

## Corporate Aspects of Trading and Investing

## Brazil

**1. INTRODUCTION**

In Brazil, all types of investments follow specific laws that should be observed by the parties involved.

All foreign capital must be registered with the Brazilian Central Bank. Foreign capital is considered to be any goods, machinery and equipment that enter into Brazil for the purpose of production and creation of any goods and services, as well as any capital brought into the Country to be invested in economic activities, provided that they belong to individuals or companies resident or headquartered abroad.

**2. METHODS OF MARKET IN BRAZIL****2.1 DISTRIBUTION AND AGENCY****Distribution Agreement**

The distribution agreement is governed by the Brazilian Civil Code. In accordance with the law that regulates this type of agreement, the distributor acquires the product that will be resold. By this type of agreement, the distributor has exclusivity in determined areas to represent the company in accordance with the contract. The company that is being represented may determine that such distributor cannot represent another company for the sale of the same or equivalent products in the same territory.

The company that is being represented may establish the rules of marketing and commercialization that shall be observed by the distributor in the territory. The risks of the business are on the account of the distributor that imposes to the products a profit margin for resale, in accordance with the rules of the agreement. The distributor must be organized as a legal entity.

Pursuant to article 713 of the Civil Code, the distributor enjoys independence and autonomy to carry out the business. The contracting parties are free to regulate their relationship in the agreement, only observing the restrictions imposed by the Civil Code. However, in some cases (for instance, automotive vehicles), there are specific laws and restrictions imposed by the represented company or by the government that must be observed by the distributor.

**Agency Agreement***Law and regulation of agency agreements in Brazil*

The legal framework concerning agency agreements and commercial agency relationship in Brazil is set out by special provisions of the Civil Code of 2002 (Arts. 710-721) and Law No. 4.886 of December 9<sup>th</sup>, 1965, as amended by Law No. 8.410 of May 8<sup>th</sup>, 1992 (“Autonomous Commercial Agents Act of 1965”). Most of such provisions have been considered “imperative rules” by national courts and may refer to public order (*ordre public*) in Brazilian law, so that principals and agents in such agency agreements are immediately bound to minimum rights and obligations emerging from the agency relationship.

With regard to international agency agreements to be executed in Brazil (in which at least one of the parties is even national or domiciled in Brazil) such provisions shall apply notwithstanding the parties' autonomy to establish the main terms and conditions of such agency agreements, as well as to choose the governing law. This may be also troublesome in respect to Brazilian Introductory Law to Civil Code of 1942, which establishes the relevant conflict rules concerning applicable law to contractual obligations.

### *Termination*

With regard to agency agreements containing limited or fixed duration, in case of termination of the contract without cause, the indemnification to be paid for the agent shall be equivalent to the monthly average payments received by the agent until the rescission date, multiplied by half of the resulting months of the contract within such limited term (Art. 27, §1, of Autonomous Commercial Agents Act of 1965).

In agency agreements with unlimited term, the indemnification shall not be lower than one-twelve of the total amount received by the agent during the effective time of duration of the contract (Art. 27(j) of Autonomous Commercial Agents Act of 1965).

### *Formal contract / requirement of formality*

Brazilian Law does not provide any requirement of formality in respect of agency agreements. The Autonomous Commercial Agents Act of 1965 however establishes that the agency agreement shall contain mandatory elements, such as general conditions for the agency ('authority'), indication of products, territory, obligations and responsibilities of the parties, exclusivity, payment of commission etc. Such elements frequently require a contract in written form. Nevertheless, under Brazilian Law, a general principle of commercial law establishes that commercial contracts shall not be subject to any requirement of formality, so that the parties could even conclude oral/verbal contract for commercial transactions.

Since Brazilian Law does not mention oral contract for agency agreements, in case of termination by any party the reimbursement shall be the same as the above mentioned in case of contract of unlimited term (item 2.2), since oral contracts are considered to be unlimited-term agreements. However, if the parties can prove that the contract has been executed for a fixed period, the reimbursement will be the same applied for those cases.

