

DEUTSCH-BRASILIANISCHE INDUSTRIE- UND HANDELSKAMMER

RECHT & STEUERN

SONDERAUSGABE COVID-19

NEWSLETTER



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Industrie- und Handelskammer
Câmara de Comércio e Indústria
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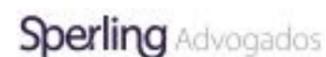


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Brazilian Tax Relief Measures Tackling COVID-19

I. The Brazilian tax system and the fight against COVID-19 effects

COVID-19 has an unprecedented impact in recent history, not only because of the significant number of fatalities and the collapse of healthcare systems but also because of its critical consequences for the global economy. In response, countries are imposing social distancing measures, maintaining only essential business activities, and taking economic relief measures trying to hold the inevitable decline of gross domestic product (GDP).

While OECD Secretary-General Angel Gurría underlined, in the last G20 Virtual Summit, “the need for sharper action to absorb the shock, and a more coordinated response by governments to maintain a lifeline to people, and a private sector that will emerge in a very fragile state when the health crisis is past”, Brazil still struggles with political and economic issues that precede the pandemic crisis.

Brazil is known for having one of the most complex tax systems in the world. Besides the high tax burden involved, companies and individuals must comply with three levels of tax authorities and legislation (Federal, State and Municipal). There are five different types of indirect taxes to assess and several ancillary obligations to fulfill. In general, the interactions between the parties are surrounded by distrust. That explains why a comprehensive and effective tax reform, although in the daily news for ages, is so hard to pass.

As a result, the country has so far taken timid federal measures and uneven state and municipal responses of tax relief for companies, once agility in decisions are interrupted by constant conflicts among Federal Executive, Legislative, and Judiciary Powers.

Brazilian tax relief measures are far from granting a satisfactory response for companies needs, as they struggle with consume decline and contract breaches. In this scenario, corporations must seek for creative and alternative means to reduce expenses and prevent their cashflow from collapsing.

As a result of Executive and Legislative’s ineffective measures, the Judiciary has been called to action by authorizing companies to defer other taxes and payments of installments from previous amnesty programs not broaden by legislation. The success of those lawsuits is not guaranteed, but a preliminary injunction can temporarily relieve cash flow.

Other relief measures can vary from entity to entity depending on its sector and size, but some are worth to mention, such as: (i) revision of tax procedures

to identify tax credits; (ii) judicial request for reimbursement of taxes illegally charged in the past 5 years, based on successful law cases; and (iii) judicial request to accelerate the offsetting of existing credits. Creativity, so far, has shown better results than the Brazilian government.

II. Main Tax Relief Measures

In this uncertain scenario, the most important (although shy from the companies’ perspective) Brazilian tax relief measures taken up to April 27, 2020 are summarized as follows.

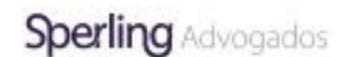
II.1 Tax Incentives (Impact on Company’s Results)

- **Social Contribution to Education Entities (aka contributions to “Sistema S”):** reduced in half (impact of approx.1.25% on company’s payroll).
- **Loan and Credit Tax (IOF):** reduced to zero the rate on loans and credit transactions, hired between April 3, 2020, and July 3, 2020
- **Federal Excise Tax (IPI):** reduced to zero the rate on products used to combat Covid-19, such as hand sanitizers, alcohol gel, surgical face masks, medicines, and others, until September 30, 2020.
- **Social Contributions on Imports (PIS/COFINS-Import):** reduced to zero rates on bulk medicines and medication in doses, until September 30, 2020.
- **State Sales Tax (ICMS):** some States (such as Bahia, Ceará, Distrito Federal, Maranhão, Pará, and Rio de Janeiro) granted tax exemption and/or reductions on products used to combat the new coronavirus, such as hand sanitizers, alcohol gel, surgical face masks, medicines, and others.

II.2 Deferral of Tax Payments’ Terms (Impact on Company’s Cashflow)

- **Social Contributions on Income (PIS/COFINS):** the collection of the contributions for March and April 2020 (ordinarily due in April and May, respectively) was deferred to August and October 2020. The deferral does not comprehend PIS/COFINS-Import.
- **Social security contributions due by the employer:** the collection of these contributions for March and April 2020 (ordinarily due in April and May, respectively) was deferred to August and October 2020.
- **Guarantee Fund for Length of Service (FGTS):** the collection of the FGTS by employers is suspended for March, April, and May 2020, with due dates in April, May, and June 2020. Payments can be made in until six installments as from June, 2020.

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II.3 Extension of Tax Filings' Terms

- **Declaration of Federal Taxes (DCTF):** the deadlines that should ordinarily be filed in April, May and June 2020, are extended to the 15th business day of July 2020.
- **Digital Tax Bookkeeping for Social Contributions (EFD-Contribuições):** the deadlines that should ordinarily be filed in April, May and June 2020, are extended to the 10th business day of July 2020.

II.4 Individual Tax Measures

- **Individual Income Tax (IRPF):** the collection of the individual income tax on 2019 earnings, ordinarily due in April 2020, is extended until June 2020.
- **Declaration of Individual Income (DIRPF):** the deadline for submitting the DIRPF for the calendar year of 2019, which should ordinarily be filed until April 30, 2020, is extended until June 30, 2020.
- **Income Declaration for Deceased Individuals and for Individuals Definitively Exiting the Country:** the deadline for filing these tax filing is extended until June 30, 2020.

Main corporate measures to attenuate the effects of the pandemic

In view of the impacts of the new coronavirus pandemic in companies' daily business, government, agencies and parastate entities have been taking measures to enable – or at least facilitate – companies to maintain their business and corporate routines.

The main recently issued measures regarding corporate matters are described below:

Annual meetings

Provisional Measure 931, published on March 30, 2020 ("MP 931"), determines that ordinary annual meetings related to companies' fiscal year ended between December 31, 2019, and March 31, 2020, can be held in up to seven months after the end of the fiscal year – instead of the four-month usual term.

The same Provisional Measure also establishes that the term of officers, directors and members of the board of auditors must be extended until the ordinary annual meeting is held.

Such rules apply to publicly and privately held companies, limited liability companies and cooperatives, as well as to public companies and mixed-capital companies and their subsidiaries.

