantial modification of the work conditions that damage the workers professional training or dignity; (ii) Unpayment or continued delays in the payment of the salary agreed; (iii) Any other grave breach of the obligations of the employer (except force majeure) and the refusal of the employer to reintegrate the employee in the same position when a legal sentence has declared it unjustified.

– For legally causes. There are some objective causes which turn a dismissal declared as fair. Objective DISMISSAL of the worker, with an indemnification of 20 days per year worked, limited to 12 monthly payments, in limited circumstance: a) Ineptitude, b) Lack of adaptation of the employee to his/her position, after technical modifications, c) Absenteeism, during a 20% of labor days in two continued months, or 25% of labor days in four discontinuous months, not taking into account periods of: strike, maternity, risk during the pregnancy, holidays, or illness or accident. d) Amortization of job places. (e) Substantial modification of the work conditions that damage the workers professional training or dignity when it does not affect a number of workers enough of collective dismissal.

In all of these cases, the dismissal must be notified in written, within previous 15 days expressing the cause and paying the legal indemnification.

– Disciplinary Dismissal : Must be based on a grave and guilty breach of the workers' obligations, such as: Repeated and unjustified braches of attendance or punctuality; lack of discipline or disobedience; verbal or physical offences against the employer, fellow workers or relatives that live with them; breach of contractual faith or abuse of confidence in the course of the job, continued and voluntary decrease in the normal or agreed work yield, habitual and serious drunkenness or drug-addiction with negative repercussions at work.

In relation to Dismissal, it is important to note that:

If a Legal representative or trade union delegate is dismissed, the process is initiated through an "expediente contradictorio" and the rest of the members of the representation and/or trade union of affiliation are heard.

– Trade union affiliation, being a candidate to represent a trade union, race, sex, civil status, pregnancy, religion, political opinions, etc. can never be a cause for dismissal.

– The Dismissal can be legally challenged within a period of 20 working days, but before going to Court, the case must be heard by the Servicio de Mediación, Arbitraje y Conciliación (SMAC).

– The Dismissal is declared , in the SMAC (by the parties) or in the Court (by the Judge) as:

• Fair, in which case, there is no indemnification.

• Null, for violation of basic rights or discrimination, in which case, the employee must be reinstated immediately.

– Unfair, because the circumstances were not as claimed by the employer, in which case, the employee must either be rehired within 5 days or indemnified with 45 days of salary for each year worked, to a maximum of 42 monthly payments. If the employer acknowledges the unfairness of the dismissal within 48 hours of the ruling by the SMAC or the Court, the worker need not claim its legal recognition. If the employer chooses readmission, the worker must be notified within 10 days from the sentence and readmit the worker within a further 3 days. As an exception to the indemnification for unfair dismissal, in the permanent contracting of disabled workers, the indemnification is 33 days salary for each year of service, with a maximum of 24 monthly payments and 12 days of salary for temporary contracts.

The Salary of the Worker. Salary and economic Rights for services rendered

In consideration of services rendered, the employee may receive money or payment of any kind, and also accrues a right to a month of vacation pay. Two bonus payments per year are obligatory, the amount being fixed by the applicable Collective Convention. IRPF (income tax) and social security payments must be withheld by the employer on these amounts.

The salary comprises the salary base and/or "salary extras". Remuneration in kind may not exceed 30% of the total salary. The minimum inter-professional wage is the minimum for all professions, is reviewed annually and its amount may not be embargoed for debts of any kind. The minimum wage for any activities in agriculture, industry and services, without distinction between the employees' sex or age, is set at 21 euros/day or 641 euros/month, depending on whether the wage is set by days or by months. Both monetary remuneration and remuneration in kind are computed in the minimum wage. This wage is understood to refer to the legal working day for each activity, without including in the case of daily wage the proportional amount for Sundays and public holidays. If the working day is lower than standard then the pro rata amount is to be received.

The delay in salary payment generates an annual interest of 10%. In case of insolvency, the first to receive payment are the employees. In the case of insolvency, the employees are paid by the FONDO DE GARANTIA SALARIAL (FOGASA). All employees and representatives have the right to receive advances. The employer must keep salary receipts and contribution slips for at least 4 years.

Non-salary items are the amounts paid for expenses incurred at work, social security payments and indemnifications for transfers, suspensions and dismissals.

Employees' Representatives and Union Representation

The participation of the workers in the Firm can take place through Unitary and/or Trade Union Representation. According to the number of workers in the firm, the Unitary Representation is by the delegation of personnel or firm committees elected by the employees. The Trade Union is the representation of the employees affiliated to the Union. The Law establishes a minimum number of trade union delegates for trade union representation.

Specific responsibilities are conferred to these representatives by Law: to receive information from the employer, to report on certain matters, to carry out monitoring and to control of certain rules, to negotiate agreements with the employer, to participate and to collaborate in the business activity, etc,...and to facilitate exercise of these functions, the employer must provide specific materials (use of premises, notice board) and time (paid), and not to do it may be considered a crime against trade union freedom.

Personnel delegates or committee members are elected every 4 years. The period can be shortened if the representative stands down, is substituted in partial elections or if he/she is revoked by the same employees who elected the delegate or member.

In disciplinary matters, they have the right to receive a prior disciplinary file before any sanction is applied, and if the dismissal is unfair, they can opt for indemnification or readmission.

On June 2011, Spain´s Government approved new labor reforms, affecting the collective bargaining system. The bill aims to introduce more flexibility within companies so that when they undergo changes or go through difficult situations they can adapt to new conditions.

The main change implies that company pacts shall have more legal weight than Sectoral agreements when conflicts arise. Thus, the COMPANY AGREEMENTS must respect the minimums of national and regional Legislation, but they shall be over Sectoral Agreements in the following areas: Base salaries and incentives, Overtime, Flexible work hours, Job classification and Contract modality.

Another measure to increase the flexibility consist on allowing the employer to redistribute 5 percent of employees' work time.

Social Security Contributions and Basis for Contributions

The employer pays monthly contributions to social security, consisting of: The Firm's Quota + the Employee's Quota. The payment is made in the month after the month of payment to the employee, through two forms: I) contributions register, where the wages and contributions to be paid are detailed); and II) which is obligatory via Internet if the workforce consists of more than 10 or 15 workers.

To calculate the value of the contributions, we shall multiply the rate legally established by the basis for contribution, deducting the bonuses applicable to the case.

The basis for contributions is the employee's monthly salary plus the proportional part of the extra payments and other income of the worker with a periodicity greater than monthly.

Although there are various special regimes, (such as sea workers, artists, bullfighters, etc.) but we will only consider the contributions to the general regime that consist of the following:

- Common contingencies;
- Work accidents and illnesses
- Professionals;
- Unemployment ;
- Fondo de Garantía Salarial;
- Professional training ;
- Overtime

Employers must make contributions for all of the above, whereas employees only contribute for common contingencies, unemployment and professional training. The contributions depend on the salary and professional category of the employee, as well as if the contract is permanent or not and the professional activity in which he/she works.

Social Security Bonuses

Recent labor reforms establish bonuses for permanent contracting, which effectively reduce the employer's social security contributions. If a person has the right to two different bonuses, they are not cumulative, so it is obligatory to choose one of them.

The bonuses are available to certain employers (companies or individual businesses) that have had no personnel the last twelve months and hire their first permanent employee. To qualify, the employer must be up to date with Inland Revenue and Social Security payment .

Bonuses are only available for the hiring of the following categories of personnel:

– Unemployed women between 16 and 45 years: Bonus of 25% during the 24 months following the start of the contract;

– Women offering services in professions with a low proportion of female workers: If they are older than 45 years, or were registered in INEM for 6 months, 70% in the first year, 60% in the second, and 35% during the first two years for other cases.

– Unemployed registered in the employment offices for more than six months: 20% during the first 24 months;

– Unemployed between 45 and 55 years: 50% in the first year, 45% for the rest of the contract;

– Unemployed between 55 and 65 years: 55% in the first year, 50% for the rest of the contract;

– Beneficiaries of unemployment benefit if they have one year remaining: 50% in the first year, 45% in the second.

– Unemployed women registered for at least one year in INEM and hired in the 24 months following childbirth: 100% during the first year;

– People in special social circumstances: 65% during the first two years;

– The conversion of a temporary contract to a permanent one: 25% in the first two years.

– For the self-employed, these reductions are applicable, incremented by 5%.

– Also, in certain situations, if the employee is a woman, the reduction increases by another 10%.

– Finally, these are bonuses for the hiring of the disabled:

– Permanent contract : 70% of the reduction per worker under 45 years and 90% for each worker over 45 years hired, during the entire contract period;

– Temporary contract : 75% of the reduction in quota for common contingencies, during 3 years, (except for relatives to the second degree);

– Training contract : 50% of the reduction, for the whole contract period;

– Apprenticeship contract : 50% of the reduction in common contingencies, for full-time contracts only, for the whole contract period.

– Health And Safety

– In Spain the main legislation is: Ley de Prevención de Riesgos Laborales LEY 31/1995, 8th November. BOE nº 269, 10 th November.

– Contracting And Outsourcing Of Work Or Services

– In matters relating to the contracting and subcontracting of services, the employer and the contractors and subcontractors are jointly liable. (Ley 31/1995)

– In Spain, there are so called Empresas de Trabajo Temporal that must be authorized, according to the Law 14/1994, through which specified workers contracted by them may be temporarily made available to work for another firm (user) for a term set on a case by case basis. If the worker continues to work in the user firm after the end of the contract, he/she becomes linked to the user firm as a permanent worker.

Retirement

Nowadays the legal age of retirement for most of professionals is 65 years old, and it is calculated basing on the last 15 years before retirement date.

The authorities have recently modified the Retirement Policy. Taking into consideration the important repercussion of its effects, it will be implanted progressively. So that from 2013 to 2027 the age of retirement will increase proportionally month by month, and in the end the age of retirement will be 67 years old, and the compensation will be calculated over the incomings of the last 25 years.

FASKEN MARTINEAU LLP
www.fasken.co.uk

→ United Kingdom

→ Foreign Investment Law

Foreign investment is much encouraged in the UK and there are very few provisions which distinguish between UK and overseas investors.

Registration with Government, authorities and permits

There are no requirements for overseas investors in the UK to register with the Government or obtain any authorisation for the making of any investments nor are there any restrictions on the foreign ownership of UK-incorporated companies. There are no exchange controls on investment into or out of the UK or the inward or outward movement of funds from the UK. Specific authorisations may be required to carry on certain types of business in the UK, but there is no difference in the application of these rules to UK and overseas investors.

Transfer of dividends, interest and royalties abroad

There are no restrictions in the UK on the transfer of dividends, interest and royalties abroad, but withholding taxes are sometimes applicable dependant on any relevant double tax treaty and whether the recipient is resident in an EU country or not and consent will normally have to be obtained to make such payments gross. The UK does not subject dividends from the UK to withholding tax

Repatriation procedures and restrictions

There are no repatriation restrictions or procedures in the UK.

Foreign personnel (permits, etc.)

To work in the UK, nationals of other European Economic Area (EEA) countries or A8 Countries need not obtain work permits, and must be allowed access to employment on equal terms with British nationals, except for government jobs. An EEA national who accepts employment automatically receives a residence permit issued by the Home Office. There are additional registration rules for workers from Romania and Bulgaria, who are required to apply to the Home Office for an accession worker card or Registration Certificate.

The Home Office has introduced a new points-based immigration system under which there are five tiers, each representing different categories of workers. Tiers 1 and 2 are the most relevant to this note. Tier 1 is for entry of highly skilled general migrants, entrepreneurs, investors and post-study workers, and tier 2 is for entry of skilled migrants with job offers who are coming to the UK to fill a gap in the UK labour market.

All individuals wanting to come to the UK will have to meet a mandatory English language requirement and will be scored against criteria including age, qualifications, previous earnings and prior UK experience as a student or employee. An individual must score 75 points for attributes, with an additional 10 points for English language and 10 points for maintenance requirements. Those with earnings over £150,000 automatically meet the attributes requirement.

A successful tier 1 applicant can apply to enter and stay in the UK without first securing a job and is also permitted to undertake any employment or self-employment in the UK. Tier 2 applicants that have been offered a skilled job in the UK, and whose employer is willing to sponsor them can apply to enter and stay in the UK to do that job.

Investors wishing to set up in business in the UK can also apply under the investor category and will be awarded points based on their ability to invest £1,000,000 or more in the UK. No job offer is required in order to apply under this category.

Furthermore, a senior employee of a company based outside the EEA which does not have a UK subsidiary can apply to act as a sole representative (someone who will establish a wholly owned subsidiary or register a branch in the UK for an overseas parent company).

An individual may also enter the UK as a business visitor for up to six months in order to transact business. They must be based abroad and have no intention of transferring their base to the UK. Additionally, they must not sell goods or services directly to members of the public or receive a salary form a UK source, with the exception of reasonable expenses to cover their costs of travel and subsistence. Board level directors may receive a fee for attending meetings. Visa nationals must apply for entrance clearance before entering the UK as a business visitor, but non-visa nationals can enter without clearance for these purposes.

Detailed advice should be taken if you wish to submit any of these applications. It should also be ensured that such an application is made in plenty of time.

Penalties

The Home Office introduced a civil penalty for employers who employs any person aged 16 or over who does not have the right to live and work in the UK. Employers who negligently hire illegal workers face a fine of up to £10,000 for each offence, and those who knowingly hire illegal workers risk an unlimited fine and a prison sentence, as this is a criminal offence.

→ Corporate Law

Framework

UK corporate law is based on both common law and statute. The legislative framework of UK company law has experienced a comprehensive overhaul in recent years with the implementation of the Companies Act 2006 (the "2006 Act") which is intended to simplify and modernise company law in the UK. The 2006 Act received Royal Assent on 8 November 2006 and has come into force by way of phased implementation since 1 January 2007 with the final provisions coming into force on 1 October 2009.
The 2006 Act exists alongside the Companies Act 1985 and Companies Act 1989 (together with the 2006 Act, the "Companies Acts"). There are a number of other statutes to be considered depending on the activity a company wishes to follow. Although the provisions are similar in the constituent parts of the UK (England and Wales, Scotland and Northern Ireland), there are some differences and what follows applies specifically to England and Wales.

Types of Business Structure

The first question to be considered by anyone wishing to establish a business operation in the UK is the type of structure to be used. Although the corporate structure is the one which is most widely used in the UK, there are a variety of other structures available to overseas entities seeking to establish a presence in the UK including setting up a branch or place of business of an overseas company, a partnership or joint venture or a limited liability partnership.

Overseas companies can register as a branch or as a place of business in the UK. A branch is part of an overseas limited company organised to conduct business through local representatives in the UK. A place of business is for companies who cannot register as a branch because they are from within the UK, they are not limited companies or their activities in the UK are not sufficient to define it as a branch (for example if the activity is simply a representative office).

Types of Companies

There are different types of corporate structure, which can be used under UK law. The most common structure used is a private company limited by shares. Companies can be either public, which means that they can offer their shares or other securities for public subscription, or private, which means that they are not allowed to offer their shares or other securities to the public. A private company bears the suffix "Limited" or "Ltd" and a public company bears the suffix "PLC". Other types of corporate structure can be established such as companies limited by guarantee or unlimited companies, but these are not common for trading entities.

Public companies are generally subject to stricter regulations under the Companies Acts and, if they are quoted, they will also be subject to the regulations and codes of practice applicable to the relevant trading market.

The formation of a company in the UK is easy and a corporate vehicle structured to the relevant needs can be obtained very quickly with a "same day" service being generally available. There are no requirements for local shareholders or directors and no minimum capital rules apply (only applicable to a private company). Certain documents, for example the company's constitutional documents, must be filed with the Registrar of Companies to form a company. A company is required to file its memorandum of association with the Registrar of Companies on applying for registration. The memorandum of association need only y state that the initial subscribers wish to form a company under the 2006 Act and they agree to become members of the company and to take at least one share each.

The articles of association contain the regulations relating to the internal management of the company covering matters such as the holding of meetings of directors and shareholders, transfer of shares and changes to share capital, appointment and removal of directors and the powers of directors. There is a standard or model form of articles of association, known as the Model Articles, which many UK private companies follow to some extent. The Model Articles will automatically apply to any company limited by shares that does not adopt its own articles of association on incorporation.

No government or other permission is required to establish a company, although there is some regulation of the use of business and trading names. Once registered, the name of a company can be changed by special resolution (75% majority) of the shareholders but care must be taken to check that the desired name is available for use by the company.

Under the 2006 Act, any person can object to a company's registered name on the grounds that it is the same as, or similar to, a name in which the objector has goodwill. Objections to the registration of company names must be lodged with the Companies Names Adjudicator.

Liability of Shareholders

Every company having a share capital, whether public or private, must have at least one shareholder. There are no rules relating to the residency of shareholders.
In the case of both private and public companies, the liability of the shareholders or members is limited to the amount unpaid on the shares held by them. The company and its shareholders are regarded for company law purposes as separate legal persons.

Authorised Share Capital

A company's authorised share capital is the total number of issued and unissued shares in the capital of the company. An increase in a company's authorised share capital requires shareholder approval by ordinary resolution (a simple majority).
There is no longer a requirement for a company to have an authorised share capital. If a company wishes to restrict the number of shares it can allot, it will need to amend its articles of association by special resolution (75% majority) to include suitable provisions to the extent the articles do not already contain any such restriction.

Issued Share Capital

The shares which are allotted and issued to shareholders will determine the company's issued share capital. In order to allot and issue shares, the company's directors must be authorised, by the articles of association or by shareholder resolution, to issue the relevant shares and also specifically authorised to issue shares where the directors wish to issue shares for cash otherwise than in proportion to existing shareholdings. Directors of private companies incorporated under the 2006 Act with only one class of share will automatically be free to allot shares without the prior authorisation from the members, subject to any express restriction on this power contained in the company's articles. A company incorporated under the Companies Act 1985 will first need to pass an ordinary resolution in order to give the directors the power to allot shares as set out above. These allotments are still subject to any rights of pre-emption in favour of existing shareholders although as before these may be disapplied by the company's articles or by special resolution (75% majority).
Shares must be issued for not less than their nominal value, although shares can be issued as partly paid and the directors can call up the unpaid amount at any time.

Minimum Shareholdings

PRIVATE COMPANIES: There are no minimum requirements for the authorised and issued share capital for private limited companies and the most typical formation is for a company to have an authorised share capital of at least £100 divided into shares of £1. However, it is possible to establish companies with shares of different denominations and in currencies other than sterling.

PUBLIC COMPANIES: Before a public company can carry on business, it must have a minimum share capital of £50,000 of which 25% of the shares must be paid up.

Share Capital Rights

The rights and restrictions attaching to the shares are set out in the company's articles of association. Most companies issue only one class of shares, known as ordinary shares. The rights and restrictions can be changed only by shareholder resolution (75% majority) and, where appropriate, a resolution of the holders of any affected class of shares. Preferred or preference shares would be expected to carry rights (eg to receive dividends, return on capital, etc) ahead of the ordinary shareholders and deferred shares would be expected to carry rights behind those of the ordinary shareholders. In the case of a quoted public company, it would be usual for the shares to be freely transferable and this would be expected to be a requirement of the UK markets. However, this is without prejudice to agreements restricting transfer, eg by way of a lock-up or to comply with the requirements of overseas securities laws.

Shares in UK companies are generally held in certificated form, although there is an electronic system known as CREST through which shares in quoted companies can generally be traded in uncertificated (non-paper) form. When shares are issued or transferred, details of the shareholder are registered in the company's statutory books and a share certificate issued or a CREST account is credited, as applicable.

Shareholder Meetings

Most powers needed to run the company are vested in the directors by the articles of association, although it is possible to include specific provisions in the articles of association or in a shareholders' agreement requiring shareholder approval in relation to certain specified matters.

The Companies Acts set out those matters which require shareholder approval. In the case of a private company with few shareholders or which is a wholly-owned subsidiary, shareholder approval can be obtained by written resolution of the shareholders, or otherwise by the shareholders in a general meeting. The written resolution procedure is not available to public companies.

Shareholder meetings require a prior period of notice to shareholders of not less than 14 days save in respect of a private company's annual general meeting where 21 days notice is required. Where not less than 90% of the shareholders of a private company agree, however, these notice requirements can be dispensed with and the meeting (including the annual general meeting) may be held on short notice.

A public company can only dispense with the requirement for a notice period in respect of a general meeting if 95% of the shareholders agree and for an annual general meeting, if all the shareholders agree. A general meeting on short notice is not permitted for a public limited company that is trading on a regulated market.

Matters reserved to the shareholders by the Companies Acts include authorisations in relation to share capital issues, certain categories of related party transactions, amendments to the company's constitutional documents and the decision to liquidate the company. A private company seeking to reduce its share capital will generally be able to do so using one of two procedures available to it designed to protect the creditors of the company. The first, and perhaps the simplest, procedure is a reduction of capital by means of a special resolution (75% majority) of the shareholders supported by a solvency statement. The second and more onerous procedure in terms of time and cost requires shareholder approval as well as the sanction of the court. Public companies seeking to reduce their share capital are restricted to using the court approved procedure.

A public company must hold a general meeting of its shareholders, known as the annual general meeting, each year at which it is usual to present the accounts, appoint auditors, deal with dividends and elect any directors who have been appointed since the last annual general meeting. Private companies are not required to hold an annual general meeting subject to any express provision to the contrary set out in the articles.

Directors and Officers: Appointment and Removal

A company may, if its articles of association permit, have only one director who must be a natural person, and be at least 16 years old.

The rights to appoint directors will be contained in the company's articles of association. Any person proposing to act must indicate his or her consent to act and provide specified information to the Registrar of Companies. It is usual for the shareholders to have the right to appoint directors and for the directors to be able to fill any vacancy on the board subject to the right of the shareholders to confirm the appointment at the next annual general meeting. Similarly, the articles of association would set out the circumstances in which a director can be removed from office and there is also a statutory right, subject to compliance with certain procedures, for shareholders, by simple majority, to remove any director from office regardless of any agreement to the contrary in place with the director.

It should be noted that the office of director is quite separate as a matter of English law from the director's position, (in the case of executive directors), as an employee and accordingly, the removal from office of a director is without prejudice to the director's rights under his or her contract of employment.

Directors' Duties

Part 10 of the 2006 Act sets out the general duties of directors which are owed to the company. There are seven statutory duties which are based on and replace the previous common law and equitable principles relating to directors' duties. The various statutory requirements and restrictions placed on the powers of directors must be considered in the light of any proposed activity of the company. The effect of these duties is that the directors can be held personally liable if they are deemed to have failed in promoting the success of the company.

It should also be noted that in certain circumstances, directors may become liable to creditors in an insolvent liquidation and that directors will be personally liable for the information about the company contained in any prospectus issued for the purposes of a fund-raising.

Subject to the rules relating to conflicts of interest, as further described below, there is no general legal requirement for a company to have a proportion of independent directors on its board nor is there a requirement for companies to have a supervisory board. However, quoted companies will be expected to comply with best practice in relation to corporate governance, which includes the requirement for independent directors.

Similarly, there are no specific rules on the level of directors' remuneration in private companies and this will usually be a matter for negotiation. In some circumstances, such as payments proposed to be made to a director for loss of office, shareholder approval will be required. In the case of fully listed (quoted) companies, shareholders must approve on an advisory basis, a remuneration report, which sets out, amongst other things, all payments and other benefits made to directors.

Conflicts of Interest

Directors have a statutory duty to avoid situations in which their interests can or do conflict, or may possibly conflict, with those of the company. Matters that give rise to an actual or potential conflict may be authorised by the board subject to the board having all necessary powers to authorise such conflicts. For private companies incorporated on or after 1 October 2008, the power to authorise is subject to anything in the company's articles of association invalidating such authorisation. Private companies incorporated prior to 1 October 2008, must pass an ordinary resolution (simple majority) expressly providing the board with the power to authorise conflicts. For a public company, the directors may only authorise a conflict of interest if permitted to do so by the company's articles of association.

Secretary

A public company must appoint a company secretary. The company secretary does not need to be a natural person. The company secretary is principally an administrative function and the

appointed secretary should be familiar with the filing and other requirements of the Registrar of Companies. Accordingly, it would be usual for the secretary to be based in the UK.
There is no requirement for a private company to have a company secretary. If a private company chooses not to have a secretary, anything which is required or authorised to be done by the secretary can be validly done by a director or any person authorised by a director.

Annual Return

Companies must complete an annual return each year, which gives details of its share capital, shareholders, location of the statutory books, registered office, directors and secretary.

Registered Office

A company needs to file details of its registered office in England and Wales with the Registrar of Companies and any official notifications will be sent to that address. Subject to certain exceptions, the full name of the company must appear at its registered office and business premises. Any change to the registered office can be made by simple board resolution and must be notified to the Registrar of Companies.

Company's Notepaper

All business stationery must show the company's full name and number and registered office. The names of the directors need not be included, but if the name of any director appears then so must the names of all the other directors.

Accounts and Auditors

Subject to exemptions for small companies, every company must appoint a firm of auditors to audit and report on its accounts for each financial period. Companies are also required to file accounts and a directors' report with the Registrar of Companies, and these documents must comply with the requirements of the 2006 Act and show a true and fair view of the financial position of the company.

The 2006 Act lays down detailed rules as to the form and content of accounts and time limits for their delivery to the Registrar of Companies.

Other Filings

Companies must also notify the Registrar of Companies whenever there is a change of share capital, directors and officers and whenever the company creates a charge over any part of its assets. In the case of a charge, the required information must be filed within 21 days of its creation to ensure its security in the event of liquidation.

