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NEWSLETTER



Deutsch-Brasilianische
Industrie- und Handelskammer
Câmara de Comércio e Indústria
Brasil-Alemanha

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INHALT

<p>I. CHANGES IN INPI'S TRANSFER OF TECHNOLOGY CONTRACT REGISTRATION ROTHMANN, SPERLING, PADOVAN, DUARTE ADVOGADOS Dr. Karin Klempp Franco, Luiz Fernando Plastino Andrade and Livia Cristina de Moraes Santos. . . 4</p>	<p>VII. DER GESETZENTWURF NR. 7.448/2017 UND DIE RECHTSSICHERHEIT IM BRASILIANISCHEN RECHT Machado Associados Advogados e Consultores Renata A. Pisaneschi 20</p>
<p>II. GESELLSCHAFT MIT BESCHRÄNKTER HAFTUNG – LTDA. X EINZELGESELLSCHAFT – EIRELI – EIGENTÜMER JURISTISCHE PERSON – REGISTRIERUNG BEI DER BUNDESSTEUERBEHÖRDE – DERZEITIGE UNMÖGLICHKEIT DER GRÜNDUNG/ UMWANDLUNG Florence² & Advogados Luivana M. de Andrade. 7</p>	<p>VIII. VERTRAGSFREIHEIT UND SCHIEDSVERFAHREN FÜR QUALIFIZIERTE ARBEITNEHMER IN DER NEUEN ARBEITSGESETZGEBUNG Stüssi-Neves Advogados Maria Lúcia Menezes Gadotti 23</p>
<p>III. PERSÖNLICHE HAFTUNG DES GESELLSCHAFTERS FÜR FORDERUNGEN DES ARBEITNEHMERS GEGEN DIE GESELLSCHAFT AUS EINEM ARBEITSRECHTLICHEN VERHÄLTNIS ZU IHR Anaya Sociedade Individual de Advocacia Dr. Beat W. Rechsteiner, LL.M 9</p>	<p>IX. BRAZIL MODIFIES RULES FOR TAXATION OF CLOSED INVESTMENT FUNDS Rödl & Partner Philipp Klose-Morero, Michael Löb and Karen Steuer 27</p>
<p>IV. DAWN OF THE COMPLIANCE ERA? Zilveti Advogados Daniel Nocetti and Raphael Matos Valentim 12</p>	<p>X. FEDERAL GOVERNMENT REGULATES THE SALE OF ASSETS BY MIXEDCAPITAL COMPANIES IN BRAZIL Demarest Advogados André Alarcon and André Luiz Freire 29</p>
<p>V. E-COMMERCE CONTRACTS IN BRAZIL – LEGISLATION, REGULATION AND SPECIFIC RULES Sonia Marques Döbler Advogados Fabiana Nitta, Camila Machado and Cintia Busse 15</p>	<p>XI. TREATMENT OF SPES OF BRAZILIAN REAL ESTATE DEVELOPERS IN JUDICIAL REORGANIZATION PROCEEDINGS Lefosse Advogados Raphael Nehin Corrêa, Laura Meyer and Rodrigo Yves 32</p>
<p>VI. BRAZIL DISCUSSES COMPREHENSIVE TAX REFORM BILL AND BRICS SIGN MEMORANDUM OF COOPERATION IN TAX MATTERS PricewaterhouseCoopers Fernando Giacobbo, Ruben Gottberg and Stefanie Fink 19</p>	<p>XII. INSIDER TRADING IN BRAZIL - CRIMINAL AND ADMINISTRATIVE PERSPECTIVE Pacheco Neto Sanden Teisseire Advogados Allékos Genadopoulos 36</p>



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Changes in INPI’s Transfer of Technology Contract Registration

The Brazilian patent and trademark office (Instituto Nacional da Propriedade Industrial, the “INPI”) has been going through the most substantial changes to its procedure for the registration of technology supply agreements and similar contracts in over four decades. Such contracts have been subject to INPI’s analysis within a system of controls and limitations to the flow of royalties and payments abroad since the 1970s and the office has interpreted and enforced tax and exchange legislations related to royalties during this period. They would, for example, veto or impose clauses to these contracts, limit the amount of royalty fees and limit the duration of payments. This started to change earlier this year when the new Normative Instruction No. 70/2017 by the INPI determined that **compliance of such agreements to tax and exchange legislations would no longer be analyzed**, thus adopting new rules of procedure for the registration of contracts through the Resolution No. 199/2017 (the “Resolution”). It may still take some time for the new rules and understandings of the INPI to mature, **since all fiscal, exchange and industrial property laws applicable to the agreements remained unchanged**, but it seems that there will be higher flexibility for the registration of contracts in the future.

Agreements subject to registration with INPI

They are: **(i) industrial property rights license/sublicense agreements**, allowing the effective use and exploitation of registered trademarks, patents, industrial designs and integrated circuit designs, as well as applications for such; **(ii) assignment agreements**, which transfer the ownership of the abovementioned rights; **(iii) franchise agreement**; and **(iv) the tricky knowledge acquisition agreements**, for transfer of know-how, divided in technology supply agreements that aim to supply a party with unprotected knowledge and technology, and technical and scientific assistance service agreements and invoices, aiming to provide certain specialized services. Copyrights and software agreements are not subject to such registration, since they are based on different laws.

Substantial changes

With the adoption of the Resolution, the **terms of the duration of knowledge acquisition agreements** have changed. The Resolution states that the deadlines agreed on by the parties shall be accepted for registration, though the contract must state a specific term of duration or be amended to include it. Previously,

the maximum duration accepted for the registration of the technology supply agreements was five years, with the possibility of one single renewal for another five years if justified by improvements in the supplied technology. As for technical services, the maximum duration needed to be compatible with the timeframes for the services. These changes in terms of duration shall not affect industrial property license agreements and franchise agreements, since their duration remain attached to on the respective validity of the registration of the licensed rights. Another relevant change to the procedure is related to the **declared value of all contracts**. The INPI shall no longer explicitly impose a limit to the maximum amount of any payable fees in their registration certificates, even in case of related parties, even though current remittance and deductibility limits are still fully applicable.

Consequences

The Resolution states clearly that information on contractual amounts, payments and duration contained in the registration certificate shall represent **a declaration of the parties under their exclusive responsibility**. Because of that, Central Bank of Brazil has stopped requiring INPI’s specific approval for payments of royalties abroad if they are based on regularly issued registration certificates. Notwithstanding INPI’s and Central Bank’s lack of enforcement at this point, **tax and exchange legislation are still in full force and effect**, so the parties are still bound to them for remitting contractual payments abroad and deducting them as operating expenses. In a way, **the parties’ responsibilities as to the compliance of their agreed terms to the Brazilian laws has increased**, they are now required to check themselves the compatibility of the agreements to the tax and exchange legislation at risk of being penalized. In addition, **commercial banks may tighten their control of exchange operations**, since they are jointly liable for such compliance with exchange regulations.

Comparative chart

Aspect	How it was	How it is now
Duration	INPI defined maximum terms of duration in the Registration Certificate as per their own understandings of tax legislation	INPI shall not interfere in the term defined by the parties
Payments	INPI defined maximum payable fees in the Registration Certificate as per their own understandings of tax and exchange legislation	INPI shall not interfere in the fees defined by the parties

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Aspect	How it was	How it is now
Subject matter	INPI defines certain services that are exempted of registration	Unchanged
Exchange	Exchange operations for the remittance of royalties abroad was subject to specific approval by the INPI	Exchange operations shall not be subject to further approval by the INPI once the contract has been registered
Tax deductibility	Up to 5% of the net contractual sales deductible from income tax	Unchanged
Remittance limitation	Related parties may only remit fees up to the tax-deductible amounts	Unchanged
Fiscalization	The Federal Revenue and the Central Bank of Brazil enforce compliance with tax and exchange legislations during the performance of the registered agreements	Unchanged

* Autor der Publikation *So geht's im Internationalen Steuerrecht Brasiliens (zu)*

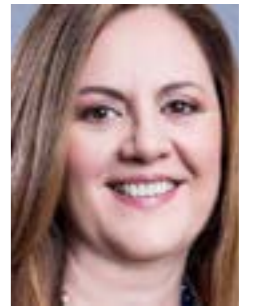
Gesellschaft mit beschränkter Haftung – LTDA. x Einzelgesellschaft – EIRELI – Eigentümer juristische Person – Registrierung bei der Bundessteuerbehörde – derzeitige Unmöglichkeit der Gründung/ Umwandlung

Die Gesellschaften mit Sitz im Ausland, die an Geschäftsentwicklungen in Brasilien interessiert sind, bedienen sich üblicherweise der Handelsvertretung, des Vertriebs, und, in einer direkteren Form, der Gründung von Niederlassungen mit Sitz im Land.