Possibility of remote meetings

MP 931 also determines that shareholders' meetings can be remotely held (totally or partially), and Normative Instruction 79, issued by the National Department of Registration and Integration of Business on April 15, 2020, details the rules for remote meetings of privately held companies, limited liability companies and cooperatives. Basically, meetings must be held through a system that registers shareholders' votes and allows the event to be recorded, subject to some communication and voting requests.

The Brazilian Securities Commission ("CVM"), by means of Instruction 622, determines similar requests and restrictions for remote meetings of publicly held companies, and by virtue of Instruction 849 authorizes investment funds to hold virtual meetings.



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**Registration of corporate acts**

The thirty-day term for corporate acts to be filed with the commercial registry to ensure retroactive effect before third parties must be counted as of the date in which the competent registry re-establishes its regular operation. The same rule applies to the registration of corporate acts related to the issuance of securities, which is suspended since March 1st.

Officers' powers during the pandemic

For corporations, until the annual meeting is effectively held, the board of directors will be able to decide on urgent matters which authority was originally attributed to the general meeting, subject to ratification by the shareholders – unless otherwise established in companies' by-laws. Also, the board will be able to declare dividends.

Publicly held companies' obligations

CVM, by means of Resolution 848 – in force since March 27 – extended the terms related to publicly held companies' obligations. Among other measures, it suspended the term of administrative proceedings during the state of public calamity, the obligation to record corporate acts that authorize the issue of promissory notes, and the four-month interval between public offers of securities distributed with restricted efforts (aiming to facilitate funding). The Resolution also determines the postponement of administrative terms, including the maturity of unsettled Instruments of Commitment obligations which due date has not yet occurred (120 days), the term for companies to send audited financial statements of regulated investment funds and of separate assets of Receivables (30 days), the deadline for regulated funds to hold annual meetings (three months), among others.

CVM Resolutions 849 and 852 also extend other relevant terms, among which the terms for the presentation of financial statements related to unregistered issuers with offers in organized and non-organized trading desks (regulated by CVM Instruction 476), and the original term or certain requirements of CVM Instruction 480/2009, such as: **(i)** for issuing companies, to send reports prepared by the fiduciary agent, **(ii)** for companies, to present relevant financial forms (ITR form, DFP, updated Reference Form and Registration Form), and **(iii)** for national issuers, to present their financial statements. Most of the extensions were of 45 days or two months.

Further, Resolution 849: **(i)** extends in two months the term for presentation of the annual report published by the fiduciary agent listing the material facts of the fiscal year to debenture holders; and **(ii)** postpones until the last business day of July the deadline for presentation of the report of the previous calendar

year as assessment of internal controls and recommendations delivered to companies' directive bodies of companies which are either part of the distribution system or securities consultants. Moreover, it extends to 4 months the term for the trading of securities distributed with restricted efforts issued in accordance with CVM Instruction 476.

CVM Instruction 849 also allows the automatic approval of investment funds' financial statements of fiscal years ended between December 31, 2019, and March 31, 2020, in case of impossibility to hold the meeting to approve such statements due to the absence of investors, and provided that the auditor's report does not modify its previous opinion.

Another relevant change is that, as a result of the revocation of CVM Resolution 846 (dated March 16, 2020) by Resolution 852, requests for the suspension of terms for both the analysis of public offers for the distribution of securities subject to registration and for registration of issuers must observe the terms set forth on article 10 of CVM Instruction 400/03 and article 6 of Instruction 480.

Based on all the above, the measures issued up to the end of April, regarding corporate aspects, intend to allow the continuity of businesses by extending the powers of companies' administrative bodies, and postponing important terms for corporate acts. With the extension of the pandemic and its effects on the economy, it is possible that new regulatory acts may be issued by the authorities, including rules that may be applicable after the end of the pandemic period, also important for the economic recovery.

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The importance of a general personal data protection law in Brazil to deal with the massive processing of personal data during the state of emergency of Covid-19 (Novel Coronavirus)

The unprecedented crisis caused by the Novel Coronavirus pandemic has been producing multiple impacts worldwide that transcends the more obvious (and serious) concern about public health and peoples' lives. As a result, multiple governmental and legislative measures¹ have been adopted in Brazil to deal with such a challenging environment. This is no different under the privacy and data protection scenario.

It is important to underline that individuals' intimacy, private life, honor and image are guaranteed by the Brazilian Federal Constitution.

In this context, one important discussion in Brazil concerns the decision rendered by the Brazilian Supreme Court (STF) suspending the effectiveness of Provisional Measure 954/2020², which provided for the mandatory delivery, by telecommunications service providers, of their consumers' names, phone numbers and addresses, to the Brazilian Institute of Geography and Statistics (IBGE). The purpose of such measure was the production of statistical data, during the public health emergency of the Covid-19 pandemic. Direct Unconstitutionality Actions filed by political parties and the Federal Council of the Brazilian Bar Association (OAB) attacked the Provisional Measure. In the preliminary analysis of the lawsuits, the STF highlighted that:

(a) the information dealt with in the Provisional Measure is within the scope of constitutional protection (article 5) that supports the right to privacy, intimacy, honor and image of individuals;

¹ Draft Bill of Law No. 2,136/2020 issued late April, 2020 provides for the virtual visit, through video calls, of family members to inpatients due to the Novel Coronavirus, just to mention one of the most recent legislative initiatives under discussion in the Brazilian Congress.

² Before that, on April 13, the Federal Attorney General's Office issued a favorable opinion for the sharing of data from users of telecommunications services to the government, in an anonymous and aggregated manner, for the purpose of fighting the Novel Coronavirus.

(b) the Provisional Measures does not establish any requirement for mechanisms and procedures to ensure the confidentiality and anonymity of the shared data (and it violates protection of fundamental rights of individuals foreseen in the Brazilian Constitution);

(c) there is no legitimate public interest in sharing the personal data of users of telephone services and that the standard does not provide conditions for assessing their suitability and need, as it does not define the form and purpose of using the personal data collected, in apparent violation of the due legal process guarantee; and

(d) combating the pandemic cannot legitimize overcoming fundamental rights established in the Constitution.

