88 Anos OAB SANTA CATARINA | Comissão de Direito e Relações Internacionais | ESA 30 ANOS | CAASC

BUSINESS GUIDE SC:

Legal aspects and business opportunities in Santa Catarina

BRIDGE PROJECT | CCJ/UFSC Módulo Jean Monnet | 30 YEARS OF JEAN MONNET ACTIVITIES Erasmus+

FICHA CATALOGRÁFICA

TITLE:

BUSINESS GUIDE SC:
Legal aspects and business
opportunities in Santa Catarina

PROMOTED:

Comissão de Direito e Relações Internacionais da OAB/SC

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SUMMARY

1 INTRODUCTION

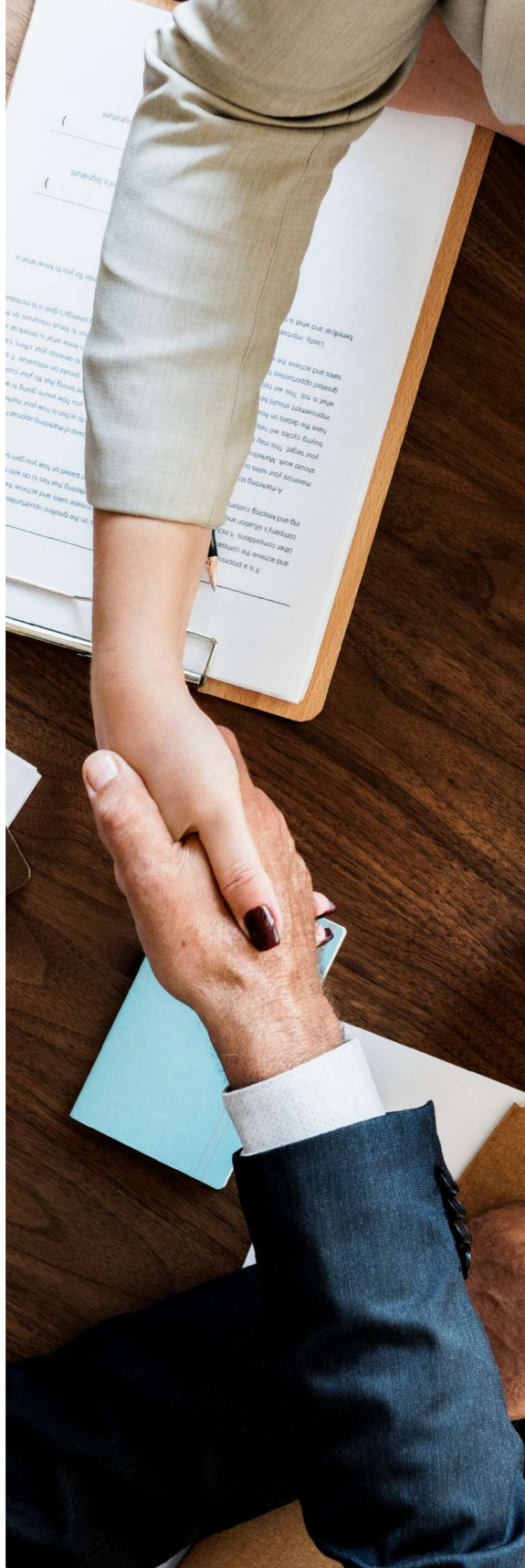
This Guide was conceived out of the need to present, more simply and objectively, the legal issues that should be taken into consideration by potential foreign investors who choose the State of Santa Catarina as the place of destination of their financial resources and strategic interests.

As a result of intense work carried out by the Commission of International Law and Relations of the Bar Association of Santa Catarina (OAB/SC), the Business Guide SC was carefully prepared under the organization of Aline Beltrame de Moura and Letícia Mulinari Gnoatton, and through the contribution of following members of the Commission: Alex dos Santos Bartell, Alison Autino Cabrera, Bettina Gomes Omizzolo, Camila Carla Virmond, Diego de Andrade Roratto, Eduardo Koetz, João de Borba Neto, Patrícia Fernanda Scalco, Rafaela Girardi Hormann, Raphael Francalacci Schambeck Luz, Raul Rietmann de Freitas, Rodrigo de Azambuja Pias, and Rodrigo Diniz Maciel, who participated in the preparation of the theoretical and practical material that composes this Guide. The initiative also received support from the Jean Monnet Module and the Jean Monnet Network of the Erasmus + Program, programs of the European Commission for the dissemination of knowledge of international law and the European Union, both instituted at the Federal University of Santa Catarina.

To promote a more accessible propagation to the target public of the project, thus reaching a greater number of foreign recipients, the Guide is available in Portuguese, English, and Spanish. The English translation was organized by Rafaela Girardi Hormann and Raul Rietmann de Freitas, and the Spanish version by Alison Autino Cabrera, all members of the Commission.

The Guide is divided into 13 sections, each corresponding to a subject that is approached following a standardized methodology that aims to facilitate the reading and understanding of the topic even by people not connected to the legal environment. Certainly, the proposal is that the investor has the first contact with Brazilian legislation through this material, however, not excluding the need for legal advice by a specialized lawyer to analyze the concrete situation.

THE ORGANIZATION | Aline Beltrame de Moura
Letícia Mulinari Gnoatton



2.1 AGENCY CONTRACT

Legal basis: Articles 710 to 721 of the Brazilian Civil Code

Among the typical business contracts in Brazilian Law is the Agency Contract. It consists of a contractual relationship in which a person or company assumes the obligation to promote, through redistribution, the realization of certain businesses - without the existence of stock.

The Agency Contract is one of the types of contracting that a foreign company can use to prospect customers and businesses in Brazilian territory. Therefore, it is essential to note the particularities of this contractual modality.

Articles 710 to 721 of the Brazilian Civil Code stipulate general rules for the relationship between the agent and the company, such as remuneration, area of operation, and restrictions on competition. Thus, it is recommended that the Agency Contract be drawn up by lawyers familiar with Brazilian Law so that it meets the interests of the contractor.

The relationship established between the parties by the Agency Contract must not be confused with employment. Brazilian courts are known for recognizing a high degree of protection for employees. Therefore, in this type of contracting it is advised that there is no exclusivity, subordination, mandatory workload, and fixed remuneration, under the risk of later recognition of an employment relationship between the parties and the application of all charges involved.

The contract has similarities to the modalities of prospecting for commercial representation and distribution. It is recommended to verify which type of contractual relationship best suits the needs of the company.

2.2 DISTRIBUTION CONTRACT

Legal Basis: Articles 710 to 721 of the Brazilian Civil Code // Law n. 6.729/79.

Distribution contracts are regulated by the Brazilian Civil Code, between articles 710 and 721. Article 710 defines agency and distribution as follows: “Under the Agency Contract, a person assumes, on a non-occasional basis and without dependency, the obligation to promote, on behalf of another, for remuneration, the realization of certain trades, generally in a specific zone, characterizing distribution when the agent has at his disposal the thing to be negotiated.”.

The distributors aim to provide the expansion of the supplier's network of products and services in different geographical areas through the production flow. Such flows are known as indirect sales, since the product is purchased from an intermediary (the distributor), who usually retains the difference between the purchase price and the resale price as economic benefit.

