Changes in the New Foreign Exchange Framework and its Impacts on Technology Contracts

02.12.2022 4 min read

Authors

Jana Fraccaroli

Related areas

Intellectual Property

Topics

Intellectual Property Patents Patent New Brazilian Foreign Exchange Market Legislation

Currently, it is necessary to record contracts related to license of use of industrial property rights (trademarks, patents, industrial designs and topography of integrated circuits), technology supply, technical and scientific assistance services and franchising before the National Institute of Industrial Property – INPI for the following purposes:

1. Legitimate the remittance of payments from Brazil to other countries as consideration for the licensed/supplied technology;
2. Allow the tax deductibility of the amounts paid by the Brazilian company receiving the technology as consideration for the licensing/supply; and
3. Produce effects before third parties.

The aforementioned types of contracts are required to be recorded/registered with the INPI and, subsequently, with the Central Bank of Brazil, in order to authorize the remittance of payments from Brazil to other countries as consideration for the right to use and exploit the licensed/supplied technology, and to enable the Brazilian company to perform the tax deductibility of the amounts paid (based on interpretation of art. 9 of Law No. 4.131/62 and art. 50 of Law No. 8.383/1991).

In addition, it is prohibited the remittance of royalties abroad resulting from these contractual modalities, between companies with corporate control (foreign parent company and Brazilian subsidiary), in an amount that exceeds the tax deductibility limits provided by the Ministry of Finance's Ordinance No. 436/58 (interpretation based on art. 14 of Law No. 4.131/62 combined with art. 50, sole paragraph, of Law No. 8.383/91).

However, these matters will undergo significant changes with the entry into force of the New Foreign Exchange Framework. This is Law No. 14.286/2021, published on December 29, 2021, which provides for the Brazilian foreign exchange market, Brazilian capital abroad, foreign capital in the Country and provision of information to the Central Bank of Brazil, and will come into force as of December 30, 2022.

Among the main changes, it is speculated that the requirement for recordal/registration of the aforementioned types of contracts before the INPI and the Central Bank of Brazil, in order to enable the remittance of payments from Brazil to other countries, may cease to exist. This is because arts. 22 and 24 of the New Foreign Exchange Framework, which amend art. 9 of Law No. 4.131/62 and art. 50 of Law No. 8.383/1991, do not mention the obligation to present the documents related to the transaction to the Central Bank of Brazil for remittance purposes, as provided for in the wording of the provisions of the previous Laws. According to the wording provided for by the new Law, the only requirement will be the submission of evidence of payment of income tax, if applicable.

In this regard, it is believed that the remittance of payments abroad will be allowed regardless of any recordal/registration of the respective contract before the INPI and the Central Bank of Brazil. Such registration would then be necessary only for tax deductibility purposes of the amounts paid by the Brazilian company.

In addition, the New Foreign Exchange Framework provides for the revocation of art. 14 of Law No. 4.131/62 and of the sole paragraph of art. 50 of Law No. 8.383/91, whose joint interpretation limits the remittance of royalties between companies with corporate control to the maximum limits of tax deductibility established by Ordinance 436/58.

Thus, the remittance of royalties between a Brazilian subsidiary and its foreign parent company in an amount exceeding the tax deductibility limit will be allowed, and the parties will be free to negotiate and agree on the royalty percentages they deem appropriate according to market practices. The maximum limits established by Ordinance 436/58 will persist only for tax deductibility purposes, but not for the feasibility of the remittances from Brazil to other countries.

It is important to mention that the New Foreign Exchange Framework is still pending regulation in several points and that the Central Bank of Brazil has recently made a Public Consultation containing proposals for normative acts related to the Brazilian foreign exchange market, which aim to regulate the New Foreign Exchange Framework.

To date, both the INPI and the Central Bank of Brazil have not officially declared their positions on the waiver of the need to record/register the technology contracts for purposes of remittance of royalties abroad. Although the aforementioned waiver is expected considering the content and purpose of the New Foreign Exchange Framework, which seeks to provide greater agility, simplicity and transparency to foreign exchange market operations, improving the business environment in Brazil, further definition on the matter is still needed for its effective implementation.

In any case, the New Foreign Exchange Framework demonstrates the legislator's intention of reducing bureaucracy in the remittance of royalties abroad and facilitating the transfer of technology between Brazil and other countries, reducing state interventionism and privileging the contractual freedom of the parties.

It is worth mentioning that, in 2017, the INPI had already taken the first step towards the reduction of state interventionism in technology contracts by implementing Instruction 70/2017 and Resolution 199/2017, and determining that it would no longer analyze and intervene in contracts submitted for recordal/registration from the perspective of fiscal, tax and capital remittance legislation.

However, the referred change in the INPI's position was not accompanied by an update of the fiscal, tax and capital remittance legislation applicable to technology contracts, providing legal uncertainty to the contracting parties as to the limits of their freedom to contract.

The New Foreign Exchange Framework seems to follow the same line as the change made by the INPI in 2017 and may confer greater agility to the negotiation and conclusion of technology contracts between Brazilian and foreign companies, encouraging new international partnerships for the exchange of knowledge and technology, and contributing to the technological and scientific development of Brazil.

>>> This article belongs to the e-book: "Intellectual Property". Click here to read more articles.

› PROFESSIONALS

Professionals who combine legal insight and market perspective


Jana Fraccaroli