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A POST-COVID WORLD, THE ESG AGENDA AND OTHER TRENDS IN 2021:

INSIGHTS FOR FOREIGN INVESTORS IN BRAZIL

CONTENTS

2020. A year like no other in recent generations. A year that dramatically changed the world and humankind in uncountable ways. A year that made a deep mark on legal and business frameworks across the globe.

2021. Contrary to all early expectations, the covid-19 pandemic still prevails across our planet and its effects will likely shape our future in many different ways. In this radically transformed world, ESG (Environmental, Social and Governance) principles have gained momentum at a speed that was unimaginable until the coronavirus appeared and started this major global "reset". Until very recently a "nice-to-have" showpiece in the corporate environment, ESG has turned out to be a "have-to-have" element in the business strategy of companies across different industries. Covid-19 has accelerated the digital transformation of the economy and has changed consumption behaviours and business relations, work dynamics, impacting different industries and increasing concerns about issues such as health and wellbeing, environment and sustainability, cybersecurity, digital transformation, and social inequality.

In the corporate world, the tensions between the shareholders' model and the stakeholders' model in business is becoming more and more evident. Investors have been turning their attention to the issue and pushing companies to act more responsibly toward a wider stakeholder community. This sense of purpose has assumed an important role in corporations. Climate change issues, decarbonization, sustainability-related challenges, corporate governance, gender equality, diversity – not only in boards of directors but throughout the organization – and employees' mental health are now major

elements in the corporate agenda.

Just as in the US, the UK and continental Europe, the ESG agenda has taken a prominent place in the Brazilian business community, but many other developments have also caught the market's attention. The pandemic brought on an enormous crisis and, as the saying goes, in every crisis there are opportunities. Companies and investors that were better prepared to navigate through these rough seas are taking advantage of those opportunities. As a result, M&A activity surged globally, and Brazil was no different. In addition to the consolidations usually seen during periods of crisis, we saw new M&A trends, especially those generated by the digital economy and tech and innovation opportunities. The fast-track to digitalization driven by the pandemic in a vast number of industries, including the financial system, is proving to be a game changer in the Brazilian market and financial landscape. Needless to say, the rapid movement to virtual environments has tremendously increased the importance of data protection.

Challenging conditions still prevail on the political and economic fronts, and will probably last until substantial progress is made in the vaccination process, paving the path to sustainable recovery in the Brazilian economy.

Venture capital activity is also reaching unprecedented levels in Brazil, as reflected in deal volumes and values. Renewable energy, infrastructure and the new rounds of public concessions and privatizations being launched by Brazil's federal government are also in the spotlight for 2021, and foreign investors will certainly have a significant role to play.

Capital markets are booming in Brazil, with IPOs and follow-on offerings reaching all-time records. Interest rates are still at very low levels in Brazil (and elsewhere), encouraging investors to search for non-fixed rate return investments. The migration to the equity market has made it possible for companies to use all sorts of different and innovative fund-raising instruments.

Challenging conditions still prevail on the political and economic fronts, and will probably last until substantial progress is made in the vaccination process, paving the path to sustainable recovery in the Brazilian economy. But investment opportunities and bright spots can be found in the Brazilian market, and domestic and foreign investors are carefully watching the players' moves in the corporate and financial arenas.

In this e-book, we have selected a number of topics that can provide legal and business insights into investing in Brazil in 2021, for both new and current investors in our country.

We hope you enjoy this exploration of issues and opportunities in Brazil in 2021. For more information on any of the topics covered in this e-book or in any other matter, our team will be more than pleased to assist.

Amir Bocayuva
Managing Partner
abc@bmalaw.com.br

ESG and the new Government Contracting Law

By **José Guilherme Berman**

The new government contracting legislation does more than maintain ESG-related concerns: it expands the ESG agenda in public procurement

Brazil's new Government Contracting Law, Law 14.133, was published on April 1, 2021. The new Law establishes general rules on competitive contracting procedures and government contracts, replacing Law 8666, which had been in force since 1993.

Even the earlier legislation, Law 8666/1993, addressed environmental, social and governance (ESG) concerns. For example, one of the principles applicable to government contracting was the promotion of sustainable development in Brazil, and there were specific requirements to ensure that the basic plans for projects contemplated the use of local materials and labor, compliance with technical and occupational health and safety standards, and the environmental impacts of the intended contract. ESG principles cannot be said to be a novelty in Brazilian legislation.

The new government contracting legislation, however, does more than maintain ESG-related concerns. As the examples below demonstrate, Law 14.133/2021 has expanded the ESG agenda in public procurement.

In environmental protection, Law 14.133/2021

Law 14.133/2021 also contains mechanisms that encourage good corporate governance. Bidders on contracts worth more than BRL 200 million must have implemented compliance programs in their organizations

does not require mere compliance with applicable legislation in government contracts: it also creates important incentives for companies that are interested in providing goods and services to the government to develop sustainability initiatives. Mitigation practices (reduction of GHG emissions) is one of the criteria for breaking ties between bidders on government contracts, and the legislation provides for the possibility of establishing variable compensation tied to achievement of environmental sustainability criteria.

Social concerns are also present in various provisions under Law 14.133/2021. For example, the contracting government agency can require that a certain percentage of bidders' workers be composed of women who were victims of domestic violence, or former prison inmates. In addition, actions to promote gender equity between men and women is another of the criteria for breaking ties between bidders.

Law 14.133/2021 also contains mechanisms that encourage good corporate governance. Bidders on contracts worth more than BRL 200 million must have implemented compliance programs in their organizations, and adoption of a compliance program is another of the criteria used to break ties in competitive bidding procedures. In addition, when applying penalties, government authorities must take into account implementation and improvement of compliance programs and, in some cases, companies that have been disqualified from bidding on government contracts can only requalify if they adopt compliance programs.

These provisions show that Law 14.133/2021 goes beyond requiring that companies interested in contracting with the government meet minimum legal requirements. The legislator has also created mechanisms to encourage adoption of practices that promote ESG principles, demonstrating that environmental, social and governance matters are now of fundamental importance for all businesses that have (or wish to obtain) contracts at the various levels of government in Brazil.

José Guilherme Berman
Partner, Infrastructure and Regulatory & Government Affairs
jgb@bmalaw.com.br

Ten years after enactment of Brazil's Competition Law, covid-19 has not affected policy and enforcement

By **Barbara Rosenberg**, **Marcos Exposto** and **José Inacio Ferraz de Almeida Prado Filho**

The Brazilian public's awareness of competition law matters has grown significantly thanks to CADE's work on high-profile matters as well as its advocacy efforts

2021 marks ten years since the Brazilian Competition Law was enacted, and the significant progress that has been made since that time does not seem to have been affected by the covid-19 crisis.

From an institutional standpoint, CADE has succeeded in maintaining its status as one of the most respected competition agencies worldwide. The Brazilian public's awareness of competition law matters has grown significantly thanks to CADE's work on high-profile matters as well as its advocacy efforts, and the strategic value of competition law enforcement is noticeably stronger. Antitrust compliance continues to gain importance in terms of good governance.

CADE has indicated that it will continue to enforce its agenda, circumstances allowing, despite the fact that the effects of the pandemic are expected to last well into 2021. In fact, there has been no noticeable change in terms of merger review and anticompetitive conduct enforcement in the recent past.

Early on in the pandemic, CADE made it clear that the authority would be very cautious about accepting the pandemic as a defense either for mergers that would not be otherwise approved (under a failing firm argument, for instance) or as a defense in the context of an anticompetitive behavior. A general principle repeated publicly and constantly by CADE officials -- and even reflected in at least one merger case reviewed by

CADE's Tribunal - is that no permanent change with enduring potential negative effects would be accepted to address a temporary situation such as this crisis.

Looking back, the balance sheet for CADE's merger-related work is generally positive, from the perspective of both the efficiency and the quality of the decisions - and, as said, there was no expectation that the pandemic would change the scenario. Looking ahead, the authority has been consistently voicing concerns about killer acquisitions and the sufficiency of current notification thresholds to capture all transactions of interest for effective competition enforcement.

In terms of conduct enforcement, Brazil has been comparatively less affected by the downturn in cartel investigations that has been observed worldwide in recent years. Even so, there is an undisputed global decrease in leniency applications, and cases at CADE are moving at a slower pace: some recently-launched local investigations are still outcomes of Operation Car Wash, which has accounted for most of CADE's work on cartel matters since at least 2014. CADE's cartel settlement program has remained quite active, and the authority has signaled that the bar should be raised in terms of contributions and payments required to settle.

Closer attention to unilateral conduct is a trend that has been reported by CADE's officers in several public statements in recent years. While this agenda for future action on dominance cases is still gaining traction, new cases have been made public and it is expected that this policy trend may be increasingly reflected in statistics, with no impact by covid-19 on the trend.

