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NEWSLETTER

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FLORENCE² & ADVOGADOS

Die Verfassungswidrigkeit der Steuererhebung auf Dienstleistungen - ISS beim Import der Dienstleistungen.

In Übereinstimmung mit Artikel 1., § 1 des Ergänzungsgesetzes 116/2003 fällt die Dienstleistungssteuer ISS auf Dienstleistungen an, die ihren Ursprung im Ausland haben oder deren Erbringung im Ausland eingeleitet wurde.

Auf der Grundlage des oben erwähnten Ergänzungsgesetzes haben mehrere Gemeinden damit begonnen, ISS über den Import von Dienstleistungen aus dem Ausland zu erheben – die Stadt São Paulo führte die Erhebung dieser Steuer gemäß Gemeindeverordnung 13.701/03 ein.

Obgleich es sich hierbei nicht um ein neues Thema handelt, ist es doch verschiedenen Unternehmen gelungen, auf gerichtlichem Wege die Abführung dieser Steuer auf Dienstleistungen, die ihren Ursprung im Ausland haben oder deren Erbringung im Ausland eingeleitet wurde, aufzuheben.

Es ist hervorzuheben, dass die zugunsten dieser Unternehmen ergangenen gerichtlichen Entscheidungen die brasilianische Bundesverfassung zugrunde legten, welche die Befugnis der Gemeinden zur Steuererhebung auf die innerhalb der jeweiligen Gebietsgrenzen der Gemeinde erbrachten Dienstleistungen beschränkt.

Somit sind die Präzedenzfälle der Rechtsprechung zweifelsfrei im Sinne der Unmöglichkeit der Steuererhebung auf Import von Dienstleistungen zu verstehen, da dies einen Verstoß gegen das Gesetz des Territorialitätsprinzips darstellt.

Diese Entscheidungen haben in der Praxis zur Folge, dass die kommunalgesetzlichen Bestimmungen, die den Dienstleistungsnehmer als Verantwortlichen für die Einbehaltung und Abführung der ISS an der Quelle vorsehen, aufgehoben werden.

Andererseits werden durch die gerichtlichen Entscheidungen, welche die Verpflichtung aufheben, die ISS, die auf Import von Dienstleistungen beruhen, an der Quelle einzubehalten, lediglich diejenigen Unternehmen begünstigt, die ein gerichtliches Verfahren eingeleitet hatten, so dass die übrigen Unternehmen, die Dienstleistungen importieren und beabsichtigen, auf dem Rechtsweg die Verpflichtung zur Einbehaltung der ISS anzufechten, eine individuelle gerichtliche Maßnahme mit Antrag auf einstweilige Verfügung einleiten sollten.

Tendenzen in den Bereichen Governance, Risiken und Compliance – GRC

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Seit dem Gesetz Nr. 12.846/13 – Antikorruptionsgesetz - ist das Thema Compliance in Brasilien Teil jeder Agenda privater und öffentlicher Unternehmen, das Führungskräfte zu Recht ebenso beschäftigt wie die Schlagzeilen über Skandale in Unternehmen unterschiedlicher Größe und aus unterschiedlichen Branchen.

Gesetzgebung und Rechtsprechung senden klare Signale eines stärker werdenden Drucks. Im Bereich der Gesetzgebung wurde etwa das Gesetz 13.303/16 erlassen – Gesetz der Haftung staatlicher Unternehmen - sowie die Gesetze der Bundesländer Rio de Janeiro (7.753/17) und Pernambuco (16.309/18), einschließlich des Bundesdistrikts (6.112/18), über Antikorruption und die Verpflichtung zur Implementierung von Integrität/Compliance-Programmen von Unternehmen, die Verträge mit der öffentlichen Hand des Bundes dieser Einheiten abschließen wollen. Eine andere rechtliche Neuerung sind die Straftatbestände der privaten Korruption in der Diskussion der Arbeitsgruppe für die nationale Strategie der Bekämpfung der Korruption und der Geldwäsche – ENCCLA, unter der Koordation des Justizministeriums. Bei den Gerichten lässt sich die erste strafrechtliche Verurteilung wegen Insidertrading durch den Supremo Tribunal Federal – STF (bras BVerfG) aus dem Jahr 2017 nennen, durch die ein Präzedenzfall für weitere Verurteilungen in diesem Bereich geschaffen wurde.

Im Hinblick auf die Technologie stehen die Unternehmen wegen der Erweiterung der Nutzung neuer Technologien, einschließlich des sogenannten *Internet of Things - IoT*, der Notwendigkeit der Innovation, der elektronischen Verwaltung von Normen, Cybercrimes, Blockchain, Bitcoins sowie die Verfahren der Informationssicherheit bei der Anpassung der internen und politischen Prozesse vor enormen Herausforderungen.

Am 28/05/18 ist die Datenschutz-Grundverordnung der Europäischen Union (*General Data Protection Regulation – GDPR*) in Kraft getreten, die auf Unternehmen der ganzen Welt mit Präsenz in Europa gerichtet ist, die Daten von Einzelpersonen, Unternehmen oder Organisationen sammeln oder verarbeiten. Die Unternehmen, die die in der Regelung genannten Voraussetzungen erfüllen, müssen Datenschutzsysteme implementieren, Strukturen für die unverzügliche Meldung eventueller Verletzungen an die Behörden schaffen, einen Fachmann oder Handelspartner ernennen, der die Funktion des *Data Protection Officer – DPO* übernimmt und weitere in der Regelung genannte Maßnahmen ergreifen.

