

## AN ANALYSIS OF THE JUDGMENT RULE WITHIN THE BRAZILIAN CORPORATE ENVIRONMENT

**Main practice areas of  
BARBOSA, MÜSSNICH & ARAGÃO  
ATTORNEYS:**

Merges and Aquisitions  
Restructuring e Reorganization  
Privatization e Concessions  
Banking and Concessions  
Banking Law and Capital Market  
Tax Law  
Litigation  
Arbitration  
Real Estate Law  
Labor and Social Security Law  
Economic Law  
Energy  
Environmental Law  
Administrative Law  
Intelectual Propoerty  
Third Sector

The liability of officers of joint stock corporations for corporate decisions is a corporate-law matter of extreme relevance, especially when one takes into account the possibility of intervention by the Government, through its instrumentalities and Branches, in the decisions made by officers.

The doctoral thesis of Alexandre Couto Silva, a partner in the corporate law area of BM&A, suggests the use of the North-American doctrine of business judgment rule as an alternative to exempt officers from liability. The thesis was defended last May at the Universidade Federal de Minas Gerais.

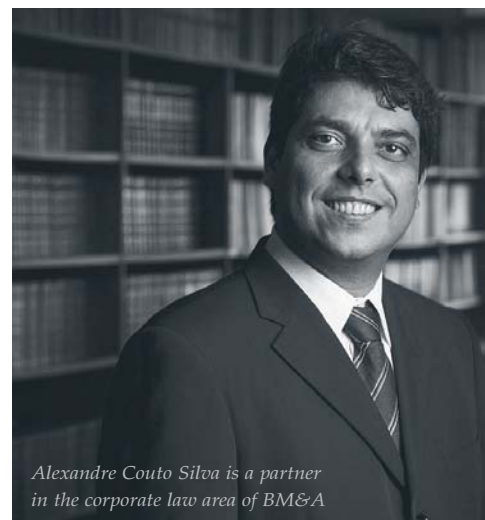
According to the attorney, the importance of the matter in the field of corporate law is based on the complexity of corporate decisions made by officers and the duties and responsibilities of such officers in dealings with the corporation and its shareholders.

Couto Silva argues that the business judgment rule can be used as a tool to exempt officers and directors from liability that could arise as a result of the decisions they make in strict compliance with fiduciary duties, which include the duties of diligence and loyalty. The first duty can be described as the diligence that should be adopted by a person facing similar circumstances; while the duty of loyalty restricts personal dealings with the company.

This is an attempt at defining principles applicable to the decisions made by officers, in order to ensure that corporate decisions are reasonable and supported by the proper information, in such a way as to avoid the liability of officers exclusively as a result of the fact that a decision has proven to be disastrous or bad for the company.

Officers have discretionary powers relating to the administration of the company and, therefore, in principle, their decisions would not be subject to a second examination by the Government (Judiciary or Executive Branch). The rule is a guideline that could assist in the examination, by the Judiciary Branch, of corporate decisions, but it is not a predefined guideline for the behavior of officers. The rule presupposes that the officers, who must not have ulterior interests and must act in an independent manner, are duly informed, guide their activities by good faith standards in order to fulfill the best interests of the company and its shareholders, and that, due to their discretionary powers, officers can assume risks on behalf of the company without being held liable for potential damages or subject to the revision of their decisions by the Judiciary Branch or by the Securities Commission (CVM).

Such assumption shall be applied, according to Couto Silva, if five elements are identified: (i) a corporate decision, (ii) absence of conflicting interests and independence, (iii) diligence, (iv) good faith, and (v) absence of abuse of discretionary powers. The rule shall not apply in cases of decisions made in a situation of conflict of interest or personal dealings with the company. Even though it can be inferred from the Brazilian corporate laws, the rule is a legal doctrine that should be further explored, since there are not enough studies to clarify the relevance of the idea with regard to joint stock corporations, given their importance in the current economic environment.