- **Essential Features of the Distribution Contract:**

  a) Acquisition of the goods on a professional and non-occasional basis by the distributor;

  b) Purpose of reselling the merchandise, providing production flow. Otherwise, the contract becomes a supply contract;

- **Accessory Features:**

  a) Exclusivity of resale in a given territorial area. The right to exclusivity must be negotiated between supplier and distributor;

  b) Usually, the distributor ensures exclusivity to the supplier to avoid conflicts of interest between companies;

  c) In some distribution contracts, the supplier grants the distributor a credit so that he can purchase the goods. In return, the distributor offers a mortgage or a personal guarantee.

ADVANTAGES AND DISADVANTAGES

The great advantages of distribution are the production flow and the expansion of the supplier's market. Distribution, however, is a complex legal relationship as it constitutes or expands a market that will be taken by two companies - the distributor and the supplier - with interests that sometimes may differ. Thus, it is important that the Distribution Contract is very well written.

Furthermore, the distributor is often in a situation of economic and financial dependence on the manufacturer. Knowing that Brazil has a protective legal system, the unjustified termination of the contract may result in the supplier paying high indemnities to the distributor. The Brazilian Judiciary has, at times, already determined the distributor's right to receive from the supplier funds relating to lost profits, goodwill, terminations of employment contracts and damages.

DISTRIBUTION CONTRACT X SUPPLY

Like the Distribution Contract, the Supply Contract is a successive legal purchase and sale relationship and usually involves the obligation to purchase a certain quantity of products over a period of time. The difference is in the power of disposal of the purchased merchandise. The supply usually serves to satisfy the buyer's own needs, while the distribution involves the production flow, expanding the supplier's market in a certain territory.

DISTRIBUTION CONTRACT X COMMERCIAL REPRESENTATION

The two types of contract raise doubts due to their similarity. The Commercial Representation Contract (Law n. 4.886/65) is the collaboration contract whereby the representative undertakes to mediate business for the benefit of the represented, on a non-occasional basis. Although the representation contract also aims at the production flow, the representative's duty is only to bring the represented and his clients closer together. However, the merchandise is not owned by the representative, unlike the Distribution Contract. If the customer who purchased the goods fails to honor the payment, the representative will not suffer the burden of default, unlike the distributor who suffers the burden since the goods belong to him.

Some authors also differentiate the Distribution Contract from the Concession Contract, since the latter has the provision of technical assistance services by the concessionaire. Since similarities between distribution and concession are greater than the differences, case law does not provide the distinctions between both contracts.

2.3 COMMERCIAL REPRESENTATION

Commercial representation

- Sites of interest: **coresc.org.br**

SUMMARY

Through a Commercial Representation contract, it is possible to hire an ally - the commercial representative - who will act autonomously in the development of your business. The Commercial Representation contract is an alternative often sought by companies as a substitute for directly employ salespeople in their commercial areas. Through this contract, the commercial representative undertakes to promote business in favor of the company, arranging orders and attracting customers, for example, under the guidance of the represented company.

The commercial representative can act autonomously, that is, without employment relationship, as long as registered with a "CORE - Regional Council of Commercial Representatives". Among the legal aspects that define commercial representation in Brazil, it must occur in a non-occasional manner, on behalf of one or more people, in order to mediate commercial transactions, arranging proposals or requests to be later transmitted to the represented.

PARTICULARITIES OF BRAZIL

Before adopting this type of contract, it is important to note that the commercial representative will not act as an employee of the represented company, but as a business intermediary in favor of the same, enjoying autonomy in relation to the represented. This autonomy, however, will not allow him to conclude business on behalf of the represented, but only to communicate them.

This type of contract is regulated in Brazil by Law n. 4.886/65 and, although it can be entered into verbally as no specific form is required, some essential elements are necessary for its configuration.

Firstly, it is necessary to define the contractual object, that is, to indicate the products or services that will be conveyed by the representative, as well as to indicate the territorial space in which representation will be exercised and if there will be the exclusivity of performance. Finally, it is necessary to define the financial remuneration of the commercial representative.

Law n. 4,886/65 also provides for "zone exclusivity", according to which the represented must refrain from selling its products/services in a certain area defined in the contract, if not through the representative hired to act in that location. The Superior Court of Justice understands that the exclusivity of performance is implicit in the commercial representation contract, except in the case of a verbally signed contract.

In addition, the law provides for the application of a fine proportional to 1/12 of all commissions received by the representative in the event of unjustified termination by the represented, which cannot be removed by a contractual provision.

Finally, care must be taken in the execution of the Commercial Representation contract, on a day-to-day basis between the representative and the represented, since the commercial representation relationship can be confused with an employment relationship, attracting the incidence of the relevant labor, social security, and tax charges. To avoid such a situation, it is essential to respect the characteristics that define commercial representation, especially the autonomy of the representative, without subordination. Excessive control and supervision of the commercial representative must be avoided, granting him freedom and autonomy to perform his duties.

2.4 LICENSING AGREEMENT AND ASSIGNMENT OF INTELLECTUAL PROPERTY

Legal Basis: Law n. 9.279/96, SC Law n. 14.328/08

- Sites of interest:

www.gov.br/inpi/pt-br, www.abral.org.br

SUMMARY

The licensing agreement aims to negotiate intellectual property. These goods can refer to inventions, brands, industrial designs and models, literary works, artistic and scientific works.

Within the intellectual property, there is a category called "industrial property" that focuses on business activity and the protection of assets such as patents, trademarks, industrial designs, industrial secrets, and geographical indications.

Law n. 9.279 of 1996, Industrial Property Law[1], assures its holder the exclusive right to manufacture, trade, import, use, sell and assign these goods.

PARTICULARITIES OF BRAZIL

Licensing has become an essential marketing tool for the growth of a company and the Brazilian market presents a promising future for the area. According to ABRAL (Brazilian Licensing Association) , the Brazilian market grew by 5% in recent years and generated approximately R$ 17 billion in 2016, creating 1,500 direct jobs and thousands of indirect ones. The investment opportunities are extensive as there are approximately 600 properties available for licensing, 60% of which are child and 40% non-child.

The most licensed properties are in the entertainment business, followed by sports brands, fashion music and arts, celebrities and games.

[1] planalto.gov.br/ccivil_03/Leis/L9279.htm

[2] abral.org.br

PARTICULARITIES OF SANTA CATARINA

The state of Santa Catarina is considered a technological center[3] of reference in the country, hosting more than 900 technology companies in the state capital alone with a total turnover of more than R$ 5.4 billion reais, much higher than the return of tourism.

Thus, in addition to the licensing possibilities offered in the country, Santa Catarina has great potential for technology licensing, providing opportunities for entrepreneurs and generating new direct and indirect jobs. The state passed the "Santa Catarina Innovation Law"[4] n. 14,328 of 2008, and since 2009 Santa Catarina has brought immediate benefits to the companies selected in regional technological development programs.

ADVANTAGES AND DISADVANTAGES

The business options can be diverse; however, the licensing agreement often turns out to be the best commercial exploration strategy.

One of the most frequent questions asked by entrepreneurs is related to the advantages of this type of contract; thus, we can affirm that licensing as a marketing strategy serves companies to strengthen and/or expand their portfolio.

Licensing is an excellent alternative for the growth of a company whenever the entrepreneur wants to expand businesses, increase the quality of his products, processes, or services, repositioning his business in the market.

Thus, if the entrepreneur already has an established brand in the market, the licensing agreement can become an important source of revenue.

