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Taxation on Forgiveness of Debt Including Payment of Tax by Instalment

Loan operations are usual in legal entities, both with their partners/shareholders and with third parties, including financial institutions. Ideally they should take the form of an agreement stipulating at least the amount of the loan, the repayment date and the rate of interest, if any. As regards this point, we should mention initially the possibility of tax repercussions in the sense that the non-existence of a formal agreement may give rise to the view that the amount in question is in fact a donation to the legal entity that must necessarily be treated as income. The disbursement and the origin of the funds must also be proved. Furthermore, if there is no provision for interest, usual in operations with partners and associates, and if the creditor has loans with third parties subject to interest, these are deemed to be unnecessary expenses and are therefore non-deductible. It should also be emphasized that special attention must be paid to the incidence of IOF, which has been the target of tax investigations.

On expiry of the term of the loan, the funds must be repaid by the debtor to the creditor. However, even if the loan agreement provides for repayment by a given date, the creditor may waive repayment and forgive the debt at its entire discretion. Thus the debt is forgiven when the creditor waives recovery of the loan for the benefit of the debtor with extinction of the obligation.

The main tax implication of this situation relates to the forgiveness or remission of the debt. Initially, the Brazilian Federal Revenue Service, through Answer to Advance Tax Ruling Request no. 17 of 2010, ruled that forgiveness of a debt represents an economic benefit to the debtor, in view of the fact that a liability is annulled without the suppression of an asset of equal or greater value. From this ruling it may be concluded that the amounts pardoned form part of the tax base for assessment of IRPJ and CSLL, as well as being classified as taxable operational income subject to the incidence of PIS and COFINS contributions.

It should be noted that the Administrative Council of Fiscal Appeals ("CARF"), the final administrative level for judging the maintenance or otherwise of tax assessment notices, in a case involving novation of a debt arising from a judicial reorganization, adopted the view that the reduction of liabilities does not constitute taxable income subject to PIS and COFINS contributions, since there is no financial inflow. Therefore the possibility of a discussion as to the incidence of these contributions on the forgiveness of a debt cannot be overlooked.

Recently this topic acquired even further relevance as a result of the Revenue's bid to demand tax also on amounts that are remitted on special instalments of tax debts, based on the view that such instalments involve rebates to debtors due to considerable reductions in the penalties and interest due on the debts.

This position was confirmed by the Federal Revenue Service through Answer to Advance Tax Ruling Request no. 65 of 2019, which has a binding effect, with the result that the discounts granted, especially on adhering to the Special Tax Regularization Programme ("PERT"), are subject to IRPJ, CSLL, PIS and COFINS, since they represent a reduction of tax liability, as against a corresponding income account.

In spite of this view that the taxpayer benefits from the reduction of interest and penalties when adhering to PERT, thereby diminishing its tax liabilities, for which reason the saving is subject to taxation, the matter is still controversial in the administrative and judicial areas.

At the administrative level CARF, although it has already decided that forgiveness of a debt cannot be treated as taxable income for the purposes of liability to PIS and COFINS contributions, since it does not represent a financial inflow in the company's income statement (Appellate Decision no. 3402-004.002, of 2017), normally maintains the assessments in cases of reductions resulting from adhesion to PERT. It thereby establishes the position that the income generated from pardon of the debt must be subject to the said contributions, since Laws no. 10.637/02 and no. 10.833/03 do not expressly authorize their exclusion (Appellate Decision no. 3302-006.474, of 2019).

This prevailing view of CARF, however, runs contrary to the constitutional concept of income established by the Federal Supreme Court ("STF") in the judgment of REXt no. 606.107/RS, which concerned the incidence of PIS and COFINS contributions on the assignment of ICMS credits. In this judgment it was held that the concept of income stated in art. 195, I (b) of the Federal Constitution should not be confused with the accounting concept, the gross income subject to the contributions being treated as the financial inflow that forms part of the assets as a new and positive element.

In the judicial sphere, the demand not only for the PIS and COFINS contributions, but also for IRPJ and CSLL, has ceased to be made on the discounts obtained on penalties and interest for tax debts included in PERT. The reasoning, according to a precedent of the STF, is that in the gains resulting from the pardon of a debt there is no acquisition of new cash assets, but only the elimination of an existing liability (case no. 1000052-91.2018.4.01.4103).

