

# Franchising Q&A: Brazil

by Fernanda Girardi Tavares and João Carlos Ariera Harres, Souto Correa Advogados\*

Country Q&A | Law stated as at 30-Nov-2019 | Brazil

---

Brazil-specific information concerning the key legal and commercial issues to be considered when setting up a franchise.

This Q&A provides country-specific commentary on *Practice note, Franchising: Cross-border overview*, and forms part of *Cross-border commercial transactions*.

---

## General

1. Is franchising common? What statistics are available to show the importance of franchising in the national economy? What types of products/businesses are susceptible to franchising? What comments can be made about the expansion of domestic franchisors overseas?

Franchising is very common in Brazil. There are many Brazilian-owned franchises, as well as many foreign franchises. According to the Brazilian Franchising Association (BFA), in 2018, the number of franchised units increased to 177,545, in comparison to 146,134 units in 2017, which indicates a significant growth of the market (*BFA: Franchising performance 2017; BFA press release, 11 March 2019*).

According to the BFA, the franchising market in Brazil represented BRL177 billion in the 12-month period up to the end of the first quarter of 2019, representing approximately 2.6% of Brazil's GDP (according to the World Bank, the Brazilian GDP in 2018 was BRL6.8 trillion (USD1.869 trillion)).

All tradable goods and services are susceptible to franchising in Brazil.

According to the Fundação Dom Cabral's 2018 report, *The trajectories of the internationalization of Brazilian businesses*, among the 13 Brazilian franchisors with the greatest presence overseas, the vast majority either maintained (16%) or decreased (46%) the internationalisation rate between 2017 and 2018.

## Overseas expansion

2. Does national law permit a foreign franchisor to enter into a franchise agreement without establishing a wholly-owned subsidiary or a branch office in your country?

Brazilian law allows foreign franchisors to enter into a franchise agreement with Brazilian franchisees directly, without any subsidiary or a branch office in Brazil. However, it is necessary to take the issues and procedures involving the protection of trade marks into account, including copyright, patents and designs. The National Institute of Industrial Property (INPI) is the official governmental entity responsible for Industrial Property rights in Brazil. It is a federal autonomous agency of the Ministry of Industry, Foreign Trade and Services.

3. Are there any rules that would restrict the setting up of branches or subsidiaries or joint ventures by a foreign-owned business?

Brazilian law does allow foreign companies to set up branches and subsidiaries in Brazil. However, formal approval from the government is required in advance (*Normative Ruling No. 7/2013, as updated by Normative Rulings No. 25/2014, No. 49/2018 and No. 59/2019, Business Registration and Integration Department (Departamento de Registro Empresarial e Integração)*).

Several documents are needed to obtain approval to set up branches and subsidiaries in Brazil:

- Corporate resolution approving the setting up of a Brazilian branch/subsidiary.
- Articles of association or bylaws of the foreign company.
- List of shareholders.
- Certificate of regularity issued by the authorities of the country of origin.
- Corporate resolution appointing a Brazilian legal representative of the company, and power of attorney giving power to act on behalf of the foreign company.
- Affidavit from the company legal representative promising to obey Brazilian laws and any conditions of the authorisation set out by the Federal Government.
- Foreign company's most recent balance sheet.
- Evidence of payment of government fees.

Once the authorisation is granted by the Federal Government, the foreign company's branch/subsidiary must be fully in compliance with Brazilian laws, including registration with the relevant authorities (for example, the Board of Trade of the state in which it is established).

All documents must be presented in Portuguese, given that any references in a foreign language will not be taken into consideration by Brazilian courts or government officials.

In addition, all references to monetary values must be made in Brazilian reals.

4. Will there be any difficulties in a domestic franchisee making payment to a foreign franchisor either in local currency or in the currency of the franchisor's country? Are there any exchange controls in operation?

To pay royalties to the foreign franchisor, the franchising contract must be registered before the Intellectual Property National Authority (INPI); there is no express limit in Brazilian Law on the amount of royalties that can be paid. However, income tax deductions for royalty payments may be limited to 5% of the franchisee's revenue, depending on the product or the activity (*Law 4.131/1962*).