The 2006 Act creates an offence where a person knowingly or recklessly causes to be delivered to the Registrar of Companies a document that is false or misleading and is liable for up to two years imprisonment or a fine.

Statutory Books

Every UK company must maintain a statutory register giving details of its shareholders, directors, secretary, any issues and transfers of shares as well as charge-holders. There should also be a minute book containing minutes of all meetings of directors and shareholders.
A company can now keep its statutory books at an address other than its registered office. This is known as a single alternative inspection location (SAIL), the location must be in the same part of the UK as the company's registered office and notification of the SAIL must be given to the Registrar of Companies.

Methods of Raising Finance

The appropriate method of raising finance will depend on the nature, size and stature of the company. Funds can be raised by way of private equity, a stock exchange listing or loan finance, and within these broad categories there are a number of variations.

→ Corporate and Personal Taxes

Corporate Residence

A company is regarded as tax resident in the UK if it is incorporated in the UK or if its central control and management is exercised in the UK. A company incorporated in the UK can also be treated as not resident in the UK under an applicable double tax treaty. It is possible for a company to be dually resident.

Rates of Corporation Tax

Corporation tax is chargeable on a company's worldwide income and chargeable gains. The rates for the financial year ended 31 March 2012 are as follows:

BAND OF TAXABLE PROFIT	%
£0-£300,000	20
£300,001-£1,500,000	27.5
over £1,500,000	26

Non-resident Companies

Companies that are not resident in the UK are only assessable to corporation tax if they carry on a trade in the UK through a permanent establishment in the UK and on all profits wherever arising which are attributable to that permanent establishment. The profits attributable to the permanent establishment are trading income, income from property held by the establishment and chargeable gains on UK assets used for the purposes of the permanent establishment. The profits for corporation tax purposes are then determined as if the establishment were a distinct and separate enterprise, dealing wholly independently with the non-resident company and assuming that it has the same credit rating as the non-resident company, and that its equity and loan capital are reasonable in the context of its independence.

Transfer Pricing

Transfer pricing rules apply to both international and domestic transactions. The basic rule may apply for transactions if an actual provision has been made between any two affected persons and one of them was directly or indirectly participating in the management, control or capital of the other or a third person was participating in the management, control or capital of both the affected persons. The basic rule requires the actual provision to be compared to an arm's length provision (which would have been made between independent enterprises) and, if the actual provision confers a potential UK tax advantage on one or both the affected persons, an adjustment (to bring the profits up to what they would have been if the arm's length provisions had applied) is to be made to the taxable profits of the advantaged persons.

Controlled Foreign Companies

A company will be a controlled foreign company ('CFC') if it is all of the following: Resident outside the UK for tax purposes. Either:
– controlled by persons resident in the UK; or
– at least 40% controlled by a UK person and at least 40% (but no more than 55%)
– controlled by a non-UK person (the 40% test).
– Subject to a lower level of taxation (broadly, where local taxes on income profits are less than three-quarters of the hypothetical UK tax on those profits in the territory in which it is tax resident).

Where a company is a CFC and does not satisfy one of a number of exemptions, then the total income profits of the CFC (computed broadly on the basis of UK corporation tax rules) and any creditable tax are apportioned among persons (whether resident in the UK or not) with an interest in the CFC. A self-assessment to tax must then be made by those persons that are UK tax resident companies with a 25% or greater interest in the CFC.

Group Taxation

In groups of companies where subsidiaries are owned as to 75% of the ordinary share capital beneficially together with 75% entitlement to income and assets it is possible to surrender current year trading losses and other amounts eligible for group relief to a profit making company within the same group. In many cases a payment for group relief is made by the claimant company to the surrendering company as consideration for the surrender. Consortium group relief is also available where a company is owned by a consortium where 75% or more of the ordinary share capital is beneficially owned between them by companies of which none owns beneficially less than 5% of that capital. UK legislation requires that both companies must be UK tax resident or non-resident companies carrying on a trade through a permanent establishment.

Tax Depreciation (Capital Allowances)

Tax allowances, called capital allowances, on certain purchases or investments can be claimed. This means a proportion of these costs can be deducted from taxable profits in order to reduce the tax charge.

Capital allowances are available on plant and machinery, buildings (including converting space above commercial premises to flats for renting) and research and development. The amount of the allowance depends on what is being claimed for. In some cases, the rates are different in the year you make the purchase from those in subsequent years.

Inter-company Domestic Dividends

Corporation tax is not normally chargeable on dividends and other distributions of a company resident in the UK, nor are such dividends or distributions taken into account in computing income for corporation tax. This rule also applies to dividends received by the UK permanent establishment of a non-UK resident company.

Substantial Shareholding Exemption

Capital gains arising from disposals of trading companies in which a trading company has at least a 10% shareholding held for at least one year are in certain circumstances free of corporation tax on chargeable gains.

Tax Incentives

Tax incentives are available for investment in unquoted trading companies providing income tax relief and capital gains tax relief.

Corporation Tax Administration

Corporation Tax is generally payable nine months after the end of the accounting period but large companies are required to pay instalments.

Double Tax Treaties

The UK has a large number of double tax treaties a list of which is provided. Relief from double taxation can be by way of treaty, by unilateral relief or by deduction.

Other Taxes

STAMP TAXES: There are currently three stamp tax regimes in the UK as follows. Stamp duty land tax is a transfer tax charged on transfers of all UK land transactions of whatever nature (subject to exemptions) regardless of the residence of the parties. For transfers of freeholds the rate of duty is 4% for transactions in excess of £500,000 with reduced rates for transfers below this threshold. For transfers of freeholds for transactions over £1,000,000 the rate of duty is 5%. Leases are generally chargeable at 1% of the net present value of the rentals under the lease where the net present value exceeds £125,000 in the case of residential property and £150,000 in the case of non-residential. Stamp duty reserve tax is a transfer tax charged on agreements to transfer UK shares and securities and on foreign shares and securities which retain a register of shareholders in the UK. The rate of charge is generally ½% of the consideration. Stamp duty is payable on the transfer of UK shares and securities at the rate of ½% and cancels any stamp duty reserve tax which may be payable. Stamp duty is not chargeable on transfers of other assets. There is no capital duty in the UK.

VALUE-ADDED TAX: VAT is a tax you paid when goods or services are bought from a VAT-registered business in the EU, including within the UK. VAT is not paid on some goods and services, and sometimes it is paid at a reduced rate. In some circumstances a refund of VAT paid may be received, for example if a person lives outside the EU and visits the UK.
Each EU country has its own rates of VAT. In the UK there are three rates.

- Standard rate. The standard rate of VAT on most goods and services in the UK increased to 20 per cent on 4 January 2011 but was 17.5 per cent for the period 1 January 2010 to 3 January 2011.

- Reduced rate. In some cases, for example children's car seats and gas and electricity for the home, VAT is paid at a reduced rate of 5 per cent.

- Zero rate. There are some goods on which VAT is not paid, like: most food items, books, newspapers and magazines, children's clothes, some goods provided in special circumstances (for example, equipment for disabled people)

NATIONAL INSURANCE CONTRIBUTIONS: Employer's national insurance contributions are payable at the rate of 13.8% on earnings in excess of £136 per week. Employees national insurance is payable at the rate of 12% for earnings between £139 and £819 per week and at 2% thereafter. For higher paid employees therefore the highest rate of tax is 42% being 40% income tax and 2% employee's national insurance.

→ Personal Taxes

Residence and Domicile

An individual's liability to tax in the UK is determined by his residence, ordinary residence and domicile status. The terms "resident", "ordinarily resident" and "domiciled" are not defined in UK legislation and so it is necessary to rely on case law and the practice of the Inland Revenue. The following is a very broad position and it must be stressed that recent court decisions have placed emphasis on the pattern of lifestyle to determine the individual's residence. An individual is treated as being resident in the UK for any fiscal year (6th April in one year to 5th April in the next year) if he is present in the UK for 183 or more days; or he visits the UK regularly and after four years his visits average 91 days or more; or he comes to the UK with the intention of making regular visits; or his home has been abroad and he intends to come to live in the UK permanently, or to remain in the UK for three years or more.

Ordinary Residence is roughly equivalent to habitual residence, and an individual is treated as being ordinarily resident in the UK from the date of arrival, if it is clear that he intends to remain in the UK for three years or more; or from the beginning of the tax year in which a decision is made to remain in the UK for three years or more; or from the beginning of the fifth year, if he visits the UK regularly, and after four years his visits average 91 days or more. Unlike residence, it is not possible to have more than one domicile at any one time, and it is not the same as nationality. Essentially, it is the place where an individual has his permanent home, and has the strongest cultural, economic and family links, and where he ultimately intends to reside. Domicile can have a significant effect on UK tax liabilities, as it enables resident, but non-UK domiciled individuals, to legally avoid UK tax on income and capital gains arising overseas if they are not remitted to the UK.

However, these rules have been amended and restricted for those who have been in the UK for seven out of the previous nine tax years. Subject to the special residence rules, non-UK domiciled individuals are not chargeable to inheritance tax on non-UK situated assets. UK domiciled individuals are however assessable on their worldwide income.

Individual Tax Rates (for the tax year 2008/2009)

	DIVIDENDS*	SAVINGS	OTHER
£1-£35,000	10%	20%**	20%
£35,001-£150,000	32.5%	40%	40%
Over £150,000	42.4%	50%	50%

** dividends are increased by a non-repayable tax credit of 1/9th. This includes non UK companies of which taxpayers own less than 10%*

*** 10% up to £2,560. If an individual's taxable non-savings income is above this limit, the 10% rate does not apply*

Dividends are treated as the top slice of total income, savings as the next slice and other income as the lowest slice

Inheritance Tax

Inheritance tax is due on death and on certain lifetime gifts. It is charged at the rate of 40% on transfers in excess of £325,000 for the tax year 2011/2012. Inter spouse transfers are free of tax provided either both are domiciled or non-domiciled in the UK for inheritance tax purposes. Where the transferee spouse is non-domiciled but the transferor spouse is domiciled there is an exemption limit of £55,000. Certain lifetime transfers are tax free if the donor lives seven years.

Capital Gains Tax

Individuals are subject to capital gains tax on their chargeable gains. Capital gains tax also applies to other entities that are not companies such as trustees and personal representatives. Gains are taxed for a "year of assessment". Each year of assessment starts on 6 April and finishes on 5 April in the following year. Under the capital gains tax regime, an individual is taxed on gains arising in a year of assessment during any part of which the individual is resident, or during which the individual is ordinarily resident in the UK. The rate of capital gains tax is 28% (where the total income and taxable gains after all allowable deductions (including the personal allowance) is above £35,000).

Double Tax Treaties

Treaty and Non Treaty Withholding Taxes

The following chart contains the withholding tax rates that are applicable to interest and royalty payments by UK companies to non-residents under the tax treaties currently in force. Where,

in a particular case, a treaty rate is higher than the domestic rate, the latter is applicable. There is no withholding tax on dividends. Relief at source may be granted on application.

	INTEREST[1] (%)	ROYALTIES (%)
Domestic Rates Companies	0/20	0/22
Individuals	20/22	20/22

TREATY WITH	INTEREST[1] (%)	ROYALTIES (%)
Antigua and Barbuda	-2	0
Argentina	12	3/5/10/153
Australia	0	5
Austria	0	0
Azerbaijan	10	5/106
Bangladesh	15/208	10
Barbados	15	0
Belarus8	0	0
Belgium	15	0
Belize	-2	0
Bolivia	15	15
Bosnia and Herzegovina	10	10
Botswana	10	10
Brunei	-2	0
Bulgaria	0	0
Canada	10	0
Chile	3/907	3/607
China (People's Rep)	10	5/723
Croatia	10	10
Cyprus	10	0
Czech Republic	0	0
Denmark	0	0
Egypt	15	15
Estonia	10	3/607
Falkland Islands	0	0
Fiji	10	0
Finland	0	0
France	0	0
Gambia	15	12.5
Georgia	0	0

Germany	0	0
Ghana	12.5	12.5
Greece	0	0
Grenada	-2	0
Guernsey	-2	-2
Guyana	15	10
Hungary	0	0
Iceland	0	0
India	5/77	5/756
Indonesia	10	5/756
Ireland	0	0
Isle of Man	-2	-2
Israel	15	0
Italy	10	8
Ivory Coast	15	10
Jamaica	12.5	10
Japan	0	0
Jersey	-2	-2
Jordan	10	10
Kazakhstan	10	10
Kenya	15	15
Kiribati	-2	0
Korea (Rep.)	10	1/506
Kuwait	0	10
Latvia	10	3/607
Lesotho	10	10
Lithuania	0	3/607
Luxembourg	0	5
Macedonia	0	0
Malawi	0	0
Malaysia	10	8
Malta	10	10
Mauritius	0	15
Mexico	0/5/10/1518	10
Mongolia	7/104	5
Montenegro	10	10
Montserrat	-2	0
Morocco	10	10
Myanmar	-2	0
Namibia	-2	0
Netherlands	0	0
New Zealand	10	10

Nigeria	12.5	12.5
Norway	0	0
Oman	0	0
Pakistan	15	12.5
Papua New Guinea	10	10
Philippines	6/911	1/168
Poland	0	5
Portugal	10	5
Romania	10	5/78
Russia	0	0
St. Kitts and Nevis	-2	0
Serbia	10	10
Sierra Leone	-2	0
Singapore	10	0
Slovak Republic	0	0
Slovenia	10	10
Solomon Islands	-2	0
South Africa	0	0
Spain	12	10
Sri Lanka	0	0
Sudan	15	10
Swaziland	-2	0
Sweden	0	0
Switzerland	0	0
Taiwan	10	10
Tajikistan	0	0
Thailand	0	5/156
Trinidad and Tobago	10	0
Tunisia	5/62	15
Turkey	15	10
Turkmenistan	0	0
Tuvalu	-2	0
Uganda	15	15
Ukraine	0	0
United States	0	0
Uzbekistan	5	5
Venezuela	0	5/721
Vietnam	10	10
Zambia	10	10
Zimbabwe	10	10

→ Real Estate law

Types of Ownership

For the purposes of this section, the UK means England, Wales and Northern Ireland but excludes Scotland. Scotland has a different system of land ownership.

A few words about terminology may help. Both the words "land" and "property" mean real estate. The word "premises" may also be used. This has the same meaning as "land" and "property" but is most correctly used to describe land or property included in a lease.

There are three types of ownership in the UK. They are called freehold, leasehold and commonhold.

Freehold is absolute, unlimited ownership. The owner of a freehold has no landlord and can do whatever he likes with his property subject to the general law of the land and subject to any restrictions placed on the property by the owner or any former owner.

Freehold ownership is most common for residential houses, large estates and investment property.

Leasehold ownership is where land is held by one person (called the tenant) from another person (called the landlord) for a limited period of time on the terms of an agreement (called a lease). Most business premises in the UK are occupied under leases. Residential flats (apartments) are also mostly occupied under leases. A tenant under a lease will pay a rent to the landlord. The lease will last for a limited amount of time. The lease document itself will contain rights and obligations both for the landlord and the tenant and numerous restrictions on what the tenant can and cannot do with the property. Modern commercial leases are long, complex documents which require legal advice.

The third form of ownership is commonhold which has been introduced recently. This new system of ownership was designed primarily for blocks of residential flats and other developments with lots of units. At the time of publication, the use of this new system of ownership is very rare.

Land Registry

There is a computerised register of land in the UK maintained by a government agency called the Land Registry. The register is computerised and accessible via the internet. The register is maintained by a number of district land registries located throughout the country. At the moment, not all land in the country is registered but the government is committed to making it so. The government is also committed to introducing within the next three to five years a

system whereby land can be transferred electronically. All registered land has its own "title number" and plan which identifies the land in question. The entries which appear on the register against a particular title number are guaranteed by the state as accurate. There are certain rights and obligations (called overriding interests) which are not noted on the register of title. In theory, such rights and obligations should be apparent by a proper inspection of the land in question or making enquiries of the current owner/occupier.

Land which is not registered at the Land Registry is increasingly rare particularly in urban areas.

Transfer

Generally, land can only be transferred by deed. A deed is a document usually prepared by a lawyer which is signed and witnessed and brought into effect in a particular way. This process does not require a notary. In order for a transfer of registered land to be effective, it must be completed by registration at the Land Registry. This cannot be done unless the relevant tax has been paid on the documents. The relevant tax is Stamp Duty Land Tax which is explained below.

Mortgages And Charges

If money is borrowed to assist with the purchase of land in the UK, the lender will invariably take a mortgage or a charge over the land in question. The expressions "mortgage" and "charge" mean the same thing. A commercial mortgage will normally involve two key documents. The first is a loan agreement which can be in the form of a formal agreement or a letter (sometimes called an offer letter or a facility letter). The second document is the mortgage itself which creates the security over the land and is registered at the Land Registry. The mortgage usually incorporates the loan agreement.

The lender who takes a mortgage is called a mortgagee or chargee. The mortgagee's main rights are as follows:

– to be repaid the loan plus interest and costs.

– if the borrower defaults, to take possession of the mortgaged property and to sell it to repay his loan. It is not always necessary for a mortgagee to obtain a court order before taking possession or selling the mortgaged property.

– to appoint a receiver to manage and if necessary sell the property.

– to prevent a sale of the property if he is not repaid.

In practice, the mortgage or charge is now the only recognised formal, fixed security taken over land in the UK. Businesses may also be asked to provide floating charges in favour of

institutional lenders. These charge all the assets of the business but only restrict dealings with those assets if the borrower is in default.

Restrictions on Acquisition

There are no restrictions on foreign ownership of UK property. In practice, it should not be possible to acquire property in the UK or to borrow money on the security of property in the UK without complying with the identification requirements of the money laundering regulations.

Legal Protection for Buyers and Sellers

In general, the law gives no special protection to buyers or sellers of UK property. Those involved in property transactions will invariably use a solicitor to represent their interests. It is the job of the buyer's solicitor to ensure that the property being bought is free from undisclosed restrictions or obligations and that it is validly transferred at the correct price.

Restrictions on Development

UK law prohibits the development of land without planning permission. Development includes changing the use of land or carrying out building, mining or engineering operations on land. A planning permission is a permission given by the planning department of the relevant local authority. The local authority is allowed eight weeks in which to reach a decision on any planning application.

Some types of minor development are permitted without planning permission. For example, minor works and changes of use where the new use is similar to the old use. However, this area is very tightly controlled and professional advice is advisable.

The law also requires that anybody carrying out building works must comply with building regulations and generally obtain a building regulation consent. That is a formal consent from the District Surveyor (a local government officer) who will consider the plans and specifications of any building works before giving consent and inspect the progress of the works at key moments.

All local authorities prepare plans for how they want different parts of their areas to be used and developed. Those plans are available to the public. They will set out areas or zones where the local authority wishes to encourage particular uses (eg shopping, residential or industrial) and discourage other uses. The local government will consider any application for planning permission in the light of these plans so that, for example, applications for industrial development in residential areas will not succeed.

Leases

A lease is the most common way of holding commercial property in the UK. The length of leases will vary depending upon the circumstances and requirements of the parties. There is however a standard which is called an institutional lease. Such a lease would be granted by a major financial institution such as an insurance company, investment trust or property company. Institutions tend to look for longer leases, eg 15 years or more (though terms of 10 years and even 5 years are available). The rent will be subject to review most commonly at 5 yearly intervals. Rent reviews in the UK are almost invariably on an upwards only basis. This means that the terms of the lease guarantee to the landlord that either the rent will go up in line with market rents or it will remain the same even if the market rent has fallen below the existing rent level.

An institutional lease will also be a "clear" lease. This means that the rent the landlord receives will be clear of any deductions to cover the cost of, for example, repairs and maintenance of the building, the supply of services to the building and the cost of insuring the building. All these expenses will be payable by the tenant or (in a building containing a number of tenants), by all the tenants together. These extra payments on top of rent are generally called a "service charge".

In addition to rent and service charge, there are local taxes to be paid to the local authority which are called business rates. These can be as much as the rent again.

The lease will impose obligations and restrictions on the tenant. The obligation which is most significant from a financial point of view is the obligation to repair, decorate and if necessary re-build or pay towards the cost of rebuilding. In an office block for example the tenant will be responsible for maintaining, repairing and decorating his own property. He will also be responsible through the service charge to contribute towards the cost of repairing and maintaining the building of which his offices form part including all services to the building (eg lifts, air-conditioning and heating plant and systems and so on). It is often the case that these expenses are not capped and if the building and its services are old, the tenant can face very significant extra costs through the service charge.

Some of the other important provisions in a typical commercial lease are as follows:-
– restrictions on use
– restrictions on alterations to the property
– restrictions on disposing of the property
– VAT is often payable on the rent of commercial property

Any lease granted for more than 7 years must be registered at the Land Registry. Tenants of property used for business purposes will normally have statutory rights to remain in the property when the lease comes to an end. They will have to negotiate a new lease and pay a

commercial rent but the landlord cannot insist that they vacate unless special circumstances apply. It is also quite common for the statutory rights to be excluded by agreement between the parties.

Stamp Duty Land Tax

Stamp Duty Land Tax ("SDLT") is a tax payable to the government on land transactions. Any sale of freehold or leasehold land or the grant of a lease at a rent gives rise to SDLT. The tax is payable by the buyer or the tenant. Tax is payable on a sliding scale up to a maximum of 4% of the either capital amount paid by the buyer or the capitalised value of the rent.

VAT

Value added tax is generally not payable on residential land. In some circumstances it is payable on the purchase price of commercial land and it is also often payable on rent and charged to tenants.

Setting Up in Business in the UK

The choices for a business setting up in the UK are:

SERVICED OFFICE: These are usually small offices where office services are supplied as part of the package. The extent of services varies between providers but normally they will include furniture, use of equipment (such as photocopies and fax machines), telephones and telephone answering, conference facilities and secretarial services. The commitment is short term and the cost is relatively high.

SHORT TERM LICENCE: This is similar to a lease but very short term (i.e. 6 months to a year). It would generally give the new business the space only. The tenant would have to supply furniture, equipment and personnel. There would be no security when the licence comes to an end.

LEASE:
The minimum commitment would be three to five years. Shorter periods are sometimes available from tenants who themselves have surplus space (ie by taking an underlease). Landlords will wish to be satisfied above all that the incoming tenant is able to pay the rent and fulfil the tenant's obligations in the lease. They will want to see accounts and references that demonstrate this. They may also require a guarantor or a rental deposit of between six months and two years rent.

BUY A FREEHOLD: This would involve a major capital commitment which is likely to be inappropriate for smaller businesses.

→ Labour Law

Employment law in the UK is based on both common law and statute. Although the employment law regime is not as onerous for employers as in many other European countries, in recent years there has been a significant increase in employment regulation, much of it to implement EU Directives.

Employment Contracts

An employer is required to provide an employee with a written statement of specified employment particulars within two months of the start of their employment. This includes details of the disciplinary, dismissal and grievance procedures that apply to his employment. Any changes to the statement must be notified within one month of the date of the change.

Cost Of Dismissal And Wrongful Dismissal

There are two issues to consider when dismissing an employee: contractual rights and statutory rights.

Contractual Rights

If an employee's contract of employment is terminated in breach of that contract, the employee may be entitled to claim damages for wrongful dismissal or breach of contract. The amount of damages claimed will be the sum that would put the employee in the position he would have been in had the contract been terminated correctly. Usually, this is the amount of salary and benefits to which the employee would have been entitled during the notice period or until the end of any fixed term contract. This entitlement to damages is subject to the employee's duty to mitigate the losses he suffers by finding alternative employment.

Statutory Rights

Statute provides for minimum periods of notice which are one week's notice for each complete year of service by the employee up to a maximum of 12 weeks' notice for 12 years of employment. However, usually the contract provides for a period of notice which can be more generous (but not less generous) than the statutory minimum.

Claims for breach of contract may be brought either in the High Court or the County Court or, for claims limited to £25,000 in an employment tribunal. It is significant to note that for claims in the Employment Tribunal, each party bears their own costs so costs are not awarded against the unsuccessful party save in exceptional circumstances. This is different from the position in the civil court where costs will usually be awarded against the unsuccessful party.

Unfair Dismissal

For employees who have one year's continuous employment with the employer, it is open for such employees to bring a claim for unfair dismissal in the employment tribunal. It should be noted that certain unfair dismissal claims (for example, dismissal by reason of pregnancy, for whistleblowing, for exercising a statutory right or for trade union membership) do not require a qualifying period of employment to be able to bring a claim.

In order to avoid claims for unfair dismissal, an employer should ensure that employees are only dismissed for a "fair" reason, following a "fair" procedure. The six potentially "fair" reasons for dismissing an employee are conduct, capability (ie competence or on health grounds), redundancy, statutory bar or "some other substantial reason" justifying the dismissal of an employee holding the position held by that employee. The procedures to be followed in relation to each category of potentially fair reason for dismissal are slightly different but they all involve consultation with the employee before the dismissal. The Tribunal will also consider whether the employer has acted reasonably in all the circumstances in treating the reason for the dismissal as a sufficient reason for dismissing the employee.

On 6 April 2009, the statutory minimum disciplinary, dismissal and grievance procedures were formally revoked.

Failure to comply with minimum discipline, dismissal and grievance procedures no longer results in a finding of automatic unfair dismissal. However, in practice, employers will still need to follow these processes or risk both unfair dismissal and an uplift to compensation, at the discretion of the Employment Tribunal. In determining whether such an uplift should be applied, the Tribunal shall take into consideration the extent to which the employer has complied with the ACAS Code of Practice and disciplinary and grievance procedures.