We may therefore confirm that there exist sound arguments to counter the bid of the Brazilian revenue authorities to demand taxes on the pardon of debts, principally in cases involving adhesion to instalment programmes, and it is even possible to claim a refund of any such payments made.

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Another Provisional Measure to try to cut the infamous Brazilian red tape

With Provisional Measure No. 881/2019 ("**MP 881**") issued on April 30, 2019, the Brazilian government tackles Brazil's economic stagnation by cutting the red tape for businesses. MP 881 reduces bureaucracy, protects free enterprise, and increases freedom to do. Further, MP 881 emphasizes the freedom of enterprise and free competition set forth in the 1988 Constitution, in particular for the benefit of small entrepreneurs.

MP 881 is a continuation of President Bolsonaro's pro-business policies and yet another major step towards making Brazil a more open and business-friendly economy. The current level of economic freedom in Brazil is still very low, and currently ranks at position 150 in the Heritage Foundation / Wall Street Journal ranking, 144th in the Fraser Institute ranking, and 123rd in the CatoInstitute ranking.

MP 881 establishes three main principles: (i) freedom to do business; (ii) the belief in a person's good faith; and (iii) minimal and exceptional governmental intervention in the business life. MP 881 also makes significant changes in Brazilian civil, business and labor laws.

MP 881 emphasizes that all Government entities must respect the following key principles:

Freedom to set prices: Government bodies may not interfere in price setting of products and services due to changes of supply and demand in deregulated markets;

Belief in people's good faith when doing business: any questions in the interpretation of the law have to be resolved by using the regulation that most respects validity of agreements and other private transactions. This should increase legal security and assure the principle of autonomy of will

Freedom to modernize: to develop, operate or sell new products and services when rules and standards seem outdated;

Freedom to offer free products: to implement, test and offer free products or services without interference of the Brazilian Government;

Freedom to negotiate: contracts between companies will prevail over corporate law;

Freedom to demand an answer: Government bodies will now have a deadline to reply to any application for licenses or permits. If the Government does not reply within this deadline, a license or permit will be automatically granted, except for those cases expressly prohibited by law (such as Law No. 140/2011 that provides for environmental licensing);

Freedom against public agents' bias: prevents agents from treating citizens in similar conditions differently; and

Freedom to be digital: all documents should be digital. This should lower costs with storage and compliance.

MP 881 does not apply to cases involving national security, public safety, health or public health.

MP 881 emphasizes that the Brazilian Government must avoid any abuse of its regulatory power when issuing new rules. This prevents rules which: **(i)** harm competitiveness or delay or prevent the use of new technologies; **(ii)** require unnecessary technical specifications; **(iii)** increase costs or demands without cause or proof of benefit; **(iv)** limit the setting up of enterprises and businesses; and **(v)** limit marketing and advertising.

The Brazilian Government will have to prepare regulatory impact studies before issuing any new rules or amending old ones. Such studies must review and determine the impact of any new rule. We believe that the elaboration of these regulatory impact studies will be quite challenging and time consuming.

In addition, MP 881 amends the following laws:

