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Legal

STEPS AND PROCEDURES TO SET UP A SUBSIDIARY OF A FOREIGN COMPANY IN BRAZIL



HOW TO SET UP A SUBSIDIARY COMPANY IN BRAZIL

Foreign companies that wants to incorporate a subsidiary in Brazil can choose different types of corporate structures when establishing a Brazilian subsidiary. The most common include Sociedade Anonima, which is a jointstock company, and the Sociedade Limitada, similar to an Limited Liability Company.

Once the Foreign company decides on a Brazil subsidiary setup option, the following steps must be accomplished:

- Obtain a registration number (CNPJ) for the Foreign company;
- File the articles of incorporation;
- Register with the Board of Trade;
- Get a tax ID;
- Establish your own bank account;
- File for a business license to operate within a municipality;
- Register with Brazil's Inscrição Estadual to pay taxes.



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Recent formed companies should also apply with its accountant firm for authorization to issue Notas Fiscais (AIDF), which allows the company to print taxable documents, use and manufacture security forms, and more.

The company must also register with Brazil's Social Security Institution (INSS) within 30 days of beginning operations, even if you do not have any employees. A company administrator should contact a social security agency to register the company with the CNPJ – an identification number issued to Brazilian companies.



BRAZILIAN LAWS

Brazilian Laws state that a company can have only one shareholder to establish a Sociedade Limitada. The incorporation of a Limitada is by using the Articles of Incorporation – locally known as Contrato Social – by complying with regional registration requirements.

The joint stock company (sociedade anônima) needs to make its minute of the General Meeting for the Constitution of the Company to be also registered at the Board of Trade of the state where the company will operate. But the jointstock company must have at least two shareholders.

Sociedades limitadas is the simplest to maintain, while the sociedade anônima is more bureaucratic. None of these companies require shareholders to reside in Brazil or hold Brazilian citizenship (except in some specific sectors), yet all of them require that executive directors be permanent residents of Brazil.



BRAZILIAN LAWS

At least one resident in Brazil must manage the Limitada, whether they are a shareholder or not. Shareholder should appoint this person in the Articles of Incorporation or another corporate document.

The company must also produce shareholder-approved annual accounts at an Annual shareholders' meeting. The minutes from that meeting must be publicly filed at the Commercial Registry in Brazil.



BENEFITS OF A SUBSIDIARY SET UP IN BRAZIL

Setting up a subsidiary in Brazil brings many advantages over opening a branch. Any foreign company can invest in, partner with, or become a shareholder of a Brazilian company to make the Brazilian company a subsidiary. The subsidiary becomes fully covered by Brazil subsidiary laws and must operate like any other Brazilian company.

Setting up a branch, on the other hand, requires complex special authorization from the Brazilian Ministry of Development, Industry, and Foreign Trade. The National Department of Trade Registration (DNRC) must evaluate the request. Due to this complexity, most third-party companies prefer setting up a subsidiary over opening a branch.



BENEFITS OF A SUBSIDIARY SET UP IN BRAZIL

A Limitada is the simplest and most flexible type of company you can start in Brazil. As a limited liability company, the parent company is responsible for any debts, litigation, or other compliance issues. You can also operate under a certain degree of independence from a parent company.



MAIN DIFFERENCES BETWEEN A BRANCH AND A SUBSIDIARY IN BRAZIL

The general rule is that any foreign company can be a partner, investor or shareholder in a Brazilian company, making the Brazilian company a subsidiary of the foreign entity. The Brazilian company will then be fully governed by Brazilian law and will have the same rights and responsibilities as any other Brazilian company.

As stated, opening a branch of a foreign company in Brazil is more complicated. This requires a specific authorisation from the Brazilian Ministry of Development, Industry and Foreign Trade. A foreign company that wishes to install a local branch in Brazil will have to send a formal request to the Brazilian Ministry of Development, Industry and Foreign Trade, where the National Department of Trade Registration, known as DNRC, will evaluate the request.

