

# Brazil

## International Estate Planning Guide

IBA Private Client Tax Committee

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## I. Wills and alternative planning documents

### A. *Will formalities, possible provisions and enforceability of foreign wills*

#### 1. TYPES OF WILLS UNDER BRAZILIAN LAW AND THEIR RESPECTIVE FORMALITIES

According to Article 1,862 of Law No. 10,406/2002, otherwise known as the Brazilian Civil Code (CC), there are three types of ordinary wills: public, sealed or private. Each type has its own formal requirements, as outlined in the items below. The CC also regulates special wills (namely nautical, aeronautical and military), which, just like sealed wills, are rarely used and are reserved strictly for emergencies. In addition to these types of wills, the Brazilian Civil Code also provides for codicils, which are used for dispositions involving assets of low value or in regard to specific directives.

A testator may revoke their last will, in whole or in part, at any time. Revocation may occur expressly, through a clause in a subsequent will or through a public instrument in which the testator declares the revocation of the previous will. This may also occur implicitly, when a subsequent will contains provisions that are incompatible with the previous version.

##### a. Public will

A public will (Article 1,864 *et seq* of the CC) is the most common and reliable type of testamentary disposition, considering that it is executed by public deed and before a notary or their legally authorised substitute, in the presence of two witnesses.

##### b. Private will

A private will (Article 1,876 *et seq* of the CC) can be either handwritten or typed by the testator. For its validity, it must be read aloud by the testator in the presence of three witnesses, all of whom must also sign the document. The downside of this kind of will lies in the risk of destruction or loss after the testator's death, as it is not registered by a public notary and may simply remain undiscovered by third parties.

##### c. Codicils

Codicils (Article 1,881 *et seq* of the CC) are also a valid option for a person wanting to express their last wishes. They are executed through a private, dated and signed document, and are limited to dispositions involving assets with a low value. A codicil has an autonomous legal existence, meaning it may exist independently or may coexist alongside any of the other types of wills listed above.

#### 2. VALIDITY OF WILLS

Upon the testator's death, Brazilian law requires the filing of a court proceeding known as 'presentation, publication and registration of wills' to verify the formal validity of the relevant will. During this proceeding, the judge will only examine whether the formal requirements outlined above have been met, without analysing the content of the dispositions (Article 735 *et seq* of the Civil Procedure Code or CPC).

#### 3. TESTAMENTARY DISPOSITIONS

Under Brazilian law, 50 per cent of a deceased person's estate must be reserved for the forced heirs ('legitimate share'). The forced heirs include the deceased's descendants, ascendants and surviving spouse (Articles 1,845 and 1,846 of the CC). It is controversial as to whether a common law partner should be considered as a forced heir. The remaining 50 per cent ('available share') can be freely disposed of through a will, according to the testator's wishes.

In addition to allocating the available share of the estate, the testator may include other types of dispositions in the document, such as: (1) the composition of each heir's share, considering the testator's preferences; (2) the allocation of legacies, ie, the assignment of specific assets to specific individuals (Article 1,912 *et seq* of the Brazilian Civil Code); (3) the imposition of obligations or conditions tied to the receipt of the available share of the estate; (4) the imposition of restrictive clauses on the estate (incommunicability, unseizability and inalienability); (5) the indication of a guardian or curator for the management of the assets to eventually be received by minors (Article 1,733, section 2<sup>o</sup> of the CC); (6) the appointment of estate administrators and executors; (7) the recognition of paternity; and (8) the disinheritance of a forced heir on the grounds of unworthiness.

#### 4. ENFORCEABILITY OF FOREIGN WILLS

A will executed in a foreign jurisdiction concerning assets located in Brazil may still be recognised as valid and enforceable in Brazil. However, it must undergo a probate proceeding before a Brazilian court, which retains exclusive jurisdiction over the succession involving assets situated within Brazilian territory.

According to Article 10 of the Law of Introduction to Norms of Brazilian Law (LINDB), the content of the will must comply with the law of the testator's domicile at the time of their death (*lex domicilii*), while its formal validity shall be governed by the law of the place where it was executed (*lex loci regit actum*).

An important exception exists to safeguard the rights of Brazilian spouses and descendants: if the law of the deceased's domicile is less favourable to these parties than Brazilian law, the latter shall prevail. Additionally, the application of foreign law is subject to limitations, as it must not conflict with Brazilian sovereignty, public policy or moral standards.

#### *B. Alternative succession planning*

Succession planning encompasses various strategies beyond the requirements pertaining to a traditional will. These alternatives may include the establishment of trusts or other legal entities, the anticipation of inheritance through donations to heirs or the use of life insurance policies, among other instruments.

Primarily, however, it is essential to point out that the Brazilian legal system does not contemplate the trust institute nor does it provide for an equivalent legal structure capable of producing the same legal effects. Therefore, trusts must be established abroad. However, if there is any connecting element related to Brazil, it is crucial to examine the fiscal implications in light of the recently enacted Law No. 14,754/2023 on offshore structures and exclusive funds ('New Offshore Law'), which established the new tax rules applicable to foreign entities. Further details can be found in III.A.2 and IV.D below.