*Alexandre Couto Silva is a partner  
in the corporate law area of BM&A*

### 01

An analysis of the judgment rule within the Brazilian corporate environment

### 02

Amendments to the Code of Civil Procedure attempt to hasten court procedures

### 03

Tenth anniversary of the Brazilian Arbitration Act

### 04

Trust assignment of investment fund quotas – new form of guarantee for real estate lease agreements

### 05

Marker system: new rules for the antitrust leniency program

### 06

Superior Court of Justice finds against the sentencing for environmental moral damages

## AMENDMENTS TO THE CODE OF CIVIL PROCEDURE ATTEMPT TO HASTEN COURT PROCEDURES

Luiz Fernando Fraga | [fff@bmalaw.com.br](mailto:fff@bmalaw.com.br)  
Elias Marques de Medeiros Neto | [emn@bmalaw.com.br](mailto:emn@bmalaw.com.br)

In October 2005 and February 2006, four laws were enacted, introducing important amendments to the Code of Civil Procedure (CPC), notably with the purpose of speeding up court procedures.

Law No. 11187, of October 19, 2005, came into effect in January 2006 and it brought about a new discipline of acceptability of appeals filed against court decisions known as interlocutory appeals and appeals held on the records of the case.

In general, those appeals are acceptable against interlocutory orders, which deal with preliminary and/or procedural matters – such as, for example, orders relating to the grantal of an injunction or to the production of evidence –, and do not decide the merits of the case, which only takes place when a court decision is rendered and, then, is subject to appeal.

It is also important to note that, at least in thesis, interlocutory appeals can be promptly heard and tried by the appellate court; while appeals held on the records of the case can only be heard and tried by the appellate court at the time of the trial of the appeal.

Law No. 11187/2005 amended the wording of arts. 522 and 527, II, of CPC, and established that appeals held on the records of the case shall be adopted in general, while interlocutory appeals shall only be acceptable in situations that involve grave and hard-to-repair damages. It is clear that Law No. 11187/2005 represents an attempt to reduce the huge number of interlocutory appeals in course. In other words, this was an initiative of the Legislative Branch to attempt to restrict the access to the courts - before the rendering of a final decision - only to cases that involve grave and hard-to-repair damages.

And, with the same purpose of reducing the number of appeals, the law also amended the sole paragraph of art. 527 of CPC and, in doing so, it drastically restricted the acceptability of specific appeals (*agravo regimental*) against the initial decisions rendered by the reporting judges on the records of interlocutory appeals.

Following the same legislative trend, Law No. 11276, of February 7, 2006, entered into effect in May 2006 and amended art. 518 of CPC with the clear purpose of restricting the acceptability of appeals, by establishing that “the judge shall not accept for hearing an appeal when the court decision is in line with a precedent of the Superior Court of Justice or the Federal Supreme Court”.

With that, one of the aspects of the notorious controversy dealing with the “binding nature of precedents” has been settled, since the law states that no appeal shall be acceptable against a court decision that is in line with a precedent (consolidated standing of a court with regard to a specific matter, usually resulting from

several decisions rendered in the same line) from either one of the highest courts in the Judiciary Branch.

Likewise, the amendment introduced by Law No. 11277, of February 7, 2006, which came into effect last May, is also a polemic one. Law No. 11277 added art. 285-A to CPC, which states that “when the matter under dispute involves only legal controversies and if the court has already rendered a groundlessness decision on the records of other identical cases, the service of process can be waived and a decision can be rendered, reproducing the contents of the previous decision”. Such legislative innovation is referred to as “first-instance precedent” and it corresponds to the standing of the judge on a given legal matter.

With the same purpose of attempting to reduce the length of court procedures, Law No. 11280, of February 16, 2006, which came into effect last May, established the new wording of art. 555 of CPC, which limits to ten days the period of time during which the case records can remain with a judge who needs time before casting a vote.

Law No. 11280/2006 also amended the wording of art. 154 of CPC, thus enabling the courts to perform and communicate official acts via electronic means, provided that the requirements of authenticity, integrity and legal validity set forth in ICP – Brazil are complied with.

Please note that the laws mentioned above joined Law No. 11232, of December 22, 2005, which came into force in June 2006, which introduced important amendments to CPC, in such a way as to shorten court procedures, especially with regard to the enforcement of condemnation decisions involving the payment of fixed amounts.

Finally, it is important to note other innovations brought about by the abovementioned Law No. 11280/2006, namely: (i) the provision authorizing judges to declare the nullity of clauses of election of courts in adhesion contracts, regardless of the standpoint of the parties, with the consequent declaration of jurisdiction of the courts of the domicile of defendant (as per art. 112, sole paragraph, of CPC); (ii) the provision authoring defendants to submit pleas of lack of jurisdiction in the district of their own domicile, even if the lawsuit has been filed in a different district (as per the new wording of art. 305 of CPC); and (iii) the elimination of the notable doctrinaire and jurisprudential controversy about the acceptability of advance court protections or precautionary measures on the records of rescisory actions. That is because such matter was settled with the new wording of art. 489 of CPC, according to which, subject to the legal requirements and to the exceptional nature of the protection, the judge is authorized to stay the effects of *res judicata* via an injunction rendered on the records of the rescisory action.