Obwohl das Bürgerliche Gesetzbuch auch andere Formen kennt, werden in der Praxis lediglich zwei derselben für die Gründung von lokalen juristischen Personen angewandt: - die S/A – Aktiengesellschaft; und die LTDA. – Gesellschaft mit beschränkter Haftung. Und, aus Gründen der Zweckmäßigkeit, Flexibilität und Kosten ist unter diesen die LTDA. die von 99,5% der Fälle bevorzugte Form, wohingegen die S/A fast ausschließlich in den Fällen benutzt wird, in denen gesetzliche Auflagen aufgrund der Aktivität der Gesellschaft bestehen (z.B. Finanzinstitutionen).

Jedoch, im Gegensatz zu weiter fortgeschrittenen Gesetzgebungen, wie der deutschen, österreichischen und italienischen, welche die Einrichtung der Ein-Mann-Gesellschaft kennen, besteht eines der gesetzlichen Erfordernisse zur Gründung einer LTDA. in Brasilien darin, dass diese sich aus mindestens zwei Gesellschaftern zusammensetzt, selbst wenn einer derselben lediglich einen repräsentativen Anteil einer Mindestbeteiligung am Gesellschaftskapital hält. So ist, ungeachtet der Zweckmäßigkeit und Flexibilität, die Pluralität der Gesellschafter in der LTDA., wenngleich fiktiv, dennoch notwendig, lediglich zur Erfüllung der brasilianischen Gesetzgebung.

Dieses Problem hätte bereits bereinigt werden können durch das Gesetz Nr. 12.441 vom 11.06.2011, welches im Bürgerlichen Gesetzbuch den Artikel 980-A einfügte, der in der brasilianischen Rechtsordnung die Figur der „Einzelgesellschaft mit beschränkter Haftung“ (EIRELI) einführte, gekennzeichnet dadurch,



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dass es sich um eine juristische Person privaten Rechts mit beschränkter Haftung handelt, die von einer einzigen Person, welche die Gesamtheit des Gesellschaftskapitals hält, gegründet wird.

Der Hauptteil des oben erwähnten Artikels 980-A bestimmt, dass die EIRELI errichtet wird durch eine einzige PERSON, welche die Gesamtheit des Gesellschaftskapitals hält, so dass man davon ausgehen kann, dass der Inhaber sowohl eine natürliche, wie auch eine juristische Person sein kann, mit Sitz in Brasilien oder im Ausland, da hierzu keinerlei Beschränkung in der gesetzlichen Bestimmung enthalten ist.

Zum Zeitpunkt der Verabschiedung des Gesetzes wurde jedoch von dem Amt für Unternehmensregistrierung und Integration (DREI) mittels der Dienstanweisung Nr. 117/11 unter Missachtung des Gesetzes das Thema genormt und bestimmt, dass die EIRELI als Inhaber nur eine natürliche Person haben kann.

Jetzt, nach all diesen Jahren, hat das DREI endlich im März 2017 seine Position überarbeitet und die Dienstanweisung Nr. 38/17 herausgegeben, die ausdrücklich bestimmt, dass die juristische, nationale oder ausländische Person, Inhaber der EIRELI sein kann.

Jedoch kann diese Dienstanweisung aufgrund einer bürokratischen Schwierigkeit noch nicht in die Praxis umgesetzt werden: Die Systeme der Bundessteuerbehörde wurden nicht parallel zur Herausgabe der Dienstanweisung des DREI aktualisiert und sind deshalb nicht fähig, die Registrierung einer EIRELI entgegenzunehmen, deren Eigentümer eine juristische Person ist. Somit muss noch eine Lösung der Bundessteuerbehörde abgewartet werden, bis diese Regel, welche jetzt zu einer Vereinfachung der gesellschaftsrechtlichen Strukturen, des Bürokratieabbaus und der Kostenoptimierung bei den Verfahren der Gründung/Erhaltung von juristischen Personen in Brasilien führen könnte, um auf diese Weise den Geschäften und der Wirtschaft ein Auftrieb zu verschaffen, ihre operationelle Umsetzung erfährt.

Die übrigen Erfordernisse, die gemäß des Bürgerlichen Gesetzbuches bei der Gründung der EIRELI zu beachten sind (auch bei Umwandlung einer LTDA.), bestehen weiterhin, und zwar: (i) das Gesellschaftskapital darf nicht unter dem Gegenwert von 100 (einhundert) in Brasilien gültigen Mindestlöhnen liegen; (ii) im Firmennamen muss der Ausdruck EIRELI enthalten sein; (iii) die natürliche Person, die eine EIRELI gründet, kann nur in einer einzigen Gesellschaft dieser Art auftreten; (iv) auf die EIRELI sind die im Bürgerlichen Gesetzbuch für LTDAs vorgesehenen Regelungen anzuwenden (Artikel 980-A, Paragraphen 1. bis 6.).

Persönliche Haftung des Gesellschafters für Forderungen des Arbeitnehmers gegen die Gesellschaft aus einem arbeitsrechtlichen Verhältnis zu ihr

Die Möglichkeit des Durchgriffs durch eine juristische Person auf das persönliche Vermögen ihrer Gesellschafter für die Befriedigung von Forderungen ihrer Gläubiger ist in den verschiedenen Rechtsordnungen unterschiedlich geregelt. Selbst innerhalb einer Rechtsordnung eines Staates können die Regeln dafür je nach Rechtsgebiet verschieden sein. Diese Tatsache trifft gerade auch auf Brasilien zu. Die Möglichkeit eines Durchgriffs ist im Hinblick auf die anwendbare Rechtsmaterie jeweils gesondert zu prüfen (Zivil-, Verbraucherschutz-, Umweltschutz-, Steuer- und Arbeitsrecht). Ein solcher Durchgriff wirft regelmäßig schwierige materiell- und prozessrechtliche Fragen auf, welche für einen Laien nicht einfach abzuschätzen und zu durchschauen sind.

Der vorliegende Kurzbeitrag beschränkt sich auf das Arbeitsrecht. In Brasilien sind inzwischen neue arbeitsrechtliche Vorschriften in Kraft getreten (11. November 2017), welche indes noch sehr umstritten sind, weshalb sie teilweise bereits wieder ergänzt bzw. abgeändert werden sollen. Auch ihre Anwendung in der Gerichtspraxis ist gefährdet, da die Vereinigung der Arbeitsrichter Brasiliens (*Associação Nacional dos Magistrados da Justiça de Trabalho*) sie in einem beträchtlichen Ausmaß für nicht verfassungskonform hält und sie deshalb nicht anwenden will. Die Rechtsunsicherheit im Arbeitsrecht bleibt mindestens bis auf Weiteres bestehen.

Eine Neuregelung im Gesetz hat auch die Möglichkeit des Durchgriffs durch eine juristische Person auf das persönliche Vermögen ihrer Gesellschafter für die Befriedigung von Forderungen aus einem arbeitsrechtlichen Verhältnis erfahren.

Um was geht es im Einzelnen? Wird ein arbeitsrechtliches Verhältnis beendet, hat der Arbeitnehmer die Möglichkeit, aus diesem entstandene und behauptete Rechte gerichtlich oder nach dem neuen Gesetz unter Umständen auch vor einem Schiedsgericht geltend zu machen. Dieses Recht muss er aber innerhalb von zwei Jahren seit der Beendigung des Arbeitsverhältnisses ausüben. Grundsätzlich kann er behauptete Rechte rückwirkend für einen Zeitraum von fünf Jahren, berechnet ab dem Zeitpunkt der Klageeinleitung, gerichtlich einfordern.



