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Bullying, Mobbing, Stalking, “Assédio Moral”

In Brasilien hat die Staatspräsidentin Dilma Rousseff am 06-11-2015 das Gesetz Nr. 13.185 verkündet. Es sieht im Wesentlichen staatliche Maßnahmen zur Bekämpfung des “Bullying” vor.

Im Sinne des Gesetzes bedeutet “Bullying” eine systematische Einschüchterung, Erniedrigung oder Diskriminierung, welche mittels physischer Gewalt erfolgt oder psychologischer Natur sein kann. Sie erfolgt absichtlich und wiederholt, ohne ersichtlichen Grund. Praktiziert wird sie von einem(r) Einzelnen oder einer Gruppe von Personen und richtet sich gegen Einzel- oder mehrere Personen, welche dadurch eingeschüchtert oder angegriffen werden. “Bullying” versetzt das Opfer in Angst. Dieses steht im Verhältnis zum Täter ferner in einem Unterordnungsverhältnis. Das Gesetz enthält eine ausführliche Beschreibung des Begriffs „Bullying“ (Arts. 1, § 1, 2 u. 3 des Gesetzes). Erfasst wird darin außerdem das „Cyberbullying“ (Art. 2, Einziger Paragraph, des Gesetzes). Dies ist der Fall, wenn eine systematische Einschüchterung, Erniedrigung oder Diskriminierung mit Hilfe des Internet erfolgt. Genannt werden dabei die Anstiftung zu Druck-, Zwang- und Gewaltanwendung, sowie die Verfälschung und Entstellung von Fotos und persönlichen Daten, wenn dies in der Absicht getan wird, jemanden gefügig zu machen und dadurch psychisch zu nötigen.

Verwandt mit “Bullying” sind “Mobbing”, “Stalking” und “Assédio Moral”. Umgangssprachlich bedeutet “Mobbing”, dass jemand kollektiv fortgesetzt schikaniert und sozial gemieden wird. Beim “Stalking” dringt der Angreifer in die Privatsphäre des Opfers ein. Er wiederholt unaufhörlich eine gleiche Handlung auf verschiedene Art und Weise. Dadurch wird die psychische Integrität des Opfers, wie auch dessen Tagesablauf und Bewegungsfreiheit beeinträchtigt.

“Bullying”, “Mobbing” und “Stalking” sind Arten des “Assédio Moral”, der aus rechtlicher Sicht vor allem im Arbeits-, Zivil- und Strafrecht von Bedeutung ist. Im Wesentlichen handelt es sich um ein wiederholtes und fortgesetztes widerrechtliches Verhalten, gerichtet gegen eine Person, das erniedrigend, entwürdigend und abstoßend wirkt. Dadurch werden deren Menschenwürde, psychische Integrität und Persönlichkeitsrechte verletzt.

Im Bereich des Arbeitsrechts kann in Brasilien “Assédio moral” vor Arbeitsgericht geltend gemacht werden, was in der Praxis immer häufiger geschieht. Ein Blick auf die Rechtsprechung des Tribunal Superior do Trabalho – TST, dem höchsten Gericht des Landes auf dem Gebiete des Arbeitsrechts, bestätigt diese Tatsache. Dabei kann der materielle Schaden neben dem erlittenen seelischen Schmerz (*dano moral*) eingeklagt werden.

Dieses Recht gewährt schon unmittelbar die Bundesverfassung Brasiliens (vgl. im Besonderen die Art. 5, V u. X, *Constituição Federal*). Der Grundsatz der Pflicht zu Schadenersatz bei unerlaubten Handlungen wird im brasilianischen Zivilgesetzbuch näher verdeutlicht (Arts. 186 u. 927 ZGB). Daneben stehen spezifisch arbeitsrechtliche Vorschriften in Kraft, so z.B. das Gesetz n. 9.029/1995, das diskriminierende Handlungen gegenüber Arbeitnehmern untersagt (vgl. im Besonderen die Art. 1 u. 4 dieses Gesetzes).

Wenn ein „Assédio moral“ durch den Arbeitgeber erfolgt, kann der Arbeitnehmer das Arbeitsverhältnis kündigen (Art. 483, d, oder e, CLT). Auf der anderen Seite, wenn das Gleiche durch eine(n) Arbeitskollegin(en) geschieht, sollten die Vorgesetzten darüber informiert werden, damit der Arbeitgeber die erforderlichen Maßnahmen treffen kann.

Außer im Arbeits- kommt dem “Assédio moral” auch im Zivilrecht rechtliche Bedeutung zu. Vor allem die zivilrechtliche Verantwortlichkeit (*responsabilidade civil*) ist relevant. Diese kann im Besonderen ebenso die Eltern bei “Bullying”, praktiziert durch deren minderjährige Kinder, betreffen. Denkbar ist aber auch die Haftung des Arbeitgebers bei “Assédio moral” durch einen seiner Arbeitnehmer, wenn dieser während der Verrichtung der Arbeit gegen nicht beschäftigte Dritte erfolgt (Arts. 932, I u. III, 933, 934, 935 ZGB). In den beiden erwähnten Fällen besteht eine Haftpflicht zudem bei nicht schuldhaftem Verhalten der Eltern bzw. des Arbeitgebers (Art. 933 ZGB). Ein Rückgriff des Arbeitgebers gegen den fehlbaren Arbeitnehmer, der vorsätzlich oder schuldhaft gehandelt hat, ist jedoch möglich.

Schließlich ist bei Vorliegen von “Assédio moral” ferner die Verletzung von strafrechtlichen Vorschriften möglich. In Betracht kommen insbesondere Ehrverletzungsdelikte (Arts. 138, 139, 140 *Código Penal*), Nötigung (*Constrangimento ilegal*; art. 146 *Código Penal*) und Drohung (*Ameaça*; art. 147 *Código Penal*).

Im brasilianischen Parlament finden sich weitere Gesetzesentwürfe zum Thema, vor allem im Bereiche des Strafrechts, wo u.a. ein besonderer Straftatbestand betr. des “Assédio moral” gefordert wird.

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M&A Market – Differences between Asset Sale and Share Purchase

Brazilian M&A transactions have been relatively stable in the last 2 years, but are expected to grow in certain areas, e.g., health care field¹. Incentives in certain sectors, such as infrastructure, because of the 2016 Olympic Games, are still making the Brazilian M&A market interesting for foreign investors. Besides, the most relevant factor attracting foreign investment is the current devaluation of the Brazilian currency (Real): prices for assets and equity in Brazil are worthy to investors.

That being the scenario, this article serves to inform about the main differences of an asset sale and a share purchase in the context of an M&A transaction in Brazil. Important to stress that each transaction has its details, which should be carefully reviewed.

Sale of Assets

The purchase and sale of one or more assets of the Brazilian company is the proposed transaction of an asset sale. The sale may be of a specific asset (an equipment or machinery – separately) or comprise a part of the business of the seller, or of an entire business unit, which is referred to in Brazil as an establishment (“estabelecimento”)².

