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Brazil Market Entry Guide

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Introduction



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Brazil has grown in economic and political importance over the last 10 years, and despite challenging economic times, continues to be an essential part of any multinational's growth plans as well as a potentially lucrative market for many smaller companies. Three key factors responsible for the success and potential of the Brazilian market are its abundance of natural resources, the size of its internal market, and the economic and political stability that Brazil now enjoys.

1. Natural resources. Brazil is a country of continental proportions, spanning tropical and temperate zones, with more available arable land than any other country. It has become the world's leading exporter of many farm products, including beef, poultry, soy, coffee and sugar. Brazil also has some of the world's largest reserves of minerals, considerable oil reserves and hydrological and weather conditions that allow the significant generation of electricity from renewable sources.

2. Internal market. Brazil has the fifth largest population in the world and is the world's ninth biggest economy, with a larger GDP per head than India or China. Economic and social reforms have reduced poverty and expanded the middle class to roughly half the population, increasing the number of consumers and first time buyers of cars, homes, domestic appliances and technology, and growing demand for better healthcare, education and other services.

3. Economic and political stability. Brazil has been a committed multi-party democracy since the end of the last military dictatorship in 1985. Inflation has been tamed and successive governments have maintained consistent macroeconomic policies whilst reducing poverty and tackling inequality. These fundamentals allowed Brazil to maintain solid growth throughout the global financial crisis and made it the world's third most attractive destination for foreign direct investment in 2013, behind only the US and China.

Although low commodity prices and a weaker currency have caused problems for the economy, there will always be opportunities for foreign investors. The 'Car Wash' corruption scandal, which has blocked many of Brazil's major companies from participating in public tenders, has resulted in increased demand for foreign contractors, as well as demonstrating the integrity of Brazil's institutions.

This guide aims to demystify the process of doing business in Brazil, by providing a simple overview into those areas we are most commonly asked about by foreign companies either considering entering the Brazilian market for the first time or wishing to expand their Brazilian operations. This guide is not, however, intended as a substitute for legal advice and should not be relied upon as such.





Ten Practical Issues

While the rest of this guide looks at certain issues in more depth, this short list sets out briefly a number of the key issues that investors should be aware of before deciding to do business in Brazil.

1. The 'custo Brasil'

This Portuguese term literally means the 'Brazil cost', and is used to refer generically to the extra costs that come with doing business in Brazil: such as those stemming from bureaucracy, under-developed infrastructure, high labour costs or inefficiency. The very fact that such a phrase exists is something to bear in mind in seeking to establish a presence in the country: with an awareness of key issues (and perhaps more patience than would usually be required), it is possible to minimise the effect of the *custo Brasil* on your company.

2. Residency requirement for directors

For *limitadas*, the most common form of Brazilian subsidiary, all directors ('administrators') must be resident in Brazil. Companies must therefore obtain a residency visa for any non-resident they wish to be a director (see page 20) before establishing a subsidiary, or appoint a local administrator, either in the interim or on an on-going basis. CMS lawyers have acted as administrators for a number of foreign companies establishing subsidiaries here.

3. Bureaucracy and corruption

Red tape affects many aspects of doing business in Brazil including setting up a company (see item 10 below), buying and selling real estate, entering into contracts, competing in public tenders and enforcing contracts. Unfortunately, where there is excessive bureaucracy, corruption is often not far behind. The key here is to understand that things will take longer to get done in Brazil and to set realistic deadlines, as well as making sure that suitable compliance procedures are implemented right from day one.

4. Currency and exchange controls

The Brazilian Real is a volatile currency, and cannot be transferred outside Brazil, while it is not possible to hold foreign currency accounts within Brazil. Funds being sent into or out of the country – including foreign investment, and the paying of dividends to foreign investors – need to be registered with the Brazilian Central Bank. This can be done electronically, though any failure to register correctly can lead to delays.

5. Enforcement of contracts

Resolving disputes through the Brazilian court system can be extremely time-consuming: the system and procedures are complex and subject to delays, a problem compounded by the possibility of numerous appeals. One way of avoiding this is to submit disputes to arbitration. Although the courts will generally recognise arbitral proceedings and awards, arbitration clauses must be very carefully drafted to ensure their effectiveness.

6. Governing law

Unlike in many countries, in Brazil the parties may only choose the governing law of the contract if the contract expressly submits disputes to arbitration. Otherwise, the governing law will depend on where the contract is made.

7. Taxation

Brazil has an extremely complex system of inter-related tax regimes: as well as federal taxes, some taxes differ by state and even by city (see pages 15-16 for more details). The taxes applicable to foreign investors are also subject to frequent change, and while Brazil has double taxation treaties with a number of countries, there are a number of major economies with which it does not, including Germany, the US and (other than for air and sea transport) the UK. Indeed, tax structuring can be crucial to the viability and competitiveness of Brazilian investments.

8. Appointing a local agent

The appointment of a local agent in Brazil is regulated by specific legislation, which imposes certain mandatory terms which can result in penalties on termination. Due to the scale of Brazil, appointing one agent with exclusivity for the whole country might not always be the best option. For more details, see page 7.

9. Employment liabilities

Brazil has a relatively litigious culture, strong unions, stringent employment laws and a judiciary inclined to protect employees in disputes, which means that companies should take care in dealing with their employment relationships. It should also be noted that Brazilian employment law can sometimes apply in situations where you might not expect it to, so this should also be considered where expatriate employees, on non-Brazilian employment or consultancy arrangements, work in Brazil.

10. Time taken to set up a company

The World Bank ranks Brazil as 175th out of 190 countries for the ease of starting a business, and puts the total number of calendar days required to complete the processes required to establish a company at 101 (for 2016). To put this in context, these processes take a fortnight or less in over 80 other countries. This extended timescale must be borne in mind, and preparations to establish a company started as early as possible.



Market Entry Options

Initial consideration: whether or not to establish a permanent presence

Once the decision is made to enter the Brazilian market, a further decision needs to be taken on how best to approach this. We consider below a number of options: appointing an agent or distributor, setting up or acquiring a Brazilian subsidiary, setting up a branch in Brazil, or entering into a joint venture with a Brazilian partner.