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Sogenannte „Nonkonformitäten“ können zur Verhängung von Bußgeldern in Höhe von bis zu €20 Millionen oder 4% des weltweiten Jahresumsatzes führen, je nachdem, welcher Betrag höher ist. Selbst Unternehmen, die nur in Brasilien tätig sind, müssen die entsprechenden Anpassungen an das *GDPR* vornehmen.

In Brasilien haben in den letzten Wochen zwei Meldungen den Blick auf Risiken durch Dritte in den Geschäftsbeziehungen gelenkt. Der Markt- und Aktienwert des Unternehmens BRF hat aufgrund von Manipulationen durch Mitarbeiter und Labore erhebliche Einbußen hinnehmen müssen. Die zweite Meldung betraf die nicht autorisierte Veröffentlichung intimer Fotos der Schauspielerin Paolla Oliveira durch einen selbständigen Kameramann, der von einer mit dem Fernsehsender Rede Globo zusammenarbeitenden Produktionsfirma beauftragt wurde. Beide Fälle demonstrieren die zunehmende Bedeutung der Kontrolle Dritter und der Verluste, die dadurch für Ansehen und Ruf von Unternehmen und Personen entstehen können.

Governance, Risikoverwaltung, interne Kontrollen und der Compliance jeglicher Organisation anzupassen und zu stärken ist ebenso fundamental und notwendig wie die Schaffung von Differentialen für die Wettbewerbsfähigkeit und Bewahrung des Ansehens und des Rufs in den Märkten, in denen diese tätig sind. Und der Moment hierfür ist jetzt!

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

Gerichtsstandsklausel in internationalen Verträgen und die Grenzen der brasilianischen Gerichtsbarkeit

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Die Grenzen der brasilianischen Gerichtsbarkeit und der internationalen Zusammenarbeit sind in der Zivilprozessordnung, Gesetz 13.105 / 2015 (CPC), sowie im Gesetz zur Einführung in die Vorschriften des brasilianischen Rechts (LINDB), Gesetzesverordnung Nr. 4.657/1942 geregelt.

In einigen Fällen ist die Zuständigkeit der brasilianischen Gerichte absolut und wirft keine Zweifel auf, beispielsweise, wenn der Beklagte unabhängig von seiner Staatsangehörigkeit seinen Wohnsitz auf brasilianischem Territorium hat, die Verpflichtung in Brasilien erfüllt werden muss oder das Geschehen sich in Brasilien ereignet hat oder die Handlung hier in Brasilien praktiziert wurde. In solchen Fällen können die Parteien keinen anderen Ort wählen. Die Zuständigkeit für die Entscheidung eines möglichen Streitfalls liegt bei der brasilianischen Justiz.

In Bezug auf die internationale konkurrierende Zuständigkeit gab es häufig Meinungsverschiedenheiten, aber mit dem Inkrafttreten der neuen Zivilprozessordnung gibt es eine Tendenz zu einem breiten Einvernehmen, da die Regel der Wahl eines ausländischen Gerichtsstandes klarer geworden ist und von der brasilianischen Justiz angewendet wird. Das heißt, wenn die Parteien ein ausländisches Gericht wählen, wird der Prozess in dem gewählten Land analysiert und beurteilt werden.

Nach dem bisherigen Verfahrensrecht vertrat die brasilianische Justiz die Auffassung, dass, selbst wenn es in einem internationalen Vertrag eine Klausel der Wahl eines ausländischen Gerichts in einem internationalen Vertrag gab, die Zuständigkeit für die Prüfung und Entscheidung der Klage in Brasilien lag. Die ausländischen Unternehmen legten dagegen die Einrede der Unzuständigkeit ein, aber die brasilianische Zuständigkeit setzte sich bei den Gerichten durch.

In manchen Situationen erlaubt das Gesetz, dass die Parteien die Zuständigkeit ändern, die sogenannte „relative Kompetenz“, dh es gibt eine konkurrierende Zuständigkeit zwischen der nationalen und der ausländischen Justiz. In solchen Fällen kann über die Klage an dem von den Parteien festgelegten und vereinbarten Ort entschieden werden. Die relative Kompetenz ist nur anwendbar, wenn private und abdingbare Interessen involviert sind und gilt nicht für nicht abdingbare Rechte und öffentliches Interesse.

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Die Parteien können im gegenseitigen Einvernehmen das Gericht wählen, in dem die Rechte und Pflichten geltend gemacht werden (Artikel 63 CPC), indem sie eine Klausel der Wahl des Gerichts in den Vertrag aufnehmen. Die Freiheit der Parteien ist jedoch nicht absolut, da es Rechtsvorschriften gibt, die nicht aus Gründen der Zweckmäßigkeit der Beteiligten überschritten werden dürfen.

Wenn in einem internationalen Vertrag eine Ausschließlichkeitsklausel für ausländische Gerichte enthalten ist, ist das brasilianische Gericht nicht befugt, den Rechtsstreit zu analysieren und zu entscheiden. Territoriale Unzuständigkeit muss als Vorfrage der Klageerwiderung geklärt werden, dh in dem ersten Moment, in dem sich der Beklagte im Prozess äußert (Artikel 25 CPC).