- **The most used types of license agreements are:**

  a) Technology licensing;

  b) Brand and franchise licensing;

  c) Copyright licensing.

These types of contracts are very common in technology companies that develop innovative products and services and are highly recommended when the company's product is an intellectual property asset, however, it is important that the company first check which type of licensing best fits your business objectives.

As these are intellectual property goods, it is necessary that the entrepreneur seeks to protect his goods already in the negotiation phase (pre-licensing), using, whenever possible, confidentiality contracts or memoranda of understanding.

An intellectual property licensing and assignment agreement provides for industrial property rights (brand, patent, industrial design, integrated circuit topography, or computer program rights), follows the basic structure of the contracts, and has as parties the "licensor" (who grants the right); and the "licensee" (who will be exploiting this technology).

- **The basic structure of the contract will include:**

  a) *definition of the product to be licensed;*

  b) *definition of the basis and terms of royalties;*

[3] inovacaosebraeminas.com.br/polo-tecnologico-de-santa-catarina-entenda-como-o-estado-desenvolve-o-empreendedorismo-no-segmento/

[4] fapesc.sc.gov.br/wp-content/uploads/2015/09/03092009lei_inovacao.pdf

c) *scope of intellectual property improvements;*

d) *co-marketing and co-promotion agreement.*

To prepare the document, both parties must plan and organize all issues related to the contractual relationship. The content of the clauses will be freely negotiated between the interested parties so that the document reflects the will and preserves the rights of both parties.

2.5 EMPLOYMENT OF STAFF IN BRAZIL

Legal basis: Constitution of the Federative Republic of Brazil, Federal Decree n.º 5.452/43 (CLT – Consolidação das Leis do Trabalho) and Lei Complementar n.º 459/09 do Estado de Santa Catarina.

- Related websites/Further reading:
planalto.gov.br, **www.tst.jus.br**

SYNTHESIS/OVERVIEW

The foreign entrepreneur must be aware of some key proceedings in order to hire an employee in Brazil. The hiring act, that will necessarily be preceded of formal registry, encompasses the designation of the type of work contract, employee health screening, responsibility terms and conditions and annotations on the employee worker document (Labor and Social Security Card / Carteira de Trabalho e Previdência Social – CTPS, in portuguese).

The employer will also be responsible for all the social security taxes, fiscal and fund mandatory contributions (Employment Period Security Fund / Fundo de Garantia do Tempo de Serviço – FGTS, in portuguese). It is equally important to acknowledge the existence of all budgetary implications of the contract, such as paid annual leave, thirteenth salary or end-of-year bonus, which substantially increase the nominal wages and shall be considered before hiring someone.

Bureaucracy cannot be a barrier, that was the motto of the recent Brazilian labor reform of 2017. Nevertheless, some basic knowledge is required, which will be addressed next, as well as the paramount advice of a duly registered lawyer.

BRAZIL'S PARTICULARITIES

Most labor laws in Brazil are primarily foreseen in the Constitution of the Federative Republic of Brazil and in the Consolidation of Labor Laws (Federal Decree n. 5.452/43), the latter having had several changes throughout the years. Other regulations that deserve our attention for that matter are the Collective Conventions and Collective Agreements.

In spite of the fact that foreign workers must obtain a working visa, which will be explained in the following section, it is important to register that there shall not be any discrimination between them and Brazilian nationals, who are entitled of the same rights, including access to labor justice in the country.

When hiring, it is paramount to verify the type of work/service that the company needs from the employee, in order to determine the obligations and legal procedures that must be undertaken for the conclusion of the labor contract.

Labor contracts are individual, composed of two parties, the employer and the employee. It can be tacit or express, verbal or

written. The parties are free to agree on every aspect that does not represent any breach of local laws, collective agreements and decisions of local authorities.

Its duration can be determined or undetermined. The general rule is the undetermined duration contract, which can be resigned by any of the parties with a mandatory 30-day prior notice, which if not observed is subject to fines.

As a contract for a determined period, it cannot exceed 2 years of duration and will only be valid for services of a transitory nature that justify the predetermination of a specific period. It is also possible to establish an experience contract that cannot exceed a 90-day period.

The employer must register the contract within 5 working days of the signature. It is required to make the duly annotations on the Labor Card and Social Security Card, which is a mandatory step for any type of employment contract, informing the admission date, wages and conditions.

In the resignation process, the employer must make the appropriate registrations, provide legally mandatory documents and forms and also pay all rescissory monies, which are subject to penalties and fines if not properly observed.

The maximum workload is forty-four hours per week. In case this workload is surpassed, a 50% increase of the normal hour wage is due for every hour of overtime. There are some categories of service that follow different schemes, such as bank workers who have a 30-hour week workload.

On top of the salary, the company must deduct and deposit the Employment Period Security Fund, pay all social security taxes and also collect federal income taxes (where applicable). Furthermore, all employees have the right of other compensations foreseen by law as of the signature, such as thirteenth salary, paid annual leave with a 30% bonus, weekly paid rest period, among others.

Positions subject to danger conditions, hazardous duties, night shifts, work schedule on Sundays and Holidays might be subject to additional payments.

It is important to note that the law nº 13.467, of 2017, above mentioned labor reform, created the possibility of intermittent contracts, in which the service offering is not continuous, as well as the possibility to hire someone through a third company, such as a contractor.

SANTA CATARINA PARTICULARITIES

In Brazil, labor laws are of exclusive competence of the Federal Government. On top of all that has been stated, it determines the national minimum wage (according to a specific law), which is updated annually. In 2020, the national minimum wage is R$1,045.00 (one-thousand and forty-five reais).

To the States, it is conferred the authority of defining the minimum wage per category. In Santa Catarina, the complementary law n.º 459/09 foresees the minimum wages of some categories such as agriculture, fisheries, tourism, commerce of consumer goods, among others, which is also updated annually.

ADVANTAGES AND DISADVANTAGES

Labor laws in Brazil have always been protective of the workers and bureaucratic. In case of labor activities performed in Brazil, regardless of contract provisions that connect this labor

relation to a third country legislations, Brazilian legal provisions must be observed due to the fact that Brazilian labor law would normally deem itself competent in those cases.

3 NATIONALIZATION OF FOREIGN COMPANIES

Legal basis: Brazilian Civil Code and DREI Normatives

▶ Related websites/Further reading:
mdic.gov.br/index.php/micro-e-pequenas-empresa/drei

Pursuant to Art. 1,134 of the Brazilian Civil Code, foreign companies wishing to obtain authorization for nationalization or installation of a branch, agency, or establishment in the country must submit the request to the National Department for Business Registration and Integration (DREI), the responsible body for instructing and examining the application.

Prior authorization for establishment in Brazil or changes to the contract or statute must be made through registration and application with the “gov.br” Portal, in which one of the following options must be indicated: installation and operation, alteration, cancellation or nationalization.

The request must be accompanied by the requirements described in Article 2 of DREI Normative Instruction No. 07/2013, which are: I - act of deliberation on the installation of a branch, agency or establishment in Brazil; II - full content of the contract or statute; III - list of partners or shareholders, with names, professions, domiciles and number of shares, except when, as a result of the legislation applicable in the country of origin, it is impossible to comply with this requirement; IV - proof that the company is constituted according to the law of its country; V - act of deliberation on the appointment of the representative in Brazil, accompanied by the power of attorney that empowers him to accept the conditions under which authorization is given

and full powers to deal with any issues and resolve them definitively, being able to be sued and to receive summons for the company; VI - declaration by the representative in Brazil that he accepts the conditions under which authorization for installation and operation by the Federal Government is given; VII - last balance sheet; and VIII - payment slip.