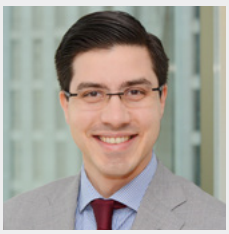
Closer attention to unilateral conduct is a trend that has been reported by CADE's officers in several public statements in recent years.

In fact, very early on in the pandemic, CADE sent out a clear message to the market stating that it was already monitoring the behavior of companies: it launched an investigation into possibly abusive price increases, asking major players for price history information for a long list of products for which demand had increased at that time, such as masks, hand sanitizer and medication for covid-19 symptoms.

In this context, official appointments that are due to take place later in 2021 will be pivotal for competition policy in Brazil. The terms of office for CADE's Tribunal Chair and one other Commissioner, as well as CADE's General Superintendent, expire this year. Their replacements will naturally play a key role in continuing the authority's work, and become especially important in a context where the Tribunal has been much more active and thorough in its oversight of the General Superintendence's work.

Barbara Rosenberg
Partner, Antitrust and Competition Law
brr@bmalaw.com.br

Marcos Exposto
Partner, Antitrust and Competition Law
maj@bmalaw.com.br



José Inacio Ferraz de Almeida Prado Filho
Partner, Antitrust and Competition Law
jip@bmalaw.com.br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ESG in financial analysis: an irreversible trend

By **Camila Goldberg** and **Carolina Milech**

Market scrutiny of ESG practices is not only growing, but implacable. In today's world, listed companies have seen their market value drop dramatically in the course of a single day because of actions, omissions and missteps in the ESG arena

In recent years, the world has seen a dramatic transformation (in a good way!) in the corporate environment and in business in general, with recognition of the need to develop a more conscientious form of capitalism that incorporates goals and parameters that go beyond the (until then overriding) objective of generating financial return for shareholders. The ultraliberal doctrine championed by the celebrated American economist Milton Friedman no longer predominates, and the search for profit has begun to be associated with broader purposes, through best practices in sustainability, social economics, and governance. In fact, the much-discussed "ESG" (Environmental, Social and Governance) criteria are already part of the corporate reality around the world.

Corporations are feeling increasing pressure – not just from their shareholders but from their stakeholders in general, including employees, regulators, consumers, creditors and collaborators – to act in a more responsible manner, not just with respect to the environment but in relation to society as a whole. Market scrutiny of ESG practices is not only growing, but implacable. In today's world, listed companies have seen their market value drop dramatically in the course of a single day because of actions, omissions and missteps in the ESG arena. With the covid-19 pandemic and its demonstration of our planet's and humanity's fragility – not to mention all the various (and worrying) aspects of the global crisis the pandemic has brought on – the natural tendency is that initiatives directed to a more sustainable economy will grow and spread.

In this post-covid world, the growing, global relevance of issues related to the environment and sustainability, positive social impact, diversity and good governance practices has become obvious and even essential if companies hope to survive and thrive in the market. Inevitably, this change in the behavior

> The financial market seems to be moving in the right direction. But what about the legacy of investments and financings in non-sustainable projects? It has become clear that simply increasing and accelerating green financing and investment in sustainable energy projects is not sufficient.

of businesses has led to significant changes in the financial and capital markets, which, by offering companies various means of raising funds and financing their businesses, are major drivers of the global economy.

Adherence to ESG criteria has become a compulsory element in credit assessments by financial institutions, which now take into account the degree to which their clients have incorporated ESG factors into their businesses in financial risk and impact calculations. The financial sector's capacity to influence the development of a sustainable economy has been increasing over the last two decades. The first notable step was the large-scale adoption of the Equator Principles, a set of directives focused on environmental and social risk and responsibility in project financing, quickly followed by financing through green, social and sustainability bonds and loans, which have reached record levels of growth and demand.

The financial market seems to be moving in the right direction. But what about the legacy of investments and financings in non-sustainable projects? It has become clear that simply increasing and accelerating green financing and investment in sustainable energy projects is not sufficient. Inevitably, financing for projects in the fossil fuel and other non-sustainable energy segments has been "black listed" since they end up hindering realistic and substantial progress toward a decarbonized, clean economy.

Sustainability is not a new question in Brazil's financial and capital markets. Since 2005, B3, the Brazilian stock exchange (then known as BM&FBOVESPA), has had a sustainability indicator, the Business Sustainability Index, the fourth such index to be created worldwide.

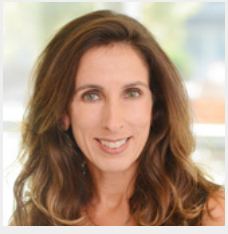
Lastly, agents in the finance market have – happily – felt the need to go a step further. Banks, development agencies and credit rating agencies have increasingly turned their attention to adoption and achievement of ESG goals by their clients and borrowers, which naturally has fostered the spread of ESG practices. Compliance with ESG criteria now serves an important metric in assessing businesses, financial assets, and the credit-worthiness of players: both Fitch Ratings and Moody's, for example, have recently released reports aimed at reinforcing the importance of ESG issues. At the same time, there is no single, unified methodology for ESG analysis, and consistency in reporting is perhaps the greatest challenge in assessing the extent to which businesses have embraced ESG principles.

Sustainability is not a new question in Brazil's financial and capital markets. Since 2005, B3, the Brazilian stock exchange (then known as BM&FBOVESPA), has had a sustainability indicator, the Business Sustainability Index, the fourth such index to be created worldwide. Some years later, Brazil's Central Bank published Resolution no. 4327/2014, establishing directives on social and environmental policies in financial institutions. Last year, the Central Bank included sustainability issues in its "AgendaBC#", the institution's official plan of work, covering short-, medium- and long-term actions. By including sustainability in its official agenda, the Central Bank has recognized the existence of climatic risk for the financial system, with the result that climatic risk stress tests are now a regulatory requirement.

To meet the growing demand by investors for ESG information, Brazil's securities and exchange commission, the CVM (*Comissão de Valores Mobiliários*), included the issue in public hearings on the information that must be provided by listed companies, proposing

changes to CVM Instruction 480, with a view to providing greater transparency, publicity and standardization of ESG-related information and to "aligning Brazilian regulation with advances that the issue has shown in all developed markets." The SEC in the United States is now revisiting its Climate Change Guidance, issued a decade ago, to reflect lessons learned in recent years – lessons that will certainly be shared in the international market. The Brazilian banking sector's self-regulatory body, FEBRABAN, has revised the commitments that are expected of financial institutions in the area of social and environmental risk management, setting a transition period for member institutions to come into compliance with the new standards, with penalties for non-compliance.

Despite the challenges inherent in establishing a responsible, uniform benchmark for environmental, social and environmental principles in business, there can be no doubt that the growing concern felt by regulators and other financial system agents over greater transparency, uniformity in disclosure, and compliance with ESG criteria will make a significant contribution in the transition to a clean, decarbonized economy by 2050, in line with the global warming reduction goals set by the Paris Accord.



Camila Goldberg
Partner, Finance and Capital Markets
cgc@bmalaw.com.br

Carolina Milech
Intern, Finance and Capital Markets
cgbm@bmalaw.com.br

BDR regulation and the new market for foreign shares in Brazil

By **Conrado De Castro Stievani** and **Gabriel Bürgel**

BDRs are negotiable certificates that represent securities issued by foreign companies. Similar to American ADRs, BDRs allow Brazilian investors to invest in foreign companies and provide those companies with direct access to the Brazilian capital markets.

Overview

The Brazilian stock market has witnessed a sharp rise in new offerings since 2019. Despite the impacts of the covid-19 crisis in Brazil, there were more equity IPOs in 2020 (25) than in the previous six years combined.[1] Market attention also turned to opportunities in Brazilian Depositary Receipts (BDRs).

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In summary, BDR programs may be either sponsored or unsponsored. Sponsored BDRs have three different levels, with increasing disclosure and issuer registration requirements. Only "Level 3" sponsored BDRs may be publicly offered to the general market.

To date, Brazil's securities commission, the CVM (*Comissão de Valores Mobiliários*), has registered over 750 BDR programs (619 since 2019), only eight of which, however, were Level 3 sponsored programs with public offerings of BDRs.[2]

Requirements and regulation

In order to establish a BDR program so that its shares can be traded in Brazil, a non-Brazilian company must be registered with, and supervised by, the regulatory authority in the company's main trading market. **It also needs to register as a reporting company with the CVM, which requires that either:**

- the majority of the company's assets and revenues be abroad; or

- the **main trading market** of that company's shares be located in a jurisdiction where the regulator has entered into cooperation agreements with the CVM or IOSCO and the market is a **recognized market** under CVM rules.

The CVM considers the main trading market to be either:

- the foreign market with the highest trading volume of the company's shares over the

preceding 12 months; or

• in the case of a sponsor in an IPO process, the foreign market on which the sponsor applied for listing and obtained the majority of the proceeds from the IPO.

