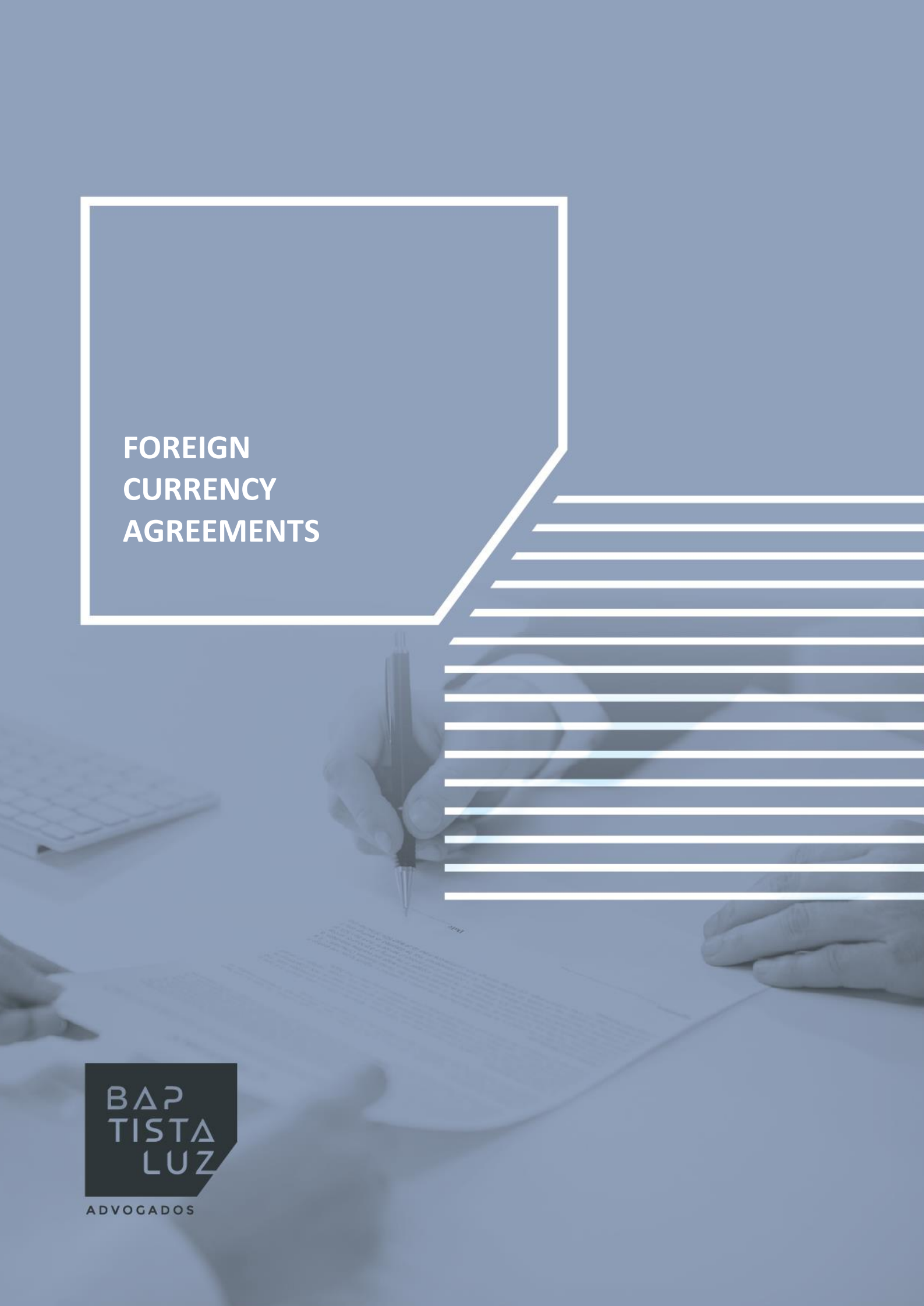
FOREIGN CURRENCY AGREEMENTS



BAPTISTA LUZ
ADVOGADOS

BAPTISTA LUZ ADVOGADOS
R. Ramos Batista . 444 . Vila Olímpia
04552-020 . São Paulo – SP
baptistaluz.com.br

/ *Thaís Hirata de Oliveira*
/ *Sandra Abate*
/ *Laura Rodrigues da Cunha Felicí*

FOREIGN CURRENCY AGREEMENTS

Upon business globalization and technology development, there is a resulting increase in the number of agreements entered into between foreign and Brazilian companies, being only natural for such companies to envisage a provision for payment in effective currency from their home country, since such agreements are associated with foreign investments. However, such intention does not seem proper so as to be considered absolute without the due legal analysis.