A sale of assets may be a simple or a complex transaction. For example, a sale of an equipment might be simple and involve only a standard sales agreement, except for few cases, it does usually not require registrations, filings or consent from third parties.

Instead, a sale of an establishment may imply a much more complex arrangement. Such sale must be registered with the appropriate commercial registry to be enforceable with third parties³. The transaction may also require the consent

¹ After Law 13,907, enacted on January, 2015, there are no more restrictions on foreign direct investment for the acquisition of companies of the health care field, such as hospitals and laboratories (human genetic, clinical analysis, pathologic anatomy, image diagnosis, among others).

² Civil code sets forth that an establishment is any organized group of assets for the carryout of a business (e.g. a branch of company that groups an entire part of the business of such company), and which may be the subject matter of rights or juridical operations compatible with its nature. See articles 1,142 and 1,143.

³ Civil Code, article 1,144.

of the creditors of the seller⁴. In most cases, the buyer would normally undertake a due diligence to confirm title, evaluate the assets and/or identify and assess potential liabilities that may arise or pass on to the buyer.

Briefly stated, the sale of equipment and machines (piecemeal sale) should not transfer to the buyer property tax liability associated with the asset sold. However, the sale of an on-going part of an establishment may transfer to the buyer liabilities, including potential property and other tax liability associated with the assets sold with the establishment, potential environmental liability associated therewith, labor liability associated with the employees transferred and liability to commercial creditors. Contractually, the buyer may agree with the seller that seller will fully retain all such liability, but this will not be enforceable towards third parties.

A sale of assets may trigger taxes, including income tax, VAT and municipal property transfer tax. Taxes would apply depending on the type of the assets involved and the structure of the transaction. Accordingly, mergers control may also apply: the transaction may be subject to the prior approval and filing with Brazilian Antitrust Authorities (CADE), depending on amounts and sizes of the companies involved.

In case of sale of an establishment, applicable law sets forth that, unless agreed to otherwise, the sale imply subrogation by the buyer of the agreements made for the exploitation of the establishment, except if such agreements are not of a personal nature. The relevant counter-party may terminate the agreement for cause within ninety days from the publication of the transfer of the establishment. In case of termination, the seller may be held liable for the resulting damages caused to the buyer, if any. Moreover, applicable law expressly provides that the seller of an establishment, unless expressly authorized by contract, will not be able to engage in the same business and compete with the buyer for a term of five years from the sale.

Share Purchase

The purchase and sale of all or part of the equity participation held in the relevant Brazilian company is the purpose of the share purchase.

A share purchase is generally formalized in a share purchase agreement, defining the basic terms and conditions of the purchase and the rights and obliga-

⁴ According to Civil Code, article 1,145, if, with the sale of the business establishment, the seller does not retain sufficient assets to pay its liabilities, the effectiveness of the sale would depend on the payment of all creditors or their consent, express or implied, within thirty days from notice.

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tions of the parties. This document includes, in most cases, representations and warranties from the parties, as well as conditions precedent (e.g., completion of due diligence, pre-closing obligations).

Buyer would normally undertake a due diligence to confirm title, evaluate the company and/or identify potential liabilities that may be associated with the target company or which may arise or otherwise pass on to the buyer. The actual transfer of the equity would be reflected in an amendment to its articles of organization, in a limited liability company, and by the execution of the appropriate share transfer book, in case of a corporation.

Unless the relevant share purchase agreement specifically provides otherwise, the seller would normally not retain any residual liability for general commercial debts, which would remain with the target company. The seller would also not be liable for tax or labor debts of the target company. However, under certain circumstances, it may still be asserted with tax and, especially, labor debts relating to the period preceding the sale.

Just as in an asset sale, the sale of equity participation may also trigger income or withholding income taxes, including the sale of equity in a Brazilian company from a nonresident to another resident. Tax implications must be carefully reviewed. Transaction may also be subject to the prior approval of CADE, depending on its effects and consequences and upon the size of the parties involved.

These were the most relevant differences between the asset sale and share purchase in Brazil. As mentioned, each transaction carried out in Brazil has its particulars and therefore, as any other corporate reorganization process, must be reviewed in light of several relevant aspects.

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Technisches Visum für 90 Tage bzw. 01 Jahr – Normgebende Resolutionen Nr. 100/2013 bzw. 61/2004

Heutzutage ist eines der am häufigsten Ausländern, die aus beruflichen Gründen nach Brasilien kommen möchten, erteilt das technische Visum. Die Erteilung dieser Art von Visum erfolgt zur Erbringung von Dienstleistungen technischen Charakters durch den Ausländer, beispielsweise die Montage und Wartung spezieller Maschinen und Anlagen.

Das Hauptmerkmal dieser Art von Visum liegt darin, dass der Mitarbeiter weiterhin bei seinem Arbeitgeber im Ausland beschäftigt ist, so dass das brasilianische Unternehmen lediglich für dessen Arzt- bzw. Krankenhauskosten in Brasilien und dessen Rückreisekosten in das Herkunftsland haftet.

Es wird in zwei Modalitäten erteilt: das technische Visum für 90 Tage bzw. das technische Visum für 01 Jahr.

Es ist wichtig darauf hinzuweisen, dass neben der Erbringung der eigentlichen technischen Dienstleistungen im Falle des auf 01 Jahr begrenzten technischen Visums der Ausländer den brasilianischen Beschäftigten der Firma, der er seine Leistungen erbringt, auch Schulungen anzubieten hat. Dies hängt damit zusammen, dass das Visum aus nationalem Interesse an der Spezialisierung der brasilianischen Arbeitskräfte und dem damit verbundenen Transfer von „Know-how“ erteilt wird.

Des Weiteren ist hervorzuheben, dass bis zum gegenwärtigen Zeitpunkt der Nationale Rat für Immigration, der für die Regelung der brasilianischen Einwanderungs- bzw. Einreisebestimmungen zuständig ist, Verwaltungs-, Finanz- bzw. Managementfunktionen nicht als technische Dienstleistungen betrachtet, wobei es allein im Falle des 90-tägigen technischen Visums eine gewisse Flexibilität gibt, abhängig von der Art der Dienstleistungen, die erbracht werden.

Für das durch die Normgebende Resolution Nr. 100 geregelte 90-tägige technische Visum besteht ein vereinfachtes Erteilungsverfahren, denn es kann direkt bei der brasilianischen konsularischen Vertretung im Ausland beantragt werden, ohne vorherige Prüfung durch das Arbeits- und Beschäftigungsministerium. Die wichtigsten Unterlagen, die von den brasilianischen Konsulaten zur Ausstellung dieser Art von Visum erforderlich werden, sind:

1. Einladungsschreiben des brasilianischen Unternehmens, in Brasilien vorbereitet und unterzeichnet, nach Maßgabe der Vorschriften und Richtlinien



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- des jeweiligen Konsulats (die Konsulate können diesbezüglich spezielle Informationen in besagtem Schreiben verlangen), und;
2. Kopie des Nachweises der Eintragung des brasilianischen Unternehmens im Handelsregister, dem sogenannten CNPJ (Cadastro Nacional de Pessoas Jurídicas).

