

INTRODUCTION TO BRAZILIAN LAW

SECOND EDITION

EDITED BY

FABIANO DEFFENTI

&

WELBER BARRAL



Wolters Kluwer

Introduction to Brazilian Law

Second Edition

Edited by

Fabiano Deffenti

Welber Barral



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*To my wife, Cass, and my children, Lucas and Max,
whose love and happiness are what I care about
above everything else.*
Fabiano Deffenti

To Heliodora, Arthur and Sofia
Welber Barral

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Preface to the Second Edition

Quite a lot has changed since the first edition of this book. When the first edition was published, Brazil was the darling of foreign investors. Being in Brazil was a must for just about all large multinational companies.

Yet, as I write this, President Dilma Rousseff has been suspended from power and replaced by her Vice President Michel Temer. Even though the process strictly followed all constitutional provisions, there are many who will argue that what took place was a coup d'état. President Rousseff's suspension from power, and likely impeachment, is a consequence – at a political level – of a raft of corruption scandals involving politicians siphoning off hundreds of millions of dollars from large-scale projects, most of them involving Brazil's state-owned oil company, Petrobras, and major mismanagement of the Brazilian economy by President Rousseff. At a legal level, it was her fudging of public accounts that allowed Congress to take the necessary measures for having her suspended and will probably ensure her impeachment.

On the positive side, Brazil's institutions have never been as transparent as they are now. The independence of the Federal Police, prosecution service and the courts have been put to the test, so far with corrupt politicians coming second best. Many of them are now in jail looking at serving long sentences. The thorough work of Judge Moro, the prosecutors and the Federal Police as part of Operation Car Wash has led to dozens of plea bargains and subsequent convictions – and the investigations and prosecutions are ongoing.

There have also been some important developments on the legislative front, the most important of which being the coming into force of the Code of Civil Procedure on 18 March 2016. While the new Code has not been free from criticism, it contains changes that should see greater flexibility in the application of civil procedure rules by the courts and, hopefully, speedier dispute resolution. It is symptomatic that in the last decade Brazil came from not having any arbitrations to becoming one of the largest markets for arbitration bodies in the world – and this was largely due to the slowness and ineptitude of Brazil's courts to deal with civil and commercial disputes (especially those involving complex matters of international law).

Finally, this second edition contains a new chapter addressing Brazil's private international law rules. The chapter should allow the reader to have a good grasp of the rules that will apply to issues with a connection to Brazil and how courts are likely to deal with them.

Fabiano Deffenti
Welber Barral

Preface to the First Edition

Brazil has recently become a major destination for foreign investors. However, when trying to become acquainted with Brazil's legal system foreigners are often perplexed with its complexity and idiosyncrasies.

Perhaps surprisingly, there has been little written about Brazilian law in the English language, with no recent work having ever been compiled to provide the reader with an overview of the main areas of Brazilian law. This book aims to close this gap.

Part of this complexity comes from the fact that Brazilian law draws from a number of sources. While the Portuguese and Roman law tradition is still strongly felt, over the centuries – and, especially, in the last few decades – Brazilian law has borrowed from the German, Italian, Spanish and American rules in a variety of legal fields, yet without a complete legal transplant from any foreign jurisdiction. This is largely due to a sophisticated legal elite, which has assisted courts and legislators in the adaptation of foreign rules to Brazil's realities.

In the late twentieth century, Brazilian law saw major improvements, after the coming into force of the Federal Constitution of 1988. Criticised by many as cumbersome and overly analytical in many parts, no one doubts that it has provided major improvements, especially in relation to individual protections and human rights. The legacy of the military dictatorship has all but vanished from the legal rules although in practice the protection of human rights has some way to go.

Administrative Law also saw a number of positive changes. The passing of the Procurement Law in 1993, the privatisation process, together with the various statutes creating regulatory agencies, and the Fiscal Responsibility Law in 2000, all of which brought about a more solid institutional structure for both local and foreign investors and business people. The Fiscal Responsibility Law, especially, is considered the key piece of legislation that has enabled Brazil to keep up with its international financial obligations and part of the reason for Brazil's recent economic success.

In 2002, the new Brazilian Civil Code was enacted, replacing the 1916 version. The Civil Code Bill sat idly for twenty-seven years in the Congress, until it passed without much scrutiny from Congress. Albeit already an old Code when it was passed, a number of provisions were modernised – especially in the fields of Property Law and Family Law. On the other hand, in a step which is criticised by many, the new Code

gave greater State influence over contractual relationships with the introduction of the 'social function of contracts' principle. Courts have used this principle to change contractual terms, severely eroding the almost unanimously accepted *pacta sunt servanda* rule.

In the dispute resolution arena, the last ten years have seen a number of changes to the Code of Civil Procedure aimed to speed up the notoriously slow Brazilian courts. The passing of the Arbitration Law in 1996, essentially implementing the UNCITRAL model with minor modifications, did not immediately have a major impact on Brazilian litigation. This was largely a consequence of the uncertainty relating to whether the Arbitration Law would be considered constitutional. Once the doubts over the validity of the Arbitration Law were put to rest by the Supreme Court's decision in *Appeal 5,206-Spain (MBV v. Resil)*, Brazil has seen a spike in the number of disputes resolved by arbitration. Large investors probably have been the greatest beneficiaries of this, embracing the new law to the extent that Brazil is now one of the key markets for arbitration bodies such as the ICC.

