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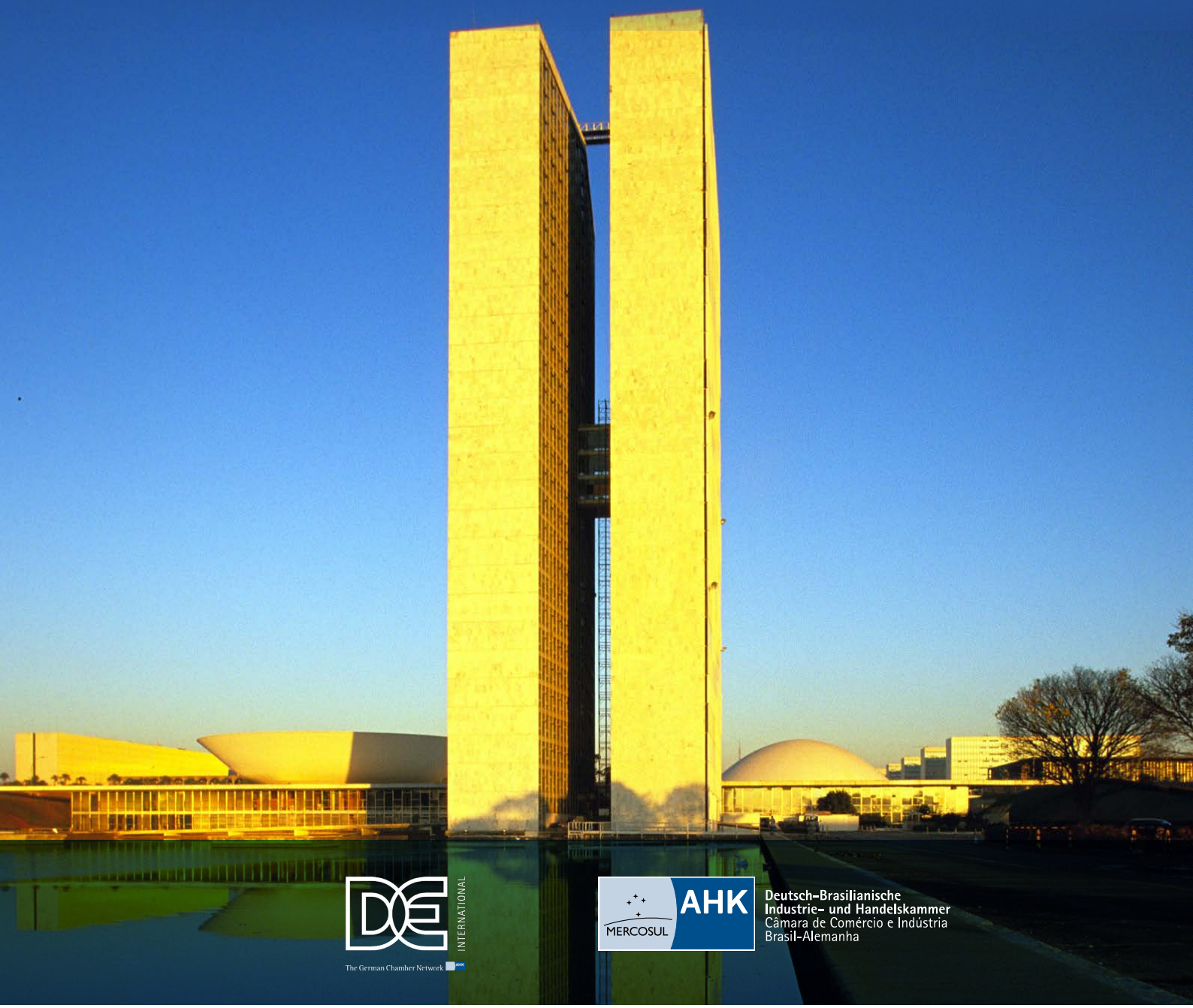

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New Controversies over ICMS on Interstate Transactions

On a commendable effort to regulate the allocation of State VAT (ICMS) revenue on interstate transactions to end consumers, the National Congress approved, in late 2021, Bill 32/2021. However, the bill was only sanctioned by the President as Supplementary Law 190/2022 on January 2022, creating new controversies over the beginning of the effects of the new rules.

To contextualize the matter, in 2015, Constitutional Amendment 87/2015 was enacted establishing that, in all interstate transactions to end consumers, the ICMS should be split between the States of origin and destination, as follow: (a) to the State of origin, the ICMS calculated with the interstate rate (4%, 7% or 12%); and (b) to the State of destination, the ICMS calculated based on the difference between the interstate rates used in the transaction and the rate applicable to internal transactions in the State of destination (usually from 17% to 19%).

This was a major advance in relation to the sharing of ICMS revenue on interstate transactions as, before such change, on interstate transactions to end consumer the split was only applicable if the acquirer was an ICMS taxpayer; on sales to non-ICMS taxpayer, the tax was fully paid to the State of origin calculated with its internal rate. Thus, with the growth of online commerce, states were losing substantial revenues on sales to non-ICMS taxpayers, since the major sellers were located in a few states, and with no revenue split applicable, the was tax payable only to the state of origin.

Although the ICMS is a State tax, the Brazilian Federal Constitution determines that national guidelines regarding the tax triggering event, taxpayer, and taxable base definition, among other matters, should be established by a national supplementary law.

However, no supplementary law was enacted to regulate the constitutional rules provided by Constitutional Amendment 87/2015; instead, ICMS Agreement 93/2015 was entered into by the states to regulate these matters. Based on such agreement, the states enacted local laws to charge the revenue split when they were the destination.

Due to the lack of a national supplementary law, the matter was taken into court, as taxpayers understood that an ICMS charge without the proper supplementary law regulation is unconstitutional.

In February 2021, the Brazilian Federal Supreme Court (STF) judged Extraordinary Appeal 1.287.019, deciding that, based on the Brazilian Federal Constitution, the ICMS revenue split under Constitutional Amendment 87/2015 requires

a supplementary law defining its general guidelines, and an agreement between states cannot suppress such constitutional requirement. As a result, the charge of the ICMS revenue split by the state of destination under the ICMS Agreement was deemed unconstitutional.

To avoid further discussions, the STF adjusted the effects of the decision in time (*modulação de efeitos*), so that it only produces effects as of January 2022. As a result, the states could continue to charge the revenue split until the end of 2021 (except from taxpayers who filed lawsuits in advance), but could only resume the charge after 2021 if a supplementary law was enacted.

In view of the above, in late 2021 the National Congress approved Bill 32/2021, to establish the required rules. However, the President only approved such bill in January 2022, resulting in the enactment of Supplementary Law 190/2022, which determines that it will become effective 90 days after its publication.

In view of this scenario, new controversies arose in light of the constitutional principle of non-retroactivity, under which a tax cannot be charged in the same fiscal year of its establishment or increase, and not before 90 days from its issuance.

It should be noted that the states already have local law governing the levy of the revenue split, but considering the beginning of the effects of Supplementary Law 190/2022, the revenue split cannot be charged by the state of destination before such date, because until then there is no supplementary law to support it, and any charge will be against the STF's decision.