### *Term/duration of the agency agreement*

Pursuant to Art. 27, §§ 2 and 3, of the Autonomous Commercial Agents Act of 1965, an agency agreement shall be considered as "unlimited term" agreement in the following situations:

- i) a contract with a determinate or fixed period, once extended the first term, either silently or expressly, shall become an unlimited term agreement; and
- ii) any contract that succeeds other contract within 06 (six) months shall be considered as an "unlimited term" contract, regardless of the term of the previous contract.

### *Prior notice for rescission*

Pursuant to Art.34 of the Autonomous Commercial Agents Act of 1965, any party to such agreements bringing the termination without fair ground with unlimited term and in force for at least six months, ought to give prior notice with a minimum of 30 (thirty) days, or pay an amount equivalent to one-third of the commissions duly received by the agent in the previous 03 (three) months. This provision only exempts the prior notice requirement when the parties have established other guarantee in the agency agreement.

## *Jurisdiction*

Brazilian courts shall exercise jurisdiction over disputes arising between principal and agent in the course of agency agreements whose performance is connected to the national territory, particularly in such cases where the relevant connecting factor is the place of domicile of the agent (Art. 39 of the Autonomous Commercial Agents Act of 1965).

## *Registry before Federal and Regional Boards of Commercial Agents*

Apart for such specific rules on agency, the Autonomous Commercial Agents Act of 1965 requires any commercial agent performing agency activities in Brazil to be registered before the Federal and Regional Boards of Commercial Agents. Further rights and obligations emerging from agency relationship rest upon the fulfillment of said requirement, so that the parties in the agreement must ensure the effectiveness of the professional registration

## **2.2 Corporations ("S.A.")**

Corporations are ruled by Law 6.404 from December 15<sup>th</sup>, 1976 and its amendments. As determined by the Brazilian Law a corporation is always a business/commercial company.

The property of a S.A. is represented by shares that can be common, preferred or fruition shares. The amount of preferred shares without voting right cannot exceed 50% (fifty per cent) of the total amount of shares.

Corporations can be (i) a public held company obtaining funds through public offers, or (ii) a closed corporation, obtaining its funds directly from its own shareholders or subscribers, having a simple accounting and administration system. If is a public held company, it shall be supervised by the Securities Commission ("CVM") and will be able to negotiate its shares and papers both in the Stock Market and in the bond market.

### **Formation of a Corporation**

The S.A. is incorporated through a General Assembly held by its shareholders that shall approve the conditions of the incorporation, as well as the By-laws, its administration, company's capital and all other matters involving the S.A. The Minutes of the General Assembly of Incorporation of the S.A. and the By-Laws shall be registered with competent State Board of Commerce and published in a major newspaper and in the State Official Gazette to inform third parties.

These companies must have at least two shareholders. In the act of constitution, the down payment shall represent at least 10% (ten per cent) of the issuance price of the subscribed capital and its payment must be through a deposit in a special account in a Brazilian bank, which is authorized to receive down payments for the purpose of the incorporation of an S.A.

The shareholders shall also approve during the General Assembly the subscription list. This document informs the shareholders of the S.A., the amount and the type of its shares. The subscription list shall also be registered as an attachment of the General Assembly and By-Laws.

The S.A. shall have certain books of registers established in Law 6.404/76, which includes but are not limited to Books of Shares, Books of Transfer of Shares, Books of General Assembly, and others.

It is important to note that the transfer of shares' property is made through its register both in the Book of Shares and in the Book of Transfer of Shares.

Equally the corporate acts of the S.A. must be registered at the Board of Commerce and published in a major newspaper and in the State Official Gazette.