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Obsiegt der Arbeitnehmer ganz oder teilweise und wird der Arbeitgeber deshalb zu Zahlungen an den Arbeitnehmer verurteilt, kann dieser deren Vollstreckung bei nicht freiwilliger Erfüllung beantragen. Verfügt der Arbeitgeber nicht über genügend vollstreckbares Vermögen, um die dem Arbeitnehmer gerichtlich zugesprochenen Forderungen befriedigen zu können, stellt sich die Frage der Möglichkeit des Durchgriffs auf das persönliche Vermögen der Gesellschafter zur Bezahlung der ausstehenden Schulden.

In der Vergangenheit war in Lehre und Rechtsprechung besonders heftig umstritten, wie weit bereits aus der Gesellschaft ausgeschiedene Gesellschafter für solche Schulden mit ihrem persönlichen Vermögen haften müssen. Dabei wurde besonders Kritik daran geübt, dass auch vor langer Zeit ausgeschiedene Gesellschafter damit rechnen mussten, mit ihrem persönlichen Vermögen haften zu müssen, wenn der nicht bezahlte Arbeitnehmer schon Dienste für die schuldnerische Gesellschaft leistete, als er noch Gesellschafter war.

Nach dem neuen Gesetz gelten nun folgende Regeln im Hinblick auf die persönliche Haftung des Gesellschafters für Schulden der Gesellschaft aus einem arbeitsrechtlichen Verhältnis: Der ausgeschiedene Gesellschafter haftet in jedem Fall lediglich bis nach dem Ablauf von zwei Jahren seit dem Ausscheiden aus der Gesellschaft. Ferner ist seine Haftung subsidiär in dem Sinne, dass primär die Gesellschaft selber mit ihrem Vermögen haftet. Fehlt es ihr an genügendem vollstreckbarem Vermögen, haften sekundär ihre aktuellen Gesellschafter mit ihrem persönlichen Vermögen. Erst wenn auch das vollstreckbare Vermögen von diesen für die Begleichung der Schulden der Gesellschaft aus einem arbeitsrechtlichen Verhältnis nicht ausreicht, können ausgeschiedene Gesellschafter persönlich haftbar gemacht werden, allerdings, wie bereits erwähnt, nur während zwei Jahren seit ihrem Ausscheiden aus der Gesellschaft. Diese Haftung besteht nicht nur, wenn die Gesellschaft von den anderen bisherigen Gesellschaftern fortgesetzt wird, sondern auch dann, wenn z.B. alle Gesellschafter ihre Gesellschaftsanteile an Dritte veräußern. Für das Ausscheiden aus der Gesellschaft ist der Zeitpunkt maßgebend, wann der entsprechende Eintrag in das gesetzlich vorgeschriebene Register erfolgt ist (*Registro Público de Empresas Mercantis – Junta Comercial – und Registro Civil das Pessoas Jurídicas*). Es ist zu hoffen, dass die beschriebene neue Regelung in der Gerichtspraxis angewendet wird und so einen Beitrag zur Rechtssicherheit leisten kann; denn eine Verfassungswidrigkeit ist hier nicht ersichtlich.

In der Vergangenheit konnte nicht nur ein ausgeschiedener Gesellschafter der unmittelbar betroffenen schuldnerischen Gesellschaft, sondern auch derjenige von einer mit ihr wirtschaftlich verbundenen Gesellschaft (*grupo econômico*) mit seinem persönlichen Vermögen für die Schulden der ersteren haftbar ge-

macht werden. Dabei wurde der Begriff der wirtschaftlich verbundenen Gesellschaft in der Praxis sehr weit gefasst. Mit der Gesetzesnovelle wurde der Begriff enger gefasst. Es ist allerdings davon auszugehen, dass auch unter der neuen Gesetzgebung eine Haftung eines ausgeschiedenen Gesellschafters der Gruppe eintreten kann, jedoch nur unter den zuvor dargestellten Voraussetzungen.

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Dawn of the Compliance era?

Brazilian's fight against the corruption is beginning a new chapter.

After implementing a bundle of laws that enforces the provision of counteracting measures against corruption, and prepare its agents to deal with the lack of transparency, now it is time to the Brazilian states to attack frauds and corruption in the process of contracting with public authorities directly.

At the beginning of October, the Brazilian State of Rio de Janeiro published a local law¹ which was a source of stir among executives, lawyers and Compliance Officers around the country.

Through the new standard, the state began to require the establishment of Corporate Integrity Programs as a requirement for companies to engage contracts, consortia, agreements, or public-private partnerships with state public administration, whose values are higher than BRL 1.5 million - for engineering works and services - and BRL 650 thousand - for purchases and services - and have a term equal or greater than 180 days.

According to the law, the Corporate Integrity Program can be understood as the set of internal mechanisms and procedures for the maintenance of integrity, incentive of internal audits and the effective application of codes of ethics and conduct, as well as policies and guidelines to detect and remedy deviations, fraud, irregularities and unlawful acts.

The requirement has the clear purpose of protecting the state against damages arising from irregularities, unethical activities and contractual fraud as well as ensuring the transparency and quality of the contractual relations by enhancing company's compliance policy.

The program will be measured for its existence and application, according to some parameters presented by law, which are:

- (i) Commitment of senior management, (Tone at the top);
- (ii) Standards of conduct, code of ethics, integrity policies and procedures, applicable to all employees of the company and, where applicable, to third parties;
- (iii) Periodic training;

¹ Rio de Janeiro Law No. 7,753/2017

- (iv) Periodic risk assessments;
- (v) Accounting records that accurately reflect the transactions of the legal entity;
- (vi) Internal controls to ensure the reliability of reports and financial statements of the legal entity;
- (vii) Specific procedures to prevent fraud and unlawful acts in the context of competitive bidding, the execution of administrative contracts or any interaction with the public sector;
- (viii) Autonomy and authority of the area responsible for the Integrity Program;
- (ix) Widely disseminated hotlines;
- (x) Application of disciplinary measures;
- (xi) Procedures that ensure the prompt response of the company in case any infraction is detected;
- (xii) Suitable procedures for hiring and supervising third parties;
- (xiii) Verification of irregularities during process of mergers, acquisitions and corporate restructuring;
- (xiv) Continuous monitoring of the Compliance Program; and
- (xv) Proven actions to promote ethical and integrity culture.

There will be specialized agents to monitor the fulfillment of the requirements of the law. In that sense, in case the company does not comply with the law, it shall be subject to a daily fine of 0.02% levied on the value of the contract, up to the limit of 10%. Furthermore, while the company does not implement the compliance policies it will be prohibited to contract with the State of Rio de Janeiro.

Despite the extensive list of requirements, it should be made clear that the evaluation requirements of the program do not present any legal innovation, being the same points already described in the Federal Decree² which regulates the Brazilian Anti-Corruption Law.

Besides, the requirements are the same used for the purposes of the *Pró-Etica* certification created by the Ministry of Transparency and Federal General Accounting Office, which attest the suitability of the companies that promote and implement measures of ethics, integrity and adopts a fighting attitude against corruption.

The Brazilian Companies that enters in leniency agreement with Brazilian authorities are also obliged to implement its compliance and to obtain a valid certification as part of the deal with Brazilian authorities. The most recent agree-

² Decree No. 8,420/2015

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ments contain such clause, in order to prevent further anti-compliance frauds and corruption.

This is the first local law that anticipates the requirements and forces companies to implement the compliance before any ties with the state is created.

In this sense, this legislation represents a major step taken by the Brazilian legislative branch, since several professionals of the area believe that the future of bidding processes is an addition of this kind of specific legislation and requirement of public certifications, which would give much more security and rationality to public contracting.

Hopefully, this measure is only the first of many that will require the minimum of Compliance and ethics in public-private relations, with the creation of a fair and competitive business environment with the simultaneous and synergistic performance of the interested parties.

