

12<sup>th</sup> Edition,  
December  
2005

### Editorial Board

#### Brazil

Thomas B. Felsberg

Neil Montgomery

Thiago V. Flores

Ricardo Salles

Antonio Amendola

Pierre Bercaire

#### U.S.

Peter Allen

Patrícia Toledo

### Contact

[Please click here.](#)

This Newsletter has been prepared by Felsberg, Pedretti, Mannrich e Aidar – Advogados e Consultores Legais. Felsberg e Associados is a full-service Brazilian law firm with offices in São Paulo, Rio de Janeiro, Brasília and Washington, D.C.

#### :: Arbitration Strikes Again Within the Public Sector

As of from 21st November 2005, disputes arising from concession contracts entered into with public entities can now be solved by means of arbitration. Clause XV of article 23, of Federal Law No. 8,987/95, formerly determined that it was necessary in a concession contract to previously establish the jurisdictional venue for any future disputes. Moreover, there was also the possibility of choosing amicable ways of solving disputes. [read more](#)

#### :: Recent Developments of Brazilian Legislation on Concessions may Promote Project Financing in Brazil

With a view to increasing private sector and financiers' interest in Brazilian infrastructure projects, as well as improving guarantees and financing conditions for concession projects, the Federal Government recently enacted Law No. 11,196 of November 21, 2005 ("Law 11,196/05"), which amended the Brazilian General Concessions Law (Federal Law No. 8,987, dated as of February 13, 1995 - "Law 8,987/95"). [read more](#)

#### :: The Brazilian-Israeli Double Tax Treaty enters into force

Having the Congress approved its text and the President ratified and enacted the Brazilian-Israeli Double Tax Treaty (the "DTT"), the same entered into force in Brazil at the end of 2005. One of the DTT's most important provisions-article 12 - limits withholding tax on royalties. [read more](#)

#### :: Change of scenario for aircraft lessors Brazil – New rule governing repossession in judicial restructurings

Article 199 of the Brazilian New Bankruptcy Law, which deals with the rights of aircraft lessors in a judicial restructuring, has recently been amended by Law No. 11,196 of November 21, 2005. The amendment was motivated by the judicial discussion which took place in Varig's case, with regard to the right of aircraft lessors to repossess the leased equipment during a judicial restructuring proceeding. [read more](#)

#### :: Guarantees Granted by International Organizations

Another measure aimed to foster infrastructure projects in Brazil, basically due to the reduction in financing costs deriving thereof, is the inclusion by the Brazilian Central Bank ("Bacen") of a new chapter (Chapter 4 into Title 3) in the Foreign Exchange Market and International Capital Regulation ("RMCCI"), setting out the rules governing guarantees granted by international organizations (of which Brazil is a member) in the context of internal credit operations through Circular Bacen No. 3,299 ("Circular 3,299") dated November 18, 2005. [read more](#)

#### Felsberg - Recent Cases

#### :: Santa Catarina State Bank's Dismissal Program is upheld by the Supreme Labor Court

On a leading case for Collective Dismissal Programs, the Supreme Labor Court upheld the validity of Santa Catarina's State Bank ("BESC") Dismissal Program, recognizing that a collective bargaining agreement may be entered directly by employees, if the Labor Union refuses to negotiate even when the program involves release of all awards due under the employment agreement. [read more](#)

For more articles and information,

Visit us: <http://www.felsberg.com.br>

#### São Paulo

Av. Paulista, 1294 - 2º andar  
Cerqueira Cesar - SP - 01310-915  
Tel: +55 (11) 3141-9100  
Fax: +55 (11) 3141-9150  
[mail@felsberg.com.br](mailto:mail@felsberg.com.br)

#### Rio de Janeiro

Av. Almirante Barroso, 52 - 22º andar  
Centro - RJ - 20031-000  
Tel: +55 (21) 2156-7500  
Fax: +55 (21) 2220-3182  
[mail@felsberg.com.br](mailto:mail@felsberg.com.br)

#### Brasília

SCN, Quadra 05 - Bloco A - Sala 1217  
Torre Norte - Brasília Shopping and  
Towers 70715-900 - Brasília - DF  
Tel.: +55 (61) 3033-3390  
Fax.: +55 (61) 3033-2855  
[mail@felsberg.com.br](mailto:mail@felsberg.com.br)

#### Washington, D.C.

1725 I Street N.W. - Suite 300  
Washington, D.C. 20006 - USA  
Tel: +1 (202) 331-2492  
Fax: +1 (202) 331-2493  
[dcoffice@felsberg.com](mailto:dcoffice@felsberg.com)

If you are not interested in receiving our newsletter, please click [here](#).