In order to better protect a firm's assets, many foreign companies choose to establish domestic subsidiaries rather than to open a branch. Operating through a branch, which is merely the extension of the foreign company, fully exposes the assets of the foreign company to risk.



MAIN DIFFERENCES BETWEEN A BRANCH AND A SUBSIDIARY IN BRAZIL

However, incorporating a business entity in Brazil does not immediately link it to the foreign company, hence protecting the foreign company's global assets. Then again, the foreign company should be aware of any Brazilian requirements regarding subordinate or controlled companies, as well as corporate groups.

Generally, in the case of a Limitada/Ltda. each shareholder's responsibility is limited to the amount of his/her assigned capital. However, in the event of the company's bankruptcy each shareholder is liable, jointly and severally with the others, for payment in full of the company's capital not yet paid in.

In the case of an S.A., the shareholders' liability is limited to the payment of the shares to which the shareholders have subscribed. Once all the shares have been fully paid in, the shareholders will have no further liability except for certain cases of violation of law or of the bylaws, in which case the corporation's legal personality can be disregarded.



AVERAGE TIME TO SET UP A SUBSIDIARY IN BRAZIL

In general, a significant amount of time is required to set up your Brazilian subsidiary. On average, the setup process takes about three months. Although, because Brazilian laws differ by state, opening a company in one location may be easier than another spot.

For foreigners that wish to form a company in Brazil, the most time consuming part is often before starting the actual formation of the company in Brazil. Preparing all the necessary foreign documentation and getting the documents translated by a sworn translator and consularized by a Brazilian diplomatic station abroad are often the most time consuming part.

Very few people undertake the job of forming a company in Brazil themselves. Most people hire a lawyer or an accounting firm to handle the process. The advantage of using a lawyer or an accounting firm that have experience with forming companies for foreigners is that they can present you with a list of documents that you will have to prepare upfront. This is an important factor, since each step in the company formation process requires different types of documentation.



APPOINT A LEGAL REPRESENTATIVE FOR THE SUBSIDIARY

As all executive directors of Brazilian companies must be permanent residents of Brazil, the first step is to select an individual who is suitable to act as the company's legal representative.

Requirements to have a local Company Administrator are usually the most challenging for foreigners who intend to form a company in Brazil.

The Company Administrator does not need to be an owner of the company but the company administrator must either be a Brazilian citizen or have a permanent Brazilian visa.

Extremely simplified, the Company Administrator is the person who will have to legally answer all actions that the company performs in Brazil.

The appointed Company Administrator will also have the power to perform dispositions on behalf of the company.

All foreign shareholders of companies registered in Brazil must appoint a person to hold their power of attorney.



APPOINT A LEGAL REPRESENTATIVE FOR THE SUBSIDIARY

While not mandatory by law, invariably the attorney needs to have the power to represent the foreign shareholders before the Central Bank, tax authorities and the Companies Registry (Board of Trade).

This is often a thorny issue from a corporate governance point of view, as the person has almost absolute powers over the company. Strategies to minimise corporate governance risk include:

- having third parties (often lawyers) who are not involved in the day-to-day activities of the Brazilian company to hold the powers of attorney; and
- appointing two individuals who need to exercise their powers jointly.

At times, foreign companies choose to appoint accountants to hold the powers of attorney for the foreign shareholders. This is far from ideal, as when tax authorities notify accountants for issues relating to the Brazilian company's tax matters an inherent conflict of interest arises (for instance, where the foreign shareholders are given notice due to non-compliance with tax obligations).



INVESTMENT MINIMUM REQUERIMENTS AND VISA IN BRAZIL

There are no requirements in terms of the minimum investment for a newly formed Brazilian company.

If the company that is formed in Brazil is going to be used to apply for a permanent Brazilian investor visa there are requirements to the minimum investment. The rules are not black and white regarding the size of the investment, but a direct foreign investment of BRL 150.000 or more will normally qualify for an investor visa.