Nevertheless, considering that the Federal Constitution provides that no tax increase may be imposed in the same fiscal year as the law that established it, several taxpayers are taking the discussion into courts to avoid the revenue split charge in the state of destination until 2023 because, technically, its regular imposition was carried out only in 2022.

Also, the Brazilian Association of Machinery and Equipment Industry (ABIMAQ) filed Unconstitutionality Declaratory Action (ADI) 7066 before the STF, requesting that Supplementary Law 190/2022 and the revenue split charge only produces effect as of January 1, 2023.

Although some states have already issued official statements declaring that the revenue split charge will only be enforced 90 days after the publication of the supplementary law, 23 states jointly filed a petition in ADI 7066, requesting their participation in the lawsuit as "amicus curiae", and that the STF declare that the imposition of the 90 days vacancy period of the supplementary law is unconstitutional.

Furthermore, the state of Alagoas filed ADI 7070 specifically to challenge the provisions regarding the beginning of the effects of Supplementary Law 190/2022 and the levy of the revenue split.

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Although the enactment of Supplementary Law 190/2022 was a necessary measure, its timing could not be worse, because if its legislative approval was made in mid-2021 or, at least, if the presidential approval was made in 2021, probably the discussions above would be significantly reduced or inexistant, as the levy of the revenue split in 2021 was allowed by the STF.

In any case, the outcome of this new controversy on ICMS on interstate transactions remains to be seen. As for the taxpayers, if they do not agree with the levy of the revenue split in 2022, it is recommended that they file their own individual lawsuits because, if the STF ends up deciding in this sense, it is most likely that it will adjust the effects of the decision in time (*modulará os efeitos*), to prevent the recovery of overpaid taxes, usually excepting lawsuits filed before the judgment.

Digital nomad – interesting possibility of migratory residency in Brazil

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After the start of the COVID-19 pandemic, many people initiated working remotely or through addresses where they felt comfortable doing their work. However, many people decided to innovate, trying to provide and render services/work from other countries and not from the country where the main labor relationship/labor's contract is stablished. This special and new condition is now known as digital nomad.

Faced with this situation, many companies/people have been asking how this situation would be handled in Brazil. If the migrant who intends to come to Brazil to carry out this work activity could carry out it with a visitor visa (tourism/business) or if they should apply for a temporary work visa?

The question was difficult to answer since we have not had any rules regulating the digital nomad. Well, the answers have come up with the publication of Normative Resolution no. 45 from September 9, 2021, however published in the Official Gazette on January 24, 2022.

It is important to highlight the definition that this rule indicates for the digital nomad: *"...the immigrant who, remotely and using information and communication technologies, is able to carry out his/her work activities in Brazil to foreign employer."*

Therefore, we have 2 (two) requirements that must be fulfilled to configure the situation of the "digital nomad": (i) work remotely and with the use of information and communication technologies and (ii) ability to perform work activities in Brazil to foreign employer.

It is very clear that the immigrant must work remotely, using information and communication technologies and the immigrant could only work for a foreign employer (not a Brazilian employer).

The 2nd paragraph of article 1 is very detailed when it says: *"The immigrant who works, with or without an employment relationship, for an employer in Brazil or whose residence permit for the exercise of work activity in the country is regulated in another legislation will not be considered a "digital nomad" of this Council."*

It is important to emphasize that the article 7 of the aforementioned Normative Resolution determines that if the Brazilian authorities discover that the all con-

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ditions and definitions are not being respected/observed, a process for official cancellation of the residency (visa) and digital nomad's status could be started.

It is important to note that not all immigrants need to apply for digital nomad residency (visa) to enjoy this situation. The article 2 of this Normative Resolution is very transparent when allowing immigrants as visitors (tourism/business) to carry out these digital nomad's activities through a remotely condition (information and communication technologies).

In any case, the interested immigrant would need to be aware of the rules regarding visitor visa (tourism/business) according to their nationality.

The general rule for visitor visa, but not for all nationalities, is based on the fact that the immigrant would be authorized to stay in Brazil for 180 days every 01 year, counting form the first entry in the country. On the other hand, based on the nationality, if the period granted on the first entry would be 90 days, if the immigrant would like to remain in Brazil for longer, he/she would have to go to the Federal Police Department in order to request an extension of the period of stay for an extra another 90 days (when and if applicable).

Americans, Canadians, Chinese, Koreans and Portuguese are within the general rule deadline.

Europeans, in general, are framed in another rule. They can remain in the condition of visitor within 90 days every 180 days from the first entry.

Therefore, if a US citizen intends to stay in Brazil for 5 months, for example, he/she does not need to apply for digital nomad residency (visa), as the visitor visa includes this period. Likewise, the German or French citizen who intends to stay in Brazil for only 90 days in this condition.

However, if the US, French or German citizen intends to stay in Brazil for a period of 9 months, they need to apply for residency digital nomad visa to enjoy this right.

Digital nomad residency (visa) can be valid for up to 1 year. This residency can be extended for the same period as the initial residency (based on an immigration's process before Ministry of Justice in Brazil).

The Digital Nomad Visa, when duly issued, is a temporary work residence (visa) (article 33, I "e" and article 142, I "e" of Decree 9.199/2017) and the registration at Federal Police would be necessary.

Also, the Digital Nomad Visa can be granted before the immigrant is in Brazil (prior request) or locally, when the immigrant is already in Brazil. For each type of immigration's process is important to observe the requirements and needed documents:

→ Prior Request: requested directly at the Brazilian Consulate abroad;

→ Local Request: requested before the Ministry of Justice and Public Security.

In the case of prior request, the immigrant must register with the Federal Police within 90 days after arriving in Brazil with the visa stamped on the passport.

As it is a temporary residence, we recommend being very careful with the issue of tax residence, that is, after 183 days in this condition in our country, the immigrant will become a tax resident in our country and subject to the rules of the Brazilian Income Tax.

For the granting of residency (visa) of the digital nomad, the immigrant must present the following documents:

I - statement attesting to the ability to carry out their professional activities remotely, through information and communication technologies;

II - employment or service contract or other documents that prove the link with a foreign employer;

III - proof of means of subsistence, from a foreign paying source, in a monthly amount equal to or greater than US$ 1,500.00 (one thousand five hundred dollars) or availability of bank funds in the minimum amount of US$ 18,000.00 (eighteen thousand dollars);

IV - certificate of criminal record from the place where he/she has resided in the last 5 years;

V - birth certificate with the full name of the parents; and

VI - valid health insurance.

It should be noted that foreign documents, if presented in Brazil, must be legalized/apostilled to be valid in the country.

Once again, the Brazilian National Immigration Council demonstrates that it is connected with the new scenario of the current world and is concerned to grant legal immigration's options to people who need or want to visit or stay in Brazil and work remotely, according to the National's rules and safety immigration's status.

