

Formation of a Brazilian Company



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GERMAN-BRAZILIAN DESK IN COOPERATION WITH FELSBERG ADVOGADOS

Four Key Topics in Terms of Suited Legal Corporate Vehicles in Brazil



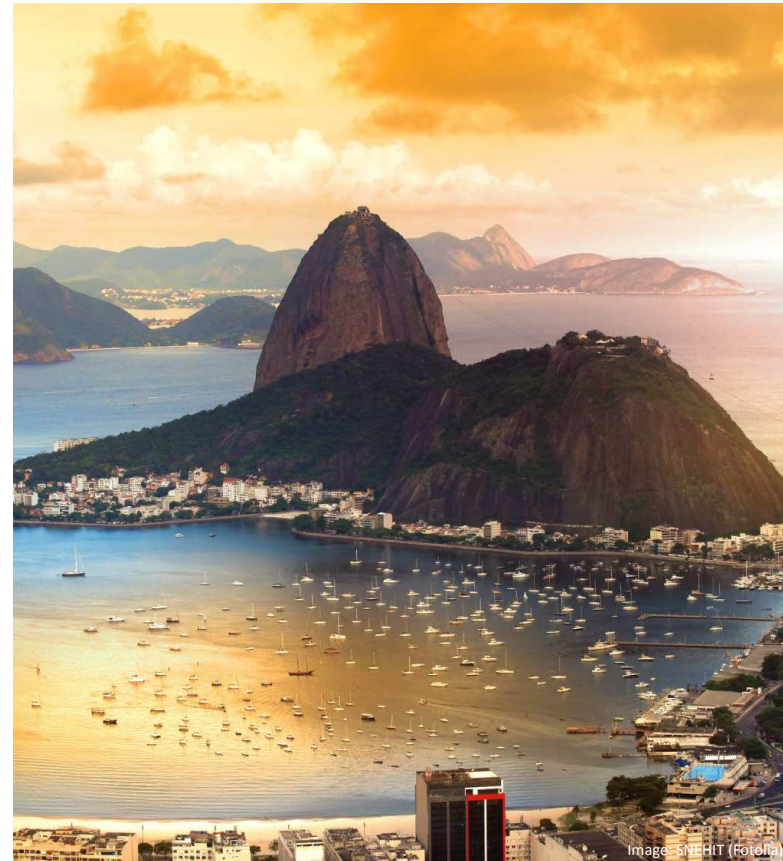
Questions & Considerations: Selection of Legal Business Vehicle in Brazil

Addressing the key questions for foreign investors as to best suited legal corporate vehicle for a specific project in Brazil:

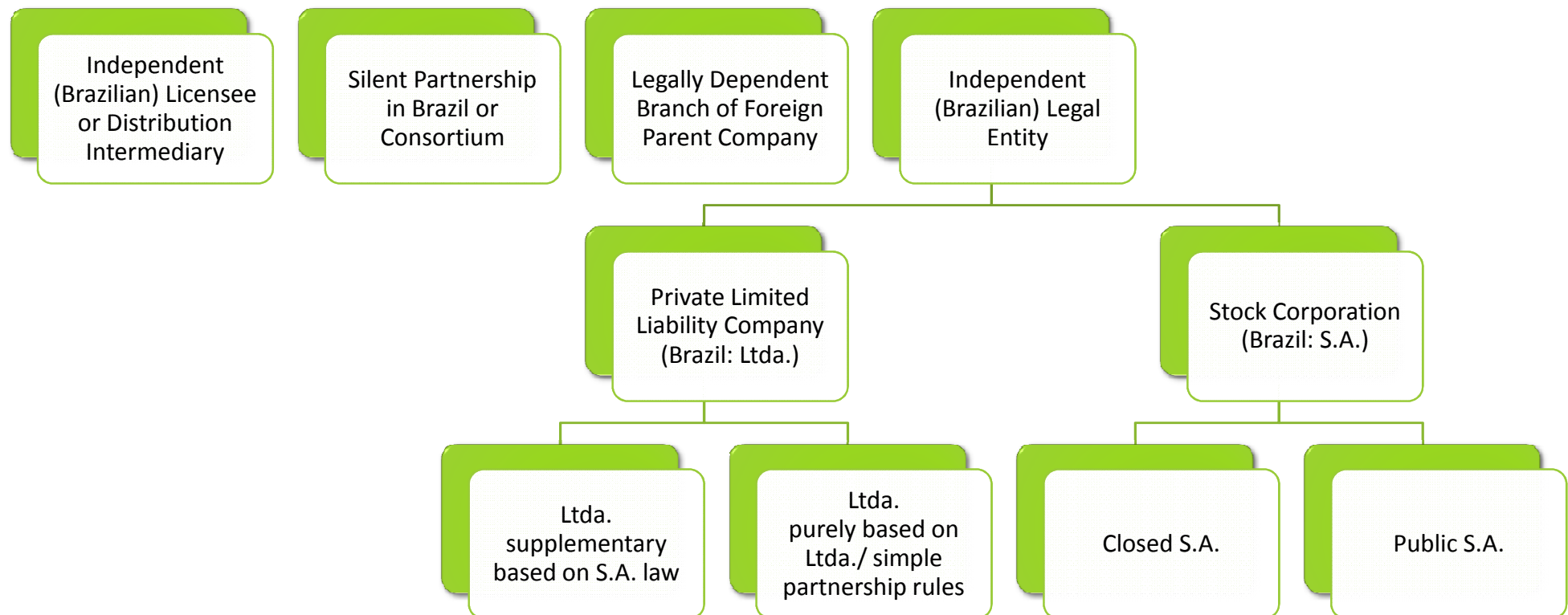
- A silent partnership, a mere branch of parent company or an independent Brazilian incorporation?
- In case of an incorporation: A private limited liability company (Ltda.) or a stock corporation (S.A.)?
- In case of a Ltda. : A Ltda. supplemented by rules of S.A. law or purely on Ltda./ simple partnership rules?
- In case of an S.A.: A closed or a public S.A. (*companhia fechada* or *companhia aberta*)?

