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Brazilian citizenship x residence for undetermined term

Many people ask us about the differences between Brazilian citizenship and residence for undetermined term, misunderstanding these two legal status. We then intend, in this article, to explain their differences very simply and directly.

Brazilian citizenship: According to article 218 of Federal Decree 9199/2017, there are 4 options for naturalization in our laws: **(i)** ordinary; **(ii)** extraordinary; **(iii)** special, or **(iv)** provisional. Find below the basic requirements migrants should comply with to obtain each one of them: **(i)** living in Brazilian territory for at least 4 years and ability to communicate in Portuguese; **(ii)** having set residence in Brazilian territory for over 15 nonstop years; **(iii)** being spouse or partner for over 5 years of a member of Brazilian Foreign Service in activity or of a person working for Brazilian Government abroad, or being or having being employed for a diplomatic mission or at Brazilian consular offices for over 10 nonstop years; and **(iv)** child or teenager having set residence in Brazilian territory before being 10 years old - it should be requested by their legal representative.

Residence for undetermined term: There are many options for obtaining the residence for undetermined term according to Brazilian laws, either through family reunion request, due to wife/husband/partner/child being Brazilian, through request of investment residence in Brazil, through request of administrator work residence or transformation work, or through request of amnesty, refugee, stateless or cross-border status.

Except for provisional residence (iv) above, all other naturalization options require the migrant's presence for certain time in Brazil. Thus, we could say one of the basic requirements for requesting a naturalization is migrants living in Brazil for undetermined term (article 221 of said Decree). In other words, there is no way for migrants to getting naturalized before having obtaining their residence for undetermined term before.

Naturalization procedures are very complex, as they include a decision by the Ministry of Justice (naturalization office) and the Federal Police. In ordinary and special naturalization requests, migrants shall be able to communicate in Portuguese. This is a very special request, but it is also currently complex, as Portuguese tests made available by Brazilian Government (Celpe-Bras) have being offered only once a year, and when the term opens there are many applications; migrants should, then, be very careful not to miss it. After filing the request with the Ministry of Justice, it has taken long for naturalization procedures to be evaluated. We currently (May/2022) expect a naturalization procedure to take 2 to 3 years to be analyzed.

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As we informed above, there are different options for obtaining a residence for undetermined term, therefore, the time for its granting may greatly vary, according to the option chosen. However, it is in general a much simpler procedure than naturalization, and its granting takes from 2 to 3 months.

benefit only migrants, that is, the interested party cannot request their naturalization at the same they request their wife's/husband's/partner's and children's naturalization. Dependents are only benefited by such granting after the decision on the naturalization procedure, which, as we informed above, currently (May/2022) takes very long to be analyzed.

Requests for residence for undetermined term, on the other hand, although a personal request as well, once granted may lead to a family reunion request for the interested party's dependents, according to Interministerial Ordinance no. 12, of June 13th, 2018, right after it or almost at the same time. Therefore, dependents could, in short period of time, have the same residence as the holder's.

Brazilian citizenship should not be misunderstood as residence for undetermined term. Brazilian citizenship is something only people born Brazilian or naturalized as such can have. Migratory residence is something only foreign people can have. Brazilian citizenship cannot be lost due to the fact (born or naturalized) Brazilian people leave Brazil for certain time. Residence for undetermined term, on the other hand, is lost in case migrants leave Brazil for over 2 years without presenting a justification, as per article 135 III of Decree 9199/2017.

Lost of original citizenship: This theme should be studied based on the laws of the country from where a person who intends to naturalize or obtain residence for undetermined term in Brazil comes. We do not know about any country revoking people's original nationality in case they obtain a residence for undetermined term in Brazil. On the other hand, there are many countries that revoke the original nationality in case someone becomes Brazilian. Example: China. Then, if a Chinese person becomes Brazilian, there are great chances of losing their Chinese nationality. We also highlight the issue on the criteria chosen by countries to obtaining nationality, as there are countries adopting "jus sanguinis" (blood right) criterion, generally European ones, while others use "jus solis" (land right) criterion, and other have mixed systems, such the Brazilian one, which takes both criteria depending on the situation. Example: if someone is born in Brazil, they are Brazilian (land right), but if a Brazilian person's child is born abroad, this child is entitled to being Brazilian due to their father, mother or both of them being Brazilian (blood right). We highlight this point, as someone born in Brazil (land right) may also be Italian, for example, if they have Italian family. In this case, the person was born with the right to have two nationalities immediately, as they used the land criteria in one case (Brazilian) and the blood one in the other (Italian), and there is no need to request naturalization in such countries. Then, this person is under no risk of losing one of their

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nationalities in these examples. Anyway, considering something so important, naturalization requests should be very carefully analyzed and pondered before being made.

We finally highlight naturalized migrants will have Brazilian passports, Brazilian identity cards, as well as they will have the same rights/duties as any Brazilian. On the other hand, migrants who have a residence for undetermined term will have RNM cards, will nor have Brazilian passport, and cannot, for example, vote in Brazil.

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Jüngste Entwicklungen im geistigen Eigentum in Brasilien

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Innerhalb der letzten zwölf Monate gab es eine Reihe von Veränderungen mit weitreichenden Folgen für das Gebiet des geistigen Eigentums in Brasilien. Das Ziel dieses kurzen Artikels besteht darin, einige der wichtigsten Neuerungen darzustellen, die in dieser Zeit stattgefunden haben.

Von politischer Seite ist vor allem die „Nationale Strategie für Geistiges Eigentum“ (ENPI) hervorzuheben, die insgesamt 210 Maßnahmen umfasst. Besagte Strategie wurde von der „Interministeriellen Gruppe für Geistiges Eigentum“ (GIPI) erarbeitet, die ihrerseits dem brasilianischen Wirtschaftsministerium untersteht, und durch die Bundesverordnung Nr. 10.886 vom 8. Dezember 2021 genehmigt. Sie enthält Detailregelungen, die für einen Zeitraum von 10 Jahren gelten (von 2021 bis 2030), und legt mehrere Leitprinzipien fest, wozu unter anderem **(i)** die strategische Nutzung von Geistigem Eigentum in der öffentlichen Politik zur Förderung von Wettbewerbsfähigkeit und Entwicklung, **(ii)** die Agilität in IP-Verfahren, **(iii)** die Balance zwischen IP, Wettbewerb und gesellschaftlichen Interessen, und **(iv)** die Gewährleistung von Rechtssicherheit, Transparenz und Vorhersehbarkeit in IP-Angelegenheiten gehören.