The act in which the company decides to open a branch in Brazil must contain the activities it intends to carry out, according to its bylaws; highlighting the capital, in Brazilian currency, for operations in Brazil; this act may include the appointment of the legal representative in Brazil. The company will operate under its corporate name and may add the expression “from Brazil” or “to Brazil”.

Regarding the entire content of the contract or statute and proof that the company is constituted in accordance with the law of its country, it should be noted that the company must be regularly constituted and registered with the responsible body in the country of origin.

Regarding the list of partners or shareholders, with names, professions, domiciles and number of shares, members of all management bodies of the company must be presented.

The act of deliberation on the appointment of the representative in Brazil must expressly contain full powers to accept the conditions under which authorization is given, to deal with any matters and resolve them definitively, including to be sued and to receive initial citations for the company. There cannot be an expiration date or a substitution of all powers. The representative may be Brazilian or foreign, however, he must reside and be domiciled in Brazil.

The payment slip that addresses item VIII Art. 2 of DREI Normative Instruction No. 07/2013 should be collected through DARF, code 6621, amounting to R$ 240.00, in 2019.

The documents must be presented in ".pdf" format. Those with foreign origins must be legalized by the Brazilian consular authority or apostilled according to the Hague Convention. Translations made by an official public translator registered at a Commercial Registry must also be submitted.

After completing the protocol, the DREI must comment on whether or not the application is granted.

If a formal irregularity is observed, the process will be placed on demand, at which time the company will have a period of 60 (sixty) days to fix it.

Government authorization will be granted through an ordinance to be published in the Federal Official Journal, requiring registration of the company at the Commercial Registry.

An alternative to the nationalization relatively less bureaucratic is the opening of the subsidiary with foreign capital. However, although the tax burden is equivalent, the participation of foreign capital is subject to restrictions.

In view of this, some of the advantages of nationalizing a foreign company derive from not being subject to restrictions imposed on companies with foreign capital, such as activities related to nuclear energy, postal services and telegraphs and the aerospace sector, or restriction or limitation of foreign capital participation in financial institutions, air transport, radio, TV and newspaper companies, mining sector, among others.

Another advantage is the possibility of adopting the nomenclature "from Brazil" or "to Brazil" (Art. 1,137, Sole Paragraph of the Brazilian Civil Code) to the name adopted in the Country of origin, transferring its headquarters to Brazil and subordination to its jurisdiction, with the whole set of prerogatives and subjections.

The most common types of companies with their own legal personality are "sociedades simples", "sociedade em nome coletivo", "sociedade em comandita simples", "sociedade limitada", "sociedade anônima" and "sociedade em comandita por ações".

Law 12.441 / 2011 created the figure of Individual Entrepreneur with Limited Liability - EIRELI. However, the requirement to pay the minimum amount of 100 minimum wages and the impossibility for legal entities to be included as holders of this type of company make its adoption unfeasible.

However, Law no. 13,874 / 2019, called the Declaration of Economic Freedom Rights recently created a new corporate type called "Sociedade Unipessoal Limitada", with no minimum limit for payment and with the possibility of securitization by both natural persons or companies.

Due to the total or partial limitation of liability inherent to these corporate types, the other existing types are of rare use.

Having made these brief notes, it is important to conclude by highlighting that the option for nationalization and the appropriate corporate type depend on the branch of activity explored by foreign society.

Nevertheless, the legislative evolution and the gradual easing over the years allow us to conclude that the national business environment has never been more favorable to the entry of foreign companies and investments that intend to expand their business in Brazil.

4 COMPANY WITH FOREIGN CAPITAL

Legal Basis: Normative Instruction n. 34/2017 from DREI; Brazilian Civil Code, Corporation Law

- Sites of interest: **bcb.gov.br/estabilidadefinanceira/registrocapitaisestrangeiros** e **mdic.gov.br/index.php/micro-e-pequenas-empresa/drei**

Brazilian law allows the opening of national companies with foreign capital, with the exception of some activities which face prohibitions or limitations for its performance by foreign companies5. The opening of a company with capitalization through foreign investment has a simplified procedure when compared to the opening of a foreign company branch in Brazil, an issue that is treated with greater attention in chapter 3 of this Manual.

The registration of a company with foreign capital has a procedure similar to the incorporation of a company with national capital, and, as a rule, the authorization of the executive power is not necessary. Registration is carried out through the Commercial Registry ("Junta Comercial")6 of the state in which the company will be headquartered.

The constitution of a company in Brazil requires (i) the elaboration of a contract to govern the company and the relationship between the partners - Contract / Bylaws; (ii) constitution of equity segregated from the partners - share

[5] Brazilian law prohibits foreign companies in activities linked to telegraphs, post offices, nuclear power, and medical services, with exceptions given by law. In addition, it has restrictions regarding prior consent in relation to the activities of financial institution, aviation, media (radio, TV, and newspaper) and the mining sector.

[6] Brazilian organ that is responsible for carrying out the notary registration of companies.

capital; (iii) institution of a legal representative of the company - Administrator, who must necessarily be a resident of the country; (iv) obtaining the necessary licenses for the performance of the company's activities.

The company will necessarily be governed by Brazilian law and may, as a rule, be constituted in the modalities of a simple or entrepreneurial company; limited, anonymous or EIRELI. The definition of the corporate type will depend on the interests of the partners, the activity performed and the tax implications arising from this choice. It is recommended that those interested in opening a company in Brazil seek legal assistance to define the corporate type, through the preparation of the Contract / Bylaws.

Regarding the transfer of funds for the composition of the share capital of the company, all foreign capital must be registered with the Central Bank of Brazil, within a period of 30 days from the inflow of funds. This registration is carried out through the Central Bank's own electronic system.

There is no requirement for a minimum share capital for the opening of a company by foreigners. Furthermore, it is noted that for obtaining a residence permit in the investor modality, minimum investment amounts are established, as discussed in item 6 of this Manual.

If the foreign partner (individual or legal entity) is not a resident of Brazil, it is necessary to appoint a legal representative in the country to answer to the official Brazilian authorities, who must necessarily be a resident of Brazil. The representative will be appointed through a power of attorney, which must contain powers to receive subpoenas, notifications and service.

The company registration procedure also involves obtaining the necessary public authorizations, depending on the activity that will be developed. Brazil has complex procedures for obtaining the necessary licenses for the opening and operating of companies, which includes federal, state and municipal bodies.

The opening of a company involves several legal and accounting issues, which need to be analyzed on a case-by-case basis. That is why we advise foreigners interested in opening a company in Brazil to contact professionals specialized in the area.

5.1 FOREIGN INVESTMENT

Legal basis: Law n. 4.131/62 (Lei de Capitais Estrangeiros/ Foreign Capital Law); Law n. 4.390/64; Decree n. 55.762/65

- Related websites/ Further reading:

economia.gov.br/central-de-conteudos/publicacoes/boletim-de-investimentos-estrangeiros

bcb.gov.br/estatisticas/investimento_estrangeiro_direto

apexbrasil.com.br/o-que-e-ied

investexportbrasil.gov.br/guia-legal-para-o-investidor-estrangeiro-no-brasil

SYNTHESIS/OVERVIEW

International business can be developed through foreign investment. Those deals consist of the investment of non-residents' capital in a specific country. In Brazil, the government body in charge of the reception and regulation of Foreign Capitals is "Banco Central do Brasil".