By taking the following factors into consideration:

- The manner of the participation – wholly-owned subsidiary (WOS) or joint venture company (JVC);
- The kind of business purpose (acquisition vehicle in an M&A transaction; holding; distribution/ production of products/ services); and
- The type of financing of the Brazilian business.



A Selected Overview of Options for Business Vehicles in Brazil



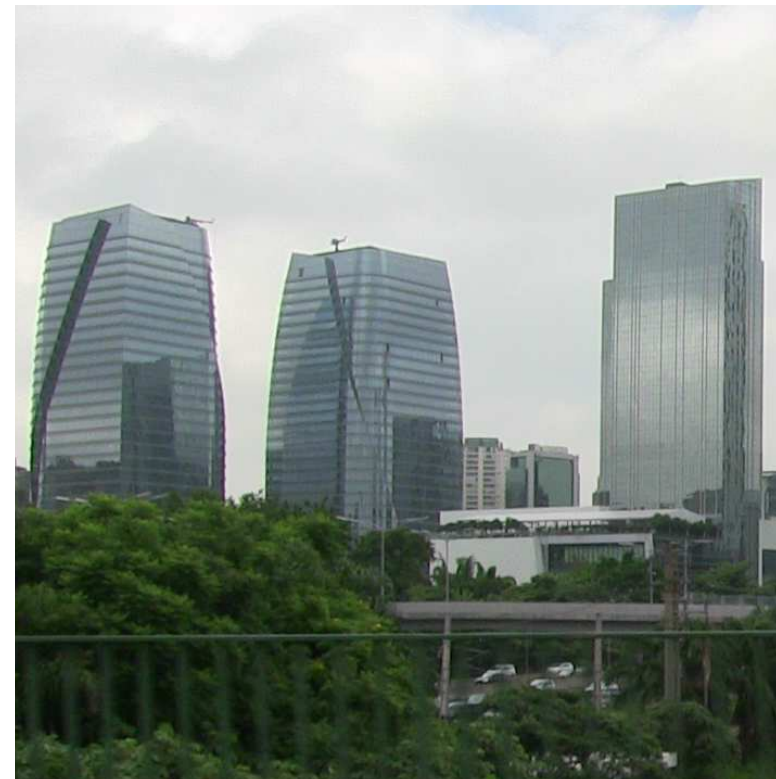
1st Key Topic: Branch or Legally Independent Brazilian Subsidiary?

Establishing a mere branch of parent company is generally possible, but entails a series of disadvantages, such as:

- Comparatively sophisticated and time-consuming approval procedure (including Federal Government approval by decree)
- Extensive publication and disclosure obligations on the parent company
- Parent company cannot rely on limitation of liability
- No tax advantages compared to independent subsidiaries

>> In practice, due to specific tax particularities and business models, only international airlines and foreign banks will establish branches.

