Part 1 - Standard Clauses "Boilerplate" agreement: Brazil

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Brazil-specific information concerning the key legal and commercial issues to be considered when drafting standard "boilerplate clauses" for cross-border agreements.

This Q&A provides country-specific commentary on *Checklist, Boilerplate clauses: Cross-border*.

See also *Country Q&A, Part 2 - Standard Clauses "Boilerplate" agreement: Brazil* and *Country Q&A, Part 3 – Standard clauses "Boilerplate" agreement: Brazil* for more country-specific commentary.

Parties

1. In your jurisdiction, what information needs to be included about the parties at the start of an agreement?

In relation to individuals, the recitals at the start of the agreement must contain their:

- Full name.
- Nationality.
- Profession.
- Marital status (and, if married, which Brazilian matrimonial property scheme applies).
- Residential address.
- Brazilian individual taxpayer registration number (CPF/ME) (or equivalent tax ID for foreign individuals).

For corporate entities, the recitals at the start of the agreement must contain their:

- Company name.
- Trading name, if any.

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- Corporate type.
- The national laws under which they are constituted and exist.
- Brazilian corporate taxpayer registration number (CNPJ/ME) (or equivalent tax ID for foreign companies).
- Head office address.
- Individual representative's personal information (see above).

Interpretation

2. Is an interpretation section usually included at the start of contracts in your jurisdiction?

Yes. Since the Economic Freedom Act (Law No. 13,874/19) came into force, the inclusion of an interpretation section such as *Standard clause, Interpretation: Cross-border* is highly recommended, because the section expressly provides for the parties to establish their own rules of interpretation, rather than relying on whatever interpretation the courts may impose. The interpretation section usually includes a definition clause.

The miscellaneous clause, generally inserted at the end of the agreement, may provide for other rules of interpretation; for example:

- The language that will prevail in case of doubt.
- That the agreement contains the entire understanding of the parties with respect to the subject matter of the contract.
- That the schedules and attachments form part of the agreement and will have full effect (see *Question 3*).

It is standard practice in Brazil to introduce an "Object" section at the start of the agreement after the parties' details, which states the object of the agreement and how it will be carried out.

It is also standard practice in Brazil that the date of the agreement is stated at the end and not in the Preamble, and this is usually the only date on which the parties or the last party signed the agreement.

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3. If Schedules are used, should they be expressly stated to form part of the agreement as set out in *Standard clause, Interpretation: Cross-border: clause 1.4* so that they are given full contractual effect?

It is not mandatory, but is common practice, to have a clause similar to *Standard clause, Interpretation: Cross-border: clause 1.4*, in which the parties can stipulate:

- How many and which Schedules are attached to the agreement.
- Which clauses should prevail in the case of a conflict between the main agreement clauses and the Schedules.
- That the Schedules are part of the agreement and, as a consequence, have full contractual effect.

It is standard practice in Brazil for the parties to initial all pages of the agreement and the Schedules.

4. In your jurisdiction, can an interpretation section be set out in a Schedule attached to the main agreement?

Yes, it can, but an interpretation section is usually included at the beginning, or the end of the agreement (see *Question 2*).

5. If non-technical terms are not defined in the agreement, will the court interpret them in accordance with their ordinary and natural meaning?

Yes; when not defined in the agreement, non-technical terms will be interpreted in accordance with their ordinary and natural meaning, following customs, practicesand market use. Legal technical terms not defined in the agreement will be interpreted as defined by law.

6. Are holding company and subsidiary defined under the laws of your jurisdiction?

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A holding company ("*sociedade controladora*") and a subsidiary ("*sociedade controlada*") are defined in Articles 1.097 to 1.101 of the Brazilian Civil Code (BCC) (in relation to corporations governed by the BCC, such as limited liability companies), and in Articles 243 to 264 of Chapter XX of the Corporations Act (Law no. 6.404/76) (in relation to corporations governed by the Corporations Act, such as joint stock companies).

If the concepts "holding company" and/or "subsidiary" are used in a contract, it is possible to define them in the Definitions section of the contract. In this case, the agreement may include its own definition, or provide that these terms will be defined in accordance with the BCC or with the Corporations Act, inserting the relevant statutory references from either the BCC or the Corporations Act, as is the case in the *Standard Clause, Interpretation: clause 1.6*.