The best choice will depend on factors such as the level of commitment to the new market, the size of any investment, time available, the business sector and local regulatory requirements, legal and tax treatment, familiarity with Brazil and investor risk profile.

An agency agreement with a local Brazilian representative may be appropriate, for example, as a first step in testing the market before making a more significant commitment. Selecting an agent with good local knowledge and contacts within the target market and sector can get things off to a good start.

Brazil is a country that places great emphasis on personal relationships and, accordingly, having people on the ground can be important to a business's success. For this reason alone, many foreign investors prefer a more permanent form of market entry, such as incorporating a subsidiary or entering into a joint venture with an established local player.

Other reasons which may justify setting up permanently in Brazil depend on the business sector. For investors wishing to sell goods or services in the oil and gas sector, strict local content regulations apply. Local content requirements are also a factor in sectors that depend upon financing from the Brazilian Development Bank (BNDES).

For businesses seeking to win public sector work, Brazilian procurement rules often require foreign bidders to set up a local subsidiary or enter a consortium with a local partner. Procurement legislation also gives Brazilian bidders a margin of preference over foreign bidders, which allows government agencies to pay up to 25% more for Brazilian goods and services. Establishing a permanent presence in Brazil should enable foreign companies to compete fairly with local companies.

A key point is that for each of the protectionist measures described above, the shareholding of the Brazilian company is irrelevant: meaning that foreign companies can take advantage of the protections themselves by incorporating or acquiring a stake in a Brazilian subsidiary or joint venture company.



Option 1: Appointing an agent or distributor

Overview

Entering into an agency or a distribution agreement with a Brazilian individual or corporate entity can be a useful first step to test the local market before making a greater commitment if the right opportunity arises. An agent would charge a commission on sales of products or services and a distributor would sell on products purchased from the principal. Care has to be taken, as agency agreements are heavily regulated in favour of the agent.

Characteristics

In both cases, there is no need to set up a Brazilian corporate entity and local responsibilities can be undertaken by the local party, so this option is quick and inexpensive to start. The local agent should have existing business contacts in the market and can therefore facilitate the introduction of new business opportunities.

As the agent will have significant responsibilities, trust is paramount. However, not all agents are reliable or perform as expected. Good knowledge of the local agent or distributor is important and due diligence should be carried out before entering into any agreement. A number of recent corruption allegations have involved the payment of bribes by Brazilian representatives.

There are specific laws relating to the agency agreement, which should be considered. These laws tend to protect the agent rather than the principal and impose certain mandatory terms in agency agreements. Brazilian law will apply and commissions are usually payable even where sales are not introduced by the agent. These agreements can also be difficult to terminate and, on termination, require a substantial payment to the agent. Advice is essential on Brazilian legislation.

Taxation

Under an agency agreement, the end customer should be responsible for all import taxes on products purchased and imported into Brazil and the principal will pay all taxes in its country of incorporation. The agent will be responsible for taxes levied on its commission.

If the principal provides services from outside Brazil, payments from Brazilian clients to the foreign principal will be subject to withholding income tax at rates between 15-25% depending on the jurisdiction of the foreign principal and other taxes (CIDE, PIS-import, COFINS-import, ISS import), which can increase the cost by around 40% in total.

For distribution agreements, the Brazilian distributor should be responsible for all import taxes on products purchased and imported into Brazil from the principal and the principal will pay all taxes in its country of incorporation.

Option 2: Setting up a subsidiary

Overview

The two most commonly used corporate vehicles in Brazil are the private limited liability company (in Portuguese, '*limitada*') and the corporation ('*sociedade anônima*' or '**SA**'). Both are limited liability companies meaning that, subject to certain exceptions, the shareholders are only liable for the amount of capital they have subscribed in the company.

Greater administration requirements apply when setting up a subsidiary as compared with trading through an agent or distributor. The subsidiary and shareholders need to register with the federal tax authorities and Central Bank and the subsidiary will need to obtain state and municipal registrations and licences as well as registering with any applicable regulator.

A subsidiary's activities are limited by its constitution and the municipal licence. Furthermore, a *limitada*'s official name must reflect its main activity.

Characteristics

Limitadas are by far the most commonly used vehicles for subsidiaries (and corporate joint ventures) because they are simpler and cheaper to operate. A *limitada* requires at least one administrator (similar to a director), who must be a Brazilian resident individual and at least two quota-holders, which may be Brazilian or foreign resident individuals or corporate entities.

Capital is divided into quotas (similar to shares in other jurisdictions) with a nominal value. There is generally no minimum quota capital and no requirement to pay up within a particular period. Where a wholly-owned subsidiary is required, it is usual to allocate a nominal quota-holding to an affiliated company, or to a related individual. Foreign quota-holders must appoint an individual in Brazil to act as their legal representative to (as a minimum) accept service of any legal or administrative proceedings.

Corporations tend to be used for larger businesses and are similar to *limitadas*, except that they:

- have an executive board ('*diretoria*') and a board of directors ('*conselho de administração*'), instead
- of an administrator, with the *conselho de administração* being optional for private corporations. The *diretoria* comprises at least two Brazilian resident individuals and the *conselho de administração* comprises three shareholders,¹ who are not required to be resident in Brazil;
- have 'shares' instead of 'quotas'; and
- may offer securities to the public and create different classes of capital.

In both corporate vehicles, the rights of the parties regarding decision-making, distribution of profits, financing and other important matters can be regulated by way of a shareholders' (or quota-holders') agreement and the company's constitution. International concepts such as tag-along and drag-along rights, restrictive covenants and put and call options are all recognised.

Funds being invested into Brazil to finance a subsidiary need to be registered with the Brazilian Central Bank as foreign direct investment; when doing this it is necessary to state whether the funds are going in as equity or debt. Under Brazilian law, there is no time limit within which funds must be repatriated.

Taxation

Corporate taxes will generally be charged on profits (or presumed profits) in accordance with the following rates:

- income tax: 15%-25%
- social contribution on net profit: 9%
- PIS contribution: 1.65%
- COFINS contribution: 7.6%

Taxes are also charged on the provision of services (ISS: 0.6%-5%) and sale of goods (ICMS: 7%-25%). After Brazilian taxes are paid, profits can be repatriated by way of dividends, which are not taxed in Brazil under Brazilian law. Interest payable on foreign loans is subject to thin capitalization rules and withholding tax, the rate of which depends on the jurisdiction to which interest is being paid.