In addition, the registration certificate of technology contracts must indicate the following (*Article 13, item XI, Normative Ruling No. 70/2017*): "The INPI did not examine the contract in light of tax legislation, taxation, and remittance of capital abroad." Normative Ruling No. 70/2017 therefore terminated the INPI's prerogative to analyse the provisions of technology contracts in terms of compliance their compliance with the local tax legislation, taxation, and remittance of capital abroad, so guaranteeing the application of freedom of contract principle on such matters.

There is no currency exchange limitation in operation in Brazil.

## Regulation of franchising

5. Is franchising specifically regulated by law? Is any legislation pending, which is likely to affect franchising? Are there any formalities that a franchisor must comply with when setting up a franchise system (for example, any registration or disclosure requirements?)

Law 8.955/1994 regulates franchising relationships. Article 3 requires a franchisor to provide to the franchisee candidate, in writing and at least ten days in advance of the date of signature of the franchising agreement, a franchise offering circular disclosing all of the following:

- A brief corporate history of the franchisor, the franchisor's trade name and all companies that are directly linked to the franchisor and their incorporated names and addresses.
- Balance sheets and financial statements of the franchisor's company for the last two years.
- Precise indication of all pending litigation in which the franchisor and its sub-franchisors are involved, and which could directly make the operation of the franchise impossible.

- Detailed description of the franchise, general description of the business and the activities to be performed by the franchisee.
- The ideal franchisee profile, describing previous experience, education level and other characteristics that are mandatory or preferable.
- Requirements concerning the direct involvement of the franchisee in the operation and administration of the business.
- Specifications as to:
  - the estimated initial investment required for the acquisition, installation and startup of the franchise;
  - the initial franchise fee and security required; and
  - the estimated value of facilities, equipment and initial stock and payment terms.
- Clear information about periodic taxes and other amounts payable by the franchisee to the franchisor or third parties referred, detailing the underlying bases and their remuneration or the purpose for which they are intended, indicating, specifically, the following:
  - periodic remuneration for the use of the system, brand or in exchange for services actually rendered by the franchisor to the franchisee (royalties);
  - equipment rental or real state rental;
  - advertising fee or similar;
  - minimum insurance; and
  - other amounts owed to the franchisor or connected third parties.
- Complete list of all franchisees, sub-franchisees and sub-franchisors network, as well as details of who left within the last 12 months, with name, address and telephone number.
- Regarding the territory, specification of the following:
  - whether the franchisee is guaranteed exclusivity or preference over certain territory of operation and, if so, under what conditions; and
  - whether the franchisee is allowed to sell goods or provides services outside its territory or to export.
- Clear and detailed information on the franchisee's obligation to purchase any goods, services or inputs needed for implementation, operation or management of the franchise, including a complete list of these suppliers.
- Indication of what is effectively provided by the franchisor to the franchisee, in respect of:
  - network supervision;
  - services provided to the franchisee;
  - franchisee training, specifying duration, content and costs;

- training of employees of the franchisee;
  - franchise manuals;
  - guidance in the analysis and selection of the venues where the franchise will be installed; and
  - layout and architectural patterns in the franchisee's premises.
- 
- The status at INPI of trademarks or patents whose use is to be authorised by the franchisor.
  - The status of the franchisee after the expiration of the franchise agreement, in relation to know-how or industrial secrets relating to the franchise and competition with the franchisor's activity.
  - The standard contract model and, if appropriate, also the pre-standard franchise agreement adopted by the franchisor, with full text, including its annexes and expiration date.

No registration or special requirements are necessary, other than the filing of the record of the franchise agreement with the INPI and registration with the Central Bank of Brazil for the following purposes:

- Remittance of royalties abroad.
- Tax deductibility of payments by the Brazilian company.
- Making the agreement valid before third parties.

Certain requirements imposed by the regulations issued by the INPI also have an impact on the terms of franchise disclosure documents and franchise agreements.

It should be noted that the progress of Bill No. 219/2015 is ongoing; this Bill envisages a new regulation of franchising that would revoke Law 8.955/1994.