The combination of these rules leaves three routes for raising capital in Brazil using BDRs. The first is the asset-revenue test, which requires that over 50% of assets and revenues be abroad. The second is the seasoned issuer test, which requires that the applicant's shares trade for at least 12 months on an eligible market. Finally, the issuer may pursue the route of simultaneous IPOs – of its shares abroad and BDRs in Brazil.

Since the consolidation of the BDR rules under CVM Resolution 3 of August 2020, there has been intense debate over the complexity of the tests and the reach and subjectivity of some of the definitions included in the regulation.

Some issuers have endured long discussions with the CVM in the context of their Level 3 BDR program registration over whether the jurisdiction where the issuer's shares trade qualifies as a **recognized market**, considering variables such as the level of transparency of that jurisdiction's corporate laws and to what extent the issuer's corporate documents should be adjusted to Brazilian governance standards.

At the center of the debates is the question of whether Regulation S and Rule 144A offers qualify as public offerings for the purpose of the simultaneous IPOs test. The CVM has insisted that the foreign IPO be directed to the general public and registered with the competent authority in a jurisdiction that meets Brazilian law transparency and governance standards.

In light of these discussions, the CVM has announced that it intends to refine its BDR regulation in 2021, particularly on the eligibility of the issuers.[3] The market expects that the securities regulator will also simplify the BDR registration tests, close gaps in the rules and reduce subjectivity in order to increase legal certainty, which may foster the development of BDRs as an inviting alternative for foreign issuers.

Conrado De Castro Stievani
Partner, Finance and Capital Markets
cto@bmalaw.com.br

Gabriel Bürgel
Associate, Finance and Capital Markets
gcb@bmalaw.com.br

1. Source: CVM (http://sistemas.cvm.gov.br/port/redir.asp?subpage=ofertaregistrada)
2. Sources: CVM (http://sistemas.cvm.gov.br/port/redir.asp?subpage=programadeDR) and B3 (http://www.b3.com.br/pt_br/produtos-e-servicos/negociacao/renda-variavel/bdrs/)
3. According to CVM's official regulatory agenda for 2021, published last December.

Compliance in a 100% digital environment: how to mitigate the risk of increased fraud in new corporate processes

By **Anna Carolina Malta Spilborghs**

Changes in working environments that had been the subject of debate and discussion, and were expected to take place over a period of five to ten years, occurred almost overnight.

Since March 2020, when the covid-19 pandemic was declared, businesses from various sectors, some with little or no experience in remote work, have had to adapt their work environments to social isolation measures.

Many companies found themselves compelled by necessity to adopt telework, which, for 51% of Brazilian companies, was entirely new. Changes in working environments that had been the subject of debate and discussion, and were expected to take place over a period of five to ten years, occurred almost overnight.

But how did corporations react to these sudden changes?

2020 was a year of adaptation. Now, in 2021, organizations have more experience with remote work and have managed to create working conditions designed to mitigate the opportunity for fraud. To do so, however, they have had to invest in training, improvements in processes, and monitoring of their workforce and their various stakeholders.

In a time of growing cybernetic fraud, one of the most important challenges for businesses has been to provide their teams with access to systems so that they could do their work remotely, in order to maintain the business's essential operations, while at the same time ensuring efficiency, security and protection of data.

But investing in strong systems is not enough if a company's workforce is not prepared, since it is an organization's people who are the first line of defence. Collaborators of all types, not just employees, should have access to permanent training on matters ranging from techniques for preventing and defending against e-mail attacks, to behavioral risks and standards of

conduct: they need to be aware that what they do is essential to the company's security.

Many studies of fraud point to a business's suppliers and other commercial partners as the weak spot in its compliance practices. In turbulent times such as these, it is essential for businesses to reinforce their background checks, review their contracts, and analyze the financial situation of their commercial partners and potential new suppliers.

There has been much talk about the power of new technologies, and especially artificial intelligence and machine learning, in the detection of frauds and cybernetic attacks. Although they require significant investment, businesses that had begun adopting these new technologies prior to the pandemic entered the crisis from a position of greater strength, with better capacity to monitor their systems, identify potential failures, and repel cyberattacks. But many other companies quickly realized the importance of fraud detection and cybersecurity and implemented their own programs or hired specialists to help.

The main point is that compliance monitoring must evolve with the times, so that businesses can identify problems as they arise, take steps to mitigate those problems, and anticipate future developments.

Anna Carolina Malta Spilborghs
Partner, Compliance, Investigations and Regulatory Enforcement
aco@bmalaw.com.br

ESG, Friedman and Brazil's corporations law

By **Luiz Antonio de Sampaio Campos**

Discussion over ESG matters in corporations has been growing worldwide, and Brazil is no different. Investors' hearts and minds – and their pockets too – have been engaged by environmental, social and governance principles.

Discussion over ESG matters in corporations has been growing worldwide, and Brazil is no different. Investors' hearts and minds – and their pockets too – have been engaged by environmental, social and governance principles.

It's natural, therefore, that companies, their controlling shareholders and their management are including ESG issues on their agendas, whether out of conviction or out of necessity. As a result, debate has arisen in various countries over what constitutes the purpose of a company – and if the primacy of a company's shareholders should give way to the interests of other stakeholders, a subject of heated discussions led by such figures as Harvard professor Lucien Bebchuk on one side, and on the other, the mythic attorney Martin Lipton, with echoes that reached as far as the Davos Forum.

In fact, in 2019, the Business Roundtable, which brings together many of the U.S.'s largest companies, changed its "Statement on the Purpose of Corporations" to extend it considerably beyond shareholders' interests.

In many countries, the debate involves a change to the governing legislation, to set aside the allegedly "Friedmanian" idea that the sole purpose of a company is to generate profit for its shareholders. France took the step in 2019 when it amended article 1833 of the French Civil Code; in the United States the scope of management's fiduciary duties is under discussion; and the U.K. has reformed its Companies Act of 2006 (section 172).

The good news is that in Brazil, thanks to Alfredo Lamy Filho and José Luiz Bulhões, and their great public spirit, vision and even genius, both privately- and publicly-held companies have been equipped to deal with these matters since the Brazilian Corporations Law, Law 6404, was adopted in 1976.

Despite their belief in capitalism, free enterprise and the market economy, Lamy Filho and Bulhões Pedreira did not fall blindly under the spell of Freidman's seminal essay (now 50 years old) on the purpose of business companies. The drafters of Brazil's Corporations Law took care to deal with what are now called ESG principles, recognizing their reality both at the level of the controlling shareholder and at the management level, and preparing the ground even for widely-held corporations where, Lamy recognized, in the absence of a controlling shareholder, true power resides with management and not with the shareholders.

The Corporations Law already speaks, in articles 116 and 154, of "social interest", the satisfaction of "the requirements of the public good and the social function of the business", respect for the "rights and interests of employees and the community in which the corporation operates", and its "social responsibility".

There is thus no need, in Brazil, to enter into discussion over short-term versus long-term social interest: if controlling shareholders and management of Brazilian corporations wish to promote an ESG agenda beyond a simple greenwash, they have the legal means and the legal backing to do so, as do other stakeholders.

The social function of businesses, the public interest, respect for the community in which the company does business, and social responsibility are all terms that encompass ESG and many other principles, and provide the legal basis for the solidarity shown by many Brazilian companies during the pandemic. And who knows? Perhaps the corporate solidarity awakened during the pandemic is here to stay.

The ESG agenda is important; the ESG trend is irreversible; and ESG principles should be pursued, preferably out of conviction.

But before thinking about changes to the Brazilian Corporations Law, we must first understand it and explore its potential. Although Law 6404/1976 is close to 50 years old, its ability to deal with ESG issues is eloquent proof of its youthful spirit.

Luiz Antonio de Sampaio Campos
Partner, Corporate and M&A
lac@bmalaw.com.br

6 Months into the LGPD: Lessons and Challenges

By **Felipe Palhares**

As the first comprehensive legislation focused on personal data processing in all sectors of the economy, the LGPD represents a substantial change in Brazilian law.

The General Data Protection Law (LGPD – *Lei Geral de Proteção de Dados Pessoais*) came into force on September 18, 2020. As the first comprehensive legislation focused on personal data processing in all sectors of the economy, the LGPD represents a substantial change in Brazilian law.

Although the LGPD was inspired by the European Union's General Data Protection Regulation (GDPR), including in its extraterritorial effects, the two pieces of legislation are not identical, and in fact, they have notable differences. In other words, compliance with the GDPR does not equate to compliance with the LGPD.

Six months after the LGPD came into effect, both lessons and challenges have emerged.

Privacy as a competitive differential

Businesses of all sizes, especially multinational companies doing business in Brazil, have seen that compliance with privacy and data protection rules provides a competitive edge. The subject has become a true "hot topic" in Brazil, driven by individuals' concerns over the protection of their privacy.