Zusätzlich zu diesen Unterlagen sind die Konsulate dazu befugt, weitere Daten anzufordern. Diesbezüglich haben einige Konsulate zur Erteilung des Visums auch einen „Technischen Assistenzvertrag“ verlangt, in dem der Aufenthalt des ausländischen Staatsbürgers zur Erbringung von technischen Dienstleistungen im Land geregelt wird. In diesem Fall hat das Unternehmen bezeichneten Vertrag vorzulegen, unter Einhaltung der speziellen gesetzlichen Formalitäten.

Das 90-tägige technische Visum kann nicht verlängert werden, es besteht keine Möglichkeit zur Einbeziehung von Familienangehörigen¹ und es kann in einem Zeitraum von 180 Tagen einmal erteilt werden.

Andererseits wird das durch die Normgebende Resolution Nr. 61 geregelte technische Visum, das für einen Zeitraum von bis zu 01 Jahr erteilt werden kann, einer vorherigen Prüfung durch das Arbeitsministerium unterzogen, das über die Genehmigung bzw. Ablehnung des Arbeitsvisums entscheidet. Das Arbeitsministerium prüft sodann die akademische Qualifikation und die Berufserfahrung des ausländischen Staatsbürgers.

Derzeit nimmt dieses Verfahren etwa 03 bis 04 Wochen in Anspruch, wobei die wichtigsten vorzulegenden Unterlagen sind:

1. Schriftlicher Nachweis einer mindestens 3-jährigen Berufserfahrung im Bereich der Tätigkeiten, die er in Brasilien verrichten wird;
2. Schulungsprogramm zum Transfer von Kenntnissen des Antragsstellers an die brasilianischen Mitarbeiter, und;
3. Nachweis der Beziehung zwischen der ausländischen Gesellschaft (deren Belegschaft der ausländische Staatsbürger angehört) und der brasilianischen Gesellschaft, was durch einen „Technischen Assistenzvertrag“ erfolgen kann, oder im Falle der Anschaffung von Maschinen bzw. Anlagen auch durch Vorlage von Einfuhrunterlagen, die von der brasilianischen Finanzbehörde anerkannt wurden.

¹ Allgemeine Einwanderungs- bzw. Einreiseregelung, als Familienangehörige werden Ehepartner/-in und Kinder unter 18 Jahren des Antragsstellers betrachtet.

Nach der Genehmigung durch das Arbeitsministerium wird das Außenministerium dem brasilianischen Konsulat die Ausstellung des Visums freigeben – diesbezüglich ist darauf hinzuweisen, dass das Visum stets bei der brasilianischen konsularischen Vertretung im Ausland abzuholen ist.

Diese Art von Visum kann nur einmal verlängert werden, über einen Zeitraum von einem weiteren Jahr, und falls der ausländische Staatsbürger zusammen mit Familienangehörigen einreisen möchte, können diese in das Verfahren zur Visumsbeantragung miteinbezogen werden.

In beiden Fällen ist binnen 30 Tagen nach der Einreise des ausländischen Visumsinhabers die Anmeldung bei der Bundespolizei auf der für den Wohnort zuständigen Dienststelle vorzunehmen, um das von Brasilien ausländischen Staatsbürgern ausgestellte Ausweisdokument (RNE – Registro Nacional de Estrangeiros) zu erhalten.

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Judicial Reorganization – DIP Financing granted to OAS Group

In recent and important precedent, the 2nd Chamber of Corporations Law of the Appellate Court of the State of São Paulo partially granted the Interlocutory Appeal nº 2152587-51.2015.8.26.0000 (Reporting Justice Carlos Alberto Garbi) and authorized the execution of a DIP Financing provided by Brookfield Brasil Ltda. (“**Brookfield**”) to OAS Group (“**OAS**”), which filed for judicial reorganization before the 1st Bankruptcy and Reorganization Court of São Paulo (Case record nº 1030812-77.2015.8.26.0100).

To secure such financing, OAS granted to Brookfield the fiduciary assignment over the equity interest it holds in Invepar S.A. (“**Invepar**” and “**Invepar Shares**”). The granting of the above mentioned collateral was authorized by the Bankruptcy Court Judge, as required by Section 60 of the Brazilian Bankruptcy Law (Law nº 11,101 of 2005).

Considering that OAS’s Judicial Reorganization Plan governs the of its equity interest in Invepar, the DIP Financing granted additional rights to Brookfield in case it decides to participate in the competitive bidding process for such asset.

DIP Financing

The DIP (“**Debtor in Possession**”) Financing is specifically governed by Section 67 of the Brazilian Bankruptcy Law, which provides that loans granted to the debtor entity after the filing of judicial reorganization proceedings will be considered post-petition claims and will enjoy a priority over the pre-petition claims in the ranking set forth by the Bankruptcy statute in case the judicial reorganization is converted into bankruptcy proceeding.

However, such form of financing is not very common in Brazil and its feasibility depends on the existence of relevant assets owned by the debtor entity free and clear any liens which may be granted as collateral to secure the financing. In practical terms, the fiduciary assignment is the only type of collateral which provides comfort to the lenders to balance the risks involved in the financing of entities under judicial reorganization proceedings, since the ownership over the asset will have been transferred to the lender and in case of bankruptcy it will not be part of the bankrupt estate.

In addition, in the few and relevant judicial precedents (i.e., Frigorífico Independência, OGX and OSX), the DIP Financing granted to the debtor entities were

not entered in the early stages of the judicial reorganization proceedings, but rather after the approval of the Judicial Reorganization Plan by the creditors and subsequent ratification by the Bankruptcy Court, thus being more similar to the Exit Financing of the U.S practice.

DIP Financing granted to OAS

The DIP Financing granted to OAS as originally conceived by the parties had the main following conditions: (i) financing by Brookfield to OAS in the aggregate amount of R\$ 800,000,000.00 (eight hundred million Brazilian reais); (ii) fiduciary assignment in favor of Brookfield over the shares owned by OAS in Invepar; (iii) Brookfield had the right to top any third party offer for the acquisition of Invepar Shares (“**Right to top**”); e (iv) Brookfield would be entitled to receive a penalty from OAS in case Invepar Shares end up being sold to any third party investor (“**Break-up fee**”).

Many creditors of OAS filed interlocutory appeals against the Bankruptcy Court Judge’s decision which authorized the execution of the DIP Financing under the terms and conditions described above grounded in the argument that the additional rights granted by OAS to Brookfield would reduce the competitiveness for the acquisition of Invepar Shares, discouraging potential investors to take part on the competitive bidding process for the asset.

