

Know how to License in Brazil: A Pragmatic Approach to Cultural and Legal Differences affecting Know How Licensing Agreements¹

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ABSTRACT. This paper gives an overview on legal, economic and cultural characteristics that are inherent to the Brazilian business scenario and how they affect the negotiation of know how licensing agreements. The Brazilian regulatory framework and the point of view of Brazilian companies can bring out significant issues not expected by their counterparts of other countries or regions. Experience demonstrates that understanding the concepts, reasons and dynamics of emerging economies from their perspective may help U.S. legal professionals to observe relevant factors and get insights to overcome obstacles in the practice of contractual law in a multinational or multicultural environment, in particular when negotiating know how licensing contracts.

KEYWORDS. Know how licensing. Negotiating contracts with Brazilian parties. Economic, legal and cultural aspects.

1. Introduction

One of Brazil's major current challenges is to play a new role as an innovative economy among the leader countries in the world, seeking a leadership that should be very different from either the U.S., European or Chinese models. Preparing a governmental program having economic growth as the main goal has been the recently reelected President's mission and such growth should be based on the country's natural resources and potential. In 2013, Brazil's GDP was US \$ 2,2 trillion, Brazil has a significant internal market and capability to transform and deliver exceptional quality goods and services. To carry it out, there must be some very consistent, long run public policies and high level governance systems, either in the public administration as well as in the private sector.

¹ Copyright 2014 by Elisabeth Kasznar Fekete. This paper was presented to AIPLA by occasion of its Midwinter Institute panel on "*License Negotiations with Foreign and Multinational Entities – Eliminating Bias for a successful Outcome*" of January 30, 2015, described by the Association as "*an international panel discussion regarding strategies for eliminating obstacles due to multinational and multicultural origins of parties during licensing negotiations. The panelists will describe those obstacles providing US attorneys with insights concerning the point of view of foreign entities on the matter and will offer various strategies US attorneys can employ to overcome them. The panel will provide suggestions on how to better navigate issues due to differences in cultural and legal systems avoiding stereotypes and working instead for a successful outcome of licensing negotiations for all the parties involved.*" The author expresses her sincere thanks to Gabriel Francisco Leonardos and to Felipe de Araújo Monteiro. Her gratitude goes also to Elise Selinger for her revision.

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An increase of private investment is expected to stimulate the economy. Therefore, companies would rely on improved economic conditions to start new businesses, negotiate contracts, and close deals. Starting a new business in Brazil takes in average three months when everything goes smoothly. Besides improvement of the country's infrastructure in areas such as transportation, energy, and logistics, legal, and tax reforms are necessary to facilitate business. With well prepared scientists, engineers, agronomists, medical doctors, etc. and state of the art laboratories performing R&D in key segments such as oil and gas, agribusiness, healthcare, telecommunications, experienced lawyers and an advanced banking and financial system, it is expected that innovation in Brazil will be enhanced with improvements seeking to develop the regulatory framework affecting the ability of inventors to obtain permits to construct, access to biodiversity resources and research of genetic innovations.

In this type of business context and economic conditions, where it is favorable to continue fostering technology transfer both to and from Brazil, this paper will discuss the strategic importance of knowing how to negotiate and manage international transactions dealing with acquisition of knowledge, and how to apply the competent legal tools based on an underlying mutual cultural comprehension.³

2. An overview on some relevant Brazilian legal, economic, and cultural aspects

2.1. Roman-German (Civil Law) system and constitutional equality rights: Brazilian law concept as a basic framework

Brazil follows a Roman-German or Civil Law regime. Statutory laws are the predominant and ruling legal sources. Custom practices, case law and scholars literature follow as subsidiary sources of law, together with analogy, general principles of law and equity, providing support to interpretation issues in case of absence of written legal rules.

International contracts involve at least one element to which more than one country's law applies and which impacts at least one country's economy in some way. This at least one element may be capital, an asset, a domicile of one of the parties, etc, that has an impact on international commerce. Therefore, the international characteristic of a contract also reflects multicultural aspects based upon elements associated with one or more parties to the contract.

³ It is relevant to note that, having mainly a cultural and practical approach, the scope of this paper does not include an analysis of the merits of contractual clauses, case law, anti-trust rules nor of tax issues that arise out of know how licensing contracts. For tax issues of licensing contracts in Brazil, see Gabriel Francisco Leonardos' classic book, *Tributação da Transferência de Tecnologia*, Forense, 1999.