>> In the vast majority of cases the establishment of a Brazilian incorporation is recommendable.



2nd Key Topic: Choosing a Suitable Form of Business Incorporation

Must-have features of entity form:

- Ability to engage non-shareholding directors;
- Maximum of shareholders' limitation of liability; and
- Permissibility to have legal entity as shareholder.


Nice-to-have features:

- Greatest possible saving of time and effort involved in incorporating/ operating the business
- Maximum of power to determine and influence:
 - Changes of directorships;
 - Appropriations of profits;
 - Corporate Restructurings; and
 - Exit scenarios.



Side Note: Complex Procedures in the Incorporation of a Company in Brazil

Incorporation process tries the patience of investors since a comparatively significant amount of time is involved.



World Bank Report *Doing Business 2016* identifies deficiencies in the process of starting a business (Brazil ranks 174 out of 189 countries; Germany, Austria, Switzerland, and France rank 107, 106, 69 and 32 respectively).

Many formal steps and registrations of the company and its shareholders with numerous administrative bodies are required in the formation phase.*

Foreign/crossborder element (e.g. translations, additional notarizations) entails further delay in establishing the company.**

* See Annex "Checklist for incorporating a sociedade limitada in Brazil".

** The Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents of 5 October 1961 will enter into force in Brazil on 14/08/2016.

Overview of Brazilian Business Vehicles

Form of Incorporation / English Term (free translation)	Acronym / Year of last Introduction	German / Swiss / Austrian / French Equivalent
empresário individual / sole proprietorship	EI/ 2003	Eingetragener Kaufmann (e.K.) / Einzelunternehmen / eingetragener Einzelunternehmer (e.U.) / microentreprise
sociedade simples / simple partnership	SS (acronym not used in practice)/ 2003	Gesellschaft bürgerlichen Rechts (GbR) / Einfache Gesellschaft / Gesellschaft nach bürgerlichem Recht (GesnbR) / société civile (SC)
sociedade em nome coletivo / general partnership	SNC (see above)/ 2003	Offene Handelsgesellschaft (OHG) / Kollektivgesellschaft / Offene Gesellschaft (OG) / société en nom collectif (SNC)
sociedade em comandita simples / commercial partnership	SCS (see above)/ 2003	Kommanditgesellschaft (KG) / KG / KG / société en commandite simple (SCS)
sociedade em comandita por ações / partnership limited by shares	SCPA (see above)/ 1977	KGaA / Komandit-AG / (-) / société en commandite par actions (SCA)
sociedade limitada / private limited liability company	Ltda./ 2003	Gesellschaft mit beschränkter Haftung (GmbH) / GmbH / GesmbH / société à responsabilité limitée (SARL)
empresa individual de responsabilidade limitada / one-person private limited liability company	EIRELI/ 2012	GmbH / GmbH / GesmbH / entreprise unipersonnelle à responsabilité limitée (EURL)
sociedade anônima / stock corporation	S/A, AS or S.A. / 1977	Aktiengesellschaft (AG) / AG / AG / société anonyme (SA) or société par actions simplifiée (SAS)

Suitability and Unsuitability of Brazilian Vehicles for Particular Needs of Foreign Investors

Only the *sociedade limitada*/ Ltda. (private limited liability company) and the *sociedade anônima*/ S.A. (stock corporation) meet the needs of foreign corporate investors such as