There is a growing local movement that recognizes value in companies that have already come into compliance with the LGPD and demonstrate real concern over their customers' personal data. Companies that have put LGPD compliance programs in place are also moving forward on revising their contracts with suppliers and commercial partners, and even terminating contracts with organizations that cannot show they too comply with the new legislation.

Action by regulatory authorities

The National Data Protection Authority (ANPD – *Autoridade Nacional de Proteção de Dados*) was set up at the end of 2020. The ANPD is responsible for issuing regulations under the LGPD and for enforcing the Law. Although the administrative penalties provided for under the LGPD can only be applied starting August 1, 2021, both the ANPD and other regulatory authorities have conducted investigations into violations of the LGPD and other Brazilian laws that deal with data protection and privacy.

In particular, consumer protection agencies such as the Public Prosecutors' Offices, the state consumer protection entities (PROCONs), and the National Consumer Department (Senacon) have made strong efforts in data protection and privacy matters, and have begun investigations into all significant data breaches in recent months that had an impact in Brazil. And while the LGPD's penalties only come into effect

in August of this year, that does not prevent regulatory authorities from applying sanctions under other legislation, such as the Consumer Defence Code and the Internet Bill of Rights.

Litigation based on the LGPD

The LGPD provides that data subjects can bring lawsuits against data controllers and processors for violating the legislation, claiming damages for both economic and non-economic losses caused by the violation. Litigation based on the LGPD began within the first few days after the legislation came into force.

Six months into the LGPD, there are already hundreds of cases before the courts. In some situations, such as personal data breaches, a new type of mass litigation has begun to appear, with numerous claims made by data subjects against the same company, usually seeking damages for non-economic injury.

Cyber attacks

With the spread of the pandemic and forced digitalization of many businesses, the number of security incidents and cyber attacks has increased exponentially over the last few months.

The sophistication of the attacks has also increased significantly. Businesses have been facing complex challenges in improving their technological structures and ensuring the security of the data they process.

Compliance with the LGPD is an essential step in preventing major risks associated with security incidents involving personal data. To learn more about the requirements related to security incidents under the LGPD, consult our guide on how to react to personal data breaches, available **here**.

Felipe Palhares
Partner, Data Privacy, Technology and Digital Business
felipe.palhares@bmalaw.com.br

ESG and Brazil's Environmental Policy

By **Márcio Pereira**

Anticipating the idea of a green economy, the PNMA also deals with financial contributions when environmental resources are used for economic purposes

Since Brazil adopted its National Environmental Policy (PNMA – *Política Nacional de Meio Ambiente*) under Law 6938 almost 40 years ago, on August 31, 1981, many laws and regulations dealing with the environmental aspects of producing goods and services have been inspired by institutional (governance) and behavioral (social) changes introduced by the PNMA.

In addition to other instruments for environmental control, such as emissions standards, environmental licensing and impact assessments (among other mechanisms which have been consolidated over the decades and used as the foundation for solid environmental compliance programs in business), the PNMA's early adoption of a financial risk approach to environmental issues is noteworthy.

Adopted in an economic context characterized by a strong state presence, the PNMA made financing (project finance) and government incentives (agricultural credit) conditional on environmental criteria and standards. When the Brazilian economy later opened up, and then

with the influence of the Equator Principles and the Principles for Responsible Investment, this trend broadened, and Brazil's Central Bank now requires that regulated financial institutions incorporate social and environmental policies, and that pension funds adopt sustainability criteria.

Anticipating the idea of a green economy, the PNMA also deals with financial contributions when environmental resources are used for economic purposes, and was followed by other legislation that promotes the use of economic mechanisms in environmental regulation, such as payment for the use of water resources, environmental reserve credits in connection with reforestation, and decarbonisation credits for production of biofuels to substitute fossil fuels. On other regulatory fronts, Brazil has seen inclusion of social and environmental standards in securities issuances and a revision of sustainability standards for the grant of credit in the agricultural sector.

> The concept of "polluter" under the PNMA is a broad one - any party that is responsible, directly or indirectly, for an activity that causes environmental degradation

In the post-covid economy, ESG principles have ushered in a new perception of systemic risk, which demands more complex regulatory analysis, particularly with respect to specific risks that are still under-regulated or unregulated, such as water security, and recognition of the value of biodiversity and genetic heritage, traditional knowledge of indigenous peoples and other traditional communities, and human rights. In fact, the human factor is not ignored by the PNMA, which includes among its objectives the protection of the dignity of human life and compatibility between environmental aims and social and economic development, which could inform complex – but interesting – legal debates over climate litigation and the protection of human rights, for example.

The broad concept of "polluter" under the PNMA – any party that is responsible, directly or indirectly, for an activity that causes environmental degradation – has driven regulatory and even judicial initiatives, both national and international, to deal with risks associated with sustainability in productive chains in Brazil (in the agricultural market, for example), employing a variety of mechanisms, including the imposition of liability on shareholders. Cases such as these reveal the reputational and financial risks that can arise when investments are disconnected from a systemic vision of environmental legislation and human rights – dissociated from ESG principles, in other words.

As socio-environmental legislation becomes more sophisticated, the mitigation of risk through an ESG approach is now essential to the generation of value and companies' performance in the long term. Reduction of these risks makes organizations more resilient, less likely to suffer a loss of reputational credibility, less exposed to legal and financial penalties, and consequently more capable of producing predictable cash flows, not to mention the positive impacts they generate for society in general, and social (as well as financial) value for shareholders.

Márcio Pereira
Partner, Environmental Law
marcio.pereira@bmalaw.com.br

The covid-19 pandemic and the rise of digital payment solutions in Brazil

By **Felipe Prado** and **Felipe Schvartzman**

Since adopting the strategic agenda known as BC#, Brazil's Central Bank has been working on initiatives aimed at financial inclusion, user acceptance of digital financial platforms and the creation of a regulatory environment that encourages disruptive business models

From the beginning of the covid-19 pandemic, Brazil has faced not only health-related but also financial challenges in overcoming the problems brought on by these difficult times.

Since adopting the strategic agenda known as BC#, Brazil's Central Bank has been working on initiatives aimed at financial inclusion, user acceptance of digital financial platforms, and the creation of a regulatory environment that encourages disruptive business models, with a view to increasing competition and improving services in financial and payment services in Brazil. The effects of the pandemic have only highlighted the importance of these initiatives.

Some results of the BC# agenda were quick to show themselves, such as retailers' accelerated transition to e-commerce, and the spread of digital payment technologies, notably contactless payments. But alongside these movements, which have increased the volume of digital payments in Brazil, medium- and long-term measures have also gained force during the pandemic, paving the way to broad structural changes in the National Financial System and the Brazilian Payments System. Some examples of this evolving ecosystem are

- **open banking;**
- **Pix, Brazil's instant payment system;**
- **the Central Bank's regulatory sandbox;**
- **the creation of payment initiation service providers; and**
- **registration of credit card receivables – all currently underway within the Central Bank.**

The first phase of Open Banking started in February 2021, and full implantation is expected by December 15, 2021. An open financial system will allow financial data and services to be shared (with the data subjects' consent) between institutions authorized to operate by the Central Bank. Open banking is a two-way street, and agents in the financial system both receive and supply data. Participation is compulsory for Brazil's larger banks, and the rollout of open banking in Brazil contemplates standardization of APIs and digitalization of the data-sharing process. One of the challenges on the horizon, however, is the inclusion of agents that are given access to financial data by data subjects, but are not under the Central Bank's regulatory jurisdiction or are outside the financial system altogether.

Pix was launched in 2020 and the creation of the Instantaneous Payments System – SPI has made instant payments and transfers "24/7" a reality for users holding bank accounts or payment accounts with any of the more than 734 participating institutions. Pix has contributed to the transition to purely electronic means of payment, reduction of costs, and the entry of fintechs and big techs in Brazil's financial services sector. In 2021, important improvements were made in the Pix regulations, such as

- **the creation of procedures for dispute resolution between direct and indirect participants in the SPI,**
- **the creation of "Pix Cobrança", which allows users to schedule payments for the future, rather than making them immediately, and**
- **additional Pix Key tools (registration, cancellation, and types of keys).**

Pix has contributed to the transition to purely electronic means of payment, reduction of costs, and the entry of fintechs and big techs in Brazil's financial services sector

The Central Bank also initiated Cycle 1 of its Regulatory Sandbox. Companies interesting in participating had until March 19, 2021 to register innovative financial or payment businesses for testing in the next two years, and the Central Bank has until June 25, 2021 to issue its decision on the proposals submitted.

In October 2020, the Central Bank issued regulations on a new type of payment institution – payment initiation service providers – PISPs. The PISP regulations allow new players and suppliers of technological innovations to enter the payments market by allowing them to offer services that merely initiate payments and transfers from transaction accounts held in other institutions. Through mobile apps provided by PISPs, users can consult and initiate financial transactions, even though the PISP does not handle funds and/or manage transaction accounts.

