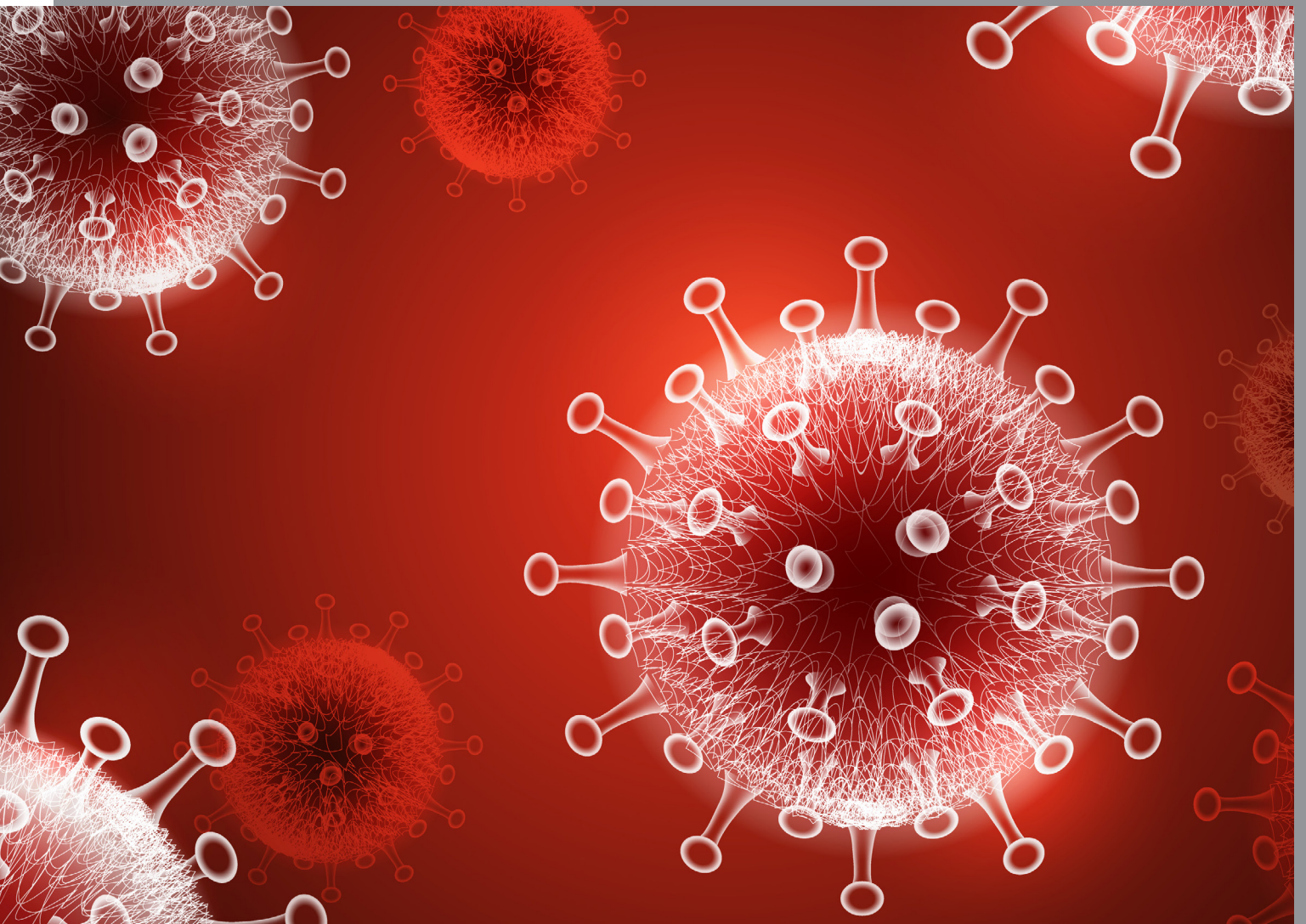




WEATHERING THE COVID-19 PANDEMIC IN BRAZIL:

A MULTIDISCIPLINARY VIEW FOR
INVESTORS AND BUSINESSES



INTRODUCTION

A detailed scanning electron micrograph (SEM) of virus particles, likely coronaviruses, showing their characteristic spherical shape and surface texture. The particles are arranged in a somewhat linear fashion, with some appearing to be connected or in the process of budding from a common surface. The background is dark, making the lighter, textured virus particles stand out prominently.

The Covid-19 pandemic that has swept the world has created economic, health and humanitarian challenges of a scale and nature that contemporary generations have never had to face. The same is true from a legal point of view, and companies now find themselves engaged in complex decision-making processes in a highly uncertain scenario, on a global scale.

In Brazil, the task is especially challenging because our legal system has three different levels of government – federal, state, and municipal – each with its own legislative jurisdiction, executive structure and regulatory agencies. These various authorities are active in issuing laws and regulations, often in areas of overlapping jurisdiction, and the potential for multiple layers of regulation and even conflict between laws is very real.

This e-book offers an overview of the laws and regulations that are most relevant to doing business in the context of the pandemic, issued up to the end of April 2020. It also highlights some of the main decisions by the courts in this period – another important element of the legal environment in Brazil, since our judicial branch is divided into various jurisdictions and instances, and our courts, with their broad, general jurisdiction over disputes of most kinds, have shown themselves to be increasingly active in matters that have significant social repercussions, as is the case with the current pandemic.

There can be no doubt that the challenge brought on by the Covid-19 pandemic is monumental. We hope that this e-book will be useful to international investors and companies with business interests in Brazil, providing them with information that can help in the process of understanding and making decisions in these uncertain times.

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1 | ANTITRUST

Brazil's competition authority continues to function normally even though most of its staff are working remotely, and in-person meetings have been replaced by audio and video conferences. Judgment sessions are also taking place remotely during the crisis.



BRAZIL'S COMPETITION AUTHORITY (CADE) CONTINUES TO FUNCTION NORMALLY

Most of CADE's staff is working remotely, and in-person meetings have been replaced by audio and video conferences. Judgment sessions are also taking place remotely during the crisis.

PROCEDURAL DEADLINES

CADE has issued a note stating that *procedural deadlines* will not run against respondents in: (a) administrative proceedings related to anticompetitive conduct; (b) administrative proceedings related to investigations of non-filed mergers (APACs); or (c) administrative proceedings for failure to provide information or documents or for providing false or misleading information or documents. *No changes are expected* in procedural deadlines for merger reviews and settlement negotiations.

MERGER REVIEWS

Mergers reviews do not seem to have suffered significant impacts to date. Although CADE's target is to keep merger reviews on track during the pandemic, delays can be expected in some cases, especially those that require information from third parties, since many businesses have established work-from-home policies and are facing other challenges at the moment, and thus may take longer to respond to CADE's requests for information. In fact, CADE has been more flexible in granting extensions for replies to its requests for information, both for the parties involved in the transaction and for third parties consulted in the review.

In terms of assessment of the merits of transactions, even though companies may face new challenges and this could lead them to request some flexibility in the review, some CADE officials have been publicly stating that the authority will be cautious about issuing pandemic-related decisions that could lead to undesired market structures or any type of cooperation that may damage the market in the medium-to-long term. As an example, CADE said it will continue adopting the same strict thresholds it adopted in the past when applying the failing firm defense theory.

INVESTIGATIONS INTO ABUSIVE PRICING IN THE MEDICAL/ PHARMACEUTICAL PRODUCTS SECTOR

CADE has opened a preliminary investigation into alleged arbitrary and abusive price and profit increases in the health sector given the high demand for

some products (i.e. surgical masks and alcohol-based hand sanitizer) during the pandemic. This shows that CADE is paying attention to movements in the market in these times of crisis, particularly in segments of the industry that can be considered essential.

BILLS UNDER DEBATE IN BRAZIL'S NATIONAL CONGRESS

Possible changes to the application of the Brazilian Competition Law (Law 12.529/2011)

Bill 1179/2020 proposes that CADE's decisions on competition offences take into consideration the extraordinary circumstances brought about by the pandemic, and consequently that, in the future, certain conduct might not be considered illegal in view of the crisis caused by Covid-19. More specifically, the Bill proposes:

- The suspension of (a) the prohibition against sale of products and services at prices that are unjustifiably below cost (predatory pricing), which could stimulate a reduction in prices, and (b) the prohibition against partial or total shutdown of business activities without good cause. In normal circumstances, these practices could constitute competition offences under article 36 §3(XV) and (XVII) of the Brazilian Competition Law.
- Suspension of the obligation to notify CADE of consortia, joint ventures, and "associative agreements", as required under article 90(IV) of the Brazilian Competition Law. In practice, this means that, if the Bill is approved, CADE will not review collaboration agreements made between competing businesses that would normally have to be submitted to the competition authority. The proposed provision would not, however, prevent CADE from conducting a subsequent merger review or investigation into anticompetitive conduct with respect to the collaborative arrangement (as provided for in article 36 of Law 12.529/2011), in which case CADE would determine whether the arrangement was actually necessary to mitigate the consequences of the Covid-19 pandemic.

Two other Bills propose freezing the price of medications and creating price caps for items essential to fighting Covid-19. CADE has already formally indicated its concerns with those proposals.



2 | BANKING & FINANCE

In response to the Covid-19 pandemic, the National Monetary Council and the Central Bank of Brazil have issued rules focusing especially on ensuring liquidity in Brazil's financial system and stimulating credit, by relaxing certain prudential requirements, among other initiatives.



In response to the difficulties created by the Covid-19 pandemic and its negative impacts on economic activity in Brazil, the National Monetary Council (CMN - *Conselho Nacional Monetário*) and the Central Bank of Brazil (BACEN) have issued rules focusing especially on ensuring liquidity in Brazil's financial system and stimulating credit, by relaxing certain prudential requirements, among other initiatives.

Highlights of the measures taken by the CMN and BACEN can be found below.

MORE FLEXIBLE RULES ON CLASSIFICATION OF PROBLEM ASSETS - CMN RESOLUTION 4782 - MARCH 3, 2020

Risk management

CMN Resolution 4782 (updated by CMN Resolution 4791) establishes temporary risk management criteria to ease provisioning for problem assets in debt restructuring transactions.

Temporary declassification of some problem assets

The classification of some assets as problem assets by reason of the borrower's ability to pay (CMN Resolutions 4557/2017 and 4606/2017) is temporarily suspended, until September 30, 2020. As a result of the change, banks are released from the requirement to increase their provisions if the debt is renegotiated during the period of the suspension.

Extension of loan due dates for clients of banks

The Brazilian Association of Banks - FEBRABAN has recommended that its members grant clients' requests to extend loan due dates, for 60 days.

MEASURES TO INCREASE BANK AND MARKET LIQUIDITY

CMN Resolution 4783 - March 16, 2020	establishes temporary percentages for RWA in calculating the Capital Conservation Buffer dealt with in CMN Resolution 4193, freeing up capital for use by banks.
BACEN Circular 3990 - March 18, 2020	establishes conditions for foreign currency repo agreements that BACEN can use to purchase external sovereign debt instruments from financial institutions, at a 10% discount.
CMN Resolution 4785 - March 23, 2020	authorizes banks to raise funds by means of Guaranteed Term Deposits (DPGEs) without assigning receivables to the Credit Guarantee Fund - FGC (Brazil's deposit guarantee scheme) and adjusts the additional contribution made to the FGC by member institutions.
CMN Resolution 4786 - March 23, 2020	authorizes BACEN to grant loans in BRL under a Special Temporary Liquidity Line of Credit.
CMN Resolution 4788 - March 23, 2020	amends CMN Resolution 4733, which deals with financial paper, to allow (a) issuances of paper with a maturity term of 12 months to meet financial institutions' liquidity needs, (b) issuances of paper redeemable at any time to meet liquidity needs, and (c) redemptions of financial paper by Segment S1 financial institutions up to April 4, 2020 for purposes of proportionate application of prudential requirements.
BACEN Circular 3993 - March 23, 2020	temporarily reduces the reserve requirement for time deposits from 25% to 17%.
CMN Resolution 4795 - April 2, 2020	authorizes BACEN to grant loans to financial institutions under a Special Temporary Liquidity Line of Credit to acquire financial paper secured by financial assets or shares (LTEL-LFG).

ENFORCEMENT PROCEEDINGS

Following the line taken by Brazil's securities regulator in **CVM Resolution 848 (March 25, 2020)**, BACEN has announced on its website that time limits are suspended while the state of public emergency lasts. The National Financial System Appeals Council's judgment sessions will continue to be held, by videoconference.

FINTECHS - CMN RESOLUTION 4792 - MARCH 26, 2020

CMN Resolution 4792 makes a number of changes in the regulations governing fintechs, including the following:



- Fintech lenders known as “direct credit companies” now have authorization to issue credit cards and receive funds from Brazil’s social and economic development bank, BNDES, for pass-through loans;
- Fintechs’ portfolios can be assigned to investment funds (other than receivables investment funds) restricted to qualified investors; and
- Control of fintechs can be held indirectly by investment funds, as long as direct control is exercised by a company located in Brazil, whose sole corporate purpose is to hold interests in financial institutions. This change relaxes the express guidance under the Manual on Organization of the Financial System, which did not permit ultimate control of financial institutions to be exercised by investment funds.

PAYMENTS SYSTEM – PROVISIONAL MEASURE 930 – MARCH 30, 2020

Provisional Measure 930 (PM 930) amends the provisions of Law 12.865/2013 on payment arrangements under the Brazilian Payments and Settlement System. Although the changes are presented as another measure aimed at mitigating the impacts of the Covid-19 pandemic, the main objective of the amended provisions (most of which originated in Bill 4729/2019) is to improve competitive conditions and prices, increase user convenience and facilitate financial inclusion in the context of payments and settlement.

To ensure that payment transactions are effectively settled, PM 930 protects funds maintained in payment

accounts (and the right to receive funds paid) by providing that the funds (a) constitute separate property and may not be confused with the assets of the payments system participants, (b) are not subject to court orders for attachment or seizure of system participants’ assets (except to fulfill obligations between system participants), (c) may not be assigned or given as security (except as security for obligations between system participants) until they are received by the final beneficiary, or (d) taken into custody in the event of business restructuring, bankruptcy or similar procedure of system participants.

EMERGENCY JOB SUPPORT PROGRAM – PROVISIONAL MEASURE 944 (APRIL 3, 2020) AND CMN RESOLUTION 4800 (APRIL 4, 2020)

Creation of the Emergency Job Support Program – PESE

Under the program, businesses and cooperatives (other than loan companies) with 2019 annual revenues between BRL 360,000 and BRL 10 million can apply for loans to allow them to meet their payroll.

Loan amount

Loans granted under the program cover the borrower’s entire payroll for two months, limited to two times the minimum monthly salary per employee.

Requirements

Loans may be contracted at any time up to June 30, 2020. The interest rate on the loans is 3.75% per year, and borrowers have 36 months to repay the loan, with a grace period of 6 months.

Funding

The Emergency Job Support Program is funded as follows:

- 15% of each loan will be supplied from the lending institution's own funds;
- 85% will be funded by the federal government. The same proportions apply in the event of default on loans made under the Program.

Deduction

Predicting a high demand for funds, BACEN announced in Circular 3997 that financial institutions participating in the Emergency Job Support Program will be entitled to deduct funds lent by them under the Program from their time deposit reserve requirements.

RESTRICTIONS ON DISTRIBUTION OF DIVIDENDS, SHARE BUYBACKS, CAPITAL REDUCTIONS, AND INCREASES IN MANAGEMENT COMPENSATION - CMN RESOLUTION - APRIL 6, 2020

The National Monetary Council has temporarily prohibited financial institutions from:

- paying interest on shareholders' equity or dividends above the minimum compulsory dividend;
- repurchasing their own shares;
- reducing their capital;
- increasing the fixed or variable compensation of members of management; and
- making early payment of any of the above items.