Eine andere löbliche Initiative war in diesem Zusammenhang die des brasilianischen „Nationalrats zur Bekämpfung von Piraterie und Verstößen gegen geistige Eigentumsrechte“ (CNCP), der im Dezember 2021 im Einvernehmen mit dem Ministerium für Justiz und öffentliche Sicherheit den „Nationalplan zur Bekämpfung von Piraterie, Schmuggel, Steuerhinterziehung und Verstößen gegen geistige Eigentumsrechte“ billigte. Besagter Plan gliedert sich in vier Säulen, in denen jeweils kurz-, mittel- oder langfristig zu erreichende Ziele festgelegt sind, welche innerhalb von einem Jahr, drei Jahren bzw. nach Ablauf von drei Jahren zu verwirklichen sind. Die erste dieser Säulen bezieht sich auf die Zusammenarbeit zwischen verschiedenen Institutionen zu dem Zweck, den Dialog und die Koordination zwischen den öffentlichen Stellen zu fördern, die für die Bekämpfung der Piraterie und den Schutz geistiger Eigentumsrechte zuständig sind. Die zweite Säule sieht Maßnahmen vor, deren Ziel darin besteht, der Herstellung, Einfuhr, Vermarktung und Verbreitung illegaler Produkte und Dienstleistungen einschließlich Pirateriewaren entgegenzuwirken. Die dritte Säule beinhaltet Weiterbildungsmaßnahmen und Schulungen, um die öffentlichen Stellen in die Lage zu versetzen, noch effektiver gegen die Piraterie vorzugehen und geistige Eigentumsrechte zu schützen. Die vierte Säule schließlich sieht Maßnahmen vor, deren Ziel darin besteht, die damit befassten Institutionen sowie die Gesellschaft im Allgemeinen für die schädlichen Auswirkungen zu sensibilisieren, die durch die Piraterie und weitere Verstöße gegen geistige Eigentumsrechte ver-

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ursacht werden, wozu auch negative Folgen für die Wirtschaft, die öffentliche Sicherheit und den Arbeitsmarkt gehören. Insgesamt wurden in den vier Säulen 62 Ziele festgeschrieben.

Was das Gebiet der Patente betrifft, so ist zunächst die Weiterentwicklung des *Plans zur Bekämpfung des Patentrückstands* hervorzuheben, der im Jahr 2019 von der Patentabteilung des brasilianischen Patent- und Markenamtes (INPI) in die Wege geleitet wurde. Die Patentabteilung bemüht sich weiterhin, die Zahl der Patentanmeldungen, deren technische Prüfung noch aussteht, erheblich zu reduzieren. Im Jahr 2019 gab es etwa 148.000 solcher Anmeldungen. Diese Zahl wurde nun auf ca. 34.000 Anmeldungen reduziert, was bedeutet, dass innerhalb von zwei Jahren seit Einführung des besagten Plans der Rückstand erheblich verringert wurde. Dies gibt Anlass zur Hoffnung, dass die Dauer der technischen Prüfungen in Brasilien in Zukunft erheblich kürzer sein wird, wodurch Innovationen und neue Technologieinvestitionen hierzulande gefördert werden. Ein anderer wichtiger Schritt war die Bewilligung des Gesetzes Nr. 14.195/21 durch die Bundesregierung mit dem Hauptanliegen, die brasilianische Wirtschaft und den Außenhandel durch Bürokratieabbau und Verfahrensharmonisierung zu stimulieren. Mit besagtem Gesetz wurde Artikel 229-C des Gesetzes zum Gewerblichen Eigentum (BIPL) aufgehoben, weshalb in Brasilien seit dem 26. August 2021 für die Erteilung von pharmazeutischen Patenten keine vorherige Genehmigung durch die ANVISA (die brasilianische Behörde für Lebens- und Arzneimittel) mehr notwendig ist.

Im Zusammenhang mit dem Patentrecht ist ferner erwähnenswert, dass der brasilianische Bundesgerichtshof (STF) im Jahr 2021 sein Urteil zur Verfassungsklage ADI 5529 erließ. Diese Klage war vom Generalstaatsanwalt eingereicht worden, um den einzigen Absatz von Artikel 40 des BIPL anzufechten, der eine Mindestschutzfrist für Patente festlegte. Der Bundesgerichtshof entschied nun, dass besagter Absatz in der Tat verfassungswidrig ist, legte zugleich aber fest, dass das Urteil nicht für Patente gilt, die bis einschließlich zum Datum seiner Veröffentlichung im Amtsblatt erteilt worden sind, vorbehaltlich folgender Ausnahmen: Patente, die Gegenstand anhängiger Klagen zur Anfechtung der Verfassungsmäßigkeit des einzigen Absatzes von Artikel 40 sind, und bestehende Patente für pharmazeutische Verfahren und Produkte sowie medizinische Geräte und Materialien, die eine sich aus besagtem Absatz ergebende Schutzfrist genießen. In Bezug auf Patente im pharmazeutischen Bereich, die zum Zeitpunkt des Urteils ADI 5529 noch gültig waren und in den Genuss der Mindestpatentschutzfrist kamen, wurde das INPI vom brasilianischen Bundesgerichtshof angewiesen, die Patenturkunden neu auszustellen, so dass die 20-jährige Laufzeit ab dem Anmeldetag läuft.

Was den Bereich der Marken betrifft, so jährte sich am 2. Oktober 2021 zum zweiten Mal der Beitritt Brasiliens zum Protokoll über das Madrider Markenab-

kommen, und die Zahlen zu diesem System sind beeindruckend. Bis zum 22. Oktober 2021 wurden beim brasilianischen Patent- und Markenamt (INPI) 20.011 brasilianische Benennungen eingereicht. Inzwischen hat es damit begonnen, mehr Entscheidungen im Zusammenhang mit diesen Benennungen zu veröffentlichen, so z.B. Beanstandungen, Teilzulassungen und Zurückweisungsentscheidungen. In diesem Zusammenhang ist zu beachten, dass jegliche Maßnahmen vor dem INPI von einem lokalen Vertreter vorzunehmen sind. Ein anderer wichtiger Schritt war die Veröffentlichung der Verordnung Nr. 37/2021 am 21. September 2021 durch das INPI, welche die Eintragung von Zeichen als Positionsmarken in Brasilien erlaubt. Folglich gehen beim INPI seit dem 1. Oktober 2021 Positionsmarkenanmeldungen ein. Abgesehen davon hat das INPI gemäß der formellen Stellungnahme Nr. 43/2021 und im Einklang mit dem von den brasilianischen Gerichten vertretenen Standpunkt damit begonnen, Ansprüche auf ein Vorbenutzungsrecht auch in administrativen Nichtigkeitsverfahren und nicht nur in Widerspruchsverfahren zu akzeptieren.

Wie man sieht, hat sich im Verlauf der letzten zwölf Monate Einiges getan, was für das Gebiet des geistigen Eigentums in Brasilien bedeutsam ist. Die vom INPI, von der „Interministeriellen Gruppe für Geistiges Eigentum“ und vom „Nationalrat zur Bekämpfung von Piraterie und Verstößen gegen Geistige Eigentumsrechte“ ergriffenen Maßnahmen waren wichtige Bausteine, um auf institutioneller Ebene das brasilianische System geistiger Eigentumsrechte zu perfektionieren.