Under article 315 of the Civil Code, in force since 2003, cash debts must be paid on their due date, in effective currency and at their face value. Following that, article 318 determines that "conventions to payment in gold or in foreign currency are void, as well as to offset the difference between the value thereof and that of the national currency, except in the cases outlined in special law"[1].

Likewise, article 6 of the law[2] which determined the Brazilian Real, point out that contracting readjustment related to foreign exchange fluctuation shall be construed as void in its full right, unless otherwise expressly authorized by the federal law and in

[1] BRAZIL. Act 10.406 dated January 10, 2002. Art. 315. Cash debts shall be paid on their due date, in effective currency and at their face value, unless otherwise provided for in the following articles. (...) Art. 318. Conventions to payment in gold or in foreign currency are void, as well as to offset the difference between the value thereof and that of the national currency, except in the cases outlined in special law.
[2] BRAZIL. Act No. 8.880 dated May 27, 1994

the commercial leasing agreements entered into between parties residing and domiciled in the country, based on fundraising derived from foreign countries.

Strictly speaking, our legislation provides that contractual obligations valid in the national territory must be carried out in national currency, and in such context, the foreign currency cannot be used as a readjustment index, except in the circumstances outlined by the law[3].

Such exceptions are contained in article 2 of Decree no. 857/69[4], which replaced the prior law dealing with the matter, and in article 6 of Act 8.880/94, authorizing some circumstances to determination of debts in foreign currency:

(i) agreements and bonds related to merchandise import or export operations;

(ii) financing or guarantee provision agreements related to export operations of assets and services sold on credit to foreign countries;

(iii) overall foreign exchange purchase and sale agreements;

(iv) loans and any other liabilities whose creditor or debtor is a party residing and domiciled abroad, except in real estate lease agreements for properties located in the national territory;

[3] Appeal no. 0004410-66.2013.8.26.0319 – Lençóis Paulista – Vote no. 29.449 – GLF – FL.

[4] SIQUIERA, Marcelo Sampaio. Revista Direito GV. P. 165-186. Jan-Jun. Available at: http://direitosp.fgv.br/sites/direitosp.fgv.br/files/rd-07_9_165-186_convencao_de_payment_em_moeda_estrangeira_no_brasil_marcelo_sampaio_siqueira.pdf, accessed on 03.30.2017

I – to agreements and bonds related to merchandise import or export operations;

II - to financing or guarantee provision agreements related to export operations of assets and services sold on credit to foreign countries; (Text given by Act No. 13.292, dated 2016)

III - to overall foreign exchange purchase and sale agreements;

IV - to loans and any other liabilities whose creditor or debtor is a party resident and domiciled abroad, except in real estate lease agreements for property located in the national territory;

V - to agreements with the subject matter of assignment, transfer, delegation, assumption or modification of the liabilities referred to in the prior item, although both contracting parties are parties resident or domiciled in the country.

Sole paragraph. Personal property lease agreements determining foreign currency payment shall be subject, for validity thereof to prior registration with the Brazilian Central Bank.

(v) agreements with the subject matter of assignment, transfer, delegation, assumption or modification of the liabilities referred to in the prior item, although both contracting parties are parties residing or domiciled in the country;

(vi) personal property lease agreements, after prior registration with the Brazilian Central Bank;

(vii) commercial leasing agreements entered into between parties residing and domiciled in the Country, based on raising of funds coming from foreign countries.

However, that has not been the case all the time. As of the decade of 1930, macroeconomic policies tried to encourage the use of national currency [5]. Within the scenario, Decree 23.501/33[6] was enacted, declaring void "any determination of payment in gold, or certain kind of currency, or by any means tending to refuse or restrict, in its effects, the forced course of the one thousand Réis paper (...)".

Such an imposition of the effective currency consecration principle to valid agreements in national territory is quite restrictive to the Brazilian jurisdiction. Legislations in Portugal and Spain [7], for example, prioritize the autonomy of intent between the parties.