Apart from the cancelled Provisional Measure 954/2020, on February 6, 2020, Brazilian Law No. 13,979/2020 (the "National Quarantine Law") was published to establish measures to deal with the public health emergency of the Novel Coronavirus. The estate of emergency will last according to the determination of the Brazilian Minister of State of Health and declaration of the World Health Organization (WHO). The National Quarantine Law established several measures such as³:

(i) compulsory medical examinations, laboratory tests, collection of clinical samples, vaccination and other prophylactic measures, or even other specific medical treatments;

(ii) immediate communication to health authorities about possible contacts with the Novel Coronavirus infectious agents and circulation in areas considered to be regions contaminated by the virus;

(iii) mandatory sharing between government agencies and entities of Public Administration of essential data for the identification of persons infected or suspected of being infected with Coronavirus, solely for the purpose of preventing its spread (this measure extends to private companies when data are requested by a health authority); and

(iv) maintenance, by the Ministry of Health, of public and updated data about confirmed, suspected and under investigation cases related to the public health estate of emergency, safeguarding the right to the confidentiality of personal information.

³ The measures provided for in the National Quarantine Law came into force on the date of its publication, on February 6, 2020, and will remain in force as long as the international state of emergency by Coronavirus persists.

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It is important to underline that all these multiple initiatives involving the processing of personal data in large scale in the pandemic environment has been occurring while the Brazilian General Personal Data Protection Law (Law No. 13,709/2018) (the "LGPD") has not entered into force yet. The LGPD defines health data as sensitive personal data, subject to restricted legal basis for processing, such as **(a)** by data subjects' consent and **(b)** conducting studies by a research body, guaranteeing, preferably in an anonymized form; **(c)** health tutelage, exclusively, in a procedure performed by health professionals, health services or health authority; and **(d)** protection of the life or physical safety of the data subject or third party.

The LGPD was sanctioned to enter into force in August, 2020, but Provisional Measure 959/2020 ("MP 959/2020")⁴ was approved extending the entry into force of the LGPD to May 3, 2021. The initial term of validity of the Provisional Measure is 60 days, automatically extended for an equal period, if the Brazilian Congress do not complete the voting process. The Provisional Measure may be enacted and converted into an ordinary law or rejected and, therefore, shelved.

It is worth mentioning that before the issuance of MP 959/2020, the Brazilian Senate approved Draft Bill No. 1179/2020 proposing the postponement of the LGPD to January, 2021 and its sanctions to August, 2021⁵. Such draft bill is currently under discussion in the Chamber of Deputies with urgent request for analysis. If MP 959/2020 is shelved at the Congress, the discussion about the extension of the initial term of the LGPD as proposed under Draft Bill No. 1179/2020 will continue.

Even though the efforts for complying with all the LGPD requirements will sum up to the manifold challenging situations that companies are struggling to handle with simultaneously, the postponement of the LGPD under the present context may lead to irreparable harm to individuals because the National Quarantine Law and other norms currently in force in Brazil do not establish clear limitations to the sharing of health information. This aspect may influence the analysis of the Congress about both MP 959/2020 and Draft Bill No. 1179/2020. In this context, companies shall keep moving forward with the steps required to be compliant with the LGPD as soon as possible, since the extension of the law enforceability can still change.

*Author of the publication *So geht's Tax Incentives in Brasilien*

⁴ MP 959/2020 also regulates the operationalization of the payment of the Emergency Employment and Income Preservation Benefit and the monthly emergency benefit for Brazilians during the state of emergency period.

⁵ Draft Bill No. 1179/2020 establishes transitional and emergency rules for the regulation of private law legal relations during the Covid-19 pandemic period, including the extension of the LGPD's entry into force.

Coronavirus: Changes for Immigration in Brazil

The coronavirus (COVID-19) pandemic is set to drive a significant evolution in all countries and cultures, forcing people to adopt new habits, reevaluate priorities, develop new skills, be creative, discover new ways to do the same thing, reinvent services and product. This new scenario (which includes considerable changes) will affect immigration's process to all countries around the world.

How these elements will influence business strategies regarding transference of immigrants between companies and countries? How businesses could be prepared for this challenge period? The situation is full of uncertainty with a tense climate across the borders.

Considering the rapid change of immigration's conditions, the current article will analyze the immigrant's transference to Brazil based on the Brazilian Migration Law and new rules and procedures just publicized.

Before going into all technical immigration's details, it is important to mention that in Brazil the quarantine will depend on the State/City. It is recommendable to check in advance the place (State/City) where the immigrant will be allocated.

So far there is no lockdown, however only fundamental/essential services are in operation. In São Paulo shopping malls, theaters, concert halls, stores, restaurants are closed. The services in operation are pharmacies, banks, hospitals, supermarkets (some of them with reduced hours).

Going into technical aspects of immigration in Brazil, find below information regarding each governmental bodies responsible for documents and procedures in Brazil:

(I) Federal Police

Based on an official position¹ all main attendances are suspended since March 16, 2020. Federal Police would only prioritize exceptional cases duly motivated or emergency according to the national public interest.

Attendance to the immigrants and Brazilians will be analyzed under strict criteria of essentiality, taking into account any risks to the population's survival, health and safety.

¹ <http://www.pf.gov.br/imprensa/noticias/2020/03-noticias-de-marco-de-2020/policia-federal-esclarece-sobre-alteracoes-nos-atendimentos-e-atividades-de-policia-de-imigracao>



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In this way, the delivery of Passport, National Migration Registration Card (CRNM) and Interim National Migration Registration Document (DPRNM) are suspended as long as the state of emergency of public health lasts, safeguarding the effective staff of Federal Police employees to work in other activities, if necessary.

In addition, the deadlines are also suspended until the critical situation is regularized. Thus, if a foreign national is in Brazil with the business/tourism and his/her visa will expire in the next days, weeks, he/she does not need to worry about its expiration because the foreign national will not receive any kind of fine, penalty due this fact.

Considering all these information, it is important to wait for another official position to know how the attendances and activities will be resumed by Federal Police, so far there is no prevision to have this situation of exception ended.

(II) Ministry of Justice

Regarding the action of Ministry of Justice, a few new legal standards deserve to be highlighted:

- **Technical Note #01 (on March 23, 2020) and Ordinance #01 (On March 25, 2020):**

They suspend the procedural deadlines for administrative processes under Ministry of Justice's Migration competence and publications of residence authorization on Official Gazette (D.O.U). The procedural deadlines are considered suspended from March 11, 2020 until the date on which the exceptional pandemic situation is ended.

