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ESTABLISHING A BUSINESS ENTITY IN BRAZIL



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ESTABLISHING A BUSINESS ENTITY IN BRAZIL

***“Establishing a Business Entity in Brazil”***

Ms. Melissa Kanô
Partner
KLA Advogados – São Paulo

***“Establishing a Business Entity in Brazil”***

Ms. Patrícia Braga
Partner
KLA Advogados – São Paulo

The two most common forms of legal entities incorporated in Brazil are the limited liability company (“Limitada”) and the corporation (“S.A.”). These are considered the most attractive types of companies given that they are the only entity types which both have the following advantages in common: (i) the liability of the equity holders is generally limited to their equity interest (subject to certain specificities described below); (ii) either can be utilized for any type of business activity (e.g. services, industry, commerce etc.); and (iii) generally speaking, neither has any minimum capital requirements (and when required, is by virtue of their activities carried out and not associated with their particular corporate type).

1. Recent updates to Brazilian Corporate Laws.

In recent years, Brazilian corporate laws have undergone several changes with the aim to improve and modernize the country’s business environment.¹

¹ Within this framework, Law 13,874 enacted on September 20, 2019 (“Law of Economic Freedom”), Law 14,030 enacted on June 28, 2020, Supplementary Law 182 enacted on June 1, 2021 (“Startup’s Legal Framework”), Law 14,195 enacted on August 26, 2021 (“Law of Business Environment”), Law 14,382 enacted on June 27, 2022, Law 14,451, enacted on September 21,

Some of the notable changes are the following innovations:

- a Limitada can now be held by only one partner (individual or legal entity);
- digital and remote general meetings for both Limitada and S.A. are now governed by express legal provisions;
- introduction of plural vote for S.A.;
- non-residents may now be elected as officers/managers, provided they are represented by a Brazilian resident for the purpose of receiving service of process;
- no longer necessary to include a Limitada’s main activity in its name;
- possibility to appoint only one officer in a S.A. (similarly to a Limitada);
- replacement of corporate books by electronic corporate books;
- possibility to issue preferred quotas in Limitadas, without voting rights (although this matter is still under academic debate);
- extinction of the corporate type known as “Eireli”, a type of Limitada with one sole partner that became obsolete since all Limitadas are now allowed to be held by only one partner;
- simplification of S.A.’s publication procedures and requirements, enabling (i) closely held corporations with gross revenue of up to BRL 78,000,000.00 to publish their corporate acts and financial statements in electronic format on a digital platform maintained by the Federal

2022, along with some regulatory changes were put into operation by the Brazilian National Department of Companies’ Registration and Integration through its regulations (“DREI”).



Government and on their website, and (ii) other corporations to publish only a summary of their corporate documents and financial statements in a newspaper with wide circulation, as long as the documents are available on such newspaper website (the publication in the Official State Gazette is no longer necessary); and

- reduction of the minimum quorums applicable to amendments of Limitada's governing documents, which now requires the approval of partners holding more than 50% of the share capital, instead of the previous quorum of 75% of the share capital.

2. Limitada x S.A.: Summary of the most relevant characteristics and the basic differences.

The Limitada is governed by the provisions of the Brazilian Civil Code, law 10,406/02 (the "Civil Code"), as amended, and the S.A. is governed by the Corporation Law, law 6,404/76 (the "Corporation Law"), as amended. The Articles of Association of a Limitada may state that the company is subsidiarily governed by the Corporation Law, in which case the latter will apply whenever the Civil Code is silent on any aspect.

A S.A. may be either publicly or closely held. A publicly held S.A. must be registered with the Brazilian Securities and Exchange Commission ("CVM") for purposes of having its stocks traded in the Stock Exchange. A closely held S.A., as the name suggests, is a private entity, which does not issue shares to the public. For purposes of this article, only the characteristics of a closely held S.A. are to be considered.

Since the S.A. was conceived to be the type of entity aimed at more substantial ventures, it is subject to more rigorous regulation. Given its nature, the S.A. is less adaptable and suitable to customization and tend to be too bureaucratic

in some instances. However, it is important to acknowledge that the Startup's Legal Framework has reduced some of the burden and bureaucracy for closely held corporations with gross revenue of up to BRL 78,000,000.00, such as the requirement for publication of corporate acts.