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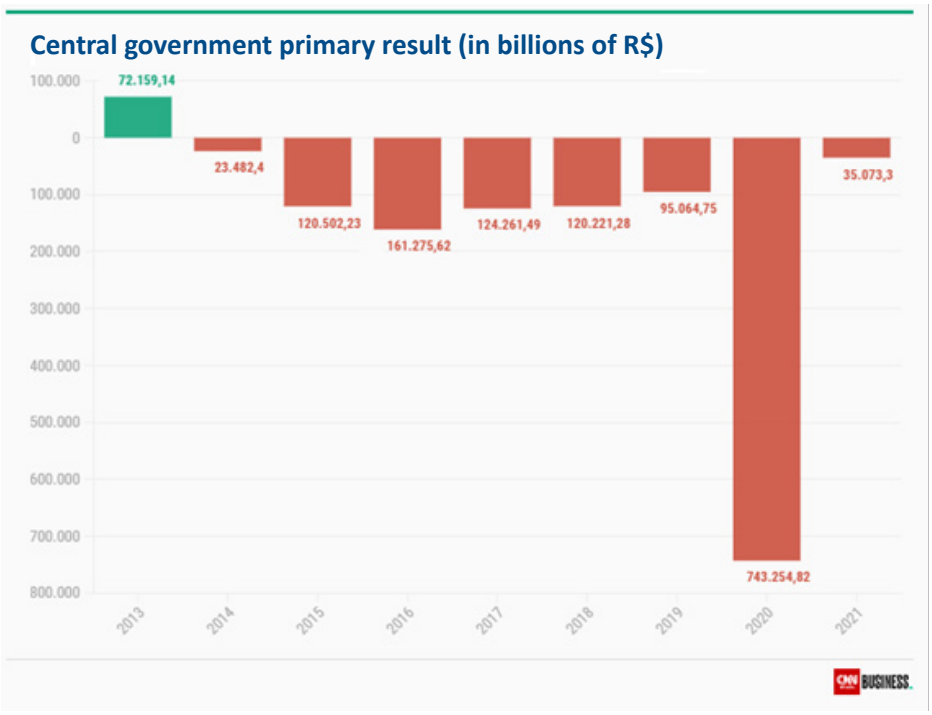
The urgent Tax Reform will be left to the next government

Any family or company that has ever had its accounts in the red knows the formula to get out of this situation: reduce expenses and/or increase revenues. It is no different with countries. The example of Brazil is emblematic, as it has been struggling for several years to put its house in order, without much room for maneuver, since, on the one hand, the tax burden is one of the highest in the world[1] and, on the other hand, public spending is very tightly constrained.

Faced with this difficult equation, the country passed Constitutional Amendment 95 in 2016, which instituted the so-called expenditure cap - basically, a system that prevents public debt from increasing, limiting it to the previous year's inflation. This measure helped reverse the trend of increasing primary deficit in the following years. As can be seen in the graph below, apart from the year 2020 - in which public spending exploded due to the health emergency resulting from Covid-19 - there is a clear trend of reduction in the primary deficit, in large part due to the expenditure cap. Last year specifically, the deficit was the lowest in seven years.



[1] A study published in 2021 by IBPT (Brazilian Institute of Planning and Taxation) cross-referencing tax burden data (tax collection in relation to GDP) with the Human Development Index (HDI) of the 30 countries with the highest tax burdens in the world places Brazil in last place, with the worst return on the amounts collected compared to the public services offered. Available at: https://ibpt.com.br/estudo-sobre-carga-tributaria-pib-x-idh-calculo-do-irbes/

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The other side of the scale would be missing, that is, the increase in revenues. But how to do this without increasing the tax burden, one of the highest in the world? This is the challenge of the Tax Reform, a subject as necessary as it is controversial.

One of the points most often explored by politicians in favor of the Tax Reform is the Brazilian option of not taxing the dividends that companies pay to their partners and shareholders. According to a survey carried out by the Tax Foundation in 2021[2], Brazil, Estonia and Latvia are the only countries in the world where there is no taxation on dividend payments.

On June 25, 2021, the Federal Government submitted the Bill no. 2.337/2021 to the House of Representatives, which has precisely the taxation of dividends as one of its proposals. According to estimations by the Internal Revenue Service[3], the approval of the Bill would bring, by 2024, an increase in tax collection of R$ 6.15 billion - approximately US$ 1.21 billion at the current exchange rate - one of the main drivers being the taxation of dividends.

At this point it is important to say that dividend taxation is not something new in Brazil. Until 1995, dividends were taxed. In that year, a legislation amendment exempted dividends from personal income tax; on the other hand, there was an increase in the corporate income tax rate. Now, the proposal is precisely to return to this previous model, with the taxation of dividends for individuals combined with a reduction in the corporate income tax rate - naturally, the increase and reduction will not be equivalent, in order to increase revenue.

Bill 2.337/2021 was approved by the House of Representatives in 2021, and the approved text established a 15% tax rate on dividends distributed to partners and shareholders. The issue then proceeded to the Federal Senate, where it awaits to be voted.

At this point, it is important to remind the foreign reader that 2022 is an election year in Brazil, when the President, Governors, Senators, and Federal and State Representatives will be elected. In this scenario, it is historically very unlikely that any controversial or unpopular proposal will be approved - as is the case of the Tax Reform, which would directly impact the business sector, not to

[2] *"Por que o Brasil é um dos poucos países do mundo que não tributa dividendos" (Why Brazil is one of the few countries in the world that does not tax dividends)*, published on June 28, 2021. Available at: https://forbes.com.br/forbes-money/2021/07/por-que-o-brasil-e-um-dos-poucos-paises-do-mundo-que-nao-tributa-dividendos/;
Dividend Tax Rates in Europe |2021 Dividend Tax Rates & Rankings, a study published by Tax Foundation on May 13, 2021. Available at: https://taxfoundation.org/dividend-tax-rates-europe-2021/

[3] Available at: https://www.jota.info/tributos-e-empresas/tributario/receita-arrecadacao-mudancas-ir-12072021

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mention the tax collection of states and municipalities. In fact, the President himself and the leader of the government in the House of Representatives have already recognized the difficulty of approving the issue this year[4].

In other words, chances are that the Bill will not be approved this year. And, depending on the results of this year's elections, it is possible that the new arrangement of political forces will bury the bill, or even suggest new and different changes. In fact, the current scenario is of high uncertainty, although with a clear sense of urgency to change the current tax system.

Even though many other concerns are in the national agenda, the taxation of dividends is still in evidence, and it is very clear that this issue generates tension and distrust in the national productive sector.

Therefore, Brazil moves at a slow pace, in yet another series of efforts and failures to move this issue forward. When all is said and done, one thing is certain: if Brazil wants to realize all its enormous potential, it must make efforts to make major reforms, one of the most urgent being the Tax Reform - with or without the controversial taxation of dividends.