Based on this rule, the immigrants will not be allowed to collect their visas before Brazilian Consulates abroad, as well as the immigrant's entry into the country and complete registration before Federal Police.

The filling application and its analysis for residences authorization (new requests, extensions and transformations) are maintained. It means that the practice of instructing legal acts are ongoing and the applications request can be filled normally, allowing the immigrant to legally work in Brazil.

Moreover, just specific and exceptional cases duly motivated by emergency/national public interest could be analyzed and have a final decision duly publicized.

- **Interministerial Ordinance # 201 (April 24, 2020):**

This Ordinance exceptionally and temporarily restrict the entrance of immigrants in Brazil by water transportation, regardless of their nationality, for a period of 30 (thirty) days.

Complete details to know who could not enter are on <http://www.in.gov.br/web/dou/-/portaria-interministerial-n-201-de-24-de-abril-de-2020-253830730>

- **Interministerial Ordinance # 203 (April 28, 2020):**

This Interministerial Ordinance exceptionally and temporarily restricting the entrance of immigrants in Brazil by air transportation, regardless of their nationality, for a period of 30 (thirty) days.

Complete details to know who could not enter are on <http://www.in.gov.br/web/dou/-/portaria-interministerial-n-203-de-28-de-abril-de-2020-254282950>

Failure to accomplish with these measures (Interministerial Ordinances # 201 and 203) will result in civil, administrative and criminal liability, as well as immediate repatriation or deportation and the disqualification of an asylum claim.

(III) Ministry of Foreigner Affairs

Even though they are not issuing the visas before Brazilian Consulates around the world (once no publication on the Official Gazette is being made), few activities are maintained ongoing. It is recommendable to check directly with the local Brazilian consulate which services are been kept during this period of pandemic, because each country/State will have its local rules to allow the services/activities.

(IV) Receita Federal

This government's body is responsible to issue the CPF (important document for tax purposes). They have structure the procedure to issue CPF by an on-line service.

(V) CONTRAN (National Traffic Council)

One of the main actions adopted by CONTRAN was to interrupt the deadlines for processes and procedures of the National Traffic System bodies and entities, as well as public and private entities providing services related to traffic according to the Deliberation # 185/2020.

Complete details to know who could not enter are on <http://www.in.gov.br/web/dou/-/deliberacao-n-185-de-19-de-marco-de-2020-249022932>

All these measures and new rules indicated above will definitely change the immigration process to Brazil for the next 2 or 3 months. For now, make sure all new procedures and rules are been observed. Also, the Brazilian Government might be more strict regarding some procedures to make sure we will have a safe and successful immigration transference to Brazil.

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Considering these immigration's changes are just a few consequences that Coronavirus has provided, all companies and immigrants will face a hard decision to be made: what are the expectation for the future regarding immigration to Brazil? Even though this question is hard to be answered, it is important to know how the governmental bodies involved with immigration procedures are working now in order to prepare and plan the expectation for the coming days, which will be full of challenges.

* Author of the publication *So geht's Ihr Visum in Brasilien*

Auswirkungen der Pandemie COVID-19 auf Gerichtsverfahren in Brasilien

Die Pandemie des neuartigen Coronavirus hat enorme Auswirkungen auf alle Bereiche unseres Alltags. Der Stillstand der Wirtschaft und die Einschränkungen für den Waren- und Personenverkehr machen es schwer, wenn nicht unmöglich, Pflichten und Erwartungen zu erfüllen, Geschäfte werden nicht zu Ende gebracht, Prioritäten geändert und es entstehen zahllose andere Situationen, die zu einer potenziellen Zunahme gerichtlicher Auseinandersetzungen führen.

Brasilianische Kollegialgerichte haben eine Reihe normativer Akte erlassen, um die Funktionsfähigkeit der Justiz und Gerichte sicherzustellen. Sie haben Regelungen für die Bearbeitung der eiligsten Fälle sowie für die Wiederaufnahme bestimmter, zur Zeit suspendierter Verfahrenshandlungen geschaffen, wie bspw. für die mündlichen Verhandlungen, die zur Zeit virtuell durchgeführt werden können, solange die Prüfung der konkreten Fälle gewährleistet ist.

Es ist durchaus möglich, dass der organisatorische Teil durch die vorgenommenen Anpassungen abgedeckt wird und es in den nächsten Monaten insoweit zu einer gewissen „Normalisierung“ des Gerichtsbetriebs kommt, große Sorgen bereiten allerdings die Auswirkungen der von den Gerichten aufgrund der Pandemie verkündeten Entscheidungen.

Während einige Gerichte Anträgen auf die Aussetzung der Erfüllung von Verpflichtungen stattgeben, ordnen andere die Stundung an, genehmigen die Überprüfung von Vertragsbestimmungen oder heben Verträge gleich ganz auf. Es gibt derzeit keine einheitlichen Kriterien für die Entscheidungen und die Auslegung vergleichbarer Situationen.

Zur Vereinheitlichung der Richtlinien wurden von der Regierung für die als am schwerwiegendsten angesehenen Fälle punktuell Notverordnungen erlassen. Daneben wurden zu unterschiedlichen materiell- und prozessrechtlichen Fragen Gesetzentwürfe auf den Weg gebracht.

Für die in diesem Beitrag behandelten Fragen möchten wir folgende Punkte aus den Gesetzentwürfen hervorheben:

- Aussetzung der Verjährungsfristen bis zum 30. Oktober 2020;
- Möglichkeit der Feststellung höherer Gewalt ab dem 20. März 2020;



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- Ablehnung der Unvorhersehbarkeit der Erhöhung der Inflation, von Währungsschwankungen oder der Ersetzung des Währungsstandards;
- Verbot des Erlasses von Räumungsbeschlüssen für Stadtimmobilien bis zum 30. Oktober 2020;
- Verlängerung der Frist für die Einleitung von Inventarverfahren bis zum 30. Oktober 2020;
- Aussetzung der Wirkungen bestimmter Anforderungen und Rechte von Gläubigern in gerichtlichen und außergerichtlichen Sanierungsverfahren sowie in Konkursverfahren mit Schwerpunkt auf den Rechten gegen dritte Garantiegeber und Mitverpflichtete während der Geltung der einstweiligen Veränderungen;
- Flexibilisierung bestimmter Anforderungen für neue Anträge auf gerichtliche Sanierung und Genehmigung außergerichtlicher Sanierungspläne während des Ausnahmezustands. So können bspw. neue Anträge auf gerichtliche Sanierung selbst von Unternehmen, denen dieses Instrument in jüngster Zeit bereits zugute gekommen ist, gestellt werden;
- Aussetzung für 60 Tage (ab dem Datum, an dem das Gesetz in Kraft tritt) von gerichtlichen Vollstreckungsverfahren betreffend die Diskussion über oder die Erfüllung von Verpflichtungen mit Fälligkeit nach dem 20. März sowie Klagen auf die Überprüfung von Verträgen;
- Schaffung eines Verfahrens der freiwilligen Gerichtsbarkeit - präventive Verhandlung – das nach Beendigung der Aussetzung von wirtschaftlich Betroffenen eingeleitet werden kann, die bestimmte Anforderungen erfüllen.