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Neuerungen bei den Geschäftsführungsregeln für brasilianische Gesellschaften

Das Gesetz 14.195 vom 26. August 2021 (Lei do Ambiente de Negócios) hat neue Regelungen für den Vorstand von Aktiengesellschaften (S.A.) sowie die Geschäftsführung von Gesellschaften mit beschränkter Haftung (Limitada) geschaffen. Danach ist es nun möglich, dass auch nicht in Brasilien wohnhafte Personen als Vorstandsmitglieder einer S.A. bzw. Geschäftsführer einer Limitada bestellt werden. Bisher konnten gebietsfremde Personen allenfalls Mitglied des Verwaltungsrats einer S.A. sein. Insbesondere der Geschäftsführer einer Limitada musste stets eine in Brasilien wohnhafte Person sein. Sofern also die Bestellung eines Ausländers, bspw. eines Geschäftsführers oder Mitarbeiters der ausländischen Muttergesellschaft geplant war, war dies nur möglich, wenn dieser mittels Geschäftsführervisums seinen Wohnsitz nach Brasilien verlegte. Häufig war es daher jedenfalls für eine Übergangszeit nach einer Neugründung erforderlich, einen professionellen Geschäftsführer zu bestellen, bis die Formalitäten für den Erhalt des Visums erledigt waren oder vor Ort in Brasilien ein vertrauenswürdiger Geschäftsführer gefunden wurde.

Im Hinblick auf das Vorstandsmitglied einer S.A. ergibt sich die Möglichkeit zur Bestellung einer nicht in Brasilien ansässigen Person unmittelbar aus dem neuen Wortlaut des Artikels 146, Absatz 2 des brasilianischen Aktiengesetzes (Gesetz 6.404/1976), der durch das bereits erwähnte Lei do Ambiente de Negócios eingeführt wurde. Die Bestellung eines nicht in Brasilien ansässigen Vorstandsmitglieds setzt voraus, dass dieser in Brasilien einen Zustellungsbevollmächtigten ernennt, der zur Entgegennahme von gegen das Vorstandsmitglied gerichtete Klagen befugt ist. Die entsprechende Vollmacht muss während der Amtszeit des Vorstandsmitglieds sowie mindestens für drei weitere Jahre nach dem Ende der Amtszeit gültig sein.

Für den Geschäftsführer einer Limitada findet sich keine entsprechende, ausdrückliche gesetzliche Regelung, die vorsähe, dass dieser auch im Ausland wohnhaft sein kann. Dennoch wurde diese Möglichkeit unmittelbar nach Veröf-

fentlichung des Gesetzes 14.195/2021 diskutiert und es wurden entsprechende Anfragen an die zuständige Abteilung des Wirtschaftsministeriums, das sog. *Departamento Nacional de Registro Empresarial e Integração* (DREI) formuliert. Dieses hat sich zunächst im Oktober 2021[1] dahingehend geäußert, dass kein Zweifel daran bestehe, dass eine nicht in Brasilien ansässige Person zum Geschäftsführer einer Limitada bestellt werden kann, wenn die Limitada über einen Verwaltungsrat verfügt und die Gesellschafter der Limitada beschlossen haben, dass auf die Limitada die Regeln des Aktiengesetzes ergänzend Anwendung finden sollen. In diesem Fall komme unzweifelhaft die neue Regelung des Artikel 146, Absatz 2 entsprechend zur Anwendung, wonach auch Gebietsfremde bestellt werden können. Auch im Übrigen hat sich die zuständige Abteilung im Hinblick auf die Bestellung von nicht ansässigen Personen positiv geäußert und darauf verwiesen, dass es kein entsprechendes gesetzliches Verbot gebe. Tatsächlich bestehe diese Möglichkeit schon seit dem Erlass des neuen Migrationsgesetzes im Jahre 2017. Diese Äußerung stand allerdings im Widerspruch zu einigen anderen gesetzlichen Regelungen und insbesondere zu eigenen Anweisungen der DREI zur Bestellung von Geschäftsführern, wonach dieser den Nachweis der dauerhaften Ansässigkeit erbringen muss.[2]

Im Januar 2022 wurde nun durch eine normative Anweisung des DREI ausdrücklich klargestellt, dass auch der Geschäftsführer einer Limitada im Ausland ansässig sein kann.[3] Ebenso wie bei einer S.A. muss auch in diesem Fall der Geschäftsführer einen in Brasilien ansässigen Zustellungsbevollmächtigten bestellen, der Befugnisse hat, bis mindestens drei Jahre nach Ende der Geschäftsführung Ladungen in Gerichts- oder Verwaltungsverfahren entgegenzunehmen.

Dennoch bestehen gerade in der derzeitigen Anfangsperiode auch noch einige praktische Unsicherheiten, die es zu bedenken gilt. Sowohl Behörden als auch Finanzinstitute haben bisher wenig Erfahrung mit nicht in Brasilien wohnhaften Geschäftsführern und werden ihre internen Prozesse noch entsprechend anpassen müssen. Insbesondere Banken bestehen bisher im Rahmen der Eröffnung eines neuen Bankkontos für eine brasilianische Gesellschaft häufig auf einen persönlichen Termin mit dem Geschäftsführer. Selbst wenn dieser „persönliche“ Kontakt über eine Videokonferenz stattfinden kann, stehen die Beteiligten ggf. vor einer sprachlichen Hürde, wenn der gebietsfremde Geschäftsführer kein Portugiesisch spricht. Es kann daher ratsam sein, zumindest für eine Übergangsphase neben dem ausländischen Geschäftsführer auch einen lokalen

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[1] Stellungnahme vom 01.10.2021, Prozess Nr. 19974.102462/2021-14.
[2] Anexo IV (Manual de Registro das Sociedades Limitadas) da INSTRUÇÃO NORMATIVA DREI/ME Nº 81/2020.
[3] INSTRUÇÃO NORMATIVA DREI/ME Nº 112/2022.

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Geschäftsführer / ein lokales Vorstandsmitglied zu bestellen, um etwaige Verzögerungen oder Probleme zu vermeiden.

Unabhängig von praktischen Schwierigkeiten sollte selbstverständlich stets im Einzelfall geprüft werden, ob es tatsächlich sinnvoll ist, bspw. einen Geschäftsführer aus der ausländischen Muttergesellschaft auch zum Geschäftsführer der brasilianischen Tochtergesellschaft zu machen. In diese Überlegungen sollten unbedingt auch Haftungsfragen einfließen, denn der Geschäftsführer einer brasilianischen Gesellschaft sieht sich häufiger als in anderen Jurisdiktionen auch arbeits- oder steuerrechtlichen Prozessen ausgesetzt. Die Einflussnahme auf die Geschäfte der brasilianischen Gesellschaft kann auch über entsprechende Regelungen zu zustimmungspflichtigen Geschäften im Gesellschaftsvertrag sowie dem Geschäftsführeranstellungsvertrag sichergestellt werden. Darüber hinaus kann es gerade in der Phase des Geschäftsaufbaus aus strategischen Gründen wichtig sein, tatsächlich vor Ort Präsenz zu zeigen und deshalb einen in Brasilien wohnhaften Geschäftsführer zu bestellen oder aber einen Mitarbeiter aus der Muttergesellschaft längerfristig nach Brasilien zu entsenden.