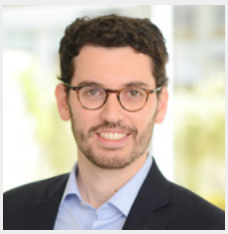
Another change is that, starting in June 2021, acquiring banks will be required to register 100% of their credit card receivables in central asset registries. This measure is intended to foster the credit card factoring market and the use of credit card receivables as security by providing a faster, more secure and more accessible alternative for commercial establishments to finance their businesses. With the new requirement, all receivables originating in credit card sales will be registered in interconnected systems, which will also record transfers and liens against the registered receivables. With the consent of commercial establishments

Although the covid-19 pandemic may have delayed the rollout of some of the Central Bank's initiatives, its challenges have also served to emphasize the importance of digital payment solutions for Brazilian businesses and Brazilian consumers

that make credit card sales, banks and other institutions interested in offering credit can consult the establishments' receivables schedules on-line, and register and lift liens against receivables given as security for loans. The initiative has benefits for multiple agents in the payments market: fintechs and acquirers will gain access to information on credit card receivables even when they are not generated by proprietary credit card machines, while retailers will gain bargaining power and more freedom in obtaining credit, since they will be able to offer their receivables as a lower-risk security.

Although the covid-19 pandemic may have delayed the rollout of some of the Central Bank's initiatives, its challenges have also served to emphasize the importance of digital payment solutions for Brazilian businesses and Brazilian consumers. It is precisely for that reason that the Central Bank has continued to push forward with the regulatory framework for fintechs and the payments industry, consolidating the BC# agenda and new opportunities for 2021.

Felipe Prado
Partner, Finance and Capital Markets
fgp@bmalaw.com.br



Felipe Schvartzman
Associate, Data Privacy, Technology and Digital Business
fan@bmalaw.com.br

Hot topics in the Brazilian legislative agenda for 2021

By **André Macedo de Oliveira** and **Giovani Trindade Castanheira Fagg Menicucci**

The promise of enhanced technological applications for finance, the internet of things and even automated vehicles made possible by the speed and connectivity of 5G networks has made the issue a priority in the government's agenda

Implementation of 5G In Brazil

The fifth generation of mobile communication networks (5G) has sparked much movement in the political scene in Brazil. The promise of enhanced technological applications for finance, the internet of things and even automated vehicles made possible by the speed and connectivity of 5G networks has made the issue a priority in the government's agenda. The draft bid prospectus for the "5G Auction", released by the National Telecommunications Agency – ANT in February 2021, is the first step in bringing 5G to Brazil. The expectation is that the auction will be held in the second half of 2021, and that

5G will be fully implemented by 2028, with rollout commencing in July 2022. The draft bid prospectus provides for sale of rights to four frequency bands: 700 MHz; 2.3 GHz; 3.5 GHz (specific to 5G) and 26 GHz.

Legislative framework for startups

The startup market has generated great interest among deputies and senators in the Brazilian Congress and the proposed Legislative Framework for startup businesses is a priority in the effort to put Brazil on the map of digital entrepreneurship. Bill PLC 146/2019, which originated in the Chamber of Deputies and has been approved by the Senate with some changes, is intended to create a regulatory environment that will facilitate development of startups and promote conditions favorable to technological entrepreneurship, with emphasis on legal certainty and contractual freedom. The Bill recognizes the innovative nature of startup businesses, and establishes more flexible rules for startups to bid on government contracts, along with protections for angel investors.

Privatization of the postal service

The Chamber of Deputies is now debating bills to put an end to the monopoly held by the Brazilian postal service, Correios, a state-owned company created in 1969. One of the privatization proposals, which originated in the Federal Executive (Bill PL 591/2021), contemplates that express delivery services, including products sold on digital platforms, will be regulated by the National Telecommunications Agency – ANT. Regulation of the sector may have a significant impact on the business model adopted by large companies that have invested in their own logistics structures. The Federal Executive's proposal would also affect e-commerce, with its provision that "orders and merchandise acquired by electronic commerce or by direct sale" constitute postal objects.

Regulation of digital assets (cryptocurrency)

There are also bills seeking to regulate virtual currencies, or cryptocurrencies as they are commonly called, before Congress. One of them, Bill PL 2303/2015, includes cryptocurrencies and air mile programs in the definition of "payment arrangements" subject to the supervision of Brazil's Central Bank. It also addresses three big issues raised by cryptocurrencies: (i) prudential regulation by the Central Bank, (ii) money-laundering and other illegal activities, and (iii) consumer defence. Bill PL 4207/2020, in contrast, establishes rules for issuing currency and other virtual assets, requirements applicable to legal entities that deal in virtual assets, and offences involving virtual assets that constitute crimes against the National Financial System.

André Macedo de Oliveira
Partner, Superior Courts and Government Relations
and@bmalaw.com.br

Giovani Trindade Castanheira Fagg Menicucci
Associate, Superior Courts and Government Relations
gte@bmalaw.com.br

Sources: Agência Câmara de Notícias, Agência Senado, and the Federal Government website.

Regulatory Revamp Boosts Insurance Opportunities in Brazil

By **Henrique Vargas Gama Beloch** and **Adriano Guatimosim Carneiro**

The regulatory sandbox is only one piece of a larger plan by regulators to modernize and, to a certain extent, deregulate the Brazilian insurance market

It's 2021 and the potential for the insurance industry in the vast Brazilian market is still largely untapped, despite the resilience of the industry even during the recent economic recession and a gradually maturing insurance culture – penetration is still low, given the size of the economy when compared to other countries. This growth potential has been in the sights of local and foreign investors alike, from consolidated players to newcomers, as can be seen from the numerous transactions and transformational changes currently underway.

Aside from an active M&A scene with a considerable volume of transactions (many of which BMA is proud to have been a part of), there has been a surprising number of new insurance operations launched in the last five years, either with financial backing of known international players, or raised from the ground up with local expertise and funding. Adding to the list, in 2020 more than 10 new insurance startups were authorized by **SUSEP** (Brazil's insurance regulator) to begin operations under the newly-created **sandbox** model, recently adopted by Brazilian regulators to allow

> Many rules governing insurance products are also being revisited. Historically, the Brazilian insurance regulatory framework has a tradition of prescribing in detail the mandatory terms and conditions of insurance products

the creation of cost-light projects based on innovative technology, launching Brazil further into fintech and insurtech territory. Although SUSEP's first foray was confined to a limited number of selected projects, the initiative caught the attention of many investors eager to ride the "new insurance wave", prompting SUSEP to announce a potential new sandbox round for 2021.

Briefly, the sandbox environment allows for an overall reduction of the regulatory burden by mitigating capital and solvency requirements, making reporting obligations and mandatory internal controls consistent with startup enterprises, and stripping down regulatory costs to the basics. Although a sandbox license has a limited duration, it serves as the ideal launching pad for pioneering projects which otherwise would face the usual go-to-market hurdles to get up and running.

But the regulatory sandbox is only one piece of a larger plan by regulators to modernize and, to a certain extent, deregulate the Brazilian insurance market. A new set of regulations has classified insurance companies into segments, according to the size and complexity of their operations, in a further effort to loosen the regulatory constraints on younger or smaller insurance businesses. Insurers at the bottom end of this range, for example, are subject to lower regulatory capital requirements when compared to those at the top end, so as to level the playing field and boost competitiveness.

Many rules governing insurance products are also being revisited. Historically, the Brazilian insurance regulatory framework has a tradition of prescribing in detail the mandatory terms and conditions of insurance products, restricting innovation and differentiation of available policies. SUSEP's new approach is to make product regulation more flexible, providing insurers with greater freedom to develop products and solutions best tailored to their clients, including usage-based insurance for certain risks. In particular, policies aimed at sophisticated customers seeking to insure large risks will be almost totally customizable.

Supported by a more business-friendly legal environment and a rapidly evolving digital economy, local insurers, reinsurers and brokers have been driving innovation by actively developing new products, new ways of selling insurance and working on improving customer experience in an increasingly competitive market.

In this dynamic context, our Insurance Desk is ready to provide specialized support to clients who wish to seize opportunities in the Brazilian market.

Henrique Vargas Gama Beloch
Partner, Insurance
hvb@bmalaw.com.br

Adriano Guatimosim Carneiro
Associate, Insurance
auc@bmalaw.com.br

The “Green Patent” fast track

By **Antonella Carminatti** and **Ana Cristina Müller**

The “Green Patents” program implemented by Brazil’s PTO is designed to reduce the time spent in examining technologies

Demand is growing for sustainable technologies that preserve the environment, and investors are likewise paying more attention than ever to companies that concern themselves with the environmental, social and governance aspects of their business.