Während der genannten Aussetzung der Klagen ist die Vornahme folgender Handlungen untersagt: **(a)** gerichtliche und außergerichtliche Vollstreckung von dinglichen, treuhänderischen und persönlichen Garantien sowie Mitverpflichtungen **(b)** Konkursöffnung **(c)** Räumung wegen Nichtzahlung oder anderer wirtschaftlicher Elemente des Vertrages und **(d)** einseitige Kündigung bilateraler Verträge. Vertragliche Bestimmungen in diesem Sinne sind nichtig. Dies gilt auch für Vorfälligkeitsklauseln.

Nach Ende der Aussetzung kann der wirtschaftlich Betroffene, der einen Umsatzrückgang von 30% oder mehr im Vergleich zum vorherigen Quartal erlitten hat, ein einziges Mal ein Verfahren der präventiven Verhandlung einleiten.

Dies sind nur einige Beispiele der zahlreichen Maßnahmen, mit denen versucht wird, nicht nur die erheblichen wirtschaftlichen Auswirkungen der Pandemie zu minimieren, sondern auch den Richtern eine einheitliche Orientierung zu geben.

Den genannten Maßnahmen ist die ehrliche Absicht nicht abzuspüren, Menschen und Unternehmen vor den Folgen der Nichterfüllung in der derzeitigen Situation schützen zu wollen. Man sollte dabei jedoch nicht aus den Augen verlieren, dass die allgemeine und einheitliche Anwendung der geplanten Regeln aus Gläubigern letztlich Opfer machen kann, womit die Belastung lediglich auf andere übertragen wird. Es ist daher von wesentlicher Bedeutung - selbst wenn es dabei zu unterschiedlichen Entscheidungen in vergleichbaren Sachverhalten kommt - die Autonomie der Gerichte nicht anzutasten. Konkrete Einzelfälle können nach ihren Besonderheiten und im Lichte der bereits im brasilianischen Recht vorgesehenen Regeln und Grundsätze, wie Treu und Glauben und der sozialen Funktion von Verträgen, mit dem Ziel geprüft werden, durch die Entscheidungen mehr Gerechtigkeit und sozialen Frieden zu schaffen.

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Federal Government passes emergency labor provisions

Due to the global crisis caused by the COVID-19 pandemic, the Federal Government sanctioned two provisional measures in the labor field, the PM 927/2020 (“PM 927”) and the PM 936/2020 (“PM 936”).

The PM 927, sanctioned on March, 22, 2020, provides alternatives in the labor sphere for coping with the state of calamity. The PM 936, in turn, was issued on April, 1, 2020, establishing the Emergency Employment and Income Maintenance Program, also providing complementary labor measures to deal with the state of calamity arising from COVID-19.

PM 927 - emergency labor provisions

The central idea of PM 927 is maintaining jobs, which is why it allows employers to enter into individual agreements with their employees on several points, with preponderance over other collective bargaining agreements, legal and business instruments, granted that the limits established in the Constitution are respected.

Among other measures PM 927 authorizes:

1. Immediate change to face-to-face work regime for teleworking (home office);
2. Anticipation of individual vacations under special conditions;
3. Concession of collective vacations without the need to observe administrative deadlines;
4. Use and anticipation of non-religious holidays;
5. Adoption of a special hour bank regime;
6. Suspension of administrative requirements for safety and health at work; and
7. Postponing of payments of the Unemployment Compensation Fund (“FGTS”).

• Teleworking

For the implementation of a teleworking regime, the Provisional Measure eases the terms and conditions foreseen in the Brazilian Labor Laws (“CLT”), regardless of the existence of previously established individual or collective agreements.

The change in the work regime must be informed to the employee at least 48 hours in advance, by electronic means if needed. General teleworking terms

and conditions, must be fixed in an individual written agreement, which may be signed in advance or within 30 days from the start of the change of work regime.

• Individual or collective vacation

In relation to individual vacations, PM 927 provides that they cannot be less than 5 calendar days, with the possibility of granting the benefit even if the acquisition period has not yet been completed. Worker must be informed at least 48 hours in advance by written or electronic means. The parties are also free to negotiate the granting of future vacation periods.

Payment of vacation pay (constitutional third), by now can be made up to December 20, 2020 (i.e. deadline for the Christmas bonus).

With regard the collective vacations, PM 927 requires only communication to employees, which may be electronic, at least 48 hours in advance; and waives the need for notification of the employee’s Union or the Ministry of Economy.

• Hour bank anticipation of holidays

Exceptional hour bank regime can be negotiated directly with employees, allowing the compensation of any interruption of regular work activities by extending the workday by up to two daily working hours, for a maximum period of eighteen months, counting from the end of the state calamity, scheduled to last until December 31, 2020.

Religious holidays may also be subject to anticipation, as long as authorized by written agreement, in advance, by the employees.

• Payment of the Unemployment Compensation Fund - FGTS

PM 927 also provides for the suspension of the demandability of FGTS payable by employers with respect to the months of March, April and May 2020.

The respective payments can be made in up to six installments starting in July, without the legal charges provided for in the legislation. In cases of dismissal of employees, the unpaid FGTS of such months should be paid immediately, with the legal charges provided for in the legislation.

• Other measures and determinations.

It was suspended the obligation to carry out occupational, clinical and complementary medical examinations, except for dismissal examinations - unless the employee has already carried out the last occupational examination within 180 days of the dismissal date.

