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Brazil: Essential tips for  
successful trading



# Brazil: Essential tips for successful trading

Supplying goods and services to Brazilian customers is no different from supplying customers elsewhere in the world, but there are some practical steps that can help smooth the process. Here are some essential tips that can help make your supply relationship a lasting and successful one.

## **Choose the law you feel comfortable with**

In cross-border relationships between Brazilian and foreign companies, the parties are entitled to choose the law that should govern their supply relationship. Brazilian counterparties may feel most comfortable using Brazilian law. Brazil is a civil law jurisdiction where laws and statutes provide the legal framework and court precedents are not binding. Contractual relationships are generally governed by the Civil Code enacted in 1916. In certain cases, depending on the nature of the obligation, the law stipulates certain formalities, for example registration as a public document, or ensuring that the document is witnessed.

Brazilian companies are becoming more familiar with regularly using international legal regimes such as English and New York law and international suppliers may prefer to have contracts governed by a common law jurisdiction with a history of court decisions interpreting commercial contracts. Although the Brazilian courts recognise the use of INCOTERMS, the jurisprudence is not yet very developed which may give rise to some uncertainty of interpretation in the event of a dispute.

## **Understand the Brazilian way**

Doing business in Brazil can be challenging. Personal contact is crucial to developing business in Brazil and can make all the difference in opening the right doors. Relationships take time to

build and you may require several visits to Brazil to complete your deals. Time can be a flexible concept in Brazil and you should prepare for procedures and processes to take longer than you may expect.

## **Regulation, regulation, regulation**

As a general rule no import licences are required to import goods into Brazil. However, non-automatic licences must be obtained for more than one third of all product lines. These are subject to special control by government agencies and usually relate to products that may cause damage to human, plant or animal health or products capable of causing environmental damage.

Any importer is required to have an Exporter and Importer Registration (REI) before it can enter into cross-border trade transactions. The importer must also be registered with an electronic system, the Integrated Foreign Trade System (SISCOMEX), a computerised system operated by the Brazilian Federal Revenue Service that processes all customs procedures. Each import transaction must be registered in the SISCOMEX electronic system in order to obtain an import declaration for the goods to clear through customs. In addition, any transaction involving the movement of funds to or from Brazil must be subject to an exchange contract that, in many instances

(including import and export transactions), must be registered with the Brazilian Central Bank.

Finally, you should be aware that individuals and legal entities (whether Brazilian or not), which manufacture, import, process, assemble or sell goods or provide services may be required to comply with requirements relating to technical regulations, conformity assessment procedures or product labelling.

### **Consider your local representation**

The Brazilian legal and regulatory system can be very complicated. Unfamiliarity and the language barrier often compound the complexity. Most overseas suppliers therefore choose to appoint an agent on the ground to deal with the customs authorities and steer products through the complex clearance procedures and out of the port. Be sure to find an agent with the right contacts and experience to suit your product.

It is also vital to ensure that you have the right tax and legal advice in Brazil, particularly in relation to Brazilian labour laws. Speak with your usual international adviser to see what representation they can offer in Brazil — more and more global firms have Brazilian offices and can offer seamless advice with your local office.

### **Comply with competition laws**

Brazilian antitrust law is extraterritorial in application and applies to conduct and agreements which, even if not executed in Brazil or governed by Brazilian law, may have an effect in Brazil. Any behaviour which has the object or effect of: restricting, distorting or in any other way harming free competition or freedom of enterprise; dominating a relevant market of products or services;

arbitrarily raising profits; or abusively exercising a dominant position, may be in breach of the relevant rules. As a rule, supply agreements that provide for vertical restrictions (i. e. resale price fixing, exclusive agreement, price discrimination, among others) which have the potential of producing anticompetitive effects in Brazil may violate the Brazilian Competition Act. Nevertheless, there is no per se violation under the Brazilian Competition Act and certain vertical restrictions may be accepted if based on reasonable economic justifications that outweigh their possible anticompetitive effects (e. g. efficiencies, protection of investments, avoidance of opportunistic behaviours — free riders, among others).