Therefore, although our current law determines the agreement as void, the caselaw mitigated such consequences, based on the preservation of the legal affairs, enacted by art. 184 of the Civil Code[8], allowing for the agreement to have effects, despite

[5] SIQUIERA, Marcelo Sampaio. Revista Direito GV. P. 165-186. Jan-Jun. Available at: http://direitosp.fgv.br/sites/direitosp.fgv.br/files/rd-07_9_165-186_convencao_de_payment_em_moeda_estrangeira_no_brasil_marcelo_sampaio_siqueira.pdf, accessed on 30.03.2017.

[6] BRAZIL. Decree 23.501 dated November 27, 1993.

[7] Available at: http://direitosp.fgv.br/sites/direitosp.fgv.br/files/rd-07_9_165-186_convencao_de_payment_em_moeda_estrangeira_no_brasil_marcelo_sampaio_siqueira.pdf, accessed on 03. 30.2017.

[8] Art.184 of the Civil Code: "Abiding by the intention of the parties, partial ineffectiveness of a legal business shall not impair it in the valid part, if such is severable; invalidity of the main obligation implies invalidity of the ancillary obligations, but invalidity of the latter shall not induce that of the main obligation."

the invalid clause, but preventing payment in foreign currency. Meaning that it determines that the established debt should be converted into foreign currency for the payment to be in Brazilian Reais.

In effect, in 2006, the Superior Court of Justice had decided[9] that an agreement, even not provided for between the legal circumstances of exception, could be entered into in foreign currency, provided that payment was made in Brazilian Reais. The decision had also determined that foreign currency conversion into national currency should occur on the payment date and not on a prior date.

In a more recent instruction issued by the Superior Court of Justice[10], in 2013, the foreign currency conversion into national currency was determined to occur by the foreign exchange estimate on the contract date and not the payment date, as well as adjusted under an official adjustment for inflation index in force in the country.

The reason for such decision was to avoid "illegal debtor enrichment, in detriment to creditor" and abiding by the determination of the effective Civil Code, forcing the course of national currency to ensure internal monetary stability and national sovereignty, i.e. the conversion of foreign currency into national currency considering the foreign exchange on the payment date was rejected, since it was considered a form of indexing the agreement to the foreign exchange fluctuation of the US-Dollar, which would breach the provisions of article 318 of the Civil Code.

The decisions of the Court of Justice of the State of São Paulo, between August 2014 and April 2017[11] did not consider the

[9] Special Appeal no. 680.543– RJ (2004/0093194-0).
[10] Special Appeal no. 1.323.219 – RJ (2011/01979988-8)
[11] Appeal no. 0004410-66.2013.8.26.0319 - Lençóis Paulista - Vote no. 29.449 – GLF – FL.; Appeal no. 1006562-15.2016.8.26.0562 - Santos - 1st Civil Court - Vote no. 30678; Appeal no. 0004913-09.2013.8.26.0539 - Santa Cruz do Rio Pardo; Appeal no. 0024394-54.2011.8.26.0562 - Santos - Vote no. 34.268 2/7; Appeal no. 0028701-51.2011.8.26.0562 - Vote no. 4.029; Motion for Clarification no. 9077222-13.2008.8.26.0000/50000 - São Paulo - Vote no. 9274; Appeal no. 0039248-53.2011.8.26.0562 - Vote no. 4.171; Appeal no. 0009992-65.2011.8.26.0562; Appeal no. 0024778-85.2009.8.26.0562; Appeal no. 0035837-36.2010.8.26.0562; Appeal no. 0019158-24.2011.8.26.0562 – Santos – Vote no. 24672; Appeal no. 0222100-44.2009.8.26.0100 -Vote no. 3754

agreements as void for being executed in foreign currency, provided that the payments were made in Brazilian Reais. However, it does not mean that the future would not comprise an opposite understanding only based on the effective law.

If, on one hand, there is certain consensus in relation to enforceability of the agreements set forth in foreign currency, provided that payment is made in Brazilian Reais, on the other, there is clear legal insecurity in relation to the foreign exchange date to be adopted to convert the cash amounts.

Although the latest statement by the Superior Court of Justice is favorable to adoption of the foreign exchange on the contract date, most decisions reviewed adopt the position of 2006, favorable to currency conversion according to the foreign exchange on the payment date. There are other decisions with minor positioning, such as use of the official foreign currency estimate on the day immediately prior to payment[12].