If an employee is successful in bringing an unfair dismissal claim, an employment tribunal can order reinstatement, re-engagement or compensation. Compensation is the most common award and comprises the following elements:

– a basic award which is calculated in the same way as a statutory redundancy payment depending on the age and length of service of the employee and a week's pay, which is currently capped at a maximum of £400 per week;

– a compensatory award which will be assessed on the basis of the losses suffered by the employee. The maximum award is currently £68,400 (this figure is reviewed annually on 1 February).

Employment Contracts For Directors

The employment contracts for directors are commonly referred to as service agreements and should be approved by the board of directors of the company before they are entered into. They usually contain more onerous provisions specifying the director's duties to the company as well as protection for the company's confidential information, "garden leave" provisions, intellectual property rights, restrictions on activities during employment and possibly post termination restrictive covenants. It is also common for directors to have longer notice periods than other employees. A service agreement usually provides for the director to resign his office on termination of the employment. There is no special regime for the employment of directors. However, there are requirements in the Companies Act 2006 which limit the period of a director's service contract to less than two years without the prior written consent of the shareholders of the company. There are also special provisions regarding notice and remuneration which apply to directors of UK quoted companies.

Employees' Representatives And Union Representation

Collective Consultation with Employee Representatives

In a situation where 20 or more employees are being dismissed by reason of redundancy within a 90-day period, or where a transfer of a business (or part thereof) is proposed, employers have a statutory duty to carry out collective consultation and to inform (with specified information) and consult with the affected employees either through a trade union (if that is appropriate) or through their own elected representatives. The penalty for non-compliance with this obligation to inform or consult over collective redundancy is up to 90 days' actual pay for each affected employee if an affected employee or his representative brings a successful claim for a protective award in an employment tribunal. The penalty for failure to comply with the obligation to inform or consult over a TUPE transfer is 13 weeks' actual pay.

European Works Councils

The purpose of a EWC is for employers to inform and consult their workforce on an ongoing basis about measures which are proposed which may affect employment prospects and decisions which are likely to lead to substantial changes in the organisation such as redundancies or transfers of the business. The Transnational Information and Consultation Regulations 1999 (TICE Regulations) apply if central management of a "Community scale" undertaking or group of undertakings is in the UK. There must be at least 1,000 employees within the EU and at least 150 employees in each of two member states.

Information and Consultation obligations are not automatic; if there is no European Works Council (EWC) (either because central management has not initiated one or the employees have not requested one) there is no obligation to inform or consult. However, if a written request

has been made by employees (or their representatives) covering 100 or more employees in at least two member states, central management must set up a special negotiating body to negotiate an EWC or a procedure for Information and Consultation. If they fail to do so within three years of an EWC request, the default model EWC provisions apply and Information and Consultation obligations arise under the TICE Regulation where workers' interests are affected in at least two undertakings in at least two member states represented on an EWC.

Union Representation

Almost one in three workers in the UK belongs to a trade union. A trade union is an organisation which consists wholly or mainly of workers of one or more description. A trade union's main aim is to reach agreements with employers over the contractual terms under which workers will work.

An employee who is a member of a trade union has rights which include the following in relation to his employer: to be accompanied to a grievance/disciplinary hearing by a trade union official; not to be refused employment, dismissed or subjected to any detriment by reason of his trade union membership or activities and the right to paid time off work to take part in trade union activities; where a trade union is recognised for collective bargaining purposes, the employer has a duty to consult on training for workers within the bargaining unit.

Collective Bargaining Agreements

A collective agreement is an agreement or arrangement made by or on behalf of a union and an employer which relates to matters such as terms and conditions of work, termination/suspension of employment, disciplinary matters or allocation of work. In large sectors of industry in the UK, levels of pay and other principal terms are agreed in a collective agreement.

Where a union has been formally recognised by an employer for collective bargaining, it can negotiate pay and other terms on behalf of a group (or groups) of workers. This will result in a collective agreement being formed.

The provisions of a collective agreement will be legally enforceable provided the agreement is in writing, and expressly states that the parties intend the agreement to constitute a legally binding agreement between the employer and the union. To be enforceable between the worker and the employer, the collective agreement must be incorporated into the worker's individual terms and conditions of employment. Such provisions will be enforceable between the employer and the worker even if the collective agreement is not legally binding as between the employer and the union.

There are statutory rights in the UK for trade unions to be recognised by employers for collective bargaining purposes, provided various conditions are satisfied. The regime seeks to promote voluntary recognition wherever possible. The recognition procedures are complex and were introduced in the Employment Rights Act 1999. The recognition machinery is contained in The Trade Union and Labour Relations Consolidation Act 2002.

Wages And Other Types Of Compensation

The National Minimum Wage Act 1998 specifies a minimum wage for employees over 18. Currently, the rates are as follows: for employees over school age but under 18 the minimum wage is £3.64 per hour, for employees aged 18-20 it is £4.92 per hour and for employees aged 21 and over it is £5.93 per hour. These rates are reviewed annually on 1 October.

The requirement to work overtime and additional payment (if any) for overtime worked is something which is usually dealt with by the employee's contract of employment.

Stakeholder Pensions

Employers who have five or more employees and do not operate a qualifying pension scheme, are required under Section 3 of the Welfare Reform and Pensions Act 1999 to designate a stakeholder pension scheme and offer their employees the opportunity to contribute to such a scheme. The obligation is simply to identify a scheme and collect any contributions the employees wish to make and pay them into the scheme. There is currently no obligation for the employer to contribute to a pension scheme for his employees although there are plans for this to change in 2012. Failure to comply with this obligation can render the employer liable to civil penalties.

Insurance Benefits

It is common in the UK for employers to provide their employees with insurance benefits. Probably the most common is private medical insurance. Other benefits which are often provided are life insurance, travel insurance, permanent health insurance and critical illness insurance. Whether or not an employer provides these to employees is a matter for the contract. Where such benefits are provided, the contract should be carefully drafted to ensure that the employer reserves all necessary rights and does not put himself in a position where he is contractually obliged to provide a benefit for which he is not insured.

Employment Regulations

The following is a brief summary of some of the main statutory provisions which employers must be aware of when employing employees in the UK:

WORKING TIME: The Working Time Regulations 1998 impose a limit on employee's working time of an average of 48 hours a week averaged over a 17 week reference period. Individual employees can choose to work longer than this by signing an opt out agreement with their employer. There are also requirements for minimum rest breaks and daily and weekly rest periods. There are special provisions for night work.

HOLIDAY: Employees are entitled to 28 days' paid holiday each year (including bank and public holidays) under the Working Time Regulations 1998. There are eight recognised public holidays per year which are included in this minimum entitlement. Employers are free to agree a more generous contractual entitlement and in the UK it is common for employers to allow paid holiday entitlement of between 20 and 30 days and for bank and public holidays to be given in addition to this entitlement.

SICK PAY: There is a statutory entitlement to sick pay for up to 28 weeks under the Social Security Contributions and Benefits Act 1992. The current statutory sick pay rate is £81.60 per week but will increase on 6 April 2012. The first three days of any sickness are "waiting days" when no sick pay will be payable. It is open to employers in the UK to agree a more generous contractual sick pay arrangement and it is common practice to do so.

REDUNDANCY: If an employee with two or more years' continuous employment is dismissed by reason of redundancy, he is entitled to receive a statutory redundancy payment from his employer. The amount of the redundancy payment is calculated by reference to the employee's age, length of service and weekly pay (subject to maximum of £400 per week). The maximum statutory redundancy payment (or basic award) is currently £12,000.

DISCRIMINATION: Currently under English law, discrimination on the grounds of sex, race, disability, sexual orientation, age and religion or belief is unlawful. Compensation for workers who successfully bring discrimination claims against their employers is potentially unlimited and can include a claim for injury to feelings.

PROTECTION FOR PART-TIME AND FIXED TERM EMPLOYEES: It is unlawful for an employer to subject to a detriment or treat part-time or fixed term workers less favourably than full time staff unless such treatment can be objectively justified. A worker whose fixed term contract is successively renewed will be considered a permanent employee after four years of continuous employment.

DATA PROTECTION: Employers have a duty to notify their staff as to the personal and sensitive personal data they hold, tell them how it will be processed and obtain their consent to process the data. Such data must be kept securely. Data must be processed in accordance with the provisions of the Data Protection Act 1988 and the various Data Protection Codes issued by the Information Commissioner's Office. Failure to comply carries civil penalties. Workers have the right to request copies of personal data held in relation to them by the employer.

MATERNITY RIGHTS: All pregnant women have the right to paid time off for antenatal care in preparation for the birth of their baby. Pregnant employees are entitled to six months ordinary maternity leave from work and then an additional maternity leave period of six months, regardless of their length of service with their employer.

Employees on maternity leave who meet the eligibility requirements are entitled to statutory maternity pay which is pay of up to 90% of the employee's salary for the first six weeks of maternity leave and either £128.73 per week or 90% of normal weekly earnings if lower for the next 33 weeks. A high percentage of this payment is recoverable by the employer out of his National Insurance contributions.

PATERNITY RIGHTS: Employees with more than 26 weeks' employment may take up to two weeks' paternity leave and 26 weeks additional paternity leave. Employees who take this leave are entitled to all benefits except pay but they are entitled to statutory paternity pay which is currently £128.73 per week or 90% of normal weekly earnings if lower.

ADOPTION RIGHTS: The adoption regime provides the same leave and pay rights and requires the same qualification provisions as the maternity provisions. In a situation where there is a joint adoption, one partner is entitled to statutory adoption pay whilst the other has paternity leave entitlements.

PARENTAL LEAVE: Employees with one year's employment can take up to 13 weeks' unpaid leave for each child up to the child's fifth birthday. This right transfers with the employee when he/she changes employer. Statute provides a scheme which allows parental leave to be taken in blocks of one week or more although no more than four weeks in any year. However, employers can agree arrangements that are more generous and in particular which permit leave to be taken in blocks of less than one week.

THE RIGHT TO REQUEST FLEXIBLE WORKING: Employees with children aged up to 17 (or aged 18 if they are disabled) have the right to request flexible working arrangements from their employer. The requirements which must be fulfilled before such a request can be made are that the employee must have been in 26 weeks continuous employment and the employee must not have made another application to work flexibly under the right to request legislation during the preceding twelve months. The employer has an obligation to consider the request and give a reason for any refusal. A refusal to consider a request for flexible working arrangements from a female worker with childcare responsibilities may amount to indirect sex discrimination if it cannot be justified on objective grounds.

TIME OFF TO CARE FOR DEPENDANTS: Employees may take a reasonable amount of unpaid time off to deal with family emergencies.

Health And Safety

An employer is under a common law duty to have regard to the safety of his employees. The employer must provide a safe place of work and safe access thereto, he should take reasonable care that employees are not subjected to unnecessary risks of injury, provide safe systems of work, safe equipment and materials and competent fellow employees. An employer can also be liable at common law for accidents caused by acts of his employees where the employees were acting in the course of their employment. In addition to these common law duties, statutory obligations have been imposed under the Health and Safety at Work Act 1974. The Occupiers' Liability Act 1984 imposes duties on an employer for both his employees and visitors to the premises. Breach of such obligations can result in criminal as well as civil liability.

Contracting And Outsourcing Of Work Or Services

The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") which implements the EU Acquired Rights Directive protects employees' rights in the event of a transfer of a business or part of a business in which they are working. The TUPE regulations do apply to the transfer of employees under outsourcing arrangements but they do not apply to situations where the shares of a company are sold.

TUPE imposes a duty on the vendor of a business to inform and consult with employee representatives before the transfer takes place. There are potentially significant penalties for failure to adhere to these obligations.

The main effect of the TUPE regulations is that in the event of a transfer of a business as a going concern, the employment rights and obligations of the employees of the business or the part of the business being transferred will be automatically transferred to the new owner of the business who will automatically assume those rights and obligations instead of the vendor. Any pre or post transfer dismissal in connection with the transfer will be automatically unfair unless it is for an economic, technical or organisational reason which entails changes in the workforce. TUPE also makes it very difficult to change the existing terms and conditions of employment of transferring employees.

Unfortunately, it is not open to contracting parties to agree that the TUPE Regulations will not apply. As the obligations which result from a TUPE transfer can be significant, particularly for the purchaser, it is common for business and asset sale agreements in the UK to contain indemnities and other provisions whereby the parties agree the way in which costs and liabilities will be borne.

Social Security

The UK operates a pay as you earn ("PAYE") tax deduction system which must be operated by all employers. There are currently four rates of tax: starting (10%), basic (20%), higher (40%) and 50%. These percentages are applied to a portion of an employee's taxable income subdivided into bands. The PAYE system requires the maintenance of pay and tax records for virtually all employees. Tax deducted by the employer under PAYE must be paid to HM Revenue and Customs within specified time limits. Employers are required to use certain forms to record pay and tax information and these must be retained for three complete tax years.

In addition employers must deduct National Insurance contributions. Generally employers must deduct National Insurance contributions on the earnings of the employee – known as employees' National Insurance contributions. In addition, employers must pay National Insurance contributions at 13.8% of the employee's earnings as employer's National Insurance contributions. Again employers have duties to keep records and account to HM Revenue and Customs within specified time limits.

Benefits provided to employees are also taxable and subject to the deduction of National Insurance contributions. Special rules apply for company cars.

→ United States

→ Why do business in/with the United States?

A number of years ago, a gentleman from Rome, Italy, approached us looking to establish a new business in the U.S. For many years his company had been the Italian distributor of a large U.S. based medical products company. That company had recently purchased his distributorship in order to address Italy and the Southern European market directly out of Rome. The parting was very friendly and the individual was now free either to retire or to seek other business opportunities with the assistance of his former company.

This prospective U.S. investor, with advanced degrees in biology and thirty years of experience in his industry, had an idea for a new series of products that he felt would revolutionize the industry. He had gone so far as to acquire some of the key patents, but was unable to raise the necessary capital in his native Italy or elsewhere in Europe. Additionally, he was concerned as to whether he could find enough qualified scientific and technical personnel in Europe to develop the patents into workable products.

The U.S. offered him the combination of opportunities he needed. Choosing to locate his business in one of the larger cities of the American Midwest, he was close to a number of complementary companies that were willing to assist him in many ways including making investments in his company and, in some cases, serving on his Board of Directors. His lawyers and other professionals found additional funds for the company among selected private investors and venture capitalists.

Additionally, since he was willing to invest a large sum of his own money, he was able to take advantage of one of the categories of lawful permanent residence and also to bring a number of key people from Europe. Finally, the technology-rich local market allowed him to recruit the personnel he needed to run the company.

This story is not unusual, and it is representative of what opportunities are available to those who wish to take a serious look at the U.S. market. In this chapter we will explore the key reasons why foreign individuals and companies seek to enter into or expand their opportunities in the United States.

The U.S. is the world's largest single national economy and consumer of a wide variety of goods and services

The U.S., with a land area of 3,537,411 square miles and a population that exceeds 300 millions, is by far the largest single economy in the world. The Gross Domestic Product (GDP) stood at more than 10 trillion dollars in 2004, up from 6.9 trillion dollars in 1994. This is slightly less than the GDP of the entire European Economic Community (EEC), and if one looks at the entire North American region (the U.S., Canada and Mexico), the total exceeds the EEC. With a solid economic growth and mild inflation rates (averaging around 2.5% per year over the past ten years), and hourly earnings averaging in excess of $13.00 per hour, giving Americans more disposable income than ever before). For example, in 2000, 41.9% of all American families had incomes in excess of $50,000 and 12.3% had incomes in excess of $100,000.

U.S. population is increasing at the rate of 1.3% a year. That is an excellent demographic number because it suggests continued national growth without the problems and necessities brought about by a rapidly growing or stagnant population. Notably, only 43% of U.S. population growth is attributable to births over deaths. The remainder is from legal immigration, which is on the increase. In 2005, over one million permanent residence visas were issued, up from 730,000 in 2003.

Demographically, there are two trends that are influenced by U.S. population growth, both of which provide significant opportunities for commercial growth. The first is the aging of the U.S. population. Between 1990 and 2000, the median age in the U.S. increased from 32.9 years to 35.3 years. By 2006, it was 36.2 years. While there are now fewer Americans between 20 and 35 years than twenty years ago, the number of people between 45 and 54 increased by 49%. These so-called "Baby Boomers" have the highest per capita income and the most disposable income of all Americans. Adding to the expansion of the older population is the growth in the number of people over 65 (the traditional retirement age in the U.S.). With life expectancy increasing, it is estimated that there are now in excess of 35 million Americans over 65, with 10 million of these over 80 years old. These older groups are ready customers for leisure-time services, information technology products and professional services such as health related insurance and home resident health care.

The second demographic trend is the growth of the Latino population and the Latino market. Latinos have passed African Americans in population in the year 2000 (in 2005, Latinos lead African Americans by 42.9 million to 39.7 million) and represent the fastest growing sector of the U.S. population. Their growth rate of 3.3% annually exceeds the growth rate of all other

groups, except Asian Americans, by nearly 3 to 1. The current Latino population has almost doubled since 1985. The U.S. is now the third largest Spanish speaking country (after Mexico and Spain). In 2005, in 8 of the 10 largest cities in the U.S., Latinos made up at least 25% of the population (ranging from 26% in Chicago to nearly 47% in Los Angeles). Latinos, though very culturally diverse, tend to be younger than other ethnic groups and therefore make up an even larger proportion of those Americans less than 45 years old. Young Latinos are now responsible for exerting significant influence on the lifestyles and culture of all younger Americans particularly in music and clothing. Latino-Americans have also made major contributions in the communications and high technology industries. Figuring out how to recognize and tap this market has brought great rewards for those who have done so.

In recent years, the U.S. Economy has grown steadily with low inflation and interest rates

Just think about it: from 1994 to 2000, the gross domestic product (GDP) of the U.S. grew about the same amount as the current GDP of Germany! From 1995 to 2005, U.S. GDP growth averaged between 4.5 to 5% per year with disposable income increasing an average of 4% per year. During this period, U.S. GDP growth exceeded inflation every year with significant increases in GDP over inflation in the late 1990's and the middle of the first decade of the 21st Century.

Part of this growth was the result of favorable interest rates. Interest rates in the U.S. are largely controlled by the Federal Reserve Bank ("The Fed"). The Fed, was created in 1913 to provide the U.S. with a safer, more flexible and more stable monetary and financial system. It establishes national monetary policies; supervises and regulates banking institutions; helps to maintain financial stability; and provides financial services to the federal government as well as of other nations. More important, for our purposes, is The Fed's control over the Federal Funds Rate and the Discount Rates that help to determine, (along with the margin added by the financial institutions) what the Prime Rate and other rates are for American consumers and businesses. This is used by The Fed to heat up or cool down the U.S. economy and to control inflation. The following exhibit gives us an understanding of U.S. interest rates in recent years.

U.S. Interest Rates (Based on the average rate at the end of the calendar year)
**Rate normally available for the bank or financial institution's best customers.*

YEAR	PRIME RATE*	FED. FUNDS RATE	DISCOUNT RATE
1990	10.00%	7.50%	6.75%
1995	8.50%	5.75%	5.25%
2000	9.50%	6.00%	6.50%
2001	4.75%	4.00%	3.75%
2002	4.25%	3.75%	3.625%
2003	4.00%	3.00%	3.25%
2004	5.25%	3.75%	4.00%
2005	7.25%	4.25%	4.75%

The activities of the Federal Reserve, along with the U.S.'s sophisticated private financial system, has helped make the massive economic expansion of the 1990's and the middle 2000's possible by providing reasonable interest rates and capital to American based businesses and consumers. This expansion was further aided by nearly two decades of low and reasonably stable inflation. In the past 12 years, inflation has averaged about 2.5% per year and it seems unlikely that the U.S. will experience significant inflation in the years to come.

U.S. Consumers are among the world's most affluent. Always receptive to foreign products, the U.S. consumer is likely to become an even more avid buyer of imported products and services as the new world economy develops

The U.S. is, by far, the world's largest importer of goods and services. Imports continued to increase from $581 billion in 1993 to $1.22 trillion in 2000 to nearly $1.17 trillion in 2005, a 200% increase in only 12 years!! Europe, that accounts for around of 20% of U.S. imports and the Western Hemisphere, that accounts for around a third of all imports, have maintained virtually the same market share during the period (although Mexico's market share increased dramatically during the 1990's and declined slightly between 2000 and 2005, while Canada's overall share has decreased slightly but it still remains the number one importer and overall trading partner of the U.S.)

Asia, as a whole, has greatly strengthened its position, but Japan has lost more than half its market share while China has more than doubled its market share to become the number two importer to the U.S.. Between 2000 and 2005, the dollar value of products imported into the U.S. from Japan has actually declined, but some of that decline can be explained by the "Americanization" of its imports that result from such companies as Toyota building more of their products in the U.S.

U.S. Imports in Dollars and percentage of total trade from 1993-2005 (In billions of U.S. Dollars)

	1993	%	2000	%	2005	%
TOTAL WORLD	580.7		1216.7		1674.3	
EUROPE	119.1	20.5	257.3	21.1	343.2	20.5
WESTERN HEMISPHERE	185.6	32.0	438.4	36.0	557.3	33.2
NAFTA (ONLY)	151.1	26.0	369.1	30.3	475.5	28.2
CANADA (ONLY)	111.2	19.1	229.2	18.8	287.1	17.2
MEXICO (ONLY)	39.9	6.9	139.9	11.4	170.2	11.0
NON NAFTA	34.5	5.9	69.3	5.7	81.8	5.0
JAPAN	107.3	18.4	146.6	12.1	138.1	8.3
REST OF THE WORLD*	168.7	29.1	374.5	30.8	635.7	38.0
CHINA (ONLY)	98.5	8.1	243.5	14.6		

American consumers continue to spend at record rates with expenditures increasing from just below 5 trillion dollars in 1995 to around 7 trillion dollars in 2004. The fastest growing markets sectors were health goods and medical services (now a trillion dollar business) and education (that now constitutes more than 12% of all consumer spending). Also having significant growth are housing, hotels and restaurants, and transportation.

There is still growth anticipated in some of the key consumer goods. The following exhibit shows the growth in four consumer products:

Areas of rapid growth in consumer goods in the U.S. 1995-2005 (Per 100 Households)

	1995	2000	2005
Personal computers	33.5	51.8	56.5
Bicycles	39.3	40.7	44.3
CD Players	56.8	66.2	69.8
Dishwashers	43.8	50.5	57.2

For investors, the U.S. remains the world's broadest and deepest financial market, one that is well regulated but runs with few restrictions. It is the best place in the world to increase investment value through the use of capital markets

As you may recall from the opening of this Chapter, our Italian investor chose the U.S. for his corporate headquarters and manufacturing center in large part because he saw a greater opportunity for capital financing in the U.S. than in his own country or any other country in Europe where stock markets are still fairly limited and venture capitalists are few and far between.

Among the options available to him was the public sale of stock through many stock exchanges, including, in the U.S., three of the most sophisticated stock markets in the world. These are the New York Stock Exchange, "NYSE," the American Stock Exchange, "AMEX," and the National Association of Security Dealers Automated Quotations, "NASDAQ." In 2004, more than two billion shares were traded daily, with over half of all trade completed on the Internet. Stock ownership in 2004 soared to over 80 million people and about half of all US households held stock directly or through mutual funds.

In 2004, capital raised through public offerings approached $200 billion with the average stock increasing nearly 50% of its value on the first day. This allowed the individual owners of stock to generate substantial sums for business expansion.

In addition to the publicly held companies, the U.S. also remained the best place in the world to raise money for privately held companies. This is usually done by remaining a private company (that is, not listed on any exchange) and selling shares or providing convertible debentures to certain accredited investors. In the case of debentures, the holder of the debenture has lent a certain amount to the company but has the option of either being repaid or to convert the debenture into stock, subject to the terms of the debenture.

In order to keep control over this type of investment, the Securities and Exchange Commission (SEC) requires that they only be offered to certain more sophisticated investors, who are given extensive information about the company and the investment, and must meet certain thresholds of net worth (currently $1 million for a married couple).

Lawyers, accountants and financial managers often arrange investments by their wealthier clients into privately held companies. Additionally, every major city in the U.S. has a number of venture capital operations that manage portfolios for their investors in privately held companies seeking capital financing. Venture capitalists, who can be individuals or companies normally work with the riskiest investments and often require substantial positions in the companies in which they invest.

With the variety of capital sources available, more and more savvy foreign investors use a technique that allows them to use the U.S. capital markets to finance growth in their holdings in their own countries. This technique known as "flipping;" is undertaken by first establishing a U.S. subsidiary of the foreign parent company. After the U.S. subsidiary has achieved some success (say 10% of the total revenues of the company) the parent and the subsidiary are then "flipped" so that the U.S. subsidiary now becomes the parent corporation or holding company. Capital investments can then be made more easily and in larger amounts from U.S. sources.

Inmigration policies favor foreign investors and their families and employees

U.S. immigration laws and regulations, particularly in recent years, have been structured to encourage foreign investment by facilitating the immigration of the foreign investor and its employees and the families of the investors and their employees.

It is important to note that foreign investors, their families and employees are given special consideration with such alternatives as Lawful Permanent Residence Status (the so-called Green Card), and the Non-Immigrant Visa Categories (for example, Professionals, Multi-National Employees and Treaty Trader and Investors) that allow foreigners to live and work in the USA for long periods of time.

On May 30, 2001 the Immigration and Naturalization Service (now the U.S. Citizen and Immigration Services or USCIS) further opened the process by allowing some of the applicants for Nonimmigrant Visa categories to expedite their applications by paying the USCIS an extra

$1,000.00 per application. For these additional funds, the application gets processed in 15 days rather than the standard 60-75 days. When these rapid process periods are compared with the waits for other forms of immigration, such as family reunification, one can see the strong bias given to the investment community.