[4] *"Reforma tributária fica sem data para votação no Senado" (Tax Reform Stays Without a Date for Senate Voting)*, published on January 19, 2022. Available at: https://www.correiobraziliense.com.br/economia/2022/01/4978642-reforma-tributaria-fica-sem-data-para-votacao-no-senado.html;
"Reformas ficarão para depois das eleições, diz líder do Governo na Câmara", (Reforms will stay until after the elections, says GOP leader in the House), published December 04, 2021. Available at: https://www.poder360.com.br/governo/reformas-ficarao-para-depois-das-eleicoes-diz-lider-do-governo-na-camara/

Kein Anfall von Steuern und Abgaben (IRPJ, CSLL, PIS und COFINS) auf Geldwertberichtigung und Zinsen gemäß dem SELIC-Satz bei der Erstattung von fehlerhaft gezahlten Steuern

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Werden, gleich aus welchem Grund, nicht geschuldete Steuern abgeführt, hat der Steuerzahler Anspruch auf Erstattung. Auf die zu erstattenden Beträge sind Geldwertberichtigung und Zinsen zu zahlen. Seit 1996 ist der SELIC-Satz der einzige Index für die Wertberichtigung und Zinsen auf die Erstattung abgeführter, nicht geschuldeter Steuern.

Nach Auffassung des brasilianischen Fiskus fallen auf Geldwertberichtigung und Zinsen nach dem SELIC-Satz auf den Betrag der Erstattung nicht geschuldeter Steuern IRPJ, CSLL, PIS und COFINS an, weil es sich dabei um neue Einkünfte handelt (Antwort auf die Anfragen COSIT Nr. 19/2003, 157/2014 und 166/2017 des brasilianischen Bundesfinanzamtes).

Es ist jedoch eindeutig, dass Geldwertberichtigung und Zinsen auf den Erstattungsbetrag gemäß SELIC-Satz keinen Vermögenszuwachs des Steuerzahlers darstellen, sondern dazu dienen, den Geldwert von zu Unrecht gezahlten Steuern wieder herzustellen und den Steuerzahler dafür zu entschädigen, dass er über die gezahlten Beträge nicht verfügen konnte, solange sie nicht erstattet wurden.

Bei der Körperschaftssteuer (IRPJ) und den Sozialabgaben auf den Nettogewinn (CSLL) besteht Einigkeit, dass diese nur auf Einkünfte verlangt werden dürfen, die einen Vermögenszuwachs repräsentieren.

Am 27.09.2021 hat der Supremo Tribunal Federal nunmehr einstimmig die Rechtswidrigkeit des Anfalls von IRPJ und CSLL auf Geldwertberichtigung und Zinsen auf Erstattungen von Fehl- bzw. Überzahlungen nicht geschuldeter Steuern gemäß SELIC-Satz festgestellt (Außerordentliches Rechtsmittel Nr. 1.063.187 – Thema 962 mit allgemeinen Wirkungen).

„Auf Verzugszinsen fallen keine IRPJ und keine CSLL an, weil diese dazu dienen, effektive Verluste auszugleichen und nicht zu einem Vermögenszuwachs beim Gläubiger führen”, so das Urteil.

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In dem Urteil hat das Gericht ferner bestätigt, dass der Satz SELIC aus zwei untrennbar miteinander verbundenen Elementen besteht, der Geldwertberichtigung, dessen Zweck darin besteht, den Kaufkraftverlust der Währung durch Inflation auszugleichen und den Verzugszinsen, mit denen der Gläubiger für die in der Zeit, in der ihm sein Vermögen vorenthalten wurde, entstandenen Verluste entschädigt wird.

Nach Einlegung einer Erklärungsbeschwerde durch den Fiskus hat der Supremo Tribunal Federal die Wirkungen der Entscheidung am 02.05.2022 moduliert und seine Auffassung bestätigt, dass die Verfassungswidrigkeit nur auf Beträge anwendbar ist, die nach dem 30.09.2021 (Datum der Veröffentlichung der Entscheidung im Verfahren des Außerordentlichen Rechtsmittels Nr. 1063187) abgeführt wurden. Ein Vorbehalt wurde für die bis zum 17.9.2021 (Datum des Beginns der Entscheidung im Hauptverfahren) erhobenen Klagen und Sachverhalte vor dem 30.9.2021, in Bezug auf welche keine Zahlung von Steuern und Abgaben erfolgt ist, gemacht.

Nach Abschluss der Diskussion über die Frage der IRPJ und CSLL dürften angesichts der Feststellung in der, dass die Geldwertberichtigung und Zinsen der Erstattung gemäß SELIC-Satz einen Ausgleich für die erlittenen Verluste darstellen und nicht als Vermögenszuwachs anzusehen sind, auf diese Beträge auch keine Sozialabgaben PIS und COFINS anfallen. Der Fiskus ist aber auch hier der Auffassung, dass Geldwertberichtigung und Zinsen auf die Erstattung gemäß SELIC-Satz Einkünfte darstellen, auf die diese PIS und COFINS anfallen (Art. 3 des Interpretativen Erklärungsakts SRF Nr. 25/2003).

Obwohl im Gesetz nicht ausdrücklich geregelt ist, auf welche Einkünfte PIS und COFINS anfallen, herrscht Einigkeit darüber, dass der Eingang von Beträgen allein nicht ausreicht und erstattete Kosten nicht zu den Einkünften gehören, sondern es sich bei dem betreffenden Betrag um einen neuen Betrag handeln muss.

In der Entscheidung über das Außerordentliche Rechtsmittel Nr. 574.706 (Thema 69 mit allgemeinen Wirkungen), in dem der Supremo Tribunal Federal selbst die Verfassungswidrigkeit der Berücksichtigung der ICMS bei der Berechnungsgrundlage von PIS und COFINS festgestellt hat, hat er die Auffassung bestätigt, dass Einkünfte für Steuerzwecke den Eingang eines Betrages in der Kasse des Unternehmens implizieren, der eine positive Variation in seinem Vermögen repräsentieren muss. Angesichts dessen und des Umstandes, dass Geldwertberichtigung und Zinsen auf die Erstattung gemäß SELIC-Satz nur dem Ausgleich des Verlusts dienen, stellen diese keine Einkünfte nach dieser Konzeption dar, weshalb auch keine Abgaben auf den Betrag anfallen können.

In diesem Sinne wurden bereits unterschiedliche Entscheidungen verkündet, die den Anfall von Abgaben auf Geldwertberichtigung und Zinsen auf Erstattungen gemäß SELIC-Satz bei Fehl- bzw. Überzahlungen von Steuern ablehnen. Das Thema muss jedoch noch von den höheren Gerichten geprüft werden, um die Diskussionen zu einem Abschluss zu bringen.

Wir weisen darauf hin, dass dem hier behandelten Nichtanfall von Steuern und Abgaben auf Geldwertberichtigung und Zinsen auf den Erstattungsbetrag gemäß SELIC-Satz eine Klage vorausgehen muss, um jegliches Risiko von Eventualverbindlichkeiten zu beseitigen. Was den Anfall von PIS und COFINS angeht, so besteht mangels Entscheidung durch die höheren Gerichte die Möglichkeit der Erstattung von eventuell auf Geldwertberichtigung und Zinsen auf den Erstattungsbetrag gemäß SELIC-Satz bei zu Unrecht abgeführten Steuern und Abgaben in den letzten 05 (fünf) Jahren.