Die brasilianische Lehre und Rechtsprechung argumentieren, dass im Falle der Wahl eines ausländischen Gerichts unter Ausschluss der brasilianischen Gerichtsbarkeit, der Ausschluss respektiert werden muss. Diese Bestimmung wird durch die Verfügung 335 des Obersten Gerichtshofs bestätigt, die lautet: „Die Klausel der Wahl des Gerichtsstandes ist gültig für die Prozesse, die sich aus dem Vertrag ergeben."

In einem kürzlich vom Gericht von São Paulo entschiedenen Rechtsstreit, an dem ein brasilianisches Unternehmen und ein deutsches Unternehmen aufgrund eines internationalen Vertrags mit einer Klausel einer Gerichtsstandswahl in Deutschland beteiligt waren, wurde die Unzuständigkeit der brasilianischen Gerichte aufrechterhalten und das Verfahren ohne Urteil in der Sache eingestellt. Das brasilianische Unternehmen muss das Verfahren einem deutschen Gericht in Deutschland vorlegen, wenn es eine richterliche Entscheidung wünscht.

Die Entscheidung wurde mit dem Fehlen der Materie begründet, deren Analyse ausschließlich den brasilianischen Gerichten obliegen würde, und überdies muss die ausländische Gerichtsstandsklausel respektiert werden, da der Vertrag von gleichgewichtigen juristischen Personen geschlossen wurde. Der Vertrag beinhaltete hohe finanzielle Beträge und es gab keine Unterlegenheit des brasilianischen Unternehmens, die die Abwahl des gewählten deutschen Gerichtsstands gerechtfertigt hätte. Die erstinstanzliche Entscheidung wurde vom Gerichtshof in São Paulo bestätigt und der Prozess wurde eingestellt.

Die Gerichtsstandsklausel ist ein wesentlicher Punkt in jedem nationalen oder internationalen Vertrag. Damit diese Klausel Rechtswirkung hat, muss sie ausdrücklich in einem schriftlichen Dokument enthalten sein und direkt mit einem bestimmten Rechtsgeschäft verbunden sein. Andernfalls ist sie nicht gültig und kann von den Gerichten abgelehnt werden.

Stellt das Gericht fest, dass die Gerichtsstandsklausel missbräuchlich ist, kann es die Klausel von Amts wegen und vor der Ladung des Beklagten für unwirksam erklären und den Prozess an den Wohnsitz des Beklagten verweisen.

Wenn der Richter die Zuständigkeit anerkennt und die Ladung des Beklagten festlegt, ist es Sache des Letzteren, die Unwirksamkeitserklärung oder Ungültigkeitserklärung der Gerichtswahl zu beantragen. Dafür muss er nachweisen, dass die Klausel missbräuchlich ist, oder dass der andere Vertragspartner stark unterlegen ist, ein Verbraucherverhältnis besteht oder ein anderes rechtliches Hindernis vorliegt, das der Legitimität, Gültigkeit und Wirksamkeit der Klausel entgegensteht.

Die neue Zivilprozessordnung ist recht innovativ im Hinblick auf den wachsenden Trend der internationalen Beziehungen, und verleiht den Verträgen zwischen in- und ausländischen Unternehmen mehr Rechtssicherheit.

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Der Ausgleich von Bilanzverlusten brasilianischer Gesellschaften durch Kredite ausländischer Gesellschafter

Die Gesellschafter einer Gesellschaft haben Vermögensrechte, z.B. den Anspruch auf Gewinne und den Anteil am Liquidationserlös, und Vermögenspflichten, u.a. die Pflicht zur Erbringung der Stammeinlage. Gemäß den brasilianischen Gesetzen, i.e.S. dem Zivilgesetzbuch (Gesetz Nr. 10.406/02) und dem Aktiengesellschaftengesetz (Gesetz Nr. 6.404/76) sind die Gesellschafter nicht zum Ausgleich der Verluste einer Gesellschaft verpflichtet. Trotzdem dürfen die Gesellschafter, solange Verluste in der Bilanz dargestellt werden, von der Gesellschaft keine Dividenden oder andere Werte erhalten.

Normalerweise können die Verluste durch Gewinne oder Kapital ausgeglichen werden. Da die Gesellschafter in Gesellschaften mit beschränkter Haftung und in Aktiengesellschaften ihren Anteil an Gewinnen und Verlusten der Gesellschaft haben, werden sie in diesen Fällen durch den Ausgleich anteilmäßig betroffen.

Eine andere Möglichkeit des Ausgleichs liefert Artikel 64, Paragraph 3 der Gesetzesverordnung Nr. 1.598/77. Dieser erwähnt allerdings neben dem Ausgleich durch Gewinne und Kapital auch den Ausgleich durch Sollbuchung eines entsprechenden Betrags auf einem Kreditkonto des Gesellschafters (z.B. ein Darlehen der Gesellschafter an die Gesellschaft). Dieselbe Vorschrift findet sich auch im Artikel 509, Paragraph 3 der Gesellschaftssteuerregelung (RIR).

Der Ausgleich der Bilanzverluste durch einen Kredit des Gesellschafters kann als eine Kapitalerhöhung angesehen werden. In diesem Fall verzichtet der Gesellschafter auf seinen Kredit gegenüber der Gesellschaft und braucht keine zusätzlichen Werte als Kapital einzulegen. Dabei belasten die Verluste nur diesen Kreditgeber, während die anderen Gesellschafter nicht betroffen werden.