By contrast, the principal strength of a Limitada lies in its flexibility and customization characteristics being subject to less regulation and bureaucracy compared to the S.A. It follows that the Limitada is by far the most popular type of corporate entity in Brazil. There are currently more than 4 million active Limitadas compared to the less than 200 thousand active S.A. And that this number does not take into account the 870 thousand Eirelis that will be converted into Limitadas pursuant to the recent enactment of the Law of Business Environment².

The tables below delineate and compare the most relevant characteristics and the basic differences between a Limitada and a S.A.

² Information available on DREI's website: <https://www.gov.br/empresas-e-negocios/pt-br/mapa-de-empresas/painel-mapa-de-empresas>

**COMPARATIVE CHART BETWEEN BRAZILIAN LIMITADAS AND S.A.****A. General Aspects**

In general, the main differences between a Limitada (with one or more partners) and a S.A. are the following:

	LIMITADA	S.A.
Holders/Owners	Holders of the Limitada are called partners/quotaholders (<i>sócios/quotistas</i>).	Holders of the S.A. are called shareholders/stockholders (<i>acionistas</i>).
Name	The Limitada may have any name followed by the wording "Ltda."	The company may have any name followed by the wording "S.A.".
Minimum Holders	One or more partners/quotaholders.	Minimum of two shareholders/stockholders.
Governing Documents	The Limitada is governed by the Articles of Association (" <i>Contrato Social</i> ").	The S.A. is governed by the By-laws (" <i>Estatuto Social</i> ").
Capital / Stock Quotas/Shares	Capital is divided into quotas, as stipulated in the Articles of Association. All quotas must have voting rights and an indicated par value. There may be preferred quotas but there is a debate whether they can exclude voting rights, as by law all quotas must have voting rights ³ .	Capital is divided into shares, which ownership is reflected in the company's corporate books, and may also be represented by certificates (although no longer common). There may be preferred shares with no or limited voting rights, and there may be shares with or without a par value.
Plural Vote	Not allowed.	A plural vote may be established in both publicly and closely held S.A., being a maximum of 10 votes per each share, with an initial term limited to 7 years. This initial term may be renewed for any time, provided that a minimum quorum is observed. Shareholders that do not agree with the deliberation for the adoption of plural vote are entitled to withdrawal from the company, upon receipt of the value of their shares.
Transfer of Interest	Articles of Association must be amended for the quotas to be transferred. Transfer of quotas to a third party may be opposed by partners representing more than ¼ of the capital stock, if not otherwise established in the Articles of Association.	Transfers of shares are registered in the company's corporate books. No need to amend the By-laws.

³ As of October 2021, pursuant to DREI's Normative Ruling No. 81, Limitadas may issue preferred quotas without voting rights, although the Civil Code stipulates otherwise.



	LIMITADA	S.A.
Securities	Limitada may not issue debentures, warrants, other securities or convertible bonds, but may issue commercial notes.	The S.A. may issue debentures, warrants and other convertible bonds (as may a closely held S.A., i.e., no need to be publicly held).
Minimum Capital	No minimum capital must be paid in at the time of formation of the Limitada.	10% of the subscribed capital must be paid in at the time of incorporation of the S.A.
Dividends	No minimum dividend payment required. Payment of dividends may be in proportion to the partners' equity interest or not.	A minimum dividend should be stipulated in the By-laws, except for closely held companies with total annual revenue of up to BRL 78,000,000.00 in which such minimum dividend may be established at any time. Payment of dividends must be in proportion to the shareholders' equity interest.
Management	At least 1 individual, without restrictions applicable to foreigners and/or non-residents. Non-residents of Brazil must be represented by a Brazilian resident for purposes of receiving service of process.	At least 1 individual, without restrictions applicable to foreigners and/or non-residents. Non-residents of Brazil must be represented by a Brazilian resident for purposes of receiving service of process.
Publication	No need to publish financial statements and corporate acts in newspapers, unless the Limitada is considered a "large size company" (refer to details below) ⁴ .	Publication of financial statements and corporate acts in newspapers is required, except for closely held companies with total annual revenue of up to BRL 78,000,000.00, in which case the relevant documentation may be made published in electronic format on a digital platform maintained by the Federal Government and in its own website.