BACEN may authorize share buybacks of up to 5% of the total shares issued, as long as the shares are acquired on the exchange or organized OTC market.

The rules under CMN Resolution 4797 apply to payments (including advances) (a) based on profits determined as at base dates in the period from April 6 to September 30, 2020, or (b) to be made in the period from April 6 to September 30, 2020, but not to payments related to the 2019 fiscal year. Amounts retained in compliance with the Resolution may not constitute a future obligation or be linked future dividend payments.



3 | CAPITAL MARKETS

Brazil's securities regulator, the CVM, has been monitoring the impacts of the coronavirus pandemic on capital markets in Brazil and around the world. The CVM has adopted a variety of measures and new guidance aimed at mitigating the negative impacts of the crisis on economic activity and the market, while at the same time ensuring that the capital market continues to function and that investors are protected.



Brazil's securities regulator, the CVM (*Comissão de Valores Mobiliários*), has been monitoring the impacts of the coronavirus pandemic on capital markets in Brazil and around the world. The CVM has adopted a variety of measures and new guidance aimed at mitigating the negative impacts of the crisis on economic activity and the market, while at the same time ensuring that the capital market continues to function and that investors are protected.

CVM RESOLUTION 848 - MARCH 25, 2020

Some deadlines are extended or suspended:

- Investment funds' financial statements: 30-day extension.
- AGMs of investment funds: 3-month extension.
- Updates to registration information for market participants: 3-month extension.
- Compliance reports by brokers, custodians, registrars and central depositories: 3-month extension.
- Reference forms for portfolio managers and investment advisers: 3-month extension.
- Time limits in enforcement proceedings and limitation periods are suspended, in accordance with Provisional Measure 928.
- Extension of filing deadlines for periodic reports.
- Postponement of the coming into force of CVM Instruction 617/2019 on the prevention of money laundering and financing of terrorism, giving market agents more time to arrange for the human and material resources required to comply with the regulation.
- Extension of deadlines for payment of fees and fines owed to the CVM.

Suspension of the mandatory four-month interval between “restricted efforts” offerings under CVM Instruction 476 initiated in the period from March 27, 2020 to July 27, 2020, as long as the immediately prior offering has been concluded.

Temporary suspension of the requirement to file corporate documents authorizing the issuance of promissory notes with commercial registries provided for in CVM Instruction 566.

PROVISIONAL MEASURE 931 – MARCH 30, 2020

- Certain deadlines applicable to publicly-traded and closely-held corporations and limited liability companies under the Civil Code and the Brazilian Corporations Law are extended. For more information on corporate matters dealt with in Provisional Measure 931, **go to the Corporate chapter** of this handbook.
- The 30-day time limit for filing corporate documents with commercial registries will run from the date the registries return to normal operations for documents signed on or after February 16, 2020.
- The requirement for filing corporate documents *prior* to the issuing of securities and certain other transactions is suspended from March 1, 2020.

CVM RESOLUTION 849 – MARCH 31, 2020

The effectiveness of article 13 of CVM Instruction 476/2009 (which establishes a 90-day lock-up period) is suspended for four months, allowing securities placed under a “restricted efforts” (which are restricted to professional investors) offering to be traded on the secondary market, as long as the buyer is also a professional investor or the securities are issued by a company registered with the CVM. The suspension is valid for lock-up periods that were running on April 1, 2020 and for lock-up periods commencing in the period from April 1, 2020 to August 1, 2020.

CVM RESOLUTION 852 – APRIL 15, 2020

CVM Resolution 852 deals with the 2020 deadlines for filing periodic reports and other information by (a) publicly-traded companies, (b) non-registered issuers that make “restricted efforts” offerings under CVM Instruction 476, and (c) condo-hotel enterprises. The changes made to the filing deadlines are summarized in the following table.



PUBLICLY-TRADED COMPANIES	
(fiscal year ending between December 31, 2019 and March 31, 2020, inclusive)	
First quarterly information report for the year (ITR)	45-day extension
Financial statements	2-month extension
Standardized financial statements form (DFP)	2-month extension
Fiduciary Agent's report	2-month extension
Registration form	2-month extension
Report on compliance with the Brazilian Corporate Governance Code	2-month extension
NON-REGISTERED ISSUERS MAKING "RESTRICTED EFFORTS" OFFERINGS UNDER ICVM 476	
(fiscal year ending between December 31, 2019 and March 31, 2020, inclusive)	
Financial statements	2-month extension
CONDO-HOTEL ENTERPRISES	
Annual financial statements (fiscal year ending between December 31, 2019 and March 31, 2020, inclusive)	2-month extension
Quarterly financial statements (for the first and second quarters, having filing deadlines between May 15 and August 14, 2020, inclusive)	45-day extension
Quarterly financial statements (for the third quarter, having a filing deadline between April 14 and June 14, 2020)	45-day extension



4 | COMPLIANCE

In the current crisis, public authorities will be focused on fighting Covid-19 and the social and economic effects of the pandemic. We recommend that compliance personnel in the private sector reinforce efforts on a number of fronts.



COMPLIANCE DURING THE COVID-19 PANDEMIC – CRISIS MANAGEMENT AND CYBERSECURITY

In the current crisis, public authorities will be focused on fighting Covid-19 and the social and economic effects of the pandemic. We recommend that compliance personnel in the private sector reinforce efforts on a number of fronts:



Crisis committees

Task force operations: Integrated action involving the areas of Compliance, Information Technology and Security, Finance, and senior management are recommended for crisis-related decision-making processes.



Monitored interaction with public agents

Given the new dimensions of interaction between companies and public authorities, special attention should be given to the constant changes in legislation, and protocols for interaction with public agents should be reviewed. The bulletin on government contracting prepared by BMA's Compliance, Investigations and Enforcement is **available here**.



Review of emergency expenses

In times of crisis, many costs and expenses are claimed to be emergency-related. Expenses and approvals should be monitored and recorded for review.



Cybersecurity

Antivirus apps, software, operating systems, and passwords for internet routers and all devices connected to corporate information should be updated.



Remote work and compliance measurement

Remote work is now the new normal, and it is important to check that policies on remote work and technology use are effective, and that employees and collaborators are following guidance on avoiding accidental disclosure of confidential information, expressing opinions on social networks, particularly if they conflict with the organization's, and sharing any type of content that could expose the organization or its personnel while adapting to remote work.



Ongoing awareness campaigns

Regular campaigns help maintain awareness of compliance issues.



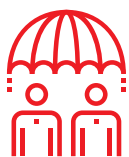
Business continuity

Crisis management and contingency plans, along with plans for business continuity, should be in place. Likewise, organizations should be structuring their reopening plans, taking into consideration not only the new economic scenario, new biosafety rules, and compliance with occupational health and safety rules (including a review of workplace health and safety programs and a potentially broader role for CIPAs, the mixed employer/employee accident prevention commissions), but also questions like shifts for on-site work, structures to support home-based work in the longer term or even indefinitely, and staggered working hours to avoid peak times



Treatment of confidential information

Policies and rules on precautions when dealing with sensitive information in audio and video calls are vital and should contain rules against disclosing confidential information to family and friends.



Human Resources

Focus on Employees. It is important to maintain contact with employees through on-line meetings, support for employees who are having problems with their health or their families, and clear and transparent communications through all channels, both pre-pandemic and those implemented during the Covid-19 emergency. Keeping track of how employees are adapting to these times of uncertainty as to their own health, the health of their families, and new work systems (remote, on-site, reduced working hours, and other changes) will help companies to adjust policies and campaigns focused on preserving employees' mental and physical wellbeing.

GUIDANCE ON RELAXED GOVERNMENT CONTRACTING RULES DURING THE COVID-19 PANDEMIC: ROBUST INTERNAL CONTROLS ARE RECOMMENDED

This week the division of Brazil's Federal Public Prosecution Service responsible for matters involving corruption and administrative misconduct issued a handbook containing guidance on the main changes made by Law 13.979/2020, which relaxed the rules on government contracting to facilitate measures to fight the Covid-19 pandemic.



The guide addresses the more flexible rules applicable to emergency contracts for goods, services and inputs, and deals with: (a) waivers of competitive bidding procedures; (b) simplified preparatory phases; (c) supplier qualification; (d) simplified procurement, including on-line bidding; and (e) government contracts. **For more information on the new flexible rules, go to the chapter on Government Contracts.**

In the same spirit, the Office of the Federal Controller-General (CGU – *Controladoria Geral de União*) has published a handbook entitled “Good Compliance Practices in Public-Private Relations during the Pandemic” offering guidance to the private sector that reinforces the importance of working together with government at this time and the need for measures to ensure transparency and compliance in emergency contracts made to deal with Covid-19 and its effects on society.

In addition, the Integrated Covid-19 Epidemic Monitoring Bureau (GIAC-Covid-19), created by the Office of the Prosecutor-General of the Republic (the headquarters of the Public Prosecution Service) has issued GIAC-Covid-19 Recommendation no. 1, directed to all members of the Brazilian Public Prosecution Service, **on monitoring the use of public**

funds intended to fight Covid-19 and its social and economic effects.

Notably, the Recommendation provides for direct communication between the members of the Public Prosecution Service and the Federal Accounts Review Board (TCU – *Tribunal de Contas da União*). As part of the joint efforts between the TCU and Public Prosecution Service, the TCU has provided GIAC-Covid-19 with its “Special Covid-19 Monitoring Plan”, which contemplates 27 initiatives for implementation in practically all sectors of the economy and industry.

COMMENTS ON COMPLIANCE AND REGULATORY ISSUES

The large volume of guidance published by control and supervision authorities shows that even in exceptional circumstances and with more flexible rules, transparency and compliance practices must be maintained and even reinforced.

Companies that supply goods and services to the government, whether through a competitive procedure or not, are subject to the principles applicable to public administration set out in the Constitution, such as good morals, impartiality, and public access to information.

Furthermore, even when a competitive contracting procedure is waived, the contracting authority must still (a) state the grounds for determining that an emergency exists, (b) set out reasons for choosing the supplier, (c) justify the price under the contract, and (d) publish an extract of the contract in the Official Gazette.

Although it may seem counterintuitive, the relaxed rules introduced by Law 13.979/2020 do not invite relaxed compliance practices on the part of suppliers. Indeed, just the opposite is true: now is the time to redouble efforts to ensure conformity with legal requirements and best practices in interactions with public agents. Once the crisis has passed, it is not unlikely that supervision and control authorities will examine emergency contracts in detail, in order to determine whether abuses have occurred.

PREVENTION OF MONEY LAUNDERING - RULES FOLLOWING FAFT RECOMMENDATIONS ARE POSTPONED

On April 16, 2020, Brazil's Central Bank issued Letter no. 4005, postponing the entry into force of rules under Circular Letter no. 3978, issued earlier this year, from July to October 2020.

The Circular Letter broadens the definition of "Politically Exposed Person" to include (a) members of the state legislatures, (b) members of municipal legislatures, (c) national presidents and treasurers of political parties, (d) heads of departments of municipal governments (secretariats). It also establishes minimum, risk-based standards for the prevention of money laundering and financing of terrorism that must be respected when implementing internal policies and controls.

The changes introduced by the Circular Letter follow international recommendations on the prevention of money laundering issued by organizations such as the Financial Action Task Force (FATF-GAFI) and brings Brazil closer to membership in the Organization for Economic Cooperation and Development - OECD.



5 | CONTRACTS

The Covid-19 pandemic, and the measures taken to mitigate its effects, have had profound effects on economic activity. Disruptions in supply chains and sharp increases or decreases in demand have left many businesses unable to perform their contractual obligations.



REMEDIES AND RECOMMENDATIONS

The Covid-19 pandemic, and the measures taken to mitigate its effects, have had profound effects on economic activity. Disruptions in supply chains and sharp increases or decreases in demand have left many businesses unable to perform their contractual obligations.

There can be no question that, in general, the pandemic must be treated as an unforeseeable and unavoidable event. But that alone does not give parties the right to terminate or modify contracts. Under Brazilian law, the use of these remedies depends on showing how the pandemic has impacted the contract, which requires a case-by-case analysis.

In that analysis, the first step is always to check whether the contract itself provides for events of *force majeure* or other factors that can upset the balance between the contracting parties, such as MAC/MAE clauses or hardship clauses. The contractual allocation of risk between the parties should also be considered, especially in provisions on breach and indemnification.

But even when there is no written contract, or the contract does not deal with events like the pandemic, Brazilian law offers a number of mechanisms that operate as parameters both for businesses that are dealing with contractual partners are unable to meet their obligations, and for the contractual partners that cannot deliver on their commitments:

Force majeure

An event of *force majeure* that makes it impossible for a party to perform its obligations can lead to termination of the contract, without liability between the parties (Civil Code, article 393), or to temporary suspension of all or part of the contract's effects. The inability to perform, whether definitive or temporary, must be a necessary and unavoidable effect of the event of *force majeure*.

Termination or revision of contracts by reason of supervening events

According to article 478 of the Civil Code, termination of a contract for excessive onerousness requires that extraordinary and unforeseeable events have made a party's obligations excessively onerous, with extreme advantage for the other. In addition, according to article 317 of the Civil Code, correction of the value under a contract can be claimed if it is shown that there is a manifest disproportion between the value of the contract at the time it was made and the value when it is performed. Frustration of the contract's purpose can also serve as grounds to terminate a contract, although Brazilian law does not specifically provide for termination for frustration.

• Bill 1179

Bill 1179/2020 (which proposes a Temporary Emergency Regime for private law matters that would apply during the Covid-19 emergency) provides that the pandemic's effects as an event of *force majeure* do not apply to events prior to March 20, 2020, and that increased inflation, exchange rate fluctuations, monetary devaluation and changes to the currency system are not unforeseeable events. If the Bill becomes law, in principle these factors would not allow contract revision or termination for *force majeure* or supervening events.

In some cases, however, a party's failure to comply with its contractual obligations result from events prior to the pandemic, or the difficulties created by the pandemic may be insufficient to satisfy the requirements imposed by law. In such cases, failure to comply with contractual obligations would be dealt with as breach of contract, and the breaching party would be subject to applicable contractual remedies, and certain legal remedies as well:

Withholding performance

If customers or suppliers fail to perform their obligations, in part or in whole, businesses can withhold performance of their corresponding obligation (Civil Code, article 476). If there are concrete elements to show that the financial situation of contractual partners has become precarious, or to support the conclusion that contractual partners will not be able to perform their obligations when they fall due, companies may refuse to perform their obligations, or require that the contractual partner provide security before continuing with the contract (Civil Code, article 477).

Termination for non-performance

In some circumstances, contracts may be terminated for non-performance. The non-performed obligation must be relevant to the economic rationale of the transaction, so that late performance is not useful or would make it impossible to achieve the objectives of the contract. If the contract does not provide for automatic termination on breach, the party wishing to terminate the contract must bring legal proceedings (or arbitration, if applicable).



PROACTIVE MANAGEMENT OF CONTRACTUAL RELATIONSHIPS

Although legal and contractual remedies can be activated when contracts break down, proactive measures to manage contractual relationships can generate value. Investigating the potential risks resulting from the Covid-19 pandemic, keeping contractual partners informed and asking them for information, looking for ways to mitigate any losses suffered, and showing a willingness to renegotiate contractual terms are some steps that may help to retain important contractual partners, and to reduce exposure if businesses are not able to comply fully with their obligations.

GOVERNMENT CONTRACTS

Go to the chapter on Government Contracts for more information on government contracts during the pandemic.

LEASES

Go to the chapter on Real Estate for more information on how the Covid-19 pandemic has affected leases.

MERGERS AND ACQUISITIONS

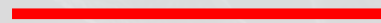
Go to the chapter on Mergers and Acquisitions for discussion of issues and impacts that market participants should be especially attentive to in M&A transactions in the current scenario.