6. Are there any laws, regulations or case law that apply to distributorship or agency relationships that might be interpreted in such a way as to apply to the franchise relationship?

Even though Law 8.955/1994 aims to regulate franchise agreements, it does not provide all the obligations and remedies to govern such a complex type of contract. Provisions of the Civil Code which deal with agency and distributorship, may apply, as well as some provisions related to contracts in general. Case law must also be taken into consideration.

7. Is there an obligation on franchisors and/or franchisees to comply with any voluntary code? What are the main obligations imposed in such code? Is it usual practice to incorporate the code into the franchise agreement?

The BFA has a Franchise Auto-Regulation Code (Code) which mainly provides guidelines that govern the conduct and behaviour of franchisees, franchisors and third parties related to the franchise. Although the Code is soft law and it is not mandatory according to Brazilian law, compliance with its provisions is mandatory if parties want to maintain BFA membership status. Either way, it is important for dealers to adopt good rules of corporate governance to make their business more profitable.

It is common practice for the biggest and most well-known franchisors to incorporate the Code by reference in their franchise contracts.

## Competition law

8. Are there any national laws or regulations that would affect the following business practices:

- Exclusive dealing?
- Territorial restrictions?
- Customer restrictions?
- Resale price maintenance?
- Minimum purchase targets?
- Imposition by the franchisor of restrictions on the sources of supply to the franchisees?
- Discrimination by the franchisor among franchisees for fees, royalties, payment for goods, services, and so on?

In general, exclusive dealing, territorial restrictions or any other obligation agreed between franchisee and franchisor are allowed. According to Law 8.955/1994, every limitation imposed on the franchisee must be disclosed in the franchise offering circular. This obligation is necessary to protect the franchisee from any damage the franchise might incur from the franchisor's bargaining power. However, resale price maintenance or any other anti-competitive practices are prohibited (*Article 36, Law 12.529/2011, Brazilian Antitrust Law*).

Customer rights limitation cannot be imposed. Law 8.078/1990, which protects consumers, is mandatory law and prohibits any practice or clause that might in any way affect customers' rights.

9. Are there any local provisions relating to the imposition of minimum or maximum prices?

The imposition of minimum or maximum prices between franchisor and franchisee is generally allowed and valid. However, according to Brazilian antitrust law, price imposition is prohibited (the franchisor can suggest specific prices but it is prohibited from imposing them), since the practice can affect the competition system. If the franchising contract provides for penalties to be applied in the event that the franchisee does not adopt the suggested prices, the sanctions are considered mechanisms to enforce the suggested prices and will therefore not be valid.

10. Are there any laws or regulations relating to restrictive covenants or covenants not to compete during the franchise agreement? To what extent is it possible to continue the restrictions after the agreement has expired? In particular, to what extent does the geographical extent and or the length of time of the restriction affect its enforceability?

Geographical and competition restrictive covenants are allowed and enforceable under Brazilian law, if previously provided for in the franchise offering circular (*Article 3, Law 8.955/1994*).

Restrictions after the contractual term are also enforced if provided for in the franchise offering circular (*Article 3, XIV, Law 8.955/1994*). However, case law is not harmonised and never allows restrictions longer than five years after termination, in analogy to Article 1.147 of the Civil Code, which restricts non-compete clauses between buyer and seller for five years. In practice, it is common to provide for non-compete clauses that extend for two or three years after the termination of the franchising contract.

11. Does national law allow the franchisor to retain for his own exclusive use volume rebates, commissions, allowances paid by suppliers of products or services to franchisees?

There is no mandatory legal provision regarding volume rebates, commissions, allowances paid by suppliers of products or services to franchisees. However, the franchisor must disclose all the conditions of the franchisor-franchisee relationship and franchise agreement terms in the franchise circular offering (*Article 3, Law 8.955/1994*). A duty to disclose would be also an obligation of the duty to contract in good faith provided for in Article 421 of the Civil Code.