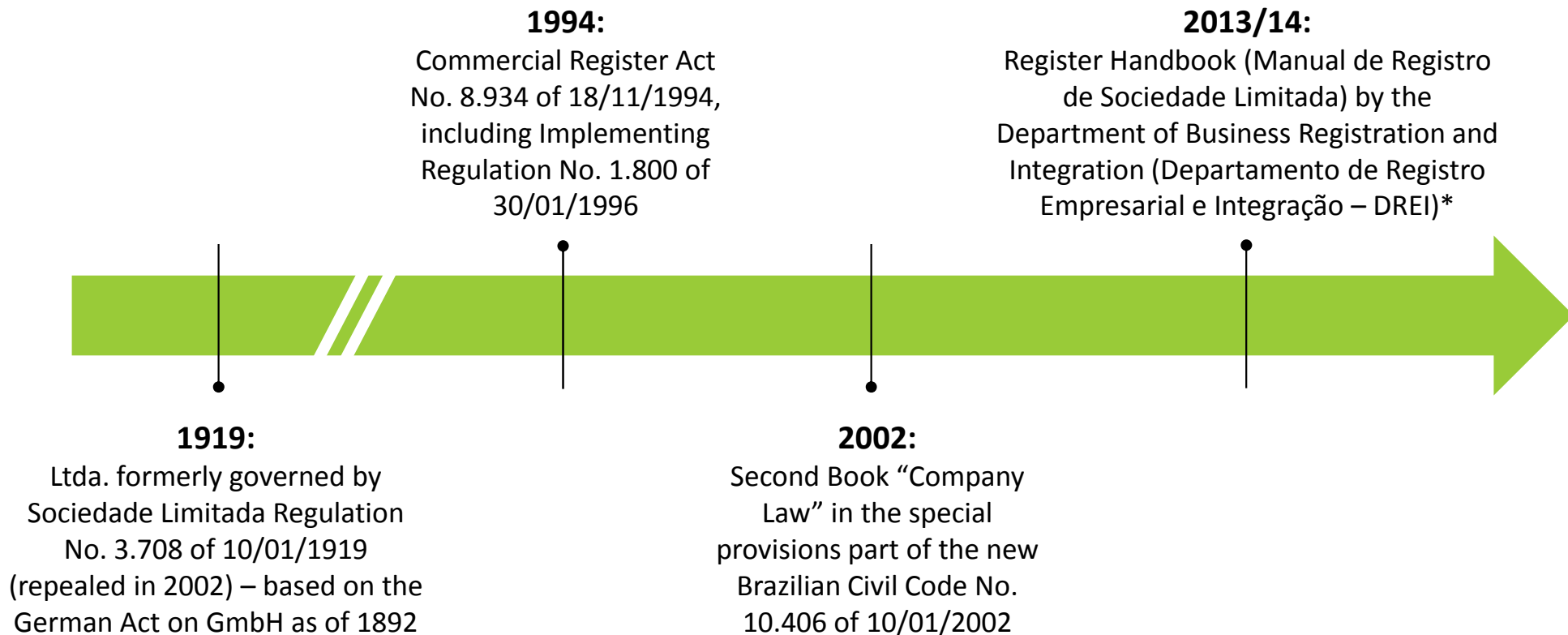
- the engagement of non-shareholding directors,
- the shareholders' limitation of liability and
- the permissibility of legal entity as shareholder.

The other above pictured business vehicles like *empresário individual* (EI), *sociedade simples* (SS), *sociedade em nome coletivo* (SNC), *sociedade em comandita* (SC), and *empresa individual de responsabilidade limitada* (EIRELI) do not fit for foreign investors because of the following major deficiencies:

- Shareholders' liability is unlimited in SNC, SS and EI, and is only partially limited in SC;
- No non-shareholding/outside directors are allowed in SNC, SC, EI; and
- Corporate entities cannot hold shares in EIRELI, SNC, EI, and have only limited ability to hold shares in SC