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During the period of 180 days, counted from the date of PM 927, the Labor Tax Auditors will act as advisors, that is, they will not impose fines on companies, except in the cases of serious irregularities, such as imminent risk, occurrence of a fatal work accident, discovery of work in conditions similar to slave or child labor etc.

Collective agreements or conventions expired or close to expire, within 180 days, may be extended, at the employer's discretion for a period of 90 days, after the end of its term.

PM 936 - Emergency Employment and Income Maintenance Program

The Emergency Employment and Income Maintenance Program was approved to avoid layoffs in the private economic sectors with a national salary subsidy for employees through the payment of Emergency Job and Income Preservation Benefit ("Emergency Benefit").

The central idea of PM 936 is to make it possible for employers, through individual agreements with employees, or collective bargaining agreements with the Employees' Unions ("CBA"), to proportionally reduce the working hours and salaries, or even temporarily suspend employment contracts. Only in those hypotheses an employee would be eligible to receive the Emergency Benefit, that will be based on the calculation of the monthly amount of unemployment insurance that would be due to the eligible employee.

The Emergency Benefit will be due from the date of the start of the working day/salary reduction or from the temporary suspension of the employment contract. Employers must inform the Ministry of Economy about the agreements signed within ten days counted from its execution.

For the hypothesis of proportional reduction of working hours and salary:

- As a general rule for individual agreements, the proportional reduction in working hours and salaries may be carried out exclusively in the percentages of 25%; 50% and 70%. This percentage will be applied to the monthly amount of the unemployment insurance to which the employee would be entitled, in order to calculate the Emergency Benefit;
- The reduction may be executed through an individual written agreement or through CBA, limited to ninety days;
- Through CBA, different percentages of proportional reduction of working hours and salaries may also be established, maintaining the calculation basis and percentages for the Emergency Benefit.

For the hypothesis of temporary suspension of the employment contract:

- The employer may negotiate and adjust the temporary suspension of the employment contract of its employees, for a maximum period of sixty days, which may be divided into up to two periods of thirty days;
- Companies that have earned, in the calendar year of 2019, gross revenue exceeding BRL 4,800,000.00 (four million and eight hundred thousand reais), may only suspend the employment contract of their employees by paying a monthly compensatory aid of 30% of the employee's salary, which will not have a salary nature. For this hypothesis the Emergency Benefit will be equivalent to 70% of unemployment insurance;
- For companies that have earned, in the calendar year 2019, gross revenue of up to BRL 4,800,000.00 (four million and eight hundred thousand reais), there will be no obligation to pay a monthly compensatory aid. Therefore, the Emergency Benefit will be equivalent to 100% of the unemployment insurance to which the employee would be entitled;
- During the period of suspension of the employment contract, all benefits usually granted to employees must be maintained.

Other provisions covered by the Provisional Measure 936:

- The Emergency Benefit may be accumulated with any compensatory aid, paid by the employer as an act of generosity, due to the reduction of the working hours and salaries or the temporary suspension of the employment contracts. The compensatory aid will not have salary nature and will not be part of the employment contract;
- For employees who receive the Emergency Benefit as a result of the proportional reduction in working hours and salaries or the temporary suspension of the employment contract, the company must respect a period of temporary tenure, so that they cannot be dismissed without just cause;
- Nevertheless, if inevitable, the dismissal without just cause of an employee in this period will bind the employer to the payment of the corresponding severance payments, in addition to the indemnification under the terms of the PM 936.

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The Coronavirus Pandemic and Criminal Compliance

Recently, compared with the decades-long existence of business control mechanisms, compliance measures have gained increased criminal law significance as the absence of such compliance, in addition to entailing consequences for a company's reputation¹, has taken on punitive ramifications. In this way, if conduct judged to be in violation of a given norm rises to the level of a criminal offense, it may result in penal sanctions for the perpetrators, not only for those directly responsible but also for those who failed in their duty to avoid the harmful result². Without the pretense of a rigorous examination of this new-found significance, it is likely due to the high level of complexity of current business relations and the consequent increase in the number of crimes committed at the institutional level. In fact, the criminal law risks arising from doing business in Brazil were always great, in large part on account of the complexity of the domestic system, but the pandemic engendered by the novel coronavirus will likely aggravate this situation even more.

As has been widely publicized by the press, Covid-19 has lead governments around the world to issue norms to confront and mitigate the social and economic costs caused by the disease. The Brazilian case has not been different. The three spheres of government have issued laws, decrees, and norms in this regard. Thus, for example, public tenders in the acquisition of goods, materials, and services destined for use in combating the public health emergency have not been required. Companies rendering services to public organs have been

¹ "Nowadays, a good corporate reputation is one of the main business assets responsible [for] sustained financial outcomes (Roberts and Dowling, 2002). This strategic potential is due to its own value-creation capability, and to its intangible character, because it makes corporate reputation quite [hard] to imitate by competitors, allowing [companies] to maintain a superior position [...] Although the intangible nature is a key characteristic to grant its relevance, it also makes [it] very hard to perform a conceptual delimitation, characterization, and measurement". CASTRO, Gregorio Martin de; LOPES, José Emilio Navas; SÁEZ, Pedro López. Business and Social Reputation: Exploring the Concept and Main Dimensions of Corporate Reputation. *Journal of Business Ethics*, p. 361

² The attribution of criminal authorship arising from omission in one's warranty duties is a complex subject, often leading to the mistaken affirmation that a compliance officer always acts as a guarantor. It is important to highlight that this is not the case as the position that such an officer holds is comprised of different activities which vary from company to company. Thus, it is perfectly possible for a compliance officer to not contractually undertake the duty of avoiding the committing of crimes related to the actions of the company nor to be the de facto guarantor, such that, it is often the case that his or her performance is limited to the obligation to evaluate the risks and to suggest the means of preventing them. This matter is further explored by the author MOTTA CARDOSO, Débora, in her book *Criminal Compliance na perspectiva da lei de lavagem de dinheiro*, 2015, São Paulo: LiberArs.

ordered to provide notification of any symptomatic or diagnosed cases of the virus. Tax measures have been introduced extending payment dates or reducing assessments for certain taxes, as well as labor law measures to preserve jobs and employee income. Obviously, any rule which elevates a company's operating risks must be closely followed by the compliance department and, in such situations, depending on the seriousness of the need, an emergency play to reduce any possible harm should be put in place. However, these actions alone are not sufficient.