Alternatively, the anticipation of inheritance through donations is a common and well-regulated practice under the Brazilian Civil Code. There are several strategic clauses that are frequently used to enhance the effectiveness of donations as succession planning tools, such as:

- usufruct clauses: a common and highly strategic clause that allows the donor to transfer only the bare ownership of the asset to the donee, while retaining the usufruct over the economic and/or political rights for themselves (ie, the rights to receive the fruits of the property and to make decisions related to its management, when applicable, depending on the nature of the asset). Upon the extinction of the usufruct (whether by renunciation or death of the usufructuary or due to the expiration of its term), all powers and rights will be consolidated in the hands of the bare owner. It is also possible to establish usufruct in favour of a third party;
- reversal clauses: stipulate that if the donor survives the donee, the donated assets shall return to their estate (Article 547 of the Brazilian Civil Code);
- lifelong or temporary clauses of no pledge, inalienability and incommunicability: when imposed, these restrictions can be extended to the asset's proceeds, fruits and to the assets acquired in substitution or that originate from subrogation. A justification must be provided if such liens are placed on a donation derived from the legitimate share; and
- exemption from collation: the donor may stipulate that the gift is to be taken from the disposable portion of their estate, exempting it from collation. Under Brazilian law, gifts from ascendants to descendants and between spouses are presumed to be an advance on the portion that they are entitled to according to inheritance, which will be subject to collation, unless otherwise established.

### C. *Advance directives*

Advance directives are essential planning instruments that allow an individual to indicate who they would like to be entitled to manage their financial, personal and medical decisions in the event of their incapacity.

Although advance directives are a non-binding instrument, they are considered by the court in the event a curatorship is instituted and by the doctors involved in the individual's treatment. This designation is crucial to ensure that someone trustworthy can make decisions on behalf of the individual when they are unable to make such decisions themselves. Various provisions can be included, depending on the declarant's wishes, such as:

- the appointment of representatives to administer the individual's estate in case of disability, as well as recommendations regarding such administration, which can be specific and vary depending on the nature of the assets involved;
- the indication of preferences regarding medical care and treatments, such as the wish to receive treatment at home or in a care facility, in addition to the appointment of a trusted doctor;
- the appointment of a healthcare agent/proxy;
- the indication of treatments that shall (or shall not) be used, such as resuscitation, use of tube feeding and mechanical ventilation, experimental treatments and palliative care; and
- burial and funeral directives.

The inclusion of organ donation wishes in advance directives can be a controversial matter. Although Resolution No. 1,995/2012 issued by the Federal Council of Medicine recognises

advance directives as a legitimate means for patients to express their preferences regarding medical treatments (also in line with Article 14 of the Brazilian Civil Code), there also exists the interpretation that authorisation by a spouse or close relative is required for organ donation (Article 4 of Law No. 9,434/1997).

## II. Estate administration

### A. Overview of probate proceedings

#### 1. JUDICIAL AND EXTRAJUDICIAL PROCEDURES

In Brazil, the transmission of an inheritance to the heirs occurs at the moment of the person's death, in accordance with the *saisine* principle. Nevertheless, in order for the estate to be distributed appropriately among the heirs, a probate proceeding must be carried out, which may take one of two forms: (1) a judicial proceeding, to be initiated before the court of the deceased's last domicile (Article 1,785 of the CC and Article 48 of the CPC); or (2) an extrajudicial proceeding, conducted before a public notary through a public deed, as permitted under Resolution No. 35/2007 issued by the National Council of Justice (CNJ).

Historically, extrajudicial probate was not allowed in cases in which the deceased had left a will or when minor or incapacitated heirs were involved. In such situations, judicial proceedings were mandatory (Article 610 of the CPC). However, Resolution No. 571/2024, issued by the CNJ, introduced significant reforms, and extrajudicial probates are now allowed, as long as several criteria are met: (1) when minor or incapacitated heirs are involved, their portion must be composed of shares in each one of the assets left by the deceased, subject to prior approval by the Public Prosecutor's Office; and (2) when the deceased has left a will, express authorisation from the competent court is required, granted according to a final and unappealable decision confirming the will's validity and enforceability.

Moreover, it is possible to convert judicial probate into extrajudicial proceedings, provided that the conditions for out-of-court administration are met.

#### 2. ESTATE ADMINISTRATOR AND EXECUTOR

In both judicial and extrajudicial probate proceedings, an estate administrator (*inventariante*) shall be appointed to manage and represent the estate, identify and locate its assets, report the list of heirs and take all the necessary actions for the completion of the probate proceedings.<sup>1</sup>

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<sup>1</sup> In accordance with the CPC, the estate administrator has the following duties (Art. 618 of the CPC):

- to represent the estate as plaintiff or defendant, in or out of court, observing, in the case of a judicial administrator, the provisions of Art. 75, S 1, of the CPC;
- to manage the estate with the same diligence as if managing their own property;
- to submit to the judge, personally or through an attorney with special powers, the initial and final inventory statements listing all of the estate assets;
- to present, at any time, documents related to the estate for the parties' review;
- if there is a will, to present the relevant certificate in court;
- to inform the judge of any estate assets received by an heir who is missing, has resigned or has been excluded;
- to present accounts of their administration when stepping down or whenever ordered by the judge; and
- to request the declaration of the estate's insolvency, if applicable.