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The opening of the free power market is closer to becoming effective

Much has been said about "opening up the energy market". But what does this mean? We must understand that the energy market in Brazil is divided into two environments: Regulated Trading Environment (ACR) and Free Trading Environment (ACL). In the first, all those consumers with load lower than 500kW (residences, small businesses, etc.) are considered captive consumers, that is, they must acquire energy exclusively from the local distribution concessionaire. In the second, consumers with load greater than 500kW can freely negotiate their power purchase agreements (PPAs), being able to choose from whom they will acquire energy. This was the regime instituted by Law nº 10,848/2004, regulated by Decree nº 5.163/2004.

To be in the ACL, the consumer (with a load greater than 500kW) must stop acquiring his energy from the Distributor and join the – Chamber of Commercialization of Electric Energy - CCEE.

Indeed, one of the great desires of the players of the market in Brazil is the reduction of the parameters for migration from ACR to ACL, making it possible for millions of consumers to choose their supplier and seek better alternatives for their energy costs - just as happened in past decades at the Telecommunication Sector.

In this sense, Bill no. 414/2021 (PL 414/2021), which is in progress before the Chamber of Deputies, bring the necessary legislative treatment for the total opening of the market, which should occur within 42 months. In other words, the Bill provides for the reduction of demand and voltage levels in order to allow all consumers to migrate to the ACL.

According to the PL 414/2021, the Regulatory Agency of Electric Energy- ANEEL and the CCEE must agree on a schedule for market opening. In such way that, in up to 42 months until the publication of the referred law, a schedule must be proposed to enable the sustainable migration of all consumers who wish to migrate to this new scenario.

Since it is such a positive evolution, why not implement it immediately? Because migration requires a series of structural and regulatory adjustments that precede it, aiming to: **(i)** maintain the balance of the distributors' concessions, which will "lose" consumers; **(ii)** structurally prepare the CCEE to receive millions of consumers (today the CCEE has fewer than 15,000 members); and **(iii)** adapt/evolve the current regulation of the sector to the new reality, which will bring savings, competitiveness and opportunities, but will also bring greater responsibility on the part of the consumer and default risks for suppliers in the ACL.

Specifically in relation to the Distribution utilities, PL 414/2021 foresees the creation of a new charge, to be regulated, to cover the distributors' exposures resulting from the overcontracting of energy due to the migration of consumers to the ACL, as well as from an eventual contracting deficit resulting from the acting as a supplier of last resort for consumers that have not been contracted in the ACL. The reason for this is that the concessionaries of distribution acquire energy in public auctions for horizons of 20 and even 30 years. Thus, they do not have total flexibility to discontinue or contract immediately the energy to supply their consumer market.

Consumers with load lower than 500kW that join after the publication of the new law will be mandatorily represented by a Retail Trader, which currently already exists in the regulation of the Power Sector but is only optional for those consumers who wish to be represented by a third party.

However, after the publication of the law, the representation by the Retail Trader will become mandatory and of essential importance for the functioning of the market. Thus, several obligations are being proposed for the Retail Trader:

i. financial capacity compatible with the volume of electric energy represented in the CCEE;

ii. mandatory disclosure of the reference price of at least one standard product, defined by ANEEL, if the retail agent is a reseller or independent power producer; and

iii. represented load of retail consumers of at least 3,000 kW, including own load, if any.

Because PL 414/2021 has undergone changes in the Chamber of Deputies and for being discussed as a substitute, the proposal may need to return to the Federal Senate, in the event it receives the approval of the Deputies. Considering that the project is on the agenda of priority issues for the government in 2022, it is believed that the conclusion of the legislative process may occur until the end of the third quarter of this year.

The PL 414/2021 brings several innovations and developments to the power market model in Brazil, however, certainly, the opening of the free market to all consumers is the change that generates the greatest expectation, since it will directly impact the lives and the way of hiring energy of all Brazilians.

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The limits of the Director's performance as per Law 14195/2021

Popularly known as a bureaucratic country, the "infamous" Brazilian government requirements also reflect internationally and, in the business scenario, it could not be different. The World Bank's ranking Doing Business is known for evaluating business and investments in economies around the world, to encourage countries to compete for more efficient business environments.

In this sense, on August 26, 2021, Law 14195/2021 **[1]** was sanctioned. Its objective was precisely to present initiatives aimed at facilitating the business environment, making provisions, among others, about the business scope, seeking an evolution of Brazil's position with the respective ranking.

One of the main changes was the repeal of the sole paragraph of article 1015 of the Brazilian Civil Code **[2]**, which provided for exceptional situations in which the company could disengage from obligations assumed by the Directors, if they had acted beyond the powers provided for in the articles of association, or if they were carrying out operations apparently foreign to the common business of the company.

This last situation was known in the law theory for being inspired by the *Ultra Vires Societatis* Theory, which argues that if the Director practices management acts in violation of the corporate purpose established in the articles of association, this act cannot be imputed to the company.

Although the Theory at first showed safety and protection for companies, its practical application did not follow the provisions of the Civil Code.

In fact, the understanding that guided the higher courts, especially the Superior Court of Justice, was that, even if the Directors had acted with excess power, the company is bound upon third parties in good faith for the acts performed. **[3]**

The main argument of the decisions that benefited third parties that contracted with the Company was to avoid the prevalence of a scenario of instability that the provisions of the sole paragraph of article 1015 of the Civil Code brought, because (i) the dynamism of the business relationship does not match the careful analysis of contracts and articles of association and (ii) the application of the article should privilege the theory of appearance and objective good faith, depending on the security of business relations.

It should be noted that although article 1015 of the Civil Code is in the chapter for private unlimited companies, it applies to limited companies, as these are governed subsidiarily in case of omission of the provisions. However, if the limited liability company is supplementarily governed by the rules applying to corporations, established in Law 6404/1976, the *Ultra Vires Societatis* Theory does not apply.

Thus, it can be concluded that the revocation came to favor the third party in good faith and the theory of appearance to the detriment of the company, in order to adapt the Civil Code to the international business environment and the understanding of the higher courts.

However, what would be the practical effects of the repeal? Will the company now be bound to all business carried out, even if the Director has acted excessively or practiced powers outside the corporate purpose?

It does not seem reasonable that the company should always be held liable, especially in cases of legal business in which there is no vulnerability or lack of assets of either party; or represent significant economic values in which the limits of the Director's performance could be known to the other party by quick consultation in the company's public documents.

The initial conclusion is that the simple generic provision in the articles of association that the Director is prohibited from using the corporate name in activities outside the corporate interest does not seem to us to have more practical application and should disappear over time, since the revocation consolidated the application of the theory of appearance.

A recommended option is to write Contracts that expressly define the powers, amounts, and types of contracting that the Directors are authorized to perform, in order to inhibit actions outside the provisions of the Instrument and also establish internal policies for the inspection of documents approved by the Directors themselves.

The opposite is also valid: the contracting party must carry out a minimum investigation, proving the powers of the legal representative who will sign the document, which, in many cases, is a simple public consultation, at no cost to the Company. This investigation is the minimum expected in economically relevant legal business or signed by large companies whose structure is notably known.

In any case, the moment requires caution, with the adoption of measures aimed at protecting the companies as much as possible while the higher courts do not define the liability of the companies in view of the performance of Directors after the repeal of the sole paragraph of article 1015 of the Civil Code.