One of the impacts of international contract negotiation and management is the challenge presented in relation to potential biases against persons because of race, gender, economic status, creed, color, religion, national origin, disability, age or sexual orientation and these potential prejudices must be preventively faced.

Thus, one of the principal responsibilities of the companies' officers and attorneys during any transaction involving a Brazilian party is to assure compliance with the Brazilian Federal Constitution. Enacted in 1988, the Brazilian Federal Constitution establishes the rights of the citizens in Article 5, according to which all persons are equal before the law, without any distinction whatsoever, inviolability of the right to life, liberty, equality, security and property being ensured to Brazilians and foreigners residing in the country.⁴ Men and women have equal rights and duties (paragraph I); freedom of conscience and belief are inviolable; the free exercise of religious cults is guaranteed (paragraph VI).⁵ No one shall be deprived of any rights by reason of religious belief or philosophical or political conviction, unless he or she invokes it to exempt him/herself from a legal obligation required of all and refuses to perform an alternative obligation established by law (paragraph VIII); the expression of intellectual, artistic, scientific and communications activities is free, independently of censorship or license (paragraph IX).⁶ Lastly, the practice of racism is a non-bailable crime, subject to the penalty of prison (paragraph XLII).⁷

Two statutes that, among others, follow the Constitution in hierarchy and that are essential for companies doing business involving rights and duties of Brazilian parties are the Civil Code, the main act ruling the relationships in the private society, and the Commercial Code, applicable to any industrial or commercial activity and forming the basic rules of corporate law, together with substantial legislation and regulations.

2.2. Special factors to observe: establishing companies, labor, consumer protection, tax legislation and other

Properly drafting licensing agreements in Brazil requires consideration of the strong information, health and safety rights assured to the consumers, whom are considered as the vulnerable party by The Brazilian Consumer Defense Code (Act number 8.708/1990). For instance, a clause whereby a supplier would waive its responsibility for any problem caused to a consumer by its products or services is null and void under the Defense Code.⁸ Also, any transaction involving Internet issues must observe the new Internet Civil Framework (Act number 12.968/2014), which governs the relationships between users – natural persons or companies - of the Internet.

⁴ World Intellectual Property Organization (WIPO), Constitution of the Federative Republic of Brazil, Art. 5, http://www.wipo.int/wipolex/en/text.jsp?file_id=218270, (last updated Nov. 2008).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Article 12 of Law number 8.708/1990.

Furthermore, complex tax legislation and the efforts of the authorities to increase tax collection have resulted in countless disputes between companies with federal, state, and municipal bodies over the interpretation of tax laws and accessory obligations regulations. It is also known that in Brazil, the costs with employees' social security rights are a high burden to companies.⁹

When a controversy between contracting parties is litigated instead of using the alternative dispute resolution systems that are increasingly being applied in Brazil, it is worth noting that the Judiciary, bound by principles such as the broad defense,¹⁰ is constantly coordinating efforts to expedite the proceedings. Long delays at the Higher, Appellate, and Lower Courts due to the high quantity of lawsuits and the plurality of appeals, among other causes, following the “two-tiered judicial review” rule, are being combatted with great progress with the overall implementation of electronic proceedings and intense debates on the reform of the Code of Civil Procedure. In part, the objective of the implementation of new laws and the reform of existing laws is to improve the judicial structure and reduce the delay of lawsuits.

Exchange rate variations produce effects that will require efforts of the contracting parties to produce adequate contractual clauses.

In the Intellectual Property area, some of the more than sixty legislative bills affecting Intellectual Property Rights pending at the National Congress might have direct impact on licensing contracts for a range of industries. The newly passed legislation does not apply retroactively to previously executed contracts, but the Brazilian business model usually involves selecting and observing bills affecting industries and deciding whether it is necessary to undertake reasonable efforts to monitor them and understand the potential risks, rules, and costs that will possibly apply in the future to the involved industry sectors.

2.3. Recent and pioneer study on economic impact of IP in Brazil

Brazil offers many opportunities for investments in the introduction or expansion of creative and innovative industries and provides an excellent context to carry out R&D and to engage in activities that involve either acquiring new technologies or that involve how to license different types of technology.