Imports are also subject to anti-dumping regulations as well as other trade remedy regulations in Brazil. The Brazilian authorities exercise control over import prices and, in the event of an investigation, the importer must prove the price adopted in the import transaction using one of the methods provided under the Brazilian customs valuation rules, which can be very bureaucratic.

### **Be sure the right people approve**

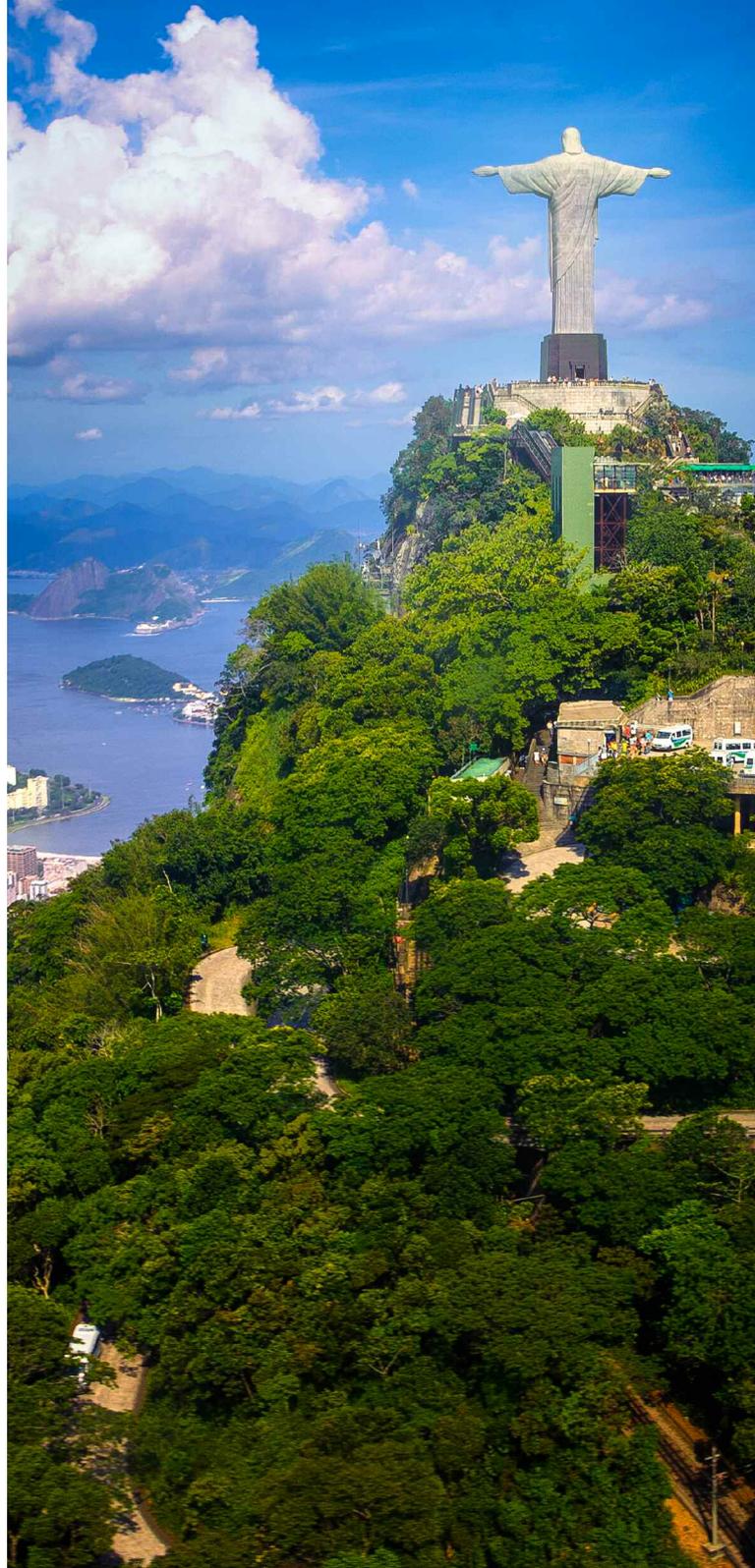
It is important to verify the corporate authority of the company you are dealing with as supplier before starting supplies or entering into supply contracts. The corporate authority of a Brazilian legal entity must be established under Brazilian law. For both a Brazilian corporation (S.A.) and a Brazilian limited liability company (Ltda.) it is the officer or officers, according to the company's corporate documents, that have power to execute documents binding the company. To this end, it is common for foreign suppliers to request, in the case of an S.A., the bylaws and the relevant resolution or resolutions appointing the officers (either the shareholders' resolution appointing the board of

