

### Setting Up a Business in Brazil

The information in this document provides an overview of the fundamental legal considerations to be addressed when acquiring or establishing a business in Brazil. The content is intended to summarize some of the pertinent provisions which apply and is not intended as specific legal advice. Readers are well advised to seek the counsel of specialist professionals in their home states to advice on compliance with the laws and identify the many planning opportunities.

#### Overview

Brazil is a federation formed by the union of twenty-six (26) States, several Municipalities and one (1) Federal District. Following the tradition of continental Europe, Brazil has a civil law system, as it has a codified system of law. The statutes are the main sources of law and case law play a secondary role.

While the Federal Government, the States and each Municipality have authority to pass laws and to create and collect taxes, the Federal Government has the exclusive jurisdiction to legislate on business, contracts, employment, litigation and intellectual property law.

The main statutes governing business entities are the Brazilian Civil Code (Law No. 10,406 of January 10, 2002 – the “Civil Code”) and the Corporation Law (Law No. 6,404 of December 15, 1976 – the “Corporation Law”).

In choosing to business in Brazil, foreign investors might form either a branch or a subsidiary. Because the formation of a branch in Brazil requires authorization through a presidential decree and is more time and cost consuming, foreign investors quite often opt to form a local subsidiary.

Brazilian law provides for several types of entities, of which limited liability companies (sociedades limitadas) and corporations (sociedade anônimas) are most commonly used. Other types of entities have found practically no acceptance, in special for providing unlimited shareholders' liability.

The choice of the type of entity will be dependent on a number of factors, such as, for example:

- Intended ownership structure;
- Legal flexibility
- Levels of corporate governance; and
- Cost and confidentiality concerns.

### Limited Liability Companies

Limited liability companies are the type of business entity most commonly used by foreign investors willing to establish a presence in Brazil through a local subsidiary, especially when a sole owner will own its capital.

A limited liability company is a relationship of contractual nature, which subsists between two or more persons or entities residing in Brazil or abroad, and having a sole class of partner or “quotaholder”, i.e. the limited liability partner.

Any partner not residing in Brazil must appoint a Brazil resident individual as its attorney-in-fact with powers to receive service of process in connection with company matters. The foreign partner is also required to register with the Federal Revenue Office and the Central Bank of Brazil.

The main characteristic of a limited liability company is that by force of law each partner has limited liability to the amount it has paid for its quotas (which stand for shares), provided, however, that all partners are jointly and severally liable for the full payment of the amount of the subscribed capital.

As a rule, limited liability companies are not adequate for joint venture enterprises since the approval of certain fundamental matters require approval from partners representing at least seventy-five percent (75%) of their capital.

They are also not required to publish their financial statements, which may be an advantage for foreign investors in terms of costs savings and confidentiality. Notwithstanding the foregoing, as of April 7, 2015, limited liability companies incorporated under the State of São Paulo and falling into the definition of “large company”, i.e. the company or group of companies under the same control which have had, in the previous fiscal year, (i) total assets exceeding BRL 240,000,000 or (ii) annual gross revenues exceeding BRL 300,000,000, are under the obligation to publish their financial statements. The issue though has generated many debates and is still controversial.

### *Formation and Organization*

A limited liability company is formed by the filing of its Articles of Incorporation with the appropriate state office in the state in which the limited liability company is to be domiciled.

The Articles of Incorporation must be drafted and executed in Portuguese and include, among others, (i) the name of the company, which must include reference to the main activity to be developed by the company and the expression Limitada or Ltda., (ii) the address of the principal place of business, (iii) the purposes, and (iv) the capital amount, its payment terms and apportionment between the partners, (v) management structure, and (vi) routine governance matters.

### *Capitalization*

The capital of limited liability companies is divided into quotas that represent the sum of money or assets transferred by the partners for the formation of the company. Any assets which monetary value can be appraised may be used for payment of the quotas representing the capital of limited liability companies. The

ownership of quotas is evidenced by the Articles of Incorporation, as amended from time to time, and there is no issuance of certificates of ownership.

As a rule, there are no minimum capital requirements. Exception may apply if the partners intend to appoint an expatriate individual to act as the local manager of the limited liability company, or if such company will engage in import and export transactions, in which case a level of capital compatible with such activities may be required on a case-by-case basis.

The capital of limited liability companies may only be increased after full payment of the previously subscribed quotas.

The Civil Code allows the capital to be reduced in case the company has (i) registered losses, and (ii) excessive capital vis-à-vis its purposes and operations. In the latter case, the capital reduction resolution will only become valid and effective in case there is no opposition of creditors within ninety (90) days counted as of the date on which such resolution has been published in the press.

### *Management*

Management of limited liability companies is vested on at least one manager (who may also be called “Officer” – Diretor in Portuguese) who must be an individual resident in Brazil.

The Officer may be appointed for one year or more. Every year (within 4 months as of the end of the fiscal year), the partners must meet to deliberate on the appointment of Officers (if applicable), as well as on the management accounts and financial statements of the company. The meeting may be waived in case all partners unanimously decide in writing on these matters.