⁹ See, Constitution of the Federative Republic of Brazil, Brazilian Labor Code; Brazilian Administrative Ruling No. 3.214/78, issued by the Ministry of Labor (discusses the prevention of and protection from accidents, personnel safety equipment, building safety requirements, transportation and handling of materials, hazardous work conditions and environmental contamination).

¹⁰ Constitution of the Federative Republic of Brazil, at Art. 5.

A recent pioneering study of intellectual property assets with an economic approach, performed by Professor Jorge Arbache¹¹ upon request of the Brazilian Intellectual Property Association, (ABPI) identifies the most knowledge-intensive industries using nine indicators, as he explains: “these indicators may include R&D money spent per employee, R&D money spent per plant and innovation expenses per industry. The analysis was divided into two steps: the first one covers the knowledge-intensive sectors and the second step discusses about the relationship of knowledge intensity and economic indicators such as employment, salary, scholarship, company revenues and international commerce.”

In one of his graphics, Professor Arbache estimates the effect of the increase in the indicators of knowledge and economic variables. The result suggests him that the increase of the investment in innovation helps to increase the company revenues.

Table 7: “Modelos econométricos – indicadores de conhecimento e variáveis econômicas” (Econometric Models- indicators of knowledge and economic variables)¹²

	Average company revenue (thousand R\$)	Penetration of imports in the industry sector	Export coefficient in the sector (%)	Average schooling in the company	Remuneration average in the company	Average employment per company
Outlay with innovation by company (thousand R\$)	+			+	+	+
Outlay with innovation by employee (thousand R\$)	+				+	+
Outlay with R&D by company(thousand R\$)	+				+	+
Part of the revenue expended on P&D (%)		+				+
Outlay with R&D by company, external purchase of R&D and external purchase of other knowledge (%)	+				+	+
Part of the revenue expended on R&D, external purchase of other knowledge (%)		+				+

¹¹ Professor Jorge Arbache is an Economist and Professor at the University of Brasilia, expert in Brazilian and international economy. His study “O Brasil e a Importância Econômica da Indústria Intensiva em Conhecimento” (“Brazil and the Economic Importance of the Knowledge Intensive Industry”), dated September 22, 2014, can be found, in Portuguese, at <http://www.abpi.org.br/materiais/diversos/Vol2-OBrasileiaImportanciaEconomicadaIndustrialIntensivaemCo.pdf>

¹² *Id.* at p. 55. Free translation of the table’s title and contents.

Outlay with R&D by company, external purchase of R&D and external purchase of other knowledge per employee	+	+			+	+
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Professor Arbache concluded that both the importance of intellectual property to Brazil's economy and the increase of knowledge intensity by the Brazilian economy, require, among others, to modernize the Intellectual Property-related framework as well as institutions and will probably create better conditions for development and sustainable growth. The study suggests that Brazil must aspire much more in the new scenario of global economy and global value chains.

The economist's comparison on the most- and least- knowledge intensive industries in Brazil is the following:

Comparison between industries most and least knowledge intensive - 2011			
	Labor productivity (1995 prices) - average	Labor force (share % of Pintec sample)	Revenue (share % of Pintec sample)
Most intensive (top 10)	44,020.00	20.38	40.60
Least (bottom 10)	7,220.00	45.51	30.25

Source: author's calculations based on Pintec-IBGE and IPEA data. Pintec is the most comprehensive dataset on innovation in Brazil. Pintec is produced by the Government's Statistical Office (IBGE) and covers manufacturing and service sectors.

Brazil should have great interest to go from here following Professor Arbache's overall main findings:

1. *"Among the most knowledge intensive sectors are pharma, telecom, oil, transportation equipment, automobile, IT equipment, electronics and optical materials, electricity and gas generation and provision, architecture services and engineering services;*
2. *the most knowledge-intensive industries employ relatively more employees; their labor force is more skilled as measured by schooling; have a higher revenue and productivity; and are more active on international trade as given by import and/or export;*
3. *the increase of knowledge intensity at the industry level is associated with the increase in revenues, pay of labor force and job creation".*

It is clear that Brazilian industries and associations will continue their efforts to attach value to improving the country's infrastructure and legal framework, both for enhanced creation and innovation in Brazil as well as for knowledge-sharing with other countries.