## Intellectual property

12. How are trade marks protected under national law?

Trade marks are protected under the Brazilian Industrial Property Law (*Law 9.279/96*). Trade marks are granted on a first-to-register basis for a ten-year term. Trade mark rights are renewable indefinitely.

13. In the event that the franchisor is based abroad, is it necessary that the franchisee is registered as owner or user of the trade mark in order to be able to import goods bearing the trade mark?

The customs authorities do not require the importer to be registered as the owner or the user of the trade mark to import the goods bearing the trade marks. However, importation of goods bearing unauthorised trade marks as counterfeited goods is not allowed and is also a crime under Article 190 of the Brazilian Industrial Property Law (*Law 9.279/96*).

14. What intellectual property rights are typically licensed in a franchise agreement?

Trade marks are the most licensed intellectual property right under franchise agreements, along with copyrighted materials such as the franchise manual. Patents, designs and software are also licensed, although less often.

15. What provisions are usually made in respect of trade marks in addition to any licensing of their use?

The most important provision is the payment of royalties to the franchisor in consideration for the licensing of the trade mark to the franchisee.



Another important provision regards the termination of the agreement. It usually provides for the franchisee to cease immediately the use of the trade mark in any activity, establishment or product, on termination of the franchise.

The term of franchise agreements must match the term of registration with INPI of any trade mark used under the agreement.

16. Does the franchisee become entitled to any rights in a trade mark (or any other intellectual property right) by virtue of selling the trade marked products in his territory?

The franchisee does not acquire any trade mark automatically only by selling goods and services bearing the relevant trade mark. In Brazil, registration is required in order to acquire any trade mark rights.

17. What provisions are usually made in respect of goodwill?

At least two provisions are usually made in respect of goodwill:

- The agreement provides for a formal waiver by the franchisee of the right to claim goodwill, so that goodwill resulting from use of the franchise shall belong to the franchisor.
- The franchisor usually requires the franchisee to take responsibility for any behaviour or act that could negatively affect the goodwill of the trade mark.

18. Can the franchisor impose restrictions on the use of the franchisor's know-how and other confidential information by a franchisee either during or after the expiration of the franchise agreement?

Regarding restrictions during the franchise agreement, a franchisor may prohibit the franchisee from disclosing any confidential information or know-how to third parties, or from using the franchisor's know-how in any activity outside the scope of the franchise agreement.

Regarding restrictions after the expiration of the franchise agreement, Brazilian law does not provide for a clear solution. Franchisors must disclose in the franchise circular offering any after-expiration obligations of the franchisee regarding:

- The franchisor's know-how accessed during the agreement.
- The deployment of competition activities by the franchisee.

However, there is no clear provision regarding the enforceability of non-compete clauses (*Article 3, item XIV, Brazilian Franchising Law (Law 8.955/1994)*). Brazilian case law provides that restrictions on the use of the franchisor's know-how by the franchisee are valid, but may not, in general, be enforced for more than five years. It is common practice to include non-compete clauses which are valid for two or three years from the termination of the franchising contract (see [Question 10](#)).

19. Are there any competition law implications of licensing intellectual property rights?

There are no specific competition implications in licensing intellectual property rights under Brazilian law. However, in case the licensing agreement has the purpose of reaching (or results in the constitution of) a dominant and anti-competitive market position, such agreement may be considered illegal under the Brazilian Antitrust Law (*Law 12.529/2011*).

## Real property

20. Are there any restrictions on ownership or leasing of immovable property that may arise in a franchising situation?

Under Brazilian law, there is no restriction or specific regulation regarding the ownership or leasing of real estate that could be used in a franchising situation for a franchisee in Brazil, irrespective of the franchisee's or franchisor's nationality. Only rural real estate has restrictions regarding deals with foreign buyers.

## Employment issues

21. Is there a risk that franchisees may be treated as employees of the franchisor?

The relationship between franchisee and franchisor is of a commercial nature. Both parties are deemed independent entrepreneurs. Under Brazilian law, neither the franchisee nor their own employees would usually be considered the franchisor's employees. In Brazil the general rule is that, for an employment relationship to exist, the relationship must meet the following requirements:

- Subordination; the employee works under supervision of the employer, is subject to orders and has no autonomy to make decisions on their own.
- Habit; the employee renders services to the employer on a regular and continuous basis.
- Remuneration; the professional is compensated for the services they render through the payment of a salary.
- Personality; the services are carried out by a specific person.