¹Either individual shareholders or individuals representing corporate shareholders.

Option 3: Setting up a branch office

Overview

Branch offices of foreign entities are given special treatment under Brazilian law. They are not to be confused with subsidiaries or similar entities with 100% foreign ownership, which are regarded as Brazilian entities.

Characteristics

Branch offices of foreign entities are governed by the law of its head office, save for employment and certain tax liabilities. Branch offices of foreign entities need a Presidential decree to operate. Given the difficulties involved in obtaining a presidential decree to commence operations in Brazil, branch offices of foreign entities are extremely rare.

Taxation

Specialist tax advice would be required, given that this option is rarely used.



Option 4: Acquisition

Overview

Acquiring an existing local corporate entity (either a *limitada* or a corporation) is usually preferred by foreign corporate entities that do not have a widely known brand name in the country, but would like to develop business on an existing, functional platform.

Characteristics

Despite the usual due diligence exercise, there could be unforeseen post-acquisition employment, contractual and taxation liabilities. Brazil is a litigious society so such liabilities are quite common. Particular attention should be taken with respect to employment claims, as an employee has the right to claim damages for a backdated period of five years from the date of the claim.

In order to register the change in ownership in a *limitada* with the commercial registry, the buyer will need the seller to provide certificates of good standing from various government bodies.² These certificates have the added advantage of reducing (but not eliminating) the risk of acquiring unknown liabilities. Other certificates³ are also commonly requested from the seller.

Many Brazilian companies are family-owned and run, which can make post-acquisition integration challenging where purchasers attempt to implement group management processes.

Taxation

There is no stamp duty or similar on the sale/purchase of shares. The seller is liable for tax on any capital gains. After the acquisition is complete, the rules set out for Option 2 apply to the acquired subsidiary. As in other jurisdictions, an acquisition means inheriting the tax history of the company, so this needs thorough investigation in advance. It is common practice in Brazil to obtain certificates of good standing, demonstrating that the company has fulfilled its tax and social security obligations.

²A certificate confirming there are no federal taxes due (Certidão Conjunta Negativa de Débitos Federal), a certificate confirming that social security contributions are in order (Certidão Relativas ao INSS) and a certificate confirming that the employee indemnity fund is in order (Certidões Relativas ao FGTS).

³It is normal to ask for certificates confirming that there are no tax debts due to state or municipal authorities (Certidão Conjunta Negativa de Débitos Estadual and Certidão Conjunta Negativa de Débitos de Municipal respectively) and a certificate confirming that there are no employee debts due (CNDT – Débitos Trabalhistas).



Option 5: Joint venture

Overview

Using a joint venture is a good way to share the risk and cost of entering into a new market as well as capitalizing on local expertise. A joint venture may be incorporated (when a corporate entity is formed to undertake the business) or contractual. A contractual joint venture can use a traditional joint venture contract or a consortium agreement and the foreign investor may enter into such arrangement either through a foreign or Brazilian incorporated company. Legal, financial and tax advice will be required to select the optimum structure for each project.

Characteristics

Incorporated joint ventures

The most widely used joint venture structure involves setting up a Brazilian *limitada* (although a corporation can also be used) with the profits, ownership and control being split among the joint venture parties in accordance with their respective quota-holdings and a quota-holders' agreement.

Contractual joint ventures – consortium

The parties may alternatively choose to set up a consortium which is a regulated contractual joint venture. Consortia are often used for the purpose of participating in Brazilian public tenders and in some cases will be required by the tender rules.

The joint venture business in a consortium does not have a separate identity from the consortium members. Liabilities for a contractual joint venture are not ring fenced within a separate joint venture company, although the parties could form special purpose vehicles to participate in the consortium.

Key characteristics of consortium:

- Regulated by Law No. 6.404/76.
- Tender rules usually require a Brazilian company to be the consortium leader.
- No independent legal identity although it must obtain a CNPJ tax registration number.
- Insolvency of one member does not extend to the others or the consortium.
- Consortium agreement regulates the sharing of expenses and revenues and is registered in the commercial registry nearest to the consortium headquarters.
- No joint liability by law, but may be agreed in the consortium agreement. Public procurement rules may stipulate how liability is to be regulated.

Other contractual joint ventures

Parties who wish to enter into a contractual joint venture do not need to do so by way of a consortium, unless there is a specific requirement (such as under tender rules). Other types of contractual arrangements, such as alliances and asset sharing, can be used and are increasingly common.

Taxation

Incorporated joint venture

The rules are the same as those applicable to subsidiaries.

Contractual joint ventures – consortium

The taxation treatment of consortium is complicated; each member of the consortium is considered separately and taxed on its profits resulting from its share in the revenues and expenses as determined by the consortium agreement.

Other contractual joint ventures

Each member is taxed separately on its sales and/or profits in accordance with usual tax rules.

COMPARATIVE SUMMARY OF MARKET ENTRY OPTIONS

Agent	Local subsidiary	Contractual joint venture	Incorporated joint venture	Acquisition
SPEED OF MARKET ENTRY				
Fast. Should benefit from local partner's market know-how and contacts.	Relatively slow. Takes 1 to 2 months to form company. Can take longer to secure licences, registrations, bank account etc. Developing business from zero will also take time.	Relatively fast as should benefit from local partner's existing structure, market know-how and contacts.	Slower than for contractual joint venture as need to form company or amend articles, secure licences, open bank account etc. but should benefit from local partner market know-how and contacts.	Fast, but integration can take time.
LEVEL OF INVESTMENT / COMMITMENT REQUIRED				
Low. Rely on agent's existing structure.	No minimum capital investment but the set-up process is bureaucratic.	Varies depending on the terms agreed with JV partners.	Same as for local subsidiary. Will also depend on JV terms agreed.	Potentially high. Need to pay purchase price and could take on existing liabilities (see below).
FINANCING				
Not relevant.	Can generate its own cash-flow. Broad range of options for additional finance: equity capital, loans from shareholders, third party investors, bank loans, share offers (SAs only).	Cannot generate own cash-flow. Each party needs to contribute to meet operating costs and further financing requirements.	Same as for local subsidiary.	Same as for local subsidiary.
INCOME				
Receive contractual revenues subject to agent's commissions.	Post-tax profits can be distributed by dividend to shareholders (local and foreign) tax free.	Regulated by contractual terms and received separately by partners.	Same as for local subsidiary.	Same as for local subsidiary.
CONTROL				
Little control over sales and marketing process.	Total control over business.	Regulated by joint venture agreement, although assets owned separately.	Regulated by joint venture agreement and company constitution.	Total control over business.