This section cannot be concluded without some mention of the attacks on the U.S. on September 11, 2001, also known or spoken as "Nine Eleven," and their impact on immigration. There is no question that tighter regulations and more strict enforcement of existing legislation has made it more difficult for international business travelers to visit the U.S. The number of business travelers to the U.S. fell ten percent in 2005 from the previous year and has created a burden on U.S. business. The Discover America Foundation estimates that because of the tighter entry requirements that U.S. business lost $31 billon in revenues between 2002 and 2004, with Europe and Canada being the greatest beneficiaries.

Since 2005, this has begun to turn around and it is now easier for international business visitors to enter the U.S. Since the September 11th attacks, the State Department has added 520 staffers to process visas and has worked to automate many of the procedures to decrease waiting time for visas. The American business community is continuing to put pressure on Washington to open up the country to international business visitors and U.S. immigration policy will continue to favor the needs of that community. So whether foreign investors are investing in the U.S. primarily to obtain a Visa or whether it is a nice additional benefit, they can be assured that with proper planning that they will be able to live and work in the U.S. as the result of their investment.

The educational system with its strong relationship with the business community continues to develop new technologies and excellent local workforce

Historically, the U.S. has been a world leader in the general belief that it is necessary to create access by many of its citizens to its system of higher education and, therefore, has created a large number of first-rate public universities. Students who do not perform well in secondary schools or who have limited funds are given access to higher education through community colleges at very minimal costs. The federal and state governments provide tax incentives and low cost loans to parents and students. In addition, the educational system provides many opportunities to attend schools oriented towards practical education in such key areas as medical assistants, electronics and computer programming that result in above average wages for their graduates. Students not ready for academic or technical programs upon graduation from secondary schools can still find specialized programs to learn basic skills. These programs often allow the poorer student to "catch up" with their peers and achieve educational goals that are virtually unavailable of in the European and Asian educational systems.

In addition to the USA's reputation for excellent private universities, the U.S. Congress decided over 150 years ago to provide each state with land and funding to establish public universities.

Today, every state has a major university and most have a number of satellite universities and/or State Colleges. A number of these state universities are now among the best in the world (University of Michigan, University of California-Berkeley and the University of North Carolina come to mind). The result today is that the U.S. has over 3,600 universities, colleges and community colleges serving over 15 million students, including over 500,000 foreign students. The State of California alone has more institutions of higher learning than any single country in Europe.

In 2005, approximately 60 million of the 296 million Americans were involved in education (including nearly 53 million students and over 7 million teachers and administrators). That year, educational expenditures exceeded $750 billion dollars. In 1998, more than eighty percent of all Americans over the age of 25 years had a high school diploma or higher. Nearly one-fourth of all Americans over the age of 25 years had at least a bachelor's degree. These rates tended to be higher in the Upper Midwest and Northeast and lower in the Deep South.

One of the great dilemmas in U.S. education is the difference between the quality of primary and secondary education on the one hand, and university education on the other. While U.S. institutions of higher learning, on a global basis, rank first in quantity and in the top two or three in quality, the performance of the primary and secondary schools has not been as successful. In a 1995 international assessment of 41 countries, twelfth graders from the U.S. performed substantially below global averages in general mathematical and science skills. However, this may be explained, in part, by the wider variety of courses offered at secondary schools (as compared with those in Europe and Asia) and the fact that many Americans students continue to have the opportunity to improve those skills in courses beyond the secondary level.

The alliance between both public and private American universities and the business community is strong and getting stronger. The U.S. has excellent professional schools and such industries as information technology and medical products and services use them to assist in developing new products and personnel. Every major university has now created a strong relationship with the business community through grants and endowments and the U.S. government is a major contributor to university research in defense, climate and space research.

Finally, this section on education would not be complete without a description of the impact of foreign students on the American educational system. In 2000, over 500,000 international students were enrolled in American universities and colleges, of which over seventy-five percent were from Europe and Asia.* This has become a major industry in the U.S. (statistics indicate that foreign students may have kept nearly 100 universities and colleges from closing during the 1990's.) International students have brought other benefits to the U.S., including the opportunity for Americans to become more "international" in their thinking, and for the American way of life to influence the attitudes of these students when they return to their home countries. U.S. education has influenced many of the best and brightest who become leaders in their own countries.

**After November 11, 2001, the attendance of foreign students in U.S. universities declined, particularly among students from the Middle East and Asia. Since 2004, the numbers have begun to increase again.*

Foreign investment laws are very liberal and there are few restrictions facing either individuals or companies

The U.S. has proven to be a very desirable place for investment by foreign individuals and companies. It is considered to be a nearly free environment that welcomes foreign investment and imposes few requirements other than those imposed on domestic investors. However, there are a few areas where foreign investment is not allowed (nuclear power and merchant marine) or severely restricted (airlines, ports and communications). Additionally, there are some restrictions on banking, mineral leases and timber rights, and continental shelf activities.

Overall, the federal government has developed a hands-off policy on foreign investment (both direct and portfolio), but it has moved to restrict investments based on three criteria: national security, foreign control of key industries and resources, and reciprocity. In the area of reciprocity, the idea is that foreign investors would not be allowed to invest in the same areas that would be restricted to U.S. investors in their countries. There are few restrictions on normal commercial trade and day-to-day activities with the citizens of most countries.

The greatest sources of investments have come traditionally from Canada, Japan, Germany, the Netherlands and the United Kingdom. Mexico, however, in recent years, has become a major source of investment in its neighbor to the north. In the Mexican case, the largest investments tend to be in the acquisition of large U.S. companies. Individual Mexicans tend to make real estate investments in the Southwest and in key resort areas.

Certain individual states have placed restrictions on foreign investments in a few key areas. Because the states have historically regulated land, many have adopted various levels of restrictions on agricultural land. Currently 31 of the 50 states have some form of restrictions on foreign ownership of land. These restrictions are either on the acquisition of state owned land; mineral rights on that land; limitations on the size of property that can be acquired; and the nature and type of the property (agricultural or fisheries). No state restricts ownership of commercial or residential property on private land.

Because the U.S. does not have an extensive network of trade agreements, it is best to approach the market directly

Before World War II, the U.S. was known for its "isolationist - go it alone" policies in regard to entering treaties with other nations. Today, the remnants of that thinking prevail in the American view of entry into common markets, economic unions and even free trade agreements. We think it is safe to say that for any time in the foreseeable future that the U.S. will not enter into

any type of common market, particularly one like the European Economic Community, where the participants have created common political entities and a common currency.

The U.S. is simply too large a market and too independent to tie its economic fortune to most forms of economic unions. It has been reluctant even to enter free trade agreements - creating them primarily in the Americas and with single countries like Israel, Jordan and Singapore. Faced with this reality, it is difficult to use a regional strategy to approach the U.S. market unless if it is structured around the NAFTA/CAFTA countries. Even in these cases, it is likely that the regional headquarters and the overwhelming proportion of the business will be with the U.S. Therefore, the U.S. is a place that often must be singled out as an independent area and approached as a stand-alone market and business strategy must be developed to take advantage of the unique aspects of doing business in the U.S. This book attempts to provide a roadmap toward reaching that goal.

→ The importance of contacts

A popular American expression posits "Its not what you know, but who you know." While Americans value education and knowledge, we also value relationships. Certain cultural traits illustrate how Americans value certain kinds of relationships more highly than others. First, despite the fact that most Americans are very friendly, they are generally difficult to get to know. Americans are likely to greet you in a friendly way and offer small kindnesses, but it is very difficult to get to become close friends as such friendships are developed from neighborhood relationship, and school friendship or from religious and/or social relationships.

Secondly, while Americans are strong supporters of the principles of democracy, the U.S. is really in many ways an elitist country, Americans will not tolerate royalty of any kind on our soil, but a relatively small number of families tend to control immense wealth. Additionally, U.S. headquartered businesses are very hierarchical and the difference in power and compensation between the CEO's and the average worker is growing rapidly. Social and business clubs that tend to dominate business in each major population center further maintains elitism.

Larger American companies often have organizations (often misnamed Public Relations) within them that serve, among other things, as a filter to discourage establishing meaningful contacts by serving as a bridge between the public and the company management. Additionally, these companies are often decentralized to the point that their procurement decision-maker(s) are not in top management or report to only one member of the management team.

Smaller American companies, and particularly those that are family owned, are often very hard to approach if you do not have the right contacts. Americans are taught that one major business doctrine is "caveat emptor" or "let the buyer beware." The general exaggeration of American

marketing also makes small businesses leery of any new contacts. This is particularly true if the contact is coming from outside our borders.

Yet it is possible to undertake business with American companies by first identifying the proper contact and finding a way to approach that contact in an acceptable way. This chapter deals with some ways in which meaningful contacts can be made with American companies of any size.

Start at home

The first place to look for connections to the U.S. market is in your home market. Consult with other companies who have experience with Americans to see if they can assist you in reaching your target market. Look for companies in complementary industries that may be selling to the same potential customers. In some cases, you may also be able to ask your competitors. Local chambers of commerce, social clubs and industry associations are excellent sources of information.

On a personal level look to see whether anyone in your community has lived in the U.S. Additionally, check to see if anyone has sent a child to America on an exchange program or hosted an American student in your community. If someone in your community has succeeded in building a strong relationship with an American family and/or company they would be an excellent source for both contacts and recommendations.

Be sure to check with the professionals in your home community. It is possible, for example, that your attorney and/or her firm are members of one of the international legal associations that refer clients back and forth, such as the International Lawyers Network, Lawyers Associated Worldwide, Multilaw, Lex Mundi, Terra Lex, and World Services Group that also includes bankers and other financial professionals. Check also with your accountants, bankers and other financial professionals to see if they have informal or formal relationships in the U.S.

American Chambers of Commerce (AmChams)

AmChams are independent, non-profit business organizations whose primary objective is to promote trade between their countries and the U.S. As such, they are often the first stop for Americans seeking to do business abroad and are also a valuable resource for locals who wish to do business with American individuals and companies. AmChams are generally located in the capital and other major cities. Membership tends to include a mixture of U.S. companies doing business in the country, local companies who serve or are served by American companies in the local market, and local companies who are already in or seek a presence in the U.S. market.

AmChams play a major role as links between the private sectors and the governments of both countries and are therefore effective in cutting government red tape and assuring the effective transfer of goods and services. Typical services provided by AmChams include:

– Matchmaking Service: AmChams will locate investors, exporters, importers, representatives and/or distributors in the home country or in the U.S.

– Company Search: Location and qualification of companies in the market that might be prospects for sale, purchase or representation of goods and services.

– Trade Fairs, Industrial Expos and Exhibits: Many AmChams have an information center that is used to organize and/or inform its members about trade fairs, industrial expos or exhibits that their members should either attend and where they may set up a display booth.

– Identification of Business Opportunities: Most AmChams maintain some sort of a research service (sometimes called T.O.S.S.—Trade Opportunity Search Service) that allows its members to advertise their interests in other countries such as the U.S.

Bi-National Chambers of Commerce

Often your national chamber of commerce has established branches abroad. Because the U.S. is the largest single market, it is often one of the first places where a branch is established. While most of the larger countries have branches in the U.S., you might be surprised to find that some of the smaller countries also have such branches (Luxembourg and Mauritius are good examples). The national chambers are often better places to start than the AmChams if you are seeking direct access to the U.S. market because they are more oriented to the needs of their nationals than to serving Americans.

A good example of a bi-national chamber is the German-American Chamber of Commerce, Inc. ("GACC") that is directly linked to the German Association of Industry and Commerce. Established in 1947, the GACC has moved from its original goal of seeking to attract U.S. capital into post-war Germany to an organization that offers a full spectrum of business services. Working out of New York City with branches in Philadelphia, Atlanta, Chicago, San Francisco and Seattle, GACC serves its members with such services as:

– Marketing Services including a Business Partner Management Program that helps German companies and individuals find the right customers and/or business partners.

– Tailor-made Market Studies to provide precise information regarding such things as the competitive position of your products and services in the U.S.

– Business Location Consultancy to assist the German company to determine where to locate by assessing good prospective locations and local incentives.

– Collection Service to assist German and American companies in collecting outstanding payments from each other.

International Chamber of Commerce (ICC)

While the ICC is not directly tied to U.S. business, it is an organization of which nearly all large American companies are members (along with a number of smaller U.S. companies). The ICC was founded in 1919 "...to serve world business by promoting trade and investment, open markets for goods and services, and the free flow of capital." The ICC serves as the voice of international business and has been effective in developing uniform codes and regulations that have been accepted (at least in part) by the major trading nations. Among these codes and regulations are:

– The ICC International Court of Arbitration.
– The Uniform Customs and Practice for Documentary Credits.
– Incoterms which are standard international trade definitions (for example, FOB, CIF) that are accepted in many global contracts.
– Codes for advertising and marketing.

In the creation and implementation of these codes and regulations, the ICC also works with national governments and the World Trade Organization. The ICC provides a number of practical services to its members in 130 countries through National Committees in 84 countries. The reader is advised that it might make sense to join one of these National Committees as a "local" member. In 2006, membership in such an organization cost 1500 Euros annually (3000 Euros for a "national" member). Membership in the ICC puts you in touch with diverse strategic contacts from some of the largest companies in the world to prominent law and accounting firms and other service providers such as freight forwarders. The ICC's website is www.iccwbo.org

Industry Associations

Virtually every industry has an international association with branches at the country level. These local branches should be one of the first places to start to determine its level of contacts with the U.S. association and how those contacts can help you make your decision on doing business in the U.S. In this section I will discuss two of these international business associations that are oriented towards the U.S. because the industry they represented either started in America or one in which the U.S. in one of the bigger global players.

International Counsel of Shopping Centers (ICSC)

Should you be considering establishing an American style shopping center in your home market or acquiring an interest in a shopping center in the U.S., the ICSC has a number of useful services. ICSC is a coalition of shopping center councils in the U.S., Canada and nearly 70

countries in Europe, Latin America, Asia and Oceania. Among its 44,000 members are developers, managers, marketing specialists, lenders, retailers and other professionals and public officials.

Among ICSC's services are the sponsorship of a variety of conferences and conventions that include such activities as "Deal Making" and "Idea Exchanges;" a government relations (lobbying and a political action committee) department in Washington, D.C.; an on-line service called www.ICSC.org which allows access to various databases and research reports; publications such as the Directory of Major Malls©; and insurance services. It is also possible to arrange educational study tours of shopping centers in various places.

International Franchise Association (IFA)

The IFA formed in 1960, now represents over 800 franchisors, 300 suppliers; and over 30,000 franchise members from most major countries. Anyone considering franchising should review its Answers To The 21 Most Commonly Asked Questions About Franchising. The IFA provides a number of the services offered by most large industry associations, including separate ongoing forums for franchise opportunities and a "Suppliers Business District." International activities are handled, in part, through The World Franchise Council (WFC) that includes approximately 40 member associations. The WFC has a number of annual conferences for its members in various world locations.

Of particular interest to members with international ambitions is the Go Global Community, an ongoing public forum that allows questions from IFA and non-IFA Members on franchise related subjects. Submitted questions are monitored and facilitated through a group of professional franchise lawyers and include such topics as:
– Determining the market for the franchise concept.
– Evaluating entry costs, sourcing issues and other potential barriers. Protecting trademarks and other intellectual property.
– Locating and qualifying franchisees.
– Franchise relationship issues (structuring, training and support). Franchising in certain countries.

Working with U.S. Government Sources

Government agencies designed to promote trade are often welcome resources for entrepreneurs seeking to do business with Americans. How helpful they are is usually dependent on what you are trying to accomplish. If you seek to represent U.S. companies in your home market or are interested in making a foreign investment in the U.S., then the U.S. federal government's Commercial Service and various state governments have numerous services available at a very low costs. If you are seeking to export your products to U.S. markets,

then they are considerably less helpful. In this case, you are more likely to obtain services from the export promotion agencies of your own government.

The U.S. Department of Commerce offers its Trade Opportunities Program (TOP) for those companies seeking to purchase or represent U.S. products overseas. Those interested in such opportunities should supply information to the U.S. commercial officers in the closest U.S. Embassy or Consulate. This information will be transmitted daily to the computer center in Washington, D.C., reviewed and immediately posted on the Commerce Department's Electronic Bulletin Board for U.S. companies to see. This is especially useful for companies who are putting products out for bid. To use this service effectively, it is helpful to know the specifications, quantities, end use and delivery dates of the type(s) of products you are seeking.

Additionally, the Department of Commerce provides a number of services for those traveling to the U.S. to seek business partners. Primary among these is the Gold Key Matching Services that for a small fee arranges one-on-one meetings with carefully selected potential business partners while visiting the U.S. The U.S. Commerce Service attempts to determine your needs and then match them with U.S. companies. In doing so, your company will meet with a trade specialist who will have completed a preliminary analysis of your needs and then attempt to match those needs by setting up between three to six meetings during your trip to the U.S. Additional assistance is available to help with travel, accommodations, professional, interpreter and clerical services while you are in the U.S. In some cases, local Commercial Service employees will accompany you to your meetings, and in some large U.S. cities, even temporary office services are provided.

Similar services are often provided on the state level. Virtually all states have some services available for those who seek their products and services or who seek to invest in the local economies. These services are usually found in the Department of Commerce or a Department of Economic Development. In some cases these departments have distinct trade offices, and some have operations in key foreign locations that are deemed more critical to the local economy. For example, the State of Washington has operations in Asia, while Arizona and Texas tend to concentrate on Mexico and the other countries of Latin America. Additionally, almost all U.S. states are willing to assist, sometimes even with tax and other benefits, those foreign individuals and companies who are willing to invest in the local economy.

Binational Cultural Associations

Very often a good entree into the U.S. is through the many national cultural associations. The United States, as "the great melting pot" has many "binational" associations such as the German-American Foundation as well as many friendship associations. These organizations are created to preserve and protect that country's nationality in the U.S. context. As such, their functions are more often educational and cultural but, nevertheless, they are also good sources of business contacts.

One example of this is The American Turkish Society that has a separate section for "Business Services" and a corporate membership category. Corporate members include many of the key businesses in the U.S. owned or run by Turkish-Americans and a good cross section of Turkish companies involved in international trade. Two benefits of corporate membership are the sharing of business information about the two markets and the opportunity to network with other businesses active in each other's country.

The National Association of Japanese-American Societies, Inc., ("NAJAS") offers even more elaborate business services. NAJAS is an association of 40 independently Japan-related organizations located in 32 cities around the USA. NAJAS offers over 800 public programs each year, of which over 500 are designated as corporate programs. Among its services is The Corporate Forum that conducts many of the corporate programs and provides a structure for senior level U.S. and Japanese executives to meet to address issues of mutual interest. Of additional interest is the opportunity to connect with the locally based Japanese-American Societies that can often be useful in providing information in deciding where to locate U.S. oriented investments.

→ Working successfully with Americans

A prominent physician from Brazil recently attended a medical conference in Atlanta. An American physician looked carefully at her badge and wanted to introduce himself. He approached her and said: "How do you do?" The Brazilian answered in her best English, "I am OK but a little bit tired because my flight from Sao Paulo was late in arriving." The American then said "I hope you feel better," handed her his business card and moved on to speak with someone else.

The Brazilian was puzzled. What she failed to realize was that, to most Americans, the expression "How do you do?" is merely a pleasantry. The questioner was probably not interested in her well being but rather merely expressing a politeness because she was physically near him or, he made this inquiry in order to begin a more general discussion. When the Brazilian commented on her feelings in some detail, the American doctor decided he was more comfortable to move on to speak to someone else. A more typical response to the American would have been "I'm fine, how are you?" to which, the American would have likely responded, "I'm fine" and proceeded with the conversation.

In this chapter we will provide a brief summary of the characteristics and values that are common to most Americans and important to business and social situations. Instrumental among these characteristics are directness, openness, self-reliance and independence. Before delving into these characteristics, a brief caveat is in order. While the U.S. has a unique and distinctive culture, this culture is as diverse as Americans are. Therefore be sure that you

understand that the information provided here contains stereotypes that might not apply to individual case(s).

Cultural Diversity

One theory used to explain a national culture for the U.S. is the "frontier thesis". This thesis posits that the vast amounts of space available to Americans is what determined their optimism, independence and self-reliance. So long as Americans had the ability to encounter wide-open spaces, they could be free to accomplish almost anything. So ingrained was this version of America that in the 1960's President John F. Kennedy spoke of the new space program as "The New Frontier." Even today Americans, in their value of open space, seek the suburbs and the special freedom of small towns. However, the frontier thesis is only a partial explanation of U.S. national character.

America is often described as a "melting pot" of numerous cultures that come together to create a society that maintains a base set of principles while developing patience and acceptance of other approaches to life. The United States started with a base of British and indigenous cultures and then, over the years, became a mixture of many cultures each with its own unique characteristics. This country has experienced massive waves of immigration tended to come from particular areas and tended to be a generation apart.

One wave was from Germany in the 1840's, followed by an Irish wave in the 1860's and an Eastern European wave in the 1880's. In each case, the first generation of these nationalities born on American soil moved partially away from its native culture to adopt many of the key elements of American culture. In the twentieth century, immigration has come less from Europe and more from Asia and Latin America. Today the U.S. receives more immigrants than any other country; in fact, one-tenth of all legal immigrants in the world end up in Los Angeles County, California.

What results is a mixed common culture based on fundamental principles brought by the British, including a modified republican system of government, followed by a series of unique cultures representing different cultural and ethnic groups. So the Korean-American merchant in Los Angeles, California largely agrees with the fundamentals of American life with the Somali family of Minneapolis, Minnesota although their day-to-day life, as dictated by their culture and religion, may be very different.

Commercial Standardization

When one travels throughout America, one will find many similarities in how commerce and trade are conducted. Your can walk into a Target store (a Minnesota based competitor to Wal-Mart) anywhere in the U.S. and find the physical layout of the departments (clothing, toys etc.) identical to the layout of any Target store in the country. However, Target stores in Minnesota,

because of its harsh climate, may carry more heavy clothing and mosquito repellent; in Arizona, because of its intense sun and its proximity to the Mexican border, Target stores carry more sun shade and Mexican themed items.

Critical to understanding of why commercial trade is conducted as it is, marketing principles and consumer surveys indicate the need for customer product standardization. For example, an American customer will know where to find the milk at any convenience store in the U.S. - it is always located in the rear of the store, because marketing principles dictate that the customer coming in for only milk is far more likely to purchase something else as they walk through the entire store. So if you seek to market your products or services on a national level, you may wish to focus on similarities rather than regional differences.

Operating within the U.S. Business Culture

In this section we will examine specific "do's and don'ts" of operating within the U. S. business culture. Included will be discussions on timelessness in making and keeping appointments; the importance of the written word; how to interpret questions and answers; and proper behavior at meetings.

Timeliness: Appointments and Deadlines

Despite their outward friendliness, many Americans do not grant appointments easily. Appointments are more likely to be granted only when there is an immediately perceived benefit to the meeting. It is absolutely critical to be on time for appointments. Lateness is viewed as disrespectful and rude behavior. Timeliness is normally considered to mean arriving from five to fifteen minutes early with the understanding that it is unlikely that the appointment will start earlier than the designated time. Lateness up to ten minutes is normally accepted. If you know you will be more than ten minutes late, you should call and notify your host. If this measure is not taken, it is very unlikely that you will receive another appointment.

In large cities and other areas where traffic is unpredictable, it is often wise to arrive very early and find a place to sit near the building for the appointment (perhaps a coffee shop or park bench), then enter the building ten minutes before the appointed time. Remember these rules apply only to the one seeking the appointment. If the person with whom you have the appointment is running late or otherwise interrupted, you will have to wait - although often the person will come out of their office to tell you that she will be late, indicate an approximate waiting time and apologize for the delay.

Finally, in the U.S., it is very important to meet deadlines. If you promise your proposal by a certain date, then Americans will expect it on that date. Since most Americans (at least initially) take people at their word, people who miss deadlines are often viewed as undependable.

The Importance of the Written Word

Americans place a very high value on the written word. For example, business cards are valued as sources for future communication and Americans expect that the card will include all contact information. Business cards containing just your name are normally discarded. However, in the U.S., business cards also tend to reflect the casualness and outwardly friendly nature of the people. For example, although my given name is Lawrence, a business card designed for the U.S. market might read:

Lawrence "Larry" Koslow

Yet a card designed for Europe or Asia might say:

Dr. Lawrence E. Koslow
or
Lawrence E. Koslow, Ph.D.; J.D.

In all written correspondence, it is critical to accurately spell the name and title of the person you are addressing. If you are unsure of the proper spellings or titles, it is wise to contact the addressee's secretary or assistant and obtain them.

If you are able to reach an agreement with an American company, they will expect long and detailed documents. Often the most important points in the agreements are in the "fine print", that is in the smaller type that defines specific terms and conditions. American executives will never sign an agreement without consulting their lawyer and neither should you- particularly if the agreement is to be governed by the law of an American state.

Interpreting Questions and Answers

Americans are direct and they appreciate directness. "Yes" almost always means "yes," but does not necessarily cover the nuances of the agreement - that is "Yes, I will do the deal," does not also necessarily mean, "I accept your terms and conditions." However, "no" almost always means an unequivocal "no," and the famous American expression is "What about no don't you understand?" "Maybe" or "perhaps" are more positive terms in the American context than they might be elsewhere in the world. These expressions do not mean "no" but indicate less than a 50-50% chance of a "yes". However, a point met by "maybe" or "perhaps" might be negotiated in your favor in exchange for something the American wants.