However, there is a risk that an employment relationship may be deemed by the labour courts to exist if a franchisee or (more likely) its employees bring a claim and can show that the relationship meets these requirements.

*(Article 3, Law-Decree No. 5.452/1943 – Consolidation of Brazilian Labour Laws.)*

In addition, to properly guarantee their position, the franchisor must assure that there will not be any interference in the employment relationship maintained between the franchisee and its employees.

## The Franchise agreement

22. Are any particular formalities required for a franchise agreement to be enforceable under national law?

Franchise agreements will be fully enforceable under Brazilian law if both these formalities are met:

- The franchisor must have made the franchise offering circular available to the franchisee at least ten days before the formation of the franchise agreement, with all the required information provided (see [Question 5](#)). If the franchisor disregards this requirement, the franchisee may declare the contract null and void (*Article 4, Law 8.955/1994*).
- The franchise agreement must also be in writing and signed before two witnesses (*Article 6, Law 8.955/1994*).

In relation to offering circulars, it should be noted that there are cases where the courts have rejected franchisee claims that the franchise agreement must be declared null and void due to the lack of a franchise offering circular where:

- The franchisees had failed to prove that the lack of the franchise offering circular resulted in actual damages.
- A considerable period of time had elapsed from the execution of the franchise contract and the claim to have it declared null and void (the delay therefore indicating acceptance of the contract despite the lack of offering circular).

In April 2019, São Paulo State Court of Appeals issued an official statement (*Enunciado IV*) which reflects the prevailing interpretation on the matter at that court (which is one of the most relevant in the country in terms of volume of potential claims), saying; "Non-compliance with the formality provided by Article 4 of Law 8.955/94 may entail the nullity of the franchising contract, provided that it has been claimed by the plaintiff within a reasonable period of time and provided that the actual loss is duly proved."

23. What rights does the franchisor usually grant to the franchisee?

Franchisees are usually granted the following rights, which are not mandatory, but must be duly set out in the offering circular:

- To use the franchisor's trade mark or patent.
- To be an exclusive distributor of the franchisor's goods or services in a restricted area (according to the franchise circular offering).
- To use franchisor's technology, software and know-how.
- To be entitled to provide a uniform to its employees, and to use other types of distinctive issues.
- To receive training sessions and submit its employees to training sessions related to the product or service to be rendered.
- To receive technical manuals related to the implantation and operation of the franchise.
- To receive architectural standards and projects to be followed when setting up its business unit.

24. Is it usual for the franchisor to grant exclusivity? Does this have any competition implications?

It is usual for the franchisor to grant exclusivity in matters such as territory and period of time.

Exclusivity does not have any prima facie competition implications regarding the relationship between franchisor and franchisee. However, in order to comply with competition law, exclusivity must:

- Be limited in territory, object and period of time.
- Not have a specific purpose of competition limitation.
- Not involve resale price maintenance, which is not allowed by the Brazilian Antitrust Law (see [Question 8](#)).

(Article 36, Law 12.529/2011.)

25. What term is commonly agreed for a franchise? Is it common to include a test period?

The franchisor is free to suggest the term of the contract (although both parties may negotiate it, the franchise contract will usually be a standard form contract of the franchisor, and therefore the franchisor usually determines its duration).

The term must be sufficient for the amortisation of the investments required from the franchisee. In addition, pursuant to [INPI's Normative Ruling 199/2017](#), The term of franchise agreements must match the term of registration with INPI of any trade mark used under the agreement.

It is common practice to provide for a five-year term, with the possibility of renewal if either of the parties so request with a reasonable notice period. It is also common that after an initial determined period of validity, the franchise contract can be extended for an undetermined period. In such a situation, it is also necessary to stipulate a notice period for a party to terminate unilaterally (see [Question 28](#)).