Under the BCC, "a company is controlled where:

- Another company holds, through the capital of the controlled company, a majority of votes on resolutions put to meetings or to the assembly of partners, members or shareholders, as the case may be, and the power to elect a majority of the administrators of the controlled company.
- Control over the company referred to in the preceding item is held by another company, through shares or interests held through other controlled companies".

Under the Corporations Act, a corporation is controlled when a controlling corporation has rights of a partner, either directly or through other controlled corporations, which permanently assure it prevalence in voting and the power to elect the majority of the officers.

7. Is it common in your jurisdiction to define "Business Day" for notice provisions by reference to days when banks are closed/open?

Yes, it is common practice to define "Business Day" for notice provisions. In Brazil, the concept of "Business Day" is defined by law. Every year, the government is responsible for making a civil calendar, in which all business days and business holidays are established.

Each state and each city may have different holidays, which may lead to a situation where business days will not coincide in every city; as a result, agreements usually provide a mechanism of resolution of this conflict, but where they do not, the reasonable approach is likely to be that "business day" will refer to the holidays of the place where the obligation is performed.

If there is a financial institution involved or the agreement provides for payment through bank transfer, the agreement may insert a reference to the bank's working hours, but it is not mandatory and depends upon the context and conditions of the deal. However, banks' days of business over the course of the year will not usually be a reference point in the context of "Business Day".

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8. Are moral rights recognised in your jurisdiction? If so can moral rights be assigned or licensed in your jurisdiction? If so, can they be included in the definition of "Intellectual Property Rights" in *Standard clause, Interpretation: Cross-border*?

Yes, moral rights are recognised in Brazil, but they cannot be assigned or licensed.

In Brazil, copyrights are regulated by the Copyright Law (9.610/98). The Copyright Law derives much of its content from the Berne Convention, and follows most of the principles adopted by civil law countries; it therefore has a strong emphasis on moral rights.

Under Article 27 of the Copyright Law, authors' moral rights cannot be waived or assigned. In this sense, although an author may assign or licence rights, allowing an assignee or licensee to use or modify the author's work, if such use or modification is in breach of the author's moral rights, the author will always be entitled to protect their reputation and image in connection with those rights. Therefore, "moral rights" should not be included under the definition of "Intellectual Property Rights" in *Standard clause, Interpretation: Cross-border: clause 1.1*.

9. Are warranties understood and commonly used in your jurisdiction? If not, is there any other legal concept or wording that is used to similar effect? Can the definition of "Intellectual Property Rights" in *Standard clause, Interpretation: Cross-border* be used in a warranty that IP rights have not been infringed?

Yes, warranties are understood and commonly used in Brazil. This clause is usually associated with an indemnification clause, under which the parties assume the obligation to indemnify the other if any of the representations or warranties are found to be wrong, mistaken or incomplete; however, the inclusion of such an indemnity provision is not mandatory.

The definition of "Intellectual Property Rights" in *Standard clause, Interpretation: Cross-border: clause 1.1* can be used in a clause in which the parties warrant that IP rights have not been infringed.

10. Is value added tax (VAT) or another service tax payable in your jurisdiction? Please state the name of the service tax, if any.

There is no VAT in Brazil. However, there are similar taxes in our jurisdiction:

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- ISSQN ("*Imposto sobre Serviços de Qualquer Natureza*"), regulated by Complementary Law nº 116/2013, is required when one of the services listed in the Complementary Law is provided. As ISSQN is a municipal tax, the rates will vary depending on the municipality where the service is provided and the type of service.
- ICMS ("*Imposto sobre Operações Relativas à Circulação de Mercadorias e sobre Serviços de Transporte Interestadual e Intermunicipal e de Comunicação*") is imposed on the sale of goods, on interstate and intermunicipal transportation services and on communication services. As ICMS is a state tax, the rates will vary depending on the state where the goods or services are provided and the type of goods or services involved.

Companies are also subject to the following contributions relating to their gross revenue, including revenue from services:

- Contributions to the Social Integration Program (PIS).
- Contributions to Social Security Financing (COFINS).

However, the rates and the deduction of expenses from the calculation basis will vary depending on the taxation method of IRPJ (income tax) and CSLL (profit contribution) chosen by the company.