In addition, the administrator must obtain prior judicial authorisation to perform the following acts (Art. 619 of the CPC):

Brazilian legislation establishes that the order in terms of the appointment of the estate's administrator is as follows: (1) the surviving spouse, provided that they were still together at the time of the deceased's death (for this purpose, partners in a stable union are treated as equivalent to a spouse); (2) the heir who possesses and manages the estate; (3) any heir, regardless of possession or management; (4) the legal representative of the minor heir; (5) the executor (*testamenteiro*), if the administration of the estate has been entrusted to them or if the entire inheritance is distributed through legacies; (6) the assignee of the heir or the legatee; (7) the judicial administrator, if one exists; and (8) a reliable third party (Article 617 of the CPC).

This order is not binding and it may be overridden either by unanimous agreement among the heirs or via instructions in the will. The person designated by the testator is usually the person appointed by the judge. In extrajudicial probate proceedings, the estate administrator is appointed by mutual consent of the heirs through a public deed, and the notary must confirm the nominee's capacity to administer the estate.

Another important representative of the estate is the executor (*testamenteiro*), who is usually appointed by the testator in their will. The executor is responsible for ensuring that the will's provisions are executed in accordance with the deceased's wishes, for safeguarding the testamentary dispositions and for defending the will's validity and enforceability.

According to Article 1,987 of the Brazilian Civil Code, unless otherwise provided in the will, the executor is entitled to a reward. If the testator has not specified the amount, such reward shall range from one to five per cent of the net estate (ie, after the deduction of any debts left by the deceased). The exact percentage is determined by the judge and varies depending on the importance of the executor's role and the complexity of executing the will. It is important to note that this reward can be overridden by an express provision in the will.

### *B. Intestate succession and forced heirship*

If the deceased did not leave a will (intestate succession), the total amount of the estate will be distributed exclusively among the legal heirs. Such heirs include the deceased's: (1) descendants; (2) ascendants; (3) surviving spouse, depending on the marital property regime; and (4) collateral relatives.

The heirs mentioned in items (1), (2) and (3)<sup>2</sup> above are forced heirs: they cannot be excluded from the inheritance through testamentary provisions (except in specific circumstances permitted by law, such as disinheritance). The heir mentioned in item (4) is a legal, but not compulsory heir, meaning that they are entitled to inherit if there is no will (and no descendants, ascendants and spouse), but they may be excluded according to the testator's discretion. Additionally, as previously mentioned above, there is an ongoing debate regarding the legal status of the common law partner in regard to succession matters. Although Brazilian legislation recognises the stable union as a family entity (Article 1,723 of the CC<sup>3</sup>), and despite the Brazilian

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- to sell any estate assets;
  - to execute agreements (judicial or non-judicial);
  - to pay the estate's debts; and
  - to incur any necessary expenses for the maintenance and improvement of the estate assets.

<sup>2</sup> The qualification of the spouse as a forced heir is currently at the center of Brazilian legislative debate under Bill No. 04/2025 ('Civil Code Reform'), which proposes to remove the surviving spouse's status as a compulsory heir.

<sup>3</sup> According to Art. 1,723 of the Brazilian Civil Code, a stable union is characterised by a relationship that is: (1) public, (2) continuous, (3) lasting and (4) established with the intention of forming a family. Such intention must exist in the present, and not

Federal Supreme Court's 2017 decision declaring that stable union partners must receive inheritance according to the same proportions as those provided for the spouse, discussions persist as to whether this recognition implies that the surviving partner should also be considered to be a forced heir.

It is also essential to highlight the order and proportions in which these legal heirs inherit the legitimate share of the estate (or the entire estate, if the deceased did not leave a will):

1. descendants together and in equal parts with the surviving spouse, unless the surviving spouse was married to the deceased under the regime of:
  - a. universal community or mandatory separation of property; or
  - b. partial community property, if the deceased did not leave individual property;
2. ascendants together with the surviving spouse, in equal parts;
3. surviving spouse; and
4. collateral relatives (Article 1,829 of the CC).

According to current legislation, an individual is free to dispose of up to 50 per cent of their estate (the available share), which may be allocated to whomever they wish. The remaining 50 per cent (the legitimate share) must be assigned to the forced heirs, as mentioned above.

If a forced heir receives a donation during the deceased's lifetime in anticipation of their legitimate share, that amount must be reintegrated into the estate through a process named collation to ensure equitable distribution among all of the forced heirs. In such cases, the legitimate share is recalculated to restore the balance (Article 2,002 of the CC).

Regarding the anticipation of assets through donation, it is paramount to highlight that, unless otherwise stipulated in the donation instrument, gifts given by ascendants to descendants and from one spouse to another are presumed to constitute an advance on the donee's legitimate share of the inheritance (Article 544 of the CC). Therefore, and considering that collation is a complex and time-consuming procedure, it is advisable to continually assess the convenience of expressly stating in the donation instrument that the gift originates from the available share of the inheritance and shall be exempt from collation (Article 2,005 of the Brazilian Civil Code).

In short, the available share may be left through a will to any person (forced heir or not) or even to a legal entity chosen by the deceased. Nevertheless, if the deceased does not leave a will, the total amount of their assets will be distributed only between the legal heirs, in accordance with the rules established by Article 1,829 of the Brazilian Civil Code (as mentioned above).