The Articles of Incorporation or any corporate resolution approving the appointment of an Officer may limit the authority of the Officer and/or provide for need of prior written authorization from the partners for the Officer to perform certain acts.

Should the partners seek to appoint an expatriate Officer, the limited liability company must apply for a permanent visa. For such purpose, the company must have a minimum of BRL 600,000 duly registered with the Central Bank of Brazil as capital investment. The investment will be reduced to BRL 150,000 if the limited liability company undertakes to create ten (10) employment positions within two (2) years as of the issuance of the permanent visa by the Brazilian Immigration Authorities.

Managers are generally required to act in good faith, with the care an ordinarily prudent person in a similar circumstance would use. Assuming that this standard is complied with, a manager generally will not be liable for its acts or omissions to act during their tenure as a manager of the limited liability company.

### *Distributions*

Limited liability companies may approve distributions of accrued profits to their partners at any time and without any restrictions. If any partner is not a Brazil resident, dividends at the commercial exchange rate are subject to prior registration with the Central Bank of Brazil. Profits distributions are not subject to income tax.

The Articles of Incorporation may authorize distributions of profits disproportionately to the equity held by each of the partners. However, distributions to foreign partners may not exceed the percentage of their equity holdings registered with the Central Bank of Brazil.

As an alternative to the payment of profits, limited liability companies may pay interest on equity to its partners, subject to the limitations set forth under the Brazilian tax laws, i.e. interest based on long-term interest rate – TJLP and existence of twice the amount of current or accumulated profits). Payments of

interest on equity are subject to the levy of the withholding income tax at the rate of 15% (or 25%, in case the foreign partner is resident in a tax haven jurisdiction). Notwithstanding, the overall taxation may be lower in certain circumstances since such payments are deductible for purposes of corporate income tax and social contribution on net profits.

### Corporations

Corporations are regulated by a detailed legal framework and allow for more sophisticated corporate governance structures, enhanced financing flexibility and transparency in comparison to limited liability companies. Consequently, they are best designed for joint ventures and arrangements having more complexity.

A corporation is a legal entity between two or more persons or entities residing in Brazil or abroad, which capital is divided into shares and shareholders' liability is limited to the issue price of the subscribed shares. Because they must be for profit, the primary purpose of corporations is to earn profits for subsequent distribution to their shareholders.

Like limited liability companies, any shareholder not residing in Brazil must appoint a Brazil resident individual as its attorney-in-fact with powers to receive service of process in connection with company matters. The foreign shareholder is also required to register with the Federal Revenue Office and the Central Bank of Brazil.

Corporations may take the form of privately held (*fechada*) or publicly held (*aberta*) companies depending on whether the intention is to have their securities traded on the over the counter market or the stock exchange. The securities of privately held corporations are not available to the public.

Corporations are required to publish their corporate documents and financial statements.

### *Formation and Organization*

A corporation may be formed either by public or private subscription of its shares by a minimum of two (2) or more persons or entities residing in Brazil or abroad. In either case, a minimum of ten percent (10%) of the capital paid in cash must be paid upon incorporation of the company.

A public subscription requires the prior registration of the shares issue with the Brazilian Securities Commissions (CVM) and the distribution of the shares for subscription must be intermediated by a financial institution. Upon subscription of all shares, the founding shareholders need to call a general shareholders' meeting to deliberate on the formation of the company.

The private subscription requires the approval from all shareholders in the context of a general shareholders' meeting or the execution of the public deed of incorporation of the company.

The By-laws of the company must be drafted and executed in Portuguese and include, among others, (i) the name of the company, which must include reference to the main activity to be developed by the company and the expression Companhia, Sociedade Anônima or S.A., (ii) the address of the principal place of business, (iii) the purposes, (iv) the capital amount, its payment terms and apportionment between the shareholders, (v) number and classes of shares, if applicable, and correspondent rights and obligations, (vi) management structure, (vii) shareholders' meetings and (viii) routine governance matters.

The corporation will be deemed formed by the filing of its By-laws (and further incorporation documents) with the appropriate state office in the state in which the corporation is to be domiciled, and their publication in the Official Gazette and another newspaper of wide circulation in the place where the company will have its principal place of business.

Corporations are required open and maintain certain corporate books, such as, for example, the Registered Share Book, Registered Share Transfer Book, Book of Minutes of the General Shareholder Meetings, Book of Shareholders' Attendance, Book of Minutes of Meetings of the Board of Directors, etc.

### *Capitalization*

The capital of corporations (fixed or authorized) is divided into shares issued with or without par value and that may be divided into common, preferred or fruition shares. The rights and obligations attributable thereto vary in accordance with their legal nature and provisions of the By-laws.

Unlike privately held corporations, publicly held corporations may issue a sole class of common shares, but both may have more than one class of preferred shares, with or without voting rights.