DAY TO DAY ADMINISTRATION			
Low, but important to monitor agent.	Need at least one resident director and external accountants. Monthly tax compliance, accounting and employment requirements.	Low, although responsibilities will be allocated under joint venture agreement.	Same as for local subsidiary.
Care needed to ensure agent does not acquire employment rights. Payment required for early termination.	Liability limited to share/quota capital. Certain employee and tax liabilities can be passed on to share/quota holders.	Liability or insolvency of one party does not necessarily affect the other.	Same as for local subsidiary. Additionally, acquired company will have all pre-acquisition liabilities.
MANDATORY RULES?			
Protective rules in favour of local agent. Brazilian law applies and Brazilian courts will claim jurisdiction.	General company law applies.	Special rules apply to consortiums. Apart from this, parties relatively free to agree terms.	Subject to local law, parties relatively free to agree terms of acquisition agreement, including the governing law and to submit disputes to arbitration.
TAX			
Foreign taxes payable. Brazilian taxes are generally the responsibility of the agent or distributor.	Brazilian taxes apply: complex and often high total tax.	Parties taxed separately, with Brazilian parties subject to Brazilian tax. Withholding tax applicable on supply of services to Brazil from overseas.	Same as for local subsidiary.
EXIT CONSIDERATIONS			
Payments usually due for early termination of agency agreement. No independent business so cannot sell.	Independent business created so normal exit routes potentially available: i.e. company sale, IPO or winding-up.	Termination subject to JV agreement. Difficult to sell stake as venture has no independent existence.	Same as for local subsidiary. Termination and sale or buy out subject to JV agreement. Right of first refusal, drag-along, tag-along of partners are common.

General Considerations

1. Restrictions on foreign investment

Unlike in a number of other growth economies, there are no general restrictions on foreign investors, requiring Brazilian companies to be controlled by Brazilian nationals or making partnerships with Brazilian companies mandatory. Instead, there are specific rules that apply in certain cases and to industries of strategic importance, including nuclear energy, media and aviation, as well as to the ownership of rural or border land and real estate.

As mentioned above, public procurement rules often require the formation of a consortium with a local partner or the establishment of a Brazilian subsidiary.

Brazil also has exchange controls which means that funds entering or leaving Brazil need to be registered with the Brazilian Central Bank and an exchange contract signed before the funds are liberated. Whilst a little bureaucratic, this is not usually a problem in practice.

2. Legal system, governing law and international arbitration

Brazil is a civil law country with a comprehensive written constitution and a system of codified laws which are passed by federal, state and municipal authorities.

Laws change frequently, particularly in areas like taxation and employment, which, when combined with a lack of binding precedent, can make it difficult to get concrete answers to legal problems.

The Brazilian court system also tends to be slow,⁴ which is one of the reasons that international contracts involving Brazilian companies are frequently subject to arbitration. The selection by Brazilian counterparties of arbitration as the method of dispute resolution is becoming increasingly common and is supported by the Brazilian Arbitration Act 1996 and by Brazil's ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Arbitration allows the parties to select a foreign governing law, often English or New York, which avoids some of the uncertainty inherent in Brazilian contract law.

This method of dispute resolution also has a number of other important advantages. In particular, it enables the parties to appoint an arbitrator who understands the commercial context of an agreement: which may not be the case with a court appointed judge, as there is relatively little sector specialisation within the Brazilian judicial system. It also makes it possible to select where hearings are to take place, which does not need to be in Brazil.

There are, of course, various strategic considerations that need to be taken into account in drafting arbitration clauses so that they provide the most advantageous dispute resolution mechanism for the circumstances, but the widespread use of these clauses in Brazil gives parties more flexibility.

⁴Recent changes to the Civil Procedure Code are aimed at improving this, and Brazil's ranking in the 2017 survey carried out by the World Bank on the ease of enforcement of contracts improved to 37 out of 190 countries.

3. Tax

The tax system is complicated and consists of federal, state and municipal taxes, 3 different corporate tax regimes, and different sales tax rates and rules within each of Brazil's 27 states. The two most important corporate tax regimes are the estimated profit regime (in Portuguese, *lucro presumido*) and the actual profit regime (*lucro real*).

Federal

Companies whose gross annual income in the preceding fiscal year did not exceed R\$78,000,000 may elect to be taxed either on the basis of actual profit or estimated profit. Estimated profit is calculated as a percentage of gross turnover. This election can be made each year and the company may, if it meets the eligibility criteria, elect a different tax treatment in different years.

As a general rule of thumb, if a Brazilian company's real profit is equal to or higher than 32% for most services (or higher than 8% for manufacturing and sales activities and some specific services) then the estimated profit system will be the best option. The basis for calculation of the tax payable under the estimated profit system can vary substantially, however, and this must be considered in determining the optimal tax structure.

Where tax is based on actual profit, taxable income is equal to gross turnover less costs of sale, administrative and operational expenses and other deductibles permitted by law (which are substantially restricted in the cases of PIS and COFINS contributions). Net operating losses can be offset against taxable income, subject to certain limitations.

Corporate income taxes	Details
Corporate income tax ('IRPJ')	<ul style="list-style-type: none"> — Using actual profit, the IRPJ is levied at 15% on adjusted net income plus a surtax of 10% on annual taxable net income in excess of R\$240,000. — Using estimated profit, the rates are the same but are levied on estimated profit, which is calculated as a percentage of gross turnover ranging from 1.6% to 32%, with the latter being the norm.
Social contribution on net income ('CSLL')	<ul style="list-style-type: none"> — Taxed in a similar manner to IRPJ at a rate of 9%.
Contribution for the social integration programme ('PIS')	<ul style="list-style-type: none"> — PIS is generally levied at 1.65% and applies to the importation of goods and to the payment of services provided by non-residents. Export revenues are exempt. — The taxpayer may obtain a tax credit for PIS to be offset against sales of products.
Contribution for social security financing ('COFINS')	<ul style="list-style-type: none"> — COFINS is levied on most gross revenues, generally at 7.6%. It also applies to the importation of goods and to the payment of services provided by non-residents. Export revenues are exempt. — The taxpayer may obtain a tax credit for COFINS to be offset against sales of products.