In order to overcome the current financial crisis, new projects will of necessity be implemented in a scenario of legal uncertainty, multiple frauds, and cyber-attacks, all of which may result in a tendency towards the hardening of compliance measures, which in turn may ultimately hamper a return to economic growth. And it is to that point which our thoughts now turn, starting from the premise that overcoming the current crisis is the common goal of all the relevant players.

This being the case, we believe that safety, transparency, and trust in business relations cannot be in competition with doing business itself. Especially in this moment of economic imbalance, there must be an alignment between these interests such that compliance becomes an instrument for the realization of new business, thereby aiding the return to normal business activities.

Even in situations in which normal conditions prevail, it is well known that executives operating in Brazil are exposed to criminal law risks which make the matter one of the most sensitive points in the realization of domestic business transactions. In fact, the repressive arm of the state tends to act practically on automatic pilot with regard to such persons, even in situations in which it is difficult to identify the agent who is directly involved with the alleged criminal conduct. This may be the case when a decision considered illicit was taken by a collective body or even when it was the result of the actions of several people from different sectors. This lack of clear culpability has perversely allowed for objective liability – a concept prohibited under criminal law – to be cited as sufficient grounds to impute authorship for corporate crimes.

Hence, criminal liability has repeatedly been imputed based solely on the position the defendant held in the company's hierarchical structure, a fact which without a doubt poses an enormous risk for partners, managers, directors, and even compliance officers. It also demands a more combative stance on the part of criminal defense lawyers to revert such unjust accusations.

By whatever means available, a safe way must be found to overcome this fear and, however well-founded it may be in light of the effects of the pandemic

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and the need to implement new projects in this context, such a path will most likely entail a preventive risk management legal strategy. All of the tools of the compliance universe, which for many years were busily employed only guaranteeing transparency and trust in business relations, must now be centered on becoming mechanisms for the prevention of business-related crimes. In other words, they should be concentrated on systematically and continually identifying potential criminal liability in order to adopt suitable means of prevention. The classical idea of criminal defense is outdated, no more so than in the time of Covid-19. A criminal defense lawyer must take on the role of preserving the reputation of his or her corporate clients and that of their managers, of preventing corporate violations, and of mapping out any potential risks. Clearly, there may be losses and damages as a result of non-compliance, and for this reason companies must protect themselves by actively preventing the commission of any crimes that may impact their return to their business activities.

Social Security

Due to the pandemic caused by Covid-19 (coronavirus) the federal government presented significant changes in social security - INSS, not only due to the impact for companies but also in what concerns the implementation and service of social security benefits for every citizen at the agency.

One of the measures adopted by the government through Provisional Measure 932, published on March 31, 2020, was a 50% reduction of certain elements that compose the compulsory contributions for autonomous social services, also known as the “S System” or other entities. In light of this news, many companies have wrongly applied for the total reduction of the INSS tax rate by 50%, without paying attention to what is described in the Provisional Measure, which is only the following components of tax rate would suffer the discount, namely: SESCOF, SESC, SESI, SENAI, SEST, SENAC, and SENAR.

The rate of retribution to the Federal Revenue due for the collection of contributions will be increased from 3.5% to 7%, and SEBRAE will allocate at least 50% of the additional contribution collected by companies to the Micro and Small Enterprise Guarantee Fund (FAMPE).

Also, in the special edition of the Official Gazette of the Federal Government of April 3, 2020, Ordinance No. 139 of the Ministry of Economy was published, which extended the payment terms of the Employer’s Social Security Contribution, including the domestic employer’s, concerning months of March and April, i.e., with the due date of April and May 2020, which should be collected together with the terms of July and September 2020, i.e., respectively, in August and October 2020.

On April 7, 2020, Ordinance nº150 was published, which extended the list of contributions established in Ordinance nº139/2020, extending the deadlines for payment of the Social Security Contribution on Gross Revenue - CPRB and the Rural Producer Contribution, in the same manner as already announced for the Employer and Domestic Employer Social Security Contributions.

The measure is also valid for the months of March and April 2020, whose due dates are extended to the months of August and October 2020 respectively. As adjustments to the DCTFWEB system are necessary, the Brazilian Federal Revenue Service has published an instruction concerning the collection bills (DARF) issuance procedures, within the DCTFWEB, in view of these contribution maturity extensions.

It is worth commenting that although the measure deals with the postponement of payment to Social Security, all the measures must be analyzed together and interpreted thoroughly.



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The monthly social security collection comprises some variables, being divided into withholdings and the INSS paid by the company, this second subdivided into the main categories of employer (20%), other entities (system S) and adjusted RAT. Note that the measure dealt with the postponement of the payment of the company's INSS liability related to the 20% employer and the adjusted RAT, but did not deal with postponement related to part of the compulsory contribution due to other entities (which was only reduced in some parts of its rate as described above) and withholdings.

It is important to emphasize that the retention of employees' values and the non-transfer of such values to the public collecting agents constitute misappropriation, provided for in the Brazilian Penal Code and, if the provisional measure does not provide for the postponement of such values, the collections should be maintained in their normality.

It is undeniable that the Brazilian economy has remained below expectations in recent years, which reflects directly on the very high number of people outside the labor market and on the dependence on social security.

In relation to the impact on citizens, one of the measures imposed is the suspension of face-to-face attendance at Social Welfare agencies throughout Brazil, a decision that has been valid since 03/19/2020. This measure aims to contain the advance of Covid-19 and the proliferation of the virus in order to avoid agglomerations of insured people at the service stations and the spread of the disease, according to WHO - World Health Organization protocol.

It is also worth highlighting the economic and social problems to be faced by society. Having created the Emergency Benefit for Preservation of Employment, there will be a substantial increase in requests for social security benefits as well as society will face a delay in a response due to dammed processes to be analyzed by the municipality.

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Impacts of the COVID-19 Pandemic on Commercial Contracts

COVID-19 is the infectious disease caused by the most recently discovered coronavirus, which has been declared a pandemic by the World Health Organization since March 11, 2020.

In Brazil, the pandemic was officially declared on March 20, 2020 and several restraint actions have been taken since then by the federal government and the different state and municipal authorities, including quarantine with the suspension of activities not deemed essential and even lockdown.

While affecting the public health, COVID-19 is also causing significant disruption to businesses all around the world. Given the financial and personnel uncertainties that COVID-19 has caused, many businesses are seeking creative options to excuse their performance under their existing contracts.