## Arbitration Strikes Again Within the Public Sector

As of from 21st November 2005, disputes arising from concession contracts entered into with public entities can now be solved by means of arbitration.

Clause XV of article 23, of Federal Law No. 8,987/95, formerly determined that it was necessary in a concession contract to previously establish the jurisdictional venue for any future disputes. Moreover, there was also the possibility of choosing amicable ways of solving disputes. However, these alternative forms of dispute resolution were always challenged before the Judiciary, and therefore did not contribute to a secure business environment for foreign and local investors.

The above-mentioned amendment confirms the present tendency whereby the Judiciary and the Legislature have been more receptive to arbitration as a way of solving disputes arising between private and public entities. Recently, in a case involving AES Uruguaiana and Companhia Estadual de Energia do Rio Grande do Sul (CEEE), a quasi-public corporation (sociedade de economia mista), the Superior Court of Justice unanimously ruled in favor of the enforcement of an arbitration clause in an agreement executed between a private party and the public sector. Furthermore, in the context of Public-Private Partnerships, Clause III of article II of Federal Law No. 11,079/04 introduce a major legal breakthrough by permitting the utilization of arbitration clauses in contracts entered into between the private and public sectors.

Foreign investors can already celebrate this new achievement, which will lead to a more secure system for investment. Nonetheless, there are still limitations for arbitration in the public sector, but this advance needs to be seen with modest precaution. Firstly, arbitration continues only to rule about issues relating to freely transferable property rights. Secondly, Federal Law No. 8,666/93, which is the general rule for establishing contract with the Public Administration, does not acknowledge the binding nature of arbitration clauses.

Additional information on the above may be obtained directly from Pierre Emmanuel Bercaire at [pierrebercaire@felsberg.com.br](mailto:pierrebercaire@felsberg.com.br) or from Roberto Kanitz at [robertokanitz@felsberg.com.br](mailto:robertokanitz@felsberg.com.br)

---

1.Federal Law No. 8,987/95 has now the following wording: "Article 23-A. Concession contract can foresee private means of dispute resolution resulting from or related to the contract, which can include arbitration, and shall take place in Brazil and in Portuguese, respecting the Federal Law No. 9,307/96"

---

## Change of scenario for aircraft lessors Brazil – New rule governing repossession in judicial restructurings

Article 199 of the New Brazilian Bankruptcy Law, which deals with the rights of aircraft lessors in judicial restructuring, has recently been amended by Law No. 11,196 of November 21, 2005. The amendment was motivated by the judicial discussion which took place in Varig's current judicial restructuring process, with regard to the right of aircraft lessors to repossess the leased equipment during a judicial restructuring proceeding. When approving the new bankruptcy law the clear intent of the Brazilian Congress was to protect the rights of aircraft lessors who entered into leases with Brazilian airlines since the airlines, through their association, argued that this would reduce the lease payments for solvent airlines.

However, when Varig filed for its judicial restructuring it requested, and was granted, a temporary restraining order against its lessors, which enjoined them from repossessing Varig's aircraft in Brazil. An ancillary proceeding was also filed by Varig in New York, under section 304 of the U.S. Bankruptcy Code, and a temporary restraining order was granted barring creditor actions to seize Varig planes within the US.

The decision granting Varig's request for such restraining order in Brazil was based on a terminological issue arising from the sole paragraph of Article 199 of the New Bankruptcy Law. The original language of such paragraph stipulated that the rights of lessors, including the right to repossess, deriving from "mercantile leasing agreements", would not be suspended in the event of a judicial restructuring. Varig's lawyers argued that the agreements entered into with its lessors did not qualify as "mercantile leases" under the Brazilian Aeronautics Code (Law No. 7,565/1986), and could thus not benefit from the exemption provided under article 199. Pursuant to Varig's arguments, its leasing agreements were "simple" (as opposed to "mercantile") since they did not provide for the option to purchase the leased equipment at the end of the leasing period.