The "Green Patents" program implemented by Brazil's PTO (INPI - *Instituto Nacional da Propriedade Industrial*) is designed to reduce the time spent in examining technologies that have less environmental impact and so contribute to fighting climate change. To be eligible for the fast track, patent applications must contemplate inventions related, for example, to alternative energy generation technologies (biofuels), transportation (hybrid/electric vehicles), energy conservation, waste management, or sustainable agriculture (fertilizers/irrigation techniques, etc.).

Along with its priority green patent program, the INPI has a number of other projects to speed up examination and review, as in cases of patent-pending infringement.

From January 2020 to March 2021, the INPI received 118 requests for accelerated examination involving green technologies. Of these, 32 applications have already been decided, with an approval rate of 65%. The average length of time from the request for accelerated examination to grant of the patent can be as little as eight months.

Along with its priority green patent program, the INPI has a number of other projects to speed up examination and review, as in cases of patent-pending infringement. In such cases, the applicant can request accelerated examination, with the cease-and-desist letter sent to the suspected infringer serving as proof of the infringement.

Examiners in the INPI's Patent Division are working more closely than ever with patent offices in other countries, such as the USPTO, the EPO and the JPO, to propose new methods for shared examinations and to move on to the new phase of the backlog reduction program, focused on patent applications filed since January 2017.

The National Intellectual Property Strategy, the National Innovation Policy, and the patent backlog reduction program are just some examples of Brazil's commitment to attracting investment to this country and making it a center of innovation, creating a virtuous circle with protection of intellectual property assets as a keystone for attracting the interest of investors.

18 Months with the Madrid Agreement

The Madrid Protocol is an international treaty that facilitates registration of trademarks in more than 100 countries. Brazil acceded to the treaty in October 2019, joining 120 other countries that represent more than 72% of the world's population and 81% of the global GDP.

Through filing a single application in a single office, such as Brazil's INPI, directed to the World Intellectual Property Organization – WIPO, the Madrid Protocol makes it possible for individuals and businesses to request protection for their marks in multiple countries at the same time, reducing bureaucracy and costs, both for Brazilians looking for protection of their marks in other countries, and for foreign nationals who wish to register their marks in Brazil.

To implement the Madrid Protocol, the INPI has made significant changes in how it processes trademark registration applications

On receiving a new application, WIPO sends it to each country named in the application, which will examine the mark in accordance with local law.

According to the latest update of the INPI's "Madrid Protocol Dashboard", which compiles data from October 2, 2019 to April 8, 2021, the number of international applications filed by Brazilian individuals and companies (in other words, Brazilian marks being "exported") was **189.** In contrast, the number of times Brazil was designated by foreign individuals and companies (i.e. foreign marks "entering" Brazil) was **13,840**.

It is interesting to compare the data on the first 18 months of the Madrid Protocol with the annual forecasts made by the INPI and WIPO when the treaty was implemented in Brazil. In the first year, it was expected that Brazil would originate between 98 and 308 applications (reflecting the 2018 numbers for Mexico and India, respectively). As for designations of Brazil in foreign applications, Brazil was expected to receive something in the range of 8100 designations (which falls between the 2018 numbers for New Zealand and Norway).

To implement the Madrid Protocol, the INPI has made significant changes in how it processes trademark registration applications. The most important are the **multiclass system**, which allows more than one class of products or services to be included in a single application, and **co-ownership**, which allows two or more individuals/businesses to own the same mark.

Trademark co-ownership is now a reality in Brazil

Co-ownership of registered marks by two or more businesses or individuals had been a long-standing demand by market agents, which often found themselves solving the shared ownership problem by forming a company solely for the purpose of holding the trademark registration. Although Brazilian law does not prohibit co-ownership in intellectual property assets, the INPI did not provide the mechanisms needed to allow more than one owner of a mark to be registered in its database.

With Brazil's recent adherence to the Madrid Protocol, the INPI had to reconsider the matter and develop new procedures.

To that end, the INPI issued Resolution 245/2019, expressly providing for co-ownership of marks. Although the resolution came into effect in 2019, only since September 15, 2020 has the INPI's system be able to process co-ownership applications for registration and co-ownership registrations. Now, however, it is possible to apply to the INPI for registration of a trademark under more than one name, which in turn makes it easier for trademarks to be used by more than one person or legal entity, as long as all the co-owners effectively engage in activities compatible with the products or services covered by the trademark's registration.

Co-owners can be added to existing registrations by submitting an application to the INPI to have a transfer of ownership entered

on record. Transfers made to include co-owners should cover all identical or similar marks, because registration proceedings for marks not included in the transfer may be cancelled.

There can be no doubt that co-ownership is an important mechanism for management of trademark ownership, since it acknowledges a legal situation that effectively exists in the market and that is now – finally – recognized by the INPI.

These sustained, focused efforts show that Brazil has the grasped central importance of intellectual property to the economy – an importance that will only increase in the future.

Antonella Carminatti
Partner, Intellectual Property
antonella.carminatti@bmapi.com.br

Ana Cristina Müller
Partner, Intellectual Property
ana.muller@bmapi.com.br

Post-Covid 19 challenges and new ways of working

By **Cibelle Linero**

The workplace, and the related issue of virtual hiring, is one aspect of the world of work that was affected by the pandemic and will certainly have consequences post-pandemic

The effects of the pandemic have not yet been fully mapped by scientists, doctors, psychologists, economists and legal professionals, and there is still no certainty as to when the public health crisis will be under control. The general feeling is that the world has changed and will never be the same as it was pre-pandemic. Unquestionably, there will be challenges in the future and employers will have to reinvent themselves in various ways, with or without government support and changes to the legal framework.

One of the aspects of the world of work that was affected by the pandemic and will certainly have consequences post-pandemic is the workplace, and the related issue of virtual hiring.

Over the past year, companies have upgraded their technological resources to make remote work possible on a large scale. What many companies learned was that remote work is viable: employees continued to be committed and aligned with their employer, and the mishaps inevitable in a new and worrying scenario were overcome. With the adoption of telework came savings (or potential savings) from the reduction in physical space needed to accommodate employees, in providing transportation to and from work (or transportation allowances), national and international travel, and the many other costs that are inherent to maintaining a physical space for large numbers of employees. These savings did not go unnoticed and have been an important factor in reassessing the traditional, in-person work model.

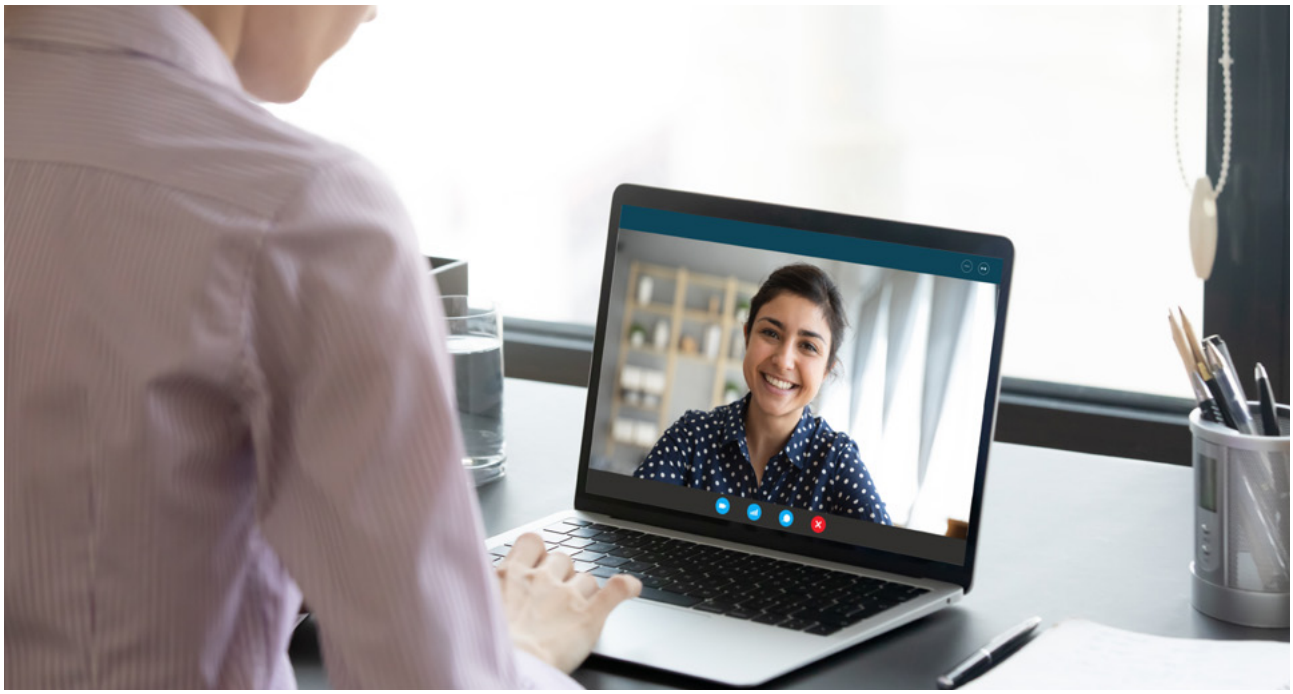
Contrary to the conclusion that might have been reached a short time ago in analyzing the advantages and disadvantages of telework, it now seems fair to say that the pandemic has brought credibility to remote work in many sectors, and it is reasonable to expect that partially remote work arrangements will become not only more common, but more desirable for both employers and employees.