There are also possibilities to obtain a visa with a lower direct investment if a plan for generating jobs in Brazil is submitted and approved by the Brazilian National Immigration Council.



COMPANY NAME IN BRAZIL

Company names that are registered in Brazil must at least conform with the following rules:

- **Veracity:** The activity indication incorporated into the name must also be real, and it must be explicit in the social objective of the company as specified in the Articles of Association.
- **Novelty:** a new name must be adopted, and it must be different from company names that already exist in the region and industry that the company operates.
- **Identification of Company form:** the type of company must be clearly identified, normally this is done in an abbreviation at the end of the name.
- **Moral Protection:** use of words or expressions that are immoral and go against good manners are forbidden.

In the Articles of Association and governmental registries it is also possible to register a trading name for the company known in Portuguese as Nome Fantasia.



LEGAL AND TAX ISSUES

A foreign entity is subject to tax in Brazil if it conducts trade or business in Brazil and earns income as a result. Thus, legal and tax issues should also be considered before opening a Brazil office. Of particular importance are issues relating to the type of legal entity to be opened, the state and municipality in which to locate, tax liability in Brazil, and the hiring of Brazilian and/or foreign staff. These issues may arise from Brazilian laws and regulations or those of the firm's home country.



STAFFING A BRAZIL OFFICE

A foreign firm generally oversees the hiring of all staff for its offices. A firm may opt to hire staffers from its home country who share the same language and understand a similar business and country culture.

On the other hand, a foreign firm may prefer to hire Brazilian staffers who are familiar with Brazilian culture, speak native Portuguese (or are bi-lingual Portuguese and Spanish speakers) and can potentially offer the firm a unique network of contacts. In many cases, hiring both Brazilian and foreign staffers is a successful compromise.

Regardless of whether a firm hires Brazilian or non-Brazilian nationals, it is important to remember that the Brazil office must comply with Brazilian laws regarding pay, environment, immigration and other issues. Many of these requirements are discussed elsewhere in this guide.



CHOOSING A LOCATION IN BRAZIL

If a foreign firm opts to open a Brazil office, choosing a location is the next major step. The following are some factors to consider.

- Location of the firm's main consumers and competitors – this should be the chief consideration.
- Costs of establishing and operating a business in a particular town, city or state.
- Access to airports or ports.
- Time zone differences. For some businesses and their Brazil subsidiaries, it is important to share similar schedules. For other firms, it is advantageous to have offices opened at different times around the globe. Brazil uses four time zones: Brasilia time +1 (UTC-02:00), used only on a few small offshore Atlantic islands; Brasilia time BRT (UTC-03:00), used in most of the country; Brasilia time -1 (UTC-04:00), used in the states of Mato Grosso, Mato Grosso do Sul, Rondônia, Roraima and most of Amazonas; and Brasilia time -2 (UTC-05:00), used in the far-western tip of the country, which includes the entire state of Acre and the southwestern portion of the state of Amazonas.



CHOOSING A LOCATION IN BRAZIL

The primary consideration should be which location provides the greatest benefits in serving the Brazilian customers. In some industries this location is obvious, while in others there is no one ideal location. Brazil is a very large country with a wide variety of markets and different infrastructure throughout.

A foreign firm should also spend time determining who its customers are; e.g., large retailers, specialty stores, department stores, small chain stores, etc. Such determinations will help to place the Brazil office in closest proximity to the greatest concentration of targeted customers.

State Sales Tax (“ICMS”) and Municipal Services Tax (“ISS”) rules and calculation bases will vary depending on the State and the Municipality where the company will operate.



CHOOSING A LOCATION IN BRAZIL

For businesses that sell goods, if the company is to have a distribution centre in more than one State, then a branch office will need to be registered. Different tax rates will apply for interstate transactions.

States and Municipalities often also offer tax breaks (and, in some cases, free land) for certain activities where the investments are substantial.