Other federal taxes	Details
Contribution for the intervention in the economic domain ('CIDE')	<ul style="list-style-type: none"> — CIDE is levied at 10%, assessed on the value of payments made to a foreign recipient, and is applicable to Brazilian companies paying royalties, fees or other amounts to a foreign entity pursuant to a service agreement or other agreement for the licensing or assignment of technology, trade names, patents and related rights. — It is also levied (at a fixed amount per cubic metre) on the import and sale of oil and gas (and derived products), as well as ethanol. The taxpayer may obtain a tax credit to be offset against sales of the same product.
Financial transactions tax ('IOF')	<ul style="list-style-type: none"> — Applicable to a variety of monetary, currency, credit, insurance, securities and gold-backed transactions, including foreign currency exchange transactions made in connection with offshore payments of loans, services and royalties. — The rate varies from 0% to 25%, with foreign currency exchange transactions (for payment in a currency other than Brazilian Real) generally being taxed at 0.38%.
Import tax ('II')	<ul style="list-style-type: none"> — Made on an ad valorem basis at a rate depending on the imported product's tax code.
Excise tax ('IPI')	<ul style="list-style-type: none"> — Rates vary from 8% to 15% and are payable by manufacturers upon the sale of goods to another manufacturer, wholesaler or retailer at a rate depending on the product's tax code. — The taxpayer may obtain a tax credit to be set off against sales of products.
PIS (see above) on imports	<ul style="list-style-type: none"> — Generally levied at a flat rate of 1.65% and under the actual profit regime, the taxpayer may obtain a tax credit to be set off against sales of products.
COFINS (see above) on imports	<ul style="list-style-type: none"> — Charged on the import of goods and payment of services provided by non-residents, generally at a rate of 7.6%. — Under the actual profit regime, the taxpayer may obtain a tax credit to be set off against sales of products.
Withholding income tax	<ul style="list-style-type: none"> — Charged on interest on loans (generally at 15%), lease payments (generally at 15%), royalties (generally at 15%), payments for technical and administrative services (generally at 15%) and other service payments (generally at 25%) made to offshore non-residents and subject to reductions established by tax treaties between Brazil and the jurisdiction of the recipient.

State valued added tax ('ICMS')

ICMS is collected by each of the Brazilian states on the sale, supply or transportation of goods and certain services, as well as on imports. Rates vary between 12% and 25% depending on the state and the relevant taxable activity (sale, supply or transportation). The taxpayer may obtain a tax credit to be offset against sales of products.

Municipal service tax ('ISS')

ISS is charged on certain services, including engineering, construction and well drilling. The full list of applicable services is attached as an exhibit to Law No. 116/2003 and the applicable rates, not exceeding 5% for each service, are determined by each municipality. Companies engaged in various activities, including oil drilling, are taxed in the municipality where the activity occurs.

4. Administrators of Brazilian private limited companies (Limitadas)

Appointment and Dismissal

The most usual way to appoint an administrator (the officer of a *limitada*, akin to a director) is by the articles of association (in Portuguese, *contrato social*) which, together with any amendments, must be registered with the Company Registry (*Junta Comercial*) in the state of incorporation. Quota-holder approval is required to do this, with the level of approval depending on whether or not the administrator is also a quota-holder.⁵ Dismissal of an administrator is a similar process requiring an amendment to the articles of association and quota-holder approval.⁶

Prerequisites

A *limitada* shall have at least one administrator; there is no maximum number. Administrators must be individuals who reside permanently in Brazil: neither foreigners with temporary visas nor corporate entities are permitted. These individuals must be at least 18 years old, and not prevented from exercising their duties if convicted of certain criminal offences.

Liability

Administrators are personally liable for any of their actions carried out on behalf of the company which: are contrary to the decisions of the quota-holders;⁷ are contrary to, or exceed, the corporate purposes of the company; exceed their powers as administrator; are illegal; or constitute fraud. The company may indemnify the administrator against liability to the company or third parties, except where such liability arises through a breach of Brazilian law.

Powers

The administrators' powers are set out in the articles of association which may establish routine actions that can be performed by one administrator individually, and provide that certain strategic actions are subject to joint representation (co-signature) with another administrator or require prior approval by the majority of the quota-holders.

5. Shareholder liability

The liability of the quota-holders of a *limitada* is limited to the amount invested in the company (or the amount invested plus the unpaid portion of the corporate capital); except for situations involving the following, when the corporate veil may be pierced:

- fraud;
- infringement of the law (which may include non-payment of taxes)⁸ or the company's articles association/by-laws; or
- bankruptcy due to poor management (applicable only to cases involving consumer and labour rights).⁹

The liability of the shareholders of a SA (a Brazilian corporation: see page 8) is limited in the same way as for quota-holders of a *limitada*, although the corporate veil will only be pierced (in the situations referred to above) if it is also proved that the shareholder in question actually agreed to or determined the actions of the managers in question. The Brazilian corporation therefore offers greater protection to shareholders from being held personally liable than a *limitada*. This advantage may be reduced, however, if the articles require certain actions to be subject to shareholder approval and that approval is given.

⁵The appointment of a director who is also a quotaholder is subject to approval by a simple majority of quotaholders. The appointment of a director who is not a quotaholder is subject to unanimous approval (if the quota capital has not been fully paid by the quotaholders), or to approval by 2/3 of the quota capital (if the quota capital has been fully paid by quotaholders).

⁶For the dismissal of the quotaholding Administrator, the required quorum is 2/3 of the total quota capital if the articles of association is silent, or such other quorum established by the articles of association, subject to a minimum quorum of 50% of the quota capital plus 1 quota. Dismissal of a non-quotaholding Administrator is subject to approval by a simple majority (i.e. 50% of the quota capital plus 1 quota).

⁷This is not restricted to formal shareholder resolutions but is widely interpreted.