11. What is the legal definition of "a person" in your jurisdiction? Does the wording in *Standard clause, Interpretation: Cross-border: clause 1.3.* cover this or does it need to be amended in any way?

A "person" in Brazil can be either an individual ("*pessoa física*") or a legal entity ("*pessoa jurídica*").

A natural person is defined as a human being capable of entering into obligations and rights in the civil sphere (*Article 1, BCC*).

A legal person is an entity formed by one or more individuals, which is capable of entering into obligations and rights in its own right. The legal entity will have a separate legal personality from its founders.

Brazilian Law provides the concept of legal persons under public or private Law. Under Article 44 of the BBC private legal persons include:

- Associations.
- Corporate entities.
- Foundations.
- Religious organisations;
- Political parties.
- Limited liability sole proprietorships (EIRELI).

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Under Article 41 of the BCC, public legal persons include:

- The Federal government.
- The Brazilian states, the Federal district and the Brazilian territories.
- The municipalities.
- Autonomous state entities, including public associations.
- Other entities of public character created by law.

To be classified as a legal person, the entity must be enrolled in the Brazilian corporate taxpayer system and have a registration number (CNPJ/ME) (though it should be noted that not all entities enrolled in the CNPJ/ME have a legal personality).

The text in *Standard clause, Interpretation: Cross-border: clause 1.3* does not cover the concept since it does not include all the legal entities provided by Brazilian Law. It would be necessary to include:

- Public entities, which could be added into the clause as "government authorities/entities".
- Limited-liability sole proprietorships (EIRELI).
- Associations.
- Foundations.
- Religious organisations.
- Political parties.

12. Does the wording in *Standard clause, Interpretation: Cross-border: clause 1.5* provide an effective definition of "company" in your jurisdiction?

Yes, the wording in *Standard clause, Interpretation: Cross-border: clause 1.5* provides an effective definition of "company" in the Brazilian jurisdiction.

The following categories of companies in Brazil are regulated by the BCC:

- Ordinary partnership ("*sociedade simples*") (*Articles 997-1038*).
- Limited liability company ("*sociedade limitada*") (*Articles 1052-1087*).
- Sole shareholder limited liability company ("*sociedade limitada unipessoal*") (*Articles 1052-1087*).

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- Sole proprietorship ("*empresário individual*") (*Articles 966-980*).
- Ordinary partnership ("*sociedade em nome coletivo*") (*Articles 1039-1044*).
- Limited partnership ("*sociedade em comandita simples*") (*Articles 1045-1051*).
- Limited partnership per shares or in commendam per shares ("*sociedade em comandita por ações*") (*Articles 1090-1092*).
- Co-operative corporation ("*sociedade cooperative*") (Articles *1093-1096*).
- Limited-liability sole proprietorship ("EIRELI") (*Article 980-A*).

Joint stock corporations ("*sociedade anônima*") are regulated by the Brazilian Companies Act.

All types of company must be registered in Brazil, with either (depending on the company's category):

- The Board of Trade of the company's home federal state.
- The Civil Registry of Legal Entities.

Foreign companies that intend to have a place of business in Brazil should be registered there. When a subsidiary is registered, it will be considered a Brazilian company. The foreign shareholder should register a legal representative in Brazil.

If not yet registered, a company will be seen as "irregular", and its shareholders rather than the company in its own right will be responsible for the company's commercial acts, so their responsibility will not be limited by the protection of a legal personality.

13. If an agreement is silent on whether fax or email or other forms of electronic communication is to be treated as writing (for example, for the purpose of giving written notice), do the laws in your country infer that fax and email are included?

Communications by the parties do not require a special form to be considered valid (*Article 107, BCC*). As a result, if the agreement is silent in relation to a specific form, notices can be sent by email, fax or any other form of communication.

It is common practice to send notifications by email. Nevertheless, to be able to evidence the fact that the other party has received the notification, the agreement will usually provide that the email must be sent with a receipt confirmation.

The wording of *Standard clause, Interpretation: Cross-border: clause 1.12* could be useful in Brazil if the parties intend to limit the means of communication and the people to whom the communication should be directed.