Die nun erfolgte Klarstellung hinsichtlich der Bestellung eines nicht in Brasilien wohnhaften Geschäftsführers ist aus Sicht der Praxis sehr zu begrüßen. Damit wird auch dem mit dem eingangs erwähnten *Lei do Ambiente de Negócios* verfolgten Gedanken der Entbürokratisierung und Vereinfachung geschäftlicher Aktivitäten in Brasilien, gerade auch für ausländische Investoren, Rechnung getragen. Angesichts der Tatsache, dass immer mehr Dokumente – sowohl gesellschaftsrechtlicher Natur als auch Verträge – digital unterschrieben werden können, besteht in der Praxis kaum mehr die Notwendigkeit, dass ein Geschäftsführer permanent vor Ort in Brasilien ansässig ist, um die Gesellschaft ordnungsgemäß vertreten und die Geschäfte führen zu können.

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Sole shareholder – the simplification of the “Sociedade Limitada”

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Brazil has a long background of excessive bureaucratization that hinders and discourages entrepreneurs with the opening of new businesses. In 2019, a step to modernize and simplify the corporate structure of the limited liability companies (“Sociedades Limitadas”) was taken: Law no. 13.874, published on September 20, 2019, instituted the sole shareholder limited liability company, known as “Sociedade Limitada Unipessoal”.

Sociedade Limitada Unipessoal is not a new type of corporate legal entity, it is the well-known Sociedade Limitada, but now it can have only one shareholder, instead of two or more as it used to be required by law, being, therefore, the Sociedade Limitada Unipessoal an effective wholly owned subsidiary.

Sociedades Limitadas, instituted in Brazil in 1919, represent approximately 99% of the companies constituted and existing in Brazil. The large accession to this corporate type is due, mainly, to the success of two of its characteristics: the limitation of the shareholders' liability and the contractual nature.

Thanks to the first, losses can be limited in case of failure of the business and, once all the company's share capital has been paid-in, its creditors cannot enforce their claims on the private assets of the shareholders. This limitation of liability is not absolute, it does not apply for labor, tax, environmental and consumer claims, as well as when it is verified fraud, excess of powers or actions against the provisions of the Articles of Association by the shareholders.

The second characteristic allows more room for negotiations among the shareholders, who may set the basis of their relations on the provisions of the Articles of Association. The Sociedade Limitada is also a much less complex company to manage, all provisions are set forth at the Articles of Association, there is no requirement of keeping books, issuing shares and usually no publication of the financial statements and other corporate documents are mandatory.

Considering the benefits of a combination of ownership and management and, mainly, the protection and limitation of the shareholders' assets, when compared to the stock corporations, this corporate type has been playing a fundamental role in the country's daily economy.

Before Law no. 13.874/19, often a Sociedade Limitada was not in fact a company with plurality of shareholders, it was a wholly owned subsidiary of an individual or a group of companies, with a *pro forma* second shareholder. Almost the totality of the shares were owned by one of the shareholders, while the other would hold an insignificant participation just to fulfill the legal requirement of

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the second shareholder. Therefore, despite the plurality of shareholders existing in the Articles of Association, what happened was that only one of the shareholders was engaged in the economic activity. Usually, this second shareholder was a foreign company, a foreign individual, or even an individual resident in Brazil, which was, in many cases, the manager of the company, resulting in bureaucracy and several matters in case of decease or resignation.

Furthermore, although the second shareholder had no powers and a very limited influence on the decision-making process of the company, he had to comply with several requirements in accordance to the Brazilian laws i.e: having a legal representative in Brazil for the corporate acts and also to be represented before the Brazilian Federal Tax Authority, complying with all the information requirements and documents regarding the ultimate beneficiary rules, etc. Although a Sociedade Limitada is a limited liability company, as mentioned above, the *pro forma* shareholder may be held liable for labor, social security, tax, environmental and consumer rights and also in the event of the company's bankruptcy.

The need of a solution to such situation was so clear that as early as 1989 the European community document already stated that *"it is convenient to foresee the creation of a legal instrument that allows the limitation of liability of the individual entrepreneur, throughout the Community".*

Official statistics from the Department of Business Registration and Integration ("Departamento de Registro Empresarial e Integração – DREI"), support the information presented. According to the data, more than half of the Brazilian economic activities are carried out by individual entrepreneurs, which makes clear their dominance in the economy and thus should render them into direct targets for the benefits of the limitation of liability.

In this context, a new corporate model was created in Brazil, the EIRELI – "Empresa Limitada de Responsabilidade Individual, in 2011, by Law no. 12.411. Aiming to fill the gap of the Sociedades Limitadas, it presented similar advantages to this corporate kind, being, however, constituted by a single person, without association with third parties. Nonetheless, it was not well accepted in the country, which is attributed to the condition of minimum capital for its constitution, equivalent to the value of one hundred minimum wages. In 2017, 7.738 companies were registered as EIRELI, compared to 18.966 as Sociedades Limitadas. It was only in 2019, that the Sociedade Limitada Unipessoal was finally formalized in Brazil, applying the previous limited liability companies' model for organizations set up by a sole shareholder.

The very term *"sociedade"* gives an idea of an association between two or more people who join themselves, voluntarily, sighting for the achievement of a common purpose, on account of the *affectio societatis*, basis of this corporate type. Previously to the institution of the Sociedades Limitadas Unipessoais, the plu-

rality of shareholders was considered a fundamental element for its existence under the Brazilian Civil Code and could even lead to the company's winding up.

Naturally, the innovation entailed significant changes to the law. Considering the term "sociedades" is defined as an agreement in which people mutually obligate themselves to contribute, with assets and services, to the development of the economic activity and to share the results, the Articles of Association were mainly affected and came into a new shape, overly simplified.

With the Sociedades Limitadas Unipessoais many clauses and provisions of the Articles of Association have lost their purpose, such as, for example, those referring to the distribution of the corporate capital, deliberations of the shareholders by means of meetings, assignment and transfer of share/quotas, distribution of profits proportional to the equity interest in the corporate capital, exclusion of shareholders, calculation and payment of assets, among others.

The facilities created by the Sociedades Limitadas Unipessoais for those who wish to open their own business are clear-cut. Thanks to this huge step, all it takes is to modernize the Articles of Association, without having to find ways to circumvent the laws, as was commonly done before. The corporate document is now much more straightforward, reducing bureaucracy even further.

This applies not only for new Sociedades Limitadas that are being incorporated since the Law no. 13.874/19 with just one shareholder, but also for existing companies, that are amending their Articles of Association, excluding the second *pro forma* shareholder, and restating the whole Articles of Association, reducing, modernizing and simplifying it.

This new legal provision must be praised since the existence of several corporate models and the broadening of the possibilities for the establishment of such companies is quite welcomed. Such diversity is an encouragement to free enterprise and, therefore, the accomplishment of this relevant constitutional principle.

