

COVID-19: Contract and employment issues in Brazil

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This guide highlights key contractual, labor and other considerations that may affect business operations in Brazil due to the COVID-19 outbreak

With the help of leading firms in each of the main jurisdictions in Latin America, we have prepared this note setting out the key aspects of the framework in each such jurisdiction. This is obviously a rapidly evolving situation that we are following closely.

How is the applicable law determined by the courts in the case of commercial contracts?

Brazilian law provides that contracts are governed by the laws of the place where they are created, rather than following the general international law principle that parties to commercial contracts be permitted to choose the law governing their contracts. When the contracting parties do not sign the contract at the same place, their obligations are considered created at the place of residence of the party that proposed the contract.

Brazilian arbitration law enhances the parties' autonomy in the choice of law by allowing them to choose the applicable law by means of an arbitration agreement. Whether a commercial contract is domestic or international, the parties may choose the applicable law if the contract incorporates an arbitration agreement.

If Brazilian law applies, most rules relating to commercial contracts are found in the Brazilian Civil Code. Depending on the subject of the contract, additional rules from other laws may apply. For example, the Brazilian Corporations Law will apply to transactions involving corporations.

Are there any statutory provisions relating to force majeure?

The general rules related to force majeure 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 ("*caso fortuito*") and act of God ("*força maior*") are 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 non-performing party has expressly undertaken liability for force

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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). Brazilian courts have not yet taken position on whether the COVID-19 crisis would qualify as force majeure or act of God.

The Brazilian Civil Code provides specific rules on force majeure. We highlight some examples:

- > A service contract may be terminated by the impossibility of performing the contract when such impossibility is motivated by force majeure;
- > In construction contracts, the contractor may suspend the construction due to force majeure;
- > In deposit contracts, the party responsible for the deposited asset may be released from such responsibility in a situation of force majeure; however, the party has the burden of proof; and
- > In transportation contracts, the carrier is liable for damages caused to persons that are transported and also to their luggage, except in cases of force majeure.

How are force majeure clauses in commercial contracts applied and interpreted in practice?

Parties to commercial contracts are free to negotiate the terms of their force majeure provisions, and Brazilian courts will generally be guided by them. Under Brazilian law, parties may allocate liabilities relating to force majeure 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 of force majeure or does so in an incomplete fashion.

In the absence of statutory provisions and/or contractual arrangements on force majeure, which instruments are available 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; (ii) unpredictability and excessive burden; and (iii) exception to breach of contract.

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- > Impossibility: Service contracts may be terminated if it becomes impossible to fulfill them due to force majeure. According to case law, financial difficulties or economic hardship do not give rise to the application of this theory.
- > Unpredictability and excessive burden: 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 the excessive burden may request termination of the contract or changes to its terms so as to make fulfillment of the contract commercially viable.
- > Exception to 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.

What else needs to be considered by clients that are party to a contract which is affected by COVID-19?

As a first step, the party affected by COVID-19 should review the terms of the commercial contract, as these terms will be the primary source for the resolution of any dispute. Among other things, the party should review: (i) whether the contract contains a definition of force majeure; (ii) whether the contract contemplates notification proceedings if a force majeure event occurs; (iii) the allocation of risks among the parties due to a force majeure event; (iv) the time for the affected party to overcome a delay caused by a force majeure event; (v) specific remediation measures that should be implemented by the parties; (vi) whether the contract contemplates termination due to a prolonged force majeure event; and (vii) the commercial consequences for the parties in case of contract termination.

In addition, the Brazilian government has been introducing legislative and regulatory measures to address the COVID-19 crisis (see below). 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.

What restrictions do laws of your jurisdiction place on an employer that wants to require employees to work remotely or from home during the COVID-19 outbreak?

There are no such restrictions in Brazil's Labor Code. However, 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 mutual

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agreement with the employee. The agreement should refer 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.

May employers in your jurisdiction require employees to use their vacation time during a COVID-19 outbreak?

If the employee is able to work (i.e., if he or she is not ill or quarantined due to the risk of COVID-19 contamination) and is entitled to vacation, the employer may determine that employees take vacation individually or on a collective vacation basis, provided that all applicable legal requirements are met by the employer, and the vacation time is in accordance with Brazilian labor law.

Are there any restrictions on putting employees on unpaid leave for limited periods of time during the COVID-19 outbreak?

Yes. If the employees are able to work and if the employer continues to develop its economic activities, the employer has no right to make its employees take unpaid leave. Even if the COVID-19 outbreak is deemed to be a force majeure, the employer may only reduce salaries by means of a collective bargaining agreement signed with the employees and approved by 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.

Are there any other key considerations for foreign companies operating in your jurisdiction relating to COVID-19?

There are no specific considerations for foreign companies operating in Brazil. This being said, the Brazilian federal government has introduced certain rules to deter the outbreak of COVID-19, which may impact the activities of businesses operating in Brazil.

Among the relevant rules, the government may determine the adoption of measures such as (i) isolation; (ii) quarantine; (iii) compulsory performance of medical examinations; (iv) immigration restrictions; and (v) temporary authorization for the import of products subject to sanitary surveillance without the applicable regulatory approvals.

Further, the 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.

States and municipalities are also introducing measures to deter the COVID-19 outbreak. For example, the São Paulo State, which is the most affected state by the outbreak so far, has issued a decree providing the following: (i) a recommendation that private establishments such as theaters, 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 offices 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. In addition, the Municipality of São Paulo has declared a state of emergency in order to permit, among other things, the public procurement of goods and services without the applicable bidding process. It is expected that other states and municipalities will adopt similar measures.



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