Considering the scale of investment required, a test period is not that common. An alternative is to establish a shorter initial term (such as a one-year validity, for instance) and the possibility of further extension.

The term must be set out in the franchise circular offering, to avoid any allegations of nullity or invalidity from the franchisee.

26. What rights of renewal are commonly included in the agreement? Is a charge made for renewal?

Franchisees usually have the right for renewal, sometimes under a performance requirement. Some franchises notoriously charge for renewal but it is not very common.

27. Does national law impose any obligations on the franchisor?

The franchisor has the main obligation of providing the franchisee with the franchise offering circular (see [Question 5](#)). Brazilian law also obliges the franchisor to grant the franchisee the licence to use its trade mark or patent and to use franchisor's technology, software and know-how (*Article 2, Law 8.955/1994*).

28. What events will be regarded in law as justifying termination of the franchise agreement? Do any statutory obligations arise on termination? What provision is usually made in the agreement for termination?

Any breach of contract can cause the franchise agreement to terminate with cause (*Article 475, Civil Code*).

Breach of the following statutory obligations may result in termination:

- For the franchisee, if the franchisor does not guarantee the franchisee the use of the trade mark, patent or know-how, and if the franchisor does not provide the franchisee with the franchise offering circular at least ten days in advance of the signature of the franchise agreement (see [Question 5](#)) (*Article 475, Civil Code; Articles 2-3, Law 8.955/1994*).
- For the franchisor, if the franchisee does not pay the franchise fee and the royalties (*Article 475, Civil Code; Article 2, Law 8.955/1994*), or adopts any conduct or practice acts that could damage the trade mark or the product which is the subject-matter of the contract.

In addition to statutory obligations, franchise contracts usually impose termination upon any breach of agreed quality or sales performances, in order to protect the franchisor's trade mark and market value.

If the franchise contract is valid for an undetermined period, it usually provides for the possibility of unilateral termination by either party by prior notice. The applicable law does not provide for the term of the notice period, but rather gives a general guideline that unilateral termination is only effective after a term compatible with the nature of the business and of the investments made to run it has elapsed (*Article 473, Brazilian Civil Code*).

29. What rights does the franchisee have to compensation on termination of the franchising agreement? How is compensation for termination calculated?

Law 8.955/1994 does not provide for termination of a franchising agreement, nor for any compensation for termination, meaning that there is no pre-liquidated (legal) compensation triggered by the termination of a franchising agreement.

For any of the parties to be entitled to compensation for termination, the other party must have failed to comply with its obligations and consequently must have caused damages to the aggrieved party. For example, if the franchising agreement is valid for a determined period, any unjustified early termination would constitute a breach and therefore be liable to compensation (except if both parties had mutually agreed to the termination). In such a situation, the compensation would be equivalent to either:

- The damages and losses incurred by the franchisee (to be duly demonstrated through evidence).
- To any pre-liquidated damages provided by the contract.

On the other hand, if the contract is for an undetermined period, both parties are entitled to terminate unilaterally without cause, provided that reasonable prior notice is given (the contract usually determines the minimum prior notice) (see [Question 28](#)). The franchise agreement must draw attention to the fact that a unilateral early termination by the franchisor will only be effective if the investments made by the franchisee have already been amortised. Otherwise, the franchisor will be prevented from unilaterally terminating the contract or the franchisee will be entitled to compensation due to an abusive and abrupt termination.

It is quite common for franchisees to seek damages related to the losses incurred due to failure to succeed commercially with a franchise. However, the courts are usually very restrictive and do not grant any type of compensation, stating that the parties are independent, and that the franchisor is not liable for the franchisee's failure. In these cases, the causal link between the conduct of the franchisor and the losses incurred by the franchisee must be proved.

## International taxation

30. What is the tax treatment of the initial fee paid by the franchisee?

The franchisee has to pay the following taxes regarding the fee paid to the franchisor overseas:

- Withholding Income Tax (IRRF) at a 15% tax rate, or a 25% tax rate if the franchisor is located in a tax haven (*Article 767, Decree No. 9,580/2018; Article 8<sup>a</sup>, Law 9779/1999*).