⁸There is considerable debate concerning the extent to which a 'breach of law' will allow the piercing of the corporate veil and it is clear that not every failure to pay correct taxes amounts to a 'breach of law' in this sense.

⁹When employment-related payments or indemnification are awarded by Brazilian labour courts.



6. Employment law

Brazil is a heavily unionised country and the employment laws are very rigid and formalistic. There is a culture of employees suing their employers and labour courts tend to be protective of employees. This is therefore an area where companies need to proceed with caution and ensure they are well advised. In particular, care needs to be taken in dismissing employees.¹⁰

The basic rules governing the relationships between employees and employers are set out in the Brazilian Consolidated Labour Laws (*Consolidação das Leis do Trabalho* or **CLT**), and in the social security statutes, jurisprudence, collective bargaining agreements and agreements developed by the International Labour Organization.

Although written employment contracts are not always required, it is sensible to use them whenever feasible, since the burden of proof regarding the terms of employment is usually placed upon the employer. Furthermore, although the vast majority of employment contracts are standard form, bespoke contracts are recommended for more senior staff or to deal with probation periods, overtime compensation, confidentiality, non-competition, bonuses and fringe benefits.

Employment agreements are generally for an indefinite term,¹¹ but employees may be hired for up to two probationary periods, totalling a maximum of ninety days, provided that such term is agreed in writing in the employment contract. At the end of the ninety-day term, the employment automatically becomes indefinite unless terminated by either party.

Requirement to employ Brazilian staff

The CLT states that the employment of foreigners by a Brazilian company is limited:

- to no more than a third of the total number of employees in the company; and
- to no more than a third of the total payroll.¹²

¹⁰The employee has the right not to be dismissed 'without cause': the CLT lists the reasons 'with cause' which permit dismissal. Where an employee is dismissed without cause, the company is fined an amount equivalent to 50% of all deposits made to the relevant employee's Severance Indemnity Fund (FGTS), of which 80% (40% of the deposits) is withdrawn by the employee, with the remainder going to the government. This can amount to a hefty fine if the employee has worked for the company for a long time.

¹¹Fixed term employment contracts are rare and allowed only in certain circumstances.

¹²For the purposes of this rule, foreigners who have lived in Brazil for more than 10 years and who are either married to a Brazilian or have a Brazilian child are considered to be Brazilian, as are all Portuguese nationals.

Summary of Key Mandatory Minimum Employment Terms

Monthly salary	Minimum monthly salary payable. ¹³ For 2018 this is set at BRL 954.00. This gets reviewed upwards each year. Different minimum salaries may apply depending on the function or profession and the state in which the employee works.
Christmas bonus	This is equal to an additional month's salary but is reduced in proportion to the months worked during the year (including vacations). ¹⁴
Holiday pay	In addition to the normal monthly salary, an additional third of the employee's monthly remuneration is paid for any holiday period.
FGTS contribution	The employer must deposit 8% of the employee's monthly salary (including any additional remuneration and certain benefits) ¹⁵ to the employee in a Severance Fund Account, kept with the Caixa Economica Federal, a Brazilian state bank.
Social security (INSS) contribution	This is equivalent to approximately 25% of the monthly salary (including Christmas bonus and holiday pay) and must be paid to the relevant Brazilian authorities.
Daily working hours	Maximum of 8 hours.
Weekly working hours	Maximum of 44 hours. ¹⁶
Overtime	Additional income is payable if an employee works extra hours (more than 8 hours per day or 44 hours per week). For each additional hour that an employee works, the Employer is required to pay an additional 50% of the employee's ordinary hourly wage.
Holiday entitlement	Vacations can be taken in 3 periods. One of the periods must be for at least 14 consecutive days and the other two must be for at least 5 consecutive days each. The employee is entitled to sell 1/3 of his entitlement back to the company for payment equal to the remuneration he receives for such days. ¹⁷
Maternity leave	120 days, ¹⁸ paid by the employer and reimbursed by the Social Security Body. Additionally, the employee is entitled to remain in employment for at least 5 months commencing on the birth date. ¹⁹
Paternity Leave	5 days, paid by the employer and commencing from the date on which the child is born
Other time off	Employees who are asked to work during an election day have the right to 2 days off work. Time is also allowed off for the death of a spouse or relative (2 days) or marriage (3 days). There are also a large number of public holidays, which can vary depending on the city.
Strike	Employees have the right to go on strike in order to renegotiate their working conditions with the employer.
Dismissal notice	30 days' prior notice or payment in lieu of notice. ²⁰

¹³There is a prohibition on reducing the salary, unless permitted by union collective bargaining or convention.

¹⁴In the event the employee has been granted a salary increase, the Christmas bonus is calculated as if they had gained the increase at the start of the year.

¹⁵Such as overtime, Christmas bonus and holiday pay. Some benefits are included in this calculation while others are not.

¹⁶There is also a requirement to have at least one day off per week (which is typically at the weekend).

¹⁷Note: Decreto-lei 1.535 de 13/04/1977.

¹⁸Certain unions have established 180 days of leave.

¹⁹This is known as the stability period. Union collective bargaining or conventions can extend this period.

²⁰This is heavily regulated and accountants usually calculate the termination payment. If the employer is the terminating party and opts not to make a payment in lieu of notice (often referred to as indemnifying the employee), the employee may opt between working for a 30-day notice period with reduced hours or a 23-day notice period working full time.

7. Visas

There are many different categories of visas that can be issued to foreigners, but from our experience, the most important visas for international companies are those set out below. Where a temporary visa is required, the individual will have to register with the Federal Police shortly after arrival in Brazil and apply for a National Migration Registration number (RNM).²¹

Visitor Visa

Visa type	Investment required?	Comments
Business Visa	No	<ul style="list-style-type: none"> — Restrictive in terms of the activities that can be undertaken. Suitable for business trips and short stays in the offices of a client or the Brazil office of an international group. Allowed business includes attending meetings, fairs, corporate events, signature of contracts, business development and others. — The individual cannot be remunerated from within Brazil or enter into a contract with a Brazilian company or organisation to provide services. However, receipt of daily fee, travel expenses, and other costs or expenses is allowed. — Allows entry to Brazil for 90 days, renewable for a further 90 days.