IN THE COURTS

Go to the chapter on Litigation and Arbitration to read about decisions the courts have made on contracts.



6 | CORPORATE



Over the last month, the federal government, Brazil's securities regulator, and the Brazilian stock exchange have taken steps to mitigate the pandemic's negative impacts on the national economy.



Over the last month, the federal government, Brazil's securities regulator, the CVM (*Comissão de Valores Mobiliários*), and the Brazilian stock exchange, B3 S.A. – Brasil, Bolsa, Balcão have taken steps to mitigate the pandemic's negative impacts on the national economy.

PROVISIONAL MEASURE 931 – MARCH 30, 2020

- Certain deadlines applicable to publicly-traded and closely-held corporations and limited liability companies are extended.
- Exceptionally, companies are allowed to hold their annual general meetings (AGMs) within seven months following the end of the fiscal year. Before PM 931, companies had to hold the AGMs within four months following the end of the fiscal year
- Boards of directors are allowed to decide urgent matters that normally fall within the shareholders' power, including distribution of dividends, subject to ratification by the shareholders, unless the company's bylaws provide otherwise.
- Remote voting in closely-held corporations and limited liability companies is authorized, as long as certain rules issued by the National Business Registration Department – DREI under DREI Instruction 79 (April 14, 2020) are followed (**more information below**).
- The 30-day time limit for filing corporate documents with the commercial registries will be counted from the date they return to normal operations.
- The requirement for filing corporate documents *prior* to the issuing of securities and certain other transactions is suspended from March 1, 2020.
- For matters related to capital markets dealt with in PM 931, **go to the Chapter on Capital Markets.**

CVM RESOLUTION 849 (MARCH 31, 2020)

- Filing and publication deadlines are extended for:

- Financial statements and standardized financial statements, until **May 31, 2020**;
- Q1 filing for corporations whose fiscal year ends on December 31st, until **June 30, 2020**;
- Registration forms and reference forms, until **July 31, 2020**; and
- Brazilian Corporate Governance Code compliance reports, until **September 30, 2020**.

- The lock-up period under article 13 of CVM Instruction 476/2009 is suspended for four months, which allows securities placed under a “restricted efforts” offering to be traded on the secondary market, as long as the buyer is also a professional investor or the securities are issued by a company registered with the CVM.

CMN RESOLUTION 4797 (APRIL 6, 2020)

Under Resolution 4797, the National Monetary Council temporarily prohibits certain acts by banks and other institutions authorized to function by the Central Bank of Brazil:

- payment of interest on shareholders’ equity or dividends above the minimum compulsory dividend fixed by law or under the institution’s bylaws;
- repurchase of institutions’ own shares;
- capital reductions;
- increases in the fixed or variable compensation of members of management; and
- early payment of any of the above items.

The rules under CMN Resolution 4797 apply to payments (including advances) (a) based on profits determined as at base dates in the period from April 6 to September 30, 2020, or (b) to be made in the period from April 6 to September 30, 2020. The Resolution expressly states that they do not apply to payments related to the 2019 fiscal year.

B3 CIRCULAR LETTER (APRIL 7, 2020)

In **Circular Letter 005/2020-VQP**, the B3 stock exchange relaxed certain of its rules. Notably:

- listed companies that approve a share buyback program before the end of the state of public emergency now have 18 months to meet the minimum free float requirement;
- companies that fall out of compliance with listing rules on the composition of boards of directors and accumulation of offices will not be notified as long as the state of public emergency lasts;
- public meetings with analysts are not required (companies listed on the Level 1 or Level 2 segments).



- the rules on informing the market in advance of events not included in companies' Annual Calendar are more flexible;
- the deadline for meeting the rules under the New Market Regulation is extended;
- payment of declared dividends may be postponed; and
- if companies fail to comply with rules that have not been relaxed, B3 will extend the time limit for presenting a defense from 15 to 30 days, and will give companies more time to come into compliance, on a case-by-case basis.

DREI INSTRUCTION 79 (APRIL 15, 2020)

In Instruction 79, the National Business Registration Department establishes rules on virtual meetings and remote voting in closely-held corporations, limited liability companies and cooperatives.

- **It is possible to hold hybrid and virtual shareholder and member meetings. The notice calling a hybrid or virtual meeting must:**

- prominently state how the event will be held;
- provide details on remote participation and voting; and
- list the documents required for shareholders, members, and their representatives to participate in the meeting; the documents must be filed electronically no later than 30 minutes before the meeting is called to order.

- Companies may hire third parties to manage information processing at meetings, and will not be liable for problems resulting from shareholders' or members' equipment or internet connection, or any other situation beyond the company's control.

- If there is a failure in the electronic system used to conduct a meeting prevents the meeting from starting or continuing, the meeting must be adjourned or cancelled, as appropriate. A new date must be scheduled for the meeting, but there is no requirement to issue a new formal notice of call to meeting.

- In-person meetings that have been called but not held because of restrictions imposed by reason of the Covid-19 pandemic may be conducted as hybrid or virtual meetings, as long as all shareholders or members are present at the meeting or expressly declare their consent to the form of meeting.

CVM RESOLUTION 622/2020 (APRIL 17, 2020)

On April 17, 2020, the CVM issued Instruction 622, dealing with participation and remote voting in shareholder meetings held by publicly-traded companies.

Companies may hold hybrid and virtual shareholder meetings. The notice calling a hybrid or virtual meeting must state:

- how the meeting will be held – whether in person or partially or entirely virtually;
- the place where the meeting will be held; and
- the information shareholders will need to access and use the electronic system.

The electronic system must ensure, at a minimum:

- that there is a register of attendance and voting by shareholders;
- that the shareholders may speak and access the documents presented during the meeting in real time, if the documents have not been sent to them before the meeting;
- a complete recording of the meeting; and
- that shareholders may communicate with each other.

- In hybrid meetings, the in-person portion of the meeting may take place outside the company's headquarters, for good reason stated in the call notice.

- Companies may require shareholders to register the documents mentioned in the call notice electronically, up to two days before the shareholder meeting.

IN THE COURTS

Go to the chapter on Litigation and Arbitration to read about decisions the courts have made on corporate resolutions during the Covid-19 crisis.



7 | DATA PRIVACY

In tackling the Covid-19 pandemic, governments and private entities have begun to employ a range of policies and countermeasures, several of which rely on large-scale processing of personal data to monitor the spread of the virus and the effectiveness of social distancing measures.



In tackling the Covid-19 pandemic, governments and private entities have begun to employ a range of policies and countermeasures, several of which rely on large-scale processing of personal data to monitor the spread of the virus and the effectiveness of social distancing measures. Some of these measures, such as the mobile phone geolocation tracking proposed by the State of São Paulo and Provisional Measure 954/2020, which requires telecommunication operators to share their clients' personal data with the Brazilian Institute of Geography and Statistics - IBGE, have already been challenged in the courts, because of privacy concerns.

FOR NOW, DATA PRIVACY RIGHTS ARE ENFORCEABLE ONLY THROUGH THE COURTS

Brazil does not currently have specific legislation on data protection. The Brazilian General Data Protection Law (Law 13.709/2018, the LGPD - *Lei Geral de Proteção de Dados Pessoais*), which was expected to come into force in August of this year, has now been postponed to May 3, 2021 by Provisional Measure 959/2020, which still has to be approved by Congress. **For more information on the legislative process for Provisional Measures, go to the chapter on Government Relations.**

In addition to Provisional Measure 959/2020, Bill 1179/2020, which was approved by the Senate in April 2020 and is currently being considered in the Chamber of Deputies, also provides for the postponement of the LGPD. Should the Bill become law instead of PM 959/2020, the LGPD's main provisions will come into effect in January 2021, while the penalties will only become enforceable in August 2021. In the absence of the LGPD, data processing, including processing of data in the context of the pandemic, is subject only to the sparse rules set forth in the Federal Constitution, the Civil Code, and sector legislation such as the Internet Law (Law 12.965/2014), and violations of data subjects' rights are, in most cases, punishable only through the courts.

ESSENTIAL PERSONAL DATA MUST BE SHARED WITH THE GOVERNMENT

Early in February, the federal government published Law 13.979/2020, establishing measures to combat the pandemic. Article 6 of the Law provides that all government entities and all private companies must share essential personal data to identify suspected or confirmed Covid-19 cases, although private companies are only required to disclose data at the request of public health authorities.

Companies may thus be required by the federal government to provide information on suspected Covid-19 cases, and, in addition, may find it necessary to take steps to control contagion among employees. These steps must be undertaken with caution to avoid unnecessary discrimination and stigmatization, and processing employees' personal data requires a careful balancing act, taking into consideration both the need to fight the pandemic and applicable labor laws and precedents. For further comments on the processing and disclosure of employee personal data during the pandemic, [**click here**](#) for our bulletin.

POSSIBLE FUTURE SCENARIO

If the LGPD does come into force while the crisis is ongoing and the exceptional measures described above are still in effect, there are two main interpretations as to how the Law would apply:

- One is that personal data processing aimed at fighting the pandemic falls outside the scope of the LGPD, since its purpose is national defense or state security, and thus falls under article 4(III)(a) and (b). Under this interpretation, the provisions of the LGPD would not apply, and the current scenario would remain in effect for the processing of personal data related to the pandemic.
- A second interpretation is that the LGPD's provisions would apply, but that pandemic-related data processing does not require the data subject's consent, because it is being used for the protection of life or physical safety and to protect health (article 7(VII) and (VIII), for non-sensitive personal data and article 11(II)(e) and (f), for sensitive personal data) or because it is necessary to comply with the data processor's legal or regulatory obligations (article 7(II) for non-sensitive data and article 11(II) for sensitive data).



- **Anonymized data**

Regardless of which of the two interpretations is chosen, anonymized data is not considered personal data under the LGPD or the Internet Law. There are thus no specific legal restrictions applicable to this type of data processing, although the general provisions of the Federal Constitution and the private law must be respected. Nonetheless, companies planning to process personal data, and those requested by public health authorities to do so, should ensure their anonymization methods are sufficient to ensure that no data subjects are identified or identifiable, in light of currently available technology.



8 | EMPLOYMENT

To combat the effects of the Covid-19 pandemic, Brazil's federal government has issued Provisional Measures to create options for labor and employment during the state of public emergency. The main initiatives aim to preserve jobs, avoiding massive layoffs and the economic impacts of high unemployment rates.



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Employers that have implemented different arrangements to maintain jobs should carefully review the measures under PM 927 and PM 926, even if their alternative arrangements respect all the formalities of Brazilian labor legislation.

PROVISIONAL MEASURE 927 - MARCH 22, 2020

PM 927 recognizes the Covid-19 pandemic as a *force majeure* event and makes a number of changes in employment relations. The most important are summarized below:



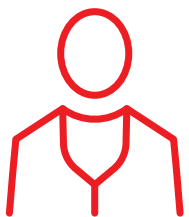
Remote work

Temporary changes have been made to the rules on home-based work, and now employers can notify employees, interns and apprentices of a change in workplace (from on-site to home-based) 48 hours in advance. Employers are required to provide the equipment and infrastructure employees need to work at home, but while employees are based at home, employers do not have to record the time worked by their employees.



Holidays

Employers can grant time off early for non-religious holidays on 48 hours' notice, while time off given in advance for religious holidays depends on each employee's consent, given by individual written agreement. Early holiday time may be set off against employees' balances under time banks.



Individual vacation

Vacation can be given on 48 hours' notice, even if the vacation accrual period is not complete. The vacation bonus normally payable (1/3 of the salary payable during the vacation period) can be postponed until December 2020. Although employees are normally entitled to convert up to 1/3 of their vacation time into pay, PM 927 allows employers to refuse employees' requests to convert vacation time.



Collective vacation

Vacation can be given on 48 hours' notice, and the labor authorities and workers' unions do not need to be notified of collective vacation in advance. Collective vacation can be divided into more than 2 periods, with periods of fewer than 10 days.



Employees in essential services

Employers may suspend vacation and unpaid leave for health professionals and other employees who work in essential services, by formal notice sent to the worker. By written agreement with individual workers, health establishments may (a) extend working hours, and (b) for employees working 12 hours on/36 hours off, include additional working hours in the period from the 13th to the 24th hour off. Additional time worked may be compensated through a time bank system within the 18 months following the end of the state of public emergency.



Special time banks

Time not worked by reason of temporary shutdowns can be compensated for through a time bank system. Negative time balances must be compensated for within 18 months from the end of the state of public emergency. At the employer's discretion, employees' negative balances can be compensated for by up to an extra 2 hours' work per day, not to exceed 10 hours in a day.



Collective bargaining instruments extended

Collective bargaining instruments that have expired or will expire within 180 days may be extended for a period of 90 days, at the employer's discretion.



Deadline extended for deposits to the FGTS - Unemployment Guarantee Fund

Specifically with regard to FGTS deposits, PM 927 provides that employers can delay payment of deposits due for the months of March, April and May until the period from July to December 2020, without interest or penalties.



Occupational health and safety

All occupational medical examinations are suspended, except for the examination required when workers leave employment and where the occupational health specialist believes there is a risk to employees. The examination on leaving employment may be waived if the employee underwent an occupational medical examination within the preceding 180 days.



Covid-19 not an occupational disease

PM 927 stipulates that contamination by Covid-19 is presumed not to be work-related, and consequently employers would be entitled to deduct social security contributions from salary paid for the first 15 days of absence due to Covid-19. This provision, however, has been found to be unconstitutional by the country's Supreme Federal Court thus has no effect.

For more information, consult our bulletin on PM 927, **available here**.

PROVISIONAL MEASURE 936 - APRIL 1, 2020

Emergency Benefit

In tandem with giving employers the power to reduce working hours and pay, and furlough employees, PM 936 creates an "Emergency Benefit for the Preservation of Employment and Income" payable to employees whose working hours and pay are cut or who are furloughed. The amount of the benefit is based on the monthly amount of unemployment insurance employees would be entitled to if they were dismissed without cause, and will vary depending on the reduction in working hours or the employer's annual revenues in 2019 (in the case of furloughs).

This measure is controversial because it may conflict with certain provisions of the Brazilian Federal Constitution which allow a reduction in salary only through collective negotiation with workers' unions. The matter is now before Brazil's constitutional court.

Reduction in working hours and pay

PM 936 allows working hours to be reduced by 25%, 50% or 70% for up to 90 days, with a proportionate cut in pay.

A reduction of only 25% in employees' working hours and pay can be made by written agreement directly with individual employees. Reductions of 50% or 70%, and furloughs, can be implemented by written agreement with individual employees in the case of employees who are paid BRL 3,135.00 or less per month, and employees classified as self-sufficient (monthly salary higher than BRL 12,202 and a university degree). For all other employees, employers must negotiate with the relevant workers' union. Collective negotiation is also required for reductions in working hours and pay different from the percentages established in the PM.

Reductions in working hours and pay may not exceed 90 days, and furloughs are limited to 60 days.

“Compensatory allowance” for furloughed employees

Employers may pay a “compensatory allowance” to employees in an amount agreed in individual or collective agreements. When employees are furloughed by employers having gross annual revenues greater than BRL 4.8 million, the employer is required to pay a compensatory allowance equal to 30% of the employee’s salary, and the Emergency Benefit will be 70% of the unemployment benefit, not 100% as in case of employees whose employers have an gross annual revenues of less than BRL 4.8 million. The allowance is not considered income from employment, and so is not subject to income tax, social security contributions, or other payroll charges.

For more information, consult our bulletin on PM 936, **available here**.



9 | ENVIRONMENTAL

Compliance with environmental and health quality and control requirements is not suspended. Environmental and health-related inspections are considered to be essential activities and will continue during the Covid-19 public health emergency.