B. Partners/Shareholders and Capital Stock

	LIMITADA	S.A.
Partners/ Shareholders	May be incorporated by 1 or more partners, individuals or legal entities, whether Brazilian or foreign. The foreign partners must be represented by a Brazilian resident and are required to obtain a taxpayer registration number. For the representation in meetings or assemblies, the Brazilian resident must either be one of the other partners or a lawyer.	Minimum of 2 shareholders required, whether individuals or legal entities, Brazilian or foreign. As for representation, foreign shareholders may be represented by another shareholder, an officer or a lawyer, all of whom to be residents in Brazil ⁵ .

⁴ There is a debate about whether Limitadas that are considered "large size companies" should be required to publish their financial statements. Currently, some Brazilian Boards of Commerce require such publication for large size Limitadas. Pursuant to Law No. 11.638, enacted on December 28, 2007, a company is qualified as large size whenever it has total assets greater than BRL 240,000,000.00 or annual gross revenue greater than BRL 300,000,000.00. In any case, such requirement may be challenged by the Limitadas, considering it has no legal basis.

⁵ Exceptionally, a S.A. may also have only one shareholder, in which case, however, must comply with certain requirements, such as being incorporated by public deed and having a Brazilian company as its sole shareholder, or being converted into a wholly-owned subsidiary through the acquisition of all its shares by a Brazilian company.



	LIMITADA	S.A.
Liability	Until the capital is not fully paid in, the liability of the partners is limited to the total amount of the capital. After the capital has been fully paid in, the liability of the partners is limited to their equity interest.	The liability of the shareholders will be limited to their equity interest, whether or not the company's capital is fully paid in.
New Partners/ Shareholders	The admission of a new partner may be opposed by partners representing more than ¼ of the capital stock, if not otherwise established in the Articles of Association. In addition, the Articles of Association or a partners' agreement may impose limitations and/or preference rights for the transfer and sale of quotas.	The By-laws or a shareholder's agreement may impose limitations and/or establish preference rights for the sale of shares.
Capital Contribution	May be paid in cash (in the national currency), credits or assets.	The same as with the Limitada, but the payment of capital through assets require a valuation of the assets and an appraisal report prepared by a specialized firm or 3 experts.
Capital Increase/ Preemptive Rights	Only possible if 100% of the capital is fully paid in. Partners have a preemptive right to subscribe to new quotas, pro-rata to their equity interest.	Only permitted after ¾ of the capital stock is paid in. Shareholders have a preemptive right to subscribe new shares, pro-rata to their equity interest.
Amendments to the governing documents	The following actions, among others, require the amendment of the Limitada's Articles of Association, subject to approval by partners that hold more than 50% of the share capital: <ul style="list-style-type: none"> • change of the corporate name, address, purposes or duration; • changes to the capital stock (increase or reduction) • changes to management provisions. 	The same as with the Limitada, but changes to the By-laws require approval of shareholders representing more than 50% of the total votes granted by virtue of voting stocks.



C. Management

	LIMITADA	S.A.
Structure	Minimum of 1 manager. Although optional, it is very uncommon to have Board of Directors in a Limitada.	Board of Officers with at least 1 member (mandatory). May also have a Board of Directors with at least 3 members.
Characteristics of Managers	Managers may be partners or non-partners and may be foreigners and/or non-residents (no nationality requirement). The foreign Manager must be represented by a Brazilian resident for purposes of receiving service of process and relevant power of attorney must be valid for 3 years following the date on which the Manager ceases to be a Manager of the Limitada.	Members of the Board of Officers and Board of Directors may be foreigners and/or non-residents (no nationality requirement). The foreign Officers/Directors must be represented by a Brazilian resident for purposes of receiving service of process and relevant power of attorney must be valid for 3 years following the date on which the Officer/Director ceases to be an Officer/Director of the S.A.
Board of Directors	There are no specific requirements for a Board of Directors in a Limitada and it is uncommon for it to have this type of board. If provided for in the Articles of Association, such a board may have a “consulting” function without management powers.	In general, not required, but if formed, the Board has a more “robust” purpose, with exclusive functions assigned by law such as general supervision, planning and powers to elect the members of the Board of Officers. Only one third of the members of the Board of Directors may simultaneously be members of the Board of Officers.
Reserved Matters	Certain reserved matters (such as spin-offs, mergers, liquidation, etc.) depend on the approval of the partners. Additional limitations to management’s authority may be adopted and incorporated into the Articles of Association.	Certain reserved matters (such as spin-offs, mergers, liquidation, etc.) must be submitted for consideration of and decision by the Board of Directors (if one exists) and the Shareholders Meeting. Additional limitations to management’s authority may be adopted and incorporated into the By-laws.
Election	Managers are always elected by the partners.	The members of the Board of Officers are elected by the Board of Directors (if one exists), or directly by the shareholders. The members of the Board of Directors are always elected by the shareholders.
Supervisory Board	Not mandatory. It may be provided for in the Articles of Association, in which case must comprise 3 or more members and their substitutes. Members may be partners or non-partners and must be Brazilian residents (no nationality requirement).	Mandatory, but the shareholders may decide at each Annual Shareholders Meeting whether it will be convened or not. When convened, the Supervisory Board must comprise 3 to 5 members, who may or not be shareholders, cannot be an officer nor a director, and must be Brazilian residents (no nationality requirement).