3. Know How Licensing in Brazil, from a Legal Perspective

3.1. Industrial Property Legislation

Two legislative levels – international and national – rule on industrial property rights in Brazil. The country is a signatory of the Paris Convention and the TRIPs - Agreement on Trade Related Aspects of Intellectual Property Rights.¹³ At the regional level, Brazil is a founding signatory of the Asuncion Treaty of March 26, 1991, that created the Southern Common Market- MERCOSUR or MERCOSUL. However, no agreements on intellectual property rights, although drafted, were signed by the member countries to date.

According to the Brazilian Federal Constitution (Article 5, paragraph XXIX),¹⁴ the law shall ensure the authors of industrial inventions a temporary privilege (patent), as well as the protection of industrial creations, the property of trademarks, company names, and other distinctive signs, observing the social interest and the technological and economic development of the country.

The protection of *undisclosed information* (*trade secrets* in the legal terminology and *know how* in contractual practice) is provided by the principles of honesty and fair competition, found in a general way in the Paris Convention (Article 10) and specifically in TRIPs (Article 39) and in Act number 9.279 of May 14, 1996, the Brazilian Industrial Property Law (BIPL), as follows:

Article 195- “A crime of unfair competition is committed by he who:

XI- discloses, exploits or uses, without authorization, confidential knowledge, information or data, usable in industry, commerce or the providing of services, excepting that which is of public knowledge or which is obvious to a person skilled in the art, to which he has access by means of a contractual or employment relationship, even after the termination of the contract;

XII- discloses, exploits or uses, without authorization, knowledge or information as mentioned in the previous item, when obtained directly or indirectly by illicit means or to which he has had access by fraud”.

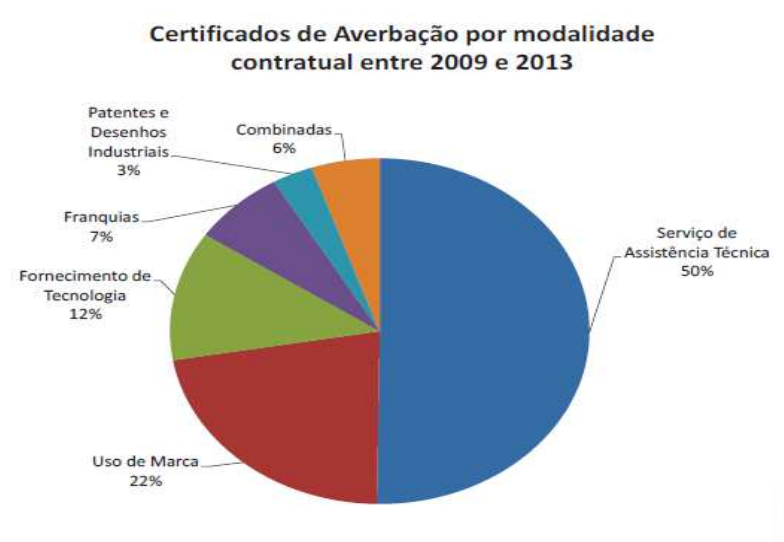
3.2. Licensing Contracts in General

¹³ Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

¹⁴ Constitution of the Federative Republic of Brazil at Art. 5 para. XXIX.

For the scope of security of licensing agreements, certain patent, industrial design, and trademark licenses as well as technical assistance and know how agreements, should be recorded at the Brazilian Patent and Trademark Office, which may be referred to herein as the “BPTO.”¹⁵ This is a legal requirement that follows BIPL’s rule according to which the recordal¹⁶ of the agreement is a condition to make it enforceable against third parties (providing it an *erga omnes* effect), to authorize and legitimize the remittance of royalties¹⁷ and to allow, when applicable, the deductibility of payments for withholding income tax purposes.¹⁸ The BPTO is not only a registering authority, it also has several written and non-written rules that must be followed by the contracting parties or else the recordal of the agreement is denied.

BPTO’s statistics show the percentages of certificates of recordal of contracts according to their different species between 2009 and 2013:¹⁹



The largest percentage of contracts were Technical Assistance Contracts (50%), followed by Trademark Licenses (22%), Know How Agreements (12%), Franchises (7%), Patents and Designs Licenses (3%), and Combined or mixed agreements (6%).

¹⁵ Instituto Nacional da Propriedade Industrial – INPI, in Portuguese.

¹⁶ The term “recordal,” as used herein, means the date of recordation or recording of a mark or an agreement or other official documents. See, e.g., 5 USCS § 1141 (4), “Title 15. Commerce and Trade; Chapter 22. Trademarks; The Madrid Protocol: the term date of recordal means “the date on which a request for extension of protection, filed after an international registration is granted, is recorded on the International Register.”

