Establishing a Direct or Indirect Presence in Brazil

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A Practice Note discussing how a foreign company can establish a business presence in Brazil. It outlines the key features of establishing a direct business presence, whether by incorporating a subsidiary or setting up a branch, or an indirect business presence, by appointing a local sales representative (agent) or a distributor.

As an alternative to incorporating a new subsidiary, acquiring an existing entity, or entering a new market through a joint venture, a foreign company can often enter a market through less expensive or formal methods, such as establishing a representative office or a branch in the new jurisdiction. Variations of these methods may exist among jurisdictions.

A foreign company may decide to participate in the Brazilian market without establishing a direct local presence by appointing a sales representative (agent), a distributor, or a franchisee. It may also establish a representative office, although the election of this option in Brazil requires the incorporation of a subsidiary or a branch.

The choice of business presence will usually depend on the amount of the investment that the foreign company is willing to make in Brazil. Costs savings are among the main drivers behind the election of sales representation and distribution activities in comparison to the incorporation of a local subsidiary.

The foreign company should also consider that by appointing a sales representative (agent) or distributor, it may lose direct control over the manner through which its products will be placed in the Brazilian market and, consequently, the resulting market penetration, which may have an impact on its future activities in the country.

The incorporation of a subsidiary would be the natural alternative if the foreign company desires to have a direct presence in Brazil, regardless of whether the activities to be performed are expected to generate income or not. In other words, even when the activities to be performed are not deemed to generate income in Brazil (for example, research into or observation of Brazil as a new potential market), the incorporation of a subsidiary would be recommendable for a direct local presence.

It is also possible to establish a branch of the foreign company in Brazil, although foreign companies often opt to establish a subsidiary instead because the formation of a branch requires authorization through a presidential decree and is more costly and time-consuming.

This Note describes the options available for a foreign company wanting to establish a business presence in Brazil, focusing particularly on establishing a subsidiary or a branch and how each operates.

Unless otherwise stated, a reference in this Note to:

- Civil Code means Law No. 10,406/2002, as amended, the Brazilian Civil Code (*Código Civil Brasileiro*).
- Corporations Law means Law No. 6,404/1976, as amended, the Brazilian Corporations Law (*Lei das Sociedades por Ações*).

Establishing a Presence in Brazil

A foreign company has various options for establishing a business presence in Brazil. It can:

- Set up a representative office (see Representative Office (Escritório de Representação)).
- Incorporate (or acquire) a subsidiary company in Brazil (see Subsidiary).
- Set up a branch (see Branch (Filial)).
- Appoint an agent, a distributor, or a franchisee (see Agent, Distributor, or Franchisee).
- Cooperate with a local partner and set up a joint venture (see Joint Venture).

To better understand the reasons a foreign company might opt to establish a subsidiary versus a branch, see Key Differences Between a Subsidiary and a Branch.

Representative Office (Escritório de Representação)

Foreign companies generally consider setting up a representative office in a new jurisdiction when their activities are deemed not to generate any income. In some jurisdictions, it is possible for a foreign company to employ an individual (or several individuals) to carry out prospecting, marketing, and advertising activities without formally establishing a local legal entity.

In Brazil, however, setting up a representative office (*Escritório de Representação*) requires the incorporation of a subsidiary or establishment of a branch, since the typical structure of an unincorporated representative office does not exist in the Brazilian legal frame.

It is quite common for foreign banks that do not have a local subsidiary or branch to establish a representative office in Brazil. However, doing so requires the submission of a formal request to the Central Bank of Brazil (*Banco Central do Brasil*). This representation may also be performed by a company or individual residing in Brazil.

Setting up a representative office in this case is usually intended to allow the foreign bank to better know the local market and decide whether it would be convenient to establish a local bank in the country. In no event may the representative office act as a bank or undertake banking business in Brazil.

Subsidiary

Brazilian law provides for several types of entities, the most common of which are:

- **A *Sociedade Limitada* (Ltda.).** An Ltda. is a limited liability company that is closest conceptually to a UK private limited company, a US limited liability company and other types of European private limited companies. For more information, see Limited Liability Companies.
- **A *Sociedade Anônima* (S.A.).** An S.A. is a limited liability stock corporation that is closest conceptually to a UK public limited company or a US corporation. For more information, see Corporations.