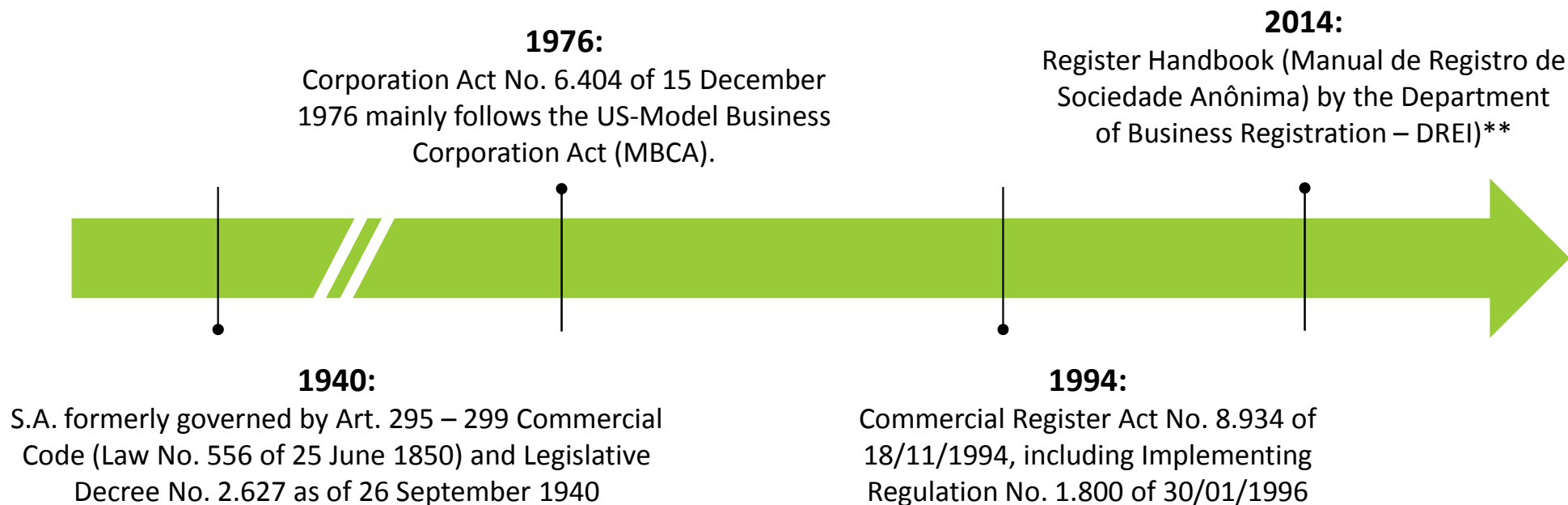


Side Note: Historical Roots and Current Law Governing the Brazilian *Sociedade Limitada* (Ltda.)



*in conjunction with administrative regulations IN DREI No. 10 of 05/12/2013, No. 21 of 04/04/2014 and No. 22 of 02/05/2014

Side Note: Historical Roots and Current Law Governing the Brazilian *Sociedade Anônima* (S.A.)



* The MBCA is a model set of law prepared by the Committee on Corporate Laws of the Section of Business Law of the American Bar Association and is followed by twenty-four US states.

**in conjunction with administrative regulations IN DREI No. 10 of 05/12/2013, IN DREI No. 21 of 04/04/2014 and IN DREI No. 22 of 02/05/2014

The Brazilian *Sociedade Anônima* (S.A.) und *Sociedade Limitada* (Ltda.): Strengths and Features Compared

S.A.	Ltda.
No joint liability of shareholders if other shareholders fail to deposit their contributions to the corporate capital	Incorporating and operating the company involves less time and effort in comparison to the stock corporation
Protection of minority shareholders from arbitrary decisions of majority shareholders	More favourable towards majority shareholders (min. $\frac{3}{4}$ majority for corporate control)
Statutory obligation to distribute profits (min. 25%)	No statute obligation to distribute profits
Availability of external finance through access to capital markets (e.g. issue of bonds)	More flexibility regarding configuration of by-laws
Non-Brazilian resident administrators can participate in company management	Requires only one director (stock corporations require at least 2 directors)

3rd Key Topic: Sociedade Limitada or Sociedade Anônima as Best Form of Incorporation?

The Brazilian private limited liability company “sociedade limitada” or Ltda. is rather suitable in scenarios involving wholly-owned subsidiaries or majority shareholdings of 75% and more in a Joint Venture Company (JVC).

In contrast, the Brazilian stock corporation “sociedade anônima” or S.A. is rather suitable for JVCs on equal terms, minority shareholdings, local capital markets finance needs, as well as when direct participation in company management (as a member of the “conselho de administração”) by non-Brazilian residents is envisaged.



Side Note: Brazil – China: Available Business Vehicles for Foreigners Compared

Form of Incorporation

Brazil: no special form of incorporation for foreign investors required, even in cases of wholly owned subsidiaries (WOS)
China: for WOS, recourse to a specific form of incorporation required

Extent of Ownership

Brazil: WOS possible without restrictions in terms of recourse to a specific form
China: In case of recourse to a standard Chinese business vehicles, a joint venture company (JVC) with a local partner in China is mandatory for foreign investors