D. Other Characteristics

	LIMITADA	S.A.
Partners'/ Shareholders' Meetings Quorum	<p>The most important decisions require the approval of partners holding more than 50% of the share capital (for instance amendments to the Articles of Association, capital contributions, changing the corporate purposes, amalgamation, merger, dissolution, or termination or liquidation of the company). Other decisions, such as approval of the financial statements, may be approved by a majority vote.</p> <p>The articles of association and partners agreement may require super majority decisions.</p>	<p>Decisions taken by majority vote.</p> <p>The By-laws and shareholders agreement may require super majority decisions.</p>
Meetings' Calls	<p>The Articles of Association may establish its own procedure to convene the partners' meetings, except if the company has more than 10 partners, in which case the call notices must be published 3 times 8 days in advance for the first call, and 5 days in the event of a second call. The requirement for a meetings' call may be waived if all partners attend the meeting.</p>	<p>Call notices for shareholder meetings must be published 3 times 8 days in advance for the first call, and 5 days in the event of a second call. The requirement for a meetings' call may be waived if all shareholders attend the meeting.</p>
Publishing Requirements	<p>In the interim, the need to publish financial statements is under discussion. There is ongoing debate whether Limitadas, which are considered "large size companies", should be required to publish their financial statements. "Large size companies", in terms of its legal definition, is a company or group of companies under common control that held, in the previous fiscal year, total assets exceeding BRL 240,000,000.00 or annual gross revenues exceeding BRL 300,000,000.00. A Limitada that does not meet these criteria, is not required to publish the financial statements.</p> <p>Minutes of partners' meetings or the articles of association are not published, except in specific cases such as in the event of mergers, spin-offs, capital reductions and conversion into another corporate type.</p>	<p>Financial statements and corporate acts must be published in a newspaper with wide circulation.</p> <p>A closely held S.A. with a total annual revenue of up to BRL 78,000,000.00 can publish its financial statements and other documents in relation to the company's administration in electronic format on a digital platform maintained by the Federal Government and in its own website.</p>
Audited Financial Statements	<p>Only required for "large size companies", as defined above.</p>	<p>Only required for (i) publicly held, and (ii) "large size companies" as defined above.</p>



3. Necessary Information

The formation documents of Brazilian entities must contain the following information:

- (a) Partners/Shareholders. Name and identification of the partners/shareholders. Foreign partners/shareholders need to obtain a taxpayer registration number in Brazil (a straightforward procedure).
- (b) Name of the Company. Although DREI's Normative Instruction No. 81, issued on June 10th, 2020, does not require that the company's main activity be included in its name, in practice the application of this requirement is subject to the interpretation of the respective Boards of Commerce in each jurisdiction.
- (c) Purposes of the Company. Aspects relating to taxation should be considered when specifying the activities to be carried out by the company.
- (d) Complete Address. The full address of the head office and branches (if any) must be provided.
- (e) Term of Duration. May be either determinate or indeterminate.
- (f) Capital Stock. Amount of the capital stock in Brazilian currency, the equity interest of each partner/shareholder in the corporate capital. The capital stock may be paid-in in domestic currency, credits or assets (in case of the S.A., if payments are in assets, such assets must be subject of an evaluation report prepared by an expert or an accounting firm).
- (g) Quotas/Shares. Number of quotas (Limitada) or shares (S.A.) to be held by each partner/shareholder and how these quotas/shares will be paid in. Usually (but not mandatory), the quotas or shares have the par value of BRL 1.00. In the case of an

S.A., it is possible to stipulate that the shares have no par value. The shares of an S.A. may either be ordinary or preferred shares, the preference of which choice is related to either political or economic advantages. Preferred shares may or may not have voting rights, provided that the number of non-voting shares is limited to 50% of the total shares issued by the S.A. Pursuant to DREI's Normative Ruling No. 81, a Limitada may also issue preferred quotas, even with no voting rights, although this is a subject of ongoing academic debate, as mentioned above.