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14. *Standard clause, Interpretation: Cross-border: clause 1.19* seeks to address the risk of the ejusdem generis rule. Does your jurisdiction apply the ejusdem generis (or eiusdem generis) rule (that is, where a general provision is qualified in any way by confined examples, the court will interpret the general words only to relate to matters of the same class as the examples given)?

The ejusdem generis rule does not apply to interpretation of contracts in Brazil. In this sense, the inclusion of *Standard clause, Interpretation: Cross-border: clause 1.19* will have little relevance.

If a clause with examples or illustrations is brought to the courts, it will be necessary to identify the parties' common intent as to whether their intention was general or specific (*Article 112, BCC*). The inclusion of *Standard clause, Interpretation: Cross-border: clause 1.19* would be useful to identify such a common intent on the parties' part, but it is not the only way to achieve this purpose. The lack of a clause with this content would equally not imply that it was a common intent to provide for all the specific terms in the agreement.

Conflicts

15. In your jurisdiction, where a contract is based on a standard form, but the parties have added special conditions, if any conflict arises between the standard terms and the special conditions, will the standard terms or the special conditions prevail in the absence of specific wording in the agreement (*Standard clause, Conflicts/Priority: Cross-border: Option 1*)?

Generally, the standard form contract will have a clause determining which clause will prevail if there is a conflict between the standard form contract and the special conditions attaching to that particular contract.

If, however, the agreement does not establish how to solve this conflict, the law will be applied. Articles 112 to 114 of the BCC provide that declarations of the parties will be interpreted in accordance with their intentions. In this sense, if an agreement is based on standard terms but also contains special conditions, the courts will try to interpret and guarantee the intentions agreed by the parties (which prevail over the literal sense of the wording).

However, in relation to standard form contracts, any ambiguous or contradictory clauses will be construed in a manner most favourable to the party agreeing to the standard terms (*Article 423, BCC*). In this sense, if a standard clause, rather than the specifically agreed terms, is more beneficial for the party agreeing to the standard terms, it will prevail in case of a conflict.

Therefore, as a general rule, where standard-form clauses conflict with special conditions added by the parties, courts will seek the parties' intention to determine which terms should prevail.

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16. Where there is a genuine discrepancy between the contractual documents before the court, how does the court approach the order of precedence?

Courts will always interpret contracts in accordance with the principle of good faith (*Article 113, BCC*) and with regard to the parties' intentions (see *Question 15*).

It should be noted that the Brazilian courts tend to interpret contracts in such a manner that allows the agreement's effectiveness to survive (in accordance with the conservation of the agreements principle), and will prioritise clauses that allow the agreement to be duly performed by the parties.

Standard clause, Conflicts/Priority: Cross-border: Option 1 is frequently found in agreements in Brazil. Such a clause is relevant when it comes to the interpretation of the parties' intention to prioritise certain parts of the agreement, such as the body of the contract prevailing over its schedules (see *Question 3*). Where there are several documents which make up the contractual documentation (for example, a master or framework agreement and then another agreement, the parties should include a provision which states the order of priority for interpretation).

It is also common for contractual amendments to take precedence over the agreement, since they were the last document signed between the parties. The amendment will normally have a clause establishing which clauses from the contract are still valid and which ones are overruled by the amendment.

Variation

17. In your jurisdiction, are there any specific barriers to the effectiveness of a variation clause such as *Standard clause, Variation: Cross-border*? Can the conduct of the parties override the contractual requirement for a variation to be agreed in writing?

No, there are no barriers to the effectiveness of *Standard clause, Variation: Cross-border*.
Variation clauses can be included at the discretion of the parties. However, depending on the circumstances, the conduct of the parties can override the need for a variation to be agreed in writing, depending on the context, the type of agreement and the circumstances, as transactions will be interpreted in accordance with the principle of good faith and the practice of the place in which they are made (*Article 113, BCC*). Under the principle of good faith, if one or both parties repeat the same conduct over time, even if this conduct is diametrically opposed to the text of the agreement, without an objection by the other party and therefore placing a legitimate reliance by the other party that such conduct was accepted, both parties will be bound by that variation.

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As the objective principle of good faith is part of public policy and cannot be waived by the parties, the inclusion of a clause in the contract will not be sufficient to prevent its application, when this is deemed appropriate.

18. What are the requirements in your jurisdiction for a valid variation of an agreement?

There are no general formal requirements for the variation of an agreement to be valid.