Die brasilianischen Steuerbehörden haben bereits entschieden, dass die Abbuchung eines Kredits des Gesellschafters zum Ausgleich der Verluste der Gesellschaft nicht als Einkommen für die Gesellschaft zählt, so dass deswegen keine Steuer zu erheben sind.

Dabei stellt sich die Frage, ob diese Form des Ausgleichs auch möglich ist, wenn der Gläubiger ein ausländischer Gesellschafter ist und ein ausländischer Kredit abgebucht wird.

Tatsächlich werden das ausländische Kapital und die Währungsaustauschgeschäfte von der brasilianischen Zentralbank kontrolliert, und sowohl ausländische Darlehen und Kredite als auch das in brasilianischen Gesellschaften investierte ausländische Kapital müssen bei der Zentralbank registriert werden.

Die Registrierung wird heutzutage elektronisch auf der Internetseite der Zentralbank erledigt. Die Überweisung von Werten ins Ausland von brasilianischen Schuldnern müssen durch Währungaustauschgeschäfte von Banken ermittelt werden.

Früher war in den von der Zentralbank veröffentlichten Regelungen ein Code für den Ausgleich der Verluste vorgegeben. Dieser Code erlaubte die Formalisierung gleichzeitiger Währungsaustauschgeschäfte, damit die brasilianische Gesellschaft die symbolische Rückzahlung des Kredits an die Gesellschafter und die symbolische zusätzliche Einlage des Gesellschafters als Ausgleich der Verluste durchführen konnte.

Dieser Code wurde aber seit Dezember 2013 gestrichen, was dazu führte, dass man die erwähnten gleichzeitigen Währungsaustauschgeschäfte nicht mehr formalisieren konnte. Demzufolge war es nicht mehr möglich, die Registrierung des ausländischen Kredits durch symbolische Rückzahlung zu beenden und die Registrierung des ausländischen Kapitals zu aktualisieren.

Obwohl die Zentralbank den Ausgleich der Verluste durch Kredite ausländischer Gesellschafter nicht ausdrücklich verboten hatte, konnte man die Streichung eines passenden Codes de facto als ein Hindernis für diese Praxis verstehen.

Doch neulich erfolgte eine Anweisung der Zentralbank dahingehend, dass derartige Ausgleiche stattfinden dürften und dass es keiner gleichzeitigen Währungsaustauschgeschäfte bedürfe. Notwendig sei lediglich, die Registrierung des ausländischen Kredits ohne Rückzahlung zu beenden und die Registrierung des ausländischen Kapitals durch die Erklärung der Werte der Eigenkapitalkonten nach dem Ausgleich zu aktualisieren. Als Grund für diese Anweisung wurde angegeben, dass das Gesetz diese Möglichkeit des Ausgleichs ausdrücklich erlaube.

Obwohl die Anweisung der Zentralbank nur informeller Natur war, ist diese Form des Verlustausgleichs nun wieder überlegenswert und dürfte sich in manchen Fällen als eine gute Lösung nicht nur für die brasilianische Gesellschaft, sondern auch für den ausländischen Gesellschafter erweisen.

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New ancillary obligation: EFD-REINF

It is commonly known that doing business in Brazil is bureaucratic and expensive, also due to the fact that time to declare taxes is exceptionally high when compared to other countries worldwide. Such is true, as Brazilian Federal Revenue in the past years has been investing billions of Reais on IT solutions and digital environment, to increase its fast and precise collection abilities - *even one of the super computers developed by the Federal Revenue is affectionately nicknamed as "T-Rex", due to its omnipotence*. The consequences, among others, was to transfer to the taxpayer the burden to declare taxes under very strict rules, following unique and specific digital formats, which compels enterprises in Brazil to spend more on IT solutions and administrative workforce. So, once again, the Brazilian Federal Revenue increases its capability of cross-checking information, by establishing a new ancillary obligation called "EFD-REINF".

Instituted by Normative Instruction 1.701/2017, which was amended on December 2017, the EFD-REINF – Fiscal Digital Bookkeeping of Withholding and other Tax Information is a new mandatory statement which is part of one of SPED Modules (Public System of Digital Bookkeeping), in force already for 2018, as better detailed below.

The EFD-REINF includes most of taxpayers' withholdings without employment contract. It is worth mentioning that in Brazil, since 2003, it is being implemented digital solutions for the integration and sharing of registry and tax information.

In the first wave of implementation, the EFD-REINF shall substitute the GFIP (ancillary obligation that discloses information to social security) regarding social security tax obligations not included in the E-Social (system of public government that collects labor, social security and tax information, aiming to reduce bureaucracy and asymmetry of information between enterprises and employees). In a second moment, it is expected that EFD-REINF also substitutes the Withholding Income Tax Statement (DIRF).

Amongst the main information to be submitted through EFD-REINF, it is highlighted that following information must be disclosed:

- Services taken and rendered through civil construction arrangements;
- Withholdings of corporate income taxes and social contribution payments of IRPJ, CSLL, COFINS and PIS/PASEP;
- Amounts related to the Gross Revenue Social Contribution (CPRB); and
- Sale of production and determination of social security contribution substituted by agribusiness conducted by legal entities (not individuals).

