

FCR Law



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Doing Business in Brazil: 6 Key Legal Points to Consider

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1. Types of Company

Foreign investors wishing to incorporate a company in Brazil generally choose between the *sociedade limitada* and the *sociedade anônima*. The main features of these types of company are detailed in the subsections below and in the comparative chart in Appendix 1.

I. The *Sociedade Limitada*

The *sociedade limitada* is the preferred type of company for most foreign investors because of its greater flexibility and simpler formalities. The corporate capital is divided into shares that can be held by foreign persons or entities, and the liability of each shareholder, vis-à-vis third parties, is limited to the value of the shares held.

The control of the company is exercised by the holders of $\frac{3}{4}$ of the corporate capital, but certain matters may be approved by the shareholders holding a majority of the corporate capital or a majority of those present at the shareholders' meeting.

While sweat equity is not allowed, in-kind contributions are possible if the value of the contributed property is approved by the shareholders.

Since 2019, it is possible for a *sociedade limitada* to have only one shareholder.

It should be noted, however, that the *sociedade limitada* is not an ideal instrument for attracting investments, because, *inter alia*, of (i) the rule that provides for joint and several liability of the shareholder for the payment of the corporate capital and (ii) the less favourable tax treatment regarding the taxation of goodwill in capital increase/fundraising operations.

II. The *Sociedade Anônima*

The ownership of a *sociedade anônima* is divided into shares and the liability of each shareholder vis-à-vis third parties is limited to the issue value of the shares held.

While sweat equity is not allowed, in-kind contributions are possible but require the prior evaluation of the property by three experts or by a specialized company.

There must be at least two shareholders.

General meetings may validly deliberate, on first call, with the presence of shareholders representing at least $\frac{1}{4}$ of the shares with voting rights and, on second call, with the number of shareholders present. As a rule, decisions are taken by an absolute majority of votes.

2. Representation of the Shareholders and Administration of the Company

Foreign shareholders of a Brazilian subsidiary (either an individual or a legal entity) must appoint a local representative with the necessary powers to represent them and to receive judicial acts. This legal representative does not have to be Brazilian. However, if the legal representative is a foreigner, he or she must reside in Brazil and be in possession of a visa.

Regardless of the type of company, the officers must necessarily be natural persons and do not need to be domiciled in Brazil.

However, if the officer resides abroad, she/he will also have to appoint a local representative with the above-mentioned powers for a period of at least 3 years from the date on which her/his mandate ends.

3. Taxation

The Brazilian tax system is relatively complex and the assistance of a specialist in the matter is strongly recommended from the outset of the project.

For example, regarding income tax, except for specific cases provided by law, any company may choose, at the beginning of each year, the tax regime applicable to its activity. This choice will have implications on several points, such as the amount of taxes paid and their basis.

There are two main tax regime options: *lucro presumido* (presumed profit) and *lucro real* (real profit).

***Lucro presumido* (presumed profit):** Under the presumed profit regime, taxes are levied on the company's monthly declared revenues pursuant to a profit margin "presumed" by law. Consequently, a company's actual costs and expenses do not reduce the taxable basis under this tax regime.

Depending on the company's activities, the "presumed margins" vary from 8% to 32%.

From a tax perspective, the presumed profit regime may be more tax efficient in the case of companies with high profit margins (e.g., higher margins than the ones set forth in the legislation).

The regime is eligible for companies with annual gross revenues of up to 78 million reais. Certain Brazilian companies, such as financial institutions, companies that generate profits, income or capital gains in foreign countries or companies subject to income tax benefits are not permitted to elect the presumed profit tax regime and are thus obliged to elect the real profit regime.

***Lucro real* (real profit):** Under the real profit regime, taxes are levied proportionally to the company's profit, calculated based on book results before taxes, adjusted by certain additions and deductions as set by the legislation.

Tax losses may be carried forward to the following years without time restrictions. Yet, losses from previous years may be deducted from the company's profits in any given year only up to a limit of 30% of the yearly profit.

Consequently, the real profit regime is more beneficial for companies operating with a loss or with lower profit margins. Oftentimes, international businesses setting up their Brazilian operations will in a first moment incur higher expenses and, therefore, elect to be taxed under the real profit regime.

4. Intellectual Property

It is strongly recommended to register the company's intellectual property with the National Institute of Industrial Property (INPI) in Brazil. The latter is competent for the registration of the following intellectual property rights: trademarks, patents, designs, geographical indications, and software.

The use of intellectual property rights by the Brazilian subsidiary may, if applicable, generate royalties for the parent company. A thorough tax analysis of the transaction would be advisable.