- (h) Management. Appointment of the individuals who will act as (i) managers of the Limitada; or (ii) officers of the S.A.; and if applicable (iii) members of the board of directors (at least three).
- (i) Dividends. Provisions on allocation of dividends and losses among the partners/shareholders.

4. Formation

3.1. Limitada: A Limitada is formed by filing its Articles of Association with the Board of Commerce of the State where the company's headquarters will be based. After the Articles of Association are filed, the Limitada will be considered as operational. There is no need to publish the Articles of Association.

3.2. S.A.: A S.A. is formed by filing, with the Board of Commerce of the State where the company will have its headquarters, the Minutes of Shareholders Meeting approving the formation of the S.A. and its by-laws. After registration, the Minutes must be published in a newspaper with wide circulation in the city where the company's headquarters are located or in electronic format on a digital platform maintained by the Federal Government and in its own website, in case of a closely held S.A.



The S.A. also needs to open and register certain corporate books.

4. Registrations.

After its formation, the Brazilian company shall obtain the following basic additional registrations, whenever applicable:

- (a) Federal Taxpayer Registration (CNPJ/ME): - required for all companies. The registration with the Federal Revenue is obtained simultaneously with the registration with the Board of Commerce, upon the company's incorporation. After such registration, the company will be able to open a bank account and sign contracts.
- (b) Registration of the Ultimate Beneficial Owner: All entities holding equity interest in Brazil must inform their "ultimate beneficial owner" to the tax authorities. The "ultimate beneficial owner" is any individual who: (i) holds, directly or indirectly, more than 25% of the capital of the company or (ii) regardless of the equity interest, directly or indirectly, controls or has the power to elect the majority of the administrators of the company.
- (c) State Registration (required only for companies involved, directly or indirectly, in the manufacture or sale of goods). The registration is obtained simultaneously with the registration with the Board of Commerce, upon the company's incorporation. After such registration, the company will be able to issue invoices related to the manufacture or sale of goods.
- (d) Municipal Taxpayer Registration (CCM - required for all companies). This registration is made after the registration with the Board of Commerce and Federal Revenue.

- (e) Municipal Service Tax Registration (ISS - required for companies involved, directly or indirectly, in the rendering of services). After such registration, the company will be able to issue invoices related to the rendering of services.
- (f) Ministry of Labor and Social Security registrations (required for all companies).
- (g) Brazilian Central Bank (required for all companies with foreign partners/shareholders).
- (h) SISCOMEX (Integrated System of Foreign Trade - required for companies operating in foreign trade in Brazil, performing imports or exports), for the obtaining of an import license called "Radar" – Registration System for Tracking the Activities of Foreign Intermediaries. The granting of a Radar license is subject to the confirmation of the existence, the substance, and the financial and operating capacities of the company. There are three different types of import license: (i) "Express", (ii) "Limited" and (iii) "Unlimited":
 - (i) Express Radar. The Express Radar is only applicable to (i) publicly held S.A.; (ii) financial institutions; (iii) companies solely or partially held by the government; and (iv) companies operating export transactions which aggregate amount in any deemed period of six consecutive months is lower than or equal to USD 50,000;
 - (ii) Limited Radar. Under the "Limited" type of Radar, the company may import only up to USD 150,000 per semester. Such kind of Radar is indicated for companies that will import or export lower volumes. The procedure to obtain the "Limited" Radar is simpler and only requires the submission of an application request



to the Brazilian Federal Revenue Customs Agency. The concession of "Limited" Radar is faster and is not heavily dependent on proof of financial capacity.

- (iii) Unlimited Radar. The "Unlimited" type allows unrestrained freedom to operate foreign trade, but a recurring analysis on the financial capacity of the importer will be performed by customs authorities – regularly based on the level of taxes collected in Brazil – in order to continuously confirm the unlimited permission to import.

Other specific registrations may be needed depending on the activity to be performed by the company. The registrations are part of the standard routine of a company formation, and we estimate that a company is fully operational within 45 days following the filing with the Board of Commerce. The time for conclusion provided above is an estimated only, which depends entirely on the internal procedures of the applicable governmental entities as well as specific requirements depending on the industry and/or market of the company.