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[1] BRASIL. Law 10406, of January 10, 2002. Available at: http://www.planalto.gov.br/ccivil_03/leis/2002/l10406compilada.htm. Accessed on: March 21, 2022.
[2] BRASIL. Law 14125, of August 26, 2021. Available at: http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2021/lei/L14195.htm. Accessed on: March 21, 2022.
[3] BRASIL. Superior Court of Justice. SPECIAL APPEAL 2012/0113956-5. Rapporteur: Justice Luis Felipe Salomão. DJe (Official Gazette) 02/05/2015. Brasília, DF: Superior Court of Justice, [2014] Available at: https://scon.stj.jus.br/SCON/GetInteiroTeorDoAcordao?num_registro=201201139565&dt_publicacao=05/02/2015

Cross-border consortia in Brazil for complex services and projects: corporate and tax advantages

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German companies frequently provide complex services and high-quality equipment to large Brazilian infrastructure projects. In order to implement the projects, the German companies sometimes need support of a Brazil based service partner. We are oftentimes asked to assist with structuring international joint ventures between German companies and local service partners in a tax efficient way. The cross-border consortium is a great option for this kind of joint venture.

Consortia are contractual arrangements among two or more parties, which allow them to jointly manage a project while at the same time remaining fully independent from each other (by contrast to e.g. incorporating a joint venture company). Accordingly, consortia enable their members to benefit from the advantages typically connected to unified legal entities (e.g., economies of scale, streamlining of production, branding) even though the members remain fully independent.[1]

Pursuant to articles 278 and 279 of the Brazilian Corporations Law (Law no. 6404/1976), consortia are not considered legal entities and shall be established by an agreement approved by each of its members' competent corporate bodies. This consortium agreement, any amendments to it, as well as its termination shall be filed with the Board of Trade, at the headquarters of the consortium.

Mandatory clauses of a consortium agreement include, among others, the purpose of the consortium, the obligations and liabilities of each member, the rules concerning profit distribution and each member's contribution to the common expenses. As a general rule, the members of a consortium are only liable under the conditions provided for in the consortium agreement and each one is responsible for its own obligations, with no assumption of joint liability.[2]

Consortia may be set up by members of any corporate type, including limited liability companies, and there is a broad consensus that consortia between Brazilian and foreign companies are allowed. In fact, international consortia have been expressly recognized on different occasions by the Brazilian Federal Revenue Services[3] and is mentioned in Article 33, par. 1 of the Brazilian Bidding Act

[1] Cf. EIZIRIK, Nelson. A Lei das S/A Comentada. Vol. III. São Paulo: Quartier Latin, 2011, 555.
[2] Cf. Article 278, par. 1 of Brazilian Corporations Law.
[3] Answers to Advance Tax Ruling Requests No. 134/2014, 14/2021, and 139/2021.

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(Law no. 8666/1993), which refers to consortia with the purpose of participating in public bids or contracts with the Brazilian government.

Foreign companies may participate in consortia without having to incorporate a subsidiary or setting up a branch office in Brazil. However, foreign companies participating in a consortium should ensure that **(i)** their activities on behalf of the consortium are performed abroad (activities on the local market such as the hiring of local staff should be avoided); and **(ii)** the consortium agreement specifically provides how each member will contribute to the performance of the project, setting out the Brazilian members as responsible for activities on the local market and the foreign members as responsible for support from abroad.[4]

From a tax perspective, revenues and income derived from the consortium's activities are taxed at the level of each member, proportionally to their respective participation in the consortium, as per the consortium agreement.

The managing member of the consortium shall keep the accounting records of the consortium's operations. The consortium's bookkeeping shall be kept segregated from the member's operations that are not related to the consortium. The other members of the consortium must also keep segregated accounting records of their operations within the scope of the consortium. Each member shall invoice (and pay taxes) for the services provided within the scope of the consortium.

Taxation on cross-border consortia, where one or more of the members are foreign entities, follows the same principles: taxes are levied on the non-resident member's revenues resulting from its activities in the consortium. The taxes levied vary according to the consortium's activities, i.e., if the foreign member provides specific services in Brazil, then the Brazilian taxes on the so-called import of services will be levied (the import of services is heavily taxed in Brazil).

The taxation of cross-border consortia was recently analyzed by the Brazilian Federal Revenue Services by means of the formal Reply to Advance Tax Ruling Requests no. 14/2021 and 139/2021, which recognized the use of such structures and provided guidance on the taxation of foreign consortium members for services provided to Brazilian clients.

If a Brazilian service provider is obliged to subcontract a foreign service provider to provide part of the required services in Brazil, it must invoice its Brazilian client the entire service fee and, consequently, is subject to payment of corporate taxes levied on the entire revenues and profits[5] resulting from the service provision in Brazil. In case of subcontracting of a foreign service provider, additionally, the Brazilian service provider must pay the foreign service provider

[4] Cf. Article 1134 of the Brazilian Civil Code; EIZIRIK, Nelson. Op. Cit., p. 557; CARVALHOSA, Modesto. Comentários à Lei de Sociedades Anônimas. 4º Vol., Tomo II. São Paulo: Saraiva, 2011, p. 442.
[5] The exact taxation varies according to the tax regime elected by the Brazilian service provider.

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and is subject to the Brazilian taxes levied on import of services, which amount to approximately 40% in the case of services imported from Germany. Subcontracting foreign service providers is thus particularly tax inefficient because it results in double taxation of the service fees.

Considering that the foreign consortium member may invoice a Brazilian client directly for the services provided, the consortium structure eliminates the need for a Brazilian consortium member to subcontract the foreign consortium member to execute a specific business in Brazil, i.e., the provision of more complex technical services that are not available from Brazilian providers. The cross-border consortium is thus an effective tool to structure international joint ventures and at the same time mitigate the Brazilian tax impact on the Brazilian and foreign service providers.

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CIDE On Offshore Remittance: What Expect From EA 928.943 (Theme 914) Judgement?

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It was scheduled for passed 18th of may the beginning of the trial by Brazilian Supreme Court – STF that will judge the constitutionality of offshore remittance taxation by the Contribution of Interference on the Economic Order – CIDE (Extraordinary Appeal number 928.942/SP; Theme 914). The judgment had been taken off from the agenda and there is not forecast of resume yet.

Briefly, STF can decide whether CIDE triggers over any offshore remittance agreement between Brazilian residents and non-residents or indeed solely over those that occur to pay royalties for entities abroad related to technology transferences, according to constitutional principles the guide CIDE creation.

In a legal scenario, according to Federal Constitution on article 149, CIDE must be used as a tax instrument for interfering in specific economic sectors, aiming to enhance its developments through the research of new technologies; funding public investments on new technologies and making possible formation of qualified labor force. The constitutional text brings the principles that guide ordinary Law on the creation, regulation, and application of CIDE. Tax basis, rate, triggering event, period and agents are all defined by ordinary Law.

This constitutional prevision complies with the one stated on article 218, in which orders the public power to promote scientific innovation and development, research and capacitation, aiming social development and wealth production.