Other types of entities, such as general partnerships (*Sociedades em Nome Coletivos* (SNCs)) and limited partnerships (*Sociedades em Comandita Simples* (SCSs)), have found practically no acceptance in Brazil, and would not be recommended for use as subsidiary trading vehicles by foreign investors.

The choice of entity type will depend on a several factors, such as:

- Intended ownership structure.
- Legal flexibility.
- Levels of corporate governance.
- Cost.
- Confidentiality concerns.

Limited liability companies and corporations in Brazil are afforded the same treatment under applicable local tax laws. However, the tax jurisdiction of the foreign investor may treat the local subsidiary's profits and losses differently depending on the entity type.

Limited Liability Companies

A *Sociedade Limitada* (Ltda.) is the most common type of business entity used by foreign investors establishing a presence in Brazil through a local subsidiary, especially when a sole owner will own its capital.

An Ltda. has a contractual nature, which subsists between one or more persons or entities residing in Brazil or abroad and having a sole class of shareholder or "quotaholder." Since the enactment of Law No. 13,874/2019, it is possible to incorporate a single shareholder limited liability company in Brazil as a *Sociedade Limitada Unipessoal* (SLU). An SLU is an Ltda., but with just one shareholder, and therefore is subject to the same legal framework as an Ltda.

Any shareholder not residing in Brazil must appoint a Brazilian resident individual as its attorney-in-fact with powers to receive service of process in connection with company matters. Foreign shareholders are also required to register with the Brazilian Federal Revenue Office (*Receita Federal do Brasil* (RFB)) (see Registration with the Federal Revenue Office) and the Central Bank of Brazil.

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

As a rule, limited liability companies are not adequate for joint venture enterprises in Brazil since certain fundamental matters require approval from shareholders representing at least 75% of the capital.

Additionally, an Ltda. is not required to publish its financial statements, which may be an advantage for foreign investors in terms of costs savings and confidentiality. Notwithstanding, as of April 2015, limited liability companies incorporated under the State of São Paulo and falling into the definition of "large company" are obligated to publish their financial statements. The issue though has generated many debates and is still controversial. A large company is defined as a company or group of companies under the same control which has had, in the previous fiscal year, either:

- Total assets exceeding BRL240 million.
- Annual gross revenues exceeding BRL300 million.

Formation and Organization

An Ltda. is formed by filing its Articles of Incorporation with the appropriate state office in the state in which it is to be domiciled.

The Articles of Incorporation must be drafted and executed in Portuguese and include, among other provisions:

- The company name, which must include a reference to the main activity to be engaged in by the company and the expression "*Limitada*" or "Ltda."
- The address of the principal place of business.
- The purpose of the Ltda.
- The capital amount, payment terms, and apportionment among the shareholders.
- The management structure.
- Routine governance matters.

Capitalization

The capital of limited liability companies is divided into quotas that represent the sum of money or assets transferred by the shareholders for the company's formation. Any assets that can be monetarily appraised in value may be used for payment of the quotas representing the capital of limited liability companies. The ownership of quotas is evidenced by the Articles of Incorporation, as amended from time to time, and there is no issuance of certificates of ownership.

There is no minimum capital requirement for an Ltda. Exceptions may apply if the shareholders intend to appoint an expatriate individual to act as the local manager of the Ltda., or if the company will engage in import and export transactions, in which case a level of capital compatible with those activities may be required on a case-by-case basis.

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

The Civil Code allows the capital to be reduced in case the company has:

- Registered losses.
- Excessive capital vis-à-vis its purposes and operations.

In the latter case, the capital reduction resolution will only become valid and effective if there is no opposition of creditors within 90 days counted from the date on which the resolution is published in the press.