## TENTH ANNIVERSARY OF THE BRAZILIAN ARBITRATION ACT

*Pedro A. Batista Martins | pbm@bmalaw.com.br*

*Octávio Fragata | ofm@bmalaw.com.br*

*Tiago Tróia | tts@bmalaw.com.br*

The Brazilian Arbitration Act has been in force for ten years. From the beginning, when the constitutionality of such law was challenged, to the current stage, when arbitration is considered as a fast and effective method of dispute settlement, a lot has changed. The slow pace of the Brazilian Judiciary Branch, mostly caused by the large number of available appeals, in addition to the decision by the Federal Supreme Court (STF) which found for the constitutionality of Law No. 9307/96, were decisive factors towards the growth in the use of arbitration in Brazil.

Besides, a vast arbitration culture has evolved in the country, which can be seen both in the doctrinaire field and in the standing of the courts. Brazilian courts are increasingly supporting arbitration, in several court decisions that favor such alternative. Used for decades in developed countries, arbitration procedures apply to disputes involving available economic rights and they are broadly used to settle commercial and corporate disputes.

The credibility of the Arbitration Act is mostly due to the changes and innovations that affected the old arbitration regime in Brazil, whose obstacles caused it to be used very rarely in the country. The enforceability of the arbitration clause and the autonomy thereof within the agreement in which such clause is inserted were amendments brought about by Law No. 9307/96.

In practical terms, the existence of an arbitration clause in an agreement is enough to deny the jurisdiction of the courts and prompt the parties to initiate arbitration proceedings to settle the dispute. The procedural rule clearly states that the existence of an arbitration clause causes the dismissal of the case without prejudice. The only exception relates to adhesion contracts. If one or more of the parties should refuse to initiate arbitration proceedings, the other party can resort to the Courts to force the renitent party to initiate arbitration.

The autonomy of the arbitration clause with regard to the corresponding contract has been expressly acknowledged by the Brazilian law and defended by court decisions. The same happens with the jurisdiction of an arbitrator to decide about the existence and validity of the arbitration clause, which represents the principle referred to as “*compétence-compétence*”.

Another important aspect of the Brazilian law is the waiver of homologation, by the Judiciary Branch, of an arbitration award rendered in Brazil, in order to assign

to such award the effects of a court decision, which was a bureaucratic requirement that used to delay arbitration procedures. The arbitration award is enforceable and has the same effects of a court decision, including the condemnation effect. The acknowledgement and enforcement of foreign arbitration awards in Brazil require only homologation by the Superior Court of Justice (STJ), a jurisdiction that has recently been acknowledged by Resolution No. 9 of STJ.

Additionally, it is necessary to note that, due to its business nature, the free will of the parties plays an important role in arbitration procedures. Such free will has been supported by the Courts and, in most of the cases, the “new” will of the party that decides to reject a previously-executed arbitration clause has been denied. Such standing has assigned a higher degree of effectiveness and security to arbitration procedures.

Another evidence of the observance of the parties’ will is the fact that ultimately it is the parties themselves who define the rules and procedures that will govern the arbitration, either via the adoption of the regulations of arbitral institutions or specialized entities or via the selection of the arbitrations. Thus, the speed of the arbitration procedure shall be conditional on the rules adopted by the parties, as well as the established deadlines and the efficiency of the arbitrators appointed to the case, who shall be trusted by the parties.

Both doctrine and jurisprudence have emphatically stated that the parties are free to select the seat and the applicable laws to the arbitration procedure and often, when the case involves international trade matters, foreign laws are selected. However, foreign rules that violate good moral conduct and public-order principles cannot be used in Brazil. In that regard, The International Convention of New York on the Acknowledgement and Enforcement of Foreign Arbitration Awards, ratified by Brazil in 2002, states that a foreign award cannot violate public order rules of the country where such award is to be enforced.

In summary, it is clear that after ten years of effectiveness of Law No. 9307/96, arbitration is now a respected and consolidated institution in the Brazilian legal environment. Thanks to updated laws and recognition by the courts, the use of arbitration as an alternative dispute settlement method is fully developed in our country.