Considering the above, to determine each heir's share in the succession, the following factors must be considered: (1) the marital property regime, if there is a surviving spouse; (2) the number of children they have; (3) if there are children, whether they are common to the deceased and the surviving spouse, or if they are only descendants of the deceased; and (4) whether the deceased left any ascendants. All of these elements must be considered to determine the participation of each one of the heirs in the deceased's succession.

### *C. Marital property*

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merely be projected into the future (ie, the couple must already be perceived by others as if they were married). Since the law does not establish objective criteria for characterising a stable union, the case-by-case analysis of different factual elements is essential.

Brazilian family law provides for five matrimonial property regimes, which can be applied both to marriages and stable unions (Article 1,639 *et seq* of the Brazilian Civil Code), as follows:

- Partial community property: if there is no prenuptial agreement between the spouses/partners, or if the agreement is null or ineffective, the regime of partial community property shall automatically apply (in other words, this is the applicable legal regime). Assets acquired by each partner before the marriage remain individually owned, while assets acquired during the marriage are considered jointly owned, with few exceptions (such as assets that are inherited, gifted or acquired in subrogation of particular property). Under this regime, the spouse is entitled to inherit only the deceased's individual property alongside the other compulsory heirs, in addition to half of the jointly acquired property (a share that they would also be entitled to receive in the event of divorce).
- Universal community of property: under this regime all of the relevant assets and liabilities are jointly owned by the spouses, regardless of whether they were acquired before or during the marriage, with very few exceptions (such as property acquired as a gift or inheritance subject to a clause of incommunicability). Thus, if, for example, a husband had an apartment before he got married under the universal community of property regime, after the marriage it will belong to both the husband and wife. Under this regime, the spouse is not entitled to inherit alongside the compulsory heirs, as they are already entitled to half of the jointly acquired property.
- Separation of property: under this regime, each spouse retains exclusive and individual ownership of both their pre-marital and post-marital assets (the signing of a prenuptial agreement is necessary). Each spouse is also free to administer, encumber or transfer their particular assets. Under this regime, in the event of divorce, no asset sharing occurs, but the spouse is entitled to inherit alongside the compulsory heirs.
- Mandatory separation of property: this regime is imposed by law in specific cases outlined in Article 1,641 of the Brazilian Civil Code, such as when one of the spouses is over 70 years old<sup>4</sup> or if they have not finalised the division of property from a previous relationship. Under this regime, the spouses do not share ownership of assets during their lifetimes. However, if there is clear and proven evidence of joint contribution to the acquisition of assets during the relationship, the courts may recognise co-ownership in accordance with Precedent No. 377 of the Brazilian Federal Supreme Court (STF). Unlike the conventional separation of property regime, when the deceased leaves descendants, the surviving spouse is not entitled to inherit (Article 1,829, item I, of the CC).
- Sharing of acquests: each spouse has exclusive ownership of their assets during the marriage. Upon dissolution, whether by death or divorce, each spouse shall receive half of the assets that were purchased during the matrimony. This is a very specific marital property regime, which Brazilian spouses do not commonly elect.

It is also important to note that, except for the separation of property regime, neither of the spouses may, without the authorisation of the other, perform certain specific actions, such as alienate immovable property, grant guarantees or make donations of jointly acquired property (Article 1,647 of the Brazilian Civil Code).

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<sup>4</sup> Recently, the Brazilian Federal Supreme Court, in the judgment *Theme 1,236* (ARE 1.309.642), ruled that the mandatory separation of property regime for individuals over 70 years old is not absolute and may be altered by the spouses' mutual agreement.

In Brazil, electing for a particular marital property regime is relatively straightforward. Intended spouses may, when registering their marriage, elect any regime provided by the Brazilian Civil Code. If they select a regime other than the partial community of property, a prenuptial agreement must be executed. It is also possible for stable union partners to elect for a marital property regime by executing a deed, which will also recognise the de facto relationship as a stable union. As a general rule, the chosen regime applies prospectively from the date of execution, and the possibility of retroactive effects is controversial.

#### *D. Administration of multi-jurisdiction estates*

As mentioned above, according to the LINDB, succession is governed by the law of the country where the deceased was domiciled at the time of their death, applying the principle of *lex domicilii*. However, there is an exception: when the deceased leaves a Brazilian spouse or child, a comparative analysis must be conducted once the succession is initiated to determine which law (Brazilian law or the law of the deceased's domicile) is more favourable to the Brazilian heirs. In such cases, the most favourable law shall prevail.

Another precept set forth in the LINDB is that the law of the heirs' respective domicile determines their capacity to succeed. In addition, Brazilian law provides that Brazilian courts have exclusive jurisdiction to conduct probate proceedings and partition assets located in Brazil, regardless of the deceased's domicile. However, in such cases, the applicable substantive law will remain the law of the deceased's domicile (except if the Brazilian law is more beneficial to the spouse and children, as explained above).

In other words, the Brazilian courts are exclusively competent to carry out probate proceedings involving assets located in Brazil, even when the deceased was domiciled abroad. This shall not be affected by the existence of probate proceedings initiated abroad, since this rule is a matter of public order.