Proper Meeting Behavior

In America most meetings start on time and are expected to last for a pre-specified period. Meetings tend to be highly organized and often have written agendas that are distributed before the meeting. While meeting preparation may be highly organized and formal, behavior during most meetings tend to be informal. Everyone is expected to participate and a quiet person is often viewed as having nothing to contribute. Therefore, you will frequently see some participants speak on matters of limited importance, simply to be heard.

Meetings are expected to accomplish something and are not considered successful unless something concrete and specific is decided. Meetings are often concluded by outlining an action plan and by establishing the next steps to be taken by the parties. Minutes are often kept and shared by all sides in the negotiation. In the U.S., issues are far more likely to be decided in large or general meetings compared to other cultures where private individual meetings are more important.

How Americans Negotiate: Time is Money

In this brief section we will review some of the key factors you need to know if you are involved in negotiations with Americans and/or American companies. The first thing to keep in mind is that the goal of negotiations is to arrive at a particular agreement and not to establish long-term relations. The immediate deal may be the only important issue, and therefore Americans are often quite happy to negotiate over the phone or by email because many Americans do not perceive the need to establish personal contact to make a deal.

Negotiations with Americans are often rushed and hectic. Negotiations often begin with unreasonable positions by the American side because they perceive the need to bargain and expect to concede many points "to get the deal done." Yet as previously stated, "time is money" to Americans and therefore they will want to complete negotiations in a short time frame. Given the combination of speed of American negotiations and the number of issues open for discussion, often the best approach you can take to the negotiation is silence, since continued silence (or non-responsiveness to the particular issues while maintaining a friendly posture) is likely to encourage the Americans to make proposals increasingly in your favor in the interest of saving time. Alternatively, if pressured, begin at a position that you perceive as unreasonable and wait for the Americans to rapidly negotiate towards a middle position.

Negotiating teams might be large or small, but, in either case, it is usually easy to identify the negotiation leader who has complete authority to make key decisions. This is largely true even when the negotiation takes place in your country or a neutral site. Single-person team leadership is viewed both as efficient and as reflecting the hierarchical order of American corporate life. In fact, American corporations value executives who can make commitments at their own discretion, without needing to consult or be concerned by how their decisions will be

received at corporate headquarters. Once this individual is identified, it is also useful to identify who in the group has an advisory function, and those who are part of the negotiation team for other reasons.

Finally, negotiating with Americans often leads to frustration because sessions often end with only broad decisions being made, and thereby leaving the unresolved details to the bureaucrats and lawyers. As stated previously, Americans will normally demand long legal agreements containing significant information in the "small print." This "small print" may relate to such critical issues as warranties, additional charges, risk of loss, availability of spare parts, and the degree to which service is available and at what cost. Remember, America is a nation of law and lawyers, so make sure that the final negotiations contains a thorough legal review of all attached documents.

Before beginning negotiations with Americans, the international business traveler is well advised to read Roger Fisher, William Ury, and Bruce Patton's Getting To Yes: Negotiating Agreement Without Giving In. The paperback edition costs around US$15 and it is short and simple enough to be easily read on your flight to the U.S.

A Basic Primer of American Social Graces

With regard to business relationships, while Americans tend to be more interested in short-term business success than in long term social relationships, it is nevertheless important to understand some of the key social situations you are likely to encounter and what constitutes acceptable behavior.

Americans often invite visiting associates or customers for a meal. If the invitation is for the persons home be sure that you formally respond either in person, by phone, or if the invitation is for a date several weeks away, by card or note. It does not hurt people's feelings if you respond that you are unable to attend, but it is considered an insult if you do not respond at all. Do not be late for a dinner party and do not be early! Arrive within five to fifteen minutes after the time stated on the invitation. If you are going to be over fifteen minutes late, telephone the host to apologize.

If you are invited to someone's home for dinner, flowers or potted plants are appropriate gifts to present to your host. A florist can assist you to select the appropriate arrangement. Other acceptable gifts are candy, a fruit basket, wine (check to see whether the host drinks or would allow alcohol to be served), a book or a small household gift. Americans also appreciate gifts from abroad especially local crafts and local versions of the gifts mentioned above. However, make sure that gifts can be accepted, for example some government employees are restricted from accepting gifts. After the event, it is polite to send a thank you note but this is not absolutely required, especially if you will see your hosts again and can thank them in person.
Americans often conduct business during meals; it is not uncommon to conduct business in a separate reserved room in a restaurant; while some socializing may take place, the conversation

will almost invariably turn to business. Keep in mind that the aim of such a meal is often to conduct business rather than to socialize and enjoy the meal. Americans tend to eat quickly in such situations and a meal scheduled for more than one hour is unusual (unless an additional program is scheduled). Nevertheless, the guest is often honored with a speech from the hosts, and is expected to offer a toast in return.

While Americans tend to wear casual attire, at least in the first meeting, it is best to dress formally and conservatively. The manner of dress in American business is often controlled by the current fad or fashion. During the 1990's casual dress was in style. This tendency has shifted in the early part of the 21st century. The definition of appropriate business attire also depends on the region of the country with a casual style dress being more in focus in California's "Silicon Valley," while conservative dress is normally the mode in the financial centers of America's large cities. However, even in the most conservative bank or law firm you may still find the practice of "casual Friday," where it is accepted for employees to come to work in casual attire. People also tend to dress more casually in the warm weather regions and during the summer. Finally, when traveling in the U. S., remember that smoking has become very unpopular. Only about 20-25% of adults smoke and that rate continues to decline. If you are a smoker, be sure to ask for a smoking room in your hotel. Smoking in public places has been banned, including in airports and stadiums, restaurants and even some bars do not allow smoking of any kind. Just remember, never light up unless you are in an appropriate area and you have asked and received the permission of all around you!!

Women in America

To complete this chapter on working successfully with Americans, it is important to discuss the role of women in American society. While employment compensation in the U.S. has not yet equalized between men and women, we must understand that women play a significant role in all aspects of American life. Women now run an increasing number of top corporations and virtually every major corporation has a number of women on its board of directors. While still below the percentages of other nations, the number of women governors has increased in the U.S., as has the number of women found in the state and national legislatures. The majority of law students have been women for some time and a large percentage of the students in nearly all professional schools are women.

The single most important piece of advice that I can give is to never assume that a woman is in a subordinate position. Such an assumption, especially if incorrect, could very well cost you the business. Also keep in mind, that American women often reject "special assistance" offered because of their gender, and do not assume that a woman needs more help or time than their male counterpart.

It is safe to assume that the women you meet are sure that they can do anything a man can do. Women also pride themselves on their ability to work outside the home while continuing to be

the primary caregiver to their family. The majority of women with children in the U.S. do, in fact, work outside the home.

Another important issue in interacting with American women in an appropriate manner in a business situation relates to touching. Do not touch women in a business setting except to shake hands. This is particularly difficult for both men and women from cultures where hugs and quick kisses on the cheek are the norm. Hugging and kissing are best kept to social situations- and even then, permissible only after you have known the woman for some time.

It is important to know how to best address a women. It is safest to address woman as "Ms". (Pronounced "Mizz" and followed by her last name) unless she tells you to call her "Mrs." or "Miss". Some American women do not take their husband's surname and some hyphenate their names e.g. Mary Smith - Jones. In this hyphenated name, Smith is the women's maiden name and Jones is her husband's surname. Be sure to ask permission before you call a woman by her first name (although this is normally acceptable).

Finally, more and more American companies are finding significant advantages in employing women to deal with international customers and contracts. Women, in general, tend to be more sensitive to cultural differences and are more willing to build relationships along with the business. As American companies become more global in orientation, more women will become chief negotiators of the international business team, yet another reason why understanding how to interact appropriately with American women is well worth doing.

→ Business Inmigration Strategies

To many, one of the great advantages of doing business with the United States is the opportunity to live and to obtain lucrative employment in this country. While simply visiting the country for marketing trips or to monitor financial investments allows you to "regularize" your immigration status by obtaining one of the B Visas (the "B" is one visa in the nonresident category), investment in U.S. companies and/or property or setting up subsidiaries and affiliates in the U.S. may actually allow you to obtain the right to earn your living and establish long-term residence in this country (through a resident visa). In some cases, your business-related activities may allow you to eventually claim permanent residence and, if desired, citizenship.

Introduction: U.S. Inmigration Policy

One purpose of the Immigration and Naturalization Service (INS), which on March 1, 2003 became part of the Department of Homeland Security, is to provide access to the country in an orderly fashion for persons in transit, persons wishing to visit, or persons wishing to become U.S. residents. The Service and Benefits division of the U.S. Citizenship and Immigration

Service (USCIS) is responsible for those functions. In general, the objectives of U.S. immigration policy are to provide, on the one hand, for family reunification (not covered in this chapter), and, on the other hand, to allow for the entry of people who can contribute to the growth and well-being of the country. This provides for the entry of talented persons and professionals, such as medical personnel, talented athletes and university professors. However, it also covers those who are willing to make a financial and technological contribution to the economic well being of the nation.

The events of September 11, 2001, resulted in a change of approach for the INS that makes it somewhat more difficult than in the past to obtain any type of visa particularly for those from countries with large Moslem populations. Student visas from non-Moslem areas in Europe and Asia that were normally issued in days or a few weeks now take months. This has caused many American universities to lose students to universities in Canada, Australia and other English speaking countries that offer American style programs. One of the most unfortunate aspects of this delay is its impact on U.S. higher education. In 2001, more than 500,000 foreign students were studying at American universities and colleges. In some cases, it was these foreign students who kept economically marginal universities and colleges afloat. Since the changes in immigration policies, nearly all institutions of higher learning have had to tighten their belts and this has tended to make it more expensive for the American students. While foreign student enrollment has begun to increase again in 2004, by 2006 it has only attained the levels it was at prior to September 11, 2001.

Before you begin your move to attain resident status in the U.S., it is necessary to enlist a trained attorney to assist you with the process. The immigration process is cumbersome and often when you call USCIS, you will receive either a busy signal or a recorded message. The visa numbers are confusing and information required for the visa is often difficult to assemble without the checklists and counsel provided by the attorney. The USCIS fee structure is also confusing as there are multiple fees for the same service (depending on embassy locations or fees for expedited services—which are highly recommended). Finally, although attorneys are not inexpensive, the fees for some of the less complex visas (L's for example) may be about the same as the cost of a business-class ticket from your home country. These various factors warrant investment in the services of good counsel. See Chapter 7 for an analysis of the considerations in choosing a good attorney.

Because of the business nature of this book, we will first concentrate on the provisions of U.S. immigration policy that provide the temporary right to work in the United States. By "work" we mean both traditional employment and the work of managing your investments. Then we will concentrate on how to convert these temporary visas to permanent visas (generally known as "the green cards", although they are mostly pink in color); and on the possibility of taking the business oriented road to citizenship. Briefly covered at the end of this chapter is the diversity lottery that has been offered now for over 15 years. Here we will touch on "E-visas" and "L-visas" as they impact investors and their key employees. It will not discuss "H-visas" in any

depth because U.S. companies use them to obtain foreign talent while foreign investors rarely do. Additionally, little will be said about the B-visas, as they are short-term, do not allow direct compensation from the U.S. company, and are relatively easy to obtain.

Temporary Working Visas: Investment and Business Visas

Temporary working visas for business persons and investors fall into two categories. The first are the "L-visas", also known as inter-company transfers visas. This visa is often used by U.S. companies and foreign-owned U.S. subsidiaries to bring in employees to work in the U.S. The "L-visas" may be very helpful to the new investor to the U.S. who seeks to work at the new U.S. company and to enable other critical employees come to the U.S. to initially set up and run the company.

The type of visa you apply for will largely depend on your distinct business and investment needs. If you own, control or are a principal in a business in your home country and want to establish a branch office, affiliated company or full subsidiary in the U.S., you probably would be best off with the L-Visa because it is relatively easy to obtain USCIS approval for a one-year start up of the business (with extensions up to seven years) and you would be able to work for compensation at your U.S. company. Additionally, the L-Visa can be used to send other employees to the U.S. as long as they have worked for you, outside the U.S., for one year or more.

While the L-1 visa was designed to permit U.S. and foreign multinational corporations to assign managerial staff to their U.S. offices, small businesses may also take advantage of the visa. As you will see in the discussion of the E-Visas that follows, any foreign business that wishes to establish a branch, affiliate or subsidiary in the U.S. that will eventually have three of more employees and revenues in excess of $500,000.00 can take advantage of the L-1A Visa.

The second category is the "E-visa." E-visa holders may work only for themselves (with an investment approved by USCIS) for E-visa enterprises. E-visas, are generally granted in five-year increments and include the spouse and dependent children (although the dependent children of E-visa holders lose their status when they turn 21 years of age). E-visa holders and their dependents may study in the U.S. and do not have to live in the U.S. for a particular period of time. They may also arrange, with proper tax advice, for certain tax exemptions.

The E-visas have two additional requirements: some level of investment must be made in the U.S., and eligibility is limited to investors from certain countries. With regard to the level of financial investment, the USCIS has not established a fixed amount for either type of E-visa and they will determine the amount in relation to the type of business. For example, a retail outlet will likely require more financial investment than a service business. E-1's generally require a lower level of investment than E-2's but, in either case, the applicant must demonstrate that he or she has enough capital available to sustain the business for a given time period. For both visas, USD $200,000 seems to be the minimum investment accepted by the USCIS. The E-2

visa requires the applicant to demonstrate to the USCIS that he/she intend to employ a minimum of three persons and that its revenues will exceed USD$500,000 per year. At least 50% of the capital invested must come from the treaty country of which the investor is a citizen.

Permanent Resident in the U.S.: converting the E and L visas

At the appropriate time, many investors desire to change their status from temporary to permanent, and at that point they begin the process of obtaining the green card. The green card can last forever and permits one virtually all the benefits of living in the U.S. except those designated for citizens only (such as voting and jury duty). Practically, this makes the green card the best of all the alternatives for those who wish to have the right to change places of employment or to work for their own businesses. For many, this is the perfect situation because it allows them to maintain their original citizenship and passport. The spouse and dependents (under 21 years of age) of green card holders can receive green cards that are valid the rest of their lives. However, green card holders are subject to U.S. taxation on their worldwide income and must make the U.S. their permanent residence.

Of the investor-related visas the L is the easiest to convert to a green card. This conversion is often done even if the individual does not plan to remain in the U.S. because it grants the benefits of the permanent resident to their spouses and children meaning that they can work in the U.S. and attend state supported colleges and universities as local residents. Additionally, the holder of permanent residence status is free to take other employment or start other businesses.

Initially, granted for one year, the L visa must be converted to a three-year visa after the first year. The three-year visa gives the applicant the time to go through the green card application process. The essential criteria necessary for the conversion are:

– The applicant for permanent residence must have served as a manager of the foreign company for at least one year (in some cases up to three years) prior to the transfer as an L-1 to the U.S.; and

– The U.S. subsidiary must have at least 50% of its common stock controlled by the foreign company.

E-visas can be extended for as long as the visa holder has the investment but are more difficult to convert to permanent residence unless a substantial U.S. business has already been built. Most often this conversion is sought if the spouse wishes to work or if the children are approaching majority age (21 years) and will thus lose their status under the E visa category. To be eligible for conversion to permanent residence, E-visa holders must establish a level of investment and economic activity similar to the EB-5 visa that will be discussed below ($500,000 to $1,000,000 committed investment and employment of five to ten U.S. citizens or permanent residents).

Two other visas strategies for obtaining permanent residence

Two other methods for obtaining permanent residence deserve to be mentioned. These are the EB-5 Visa - generally known as "the million dollar green card" that makes available an additional 10,000 visas a year, and the annual diversity lottery that adds an additional 50,000 visas per year.

The EB-5 visa carries many of the same requirements that an E-visa holder would need to meet to obtain a green card. What is different is that the EB-5 is oriented toward an investment yet to be made or in the early process of being made. To obtain an EB-5, the applicant must demonstrate that the investment will benefi t the U.S. economy and create a requisite number of full-time jobs for U.S. citizens and permanent residents within the United States. The expression "million dollar green card" refers to the requirement to invest at least one million dollars in the United States. and to hire at least ten people. The amount required could be reduced to as little as five hundred thousand dollars and five jobs if the money will be invested in a high unemployment or rural area identified by the government, or if it is invested in a "troubled" existing U.S. business approved by the USCIS.

Very few EB-5 visas are ever issued because of the scrutiny applied to the applicants. I represented a highly reputable investor that had worked hard and made his money honestly. His investment was to be considerably more than the minimum required and he was going to create about thirty jobs. In order to transfer funds from Italy for his new business, we had to wait a considerable time while the U.S. government undertook an in-depth analysis to ensure that the funds did not come from organized crime and were not "laundered" in any other way. Additionally, his business was heavily monitored to ensure that it continued to provide the investment and jobs that were promised in the application. Because of the difficulty of compliance with EB-5 regulations, such as illustrated in this case, most investors prefer to go the route of the other E and L visas.

On the other side of the spectrum is the annual Diversity Immigrant Visa Program or - as it is more commonly known - "the green card lottery." The purpose of the program is to allow for people to come to the U.S. as permanent residents from countries from which immigration to the U.S. has been historically low. Begun in the late 1980's, the program was originally oriented to allow for more Irish immigrants but now it is available for citizens of countries that have sent less than 50,000 (legal) immigrants to the U.S. in the past five years. Each year the program offers 50,000 immigrant visas. If you are a winner, the program allows you to bring your spouse and all children under the age of 21 to the U.S.

The only application requirements are that you can prove birth in a eligible country, (either where you were born; or a country where both your parents were born) and can meet the educational requirements (either the equivalent of a U.S. high school degree or two years

working in a profession that requires at least two years training).

Applications for the lottery are free though the National Visa Center and can be completed on behalf of the applicant by any third party. Many immigration law firms will serve as your agent and file on your behalf for a $25 to $100 fee. They hope that you win and then employ their services to process your permanent residence application, or you will lose and then use them to apply for some other visa. The countries eligible each year change (depending on the number of legal immigrants entering into the U.S. in past years) but for the 2007 Lottery all countries were eligible except for:

– Canada
– People's Republic of China. Hong Kong, Macao and Taiwan are eligible. Colombia
– Dominican Republic
– El Salvador
– Great Britain. Ireland and Northern Ireland are eligible. Haiti
– India
– Jamaica
– Mexico
– Pakistan
– Philippines
– Russian Federation
– South Korea
– Vietnam

Despite the fact that winning the Diversity Lottery is a long shot, more than 900,000 immigrants have used the lottery to obtain permanent residence. Therefore, if you are from a qualifying country, you are well advised to enter the lottery as part of your general immigration strategy.

→ Marketing and sales to the U.S.

The United States of America with only five percent of the world's population consumes about twenty percent of the world's production. Besides being the world's biggest single national market, it is relatively accessible to foreign business. While both explicit and hidden trade barriers exist, it is not those barriers that will keep you from being successful in the market, but the difficulty in seeking out and meeting potential customers. There are, however, many effective ways to market and sell to the U.S. and in this chapter we will discuss some of them. We will begin by offering some tips on preparing for the market and on how to find and meet with potential customers and/or marketing channel organizations such as agents and distributors. We will then look at how to market to the U.S. directly from your home base. Next, we will explore how to enter the market through the use of intermediaries such as original

equipment manufacturers (OEMs), agents and distributors. Finally, we will look at what is necessary to establish your own marketing and sales organization in the U.S.

Preparing for U.S. market

Given the nature of the U.S. market, it is a good idea to take some preliminary steps before attempting entry. The first of these is to develop what Americans know as a clearly articulated "value position." A value position is a vision of what you are selling, why it is an excellent value and why is your product or service is different than your competitors. The value position will be different for different products and markets. Your first step will be to locate and research potential target markets with a need or desire for your product or service. For example, if your products are not at the low end in price, you will need to stress why they are of higher value and describe why this is the case (e.g. because they offer superior performance and/or because they are more cost effective in the long run because of their higher quality and lower repair costs.) Your brand, and the experience customers will have with your product or service, will form the foundation for developing your value proposition.

You should also expect to make some investment upfront to protect your intellectual property. If your products are patented in your home country, find out whether it is still possible to patent them in the U.S., and if so, hire a patent law firm and begin the process. While this can be avoided in smaller markets, it is absolutely essential in the U.S.! If your products are based on trade secrets, make sure you take steps to protect those trade secrets in the U.S. The same applies to trademarks and service marks, which can be registered quickly, by your company or any attorney at minimal cost.

Make sure you understand the regulatory issues you will have to face before selling in the U.S. For example, imports into the U.S. could be subject to regulation or exclusion. Reasons for either include product types (e.g. cigars from Cuba and products made with slave labor are prohibited); import restrictions or quotas based on country of origin; specialized product requirements (e.g. product labeling, marking or packaging); and country of origin marking requirements. (All imported products must be marked in a prominent place, "Made in country that applies'.")

Targeting

While the U.S. is the largest single national market there are significant differences among customers based on a variety of factors such as geography, type of business, and demographics. Targeting is the process of developing marketing programs and advertising campaigns directed toward identified business segments or specific targets.

The first key step is to determine to whom you will sell. Below we will discuss the key differences in selling to consumers and businesses. Also determine whether you will sell to a different type

of customer in the U.S. than you do in your home country. For example, while you may sell directly to the user in your home country using employee salespersons, in the U.S. you may decide instead to use distributors, meaning that your products will be sold to an intermediary for resale.

Business to Business (B2B)

The business-to-business market is where the vast majority of products and services are sold. One of the benefits of targeting B2B is sheer volume. An individual customer may visit a clothing manufacturer's website and/or a catalog and order two pairs of shoes or a sweater. The buyer for a national chain of clothing stores, however, may order 5,000 pairs of shoes and 2,000 sweaters. This is why many companies provide for both B2B and B2C offerings through their websites and other outlets.

With the growth in electronic communications, B2B has taken on even more importance. Modern corporations now conduct all types of transactions online. B2B communications are now common means used to promote investment, trade stocks and form financial alliances. Because the price of these transactions is far beyond the reach of most individuals, there is no equivalent business-to-consumer option available. Some B2B transactions handled electronically can run into the billions of dollars.

Business to Consumer (B2C)

The business to consumer market can be complex depending on the product or service you want to introduce. It is not uncommon to first target a single region of the country. This approach often does not work, because even though understanding the demographics of your target customers is critical, it is even more important to gain an understanding of their "psychographics", (their values, expectations, brand perceptions, etc.) As such, B2C websites are often only successful for items that are commonly sold on the Internet regardless of customer location.

Branding

Branding is the process of building a favorable image for a product or company that differentiates it in the minds of customers and prospects from your competitors. It is a traditional advertising method used to create a response from a target audience based on cumulative impressions and positive reinforcement. The purpose of branding is not solely to make a sale, but to increase product recognition and company awareness and to serve and cultivate long-term customers. Branding is more complicated than it first appears: it is more complex than simply finding a clever name for something.

Here are some ideas for developing a strong and effective brand message:

– Create a plan to ensure that every customer experience reinforces the brand promise.

– Study your target industry, concentrate on the marketplace needs you are uniquely positioned to fill, and develop brands that showcase your added value. Ask yourself what are the strengths and weaknesses of your brand? How can you capitalize on your strengths and improve upon your weaknesses? How should you promote your brand so that it resonates with a changing marketplace of prospects and buyers? Do you need to adjust your brand message for a new market?

– Focus resources on beginning-to-end planning. As part of your marketing effort, examine how your brand will change from product introduction to obsolescence.

In summary, deciding on a target market, creating a differentiated value proposition, developing a strong brand and messaging are all strategies that must be developed in order to enter the U.S. market. This is true whether you choose to enter the market directly or through a third party.

Entering the U.S. market: direct marketing from your home base

This section deals with how your company outside the U.S. can market directly to the U.S. without a U.S. - based intermediary, such as an agent, distributor, OEM or franchise, and without creating a separate company or subsidiary in the United States. Also discussed is how to target the market through various B2B and/or B2C methods and the Internet. Even if this is not your initial approach to the market, you should review this material because you will need to apply many of the strategies described here regardless of what approach to the market you ultimately decide to take.

Preparing to tackle the U.S. market will require substantial time, thought and planning, for both B2B and B2C markets. The good news is that this need not be cost prohibitive. In B2C markets, selling through the Internet is a viable alternative to target customers as long as they are active users of the Internet and use it to make purchases. Your company will need to invest in marketing and advertising tactics to create awareness of your brand, site and value proposition. If this does not work on the Internet, your company's best first entry into the B2C market may be through an intermediary or partner in order to maximize your investment.

Creating a viable B2B strategy is one of the best ways to initially approach the U.S. market because it provides a direct approach to potentially all types of business customers. Expensive advertising campaigns do not make sense for finding initial markets and partners: they are most effectively employed when your marketing and sales forces are already in place and when you seek to strengthen the identifi cation of your products and services. You are better off establishing an appropriate email address, good websites, brochures and sales letters and then using trade shows and such organizations as the American Importers Association as your entry vehicles.

A good way to initially enter the U.S. market is to create a reliable and secure list of email addresses. For those exporting to the U.S., the American Importers Association recommends the creation of three email addresses structured as such; those being:

– Sales@companyname;
– Exports@companyname;
– Services@companyname .

These formats indicate to the buyer the destination of their order or requests and will improve the chances that potential buyers will take you company seriously.

It is not recommended to use a free email service (such as yahoo or hotmail). Potential customers are not likely to take such an address seriously and many will not use it because of their concerns about vulnerability to viruses.