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Der Datenschutzbeauftragte nach dem brasilianischen Datenschutzgesetz

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Der Datenschutzbeauftragte ist die vom Unternehmen benannte Person, die für die Kommunikation zwischen dem Unternehmen, dem Inhaber der personenbezogenen Daten und der brasilianischen Datenschutzbehörde ANPD verantwortlich ist. Die ANPD ist für die Überwachung der Einhaltung des Allgemeinen Datenschutzgesetzes (LGPD - Gesetz 13.709/2018) zuständig.

Artikel 41 LGPD verpflichtet alle Unternehmen, einen Datenschutzbeauftragten zu benennen.

Die ANPD hat jedoch eine Ausnahme von dieser Regel für Kleinstunternehmen, Kleinunternehmen, Startups, juristische Personen ohne Gewinnzwecke, natürliche Personen und Organisationen ohne Rechtspersönlichkeit vorgesehen. Allerdings sind diese Unternehmen verpflichtet, einen Kanal für die Kommunikation mit den Dateninhabern bereitzustellen, wenn sie keinen Datenschutzbeauftragten benennen.

Wichtig ist, dass die vorgenannte Entlastung nur bezüglich der Benennung eines Datenschutzbeauftragten gilt. Das LGPD ist ansonsten auf alle Unternehmen anwendbar, die Daten verarbeiten.

Personen, die in den nachfolgend beschriebenen kleinen Unternehmen Daten verarbeiten, sind nicht von der Benennung eines Datenschutzbeauftragten befreit:

→ Personen, die personenbezogene Daten mit hohem Risiko für die Dateninhaber verarbeiten oder Bruttoerträge erwirtschaften, die die in Art. 3, II Ergänzungsgesetz Nr. 123 aus dem Jahr 2006 genannten Beträge überschreiten (Bruttoerträge von mehr als 360.000,00 BRL und gleich oder niedriger als 4.800.000,00 BRL),

→ Startups, unabhängig von der angenommenen Gesellschaftsform, definiert in Art. 4, Abs. 1, I Ergänzungsgesetz Nr. 182 aus dem Jahr 2021, die Bruttoerträge von bis zu 16.000.000,00 BRL im vorangegangenen Kalenderjahr erwirtschaften bzw. 1.333.334,00 BRL, bei weniger als 12 (zwölf) Mona-

ten multipliziert mit der Anzahl von Monaten der Aktivität im vorangegangenen Kalenderjahr;

→ Unternehmen einer faktischen oder rechtlichen Wirtschaftsgruppe, deren globale Erträge die in Art. 3 II Ergänzungsgesetz Nr. 223 aus dem Jahr 2006 oder, im Fall von Startups, die in Art. 4, Abs. 1 I Ergänzungsgesetz Nr. 182 aus dem Jahr 2021 vorgesehenen Grenzen überschreiten.

Was sind die Aufgaben eines Datenschutzbeauftragten? Nach dem bereits erwähnten Artikel 41 sind dies folgende:

1) Beschwerden und Mitteilungen der Dateninhaber entgegennehmen, Erklärungen abgeben und Maßnahmen ergreifen,
2) Mittteilungen der nationalen Behörde entgegennehmen und Maßnahmen ergreifen,
3) Mitarbeiter und Beauftragte des Unternehmens über zu ergreifende Maßnahmen für den Schutz personenbezogener Daten orientieren; und
4) die übrigen vom Datenschutzbeauftragten oder in ergänzenden Vorschriften festgelegten Aufgaben wahrzunehmen.

Ist eine Auslagerung des Datenschutzbeauftragten für personenbezogene Daten in Brasilien möglich? Da im LGPD kein Verbot der Auslagerung des Datenschutzbeauftragten vorgesehen ist, muss es sich beim DSB nicht zwingend um einen Mitarbeiter des Unternehmens handeln.

Mit der Beauftragung eines externen Datenschutzbeauftragten können sich die Unternehmen auf das Core Business konzentrieren, um das Unternehmen nicht zu überlasten und ihre Beschäftigungsverhältnisse nicht zu beeinträchtigen, da die Benennung eines DSB unter Mitarbeitern rechtliche Folgen wie die Zahlung von Zuschlägen wegen Abweichung von der ursprünglichen Funktion oder der Ausübung zweier Tätigkeiten haben kann.

Die Beauftragung eines Mitarbeiters des Unternehmens als Datenschutzbeauftragten ist bspw. dann gerechtfertigt, wenn die Größe des Unternehmens und das Volumen von Daten so hoch ist, dass dieser Mitarbeiter ausschließlich dieser Funktion ausübt.

Die brasilianische Rechtsanwaltskammer hat Rechtsanwälte in ihrer Antwort auf die Anfrage Nr. E-5.537/2021 autorisiert, offiziell die Aufgabe eines Datenschutzbeauftragten auszuüben.

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Die Rechtsfolgen für die Nichterfüllung des LGPD, das bereits seit Anfang August in Kraft ist, inklusive hinsichtlich des Fehlens eines Datenschutzbeauftragten, sieht neben Schadenersatzansprüchen wegen individueller oder kollektiver Vermögensschäden und immaterieller Schäden Bußgelder von bis zu 50 Millionen BRL vor.

Das Team von Stüssi-Neves Advogados steht für Rückfragen zu diesem Thema gern zur Verfügung.

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Technology transfer in Brazil: the new exchange rate framework and its impacts

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On December 30, 2021, Federal Law No. 14,286/21 was published in the National Official Gazette of the Union, providing for the Brazilian foreign exchange market, Brazilian capital abroad, foreign capital in the country and the provision of information to the Central Bank of Brazil (BACEN), amending a number of legislation regarding these matters. The new legislation and its changes will come into force as of December 30, 2022.

The recent law embodies a whole new exchange rate framework.. The law facilitates the purchase and sale of foreign currency with different agents and allows the opening a dollar account in Brazil by a foreign investor or in specific cases upon justification BACEN. Moreover, Law No. 14,286/21 provides for the possibility of payment of obligations due in Brazil in foreign currency.

Hence, the law is an important landmark for export and import relations, and investors, lessening the risks in transactions. More importantly, the law also affects the innovation scenery by lifting up a number of prior restrictions for technology transfer transactions.

In a very brief retrospect, from the mid-1950s onwards, Brazil imposed a number of currency containment rules, prioritizing the country's internal industrialization process. Hence, Article 14, of Law No. 4,131/1962, prohibited the remittance of royalties from a Brazilian branch or subsidiary to its foreign parent company. In 1991, Law nº 8,383/1991, revoked such prohibition, for contracts signed after December 31, 1997, as per the sole paragraph, of art. 50. However, these contracts had to be recorded with the Brazilian National Institute of Industrial Property (INPI) and registered with BACEN, respecting the limits and conditions of deductibility in the legislation in force (Ordinance of the Ministry of Finance PMF No. 436/1958), which vary from 1% to 5% of the net sales, depending on the case and industry involved.

Thus, a Brazilian subsidiary could only remit payments in connection with technology transfer to its parent company up to the above-mentioned limit, subject to penalties and repatriation of resources.