E-Commerce Contracts in Brazil – Legislation, regulation and specific rules

1. Introduction

Nowadays, consumers are highly informed people and have access to various channels of product and service offerings in the virtual environment, through various sources, such as the internet, computers, smartphones, social networks, sales data, among others.

Knowledge and mapping of consumer habits have always been a great desire of companies, although it has never been a simple task. However, in the current scenario, this has become increasingly viable, through access to digital data, which reveals the profile of the consumer who usually purchases services and products offered on online shopping websites.

As a consequence, there are a growing number of Brazilian companies that adhere to e-commerce in their businesses, with the advantages of being able to:

- Promote and expand their business activities;
- Energize their business relationships;
- Reach new markets, being able to offer its products and services in other cities, states and even abroad;
- Better serve their customers, through a new format of service provision and product delivery;
- Provide more information about their business, in digital media;
- Get more information about their consumer customers, by creating their own electronic database.

However, online sales of products and services have their own legislation and require certain cautions, which must be observed by companies.

An e-commerce contract, or electronic contract, means any contract entered into through the internet. Such contracts can be signed between companies (B2B) or between companies and consumers (B2C).

2. E-Commerce Contracts

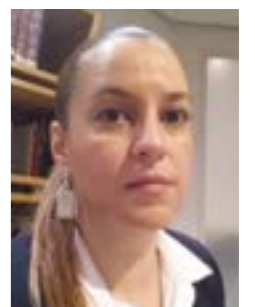
Electronic contracts are considered as a valid form of contracting, except in cases where the law requires a specific form, such as in real estate purchase and



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sale agreements, or even in those in which the legal system prohibits the conclusion of electronic contract. What we see, nowadays, is that a large part of the legal business is done “by click”, which is known in foreign law as click-through agreements¹.

The contracted terms are accepted by digital confirmation on the computer screen or similar device, and the contractor accepts the general terms proposed by clicking the “accept” button in a dialog box or an opened *pop-up* window. Examples of these agreements are the “Software Licenses” to download programs and the “General Terms and Conditions” that the buyer must read and accept in order to continue the online purchase of products or services.

In other cases, the supplier offers products or services for sale on its website and the consumer, in turn, acquires them, filling out forms and transmitting a purchase order presented on the computer screen. From the moment that the acceptance is configured, by the consumer, the contract is considered signed/entered into.

In addition to fulfilling the requirements necessary for any contract, the legal validity of electronic contracts is intrinsically linked to the issue of security on information delivery and applied methods.

It is worth noting that current technology provides specific means to confer security, authenticity, and integrity to electronic documents and contracts, such as digital signature by encryption and biometrics.

2.1. Laws regulating E-commerce in Brazil

- Law n. 8.078/90 (Consumer Defense Code);
- Decree n. 7.962/13 (deals with contracting in electronic commerce, known as the “E-Commerce Law”);
- Law n. 12.741/12 (provides for measures to clarify the consumer, also applicable to e-commerce);
- Law n. 12.965/14 (establishes principles, guarantees, rights and duties for the use of the Internet in Brazil, applicable to e-commerce);
- Law n. 10.406/02 (Brazilian Civil Code).

¹ Source: https://en.wikipedia.org/wiki/Click_wrap

2.2. What information must an Online Seller to provide before concluding a contract online?

According to Article 2 of the E-Commerce Law, the online seller must provide accurate information on:

- (i) Complete name or company name of the supplier and its registration in the National Registry of Individuals or in the National Registry of Legal Entities of the Federal Revenue Office, when applicable;
- (ii) Physical and electronic address, and other information necessary for its location and contact;
- (iii) Essential characteristics of the product or service, including risks to the health and safety of consumers;
- (iv) Discrimination in the price of any additional or accessory expenses, such as delivery or insurance;
- (v) Full conditions of the offer, including payment means, availability, form and term of the service provision or of the product delivery or availability;
- (vi) Clear and ostensive information regarding any restrictions on the fruition of the offer.

2.3. Which rules apply when contracts are concluded in Web Shops? (companies that sell products on the internet)

The rules of the Civil Code, the Consumer Defense Code and the E-Commerce Law shall be applied. The first, defines the validity, effectiveness, defects and invalidity requirements of any legal business, while the latter two contain specific regulations and establish additional responsibilities for the seller and additional rights to consumers, such as the obligation to provide clear information regarding the product, service and the supplier itself and the right to repentance (return or exchange the purchased product), for instance.

B2B electronic contracts are governed, as a rule, by the provisions of Brazilian Civil Code, applicable to commercial contracts in general. Only the Consumer Defense Code (Law n. 8.078/90) and the E-Commerce Law (Decree n. 7.962/13) will be applied to B2B contracting, if the company is purchasing products or services from another for its own consumption (for example: online purchase of cleaning products) and not for using in their own production or trading chain (for example: supply of parts or equipment for a particular industry).

2.4. What is important to know with regard to E-Commerce after sales issues?

Companies that practice E-Commerce must comply with the provisions of article 5 of the E-Commerce Law (Decree n. 7.962/13), which provides for the

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consumer's right to repentance for the purchase and the possibility of returning or exchanging the product. According to the law, the conditions of repentance return or exchange of the product and the adequate and effective means for the exercise of this right must be expressly stated, in a clear and ostentatious way, in the sale and purchase agreement.

In addition, companies should also note that the law determines that the repentance cannot be a burden on the consumer, so freight for return or for return and delivery of another product (in the case of exchange) must be borne by the seller.

3. Conclusion

The importance of e-commerce contracts for the Brazilian economy can be seen in its growing use by companies, which aim to promote and expand their business activities, as well as better serve their customers and consumers.

However, it is essential that companies take the necessary care and caution in entering into online contracts, in order to ensure the validity and security of contracting, both in B2C contracts, in which attention must be paid to the principles governing the Consumer Law in Brazil, as well as in B2B contracting, governed by the Civil Code, which are still an incipient market in our country, but with a lot of growth potential.

* Autor der Publikation "So geht's M&A in Brasilien"

Brazil discusses comprehensive tax reform bill

On August 22, 2017, the Brazilian Representative Luiz Carlos Hauly presented to the President and his Ministers a bill for a comprehensive tax reform that foresees the end of 10 (ten) taxes in Brazil.

According to the bill, the ICMS (State VAT on sales and certain services), ISS (municipal service tax), IPI (federal excise tax), COFINS (federal social contribution on billing), PIS/PASEP (federal contribution to the social integration program), CIDE (federal contribution for intervention in the economic domain), IOF (tax on financial operations) and the Salário-Educação (educational allowance) will be consolidated into a new tax (a value added tax - VAT), whereas the CSLL (federal social contribution on net income) will be absorbed by the IRPJ (Brazilian corporate income tax).

In addition, a selective tax will be created to be levied on products of 7 industries: electric power, fuels, telecoms, tobacco, beverages, automobiles, tires and auto parts.

This comprehensive project of tax reform is expected to involve approximately 11 bills and a proposal for an amendment to the Constitution. The bill is expected to be presented for debate in the Congress shortly.



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BRICS sign Memorandum of Cooperation in Tax Matters

On 27 July 2017, the heads of the tax authorities of the five countries that form the BRICS (Brazil, Russia, India, China and South Africa) signed a Memorandum of Cooperation in Tax Matters.

This landmark document shows the commitment of the countries to implement the G20 tax agenda, including the Base Erosion and Profit Shifting (BEPS) project and the automatic exchange of information, in order to foster economic growth and counteracting tax avoidance and aggressive tax planning.

Note that, over the last year, Brazil has introduced tax rules to comply with the BEPS minimum standards and it has recently filed a request to become member of the OECD.



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Der Gesetzentwurf Nr. 7.448/2017 und die Rechtssicherheit im brasilianischen Recht

Der Gesetzentwurf Nr. 7.448/2017, der 2015 im Bundessenat begonnen wurde und dessen Ziel es ist, diverse Bestimmungen in das sogenannte Einführungsgesetz zu den Normen des brasilianischen Rechts (die Gesetzesverordnung nº 4.657/42) einzufügen, befindet sich im brasilianischen Repräsentantenhaus in seiner Schlussphase.