While the EFD-REINF must be submitted on a monthly basis until the 15th day of the following month that the accounting entry refers to, the schedule for implementation and entry into force of this new obligation is also phased according to enterprises level of operation, namely:

- May 2018 (first delivery on June 2018) for Legal entities with gross revenue greater than BRL 78 million in 2016;
- November 2018 (first delivery on December 2018) for other legal entities and individuals that have employees.
- May 2019 (first delivery on June 2019) for some specific public bodies;

It is worth noting that for those who fail to attend the deadline of EFD-REINF, the penalty foreseen could reach up to BRL 1.500,00 per fraction or month. For the event of omission of financial operations, incomplete or inaccurate disclose of information, the penalty applied is of 3% of the amount of the mentioned financial operation.

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General data protection law comes into force in Brazil

In line with the worldwide trend to properly regulate the processing of personal data of individuals, on August 15, 2018, Bill of Law No. 13,709/2018, or General Data Protection Law (LGPD), as it has been called, was published in Brazil.

With clear inspiration in the recent European General Data Protection Regulation - GDPR, the LGPD will come into force 18 months after its publication, or in other words, in February 2020. The law seeks, precisely, to regulate and delimit the treatment of personal data, from its collection, through the use, storage, sharing, until its exclusion, whether by natural persons or legal entities under public or private law.

Although the term in question seems to be extensive, not requiring immediate action, the reality may not be exactly that. As example, in recent months, European companies have experienced great difficulties in complying with GDPR, even though they had a much longer period to adjust to the new requirements.

But what is the purpose of the law, and its main points? Let us highlight some of them:

- **What is personal data?** Any piece of information that allows the identification of a natural person, such as name, document numbers, addresses and even more complex information such as personal interests, most visited pages on the internet, purchases recently made or even places where someone personally was.
- **What is sensitive data?** Information such as religion, political leanings, ideologies, health characteristics or sexual preferences are listed as restricted, requiring special authorization from the person and that should not, in any way, be used for purposes that could lead to discriminatory situations.
- **What formalities must be adopted?** The law also requires a registered authorization of the individuals whenever their data is collected and stored and the companies shall also offer tools that allow the users to access all of their eventually catalogued data, as well as correct them, request their deletion, request to send them to another supplier (portability), or keep them anonymous. Registry and documentation of such authorizations is of utmost importance.

- **Is it limited to digital data?** The scope of the law will not be limited to the digital data since its provisions include physical data files. In this way, Human Resources departments of companies (labor relations), customer registries in shops, filming, voice recordings or even clubs that collect basic data of their members should also comply with the provisions of the LGPD.
- **How does it work with international transfer of data?** It shall be permitted, in some specific cases, to countries with "adequate" level of data protection, and if the parties adopt some standard contract clauses, certificates, or follow specific regulations to receive an approval by the protection authority (not defined yet).
- **Is it necessary to evidence data protection?** It will not suffice to properly protect its own database. It is essential to document what is done by the company, by demonstrating data protection routines.
- **What preventive measures can be adopted?** It is highly recommended to implement data protection programs, such as encryption in the case of electronic data. And, of course, to provide means to document and record everything that will be done, as a preventive way to defend in a potential investigation. If any kind of leaks occurs, it should be informed to the protection authority (yet to be defined by the Government) and, in some cases, to the individuals directly affected.
- **What is the role of the Data Protection Officer?** The law also requires that companies appoint a Data Protection Officer, a person who will be in charge of protecting files containing personal data and responsible for all the company's routines that guarantee the protection of such data. This person should have direct access to the managers, document the actions taken by the company regarding data protection, and will be responsible to implement data protection programs. In some cases this person will also be responsible to enable the issuance of the so-called "Impact Report on the Protection of Personal Data" to the protection authority, which should contain a description of the processes using personal data, as well as measures and mechanisms for risk reduction. Naturally, proper training of this professional is of the utmost importance.

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- **What penalties are the companies exposed to?** For those who fail to comply with legal requirements, liability can be quite severe. In the event of data leak, it will not matter that this was caused by a hacker or another subcontracted company, the responsibility will be full of all involved in the filing and manipulation of the data, even if its main activity has no relation with computer or IT. The penalties that may be applied to those who violate the provisions of the law range from warnings, publication of infractions, forceful data elimination, to fines that may reach 2% of the company's annual revenues, limited to fifty million Brazilian Reais (BRL 50,000,000.00).
- **The Regulatory Agency veto. What happens next?** One central point of the law, however, received a veto by the President of the Republic, i.e., the creation of a regulatory agency, which would be in charge of enforcing the law, supervising the sector, creating rules and applying penalties. President Michel Temer has promised to give priority to the creation of this regulatory agency in the preparation of the next annual budget. However, being year of elections, it is possible that it ends up being a task to be executed by the next President of the Republic.

The most important question now surely is: **How can companies already start working towards complying with the new rules?**

1. Appoint the Data Protection Officer as soon as possible;
2. Start reviewing all internal procedures that use data from natural persons;
3. Reassess all the personal data that are normally required;
4. Implement mechanisms of authorization of obtaining personal data, archiving and management the permission to change such data and, also, making it possible exclusion requests.

Experts are unanimous in saying that the law is a milestone for the country, paving the way for greater legal certainty for companies and national industry. It is a fact that many companies, based on the recent experience of European GDPR, have already started the race to adapt their internal procedures to the new legislation. The recommendation is not to leave for the last moment, thus avoiding potential damages and disruptions to the production chain.

