

— THE  
IMPLICATIONS  
OF **COVID-19**  
FOR BUSINESSES  
IN BRAZIL

# Introduction

## — The Covid-19 pandemic is having a profound impact on the Brazilian economy.

Hitting Brazil at a time when the economy was showing signs of recovery, the Covid-19 spread may eliminate the prospects of growth for Brazil in 2020 altogether. More importantly, government measures to contain the spread of the virus risk are drastically changing the reality of many businesses. In this article, we outline the changes in the following key areas: health, contracts, labor and employment, and tax. The topic is very dynamic and new developments will continue to happen at a fast pace, so we plan to update this article over the next several weeks as necessary.



## Health

The federal government has formally declared a state of calamity in Brazil, which is meant to enable the undertaking of measures otherwise not available to it, including incurring in expenditures in excess of the 2020 budget in order to fight the Covid-19 outbreak. In addition, the government has issued a list of activities and services deemed essential, i.e., they may continue to be normally developed during the Covid-19 outbreak (although not exempted from complying with applicable health recommendations and/or determinations).

Further, the federal government has introduced several measures that are impacting businesses. Based on new legislation, the federal government may impose periods of isolation and quarantine, the compulsory performance of medical examinations, and restrictions on immigration. Any person with Covid-19-related symptoms must self-quarantine and follow medical prescriptions. Failure to do so may result in fines and even imprisonment.

States and municipalities are introducing similar, and sometimes more restrictive measures. For example, the São Paulo State, which is the most affected state by the Covid-19 outbreak so far, has determined quarantine from March 24 to April 7, in which period several activities

are restricted. In addition, São Paulo State has issued a decree providing the following: (i) recommendation that private establishments such as theatres, cinemas and gyms be closed for up to 30 days, (ii) the closure of museums, libraries, theaters and cultural centers maintained by the State of São Paulo for up to 30 days, (iii) home office for state employees over 60 years old, except for those working in the areas of public safety and health, and (iv) the closure of elderly centers for 60 days.

Another significant development relates to telemedicine, which used to be prohibited in Brazil (save for certain exceptions) and now is being used to address the Covid-19 crisis. A new regulation permits pre-clinical support, medical examination and diagnosis, as well as the issuance of prescriptions in cases of Covid-19-related symptoms.

In order to cope with the shortage of supplies, the federal government may authorize the importation of medical equipment and products without the applicable regulatory approvals. In addition, the federal government may temporarily procure goods and services required to fight the Covid-19 outbreak without observing the bidding process contemplated in the relevant public procurement laws. Several other states and municipalities are adopting similar legislation concerning public procurement.

## Contracts

Many businesses are looking to review, modify and even terminate their contracts as a way to reduce cost and navigate this period of crisis. Therefore, it comes as no surprise that in Brazil, as in the rest of the world, the law on force majeure and acts of God is being carefully examined. The question is whether the Covid-19 pandemic qualifies as an event of force majeure or an act of God that could justify changes in the economic substance of contracts and/or their termination. Brazilian courts have not yet provided a clear response to this question, but will likely do so as the crisis continues.

The general rules related to force majeure and acts of God are found in the Brazilian Civil Code. However, depending on the type of contract, other laws may apply (e.g., the Brazilian Consumer Code applies to contracts with consumers, and the Labor Code applies to contracts with employees).

Under the Brazilian Civil Code, force majeure and acts of God are generally defined as events beyond a party's control or diligence that make it impossible for the party to comply with a certain contractual obligation. Unless the debtor has expressly undertaken liability for force majeure and act of God

events, no liability should arise when such events materialize.

In order to qualify as force majeure, three elements must be shown: (i) an unforeseeable event, (ii) the event is beyond the control of the party arguing force majeure, and (iii) the event makes it impossible for the party to perform its contractual obligations. According to case law, the requirement of an unforeseeable event does not apply to acts of God, since in such cases the event is typically inevitable, even if it can be foreseen. Moreover, most Brazilian legal scholars typically associate an act of God with a natural occurrence or an event derived from the force of nature, such as storms, inundations or earthquakes. Force majeure, on the other hand, is generally attributed to human action (e.g., war).

Parties to commercial contracts are free to negotiate the terms of their force majeure and act of God provisions, and Brazilian courts will generally be guided by them. Under Brazilian law, parties may allocate liabilities relating to force majeure and act of God as they see fit in their commercial contracts. Courts will apply the provisions of the Brazilian Civil Code to the extent that a commercial contract does not address the issue, or does so in an incomplete fashion.

Besides force majeure and act of God, Brazilian law contemplates other

provisions that may be used to avoid the performance of contractual obligations. Under the Brazilian Civil Code, parties to a commercial contract may rely on the doctrines of (i) impossibility of the contract, (ii) unpredictability and excessive burden of the contract, and (iii) exception of the breach of contract.

**Impossibility of the contract:** Service contracts may be terminated if it becomes impossible to fulfill them. According to case law, financial difficulties or economic hardship do not give rise to the application of this doctrine.

**Unpredictability and excessive burden of contract:** In a long term commercial contract, when the performance of the contract becomes excessively burdensome to one of the parties and/or gives rise to excessive gains to the other party due to extraordinary and unpredictable events, the party experiencing excessive burden may request termination of the contract or changes to its terms so as to make fulfillment of the contract commercially viable.

**Exception of the breach of contract:** one of the contracting parties may claim the suspension of the duty to perform its obligations and even the termination of the contract if the other party fails to perform its contractual obligations.