In Brazil, however, the current legislation does not adequately govern the details of the new work models now emerging. Since the Employment Law Reform of 2017, we have provisions that deal with remote work, which require that existing employment agreements be amended to specify employers' and employees' obligations with respect to matters such as the provision of the technological equipment and infrastructure needed for remote work, and reimbursement of work-related expenses paid by employees. The law also provides that employers are not required to record the time worked by employees who work remotely.

The legislation does not contemplate situations where employees work under a hybrid model, so that part of their job is performed at home and part in person, at the employer's establishment. Although a mixed system of in-person and remote work is legally possible, the legislation does not address questions such as control of time worked (and rights to overtime), provision of work tools and infrastructure, and reimbursement of expenses.

There are other situations that can be expected to arise much more frequently, and are not contemplated in the legislation or in decisions by the courts. For example, by law in Brazil, all employees are represented by labor unions, whose jurisdiction is defined by economic activity and territory. What happens when a company located in one city hires an employee in another city or state to work exclusively on a remote basis? Which union will represent the employee? Which municipal or state holidays apply? Will there be any difference in employee rights when telework is optional? And how will employers monitor confidentiality issues in telework?

The challenges are many, and the law tends not to keep up with the pace of the transformations that are taking place. Now more than ever, employers should ensure that they have clear, express rules in their employment agreements, internal policies, and collective bargaining agreements to govern their relationship with employees in a time of rapid change.



Cibelle Linero
Partner, Labor and Employment
cml@bmalaw.com.br

Adjustment for inflation in contracts: which index?

By **Felipe Galea** and **Bruno De Conti**

Perhaps because of Brazil's past experience with chronic inflation, the country has many indexes that track the purchasing power of money.

Perhaps because of Brazil's past experience with chronic inflation, the country has many indexes that track the purchasing power of money. The General Market Price Index (IPG-M – *Índice Geral de Preços – Mercado*) is one of the indexes most frequently used to adjust prices under contracts. The IGP-M is broad in scope because it is composed of three other price indexes: the General Producer Price Index (IPA – *Índice de Preços ao Produtor Amplo*), which records variations in the prices of agricultural and industrial products in transactions prior to sale to the final consumer, makes up 60% of the IGP-M; the Consumer Price Index (IPC – *Índice de Preços ao Consumidor*) represents 30%; and the National Construction Cost Index (INCC – *Índice de Custo da Construção*) is responsible for the last 10%.

In 2020, due to macroeconomic factors driven by the covid-19 pandemic and its impacts on Brazil (such as the increase in the value of the US dollar), the IPA in particularly climbed sharply and the IGP-M necessarily followed suit, leaving the official inflation index, the National Broad Consumer Price Index (IPCA – *Índice Nacional de Preços ao Consumidor*, published by the Brazilian Institute of Geography and Statistics) quite some distance behind.

Players in various economic sectors reacted by trying to negotiate the replacement of the IGP-M under continuing performance contracts by another, more moderate index. This movement was particularly notable in the real estate sector, where use of the IGP-M to adjust rents under commercial and residential leases is almost universal, but which has little or no relationship to the IPA, which contributed the most to the increase in the IGP-M.

In recent months, lessees who were frustrated in their attempts to renegotiate rent increases have brought lawsuits to try to compel lessors to accept their claims.

This movement was particularly notable in the real estate sector, where use of the IGP-M to adjust rents under commercial and residential leases is almost universal

Although the Superior Court of Justice (STJ – *Superior Tribunal de Justiça*, the highest court on non-constitutional matters) has taken the

position that "adjustment for inflation adds nothing to the value of money, serving only to restore its purchasing power, which has been corroded by the effects of inflation",[1] the court has not yet considered the issue in the current scenario. In 2003, however, in a case dealing with the distance between the IGP-M and the actual inflation rate, the STJ held that "A contractual option for one of the currently used indices, which is considered legal, ... does not justify the conclusion that [the index] is abusive, ... without an effective demonstration that the disparity arose in a certain period, by reason of an abnormal, unforeseen circumstance."[2]

In contrast, the Court of Appeal of the State of São Paulo is dealing with cases arising in the current situation, and has issued preliminary decisions on both sides of the question, sometimes denying demands to substitute the IGP-M,[3] and sometimes granting lessees' petitions in light of the disproportion shown by the index.[4]

The question is a significant one in Brazil, and BMA is keeping a close watch on developments in the courts.

Felipe Galea
Partner, Litigation and Arbitration
fes@bmalaw.com.br

Bruno de Conti
Associate, Litigation and Arbitration
bruno.deconti@bmalaw.com.br

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2. Appeal REsp 403.028/DF.
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Brazil's New Natural Gas Law

By **Carlos Frederico Lucchetti Bingemer** and **Ana Cândida de Mello Carvalho**

The new framework legislation introduces important changes in the natural gas segment, creating the legal conditions needed to build a more open, dynamic and competitive market

Brazil's energy sector has entered a decisive period with the presidential sanction of Law 14.134 (the New Natural Gas Law) on April 8, 2021. The new framework legislation introduces important changes in the natural gas segment, creating the legal conditions needed to build a more open, dynamic and competitive market, and an environment designed to attract investment.

Prior to the new legislation, there were various barriers to an open market and competition between sector players, including a lack of legal mechanisms to guarantee shared access to the gas pipeline network; Petrobras's dominant position in the productive chain, operating essentially all the sector's infrastructure; and tax inefficiencies affecting the entire chain.

Among the changes introduced by the New Natural Gas Law are transportation unbundling (requiring transporters and companies that operate in competitive businesses to be independent); adoption of the simpler authorization process for construction of gas pipelines rather than the more complex concession model; and implementation of the entry and exit model for transport capacity assignment, allowing a greater number of companies to inject and withdraw gas.

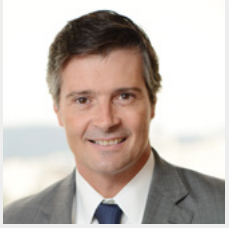
The new legislation also adopts the authorization model for underground gas storage and requires expanded access to essential natural gas infrastructure for new operators, ensuring increased supply and promoting competitiveness to end the state monopoly in the sector.

> To achieve the New Natural Gas Law's objectives, profound changes in the natural gas industry will be occurring over the next few years

In addition, the New Natural Gas Law provides that the federal government – acting through the Ministry of Mines and Energy and the ANP, Brazil's oil and gas regulator – must work together with the states and the federal district to improve and harmonize state regulations.

The expected arrival of competition in the sector is the highlight of the New Natural Gas Law. With the end of the current scenario, with its single supplier, natural gas will become more accessible, boosting development and reindustrialization in this country, and increasing opportunities for investment in infrastructure.

To achieve the New Natural Gas Law's objectives, profound changes in the natural gas industry will be occurring over the next few years, at all stages of the productive chain. The expectation is that the new legislation will create an environment of greater legal certainty that can attract new investments and drive the development and growth of the natural gas market in Brazil.



Carlos Frederico Lucchetti Bingemer
Partner, Corporate and M&A
cfl@bmalaw.com.br

Ana Cândida de Mello Carvalho
Partner, Infrastructure and Regulatory and Government Affairs
acmc@bmalaw.com.br

The Fiagro and new opportunities for investment in Brazilian agribusiness

By **Cristiana Moreira** and **Conrado de Castro Stievani**

The government's aim with Fiagro is mainly to relieve public coffers of the pressure from subsidizing interest rates for agriculture production by encouraging private investors

Enacted on March 29, 2021, Federal Law 14.130 creates a new type of investment fund in Brazil, dedicated to investments in the agribusiness production chain. The new legislation is quite flexible in terms of the asset classes in which an agribusiness investment fund, or Fiagro, can invest.

The government's aim with Fiagro is mainly to relieve public coffers of the pressure from subsidizing interest rates for agriculture production by encouraging private investors – both national and non-national – to inject liquidity into the industry.

A Fiagro's portfolio may include several asset classes, ranging from fixed income securities, equity issued by agricultural businesses, to rural land. While many of those assets have been in the portfolios of existing investment vehicles that are widely available to foreign investors, rural land is one asset that has not been available and has been a controversial topic for several years.