# TRUST ASSIGNMENT OF INVESTMENT FUND QUOTAS – NEW FORM OF GUARANTEE FOR REAL ESTATE LEASE AGREEMENTS

*Mateus Leandro de Oliveira | mol@bmalaw.com.br*  
*Rafael Maradei | rafael@bmalaw.com.br*

The real estate market has witnessed the inception of new form of guarantee to secure lease agreements: the assignment of investment-fund quotas, which may or may not be used exclusively for purposes of guaranteeing real estate lease agreements.

Created by Law No. 11196, of November 21, 2005, as a result of the so-called “MP do Bem”, and recently regulated by CVM Instruction No. 432, of June 1, 2006, this form of lease guarantee is a new option for lessors and lessees, in addition to pledges, sureties and lease insurances, which were provided for under the Lease Law (Law No. 8245/91). This innovation improves the dynamism in the real estate lease market and grants more security to investors in this sector, given the obstacles that usually hindered the institution or enforcement of traditional forms of guarantees.

In order to enable the operation of this new form of lease guarantee, the institutions certified by the Securities Commission (CVM) to manage securities portfolios are authorized to institute investment funds, in the form of open condominiums, to be used in the trust assignment of its quotas to serve as guarantee in real estate lease agreements. It should be noted that such funds can be instituted in the form of investment funds that acquire quotas from other funds and are governed by CVM Instruction No. 409, of August 18, 2004, with regard to the institution, management, operation and disclosure of information, subject to the exceptions set forth in CVM Instruction No. 432.

That being so, the holder of quotas in such investment fund can assign said quotas, in a trust transaction, in the capacity of lessee or third-party guarantor, in order to secure the fulfillment of the obligations set forth in a real estate lease agreement. The trust assignment is carried out via a request submitted by the quotaholder – assignor, together with a trust assignment instrument and one counterpart of the lease agreement. The trust assignment shall be annotated by the manager of the fund in the corresponding quota registry, pursuant to which the conditional ownership of the quotas is assigned to lessor, in the capacity of trust creditor. Upon such annotation, the fund manager becomes the trustee of the assigned quotas, which, from then on, become unavailable and cannot be disposed of or given in pledge.

With regard to the enforcement of the guarantee, the law provides for a very fast extrajudicial procedure. In case of breach of contract, lessor can notify lessee and guarantor, if

they are not one and the same, claiming payment of the debt, in full, within ten days. If such payment is defaulted, lessor may request that trustee transfers the full, exclusive and irrevocable ownership of the quotas subject to the guarantee, in a sufficient amount to cover the debt. Nonetheless, Lessor shall resort to the courts to seek eviction orders or collection of any amounts in excess of the value of the quotas subject to the guarantee, if necessary.

Therefore, the parties must be careful when executing such transaction, in order to ensure that the transfer of the full ownership of the quotas to lessor occurs in a proper manner, free from potential challenges, such as debt disputes, for example. In that regard, the law expressly provides for the liability of lessor for damages caused to lessee or to guarantor as a result of any improper procedure. In turn, trustee shall be held liable in cases of evidenced willful misconduct, bad faith, sham transactions, fraud or negligence in the management of the fund. With regard to the term of effectiveness and other conditions that are inherent to real-estate lease guarantees, the lease agreement shall include the necessary provisions to ensure the proper operation of this form of guarantee.

Based on the suggestions received during the time when CVM Instruction No. 432 was subject to public hearing, a different use for this form of guarantee came about, which is represented by the trust assignment of quotas of other investment funds that do not have the exclusive purpose of guaranteeing real-estate lease agreements, provided that such funds must be constituted according to CVM Instruction No. 409. In that case, the fund manager is under the same obligations that apply to funds specifically instituted for purposes of guaranteeing real-estate lease agreements. On the other hand, please note that none of the expenses that are inherent to the operation of lease guarantees can be charged to the investment fund, such as the annotation of the assignment instrument and the disclosure of information to lessors and lessees. Such expenses must be borne by the quotaholder-assignor, be it lessee or third-party guarantor.

Finally, it is important to note that the creation of new forms of real-estate lease guarantees, such as this one, furthers the development of the real estate market. However, the players in this sector need to be educated about this new instrument, so that it can be used in the proper manner and grant the necessary legal security to enable the achievement of the intended goals, without any legal challenging.