**For more articles and information,**

**Visit us:** <http://www.felsberg.com.br>

### São Paulo

Av. Paulista, 1294 - 2º andar  
Cerqueira Cesar - SP - 01310-915  
Tel: +55 (11) 3141-9100  
Fax: +55 (11) 3141-9150  
[mail@felsberg.com.br](mailto:mail@felsberg.com.br)

### Rio de Janeiro

Av. Almirante Barroso, 52 - 22º andar  
Centro - RJ - 20031-000  
Tel: +55 (21) 2156-7500  
Fax: +55 (21) 2220-3182  
[mail@felsberg.com.br](mailto:mail@felsberg.com.br)

### Brasília

SCN, Quadra 05 - Bloco A –Sala 1217  
Torre Norte – Brasília Shopping and  
Towers 70715-900 – Brasília - DF  
Tel.: + 55 (61) 3033-3390  
Fax.: +55 (61) 3033-2855  
[mail@felsberg.com.br](mailto:mail@felsberg.com.br)

### Washington, D.C.

1725 I Street N.W. - Suite 300  
Washington, D.C. 20006 - USA  
Tel: +1 (202) 331-2492  
Fax: +1 (202) 331-2493  
[dcoffice@felsberg.com](mailto:dcoffice@felsberg.com)

If you are not interested in receiving our newsletter, please click [here](#).

The recent amendment to Article 199 of the Bankruptcy Law has put an end to the discussion. The new language of Article 199 provides that all kinds of leasing (either "mercantile" or "simple") of aircraft and aircraft components are exempted from the effects of the lessee's judicial restructuring, i.e., should an airline file for judicial restructuring in Brazil, the right of lessors to repossess the leased equipment shall be preserved. In any event, Law No. 11.196 expressly provides that it is not applicable to proceedings filed before its enactment, i.e., the new language of Article 199 of the Bankruptcy Law shall not affect the decisions already taken in Varig's case. Additional information on the above may be obtained directly from Thomas Benes Felsberg at [thomasfelsberg@felsberg.com.br](mailto:thomasfelsberg@felsberg.com.br).

## Recent Developments of Brazilian Legislation on Concessions may Promote Project Financing in Brazil

With a view to increasing private sector and financiers' interest in Brazilian infrastructure projects, as well as improving guarantees and financing conditions for concession projects, the Federal Government recently enacted Law No. 11,196 of November 21, 2005 ("Law 11,196/05"), which amended the Brazilian General Concessions Law (Federal Law No. 8,987, dated as of February 13, 1995 - "Law 8,987/95").

In general terms, the main changes to the General Concessions Law relate to: (i) the requirements for approval of transfer of the shareholding control of concessionaires of public services; and (ii) the security package available to financiers of public services concessions.

### A. Requirements for Approval of Transfer of Shareholding Control of Concessionaires

Law 8,987/95 was also amended by Law 11,196/05 with the purpose of facilitating the transfer of shareholding control of concessionaires to lenders, so as to enable the financial restructuring of the concessionaire and assure the continuity of the public services. This mechanism, also known as step-in rights, is typically used in project finance transactions (but which had not been available, until now, under concession agreements).

The transfer of shareholding control of public service concessionaire to the lender will only be possible upon demonstration of fiscal and legal good standing of the lender. It is worth noting that, pursuant to Law 11,196/05, the granting authority may exempt the lender from demonstrating satisfaction of technical capacity requirements. Thus, it is a faculty of the granting authority, and not an obligation.

Moreover, we note that, as already contemplated in Law No. 11,079/04, the assumption by the lender of the shareholding control of the concessionaire must envisage the financial restructuring thereof. In this regard, Law 11,196/05 establishes that the obligations and responsibilities of the concessionaires and their controlling shareholders will fully remain with the same during the period in which control is transferred to lenders.

### B. Fiduciary Assignment of Credits Finally,

Law 11,196/05 has amended Law 8,987/95 in order to permit the fiduciary assignment of a portion of the operational credits of the public services concessionaires to lenders, such receivables being most of the times represented by tariffs payable by end consumers of the services rendered.

For purposes of validity and effectiveness of the fiduciary assignment of the credits of public service concessionaires, which shall only be instituted under financing agreements with a term greater than 5 (five) years, satisfaction of the following requirements is necessary: (i) registration of the Fiduciary Assignment Agreement with the competent Registry of Deeds and Documents; and (ii) official notification thereof to the granting authority as a requisite for validity of the assignment therewith. The assigned credits shall be deposited into a blocked account linked to the underlying credit agreement, with the obligation of the depository financial institution to transfer the funds to the lenders as the debt service obligations become due and return any surplus to the concessionaire. A financial institution may be indicated by the lender for the collection and deposit of assigned credits.

The changes described herein may promote much needed Brazilian infrastructure projects, especially under the project finance structure, insofar as they offer better guarantees and flexibility to financiers and market players.

Additional information on the above may be obtained directly from Thiago V. Flores at [thiagoflores@felsberg.com.br](mailto:thiagoflores@felsberg.com.br).