Das Einführungsgesetz zu den Normen des brasilianischen Rechts enthält allgemeine Vorschriften, die sich sowohl auf die Rechtsauslegung und -anwendung als auch das Kollisionsrecht im Internationalen Privatrecht beziehen.

Der Gesetzentwurf sieht vor allem die Einbeziehung verschiedener Bestimmungen vor, die mit den Beziehungen im Bereich der Öffentlichen Verwaltung zusammenhängen, und bezweckt eine Qualitätsverbesserung der im Verwaltungs- und juristischen Bereich sowie durch die Kontrollorgane getroffenen Entscheidungen.

Grundsätzlich versieht der Gesetzentwurf das Einführungsgesetz zu den Normen des brasilianischen Rechts mit verschiedenen Prinzipien und Auslegungsregeln, die von den gesetzanwendenden Staatsgewalten zu berücksichtigen sind.

Ein ständiger Aspekt ist bei diesem Gesetzentwurf die Festlegung von Mindestmaßstäben, die von den Verwaltungsstellen zu beachten sind, wenn diese auf der Grundlage von abstrakten juristischen Werten (Gerechtigkeit, Vernünftigkeit, Verhältnismäßigkeit, Sozialfunktion des Eigentums etc) Entscheidungen treffen. Der Gesetzentwurf bestimmt, dass Entscheidungen mit irgendeinem politischen oder ideologischen Gehalt die praktischen Konsequenzen zu berücksichtigen und die Notwendigkeit und die Angemessenheit der Entscheidung im Vergleich zu anderen Alternativen zu erklären haben.

Ein anderer im Gesetzentwurf hervorstechender Aspekt ist der Einsatz einer obligatorischen Übergangsregelung in all den Fällen, in denen die Entscheidung eine neue Auslegung oder Orientierung bezüglich einer Norm abstrakten Gehalts anwendet, die eine neue Pflicht oder Beschränkung auferlegt. Der Gesetzentwurf legt fest, dass die betroffene Partei berechtigt ist, diesbezüglich Verhandlungen mit der staatlichen Stelle aufzunehmen, falls diese Regelung nicht im

Voraus erlassen wurde; dazu wird dann jeweils eine "Verpflichtungserklärung" formalisiert. In diesem Punkt strebt der Vorschlag demnach eine größere Rechtssicherheit für die betroffenen Privatparteien an.

Auf derselben Linie sieht der Entwurf weiterhin vor, dass die Überprüfung der Gültigkeit des wirksam gewordenen Aktes, Vertrags, Prozesses oder der Verwaltungsnorm die allgemeinen Richtlinien jener Zeit berücksichtigen muss. So verbietet man, dass eine Änderung des Einvernehmens vollumfänglich konstituierte Situationen beeinträchtigt.

Eine andere wichtige Neuerung ist die Schaffung der Öffentlichen Erklärungsklage (*ação civil pública declaratória*) in Bezug auf die Gültigkeit von Akten, Verträgen und administrativen Anpassungen, die allgemeine (*erga omnes*) Bindungswirkungen entfalten wird und die solche Rechtsunsicherheiten verringern kann, welche verschiedenen Situationen bei von der Staatsgewalt ausgeübten Akten innewohnen.

Der Gesetzentwurf ermöglicht auch den Abschluss einer Verpflichtung mit Privatpersonen, um eine verhältnismäßige, wirksame und mit den allgemeinen Zielen zu vereinbarende rechtliche Lösung zu finden, und die sogar Transaktionen zu Sanktionen und Krediten sowie die Festsetzung einer Übergangsregelung enthalten kann. Obwohl der Entwurf vorsieht, dass für den Abschluss der Verpflichtung eine gerichtliche Genehmigung verlangt werden kann, so kann diese Bestimmung doch für eine Vielzahl von Streitigkeiten aus dem Verwaltungsbereich die Möglichkeit einer Verhandlungslösung darstellen.

Im Gesetzentwurf sind zudem spezifische Situationen vorgesehen, in denen der Beamte nicht persönlich haftbar gemacht wird. Unter anderem wird festgelegt, dass er nur bei Vorsatz oder grober Fahrlässigkeit für seine Handlungen, Entscheidungen oder technischen Meinungen haftet. Diese Bestimmung ist besonders für den Schutz derjenigen Beamten relevant, wenn sie polemische, aber doch technisch gut begründete Entscheidungen nach Treu und Glauben getroffen haben.

Der Gesetzentwurf erkennt also allgemein den vagen und unbestimmten Charakter verschiedener Rechtskategorien an, was zu einer großen Bandbreite für unterschiedliche Interpretationen führt. Dies bringt sowohl für die öffentliche Verwaltung als auch für die Bürger Risiken, doch diese Anerkennung bewegt sich in Richtung eines Schutzes von Treu und Glauben sowie der Rechtssicherheit. Die letzte Bestimmung des Entwurfs mag als Beispiel für dieses Ziel gelten, denn sie sieht vor, dass "die staatlichen Behörden bei der Gesetzesanwendung zur Steigerung der Rechtssicherheit tätig werden müssen".

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Da der Gesetzentwurf anerkennt, dass die heutigen Werkzeuge des brasilianischen Rechts nicht ausreichen, um den Bürgern und den Beamten selbst Sicherheit zu gewähren, bietet er neue Mechanismen an. Es ist ein Vorschlag, der viele Begriffe des Öffentlichen Rechts ändert. Im Falle seiner tatsächlichen Verabschiedung wird es länger und kontinuierlicher Bemühungen bedürfen, bis die Verwaltungs- und Justizorgane tatsächlich dazu übergehen, diese Bestimmungen einzuhalten.

Vertragsfreiheit und Schiedsverfahren für qualifizierte Arbeitnehmer in der neuen Arbeitsgesetzgebung

Vorbemerkungen

Durch das Gesetz Nr. 13467 wurde der einzige Absatz des Artikels 444 CLT (brasilianisches Arbeitsgesetzbuch) eingeführt, der es Arbeitnehmern mit Universitätsausbildung und einem Gehalt von mindestens dem Zweifachen der höchsten Berechnungsgrundlage der gesetzlichen Rentenversicherung erlaubt, in rechtlich wirksamer Weise Vertragsbestimmungen mit dem Arbeitgeber zu vereinbaren, die Vorrang vor tarifvertraglichen Bestimmungen haben.

Gleichzeitig wurde aufgrund des genannten Gesetzes Artikel 507-A in den alten Text des CLT aufgenommen, in dem die Möglichkeit vorgesehen ist, in einem Vertrag mit einem Arbeitnehmer, dessen Gehalt mindestens dem Zweifachen der höchsten Berechnungsgrundlage der gesetzlichen Rentenversicherung entspricht, in einer Schiedsklausel vorzusehen, dass arbeitsrechtliche durch Schiedsverfahren gelöst werden können, unter der Bedingung, dass diese entweder vom Arbeitnehmer vorgeschlagen wird oder er dieser ausdrücklich zustimmt.

Im vorliegenden Artikel werden wir diese beiden neuen gesetzlichen Vorschriften behandeln.

Vertragsfreiheit

Durch die oben erwähnte, unseres Erachtens relevante Gesetzesänderung wird den Parteien beim Vertragsabschluss mehr Freiheit als bei der alten Regelung des Artikels 444 CLT eingeräumt und gewährleistet, dass die zwischen Arbeitgeber und Arbeitnehmer vereinbarten Vertragsbedingungen, die die in Artikel 444 CLT vorgesehenen Voraussetzungen erfüllen, dieselbe rechtliche Wirksamkeit haben wie ein Tarifvertrag.

Mit anderen Worten sind die zwischen dem im einzigem Absatz des Artikels 444 CLT definierten Arbeitnehmer und dem Arbeitgeber ausgehandelten Bestimmungen (solange sie nicht gegen Vorschriften der Bundesverfassung und des CLT verstossen) rechtlich gültig, wirksam und bringen den Parteien mehr Rechtssicherheit.