Temporary Visas

Visa type	Investment required?	Comments
Technical Assistance Services	No	<ul style="list-style-type: none"> — Work permit for a foreign technical professional who is not employed by a Brazilian firm, to perform technical assistance services in Brazil under a contract, cooperation agreement and/or technology transfer agreement, as applicable, between a foreign and a Brazilian entity. Not suitable for administrative, financial or management functions. — Better to request at the Brazilian Consulate rather than in Brazil (faster and less bureaucratic). — Valid for up to one year. The visa can be renewed for another year, subject to detailed justification for the need to continue the services without an employment relationship established in Brazil. — Suitable for engineers and project managers who need to work in Brazil on a temporary, medium term basis to service a client.
Technology Transfer Services	No	<ul style="list-style-type: none"> — Work permit for a foreign professional who is not employed by a Brazilian firm and who enters the country in order to work under a technology transfer contract. — A simplified training plan must be submitted, specifying the professional qualifications of the foreign professional, scope of training, number of Brazilian individuals to be trained, place of training, estimated duration and anticipated results. — Valid for up to one year and renewable for a further one year (i.e. a maximum of two years), subject to detailed justification for the need to continue the services without an employment relationship established in Brazil. — Suitable for engineers and project managers who need to work in Brazil on a temporary, medium term basis to service a client.

²¹It may also be worth applying for a Tax Registration Number (CPF) with the federal tax authority (Receita Federal) since a CPF is essential in Brazil for many activities, such as opening bank accounts and buying property.

Temporary Visas

Visa type	Investment required?	Comments
Work Visa – Local Labour Contract	No	<ul style="list-style-type: none"> — Work visa for a foreign professional who is to be employed by a Brazilian firm. — Valid for up to two years. Can be renewed under specific circumstances not yet defined by the Brazilian government. — Possible to convert to a permanent visa by application to the Ministry of Justice, provided that the foreigner has been carrying out the same activity in Brazil for a period of two years and the application is made at least thirty days prior to the expiry of the visa. — Proof of qualifications and professional experience is required. The Brazilian firm applying for the visa will arrange this by getting declarations, diplomas and certificates from the institutions and companies where the foreign national studied and/or worked. — Normal employment tax and social security contributions payable by Brazilian company. — Suitable for longer term projects with a Brazilian company or where there is the intention to apply for a permanent visa.
Director or Administrator Visa	BRL 600,000 or BRL 150,000	<ul style="list-style-type: none"> — The foreign national must be appointed as an administrator, manager, director or executive with management powers, of a new or existing Brazilian company, with potential to generate jobs or income, which must show that the equivalent of at least the following amounts in foreign currency have been invested into it as share capital, by a foreign company or person that is not the applicant: <ul style="list-style-type: none"> • BRL 600,000 per administrator, manager, director or executive, or • BRL 150,000 per administrator, manager, director or executive, and the commitment to generate 10 new employment positions within two years after the incorporation of the Brazilian company, or after the admission of the administrator, manager, director or executive. — This is permanent provided that the foreign national remains a director/administrator. — Suitable for senior positions such as country managers and managers of the Brazil office or subsidiary of an international group. — The visa is tied to the company that makes the visa application. Accordingly, for groups of companies, it is sensible that the holding company makes the application so that the individual can work for various companies in the group without needing to seek further authorisation.
Investor Visa	BRL 500,000	<ul style="list-style-type: none"> — The foreign national must show that he or she has invested the equivalent of at least BRL 500,000 in foreign currency as share capital into a new or existing Brazilian company. — Alternatively, the temporary visa may be granted for investments of less than BRL 500,000, but not inferior to BRL 150,000, if the project in Brazil has the purpose of innovation, or involves scientific or technologic basic or applied research, and complies with one of the conditions determined by the Government. — In all cases, it is necessary to prepare an investment plan for a 3 year period, demonstrating that it is in the social interest of Brazil for the investment to be made with this being characterised by the creation of jobs and income in Brazil, the increase of productivity, the assimilation of technology, and the investment of resources into specific industry sectors. — The visa remains valid until the investor exits from the company.
Family reunion	No	<ul style="list-style-type: none"> — Among others, a family reunion visa can be granted to persons married or in marital status to Brazilian nationals or to immigrants with a residency authorisation, or who have a Brazilian child or immigrant child with residency authorisation, or who are ascendant or descendant up to second degree to a Brazilian national or immigrant with a residency authorisation, or who have a Brazilian brother/sister or an immigrant brother/sister with residency authorisation who, if older than 18 years old, is economically dependent on them, or who have a Brazilian national under its care or guard. — Under a family reunion visa the foreign national will be authorised to stay in Brazil as long as the main visa holder.

8. Registration with the Regional Council of Engineering and Architecture (CREA)

Those carrying out construction or similar projects in Brazil will have to be aware of the registration requirements relating to CREA. The engineer legally in charge of a construction project in Brazil is called the *responsavel tecnico* ('RT'). The RT, whether Brazilian or foreign, must be registered with the local CREA for the relevant worksite. For foreigners, such registration requires a temporary or permanent work visa, as well as the validation of their graduate diploma by the local CREA. There is an additional cost involved in this, but if the documentation provided is acceptable to the relevant CREA, this can be obtained relatively quickly. In principle, if such registration is not obtained, the foreigner acting as RT, project manager or engineer on a construction project will be considered illegal.

In practice, however, not all expatriate project managers assume the role of RT, or project engineer, but appoint a local CREA-registered engineer for this purpose and supervise in consultation with the CREA-registered RT. As the RT will be ultimately responsible for the works, however, they will insist on retaining some control over the project.

If a foreigner is not to be engaged as an engineer or project manager (so as to avoid the requirement for CREA registration), it may be difficult to justify his application for a Technical Services Visa and would be necessary to consider alternative types of visa.

9. Compliance

Civil law

In an effort to improve the country's image in the international business community, align local laws with international treaties and to encourage foreign investment, Brazil's first comprehensive anti-bribery and corruption legislation applicable to corporate entities, The Clean Company Law Act (Law No. 12.846), was enacted in 2014. This new law contains the following offences for which corporate entities can now be liable:

- Active bribery - promising, offering or giving, directly or indirectly, any unjust advantage to a public official.
- Illegal sponsoring – financing, paying for or sponsoring any offences set out in the new law.
- Concealment – any activities to conceal any illegal activities or interests.
- Public procurement – bid rigging, impeding or frustrating a due administrative process, committing fraud in a bid submission or seeking to obtain any undue advantage.
- Obstructing investigations.