- Contribution of Intervention in the Economic Domain (CIDE) with a 10% tax rate (*Article 2, Law 10.168/2000*).
- Service Tax (ISS) (*Law 116/2003*). Since this is a municipal tax, the rate can vary from 2% to 5%. In the Brazilian Supreme Court there is case law discussing the constitutionality of ISS over franchising services, but there has not been a final decision (*Appeal to the Supreme Court (RE) No. 603136*).
- Social Contributions PIS and COFINS at a combined total rate of 9.25% (*Law 10.865/2004*).
- Financial Transaction Tax (IOF) at a rate of 0.38% of the exchange transaction (*Decree No. 6.306/2007*).

There are exceptions in the taxation mentioned when the franchisor is located in a country that has a double taxation treaty or agreement with Brazil. Usually, the tax reductions applied on these agreements involves Income Tax and Withholding Income Tax, but these exceptions must be individually analysed by considering the treaty and the specific operation.

31. How will management and other continuing fees from the franchisee to the franchisor be treated in the franchisee's hands and, in particular, are there any tax deductions that have to be made?

For franchisees located in Brazil, as a rule those expenses are treated as imports of services, for the IRS. Moreover, companies taxed by the actual profit regime should obey the deduction limit of royalties for the use of technology and brand, which is a minimum of 1% and a maximum of 5% of revenue of products or sales benefiting from the technology or the brand (*Article 74, 3.470/1958; Ordinance MF No. 436/1958*).

In addition, the deduction will only be permitted from date of the registration of the respective act or contract by INPI (*Article 365, Decree No. 9.580/2018*).

Beyond the limit above, if the franchisor is located in a country deemed to be a Privileged Tax Regime, the expenses are non-deductible in determining the actual income calculation basis (*Article 24, Law 9.430/1996; Article 26, Law 12.246/2010*).

The exception to this non-deduction occurs if all three of the following criteria are met:

- Effective identification of the beneficiary of these amounts.
- Proof of operational capacity of the entity abroad
- Documentary proof of the payment and the proof of the use of the rights or services.



32. What is the tax treatment of intellectual property royalties paid by the franchisee?

The franchisee has to pay the following taxes regarding royalties paid to the franchisor overseas:

- Withholding Income Tax (IRRF) at a 15% tax rate, or a 25% tax rate if the franchise is located in a tax haven (*Article 767, Decree No. 9.580/2018; Article 8a, Law 9779/1999*).
- Contribution of Intervention in the Economic Domain (CIDE) at a 10% tax rate (*Article 2, Law 10.168/2000*).
- Financial Transaction Tax (IOF) at a rate of 0.38% of the exchange transaction (*Decree No. 6.306/2007*).

Regarding social contributions PIS and COFINS, the Brazilian IRS accepts that these taxes will not be payable on royalties if the franchising contract separates on an individual basis the amount of royalties, technical services and technical assistance (*Solution IRS Inquiry: COSIT 71/2015*).

33. Will a foreign franchisor who appoints a franchisee directly in your national territory be regarded as carrying on business in the national jurisdiction and therefore subject to the national tax regime?

Yes, it is possible for the foreign franchisor to be considered a business carrying on activities in Brazil, but this is rarely identified and verified by Brazilian tax authorities. It is also possible for the franchisor to incorporate a company in Brazil, which will then be the franchisor.

34. Is it possible to make use of tax haven companies in international franchising?

It is possible. However, the tax burden of the operation would be as mentioned previously for a franchisor located in a tax haven (see [Question 30](#) and [Question 31](#)).

35. Is there a withholding obligation on dividends paid to foreign companies/individuals?

Since 1996, dividend payments to partners and shareholders are exempt from income tax: even for those located in tax haven countries (*Article 10, Law 9.249/2005*).

36. Are there any other differences in the tax treatment of dividends paid to foreign companies/ individuals as opposed to domestic shareholders?

No.

37. Are there circumstances in which the (undistributed) profits of a foreign subsidiary can be taxed in the hands of a parent company that is tax resident in your jurisdiction (controlled foreign company legislation)?