¹⁷ Royalties follow acts Numbers 4131/1962 and Resolution 3844/2010 of Brazilian Central Bank.

¹⁸ See Act number 4131/1962, Act number 8383/1991, Decree 3000/1999 and Ordinance of Treasury Ministry 436/1958.

¹⁹ INPI/DICIG/CGTEC graphic, at www.INPI.org

As it can be noticed, the importance of trading know how by means of technology supply and technical assistance agreements is significant for the Brazilian market. This importance of trading know how surpasses other main categories of industrial property rights licenses including: i) patent licenses (agreements granting authorization of the exploitation by third parties of a pending or issued Brazilian patent and/or a pending or issued Brazilian design); ii) trademark licenses (agreements that authorize the use, by a third party, of a trademark regularly filed or registered in Brazil); iii) franchise agreements (that include services, technology transfer and transmission of patterns, besides the use of trademark and possibly patents).

Other than licensing agreements, agreements assigning the ownership of industrial property rights (patents, trademarks and designs) are also subject to recordal with the BPTO when they involve payment and the owner is domiciled abroad as well as to keep updated the title of ownership of the assignee.

3.3. Know How Licensing Agreements

While agreements involving the licensing of issued or pending Brazilian patents indicate the number and title of the patent and follow the provisions of articles 61, 62 and 63 of the BIPL,²⁰ technology transfer agreements establish the conditions for the acquisition of know how not protected by registered patents, utility models, designs or any other intellectual property rights filed or issued in Brazil.

A technical & scientific assistance or service agreement involves obtaining rights to technologies for the elaboration of projects and studies and the rendering of certain specialized services.²¹

²⁰ As minimum requirements, patent license agreements must include the corresponding Brazilian number of the pending patent or issued patent, title of the patent and the nature of the license (exclusive or not) and whether sublicensing will be allowed or not.

²¹ Because they do not characterize any technology transfer, in accordance with the terms of article 211 of Act 9279/96, certain specialized technical services are exempted of recordal at the BPTO.

An important requirement of know how and technical assistance agreements is that the Brazilian licensee, as discussed herein, demonstrates conditions for absorbing the knowledge and the need for obtaining the specialized services.

The BPTO's decisions with regard to the recordal of agreements may be either an answer to a preliminary consultation, granting of the recordal, raising an official action, rejecting the recordal or dismissal of the request. Decisions are delivered in thirty days, from the date of acknowledgement of the request by the BPTO's Contract Department, named DICIG, in accordance with Article 211 of BIPL.²²

The final stage of the agreement registration process is the issuance of the certificate of recordal or the waiver of the recordal request in cases where there is no technology transfer involved. Dismissal of the recordal request occurs in the case where the applicant does not comply with the official actions previously raised.

3.2. Special rules applied in Brazil with regard to know how licensing and how to manage know how licenses in international contracts

Technology Transfer agreements (known as *Fornecimento de Tecnologia Industrial – FTI*) involve the acquisition of knowledge and techniques not protected by industrial property rights, applied to the manufacture of products and/or rendering of services. These agreements must include a precise definition of the product/ service involved and identification of the area/ industrial sector where the technology will be applied.

Brazilian legislation has a somewhat unique understanding with regard to know how, that it cannot be temporarily licensed, only assigned or sold. Thus, the BPTO records know how contracts taking into consideration need of the recipient to absorb the technology. As a general rule, these agreements are recorded by BTPO for a maximum five year term of validity, in accordance with article 12 of Law No. 4131/62, and may

²² The DICIG is the Directorate of Agreements, Geographical Indication and Registrations which is a part of the BPTO.

be renewed for an identical period provided the parties are in a position to justify the renewal request. The renewal application form should be submitted by the parties to the BPTO prior to the last day of validity of the first five-year term.

Emphasizing the legal nature of know how in Brazil is of essential guidance to American attorneys. While U.S. law attributes a right of property on trade secrets, in Brazil, undisclosed information does not generate a property right and no legislative harmonization can be foreseen in this regard.²³ As a consequence, the legal nature of know how agreements is not considered, from the BPTO's perspective, to be a temporary license but a definitive assignment of rights. Therefore, the parties need to consider the following main impacts: the price of the transaction, its taxation, and the duration of the confidentiality duties. In other words, trade secret regimes are so different in these two jurisdictions that any contractual approach on this asset should bear in mind the parties' necessity to jointly examine their wills and plans and discuss contractual clauses that can achieve the maximum benefits for both parties.