A written agreement may be effected by a written amendment which leaves no doubt as to the terms of the variation. It may also be modified through the parties' behaviour.

Parties' actions or omissions can "create" or "modify" certain contractual relationships based on the good faith principle (see *Question 17*).

If the contract is of a type that has formal execution requirements and must be executed by public instrument (that is, a template agreement, into which the parties insert the specific conditions of their deal), the amendment will only be valid if it meets the same formality requirements and is made by public instrument.

Severance

19. Does illegality render a contract valid but unenforceable or would the contract become invalid for illegality in your jurisdiction?

If a court declares the contract illegal, it will be considered null and void (*Article 166, BCC*).

However, courts can declare or recognise the partial nullity of a contract, if not all its clauses are illegal, and so keep the effectiveness of legal and valid clauses. This measure aims to avoid invalidating the entire agreement (*Article 184, BCC*).

In general, Brazilian agreements have a clause establishing that the nullity, annullability or unenforceability of one of its clauses will not invalidate all the agreement, but only that specific clause. Brazilian law accepts the severance rules used in *Standard Clause, Severance: Cross-border: clauses 1.1 and 1.2*.

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20. In your jurisdiction is some degree of severance applied by the courts even if no severance clause is expressly written into the contract? If so, in what circumstances.

Yes, this would be applied. Provided that the intention of the parties is respected, partial invalidity of the letter of an agreement between the parties does not affect the valid part, if the invalid part can be separated (Article 184, BCC), the courts must try to avoid invalidating the entire agreement (see *Question 19*). In this sense, even if a severance clause is not expressly set out in writing and agreed by the parties, the courts will maintain the validity of the remaining clauses, if possible, under the contract, if this is the will of the parties.

Severance will be applied to contracts when the clause considered null or void is not of the essence of the agreement, and its severance would not impact the economic operation of the contract. In this sense, the invalidation should not impair the main obligations of the parties.

21. Is an obligation to negotiate a substitute of an equivalent but valid clause enforceable in your jurisdiction (see *Standard clause, Severance: Cross-border: clause 1.2*)? Is it only enforceable if the substitute wording is easily ascertainable?

There is no statutory obligation to negotiate a substitute clause for the one declared null or void. However, if the parties include such an obligation in the contract, this provision will be fully enforceable.

Even if there is no contractual provision in this regard, the parties can choose to negotiate a new and valid clause, or, at least, a new interpretation that will achieve the purpose they were seeking when they agreed the invalid clause, if possible and authorised by law.

The obligation to negotiate is enforceable even if the substitute wording is not easily ascertainable.

22. Are there any legal provisions in your jurisdiction that deal with severance of certain terms?

Yes, there are (see *Question 20* and *Question 21*).

However, severance will only be possible if the invalid term can be separated from the rest of the contract's obligations.

Invalidity of a main obligation will imply the invalidation of its accessory obligations, but the invalidity of an accessory obligation does not imply the invalidity of the main obligation (*Article 184, BCC*).

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Counterparts

23.Is a document signed in counterpart validly executed in your jurisdiction? Are the counterparts treated as a single document? Is each copy of the agreement signed in counterpart considered to be an original?

Yes, a counterpart can be valid and enforceable in Brazil when it is executed by one party and by two witnesses (*Article 784, III, Civil Procedure Code*). All of the different copies, together, will complete a single agreement and any of these copies can be treated as an original for evidentiary purposes, since they are signed by one party and two witnesses.

24. In your jurisdiction, are there any limitations to the methods of electronic delivery of counterparts? Is delivery of the whole counterpart required or can only delivery of the signature page be acceptable (see *Standard clause, Counterparts: Cross-border, clause 1.2*)?

Limitations

There are the following limitations.It is important to differentiate between:

- Documents that constitute a judicial execution title in Brazil, and which are therefore valid before Brazilian public authorities and can be enforced before a civil court.
- Documents that produce their effects only between the parties.

Agreements that constitute a judicial execution title and are accepted by Brazilian public authorities must be executed by the party and by two witnesses in 3 forms:

- Handwritten signature in a hard copy original.
- Electronically, through a public key certificate. This is a certificate registered with ICP-Brasil (Brazil's National Information Technology Institute, responsible for guaranteeing the authenticity of electronic signatures, regulated by Brazilian Provisory Measure No. 2200-2/2001).
- A digitalised copy of the hard copy, with certification of signature issued by a public notary.