A general overview of the administrative and civil liabilities of legal entities in Brazil

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By means of this article we intend to provoke some thoughts regarding the liabilities that company managers can have, which may imply administrative and civil sanctions due to certain laws, such as the Administrative Improbity Law (Law No. 8429/1992) and the Anti-Corruption Law (Law No. 12.846/2013).

This subject is extremely relevant and current, considering that the Brazilian Security Commission ("CVM") is now analyzing the actions taken by Petrobras' managers and administrative council, for allegedly acting without taking the proper and expected care when invested with such responsibilities during the purchase of Pasadena oil refinery.

In almost every economic sector, corporate executives usually need to decide about matters that require specific technical knowledge which must be considered before approving relevant operations that deal with large sums of money.

In this sense, management approvals without previous technical assessments to support them may create liabilities for being negligent or causing an agency problem. Such practices can also suggest more serious irregularities, such as fraudulent schemes or briberies.

It is undeniable that the Anti-Corruption Law changed the common course of managerial actions when it began allocating strict liability to the companies which somehow contributed to the practice of corruption in its favor. This law also provided that the company managers will share the liability via a fault-based system.

Additionally, the Administrative Improbity Law also came up with a fault-based liability system when treating other individuals who also contributed to the illicit to their own advantage.

In a quick glance, we may think that only the ones who effectively take action could be liable for the illicit; however, some individuals who somehow took part on the corporate decision can also be accountable for such actions, as we will see.

Regardless of how the real case mentioned above turns out, this article will explain the duties and liabilities that incur on: (i) the managers; (ii) the members of the administrative council; and, at last, (iii) the controlling shareholders of a company.

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At first, it is important to consider the dual composition of the Brazilian entities, which entrusts the management of the corporations to both an administrative council and a board of directors, each one with specific competences granted by law or by the company's acts. Both entrusted bodies need to follow the guidelines of the controlling shareholders, especially in relevant decisions.

In a limited liability company, the managers are liable for all the company's decisions, and for this reason they must act within the general requirements of care and diligence that a regular person must follow whenever doing business. If the bylaws do not provide specific management rules, the director can take all the necessary actions to manage the company. Decisions taken by misusing power, by abusing the authority granted by the bylaws, or by taking actions which are dissociated with the company's business, may be opposed by the other managers and decision-makers, excluding their responsibilities.

Managers and members of the administrative council have certain duties and responsibilities provided by the Brazilian corporation law. The first and most important duty is the diligence, i.e., the officer must employ all the care and diligence expected of an industrious and honest person as usually employed in the administration of his or her own affairs, avoiding any action that can jeopardize the company and its assets, even if prompted with receiving direct or indirect advantages.

All the other duties applied to the corporation's managers are resultant of the duty of diligence explained above: loyalty, to inform the shareholders, and to not take any action in case an agency problem is acknowledged.

Such duties may be imposed on both managers and members of the administrative council, since such bodies are liable for the actions taken by the company. The directors represent the company before third parties, executing the documents to effectively operate its business, while the council is responsible for establishing the general strategy for the corporation's business and for supervising the directors' performance, examining the books and records at any time.

Moreover, the council members may be subject to administrative and civil sanctions provided by the Anti-Corruption Law, should their actions be deemed illegal. For such reason, implementing compliance procedures to review corporate decisions seems to be the proper way to mitigate the eventual risk of being involved in such decisions.

Certain investigative compliance procedures are able to assist the executive bodies to detect non-compliant practices and provide them with a number of

possibilities to amend the specific breach.

At last, we may comment on the liability allocated to the shareholders due to actions taken by the corporation directors.

Brazilian corporate law provides that the controlling shareholder shall have duties and responsibilities towards the other shareholders, those who work for the corporation and the community in which it operates.

Such liabilities are very common whenever foreign companies settle their branches in Brazil and keep their management abroad, hence it approves the actions to be taken by the managers and directors. This close control pursued by the shareholders can also contribute with the distribution of the liabilities among the shareholders, including the civil and administrative accountabilities brought by the Anti-Corruption law.

For such reasons, compliance measures must be secured in order to increase the flow of relevant information to the shareholders and members of the council, such as proper investigative procedures and certain technical devices which provide the managers with a good overview of all actions taken by the managers during the course of the business activities.

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The Brazilian Innovation Law and Decree No. 9.283/2018

The Brazilian Innovation Law (Law No. 10.973 of December 2, 2004), based on the French and North-American legislations, was a first and very important step for the increase of investments in science and technology in Brazil, changing significantly the legal framework related thereto. However, due to the economic crisis in the following years Brazil has decreased several positions in the Global Ranking in Innovation of INSEAD, being currently in the 69th position. In fact, such rules already exist for some time in countries like China, India and South Africa. Many companies were also obtaining collaboration abroad because the Brazilian legislation did not allow or regulate a collaboration with universities and public entities.

Therefore, in February 2018, Decree No. 9.283 (*"Marco Legal da Ciência, Tecnologia e Inovação"*) was issued in order to adjust, update, regulate and detail the provisions of the Innovation Law. It does also change and regulate provisions of certain other laws, such as Law No. 13.243, of January 11, 2016 which provides for incentives to the scientific development, research, scientific and technological training and innovation.