Once this distinction is clear to all professionals involved, a cooperative environment is established instead of a "Babel Tower," and the form of payment for the know how acquisition can be tackled by these professionals, facilitating negotiation, and additionally taking into consideration the prices applied on similar agreements in Brazil and abroad.

In case a licensor and licensee have a shareholder relationship, besides bearing in mind the usual rates of the market, the deductibility ceilings should be observed. These deductibility ceilings include those established by Law 4131/62²⁴ and Ordinance of Treasury Ministry 436/1958,²⁵ as well as article 50 of Law No. 8383/91, according to

²³ See the author's book *O Regime Juridico do Segredo de Industria e Comercio*, Rio de Janeiro: Ed. Forense, 2003, chapters on the nature of privileged undisclosed information and of the contracts related thereto (pages 254-262 and other).

²⁴ Law 4131/62 regulates foreign direct investments. See, Deloitte.com, Deloit Doing Business, *Investment in Brazil: How to Invest* <http://www.deloitte.dbrazil.com.br/show.aspx?idCanal=csHRv3jsJiDvW5wRDNNWOA>== (last visited Nov. 29, 2014).

²⁵ Brazil Desk News: *Technology & Innovation: Cooperation, Licensing and Technology Transfer in Brazil, Germany and Russia* http://www.noerr.com/~/_media/Noerr/News/Newsletter%20Brazil/Noerr_News%20Brazil_Apr_2013_EN.pdf, (last visited Nov. 29, 2014) ("Brazilian Ministry of Finance Ordinance of Treasury Ministry No.

which there is a maximum payment in each type of industry and in any case the rate can never be higher than 5% (five per cent) of the licensee's net sales.

Technology transfer agreements usually establish a fixed price for unit of the product sold or a percentage royalty rate to be calculated over the net sales price of the product/ net revenue of the services, as it is also done in patent license agreements. However pending patents do not trigger the payment of royalties. Rather, when the patent is issued, the applicant must request the update of the corresponding certificate of recordal, asking for payments to retroact to the filing date of the recordal of the agreement.

Scientific and Technical Assistance Services (SAT) Agreements include the conditions for obtaining techniques, planning and programming methods, as well as researches, studies and projects destined to the performance or rendering of specialized services. The services directly related to the main activity of the recipient, as well as the services performed in connection with equipment and/or machines outside Brazil, are subject of recordal at the BPTO, when supervised by Brazilian technicians and/or when these services generate any kind of document, as for example, a technical report. As already mentioned herein, the subject matter of the agreement should clearly identify and describe the services that will be performed by the contracted technicians. These agreements provide criteria for the payments in accordance with men/hour or men/day rates, detailing the qualification of the technicians involved in the rendering of the services and also giving an estimate of the total price of such services. These agreements follow the same deductibility ceilings as the agreements discussed above when the contractual parties have any shareholder relationship. The agreements are registered for the estimated term for the rendering of the services or for the term during which the services were already rendered up to maximum of 5 (five) years.

Only those technical services agreements in which the supplier is a foreign company are subject to recordal at the BPTO. In other words, technical assistance service agreements which involve the exportation of services, i.e., where the company which will render the services is a Brazilian party are not subject of registration at the BPTO.

436/1958 establishes the maximum percentages for ta deduction of royalty payments, which vary between 1-5% depending on the product or industry involved.”).

3.3. Additional Aspects regarding Negotiating Know How Licensing Agreements in Brazil

At the pre-contractual stage of international contracts involving the transference of secret knowledge, specific confidentiality requirements should be negotiated with a clear understanding of local law, ethics, and consequences applicable if eventually no deal is reached. This pre-contractual dialogue involves, for instance, a mutual learning process and discussion of what information will be informed to their employees, suppliers, and other stakeholders that are usually key to the feasibility of the contract, such as government bodies, funding agencies, research centers, universities and insurance companies.