Any given foreign capital entering Brazil is subject to Law n. 4,131 (Foreign Capital Law) of September 3rd, 1962 and Law n. 4,390 of August 29, 1964. Both of these laws are regulated by the Decree n. 55.762 of February 17, 1965 and its further modifications.

Foreign investments are divided into Foreign Direct Investment or Foreign Portfolio Investment. The Foreign Direct Investment (FDI) aims to control the ownership of assets through the investment of capital. That encompasses all sorts of investments made by companies as a mean to produce goods or services abroad.

According to Banco Central do Brasil, the FDI is the investment made by foreign individuals or companies in the share capital of Brazilian enterprises, regardless of the percentage of shares or quotas being acquired, provided that this acquisition is performed directly (either by the subscribed share or issued share of paid-up capital owned by the seller). That, therefore, does not apply, has it been operated in official stock market or not, to acquisitions made in special auctions, such as the ones for the privatization of companies, preceded by all legal bidding procedures.

There are several types of FDI. It can be the implementation of a brand-new factory, referred to as greenfield investment; it can be the purchase of an existing factory; or to the settlement of a partnership, which constitutes a joint-venture.

The portfolio investment occurs through the purchase of foreign financial assets (shares, bonuses, certificate of deposits and other papers). According to Banco Central do Brasil, portfolio investment is specifically related to the stock market (shares or other assets) owned by individuals or companies.

In Brazilian legal texts and regulations, the term 'portfolio investment' has been used to designate any type of investment made by foreign non-resident individuals into the national stock and capital market of the country. Regarding the investment in Shares Portfolios (annex III), DR or ADR (annex V) and in Securities must comply with the proceedings determined on the Resolution n. 1.289.4

In Brazil, the FDI flow is regulated by the Lei de Remessa de Lucros and are aimed to the creation and expansion of the national productive capacity or the acquisition of companies in

privatization process. Its assets are less liquid in comparison to FPI, which are mainly financial assets.

BRAZIL'S PARTICULARITIES

According to national legislation, as well as the input of capital by non-residents or companies whose headquarter is not in Brazil, foreign capital can also be constituted by goods, machinery and equipment that are brought to Brazil without being converted into currency, provided that it is aimed at the production of goods or services.

Foreign capitals brought to this country are duly and individually registered at the Banco Central do Brasil (BACEN), in national or foreign currency. This procedure is mandatory and must be made prior to the transaction.

According to the BACEN Resolution n. 4373/2014, all foreign or non-resident investors must have a representative in Brazil and be registered under the Comissão de Valores Mobiliários (Brazilian Securities Commission) before the operation takes place. Also, whether an individual or a company, the investor must also register at the Receita Federal (Brazil's Inland Revenue System).

The actual register of the foreign capital is made electronically, through the Central Bank Information System (Sibacen, in portuguese), at the Electronic Declaratory Registry (DRE, in portuguese), under some specific modules: a) Foreign Direct Investment (FDI); b) Financial Operation Registry (ROF, in portuguese); c) Stock and Capital Market (FPI).

The *Lei de Remessa de Lucros* states that such registration will be made in the national currency and that the reinvestment of profits shall be made in both currencies, national and the currency of the country to where it can be diverted, using the exchange rate of the date of the reinvestment. This procedure must be made within 30 days of the investment entry's date.

ADVANTAGES AND DISADVANTAGES

The Agreement on Cooperation and Facilitation of Investments (ACFI), is a model of international investment (bilateral or multilateral) treaty that aims to provide a favorable environment for investors and States.

This new model was developed by Brazil in order to promote the internationalization of Brazilian companies and attract FDIs to the country. The ACFI has as its pillars the institutional governance, risks mitigation, dispute prevention and settlement mechanisms and the promotion and fomentation of investments through thematic agendas.

The ACFI still resemble some characteristics of the former Agreements for the Promotion and Reciprocal Protection of Investments (APPRIs, in portuguese), such as non-discrimination clauses, direct expropriation, fund transfers and compensation for losses caused by wars, civil disturbances and alike. Furthermore, it presents clauses of transparency, corporate social responsibility and to fight corruption.

The ACFI is in compliance with the national treatment and most favored nation principles, also present on the multilateral agreements of the World Trade Organization (WTO), to which Brazil is a signing party. The ACFI acknowledges the arbitration as its dispute settlement system, solely among States.

5.2 FOREIGNER PARTNER

Legal basis: Constitution of the Federative Republic of Brazil, Law n. 13.445/17; Decree n. 9.199/17; Law n. 8.934/94; Decree n. 1.800/96; Law n. 8.080/90; Decree n. 2.784/40; Law n. 10.610/02; Law n. 11.442/07; Law n. 6.404/76; Law n. 9.718/98; Normative Resolution CNIG nº 95/2011.

- Related websites/ Further reading: **www4.planalto.gov.br/legislacao/**; **economia.gov.br/**; **jucesc.sc.gov.br; receita.gov.br/**;

SYNTHESIS

Clarify the main legal aspects for the foreigner, as a natural person, to be a partner or an owner of a Brazilian company, either as shareholder or as administrator. Or even as a legal person wanting to be part of a partnership[7] established in Brazil.

PARTICULARITIES OF BRAZIL

The foreigner can be part of a Brazilian partnership as long as he or she meets the criteria required by legislation and government agencies. Living in Brazil is not necessary to be a shareholder in a Brazilian company.

AS A SHAREHOLDER

It's possible to be part of a Brazilian partnership even if he or she lives abroad or does not have any kind of visa issued by the Brazilian State. However, if that's the case, there must be a Brazilian attorney or a foreigner with residency permit and full powers appointed – including being able to be judicially summoned.

To be possible to make investments or to be a shareholder partner without a permanent attorney, the Migration Law – Law n. 13.445/2017 – demands the foreigner to have a temporary visa or a residency permit.

AS AN ADMINISTRATOR

To be an administrator of a company in Brazil, on the other hand, it is necessary to have a residency permit (or a permanent visa).

It is important to be aware of the fact that the visitor acquires the fiscal resident status if he or she gets a job, if he or she is granted a residency permit or if he or she stays more than 183 days, consecutive or not, in the country, in a total of 12 months. In any of these cases, the immigrant will be considered by the Federal Revenue Service as a resident to tax ends, so that he or she must file the income tax until next year's April.

The law allows, thereby, the natural or legal person, even living abroad, to be a partner in a Brazilian company.

[7] It's important to say that there are crucial differences concerning types of business entities between Brazil and other countries. In the USA, for example, businesses can be structured as: (a) sole proprietorships, (b) partnerships, (c) Limited Liability Companies (LLC) and (d) corporations. Considering that the expression 'sociedade empresária' – used in Brazilian legislation – represents a broad range of businesses types, we chose to translate it as 'partnerships', which is also a more generic term to refer to business entities.

For this, it is indispensable to have an attorney living in Brazil, and with specific powers to represent him or her in matters involving the Central Bank and the Federal Revenue Service, including being able to be judicially summoned and to receive judicial and extrajudicial notifications.