The economic development of a country depends on the promotion of its scientific and technological activities, the strengthening of entrepreneurs and start-ups, and the elimination of the existing obstacles to investments. The legal and institutional support is essential to help to construct a favorable environment for the innovation culture.

The recent Decree is the result of a discussion occurring during many years in the scientific community, and the intention was to eliminate the bureaucracy involved in the research and development activities, as well as several legal difficulties, providing more flexibility. It is a mechanism to integrate scientific and technology institutions with business companies in general, allowing the increase of the investments made by private entities in research.

Nowadays, with the Decree, the direct and indirect public administration may create and develop incentives and support strategic alliances and the cooperation related to research and development projects involving business companies (Brazilian or foreign companies) and non-profit organizations, for the generation of innovative products, processes and services and the transfer of technology.

One of the main modifications introduced by the Decree was the creation of multiple alternatives for the creation of such strategic alliances.

According to the Decree, the entities pertaining to the direct and indirect public administration may also participate, as a minority shareholder, in the capital stock of business companies with the purpose of developing innovative products and processes which are in accordance with the guidelines and the priorities defined in the scientific, technology, innovation and industrial development policies. This investment may be made directly in the business company, with or without the co-investment of the private investor, or indirectly, through investment funds created with their own or third-party funds.

This is an extremely important change. The knowledge generated in the State University of Campinas (Unicamp), one of the best universities in Brazil and in Latin America, has already generated the creation of more than 500 companies, which revenues are of approximately R$ 3 billion. If Unicamp had a corporate participation in such entities, the results could be even better. With this type of regulation it will be possible to transfer the knowledge generated basically in public institutions and universities to the market.

Another new measure implemented by the Decree has been the creation of an additional mechanism for the financial assistance of small and medium-size companies (start-ups) – the "technology bonus" - which is a financial support granted by public institutions and destined to the payment of the use or sharing of research infrastructure or for contracting specialized technology services, in order to help new companies to produce research and development. The companies receiving such technology bonus will have certain financial or non-financial retribution, as set forth by the granting entity.

Technology bonuses, as well as scholarships and general financial support to the benefit of individuals shall be granted through the execution of the relevant Granting Instrument (*"Termo de Outorga"*). In addition, the Decree also sets forth other legal instruments to formalize the incentive to innovation, such as partnership agreements (*"parcerias"* - without the transfer of public resources to the private partner), agreements (*"convênios"* - with the transfer of public resources to the private partner) and technological orders (*"encomenda tecnológica"*), being this last modality a very usual instrument outside of Brazil.

There are several other specific provisions in the Decree, such as those related to the ownership, exploitation and transfer of intellectual property rights, to facilitate and simplify the importation of products and equipment, related to the adoption of control rules based on evaluation of projects and their results, etc., aiming at simplifying the general procedures related to the management of scientific and technological projects.

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Certain institutions and Brazilian States (such as the State of São Paulo) already had specific rules to be followed on the matter. In the State of São Paulo, for example, the legislation had already set forth the participation of public entities in research and development business companies. However, the Innovation Law and the Decree No. 9.283 provided more legal safeguards for the creation of such cooperation between public and private entities and extended it to the entire country.

Now it is necessary to test and evaluate the developments occurred based on the referred Decree and keep discussing with all parties involved in order to guarantee the continuance of the improvement of the legal rules applicable to innovation in Brazil.

*Autor der Publikation ***So geht's Tax Incentives in Brasilien***

New rules applicable to public offerings in Brazil

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The new Rule no. 601 of the Brazilian Securities Commission (Comissão de Valores Mobiliários – CVM) entered into force as of August 24, 2018. CVM Rule no. 601 changes certain provisions of CVM Rule no. 400, applicable to public offering subject to prior registration before the CVM, and CVM Rule no. 476, applicable to public offerings with restricted placement efforts, which are exempt of prior registration before the CVM.

In registered public offering, greenshoe options may now only be granted and exercised in connection with stabilization activities of the offered securities, which means they no longer may be exercised as an over-allotment option in the event of excess demand during the offer.

As for restricted offerings, the main changes brought by CVM Rule no. 601 are the following:

- **What is the role of the Data Protection Officer?** The law also requires that companies appoint a Data Protection Officer, a person who will be in charge of protecting files containing personal data and responsible for all the company's routines that guarantee the protection of such data. This person should have direct access to the managers, document the actions taken by the company regarding data protection, and will be responsible to implement data protection programs. In some cases this person will also be responsible to enable the issuance of the so-called "Impact Report on the Protection of Personal Data" to the protection authority, which should contain a description of the processes using personal data, as well as measures and mechanisms for risk reduction. Naturally, proper training of this professional is of the utmost importance.
- The lead underwriter or the type, series, or class of the offered securities may no longer be changed in the course of the offering;
- Price stabilization activities of the offered securities are now permitted, as long as the stabilization agreement contains certain minimum provisions set forth by the entity managing the organized markets where the securities are traded;

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- The offeror may grant a greenshoe option to an intermediary institution, to the limit of 15% of the total amount of offered securities, in connection with stabilization activities of the offered securities, and shareholders will not be entitled to priority rights over any primary tranche of such greenshoe option exercise;
- The 90-day lock-up following the underwriting or acquisition date of the offered securities is no longer applicable to:

  ✓ shares, subscription warrants, shares deposit receipts and securities deposit receipts related to the sponsored BDR Level I, II, and III, and