directors and the board resolution appointing the officers or, if the S.A. does not have a board of directors, simply the shareholder resolution appointing the officers). In the case of a Ltda., it is common to request the articles of incorporation, which will normally have the name of the officer or officers — if not, the officers may have been appointed by a separate act of the quota holders, which should be requested for analysis.

It is also advisable to ensure that there are no restrictions in the bylaws/articles or any shareholders' agreement which would require approval from the board of directors or the shareholders for the particular transaction. In such case, a resolution approving the terms of and the transactions contemplated by the supply contract and authorising a specified person or persons to execute the supply contract on its behalf must also be requested. Many Brazilian companies are still owned by the founding family, which can include several branches of the family, whose relationships will be governed by a shareholders' agreement. It is important to ensure that all necessary approvals have been followed, particularly where management represent (or are even the same individuals) as one branch of the family.

### **Be secured**

A supplier should check the creditworthiness of its Brazilian counterparties and it is common for payments to be made by Brazilian buyers to suppliers abroad to be secured. The main types of security available in Brazil include a guarantee from the parent company or the promoters of the Brazilian buyer, bank guarantees, irrevocable letters of credit, collateral in the form of mortgage over immovable property or a pledge over movable property.



Whatever type of security the parties ultimately agree to, it is essential to clearly define the payment obligations in the underlying supply agreement to ensure that the secured obligations are defined in sufficiently specific terms. This is particularly important where the supply agreement takes the form of a framework agreement and deliveries and payments are made on the basis of separate orders.

### **Seek good tax advice**

Supply relationships with suppliers from other jurisdictions outside the Mercosur countries are subject to the normal Common External Tariff applied by Brazil. The current average rate is 15%, levied on the customs value of the goods which is generally based on cost plus insurance and freight. Beware that supplies of goods to Brazil may also be subject to federal and state value added taxes, as well as social contribution taxes (PIS and COFINS).

Some of these taxes may be reduced or available to credit against other local tax liabilities and there may be exemptions or reductions available depending on tax incentive programmes or the nature of the goods to be imported, their destination, origin and value. Brazil is not a party to many free trade agreements outside of the Mercosur area but there may be some structural solutions available to optimise import duties. For all of these reasons, it is crucial to seek good tax advice.

Brazil is also party to only a limited number of bilateral agreements on the avoidance of double taxation and it is normally advisable for suppliers to verify tax risks in advance and to include appropriate contractual tax gross-up and indemnity provisions in their supply agreements.

### **Consider where you want to resolve any disputes**

Resolving a dispute in the Brazilian courts can be time consuming and expensive. However, judgments rendered by a foreign court or decisions of an overseas arbitral tribunal cannot be enforced directly in Brazil but must first be approved by the Brazilian Supreme Court. This process can take significant time, at a point when there is already a judgement against the Brazilian counterparty.

The situation is different for decisions rendered by an arbitral tribunal in Brazil, which are usually upheld by the Brazilian courts without any need for discussion of the merits. For any cross-border supply agreement involving Brazil, it is, therefore recommended for the parties to include an arbitration clause into their agreement, using the rules of a recognised international arbitration body (such as the ICC or the Brazil-Canada Chamber of Commerce) and with the seat of the arbitration in Brazil (usually São Paulo or Rio de Janeiro).

### **Be insured**

Even if all these rules are strictly complied with and due diligence done, there will always remain a certain level of risk of non-payment and unpredictability. Such risks may arise due to insolvency or protracted default of the buyer, or external events or factors that are beyond the parties' control, such as earthquakes, floods and other natural calamities, strikes, riots, civil commotion, adverse geological conditions and weather, and the risk of institutional and regulatory changes such as currency inflation or changes in Brazil's foreign trade policy. The importance of seeking trade credit insurance to mitigate potential risks cannot be stressed enough.

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