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Brazilian Civil Code, General Provision Chapter and Law No.11,101/2005 *(Lei de Falências e Recuperação de Empresas – **Bankruptcy Law**)*	Disregard of the legal entity	• Amends article 50 of the Brazilian Civil Code authorizing the piercing of the corporate veil in case of "misuse of purpose" and "confusion of assets". • The effects of bankruptcy apply only the cases set out in the new article 50 of the Brazilian Civil Code.
Brazilian Civil Code, Right of duties Chapter	Legal security of contracts	• Governmental intervention in contracts is only **exceptionally** allowed. • Express wording of contracts prevails. • Contractual parties are considered to being equal (belief in symmetry).
Brazilian Civil Code, Business Law Chapter	Modernization of business models	• Limited liability reiterated for the owners of EIRELIs (small companies – with limited liability of individual entrepreneurs) – clear separation between the company's assets and the owner's assets. • Enactment of rules for limited sole traders *(sociedades unipessoais)*.
Brazilian Civil Code, Right of Things Chapter	Modernization of investment funds	• Limited liability of investors in investment funds, as well as separation of responsibilities between fiduciary service providers of funds.
Brazilian Corporate Law (Law No. 6,404/1976)	Modernization and simplification for small and medium-sized enterprises	• No need for subscription lists or bulletins for partnerships. • Reduction of bureaucracy for small and medium-sized enterprises.
Law of the Rede *Nacional para a Simplificação do Registro e da Legalização de Empresas e Negócios* (Law No .11,587/2007)	Standardization	• Businesses that carry out "low risk" activities will no longer require licences to start operations.
Law No. 12,682/2012 And **Law No. 6,015/1973**	Scanning	• Regulates scanning of electronic documents and public deeds.
Decree- Law No. 9,761/1946	Reduction of bureaucracy	• Decrease in the Federal bureaucracy in relation to assets owned by the Brazilian Government, improving the business environment and fostering investments.
Law No. 10,522/2002	Legal Security and Isonomy	• Implementation of isonomy (section IV, article 3), which is the duty of the Government to apply judicial precedents to all equally, regardless of whether individual action was taken or not.
Law No. 11,887/2008	*Fundo Soberano* - Sovereign Fund	• Removal of bureaucratic costs with a low budget fund.

Provisional measures such as MP 881 have the same force of a law, but they are valid only for 60 days (renewable for additional 60 days). During this period, the Brazilian Congress can either (i) convert MP 881 into law, as originally written or with amendments; or (ii) reject MP 881, which would make MP 881 null and void.

However, despite the immediate validity, please note that many of the principles and rules set out above will require specific new regulations to trigger practical effects in the day-to-day business of companies in Brazil.

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Key Elements to Successful International Relocations

Face to the current dynamic and globalized international scenario, and the consequent expansion of companies to other markets, it is possible to see the growth of international assignments and the need for using international assignees or expatriates for managing companies' global operations.

Thus, the process of transferring employees is a common practice in multinational organizations, seeking to expand to new markets, covering markets with a shortage of specialized labor, diffusing technical knowledge and improving business' strategies in locations where these companies either operate or intend to operate.

In summary, to bring success and the expected results in international transfers, some of the recommended steps are:

1. Interaction between strategic areas of the company: this interaction has the purpose of aligning and updating the measure of Return on Investment (ROI) relating to transfer processes, including the priorities of the company and what results to expect – for both the company and for the employee.

2. Implementing Expatriation Policies: it is necessary to carefully prepare expatriation policies, being flexible to the trends and concepts and being strict on complying to them, also assuring attractive conditions for the employee to accept the challenge of the change.

The policies must include international assignment guidelines, including the type of assignment, duration, compensation and benefit program, support during the moving process - for example, cost of task preparation, cost of moving household goods, airline tickets, lodging, school costs, transportation cost while in the country, visits to the country of origin and safety -, regulatory aspects, assuring compliance with the applicable laws, and repatriation among others.

It is known that transferees often connect to each other by comparing their benefits so the Expatriation Policies must be very clear and comprehensive in order to avoid discomfort to the Human Resources teams.

3. Candidate Selection: determining the purpose and the goals of the international assignment will help to guide the candidate selection process. Moreover, in addition to the technical abilities, related to work, it must be likewise assessed the professional's adaptation skills to the culture and the life style of the country of destination and his/her inter-cultural skills, once these are essential aspects for the success of the assignment.

It is very common to see professionals with excellent results in a country and poor results in another, due to cultural issues, which should be observed and predicted when selecting those candidates.

4. Preparation and moving: although many companies recognize the need for a detailed preparation for the transfer, this is, usually, associated to the employee, forgetting all other parties involved in the international assignment: team, leaders and family.

The team must be informed about the plans for the formal introduction of the new expatriate to reflect the local culture - it may require further research and planning, as well as information on the local work team. Multiple strategies should be considered in case the original plan for the previous or new team is not performed as planned.

The leaders must have access to the expatriate's history in the organization and must be directly in touch with the candidate, in order to set their expectations as leaders, as well as the expectations of the transferees. Moreover, the possibilities for the candidate to have a mentor will directly affect his/her productivity increase, in guidance of his/her career and in the repatriation process.