As noted, the federal government, states and municipalities have been introducing legislative and regulatory measures to address the Covid-19 crisis. Such measures may affect commercial contracts, especially those in regulated industries and/or those having the government as one of the contracting parties. As new measures are introduced at a fast pace, it is important to always look for any new measures that may affect the analysis of commercial contracts.

## Labor and Employment

Several questions arise in the area of labor and employment, and the government has been introducing legislative changes that may change the answers. Thus far, the questions relate mainly to the possibility of employers changing the relationship with employees in order to (i) create a remote work policy, (ii) put employees on unpaid leave, and (iii) require that employees use vacation time during the outbreak. Below we answer each of these questions separately.

There are no rules preventing an employer from requiring employees to work remotely or from home during the Covid-19 outbreak. This being said, the employer may be subject to a collective bargaining agreement containing provisions on this topic, in which case the employer should review to what extent such provisions may restrict the ability to require employees to work remotely or from home during the Covid-19 outbreak. Assuming that no such provisions exist and/or do not impose any restrictions, the employer may introduce a remote work or home office policy. Ideally, this should be done by way of an agreement with the

employees. The agreement should make reference to the Covid-19 crisis and state that the employee should work from home and/or remotely until the crisis is over and the employee is asked to return to the employer's premises.

On the other hand, there are restrictions on putting employees on unpaid leave for limited periods of time during the Covid-19 outbreak. If the employees are able to work and if the employer continues to develop its economic activities, the employer has no right to put its employees on unpaid leave. Even if the Covid-19 outbreak is considered within the legal labor concept of force majeure, the employer may only reduce salaries by means of a collective bargaining agreement signed with the employees and having the approval of the respective Union. If an employer decided unilaterally to put employees on unpaid leave for more than 30 consecutive days, this may be interpreted by the courts as dismissal leading to mandatory severance payment and possible moral damages compensation.

Brazilian labor law provides certain rules on unpaid leave that must be observed in any collective bargaining agreement, including, for example, a maximum period of five months for

the unpaid leave, and the granting of certain benefits to the employees.

Finally, if the employee is able to work (i.e., if he or she is not ill or quarantined due to the risk Covid-19 contamination), the employer may determine that the employee take vacation individually or on a collective vacation basis, provided that all applicable legal requirements are met by the employer.

During the Covid-19 crisis, the government continues to introduce measures to enhance the flexibility of labor relations, including, for example, the possibility of the employer converting overtime hours into vacation time, as well as postponing payments to the government's unemployment fund. It is likely that additional measures will be taken in order to provide employers with greater flexibility in the revision of the relationship with employees at this time of crisis.

# Tax

Tax litigation is more common in Brazil than other countries, and is often used by businesses to reduce their tax liabilities. The Covid-19 outbreak is leading many businesses to review whether they can reduce and/or defer their tax obligations in Brazil, and litigation (either through administrative proceedings or before the courts) may be a suitable means to achieve these goals.

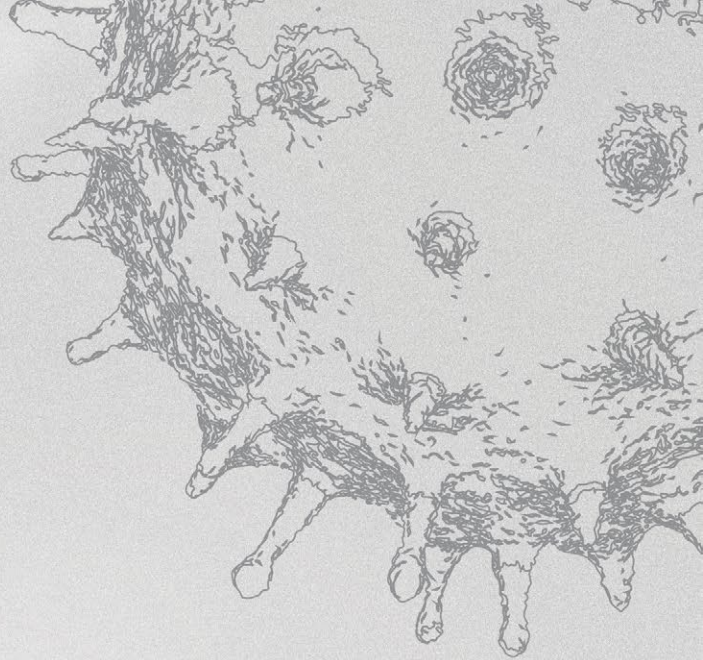
In parallel, the federal government, states and municipalities are taking practical measures to provide tax relief to businesses. These include, for example, (i) the suspension or deferral of tax collection proceedings, (ii) the possibility of reaching settlements in tax disputes pursuant to which tax debts may be paid in reduced monthly installments, and (iii) the postponement of certain tax due dates.

Finally, all levels of government are contemplating legislative changes in order to reduce the tax burden on businesses operating in Brazil. Among those already implemented is the reduction or suspension of taxes due on the importation of medical equipment and supplies needed to fight the Covid-19 outbreak.



## Concluding remarks

As noted in the introduction, the Covid-19 pandemic is developing rapidly, which is causing governments to constantly review their measures to mitigate the crisis. Brazil is no exception. In addition to the above areas, we may see changes in areas such as insolvency law, capital markets, finance and regulatory, to name a few. We will continue to monitor developments closely, and will update this article as necessary.



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