The S.A. also needs to arrange at least an annual assembly, to (i) approve the administrator's accounts; (ii) deliberate about the destination of the net profits and dividends' distribution; and (iii) appoint administrators and members of the Fiscal Council if it's the case. However, the shareholders meetings in an S.A. must, all of them, be published in a major newspaper and in the Official Gazette. If the S.A. has more than 10 shareholders and its net worth is more than R\$ 1.000.000,00 (one million of Reais), the balance sheets of the company must be published in the Official Gazette and in a major newspaper at least 30 days prior to the annual shareholders meeting and also be registered with the Board of Commerce.

The company's capital is composed by shares. The liability of the shareholders is limited to the value of the shares they subscribed or acquired.

The shareholders may sign a Shareholders Agreement establishing the rules for the sale of its shares, vote rights, and other matters, in accordance with the law. The rules established in such document may be subject to specific performance as established in Law 6.404/76.

## **Management of a Corporation**

The corporation shall be formed as follows:

- General Assembly;
- Board of Directors, not obligatory for closed capital corporations. It shall be formed by at least three members. The members of the Board of Directors must be shareholders of the S.A. with at least one share and shall be appointed by the General Assembly. The members can be foreign individuals provided that duly represented in Brazil by an attorney with the powers established in laws;
- Executive Board. It shall be formed by at least two members, which must be Brazilian residents, or if a foreigner, he/she must have permanent visa in Brazil. The members shall be appointed by the Board of Director if it established, or by the General Assembly. Not more than 1/3 of the members of the Board of Directors can be elected as member of the Executive Board; and
- Board of Auditors, not obligatory in cases foreseen in law.

It is important to note that this is a very simple memorandum regarding the rules of the Corporations. The Law 6.404/76 determines specific rules for each case. Besides this Law, there are several laws and regulations of the Securities Commission that must be observed.

## **2.3 BRAZILIAN LIMITED LIABILITY COMPANY**

Limited Liability (*Sociedade Limitada*, "Ltda.") and Corporations (*Sociedade Anônima*, "S.A.") companies are the most common types of association in Brazil.

First of all it is important to mention that a Ltda. is not allowed to negotiate its quotas or other papers neither in the Stock Market nor in any other kind of bond market.

In a limited liability company, the capital is divided into quotas and must have at least two quota holders (two partners). This type of company may be constituted by a foreign individual or legal entity, provided that they are duly represented by an attorney resident and domiciled in Brazil.

The liability of the quota holders is limited to the amount of their quota part in the capital of the company. However, if the capital subscribed is not fully paid, all quota holders respond for the entire capital.

The quota capital can be subscribed and paid by the partners in money, goods, credits or rights at the moment of the signature of Articles or Association, or within certain limit of time established by the same document.

The quotas are not physically represented. The quota part of each partner is represented in the Articles of Association of the company.

The foreign investment must be registered with the Brazilian Central Bank. Any Brazilian company held by foreigners is only allowed to send dividends abroad once this company has its foreign investments properly registered with the Central Bank of Brazil.

Another important aspect is that if one or more quota holders, representing the majority of the company's capital understand that the minority quota holder is a risk for the company, if duly justified, they may exclude this quota holder of the company.

### **3. FORMATION OF A LIMITED LIABILITY COMPANY**

#### **3.1 GENERAL INFORMATION**

The Limited Liability Company in Brazil ("Ltda.") is established through its By-Laws and Articles of Incorporation which shall be registered before the Board of Trade within the State in which the company has its headquarter. The Ltda. is recommended for start-up companies in Brazil, once it has simple rules and lower costs for establishment and maintenance.

The company can have one or more quota holders (the sole quota holder company is a new company type in Brazil and is described in detail in item 3.2 below). The liability of the quota holders is limited to the amount of its quotas held in the capital of the company. However, if the capital subscribed is not fully paid, all quota holders shall respond for the entire capital value.

The quota capital can be subscribed and paid up by the partners in money or in goods at the moment of the signature of the By-Laws and Articles of Incorporation, or within the time established in this document, i.e., in 2 years.