A recent decision issued by the Court of Justice of the State of São Paulo[13], adopts the latest decision of the Superior Court of Justice, favorable to use the foreign exchange on the contract date for the foreign exchange fluctuation not to influence with the obligation, thus serving as an index.

This brief text is not intended to detail historic or Comparative Law aspects, but only point, with quite objectivity, to the current treatment offered by our legal framework, as regards the legal provisions, practical solutions and position adopted by courts.

But in the current context, especially considering the precedents of the Superior Court of Justice and the Court of Justice of the State of São Paulo, the decision on the possibility to apply the "national currency equivalence principle" seems uncontroversial, i.e., acceptance of agreements with sums determined in foreign

JV – M/S/A/AB/E/V; Appeal no. 9000081-36.2012.8.26.0562 – Santos – Vote no. 27875; Interlocutory Appeal no. 2013045-81.2016.8.26.0000 – 23rd Private Law Chamber – Court of Justice of the State of São Paulo; Appeal no. 1001301-40.2014.8.26.0562 -Vote no. 357.

[12] Appeal no. 0004913-09.2013.8.26.0539 - Santa Cruz do Rio Pardo.

[13] Appeal no. 0004410-66.2013.8.26.0319 - Lençóis Paulista.

currencies, provided that payment is made in an equivalent of national currency.

Notwithstanding, the dilemma seems to lie in the foreign exchange date to be used in conversion of the obligation amounts whose payment is determined in foreign currency to be carried out in national currency (contract date vs. payment date), pointing out that the latest decision by the Superior Court of Justice determined conversion of the sum into foreign currency by the contract date exchange estimate, not the payment date, so as to prevent the foreign exchange fluctuation from influencing on the obligation.

Employment contracts in foreign currency

In relation to the effectiveness of employment contracts agreed in foreign currency, it should be noted that the Consolidated Labor Laws (CLT)[14] determine that the salary payment must be paid in the effective currency of the country, i.e., in Brazilian Real. Notwithstanding, salary payment in other currency is construed as not made.

Unlike other agreements, the determination of the salary payment in national currency is an international trend, since Convention no. 95[15] of the International Labor Organization (ILO), ratified by Brazil in 1956[16], contains a provision similar to the Brazilian regulation, in force since 1943.

The analysis of the labor courts is more restrictive than the others. A decision[17] dated 2011, from the 3rd panel of the Regional Labor Court from the 10th region (TRT/DF & TO), did not challenge the payment of monthly remuneration in Brazilian Reais based on its equivalent in foreign currency, provided that

[14] BRAZIL. Decree-Law 5.452 dated May 1, 1943. Art. 463. Installment, in cash, of the salary shall be paid in effective currency of the Country.
Sole paragraph – The salary paid not in compliance with this article is construed as not made.
[15] CONVENTION No. 95 CONCERNING SALARY PROTECTION. ARTICLE 3.1. Salaries payable in cash shall be solely paid in legal effective currency, payment as payment order, bonus, coupons or under any other form supposed to represent the legal effective currency, shall be prohibited.
[16] BRAZIL. Legislative Decree no. 24, dated 1956.
[17] TRT, 3rd Panel, **00829-2010-003-10-00-7-RO**, rep. min. **Douglas Alencar Rodrigues**

no salary reduction would occur, under the provisions of the CLT and Federal Constitution[18].

Accordingly, in the case in question, the employer had to offset foreign exchange fluctuations of the US-Dollar in non-compliance with the salary registered in Brazilian Reais in the Work Booklet (CTPS), although the document also contained the information of the salary based on US-Dollars. On the other hand, payments more favorable to defendants were also possible for revision.

To avoid fluctuations in the salary monthly received, and the resulting possible loss to the employee, the foreign exchange rate of the contract date is recommended, not on the payment date, for foreign currency conversion into Real. This was the understanding[19] in 2014 of the Regional Labor Court from 2nd Region (TRT/SP), based on decision of 2005 of the Superior Labor Court (TST).

Therefore, adjustments to employee's salary, throughout time, must be made through other factors such as salary increase or upfront payments, not due to the foreign exchange fluctuation of a foreign currency in relation to Real.

[18] Art. 7. The following are rights of the urban and rural workers, as well as others aimed at improving their social condition:
(...)
VI – irreducibility of the salary, unless otherwise provided for in a convention or collective agreement;
[19] PROCEEDING TRT/SP No. 000006874.2010.5.02.0015