For the family, it is recommended that all the parties (HR, assignee, family) attend an intercultural training and that they may prepare the processes related to moving from the home country to the host country.

An effective way of minimizing impacts, assuring safe procedures and making the relocation process pleasant - for both the employee and the company – it is counting on the consulting of partners specialized in foreigner's accommodation activities, also named as Relocation/Destination Services companies.

Some of the benefits of hiring a specialized consulting service are:

• it mentally prepares the individual and his/her family for moving.

• it increases self-awareness and inter-cultural understanding.

• it provides the opportunity of addressing important questions and anxieties in a supporting environment.

• it reduces the stress level and provides strategies for facing an unknown situation.

• it facilitates the settling-in process.

• it reduces the rates of failure in assignments.

• it complies with the applicable legislation.

Among some of the differential offered by Relocation Consulting, we point out:

- **INTERCULTURAL TRAINING**
- **RECEPTION AT THE AIRPORT**

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- **ORIENTATION TOUR**
- **HOME SEARCH**
- **HIRING RESIDENTIAL SERVICES**
- **TERMINATION OF THE LEASE CONTRACT**

Being able to count on all of these facilities, the transferred employee is certainly allowed to focus his/her energy to the project he/she was assigned to, and the company to have its investment reverted into profit, multiplied on large-scale.

5. Performance Review: the lack of success in an international transfer can be extremely expensive for the organization. Therefore, a consistent and detailed assessment of the performance of the expatriated employee, as well as an assessment of the operation in general, throughout the assignment, is essential. It is important to point out that details related to work, country, culture and other variables must be considered.

6. Repatriation: ideally, the repatriation process must be continuous and set at the beginning of the transfer process, addressing the following topics:

a) Career Planning;

b) Mentoring;

c) Active Communication;

d) Visits to the home country;

e) Preparation for returning home.

Aware on these stages, it is required from the global mobility professional to use the available tools and the best industry practices in global mobility, in order to offer solutions and alternatives seeking to maximize the experience of the expatriate, meeting the business needs and achieving the success results in managing international transfers.

LABOR IMMIGRATION AND COMPLIANCE IN LATIN AMERICA AND THE CARIBBEAN

A new guide has been recently published with the target to provide practical and relevant information on some of the countries with the highest labor immigration flow in Latin America and the Caribbean region. General local instructions such as care to be taken, application of visas and travel permits, immigration compliance, among other topics are presented with the purpose of being useful and help in global mobility processes. For reading this brand-new material, access the link https://drive.google.com/file/d/1gAdK7J3k8egPtbyXEYkSCBvQ4Oq_vCRv/view

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Inova Simples – A new support to innovation in Brazil

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Supplementary Law 167 (LC 167), published on April 24, 2019, brought new supports to innovation in Brazil. The first is the creation of the Simple Credit Company (Empresa Simples de Crédito), a company whose purpose is to provide credit to individual microentrepreneurs, microenterprises and small companies.

The other incentive is Inova Simples, a new special simplified regime that applies to startups to foster their formalization, development and consolidation as agents of technological progress and generation of employment and income.

A startup, as per LC 167, is an innovative company, the purpose of which is to improve systems, methods or business models of production, services or products. If the purpose of the startup is to improve an existing model, it will be considered as an incremental startup; if, on the other hand, its purpose is to create something completely new, it will be considered as a disruptive startup.

Inova Simples consists of a simplified procedure for the creation and closing of companies identified as startups according to the definition above. Under this regime, the eligible companies will access and provide certain data in the website REDESIM (National Network for Simplification of Registration and Legalization of Companies and Businesses) to obtain immediate and automatic generation of the Corporate Taxpayers' Register (CNPJ) number.

In particular, the founders of the startup will have to submit the following information to benefit from Inova Simples:

(i) Civil identification data, domicile and Individual Taxpayers' Register (CPF) number;

(ii) Description of the innovative business purpose and definition of the company's name, which must include the expression "Inova Simples";

(iii) Self-declaration, under the penalties of law, that the exercise of the startup's activities will not result in pollution, noise or traffic crowding;

(iv) Definition of the headquarters address, which can be a commercial, residential or mixed address, provided that the business activity in such address is not prohibited by the Municipality; the use of a technology complex, educational institution, business incubator, accelerator and coworking locations are accepted; and

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(v) The non-mandatory indication of any support or data validation by technical, scientific or academic institutions, as well as by business incubators or accelerators.