  ✓ commercial notes, non-convertible debentures, certificates of real estate or agribusiness receivables and financial bills, as long as they are not related to active linked transactions, and, in any case, only in connection with the exercise of firm guarantee of placement, in which case an investor acquiring such securities remains subject to the lock-up for the remainder of the original 90-day period.
- Securities acquired by an intermediary institution in the context of the exercise of firm guarantee of placement may be transferred to other investors at the offering price adjusted by the curve price variation (i.e. interests and price index);
- Shareholders may no longer assign or otherwise transfer priority rights in the underwriting of shares, subscription warrants, convertible debentures or deposit receipts of the foregoing securities in the context of a restricted offering;
- Shareholders may establish a maximum underwriting price when exercising priority rights in a restricted offering, in case the exercise of such priority right occurs before the offering pricing date;
- A restricted offering may now last for a maximum period of 24 months;
- Issuers and/or offerors may not carry out another public offering of the same type of securities for a four-month period in case an existing offering of such securities is cancelled (such restriction was formerly applicable only when an offering successfully closed).

CVM Rule no. 601 also brought other changes related to the disclosure of financial statements and material fact notices by private issuers, as well as other obligations applicable to the issuers, intermediary institutions and their officers.

Should you have any questions about the new rules, feel free to contact us.

Superior Court of Justice of Brazil (STJ) standardizes its decisions and establishes a limitation period of ten years for filing a lawsuit related to contractual's events of default.

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The statute of limitation in Brazilian law has the purpose to limit the exercise of a right in a certain period of time. If there was the possibility of exercising rights indefinitely in time, there would be social instability and legal uncertainty in business relations. Therefore, "the course of time, in greater or lesser lapse must place a stone on the legal relationship whose right was not exercised." [1]

Over the last two decades, the Superior Court of Justice of Brazil ("STJ") - the court responsible for standardizing the interpretation of federal laws in Brazil, following constitutional principles and the guarantee and defense of the rule of law - have discussed and changed their opinion consistently when it comes to the applicable limitation period for disputes relating to contracts.

This constant change of opinion occurred because the Brazilian Civil Code ("CC/2002") is not clear about the statute of limitation applicable file indemnification's lawsuits due to contractual infringement. Article 206, paragraph 3, Item V of the CC/2002 sets forth that the right to claim an indemnification expires in three years without clarifying whether that period refers to both types of indemnification (contractual infringement and torts).

In 2006, the 3rd Panel of the STJ stated that statute of limitations to file indemnification's lawsuits arising from a contract infringement would be three years (article 206 of the CC/2002).

In 2008, the 2nd Panel of the STJ ruled forty-four appeals on the same legal controversy. On that occasion, there was a change of opinion and it was established that the period of limitation would be ten years for indemnification's lawsuits due to contractual default, based on art. 205 of the CC/2002.

In that same year, the 5th Panel of the STJ established that the limitation period for such sort of claim would be - again - three years.

[1] VENOSA. Sivio de Salvo. Direito Civil: Parte geral. Volume 1 – 14. Ed – São Paulo: Atlas, 2014. P.585

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Between 2008 and 2011, the 4th Panel of the STJ ruled seven appeals applying the term of ten years for contractual liabilities. In the period from 2013 to the first half of 2016, it is noticed that there was a standard in the judgments of this Court, since in most them the ten-year period established by article 205 of the Civil Code was considered the right one.

However, as from the second half of 2016, a different opinion of the 3rd Panel of the STJ arose, in the sense that a three-year limitation period should be established to claim all sort of damages, including those arising from contractual infringement. In the judgment, the Court held that *"the term 'civil redress', mentioned in article 206, paragraph 3º, Item V of CC/2002, should be interpreted broadly, reaching both contractual liability (articles 389 to 405) and torts liability (articles 927 to 954)"*(REsp 1281594 / SP, 3rd Panel STJ, DJe 11/28/2016).

To end with this controversy, the 2nd Section of the STJ - which standardizes the discussions the private law interpretation (3rd and 4th) - decided in a trial held in June 2018 that the statute of limitations to discuss contractual default events is ten years from the date of default.

The aforementioned trial is about a lawsuit filed by investors of an investment club against the administrator, in which they alleged damages suffered as a result of non-compliance with the fund's by-laws, which is – according to Brazilian law - a liability situation due to contractual default. The investment club, on the other hand, argued that even if the suit was legitimate, investors' claim could not be pursued because it would already be barred by the statute of limitation- because the three-year deadline has already been expired.[2]

Tort liability establishes the general duty to repair damages which do not arise from a previously established contractual relationship. It would be, for example, the case of a traffic accident in which the victim pleads the compensation for damages.

When it comes to liability for contractual default, there is previously a contractual relationship between the parties that extends over time, usually preceded by approximation and negotiation. In such cases there is a degree of closeness between the parties and the duty to indemnify contractual liability is founded on the assurance of legitimate expectations between them.

The issue addressed in this text is of great relevance when it comes to discussing contractual breaches and events of default arising from business contracts, since the new position of the STJ establishes a much broader term to allow the possibility of disputes in court in arbitration of arising from breach of contract.

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

[2] Embargos Divergentes n° 1.280.825, 2ª Turma do Superior Tribunal de Justiça, DJe: 02/08/2018, pag. 26

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