Brazilian companies generally must have a registered office with a unique address. In some circumstances, a company may use a virtual office for administrative purposes or if it is a service provider.

Companies selling goods can lease their own warehouses or have a lease in place with a third-party warehouse. The warehouse needs to be suitable for the company's operations and may be inspected by tax officers to confirm that it is suitable for the company's operations.



ACCOUNTING FIRM REGISTERED IN BRAZIL

Brazilian tax law is very compliance-heavy. All Brazilian companies with foreign shareholders must have a Brazilian accountant responsible for preparing its books and making all required filings.

Finding a suitable accountant who is familiar with international issues and speaks English well is often a challenge, especially for those companies on tight budgets. Once the accountant is selected, it is strongly recommended to have a detailed agreement customised for Brazilian law in place with the chosen accountancy firm.



BRAZILIAN TRADEMARK SYSTEM

The Brazilian National Institute for Intellectual Property (“INPI”) has a unified database of all trademarks registered publicly available. Conducting searches on the INPI database is fairly straight forward and can be done online at any time.

Brazilian law follows the first-to-file principle. Thus, it is strongly recommended that you file trademark applications as soon as you form a view that you may sell products or services in Brazil. These applications can be made by the Brazilian company, or by any individual or foreign entity (and there are important tax consequences to this).



TYPES OF LICENCES TO OPERATE

Different businesses and activities require different licences to operate. Food, agricultural related activities and mining are well known for the various steps required to be taken to obtain their respective licences.

Some types of licences can take some months to be granted by authorities. Hence, it is very important that you ascertain the requirements and allow for reasonable estimates when planning the start of your Brazilian operations.



BRAZILIAN COMPANY TO IMPORT GOODS

Not all Brazilian companies are allowed to import goods from abroad. Before a company can import goods, it must obtain registration with the Foreign Trade Integrated System (“Siscomex”). In broad terms, there are three types of registration available:

- express, which only allows for a total of US\$50,000 worth of goods to be imported every six months;
- limited, which allows for a total of US\$150,000 worth of goods to be imported every six months; and
- unlimited.

The Brazilian Federal Revenue (“RFB”) will analyse the Brazilian entity’s “financial capacity” when deciding which of the three types of registration will be granted.

This analysis is undertaken by the RFB every six months and is based on the sum of corporate income tax (“IRPJ”), the Social Contribution on Net Profits (“CSLL”), PIS and COFINS (these being levies), as well as the amount of Social Security that the company paid for its employees in the previous five years.



BRAZILIAN COMPANY TO IMPORT GOODS

Where a new company has been operating for less than five years, it may apply for a licence with a higher threshold if it can establish that it has sufficient net assets to meet its import-related obligations.

In addition to Siscomex registration, different licences may need to be obtained depending on the type of product to be imported. These licences may be under the jurisdiction of different bodies such as the Ministry of Agriculture (“MAPA”), the National Health Registry Agency (“ANVISA”), the Ministry of Defence and the Foreign Trade Chamber (“Camex”), among others.



BANK ACCOUNT FOR THE COMPANY

Opening a bank account in Brazil may take between one to two months (even longer in some cases). Hence, it is important to confirm with your bank of choice the timeframe required for approvals and allow for possible delays.

Some banks require different registration processes to open a current account and for the company to be able to buy and sell foreign exchange. In some cases, depending on how quickly the company needs to start operating, smaller banks are used. Also, it is not unusual for companies to hold an account with a foreign exchange specialist bank, as the larger banks tend to be very compliance-intensive for small and medium-sized companies (especially those that are not listed on any stock exchange).



FINAL CONSIDERATIONS

Setting up a foreign subsidiary company in Brazil invariably has various consequences and risks. Seeking legal advice before making a decision will avoid many pitfalls and costs down the track. The questions highlighted above are just some of the many issues that you will need to consider before registering a company in Brazil.