ENVIRONMENTAL COMPLIANCE AND LICENSING

Compliance with environmental and health quality and control requirements is not suspended. Environmental and health-related inspections are considered to be essential activities and will continue during the Covid-19 public health emergency (Decree 10.282/2020).

The Federal Institute of the Environment and Renewable Natural Resources (IBAMA) has adopted a set of temporary guidelines for federal environmental licensing that will apply during the Covid-19 pandemic (Communiqué no. 7337671/2020-GABIN):

- Companies should act promptly to minimize non-compliance effects and duration.
- Companies should also document the non-compliance or incident and its causal link with the pandemic, and report to IBAMA.
- In view of the exceptional nature of the Covid-19 pandemic, before applying any administrative penalty (Decree 6514/2008), IBAMA will consider the circumstances of any failure to comply with environmental obligations.
- The guidelines apply retroactively from March 12, 2020 and IBAMA will announce the termination of the guidelines at least 10 days in advance.

SUSPENSION OF DEADLINES FOR ENVIRONMENTAL ADMINISTRATIVE PROCEEDINGS

Some environmental agencies have issued rules how to proceed during the Covid-19 pandemic, or have simply determined that licensing deadlines will not run while the state of emergency persists. In some cases, it is possible to apply online to renew licenses and permits.

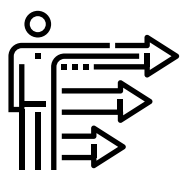
Public water agencies (*Sistema Nacional de Gerenciamento de Recursos Hídricos* – SINGREH) have adopted similar procedures for authorizing use of water resources and related obligations. Brazil's Health Surveillance Agency, ANVISA, has also suspended its procedural deadlines.



CLEARANCE FOR ACTIVITIES AND WORKS TO COMBAT THE PANDEMIC

ANVISA has temporarily waived sanitary authorizations for the manufacture, import and purchase of medical devices identified as priorities for use in health services (RDC 356, March 23, 2020). It has also established new criteria and procedures for the manufacture and sale of sanitization products without prior authorization from the agency (RDC 350/2020, March 19, 2020).

Some state governments have published regulations to allow environmental authorizations to be issued electronically for works or activities to combat the coronavirus pandemic or deal with its effects. In urgent cases, it may be possible to obtain authorization after beginning the work or activity.



ADMINISTRATIVE SETTLEMENTS

The possibility of extending deadlines for compliance with obligations established in administrative settlements (such as, reverse logistic, remediation measures, reforestation, site recovery, and so on), or even terminating the administrative settlement early, should be considered on a case-by-case basis. The Covid-19 pandemic may excuse companies' failure to comply with their obligations under administrative settlements, either temporarily or definitively, if non-compliance is a necessary consequence of an event of *force majeure*.

IN THE COURTS

Brazil's Supreme Federal Court has recently issued some decisions related to environmental matters affected by the Covid-19 pandemic, mainly involving conflict of jurisdiction between levels of government (federal, state, and municipal) and their power to establish sanitary restrictions or to allow activities without prior authorization in function of the pandemic. **For more information, go to the chapter on Government Contracts.**



10 | GOVERNMENT CONTRACTS

Shrinking global commerce and the closing of land and air borders to avoid the spread of Covid-19 have had impacts not only on the public health sector, but on government contracts and bidding procedures, administrative proceedings, and the supervision and control of government acts, profoundly affecting relations between the private and public sectors.



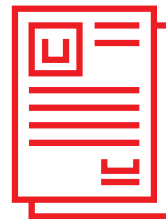
SOCIAL ISOLATION RULES

Shrinking global commerce and the closing of land and air borders to avoid the spread of Covid-19 have had impacts not only on the public health sector, but on government contracts and bidding procedures, administrative proceedings, and the supervision and control of government acts, profoundly affecting relations between the private and public sectors.



Brazil's continental size, in addition to its three -levels of government structure (federal, state and municipal), poses

significant challenges in the adoption and coordination of measures to fight the Covid-19 pandemic. Overlapping authority in some pandemic-fighting measures has been a source of legal uncertainty.



The main federal legislation on measures related to Covid-19 is Law 13.979/2020. It allows government authorities to adopt isolation and

quarantine measures, thus imposing broad control and closure measures, as well as restrictions on business activities, all aimed at reducing the spread of the disease.



Various state and municipal governments have also imposed restrictions of the same kind, some of them different or stricter than those established

by the federal government. In an attempt to centralize social isolation measures, on March 20, 2020 the federal government issued Provisional Measure 926, followed by Decree 10.282, which defines essential services and activities that must be maintained during the pandemic.



State and municipal governments reacted by filing, through a political party, a constitutional complaint with the Supreme Federal Court to

challenge the federal government's measures. The final ruling held that all levels of government have the power to adopt social isolation measures, assuring citizens' right to a healthy life; the federal government has the authority to define essential activities on a national basis, but states and municipalities can expand the list within their sphere of jurisdiction.

MORE FLEXIBLE RULES ON PUBLIC PROCUREMENT OF INPUTS NEEDED TO FIGHT THE PANDEMIC

Many Brazilian municipalities, states, and branches of the federal government have decided to suspend bidding procedures following the declaration of the public health emergency under Law 13.979/2020. Their decision is based on article 49 of the Government Contracting Law (Law 8666/1993), in light of the occurrence of a supervening event (the public health emergency) that justifies the public interest in focusing on solving the emergency.

More flexible contracting procedures have been put in place, aimed at speeding up the acquisition of goods and services, especially for essential material needed to manage the risks and harm resulting from the pandemic.

• Requisition of goods and services

Another measure set out in Law 13.979/2020 to help the government to cope with the public health emergency caused by Covid-19 is the administrative requisition of private property (article 3(VII)). It also finds support in article 5(XXV) of the Federal Constitution, which allows administrative requisition of private property in cases of imminent public danger, against later payment of compensation to the owner of the property. Under Law 13.979/2020, the Ministry of Health and local health management authorities can only requisition private property in exceptional circumstances, by administrative decision setting out the reasons for the requisition, where the emergency is such that the adoption of the usual formalities is not viable. According to article 3§1 of the Law, requisitions can only be made based on evidence-based analyses of strategic health information, and they must be limited in time and space to the minimum that is absolutely necessary to promote and preserve public health. This measure is different from expropriation of private property, in which the property is transferred on a definitive basis and compensation has to be paid in advance. When administrative requisitions amount, in practice, to an expropriation, they may be challenged in courts once the state of emergency is over.

• Suspension of competitive bidding procedures

For the acquisition of health-related goods, services and inputs that will be used to deal with the public health emergency, the competitive bidding procedure can be waived (Law 13.979/2020, article 4).



• **In the Congress**

A constitutional amendment has been proposed which would waive competitive contracting procedures for contracts related to the pandemic. Proposed Constitutional Amendment no. 10, known as the “War Budget”, which is currently making its way through Brazil’s National Congress, provides for the waiver, in addition to relaxing fiscal and tax rules applicable to public entities.

• **Contracts with ineligible suppliers**

Contracts can also be made with suppliers which had been declared to be ineligible, or whose right to take part in bidding procedures has been suspended, if they are the only suppliers of the health-related goods or services required (Law 13.979/2020, article 4§3, as amended by Provisional Measure 926).

Although it may seem counterintuitive, the relaxed rules introduced by Law 13.979/2020 do not invite relaxed

compliance practices on the part of suppliers. Indeed, just the opposite is true: now is the time to redouble efforts to ensure conformity with legal requirements and best practices in interactions with public agents. Once the crisis has passed, it is not unlikely that supervision and control authorities will examine emergency contracts in detail, in order to determine whether abuses have occurred. **For information on compliance and regulatory issues, go to the chapter on Compliance.**

REMEDIES IN GOVERNMENT CONTRACTS

• **Grounds for non-performance**

Some of the government measures adopted in the context of the Covid-19 pandemic can make it difficult, if not impossible, for suppliers of goods and services to perform their obligations under contracts with the government. Referred to as *factum principis* (act of the prince, literally translated), these measures are usually related to the government’s police powers and, once proved, will excuse suppliers’ non-performance.

- **Re-establishing the economic and finance balance under government contracts**

Sometimes, even though deeply affected, contracts can still be performed. The unforeseen events related to Covid-19 can affect the economic and financial balance established between the parties and are legitimate triggers for requests to re-establish the balance under the contract, as provided for in article 65(II) (d) of the Government Contracting Law.

It is likely that Covid-19 crisis will constitute an event of *force majeure* in requests to re-establish the economic and financial balance under government contracts. The major issues, in such cases, are likely to be: (a) the causal nexus between the pandemic and/or state of emergency, and the economic-financial impact on the contract that caused it to become more onerous to the supplier, (b) the terms on which the request is made, and (c) the quantification of the economic-financial impacts (and the evidence of the impacts). For more information on the qualification of Covid-19 crisis as a *force majeure* event and its consequences, **go to the chapter on Contracts**. For information on the economic and financial balance under concession contracts in the transportation sector, **go to the chapter on Infrastructure and Public-Private Partnerships**.

- **Grounds for termination and right to compensation under article 78 of the Government Contracting Law**

In some cases, contracts can be terminated without the fault on the part of the supplier and the supplier will have the right to (a) payment for the portion of the contract that has been performed, (b) compensation for proven losses suffered by reason of termination, (c) compensation for demobilization costs, and (d) return of the performance bond. Article 78 (XII) to (XVII) of the Government Contracting Law set out the situations where termination is justified:



- Reasons of public interest that are highly important and widely known, as determined by the highest authority within the administrative sphere to which the contracting party is subject;
- Exclusion, by the government, of works, services or purchases resulting in a change in the original value of the contract of more than 25% in the case of the supply of goods and services and more than 50% for the refurbishment of buildings or equipment (Government Contracting Law, article 65§1);
- Failure by the government to make available, within the period stipulated in the contract, the place where the works, service or supply were to be performed, the land or thing contemplated in contract, or the sources of natural materials specified in the plans under the contract;
- Events of *force majeure* or acts of God that prevent the performance of the contract.

• **Grounds for terminating or suspending the contract under *force majeure*.**

In addition to providing grounds for revision of the terms of government contracts, events of *force majeure* can also trigger termination of the contract, without liability, or a temporary suspension of its effects, in part or in whole, depending on the severity and duration of the event.

ACCESS TO INFORMATION REQUESTS AND SUSPENSIONS OF DEADLINES AND LIMITATION PERIODS

Provisional Measure 928/2020 (PM 928) has made temporary changes to the rules on requests for information made under the Access to Information Law (Law 12.527/2011).

- The PM prioritizes responses to requests for information regarding the measures taken by the government to deal with the public health emergency brought on by Covid-19.
- It suspends the deadlines for responses to requests for information involving public authorities that are quarantined or working remotely, whenever the response to the request would require (a) physical access to records by public agents, or (b) public agents who are involved on a priority basis in combating Covid-19.

- For requests that have been suspended, the enquirer must file a follow-up request within 10 days following the end of the state of public emergency declared under Legislative Decree 6/2020. During the state of public emergency, all requests for access to information must be filed exclusively via the electronic system made available on the government agency's website.
- PM 928 also suspends filing deadlines that run against respondents and private entities in administrative proceedings, while the state of emergency brought on by Covid-19 exists.
- PM 928 suspends the running of limitation periods for application of administrative penalties under Law 12.846/2013 (the Anti-Corruption Law), Law 9.873/1999 (which establishes limitation periods for punitive actions brought by the federal public administration), Law 8112/1990 (which establishes the legal regime applicable to federal public servants, including those working in federal agencies and federal public foundations), and other legislation applicable to government employees.



11 | GOVERNMENT RELATIONS

The Covid-19 crisis has led Brazil’s Chamber of Deputies and Federal Senate to adopt “deliberations by teleconferencing” and to fast-track matters related to fighting the pandemic. Alongside the legislative branch’s initiatives, Decrees and Provisional Measures issued by the federal administration have been making their way through Congress.

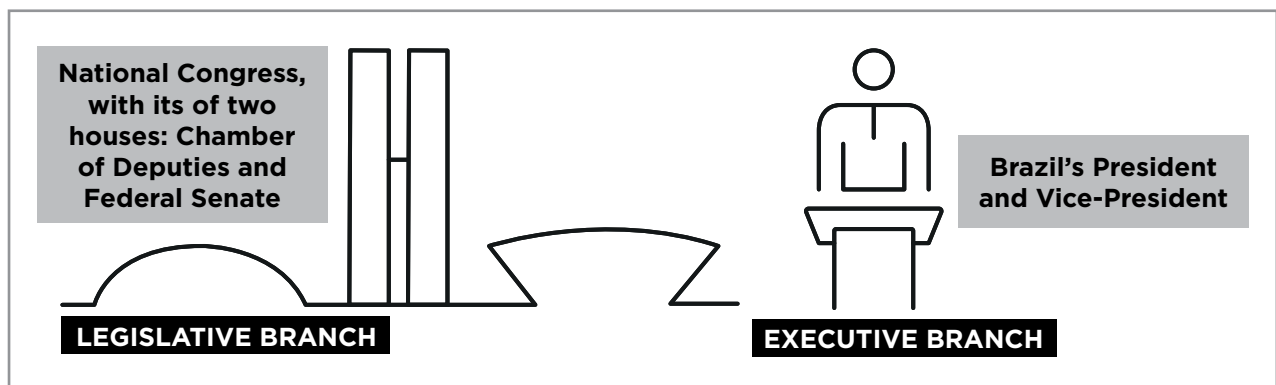


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GOVERNMENT STRUCTURE

Brazil is a federation, with three levels of government (federal, state and municipal), which poses significant challenges in adopting and coordinating measures to fight the Covid-19 pandemic. Overlapping authority in some pandemic-fighting measures has been a source of legal uncertainty, as discussed in the **chapter on Government Contracts**.

The legislative branch at the federal level is composed of the National Congress, while the executive branch is led by Brazil’s president. The state and municipal structures follow a similar division.



STATE OF EMERGENCY

On March 20, 2020, Brazil’s Congress approved a request sent by the President of the Republic to recognize the existence of a state of emergency in the country due to the coronavirus. The state of public emergency allows government to increase public spending and exceed the fiscal target for the year. The state of emergency will end on December 31, 2020.

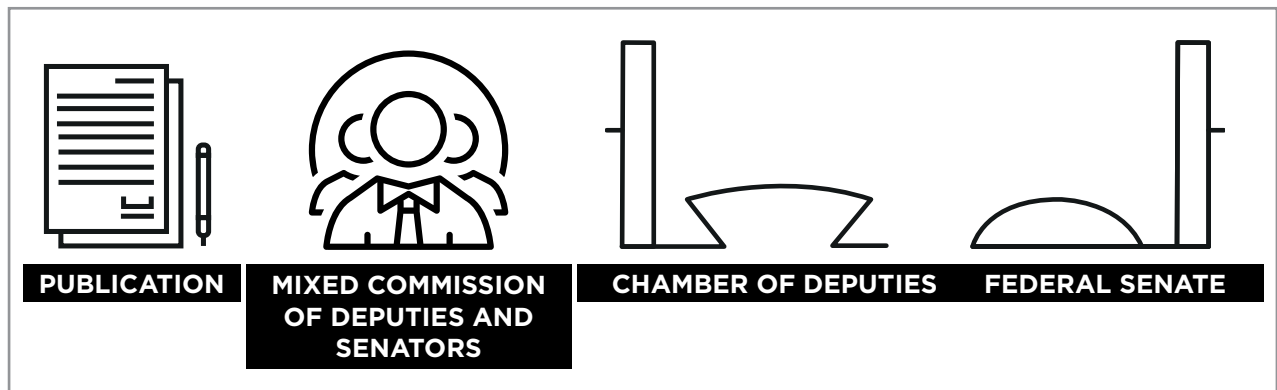
PROVISIONAL MEASURES

The President has made use of Provisional Measures to combat the effects of Covid-19 and the social and economic consequences of the pandemic in Brazil.