CIDE is finally regulated by Federal Law number 10.168/2000 that, as prescribed, designated all tax aspects, linking CIDE collection with public investments in areas that connect universities and productive sector, boosting scientific research and technologic development, strictly complying with the constitutional objectives of the tribute.

However, federal Law number 10.332/2001 came to amplify tax triggering events of CIDE, adding new texts for paragraphs 2nd and 3rd of article 2nd, bringing the prevision of CIDE triggering over any remittance from Brazilian entities for non-residents abroad, not mattering if the payment is related to technology transference (as the original ideia of CIDE), or if it is related to cost sharing agreements, refunds, technical assistance services or a simple payment of a trademark license, for example, at a 10% rate.

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From 2002 ahead, the cost of remitting funds on cross border operations had been increased considerably, most of it because of the enlargement of CIDE triggering events reach, representing an unconstitutionality.

Indisputably, the enlargement of tax hypothesis of CIDE represents an extrapolation if we consider the constitutional goals originally defined on article 149 as shown. Indeed, collect CIDE from remittance related to cost sharing agreement payments has not constitutional basis, nor over payments for technical assistance or trademark license. This is not technology transference.

Taxpayers do have strong arguments to defend the unconstitutionality of CIDE collection on operations that do not represent technology transferences. Federal Law number 10.332/2002 brought legal abuses. Not recognizing this harm for Brazilian legal system is a complacency that STF must avoid.

As a benefit from this conclusion is the right of the taxpayers requesting refund or compensation of accumulated tax credits over the lats five years. The sooner the request is filed, the larger the amount will be refunded/compensated.

On the other hand, Brazilian tax authority sustains that Law 10.332/2001 is constitutional since it is not possible to enhance technology transference operations in Brazil given that it is not a cheap event, what prevents from achieving constitutional goals. One cannot ignore the fact of payments related to other services are financially more attractive for multinational companies, setting harder the materialization of the constitutional objectives.

Since it is cheaper to operate by cost sharing agreement or know-how license, for example, how not to tax these events whereas they are much more common instruments? This is the fiscal reasoning. In other words, achieve constitutional objectives through a tortuous way. If not taxing these agreements, constitutional principles would never be achieved because they are not financial interesting for taxpayers, so, taxing cost sharing agreements would be necessary. This is the mindset. These arguments cold make sense if we were discussing public policies, but in a legal perspective, the text is what must prevail.

At the end of the day STF shall decide if legal text is what really matters, or Brazilian state interests are the ruler. Actually, in a global perspective of tax matters, an half term decision is expected, as a general profile of the last tax judgments (exclusion of ICMS from PIS/COFINS tax basis; ICMS DIFAL, etc).

These decisions guaranteed the accomplishment of the constitution commandment but paying attention on its financial impacts as well, not compromising federal financial balance. I mean, unconstitutionality of CIDE over offshore remittance in the terms of paragraphs 2nd and 3rd of Law number 10.332/2001 shall be declared, but having a modulation of effects in this decision, what could

be *i)* last five years of possible tax credit compensation only for who filled initial petition before the conclusion of the judgment and ii) possible tax credit compensation accumulated only from the date of the judgment on for those who filled petition after the conclusion.

This is the expected scenario. As described, CIDE over offshore remittances for those agreements that do not represent a real technology transference is an unconstitutional way of collecting taxes, distorting hole Brazilian tax and legal ordering. If your company has cross-board operations, it is your chance to recover tax credits.

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New Rules on Teleworking Arrangements

Executive Order No. 1,108, published on March 28, 2022, brings fundamental new rules and changes to teleworking in Brazil, one of which is the assignment of a concept to teleworking, which is now defined as the work performed outside the employer's premises, **whether or not predominantly,** with the use of information and communication technologies, which, by their nature, do not themselves qualify as external work. Thus, the concept of teleworking extends to the so-called “hybrid work”, where employee performs the activities partly outside the workplace and partly at the employer’s premises.

Although the Executive Order produces legal effects immediately and remains in force for a maximum period of four months, it is still subject to the analysis and approval by the Brazilian Congress. Therefore, unless Brazilian Congress approves its conversion into law, with or without amendments, within such period, Executive Order will lose effects by the end of four months.

→ **Tracking of working hours:**

Within the new teleworking framework, only employees who provide service by production or tasks are exempt from tracking working hours.

Therefore, given that employers with more than twenty employees are legally required to control working hours, now they must include those under a teleworking arrangement in such control, except for the employees who work by production or task.

This innovation challenges one of the main discussions in connection with "home office" in the Brazilian Labor Courts. Since enactment of the Labor Reform in the end of 2017, our Labor Courts have been deciding that the home office arrangement prevents the employer from tracking the employee’s working hours, grounded on the exception set forth by article 62, III of the Consolidation of Labor Laws - CLT.

→ **Express arrangement in the employment contract**

In addition, teleworking arrangement must be expressly agreed in the employment contract entered into by and between employer and employee and can also be adopted for interns and apprentices.

So as to improve legal certainty, employment contract may rule the timetable and means of communication between employee and employer, provided that legal rest periods are ensured.

→ **Specific on-site activities**

Another important clarification brought by Executive Order refers to on-site activities, which are now expressly authorized. In other words, the attendance by employee at the workplace for specific activities, even if habitually, does not denature the teleworking arrangement.

→ **Time available to employer**

Regarding the use of technological equipment and the necessary infrastructure, as well as software, digital tools or internet applications used for teleworking, outside the ordinary working day, Executive Order establishes that it does not characterize time available to employer or on-call/stand-by, unless there is a specific provision in this sense in the employment contract or in the collective bargaining agreement, in cases where the type of work so requires.

→ **Return to employer's premises**

If teleworking arrangement is temporary and employee is called back to fully perform the work activities in employer's premises, the latter will not be responsible for the expenses in connection with return to the workplace whenever employee has chosen to work remotely outside the location established in the employment contract, unless otherwise agreed upon by the parties.

→ **Teleworking abroad**

Teleworking abroad has now been regulated by Executive Order, which establishes that Brazilian legislation is the one applicable to the employment contract of an employee hired in Brazil who chooses to work remotely abroad, unless the parties have agreed otherwise.

→ **Final comments**

It is worth mentioning that the Executive Order is not an ordinary law, but a rule enacted by the Federal Executive Branch with the status of law and, despite having immediate legal effects, it must necessarily undergo further analysis by the Brazilian Congress (Legislative Chamber and Senate) to definitively become an ordinary law.

The Executive Order is valid for an initial period of sixty days, renewable for additional sixty days, unless Brazilian Congress has voted for its conversion into ordinary law prior to its expiration. Otherwise, the Executive Order will lose effectiveness by the end of four months.

Given the relevant changes brought by Executive Order No. 1,108, companies that have implemented teleworking or home office policies before March 28, 2022, should reassess and adapt them to the new rules.

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Human rights in Supply Chain | Brazilian perspective

Approaching global supply chains from a human rights management perspective can seem a daunting challenge, as well as implementing a human rights program. Even more, concerns arise from the care beyond the first tier of suppliers which can include tens of thousands of entities around the world, potentially affecting hundreds of thousands of people and communities.