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Der Wortlaut des Gesetzes 13467 wird von vielen Fachleuten kritisiert, i) da er den Gleichbehandlungsgrundsatz verstosse, denn er behandle Personen gleich, die sich nicht in der gleichen Lage befänden, ii) da der Umstand, dass jemand einen Universitätsabschluss habe angesichts der teils fragwürdigen Qualität einiger brasilianischer Institutionen keinen ausreichenden Anlass biete, dem Inhaber eines solchen Abschlusses zuzusprechen, Vertragsbestimmungen frei auszuhandeln, und iii) bestimmte Bestimmungen wie Gehaltsreduzierungen ohnehin unter dem Vorbehalt der Festlegung in Tarifverträgen verblieben, da die Bundesverfassung für diese spezifische Situation zwingend eine Regelung in Unternehmens- bzw. Verbandstarifverträgen verlange. Derartige vorübergehende Veränderungen des Arbeitsvertrages dürften daher nicht individuell vereinbart werden, da dies gegen verfassungsrechtliche Vorschriften verstossen würde.

Tatsache ist jedoch, dass Artikel 444, einziger Absatz CLT einen der von Arbeitgebern geäußerten Kritikpunkte beseitigt, die grössere Rechtssicherheit bei den mit höher qualifizierten Arbeitnehmern abgeschlossenen Arbeitsverträgen in hervorgehobenen Positionen der hierarchischen Struktur des Unternehmens, die differenzierte Gehälter/Sonderzuwendungen erhalten, gefordert hatten.

Dementsprechend haben die mit den Arbeitnehmern, die die im einzigen Absatz des Artikels 444 CLT vorgesehenen kumulativen Voraussetzungen erfüllen und weder gegen die Bundesverfassung noch gegen das Arbeitsgesetzbuch verstoßen, seit dem 11.11.2017 dieselbe rechtliche Wirksamkeit wie Tarifverträge und haben Vorrang vor diesen, was eine höhere Stabilität der Arbeitsverhältnisse und Rechtssicherheit für die Parteien, insbesondere für den Arbeitgeber, mit sich bringt.

Klauseln über Wettbewerbsverbote, Geheimhaltung, Abwerbungsverbote, Einbehalt bei Eintritt bestimmter Ereignisse oder Vornahme bestimmter Zahlungen etc. können nicht mehr angefochten oder annulliert werden, solange sie nicht gegen Verfassung oder CLT verstoßen und haben damit Vorrang vor der gesetzlichen Mindestregelung.

Schiedsverfahren für die Lösung von Arbeitskonflikten

Durch die neuen Vorschriften wird ein Paradigma verändert, das im brasilianischen Arbeitsrecht bisher für Konfliktlösungen galt:

Seit dem 11.11.2017 ist es möglich, für die Lösung von Konflikten aus Arbeitsverhältnissen mit Arbeitnehmern, deren Gehalt mindestens dem Zweifachen der höchsten Berechnungsgrundlage der gesetzlichen Rentenversicherung ent-

spricht, eine Abrede über ein Schiedsverfahren zu vereinbaren, unter der Bedingung, dass diese entweder vom Arbeitnehmer vorgeschlagen wird oder er dieser ausdrücklich zustimmt.

Anders als im einzigen Absatz des Artikels 444 CLT vorgesehen, kann der Arbeitnehmer, der zwar keinen Universitätsabschluss hat, aber ein Gehalt bekommt, das mindestens dem Zweifachen der höchsten Berechnungsgrundlage der gesetzlichen Rentenversicherung entspricht, eine solche Schiedsklausel abschließen.

Da das Schiedsverfahren jedoch ein Sonderverfahren darstellt, das Kosten für die Parteien involviert, sollte die Schiedsabrede mit Vorsicht gehandhabt und nur dort eingesetzt werden, wo sie wirklich gerechtfertigt erscheint.

Unabhängig von der ausschließlichen Autorisierung zur Vereinbarung derartiger Klauseln befürchten wir, dass Artikel 507-A von der Arbeitsgerichtsbarkeit mit dem Argument für verfassungswidrig erklärt werden könnte, dass Arbeitnehmer nicht rechtswirksam auf Ansprüche nicht verzichten können.

Abschließende Anmerkungen

Die hier behandelten Innovationen sind relevant und sorgen für ein größeres Gleichgewicht in den Arbeitsverhältnissen.

Anders als viele Fachleute sind wir der Ansicht, dass qualifizierte Arbeitnehmer, die eine differenzierte Position in der Hierarchie bekleiden und höhere Gehälter und Sonderzuwendungen als andere bekommen, in der Lage sind, differenzierte Vertragsbedingungen auszuhandeln. Bei solchen Arbeitnehmern manifestiert sich in der Praxis oft genug ein umgekehrtes Über-/Unterordnungsverhältnis (das Unternehmen hängt von der Expertise, Qualifikation und beruflichen Erfahrung ab und nicht anders herum), weshalb es weder rechtmässig noch ethisch korrekt ist, wenn zugunsten eines solchen Arbeitnehmers später die Feststellung der Nichtigkeit oder die Zahlung von Beträgen geltend gemacht wird, auf die er keinen Anspruch hat.

Wie bereits ausgeführt stellen die durch das Gesetz Nr. 13467 zur Schutzbedürftigkeit vorgenommenen Änderungen ein relevantes Werkzeug für die Unternehmen dar, um mit ihren Führungskräften differenzierte Vertragsbedingungen auszuhandeln und eventuelle Konflikte mit diesen Arbeitnehmern ohne Anrufung der ordentlichen Gerichte zu lösen, und stellt damit die gewünschte grössere Rechtssicherheit her.

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Nichtsdestotrotz raten wir jedoch, wie im Artikel ausgeführt, vorerst zur Vorsicht, bis die Arbeitsgerichte und die für die Aufsicht zuständigen Behörden Stellung zu den Modifikationen durch die Arbeitsrechtsform bezogen haben.

*Autor der Publikationen *So geht's Ihr Einstieg in Brasilien* und *So geht's Arbeitsrecht in Brasilien*

Brazil modifies rules for taxation of Closed Investment Funds

Brazilian Government approved Provisional Measure # 806 on October 30th, 2017, bringing significant modification concerning taxation on Closed Investment Funds's, which has been subject of great discussions and criticism amongst tax experts.

The first controversial topic relates to the applicability of such rule in 2018 if the Provisional Measure is not converted into Law still in 2017, due to the prospective principle (in which any laws that imply on the increase of taxation should be effective as from the following fiscal year). On the other hand, tax authorities may argue that this rules only modified the moment of taxation, as the tax rules were already in place. The applicability should certainly be discussed amongst judicial courts if the Provisional Measure is not converted into law still this year.

As for the modifications, under the current applicable regime, closed investment funds paid taxes only on their redemption or amortization of the funds' shares. The new regime establishes that the funds shall be taxed regardless of the effective distribution. In fact, such shall be taxed following the rules already in place for open investment funds, whereby an anticipation of tax (the so-called 'come cotas') in this case, the Withholding Income Tax – WHT – is due in the last business day of May and November being the tax basis the net asset value of the shares.

The income to be taxes should be the excess of equity value of quotas on May 31st, 2018 over their acquisition cost. Under such rules, the accumulated income prior to this threshold shall also be subject to WHT, levied at progressive rates depending on the maturity date of the investment.

Another relevant modification relates to the reorganization of investment funds. The previous rules did not regard any reorganization of the investment funds (such as merger, spin-off) as a taxable event, if the portfolio content was not subject to a more favorable regime. Under the new rules, the income derived from investment funds shall be deemed to be paid to quotaholders when such funds are transformed, merged or spun-off, regardless of their tax regime.

It is worth stressing that several funds were not affected by the modifications of the Provisional Measure # 806/2017, which are the following:



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- Real Estate Investment Funds (FII's);
- Receivables Investment Funds (FDIC's) and funds that hold quotas of FDICs being future subject to taxation at the moment that these quotas are amortized, redeemed or sold;
- Equity Investment Funds (FIA's) and holders of such quotas that shall be taxed on the quotas' redemption;
- Any other kind of closed investment funds to be extinct as from December 31st, 2018, and whose deliberation was written at their bylaws as from October 31st, 2017.