A Fiagro's portfolio may include several asset classes, ranging from fixed income securities, equity issued by agricultural businesses, to rural land

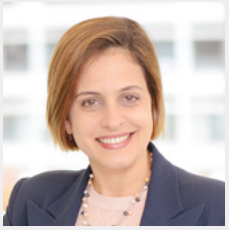
One of the reasons for the controversy is that acquisition of rural property by non-Brazilian persons or Brazilian entities controlled by foreigners faces restrictions under Federal Law 5709/1971. When the 1988 Federal Constitution of Brazil was adopted, there was a certain flexibility in relation to the acquisition or lease of rural properties through legal Brazilian entities controlled by foreigners. However, since 2010, such acquisitions again became subject to restrictions, and subject to prior approval by

federal government, depending on the size and location of the properties as well as the project to be developed in the land.

When the Fiagro bill was presented in Congress, the market expected that legislators would take the opportunity to clarify the rules applicable to foreign investment in rural land. Although there were debates about the matter, specific rules have not been drafted or approved in the context of the new Law.

One view in the market is that the new Law permits (by not prohibiting) non-Brazilian individuals and entities to invest – indirectly – in rural property, by acquiring shares in Fiagros that hold the title to rural property. That view finds support in the fact that congressional representatives discussed whether the provision allowing investments in rural property by Fiagros should or should not be removed from the text, precisely because non-Brazilian individuals or entities could hold a majority of the units in the investment fund and thus be the ultimate beneficial owner of the land. Congress decided to keep the provision in the Law.

The questions now concern how the market will test the Fiagro structure for investment in land and what regulations may be enacted in the coming months. Meanwhile, the expectations of fund managers and investors for positive developments remain high and the first Fiagros will hit the market soon – whether to invest in rural land or in all the other available asset classes is still to be discovered.



Cristiana Moreira
Partner, Real Estate
cm@bmalaw.com.br

Conrado De Castro Stievani
Partner, Finance and Capital Markets
cto@bmalaw.com.br

The Brazilian corporate insolvency legislation reform: fostering distress investing

By **Sergio Savi** and **Eduardo Guimarães Wanderley**

Federal Law 14.112/2020, which came into force on January 23, 2021 introduced significant changes to judicial reorganization and other insolvency proceedings governed by the Brazilian Insolvency Law

One of the cornerstones of any corporate insolvency system is reliability. The proposition is even more valid when it comes to investments in a distressed environment, where the legal framework should

- **reduce transaction closing time;**
- **provide for free and clear assets sales; and**
- **give priority to new money,**

all combined with transparency and due process.

Federal Law 14.112/2020, which came into force on January 23, 2021 (New Legislation), introduced significant changes to judicial reorganization (JR) and other insolvency proceedings governed by the Brazilian Insolvency Law, Federal Law 11.101/2005 (LRF – *Lei de Recuperação e Falências*). Even though the reform, as a whole, is not free from criticisms, it aims at fostering investments by granting additional protection to purchasers of assets and debtor-in-possession lenders.

The New Legislation provides that, if authorized by the JR court, the debtor-in-possession may contract DIP loans, offering its own or third parties' assets as collateral. Anyone can be the DIP lender, including pre-petition creditors and the debtor's shareholders.

The New Legislation also makes it clear that DIP loans are excluded from the JR and will have priority for repayment over practically all other claims in the event of debtor's bankruptcy liquidation. Due to the amendment in the bankruptcy liquidation waterfall rules, shareholders will also rank senior if they provide the DIP financing, as long as the DIP lending transactions are arms' length.

Lastly, if the loan has been disbursed by the lender, any modification of the JR judge's decision authorizing the DIP loan will not modify the loan's priority status nor affect the collateral granted to lenders in good faith.

With respect to sales of assets, in addition to expressly providing that an isolated business unit (IBU) may be composed of assets of any kind (tangible or not), including equity interests, and under any legal structure, the New Legislation amended the LRF to make it even clearer that IBU sales are free and clear of liabilities of any kind. The new rules also provide that the sale of IBUs to good-faith investors, as authorized by the JR court or as provided under an approved and confirmed JR plan, cannot be set aside or unwound after the transaction is closed with receipt of funds by the debtor.

Another significant improvement under the New Legislation is the greater flexibility in holding a competitive bidding process to sell assets, including IBUs. A new provision allows a "specialized agent" to run the asset sale process, as detailed under the JR plan, departing from the old-fashioned court-supervised auction system.

Although it is still too early to know whether the highlights outlined above will streamline the investment process for debtors in JR, it seems clear that the New Legislation is aimed at improving LRF's framework for investments, which at least theoretically should help foster transactions that bring liquidity to debtors in possession.

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Sergio Savi
Partner, Restructuring and Insolvency
sergio.savi@bmalaw.com.br

Eduardo Guimarães Wanderley
Partner, Restructuring and Insolvency
egw@bmalaw.com.br

Tax reform in Brazil: Congress stalled; Supreme Court active

By **Ligia Regini da Silveira** and **Daniel Loria**

A tax reform agenda has been dragging on for decades, with attempts being made by various administrations, some broader in scope and some narrower

The Brazilian tax system is one of the most complicated in the world, requiring huge amounts of work from in-house teams and outside counsel. The country is consistently positioned as one of the worst countries in the world to pay taxes in, sitting at the bottom of the Doing Business World Bank rankings for many years.[1]

A tax reform agenda has been dragging on for decades, with attempts being made by various administrations, some broader in scope and some narrower. The main objectives are to simplify the system and reduce tax litigation (which has reached more than USD 1 trillion according to recent estimates[2]). Some also argue for greater progressivity and tax justice.

In Congress, the most recent efforts, under Mr. Bolsonaro's administration, are related to the "indirect taxes" (i.e. taxes on consumption), where many distortions exist. At federal level, Brazil has a one-of-a-kind tax on gross revenues (PIS/COFINS), which has been widely challenged in the courts, leading to substantial losses to the government. There is also a tax on sales of goods (the ICMS tax at state level, regulated by each of the 27 Brazilian states) and yet another tax on sales of services (the municipal ISS tax, with general rules in federal legislation and specific regulations by the more than 5000 municipalities of Brazil). There are special tax regimes that harm competitiveness.

Three main bills now being debated in Congress aim to move Brazil from this chaotic regime to a more unified taxation on consumption of goods and services, under a value-added (VAT) system, following the European model.

There are other bills in Congress dealing with corporate and personal income tax, although they are still in the early stages. Some bills propose taxation of dividends (currently exempt in Brazil), in combination with a reduction in the corporate income tax rate (currently at 34%), or even without a reduction (in which case the effective tax rate on corporate profits would increase significantly).

There is also talk of other changes to the tax law, varying from a tax on payments to a green tax on products with negative externalities, such as fuels.

In practice, however, we have witnessed

political turmoil and a lack of real progress in Congress. The congressperson in charge of presenting a report on tax reform has delayed his report more than once. In contrast, we have seen greater activism by Brazil's Supreme Court (STF – *Supremo Tribunal Federal*) on a variety of tax matters.

Helped along by the quicker virtual judgment sessions adopted by the court during the pandemic, the STF has decided a significant number of tax cases in various situations and economic sectors, usually upholding taxation:

• social security contributions are payable on the additional pay (equal to 1/3 of a month's salary) owed to employees when they take their vacation, reversing earlier decisions by the Superior Court of Justice and the STF itself, in a judgment binding on all lower courts and the administration;

• the IPI excise tax attaches to imported goods when they leave the importer's establishment, reversing decades of decisions to the contrary by the Superior Court of Justice (STJ – *Superior Tribunal de Justiça*);

• the PIS/COFINS gross revenues tax attaches to financial income and fees paid to credit card operators;

• software licenses are subject to the ISS service tax, not the ICMS tax on sales of goods, reversing a position established decades earlier;

• imports by persons and entities that are not ICMS taxpayers are subject to ICMS;

• the quasi-tax payroll contributions to SEBRAE and INCRA are constitutional;

• vehicle owners that have multiple tax domiciles (i.e. car rental companies) are subject to the IPVA vehicle tax in multiple states;

• indirect exports (i.e. through trading companies) are exempt from taxes;

• maternity benefits are not subject to social security contributions.

The STF has thus shown considerable activism in addressing gaps in the tax system, through decisions that go contrary to the court's earlier position and seem to be based on consequentialist considerations – elements of a financial or budgetary nature, aimed at containing losses to the public coffers.

In tax matters, therefore, it's fair to say that delays by the legislative and executive branches have pushed the STF into the protagonist's role.

Ligia Regini da Silveira
Partner, Tax
lrd@bmalaw.com.br

Daniel Loria
Partner, Tax
daa@bmalaw.com.br

1. The latest rankings are available online at https://data.worldbank.org/indicator/IC.TAX.DURS?locations=BR&most_recent_value_desc=false.
2. Report prepared by the Insper Center for Tax Studies in December 2020, in relation to the 2019 calendar year. Available online at https://www.insper.edu.br/wp-content/uploads/2021/01/Contencioso_tributario_relatorio2020_vf10.pdf

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