The company shall be managed by one or more Administrator(s) who shall be a person resident and domiciled in Brazil. The Administrator cannot be a legal entity. This person can be a quota holder or a third party and shall be appointed by the quota holders in the By-Laws and Articles of Incorporation or in a side document. The appointment document shall also establish the limit of the powers of the Administrator(s). If the Administrator is not allowed to practice some kind of act by any limitation established through the Articles of Incorporation, the deliberation will be held by the quota holders in accordance with the Civil Code or with what is determined in the

By-Laws and Articles of Incorporation. The Administrator can be removed any time through the quota holder's decision.

It is important to note that all corporate acts shall be registered within the Trade Board to be valid before third parties, such as quota holders meetings, openings of branches, appointments of Administrators and others.

The limited liability company shall hold before the end of April of each year a quota holder's meeting to verify and approve or reject the Administrators' accounts, deliberate about the balance sheet and economic results, appoint Administrator(s) (if is the case) and deliberate about any other matter.

### 3.2. NECESSARY INFORMATION AND DOCUMENTS

**The company's name:** the company's name has to mention the principal purpose of the company.

**The quota holders:** as mentioned above, the company can have one or more quota holders. If it has two or more partners, then the applicable law is the Brazilian Civil Code. The possibility of having a company constituted by a lone business owner, individual or legal entity, is regulated by the - relatively new – Law 12.441/2011 that sets up a single-holder limited-liability firm named "EIRELI". The main requirement is a social capital of 100 minimum wages, currently R\$62,200.00 (sixty two thousand and two hundred reais). Moreover, the law states that, when applicable, the rules to this firm should follow the ones from the Limited Liability Companies (Ltda.)<sup>1</sup>.

Regarding a foreign person or entity quota holder, according to the Brazilian laws, they shall have an attorney-in-fact duly resident and domiciled in Brazil, with full powers to represent the grantor, including powers to sign corporate documents on their behalf and also to be served on their behalf in case of lawsuit against them happens to occur. We usually function as attorney-in-fact with such powers for most of our foreign clients.

Moreover, the foreign person or entity quota holder needs to be enrolled within the Federal Revenue Office (IRS) in order to obtain, respectively, the CPF/MF - Individual Taxpayers' Register Number or the CNPJ/MF - General Taxpayers' Register Number.

The CPF/MF of the foreign partners will be also required for obtaining the CNPJ/MF of the company (Ltda.) to be incorporated.

In case of foreign person, the documents required for obtaining CPF/MF are:

- (i) photocopy of the Passport;
- (ii) photocopy of any document which contains the mother's name of the applicant (it could be birth certificate, marriage certificate or any other); and
- (iii) power of attorney granting power to represent the grantor before the IRS with legalized signature.

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<sup>1</sup> It is important to mention that any limited liability company can be transformed into an EIRELI through a concentration of quotas, but an individual can only have one company in this regime. The prospect of foreign legal entities to constitute an EIRELI, however, is still being discussed in the Judiciary since some Boards of Trade are not accepting this type of ownership structure yet.

In case of foreign entity quota holder, the documents required for obtaining CNPJ/MF are:

- (i) photocopy of the minutes of incorporation or an Affidavit informing the name, headquarters, purposes, partners and the type of the shares of the foreign entity quota holder;
- (ii) photocopy of any document proving the entity quota holder's address; and
- (iii) power of attorney granting power to represent the grantor before the IRS with legalized signature.

**The headquarters:** the new company shall have head quarter in Brazil. If you do not have an address for the company, we may ask for an accounting firm with which we are used to work with if they can provide a temporary address of the company.

**The company's purposes:** it is important to observe that all activities the company may exercise here in Brazil have to be described in its purpose. This is also an important issue regarding the obtainment before National Institute of Industrial Property (INPI) of all necessary licenses and registers that the company may need.