Provisional Measures are a prerogative of the President of the Republic that can be used in situations that are both important and urgent. Although Provisional Measures have the force of legislation, they must be approved by both the Chamber of Deputies and the Senate in order to be converted into ordinary legislation.

Provisional Measures initially have effect for 60 days, and can be automatically extended for another 60 days if voting on the PM in Congress has not been concluded. If a PM is not voted on within 45 days after being published, it takes on priority status, and all other deliberations in the house where the PM is being considered are put on hold until voting on the PM is concluded.

The figure below shows the process for legislative approval of Provisional Measures:



If a PM is approved by the two houses of Congress, it is converted into ordinary legislation; if it is not, the PM ceases to have effect, and Congress can opt to establish rules to govern acts performed while the PM was in effect by means of a Legislative Decree.

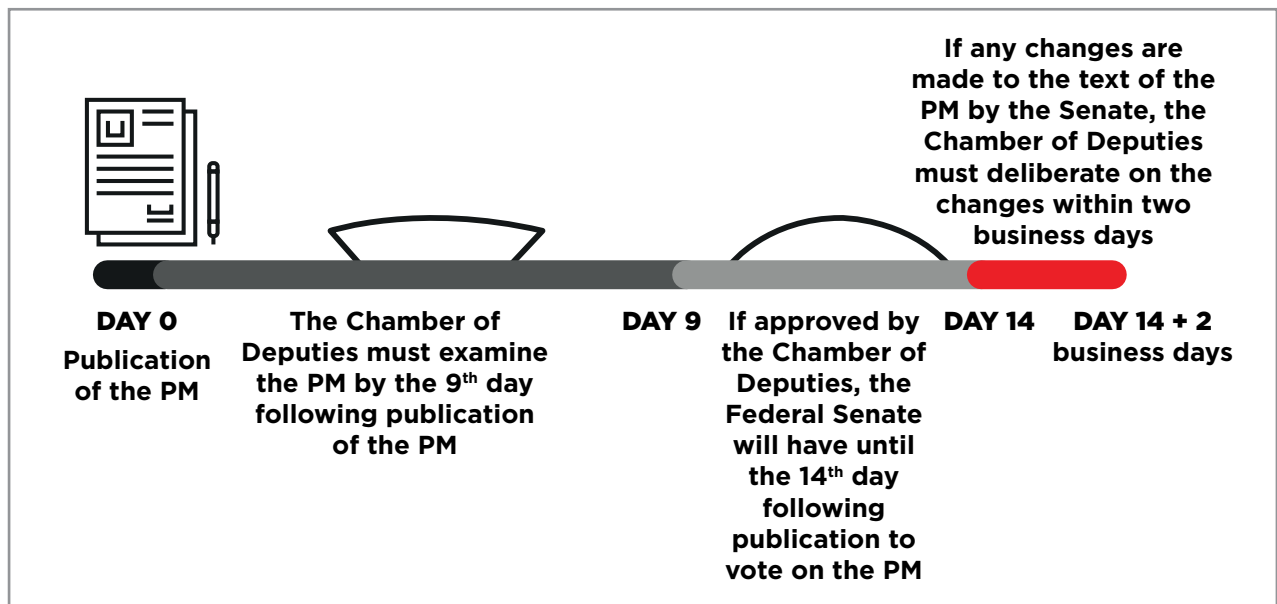


FAST-TRACKING FOR PROVISIONAL MEASURES DURING THE COVID-19 PANDEMIC

Because of the change in priorities brought about by the pandemic and the need to fast-track Provisional Measures dealing with the crisis, the Supreme Federal Court (Brazil’s constitutional court), has been asked to give its opinion on whether it is possible alter the process for approval of PMs, given that the process is set out in the Federal Constitution of 1988.

Justice Alexandre de Moraes of the Supreme Federal Court issued a preliminary decision allowing certain changes in the approval process during the state of emergency. The full panel of the Supreme Federal Court has begun to review the preliminary decision, and there is a strong indication that it will be upheld. Under the terms of the decision, PMs do not have to go through a Mixed Commission: instead, one member from each of the houses can report on the PM to house in plenary session.

With the authorization of the Supreme Federal Court, Congress issued the new, exceptional rules for approval of Provisional Measures:



The objective behind the initiative is to speed up the approval process: under ordinary rules, approval can take up to 120 days, while under the special fast-track rules, PMs can be approved in fewer than 20 days.

LEGISLATIVE PROPOSALS

Since the state of emergency was announced, legislators have presented many proposals for overcoming the health-related and economic consequences of the pandemic. Taken together, the Federal Congress and the legislatures of Brazil's 26 States and its Federal District have seen more than 3500 proposals.

Measures to protect workers and financial incentives to support businesses in difficulty are present in a large number of these proposals. Some proposals suggest the creation of compulsory loans and government requisition of privately-owned goods, buildings, services and health-related inputs. Others focus on fighting price manipulation and other abusive practices, and on making certain lines of credit interest-free during the crisis. **The more important legislative proposals are discussed in other chapters of this handbook.**



12 | INFRASTRUCTURE AND PUBLIC- PRIVATE PARTNERSHIPS

Supporting and accessory activities to essential services are themselves essential and will also be maintained during the state of public emergency.



OVERVIEW OF THE MAIN IMPACTS ON INFRASTRUCTURE

Many infrastructure sectors and public-private partnerships fall into the category of essential services, such as activities related to health, public and private security services, carriage of goods and passengers, telecommunications and internet, supply of natural gas, energy and fuel, sewage and water treatment, control of traffic by air, water and land, and customs and tax inspection. Supporting and accessory activities to essential services are themselves essential and will also be maintained during the state of public emergency (Law 13.979/2020 and Decree 10.282/2020).

Except in the case of public services, which must be continued, an interesting debate has arisen over whether businesses that are classified as essential under the Covid-19 regulations are required to continue operating, or whether they are simply authorized to do so, at their discretion. Our team is available to provide further information on this issue.

Virtual public hearings are a possibility

In competitive bidding procedures, public hearings are usually mandatory. The Office of the Prosecutor General of the State of São Paulo has issued an opinion in favor of holding virtual hearings for the state government's concession projects. The precedent opens up the possibility that other public entities will follow São Paulo's lead, which would facilitate the continuation of investment programs based on partnerships with the private sector (Opinion CJ/SIMA 158/2020).

The question of public health controls at airports and ports has been considered by the courts. For more information, go to the chapter on Litigation and Arbitration.

Economic and financial balance under concession contracts in the transportation sector

An opinion prepared by the legal department of the Ministry of Infrastructure recognizes that the Covid-19 pandemic may be grounds for re-establishing the economic and financial balance under concession contracts in the transportation sector. The opinion does not deal with the situation of any specific concessionaire, however, and therefore the right to revision of obligations under concessions will depend on proof of the impact made by the pandemic on concessionaires' revenues or expenses, on a case-by-case basis. (Opinion 261/2020/CONJUR-MINFRA/CGU/AGU)

The opinion is positive, especially in view of the fact that the transportation sector is one of the sectors most affected by pandemic containment measures. Still, many questions remain open, such as: (a) when to request revision of the contract, since the impacts of the pandemic are not limited to those identifiable today and may be felt for a much longer time, (b) how to measure the imbalance

in the parties' obligations, and (c) how balance can be restored, since some measures, such as an increase in tolls or rates, are not viable in an economic crisis. **For more information on the qualification of Covid-19 crisis as a *force majeure* event and its consequences, go to the chapter on Contracts. For information on the remedies applicable to government contracts, go to the chapter on Government Contracts.**

BNDES grants a temporary standstill on loan amortization and interest payments

The standstill is in effect for up to six months and covers both direct and indirect loans, in a total of BRL 30 billion. The term of the loans will remain the same, and the unpaid installments will be capitalized. In the case of direct loans, payment of dividends by the borrower must be limited to the minimum compulsory dividend.

Regulatory agencies in the transportation sector extend time limits for compliance with contractual and regulatory obligations and suspend certain requirements.



HIGHWAY TRANSPORTATION	
ANTT Resolution 5879/2020	The National Land Transportation Agency - ANTT grants a 120-day extension of the validity of licenses and authorizations related to carriage of goods and passengers by highway.
ARTESP Directive 40	The State of São Paulo Transportation Agency grants a 60-day extension for registrations and authorizations expiring between March 20, 2020 and April 30, 2020 related to intermunicipal collective transportation of passengers, and suspends filing deadlines and time limits for reimbursement of rates for 60 days.
ANTT Resolution 5848/2019	Application of the Regulation on Highway Transportation of Hazardous Products is suspended throughout the country.
ANTT Resolution 5232/2016	Requirements related to less-than-load shipping of ethanol or ethanol solutions (UN no. 1170) at concentrations of 70% or more are lifted.
RAILROAD TRANSPORTATION	
ANTT Resolution 5879/2020	120-day extension of the validity of licenses and authorizations related to carriage of goods by rail expiring in the period from March to June 2020.
ANTT Resolution 5879/2020	The deadline for reporting serious railroad accidents and filing the half-yearly new rights-of-way schedule is now July 31, 2020.
ANTT Resolution 5883/2020	The deadline for reporting requests by third parties to carry out work that may affect rail networks under concession is extended.
ANTT Resolution 5883/2020	The deadline is extended for mapping sensitive and risk spots on rail lines used to carry hazardous products.
TRANSPORTATION BY WATER	
ANTAQ Resolution 7660/2020	The National Transportation by Water Agency - ANTAQ suspends for 60 days certain time limits and obligations, such as (a) delivery of the first inventory and list of reversionary assets prepared by specialized firms engaged by port authorities or lessee of port facilities, (b) delivery of accounting records by holders of port facility leases, transition agreements, or port facility access agreements, (c) delivery of the Port Administration Accounts Manual.

AIR TRANSPORTATION SECTOR: EMERGENCY MEASURES

Extension of deadlines for payment of air navigation charges to federal government entities

The new deadline will fall within the current year. (Federal Decree 10.284/2020)

New rules for reimbursement of airline tickets.

Airlines are entitled to reimburse tickets within a period of 12 months, subject to contractual rules and applicable regulations. Consumers who opt for credits rather than reimbursement have a period of 12 months from the date of the original flight to use them, and cancellation penalties do not apply. (Provisional Measure 925/2020). **Go to the chapter on Litigation and Arbitration to read about decisions the courts have made on reimbursement of airline tickets.**

Extension of deadline for payments by airport concessionaires

Fixed and variable payments by concessionaires are now payable by December 18, 2020. (PM 925/2020)

The National Social and Economic Development Bank - BNDES has announced a financial support package for companies in the sector, available on the condition that all funds be invested exclusively in Brazil:

- Financing secured by issuance of debentures or other fixed-income instruments;
- Fixed income instruments at competitive rates;
- Fixed income instruments can be complemented by equity or quasi-equity instruments;
- Grace period of up to 24 months and a total term of up to 60 months;
- Compatible with market conditions, without subsidies.

POWER SECTOR: MEASURES TO FIGHT COVID-19

Provisional Measure 950/2020 published by the federal government on April 8, 2020 provides for:

Exemption from electricity rates for low-income consumers who benefit from the “social rate”, for consumption of up to 220 kWh/month, in the period for April 1 to June 30, 2020. Above the 220 kWh limit, regular rates apply. The exemption is funded by a BRL 900 million contribution by the federal government to the Power Development Account - CDE. (PM 950/2020)



Amortization of financial transactions in the power sector

The Power Development Account – CDE may be used to amortize financial transactions related to measures adopted to fight the impact of Covid-19 on the power sector. Regulations on the terms and conditions for structuring the financial transactions and on the availability of funds have not yet been issued by the federal government.

Financial transactions benefiting distributors will be amortized by means of a rate charged in proportion to power consumed in the regulated power market. The federal government will issue regulations on the amortization charge, and funds from the charge will be managed by the Electrical Power Trading Chamber – CCEE.

Power generation and transmission auctions postponed

The auctions are postponed indefinitely. All steps taken to date in connection with the auctions remain valid and new time limits will be established when the auction schedule recommences. (Directive 134/2020)

Creation of temporary sector committees

Directives 131/2020, 132/2020 and 133/2020 create temporary sector

committees to monitor the public emergency and coordinate the needs of the power, oil, gas and biofuel, and mining sectors.

PORTS: PROVISIONAL MEASURE MODIFIES RULES ON ASSIGNMENT FROM THE INDEPENDENT PORT WORKERS POOL

Because of the significant change in the flow of goods through Brazil's ports, the federal government issued Provisional Measure 945/2020 to modify the rules on assigning workers from the pool of independent port workers, who load and unload ships at public ports.

Risk groups

Workers may not be assigned if they have been diagnosed with Covid-19 and are part of the risk group for the disease, or if they show cold or flu symptoms.

Electronic and remote assignment for workers

Workers who cannot be assigned to work will be entitled to a monthly compensation

Free hiring if independent port workers are unavailable

Workers may be hired as formal employees for up to 12 months, while the pandemic lasts.



13 | INSURANCE

Broad coverage for losses arising out of disruption in companies' supply chains resulting from events of *force majeure* or acts of God is not common in Brazil. Nonetheless, certain types of insurance that are more common in the Brazilian market, which will be discussed below, may cover part of the effects of the Covid-19 pandemic and/or the restrictive measures imposed to contain its spread, depending on the terms of the policy.



GENERALLY SPEAKING, DOES INSURANCE IN BRAZIL COVER LOSSES RESULTING FROM PANDEMICS?

There is no simple answer to this question, since the matter is not specifically addressed either under regulations dealing with insurance or under Brazilian laws generally. Each case has to be examined in light of the terms and conditions of the specific policy or policies.

Broad coverage for losses arising out of disruption in companies' supply chains resulting from events of *force majeure* or acts of God (known as "supply chain" or "business disruption" insurance in the United States) is not common in Brazil. Nonetheless, certain types of insurance that are more common in the Brazilian market, which will be discussed below, may cover part of the effects of the Covid-19 pandemic and/or the restrictive measures imposed to contain its spread, depending on the terms of the policy.

It is not uncommon, however, for pandemics to be listed among the events that will exclude coverage, precisely because the extent to which a pandemic may affect an insurer's portfolio is unforeseeable. Still, even in the absence of specific exclusions, policies should be examined to determine if some other provision could exclude or limit coverage, such as limitations on coverage for certain types of risks, like accidents involving physical or bodily injury.

In short, the recommended course of action is to examine each policy in detail, with the help of an experienced legal adviser and the insurance broker, in order to determine the exact scope of coverage under the policy.

Recently, the Covid-19 pandemic led some members of Brazil's National Congress to present bills that would make insurance coverage compulsory in certain situations, by making coverage for death by Covid-19 mandatory under life insurance policies, for example, or by requiring certain app-based businesses (such as Uber and Rappi) to take out "loss of profits insurance" to cover their members for extended periods of inactivity. For the time being, however, it is uncertain whether these bills will become law.

WHAT TYPES OF INSURANCE MERIT GREATER ATTENTION IN THE CURRENT CIRCUMSTANCES?

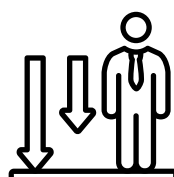
Although the answer to this question will depend on the nature of the losses suffered, some types of insurance tend to stand out in discussions involving Covid-19:



• Health Plans and Insurance

Although guidance on the use and coverage of health plans should

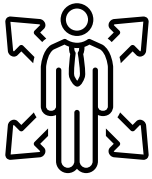
come primarily from health plan operators and insurers and the brokers and benefit administrators hired by the companies that have contracted the coverage, Brazil's private health insurance regulator, the ANS (*Agência Nacional de Saúde Suplementar*), recently determined that coverage of tests to detect Covid-19 is mandatory. Tests will be covered for beneficiaries of health plans offering outpatient, inpatient or comprehensive coverage, on medical prescription. As for **treatment** of the disease, beneficiaries should check the type of coverage they have and the terms and conditions of their plan. For example, does the plan cover hospitalization or only ambulatory services? Does it offer discounts on purchase of prescribed medications? Are there deductibles or co-pay requirements?