## MARKER SYSTEM: NEW RULES FOR THE ANTITRUST LENIENCY PROGRAM

Barbara Rosenberg | [brr@bmalaw.com.br](mailto:brr@bmalaw.com.br)

José Carlos da Matta Berardo | [jcm@bmalaw.com.br](mailto:jcm@bmalaw.com.br)

On March 7, 2006, the new rules enacted by the Economic Law Office (SDE) of the Ministry of Justice (MJ) – the authority of the Brazilian Antitrust System in charge of investigating antitrust practices came into effect. Among the different changes affecting the procedures for the analysis of concentration acts and investigation of antitrust practices, Ordinance MJ No. 4/2006 brought about profound changes to the rules of applicability of the antitrust leniency program in Brazil.

In effect in Brazil since 2000, the antitrust leniency program only came into the spotlight as an essential rule in the fight against cartels in 2003. Cartels seek to eliminate the competition within a market segment by means of agreements between competitors, fixing prices or other competition variables. Recently, the repercussion of this type of illicit act has been target by Brazilian authorities, since cartels cause significant losses to consumers and to the Brazilian economy.

With the antitrust leniency program, a company that is part of a cartel can avoid the penalties resulting from the application of Law No. 8884/94 – fines of up to 30% of its earnings – if it submits evidence of the offense to the antitrust authorities and cooperates with the investigation. Therefore, this is a protected whistleblower program, pursuant to which the reporting party benefits from a reduction or extinction of the penalty.

The recent Brazilian experience and the examples that come from foreign bodies indicate that antitrust leniency programs, together with the application of stricter penalties and a proactive investigation on the part of the authorities actually reduce substantially the incentives that drive a company to enter and remain in a cartel. It is important to note that the antitrust leniency program in Brazil enables officers who are involved in illicit schemes to receive not only administrative immunity but also criminal immunity.

In Brazil, only the first company to report the cartel can benefit from the leniency program. In thesis, the immunity guarantee granted only to the first one to report acts as an additional element of destabilization of the cartel, since it generates a “race” to the authorities. However, the former provisions on the adherence to the leniency program stated that the adherence could only take place if the company filed a request with SDE in that respect, submitting a vast and detailed set of information about the facts, companies and executives involved. Due to the lapse of time between

the identification of an antitrust act (which can occur, for example, via antitrust compliance programs), the decision to join a leniency program and the compilation of all documents and information necessary to formalize the filing, one can conclude that many companies were discouraged from joining the leniency program.

In an effort to encourage the reporting – and prevent that companies feel intimidated by the large volume of documents they were required to gather before contacting SDE – Ordinance No. 4/2006 introduces what North-Americans call a marker system. Under the new ordinance, a company can “save its place in line” merely by providing information of the existence of the cartel, and then submit the necessary formal data and documents at a later date.

The new rules state that an interested company can contact SDE anonymously – in writing, by its attorneys or verbally – and inquire about the existence of whistleblowers for any given cartel. If none exists, then the company has up to 30 days to formalize a leniency request. After the submittal of documents, SDE and the company have an additional term during which to formalize the leniency agreement.

The adoption of the marker system indicates that the authorities are still interested in strengthening the leniency program as part of the antitrust laws (i.e., increase the number of reports), due to the very creation of instruments that reduce uncertainties that, by definition, surround such program. However, the marker system has a downside too: a company can generate false hope for the authorities by informing that it will report on a cartel based on certain documents, when, in fact, it will do so based on other data. Since there is no provision on such borderline cases, only time can tell how SDE will address this problem.

Still, one must admit that the new leniency program rules represent an evolution when compared to the previous ones. Considering that, in the absence of a marker system, the number of reports had been gradually increasing (public sources indicate that five agreements were signed in 2003), this new procedure is expected to enable a significant increase in such number. Besides, the creation of the marker system placed the Brazilian leniency program among the most modern programs to control cartels in the world. Now it remains to be seen if the authorities will actually be able to maintain the confidence in the leniency program and induce at a larger number of reports.

## SUPERIOR COURT OF JUSTICE FINDS AGAINST THE SENTENCING FOR ENVIRONMENTAL MORAL DAMAGES

Álvaro Palma de Jorge | [aaj@bmalaw.com.br](mailto:aaj@bmalaw.com.br)

The First Panel of the Superior Court of Justice (STJ) recently decided, during the trial of Special Appeal No. 598.281-MG, that defendants cannot be sentenced to pay environmental moral damages as a result of public civil actions. In summary, the court decided that the moral damages that can give rise to an award are individual in nature and, thus, are incompatible with the notion of trans-individuality that is characteristic of environmental damages.