Sanctions include large financial penalties, unlimited corporate liability, confiscation of assets illegally obtained, barring from participating in public bids and in extreme cases, the courts can issue a winding-up order. The law applies in respect of offences committed by Brazilian corporate entities, irrespective of whether the offence is committed in Brazil or aboard, as well as any offences committed by foreign companies in Brazil.

The Criminal Code²²

This applies to individuals only and sanctions include imprisonment of up to 12 years and fines. Offences include active bribery, passive bribery (requesting or receiving bribes), active bribery in international business transactions and seeking to influence public officials (Brazilian or foreign).

Extra-territorial reach and importance of compliance procedures

While international companies may already be subject to the extra-territorial reach of the US Foreign Corrupt Practices Act 1977, UK Bribery Act 2010 and similar laws, the fact that Brazil has now introduced similar rules (including a leniency regime) highlights the importance of having suitable compliance procedures in place and ensuring that anti-bribery measures are being strictly implemented.

²²The Brazilian Congress is currently debating a new bill (PL n.236/2012) 'The New Brazilian Criminal Code' which, if passed, would criminalise private bribery.

10. Intellectual property

As one of the original signatories to the Paris Convention, Brazil has robust intellectual property protection, which is currently reflected in the Industrial Property Law of 1996. Generally viewed as being TRIPS²³ compliant, this law covers trademarks, geographical indications, patents, utility models and industrial designs.

Trademarks

While some 150,000 trademark applications are filed each year in Brazil, with the vast majority now being filed online, it must be remembered that the trademark system is not multi-class and Brazil does not adhere to the Madrid Protocol.²⁴ With a life span of ten years, renewable for successive ten year periods, trademark designs are classified in accordance with the Vienna Classification, and goods and services classified using the Nice Classification of Goods.

Patents

Patents are valid for 20 years from the date of filing and utility models for 15 years. Classification is made in accordance with the International Patent Classification (IPC) and it currently takes an average of eight years before a patent is granted. Much of the delay in granting patents is because ANVISA (the Brazilian Health Authority) must review any patents with a pharmaceutical process or product. Foreign patents can be filed through the Paris Convention or Patent Cooperation Treaty, to which Brazil is a signatory. Applications for patents are made with the Brazilian Patent and Trademark Office (INPI).²⁵

11. Recognition of foreign documents

In order for foreign public documents and documents signed outside Brazil to be recognised in Brazil, they need to be notarised and then legalised in the Brazilian Consulate of the relevant country.

With Brazil's accession to the Hague Apostille Convention on 14 August 2016, this process has been simplified for documents executed in other Hague Convention countries. Foreign documents executed in such countries will only be required to bear an 'apostille' stamped by a local notary public.

Software

Computer software is protected by the Software Law, 1998, which protects the rights and interests of software owners for a term of 50 years following creation and governs licensing agreements in this area. To benefit from this protection, the physical attributes of software need to be registered with the INPI.

Copyright and moral rights

While there is no single body before which copyright is registered, it is protected by the Copyright Law of 1998. The moral rights and economic rights of the author are protected and rules as to who can and cannot reproduce a work are set out. A copyrighted work enters the public domain 70 years after the death of the author, and the 1998 law is in line with the Berne Convention, to which Brazil is a signatory.

Registration of agreements with the INPI

Interestingly, the INPI also plays a role in recording certain types of agreements and licences and, as such, it is obligatory to record with the INPI contracts which license the use of trademarks or patents, franchise agreements, any agreements which transfer technology and those providing know-how. This is crucial to allowing royalties to be remitted abroad and so that certain tax deductions can be applied on these royalties.

²³The Agreement on Trade-Related Aspects of Intellectual Property Rights is an international agreement administered by the World Trade Organization.

²⁴While most of the world adopts this treaty, Brazil (along with most South American countries) does not. Under the treaty, by filing a single trademark application with the World Intellectual Property Organisation, one can then nominate it to be filed in as many countries around the world as adhere to the treaty, only paying each country's internal filing fee.

²⁵Since 2009 INPI has become a World Intellectual Property Organisation recognised International Searching and International Preliminary Examining Authority.



Cultural Aspects of doing Business in Brazil

Like any nationality, Brazilian culture has some particular characteristics, and business relationships can be smoother if time is taken to get acquainted with these before doing business here. With this in mind, set out below is a short overview of key things to be aware of:

Personal relationships

According to one international cultural expert, Brazil is *'the country that places the most importance on personal relationships.'* Consequently, Brazilians prefer face to face meetings and business networking tends to be a slower process than in some Northern European countries, as trust is built-up gradually. Marketing can therefore take a great deal of personal commitment, although once business relationships are formed they tend to be long term.

Less formality

Meetings are usually less formal than in Northern European countries or the US, and it is not uncommon to start meetings by talking about non-business matters. First names are also used more readily than in continental Europe. Although the dress code is generally quite relaxed, the safe approach is to dress in the same way as for meetings in Northern Europe or the US. Additionally, although Brazilians can be less punctual than Europeans, they will still generally expect Europeans to be on time.

Compliance with rules

A more flexible view on compliance with regulations is sometimes encountered. This may be due in part to the complexity and volume of local laws.²⁶ This reinforces the need to conduct thorough legal and financial due diligence before entering into commercial transactions, and sometimes requires foreign investors to be pragmatic and consider the relative risks and benefits of different approaches.

Language

International transactions are often conducted in English, although being able to speak Portuguese is certainly appreciated (and in certain circumstances essential). Those Brazilians used to dealing internationally will generally be able to speak good English, though this may not be true in smaller companies, or for all employees.

Timing

Things can take longer to do in Brazil, particularly when dealing with public and regulatory bodies, or registering documents and contracts before the various public notaries and commercial registries. There are also certain times of year when everything slows down, such as Carnival and Easter. The key here is to be both patient and persistent.

²⁶There is even a popular expression which illustrates this, *'para ingles ver'*, which translates to 'for the English to see', and which was coined during the auditing of British Railway companies in the 19th century to describe the process of making a business appear, on the surface, to look good.

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