• Loss of Income

Because of the restrictive measures imposed by local authorities, which in some cases

come close to a total lockdown, loss of income insurance has gained special attention. Although this type of insurance can be contracted separately in Brazil, it is usually linked to broader property insurance products, such as comprehensive business insurance, which are intended principally to cover losses resulting from physical damage in the insured company's establishment. If the principal coverage is conditional on the occurrence of physical damage (such as explosions, fires, and other accidents), secondary coverage for loss of income may be compromised, since a shutdown of operations caused by a pandemic is not equivalent to physical damage. Nonetheless, coverage for loss of income can be broader, extending to shutdowns that do not result from physical damage - business interruptions caused by government orders is an example.



- **Crisis Management**

Generally included as a secondary coverage under more general insurance products,

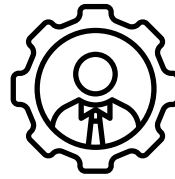
crisis management coverage offers indemnities for certain extraordinary expenditures made by the insured business when dealing with a crisis situation, such as publication of press releases, attorneys' fees, media advisors, and specialized consultants.



- **Surety bond insurance**

The destabilization of the economy and supply chains has generated systemic risks of default

under many different types of contracts and projects, from financial commitments to complex obligations like construction works. When obligations are secured by surety bond insurance, it is worth noting that the standard clause used by insurers in Brazil excludes coverage in cases of "*cas fortuit* or *force majeure*", legal concepts frequently associated with the current pandemic. **Go to the chapters on Contracts and Mergers and Acquisitions for more information on the application of *force majeure* in the context of Covid-19.**



- **Civil liability**

This type of insurance covers claims by third parties for losses caused by the insured

individual or company. Coverage may be available under such policies, depending on the facts of each case, where claims arise in connection with Covid-19, such as claims by clients or business partners related to a shutdown or slowdown of the insured company's operations, or claims by employees or third parties based on contamination by Covid-19 at the workplace. Civil liability insurance typically covers both the costs of defence (court costs, legal fees) and any award that may be made in favor of claimants.



- **Life insurance**

Although exclusion of pandemics is common in life insurance policies, various Brazilian insurers

have made an exception and have covered events related to Covid-19. Beneficiaries should contact their insurers to find out the insurer's position on the Covid-19 pandemic.



14 | INTELLECTUAL PROPERTY

Brazil's INPI has launched the Covid-19 Technologies Observatory, which brings together and discloses information on technologies that can contribute to solutions to the pandemic.



REMOTE WORK AND SUSPENSION OF TIME LIMITS

Brazil's National Institute of Industrial Property (INPI - *Instituto Nacional da Propriedade Industrial*) has transitioned its entire staff to home-based work and has suspended all deadlines and in-person meetings as of March 16, 2020. The original suspension was to end on April 14, but has since been extended twice, first to April 30 and then to May 15, 2020. All time limits, including publication deadlines, will begin to run, or start running again, at the end of the suspension. Nonetheless, it is advisable to meet original deadlines whenever possible, to avoid overloading the system when the suspension ends.



PROJECTS TO DISSEMINATE INFORMATION AND TECHNOLOGIES TO FIGHT THE PANDEMIC

Shortly after suspending its deadlines, the INPI launched a project called the "Covid-19 Technologies Observatory", which brings together and discloses information on technologies that can contribute to solutions to the pandemic.

The Covid-19 Technologies Observatory platform is updated regularly with information from around the world on the development of vaccines, medications, health equipment, diagnostic tests and other technologies, and also contains studies carried out internally. The first two studies provide an overview of patent applications and registrations before INPI that describe (a) methods for diagnosing the coronavirus and other respiratory viruses, and (b) lung ventilators.



PRIORITY PROCESSING OF PATENT APPLICATIONS

The INPI has amended its regulation on priority processing of patent applications (Resolution 239) in light of the Covid-19 pandemic. According to Directive 149/2020, published on April 7, 2020, "fast-track" processing is available for patent applications dealing with technology related to Covid-19, namely technologies for vaccines, medications, diagnostic methods, or other pharmaceutical or health-related products, processes or equipment that could contribute to fighting the novel coronavirus.

Fast-track processing may be granted at the request of the applicant or any interested third party. Requests may be filed at any time until June 30, 2021 and, if granted, the relevant patent application will be examined on priority basis. Expedited proceedings were already available for other health-related technologies and green technologies, and can sharply reduce the time for a final decision on the patent application, from years to months.



COMPULSORY PATENT LICENSING

According to article 68 of the Brazilian IP Law, patent owners are subject to compulsory licensing if (a) they exercise the rights resulting from their patent in an abusive manner or (b) they use the patent to commit an abuse of economic power. Abuse of patent rights must be proven through an administrative or court proceeding and the IP Law sets out defenses available to patent owners: (a) legitimate reasons for failing to use the patented technology, (b) serious and effective preparations for commercial use of the patented technology have been undertaken, and (c) legal obstacles to the manufacture or sale of the patented technology.



COMPULSORY LICENSING IN NATIONAL EMERGENCIES

In cases of national emergency or public interest, a compulsory license of patented technology may be granted under article 71 of the IP Law and Decrees 3201/1999 and 4830/2003. The compulsory license requires an act of federal executive authorities, on finding that the patent owner or the patent licensee is not meeting the demand created by the exceptional situation. To date only one case has resulted in compulsory licensing: in 2007, for two patents in connection with Efavirenz, to meet the demands of the National STD/AIDS Program.

• Possible future scenarios: proposed legislation

Legislative initiatives (Bills 1184/2020, 1320/2020 and 1462/2020) have been introduced in the Chamber of Deputies between March 30 and April 2, 2020, seeking to make the provisions on compulsory licensing more flexible. The most recent initiative, combining elements from the first two, proposes to amend article 71 of the IP Law to make an act of federal executive authorities unnecessary in the event of a “declaration of a public health emergency” by the World Health Organization or by “competent national authorities”. In practice, the proposed legislation would make the granting of compulsory licenses automatic, without need to show that the patent owner or licensee does not meet the demand created by the emergency situation.



15 | LITIGATION AND ARBITRATION

Brazil's courts and arbitration chambers continue to function, and BMA is monitoring decisions issued around the country on the effects of the pandemic.



COURTS AND MEDIATION AND ARBITRATION CHAMBERS ARE STILL FUNCTIONING AND AVAILABLE TO PARTIES AND ATTORNEYS REMOTELY

Brazilian courts continue to function during the Covid-19 isolation measures. The National Justice Council (CNJ – *Conselho Nacional de Justiça*), however, decided to suspend procedural deadlines for a limited time ending at the beginning of May 2020 for cases in the electronic filing system, or when the courts resume regular operations, for cases with physical records. Although in-person services are not permitted, the courts are generally still available to parties and attorneys remotely, through technological resources like e-mail and audio and video conferences. BMA is tracking how courts around Brazil have applied the CNJ's decisions on court services during the state of public emergency.

Similarly, the main mediation and arbitration chambers in Brazil continue functioning, conducting administrative and procedural work electronically. Except for a few cases where meetings and hearings have been cancelled or postponed, most arbitrations are proceeding normally.

IN THE COURTS

BMA is monitoring decisions issued by courts around the country on the effects of the pandemic. The main trends we have identified so far are summarized below. Our dispute resolution team is ready to help you understand how these precedents apply to your business.

Court-supervised restructurings and bankruptcies

Following CNJ Recommendation 63, courts all over Brazil have been implementing changes in court-supervised restructuring and bankruptcy proceedings, and making the obligations imposed on debtor business more flexible to help them cope with the effects of the Covid-19 pandemic. **Go to the chapter on Restructuring and Insolvency to read more on this topic.** Some noteworthy decisions are summarized below:

- **Creditor meetings**

Various courts in the State of São Paulo have cancelled in-person general meetings of creditors to avoid large gatherings and public health risks. In some cases, the court ordered that a virtual meeting be held instead, as recommended by the CNJ.

- **Extension of the stay period**

Courts in various states have extended the stay period applicable to lawsuits and enforcement proceedings against companies under court-supervised restructuring, for as long as the effects of the pandemic last.

- **Compliance with restructuring plans**

Many companies have applied for a complete or partial suspension of obligations under their restructuring plans. So far, most applications have been accepted by the courts, in view of the economic impacts the pandemic has had on recovering businesses. Decisions denying applications for a suspension cite the need for approval by the creditors in meeting for any change to the restructuring plan, or to the fact that the debtor company was already in breach of its obligations prior to the pandemic.

- **Small creditors**

In a large bankruptcy proceeding, a São Paulo court ordered the immediate payment of claims of up to BRL 10,000.00 by means of an exceptional distribution of the assets of the bankrupt company. According to the court, although the payment was unprecedented, it was justified by the economic benefits resulting from making funds available to creditors, and by the fact that it simplified the bankruptcy proceeding by discharging part of the debts.

- **Debt restructuring**

The courts have seen much litigation over debt restructuring, particularly when the creditor is a financial institution. Many decisions have been issued suspending the enforceability

of loan payments by reason of the pandemic. In one case, the court prevented the sale of shares that had been given as security for a loan because of the sharp fall in the trading price of the shares. In most cases, the courts granted relief to debtors only after unsuccessful negotiations with the creditor.

- **Attachment orders**

Various decisions have relaxed orders to freeze funds or attach property in order to give debtors needed liquidity during the state of public emergency. For example, we found decisions that reduced percentages under garnishee orders, denied applications to freeze bank accounts, and released funds held under attachment orders. There appears to be a special concern when



debtors are health institutions, which are engaged in an essential activity, especially in the context of the Covid-19 crisis.

- **Corporate resolutions**

Exceptionally, and in light of the social dimensions of the claim made in the case, one court allowed the majority shareholders of a company to take the steps needed to have their company begin selling alcohol-based hand sanitizer, without need for the minority shareholder's signature. For more information on regulations affecting companies during the Covid-19 pandemic, **go to the Corporate Chapter.**

- **Performance of contractual obligations during the pandemic**

The courts have seen many cases dealing with the pandemic's impacts on performance of contractual obligations. Noteworthy cases include (a) a decision ordering that payment obligations denominated in U.S. dollars be converted into Brazilian reais in order to maintain the financial balance of the contract and avoid unjust enrichment, (b) decisions either granting or denying extensions of deadlines for complying with court-approved settlements, (c) a decision

- **Time limits for non-procedural acts**

The courts have taken the position that while time limits for procedural acts (such as filing defences and appeals) will in general be suspended, time limits "outside the proceeding" (such as deadlines for payment of the price of goods under a sale agreement) will continue to run normally.

holding that the price of an equity interest in a limited liability company, originally payable in three installments in April, May and June 2020 should be paid in 10 monthly installments, in view of the unforeseen impacts of the pandemic, and (d) decisions reducing the amount of rent so that the financial burden of the effects of the pandemic are not borne by one party only. For more information on how the pandemic has affected contractual obligations, **go to the chapter on Contracts.**

- **International contracts**

The courts have recently considered two interesting issues related to the international sale of goods. In one case, the court denied a request to extend the deadline for delivery of a product because the claimant failed to prove that the required input could only have been acquired from its Chinese supplier, which was affected by the pandemic. In another case, the court granted a preliminary order requiring customs clearance to proceed for imported goods that had been stalled with the customs authorities. For more information on how the pandemic has affected contractual obligations, **go to the chapter on Contracts.**

- **Reductions in rent and evictions**

The courts have seen a large volume of cases dealing with leases and rental contracts, many involving requests to suspend or reduce the rent for commercial establishments. The decisions vary considerably, showing that there is as yet no consolidated position on this question. Another common request is for a stay of eviction orders, which is usually granted in order to avoid risk to tenants' health.

- **Orders to vacate property**

Courts in various states have stayed orders to vacate property in light of the health risks associated with the coronavirus.

- **Consumer rights**

The courts have been denying consumers' requests for preliminary orders allowing them not to pay, or to cancel, airline tickets, especially in view of Provisional Measure 925, which gives consumers two options: credit for a future flight, or reimbursement according to the rules of their fare class. **For more information** on the new rules regarding reimbursement of airline tickets, **go to the chapter on Infrastructure and Public-Private Partnerships.**

In the private education sector, one court refused to grant a reduction in monthly tuition fees where the school had implemented adaptations to continue instruction online and planned to make up lost in-person lessons. There is also a Bill before Congress that would reduce monthly tuition fees by at least 30%.

Directive 15/2020 issued by the Ministry of Justice is another noteworthy initiative. Under the Directive, companies that meet certain requirements must register on the "Consumidor.gov.br" platform. The platform enables the solution of consumer conflicts via internet. For more information on how the pandemic has affected contractual obligations, **go to the chapter on Contracts.**

- **Public health controls at ports and airports**

The courts have refused to grant injunctions requested by ANVISA (Brazil's health surveillance agency) and the Federal Public Defenders' Office to implement public health controls at ports and airports in Brazil. The decisions point out that such measures could result in confusion and a lack of coordination among state agencies, and that it would be difficult for the courts to determine whether the measures were being complied with.



16 | MERGERS AND ACQUISITIONS

The Covid-19 pandemic has injected a considerable degree of uncertainty and volatility into the market, with impacts on market players and M&A activity. Nonetheless, just as in past crises, such an environment can create merger and acquisition opportunities.



The Covid-19 pandemic has injected a considerable degree of uncertainty and volatility into the market, with impacts on market players and M&A activity. Nonetheless, just as in past crises, such an environment can create merger and acquisition opportunities, in the guise of the sometimes temporary depreciation of certain assets and businesses, or because companies in need of liquidity are selling assets that they would otherwise not put up for sale, or even in the form of unsolicited offers. A shift in the shareholder base and, consequently, in the interests to be accommodated by companies' management and by third parties interested in a takeover or other M&A transaction, is also common when the scenario changes.

Public companies that lack clear controlling shareholders are more likely to receive unsolicited offers. On the one hand, it is advisable that boards of directors and management evaluate, prepare and even implement some precautionary measures (such as proposing amendments to the corporate bylaws to include defensive provisions) before the company becomes a target of an unsolicited and opportunistic bid. Acting too late may hinder companies' ability to react swiftly to an offer, exclude defense mechanisms that might have been available earlier and, in the end, limit their negotiating leverage. On the other hand, those on the buy side have to deal with those protective mechanisms and identify the right party to negotiate with. In some cases, the right party will be a group of significant shareholders; in others the company's management. Boards play a significant role in these cases, as they are expected to provide their opinion to the shareholders on proposed offers and transactions.

In transactions that involve assets and/or businesses in distress, dealing with third party creditors may be decisive for a successful closing. Various debt instruments contain negative covenants that limit transactions which result in a change of control, mergers and other corporate reorganizations, and the sale of material assets. In order to avoid last minute obstacles, it is important for the parties to plan ahead and discuss how and when to involve third party creditors.

Below we comment on the main issues and impacts that market participants should be particularly attentive to in M&A transactions in the current scenario.



Material Adverse Effect provisions - MAC/MAE

The high degree of uncertainty and

volatility surrounding the impacts of the Covid-19 pandemic makes it important to review and assess, with particular care, provisions and definitions involving Material Adverse Effects (or Material Adverse Changes or Events), usually referred to as MAC or MAE in M&A agreements. Many standard MAC/MAE provisions used prior to the pandemic do not expressly refer to epidemics and pandemics and their economic impacts on the transaction, although such effects may be covered – or excluded – by more general wording, depending on the case.