In light of this legal provision, there is a prevailing jurisprudential understanding that Brazilian courts do not have jurisdiction to conduct probate proceedings involving assets located abroad. This interpretation, drawn *a contrario sensu*, is based on the principle of the plurality of successions, which establishes that each country has jurisdiction over the succession of assets located within its territory. Therefore, even though there may be isolated decisions to the contrary, the prevailing position in current case law prohibits Brazilian courts from deciding on the partition of offshore assets, which must be addressed by the authority in the country where such assets are located.

#### *E. Payable on death accounts and joint tenancy with rights of survivorship*

Under Brazilian law, there is only one category of assets that bypass probate proceedings and that is transferred directly to beneficiaries: life insurance policies, including specific private pension plans, such as the *Vida Gerador de Benefício Livre* (VGBL) and the *Plano Gerador de Benefício Livre* (PGBL). These instruments enable the designation of beneficiaries at the time of contracting, ensuring that, upon the policyholder's death, the designated individuals receive the funds directly. This provides greater efficiency in regard to estate administration and immediate liquidity to the beneficiaries. Although these plans are commonly used for estate planning purposes, they cannot serve as a means to commit fraud against the legitimate share of the inheritance.

Additionally, life insurance policies are exempt from inheritance and gift tax (ITCMD). This tax exemption was also recently confirmed for VGBL and PGBL plans by the STF's decision in Extraordinary Appeal 1.363.013, which ruled that the transfer of these funds to beneficiaries does not constitute inheritance, but rather a contractual right. Therefore, ITCMD does not apply to such transfers. Nevertheless, it is essential that VGBL and PGBL plans truly have an insurance-based nature (and not a financial investment nature, with frequent withdrawals).

It is important to note that, as of 11 June 2025, specific contributions to VGBL plans have become subject to the tax on financial operations (IOF). This topic has been subject to multiple changes over the past few months, so it is paramount to confirm the ruling applicable to the IOF at the time of the financial transaction.

Otherwise, certain instruments, such as joint tenancy with rights of survivorship (JTWRS), which are common in other jurisdictions, are not recognised under Brazilian law. Although certain assets may be jointly owned by more than one individual, this does not eliminate the requirement for undergoing probate proceedings upon the death of one of the co-owners (unlike the automatic transfer mechanism provided by the JTWRS).

In cases involving the JTWRS of offshore assets, individuals must remain attentive to potential tax and inheritance implications in Brazil. Typically, to avoid complications related to the Brazilian ITCMD, only spouses married under the universal or partial community property regimes (provided that the JTWRS involves a common asset) should be designated as joint tenants.

### **III. Offshore companies and trusts**

#### *A. Common techniques*

Within the Brazilian legislative framework, there are no institutions or entities specifically designed for estate planning purposes. Accordingly, trusts and foundations, as they exist under common law legislation, do not exist in Brazil.<sup>5</sup> It was not until recently, according to the provisions introduced by the New Offshore Law, that the tax implications for foreign trusts were regulated. In addition to this, the New Offshore Law systematically changed the tax system for (1) offshore entities controlled by Brazilian resident individuals and (2) financial investments held abroad.

Even before the enactment of the New Offshore Law, Brazilian resident individuals (as defined in IV.A) often made use of two common structures when planning estate succession: (1) offshore company structures and (2) foreign trusts. The following section will outline general aspects of these structures, and IV will address the related tax aspects.

#### **1. OFFSHORE COMPANIES**

Investment vehicles incorporated abroad are commonly referred to as 'offshore companies' or 'offshore vehicles', simply meaning a type of company, fund or any other vehicle incorporated outside of Brazilian jurisdiction. This term does not have any link with the type of taxation to which those companies are subject or with the jurisdiction in which they were established.

Historically, offshore companies were regarded by Brazilian resident individuals as highly tax-efficient structures, primarily because the income generated by such entities was not subject to

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<sup>5</sup> Nevertheless, it is important to note that there is a legislative proposal (Bill No. 4,758/2020 (PLP 4785/20)), which aims to regulate the legal framework for trusts in Brazil, introducing this instrument into the Brazilian legal system.

taxation in Brazil unless they were effectively made available to the individual, who could benefit from a tax deferral. That situation changed with the coming into force of the New Offshore Law, as detailed in Section IV.C.

## 2. TRUSTS

Trusts traditionally are common law structures, used for multiple purposes and in a variety of scenarios and contexts, but do not yet have a direct equivalent under Brazilian law. Nevertheless, Brazil recognises trusts that are established by foreign legal systems, provided their constitutive elements do not infringe upon Brazil's sovereignty. Foreign trusts can directly hold assets in Brazil.

Under foreign law, the institution of trusts allows the settlor to allocate a portion of their estate to a separate legal arrangement. This segregated estate, composed of assets and/or rights, is managed by a trustee: usually an individual or a legal entity other than the original owner.

The parties involved in the trust structure are typically:

- the settlor: the original owner of the assets and rights forming the segregated estate;
- the trustee: the individual or legal entity entrusted with custody and ownership of the assets and rights underlying the trust, and whose primary obligation is to manage and distribute the trust's estate according to the rules established upon the settlement of the trust; and
- the beneficiaries: who will benefit from the trust's estate and its income.

The transfer of property to the trust by the settlor forms an autonomous estate. Although the trustee is entrusted with the trust's assets and rights, they are not included in their personal estate and shall not be responsible for debts and other obligations of the trustee.