**The company's capital:** the company can be incorporated with its capital subscribed and fully paid or to be paid in goods, real estates, or cash within the time established in the By-Laws and Articles of Incorporation. As mentioned above, the capital can be fully paid by the time the company is established, or within a certain period determined by the partner in the By-Laws and Articles of Incorporation.

**The company's management:** the company shall have one or more Administrators, which shall be resident and domiciled in Brazil. The Administrator can be appointed in the Articles of Incorporation or in a separate document. The powers and limits of its actions can be stipulated in the Articles of Incorporation. Should you do not know anybody in Brazil that can be the Administrator of the company, we are able to suggest you a person for a temporary period of time.

**The company's trademark:** it could be important to have the company's trademark protected before the National Institute of Industrial Property (INPI). For that, the company shall follow an application procedure that would be supported by our Law Firm.

### 3.3. REGISTRATION WITH PUBLIC OFFICES

With regard to the Brazilian Central Bank (BACEN) we inform you that the foreign quota holders shall be registered, as well as the Brazilian company, for the obtainment of the CADEMP – Company's Register and RDE-IED – Electronic Declaratory Register of Direct Foreign Investments. Once registered, the Brazilian company will be able to receive foreign investments and to send dividends abroad.

Since we are talking about foreign capital coming into Brazil, this foreign investment shall be registered within the Brazilian Central Bank (BACEN). In case the investment is not duly registered by the time of its entrance, it will be not possible to remit dividends or repatriate investments abroad. Moreover, the Brazilian company will be subject to the penalties of the BACEN applicable in this case. These registrations shall be done within 30 days after the money arrives in Brazil. They are done through the software named SISBACEN - Brazilian Central Bank Information System and we usually take care of this issue for our clients.

The Brazilian company shall be also enrolled before the following public offices:

- (i) Federal Revenue Office;
- (ii) Social Security;
- (iii) Unemployment Guarantee Fund; and
- (iv) Municipality of the head quarter City.

Normally, the above mentioned registrations are made by an accounting firm. We are also at your entire disposal to refer an accounting firm for the enrollment with the IRS and to take care of the other accounting matters of the Brazilian company.

Furthermore, we emphasize that all documents requested to the foreign partner shall be notarized and legalized by the nearest Brazilian Consulate. Once in Brazil the document shall be translated by a sworn public translator and registered with the Registry of Deeds and Documents. All these procedures are necessary for the foreign document be valid in Brazil, excepting for public documents from France and Argentine.

#### **4. MANAGEMENT OF A LIMITED LIABILITY COMPANY**

The company can be managed by one or more Administrator(s) that shall be individuals resident and domiciled in Brazil. The Administrator cannot be a legal entity. This person can be a quota holder or a third party and will be appointed by the quota holders in the Articles of Association or in a side document. The company may be managed by a foreigner with permanent visa and domiciled in Brazil.

The Administrator can be removed at any time through the quota holder's decision observing the legal quorums established in the Brazilian Civil Code or in the Articles of Association.

#### **5. OFFICERS' LIABILITY OF A LIMITED LIABILITY COMPANY**

The administrator of the Limited Liability Companies shall act in accordance with the law and with the Articles of Association, and the side documents that appointed him/her as administrator, with the By-laws, and any other document that imposed the limits for the administration.

If the administrator exceeds such rights or acts against the laws he/she can be personally liable under civil and criminal law.

#### **6. TAXATION OF PROFITS**

To discuss the Brazilian taxation system, one must first understand the political structuring of Brazil. The Federative Republic of Brazil is made up of twenty-six states and the Federal District. These states together have 6,000 municipalities. These three levels of organization (Federal Government, States and Municipalities) have, in terms of the Federal Constitutions, competencies to legislate on different taxes.