In the judgment of the interlocutory appeals, the Appellate Court reduced the amount of the DIP Financing to R\$ 500,000,000.00 (five hundred million Brazilian reais), and authorized the immediate release to OAS of R\$ 200,000,000.00 (two hundred million Brazilian reais). The Appellate Court conditioned the release of the remaining balance of R\$ 300.000.000,00 (three hundred million Brazilian reais) to the demonstration by OAS to the Bankruptcy Court Judge of the need of the funds to its operational activities. It is worth noting that the granting of the fiduciary assignment in favor of Brookfield of the Invepar Shares was upheld by the Appellate Court.

Moreover, the Appellate Court also held that the provisions of the DIP Financing which granted additional rights to Brookfield, such as the Right to top and the Break-up fee, should be part of the Reorganization Plan and should only be maintained in case the creditors expressly approve them at the Creditors’ Meeting which will deliberate and vote on the Reorganization Plan.

Hence, if the creditors deem excessive the provisions which granted additional rights to Brookfield, they will be in a position to negotiate their amendment or exclusion from the Reorganization Plan.

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Relevance of the precedent

Such judicial decision represents a relevant precedent in the consolidation of the DIP Financing as a form of financing of companies under judicial reorganization in the early stages of the proceeding coupled with the granting by the debtor entity to the lender of a relevant asset as collateral to secure the loan, in accordance to Section 60 of the Brazilian Bankruptcy Law.

Brazil's interest on net equity and Action 2 of the BEPS Project

As widely known, the OECD has developed a comprehensive action plan to prevent base erosion and profit shifting in international transactions. In this context, Action 2 of the BEPS Project sets out recommendations for domestic rules and tax treaties, in order to neutralize the effect of hybrid mismatch arrangements, which produce multiple deductions for a single expense or a deduction in one jurisdiction with no corresponding taxation in the other jurisdiction, among others¹.

In order to neutralize deduction and non-inclusion schemes, the OECD recommends the adoption of a linking rule that aligns the tax outcomes for the payer and the payee under a hybrid financial instrument, which combines both equity and debt characteristics in the same investment, such as redeemable preference shares, profit-participating loans, subordinated debentures, convertible bonds and perpetual debts. In this sense, the primary response should be to deny a deduction for payments made under a hybrid financial instrument in the payer jurisdiction. If the payer jurisdiction does not adopt the primary response, the payee jurisdiction should apply a defensive rule, by means of which the deductible payment should be included in the income tax base, instead of being exempted².

For the application of the “anti-hybrid rules” described above, it is necessary to fulfill four cumulative conditions, as follow: (i) the use of a financial instrument by the taxpayer; (ii) the existence of an actual payment; (iii) an effective mismatch in the tax treatment, characterized by the deduction of the payment in the payer jurisdiction without the taxation of the corresponding amount in the payee jurisdiction; and (iv) the presence of a hybrid element as the cause for the conflict in the characterization of the payment under two different tax systems.

Based on this definition, which is quite extensive, the Brazilian interest on net equity might fall under anti-hybrid rules patterned on Action 2 of the BEPS Project, given the fact that it is deductible from the corporate income tax due in Brazil and, at the same time, it is qualified as exempt dividends in certain countries, based on participation exemption regimes.



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¹ OECD. *Neutralizing the effects of hybrid mismatch arrangements*. OECD/G20 Base Erosion and Profit Shifting Project. Paris: OECD, 2014.

² OECD. *Neutralizing the effects of hybrid mismatch arrangements*. Op. cit., p. 15.

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Primary response

As mentioned above, as a primary response, the OECD suggested that the payer jurisdiction should deny a deduction for payments made under a hybrid financial instrument, when the corresponding income is not taxed in the payee jurisdiction. Thus, the first question that arises is whether Brazil should deny the deduction of the interest on net equity if the corresponding income is not taxed in the residence state.

In 1995, the Brazilian interest on net equity was created to assimilate the different tax treatment on corporate financing through equity or debt, as well as to encourage the capitalization of Brazilian companies through formal capital contribution, in order to prevent leveraging and excessive level of indebtedness.

In addition, the Brazilian interest on net equity relieves economic double taxation of profits earned through legal entities, once when the income is derived and, a second time, upon the profit distribution, in the hands of the shareholders.

With the purpose of restricting the possibility of base erosion and profit shifting, article 9 of Law No. 9,249/1995 already established a maximum amount to be deducted from the taxable profits, based on the application of the lower amount between the long-term interest rate (TJLP) and a fixed cap of 5% rate, on the adjusted equity of the Brazilian company, considering all variations occurred during the calendar year, subject to the limits of either 50% of the current profits or 50% of the retained earnings. Moreover, the payment of interest on net equity is subject to the withholding income tax at a rate of 18%, since the edition of Provisional Measure No. 694/2015, with effect as from January 2016. In the case of payments made to beneficiaries domiciled in low tax jurisdictions the tax rate is increased to 25%.

Thus, as the Brazilian interest on net equity is already limited by the Brazilian law regarding the avoidance of base erosion and profit shifting, the primary response may not be implemented by Brazil, because this restriction runs counter to the tax policies objectives pursued by the legislator. Also, Brazil has already strengthened its anti-avoidance rules related to the interest on net equity, by increasing the WHT levied on payments made to beneficiaries domiciled in low tax jurisdictions and limiting the amount that can be deducted for tax purposes.

Defensive rule

In an international context, when a Brazilian company pays interest on net equity to a company resident abroad, this payment is deductible in Brazil and, in most cases, it is also exempt in the payee jurisdiction. This is because several European countries grant exemption to dividends received from qualifying share-

holdings in order to avoid double economic taxation, through the application of participation exemption regimes. Thus, Brazilian interest on net equity may fall under a “deduction and non-inclusion scheme”, which is reached by OECD in Action 2 of the BEPS Project.

As an example, under German tax law, Brazilian interest on net equity qualifies as dividends, because it represents income from shares paid to shareholders, whose payment is dependent on the existence of profits. It is not possible to find characteristics of interest in the Brazilian interest on net equity, given the fact that interest is considered as regular remuneration for the use of capital borrowed, which derives from a debt-claim or a loan agreement. Based on its qualification as dividends, German tax law would provide an exemption of 95% to the interest on net equity received by a company in Germany.

Because of situations as described above, Germany introduced a new rule in its tax system in 2013, which extended the material matching principle (“*materielles Korrespondenzprinzip*”) to ordinary dividends, according to which any payment that would, in principle, qualify as an exempt dividend is no longer 95% exempt if the payment has been treated as a deductible expense by the paying company³.

What is striking in the application of defensive rules to the Brazilian interest on net equity is the fact that it does not have a hybrid element in the financial instrument, as target by the OECD in Action 2 of the BEPS Project. On the contrary, the Brazilian interest on net equity may be paid even when the financial instrument is a plain vanilla equity, which shows that the reason (hybrid element) presented by the OECD to justify the application of anti-hybrid rules by both countries involved is not an issue in the case at hand.