Management

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

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

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

Should the shareholders seek to appoint an expatriate Officer, the Ltda. must apply for a permanent visa. For that purpose, the company must have a minimum of BRL600,000 duly registered with the Central Bank of Brazil as capital investment. The investment requirement will be reduced to BRL150,000 if the Ltda. undertakes to create ten employment positions within two years of the issuance of the permanent visa by the Brazilian Immigration Authorities.

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

Distributions to Shareholders

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

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

As an alternative to the payment of profits, limited liability companies may pay interest on equity to its shareholders, subject to limitations under the Brazilian tax laws (that is, interest based on long-term interest rate – TJLP and existence of twice the amount of current or accumulated profits). Payments of interest on equity are subject to the levy of withholding income tax at the rate of 15% (or 25% if the foreign shareholder is resident in a tax haven jurisdiction).

Notwithstanding, the overall taxation may be lower in certain circumstances since those payments are deductible for purposes of corporate income tax and social contribution on net profits.

Corporations

A *Sociedade Anônima* (S.A.) is regulated by the Corporations Law, which is a detailed legal framework and allows for more sophisticated corporate governance structures, enhanced financing flexibility, and transparency in comparison to limited liability companies. Consequently, they are best designed for joint ventures and business arrangements that are more complex.

An S.A. is formed between two or more persons or entities residing in Brazil or abroad. The capital of an S.A. is divided into shares and the liability of the shareholders is limited to the issuance price of the subscribed shares. As they must be for profit, the primary purpose of corporations is to earn profits for subsequent distribution through dividends to their shareholders.

Like limited liability companies, any shareholder of an S.A. not residing in Brazil must appoint a Brazil resident individual as its attorney-in-fact with powers to receive service of process in connection with company matters. Foreign shareholders are also required to register with the RFB (see Registration with the Federal Revenue Office) and the Central Bank of Brazil.

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

Corporations are required to publish their corporate documents and annual financial statements in a newspaper of wide circulation in the location where the S.A.'s headquarters is located, in summary form and with simultaneous disclosure of the entirety of the documents on the page of the same newspaper on the internet, which must provide digital certification of the authenticity of the documents by an accredited certification authority (Law No. 13,818/2019).

Formation and Organization

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

A public subscription requires the prior registration of the share issuance with the Brazilian Securities and Exchange Commission (*Comissao de Valores Mobiliarios* (CVM)) and the distribution of the shares for subscription must be intermediated by a financial institution. Upon subscription of all shares, the founding shareholders must call a General Shareholders' Meeting to deliberate on the formation of the company.

A private subscription requires the approval from all shareholders in the context of a General Shareholders' Meeting or the execution of the public deed of incorporation of the company.

The by-laws of the company must be drafted and executed in Portuguese, and include, among other provisions:

- The company name, which must include a reference to the main activity to be engaged in by the company, and the expression "*Companhia*," "*Sociedade Anônima*," or "S.A."
- The address of the principal place of business.
- The purpose of the S.A.
- The capital amount, payment terms, and apportionment among the shareholders.
- The number and classes of shares, if applicable, and correspondent rights and obligations.
- The management structure.
- The required shareholders' meetings.
- Routine governance matters.

A corporation will be deemed formed by the filing of its by-laws (and further incorporation documents) before the Board of Trade (*Junta Comercial*) of the state in which the corporation is to be established, and their publication in the Official Gazette and another newspaper of wide circulation in the place where the company will have its principal place of business.

S.A.s are required to open and maintain certain corporate books, such as:

- A Share Registry Book (*Livro de Registro de Ações Nominativas*).
- A Share Transfer Book (*Livro de Transferência de Ações Nominativas*).
- A Book of Minutes of the General Shareholders' Meetings.
- A Book of Shareholders' Attendance.
- A Book of Minutes of Meetings of the Board of Directors.

Capitalization

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

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

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

There are no physical stock certificates. Shares ownership is evidenced upon recordation under the Share Registry Book or, if applicable, by the statement issued by the financial institution acting as depositary agent.

In addition to the shares, an S.A. may issue other securities to investors to raise additional capital, such as:

- Debentures.
- Beneficiary parts (for privately held corporations only).
- Subscription rights.