The proportion of the distributions that are paid to the beneficiaries is defined by the settlor in the trust deed and letter of wishes. In some circumstances, the trustee may have certain discretion regarding the trust's administration and distributions.

Trusts can be classified into two main types: (1) revocable trusts and (2) irrevocable trusts. In general, the former may be amended or terminated at any time by the settlor, while the latter cannot be altered or revoked once it is set up (the assets that are transferred are no longer accessible by the settlor).

The enactment of the New Offshore Law marked a significant shift in the treatment of foreign-held investments, including the introduction of the taxation of trusts.

## IV. Taxation

### A. *Residency tax*

#### 1. TAX RESIDENCY CONCEPT

Tax residency is a key concept for determining income tax (IT) liability in Brazil. Individuals who qualify as Brazilian tax residents are subject to taxation on a worldwide basis: they must report and pay taxes on income earned both in Brazil and abroad. In contrast, non-residents are taxed exclusively on income derived from Brazilian sources and assets located within the country.

According to the Normative Instruction (IN) No. 208/2002, the criteria to determine whether an individual qualifies as a Brazilian tax resident are as follows: (1) individuals who live in Brazil permanently; (2) Brazilian citizens who have acquired a non-resident condition and return to Brazil intending to stay in the country permanently (as of the date of entry in Brazil); (3) Brazilian citizens who leave the country under an employment contract to state agencies or departments located abroad; (4) foreign nationals who hold a permanent visa (as of the date of entry in Brazil) or a temporary visa (after completing 184 days of physical presence in Brazil, consecutive or not, within one year); or (5) Brazilian residents who live abroad during the first 12 months after their departure (without an exit process filed).

As demonstrated above, this classification encompasses tests for determining tax residency in Brazil that go beyond the physical presence of the individual in a given territory (ie, remaining in Brazil for 184 days within a 12-month period to acquire tax residency or 12 consecutive months of absence in order to lose it), but also include a series of tie-breaker tests that may be applied to assess the individual's intent (or *animus*) to maintain a permanent domicile in the national territory or abroad. These tie-breaker tests include verifying the individual's family and social relationships, the economic relevance of their participation in political and cultural activities in the location and any business, professional and property management activities carried out. These requirements must be reviewed in a case-by-case analysis to determine their relevance and legal implications.

Once individuals acquire the status of tax residents in Brazil, they become subject to Brazilian tax legislation. Broadly, this means that the individual must: (1) register with the Individual Taxpayer Registry (CPF); (2) report all of their assets and rights held in Brazil and abroad by filing an annual income tax return (ITR) and, when applicable, submit a specific declaration to the Central Bank of Brazil; and (3) offer all income/gains earned in Brazil and abroad up to taxation, in addition to other specific obligations.

Given this context, it is essential for individuals entering Brazil to be aware of the applicable legislation and other elements that may establish tax residence. Once an individual becomes a Brazilian taxpayer, all of the tax obligations must be observed. Otherwise, they can be subject to penalties and interest charges due to non-payment or late payment of taxes in Brazil.

## 2. TERMINATION OF TAX RESIDENCY

Foreign nationals and Brazilian citizens who qualify as tax residents in Brazil shall have their tax residency status terminated if they leave the country:

- on a permanent and definitive basis, with the submission of a Communication of Definitive Departure, which is a specific form that formally notifies their departure to the Brazilian tax authorities. This communication should indicate all of their income sources in Brazil and any dependents and must be submitted to the Federal Revenue of Brazil (RFB) by the last day in February of the calendar year following the year of their definitive departure. Once submitted, this process enables the reclassification of the investments eventually maintained in Brazil to a non-resident status, as per Resolution No. 4,373/2014 issued by the National Monetary Council (CMN); or
- on a temporary basis, when the individual leaves the Brazilian territory and does not return for 12 consecutive months. Although the Brazilian tax authorities require, as a rule, the submission of a Communication of Definitive Departure, in this case, it is arguable that the mere expiration of the 12 months is sufficient to trigger non-resident status, even in the absence of such a formal notification.

It is highly recommended that an individual carries out a thorough review of all their assets held, domestically and abroad, before leaving the country, and seek appropriate legal and tax guidance. Failure to observe the necessary formalities (such as the submission of the Communication of Definitive Departure, communication in regard to their income sources and filing the definitive departure income tax return) may result in unanticipated regulatory burdens, continued tax obligations or penalties following their departure.

### *B. Gift and inheritance tax*

According to the Brazilian Federal Constitution, asset transfers arising from donations and succession are generally subject to the Brazilian gift and inheritance tax, known as ITCMD, a state-level tax. As such, each state within the Federative Republic of Brazil has its own specific ITCMD regulations.

For real estate transfers, ITCMD is due to the state in which the property is situated. Concerning movable assets, securities and credits, the tax is due to the state in which the probate is processed or where the donor is domiciled.

Historically, the STF has decided that ITCMD was not due in two specific international scenarios: (1) when the donor is resident abroad or (2) when the deceased, even if resident in Brazil, held assets located abroad. The Supreme Court ruled such taxation to be unconstitutional, due to the absence of a specific federal law regulating these cases.

However, Constitutional Amendment No. 132/2023 allowed states to regulate ITCMD collection in regard to such international scenarios, even in the absence of a federal complementary law. In some cases, it remains arguable whether such collection of taxes is still unconstitutional. For instance, in São Paulo, previous provisions attempting to regulate ITCMD on international transfers were declared unconstitutional and, therefore, a new law should be enacted to enable such taxation.