Well-designed websites are essential to all businesses involved in international trade. In my businesses - legal and international business consulting - websites themselves rarely lead to new business. However, they are effective at showing the potential customers what you can do, whom you have served in the past, and how you define your services. On the other hand, some are companies are designed exclusively to do business on their websites. Amazon.com and ebay.com are probably the most famous, but there are thousands of websites that represent the entire marketing and sales efforts of their companies. Our family, for example, purchases some products for our pets from a website in Australia. Additionally, many websites attempt to attract the business market and these are addressed in the following paragraphs.

American businesses are looking increasingly to B2B websites to purchase goods and services. Revenues from such websites have increased from around US$400 billion in 2000 to US$2.7 trillion in 2004. B2B websites must support a more complex buying process than the typical business to consumer website. For example, the typical B2C website may have a "shopping cart" for purchases. This is not usually suitable for a website directed to customers with a multiple- step buying process. B2B websites must provide substantially more product information so that the person(s) using it can have sufficient and pertinent information to discuss the purchase with other decision-makers.

B2B websites must thoroughly and accurately indicate information about prices and any volume discounts that may be offered. Failure to provide prices may limit access to those who are just beginning their buying process and are looking for a reasonable range of prices. B2B buyers will also be more sensitive to add-ons that are often more profitable to the seller, and therefore more costly to the buyer, than the products themselves. These include special shipping, insurance and add-on product tie-ins (arrangements where two items are purchased together at a discounted price). Add-on's should be limited or nonexistent on B2B website.

Websites appealing to the end user must show full product details including downloadable product photos, descriptions and product brochures providing complex information. B2B websites should also stress product service and be sure to offer telephonic availability for product questions at hours that are suitable to the in the U.S. time zones. If your products are better in some or all ways than your competitors, you should stress that, perhaps by adding charts and graphs that show those comparisons. The combination of these items is called an "Advocacy Kit": a combination of facts and arguments that persuade someone in the buyer's business to advocate your products over the competitions. Finally, whether you are using a B2B or B2C website, be sure that you keep it up to date. Customer reaction to an outdated website is usually to dismiss the company and move on to others that provide complete and current information.

Other effective ways to reach the U.S. market are through brochures and sales letters. The effectiveness of brochures has declined in recent years with the development of websites. In our businesses, we have abandoned the use of brochures for sales meetings and conventions and, instead, laser print the website pages relevant to each event on high quality paper. If you do develop a brochure for the U.S. market, it is advisable to keep it short. The American Importers Association ("AIA") recommends no more than two pages. The short brochure is a "takeaway" to be viewed later. If the potential customer is really interested, they will go to your website expecting that it will be more complete and updated with the latest information.

Sales Letters used to make an initial contact with potential customers are not recommended unless you acquire a list of screened and accredited customers from a reliable source. If you do use sales letters, keep them very simple - not to exceed three or four short paragraphs. Such letters (or emails) should state exactly what you do or sell, price and your advantage over your competitors. Just remember, in the U.S., even targeted letters and emails rarely get a response. Most Americans view them as "junk" and they wind up in the wastebasket. Unsolicited faxes and phone calls usually get the same response. "Blast" faxes almost always end up in the trash and Americans are hassled so much by unsolicited phone calls that they hang up immediately about ninety percent of the time.

Some suggestions for the creation of effective marketing and sales materials

Marketing and sales materials are not comprehensive answers to every sales-communications situation. Their purpose is to create in the mind of your potential customer an attitude that will draw your company closer to a sale.

Use a magazine format. Make your brochures look like magazines. Create articles that position your company, products or services as ways to solve problems or achieve customer-desired goals.

Design useful marketing products. Here is a lesson from the healthcare industry. Every day, legions of pharmaceutical and medical device representatives leave tons of samples, coffee

mugs and brochures in physicians' offices across the country—clutter, clutter and more clutter. In a competitive field, how do you stand out?

One medical products manufacturer got wise. It developed a pad of order forms, 8.5" x 11", with pre assigned check boxes so that a physician can complete it in seconds; ordering products requires simply checking a few boxes, signing the form and sending it to the vendor. In a crowded field of competitors, this manufacturer got the most orders—not because it had the nicest mug or the most beautiful brochure, but because its marketing tool provided a means for making its products easy to order.

Educate. Give your prospects a taste of your expertise. Professional services companies have been doing this for years with the ubiquitous "white paper", an extended essay about a relevant topic of business interest.

Why not apply the "white paper" idea to products and consumer services as well? Any product complex decision could benefit by an educational product guide that simplifies. Imagine a guide to countertop selection for a kitchen-remodeling firm or an explanation of housing values for real estate agencies. With a little research and imagination, these businesses and others like them can distinguish themselves as authorities in their field. For example, The Wall Street Journal has been offering personal finance guides as subscription lures.

Present information in "bite-sized" pieces. Customers love handy advice or insights presented in a manner that is just detailed enough to be helpful but short enough to be easily understood. The key is to break your know-how into bite-sized bits that busy people can consume quickly. For example, one company targets the multibillion-dollar mergers and acquisitions markets using a "top ten tips" on mergers guide. Another company in the health and life style sector provides a constantly changing list of how to make health and life style choices.

Give customers promotional items they will keep. Items with on-going value and use for a customer can be a very effective marketing tool. Design promotional items that are closely associated to your business, proposition or message. One enterprise targeting authors (especially consultants and motivational authors) creates decks of custom cards for each of its authors where each card serves as a chapter or topic summary. The decks are much more memorable than business cards or brochures, and are less cumbersome and expensive than free copies of the books themselves.

If brochures remain your best option, then consider writing from the customer's point of view. Tell them how you solve problems, and provide specific evidence that makes your claims credible. By adopting this perspective, you demonstrate empathy with the customer—you're on their side—and you show a grasp of real-world circumstances that prospects will recognize and respond to.

Know your goal. You should always have a specific marketing or business goal in mind for each piece you create. Everything you make must serve a dynamic role in your sales process, an objective that moves the prospect one step closer to buying. What do you want the customer to do in response to your piece? Whatever that is, make it explicit.

Conclude your brochure with a "call to action," a directive to phone, write or otherwise respond to you. If you can provide an incentive—a discount, a premium, a free analysis—all the better. But, at the very least, ASK for a response and tell readers exactly how to reach you.

Markting the U.S. through intermediaries

Going it alone in a market as large as the U.S. is very difficult for even a large company. It might make sense to use another party with knowledge of local markets and dedicated resources in the U.S. market to assist you to enter that market. Using intermediaries might be a mid-term strategy that could last between three to seven years to be replaced when your own U.S. operations are established, or it may be a single long-term strategy. However, given the size and importance of the U.S. market, it is more likely that your company will consider establishing direct operations in the U.S. in the future.

There are many types of intermediaries to consider and the choice of intermediary will typically be made on the basis of the type of products and services to be sold, the nature of the market or the sales cycle. For example, if you are selling large expensive products that need to be individually configured for each sale and have a long sales cycle, you are more than likely to choose a sales agent or representative—these words are used interchangeably. For example, an agent who is a former vice president at a U.S.-based computer company who may assist you in marketing and sales of complex computer systems.

If on the other hand, your product is a commodity to be sold in numerous retail stores you probably want to use a distributor who is well placed in your industry. It is possible in this case to use both an agent and distributor. For example, if you manufacture and sell toys for pets, you would need an agent who has contacts with larger pet stores such as Petsmart™ as well as a distributor who could sell to the pet departments of drug, toy and grocery stores. This section will further discuss these and other types of intermediaries such as original equipment manufacturers (OEM's), value added remarketers (VAR's), franchises and trading companies.

Agents (Representatives)

Agents (sometimes called representatives) are independent companies (and sometimes individuals) who represent foreign exporters and take orders on the exporter's behalf. Agents do not take title to, or possession of, the goods or services they represent and the prices to be charged are agreed to between the seller and the buyer and almost never are set by the

agent. Normally, agents do not stock product nor do they provide pre- or post-sales support to the customer.

Companies will normally appoint foreign representatives/agents if they are not ready to establish their own operations but wish to either deal directly with individual customers, or to seek customers on a Request for Proposal (RFP) or project basis. Agent qualifications are normally personal contacts and some industry experience (although ex government employees are helpful in dealing with government agencies even if they do not have industry experience). Technical skills, while helpful, are not necessary, except in particular cases.

Agents normally work on a commission basis and are paid when the exporter makes a direct sale to the customer (although some agents may require some of their commission upfront if there is a complicated or long sales process). The biggest single area of disputes involving agents, both during and after the relationship, is over commissions and the commission structure. Typical issues are when commission payments are due, how long commissions will apply (e.g. whether commissions apply to reorders); the effect of price reductions on commissions; and methods of resolving disputed commissions.

Distributors (Dealers)

Distributors are independent companies that purchase product ("take title") from foreign manufacturers or other importers to sell in their home market. The products purchased are intended for resale to the distributors' customers, which can be actual end-users or another distributor or dealer. Nearly half of all international sales are handled through distributors or "dealers", usually sub-distributors who are active at the actual point of sale.

While sometimes it is necessary to make alterations to products sold, distributors normally sell what they purchase without alterations. Distributors assume the risk of buying and stocking products in the local market and normally provide product support and after market services such as extended warranties (which may, in themselves, be highly profitable). Distributors establish and maintain their own contacts with customers, including setting prices to charge to those customers. They are normally responsible for local advertising and promotion.

The largest areas of concern with distributors are territory and pricing. Unless the U.S. is a small market for your products and services, or there are only a few customers, you should carefully evaluate the expected volume and number of customers before granting rights to the entire U.S. market to one distributor. Before making that decision, you should be sure the distributor has national coverage. If not, you should consider regional or even state-by-state distributors. On the other hand, you should also consider the distributor's interests: the territory given to your distributors should be large enough for them to make a profit with your products. If they do not stand to make much profit from selling your products in their region, they will not pay much attention to them.

Since the distributor will provide marketing, sales, inventory and service functions for your company, you should be willing to offer the distributor a solid discount off of your standard pricing. The key is to set pricing in such a way that both parties make acceptable profits and provide your distributors the incentive to put your products first. In the U.S., it is illegal to dictate the price at which the distributor can sell your products. Distributors must be free to raise or lower your price, or if they want to, to give products away - which is sometimes done to get the customer to purchase a more expensive product (e.g., to give away a printer in order to sell a computer). Often, a distributor will miscalculate the price and set it too high, and this often leads to decreased sales. Be sure to discuss these issues with any potential distributor before signing a contract.

OEMs and VARs

OEMs (Original Equipment Manufacturers) and VARs (Value-Added Remarketers) are other means to approach the U.S. market through an intermediary. OEMs normally integrate your product(s) into other products for resale. VARs normally offer your products as part of a combination of products sold together as a "system" or "package." The appointment of OEMs and VARs entails many of the same issues and considerations, as the appointment of distributors although OEM/VAR territory may be more industry than geography focused and pricing will be heavily influenced by quantities.

Two additional considerations are the "just in time" character of OEMs and VARs and the protection of intellectual property. OEMs and VARs are often not positioned to fulfill the need for just in time delivery. If they are not well positioned, the foreign company may need to locate — and be responsible for — its product warehoused in the U.S. With distributors, intellectual property concerns are generally limited to how the distributor presents the products. While the principal should monitor the distributor's usage of such intellectual property in its business documents, it is unlikely that the distributor could appropriate the principals manufacturing patents, know-how or trade secrets.

However, OEMs, and to a lesser extent VARs, have considerable knowledge of how the products will function in the integrated environment, and perhaps require access to certain trade secrets to enable them to develop and coordinate their integrated products and services. Therefore, extra scrutiny should be used in appointing OEMs and VARs and your lawyers should be directed to create contracts that address these concerns.

Franchises

A franchise operation involves a complex contractual relationship between a franchiser and franchisee. The franchiser offers, or is obligated to maintain, a continuous interest in the business of the franchisee in such areas as know-how and training. The franchisee operates under a common branded trade name, format, or procedure owned or controlled by the

franchiser, and has made, or will make, a substantial capital investment in the business from its own resources.

The U.S. is the franchise capital of the world, and most of the famous franchises began in this country. Given Americans taste for franchises in most every type of endeavor, many companies outside the country have now begun to introduce franchises into U.S. markets. In the Southwest, for example, Mexican-style restaurants and clothing store franchises have entered the market, often first in the Mexican-American neighborhoods and followed by expansion to broader markets.

There is also a substantial market for potential franchisees in the U.S. Members of the "Baby Boom" generation are nearing retirement. Many are looking for things to do rather than to fully retire, and have the capital and business experience needed to establish and run a successful franchise. The franchise concept also speaks to the American cultural mindset of valuing independence that is often achieved by starting and running your own business. It is especially appealing to Americans because of the advantages of an established system and of receiving substantial guidance from the franchiser. These factors considerably increase the odds of business success. However, there are risks in franchising. If your business decides to franchise in the U.S. be sure to keep the following considerations in mind.

— Business experience, knowledge, and acumen of the potential franchisee in one area are not necessarily transferable to another area. An international banker may not have the acumen to run a restaurant. Likewise, a former executive from a major food corporation may not do well in tire sales.

— Lack of experience in the business of the franchise can be overcome if the franchisee is willing to seek and accept advice and guidance from the franchiser. Look for a personality type that can deal well with change.

— Many franchises fail because of the investor's lack of financial or human resources. If the estimated cost of starting a franchise is US$250,000, require the potential franchisee to place an extra $75,000 to $100,000 in reserve. You are better off with fewer, but more stable, franchise outlets.

— Consider whether your franchise system requires a substantial direct involvement of the franchisee or whether the nature of the system and the economics will allow the franchisee to employ others to manage the personnel working in the franchise.

Establishing direct relations in the U.S. through your own operations

There are many reasons why your company may want to establish a physical presence in the U.S. market. First and foremost, it might be necessary to move part or all of your production to the U.S., as well as the marketing and sales activities that support that production. Secondly,

given the size of the market, it may make sense to have an operation that is close to your customers. Thirdly, there may be no suitable intermediaries available in terms of the financial cost of such assistance and/or degree of control may be prohibitive. Finally, the market or the customers may prefer to deal directly with the manufacturer or its local U.S. subsidiary.

Whatever the reason, there are three standard ways for a foreign company to establish direct operations in the U.S.: creating an equity joint venture with a U.S. party; purchasing an existing U.S. company: or creating a new company. The advantages and disadvantages of each will be discussed below.

Equity Joint Venture

An equity joint venture is created when two or more persons and/or entities come together to create a company in which all hold some equity. This can be accomplished either by a party or parties buying into an existing company or by the parties creating a brand new company. This should not be confused with the civil law concept of "joint venture" - known in many countries as a strategic alliance or consortium in which companies agree to approach the market (or an individual project or projects) together but do not create a separate legal entity.

Often a U.S.- based equity joint venture is created when a foreign company purchases part of the equity of its distributor. One client of mine, a U.S. based distribution company has decided to sell some its equity to two of its key suppliers by allowing them significant equity positions (but not to exceed 49% collectively). If this works, everyone will benefit. The U.S.- based company will ensure its supply by obtaining exclusive relationships and the personal attention of its suppliers, who will now become real partners of the operation. The foreign-based companies will now have more of a say in addressing the U.S. market by participating on the strategic team and will also be allowed to share in the profits of the U.S. based company.

Creating a brand new company with a U.S. party through an equity joint venture is a less commonly used approach but is often used when the foreign company is just beginning to enter the U.S. market. One example from my clients is a foreign-based company that is willing to sell directly in the U.S. through a U.S. based subsidiary but felt it needed to have a U.S. citizen, who is experienced with the customers, to run the operation in order to bring initial credibility to the products. This foreign company created a U.S. company, but basically gave the key U.S. executive a large minority equity. If this works, it will provide the best of all possible worlds for the foreign-based company by giving it good access to the market by employing a known and trusted American to call on the customers. For the American, it provides the opportunity for a top management role, to have a real voice in the company, and to become wealthy if the company is successful.

Equity joint ventures have some disadvantages. There are often arguments over whether and how the various partners will be compensated. Often the individual(s) or smaller company

partners are seeking a shorter-term payback for their efforts and want higher compensation and/or dividend packages compared to larger partners who are more likely to be involved with the joint venture for the long run. In fact, very few equity joint ventures last longer than ten years. This does not necessarily mean that the joint venture was not successful, but rather that the interests of the parties changed or continued to differ with one party eventually buying out the others.

Another major challenge found in equity joint ventures is the competition for control. In one of the joint ventures mentioned above the U.S. partner, who is the individual partner and the CEO, will most likely want to continue to control the business while his partner, the foreign majority company, may at some time attempt to seize control. Shareholders agreements for equity joint ventures often contain provisions to balance the equity between the parties such as high vote majorities, which empower the minority party to block the vote of the majority. While useful, it should be remembered that it is these provisions that often bring the company to deadlock.

One final problem for equity joint ventures is financing. Often one or more of the parties do not want to contribute or guarantee additional capital infusions, making it difficult for the company to grow. These issues are often resolved by providing rights of first refusal that, if not accepted, may result in restructuring the ownership of the company in favor of those who make or guarantee the additional investments.

Acquisition of an Existing Company

The acquisition of an existing company is a common situation where one company acquires another to gain access to the U.S. market, or where the foreign-owned company acquires its agent or distributor in order to take over direct operations in the U.S. market. There are two distinct ways of acquiring a U.S. company under the laws of the various states: by acquiring the assets of the company (an "asset purchase"), and by acquiring the shares or units of the company (a "stock purchase').

In an asset purchase, one party purchases all or part of the assets of another company. Because the shares are not purchased, the original company continues to exist - at least on paper. The company purchasing the assets must create a new corporate entity in which to place the acquired assets.

Foreign companies undertake asset purchases for a number of reasons. For one, such purchases allow the company to purchase only the assets that are needed. This is particularly useful when the foreign company only wishes to acquire part of the business, for example, one division or product line, or only certain geographical locations. Another motivation for an asset purchase is that the liability of the acquiring company is limited to those liabilities associated with the acquired assets.

The biggest drawback to the asset purchase is the complexity of the process. You need to be sure that you have acquired exactly the assets you need and that the seller can provide clear proof of ownership. Additionally, the name of the company is considered an asset and it can be acquired, but if not, it will continue to be associated with what is left of the purchased company. You should check with counsel to see what obligations accompany such an asset purchase, such as continued payments, tax liabilities, audit rights or lawsuits associated with the acquired assets.

In a stock purchase the foreign company acquires all the shares of the U.S business. In stock purchases, the purchaser acquires both the assets and the liabilities of the acquired company. On the surface, this appears to be a much simpler and more advantageous transaction than the asset purchase. For starters, it is possible to avoid dealing with company management because the shareholders are approached directly. Additionally, the purchaser avoids establishing a new company and transferring all documents as part of the transaction. Stock purchases also preserves corporate identity- such as the corporate name and logos. Finally, if commercial contracts and intellectual property agreements have "successor in interest" clauses (e.g. the new owners assume the contract), it may not be necessary to assign them.

However, the stock purchase has its disadvantages. First, it is possible for dissenting shareholders to delay the transaction for some period of time or prevent the transaction. Additionally, since the purchaser assumes all liabilities, more due diligence is required to be sure that provisions are made for known and unknown liabilities. (Unknown liabilities could be a future tax audit, lawsuits, or claims from terminated employees). If the stock is publicly traded, the purchaser may need to acquire the approval of the U.S. Securities and Exchange Commission and, even if the company's shares are not publicly traded, other government approvals may be necessary, if the company to be acquired is subject to the foreign investment laws and regulations of the U.S. and the various states. Finally, an acquiring company may also require the existing shareholders of the company to terminate certain unwanted employees before the sale closes to prevent the purchaser from having to deal with this issue, and its additional costs, after the time of purchase.

Creating a New Company or Subsidiary

Often the best approach is to simply create a new company to undertake your business in the U.S. In this section, we will discuss some of the legal and tax practicalities involved in establishing your U.S. entity and conclude with an analysis for achieving company success.

Before establishing your entity you should consider who is going to own it. Most companies will simply establish a U.S. subsidiary of the parent company - that is, the parent company will hold the equity of the company that will become its direct subsidiary. However, in some cases, it is preferable to have some or all of the shareholders of the parent company to have ownership in the new entity. That results in distinguishing the U.S. Company from the parent company.

However, a primary reason for not creating a direct subsidiary of the parent company is tax liability and other tax issues.

One of the first decisions in establishing a new or subsidiary company in the U.S. is determining in which state(s) you want to organize in. Unlike Canada, where businesses have the option of creating either provincial or national companies, the U.S. requires that corporations and limited liability companies be established in at least one of the states or territories. Foreign and domestic companies used to choose the state of Delaware because of its clear and favorable corporate laws; however, in recent years, most of the other states have developed laws similar to Delaware.

Most states will attempt to tax any company doing significant business within its borders. So a major consideration for some investors in choosing the state of incorporation is state taxation, with states like Nevada and Montana favorable to business because they have no state income tax, Montana also has no state sales tax. More investors are considering Montana as their U.S. location, as it is possible to purchase and then move large physical assets (such as aircraft) into the state without paying sales taxes. However, forming a corporation in Nevada or Montana only makes sense if you will establish significant operations in those states that will result in selling out of that state(s). If most of your sales will be solicited from and/or come from other U.S. states, incorporating in Nevada will result in no significant savings.

It is also important to look for state specific provisions in regard to specific industries. For example, South Dakota has become a favorite state for credit card operations because of its laws regarding interest rates and other financial considerations. However, unless you need or are eligible for these special conditions, it probably makes sense to incorporate in the state where you will have your U.S. headquarters and/or undertake a significant part of your sales. Ask your advisors whether you must register in any other states as a foreign corporation (in this context, foreign to the state of Nevada would be any of the other U.S. state). This will probably be necessary in states where you transact significant business and such registration will allow you to use their offices and courts to collect from customers.

Most foreign corporations will choose the corporate form of business. U.S. tax regulations allow corporations that meet certain standards (e.g. not publicly traded; fewer than 75 shareholders) to elect the "Subchapter S" tax status, which requires profits to be taxed only after they are distributed to shareholders. This option is not available to companies with foreign shareholders. However every state provides for a Limited Liability Company (LLC) status, which requires equity holders to pay taxes only when profits are distributed to them. These are available to foreign companies and individuals but are usually reserved for small companies. LLCs also cannot be publicly traded. The LLC status could work nicely for a company or individual creating a relatively small U.S. subsidiary and can be converted to a corporation at another time.

Once your U.S. subsidiary is established you must decide its functions, how it is going to be managed- especially how it presents it products, how and where it takes its profits, and the opportunities it presents to its U.S. employees. In the early years, many companies will orient the business primarily toward building confidence and loyalty in their products. This approach must be given special consideration in the U.S. market, especially when there are U.S. competitors. Korean auto companies tried to enter the U.S. market in the late 1980's and early 1990's with vehicles that were inexpensive, but had many maintenance problems. This almost ruined the market for the Korean manufacturers.

They were only able to survive and eventually increase their market share by offering good extended warranties and improving the quality of their vehicles. Now the Korean automobile is widely accepted in the U.S. as a low cost alternative to U.S. and Japanese models because they match their competitor's maintenance capabilities, and offer both safety and value. In retrospect, however, the Koreans would have been better off to wait a few years and introduce a better product to the market.

Another question is what style of management the foreign company will apply to its U.S.- based company. As a general rule, the more "American" the company is in its style and treatment of employees, the better it will do in the U.S. market. European companies with their "portfolio" style of management that allows local decision making by the local subsidiary, allowing each subsidiary to adapt to the local market, tend to fare better in addressing the desires of the American consumer. On the other hand, Asian companies that tend to be more rigid in their management style and to concentrate control from headquarters, tend to have more difficulty in retaining and promoting American employees.

Financial considerations include not only the amount of overall profit will be, but where the company will take its profits. Most companies begin their global expansion with the idea of returning profits to the home country. However, the more global in orientation a company becomes the more likely is it will attempt to take its profits in the lowest tax jurisdictions. Sometimes the U.S. will be a high tax jurisdiction and sometimes not, and the U.S. Internal Revenue Service (IRS) wants to ensure that products sold through foreign subsidiaries will be price regulated so that a good part of that company's taxes will be paid in the United States.

Finally, the foreign company entering the U.S. must decide whether the American employees will remain just that - American employees - or whether they are part of the company's global reach and could be allotted global opportunities based on their skills and desires that would be the same as the home based employees of the company. With so many American corporations being global in orientation, consideration must be given to the "globalization" of the work force in order to obtain and retain the best U.S. based employees. The U.S. subsidiary does not want to invest heavily in its American employees only to have them leave for their U.S competitors, because those competitors will use such Americans in developing and maintaining their global strategies.

With that in mind, the U.S. subsidiary must maintain a balance between the U.S. lifestyle and the best local business practices and the establishment of a global orientation, not only for its products and services but also for its employees. At the end of the day, it is not only what the company brings to the United States, but aspects of the U.S. experience it can bring to its own global vision.

→ Investing in Real Estate in the U.S.

Up to 2011, more Americans acquired their wealth through the acquisition, holding and sale of real property (land and buildings on the land) than through any other form of wealth creation. There are a number of reasons why the U.S. presented such a unique opportunity for real estate investment. The first is the sheer amount of land available for private acquisition. Coupled with the economic and population growth, this generally means that land will continue to increase in value no matter where it is located.

Secondly, the availability and affordability of real property is greatly enhanced by the number of financial vehicles available in the United States. In the U.S. it was very easy to finance nearly all (and in some cases all) of the purchase price of the acquired property at very low rates and on a long-term basis. For example, a typical $250,000 residence could be purchased with a $25,000 down payment and monthly payments of approximately $1,350 for thirty years at a fixed rate of 6% per annum. This means that a family with approximately $50,000 annual income and a good credit rating could qualify for this home.