There is no minimum capital requirement for an S.A. Exceptions may apply if the shareholders intend to appoint an expatriate individual to act as the local officer of the corporation, or if the company will engage in import and export transactions, in which case a level of capital compatible with those activities may be required on a case-by-case basis.

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

The Corporations Law allows the capital to be reduced if the company has:

- Registered losses (up to the total amount of the accumulated losses).
- Excessive capital vis-à-vis its purposes and operations.

In the latter case, the resolution will only become valid and effective if there is no opposition of creditors within 60 days counted from the date on which the resolution was passed by the General Shareholders' Meeting.

Governance and Management

An S.A. has the following governing bodies:

- General Shareholders' Meeting (*Assembleia Geral*).
- Board of Directors (*Conselho de Administração*).
- Board of Officers (*Diretoria*).

- Audit Committee (*Conselho Fiscal*).

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

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

The Board of Officers is charged with the legal representation of the corporation. It must be comprised of at least two individuals residing in Brazil or abroad, appointed by the Board of Directors or the General Shareholders' Meeting, as applicable, for a term not exceeding three years, re-election being permitted.

The duties of the Audit Committee, when in operation, include:

- The supervision of the acts performed by the officers and directors.
- The review of their accounts and reports.
- The issuance of opinions on any proposals related to capital increases or issuance of securities.
- Generally ensuring compliance with the law and by-laws.

The Audit Committee may operate under a permanent or temporary basis or whenever requested by the shareholders. It must have three to five members residing in Brazil and an equal number of substitutes (shareholders or not) who must be elected by a General Shareholders' Meeting.

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

Distributions to Shareholders

Shareholders of an S.A. are entitled to a compulsory dividend in accordance with the provisions of the by-laws, subject only to the sufficiency of profits. If the by-laws are silent, shareholders are entitled to 50% of the net profits. If any shareholder is not a Brazil resident, dividends at the commercial exchange rate are subject to prior registration with the Central Bank of Brazil. Dividend distributions are not subject to income tax.

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

Shareholders of an S.A. are generally shielded from personal liability for the obligations of the corporation. Generally, a shareholder's liability for the debts and obligations of the corporation is limited to the amount the shareholder has paid for its shares.

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

Registration with the Federal Revenue Office

All non-Brazil resident companies and individuals holding equity interest in Brazilian companies are required to register with the RFB, for obtainment of a CNPJ/ME (Corporate Taxpayer Register of the Ministry of Economy) number and a CPF/ME (Individual Taxpayer Register of the Ministry of Economy) number, respectively.

This same requirement applies to non-Brazil resident companies and individuals holding assets and rights subject to public registration in Brazil, such as real estate, vehicles, vessels, aircraft, bank accounts, investments in the financial market, investments in the capital market, and other activities set forth and governed by the rules issued by the RFB.

Brazilian regulations also require domestic and foreign companies registered with the CNPJ/ME to identify their ultimate beneficial owners and report that information to the RFB within a period of 90 days following the date of their enrollment, extendable for an additional 90-day period.

The ultimate beneficial owner is defined as the individual who ultimately, directly or indirectly, possesses, controls or significantly influences a company, or on whose behalf a transaction is conducted. Local regulations define "significant influence" as directly or indirectly holding more than 25% of the company's capital or directly or indirectly holding control in shareholders' resolutions and the power to elect most board members. The RFB must also be informed in case the entity does not have an ultimate beneficial owner.

Despite the disclosure requirement, currently there is no ultimate beneficial owner register in Brazil.

Branch (Filial)

The process of establishing a branch of a foreign company in Brazil requires authorization through a presidential decree and, for a long time, has been a costly and time-consuming process.

There have been recent legislative efforts aimed at simplifying the process, such as possibly submitting the request to operate in Brazil online through the website of the Federal Government.