For more articles and information,  
Visit us: <http://www.felsberg.com.br>

#### São Paulo

Av. Paulista, 1294 - 2º andar  
Cerqueira Cesar - SP - 01310-915  
Tel: +55 (11) 3141-9100  
Fax: +55 (11) 3141-9150  
[mail@felsberg.com.br](mailto:mail@felsberg.com.br)

#### Rio de Janeiro

Av. Almirante Barroso, 52 - 22º andar  
Centro - RJ - 20031-000  
Tel: +55 (21) 2156-7500  
Fax: +55 (21) 2220-3182  
[mail@felsberg.com.br](mailto:mail@felsberg.com.br)

#### Brasília

SCN, Quadra 05 - Bloco A - Sala 1217  
Torre Norte - Brasília Shopping and  
Towers 70715-900 - Brasília - DF  
Tel.: + 55 (61) 3033-3390  
Fax.: +55 (61) 3033-2855  
[mail@felsberg.com.br](mailto:mail@felsberg.com.br)

#### Washington, D.C.

1725 I Street N.W. - Suite 300  
Washington, D.C. 20006 - USA  
Tel: +1 (202) 331-2492  
Fax: +1 (202) 331-2493  
[dcoffice@felsberg.com.br](mailto:dcoffice@felsberg.com.br)

## Guarantees Granted by International Organizations

Another measure aimed to foster infrastructure projects in Brazil, basically due to the reduction in financing costs deriving thereof, is the inclusion by the Brazilian Central Bank ("Bacen") of a new chapter (Chapter 4 into Title 3) in the Foreign Exchange Market and International Capital Regulation ("RMCCI"), setting out the rules governing guarantees granted by international organizations (of which Brazil is a member) in the context of internal credit operations through Circular Bacen No. 3,299 ("Circular 3,299") dated November 18, 2005.

Circular 3,299 amends National Monetary Council Resolution No. 3,218 of June 30, 2004, which **authorized** the registration of such guarantees in the ROF module (register of financial operations) of Bacen's electronic system, making it now mandatory.

The aforementioned guarantees (including conditions and terms thereof) shall be registered by the debtor of the underlying internal credit operation upon execution of the guarantee agreement. The beneficiary of the funds remitted to Brazil under the guarantee shall be the creditor of the underlying internal credit operation identified in the ROF on the date of remittance of funds by the foreign guarantor into Brazil.

The registration of the funds entering Brazil for purposes of honoring the guarantee shall be effected in the currency remitted from abroad. On the other hand, the amounts in foreign currency that may be remitted abroad shall correspond to the amounts (in local currency) owed to the guarantor as a result of the sub-rogation by the latter in the credit of the internal creditor.

The registration set forth by Circular 3,299 aims at stimulating the granting of foreign guarantees by international organizations of which Brazil is a party (such as the World Bank and the Inter-American Development Bank) in connection with internal credit operations and shall contribute towards reducing financing costs of internal credit operations. The granting of such guarantees was not usual to date in Brazil due to the impossibility of registering the same with the Central Bank.

Further information may be obtained directly from Thiago V. Flores at [thiagoflores@felsberg.com.br](mailto:thiagoflores@felsberg.com.br)

---

## The Brazilian-Israeli Double Tax Treaty enters into force

Having the Congress approved its text and the President ratified and enacted the Brazilian-Israeli Double Tax Treaty (the "DTT"), the same entered into force in Brazil at the end of 2005.

One of the DTT's most important provisions-article 12 - limits withholding tax on royalties. Pursuant to such article, to the extent that the effective beneficiary is located in either Brazil or Israel, the country of source may impose withholding tax on royalties (deemed also to cover fees payable for technical assistance and technical services fees) at the following maximum rates: (i) 15%, when royalties relate to the use of industrial or commercial trademarks; and (ii) 10%, for any other kind of royalty.

The reduction of the withholding tax rate from 15% (which is the rate usually levied in Brazil, on royalties, regardless of the underlying reason for such services) to 10% (except for royalties payable by virtue of the use of industrial or commercial trademarks), introduced by the DTT, is very beneficial.

Moreover, taking into account that Brazilian tax legislation levies a 15% withholding tax on technical assistance and technical services fees, it is arguable that article 12 of the DTT limits such withholding tax to a rate of 10%, given that the concept of royalties includes technical assistance and technical services fees.

In light of the above benefits, the DTT may be seen as a device to promote cross-border transactions between Brazil and Israel, since it reduces the tax burden on certain royalties, technical assistance and technical services fees. Notwithstanding, it should be noted that cross-border services agreements are still heavily taxed in Brazil and other taxes should be taken into account in the identification of the tax treatment applicable to payments to non-residents (i.e., Service Tax-ISS, CIDE, and PIS/COFINS), especially when residents in Brazil and in Israel are related parties.