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The new Law No. 14,286/21 revokes Article 14, of Law 4,131/1962, in its entirety, and the sole paragraph, of Article 50, of Law No. 8,383/1991, amending the head of this article. As per its Article 24, expenses in connection with technology agreements (i.e. royalties in connection with trademark and patent licensing, technology transfer, franchise and expenses regarding the provision of technical assistance services) must only have their respective contracts recorded with the INPI for deductibility purposes, exempting the parties from registration with BACEN.

In conclusion, the parties need not to register the agreement with the INPI to remit royalties abroad, nor there is any limitation on such royalties, but for fair market conditions. Registration with the INPI remains mandatory for tax deductibility reasons.

It is important to note that tax deductibility is a relevant tool for Brazilian subsidiaries to foster innovation in the country, exempting a part of federal income tax payment by proving expenses, in better words, investments in connection with technology transfer.

Technological progress and innovation have always been associated with economic growth. Hence, technology transfer is an effective mechanism to reduce the technological space between developed and developing nations. Therefore, policies to promote technological advancement should walk hand in hand with economic concerns. Less developed nations have the characteristic of technological fragility – which increasingly marginalizes them from economic growth. Accordingly, the need to promote technology transfer.

Technology gaps between nations do exist. The differences between capacities and access to technologies among countries have the power to amplify the economic distance. The challenge is to promote stronger flows of technology through transfer channels and to develop the technology receptor's absorption capacities necessary for the use, adaptation and development of technology, to translate them into innovation, with the promotion of internal economic development.

Innovation is the main force driving economic development and growth. The combination of investments with the ability to absorb technology appears to be the solution. Developing countries that invest in innovation are more apt to introduce new technological advances.

There are a number of forms to advance technology transfer. The trade of goods promotes the transfer of technology embedded in such goods. Therefore, the reduction of barriers to imports can reduce the costs of technology transfer. Licensing is also an important means; however, licensee must have adequate absorption capacity. Finally, encouraging foreign investment stimulates the exchange of technology between nations.

Law No. 14,286/21 took into account these matters and inserted in its provisions forms to boost the economy and technology transfer. Although pending further regulation in some aspects, we should expect a more dynamic scenery as of December 30, 2022 in technology transactions with Brazil.

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MP 1.085/21 und die Modernisierung der Notar- und Registerdienste in Brasilien

Am 28. Dezember 2021 wurde die vorläufige Massnahme Nr. 1.085 vom 27. Dezember 2021 („MP 1.085/21“) veröffentlicht, die neben der Einführung des Elektronischen Systems der Öffentlichen Register (SERP) darauf abzielt, die Verfahren im Zusammenhang mit öffentlichen Registern von Rechtsgeschäften zu modernisieren und zu vereinfachen. MP 1.085/21 gilt für die zuständigen Notare der öffentlichen Register und Nutzer der jeweiligen Dienste und hat die Fristen für die Analyse und Registrierung von Urkunden und die Ausstellung von Bescheinigungen wesentlich verkürzt.

Die Einführung des SERP hat insbesondere Folgendes ermöglicht:

- die elektronische Registrierung von Rechtshandlungen;
- die Vernetzung der Geschäftsstellen der öffentlichen Register;
- die Interoperabilität zwischen den Datenbanken der Geschäftsstellen der öffentlichen Register und dem SERP;
- die Fernunterstützung für Benutzer der Geschäftsstellen der öffentlichen Register über das Internet;
- das Empfangen und Versenden von Dokumenten, die Ausstellung von Bescheinigungen und Bereitstellung von Informationen in elektronischem Format;
- die elektronische Einsicht in Rechtshandlungen, die bei den Geschäftsstellen der öffentlichen Register registriert oder eingetragen sind;
- der Austausch elektronischer Dokumente und Informationen zwischen den Geschäftsstellen der öffentlichen Register und öffentlichen Einrichtungen und Nutzern im Allgemeinen;
- die Speicherung elektronischer Dokumente zur Unterstützung der Registrierung von Rechtshandlungen;
- die Verbreitung statistischer Indizes und Indikatoren, die aus Daten ermittelt werden, die von Beamten öffentlicher Register bereitgestellt werden;
- die Konsultation der Nichtverfügbarkeit von Vermögenswerten, die von der Justiz oder von öffentlichen Stellen verfügt wurden;

- die Konsultation von Beschränkungen und Belastungen, die auf bewegliche und unbewegliche Güter erhoben wurden, die in öffentlichen Registern eingetragen sind, sowie von Rechtshandlungen, in welchen die geforschte Person als Schuldnerin von protestierten und unbezahlten Titeln, Garant oder Bürge, u.a. aufgeführt ist; und
- andere Dienste, die vom Nationalen Justizrat (CNJ) festgelegt werden.

Im Folgenden gehen wir näher auf einige der oben aufgeführten Punkte der MP 1.085/21, die aus unserer Sicht besonders wichtig sind, ein.

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1. Schaffung eines einheitlichen elektronischen Zugangssystems zu öffentlichen Registern

Mit der Einrichtung des SERP und dem Austausch elektronischer Dokumente und Informationen zwischen den Geschäftsstellen der öffentlichen Register wird es den Nutzern unter anderem möglich, unabhängig vom Ort der Eintragung der Rechtshandlung für jeden Zweck elektronische Urkunden anzufordern und Titel zur Eintragung auf elektronischem Wege auf einer nationalen Plattform vorzulegen. Obwohl diese Möglichkeit bereits für Grundbuchämter vorgesehen war, weitete die MP 1.085/85 ihren Anwendungsbereich auf andere öffentliche Register aus, insbesondere auf das Register für Titel & Dokumente. Darüber hinaus wurde die Pflicht zur Buchführung, Veröffentlichung und Aufbewahrung von Aufzeichnungen durch die Dienste in elektronischen Medien geregelt.

2. Elektronische Suche nach Belastungen und Beschränkungen von beweglichen und unbeweglichen Gütern

Es wurde ein Konsultationssystem über das SERP eingerichtet, das durch die Information der Steuerzahlernummer einer natürlichen oder juristischen Person (CPF/CNPJ) jegliche Nichtverfügbarkeit von Gütern, sowie Einschränkungen und Belastungen rechtlichen, konventionellen oder verfahrensbedingten Ursprungs und Geschäften, in denen der Befragte als Schuldner eines protestierten und unbezahlten Titels, Bürge, Finanzpächter, Kreditabtreter oder Inhaber eines Rechts an einem Vermögenswert, der verfahrensrechtlichen oder administrativen Beschränkungen unterliegt, aufgeführt ist. Diese Konsultation erstreckt sich auf das gesamte brasilianische Gebiet.

3. Registrierung aufgrund von Auszügen

Elektronische Auszüge wurden zur Registrierung oder Eintragung von Fakten, Rechtshandlungen und Rechtsgeschäften geregelt. Bei dieser Modalität wird

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auf die Vorlage der Originalkopie des Wertpapiers für Registrierungszwecke verzichtet und diese wird durch ein elektronisches Formular ersetzt, das vom Antragsteller, z. B. Kreditinstituten und Notaren, ausgefüllt wird. Der Nationale Justizrat (CNJ) kann in Bezug auf Rechtshandlungen und Transaktionen im Zusammenhang mit beweglichen Gütern die Arten von Dokumenten festlegen, die vorrangig per elektronischer Erklärung empfangen werden.