The request to establish a branch should include the following documents according to Normative Ruling No. 77, dated March 18, 2020, of the National Department of Business Registration and Integration (*Departamento Nacional de Registro Empresarial e Integração*) of the Ministry of Economy (DREI):

- A resolution approving the setup of the branch in Brazil, which must include the activities the foreign company intends to carry out in Brazil and the indication of the capital, in national currency, destined to its Brazilian operations.
- By-laws or Articles of Incorporation of the foreign company (in their entirety).
- A list of partners or shareholders, as well as of the members of all management bodies of the foreign company, with the names, professions, domiciles, and number of quotas or shares, except when compliance is not possible because of foreign legislation.
- Proof of existence of the foreign company in accordance with the laws of its jurisdiction.
- A resolution appointing a Brazilian resident as the foreign company's legal representative, together with the power of attorney that gives the representative powers to:
    - accept the conditions under which the authorization is given;

- deal with any issues and solve them in a definitive manner; and
- receive service of process in Brazil on behalf of the foreign company.

- The most recent balance sheet of the foreign company.

The foreign company will be able to operate in Brazil using its own corporate name, which may be added by the expressions "*do Brasil*" or "*para o Brasil*", and its local operations will be subject to the Brazilian laws and courts.

Once the authorization is issued, the foreign company must file additional documents with the appropriate state office in the state in which the branch will be domiciled, including the page of the Official Gazette of the Federal Government in which the presidential decree has been published, as well as the documents listed above.

The foreign company is also required to make public in Brazil the financial statements it is statutorily required to provide in its country of origin. This publication must be made in the Official Gazette of the Federal Government and of the State or Federal District, depending on the location where the branch is established, as well as another newspaper of wide circulation.

All changes to the foreign company's by-laws or Articles of Incorporation will only be effective in Brazil after the approval by the Federal Government, which must also be requested online through its website.

Approval is not required for the change of address or of the legal representative of the foreign company, provided it does not require a change to its by-laws or Articles of Incorporation.

All foreign documents to be filed in Brazil must be legalized (notarized and certified by the Brazilian Consulate General or apostilled, as applicable).

Key Differences Between a Subsidiary and a Branch

While the liability of a foreign company as the shareholder (or quotaholder) of a Brazilian subsidiary formed as an S.A. or Ltda., which can be incorporated with the foreign company as the sole shareholder, is limited, the liability of a foreign company for its Brazilian branch is in principle unlimited.

In other words, the foreign company is fully liable for all debts and obligations of its Brazilian branch.

Setting up and maintaining a branch requires more filing requirements than a subsidiary company.

Agent, Distributor, or Franchisee

A foreign company may consider appointing an agent, a distributor, or a franchisee in Brazil. In these cases, the foreign company does not have a legal presence in Brazil and most of the legal risks are borne by the agent, distributor, or franchisee.

Under Brazilian law, special rules apply to agents, distributors, and franchisees, which are outside the scope of this Note.

The activities of agents are governed by Law No. 4,886/1965, as amended by Law No. 8,420/1992, and the Civil Code. An important statutory provision to consider relates to the indemnification payable to the agent upon the termination of the agency agreement.

Distribution activities are not subject to a specific statute in Brazil but are affected by general provisions of the Civil Code relating to contracts, including a provision stating that an agreement without a definite term may only be terminated by a party if, taking into consideration the nature of the agreement and its duration, the other party has had enough time to recover its investments made in connection with the agreement.

Finally, since March 2020 franchise activities in Brazil have been governed by Law No. 13,996/2019.

Joint Venture

The foreign company may also consider cooperating with a local partner to set up a joint venture. The most common forms of joint ventures in Brazil are:

- Contractual joint ventures, such as a *consórcio*, which are contractual arrangements among two or more parties and do not involve the creation of a new legal entity. The *consórcio* agreement must comply with the requirements of the Corporations Law and should govern the joint venture.

  In a *consórcio*, each joint venture partner maintains its own legal personality, management, assets, and liabilities. A *consórcio* is usually intended for the carrying out of a single project with a fixed duration. Since a legal entity is not created in the context of *consórcios*, there is no need to go through a liquidation process at the end of the project.

- Corporate joint ventures, which do involve the creation of a new legal entity, usually a limited liability company or a corporation.

Details of forming or operating joint ventures in Brazil are outside the scope of this Note. For more information on joint ventures, see Country Q&A, Joint ventures in Brazil: overview.

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