Indeed, the BEPS Project is based on the need to counteract aggressive tax planning structures, which does not occur in the payment of interest on net equity. In addition, the OCDE expressly mentions that, “*while cross-border mismatches arise in other contexts (...), the only types of mismatches targeted by this report are those that rely on a hybrid element to produce such outcomes*”⁴. The OECD also states that it is not necessary to establish which country has lost tax revenues under the hybrid arrangement, because the “*rules are intended to drive taxpayers towards less complicated and more transparent tax structuring that is easier for jurisdictions to address with more orthodox tax policy tools*”⁵. As can be seen, the Brazilian interest on net equity does not have a hybrid ele-

³ Otmar Thömmes, Alexander Linn, “The New German DCL and Dividend Matching Rules and EU Law”, *Intertax*, Volume 42, Issue 1, Kluwer Law International, 2014, p. 32.

⁴ OECD. *Neutralizing the effects of hybrid mismatch arrangements*. Op. cit., p. 18.

⁵ OECD. *Neutralizing the effects of hybrid mismatch arrangements*. Op. cit., p. 95.

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ment in the financial instrument itself, since it may be paid by any legal entity domiciled in Brazil. It also does not derive from complicate or non-orthodox financial instruments. Diversely, the Brazilian legislator just treated the interest on net equity as a financial expense for tax purposes, as a tax policy instrument to reduce the debt bias in an environment of high inflation and reduction in the purchasing power of money.

Given the above, the new rule introduced by Germany in 2013 seems to be more in line with the recent provision introduced in Article 4.1(a) of the European Parent-Subsidiary Directive (“PSD”), according to which the EU-Member State of the parent company must only refrain from taxing distributed profits as long as such profits are not deductible by the subsidiary. On the other hand, the Member State must tax the dividends received to the extent that the corresponding payment was deducted from the corporate income tax paid by the subsidiary. This rule clearly tackles deduction and non-inclusion schemes, but it does not expressly require a hybrid element. The compatibility of this rule with the EU Law is debatable, but it should be acknowledge that at least the PSD does not require a hybrid element.

Conclusion

Based on the above, it is possible to notice that countries are changing their domestic law in order to implement the anti-hybrid rules and to avoid base erosion and profit shifting, as recommended by OECD. However, in concrete cases, it necessary to distinguish tax rules that tackle any kind of deduction and non-inclusion schemes from anti-hybrid rules, which require a hybrid element in the financial instrument as the cause of the mismatch. Several countries already adopted rules to counteract deduction and non-inclusion schemes, but the scope of application is not always aligned with Action 2 of BEPS Project. Ideally, tax policy measures adopted based on the allowance for corporate equity (“ACE”) should not be lumped together with tax arbitrage, in which the taxpayer explores mismatches in the characterization of a financial instrument in two jurisdictions to achieve double non-taxation.

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Increase of Income Tax on Capital Gains

Within the fiscal adjustment program intended by the Federal Government, Provisional Measure nr. 692 published on September 22nd, 2015 (“PM 692”) increased the income tax rate payable on the capital gain obtained: (i) by individuals domiciled in Brazil upon the sale of assets or rights of any nature and (ii) by certain legal entities in Brazil upon the sale of non-current assets and rights.

Although PM 692 does not make any express reference to the capital gain verified by non-resident individuals or legal entities, these new rules may also be applicable to them as section 18 of Law No. 9,249/95 provides that the capital gains realized by non-residents shall be calculated in accordance with the same rules applicable to Brazilian residents.

Pursuant to PM 692, as of 2016 the capital gain obtained by individuals in the sale of assets and rights (which, as a general rule, is taxed by income tax at a 15% rate) will be subject to income tax at progressive rates ranging from 15% to 30% in accordance with the capital gain obtained, as follows:

- 15% if the capital gain does not exceed BRL 1 million;
- 20% on capital gain exceeding BRL 1 million and up to BRL 5 million;
- 25% on capital gain exceeding BRL 5M and up to BRL 20 million; and
- 30% on capital gain exceeding BRL 20 million.

If the sale of the asset or right is performed in installments, the capital gain obtained as of the second transaction must be added to the gains obtained in the previous transactions for purposes of determination of the applicable rates. Under this situation, the taxpayer is allowed to deduct the income tax paid in prior transactions. PM 692 also establishes that shares or quotas of the same legal entity shall be considered as part of a single asset for purpose of determining the income tax rate on capital gains. These rules aim at preventing the taxpayer from performing several transactions at lower single amounts involving the same asset, as a mechanism to avoid the capital gain taxation under higher scale of income tax rates.

It is worth mentioning that PM 692 regulates the general income tax rules applicable to capital gains verified by individuals (and certain legal entities, as detailed below) and in principle shall not change specific rules on the capital gain



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taxation verified in situations already regulated by special tax legislation, such as gains verified in transactions carried out in the stock exchange, which shall remain subject to the existing tax treatment.

As already mentioned, the new income tax progressive rates will also be applied to the capital gain obtained by certain legal entities in Brazil upon the sale of non-current assets and rights. The legal entities not covered by this new rule are those subject to taxation based on the Real Profit method (“Lucro Real”), Presumed Profit method (“Lucro Presumido”) or Arbitrated Profit method (“lucro arbitrado”) for purposes of corporate income taxes, which continue subject to the current income tax rule (that is, the capital gain is considered part of the taxable income subject to the basic rate of 15% plus the additional rate of 10%). Thus, it is possible to conclude that the new rules will apply only to micro and small companies subject to the Special Unified scheme of Collection of Taxes and Contributions („SIMPLES Nacional“).

We remark that PM 692 will take effect on January 1, 2016, provided that it is converted into law until the end of 2015.

Finally, it is important to mention that the new tax rules described above may be changed during the process to convert PM 692 into Law. Several amendments to PM 692 were already presented by the Brazilian National Congress. Among these amendments, we highlight the ones proposing to exclude the non-residents and the micro and small companies subject to „SIMPLES Nacional“ from the application of the new income tax rates on capital gain.

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Update on the obligation to disclose certain transactions in Brazil

On November 17, 2015, the Brazilian Congress approved the project for conversion into law of the Provisional Measure 685/2015 (PM 685/2015), without the articles intended to impose an obligation to disclose tax planning transactions.

The PM 685/2015 was released by the Brazilian government on July 21, 2015 introducing, among other provisions, rules concerning the disclosure of certain transactions to the Brazilian Internal Federal Revenue Service (RFB).

In Brazil, a PM is a temporary executive order issued by the executive branch of the government. A PM has the authority of law, but it requires formal conversion into law by the Congress within a 60-day term. If Congress does not act within this initial term, then the measure expires unless extended for one additional 60-day term. On September 9, 2015, the Brazilian Congress extended the PM 685/2015 for an additional 60-day term (no further extensions permitted).

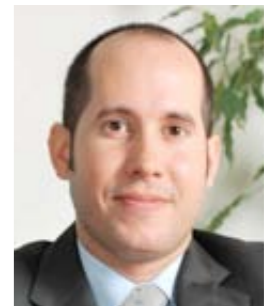
During the legislative process for converting the PM 685/2015 into law, the legislators considered imposing an obligation to disclose tax planning operations resulting in suppression or reduction of taxes.