4. Bescheinigung über den rechtlichen Status der Immobilie

Es wurde eine vereinfachte Bescheinigung geschaffen, die die wichtigsten Informationen über die Immobilie und ihren Eigentümer enthält, wie z. B. Beschreibung, Steuerzahlernummer, Eigentümer, gerichtliche und behördliche Rechte, Belastungen und Beschränkungen.

5. Verkürzung von Fristen und Anrechnung nach der Zivilprozessordnung

Fristen in öffentlichen Registern werden nun unter Beachtung der in der Zivilprozessordnung festgelegten Kriterien gezählt, und zwar, in Werktagen, ohne den Anfangstag und einschließlich des Ablaufstages, sofern nicht anders bestimmt. Darüber hinaus wurden einige Fristen verkürzt, wie z. B.:

(a) Registrierung oder Ausstellung eines Rücksendescheins innerhalb von 10 Tagen;

(b) Registrierung innerhalb von fünf Tagen der elektronischen Dokumente, die über das SERP eingereicht werden, Kaufs- und Verkaufsurkunden ohne besondere Klauseln, Baueintragungsanträge und Aufhebung von Garantien, sowie fristgerecht wiedereingereichte Urkunden mit der vollständigen Erfüllung der formulierten Forderungen;

(c) Ausstellung von Immobilienbescheinigungen in einem Tag und Immobilienabschriften in fünf Tagen.

6. Konzentration von Handlungen in öffentlichen Registern

Das Konzentrationsprinzip wurde dadurch verstärkt, dass festgelegt wurde, dass die Grundstücksmatrikel zum Nachweis von Eigentum, Rechten, Reallasten und Beschränkungen an dem Eigentum unabhängig von einer spezifischen Bescheinigung durch den Beamten ausreicht. In diesem Sinne sieht das Gesetz ausdrücklich vor, dass für die Gültigkeit oder Wirksamkeit von Rechtsgeschäften oder für die Charakterisierung des guten Glaubens des grunderwerbsberechtig-

ten Dritten oder des dinglichen Berechtigten die vorherige Einholung von weiteren Urkunden oder Bescheinigungen wie z. B. Gerichtsbescheinigungen nicht erforderlich ist. In Bezug auf bewegliche Güter wurde die Möglichkeit vorgesehen, gerichtliche oder behördliche Beschränkungen im Register für Titel & Dokumente einzutragen, was ebenfalls die Konzentration von Informationen über diese Art von Vermögenswerten fördern wird.

7. Verzicht auf Mehrfachregistrierung im Register für Titel & Dokumente

Die Eintragung von Rechtsgeschäften in die Register für Titel & Dokumente an den Wohnsitzen aller Parteien ist nicht mehr erforderlich. Es reicht die Eintragung an einer einzigen Stelle. Diese Befreiung gilt allerdings erst ab dem 1. Januar 2024.

MP 1.085/21 muss innerhalb von 120 Tagen in Gesetz umgewandelt werden, sonst verliert sie ihre Wirksamkeit.

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The main changes brought by the New Foreign Exchange Law

The New Foreign Exchange Law ("Law 14,286/21"), published on December 30, 2021 in the official federal gazette aims to modernize, simplify and bring more efficiency to the foreign exchange market in the country. The new rule also provides for Brazilian capital abroad, foreign capital within the country and the compilation of official macroeconomic statistics. The Presidency of the Republic has sanctioned without vetoes the text of Bill No. 5.387/19, approved by the Chamber of Deputies in February 2021 and by the Federal Senate on December 8, 2021.

As part of the so-called BC# Agenda, promoted by the Central Bank of Brazil ("BCB"), Law 14,286/21 aims to modernize the Brazilian foreign exchange legislation, which today comprises a diffuse set of more than 40 laws, many of them in force since the beginning of the 20th century, when Brazil faced a shortage of international currency. Law 14,286/21 brings Brazilian foreign exchange legislation closer to international standards, in addition to compiling the theme in a single legal text.

Below, we list the main changes brought by Law 14,286/21, which will come into force one year after its official publication, that is, as of December 30, 2022. Furthermore, we emphasize that the BCB and the National Monetary Council ("CMN") will issue regulations concerning the matters addressed in Law 14,286/21.

1. Circulation of Reais Abroad

Article 6 of Law 14,286/21 authorizes banks operating in the foreign exchange market, in the form of a regulation to be issued by the BCB, to comply with payment orders in reais received from abroad or sent abroad, through the use of accounts in reais held at banks, held by institutions domiciled or headquartered abroad and that are subject to financial regulation and supervision in their country of origin. The objective is to increase the circulation of reais abroad, while overturning a historical limitation on the investment abroad of funds raised in the country.

2. Payment in Foreign Currency of Feasible Obligations in National Territory

Article 13 of Law 14,286/21 lists the situations in which obligations enforceable in national territory can be paid in foreign currency. Among them, item VII stands out, which provides for contracts entered into by exporters in which the counterparty is a concessionaire, licensee, authorization holder or lessee in the infrastructure sectors. In view of this, the landmark Decree-Law No. 857, of September 11, 1969, which, together with the Real Plan Law, were the main normative bases of the matter until then, is revoked.

3. Equal treatment between resident and non-resident accounts in Brazilian reais

Article 5, §4 of Law 14,286/21 establishes that accounts in reais held by non-residents will have the same treatment as accounts in reais held by residents, except for the requirements and procedures that the BCB may establish. This is expected to be a breakthrough from a practical point of view in this matter.

4. Private Compensation between Residents and Non-Residents

Article 12 of Law 14,286/21 authorizes the private offsetting of credits or values between residents and non-residents, in the cases provided for in the regulation of the Central Bank of Brazil. Under current legislation, such compensation is prohibited.

5. Competence for Exchange Operation Classification

Article 4, §§ 2 and 3 of Law 14,286/21 transfers to the taxpayer the responsibility to classify their own exchange operation, as provided for in the regulation to be issued by the BCB. Until then, this duty belonged to the financial institutions, which could even be penalized in case of erroneous classification of the nature of the operation. However, Law 14,286/21 obliges financial institutions to provide assistance, whenever necessary, to their clients for the correct classification of said operations.

6. Documents Required by Institutions in Foreign Exchange Transactions

Article 27 of Law 14,286/21 prohibits institutions authorized to operate in the foreign exchange market from demanding documents, data or certificates from

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their clients that are available in their databases or in public and private databases with wide access. Such provision is intended to make the business environment simpler for citizens. However, the client is entitled to present the aforementioned documents, data or certificates.

7. Investment of Funds Raised in Brazil in Operations Abroad

Article 15 of Law 14,286/21 extends to financial institutions and other institutions authorized by the BCB (including payment institutions) the competence to allocate, invest and allocate for credit and financing operations, in Brazil and abroad, the funds raised in the Country and abroad, subject to regulatory and prudential requirements established by the CMN and the BCB. This is a technical change that formalizes and increases the legal certainty of a regulation in force with a similar wording.