5. Basic Tax Aspects to be Considered.

5.1. Taxation: Brazilian legal entities are individually taxed, without the possibility of tax consolidation. They may be subject to taxes at the Federal, State and Municipal level of government, according to their activities:

- (a) All companies are subject to income taxes (Corporate Income Tax - IRPJ and Social Contribution on Net Profit - CSLL). The most common regimes of assessment of these taxes are the Deemed Profit Regime and the Real Profit Regime, as further detailed below.
- (b) PIS and COFINS contributions are also generally due by all companies. In most

cases, their regime varies according to the income tax regime elected by the taxpayer. If the company opts for the Deemed Profit Regime, as defined below, it will be subject to the PIS/COFINS cumulative regime, under which they are calculated based on gross receipts from operating activities at lower rates (3.65% combined), but without offsetting credits. If the company elects for the Real Profit regime, it is generally subject to the PIS/COFINS under the non-cumulative regime, which are calculated with higher rates (9.25% combined) on a wider base encompassing operating activities, non-operating and financial transactions. Financial income is generally subject to PIS/COFINS at a combined 4.65% rate. The non-cumulative regime allows the taxpayer to offset credits from certain costs and expenses. PIS/COFINS are also levied on the importation of goods at a combined rate of 11.75%, whereas importation of services is taxed at a combined rate of 9.25%. Imported goods and services are generally creditable under the non-cumulative regime, if those costs and expenses qualify under the requirements stipulated by statute.

- (c) The Import Duty is collected upon customs clearance of goods imported into Brazil. The taxable base is the CIF value of the goods. The rates are usually defined in a schedule based on the Harmonized System and generally vary from 0% to 35% (goods considered to be "essential" are subject to lower rates while superfluous goods are taxed at higher rates). The amount paid upon customs clearance is not recoverable by the importer in the form of a credit and consequently becomes part of the cost of the imported product. Brazilian importation rules follow WTO standards,



including in what respects valuation of goods.

- (d) The IPI is an excise tax charged on a value-added basis and is imposed on the importation of goods, on their subsequent sale and on the sale of products arising from industrial processes. The taxable basis is the CIF value of the goods and the Import Duty in case of importation, or the value of the transaction on subsequent sales. Rates are also provided for by a schedule based on the Harmonized System, ranging from 0% to 45% (as to the Import Duty, it follows the “essentiality” principle).
- (e) The ICMS is a State tax charged on a value-added basis upon importation and sale of goods. On transactions taking place within the boundaries of any given State (importation and transactions within the State), the tax is entirely due to such State. Sales across State lines impose the split of the tax between the State of origin and the State of destination. The general mechanism for this split is the determination of an interstate rate (4%, 7% or 12%) that is lower than the regular rate for intrastate transactions (usually 18%), allowing the destination State to collect the difference on the subsequent sales or the balance derived from the difference between the interstate and the intrastate rates when the acquirer is the end-user of the product (i.e., there is no subsequent transaction with the good)⁶.

⁶ Many products or transactions are subject to what is called the ICMS Substitution Regime (ICMS-ST), under which one participant in the production and consumption chain (usually the manufacturer or importer) anticipates the payment of the tax due across the entire chain, based on certain statutory presumed profit margins. After the entity appointed by the law as the “substitute taxpayer” makes payment of the tax, all subsequent transactions within the State boundaries are

- (f) The ISS (Municipal Tax on Service) is due upon the importation and the rendering of services, and its rates vary from 2% to 5%.
- (g) Payments abroad are usually subject to a 15% withholding income tax, including technical services⁷, but are aggravated to 25% if paid to a beneficiary domicile in a tax haven. Non-technical services are also subject to a 25% rate. Other taxes may be levied depending on the nature of the remittance. Dividends are tax free in Brazil, irrespective of the domicile of the beneficiary.
- (h) The most relevant labor-related taxes are Social Security Contribution of 20% on payroll and Employment Security Fund – FGTS of 8%, also on payroll.

5.2. Tax Regimes: There are two basic regimes for calculation and payment of the Corporate Income Tax (IRPJ) and the Social Contribution on Net Profit (CSLL), namely the “Real Profit Regime” and the “Deemed Profit Regime”.