Private Equity Funds (FIP'S) also suffered significant modifications. The ruling 579/2016 from the Brazilian Securities and Exchange Commission (CVM) segregated the FIP's into two categories: investment entities and others (property funds). The legislation established criteria to qualify the FIP's as an investment entity, namely, to have an empowered and qualified manager, valuation of investment according to their fair market value, clear and objective investment strategy duly described in the bylaws. Also, the FIP's should have at least two investments, or two quotaholders, or even funds with investments in entities in which the quotaholders had not invested yet.

Even though the rules applicable to investors – resident and nonresident – have not been expressly changed by Provisional Measure 806/2017, in practice, an investor's returns and profits may be also affected as a result of the tax treatment imposed on the FIP's under this new rule.

The current rules regard FIP's as tax neutral, being the quotaholder taxed only upon the distribution of income. The new rules determined that FIP's (property funds) should be regarded as a corporate entity obliged to comply with all tax obligation, by which the fund administrator is liable to fulfill. Finally, incomes and gains realized by such FIP's should collect WHT at 15% rate as from January 2nd, 2018, including accumulated income in the period.

A Normative Ruling issued by the Brazilian Federal Revenue Service is yet to be published, establishing new procedures related to the closed investment funds upcoming tax treatment.

*Autor der Publikationen *So geht's Besteuerung von Unternehmen in Brasilien* und *So geht's Buchhaltung in Brasilien*

Federal Government regulates the sale of assets by mixed capital companies in Brazil

On November 3, 2017, the Government published Decree 9,188/2017, which establishes new guidelines for the sale of assets owned by federal mixed-capital companies ("Federal Companies"), such as Petrobras and Eletrobras. The goal is to set clear standards with respect to the corporate governance, due process of law and transparency to be followed by Federal Companies. The Decree also seeks to expedite the implementation of sale transactions, which are key to federal accounts balancing and have been suffering significant delays.

According to Law 13,303/2016 ("Government-Controlled Companies Law") the sale of such assets is released from the conduction of a standard public tender procedure for the sale of shares, credit and debt securities and goods produced by these entities (Section 29, XVIII).¹

Despite not being subject to the general public tender rule, the transactions carried out by Federal companies must be compatible with public law principles applicable to them.

The Decree sets forth a noncompulsory regime that can be adopted at the discretion of Federal Companies, including a specific competitive procedure, more flexible than the standard public tender process, in order to select the private parties in each sale. That mitigates the risk of such transactions being challenged by third parties and controlling bodies, due to violation of the law.

Although optional, the new regulation encourages Federal Companies to evaluate the possibility of selling assets.

In case of enrollment, each Federal Company will approve a privatization plan, which will identify assets that can be offered to the market.

¹ The Decree defines as "sale of assets" any total or partial assignment of assets to third parties (that are not controlled entities or controllers of the company) involving business and operational sites, as well as rights and direct and indirect equity stakes in other companies. The Decree does not apply to cases of disposal of assets related to the corporate purpose of state-owned companies (Section 28, § 3th, I).



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The procedure comprises the following stages:

- (i) **Planning and preparation phase**, which includes the valuation of the assets, the analysis of the tax, financial and corporate impact of the transaction in the Federal Company, the motivation for the sale pursuant to the corporate strategy of the Federal Company, as well as the listing of the required licenses and governmental authorizations, the intended structure and the estimated amount of the transaction;
- (ii) **Market testing** by means of a call for interested parties. Those who express interest shall demonstrate its ability to comply with the selection criteria provided for in the request for proposals. They will also be required to execute a non-disclosure agreement with the Federal Company. The expression of interest does not bound the interested party to further engage in the process;
- (iii) **Preliminary offers / shortlisting**. This is an optional phase. If conducted, the Federal Company will select at least 3 parties to engage the next phase;
- (iv) **Submission of binding offers**. The Federal Company will send a request for binding proposals to those selected in the market-testing phase or in the shortlisting phase. The binding offers may include comments to the transaction documents. The selection criteria will be the best economic return based on offered price, commercial conditions and risk allocation. Financial statements may also be considered;
- (v) **Negotiation of the selected offer** and submission of the final offer to the analysis of an independent expert (financial institution) in order to confirm the fairness of the proposal;
- (vi) **Awarding and execution of the relevant contract and transaction documents**.

In order to conduct the procedure, the Federal Company must designate 2 Committees, each composed by 3 members: (i) a Valuation Committee, responsible for the valuation of the asset (possibly with the assistance of or delegation to an independent expert) and (ii) a Selection Committee, responsible for the selection of the buyer. The Federal Company's management must approve all acts performed by the Committees.

In addition to the above, all stages of the procedure will be subject to the surveillance of Brazilian public controlling bodies, such as the Court of Audits and the public prosecutor's office.

The valuation of the assets and other economic and financial data will be confidential. Other information may also be deemed confidential in order to protect the Federal Company and the asset value. It is not clear how the confidentiality

provisions will be conformed to the need of the private parties to access material information on the assets.

The procedure does not apply to certain types of sale, such as those involving consortia between national and foreign companies, with the purpose to expand the Federal Company's activities, bring new technology or increase investments in local industry. In our view, that is clearly a concern of Petrobras and other Federal Companies that need more agility due to the market in which they operate.

The provisions of the Decree are an attempt to bring clarity on the best corporate and public governance practice involving mixed-capital companies where many of them are preparing to sell a material part of its assets. The actual impact of the regulation however will only be known if the companies choose to adopt its terms and to follow the special regime.

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Treatment of SPEs of Brazilian real estate developers in judicial reorganization proceedings

Leading Cases to Watch

The Brazilian “Car Wash” operation investigating corruption and fraud allegations involving Petrobras management and political parties deeply affected Brazilian construction companies. Many large construction companies were forced to seek protection under Judicial Reorganization¹ proceedings - “JR”.

These JR proceedings led to a severe downturn in the Brazilian real estate sector as a whole during the last two years.

There is one key question, which repeatedly surfaces in the context of these JR proceedings and is of extreme practical relevance for swift recovery and future funding of the Brazilian construction sector. The question is on whether Specific Purpose Vehicles (*Sociedades de Propósito Específico* – SPEs) with so-called “Segregated Estates” (*Patrimônio de Afetação*), hereinafter referred to as **Segregated Estate SPEs**, form part of the assets of construction companies in JR proceedings.

The legal background to this relevant issue is as follows:

Segregated Estate SPEs are set up for the development of specific real estate projects. Brazilian law allows real estate developers to use Segregated Estate SPEs comprising the land, concessions and other rights, which serve as the only collateral for purchasers of residential units and financiers in real estate development projects². This means that any such purchasers and financiers can only raise claims against such Segregated Estate SPEs in case of defaults and, furthermore, that any other assets of the real estate developer cannot be held liable by such purchasers.

This ring-fenced liability of Segregated Estate SPEs is not only used to stimulate investments in real estate³, but also grants tax benefits and ends up allowing real estate developers to obtain easier access to funding of individual development projects.

¹ Federal Law nº 11,101/2005

² Federal Law nº 10,931/2004

³ This protection was designed to avoid collapses similar to the one of Encol S/A, a widely known Brazilian construction company, that went bankrupt in 1999.

The Atlântica Case

One of the first cases in which this Segregated Estate SPEs structure was tested was the JR proceeding of Construtora e Incorporadora Atlântica Ltda. (“Atlântica”). The key legal topic in this proceeding was the question of whether the Segregated Estate SPE named SPE Fidalga should be considered as an asset of Atlântica in the JR proceeding.

The reorganization court held that SPE Fidalga is excluded from the JR Proceeding (the decision is still pending review of the State Court of Appeals). The key legal arguments underpinning this decision, which favours the creditors of SPE Fidalga, are:

- (i) by allowing Segregated Estate SPEs to develop housing projects, the Brazilian legislator meant to provide benefits for individual purchasers of real estate units and not for the construction company or regular creditors or suppliers; and
- (ii) any mingling of assets of Segregated Estate SPEs with assets of the construction company represents a step backwards, thus returning to the legal insecurity that existed before creation of Segregated Estate SPEs.