Advances have also been seen in the insolvency field, with the new Business Restructuring and Bankruptcy Law being enacted in 2005. Borrowing heavily from Chapter 11 of Title 11 of the United States Code, the Law shows a change of mind set on the part of legislators. Now it is clear that great efforts must be made to keep companies in trouble in business. Also, the adoption of fiduciary transfers (*alienações fiduciárias*), in particular, relating to real property (which occurred in 1997) and securitisations, giving further comfort to creditors in business transactions and to financial institutions, thus increasing the availability of credit in the market.

Unfortunately, it is in the key areas of Labour Law and Taxation Law that little has changed. In relation to the former, rules and regulations date back to a time when there was a much clearer employer-employee relationship than today. Created during the Getulio Vargas government in the 1940s, Labour Laws are both complex and very demanding on employers. The detail and complexity of the laws reflects in major bureaucratic costs whose clear beneficiaries are not altogether clear. Taxation Law, on the other hand, became a major source of litigation with the coming into force of the Federal Constitution in 1988. The burdensome procedures for passing tax-related laws and a poor level of procedural compliance on the part of the Congress saw hundreds of thousands of cases litigated before the courts. Tax laws have grown in an unstructured manner, with loopholes being included amidst relevant changes in various statutes not always connected with one another. This myriad of laws and regulations has now made Brazil one of the hardest places in the world to comply with tax norms. Hopefully, the newly elected legislators will make the required changes.

This book aims to provide the reader with sufficient knowledge to navigate through the major areas of Brazilian law. It is hoped that it will allow foreign lawyers and scholars to begin looking into the issues faced by Brazil and consider undertaking closer research and analysis into the laws that govern this very large developing economy that over the years has been much better known for its soccer successes than for its compliance with the rule of law.

Fabiano Deffenti

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The editors would also like to thank the assistance of Carolina Bohrer and Luciana Queiroz Pereira in editing the second edition of this book.

List of Abbreviations

ADC	Declaratory Action of Constitutionality (<i>Ação Direta de Constitucionalidade</i>)
ADI	Direct Action of Unconstitutionality (<i>Ação Direta de Inconstitucionalidade</i>)
ADI-O	Direct Action of Unconstitutionality by Omission (<i>Ação Direta de Inconstitucionalidade por Omissão</i>)
ADPF	Claim of Non-compliance with a Fundamental Precept (<i>Arguição de Descumprimento de Preceito Fundamental</i>)
BDRs	Brazilian Depositary Receipts
BM&F	Mercantile and Futures Exchange (<i>Bolsa de Mercadorias e Futuros</i>)
BOVESPA	São Paulo Stock Exchange (<i>Bolsa de Valores de São Paulo</i>)
CDC	Consumer Defence Code (<i>Código de Defesa do Consumidor</i>)
CLT	Consolidated Labour Laws (<i>Consolidação das Leis do Trabalho</i>)
COFINS	Contribution for Social Security Financing (<i>Contribuição para o Financiamento da Seguridade Social</i>)
CPC	Code of Civil Procedure (<i>Código de Processo Civil</i>)
CPI	Congressional Investigating Committee (<i>Comissão Parlamentar de Inquérito</i>)
CSLL	Social Contribution over Net Profits (<i>Contribuição Social sobre o Lucro Líquido</i>)
CTPS	Employee's Work and Social Security Card (<i>Carteira de Trabalho e Previdência Social</i>)
CTN	Brazilian Tax Code (<i>Código Tributário Nacional</i>)
CUT	Unified Workers' Central (<i>Central Única dos Trabalhadores</i>)
FGTS	Unemployment Guarantee Fund (<i>Fundo de Garantia do Tempo de Serviço</i>)

List of Abbreviations

ICC	International Chamber of Commerce
ICMS	State Tax on the Sale of Goods and Services (<i>Imposto sobre a Circulação de Mercadorias e Serviços</i>)
ILO	International Labour Organization
IOF	Tax on Financial Operations (<i>Imposto sobre Operações Financeiras</i>)
IPI	Excise Tax over Industrialised Products (<i>Imposto sobre Produtos Industrializados</i>)
IPTU	Tax over Buildings and Land (<i>Imposto Predial e Territorial Urbano</i>)
IRPJ	Company Income Tax (<i>Imposto de Renda de Pessoas Jurídicas</i>)
ISS	Municipal Services Tax (<i>Imposto sobre Serviços</i>)
ITBI	Intervivos Real Estate Transfer Tax (<i>Imposto de Transferência de Bens Intervivos</i>)
ITR	Rural Land Tax (<i>Imposto Territorial Rural</i>)
IVA	Value-Added Tax
Oss	Social Organisations (<i>Organizações Sociais</i>)
OSCIPs	Public Interest Civil Society Organisations (<i>Organização da Sociedade Civil de Interesse Público</i>)
PIS	Social Integration Program (<i>Programa de Integração Social</i>)
PND	National Privatisation Program (<i>Plano Nacional de Desestatização</i>)
SESC	Social Service for Commerce (<i>Serviço Social do Comércio</i>)
SESI	Social Service Industry (<i>Serviço Social da Indústria</i>)
STF	Federal Supreme Court (<i>Supremo Tribunal Federal</i>)
STJ	Superior Court of Justice (<i>Superior Tribunal de Justiça</i>)
SUS	Integrated System of Health (<i>Sistema Único de Saúde</i>)
TCU	Audit Court (<i>Tribunal de Contas da União</i>)
TEC	Common External Tariff (<i>Tarifa Externa Comum</i>)

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