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Agreements with handwritten signature and digitalised are valid between the parties but not before the authorities. In this case, the party that brings a claim against the other with such a document will bear the burden of proof of the signature's authenticity.

There is another option of signature whose effects would lie in between the above options: it is also possible for the parties to execute the agreement with a certificate issued by a non-licensed certifying company (such as DocuSign), rather than the ICP-Brasil. In this case, the agreement will be valid, but there may be discussions about its enforceability (there is case law in both directions). To avoid any confusion, it is highly recommended to insert a clause in the agreement where the parties expressly agree to use and recognise as valid any form of proof of consent to the terms of the agreement in electronic format, even if they do not use a digital certificate issued registered with ICP-Brasil (*Article 10, paragraph 2, of Provisional Measure no. 2,200-2*).

Finally, there is a recent understanding from the Superior Court of Justice admitting the enforceability of a document electronically signed by the party without the signature of 2 witnesses, when it was signed by a certificate registered with ICP-Brasil.

Whole counterpart required, or just signature page?

While there is no specific legal requirement, it is market practice to undertake the following steps, for evidentiary reasons:

- The entire document must be delivered to the other party, with all exhibits and attachments, if any.
- When handwritten (hard copy or digitalised), the parties must sign the signatures page and initial all other pages.

Therefore, *Standard clause, Counterparts: Cross-border: clause 1.2* would not be appropriate in Brazil.

25. Where an agreement provides for the agreement not to take effect until each party has executed one counterpart, as set out in *Standard clause, Counterparts: Cross-border, clause 1.3*, could this create a risk that the parties do not intend to be bound by the written agreement until it is executed by each party?

In Brazil, an agreement is valid and enforceable when duly signed by the parties and two witnesses. In this sense, the content of *Standard clause, Counterparts: Cross-border: clause 1.3* is applied by default in Brazil. This does not create any risk that the parties do not intend to be bound by the written agreement until it is executed by each party.

26. Is a duty or other tax payable on counterparts or duplicates of contracts in your jurisdiction?

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The mere execution of the agreement (and so also a counterpart or duplicate agreement) does not trigger any duty or tax.

However, where the type of agreement means that it should be registered with a public registry (see *Question 33*), the parties will have to pay a registration fee. This will apply where the counterpart needs to be registered.

Language

27. Is there any requirement in your jurisdiction that commercial contracts must be written in the local language to be valid and enforceable?

There is no requirement for commercial contracts to be written in the local language. However, contracts written in a foreign language will only be enforceable in Brazil when translated into Portuguese by a sworn or court-appointed translator (*Article 149, Law no. 6.015/1973; Article 224, BCC*).

As a result, if the contract is to be performed in Brazil, it is advisable that the parties draft a bi-column Portuguese-foreign language agreement, so that they have control over the translation.

28. Under the laws of your jurisdiction, will the local language version of any agreement prevail or can the parties agree which version will prevail over the other (see *Standard clause, Language: Cross-border: clause 1.3*)?

Any documents used by any Brazilian government agencies or authorities or enforced in the Brazilian court must be in Portuguese or accompanied by an official Portuguese translation prepared by a sworn or court-appointed translator, and the public authorities or courts will only analyse the Portuguese version.

If there is a prevailing language clause stating that the foreign language should prevail in the case of conflict of interpretation, this clause would have effect as between the parties and before any arbitral tribunal (if arbitration is provided for); such a clause would not be upheld by the state courts and public authorities, which would only consider the Portuguese version.

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29. If a commercial agreement needs to be submitted for government approval in your jurisdiction, in what language should it be submitted? Could an English version of the document be approved?

The submission should be in Portuguese, and the version of the agreement itself should be in Portuguese. A foreign language version would only be approved if accompanied by a Portuguese translation prepared by a sworn or court-appointed translator, which would automatically prevail over the English original (see *Question 27*).

Governing law and jurisdiction

30. Does the law in your jurisdiction dictate (a) which governing law will apply to commercial agreements and (b) in which jurisdiction any dispute will be heard?