After extensive discussions involving the legality of tax planning in Brazil and the extension of RFB's powers, which is evidenced by repetitive moving back and forth between the upper and the lower chambers of the Congress, the law project was approved on November 17, 2015. Interestingly, the final draft was approved without the articles intended to impose an obligation to disclose tax planning transactions.

The newly converted law will now be submitted for Presidential assent, which may only veto or approve it, without the possibility to reintroduce the provisions excluded by the Congress.



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The Integrity Programme as a tool for warding off sanctions

For long Brazil has taken a variety of measures for fighting the practice of corruption. The most remarkable point of this movement was the Anticorruption Act (Law No. 12,846/2013). This law better enforces the provision of counteracting measures against corruption, resulting in a situation where companies can no longer avoid liabilities when involved in any sort of corruption scheme. In the other hand, the new rule sets up legal benefits for companies that create and effectively apply integrity programmes among their businesses.

Naturally, the new law roused the discussion about the acts of corruption towards the public sector, and got the attention of the entire corporate environment pointing to the fight against corruption and to the practice of actions aimed at the ethics on relationships with third parties.

The main novelty brought out by the Anticorruption Act was the strict liability of legal entities, both under the civil law and under the administrative law, when practicing acts of corruption. With the strict liability presented in this law, the entities involved with acts of corruption must both repair the damages and yield to punitive measures, without his culpability is being taken into consideration.

This form of liability for the practice of corruption acts introduced a change of perspective in the corporate sector, which in turn began reaching out for a more ethical posture both internally, within the entity, and externally, when relating with third parties – including the State.

This search for an ethical standard in commercial relations intensified when the effectiveness of such integrity programmes within the corporate environment began to result in dampening effects in cases where the legal entity finds itself involved with corruption situations. Thus, companies began to improve their compliance structures and to bring into effect the practices which counteract corruption.

Yet what really means to own an upright company? An upright company is that which promotes good corporate practices both internally as externally, with its partners, clients and providers. But the promoting of good practice is not enough. One must adopt an active posture for building a responsible and ethic society.

This may sound as extremely complex or even utopic. After all, which way must a company path to reach the integrity within its commercial relations? What degree of allegiance to integrity programmes must it hold? May such practices end up compromising the company's routine? Such questions showed up in both large and smaller companies' CEOs.

The Decree no. 8,420/15, which regulated the Anticorruption Act defines that the integrity programme must span over the following points:

- Tone at the top, in other words, the engagement of high ranking officers of the legal entity, including their councillors;
- Standards of conduct, code of ethics, integrity politics and procedures applicable to all employees and administrators, regardless of their position of their functions;
- Standards of conduct, code of ethics and integrity politics extended, when needed, to third parties, such as suppliers, contractors, intermediary agents and associates;
- Periodic trainings regarding the integrity programme;
- Periodic risk analysis to perform the needed adaptations to the integrity programme;
- Accounting records which completely and precisely express the legal entity's transactions;
- Internal controlling which guarantee the prompt draw up and the reliability of corporate financial report and statements.
- Specific procedures to prevent frauds and offenses out of bidding processes, execution of administrative contracts or of any interaction with the public sector, even when intermediated by third parties, such as tax filings, subjecting to inspections, or obtaining public authorizations, licences, permissions and certificates.
- Internal independence, structure and authority responsible for applying the integrity programme and monitoring its compliance;
- Reporting channels for wrongdoings, fully open and disclosed to employees and third parties, and tools for protecting good faith reporters;
- Disciplinary measures in cases of violation of the integrity programme;
- Procedures which ensure the quick interruption of the detected wrongdoings or violations and the prompt remediation of the resulting damages;
- Appropriate diligences for contracting and, in some cases, supervising third parties such as suppliers, contractors, intermediary agents and associates;
- Verification, during corporate mergers, acquisitions and restructuring, of wrongdoings or violations or of the existence of vulnerabilities among the involved legal entities;

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- Continuous monitoring of the integrity programme, aiming on its improvement when preventing, detecting and counteracting the occurrence of the damaging acts; and
- Disclosure and openness of the legal entity regarding donations to election candidates and political parties.

Initially, this large list demonstrates all the necessary means for applying an integrity programme to be reviewed by the CGU (Brazil's General Controller's Office), the federal organ responsible for counselling the Executive Power which acts directly on actions for preventing and counteracting corruption, when investigating a possibly corrupt entity.

However, when referring to integrity programmes, we're not only mentioning an assemblage of documents and actions to be taken, unrelated to each other. The inclusion of an integrity programme inside a company requires much more than that. It requires the perceiving that ethics when relating with third parties is inserted into the company's culture and that it is defended by its workers.

And can such conducts only be practiced by large multinational companies? We think not. The ethical culture must be practiced by every and any legal entity, regardless of its size of business.

That taken into account, the CGU disclosed on September, this year, the Joint Ordinance no. 2,279/2015, which presents simpler criteria for reviewing integrity programmes in smaller companies. The fundamental issue is that the company must adopt measures able to demonstrate its commitment with ethics and integrity when conducting its businesses.

According to this ordinance, the integrity programme will be reviewed by taking two reports into consideration:

- A profile report, which will contain the company's fields of business, the ones responsible for its administration, quantity of workers, the organizational structuring and the level of relationships with the public sector; and
- A conformity report, presenting the workings of the adopted integrity measures and how such measures contribute to the prevention, detection and remediation of acts that are detrimental to the Anticorruption Act.

Besides this ordinance simplifying the process of implementing an integrity programme for smaller companies, the CGU launched a programme which presents six steps for a company to take in order to be considered law-abiding and upright. The steps are as follows:

- Step 1** – Adopting an anticorruption policy;
- Step 2** – Planning on its appliance, by defining the company's risks and the on-going practices;
- Step 3** – To develop a detailed anticorruption programme, integrating the adopted anticorruption policy with the company's organizational structure.
- Step 4** – Implementing the programme throughout the entire company;
- Step 5** – Regularly monitoring the company's practices; and
- Step 6** – Evaluating the monitoring, receiving feedback and improving the programme.

Along these measures for implementing integrity conducts, after the corruption scandals taken place in Brazil, brought out the "Operation Lava-Jato", the companies now look for improving themselves with disclosure and integrity practices when contracting with the public sector.

The presented scenery of corruption and obscurity in agreements took the companies to search for an environment of clarity whenever they agreed and contracted with the public administration. Any diverging situation could put the company in peril.

This legislation is young, but received massive participation of the corporate sector in Brazil. The application of this law is recent, and for this reason we still don't have a considerate repressive history about this matter. While abroad and elsewhere, there were cases where the integrity programmes were crucial for the company to wriggle out liabilities for the practice of denigrating acts by its representatives. In Brazil, this issue is yet to be subject of analysis.