If the above information is provided correctly, the CNPJ number will be immediately issued and the company will have to open a bank account right after the registration, in which the funds for payment of the corporate capital must be deposited. As per LC 167, such funds may be provided by the founders, foreign investors, public or private lines of credit, or other sources allowed by law.

The investment received by the startups will not be considered as income and must be used only for the development of the startup business activity. The experimental trade of the service or product up to the revenue limit applicable to microentrepreneurs (currently R$ 81,000.00 per year) is allowed.

It is also foreseen that a procedure for automatic communication with the Brazilian Patent and Trademark Office (INPI) will be created in REDESIM, to allow the sharing of information about the startup's innovative contents for the purposes of registration of patents and trademarks, without prejudice to the need to apply for the registration directly with the INPI, who will create simplified procedures for these cases.

In case the startup business does not succeed, the cancelation of the CNPJ will be automatic upon a self-declaration to be made in REDESIM.

Pursuant to LC 167, the procedures of Inova Simples will have to be regulated by the Management Committee of Simples Nacional - a committee in charge of creating rules and supervising the tax aspects of microenterprises and small companies. It is to be noted that LC 167 did not expressly link Inova Simples to any tax regime applicable to legal entities in Brazil and it is not possible to conclude about any particular aspects on the taxation of the startup businesses benefitting from Inova Simples.

It also is not clear how Inova Simples will interact with the corporate registration procedures governed by the rules issued by the National Department for Business Registration and Integration (DREI), but it is expected that both procedures will be integrated and result in less bureaucracy to incorporate and wind up startups, which will indeed foster the development of new businesses. Of course, successful startups will at some point in their lives migrate from Inova Simples to the regular regime, which should not adversely affect them.

The Registration of Chattel Mortgage ("Alienação Fiduciária") of Rural Properties in Contracts with Foreign Companies or Brazilian Ones Treated as Such

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Despite going through a period of economic recession, Brazil is on the list of emerging economies that receive the most foreign investments. In any event, in view of this period of recession, both domestic companies and foreign investors are more cautious when agreeing on contracts and commercial agreements in Brazil, seeking stability in guarantees, among which stands out the so called "alienação fiduciária" (chattel mortgage) of real estate assets, as it represents advantages in relation to other types of guarantee, due to an out-of-court proceeding for its enforcement. Besides, creditors are not affected in case a judicial reorganization or a bankruptcy is filed.

Regulated by Law n. 9.514/97, the "chattel mortgage" consists in the constitution of a real right (in the name of the creditor) with respect to the goods of another (the debtor). The creditor will become the full owner of the real estate onlu in the event of default. Note that this is different from having the full ownership of the goods - which would be a real right over the thing itself - when the owner enjoys all rights related to the real estates, which means he can use them, sell them, and so on, without any restriction. In this sense, article 1.367 of the Brazilian Civil Code states that "fiduciary property as a collateral [...] is not equated, for any purpose, with the property referred to in article 1231" (the full ownership), which evidences the intention of the legislator to clearly separate the "fiduciary property" and the full ownership.

Considering that the chattel mortgage is constituted from the registry of the contract in the Real Estate Registry Office, having a clear understanding about the difference between the "fiduciary property" and the full ownership will be essential to understand the problems that arises when business contracts signed with foreign companies or nationals controlled by foreigners provide as a collateral the chattel mortgage of a rural property.

The reason for this is that, according to the enforcement proceeding of the chattel mortgage, if the debt is not settled, the property will be consolidated in the creditor's name, and will be submitted to a public auction, limited to two. If

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the real estate is not auctioned off, it will be awarded to the creditor, thus consolidating full ownership in his name, an opportunity in which the creditor will become the definitive owner.