In this case, the foreigner not living in the country will only be able to be a member of the Administration Board, if it exists. It's different when he or she wants to be the administrator of the partnership he or she takes part of.

To be an administrator of a Brazilian company, the immigrant must have an ID card issued by the Brazilian State, what only happens if he or she is granted the residency permit by the competent authority. Therefore, not living in Brazil is an unavoidable obstacle to take over the administrator role in a Brazilian company.

In the case of an investor partner that wishes to be an administrator, a manager, a director or an executive with decisional power over a company, the competent authority can give a residency permit for him or her to be able to represent a social or business partnership, an economical group or conglomerate, through the proof of having the amount of at least R$ 600.000,00 per administrator.

Or, yet, the proof of having the amount of at least R$ 150.000,00 per administrator and that the company he or she runs will create 10 (ten) new jobs in a period of time no longer than 2 (two) years.

In both the cases, it's necessary to proof the payment of the investment in the receptor company, just like it's necessary to proof the foreign exchange contract issued by the bank who will receive the respective values. Anyway, the term of residency will be indefinite.

Brazilian law also allows the establishment of a Brazilian company only with foreigner partners, on the condition that one of them lives in Brazil who, consequently, will take over the role of administrator. A few exceptions may apply, like companies whose main activity are coasting, broadcasting and press media, mining, hydraulic energy, and those companies that are part of the National Financial System.

Portuguese migrants have a different treatment because of the Friendship Treaty, Cooperation and Consult, signed by Brazil and Portugal, through which the Portuguese citizen has the same rights and duties of a Brazilian citizen, being necessary that he or she owns the very same documentation where it must be clear his or her nationality and the reference to the mentioned Treaty.

At last, when it concerns citizens from countries that take part in the MERCOSUL, if they are proven to have a residency permit for 2 (two) years, they will be able to join businesses entities as sole proprietors, partners or administrators in Brazilian companies or cooperatives, even appear as owners or administrators in a Limited Responsibility Individual Company (known in Portuguese for its acronym 'EIRELI').

SOCIAL SECURITY AND TAXATION

Every foreigner is entitled to public and free healthcare despite of the absence of any kind of contribution to the Social Security System.

In Brazil, the contribution to the Social Security System is mandatory. However, the partner of a company can decide how much he will earn for his work and this value will be considered for the percentage – 11% (eleven per cent) – destined to the Social Security System, only respecting the minimum wage and

the maximum of a benefit paid by the National Institute of Social Security ('INSS', on Portuguese).

The value mentioned above is also used as reference to the Individual Income Tax ('IRPF'), whose rates vary from 0 (zero) to 27,5% (twenty-seven point five per cent), according to the charts presented by the Federal Revenue Service.

On the other hand, the profit that is transferred to a natural person is free of taxation. This way, the earnings of a partner in a business partnership is considerably higher. Only Brazil and Estonia take this kind of approach.

PARTICULARITIES OF THE STATE OF SANTA CATARINA

There's no particularity about the State of Santa Catarina, since the Union is the only federative entity to legislate about the subjects previously described. The reason for this is that the question of foreigner partners may affect public policies formulated by the federal government.

5.3 LOAN AGREEMENT

Legal Basis: Articles 85 and 586 to 591 of the Brazilian Civil Code

- Sites of interest:

planalto.gov.br/ccivil_03/leis/2002/l10406.htm

SUMMARY

The Loan Agreement is nothing more than a loan of funds between two or more individuals.

In technical terms, Article 586 of the Brazilian Civil Code defines the loan as *a loan of fungible things, in which the borrower is obliged to repay to the lender what he received in the same kind, quality and quantity.*

Pursuant to Article 85 of the Brazilian Civil Code, fungible things are understood as things that can be replaced by others of the same species, quality and quantity.

Generally speaking, it can be said that objects to loan agreements are fungible and consumable things, being fungible goods that can be replaced by others of the same kind, quality and quantity, and consumables those whose use involves immediate destruction of the substance itself - those destined for disposal being also considered.

The intervening figures are referred to as the "mutuante" (lender), who lends the resources; and "mutuário" (borrower), who receives them.

As it is a commercial instrument, a written contract must be prepared with qualification of the parties, the value of the operation, the deadline for return, form of remuneration, interest rate, the correction index, and the effects resulting from a possible default, such as late payment interest and fine. Other clauses that express the will of the parties, such as the allocation of resources, may also be the object of an agreement.

In summary, the lender transmits the domain of the thing, which will be consumed and returned by another of the same species, quality and quantity by the borrower. The most common examples include the loan of agricultural products, seeds and cash.

PARTICULARITIES OF BRAZIL

The Loan Agreement for economic purposes, better known as "mútuo feneratício", is one of the most used instruments in the country.

The **mútuo feneratício** is provided for in Article 592 of the Brazilian Civil Code, which establishes that, *for economic purposes, interest is assumed, which, under penalty of reduction, may not exceed the rate referred to in Article 406, annual capitalization allowed.*

Interest is the profit taken from the borrowed capital or the income from the money, as the rent is the price corresponding to the use of the leased thing. They are subdivided into default interest and compensatory or remunerative. The default arises from the delay in the return of the capital, whereas the compensatory ones are the result of the borrowed capital, incident from the moment of delivery to the borrower.

Capitalization of interest is permitted on an annual basis, as expressly provided for in Article 591 of the Brazilian Civil Code.

As for the percentage of interest applicable, Article 406 of the Brazilian Civil Code says that when default interest is not agreed, or is without a stipulated fee, or when it comes from the determination of the law, it will be fixed according to the rate that is in force for the delay payment of taxes due to the National Treasury.

According to Article 161, § 1, of the National Tax Code, if the law does not provide otherwise, the default interest is calculated at the rate of one percent per month.

Decree n. 22,626 / 33 in its article 1 has the following wording: it is forbidden, and will be punished under the terms of this law, to stipulate in any contracts interest rates higher than twice the legal rate.

However, Súmula 596 tried to exclude the application of this provision from Financial Institutions, by providing that the provisions of Decree 22.626 / 1933 do not apply to interest rates and other charges charged on operations carried out by public or private institutions, which integrate the National Financial System.

As seen, financial institutions are not subject to legal limits for the percentage of interest paid or the periodicity of capitalization.

Among individuals and legal entities not part of the national financial system, it is possible to impose interest at 12% per year, capitalized annually, in the form of Articles 406 and 591 of the Brazilian Civil Code.

Article 318 of the Brazilian Civil Code defines the payment forecast in foreign currency as null, whereas Law 10.192 / 01 in its article 1 determines that the payment stipulations for obligations involving money in the national territory must be made in Real, at its nominal value.

However, the Superior Court of Justice considers the signing of a loan in foreign currency to be valid, provided that the debt is converted into reais, based on the quotation on the date of the signing of the contract, and updated considering the official monetary correction index. (REsp 1,323,219 / RJ).

In spite of past doctrinal discussions, it can currently be said that the onerous loan agreement is one of the instruments that best provide legal certainty to the parties that have chosen, on their own initiative, to contract reciprocal rights and obligations.

As for taxation, in onerous loans between legal entities or a legal person as a lender and an individual as a borrower, the transaction is subject to both Income Tax and Financial

Operations Tax, upon retention of the payment source, the rates of which vary according to with the constitution of the legal entity involved, terms and values of the operations.