It is important to stress out that the integrity programme must be real. An inefficient programme that only shows off a regular and upright company to the eyes of outsiders is not the answer. The CGU and the Judiciary already agree that such initiatives will not be sufficient to grant the company the evasion from liabilities.

Such measures can also be incremented by contractual means, for instance, with the inclusion of clauses allowing the individual to immediately leave a commercial relationship as soon as the smallest sign of corruption arises from the company it is relating with.

Our current reflexion deems that the legal entities must acknowledge that ethics within relations had with the State and with third parties will dictate the next steps, certainly bringing about a transparent environment in which integrity will prevail.

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Brasilien tritt dem Übereinkommen zur Befreiung ausländischer öffentlicher Urkunden von der Legalisation bei

Vor etwas mehr als 54 Jahren, genauer gesagt, am 05. Oktober 1961 wurde in Den Haag das Übereinkommen zur Befreiung ausländischer öffentlicher Urkunden von der Legalisation geschlossen, das den Unterzeichnerstaaten erlaubt, ausländische öffentliche Urkunden von der Legalisation durch Botschaften bzw. Konsulate zu befreien.

Die sogenannte Legalisation besteht kurz in der Beglaubigung der Unterschrift, der Funktion des Unterzeichners und der Echtheit des Siegels bzw. Stempels durch die dortige Botschaft bzw. Konsulat, damit dieses in deren Territorium Wirkung entfaltet.

Dieses Verfahren wurde wegen der dadurch verursachten Bürokratie stets kritisiert, da diese den Rechtsverkehr zwischen den Mitgliedsländern erschweren. Für die Parteien war die Legalisation im Grunde nichts Anderes als eine neue Bescheinigung, die attestiert, dass das andere Zertifikat gültig ist, was so wenig zu rechtfertigen ist, dass verschiedene Staaten bereits im Jahre 1961 entschieden, das Verfahren abzuschaffen.

Aus nicht nachvollziehbaren Gründen war Brasilien bisher einer der wenigen Mitgliedsstaaten, das dem Abkommen nicht beigetreten war, was stets zu Brasiliens Ruf beigetragen hat, bei internationalen Themen hinterherzuhinken. Mit der Legislativverordnung Nr. 148 vom 6. Juli 2015 hat sich dies nun geändert und das Land hat nunmehr diese einfache, aber wichtige Änderung vollzogen.

Der Beitritt ist ein wichtiger Schritt, der sich allerdings noch nicht unmittelbar auswirkt, da die Beitrittsurkunde nach Art. 12 des Übereinkommens zunächst beim Außenministerium der Niederlande hinterlegt werden muss, wonach eine Frist von 6 Monaten zu laufen beginnt, in der die einzelnen Mitgliedsstaat die Möglichkeit haben, dem Beitritt zu widersprechen. Sollte dies geschehen, würde das Abkommen nur für die übrigen Ländern gelten, nicht jedoch im Verhältnis zu dem Einspruchsland. Das Abkommen gilt zwischen Brasilien und den Ländern, die sich nicht gegen den Beitritt ausgesprochen haben, ab dem 60. Tag nach Ablauf der eingangs genannten Frist von 6 Monaten.

Gemäß mit dem ersten Artikel des Übereinkommens ist die Legalisation bei folgenden öffentlichen Dokumenten nicht erforderlich:

a) Urkunden eines staatlichen Gerichts oder einer Amtsperson als Organ der Rechtspflege, einschließlich der Urkunden, die von der Staatsanwaltschaft

oder einem Vertreter des öffentlichen Interesses, von einem Urkundsbeamten der Geschäftsstelle oder von einem Gerichtsvollzieher ausgestellt sind;

- b) Urkunden der Verwaltungsbehörden;
- c) notarielle Urkunden;
- d) amtliche Bescheinigungen, die auf Privaturkunden angebracht sind, wie z.B. Vermerke über die Registrierung, Sichtvermerke zur Feststellung eines bestimmten Zeitpunktes und Beglaubigungen von Unterschriften (dies betrifft in der Praxis bspw. Vollmachten).

Ausdrücklich ausgenommen sind Urkunden, die direkt von diplomatischen oder konsularischen Vertretern erstellt werden sowie Urkunden von Verwaltungsbehörden, die sich direkt auf den Handel oder auf ein Zollverfahren beziehen. In diesen Fällen kann eine Legalisation verlangt werden.

Zu den Urkunden, deren Anerkennung in Brasilien erleichtert wird, gehören ausländische Urteile und sonstige Dokumente aus der staatlichen Sphäre eines ausländischen Staates, einschließlich des Verwaltungsbereichs.

Die Tatsache, dass in dieser Aufzählung notarielle Urkunden und private Dokumente mit amtlichen Bescheinigungen auftauchen, stellt sicher einen erheblichen Fortschritt in den internationaler Handelsbeziehungen dar und erleichtert den Rechtsverkehr, da deren Anerkennung in Brasilien einfacher wird und schneller erfolgt. Obwohl Art. 4 vorsieht, dass in diesen beiden Fällen eine sog. Apostille erforderlich ist, handelt es sich hierbei um eine deutlich einfachere Form der Bescheinigung. Außerdem könnte durch ein Übereinkommen zwischen beiden Ländern selbst die Apostille entbehrlich werden.

Das Ende dieser Legalisation kommt zwar spät, wird in Brasilien aber von allen, die mit internationalen Operationen zu tun haben, sowie von den Juristen, die mit ausländischen Mandanten arbeiten, mit Optimismus erwartet.

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

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Softwarelizenzverträge in Brasilien

Bei Technologieverträgen ist es häufig der Fall, dass die Geschäfte von den typischen Verträgen differieren. Die Frage nach dem passenden Vertragstypus stellt sich oft, weil es sich meistens um komplexe und neue Geschäftsformen handelt, in denen besondere Leistungen und Vergütungen vereinbart worden sind. Es gibt viele verschiedene Technologiegeschäfte und dazu passende Verträge, u.a. die Softwarelizenzverträge.

Unter Softwarelizenzverträgen versteht man, dass das geistige Eigentum an der Software bei dem Softwarehersteller verbleibt und deren Nutzung durch den Lizenzvertrag geregelt wird. Dabei spricht man von einem Mietvertrag, in dem der Kunde die Sache während der Vertragszeit gegen Entgelt benutzen darf.

Heutzutage kann nicht immer von einem Mietvertrag gesprochen werden, weil die Software in vielen Geschäften als Dienstleistung angeboten wird (*“Software as a Service“*). Die Software und die IT-Infrastruktur werden durch Cloudcomputing bei einem externen Dienstleister betrieben, und der Kunde darf die dazugehörigen Dienstleistungen nutzen.

Trotzdem wird die Überlassung von Software manchmal auch als ein Kaufvertrag interpretiert, nämlich dann, wenn die Software standardmäßig ist und sich an einen breiten Anwenderkreis richtet (und nicht speziell für die Bedürfnisse eines bestimmten Kunden hergestellt worden ist). Dann kauft der Kunde eine Softwarekopie und darf sie auf Dauer benutzen.

