
DISTRIBUTION AGREEMENTS, CONSORTIUM, SYNDICATED LOANS AND *PROJECT FINANCE IN BRAZIL*

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I) INTRODUCTION

Before establishing corporate structures in Brazil, or even to discover the manner of functioning of the Brazilian Market before making substantial investments, foreign companies in general execute agreements with Brazilian companies for the distribution of their products or even to the rendering of specific services, as well as to participate in activities with the government by means of international consortium.

In relation to financial institutions and funds, on their turn, the alternatives for their indirect ingress into the national market are the *Syndicated Loans* and *Project Finance*.

We will present herein below details on those instruments for ingress in the Brazilian market without the direct investment.

II) DISTRIBUTION AGREEMENT

The distribution agreement is a manner to establish a specific commercial relationship between two companies, establishing the conditions to such relation. One of the parties (normally the manufacturer, importer or a wholesaler) guarantees more favorable conditions to the other party, to wit, the distributor or the distributing company (in general a reseller) in relation to price, or in relation to

conditions of payment, with the aim of making possible the distribution of its products.

At the agreement there may be inclusively sales goals to be attained by the distributor.

Two relevant issues that must be observed at the preparation and negotiation of the distribution agreement: (i) the duration of the relationship and (ii) the existence or not of exclusivity.

The duration of the agreement must be established in a manner to allow the distributor the recovery of the investments made for the performance of the agreement.

The issue of exclusivity, on the other hand, must be well discussed between the parties. If there is the intention of not allowing the distributor to resell products of other brands or manufacturers, importers or wholesalers which compete with those which are the object of the distribution agreement, such clause must be express, i.e., written in the agreement.

Being defined the exclusivity by the distributor; there must be also the prohibition to the manufacturer, importer or wholesaler to establish other sales channels in the same region of activities of the distributor, being by means of sales representatives or distribution agreements

with other resellers companies at the same geographic region.

III) CONSORTIUM

In consortium, two or more companies join their efforts to develop a determined venture, maintaining their individuality. It is a fairly common practice in Brazil, especially for the large public works (mainly engineering related).

It is worth to emphasize that although there is not a stronger link among the parties (such as corporate equity position, for example) there is joint responsibility among the consortium companies by the acts performed under consortium, in the event of participation in bids and or agreements with public bodies.

The formalizing of the consortium is made by means of an agreement, which shall be filed before the Board of Trade of the State of the head office of the consortium. In case of consortium for an international public bid, the Bidding Law (Law No. 8,666, dated June 21, 1993) establishes that the representation of the consortium must be made by a Brazilian company.

As par the Brazilian rules¹, the consortium does not possess legal entity status – even if the filing of its incorporation acts before the Board of Trade are mandatory and the consortium is legally bound to obtain a Taxpayer Registration No. before the Ministry of Finance (“CNPJ/MF”).

Each party is responsible for the obligations assumed by means of the consortium agreement; however the consortium per se undertakes all

obligations in its own name in relation to its activities.

To achieve its aims the consortium undertakes individually obligations before third parties, obligations which are performed individually by each of the participants of the consortium as per the dispositions of the consortium agreement.

The Corporations Law establishes² certain mandatory disposition at the consortium agreement, among which we highlight: (i) definition of activities; (ii) definition of obligations of each party; (iii) administration of the consortium; and (iv) contribution by each party to the joint venture (the parties must mention in the consortium agreement the resources that will be brought by each one of them – in cash, assets or rights – to the performance of the consortium activities), among others.

IV) SYNDICATED LOANS

The Syndicated Loans have allowed a structure of repayment and guarantees adapted to the characteristics of the borrower and are indicated to those companies that need large volume of resources to finance their projects.

The procedure consists in the structuring and distribution of credit operations shared by various Banks as creditors, diluting the operational risk among the participating banks, but without losing the sole communication with the leader.

Among the advantages for the borrowing company are: (i) *tailor-made* structure (different types of instruments, currency,

¹ First paragraph of article 278 of Law No. 6, 404, dated December 15, 1976.

² Article 279 of Law No. 6,404/1976.

terms, guarantees and representations); (ii) simplified due diligence; (iii) opening of new bank relationships; (iv) more exposure of the company in the international financial market; (v) better perception of credit; and (vi) one sole agreement coordinated by one sole bank.

Among other advantages for the Banks and/or creditors involved are: (i) tool for risk management (administration of the limit of credit and financial guarantees); (ii) opportunities for *cross-selling* (*Cash Management*); and (iii) more efficiency in the use of capital (*fees*, risk and limits).

V) **PROJECT FINANCE**

The *Project Finance* consists in a financial structuring to make a determined investment project viable. In some cases it is incorporated a specific purpose company, isolating the project from its shareholders. Such structure is being used mainly at infra structure projects, due to foreseeable revenues flux.

The idea to make a project of communications, energy or road concession feasible by means of a *Project Finance* aims essentially the isolation of the risk of the project from the risk of its shareholders. Thus, in *Project Finance* it is not requested any type of guarantee or participation from the entrepreneurs – what has not being happening in practical.

In a *Project Finance* structure the creditors (those who incur in the larger risks) need that the entrepreneurs present all risks duly accessed so that nothing goes wrong with the project. Thus, for example, the entrepreneurs must guarantee that the supplier delivers the equipment in the set date, or that the vehicles flux in highway

be the one projected or that a determined thermoelectric has a sale of energy agreement with the sale price already set during the term of the financing, etc.

A *Project Finance* does not make a bad project into a good one or the contrary; what it guarantees is a more smooth timeline to the entrepreneur and to the creditor himself, as there is not a more liquid guarantee than the receivables from the project to guarantee the payment of the installments of the financing.

Aside from that, modeling a *Project Finance* is expensive, due to the need of hiring of specific consulting companies and specialized attorneys who can provide to the investors and creditors, certainty, transparency in the assessments, projections and preparation of agreements as well as guarantee of the implementation of the project as well as its following up.

To enable the revenues flux to guarantee the payment of interests and amortization of the financing, it is created an account in a bank that is called a trustee. By means of such account, called escrow account, the revenues of the project will be received, being in a first moment accrued to reach the resources sufficient to pay some future installments of the financing, and only after the additional resources are made available to the project company.

Different from traditional types of financing, the *Project Finance* possesses some flexible terms such as: (i) the idea of the project auto financing and auto paying itself; (ii) less encumbrance of own resources by the shareholders; (iii) non granting of real estate and personal guarantees; (iv) entrepreneurs financial

statements with less debts; (v) transparency with the results of the project; and (vi) liquidity of the guarantees granted to creditor, among others, which makes the conclusion that such type of financing will be more used in the future.

The Corporate Department of Almeida Advogados counts with a highly specialized team who has extensive expertise in preparing agreements, and is at your disposal for any additional information or clarifications about the matters dealt herein.