The parties' timing and expectations during the contracting process need to consider that formalities in Brazil can be time consuming, depending on each public entity's requirements for specific situations. For example, at the BPTO, the translation of a document originated in a different language into Portuguese can be made only referring to the excerpt that is relevant to prove the use of a trademark, but the translation has to be complete in the case of a contract submitted to recordal. Consularization is not always mandatory, but notarization and legalization before consulates is commonly requested for affidavits.²⁶ At court, both are mandatory, unless the country has a judicial cooperation treaty with Brazil. Finally, copies of documents are often accepted only when notarized or, in the case of the BPTO, provided that the right's owner's industrial property attorney in Brazil certifies that it is a faithful copy of the original document and that the document is not illegible, on its face (*prima facie*) or without date.

In addition, the rather complex Brazilian immigration legislation should be always taken into consideration whenever licensing involves visits of professionals to the country.

²⁶ John O'Connell, The Blackwell Encyclopedia of Management (edited by Cary L. Cooper) http://www.blackwellreference.com/public/tocnode?id=g9780631233176_chunk_g97806312349376_ss1-112 (last visited Nov. 28, 2014) ("Consularization is the process of stamping documents or translations with the official seal of an embassy or consulate of a country.")

Finally, parties in know how license agreements involving Brazilian elements will want to consider the Tax Benefits Act (Act number 11.196/2005, the so-called “*Lei do Bem*”), that grants tax incentives, lowering the rates of certain taxes or suspending them, aiming at stimulating R&D.

4. Cultural Aspects

Cultural understanding involves continuous efforts of the parties to reciprocally improve their attitudes and add value to the decision process. Taking into consideration characteristics like economic and social conditions, language, art, political trends, the mutual knowledge of traditions, and their historical and geographical background can be very helpful in multicultural negotiations.

Due to Brazil’s continental size, a variety of native and immigrant cultures are found within the territory. Brazilian points of view are better understood if it is considered that most capitals of the country’s states have a westernized culture, well educated professionals, significant broadband access, booming electronic commerce, and extremely intense use of social media, in fact, Brazil’s use of social media is one of the highest in the world.²⁷

From the attitude perspective, flexibility, optimism, patience, and understanding infrastructure limitations are expectations that should be acknowledged by anyone doing business with Brazilian stakeholders.

In general, Brazilian professionals are focused on relationships and the physical is very important. For example, Brazilian professionals appreciate *face-to-face* meetings, short body distance between parties, eye contact, hand shaking, hugs and kindness, more than politeness. These features are all part of the bold repertoire of the Brazilian communication model. Logic and productivity are of course the end goals, but generally speaking, they are expressed in different ways by U.S. and Brazilian professionals that have not lived abroad. For instance, it is said that 95% of Latin Americans do not do business by telephone.

²⁷Ryan Holmes, Forbes Online, *The Future of Social Media? Forget About the U.S., Look to Brazil* (Sept. 12, 2013) available at <http://www.forbes.com/sites/ciocentral/2013/09/12/the-future-of-social-media-forget-about-the-u-s-look-to-brazil/>

Again, it is impossible to generalize, but classic stories were written by literature specialized in the cultural understanding between Americans and Brazilians, like the “World Ship Case”²⁸:

[I]n a movie, actor Tom Hanks spent four years on an island in the Pacific Ocean, he still delivered his guaranteed package. In this case, a policy change at World Ship may not seem very dramatic, but it left some Brazilians wondering if life on an isolated beach would not be so bad. World Ship has operations all over the globe and a local office in Salvador, Bahia. Clóvis Oliveira has been the branch manager of the Salvador office for the past three years, and one of his top sales executives is Nelson Barbosa.

Last year, World Ship introduced a new focus called Primary Customer Priorization (PCP). World Ship prioritizes customers into three categories. For infrequent, and low-revenue customers there are drop-off sites, pamphlets, online descriptions and a host of other services that are available to all customers. These customers, classified as PCP3, do not require any special, specific, or additional contact with sales executives. Mid-volume customers, who generate revenues of between five hundred and five thousand dollars per month, require additional assistance, and this is provided over the telephone through World Ship customer service representative (CSRS). These customers are classified as PCP2. High-volume customers, who generate revenues above five thousand dollars, are classified as PCP1 customers; they receive direct visits from the sales executives of the local World Ship station.