Firstly, the Federal Government is competent to institute and collect among others Income Tax, Taxes on Industrialized Products, Import Tax and Contributions (such as social security, taxes on financial activity, intervention in the economic domain). It is the entity with the most elastic competency to create and collect taxes in Brazil.

The main due taxes to the States are Tax on Circulation of Goods (ICMS) and Tax on Motor Vehicles (IPVA).

Finally, the municipalities collect taxes on Services and Urban Property.

As one can imagine, it is a complex taxation system, widely regulated by the Federal Constitution, as well as by the Federal Legislation, which has the role of not only regulating tax collection under the Federal Government's competency, but also of providing on the general themes concerning taxes under competency of the States and Municipalities, aiming at preventing conflicts between said political entities.

The dividend system follows the basic table of Income Tax in Brazil, whose maximum percentage for calculation of the tax is 27.5%. There is a series of exceptions and rules especially applicable to companies, depending on the form of taxation specific to them or that they choose. In certain cases, taxation on dividends does not even exist.

## **7. BRANCH**

It is established in the Brazilian Civil Code that foreign companies need governmental authorization to act in Brazil. The Brazilian government will decide about the authorization and restrictions based on the Brazilian economy. This is a very unusual situation in Brazil. There is a very small number of companies in this Country under this condition, since this is a process that does not present any advantage, is quite bureaucratic and takes time to be terminated, given that it needs to be approved by Presidential Decree. Therefore, foreign investors prefer to establish subsidiaries rather than branches to their business.

The company cannot start its activities in Brazil before having such Presidential authorization. To support such application the company must present, among other documents:

- evidence of its regular incorporation in its country of origin;
- the company's Article of Association or By Laws;
- list of the members of all administrative bodies;
- the company's act which approved the opening of the branch in Brazil;
- the company's act which defined the share capital in Brazilian currency that the parent company assigns for the Brazilian operation;
- proof that the company appointed a legal representative in Brazil with full powers to accept the conditions determine by the authorization; and
- the last financial statement.

All these documents must be notarized and registered by the nearest Brazilian Consulate, translated by a Brazilian sworn public translator and registered with the Registry of Deeds before being presented to the authorities. Brazil is not party of the Hague Legalization Convention and therefore an apostille certificate cannot be used. Apart from France, with whom Brazil has an Agreement discharging the registration before a consulate, all other

countries must follow the mentioned legalization steps. Furthermore all these documents must also be published in the Official Gazette and in a major newspaper.

If all is in order and according to the Brazilian policies interest, the President will by Decree, approve the creation of the foreign branch in Brazil.

By President Decree number 5.664 of January 10<sup>th</sup>, 2006, it is now from the Minister of Development, Industry and Foreign Trade the power to authorize the incorporation of foreign companies in Brazil.

This branch is considered as an extension of the foreign company. Therefore, the Brazilian law establishes that the liability is not limited to its own amount, but to all capital of the company. The foreign company is accountable in Brazilian courts for the acts of its branch in Brazil.

The company must always have a legal representative in Brazil with full powers to represent it.

Any amendment to the company's Articles of Association, Agreement or By-Laws shall depend on the prior government approval to be enforced in Brazil.

The parent company must every year publish its financial statements and its branch's financial statements in the Official Gazette and widely circulated newspaper in Brazil.

This article is an overview of the most common ways of entering into the Brazilian market and its consequences. It is important to contact a lawyer if you are planning to invest in Brazil.

The legal system adopted in Brazil is codified, with its laws edited by the federal government, States and Municipalities, with due regard for their individual spheres of authority determined by the Federal Constitution.

Therefore, all types of investments follow specific laws that should be observed by the parties involved.

All foreign capital must be registered with the Brazilian Central Bank. Foreign capital is considered to be any goods, machinery and equipment that enter into Brazil for the purpose of production and creation of any goods and services, as well as any capital brought into the Country to be invested in economic activities, provided that they belong to individuals or companies resident or headquartered abroad.

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