Thirdly, and most importantly, is the attitude of the American people and their government toward home ownership. To Americans, property is something to be sought to provide for a better life, to save for retirement, and to pass on to one's children. Government policies on home ownership encourage and support this goal by providing many benefits for purchasing and owning a family home. Most important of these are the federal tax policies that allow for deductions on mortgage interest and property taxes on the primary residence.

These deductions reduced the overall cost of home ownership. Using the example in the previous paragraph, let us say that $1150 of the $1350 monthly payment is mortgage interest (or $13,800 per year) and that the home is subject to $3,000 per year in property taxes; this would result in reducing the family's taxable income by $16,800. For example, the home owner with an effective U.S. Federal income tax rate of 25%, would obtain an overall reduction in their income tax liability of $4,200. Additionally, most states that have an income tax, allow tax deductions similar those of the federal tax regime.

The result of these aspirations and policies is that most American families own their homes: 69.2% according to the 2005 U.S. census. This figure increases to 74% for heads of households over 35 years of age, and over 80% for heads of household over 60 years old.

This changed dramatically after 2007, with the recession which brought the economic downturn, especially in the residential real estate market. The upside, especially for foreign investors is the opportunity to acquire real estate at very low prices and low interest rates. This recession is expected to last through 2014, and if real estate is a major part of your reason to enter the U.S. market, now is the time.

In this chapter we will discuss issues in acquiring real property by looking first at the restrictions on ownership for foreigners, and later at the acquisition of commercial and manufacturing property. However, the bulk of the chapter will look at residential real estate.

Restrictions on Foreign Ownership of Real Property in the U.S.

There are no significant legal roadblocks for foreigners wishing to acquire, keep and to pass on to their heirs real estate in the fifty states. However, the federal government does place some restrictions on foreign ownership in the District of Columbia, on public lands owned by the federal government, and on real property in U.S.-held territories.

Some states place restrictions on non-citizens in certain areas. These restrictions fall into four categories:
1. A few states restrict the use of public land to citizens and to those who have declared their intention to become citizens.
2. Most of the states in the Middle West impose restrictions on ownership of agricultural land by foreign individuals and corporations. These restrictions normally define a maximum number of acres that can be foreign owned.
3. Some states require that foreign corporations register to do business within the state before they can acquire real property.
4. While no state totally restricts the right of foreigners to inherit land, some do place restrictions on how long inherited land can be held by foreigners. Overall, there are virtually no restrictions on foreigners concerning the acquisition of residential, commercial and manufacturing land in the urban areas of most states

The following table gives a general overview on the state restrictions:

Alien Ownership of Real Property in the United States

	GENERAL RESTRICTIONS	INHERITANCE	CORP/BUSINESS ENTITIES
Alabama	X		X
Alaska	X		X
Arizona	X		X (1)
Arkansas	X		X
California	(2)		X
Colorado			
Delaware			
District of Columbia	X	X	X
Florida		X (3)	
Georgia			X (1)
Hawaii	X		X
Idaho	X (2)		
Illinois	X	X	X
Indiana	X	X	X
Kansas	X (3)	X	X
Kentucky	X	X	X
Louisiana	X		X
Maine			
Maryland			
Massachusetts		X	X
Michigan			
Minnesota	X		X
Mississippi	X	X	X (2)
Missouri	X (4)	X (4)	X (4)
Montana	X (2)		X (2)
Nebraska	X	X	X
Nevada	X (2)		
New Hampshire			
New Jersey			
New Mexico	X		
New York		X	X (5)
North Carolina	X		X (5)
North Dakota	X (4)	X (4)	X
Ohio	X (5)		X (5)
Oklahoma	X	X	X
Pennsylvania	X (4)		
Rhode Island			
South Carolina	X (4)		X (4)

South Dakota		X (4)	X (1)
Tennessee			
Texas			X (6)
Utah			
Vermont	X (7)		
Virginia	X (5)		
Washington			X (1)
West Virginia			X (1)
Wisconsin	X (4)		X (4)
Wyoming		X	

(1) Must be registered or qualified to do business in the state.
(2) Applies to public land only.
(3) No restrictions but state retains rights to create them.
(4) Applies to agricultural land only—usually restrictions regarding the amount of land that can be owned.
(5) Only filing or reporting required.
(6) Foreign company may purchase real property only if necessary to do business in the state.
(7) Oath of Allegiance to the state required.

Why Invest in Real Estate?

Is investment in real estate in the U.S. the proper course of action for you or your business? Unless you are buying only for your own use, real estate is the form of investment that requires the most attention. Besides simply buying the property, you must also find and retain tenants, manage your cash flow, maintain your properties, and maintain excellent records. Like other investments, you will need to know when to hold the property and when to sell it, although one common long-term strategy, based on acquiring real estate to build wealth for retirement, is to purchase property strictly for investment purposes, sell it when the value increases, and leveraging the increased value to acquire more property.

The rewards of property acquisition can be numerous for the right person. However, as you will see below, real estate tends to be a better investment because of the ability of the owner to leverage its value during the time the asset is owned.

Opportunities for profits on property exist both in the short term and the long term. Short-term profits are generally made on the "fixer-upper" properties, i.e., properties that require repair before they can be sold at the market price for the area. Foreigners who do not live permanently in the U.S., generally do not attempt this approach, because of the intensity of work required to make a quick profit.

This short-term business has become so profitable that a number of real estate companies have been formed to deal solely or primarily in "fixer-upper" properties. Additionally, a number

of franchise businesses have been developed such as HomeVestors (better-known by their slogan "We Buy Ugly Houses") that has developed a franchise model for repairing residential properties and now has more than 500 franchised offices in the U.S. This type of real estate investment (also known as "flipping") has become so popular that a national television program was created to promote it. This strategy is not for the risk averse and it has declined significantly during the recent real estate entrenchment in the U.S., but is likely to come back when a stronger real estate market returns.

Long-term investment in residential real estate is a safer strategy for absentee investors. Historically, real estate has shown a consistent growth in value. The combination of this increased value and the paying down of the mortgage on the property totals the overall appreciation of the property. If you rent or lease your property, you may be able to recuperate the costs of maintaining it, and after a few years, because of increasing rent and fixed mortgage costs, show a decent operational profit. The following example (which assumes a return to the normal housing market beginning in 2014) shows how this might be accomplished.

In 2012, you purchase a $250,000 single family home and put $50,000 (20%) down. The remainder is secured by a 30-year mortgage at a fixed rate of 5½%. Your monthly costs are a $1,250 per month mortgage payment plus $300 in property taxes and $500 in upkeep and in a fee paid to a real estate company to collect rents and make repairs. The total monthly cost of owning and maintaining the property is thus $2,050.* Initially, you are able to lease the house at $1,750 per month leaving you a deficit of $300 per month. However, assuming you can raise the lease payment by 5% a year (property taxes and upkeep will increase some), by the third year you break even and by the fourth you will be making a profit.

In 2017 you decide to sell the home. By that time, the home is valued at $350,000 and your mortgage balance is $186,000. This leaves you with $174,000 in equity on the original investment of $50,000, or a profit of $124,000 in five years (less any selling costs) and any additional profits you have made from the lease during the five year period. The result is a substantial return on your investment.

Commercial Real Estate

Commercial and industrial real estate can be acquired for their own purposes such as to hold for future sale; and/or to improve and lease as a distinct business. Normally, commercial real estate is not held for long-term investment; however, undeveloped or underdeveloped land within or near metropolitan areas may be considered and held for the middle term (three to seven years). In recent years, foreigners have begun to purchase such commercial properties as shopping centers, office complexes, manufacturing and assembly sites, and industrial parks.

Next you must determine what type of team you will need to put together to acquire and hold commercial real estate. Team composition will differ depending on whether you are developing

projects from scratch and building to suit your requirements, refurbishing existing projects or acquiring finished projects whose primary need is to be managed. In all cases, you will need accounting and legal advisors familiar with federal, state and local laws in the U.S. and experienced in working with your home country advisors. For example, your attorney should understand the manner in which real property is classified and recorded in both in the U.S. and in your home country.

Additionally needed in all cases is a good real estate broker. The use of brokers is advised for property location, assistance in negotiation, understanding of price and terms and understanding the selling party. Buyer's brokers in the U.S. are often compensated by a percentage of the price paid from the proceeds delivered to the seller. This creates a type of conflict of interest for the broker as the more the buyer pays, the larger a commission the broker receives.

Individuals and companies not used to dealing with the U.S. real estate market should consider selecting a broker who will be paid a fee or a fee plus commission by the buyer that is based entirely on the buyer's needs and paid only upon completion of the transaction (although some of the fee may be paid upfront).

If your company has decided to build from scratch or to make considerable alterations or enhancements to an existing property you might consider acquiring the services of a licensed and bonded architect who is knowledgeable about local physical conditions and local building codes and regulations. If building and improvements are sought, you will also need a general contractor who can bring together all of the suppliers needed for the project. Sometimes the architect will want to serve as a general contractor. This is generally not a good idea, as the two functions require very different skills.

Finally, the more complex the project, the more it may need a number of consultants to advise and counsel on various issues that might arise. These consultants might include various engineers (structural, civil or mechanical), government consultants, soil experts and space planners.

Tax Implications of Real Estate Investment in the U.S.

The critical tax considerations regarding real estate and any other form of income taxation is dependent on whether you are a resident alien or a nonresident alien. This is discussed in more depth in the chapter on Taxes, but with few exceptions, the resident alien will be taxed the same way as an American citizen living in the U.S.

While both resident aliens and nonresident aliens are subject to certain property taxes, which are normally determined by a county or school district, the issue income tax issue facing the

nonresident alien is whether or not the property is to be used as an ongoing investment. (e.g., when the property will be leased or rented).

There are two tax treatments for such property. The first is not to classify the property as a U.S. trade or business, in which case any income would be subject to the same kind of tax treatment as dividends and royalties, which is a fixed thirty percent withholding tax on rental income without any allowance for deductions. While this is a high tax, the advantage to holding your investment property in this manner is that it would be exempt from any capital gains taxes on the disposition of the investment. This would be quite beneficial to the investors if the rents collected exceed the costs by thirty percent and/or the investor stood to make a significant profit on the sale of the property in the near future.

The second and more common approach is to apply the property income connected to the overall structure of U.S. trade or business to the business. This requires placing the property into a U.S. legal entity such as a corporation or a limited liability company. In this case, the income of the entity would be taxed the same as any other such entity and subjected to whatever rate applies to the profits of the company (as distinct from the gross income or revenues). The legal entity would be allowed to take the normal deductions against revenues and, with the case of real estate and the allowable deductions for depreciation, could result in a tax filing with little or no taxable income. The main downside to this approach is that the legal entity will most likely be subject to taxation on any capital gains on the sale of the property. However, there may be an exception to this for the "residence of the seller" in the law and in most treaties. Given the frequent changes in tax law and the complexity of the subject, the potential foreign investor should seek the counsel of a tax expert before making any investments in property in the United States.

→ Legal Considerations

Doing business in the United States requires a basic understanding of the American legal system and the role and function of attorneys. The importance of law and of the role of lawyers in the U.S. cannot be overstated. In no other country are there so many lawyers and, in no other country is their role so critical in all aspects of American business and American life. This chapter will first review the American legal system concentrating on those aspects necessary for a general understanding and on key concepts important to foreign investors. The chapter will also discuss how lawyers and law firms work, and conclude with a series of questions and answers related to retaining and working with U.S. based lawyers.

An American Perspective on Common Law

The American legal system is built primarily on the legal system of common law. This system came to America from the British and is also found in many British- and American- influenced countries such as Canada, Australia, New Zealand and Nigeria. The fundamental basis for this legal system is a body of case precedents, distinct from the comprehensive codes (civil, commercial, property, and labor codes) of the civil law system that is prominent on the European continent.

People who are from the civil law countries (which also include most of Latin America and other countries that were former colonies of the civil-law-influenced countries of Europe) often misinterpret what they perceive as uncertainty in American law and American lawyers. Under U.S. law, there is more freedom of contract that results in longer and more detailed agreements, and the American lawyer has more discretion and importance than in the typical civil law jurisdiction where the various codes (e.g. civil, commercial, or property) set parameters on what can and cannot be in legal agreements. While the U.S. doctrine of adherence to established case precedents derives from the British traditions, it has a distinct American cultural orientation which is found in how lawyers are organized and the structure of the legal system, which will be discussed later in this chapter. Historically, continental Europeans (particularly the French from whom much civil law is borrowed) tended to be advance planners who liked to design rules and then to codify those rules. The British, on the other hand, tended to be inductive improvisers who were more comfortable making decisions on the spot. Some historians attribute these tendencies to the necessity of having to make those decisions in the remote colonies of the British Empire.

One fundamental basis of the U.S. legal system is the concept of stare decisis ("to stand by things decided") that gives much more consideration to the past decisions of legislation and its interpretation by the courts than to fixed codes. Stare decisis is essentially the doctrine of precedents that mandates the court to follow earlier judicial decisions in new litigation. Lawyers must identify the earlier decisions of courts that are "on point," (e.g. relevant and supportive of the arguments being made in the case at hand), while judges need to determine whether the lawyer's argument is reasonable. Law is often made in this litigation context when a judge is convinced that the case at hand is different enough from what has been previously decided to interpret the law to fit the new circumstances.

Let the Buyer Beware: Development of Product Liability Law

One of the most strongly held concepts of American common law is *caveat emptor* ("let the buyer beware"). Because of this concept, nineteenth and early twentieth century court decisions rarely held in favor of the plaintiff in suits regarding product safety. This lack of product protection contributed to the development of the legal concept of product liability, which began as a series of court decisions and later became codified in various state and

federal laws. What now exists is an elaborate system of product liability laws that do not exist to any great extent in Europe, Latin America or Asia. Tens of thousands of U.S. lawyers make their living from trying product liability cases. While the Japanese, for example, have some aspects of the U.S. product liability system, they still rely more on the cultural/ and business values of Japanese manufacturers who are culturally driven to build a high standard of safety into their products and therefore avoid the need for damages, litigation and the involvement of a large number of judges and attorneys. Nevertheless, manufacturers considering selling their products in the U.S. should be aware of the potential costs of product liability, discuss this with their attorneys, and make provisions for the additional costs that result from product liability claims and litigation.

Codification of U.S. Law: The Uniform Commercial Code

While the U.S. legal system is still dominated by the doctrine of case precedent, the U.S. is moving, at least in the commercial area, toward a code system that is a hybrid of the common and civil law systems. Perhaps the best example of code type law that is of importance to foreign business is the Uniform Commercial Code (UCC). With fifty states and heavy interstate commerce, the business community decided that it needed a single uniform code to govern commercial transactions, and in particular the sale of goods. The UCC has been adopted in all 50 states (except that Louisiana does not apply Section 2*) and in the District of Colombia. It covers leases, negotiable instruments, bank deposits, funds transfer, letters of credit, bulk transfers and sales, warehouse receipts, bills of lading and other documents of title search, investment securities and secured transactions. The UCC applies to commercial transactions; it does not apply to employment contracts, the sale of real estate and service transactions where the law remains partially codified and partially determined by the doctrine of precedence. While the UCC has been adopted by all fifty states, there are still some local differences so it is important to obtain legal advice if doing business in multiple states.

While the UCC does not require formal written agreements for parties wishing to enter into commercial transactions, it does require written evidence to establish the intentions of the parties. This reflects an aspect of common law that makes oral evidence more difficult to introduce and apply than in civil law. The UCC also addresses the basics of how delivery (e.g. to a single address) and payment should occur (e.g. upon delivery of the goods subject to reasonable inspection). Such details may be changed by a mutual written agreement of the parties, which is often not allowed to the same extent--if at all--in civil law jurisdictions.

The UCC also attempts to address the question of express and implied warranties on goods. Express warranties require that goods conform to a basic expectation on the part of the buyer based on the nature of the transaction. With implied warranties, the buyer can expect to have the quality of the goods purchased to be consistent with the quality of goods that are normally shipped by the merchant.

Lawyer Compensation: The Contingency Fee

One of the unique characteristics of the American legal system is one type of lawyer compensation: the contingency fee. The contingency fee, which has been outlawed in the United Kingdom, allows the American lawyer for the plaintiff ("the party who brings a civil suit in a court of law.") to take certain types cases on a contingency basis. That is, the lawyer and the client agree to a fee, normally ranging from 25 to 40% of the total recovery for the lawyer to pursue the case. If the plaintiff loses, the lawyer receives nothing, but if plaintiff wins, the percentage earned on the recovery is often much higher than the lawyer would have received if he had taken the case on an hourly or fixed fee basis. This contingency fee arrangement is normally available in commercial and personal injury litigation, but not for family law, immigration or criminal cases. It is virtually never available for defendants.

The contingency fee is hotly contested in the U.S. and because of its uniqueness is often misunderstood by those not familiar with the American legal system. Its supporters point out those contingency fees allows people of limited means to have their day in court. Its opponents argue that it greatly increases legal costs, results in too many attorneys, and, in generally increasing business expenses, thereby hurting American competitiveness. Often foreign individuals will begin litigation on an hourly basis and then request a shift to a contingency fee arrangement after costs begin to mount. However, in almost all cases the decision to accept the contingency fee approach must be agreed at the outset of the dispute or litigation and cannot be changed. However, some lawyers and law firms, at the onset of the dispute, might accept a mixture of reduced hourly fees and smaller contingency results. The profitability of contingency fees is probably one of the key reasons for the high number of lawyers in the U.S. and for the amount of litigation.

Choosing your Law Firm

American law firms range in size from single practitioners to law firms employing more than a thousand lawyers. Since there is no such thing as a typical law firm, we will discuss the trends in the profession and how they relate to those seeking legal services:
– The size of a law firm is largely dependent on the size of the metropolitan area(s) in which it is found. For example, a firm of 300 attorneys would not be considered large in the New York City metropolitan area, but would be considered quite large in cities like Phoenix, Arizona or Minneapolis, Minnesota.

– As a general rule the larger the firm, the more expensive its services. This is because a larger firm is likely to have more non-revenue generating departments, such as marketing, advertising and public relations. Large firms also undertake staff investments that small firms do not, for example, when they engage in bidding wars for top law students who often bring little to the firm in their first 3-4 years, other than cost.

– The trend in American law firms is toward larger full-service firms and smaller specialty firms and away from the middle-sized firm located in only one or a few markets. Full-service firms offer their clients a high level of service in all major areas of law and on a national and sometimes international level. Specialty firms provide expertise in specific legal areas (for example, human resources, tax and immigration), but tend to be smaller with less overhead than the large firm.

– More and more, law firms are creating specific practices organized around certain industries or types of clients, rather than around legal specialization. Northern California, a hub for the high technology industry, is full of law firms specializing in high technology issues, while firms in Boston and Minneapolis - cities with a robust health care sector - have developed practice groups specialized to serve the medical industry. In doing so, they often "partner" with non-legal professionals such as accountants and business consultants.

– Many large firms are attempting to create a global presence by opening offices in a number of different countries, while middle-sized firms are often establishing strategic alliances with similar sized law firms in other countries.

– Washington D.C., has become the center for a number of specialty law firms that specialize in foreign trade. While any lawyer in any location can deal with the U.S. Departments of Commerce, State and Defense, these specialty firms give rapid access to the decision-makers by being able to arrange face-to-face meetings in their Washington offices. However, the value of this structure is changing as the U.S. government starts to locate key offices outside the capital. For example, the Treasury Department has moved the part of its Office of Foreign Assets Controls that deals with Cuban issues to Miami, Florida.

Foreign investors in the U.S. are often drawn to large law firms because of these firms' overseas relationship and more prominent public presence. Therefore it is useful to examine the pros and cons of using a large law firm:

PROS: The convenience of "one-stop service: one firm can cover most practice areas. Large law firms generally represent powerful clients and therefore are likely to have attorneys with more political clout. Large law firms are likely to have offices and/or relationships throughout the world and home office staff who are global in orientation. This may facilitate the relationship between the U.S. law firm and your home country counsel.

CONS: Large law firms tend to be very expensive. Partners often have annual personal overhead in excess of US $250,000 (the amount they must first contribute to the firm before they can receive any direct compensation) and therefore must charge higher fees. Large law firms are oriented towards large firms and large projects. They tend to assign the firm's less experienced lawyers to the smaller clients, who may also have to wait longer to obtain service. Practice groups within a large firm may vary in quality and lack coordination, sometimes resulting in

confusion and over-billing. For example, one of my clients had a $10,000 budget for all his legal expenses, but wanted an overall tax analysis as part of that budget. I asked a partner in the tax group if he could provide an overview of the key tax issues for $1,500, but to wait until the project was near finalization. He said yes, and then proceeded to immediately put together a complex tax analysis and billed $7,500 for his time.

If you decide to work with a smaller firm or individual lawyer, it is recommended to ask your local country attorney to refer you to someone they have worked with successfully in the past, or you may check with the state bar association in the state(s) you will be working in to review its lists of area specialists.

Legal Fees and Costs

Attorneys bill their clients for both fees and costs. Fees refer to the amounts charged for their services and costs are amounts charged for out -of -pocket expenses of the attorney or law firm. Normally, legal fees take three forms. The first is the contingency fees normally used in personal injury litigation and sometimes in commercial litigation. These have already been discussed. The second, and most common form of fee is based on time. Normally, a firm will establish an hourly fee for each of its attorneys. This fee is set based on an attorney's number of years of practice, the type of law involved, the prestige of the attorney and the competitive factors of the market place. The attorney charges his or her time based on 6-12 minute intervals so that the client pays only for actual work time. Thus, if an attorney charges $200 per hour, you can expect a 12-minute phone conversation to cost $40. In addition to attorney fees, the client is charged for any costs incurred on its behalf by the law firm. This includes long distance telephone and express mail costs and may include photocopying and domestic postage.

Issues often arise over whether the attorney can charge hourly fees for: Meals with the client where business is discussed. Time the attorney spends traveling to and from the meeting or to court, or time spent waiting for a late client or a delayed meeting.

Two or more attorney's time when they are talking to each other about your case or project. It is absolutely essential that the client understand (and negotiate) the billing process before the attorney-client relationship begins.

The third type of legal fee is the fixed-fee arrangement. In some areas of law this is the standard arrangement. For example, an immigration lawyer is likely to charge a fixed fee for the service of obtaining a certain type of visa, and fixed fees are often used in standardized type of functions and procedures such as establishing a corporation, or for a memorandum of law on a particular subject. A variant of this fee structure is a monthly or annual retainer whereby the attorney (or law firm) and the client agree to a fixed amount for the overall provision of legal services.

These three payment forms are standard, but all types of arrangements can be made to mutually benefit the needs of the attorney and the client. For example, many law firms wishing to stabilize their cash flows will agree to some reduction of their fees in exchange for payment of a set minimum. It is also possible to have a number of arrangements with the same lawyer or firm for different issues (for example, fixed fees for establishing your corporation and hourly fees for your other work).

Working with Attorneys: Questions and Answers

In this Section we will try to address common questions asked by foreign individuals and investors in working with attorneys in the United States. Is there any difference between an attorney and a lawyer? In this chapter we use the terms interchangeably, and in the U.S., one term is the same as the other. The exact definition states that: a lawyer is a person who practices law, while an attorney is one who represents and transacts business for another but is not necessarily a lawyer, such as an "attorney-in-fact" or in a situation where someone gives someone else power of attorney. An attorney is similar to a British solicitor while a lawyer is similar to a British barrister. However, the solicitor-barrister relationship is not recognized in American law. All licensed attorneys are officers of the court.

Should I choose an attorney from advertisements? Finding an attorney through an advertisement is not recommended! American attorneys have been able to advertise in nearly all forms of media since 1977 and many do advertise in the telephone directories, on radio and television and even on road signs. While a substantial part of the organized bar does not approve of such advertisements, the fact that an attorney or law firm advertises is not inherently bad. Nevertheless, caution should be taken when selecting an attorney from advertisements because often you are not likely to obtain the services of the attorney who is doing the advertisement. Often advertisements result in the client being reassigned to another attorney who pays the advertiser a fee to obtain the client.

What about attorney rating services? Some attorney rating services are reliable and others are not as worthwhile. The ratings of Martindale Hubbell are a credible form of learning an attorney's or law firms experience level and are particularly valuable because the ratings are based on peer evaluations. Other ratings, such as those in "The Best Lawyers in ←city→" books are often more biased, for example, because the attorney that purchases the most expensive advertisement in the book is likely to get the highest rating. Here is one example of how advertising can influence ratings: a ratings publisher contacted an attorney offering to list him as one of the best lawyers in the area in family law. When the attorney informed him that he did not practice family law but commercial law, the publisher offered to list him in both categories for the price of one expensive advertisement.

If advertisements and ratings are unreliable, how do I find a good attorney or law firm? The best way to find a good attorney is through a referral from someone currently using that lawyer

or law firm or has used it in the past. There is no other way to truly know what to expect unless you talk with someone who has had experience with that attorney. Recommendations can come from other business people or from other service providers, such as accountants. If no such reference point is available, your next best option is to contact the local bar association to obtain a list of attorneys. You might also check with the embassy or consulate of your home country to obtain its list of approved attorneys. In either case, ask the attorney you are considering hiring for references and be sure to check them out.

Should I use one attorney or law firm for all my legal needs? Think of attorneys as you would think of doctors. If you have fairly simple or standardized legal work (for example, company formation and tax registration) one good business attorney might be fine. If that attorney has experience and expertise, you may wish to use him or her as the focal point of your legal affairs that could provide you with references or subcontract attorneys for legal work that falls outside his/her purview. A full service law firm may be a good choice, but compare it to a U.S. type of Health Maintenance Organization (also known as "HMO's") in which you can obtain a referral to an expert, but that expert must be one within that law firm. Think also of what you intend to spend for legal services. While a $3,000 a month legal budget might appeal to a good sole practitioner, it is unlikely to turn heads in a large law firm.