PARTICULARITIES OF SANTA CATARINA

As one of the national startup centers, there is a growing interest in Santa Catarina for the so-called Convertible Loan Agreement.

Generally speaking, the Convertible Loan is very similar to the conventional Loan Agreement (Feneratício).

As occurs in the Convertible Notes of the comparative law and in the convertible debentures of national corporations, after the term the lender has the option to recover the money or convert the amount invested into equity interest.

ADVANTAGES AND DISADVANTAGES

If the loan agreement contains a clause with anticipated expiration of the debt in case of default, provided that it is signed by (2) two witnesses, the document will be considered a certain, liquid and enforceable extrajudicial enforcement order, which authorizes the lender to enroll the name of the debtor in a public list of defaulters.

The lender may also resort to a procedural rite of Execution of Extrajudicial Title, in which the borrower will be summoned to pay the debt with the legal and contractual additions in (3) three days, under penalty of directly responding with his private assets for the debt.

In this case, as a rule, there is no need for the so-called procedural knowledge phase, with a wide analysis of documents, hearings of witnesses and experts, in view of the extrajudicial constitution of the executive title. These are some of the advantages of this valuable contractual instrument.

The advantages of the loan agreement in relation to other credit instruments, such as checks, promissory notes, bills of exchange, which also enjoy executive power, relate to the institution of real guarantees such as pledge, mortgage, fiduciary alienation, among others , both in movable and immovable property.

The disadvantages are linked to the scarcity in the supply of credit and a great demand in the financial market, which ends up generating one of the most disparate interest rates in the world in this sector.

Despite this, little by little Brazil has been investing in creating an environment conducive to the promotion of credit, thanks to greater economic freedom.

This political option has resulted in a gradual increase in the supply of credit, thanks to the emergence of fintech's, which have proved to be an excellent alternative to the traditional financial system, with attractive interest rates and greater agility to close deals.

There is still much to be done, especially in the tax and judicial spheres, but the will of the parties has been increasingly respected, without undue interventionism in contractual freedom.

The scarcity of credit, combined with the legal security built over the years and a favorable business environment, makes Brazil currently considered one of the best terroirs as an investment destination.

And if this is the option, the financial instrument that best serves the interests of all parties, providing security, predictability and ample negotiating margin is, without a doubt, the onerous loan.

6.1 INVESTOR VISA

Legal Basis: Normative Resolution CNIg 13/2017, Law 13.445/2017

- Interest websites: **www.pf.gov.br** and **www.gov.br**

SYNTHESIS

The foreign individual investor visa is regulated by the Normative Resolution nº 13/2017[8] of

National Immigration Council (Conselho Nacional de Imigração - CNIg). According to the regulations, a permanent visa can be granted to any investor wishing to invest their own resources of external origin in productive activities in the national territory. In order for the visa to be granted, the investor must fulfill the following requirements:

a) Proof of minimum investment of R$500.000,00 (five hundred thousand Reais) in a company constituted for this purpose or, in an existing company;

b) Elaboration and presentation of an Investment Plan that will determine how the resources will be invested within a period of 03 (three) years, as well as the employment generation in the same period and,

c) Proof that the foreign capital invested was duly paid up.

BRAZIL'S PARTICULARITIES

Investment as an individual in Brazil is particularly attractive to foreigners as it makes it possible to grant a visa with a relatively low capital investment. In addition, the permanent visa allows the foreigner to apply for naturalization[9] after the minimum legal period (4 years), if he so wishes.

SANTA CATARINA'S PARTICULARITIES

The southern region of the country is one of the most attractive for foreign investment, both in the tourism sector and in the technology sector. Santa Catarina is one of the states that in addition to having investments and activities in other sectors (industrial, agricultural-livestock), has become a reference as a technological center with more than 900 technology companies[10] in Florianópolis, the state capital.

ADVANTAGES AND DISADVANTAGES

Thus, the same normative of the investor, it is also possible to grant a visa to entrepreneurs who wish to settle in the country to invest in the area of innovation, basic or applied research, scientific or technological. The advantage is that this type of investment or the investment amount is much lower. Minimum investment of R$ 150.000,00 (one hundred and fifty thousand reais); that is, R$ 350.000,00 (three hundred and fifty thousand reais) less for other types of companies.

[8] pf.gov.br/servicos-pf/imigracao/legislacao-1/resolucao-normativa/rn-13-2017-cnig-autorizacao-de-residencia-para-realizacao-de-investimento-de-pessoa-fisica-em-pessoa-juridica-no-pais.pdf/view

[9] www.gov.br/pt-br/servicos/naturalizar-se-brasileiro

[10] inovacaosebraeminas.com.br/polo-tecnologico-de-santa-catarina-entenda-como-o-estado-desenvolve-o-empreendedorismo-no-segmento/

In addition to the above amount, the investor must keep one of five conditions:

a) *Received investment, financing or resources directed to support innovation from a governmental institution;*

b) *Located in a technological park;*

c) *Incubated or be a graduated enterprise;*

d) *Finalist in a government program that supports startups;*

e) *Benefited by a startup accelerator in Brazil.*

The National Immigration Council (Conselho Nacional de Imigração - CNIg), after fulfilling the above requirements, it will also analyze and verify the social interest of the investment following these specifications:

a) originality as to the degree of unprecedented and peculiarity of the product, process or service to be introduced in the market or which constitutes the main activity of the company;

b) scope as to the degree of penetration of the product, process or service to be introduced in the market or which constitutes the main activity of the company;

c) relevance as to the degree of impact and potential to generate value of the product, process or service to be introduced in the market or that constitutes the activity.

The maximum period of validity of the permanent visa is 03 (three) years and may be extended if the investor proves that he continues to work in the same area of activity established in the Investment Plan.

The investment plan will serve as a kind of guiding map that will guide the investor in your venture.

The Brazilian authorities will issue a foreign identity card with personal information, your status as an investor and the term of validity of 03 (three) years.

It is important to remember that the visa may be canceled when the extension of the term is not required before the expiration date or in case of non-compliance with the Investment Plan or any of the information provided by the applicant (art. 8º §2º and §3º).

We point out that despite the regulations, it is possible to grant an investor visa after fulfilling the previously mentioned requirements; the CNIg itself may also request due diligence from the Regional Super intendencies of the Ministry of Labor and Social Security, and even from the Federal Police Department, to visit the place where the investor establishes the company (either to verify the existence of the company or to prove that the Investment Plan is being followed).

6.2 CONCESSION OF WORK VISA FOR FOREIGNERS

Legal Basis: Consolidation of Labor Law e Brazilian Code of Civil Procedure

- Sites of interest: **www.trabalho.gov.br**

SUMMARY

Brazil's visa granting system is on demand, in other words, it is necessary that some Brazilian company wants to hire a foreign

worker. The company must apply to the Ministry of Labor and Employment (Ministério do Trabalho e Emprego - MTE) for a work permit that will be converted into a temporary visa.

PARTICULARITIES OF BRAZIL

According to Brazilian law, Brazilians have priority in vacancies and, therefore, companies must justify the need to hire foreign workers. Temporary work visas are divided into 4 categories: up to 90 days, up to 1 year, up to 2 years with an employment contract in Brazil and up to 2 years without an employment contract in Brazil.