Yes, the profits earned by subsidiaries and branches of a legal entity domiciled in Brazil are subject to Brazilian controlled foreign company rules (*Law 12.973/2014*).

38. Does national law permit a franchisor to make loans to a franchisee? Does national law dictate any terms of such a loan, for example, rate of interest? Does national law/regulation impose any debt/equity restrictions?

There are no specific rules governing loans between franchisor and franchisee. Therefore, the operation must follow the legal requirements concerning loans between legal entities.

If there is some degree of exclusivity between companies, they may be considered affiliated and therefore the loan must comply with the rules of thin capitalisation and transfer pricing (see [Question 40](#)) (*Law 12,249/2010; Law 9430/1996*).

39. Is there a withholding obligation on interest paid to foreign companies/individuals?

There will be Withholding Income Tax (IRRF) at a 15% tax rate, or a 25% tax rate if the franchisor is located in a tax haven.

40. Are there any restrictions on the capital structure of a company incorporated in your country with a foreign parent (thin capitalisation rules)?

Act 12,249 of 2010 introduced in Brazil thin capitalisation rules especially limiting the deduction of interest expenses from debt with related parties. These rules were designed to prevent Brazilian companies becoming undercapitalised due to excessive debt with related companies abroad or companies located in tax havens. Therefore, the rules set how much interest paid to an affiliated company abroad is deductible for income tax purposes.

In 2011, the IRS regulated (by IN RFB No. 1.154) the deductibility of interest paid or credited by a source located in Brazil to individuals or legal entities resident or domiciled abroad, considered affiliated. For example, one of the several requirements established is that the value of debt with the affiliated entity abroad may not exceed 200% of the value of the affiliate's participation in the legal entity resident in Brazil (30% if the affiliated company is located in a tax haven).

Moreover, legal entities should comply with Brazilian transfer pricing rules when forming loans or buying and selling goods with affiliates abroad (*Law 9.430/1996*).

41. How does national law define a "branch"? How are its profits taxed? What taxes are payable on the repatriation of profits by a foreign branch?

A foreign company can establish in Brazil a subsidiary, branch or agency, with permission to work in the country, in accordance with Articles 1.134 to 1.141 of the Civil Code (*Law 10.406/2002*). However, there is an excessive bureaucracy for the establishment of branches of foreign companies.

Once the branch is authorised, the foreign company is subject to Brazilian laws and taxation for the acts or transactions carried out in Brazil, just like any other Brazilian company (*Article 1.137*). Since the branches are independent entities the taxation should be based on their operation. Moreover, the repatriation of profits will attract the same legislation as a Brazilian company, dividend payments to partners and shareholders are exempt from income tax (*Article 10, Law 9.249/2005*) and under Brazilian tax law, it is possible to pay shareholders "interest on net equity" (JSCP), based on the application of the public long-term interest rate TJLP to the Brazilian company's net equity. There are some limitations on the deductible for corporate income taxes and the payment is subject to a 15% withholding income tax or 25% in case of beneficiary residents in a tax haven (*Article 9, Law 9.249/2005*).

42. Are there any special tax considerations when a joint venture is used as a franchise vehicle?

A joint venture will be taxed on the same basis as other franchisees or franchisors.

*\*based on an original provided by Ana Paula Olinto Yurgel, George Rodrigues de Oliveira and Caio Nunes, CMT – Carvalho, Machado e Timm Advogados*

**Contributor details**

**Fernanda Girardi Tavares, Partner**

**Souto Correa Advogados**

E [fernanda.girardi@soutocorrea.com.br](mailto:fernanda.girardi@soutocorrea.com.br)

W [www.soutocorrea.com.br](http://www.soutocorrea.com.br)

**Areas of practice.** Commercial agreements and data privacy.

**João Carlos Ariera Harres, Associate**

**Souto Correa Advogados**

E [joao.harres@soutocorrea.com.br](mailto:joao.harres@soutocorrea.com.br)

W [www.soutocorrea.com.br](http://www.soutocorrea.com.br)

**Areas of practice.** Intellectual Property.

---

**END OF DOCUMENT**