I want to start a business in the United States. How reliable are incorporation services advertised in the airline magazine advertisements? These services are not recommended. I recently saw one that advertised incorporation for $50. This is misleading, because $50 is merely the state registration fee; the incorporation service will charge you substantial additional fees for the actual incorporation process. Find a good lawyer and accountant team and have them explain the pros and cons of where and how to set up your business in the United States.

Lawyers often request advanced payment. Is this appropriate and reasonable? Collection is a very difficult subject for American lawyers who are governed by the ethics of the profession regarding types of collection techniques and interest rates and late payment fees that they may charge. This is especially true in the case of foreigners, particularly those who do not have attachable bank accounts or other assets in the United States. For these reasons, attorneys will ask for a "retainer", an advance payment that ensures that they will be paid something if the client later refuses to pay or disappears after the work is completed. This is especially true in immigration matters. No good American lawyer will take on a foreign client without a retainer (exceptions might be large multinational companies). While retainer fees are standard practice, make sure that before you write the check or transfer the funds that you are certain of your choice of lawyer or law firm and that you feel comfortable that the retainer is reasonable amount to be given for the work to be performed.

What happens if I receive my bill for legal services and think I have been overcharged? This is most likely to be the case where hourly fees are involved or when additional unplanned charges have been added. If the bill does not sufficiently detail the hourly fees, begin by asking for a

detailed analysis and itemized list of fees. Check for unusual charges (e.g. 12 hours to draft a simple contract or three lawyers discussing your case and each one charging you a different amount time for that discussion). In addition to legal fees, also examine the other charges. A partner at one large New York City law firm told me recently that their largest single profit center is photocopying charges, they charge the clients $0.30 per page.

If the charges are suspicious, insist on clarification. Such charges are often the results of legitimate mistakes. If the charges are incorrect, ask for an adjustment in the bill. Large law firms, in particular, are likely to reduce their legal fees as a means to keep your business. If you do find problems in the costs area, negotiate a reduction in those costs if you can (e.g. reduce photocopying to $ 0.15 per page). Keep a tight control on your legal costs, but remember to keep the bigger picture in mind - are you getting good service at a fair price? If that is the case, you may not want to audit every charge on every bill.

When should I change attorneys? The key indicator to a good relationship with an American attorney or law firm is whether they pay attention to your case and provide their services in a cost effective manner. Once they stop paying close attention to your issues and/or the costs are out of line with the service received, it is time to replace them. Indicators of poor service and other reasons to shop for a new legal service provider are:

– Late return or failure or to return of phone calls and email messages.
– Your principal lawyer in the law firm retires or leaves the firm.
– Attorneys working on your projects are replaced without your knowledge.
– Decline in the attention to detail in your projects.
– Decline in attention to detail in your billings.
– Failure to ask you for updates on your business or failure to request new business from you.

Keep in mind that changing attorneys and/or law firms is often complex and could be expensive. Time and money will be required to orient the new attorney to your projects. Therefore, before switching lawyers/fi rms, it is recommended to meet with your principal attorney to discuss your concerns and give the existing firm another opportunity to improve before making the change.

→ Regulation of Foreign Investment and Taxation in the U.S.

In this chapter we explore two of the issues most critical to the foreign investor: regulation of foreign investment and taxation. We begin by providing an analysis of the U.S. regulation of foreign investment. The news here is mostly good, as the bulk of investment, known as portfolio investment-company stocks and bonds, other financial instruments and bank accounts is virtually unregulated. Direct investment (including creating or acquiring a company in the U.S.) is subject to more regulation. However, the U.S. has one of the most liberal regimes for accepting and supporting direct foreign investment.

The second area is that of taxation of the foreign investor. This area is more complex and requires the special attention of legal and tax experts. Addressed in the chapter will be the two key considerations for the foreign investor: worldwide taxation and the U.S. system of double taxation as it applies to the corporation and then to the shareholder. Also covered in this chapter are the different types of income that can be created and how they might be taxed.

Regulation of Foreign Investment

The U.S. has a long history of welcoming foreign investment into its economy. Approximately sixty percent of this investment falls into the general category of portfolio investment. Such investment includes stocks, bonds, bank deposits and certain other forms of financial instruments. Except for money laundering issues, the U.S. does not regulate portfolio investment by non-U.S. residents or tax its profits.

About forty percent of foreign investment in the U.S. is direct investment. Such investment includes the creation or acquisition of U.S. businesses in which the foreign investor(s) have direct control of the business. With the exception of certain sensitive and highly regulated sectors, such investment is not strictly controlled. Generally speaking, any non-U.S. citizen or company can establish a U.S-based entity without oversight, review or control of any governmental entity in the United States. Essentially, this means:

– There are no formal government approvals of foreign investments required except in the sensitive and highly regulated areas

– There are no restrictions on the types of financial arrangements that can be made by the non U.S. party.

– Generally, there are no foreign exchange controls.

– Technology transfer fees, interest and royalties charged to the U.S.-based subsidiary by its foreign parent can be freely established and repatriated subject to the appropriate withholding tax.

– The foreign-owned U.S. enterprise can freely remit profits abroad and repatriate its investments and equity.

Direct foreign investment might even be eligible for certain federal and state incentives. Most federal level incentives are either linked to tax treaties between the U.S. and the investor's home country or are accessible to those investors who will export U.S. manufactured goods. State incentives tend to be broader and more diverse since they deal primarily with improving economic conditions within the respective states.

The Tucson, Arizona metropolitan area offers one example of a region with a mixture of federal and state benefits available to all investors. These include:

– Empowerment Zone Credits. These are for businesses willing to locate in certain urban areas and employ people in those areas. Benefits include employment and work opportunity tax credits, business investment incentives, the ability to issue tax exempt bonds, and Welfare to Work tax credits.

– Enterprise Zone Credits. These are for businesses willing to locate in certain areas where there is high unemployment and poverty rates. Benefits include much of the cost of hiring, training and insuring employees, as well as property reclassification tax credits that result in the reduction of local property taxes. Empowerment and Enterprise Zones may overlap.

– Foreign Trade Zone Credits. These are designed to assist companies that import parts, materials or manufacturing components into the U.S., convert them to finished goods and parts in the Foreign Trade Zone, and then export the finished parts. Benefits include: reduced or eliminated import duties, lower inventory costs, and distribution savings.

– Job-Training Grants. Many states offer job-training grants. In Arizona, these grants may result in reimbursement of up to 75% of the training costs for new employees and 50% for existing employees.

This excellent situation for foreign investors is available to most industries but there are a number of industries in which foreign investment is restricted. These include aviation (where, unless there is an exemption, U.S. shareholders must hold at least 75% of the shares); communication and broadcasting (80%); maritime that includes inland and fresh water shipping (75%); and mineral leases (90%). Other even more restricted sectors include banking, defense industries, insurance and power generation. There are also certain state restrictions on investment in agricultural lands.

U.S. Taxation

In many ways this is the most important and most complex part of this report. The question of federal, state and local taxation is critical to both living and doing business in the United States. Decisions about whether to accept an employment offer, acquire real estate, and, in many cases, which type of immigration status will likely have federal and local tax considerations. Additionally, although there are generally clear answers to many tax issues, often these answers depend upon what immigration treaties (treaty trader and treaty investor countries and the Green Card Lottery) and tax treaties the U.S. may have with your country of citizenship or birth. While the analysis in this chapter will be helpful for you to understand basic tax issues and perhaps to begin your tax planning, recognize that the tax situation is ever changing and always complex and you should not make any major decisions without the benefit of expert advise.

This section will discuss tax issues as they affect both individuals and companies. It will cover tax issues on the national and state levels and, in particular, income tax. Consult your tax expert for specific state, county and municipal tax issues because the relative tax advantages on those levels are key factors in deciding often where in the U.S. to locate your business.

Federal and State Corporate Tax Rates

Federal income taxes apply uniformly throughout the United States. They are based on your corporation's annual worldwide taxable income minus allowable deductions. Corporate tax rates for the 2011 tax year are:

- 15% on the first $50,000 of taxable income;
- 25% on taxable income between $50,000 and $75,000
- 34% on taxable income up to $10,000,00, and
- 35% on all taxable income beyond that point.

These tax obligations may be adjusted downward if the corporation has eligible tax credits and or incentives. The rates above are simplified, but close to accurate. Your tax specialist will determine the fi nal rates.

Individual state corporate taxes range from a zero tax rate in Nevada, Washington State, and Wyoming to a 9.99% flat rate in Pennsylvania (with Minnesota at 9.8% and Massachusetts at 9.5%). Some states base their tax on income with a common rates ranging between 5 and 8%. New York and California are high tax states with flat corporate tax rates of 7.5% and 8.84% respectively. Corporate tax goes by other names in some states. Michigan has a "business tax" of 1.9% and Texas calls it a "franchise tax" which is 4.5% on earned surplus or 2.5% of net worth.

Business Entity Taxation

Business entities may or may not be subject to U.S. taxation depending on how they do business in the United States. In this section we will look at four approaches a company may take to doing business in the U.S. market and the tax implications of each approach.

Doing Business through a third party (Normally distributors, representatives, OEM's or VAR's)

A foreign business will be deemed to be doing business - and therefore subject to income taxation - in the U.S. and the various states in which it operates if, in the view of the tax authorities, it has created a permanent establishment. Permanent establishment is usually based on two factors; physical presence of the company in the U.S. and/or having decisions made by an employee or an empowered representative located in the United States. From an income tax perspective, you may first want to decide whether the business wishes to attempt

to avoid U.S. and state income taxation. If so, for this and other reasons, you may prefer to operate through a third party.

The Internal Revenue Code (IRC) of the U.S. does not require tax payments from companies not "... engaged in trade or business in the United States." One example of such a company is one that solicits sales but does not specifically target U.S. customers. Another example is selling through an independent distributor who makes all pricing decisions for U.S. and other sales. In this case, the distributor is the party responsible for U.S. taxation.

Finally, depending on the circumstances, it is possible, that using an independent freight forwarder is not considered to mean "engaged in trade or business in the United States." However, if the distributor or the freight forwarder is "directed" by the foreign company to approach the U.S. market in a particular way or a website is targeted to the U.S. (e.g. to a U.S. address and/or telephone number) the "permanent establishment" provision may apply and taxes must be paid on the U.S. income derived from that business.

Permanent establishment is created if a person from a contracting state, "...has, and habitually exercises in an American state, an authority to conclude contracts in the name of the resident." One of the clearest definitions of "permanent establishment" is found in Article V of the Tax Treaty of 1980 between the United States and Canada. Here, permanent establishment is defined as "...means a fixed place of business through which the business of the resident of a Contracting State is wholly or partially carried on." This is further defined in the treaty to include a place of management; a branch; an office; a factory; a workshop; and a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

The exception in the 1980 Treaty to the employee or representative rule is: "A resident of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because such resident carries on business in that other State through a broker, general commissioned agent or any other type of agent of an independent status, provided that such persons are acting in the ordinary course of business."

There are some Treaty exceptions to the rule of maintaining a physical presence. These are:

– The use of facilities for the purpose of storage, display or delivery of goods or merchandise belonging to the resident;

– The storage of a stock of goods and merchandise belonging to the resident for the purpose of storage, display or delivery;

– The maintenance of a stock of goods or merchandise belonging to the resident for the purpose of processing by another person;

– The purchase of goods or merchandise, or the collection of information, for the resident; and – Advertising, the supply of information, scientific research or similar activities which have a preparatory or auxiliary character for the resident.

Taken together, this means that there are some significant activities that can be undertaken in the U.S. without, in of themselves, creating an income tax liability. These include some very significant activities involved in developing the U.S. market for the future and the storage of goods and merchandise (perhaps raw materials or products destined for further assembly) for future use by your American customer.

As a Global Corporation with a Permanent Establishment in the U.S.

In this case, the foreign corporation chooses to do business in the U.S. without creating an independently based subsidiary. In general, U.S. taxes on the income of foreign persons and corporations are paid only on the portion of the income that is U.S.-sourced. However, not all U.S.-sourced income is subject to U.S. taxation. In general, a taxpayer is not taxed on U.S.-sourced income from business operations unless the taxpayer is engaged in a trade or business within the United States. This was discussed in the first section and relates largely to the permanent establishment rules.

Taxes on U.S.-sourced income are incurred on the portion of income that is "effectively connected" with a U.S. trade or business and on certain periodic investment income having a U.S.-source. The definition of "effectively connected income" is complex. The general rule is that all of the U.S.-sourced gross income of a foreign corporation is "effectively connected" gross income if that corporation is engaged in business within the United States.

So, for example, if you manufacture or assemble products in the U.S., all of the U.S. sourced income from manufacturing or assembling those products in the U.S. is effectively connected income. However, there are some exceptions to the rule and these exceptions must be understood before a foreign corporation chooses to enter the U.S. market with a permanent establishment.

A foreign corporation is taxed on its effectively connected income under rules that are roughly comparable to those of U.S. corporations. The tax rates and allowable deductions are similar. A foreign corporation may claim deductions for business expenses and depreciation in computing its effectively connected income. The most complex issue is establishing the linkage between business expenses and depreciation and their effective connection to a U.S. trade or business. Determining whether this linkage exists requires the services of an expert on taxation. Foreign corporations may also claim deductions for charitable contributions in much the same manner of a U.S. corporation. In this case, however, the deduction is not subject to the establishment of the linkage to U.S. trade or business.

Setting up a U.S. Corporation (a subsidiary) to handle U.S. Business

This approach is a variant of the second approach in that the foreign party sets up an independent company in the U.S., (although the independent company often has the same ownership as the parent company). Your decision to set up a distinct subsidiary of the parent (or a regional) company is usually dictated by issues other than taxation, but it does have a few important tax implications. The first is whether there is a tax treaty with your country. If so, many of the vague and difficult terms of the U.S. Tax Code are addressed making it easier to begin the process of establishing your subsidiary.

Perhaps the most difficult issue in setting up the distinct U.S. subsidiary company is transfer pricing. The challenge lies in determining a price, which for tax purposes, is fair and equitable to both the exporting company and the United States. For example, if a company in Germany sells its products and services at very low prices to its U.S. subsidiary in order to reduce its tax liability in Germany and take its profits in the U.S. which has lower overall corporate and other taxes, this would be of great concern to the German tax authorities. Just the opposite would be true if the profits were taken outside the U.S. by setting high prices and allowing the controlled subsidiary in the U.S. to operate on a low profi t or breakeven proposition.

Given the complexity of international business, the Internal Revenue Service, in determining the appropriate transfer price, looks at four aspects of related corporate commerce: costs of goods, costs of services, transfer of tangible property and transfer of intangible property - usually such things as royalties. The general rule for most tax authorities, including those of the U.S. are to determine the transfer price by looking at:

– How do the prices compare with those used by unrelated parties?
– Best method rule. Is the best method available used to decide the prices. An example might be how royalty fees are determined between related and unrelated parties?
– Comparability. Are contractual terms, economic conditions, volumes, and risks the same or similar between related and unrelated parties?
– Arm's-length range. Attempt to determine a fair range for arm's-length prices and require the companies involved to stay within that determined range.

An additional tax consideration when setting up your company in the U.S. is the business form selected. Most companies will choose the corporate form that results in a system of double taxation. Double taxation, refers to when a corporation is taxed on its profits, and a second tax results when the after tax profits are distributed to shareholders are taxed as part of their personal income. To avoid double taxation, one might consider forming as a limited liability company ("LLC"). The LLC is a hybrid between a corporation and a partnership that provides corporate-like protection for the owners while being taxed like a partnership, thus avoiding the first level of taxation. Because LLC's are not permitted to go public, publicly held corporations (or those who want the option to go public) do not select the limited liability company form. It is

available, as is the partnership form, for those companies that wish to remain private. Generally speaking, the LLC can be treated as a corporation or partnership for tax purposes by the taxpayer(s), that is, the equity owners of the LLC. This is a decision that should be discussed in detail with your attorney and accountant.

Setting up a U.S. Branch of a Foreign Corporation

Normally, a company entering the U.S. would consider opening a branch office if it desires total home office control, secrecy, and simplicity of management. A branch office is registered with local authorities as another office (branch) of the parent company, or in some cases, as the branch of a subsidiary of the parent corporation. It is not a legally distinct subsidiary. The major disadvantage of the branch office is that it subjects the parent company itself to local taxation. Additionally, the assets of the parent company are also exposed to U.S. federal, state and local taxation.

Nevertheless, if the business to be started is likely to have substantial losses in its initial years, the branch may be a viable alternative. Just as the profits would be ascribed to the parent company, so would the losses of its foreign branches. Taking these losses against the profits of the parent company then result in a substantial tax savings in the parent company's tax home. Therefore, a company may desire to begin as a branch operation and shift to a subsidiary form when the branch office becomes profitable. The latter scenario might make sense where company expects losses in its initial years, such as when it introduces new products and services into the U.S. market and/or where the sales cycle or collection process is very long.

Tax Treaties

The U.S. has income tax treaties with over fifty countries dating back to a 1948 treaty with Denmark. Under these treaties, residents (not necessarily citizens) of foreign countries are taxed at a reduced rate, or are exempt from U.S. income tax on certain sources of income received from within the United States. These reduced rates and exemptions vary among countries and types of income sources. A current list of those treaties is included related to company taxation and related to individual taxation.

Country Tax Treaties

Although the corporate tax structure is complex, it is far less onerous where a tax treaty exists. In 2006, the U.S. had tax treaties with 54 countries that included most of the critical countries except the People's Republic of China. Additionally, studies show that the average amount of taxes paid to the U.S. Internal Revenue Service on global receipts is less than 1.5%. Therefore, proper understanding and management of the tax function should not deter businesses from operating in the U.S.

The major purpose of tax treaties is to create conditions where double taxation is avoided. All such treaties allow a company to write off its overseas taxes against its home tax liability. Tax treaties are also valuable for establishing withholding rates on interest, royalties and dividends and to establish clear rules on the repatriation of profits and investment. Table 8-1 shows the countries that have treaties with the U.S. and the dates of the treaties. Be sure to look at the treaty relevant to your home country (ies) as the treaties differ from country to country.

Country Tax Treaties with U.S.A.

COUNTRY	YEAR SIGNED	COUNTRY	YEAR SIGNED
Australia	1982, 2001	Lithuania	1998
Austria	1996	Luxembourg	1962, 2001
Barbados	1984	Mexico	1992, 2003
Belgium	1970	Morocco	1977
Canada	1980	Netherlands	1992
China, Rep. Of	1984	New Zealand	1982
Cyprus	1984	Norway	1971
Czech Republic	1993	Pakistan	1957
Denmark	1948, 2000	Philippines	1976
Egypt	1980	Poland	1974
Estonia	1998	Portugal	1994
Finland	1989	Romania	1973
France	1994	Russia	1992
Germany	1989	Slovak Republic	1993
Hungary	1979	Slovenia	1999
Iceland	1975	South Africa	1997
India	1989	Spain	1990
Indonesia	1988	Sweden	1994
Ireland	1997	Switzerland	1996
Israel	1975	Thailand	1996
Italy	1984	Trinidad	1970
Jamaica	1980	Tunisia	1995
Japan	1971, 2003	Turkey	1996
Kazakhstan	1993	Ukraine	1994
Korea	1976	United Kingdom	1975, 2001
Latvia	1998	Venezuela	1999
United States	1996		

**Source: United States Department of Treasury, Internal Revenue Service*

Individual Taxation in the U.S.: Residents vs. Non-Residents Aliens

The distinction between a resident alien and a nonresident alien is critical from a tax point of view: The resident alien is subject to U.S. income tax on their worldwide income, while the nonresident alien is generally only subject to U.S. income tax on the income earned from U.S. sources.

Resident Aliens

Resident aliens are generally defined as U.S. residents for tax purposes if they are lawful "permanent residents," that is, (a) they hold an immigrant visa ("green card"); or (b) they meet a "substantial presence test." The substantial presence requirement is generally met if they are present in the U.S. for at least 31 days during a calendar year and the total number of days present in the U.S. in the current and immediately preceding years is at least 183 days. Resident aliens generally file the same forms and at the same time, as U.S. citizens. While they are generally taxed on their worldwide earnings, exceptions do exist.

First is the "closer connection exception". This applies when a resident alien is physically present in the U.S. less than 183 days in a calendar year, maintains a home in another country and can prove a "closer connection" to that home abroad. In such a case, the alien is treated as a nonresident for tax purposes. Additionally, if a tax treaty exists between the U.S. and the taxpayer's home country, the treaty may provide that only the income from U.S. sources is subject to U.S. taxation.

Even if the resident alien does not meet the "closer connection" test, he or she may qualify for treatment as a nonresident for tax purposes if he/she meets the requirements of the "substantial presence" test. This test applies to employees of foreign governments or international agencies (such as the United Nations) and to certain teachers, trainees, students and professional athletes. Different criteria apply to each of these categories, but if one applies to you, you may be treated as a nonresident alien for tax purposes.

Nonresident Aliens

Income of nonresident aliens that is not effectively connected with the conduct of U.S. trade or business is generally exempt from U.S. taxes, unless it is from sources within the U.S. and falls within the definition of "fixed or determinable annual or periodic gains, profits and income." This is known as "FDAP" income. FDAP includes wages and compensation, interest, dividends, rents and royalties received from U.S. sources, but normally does not include capital gains and other income realized from the sale of property. FDAP based taxes are applied at a flat rate of 30% and are collected by a resident payer who withholds the tax from the nonresident alien and pays it directly to the Internal Revenue Service. No deductions are allowed for FDAP taxes. There are, however, many important exceptions to the FDAP rules:

– Income from wages and compensation is exempted if they do not exceed $3,000 per year or if the person is not present in the U.S. for more than 90 days during the tax year.

– There are no taxes and withholding on interest income on U.S. bank deposits or on portfolio investment interest.

– There are certain exemptions on dividend income when the corporation that issues the dividend derives 80% or more of its gross income from activities outside the U.S. or in a U.S. possession.

– Rental income is not subject to FDAP treatment if the owners of the real estate treat it as part of the assets effectively connected with a trade or business. Then such income will be treated under the normal tax regime, which means it is not withheld at source and the normal deductions associated with this type of business are allowed.

– FDAP taxes may also be reduced or eliminated by various tax treaties. This is especially true in relation to wages and compensation.

U.S. Tax Treaties Applied to Individuals

The U.S. has current treaties with 57 nations that provide for certain tax exemptions for individual foreigners who either: a) provide certain services in the U.S or; b) are employed by or retired from foreign governments and choose to live in the U.S. but are not citizens of the U.S. These treaties fall into four categories:

1. Personal Services Income: Certain personal services are exempt from U.S. income tax. This tax category is normally reserved for independent contractors and self-employed individuals whose business does not have a permanent establishment in the United States. Each treaty has different considerations but all generally limit the number of days such individuals may be present in the United States. This category does not apply such people as actors and musicians.

2. Professors, Teachers and Researchers: The U.S. has treaties with 32 countries that allow professors, teachers and researchers to be exempt from U.S. income tax. The treaties generally grant such exemptions for two or three years.

3. Students and Apprentices: This exemption from U.S. income tax is allowed by all 57 treaty nations for those individuals who come to the U.S. short-term to obtain a technical education. These treaties rarely allow for an eligibility period of more than three years.

4. Wages and Pensions Paid by a Foreign Government: All 57 treaty nations allow an exemption from U.S. income tax for their non- U.S. employees working in the U.S. and for their non-citizen pensioners who choose to retire in the United States.

Countries with U.S. Tax Treaties regarding Taxation of Individuals*

COUNTRY	TYPES	COUNTRY	TYPES
Australia	1,3,4	Latvia	1,3,4
Austria	1,3,4	Lithuania	1,3,4
Barbados	1,3,4	Luxembourg	All 4
Belgium	All 4	Mexico	1,3,4
Canada	1,3,4	Morocco	1,3,4
China-PRC	All 4	Netherlands	All 4
CIS	All 4	New Zealand	1,3,4
Cyprus	1,3,4	Norway	All 4
Czech Republic	All 4	Pakistan	All 4
Denmark	1,3,4	Philippines	All 4
Egypt	All 4	Poland	All 4
Estonia	1,3,4	Portugal	All 4
Finland	1,3,4	Romania	All 4
France	All 4	Russia	1,3,4
Germany	All 4	Slovak Republic	All 4
Hungary	All 4	Slovenia	All 4
Iceland	All 4	South Africa	1,3,4
India	All 4	Spain	1,3,4
Indonesia	All 4	Sweden	1,3,4
Ireland	All 4	Switzerland	1.3.4
Israel	All 4	Thailand	All 4
Italy	All 4	Trinidad & Tobago	All 4
Jamaica	All 4	Tunisia	1,3,4
Japan	All 4	Turkey	All 4
Kazakhstan	1,3,4	Ukraine	1,3,4
Korea, Republic of	All 4	United Kingdom	All 4
Venezuela	All 4		

Treaty Types

1. Personal Service Income
2. Professors, Teachers and Researchers
3 . Students and Apprentices
4. Wages and Pensions Paid by a Foreign Government

** Source: U.S. Department of Treasury, Internal Revenue Service. Publication 901 (Rev. May, 2004).*

→ Statement of Practice

Koslow & Associates is involved in all aspects of international trade and development. It assists U.S. based clients in providing services related to conducting business in international markets and also assists foreign individuals and companies in entering into U.S. markets and in establishing residency in the U.S.