Regarding this possibility, some companies are facing obstacles in registering contracts that provide as collateral the chattel mortgage of rural properties due to the Law 5.709/71, which imposes restrictions on foreign companies (or national companies controlled by foreigners) in the case of acquisition of rural real estates in Brazil. Some Brazilian states and their Real Estate Registry Offices have settled that the restrictions listed in the Law 5.709/71 also apply to the chattel mortgage of rural properties if the creditor becomes the definitive owner of the rural property.

On the other hand, other Brazilian states and their respective Real Estate Registry Offices understand that there is no obstacle for the registration of agreements entered into with foreigners (or with nationals controlled by foreigners) which provide as a collateral the chattel mortgage of a rural property, precisely because of the obligation of the good be auctioned after the full ownership is consolidated in favor of the creditor. In accordance to this understanding, if the rural property is sold, the restrictions set forth in Law 5.709/71 would not apply, and thus the denial of registration based on a future situation that may not occur makes no sense.

In view of these contradictory understandings, in May 2018, the Brazilian Association of International Banks (ABBI) consulted the National Inspector's Office of Justice, with the purpose of providing clarification to all Real Estate Registry Offices in the sense that the constitution of a chattel mortgage of a rural property as collateral in favor of foreign legal entities or the Brazilian companies treated as such is not subject to the restrictions provided for in Law 5709/71. However, the National Inspector General's Office of Justice understood that, since the matter is still pending before the Federal Supreme Court (original civil action no. 2463), it was prudent to suspend the consultation until a final decision is rendered by the Supreme Court.

Therefore, as long as the matter dealt with in this article is not resolved by both the Supreme Court and the National Inspector General's Office of Justice, foreign and domestic companies that are equivalent to them should be cautious about negotiating a chattel mortgage of a rural property involving the Brazilian States that do not allow the registration of the collateral in such cases.

New Rules on Publications by Brazilian Corporations

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Law No. 13,818, of April 24, 2019 ("Law 13,818") amends Articles 289 and 294 of Law 6,404, of December 15, 1976 ("Corporations Law"), establishing new rules regarding mandatory publications by joint stock companies ("Corporations"), and increases the maximum amount of net equity allowable for non-listed companies to be entitled to the simplified regime of publication of their corporate acts.

With regard to the new rules on mandatory publications, we highlight two main changes: (i) Corporations are no longer obliged to publish their documents in the Brazilian official gazette; and (ii) publication of such documents in large-circulation newspapers, published in the locality of the Corporation's headquarters, shall now be made in a summarized format, with the complete content being made available on the webpage of the same newspaper, which shall provide digital certification of its authenticity issued by the certifying authority duly registered under the Brazilian Public Key Infrastructure (ICP-Brasil).

It is, therefore, a modernization of the Law— an updating of the legal text to converge with the current social scenario. For a long time the reading of Official Gazettes has declined to the point of disuse and physical newspapers are increasingly being replaced by digital ones. With all the information that is available in the palm of our hands and, considering the speed with which the news is available on the internet, it is only natural that printed publications are giving way to digital ones.

The new rule, however, provides for the content of the summary to be published in printed newspapers only in relation to financial statements. In this case, the summarized publication must contain at minimum, in comparison with the data of the previous fiscal year, information or global figures for each group and the respective classification of accounts or records, as well as extracts of important information provided in the explanatory notes and in the opinions of the independent auditors and audit committee reports, if any.

It is still unknown how the parameters for the printed publication of the summaries of the Companies' other financial documents will be followed in practice. However, it is already possible to say that the changes in the rules of publication represent a big step towards reducing bureaucracy and costs— an environment which in turn encourages business in the country.

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It is important to note that, although there is great expectation for the immediate application of these new rules—in view of the benefits that will be brought to the Companies—, the new text of Article 289 of the Corporations Law will only come into force as of January 1, 2022.

With respect to the simplified regime for publishing corporate acts, the Brazilian Corporations Law allows non-listed companies that comply with certain requirements to call general meetings by means of delivering a call notice to their shareholders—instead of publishing such an announcement—bypassing the need for publication of the documents referred to in Article 133 (in general, documents related to the agenda of the meeting), provided that they are filed with the Board of Trade and Commerce.