5. Reporting Requirements to the Brazilian Central Bank and Register of Beneficial Owners

Any Brazilian company that receives funds from abroad, either through a capital contribution or by means of a loan agreement, or that has a foreign shareholder, must systematically report those activities to the Brazilian Central Bank.

Brazilian companies are also required to register beneficial owners. According to Brazilian law, a beneficial owner is the natural person who, directly or indirectly, holds more than 25% of the corporate capital of the company or group of companies in question or has the power to make decisions in the company's deliberations and to appoint the majority of the company's officers.

Among the companies exempt from fulfilling this obligation are those whose shares are listed on the stock exchange, in Brazil or abroad.

6. Accounting

Brazilian companies are required to use the services of an accountant.

Brazil adopts IFRS (International Financial Reporting Standards), with some adaptations.

A simplified version of IFRS may be adopted by any Brazilian company, except in one of the following cases:

- A company whose total assets exceed R\$ 240,000,000.00 or whose annual gross income exceeds R\$ 300,000,000.00 or whose group of companies meets any of the above conditions;
- A listed company; or
- A company regulated by the Central Bank of Brazil, the Superintendence of Private Insurance or any regulatory body with regulatory authority (e.g., one of the many national agencies in Brazil: National Telecommunications Agency, National Health Surveillance Agency, etc.).

	<i>Sociedade limitada</i>	<i>Sociedade anônima</i>
Shareholders		
Minimum Number of Shareholders	The shares can be held by a single shareholder.	Requires at least 2 shareholders.
Liability	Limited to the issue value of the shares. The shareholders are however jointly and severally liable for the full payment of the corporate capital.	Limited to the value of the shares.
Control	Established when a partner holds at least $\frac{3}{4}$ of the corporate capital.	Established when a shareholder holds at least $\frac{1}{2} + 1$ of the issued ordinary shares. Control may also be established by other means, for example: based on the existence of a shareholders' agreement or absence of shareholders at general meetings.
Shareholders' Right to Withdraw	Without reason in companies with an indefinite duration or in case of modification of the statutes, merger, incorporation into another company.	In case of (i) creation of preferred shares or issuance of new preferred shares, without maintaining the proportion with the other classes of preferred shares issued; (ii) modification of the preferences, benefits and conditions of redemption or amortisation of one or more classes of preferred shares or creation of a new more favoured class; (iii) reduction of the mandatory dividend; (iv) merger or incorporation; (v) participation in a group of companies; (vi) change of corporate purpose; (vii) demerger; (viii) change of legal form; (ix) incorporation of shares, among others.

	<i>Sociedade limitada</i>	<i>Sociedade anônima</i>
Corporate Capital		
Types of Contribution	In cash or in kind. Sweat equity not accepted.	Likewise.
In-kind Contribution	The shareholders can evaluate the asset.	The evaluation of the assets must be carried out by three experts or by a specialized company.
Shares		
Possibility of Issuing Preferred Shares	<p>Yes, up to 50% of the total number of shares issued by the company.</p> <p>The voting rights of the preferred shares can be suppressed or limited, while the rights to receive dividends or the repayment of the capital in priority can be granted.</p>	Likewise.
Voting Rights	Voting rights are attributed to the shareholders according to their participation in the corporate capital.	Voting rights are attributed to shareholders according to their participation in the corporate capital, with some exceptions. Since 2021 it is possible to introduce multiple voting rights, under certain conditions.
Transfer	<p>Except if otherwise specified in the articles of association, the transfer of shares to third parties may be impeded by the shareholders representing ¼ of the corporate capital.</p> <p>In the event of a transfer of shares, the company's articles of association must be amended to reflect the transaction and filed with the Trade Board.</p>	<p>In principle, there are no restrictions on the transfer of shares.</p> <p>The shareholders may set out restrictions in the bylaws and/or in the shareholders' agreement, provided that these restrictions are sufficiently detailed and do not subject the shareholder to the discretion of the management bodies of the company or of the majority of the shareholders. The transaction is recorded on the transfer term in the company's share transfer book.</p>

	<i>Sociedade limitada</i>	<i>Sociedade anônima</i>
Management		
Officers	<p>Requires at least one officer, appointed by the shareholders or the board of directors.</p> <p>Legal entities may not be appointed as officer.</p>	Likewise.
Directors	<p>Optional.</p> <p>Legal entities may not be appointed as director.</p>	<p>Optional.</p> <p>Mandatory only for listed companies or companies with authorized capital.</p> <p>Legal entities may not be appointed as director.</p>
Tax Considerations		
Payments to Foreign Shareholders	<p>Dividends: tax-exempt in Brazil;</p> <p>Interest on equity (<i>juros sobre o capital próprio</i>): generally subject to a 15% withholding tax in Brazil.</p>	Likewise.
Taxation of Goodwill or of the Share Premium	Yes.	No.