This article aims at shedding some light on the problematics involving the private commercial relations during COVID-19 pandemic and the legal remedies available in the Brazilian law for the parties that have actually suffered the effects of the pandemic in their contracts.

A. Act of God /Force Majeure (art. 393 of the Brazilian Civil Code)

Act of God and Force Majeure (=Latin: "superior force") – which have no real difference under the Brazilian law – essentially consist of extreme and unforeseen circumstances beyond the control of either party which effects cannot be prevented or avoided.

Even though COVID-19 pandemic is an event of Force Majeure/Act of God according to this concept, it can only be argued by debtor as an excuse not to perform **if and to the extent** that debtor can prove that: (i) its effects impaired debtor's ability to fulfill its obligation under the contract (cause and effect relation); (ii) it made all the efforts to fulfill its obligation; (ii) it effectively tried to mitigate the effects thereof (good-faith); and (iii) it has not contributed to the impacts of the event on the contract (non-culpability).

Once it is proven, it operates to: (i) exempt debtor from performing its obligation for the duration of the event; and (ii) absolve debtor from liability of its failure to render its obligation due to such inevitable and unavoidable circumstance.

However, it bears exceptions: (i) if the parties have contractually agreed that no such event might be an excuse not to perform; or (ii) if debtor was already in default prior to the event.



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In principle, it is a remedy to exempt/delay performance of the specific obligation affected by the Act of God/Force Majeure within a contractual framework, although there may be cases that ultimately lead to the termination of the contract itself.

B. Hardship | Excessive Burden (art. 317 and arts. 478-480 of the Brazilian Civil Code)

Pursuant to our legal system, it is important that the **proportion** between the parties' obligations existing when the agreement was born (long-term agreements or agreements with deferred obligations) remains reasonably the same along its life.

Article 317 of the Brazilian Civil Code establishes that if due to unforeseen reasons an event occurs that causes a **manifest disproportion** between the value of the obligation agreed to at the time the contract was signed and at the time the obligation is to be performed, the Court may adjust the amount to be paid (contract review).

According to articles 478 to 480 of the Brazilian Civil Code, where performance becomes **too burdensome** to a party and **extremely advantageous** to the other party due to extraordinary and unpredictable events, the party under the obligation to perform may claim the termination of the agreement in Court (contract termination).

Within these scenarios, if COVID-19 pandemic's effects - instead of causing debtor's impossibility to perform (Force Majeure/Act of God) -, bring disproportion between the original obligations agreed upon by the parties, the affected party may claim the **contract review** in Court in order to restore the original proportion.

On the other hand, if such disproportion created by COVID-19 pandemic causes excessive burden to one of the parties and extreme advantage to the other, debtor may claim the **contract termination** in Court. Creditor, on its turn, in order to avoid termination, may propose to amend the contractual conditions on a fairly basis.

It is important to stress that the contract review and the contract termination are exceptions to the *pacta sunt servanda* principle that has been reinforced by the recent Law No. 13,874/19 ("Economic Freedom Act"), which added some articles to the Brazilian Civil Code to make sure that the risk allocation defined by the parties in the private contracts is respected. Therefore, the presumption is that the parties properly calculated the risks involved in the contract when they signed it.

In this sense, Courts should not rewrite an agreement or interfere with the freedom to contract in order to relieve one of the parties from the apparent hardship of an improvident bargain. Besides, risks inherent to the contract cannot give rise to hardship.

Finally, the main inconvenience is that either the contract review or its termination grounded on hardship / excessive burden must be declared by a judge. So, it is always recommendable to firstly try to amicably settle the dispute in good-faith out of Court.

C. Emergency and Transitional Legal Regime for Private Law Legal Relations Bill of Law No. 1,179/2020

On April 3, 2020 the Senate approved Bill of Law No. 1,179/20, authored by Senator Antonio Anastasia, Senate's Vice-President, with the purpose of establishing rules, of an emergency and transitory nature, applicable to private law relations during the period of public calamity caused by COVID-9 pandemic.

With respect to the commercial contracts, the most important points established by Bill of Law No. 1,179/2020 are the following:

- Non-retroactivity of the pandemic's effects on contract execution for the purposes of arguing the unpredictability of COVID-19 pandemic and its impacts on contracts or legal obligations. Events before versus after this date will be treated differently.
- Inflation, exchange rate variation, currency devaluation and substitution of monetary standards are excluded as unpredictable facts for purposes of contractual review or termination.

Bill of Law No. 1,179/2020 is still subject to approval by the Chamber of Deputies and then presidential veto. Depending on the outcome, it can directly influence judicial interpretations.

D. Arbitration amid the COVID-19 pandemic

The contract review or termination with grounds on the Act of God/Force Majeure and hardship doctrines depends on a case-by-case analysis by the Court, which, besides being unpredictable, may result in fruitless solutions given the timeframe involved and, also, the inconvenience of having the judicial intervention in the contracts.

As an alternative, the parties might, by mutual consent even if they have not contractually agreed so, submit the issue to arbitration, since, in most cases, it results in faster and more effective solutions for the parties, in addition to keeping the procedure under confidentiality.

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Furthermore, several arbitration centers in the country have on-line systems that allow the conduction of the procedure remotely, in deference to social isolation required to avoid the novel coronavirus from spreading.

E. Final Remarks

We recommend that companies review all important agreements in order to understand how Force Majeure, hardship or excessive burden might impact their contractual relationships.

Besides, as soon as they realize that they will not be able to perform their obligations, they should seek legal advice, given that the protections available under the Brazilian law may not be there if prompt action is not taken.

As for the new contracts, it is strongly recommended that the entirely uncertain development of the pandemic be appropriately taken into account by including specific clauses.

Finally, as a general orientation to prevent the disruption of businesses and avoid litigation, companies should firstly try to renegotiate their agreements impacted by the pandemic, in order to preserve the contractual relation now adjusted to the new reality, with conditions to be in force for a temporary period of time only while the pandemic's effects remain, such as new payment terms, exclusion of prices monetary readjustment, granting of discounts, all of them duly formalized in the appropriate contractual instruments.

Alle Inhalte dieses Newsletters obliegen der Verantwortung der jeweiligen Autoren und wurden von diesen sorgfältig recherchiert.

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