The shares may be paid in cash or any assets which monetary value can be appraised; in the latter case, an appraisal report must be prepared and submitted to the approval of the shareholders in the context of a general shareholders' meeting.

Shares ownership is evidenced upon recordation under the Registered Share Book or, if applicable, by the statement issued by the financial institution acting as depositary agent.

In addition to the shares, a corporation may issue additional securities to investors in order to raise additional capital, such as, for example, debentures, beneficiary parts (for privately held corporations only) and subscription rights.

As a rule, there are no minimum capital requirements. Exception may apply if the shareholders intend to appoint an expatriate individual to act as the local officer of the corporation, or if such company will engage in import and export transactions, in which case a level of capital compatible with such activities may be required on a case-by-case basis.



The capital increase upon subscription of shares may only be effected after payment of at least three-fourths (3/4) thereof.

The Corporation Law allows the capital to be reduced in case the company has (i) registered losses (up to the total amount of the accumulated losses), and (ii) excessive capital vis-à-vis its purposes and operations. In the latter case, the resolution will only become valid and effective in case there is no opposition of creditors within sixty (60) days counted as of the date on which such resolution has been passed by the general shareholders' meeting.

### *Governance and Management*

A corporation has the following governing bodies:

- (i) General Shareholders' Meeting (Assembléia Geral);
- (ii) Board of Directors (Conselho de Administração);
- (iii) Board of Officers (Diretoria); and
- (iv) Audit Committee (Conselho Fiscal).

The General Shareholders' Meeting is the highest authority in a corporation and may pass almost every resolution, including any amendments to the by-laws, the election or replacement of any managers of the company (excepting officers where a board of directors exists), the approval of the financial statements and management accounts, as well as the merger, consolidation, spin off, dissolution or liquidation of the company, etc.

The Board of Directors is the collective decision-making body of the corporation and is optional for privately held corporations. It must be formed by at least three (3) individuals, Brazilians or foreigners, appointed by the General Shareholders' Meeting for a term not exceeding three (3) years, reelection being permitted.

The Board of Officers is in charge of the legal representation of the corporations. It must be formed by at least two (2) individuals residing in Brazil, appointed by the Board of Directors or the General Shareholders' Meeting, as applicable, for a term not exceeding three (3) years, reelection being permitted.

The duties of the Audit Committee, when in operation, include the supervision of the acts performed by the officers and directors, the review of their accounts and reports, the issuance of opinions on any proposals related to capital increases or issuance of securities, generally ensuring compliance with the law and By-laws. The Audit Committee may operate under a permanent or temporary basis or whenever requested by the shareholders. It must have three to five members residing in Brazil and an equal number of substitutes, shareholders or not, who must be elected by General Shareholders' Meetings.

Managers are generally required to act in good faith, with the care an ordinarily prudent person in a similar circumstance would use. Assuming that this standard is complied with, a manager generally will not be liable for its acts or omissions to act during their tenure as a manager of the corporation.

### *Distributions to Shareholders*

As a rule, shareholders are entitled to a compulsory dividend in accordance with the provisions of the By-laws, subject only to the sufficiency of profits. If the By-laws are silent, shareholders are entitled to fifty percent (50%) of the net profits. If any shareholder is not a Brazil resident, dividends at the commercial exchange rate are subject to prior registration with the Central Bank of Brazil. Dividend distributions are not subject to income tax.

While all dividends must be distributed in proportion to each shareholders' equity, it is possible to attribute specific benefits to the shareholders upon the creation of preferred shares.

### *Shareholder Liability*

Shareholders of a corporation are generally shielded from personal liability for the obligations of the corporation. Generally, a shareholder's liability for the debts and obligations of the corporation is limited to the amount the shareholders have paid for their shares.

In case of fraud or illicit acts, however, a court may decide to "pierce the corporate veil" in order to impose liability on shareholders, especially with respect to tax and labor-related debts.

### *Taxation*

Limited liability companies and corporations in Brazil are afforded the same treatment under the applicable tax laws. Please note, however, the tax jurisdiction of foreign investors may treat the local companies' profits and losses differently depending on their corporate type.

### Establishing a Business

#### *Incorporation*

The timing for the establishment and organization of a limited liability company or corporation is directly linked to the activities in which the company will engage in Brazil. Such activities will determine the list of licenses, permits and registrations to be applied on behalf of the company in order for it to carry on its businesses. As a rule, a holding company may take from 20 to 30 days to be established.

Companies are established and incorporated on a national level, although they are registered in the state office of the state in which their principal place of business are located. Once incorporated, the company may need to qualify in other states to do business subject to the activities to be developed therein.

### *Taxes and Related Matters*

To conduct business in Brazil, a company will need to obtain its registration with the Federal Tax Authorities, i.e. the so-called CNPJ/MF (the Corporate Taxpayer Register of the Ministry of Finance). Such registration may be obtained by the company by using the appropriate Internal Revenue Service form.

Subject to the activities to be performed, a company may also need to obtain registrations with the State and Municipal Tax Authorities.

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