Naturally, the trend now is for MAC/MAE provisions to refer expressly to pandemics or even to Covid-19 specifically, and their impacts, and to allocate the associated risks in the manner negotiated by the parties. Sellers can be expected to exclude the effects of the pandemic in drafting MAC/MAE clauses, to ensure that the deal will close, while buyers will want to specify the extent to which Covid-19's economic impacts on the target are compatible with the obligation to close the transaction.

Some MAC/MAE provisions establish metrics or amounts above which the parties agree that the target's economic and financial situation will be materially altered, allowing the buyer to back out of the transaction. Special attention should be given to

these metrics and limits, and both the base date against which they are measured and what would constitute an “acceptable” financial impact on the target's business need to be carefully considered. In addition, some MAC/MAE clauses exclude events and changes that affect the market generally. In any case, the relevance of the pandemic to the wording of the agreement and the pandemic's effects on the target are issues that should be discussed on a case-by-case basis, in light of the circumstances and peculiarities of each transaction.



Force majeure and revision of contracts

Some Brazilian authorities have acknowledged that

Covid-19 is an event of *force majeure*, and the courts have considered the question in a number of cases. Under Brazilian law, *force majeure* will release parties from liability for failure to perform their obligations, regardless of whether their agreement contains an express provision to that effect (Civil Code, article 393). There are also other circumstances where the law allows contracts to be terminated or modified, such as when the contract becomes excessively onerous for one of the parties, with extreme advantage for the other (Civil Code, article 478), and or a disproportion arises between the value of the contract at the time it was made and its price at the time of performance (Civil Code, article 317). But the mere fact that the pandemic has occurred does not in itself mean that the law will exclude liability for non-performance or provide grounds



to revise contractual obligations. In each case, the legal prerequisites must be met and, in particular, the pandemic must have had an actual impact on the economic rationale underlying the contract. For example, it is important to show a causal relationship between the pandemic and the failure to perform, and so parties that were already in default when the pandemic made itself felt will have more difficulty in demonstrating that their failure to perform was due to the economic consequences of Covid-19.

In transactions where the documents have been signed but closing has not yet occurred, the question of whether these legal mechanisms might apply merits special attention. The date on which the signing occurred, and the foreseeability (or unforeseeability) of Covid-19's impacts at the time of signing are important factors to be considered. **For more information on the Covid-19 pandemic as a *force majeure* event, go to the chapter on Contracts.**



Recommendations for the due diligence phase

In legal, financial, accounting and operational due diligence processes, the burden will be on the parties and their advisors to identify the particular impacts that Covid-19 has had, or could have, on the target and its business, contracts, operations, finances, and business projects, among other matters.

Naturally, each target and its market or industry segment will present their own particularities, and some or even many aspects will be difficult to assess, requiring joint efforts by clients and their legal and financial advisers.

In general terms, it will be important to evaluate (a) the target's operations, and especially the operation of industrial plants, which may have been – or might in future be – shut down in function of the target's policy, the legislation in the relevant state or municipality, and logistics problems in the region, (b) the steps taken to deal with stock on hand, and the potential depreciation or even loss of stock, in light of uncertainties as to when an economic reopening may occur, among other factors, (c) the impacts that the pandemic has had and will have on the business and operations of the target's main customers and suppliers, including whether the customers continue to operate during the pandemic, and whether suppliers will have the capacity to meet the target's needs, (d) the target's main contracts, and which of those contracts have significant chances of being suspended, revised or terminated in view of the economic and social impacts of the pandemic, along with the extent to which the target is meeting its own contractual obligations, (e) any employment risks that may have arisen in connection with changes in operations and the workplace environment by reason of the pandemic, (f) Covid-19's financial impacts, including a possible increase in the target's indebtedness resulting from deferral of taxes, rents, and other significant obligations, (g) impacts on financial contracts and collateral security agreements, most of which establish financial metrics that must be

met, subject to penalties or even termination, and (h) any insurance the target may have that offers full or partial coverage of the effects of the pandemic on its operations, among many other matters.



Representations and warranties

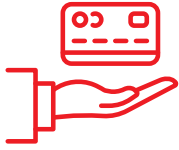
Reps and warranties also require careful attention, especially those dealing with the target's business and the maintenance and continuity of its operations, compliance with its obligations, including tax and employment obligations, accounts receivable, material contracts, and customers and suppliers. Sellers are likely to try to exclude the effects of the pandemic from their representations and warranties, but if a wholesale exclusion is not possible, they will try to include significant qualifiers as to the materiality of the effects and impacts of the pandemic on their business and operations, in order to reduce the chances of a breach of the representations and warranties. Buyers, in contrast, will tend to demand wording that restricts their exposure to the risks represented by the pandemic and its impacts on the target's business.

Given the widespread impact the Covid-19 pandemic has had on businesses generally, buyers can be expected to seek the greatest access possible to the target's operational and financial information prior to the closing, to check that the representations and warranties made at the time of signing continue to be true.



Conditions precedent and pre-closing obligations

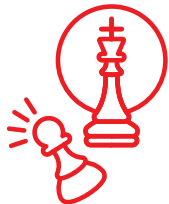
Parties can consider including as conditions precedent events that could mitigate the effects of the pandemic on the target's business, or implementation of mitigating measures by the seller, or even mechanisms for compensation if certain material events occur, such as the loss of material customers. Buyers can be expected to want conditions that allow them to abandon the transaction without liability if the effects of the pandemic on the target's business worsens between signing and closing. Another point worth attention is whether conditions precedent can effectively be met by the deadlines fixed by the parties, in view of lockdowns imposed in various cities, the suspension of procedural and administrative time limits, and limitations on the services provided by some public authorities and departments. Longstop date clauses should be reviewed in light of the pandemic's effects on the various public authorities relevant to the deal. The parties can also agree to lengthen or shorten deadlines, depending on whether lockdown measures and other effects of the pandemic are easing. In any case, the party facing difficulties in fulfilling conditions precedent should alert the other party as soon as possible as to the potential obstacle to meeting contractual deadlines.



Price and form of payment

Since the Covid-19 pandemic may have had (or will have) significant impact on the target's working capital and net indebtedness, special attention should be given to mechanisms aimed at capturing material differences in the target's financial circumstances between signing and closing. In addition, projected cash flows tend to suffer significantly by reason of the pandemic, and consequently deferred payment or compensation, including earn-out mechanisms, will tend to be the subject of much discussion and even dispute in times like these, as they involve allocation and sharing of risk between the parties in an uncertain scenario. Similarly, alternatives to cash transactions are also more readily considered, and there has been an increase in stock-to-stock deals involving companies in the same sector, which tend to be affected by the pandemic in the same way, even if the effects themselves may be unpredictable.

Sellers especially should concern themselves with conditions that will ensure that the buyer can conclude the transaction: is the buyer using its own capital, or relying on financing, which may not be available because of market flex provisions?



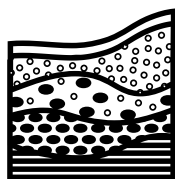
Indemnification

Disputes can be expected over the extent to which indemnification is excluded or limited with respect to events or liabilities related to the pandemic, even if the actual impact of the pandemic is still unknown.



17 | MINING

Monitoring of constructions and dams that may pose a safety risk are considered to be essential activities and will continue during the Covid-19 public health emergency.



CLEARANCE FOR MINING ACTIVITIES DURING THE PANDEMIC

Under Directive 135/GM/2020 issued by the Ministry of Mines and Energy, the availability of mineral inputs is essential because they are needed in the supply chains of essential activities listed in Article 3§1 of Decree 10.282/2020, which was ratified by Decree 10.239/2020. Mining activities should therefore continue during the state of emergency brought about by Covid-19.

Among the essential mining activities listed by Directive 135/GM/2020 are: (a) exploration for and extraction of mineral resources; (b) mineral processing; (c) sale and distribution of products generated in the mineral productive chain; and (d) transportation and delivery of minerals to the supply chain.

The courts have upheld the essential nature of mining activities. At the beginning of April, for example, the 18th Regional Labor Court issued an order allowing a mining company to continue operations during the lockdown adopted by the State Government of Goiás, on the grounds that mining is an essential activity under Directive 135/GM/2020 (TRT-18, Application for Judicial Review no. 0010221-21.2020.5.18.0000, 2 April, 2020).



COMPLIANCE AND MONITORING OBLIGATIONS

Monitoring of constructions and dams that may pose a safety risk are considered to be essential activities and should continue during the Covid-19 public health emergency (Federal Decree 10.282/2020). Depending on the difficulties faced in specific cases, companies may be able to renegotiate regulatory requirements with the relevant authority.

In the State of Minas Gerais, dam-related inspections continue to take place (Joint Resolutions SEMAD/IEF/FEAM/IGAM nos. 2950 and 2955).

SUSPENSION OF DEADLINES IN ADMINISTRATIVE PROCEEDINGS

The National Mining Agency (ANM) suspended all deadlines from March 20 to until May 31, 2020 (ANM Resolution 28/2020, altered by ANM Resolutions 29 and 30/2020). Some environmental agencies have issued rules how to proceed during the Covid-19 pandemic, or have simply determined that licensing deadlines will not run while the state of emergency exists. In some cases, it is possible to apply online to renew licenses and permits.

DECOMMISSIONING

The deadline for decommissioning of upstream tailings dams was not suspended and inspection and control requirements under the National Dam Safety Policy (ANM Resolution 28 of March 26, 2020) remain in effect.



18 | OIL AND GAS

Federal Decree 10.1282, issued on March 20, 2020, recognizes oil production and production, distribution and marketing of fuels, LPG and other petroleum derivatives as essential activities.



OIL AND GAS IS AN ESSENTIAL ACTIVITY

Federal Decree 10.1282, issued on March 20, 2020, recognizes oil production and production, distribution and marketing of fuels, LPG and other petroleum derivatives as essential activities.

The State of Rio de Janeiro, which represents 71% of the total volume of petroleum produced in Brazil, authorized the onshore oil and gas industry in the state to continue functioning throughout the period of public emergency, to ensure supply of gasoline and natural gas to the population (State Decree 47.002). It has also created a commission to draw up a proposal to modernize state legislation in the oil and gas sector, by simplifying and debureaucratizing the rules and regulations governing the industry at the state level (State Decree 47.007).

EMERGENCY MEASURES ADOPTED BY THE NATIONAL PETROLEUM AGENCY - ANP

Brazil's oil and gas regulator, the ANP, has implemented a number of measures in response to the state of public emergency brought about by the Covid-19 pandemic. Highlights of the measures are listed below:

- The ANP has made recommendations on measures to protect workers and ensure safe operations in the industry.
- Changes in operational routines that could compromise domestic supply of oil, petroleum derivatives, natural gas, or biofuels must be notified to the ANP. Notices must be accompanied by action plans for continuity of services and maintenance of domestic supply. The ANP points out that agents in the regulated O&G sector are responsible for supply of fuel and therefore conduct that harms supply is subject to penalties imposed by the ANP.
- The rules for certain obligations related to oil and gas exploration and production are more flexible, such as extended deadlines for submitting Development Plans, Annual Work and Budget Programs, and Annual Production Programs.
- Activities contemplated under 2020 Annual Work and Budget Programs are postponed to 2021, without need for a revised plan.
- Extraordinary burn-offs of natural gas of up to 100,000 m³/day are authorized in small producing fields.

- On-site inspections in Local Content certification processes are suspended. Temporarily, mandatory on-site inspections may be conducted remotely by videoconferencing technology that allows the production process to be tracked. The remote inspection will be recorded and included in the certification proceeding file.

The ANP stressed that it is evaluating the need for further action and that new measures in the O&G sector may be forthcoming.

MEASURES ANNOUNCED BY PETROBRAS

Petrobras, the state-controlled company that operates fields responsible for 93.3% of the oil and natural gas produced in Brazil (as of March 2020), has announced a series of measures to control costs and to protect workers' health and support containment of the coronavirus in its operational and administrative areas.

- A cut in production of 200,000 barrels a day, with adjustments to processing at Petrobras refineries in line with demand for fuel. Although Petrobras is carrying out a disinvestment program, the company still controls 98.2% of the refining capacity in Brazil, according to the ANP's 2019 annual report.
- Mothballing some shallow-water platforms, where the cost of extraction per barrel is higher, resulting in a negative cash flow with the drop in oil prices.
- Senior management continues to be committed to the original Disinvestment Plan, although the time line will have to be moved back in some cases.
- Temporary measures on distribution of gas include a proposal to relax the rules under natural gas supply contracts with local distributors to serve the industrial, residential, commercial and vehicular markets (i.e. non-thermoelectric). Under Petrobras's proposal, local distributors would be able to pay invoices for April, May and June 2020 in installments.



- Petrobras also reiterated that it will not charge penalties for failure to meet scheduled daily volumes, and will not enforce ship-or-pay and take-or-pay provisions with respect to volumes of gas affected by diminished demand.



19 | REAL ESTATE

While no one suggests that breach of contract should be “institutionalized”, the social and economic disruption brought about by the Covid-19 pandemic requires action by both the legislature and the judiciary to mitigate the impacts of the crisis.



MAIN IMPACTS SO FAR

• **Shutdown of commercial establishments**

The recent closing of commercial establishments like shopping centers, gyms, and theaters as part of the restrictive measures adopted by state governments in the fight against Covid-19 has generated many questions – and some disputes – between tenants and landlords, especially with respect to payment of rent, condominium fees, and other charges, depending on the establishment affected by the shutdown order.

• **Shopping centers**

In the shopping center sector, some operators have taken the initiative and suspended payment of rent while the center is closed. This, in fact, was the guidance issued by the Brazilian Association of Shopping Centers – Abrasce, which also recommends that operators suspend or reduce condominium fees and amounts payable to advertising funds during the shutdown.

POSSIBILITIES FOR THE FUTURE: PROPOSED LEGISLATION

Not only are these questions novel from a legal point of view, they are very recent, and involve a number of other matters that require a careful case-by-case analysis, especially the amount of time that establishments will remain closed, which is still uncertain, and evidence of effective losses suffered by tenants, in order to justify their inability to honor their obligations.

While no one suggests that breach of contract should be “institutionalized”, the social and economic disruption brought about by the Covid-19 pandemic requires action by both the legislature and the judiciary to mitigate the impacts of the crisis.

A number of bills have been presented in Brazil’s National Congress to govern the relationship between tenants and landlords during the state of public emergency, along with other types of contracts governed by the private law. All bills are still in the earliest stages. **For more information, go to the chapter on Government Relations.**

- **Bill 936/2020** is intended to protect those who have been affected by emergency measures related to the Covid-19 pandemic by ensuring that leases cannot be terminated and tenants cannot be evicted while the measures are in effect. The bill also provides for discounts and deferrals of the debt on which eviction actions are based.
- **Bill 1028/2020** provides for a stay of 90 days in actions for eviction for failure to pay rent under residential and non-residential leases by reason of economic difficulties resulting from measures implemented to fight Covid-19.
- **Bill 1179/2020** proposes to establish a Temporary Emergency Regime for private law matters that would apply during the Covid-19 pandemic. On the subject of leases, the bill provides, in certain cases, for a ban on preliminary eviction orders until October 30, 2020 in actions filed after March 19, 2020.
- **Bill 872/2020** provides for a stay of all actions for eviction or repossession based on non-payment of rent and loans for residential properties, including foreclosures on mortgages.

Interestingly, these Bills propose solutions that have never before been adopted in Brazil, inspired by measures taken by other countries, such as Germany.

IN THE COURTS

In the absence of legislation dealing specifically with these questions, tenants have brought lawsuits throughout Brazil, seeking relief that ranges from declarations that payment of rent and other charges is not enforceable during the state of public emergency, to rent reductions and even waivers.