Under the new guidelines, when a potential customer calls a sales executive, the sales executive asks the customer questions, creates a profile, and provides the customer with a phone number. Based on the answers to the profile questions, the new customer is categorized as PCP1, PCP2, or PCP3. The new profile system is designed to be advantageous for both customers and sales executives, PCP3 customers become aware of the services provided. PCP2 customers, by using the CSRS over the telephone, receive assistance in tracking packages and advice in payment options. These levels of assistance leave sales executives more time to attend to the personal need of the PCP1 clients. The sales executives can be more flexible, have more time at their disposal, develop future projects, and be more focused on the changing needs of the PCP1 customers. For example, before the new policy Nelson Barbosa worked with 200 clients, clients that he visited on a regular basis. Only 60 of those clients are now classified as PCP1, but those 60 represent more than eighty percent of his total revenue in sales. The other 140 are now classified as PCP2 and receive their services from CSRS over the phone.

So what is the downside of the policy? As Clóvis Oliveira explains, “Technically, the new policy is one hundred percent correct. Culturally, it is one hundred percent complicated.” To begin with, it was culturally bizarre for Nelson to tell the 140 clients that he had been visiting, some for over three years, that he could no longer attend to them personally and that instead they would have call a number

²⁸ See Orlando R. Kelm and Mary E. Risner’s book “Brazilians working with Americans: Cultural Case Studies”, University of Texas Press, Austin, First Edition, 2007, pages 17-23.

*to talk to a representative on the phone. **Brazilians want to be treated as special. The pleasure of doing business is found in the pleasure of dealing with people.** “ You mean you won’t be able to take care of me any more, Nelson? What do you mean you can’t come and see me? We can’t even go out for coffee, Nelson? Oh, Nelson, what’s going on at World Ship?” A similar problem arises when new potential customers give the sales executive a call. Culturally, it makes no sense for someone who is already talking to Nelson to be told, “ You need to call the central office, build a profile, and then they’ll tell you who to talk to”. Every Brazilian on the planet will respond by saying, “ But Nelson, what’s going on? I’m already talking to you, and now I need to talk to someone else to find out if I can talk to you?” That, however it is the way it is now at World Ship. Without knowing the buying potential, the sales executives cannot make personal visits. To be clear, World Ship is not refusing any customer. The company simply has different levels of assistance.*

*In addition to restricting visits to PCP1 customers only, the home office also has a new set of guidelines for how often PCP1 customers can be visited. Each kilometer traveled and every visit made must be reported. If a sales executive is allowed ten visits, with a certain client, and he visits twenty times, he must answer to the station manager and the home office. The number of visits is determined by a matrix based on the revenues generated and any increase or decrease in sales. The home office has really been cracking down on how sales executives spend their time. Sales executives need to know the costs of time spent in visits that do not correlate to sales. **A good portion of Clóvis’s time is now dedicated to helping sales executives understand the actual costs involved in how they spend their time. World Ship may be a global company, but in Brazil this is seen as a very “ American” way of doing business.***

Lately, the Brazilians have been discovering ways of getting around the new policy. It is not their intent to do anything illegal or underhanded, but they want to soften the harshness of the new policy for those old customers who no longer receive personal visits. For example, the station in Salvador has a secretary named Sandra. Of course, Sandra’s job is not to be a sales executive. However, the station receives a number of over-the-counter drop-off packages. Normally, these in-station deliveries do not account for more than two thousand dollars in revenues per month. Since the new policy, however, over-the-counter revenues are up to nearly thirty thousand dollars. Old clients simply go straight to Sandra. Sandra also seems to be enjoying more flowers and chocolates from grateful customers who thank her for tracking their packages.

5. Conclusion

Know how licensing seemingly often involves multicultural organizations among the contractual and funding parties. This paper, hoping to enable some comparative observations for U.S. attorneys, has provided a snapshot on legal, economic and cultural

aspects to be considered when one of the parties is a Brazilian company, once these three perspectives are interrelated.

Understanding the legal scenario certainly helps integrating the parties in their needs to license or acquire technologies, avoiding difficulties to understand the gears and variables that can make a difference to convince the other party and facilitate negotiation.

Workable contract relationships involving parties or assets from Brazil substantially rely on the recognition and knowledge of the country's economic achievements and great potential of growth.

On the other hand, although cultural differences follow no rules and are of a subjective nature, acknowledging them, as well as the country's government policies, business ethics standards and habits, is also historically related to the legal aspects, producing direct or indirect effects from the beginning of the negotiation phase throughout the whole life of the contract.

Experience suggests that multinational open innovation environments also produce best results with a pragmatic and synergetic approach to identify and grasp the differences that matter to the licensing industry professionals.