Constitutional Amendment No. 132/2023 also introduced the mandatory adoption of a progressive ITCMD rate, up to eight per cent. As a result, states that previously applied fixed rates (such as São Paulo, which has a flat rate of four per cent) must now revise its legislation to incorporate progressive tax rates.

Additionally, it is essential to highlight a key change that might be introduced by Complementary Bill No. 108/2024 (PLP 108/2024), which is still pending approval by the Federal Senate. It establishes changes to the method of assessing the tax base that will substantially increase the ITCMD burden, particularly in the context of holding companies, which are frequently used in succession planning.

### *C. Taxes on income and capital gains*

Brazil adopts a worldwide taxation system, meaning that any income and capital gains earned by Brazilian tax residents is, as a general rule, subject to IT in Brazil, even if such income or capital gain is generated abroad.

For IT purposes, amounts received by Brazilian residents are classified into two categories, based on their nature: ordinary income and capital gains. A case-by-case analysis is essential to determine the legal nature of any cash flow received by an individual. Typically, however, (1) ordinary income refers to amounts derived from labour, capital or a combination of both, and

(2) capital gains arise from a disposal event and correspond to the positive difference between the sale price and the acquisition cost of the asset disposed of by the taxpayer.

As a general rule, the triggering event for income tax purposes is any form of economic or legal availability of income (ie, when the amounts are effectively made available to the Brazilian resident individual). Accordingly, the mere access to funds by the individual may be sufficient to trigger an IT liability, even if such funds are subsequently reinvested.

However, as previously mentioned (Section III.A), the New Offshore Law has modified the income deferral rules applicable to controlled foreign entities that do not elect for tax transparency, as unrealised profits may also be subject to taxation under the Brazilian IT regime. In contrast, capital gains are only recognised upon the occurrence of a disposal event, such as the sale, exchange or transfer of ownership of an asset.

## 1. ORDINARY INCOME

### a. Brazilian assets

Ordinary income paid by local sources is generally subject to IT at progressive rates of 0 per cent, 7.5 per cent, 15 per cent, 22.5 per cent and 27.5 per cent. From February to December 2024, these progressive rates were applied according to the following tax brackets:

<b>Tax base (BRL per month)</b>	<b>Tax rate (per cent)</b>	<b>Deductible amount to ensure progressive taxation (BRL)</b>
Up to 2,259.20	-	-
From 2,259.21 to 2,826.65	7.5	169,44
From 2,826.66 to 3,751.05	15	381,44
From 3,751.06 to 4,664.68	22.5	662,77
Over 4,664.68	27.5	896,00

If income attributed to a Brazilian tax resident is subject to withholding at source, such withholding is treated as an advance payment of the annual income tax. This amount may be offset against the total tax due, as calculated in the individual's annual income tax return.

Earnings received from other resident individuals are also subject to the progressive rates mentioned above. However, in these cases, the taxpayer is responsible for calculating and paying the tax through a procedure commonly known as *carne-leão*. These payments are made on a monthly basis, and the amounts paid are also considered advance payments of the annual income tax due, as reported in the individual's ITR.

Under both the *carne-leão* regime and the withholding at source system applied, certain specific deductions may be allowed from the taxable base. Such deductions include, for example, contributions to Brazil's public social security system, as well as child support payments made according to a court order or a judicially approved settlement.

Still within the context of Brazil's IT framework, Bill No. 1,087/2025 (PL 1,087/2025), proposed by the Brazilian government in March 2025, might, if approved, bring about significant changes. The law is complex, but, in general terms, it proposes, among other changes: (1) an increase in the monthly exemption threshold, (2) the introduction of a minimum individual income tax (IRPFM) and (3) taxation on dividend distributions.

#### b. Offshore assets

As already mentioned, the New Offshore Rule introduced significant changes to the taxation of offshore assets.

For financial investments, the law establishes that gains arising from financial investments will be subject to IT at a flat of 15 per cent and the tax will be: (1) due upon any form of realisation (income payment, reinvestments, ownership transfer and so forth) and (2) paid once a year in regard to the relevant ITR.

The concept of offshore financial investments for the purposes of the Brazilian tax rules comprises all sorts of financial products (bonds, T-bills, shares of non-controlled companies, quotas of non-controlled investment funds and so forth), as well as financial loans wherein the debtor is an offshore entity and in regard to some kinds of insurance policies. Insurance policies are classified as financial investments when: (1) the principal or interest can be withdrawn, individually or jointly, by the policyholder or the designated beneficiaries; and (2) the policyholder does not have the power to define or exert influence over the investment strategy adopted by the foreign insurer.

It is usually possible to offset any taxes paid abroad in regard to a financial investment or losses with other financial investments in regard to the IT due in Brazil.

For controlled foreign corporations (CFCs), the New Offshore Law establishes, as a rule, that every entity abroad that is controlled<sup>6</sup> by a Brazilian tax resident and that assesses more than 40 per cent of its passive income, or that is in a black- or grey-listed jurisdiction, must prepare a financial statement<sup>7</sup> on 31 December of each year. The Brazilian tax resident must pay IT in regard to the yearly proportional profits, regardless of any distribution of such funds, at a flat 15 per cent rate. This profit must be listed in regard to a specific account in the balance sheet of the relevant controlled entity and reported in the ITR as 'dividends receivable'. The taxed amount will not be subject to new taxation in the case of a positive exchange rate variation at the time that the funds are distributed to the Brazilian individual.