The Viver Case

On 16 September 2016, *Viver Incorporadora e Construtora S.A.* (“Viver”) filed for JR to restructure an estimated debt of BRL 1 billion. Amongst 64 companies of the Viver group, 16 are Segregated Estate SPEs.

This was the leading case in Brazil in recent times.

The First Instance

The Sao Paulo bankruptcy court had to decide which of the three alternative procedural solutions to follow, namely:

- **Substantive Consolidation.** Disregard the Segregated Estate of the SPEs and allow the JR to proceed with the totality of all intermingled assets of the Viver group as collateral for all pre-petition claims of all Viver group creditors;
- **Procedural Consolidation.** Uphold the Segregated Estate of the SPEs, thus only allowing each Segregated Estate SPE to respond with their Segregated Estate exclusively for the corresponding pre-petition claims arising out of the individual real estate development project; or

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- **Exclusion of Segregate Estate SPEs from the JR proceeding.** Uphold the Segregated Estate of the SPEs and determine each Segregated Estate SPE to follow its own proceeding with its respective creditors in accordance with the provisions of the specific law (Federal Law nº 4,591/1964 as amended by Federal Law nº 10,931/2004).

The São Paulo court ruled in favor of the second alternative, Procedural Consolidation, upholding the Segregated Estate of the SPEs.

The key problem the São Paulo court had to deal with in its decision was the fact that there is no specific law or provision dealing with Segregated Estate SPEs in JR proceedings.

Naturally, Viver was arguing in favor of the first alternative. This would allow the turnaround of the entire Viver Group by having more assets to satisfy all pre-petition claims. Some creditors of Segregated Estate SPEs (including financial institutions) were of course energetically arguing in favor of the second alternative to secure better chances of recovering of their pre-petition claims.

For those, such as Viver, defending the first alternative, the absence of a specific regulation allows for a substantive consolidation. The legal argument is that Brazilian Bankruptcy Law expressly excludes the Segregated Estate in a bankruptcy liquidation scenario. The rationale behind this line of reasoning is that if it was the purpose of the law to exclude the Segregated Estates also from JR proceedings, this should have been spelled out expressly (as in the case of bankruptcy liquidation). Thus, due to this legal gap, Segregated Estates should be included within a JR proceeding by sort of an “inverse analogy” to Brazilian Bankruptcy Law.

Quite to the contrary, however, financial institutions argued that assets of the Segregated Estate SPEs should not be mingled with assets of a company under JR. Their argument was that the lack of specific regulation in case of Segregated Estates within JR proceedings would have been made on purpose (i.e. not forgotten by accident by the legislator). The rationale behind this line of reasoning is that both institutes, judicial reorganization and bankruptcy liquidation, are incompatible and have different purposes (i.e. one aims at the recovery of the company while the other liquidates the company).

The Second Instance

Naturally, the creditors of the Segregated Estate SPE’s – mostly financial institutions – and Viver promptly escalated this question to the State of Sao Paulo Court of Appeals.

The Court of Appeals ruled this question also against Viver. However, the decision was based on alternative three, by stating that the Segregated Estate SPEs must be excluded from the JR proceeding. The legal reasoning behind this was that Segregated Estate SPE, which did not yet deliver the respective residential units to the purchasers, should have obtained prior approval of the purchasers of residential units before even filing for a JR.

Again, the decision of the Sao Paulo Court of Appeals is still subject to revision by the Brazilian Superior Court of Justice.

Final Remarks

While the treatment of Segregate Estate SPEs in JR proceedings is therefore far from being settled, this matter deserves full attention of everyone in the real estate sector, considering the potential this matter has to affect the whole risk assessment criteria in the - already controversial - Brazilian real estate sector.

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Insider Trading in Brazil - Criminal and administrative perspective

During the year 2017, Brazil faced a lot of corruption scandals involving uncommon relationships between the private and public sectors. Once and again, Brazilians unfortunately will keep in their memories another difficult moment.

From a securities market perspective, we have the Securities and Exchange Commission of Brazil ("CVM") created by the Federal Law 6,385/76 in 1976, almost at the same time as Brazil's Corporation Law was published.

Some of CVM mandates are to protect the holders from securities and the investors of the market against the use of relevant information not disclosed and ensure, the observance of fair trade practice in the securities market.

Considering that, to enable CVM to comply with its mandates, it is important to remind that the reliable securities market is one of the reasons to ensure every investor of the amount invested is being at least monitored and controlled.

Since that listed corporations in Brazil are strictly regulated from CVM's perspective and according to the article 13 and paragraphs of CVM Instruction 358/02, it is completely forbidden (prior to the disclosure to the market of a relevant fact or act, to trade securities issued by the company), by its shareholders, executive officers and several other positions.

CVM is responsible to investigate and to apply administrative penalties based on several evidences if there has occurred or not, trade of securities upon the use of privileged information.

For that reason, in the year 2017, relevant changes in the Federal Law 6.385/76 have occurred, as we will identify below;

CVM is commonly known as "The Securities Police", due to its high level of regulations published and their proper administrative investigation procedures. It is important to remind that CVM can only apply administrative measures, such as penalties, suspension, and others.

The administrative penalties that can be applied in case of offense based on insider trading, are several, but one specifically is the applicable fines.

The limit of CVM fines was five hundred thousand reais (R\$ 500,000.00) in case of the occurrence of an insider trading act, for example. Then, for several reasons, in the middle of 2017, a Provisional Measure number 784/2017 was issued by Brazilian President Michel Temer, and raised the fine to one thousand times (1000) the fine's amount, which went from five hundred thousand reais (R\$ 500,000.00) to five hundred million reais (R\$ 500,000,000.00).

These facts caused a lot of repercussion and discussion, and instead of increasing to one thousand times (1000) the fine's amount, the new Federal Law approved 13,507/2017 on November 14th, 2017, modified again the fines limit, and defined that the maximum amount to be applied on a fine is one hundred (100) times the old amount, currently fifty million reais (R\$ 50,000,000.00).

This new federal law was only published a few days ago and also intensifies the criminal impact of a case of insider trading conviction, by the Court, see hereby the following text:

Federal law 6,385/76

Art. 27-D. Use of relevant information that has not yet been disclosed to the market that is capable of providing, for themselves or for others, an undue advantage by negotiating, in their own name or by third parties, securities: (Redaction provided by Law 13,506, 2017)

Penalty - imprisonment, from 1 (one) to 5 (five) years, and a fine of up to 3 (three) times the amount of the illicit advantage obtained as a result of the crime. (Included by Law No. 10,303, dated October 31, 2001)

Paragraph one - The same penalty shall be imposed on anyone who transfers confidential information related to a material fact to which he or she has had access because of a position or position that occupies the issuer of securities or because of a commercial, professional or trust relationship with the issuer. (Included by Law 13,506, dated 2017)

Paragraph two - The penalty is increased by 1/3 (one third) if the perpetrator commits the crime foreseen in the caput of this article using relevant information of which he has knowledge and of which he must maintain secrecy. (Included by Law 13,506, dated 2017)

The new Federal Law innovates CVM administrative proceedings and intensifies the crime of insider trading. A clear message that CVM is aware of the facts in Brazil.

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Hardening the law, CVM is discouraging the practice of unlawful acts, especially the occurrence of insider trading. Intensifying the criminal law against insider trading is an important fact.

Important to mention, is not fair that several investors that operate in the securities market with a standard and public information of the companies, suddenly be surprised that one investor traded with insider information, and profited a lot in comparison to another.

Insider trading, in our view affects the securities market, the investors and the proper country. An existing company create jobs, pay taxes, and generates value to the society and develops the local market in some cases.

As the companies keep bringing benefits to the society and the country, it is imperative and commonly said in Brazil “do not play a game with marked cards”, which means you know the final result.

The company’s administration must blindly comply to the duties of loyalty and secrecy of the company.

With the new Federal Law 13,506/2017, we realize that the Securities Market is becoming even more regulated, with the clear objective to bring more confidence to investors and encouraging fair market practices.

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