The complexity of the issues is reflected in the decisions issued by the courts, which vary widely, with

some taking diametrically opposed positions. For more on the decisions issued by the courts, **go to the chapter on Litigation and Arbitration.**

In this uncertain and unpredictable environment, prior to bringing legal proceedings, it is more important than ever for parties to negotiate in good faith, taking into consideration their own particular circumstances, in order to find reasonable solutions for dealing with the challenges created by the Covid-19 pandemic and to mitigate the losses that all will suffer.



20 | RESTRUCTURING AND INSOLVENCY

The National Justice Council issues recommendations to judges presiding over judicial reorganizations, and Congress debates bills to deal with the effects of the Covid-19 emergency.



THE NATIONAL JUSTICE COUNCIL, WHICH SUPERVISES THE ADMINISTRATIVE AND FINANCIAL ASPECTS OF BRAZIL'S JUDICIARY, ISSUES RECOMMENDATIONS TO JUDGES

A Resolution issued by the National Justice Council (CNJ – *Conselho Nacional de Justiça*) on March 31, 2020 does not change the law but makes recommendations to judges presiding over judicial reorganization (*recuperação judicial*) proceedings:

- Priority should be given to matters dealing with the release of accounts receivables serving as collateral, and to measures to ensure funds are effectively released.
- In-person general meetings of creditors should be postponed. In urgent cases, virtual meetings should be held.
- If general meetings of creditors must be postponed, the stay period under article 6 of the Business Recovery and Bankruptcy Law (Law 11.101/2005) should be extended until a decision by the creditors in meeting is possible.

- If as at March 20, 2020, debtors were not in default on obligations under a restructuring plan, they should be allowed to present a modified plan to the creditors for consideration. Debtors must also be able to show that their capacity to perform the plan has been affected by the Covid-19 pandemic.

- Court-appointed administrators (trustees) should continue to oversee, remotely, the activities of businesses under restructuring and should disclose their Monthly Activities Report on their websites.

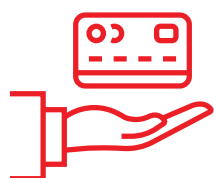
- Caution should be exercised in issuing eviction orders for failure to pay and orders to attach property during the state of public emergency. **Go to the chapter on Litigation and Arbitration to read about the main judicial decisions on restructuring and insolvency.**

POSSIBLE FUTURE SCENARIOS: PROPOSED LEGISLATION ON BUSINESS RESTRUCTURING AND INSOLVENCY IN THE CONTEXT OF THE COVID-19 PANDEMIC (BILLS 1397 AND 1199)



• Suspension of debt enforcements

With respect to any “economic agent”, proceedings relating to debt enforcement and revision of contracts would be suspended for 60 days, including individuals and entities engaged in business of any kind. Bill 1397 would prevent, for 60 days, (a) enforcement of collateral, either in or out of court, (b) declarations of bankruptcy liquidation, (c) eviction for failure to pay or other economic element, (d) unilateral termination of bilateral contracts, and (e) application of fines falling due from March 20, 2020 on.



• Preemptive Negotiation

At the end of the 60-day period, the Bill 1397 provides that economic agents that have suffered a reduction of 30% or more in their sales revenue in comparison with the average of the last quarter of the preceding year can apply to the courts for a “preemptive negotiation” procedure with creditors. The negotiation period would be 60 days, and would expire whether or not an agreement was reached by the parties.



• Extrajudicial Reorganization (*recuperação extrajudicial*)

Under Bill 1397, employment-related claims could be included in extrajudicial reorganization plans, and the requirements for approval of the plan would be relaxed: debtors would be able to apply to the court for approval of the plan on showing the agreement of creditors representing at least 1/3 of all classes of claims covered by the plan, and would have a period of 90 days to achieve the required approvals.



• Court-confirmed judicial and extrajudicial reorganization plans

Both Bills provide that (a) enforcement is suspended for all obligations under court-confirmed restructuring plans, in both judicial and extrajudicial reorganizations, (b) restructuring proceedings cannot be converted into bankruptcy liquidations, and (c) debtor businesses may submit a new plan.



• **New applications for judicial and extrajudicial reorganizations**

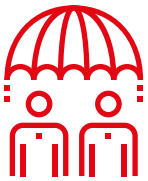
Bill 1397 would allow debtors to apply for judicial reorganization even if they had a restructuring plan confirmed by the court less than five years ago, and would allow debtors to apply for extrajudicial reorganization even if they had a judicial or extrajudicial confirmed by the court less than two years ago. In addition, debtors under judicial reorganizations could apply for extrajudicial reorganization.

• **Collection rights against guarantors and co-payors would be suspended during the state of public emergency.**



• **Creditors excluded from restructuring plans and bankruptcy liquidations**

Creditors holding fiduciary liens and other proprietary rights or rights under advances on export contracts, would not be able to enforce their rights during the state of public emergency. Bill 1397 would temporarily release to debtors 50% of receivables given as collateral.



• **Protection against attachments, seizures and repossessions**

is offered under Bill 1199, including (a) suspension of repossessions of property and equipment by lessors of aircraft, (b) a release of funds deposited into court to cover salaries and business activities for companies under judicial reorganization, and (c) a ban on eviction for failure to pay rent or other charges, during the state of public emergency in Brazil.



• **The threshold for applications to have bankruptcy liquidation declared**

for failure to pay would increase from 40 times the minimum monthly salary (currently BRL 1,045) to BRL 100,000.00, as of the date on which the application is made.



21 | TAX

Various tax measures have already been adopted in Brazil, and further measures are expected that will reflect broader, more encompassing policies, aimed at more than small businesses and the sectors most affected by the pandemic (services and tourism). In the meantime, the number of taxpayers seeking relief from the courts is growing.



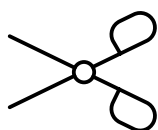
EMERGENCY TAX MEASURES ADOPTED BY THE BRAZILIAN GOVERNMENT

Various tax measures have already been adopted in Brazil, as described below. Further measures are expected that will reflect broader, more encompassing policies, aimed at more than small businesses and the sectors most affected by the pandemic (services and tourism). In the meantime, the number of taxpayers seeking relief from the courts is growing.



Payment deadlines extended for some federal taxes

Contributions payable for March and April are now due in July and September 2020 for (a) PIS/COFINS, (b) employers' social security contributions, (c) contributions owed by agroindustry and rural producers, and (d) social security contributions calculated on the basis of gross revenue (CPRB). Payment of corporate income taxes (IRPJ/CSLL) was not postponed. (Directives 139/2020 and 150/2020)



50% reduction in social contributions to the “S System”

From April 1 to June 30, 2020, contributions to sector institutions like SESI, SENAC, and SENAR – the “S System” – are cut in half. (Provisional Measure 932/2020)



Loans exempted from IOF/Credit

The Tax on Financial Transactions (IOF) will not be levied on loans taken out in the period from April 3, 2020 to July 3, 2020. (Decree 10.305/2020)



Payment of taxes by small and very small businesses deferred

Small and very small businesses will have at least three extra months to pay taxes owed for March, April and May under the SIMPLES simplified tax system (Resolution 154/2020).



Deadlines extended for filing tax returns (Instructions 1930/2020, 1932/2020 and 1934/20, and Resolution 153/2020).

- June 30, 2020 is the deadline for delivery of (a) 2019 annual tax returns by individuals; (b) SIMPLES Nacional monthly tax returns; (c) tax returns for estates, tax returns for income and capital gains earned abroad by individuals resident in Brazil, and tax returns for income and capital gains earned in Brazil by individuals resident outside Brazil;
- July (10th and 15th business days) is the deadline for delivery of PIS/COFINS Digital Tax Records (EFD-Contribuições) and Federal Tax Debits and Credits Statements (DCTF) with respect to April, May and June 2020.

Collections suspended and Tax Clearance Certificates extended

To preserve the good standing of taxpayers, the validity of tax clearance certificates (CNDs) has been extended. Among other things, CNDs are needed to obtain loans and government contracts. In addition, collection procedures like electronic collection, protest of debts, collection proceedings against third parties, and exclusion from installment plans for failure to pay have been suspended.

Exemption from import tax for some medical and hospital products

The import tax rate has been reduced to 0% for certain products, such as hydroxychloroquine, chloroquine, Covid-19 test kits, intubation kits, alcohol, immunoglobulin, vitamin D3, respirators, and paracetamol (acetaminophen) (Resolutions 22/2020, 28/2020 and 31/2020).

Revenues from sale of zinc sulfate for medical use exempted from PIS/COFINS

Until September 30, 2020, the PIS/COFINS and PIS/COFINS-Import rates are reduced to 0% on revenue from domestic sales or imports of zinc sulfate used in parenteral nutrition (Decree 10.318/2020).

National Treasury issues rules on federal tax settlements

The National Treasury has issued rules on settlements with respect to federal taxes that are under collection through the courts. Currently, the time period for applying for an extraordinary tax settlement is running, and the deadline is June 30, 2020 (Directives 9917/2020 and 9924/2020).



Deadline extended for payment of taxes on telecom services (Provisional Measure 952/2020).

Deadlines have been extended for payment of (a) the Operations Inspection Fee provided for in article 8 of Law 5070/1966, (b) the National Movie Industry Development Contribution provided for in Provisional Measure 2228-1/2001, (c) the Public Radiobroadcasting Incentive Contribution provided for in Law 11.652/2008. Payment may be made:

- in a single installment due on August 31, 2020, or
- in up to five installments with the first due on August 31, 2020 and the rest on the first business day of each month. Interest is payable on the installments at the SELIC rate.

State of Rio de Janeiro offers tax benefits to mid-sized businesses

Mid-sized businesses with total assets of less than BRL 240 million or gross annual revenue of less than BRL 300 million in the previous year are eligible for new tax benefits and incentives. In addition, the State of Rio de Janeiro's development agency, AgeRio, is authorized to grant direct loans of up to BRL 5 million to businesses based in the state.

IN THE COURTS

Courts asked to postpone payment of federal, state, and municipal taxes and installments

Since the state of public emergency was declared, taxpayers around the country have brought actions in the courts seeking to postpone payment of taxes and installments under tax amnesty plans, and delivery of tax returns of all kinds, especially where the government has not granted an extension. The situation is still very dynamic, but to date decisions in favor of taxpayers prevail in the regions of the Federal District, São Paulo, Rio de Janeiro, and Rio Grande do Sul, despite an exceptional unfavorable decision by the country's Supreme Federal Court. Actions continue in the courts, dealing with state taxes (ICMS, the state value-added tax) and municipal taxes (ISS, the municipal service tax), as well as federal taxes and contributions.

Release of funds deposited into court

Because of the pandemic's negative economic and financial impacts and the critical situation of some segments, courts have been authorizing the release of funds deposited into court on presentation of less onerous security.

LEGISLATIVE PROPOSALS FOR NEW TAXES

The cost of fighting the pandemic is enormous and discussion over how society will pay has already begun. Various bills have been presented in the National Congress to increase tax revenues. The bills are being debated and as yet there is no way to predict whether they will become law. Some of the more important proposals are:

- **Taxation of dividends**

Currently, taxation of corporate income is concentrated in the legal entity, at a rate of 34%. Dividends are tax-exempt. Even before the pandemic, the government intended to put forward a project to reduce corporate taxes while at the same time taxing dividends. There are other bills that seek to tax dividends, without reducing corporate income tax rates.

- **Wealth tax**

There are a number of bills that would create a wealth tax in Brazil, at rates ranging from 0.5% to 1% on assets greater than BRL 20 million or BRL 50 million, depending on the bill (about USD 4 million and USD 10 million, respectively). The tax would apply to foreign investors. Bills of this type have been discussed many times in the past, but never became law.

- **Compulsory loan**

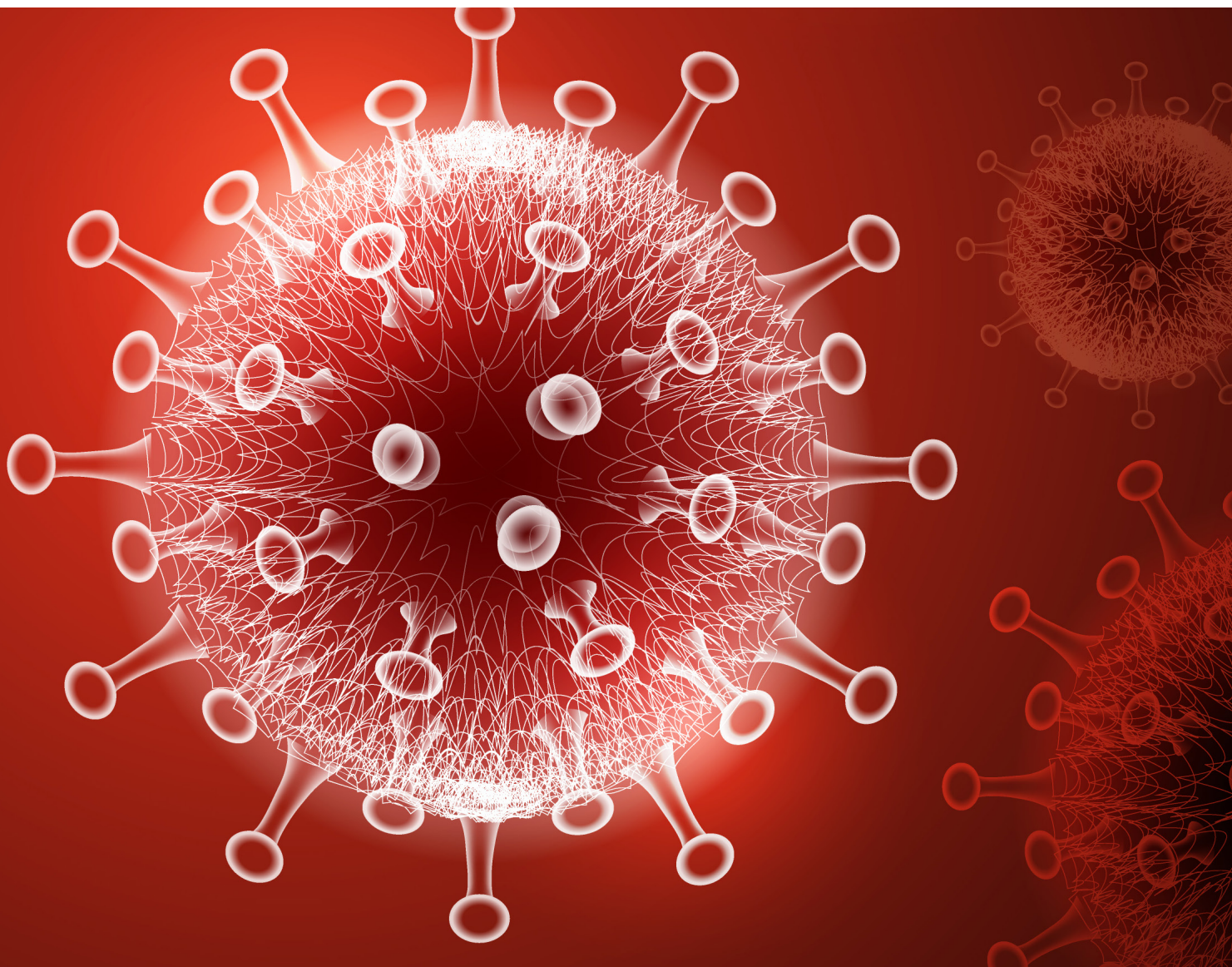
Some bills propose that companies with net assets greater than BRL 1 billion should be required to make a compulsory loan to the treasury, to be paid back over time, as the public purse allows.

- **Unified consumption tax**

Discussions continue in the National Congress over a tax reform that would unify consumption taxes into a single tax.

- **Other tax measures**

Proposals on an increase in taxation of financial institutions, increases in income tax for individuals, and other changes continue to make their way through Congress.



BMA

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