ADVANTAGES AND DISADVANTAGES

"The hiring takes place while that activity cannot be supplied by a Brazilian professional", explains Paulo Sérgio de Almeida, general immigration coordinator of the Ministry of Labor and president of the National Immigration Council (Conselho Nacional de Imigração - CNig). To hire foreigners, the company must have two thirds of Brazilian citizens employees.

The application for the granting of a work visa can be made via the internet, and the company has the duty to initiate the process. After this step, the company must send the company registration and future employee registration by mail. This file is the one that concentrates the greatest number of problems, because foreign documents must be legalized in Brazilian diplomatic offices abroad and translated by a sworn translator in Brazil.

"The problem is that Brazilian law dates back to 1980, and these processes for legalizing documents are complicated. The arrival movement of foreigners has started and the law has not changed. It has a backward and bureaucratic logic," says Almeida.

Upon registration, a company must justify the need to hire foreigners and the MTE will analyze the request. After the approval, the MTE will inform the Itamaraty for visa issuance at the consulate of the country that the foreigner resides. The consul will analyze whether the foreigner can or cannot receive a visa.

According to Almeida, the process takes an average of 30 days. There are 22 days for the analysis of the MTE and the rest of the period comprises the procedure at the consulate.

Renê Ramos, lawyer and partner at Emdoc, a consulting firm specializing in immigration to Brazil, believes that the Brazilian process cannot be considered lengthy. "It is average, but there is still much to improve. But, companies know few about the legislation", he says.

The biggest difficulty is if the foreigner is not well oriented, does not present the complete documents and does not know the information that the MTE needs to have. The term may double and the visa may be rejected due to the lack of consistency in the process", points out Marta Mitico, a partner at BR-Visa, a company that provides immigration consultancy and advice.

Brazilian law does not permit the "transformation" of visas, that is, a 90-day, 1-year or 2-year temporary visa without an employment contract cannot be changed to a permanent visa or a tourist visa cannot be converted on a temporary work visa. To obtain a new type of visa, the foreigner must carry out a new process, according to the desired mode. Only foreigners with an employment contract in Brazil, whose employment contract is for 2 years, may request the transformation of the temporary visa into permanent if the contract period is extended. Before, this change only occurred after 4 years of work, 2 years that could be extended for another 2 years.

7 INTERNATIONAL CAPITAL TRANSFERS

Legal Basis: Law n. 4.131/62[11], Law n. 4.390/64[12], Decree n. 55.762/65[13], Law n. 9.069/95[14], Law n. 11.371/06[15], Circular n. 3.822/17[16], Resolution n. 4.373/14[17], Circular n. 3.689/13[18], Resolution n. 3.568/08[19], Law n. 8.894/94[20], Decree n. 6.306/07[21].

- Related websites:

bcb.gov.br, receita.fazenda.gov.br and **cvm.gov.br**

SUMMARY

Aiming to provide general guiding legal and administrative lines to foreign individuals (residents or non-residents) who are willing to invest capital into Brazilian territory, it is important (even in a general scope), bring attention to the following aspects which will require a diligent approach by the investor and her/his consultants.

By law, international capital is considered:

a) Brazilian nationals' capital invested abroad;

b) foreign capital already found in Brazil;

Capital owned by individuals and companies residing or with headquarters abroad, is framed as foreign capital.

PARTICULARITIES OF BRAZIL

Brazil's Central Bank, known as BACEN, demands that any foreign investment must be registered[22] that is made in the country. An obligation that any foreign investor is subject to.

[11] Disciplines the application of foreign capital and remittances of money abroad and takes other measures.

[12] Amends Law No. 4,131, of September 3, 1962, and takes other provisions.

[13] Regulates Law No. 4,131, of September 3, 1962, modified by Law No. 4,390, of August 29, 1964

[14] Provides for the Real Plan, the National Monetary System, establishes the rules and conditions for issuing the REAL and the criteria for converting the obligations to the REAL, and takes other provisions. From art. 65 - Final Provisions - there is a treatment for the entry and exit of national and foreign currency.

[15] Provides for foreign exchange transactions, registration of foreign capital, payment in free stores located in the primary zone of a port or airport, taxation of aircraft leasing, renewal of contracts entered into under the terms of § 1 of art. 26 of Law No. 9,491, of September 9, 1997, amends Decree No. 23,258, of October 19, 1933, Law No. 4,131, of September 3, 1962, Decree-Law No. 1,455, of April 7, 1976, and revokes the provision of Provisional Measure No. 303, of June 29, 2006.

[16] Economic and financial statements that must be made throughout the year by companies that receive foreign direct investment.

[17] Provides for investments of non-resident investors in Brazil in the financial and capital markets in the country and provides other measures.

[18] Regulates, within the scope of the Central Bank of Brazil, the provisions on foreign capital in the country and on Brazilian capital abroad.

[19] Provides for the foreign exchange market and makes other arrangements.

[20] Provides for Tax on Credit, Exchange and Insurance Operations, or relating to Bonds and Securities, and takes other provisions.

[21] Regulates the Tax on Credit, Exchange and Insurance Operations, or relating to Bonds or Securities - IOF.

[22] The registration duty is imposed on the representative of the national company that will receive the foreign investment, or even by the representative of the investing company, under the terms of Circular BACEN n. 3,822/17.

The investor must attend the following procedures:

a) Central Bank Information System (SISBACEN);

b) Electronic Declaratory Registry (RDE);

c) Foreign Direct Investment (IED);

d) Financial Operation Registry (ROF)[23]

e) Stock and Capital Markets (Portfolio).

Among the legal investment categories, the foreign direct investment (FDI), ends up being the most popular to those who are willing to internalize capitals into Brazilian territory.

An important technical information is that, those investors who reside outside of Brazil, will have to constitute a legal representative in the country. The latter, as well as the legal representative of the national enterprise that will receive the investment, will be responsible for all procedures related to the registry under the Central Bank and other public authorities.

Beyond the FDI, there are other legal instruments aimed at the internalization of investment capital, among which we can list:

a) International Conference of shares or quotas;

b) Investment through conversion of foreign credit;

c) Portfolio Investment.

It must be reinforced that the paramount aspect of capital internalization in Brazil in the scope of investment is that it mandatorily subject to all Central Bank regulations, as well as to the procedures included in the SISCOMEX system.

Ultimately, it is important to state some legal restrictions to foreign investments in Brazil, which are subject to specific procedures or limitations by the local authorities.

According to laws and regulations, foreign investments in the following areas are subject to restrictions:

a) Telecommunication;

b) Development of activities related to nuclear energy;

c) Mail and telegraph services;

d) Aerospace industry; and

e) Rural land acquisition in Brazilian border regions.

PARTICULARITIES OF SANTA CATARINA

Even though the transactions of capital investment are under the competence of the national Central Bank, it is understood that the local State and Municipal authorities are entitled of, to a certain extent, request proof of the legality of the transfer and also its origin. No other legal imposition can be made as to limit/restrict that transaction.

ADVANTAGES AND DISADVANTAGES

In spite of the intricate regulation of this theme, the fact that it is centralized under the Central Bank competence, notably through SISBACEN, is actually an advantage. That means that all necessary information to clarify the transaction can be obtained at the official website. Nevertheless, it is extremely advisable to seek assistance of a specialized accountant and/or lawyer, who would be able to handle all those procedures before the Brazilian authorities.

[23] External loans and financing with a maturity of more than 360 (three hundred and sixty days), leasing, royalties and the like, as well as guarantees that may have been made by international organizations.

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