8. Centralization of Regulatory Capacity in the BCB

Law 14,286/21 determines the centralization of the regulatory capacity of the Brazilian foreign exchange market in the figure of the BCB in several articles, among which article 18 stands out, granting the BCB the ability to establish special requirements and procedures for market operations exchange rate more effectively.

9. Need to declare amounts greater than US$ 10,000.00 (ten thousand United States dollars) in foreign currency in cash, upon entry and exit from the country

Article 14, §1 of Law 14,286/21 raises the amount that must be declared in foreign currency in cash, upon entry in or exit from the country, from BRL 10,000.00 (ten thousand reais) to US$ 10,000.00 (ten thousand US dollars). This change is due to the historical context that defined the previous value, referring to the genesis of the Real Plan, where the parity against the dollar was 1:1. Thus, there was only an adjustment in order to reflect the current international macroeconomic situation.

Additionally, §2 of the same article, in its item II, provides that the BCB will regulate which types of institutions authorized to operate in the foreign exchange market that cannot enter the country and leave the country of national or foreign currency, considering the size, nature and business model of the institutions, in line with the principle of regulatory proportionality.

Infralegal Labor Regulatory Framework (Decree No. 10,854/21) and its innovations in employment relations

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Known as the Infralegal **Labor Regulatory Framework**, Decree No. 10,854, published on 11/Nov/2021, was enacted by the Federal Government with the aim of regulating a considerable and relevant portion of the infralegal labor legislation that is not covered by the Consolidation of Labor Laws.

Historically, except for the Labor Reform, which took place in 2017 (Law No. 13,467), all the other updates in the labor legislation over the last decades resulted mainly from decrees, ordinances and normative instructions, leading to a wide variety of sparse rules that ended up bringing legal uncertainty to employment relations.

To change this situation, the Infralegal Labor Regulatory Framework revised and consolidated in 15 acts more than 1,000 decrees, normative instructions and ordinances seeking to simplify and unify the rules applicable to labor relations, making them more transparent and accessible both for employers and employees.

The Infralegal Labor Framework addresses the following main topics:

→ Creation of the Permanent Program for Consolidation, Simplification and Debureaucratization of Infralegal Labor Standards

→ Electronic Work Inspection Book - eLIT

→ Supervision of protection to work and safety and health at work standards

→ Guidelines for the elaboration and revision of regulatory standards for safety and health at work

→ Certificate of approval of personal protective equipment - EPI

→ Electronic journey control records

→ Mediation of collective labor conflicts

→ Outsourcing

→ Temporary work

→ Christmas bonus (13th salary)

→ Transport voucher

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→ Citizen Company Program (Programa Empresa Cidadã)

→ Situation of workers hired or transferred abroad

→ Paid weekly rest and salary payment on holidays

→ Annual List of Social Information - RAIS

→ Worker's Food Program - PAT

Some of the revised and consolidated topics have direct impact on the daily life of companies, among which the following stand out.

1. Transport voucher

Although the Infralegal Labor Regulatory Framework did not bring significant changes on transport voucher, it was innovative by consolidating all the scattered rules in one single diploma.

Consolidated rules:

- The transport voucher: (i) cannot be used in individual or collective private transport services, such as Uber, taxi and other transport applications; and (ii) must be used in collective public transport only, with exclusion of any other type of transportation.
- Except for domestic employees, the replacement of the transport voucher by in-advance cash or any other form of payment is forbidden and mischaracterizes the benefit.

  Exception: in case of operational unavailability of the company providing transport voucher, the employee who bears the transport cost must be reimbursed by the employer in the immediately subsequent payroll.

2. Electronic Work Inspection Book - eLIT

Innovations: The Work Inspection Book will be made available by the Government in the electronic format (eLIT), not only modernizing inspection procedures, but also introducing new purposes for the use of the Book.

- The eLIT will allow access to information on inspections and labor administrative proceedings and will serve as an official instrument for the (i) exchange of communication between the company and the labor inspection authorities, (ii) transmission of information, (iii) fulfillment of requests made by the labor authorities in connection with ongoing inspections within the established deadline and, (iv) payment of administrative fines.

- Companies must pay attention to the communications received through the eLIT since they are valid as subpoena, dismissing thus its mailing and/or its publication in the Official Gazette.
- The eLIT is not yet mandatory and depends on regulation by the Ministry of Labor and Social Security.

Previously: The Work Inspection Book was physical and had the only purpose of recording the visits made by the labor inspection and other requests addressed during the visits.

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3. Outsourcing

Previously:

- The outsourcing was mischaracterized and transformed into an employment relationship if at least two elements of the labor relation were present (personally conducted work and legal subordination).
- The outsourced worker could file a labor claim against the company providing and/or the company taking the outsourced services, without any pre-defined criteria.

Innovations:

- For the Labor Court to recognize the employment relationship between the outsourced worker and the company taking the services, it is necessary to prove: **(i)** that the contract between the company providing and the company taking the outsourced services was executed with fraud and/or **(ii)** that **four** elements characterizing the employment relationship are present: continuity (activity performed on a permanent, not occasional, basis); legal subordination (activity performed under coordination and guidance of the company taking the services); salary; and personally conducted work (activity performed by a specific person). Therefore, the legal subordination and personally conducted work alone are no longer sufficient for the recognition of the employment relationship.
- On 22/Feb/2022, the Full Bench of the Superior Labor Court (TST) decided, by majority of votes, that both the company providing and the company taking the outsourced services must join as defendants in labor claims in which the outsourced worker challenges the legality of the outsourcing and proves the existence of an employment relationship with the company that took the outsourced services.

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4. Temporary work

Temporary work is the one performed by an individual hired by a company providing temporary work that makes him or her available to another taking the temporary work to meet the latter's need for transitional replacement of permanent personnel or the complementary demand for services.

Innovations:

- The definition of complementary demand for services, which is the one arising from unpredictable factors or predictable factors of an intermittent, periodic or seasonal nature, was complemented in order to exclude: (i) continuous and permanent demands; and (ii) demands resulting from the opening of branches.
- The temporary work now authorizes the hiring of workers to replace on a provisory basis an employee due to suspension or interruption of the latter's contract (vacations, licenses and other absences provided for by law).

Important remarks:

(i) The temporary worker is entitled to receive FGTS.

(ii) Temporary work is different from fixed-term employment, where the employee is hired to work for a pre-fixed period.

(iii) Temporary work is distinct from probation contract, as the latter is intended only for employees in the probation period that precedes an indefinite employment contract.

Final considerations

The Infralegal Labor Regulatory Framework came into force on 11/Dec/2021 (30 days after its publication), except for the provisions on the Worker's Food Program - PAT, which will only be effective in 2023. Therefore, in order to be compliant with this new Framework, it is highly recommended that companies revise and adjust their routines to be in line with the changes brought by said regulation, preventing the exposure to potential labor liabilities.

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