Additional information on the above may be obtained directly from Antonio Amendola at [antonioamendola@felsberg.com.br](mailto:antonioamendola@felsberg.com.br).

For more articles and information,  
Visit us: <http://www.felsberg.com.br>

### São Paulo

Av. Paulista, 1294 - 2º andar  
Cerqueira Cesar - SP - 01310-915  
Tel: +55 (11) 3141-9100  
Fax: +55 (11) 3141-9150  
[mail@felsberg.com.br](mailto:mail@felsberg.com.br)

### Rio de Janeiro

Av. Almirante Barroso, 52 - 22º  
andar Centro - RJ - 20031-000  
Tel: +55 (21) 2156-7500  
Fax: +55 (21) 2220-3182  
[mail@felsberg.com.br](mailto:mail@felsberg.com.br)

### Brasília

SCN, Quadra 05 - Bloco A - Sala 1217  
Torre Norte - Brasília Shopping and  
Towers 70715-900 - Brasília - DF  
Tel.: + 55 (61) 3033-3390  
Fax.: +55 (61) 3033-2855  
[mail@felsberg.com.br](mailto:mail@felsberg.com.br)

### Washington, D.C.

1725 I Street N.W. - Suite 300  
Washington, D.C. 20006 - USA  
Tel: +1 (202) 331-2492  
Fax: +1 (202) 331-2493  
[dcoffice@felsberg.com.br](mailto:dcoffice@felsberg.com.br)

## Felsberg - Recent Cases

---

### Santa Catarina State Bank's Dismissal Program is upheld by the Supreme Labor Court

On a leading case for Collective Dismissal Programs, the Supreme Labor Court upheld the validity of Santa Catarina's State Bank ("BESC") Dismissal Program, recognizing that a collective bargaining agreement may be entered directly by employees, if the Labor Union refuses to negotiate even when the program involves release of all awards due under the employment agreement.

The BESC program is the largest dismissal program to have been implemented in Brazil, having involved approximately 5,000 employees. It was elaborated with the assistance of Felsberg e Associados, as part of the Bank's privatization.

After examining a group of ten labor claims filed against the program, the Supreme Labor Court ruled that employees may enter into a collective bargaining agreement directly, if the Labor Union refuses to negotiate with the company. Although such provision is provided for by Article 617 of the Consolidation of Labor Laws (CLT), Labor Courts rarely recognize its applicability, especially after the Federal Constitution of 1988, which determines that collective agreements should be entered into by Labor Unions in order to be deemed valid.

Moreover, the Supreme Labour Court upheld the employees' full acquaintance as to all labor entitlements arising from their terminated employment relationship with BESC, based on the structure of the program and the procedures taken, in direct opposition to the Statement of Binding Precedents ("Orientação Jurisprudencial") no. 270 issued by the same Supreme Labor Court, which establishes that, unless a judicial settlement is reached, the waiver of labor entitlements is only valid as to the amounts and entitlements expressly stated in the receipt.

Additional information on the above may be obtained directly from our Labor Department at [trabalhista@felsberg.com.br](mailto:trabalhista@felsberg.com.br).

**For more articles and information,  
Visit us: <http://www.felsberg.com.br>**

#### **São Paulo**

Av. Paulista, 1294 - 2º andar  
Cerqueira Cesar - SP - 01310-915  
Tel: +55 (11) 3141-9100  
Fax: +55 (11) 3141-9150  
[mail@felsberg.com.br](mailto:mail@felsberg.com.br)

#### **Rio de Janeiro**

Av. Almirante Barroso, 52 - 22º  
andar Centro - RJ - 20031-000  
Tel: +55 (21) 2156-7500  
Fax: +55 (21) 2220-3182  
[mail@felsberg.com.br](mailto:mail@felsberg.com.br)

#### **Brasília**

SCN, Quadra 05 - Bloco A - Sala 1217  
Torre Norte - Brasília Shopping and  
Towers 70715-900 - Brasília - DF  
Tel.: + 55 (61) 3033-3390  
Fax.: +55 (61) 3033-2855  
[mail@felsberg.com.br](mailto:mail@felsberg.com.br)

#### **Washington, D.C.**

1725 I Street N.W. - Suite 300  
Washington, D.C. 20006 - USA  
Tel: +1 (202) 331-2492  
Fax: +1 (202) 331-2493  
[dcoffice@felsberg.com.br](mailto:dcoffice@felsberg.com.br)