Where the parties do not establish otherwise, Brazilian law dictates:

- Which governing law will apply to commercial agreements.
- In which jurisdiction any dispute will be heard.

If the parties have not agreed otherwise, agreements executed in Brazil and to be performed in Brazil will be governed by Brazilian law and subject to the Brazilian courts' jurisdiction (unless the parties have agreed upon an arbitration clause) (*Article 21, II, Brazilian Civil Procedure Code*). The provisions relating to conflicts of laws are set out in:

- The Law of Introduction to the Rules of Brazilian Law (Decree-Law No. 4.657/1942).
- Law 13.105/2015 (Brazilian Civil Procedure Code).

Where there is a conflict of jurisdiction and law:

- The courts will verify whether they have jurisdiction to rule on the case (*Articles 42-53, BCPC*).
- If the courts declare Brazil to be the competent jurisdiction, courts will verify which law will apply to the case, based on an analysis of Articles 7 to 11 of the Law of Introduction to the Rules of Brazilian Law, which contain guidelines for the establishment of the competent jurisdiction.

The specific city of jurisdiction can be chosen by the parties but, if the parties do not choose, the BCPC contains guidelines for the establishment of the competent jurisdiction.

In summary, Brazilian law always prevails unless Brazilian law expressly provides otherwise. A solution to this, and one of the most effective ways of electing the governing law and jurisdiction, is to submit any disputes between the parties to arbitration. This is because the parties can choose which law will apply to arbitration proceedings, as long

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as that foreign law or provision(s) does not breach public policy and good moral values (*Article 2, §1, Arbitration Law (Law No. 9,307/1996)*).

31. Are jurisdiction clauses that are for the benefit of one party (as in *Standard clause, Jurisdiction: Cross-border: Option 2 of clause 1.1*) enforceable in your jurisdiction?

The parties are able to allocate risks and burdens in the way they find suitable. It is important to note, however, that Brazilian courts are, in general, very protective of the more vulnerable/exposed party. Clauses that are for the sole benefit of one party (such as jurisdiction clauses that benefit one specific party) have a high chance of being considered abusive and, therefore, void.

To be able to enforce the chosen jurisdiction of the contract, the parties are advised either to:

- Include arbitration clauses (to choose the jurisdiction in national agreements).
- Submit arising conflicts to a different jurisdiction (in cross-border agreements in which another jurisdiction might be competent).

32. In your jurisdiction, would the courts give effect to *Standard clause, Jurisdiction: Cross-border: Option 3 of clause 1.1*, where the parties set out a reciprocal agreement to bring proceedings in the court wherever the defendant is domiciled?

Yes, since the parties can choose the jurisdiction and specific place of jurisdiction (See *Question 30* and *Question 31*).

Execution and other formalities

33. How does this agreement need to be executed to ensure it is valid and enforceable? Does it need to be registered with any authority in your jurisdiction?

Execution formalities

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Generally, for contracts to be considered enforceable out of court by means of a judicial execution lawsuit (an expedited proceeding), they need to be signed in the presence of two witnesses, who must also sign all counterparts of the contract (they do not need to initial the counterparts, however) (*Article 784, III, Brazilian Civil Procedure Code*). (However, see *Question 24* for a discussion of a recent Superior Court of Justice decision on an ICP-Brasil-certified digital signature with no witnesses).

Contracts executed in Brazil, in general, do not require any other formalities regarding execution to be considered valid and enforceable.

Nevertheless, for a contract executed abroad to be enforceable in Brazil, it must be accompanied by a Portuguese translation prepared by a sworn or court-appointed translator (*Article 192 and sole paragraph, Brazilian Civil Procedure Code*).

Registration formalities

The registration formalities depend on the type of contract and whether the parties intend the contract to be enforceable against third parties.

Generally, agreements do not need to be registered (see *Question 26*).

However, there are specific formalities required in relation to certain types of agreement; for example:

- In an agreement for the purchase and sale of property, if the value exceeds 30 times the statutory minimum wage, the contract must be signed as a public deed (*Article 108, BCC*).
- In the case of a conditional real estate sale, the contract must be registered at the Real Estate Registry Office (*Article 23, Law no. 9514/97*).

In any case, the parties may wish to have the agreement registered with a Public Registry, in order to make it enforceable against third parties. In this case, the parties will need to pay a fee for registration.

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