The public civil action in question was filed by the Public Prosecutors' Office of Minas Gerais against the municipality of Uberlândia and a real estate developer, for purposes of staying the activities relating to two developments. The lower court found for plaintiff, adopted mitigating measures to avoid the continued soil erosion that was taking place in said developments and also awarded moral damages "due to the carelessness and the illicit behavior of defendants against the Environment".

When the Court of Justice of Minas Gerais reexamined the matter it decided that the moral damages award was unjustified, since moral damages are individual in nature. The Public Prosecutors' Office contested such decision and filed a special appeal with STJ, arguing that Laws No. 7347/85 and 6938/81 had been violated, due to the provisions contained in such laws that called for the payment of environmental damages, which allegedly covered environmental moral damages.

Justice Luiz Fux voted to uphold the appeal. He based his vote on the opinion of several authors and, in summary, argued that the environment held inestimable value for humanity, while the new constitutional order, in force since 1988, had enabled moral damages to "exceed the individual barrier and cover non-property damages sustained by individuals and by society".

According to Fux, the Public Civil Action Law enables the payment of this type of moral damages, which can be characterized by the worsening of the quality of life of the population,

due to the environmental damages that affect society as a whole. In that regard, he argued that "the acknowledgement of environmental moral damages is not connected to the physical repercussions on the environment, but, instead, it relates to the transgression of the collective wellbeing, represented by community suffering as a result of certain environmental damages".

Justice Teori Zavaski disagreed with the reporting justice and affirmed that environmental damages could, in thesis, also cause moral damages, such as in the case of destruction of a tree planted by relatives of an individual, due to the affective value involved in the case. Nevertheless, he firmly affirmed that "the victims of moral damages are, necessarily, individuals". Without disregard for the constitutional value held by the environment, justice Zavaski stated that the idea of trans-individuality is incompatible with moral damages, since the latter requires the occurrence of damages to personal rights.

Due to different fundamentals, considering that the lower courts had failed to evidence the existence of collective and diffuse right and, therefore, there was no proof of a violation of the collective sense of the local community, justice Denise Arruda also opposed the vote of the reporting justice, but did not state a belief that environmental moral damages are impossible to redress.

Closing the trial, Justice José Delgado followed the opinion of the reporting justice, while Justice Francisco Falcão followed the divergent opinion and, therefore, by majority of votes, the appeal filed by the Public Prosecutors' Office was denied.

It is important to note that the standing of Justice Denise Arruda can be different in a future case that deals with the same matter, which would change the new standing of STJ. Therefore, the players of the sector still need to closely observe the applicable environmental rules, in such a way as to avoid this new and important environmental liability.

### PROJECT TEAM

#### EDITORIAL COMMITTEE

Paulo Cezar Aragão, Francisco Antunes Maciel Müssnich, Plínio Simões Barbosa.

#### EXECUTIVE EDITORIAL BM&A Pesquisa

#### PRODUCTION

Taciana Correa  
Glauco Santoro  
Daniela Christovão

#### GRAPHIC DESIGN AND LAYOUT Soter Design

#### PHOTOLITHO Davanzzo

#### PRINTED BY J. Sholna

This publication may not be reproduced in whole or in part without prior authorization by Barbosa, Müssnich & Aragão Advogados.

[bmareview@bmalaw.com.br](mailto:bmareview@bmalaw.com.br)

O BM&AReview® is published for informational purposes only and should not be relied on as legal advice for specific transactions or operations.

**RIO DE JANEIRO**  
Av. Almirante Barroso, 52  
31º andar CEP 20031-000  
TEL. (+55) (21) 3824 5800  
FAX. (+55) (21) 2262 5536

**SÃO PAULO**  
Av. Presidente Juscelino Kubitschek, 50 - 4º andar  
CEP 04543-000  
TEL. (+55) (11) 3365 4600  
FAX. (+55) (11) 3365-4597

**BRASÍLIA**  
Setor Comercial Sul,  
Quadra 1 Bl.F nº 30 - 7º andar  
Edifício Camargo Correa  
CEP 70397-900  
TEL. (+55) (61) 3218-0300  
FAX. (+55) (61) 3218-0318