It is important to note that the rules above apply to accumulated profits as of 2024. On the other hand, the profits accumulated until the end of 2023 will only be taxed when they are distributed to the Brazilian resident individual, as used to happen before the enactment of the New Offshore

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<sup>6</sup> The law qualifies control of the CFC as the Brazilian tax resident that holds: (1) rights that ensure predominance in corporate decisions or powers to elect or remove the majority of the entity's administrators, directly or indirectly, alone or together with other parties, including via a voting agreement; or (2) more than 50 per cent of the capital or rights to receive profits or assets in the event of liquidation, directly or indirectly, alone or together with related parties.

<sup>7</sup> For the purposes of determining the accounting profit subject to income tax, the law requires that the financial statement of the CFC is prepared following International Financial Accounting Standards (IFRS) or Brazilian Accounting Standards (BR GAAP), which are usually very similar.

Law. Therefore, such profits must also be listed in regard to a specific account on the controlled entity's balance sheet.

Furthermore, the legislation establishes that controlled entities within a specific structure must be viewed horizontally. That is, CFCs held directly and indirectly (ie, through another controlled entity) must be reported on and taxed as if directly held by the individual. To enable this, the New Offshore Law established that the profits of CFCs, which will serve as the basis of the IT, should exclude the profits of other subsidiary CFCs.

The primary concern regarding the taxation system detailed above is usually associated with the fact that the accounting profits of a CFC can comprise of both realised and unrealised gains (because of the market-to-market valuation of assets). To try to mitigate potential inefficiencies associated with the taxation of unrealised gains, one can elect the CFC to be transparent. This election essentially results in the individual not declaring the necessary details of the entity but all of its assets, and it is often an option chosen by individuals who do not want to be subject to IT on the CFC profits, but instead want to pay IT only when funds are made available.

The election for tax transparency: (1) can be made separately for each CFC, directly and indirectly, held by Brazilian tax resident; (2) is irrevocable, meaning that it cannot be changed, even in subsequent periods, except in the event of an ownership transfer, such as in a succession; and (3) must be exercised by the Brazilian individuals in the first income tax return after the acquisition of the corresponding asset.

Finally, circling back to the insurance policies matter, they will be considered CFCs if: (1) the principal or the interest may be withdrawn, individually or jointly, by the policyholder or the designated beneficiaries; and (2) the policyholder has powers to actively participate in the management and decision-making process related to the investments held through the policy.

In this context, if the insurance product meets the criteria above, the policyholder would have to prepare a financial statement regarding its portfolio and would be required to pay IT on the profits registered annually, regardless of any distributions.

Alternatively, the Brazilian tax resident could elect to treat this 'deemed' CFC as transparent and would then be required to disclose all of the financial assets included in the insurance product portfolio (and, as a result, the financial assets rules would apply to each asset individually).

## 2. CAPITAL GAINS

### a. Assets in Brazil

As a general rule, capital gains earned by Brazilian tax residents are subject to progressive IT rates ranging from 15 per cent to 22.5 per cent. The capital gain is typically calculated as the positive difference between the sale price and the acquisition cost. The taxpayer is responsible for paying the applicable tax by the last business day of the month following the one in which the gain was earned.

### b. Foreign-controlled entities and financial investments

According to the New Offshore Law, gains from positive foreign exchange variations verified at the time of the disposal, write-off or liquidation of the principal invested in foreign-controlled entities (including in contexts of capital redemption) shall be subject to the same progressive IT

rates, ranging from 15 per cent to 22.5 per cent. On the other hand, for financial investments, because all income realised by the Brazilian resident individual will be subject to IT in Brazil at a flat 15 per cent rate, gains from positive foreign exchange variations will also be subject to IT in Brazil at a 15 per cent rate.

#### *D. Taxation of trusts and similar structures*

Under the New Offshore Law, trusts are classified as look-through (or transparent) structures for tax purposes. This means that all of the underlying assets held within the trust must be directly declared in the ITR of the settlor or the beneficiary, depending on who is considered as the owner of the trust, which is determined based on the nature of the trust.

In the case of revocable trusts, the assets must be declared by the settlor until their effective distribution to the beneficiaries or until the settlor's death (at which point the assets will be considered as distributed to the beneficiaries). On the other hand, in regard to irrevocable trusts, the assets might be declared either by the settlor or by the beneficiary from the outset.

The IT implications will vary based on the specific types of assets declared, which must be considered individually. For example, if a trust holds shares in a CFC, real estate and financial investments, these are the assets that shall be declared.

Additionally, there are implications related to the ITCMD: the transfer of assets and rights to the beneficiaries are treated as donations (if distribution occurs while the settlor is alive) or inheritance (if distribution occurs after the settlor's death) for tax purposes, subject to the ITCMD.

Finally, the New Offshore Law provides that the rules that apply to trusts shall also apply to other instruments governed by foreign law that have characteristics similar to those of a trust and that are not classified as controlled entities.