While the UN Guiding Principles on Business and Human Rights are clear that the duty to identify, prevent, mitigate and respond to adverse human rights impacts extends across a company's value chains and business relationships (including suppliers), they do not provide concrete guidance on how to apply such principles in practice.

All companies, regardless of industry, should consider human rights risks throughout their supply chains. In addition, take steps to ensure that their practices respect and protect the rights of workers and communities.

Despite not having specific legislation regarding the Supply Chain, Brazil has, in its several legislations, legal provisions for the protection of human, environmental, and children's rights, and others. All of them are based on the principles brought by the American Convention on Human Rights (Pact of San José of Costa Rica) signed among the American countries, guaranteeing a regime of personal freedom and social justice, based on the respect for essential human rights such as the right to liberty, prohibition of slavery, personal integrity, among others.

Regarding the supply chain, for many years it has been discussed the liability of companies when they outsource their activities or part of their production, as well as the liability of those who are subcontracted for the business to generate revenue. In Brazil, although there is still a need for investment in the identification of legal parameters of accountability, it is common for the courts to recognize civil, criminal, and labor liability for companies that do not pay attention to this when outsourcing their activities, and the argument of "not knowing" is not accepted by them, often leading to fines and public recognition of the error, as well as the listing of these companies as "unreliable" for adopting illegal practices.

Human Rights

At the civil-labor level, some theories seek to explain the role of each of the stakeholders in the various productive layers within a chain in which there is the exploitation of labor analogous to slavery or child labor, for example, and, based on these findings, to delimit the responsibility of those benefited by this type of violation of fundamental labor rights and human dignity.

Labor analogous to slavery is that which results from the following situations, either jointly or separately: the submission of a worker to forced labor; the submission of a worker to an exhausting workday; the submission of a worker to degrading working conditions; the restriction of the worker's locomotion, whether due to debt, or by restricting the use of any means of transportation by the worker, or by any other means with the purpose of retaining him/her in the workplace. Child labor is any form of work performed by children and adolescents under the minimum age, according to each country's legislation. In Brazil, work is prohibited for those who have not yet turned 16, as a general rule. When performed as an apprentice, it is permitted from the age of 14.

Important to mention one of the most complicated situations regarding slavery and child labor are related to rural areas, farms, and also clothing industry. In the past, it was common to have cases of "debt bondage" where a person worked and had part of his/her salary deducted to pay off a non-existent housing debt, for example. These are cases that are still found in many regions of Brazil and that are not legalized since they are often analogous to slave labor.

One of the objectives of the Labor Ministry and Social Security is to eradicate slave and degrading work, as well as child labor, through fiscal actions coordinated by the Secretariat of Labor Inspection, in the previously mapped focuses. The aim of Labor Inspection is to regularize the employment relationships of the workers found and to free them from such conditions.

Other impacts on Supply Chain

It is also possible to identify the responsibility of companies when evaluating Environmental & Fair Business Practices of the Supply Chain. When a service is outsourced, Company must guarantee that the business is fair and the rules are being followed, not only labor/human rights but also environmental obligations since the company must have enough documents and governmental approvals explaining the negative impact on the environment and the preventive measures took to prevent damage.

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How to proceed

Considering this scenario, companies must provide implementation, reviews, maintenance, due diligences, and internal audits, in the evaluation of all labor issues that must be proven, and guaranteed, by the service providers who should have, at least, the necessary evidence of the compliance with human rights. Additionally, it is expected that companies map processes and identification of the entire supply chain, provide internal adjustments in the company's culture and philosophy, develop internal controls, as well as the implementation of the headquarters rules/procedures in the South American subsidiaries; stipulate with the company measures for risk reduction and how to identify potential violations, monitoring their effectiveness on an ongoing basis; among other measures.

The Doctrine of Substantial Permormance in Brazil: Application to Business Contracts

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The doctrine of the substantial performance of contracts is a construction of English law. It arose out of the observation by courts of the disproportionality that could result from the contractual termination unconditionally applied to certain situations contract default, particularly those in which the obligation had been partially fulfilled by the debtor.

Although widespread in Brazil, there is no provision in the Brazilian Civil Code that expressly allows the application of such doctrine to business contracts. Nevertheless, there are provisions that help creditors of default, most of them holding the infringing party responsible for the damages caused by the contract infringement, in addition to the possibility of termination of the contract.

To draw a parallel and delimit the approach to the current discussion, for comparison purposes, among the remedies for breach of an obligation foreseen in the Brazilian Civil Code, there is only one hypothesis in which the contract is upheld: the scenario in which the creditor demands the specific fulfillment of the obligation. Such a hypothesis is the only one in harmony with the principle of the preservation of business contracts and defense of the social function of contracts.

As a result of application of such principles, the doctrine of substantial compliance, as an alternative to contract termination, was adopted by the Brazilian doctrine from the internationalization of the substantial performance derived from the common law. In this scenario, therefore, the application of the theory prevents the contract termination due to default since it considers the disproportionality between the breach and a minimum non-performance by the infringing party, thus admitting that the obligation would have been practically fully fulfilled.

The application of the doctrine by the Brazilian Courts, especially the Superior Court of Justice, is the result of doctrinal construction and not specific legislation on the subject since, as mentioned, there are no express provisions regarding this matter in the Brazilian Civil Code.

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The first judgment of Brazilian Superior Court of Justice to address this doctrine (REsp 76.362/MT[1]) arises from a dispute in which debtors intended to obtain insurance compensation, considering that the last installment of the insurance contract was not paid. Since then, the Superior Court of Justice has applied this doctrine, which aims to prevent the inadequate and unbalanced use of the right of termination by the creditor, with a view to realizing the principles of good faith and the social function of the contract.

Particularly concerning business contracts, it is essential to mention that there is no obstacle (or, at least in theory, there should not be) to its complete application, especially considering that the principles of good faith and the social function of the contract are equally applicable to these contracts.

Both UNIDROIT -- The International Institute for the Unification of Private Law -- and CISG - United Nations Convention on International Sale and Purchase of Goods (incorporated into the Brazilian legal system through Decree 8.327/2014) admits the application of the doctrine substantial compliance. In the first case, principle 7.3 provides the right to terminate a contract in case of fundamental breach by the other party. The CISG, by its turn, also establishes that the fundamental breach is a requirement for the termination of the contract, as provided by articles 25 and 64. Hence, the doctrine of substantial performance restricts the right of a creditor to request, at its discretion, the termination of an international purchase and sale agreement, for example.

In conclusion, what can be observed, therefore, is that the application of the doctrine of substantial performance, even though not expressly provided for in Brazilian legislation, is fully possible and is already being adopted by the Courts to avoid contractual termination in cases in which the obligation has been almost fully performed. In the same direction, it is possible the application of the doctrine to international contracts, in view of the contemplation of this possibility by UNIDROIT and CISG.

[1] STJ, REsp n. 76.362/MT, rel. Min. Ruy Rosado de Aguiar, 4ª T., j. 11.12.1995, DJ 01.04.1996

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