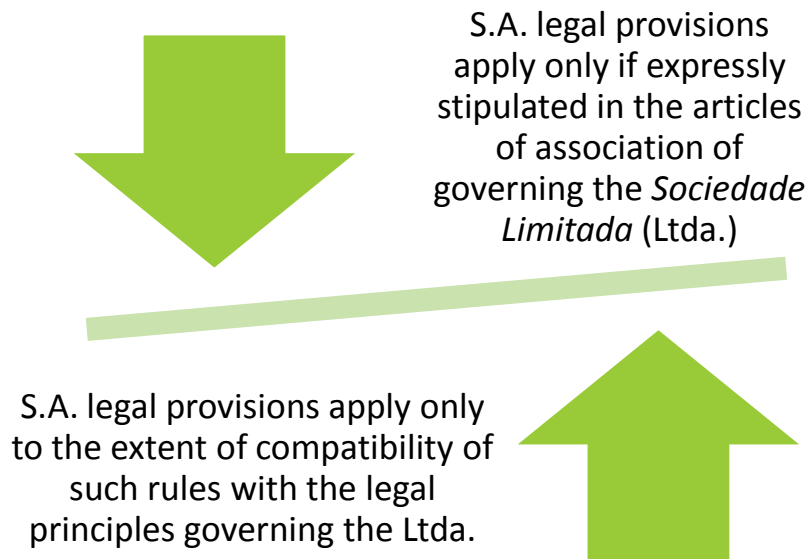
>> Brazil provides important advantages in comparison to market access in China where a recourse to a wholly owned subsidiary (WOS) or to a JVC with a local partner is required.

Fourth Key Topic: Sociedade Limitada With or Without Supplementary Application of S.A. Law?

Shareholders of the Ltda. have the option to recourse to the supplementary application of the Brazilian stock corporation *sociedade anônima* (S.A.) law.

Otherwise, only the simple partnership rules under general civil law apply on a subsidiary basis to the rules of the Ltda.

>> **Recommendation:** Shareholders should weigh the pros and cons of recourse to the rules governing the Brazilian S.A. (see the following table) and may opt for the application of only specific parts of S.A. law.



Consequences of Supplementary Application of S.A. Law to the Ltda. where Determined by the Articles of Association

	Non-application of S.A. Provisions	Supplementary application of S.A. provisions
Annual appropriation of profits	Decision by way of a simple majority of shareholders	Decision by way of an absolute majority of shareholders
Minimum distribution of profits	Not compulsory	Compulsory
Deadlock (determined by reference to the share capital)	Decision on a <i>per capita</i> basis; decision by way of judicial determination in the event of a <i>per capita</i> deadlock	A new shareholders' meeting must be summoned and votes must be cast anew; decision by a third party appointed by the shareholders in the event of another deadlock; failing this, judicial determination
Transactions unrelated to the company's core business (<i>ultra vires</i>)	Generally invalid	Generally valid
Scenarios in which an individual shareholder can be compelled to surrender his shareholding	Six scenarios	Three scenarios

Annex 1: Checklist for Incorporating a Sociedade Limitada in Brazil

1. All founding shareholders to sign powers of attorney authorising a legal representative (resident in Brazil) to deal with Brazilian authorities and courts (obligatory), and in all company-related matters, including incorporation itself (recommended); requirements for validity of powers of attorney: (a) signing before a notary public; (b) prior certification of signatures and/or the notary's official seal by the competent authority (if the signatures and/or the official seal are registered with the Consulate General, this will not apply); (c) final certification (legalisation) at the Brazilian Consulate General.

2. Commercial register excerpts in respect of the founding shareholders to be delivered for Brazilian consular legalisation.

3. Scans of the thus legalised powers of attorney and commercial register excerpts to be emailed to the Brazilian attorney; Brazilian attorney to verify the powers of attorney and commercial register excerpts based on the scans; originals of powers of attorney and commercial register excerpts to be mailed to the Brazilian attorney via express post.

4. (Portuguese) translations of the powers of attorney (originally in English) and the commercial register excerpts (originally in German) to be procured from a translator officially appointed by the commercial registry in Brazil; registration of the aforementioned documents in the Brazilian public register of documents and titles.

5. All founding shareholders to be registered with the Central Bank of Brazil (SISBACEN) and Department of Federal Revenue of Brazil (CNPJ/MF).

6. Articles of association to be drafted in English; after authorisation by the founding shareholders drafting of articles of association in Portuguese; signing by the shareholders' legal representative, the (locally resident) director, and the Brazilian attorney; registration of articles of association with the commercial registry (in São Paulo: JUCESP). **(NIRE)**

7. Company to be registered with the Department of Federal Revenue of Brazil (CNPJ/MF).

8. Apply for company access to the Electronic System of the Central Bank of Brazil (SISBACEN).

9. Founding shareholders to apply for investor code (RDE-IED) to SISBACEN.

10. Apply for company's bank account to be opened.

11. Share capital to be paid into the company's bank account.

12. Deposit of share capital to be registered with SISBACEN.

13. Company to be registered with the City Hall at the company's place of business.

14. Company to be registered with the social security authority (INSS).

15. Company to be registered with the Employee Indemnity Guarantee Fund (FGTS/CEF).

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