- (a) Real Profit Regime. Companies with total gross revenues greater than BRL 78,000,000.00 per year must assess income tax according to the Real Profit Regime, which is based on quarterly or annual balance sheets. They may not opt for the Deemed Profit Regime (a simplified system of taxation based on a statutory percentage of gross revenues).

exempt from it. In the event of subsequent interstate transactions, the ICMS must be paid again by the seller and the amounts previously paid by the substitute taxpayer and ultimately collected from the seller become a credit to the seller.

⁷ The definition of “technical services” is very broad, encompassing consultancy services, managerial assistance, or any other provision of service in which technical knowledge in general are applied. In practice, since all services are in certain level “technical”, the 25% rate is seldom applicable.



Other companies subject to the Real Profit Regime of taxation, irrespective of the revenue level, are the following: (i) involved in financial activities (banks, leasing companies and other financial institutions) or factoring; (ii) that have earned profits or capital gains arising from foreign interest (income from foreign trade or exported services is not considered foreign interest for these purposes); (iii) that enjoy tax benefits (exemption or reduction of income tax); (iv) that had made payments under the estimated system during the tax year.

- (b) **Deemed Profit Regime.** Under this regime, the calculation of taxes is simplified. First, the company must determine its basis, which corresponds to applying a statutory percentage to its gross revenues (32% for services, including the assignment of rights, and 8% for the sales of goods). The resulting amount is the basis, which is subject to the tax rates.

The rates are the same as in the Real Profits Regime, that is: (i) IRPJ of 15%, with an additional 10% on the profits that exceed BRL 20,000.00 per month (i.e., profits of BRL 240,000.00 per year are taxed at a 15% rate, and the exceeding amounts are taxed at a combined 25% rate); and (ii) CSLL of 9%.

5.3. Transfer Pricing on Foreign Loans and Thin Capitalization Rules: All foreign loan agreements in Brazil are subject to transfer pricing rules, according to which the interest paid to related parties is deductible up to an amount which does not exceed the amount corresponding to:

- (a) the market rate of Brazilian bonds issued abroad in US Dollars, for transactions in US Dollars with fixed rate;

- (b) the market rate of Brazilian bonds issued abroad in Brazilian Reais, for transactions in Brazilian Reais with fixed rate;
- (c) the Libor rate for 6-month deposits in the currency of the corresponding agreement⁸ or in US Dollars for agreements signed under a currency for which a specific Libor rate is not available, for other transactions; or
- (d) the specific rate stipulated by the Treasury Ministry, for transactions in Brazilian Reais with floating interest rate⁹.

In the first three cases above, the maximum interest rate is increased by a 3.5% spread.

Thin capitalization rules impose additional restrictions on the interest paid on loans to related foreign companies. In general, interest paid to foreign related parties is deductible only if, cumulatively:

- (a) it consists of a necessary expense for the entity; and
- (b) the amount of the indebtedness with a related company does not exceed twice the amount of the participation of the related entity in the net worth of the Brazilian entity (or twice the overall net worth of the entity if lender does not hold any participation). In any case, the sum of all loans with related parties abroad must not exceed twice the value of the participation of foreign shareholders in the net worth of the Brazilian entity.

⁸ At the moment, Libor rates are only available for deposits in US Dollars, Euros, Pounds Sterling, Swiss Francs and Japanese Yen.

⁹ This alternative is not in effect because the Treasury Ministry has not stipulated an interest rate in this case. Thus, controlled foreign loans concluded in Brazilian Reais with floating rate will be tested against the Libor rate for 6 months.



Thus, besides observing transfer pricing rules, the Brazilian companies shall pay attention to specific debt/equity ratios, as follows: **(a)** a debt/equity ratio of 2 to 1, in general, or **(b)** a debt/equity ratio of 0.3 to 1, in case the related entity is domiciled in a blacklisted jurisdiction or is subject to a privileged taxation regime.

The debt/equity ratio above must be tested every month, considering both the amount of accrued interest, as well as the net equity of the previous year or month (if available). In this sense, profits accumulated during the year may reduce the debt/equity ratio.

Notwithstanding the above, when the company verifies that the ratio is about to reach the limit stipulated by law, it is possible to convert part of the loan into equity. This procedure is simple to implement, but it may trigger IOF (Tax on Financial Transactions) in some cases. It may also trigger the withholding income tax if a portion of interest due is also converted into equity, or the recognition of exchange variation gains or losses (in cases where the company elected the cash basis regime).