Anders ist es jedoch, wenn der Softwarehersteller mit der Software auch den Sourcecode überlässt. In diesem Fall kauft der Erwerber auch das geistige Eigentum und wird der neue Besitzer der Software bzw. der Technologie. Diese Verträge werden als Kaufverträge mit Technologietransfer beschrieben.

Ein weiteres wichtiges Thema in Softwaregeschäften sind die damit verbundenen Dienstleistungen, z.B. Anpassung, Customizing oder Unterstützung. Manchmal werden diese Dienstleistungen im Lizenzvertrag geregelt oder spezifische Dienstleistungsverträge werden angeboten.

Zu erwähnen ist auch, dass früher die Software oft auf einem Datenträger gespeichert wurde und der Datenträger an die Kunden geliefert wurde. Im Gegensatz dazu wird die Software heutzutage normalerweise den Kunden zum Herunterladen zur Verfügung gestellt.

Es gibt kein einheitliches Lizenzmodell, und diese unterschiedlichen Geschäftsformen haben nicht nur wirtschafts-, sondern auch steuerrechtliche Effekte. Deswegen ist es unerlässlich, detaillierte und klare Regeln im Vertrag festzulegen, damit sowohl die Parteien als auch die Steuerbehörde ein gutes Verständnis über das Geschäft und dessen Auswirkungen haben.

In Brasilien wird die Dienstleistungsgemeindesteuer (ISS) auf Dienstleistungen erhoben. Der Steuersatz variiert von 2% bis 5%, je nach der Art der Dienstleistung und dem entsprechenden städtischen Gesetz. In São Paulo beträgt der Steuersatz zum Beispiel 2% auf den Lizenzwert (es ist gleichgültig, ob die Lizenz eine Dienstleistung ist oder nicht).

Andererseits wird die Warenumlaufsteuer (ICMS), eine Landessteuer, auf Geschäfte mit Waren, Transport und Kommunikation erhoben. In der Regel beträgt der Steuersatz 18% auf den Geschäftswert in Geschäften innerhalb eines Bundeslandes.

In Softwarelizenzverträgen war der Umgang mit diesen Steuern äußerst problematisch, weil die Steuergesetze nicht über klare Regeln verfügen, welche die verschiedenen Softwaregeschäfte unterscheiden. Im Allgemeinen erwähnen die städtischen Gesetze Softwarelizenzen als steuerpflichtig im Rahmen der ISS, und die Gesetze der Bundesstaaten erläutern auch nicht, bei welchen Softwaregeschäften die ICMS fällig ist.

Das brasilianische Bundesverfassungsgericht (STF) hat 1998 und 1999 in den sog. *Recursos Extraordinários* 176.626/SP und 199.464/SP entschieden, dass die Standard-Software (also jene, die gleichförmig hergestellt wird und in großem Maßstab als mehrere Kopien an jeden interessierten Kunden verkauft wird) als Ware besteuert werden soll. Das heißt, hier muss die ICMS und nicht die ISS erhoben werden.

Im Bundesstaat São Paulo entsprach die ICMS-Bemessungsgrundlage zweimal dem Wert des Datenträgers. Infolgedessen waren die heruntergeladenen Standard-Softwarelizenzen nicht besteuert, weil es keine Bemessungsgrundlage gab, und die Steuerbelastung in Geschäften, in denen die Software auf einem Datenträger gespeichert wurde, sehr niedrig war, da der Wert des Datenträgers im Vergleich zum Wert der Softwarelizenz gering war.

Ein am 29. September 2015 veröffentlichtes Dekret des Bundesstaats São Paulo (Dekret Nr. 61522/15) hat die Bemessungsgrundlage der ICMS auf Softwarelizenzen geändert. Ab dem 1. Januar 2016 wird die ICMS auf den Wert des Softwaregeschäftes erhoben; dies ist auch die Regel in vielen anderen Bundesländern. Daraus ergibt sich sicherlich eine bedeutende Erhöhung der Steuerbelastung bei Standard-Softwarelizenzen.

Diese Änderung soll sich aber nicht auf die Besteuerung der Softwarelizenzverträge auswirken, in denen die Software speziell für die Bedürfnisse eines gewissen Kunden hergestellt worden ist. Auf diese Fälle trifft immer noch die ISS zu.

Anzumerken ist, dass die Formulierung der Softwarelizenzverträge alle diese Variablen berücksichtigen soll, nicht nur, um das Verhältnis zwischen den Parteien richtig zu regeln, sondern auch zur Verminderung der Risiken bei Auseinandersetzungen mit den Steuerbehörden.

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Change in the index for the readjustment of the labor liabilities: more burden to the companies!?

In a recent decision, the Full Session of the Superior Labor Court (“TST”) determined, by unanimous vote, that the labor debts shall be readjusted by the National Index of Prices to the Consumers (“IPCA-E” - *Índice Nacional de Preços ao Consumidor Amplo Especial*) and no longer by the Reference Index (“TR” - *Taxa Referencial*).

According to TST’s decision, all the debts arising out of condemnatory decisions pronounced in labor claims in course as from July 30, 2009 shall be readjusted by the IPCA-E. The decision, however, is not applicable to the claims which labor debts have already been paid, even if partially.

This decision is still under discussion, since the Ministry Dias Toffoli, from the Supreme Court (“STF”), granted an injunction suspending the effects of TST’s decision, in the grounds of a Constitutional Complaint filed by the Brazilian Federation of Banks. The final definition, therefore, will only happen by the occasion of the judgment of the merits of the concerned Constitutional Complaint.

It is important to emphasize, however, that, if confirmed, TST’s decision will bring considerable implications to the companies that have labor claims ongoing against them, because the TR is much lower than the other Brazilian official inflation indexes. As an example, in 2014, the accumulated TR index achieved 0.8592, while the accumulated IPCA-E index of the same period achieved 1.0644. The modification burdens the cost of the labor claims in around 30% (thirty per cent) along 05 (five) years.

In the same direction, some Higher Labor Courts have already been consolidating the understanding in the sense that the TR is not the appropriate index to readjust the labor debts. As an example, the Higher Labor Court of the 4th Region – State of Rio Grande do Sul, by means of the Resolution No. 07/2014, published in June, 2014, approved the Jurisprudential Directive No. 49, ordering the application of the INPC - another Brazilian official inflation index -, instead of the TR, for the readjustment of the labor debts originated from decisions of such Higher Labor Court.

As a result, if confirmed the trend to replace the TR by other readjustment index, such as the INPC or the IPCA-E, the companies shall adapt to this new system, revising their contingency policies, in light of the considerable increase that this modification may cause in their labor liabilities. The moment for the companies to realign their policies shall be discussed with their legal consultant, so as to avoid being surprised with the revocation of the injunction granted by STF.

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Alle Inhalte dieses Newsletters obliegen der Verantwortung der jeweiligen Autoren und wurden von diesen sorgfältig recherchiert.

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