The second amendment brought by Law 13,818 refers specifically to one of the requirements for the framing of non-listed companies under the simplified regime of publishing of corporate acts. The requirements are two-fold: i- the maximum number of twenty (20) shareholders, which remains unchanged, and ii- the maximum amount of net equity, which has been updated. Previously, since 2001, the maximum amount of net equity established in the Law was one million reais (BRL 1 million) and, with the new rule, this limit has been increased to ten million reais (BRL 10 million).

Taking into account that the previous amount of net equity was established many years ago, there was not an increase in the value itself, but rather an adjustment of the value to correct the time lag and its effects on economic-financial ratios.

Usually, non-listed companies with net equity of up to ten million reais (BRL 10 million) do not have large numbers of shareholders. Therefore, the simplified regime of publishing of corporate acts does not represent any obstruction to the shareholders regarding access to the information of the company, since they are used to having greater proximity to the management of the company and, consequently, easy access to the company's documents and records.

This simplified regime for private companies, with the new maximum amount of net equity, is already in force and can be adopted by non-listed companies

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New Rules for the Dismissal of Shareholder and Administrator of the Limitadas

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Brazilian congress and office of the presidency were prolific in the first four months of the year in the enactment of statutes and regulations with strong business orientation. To cite only the more conspicuous acts, *Medida Provisória* (MP) 881, touching subjects as the single partnership *Limitada* and the piercing of the corporate veil, Law 13.818 creating new rules for mandatory publications of the *S.A.,* Complementary Law 167 creating the Simplified Credit Company (ESC), and Federal Law 13.792/19 which, although short, tapped into topics that are sensitive and common to many Brazilian *Limitadas*, to wit, the dismissal of managers and exclusion of minority shareholders.

The *Limitada* is the number one choice of the Brazilian entrepreneur when it comes to choosing a partnership (i.e. apart from MEI and single partnerships in general), largely surpassing the number of joint stock corporations, or *sociedades por ações*. They are simpler, less expensive and less complicated to operate: the articles of association of the *Limitada* is usually modified and restated, thus information is clear and always at hand; there is no obligation to publish financial and accounting information, thus no extra costs with newspapers and official gazettes.

Federal Law 13.729/19 brought two modifications to the civil code in the *Limitadas* chapters, to bring even more smoothness to the already very popular corporate type. From the enactment of the law on, the shareholders of any *Limitada* may dismiss the managing shareholder from the managing position with a vote of at least 50% + 1 of the share capital. Before the new statute, the rule demanded that at least 2/3 of the capital voted for the exclusion. The second and more profound change is related to the ability that the majority shareholder now has to remove his or her minority shareholder, without having the necessity to convoke a meeting to deliberate about the exclusion with the possibility to the minority shareholder to present his or her arguments and defense. This rule is only valid when the company has 2 shareholders.

We have seen historically in the realm of the *Limitadas* a large number of companies with two shareholders, being one the holder of 90% or more of the corporate capital, while the second shareholders held the remainder, showing

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that the most part of *Limitadas* had 2 shareholders exclusively to accomplish the original obligation of at least two shareholder per company. Thus, we believe the recent modifications in legislation such as the EIRELI are welcome and should foster business in Brazil. The new provisions of Law 13.729 empower substantially the majority shareholder and will be still the object of controversy in courts, but we do believe they point towards a more flexible system to make business in Brazil.

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Brazilian General Data Protection Law - LGPD and the Labor Relations

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Introduction

Much has been discussed about the new Brazilian General Data Protection Law[1], commonly known as LGPD, but little has been heard about how it will affect the labor relations within the companies.

The LGPD does not specifically rule the protection of employees' privacy, though there is no doubt that it also applies to them. However, precisely for not addressing the matter so clearly, the companies tend to neglect it.

Although this article will focus on employment relations per se (i.e., the individuals with signed employment booklet), the labor relations concept is much broader and extends to independent service providers, outsourced manpower and any other natural person that has some kind of labor relation with the company.

In addition, it is important to mention that this article aims at discussing the matter under the **company's standpoint,** without, however, exhausting it.

Why does the LGPD affect me?

Unlike the European Regulation (General Data Protection Regulation), the LGPD makes no distinction as to the company's size to define its applicability. In other words, if the company processes personal data of its employees, it will be subject to the LGPD and shall comply with its obligations.

The LGPD brings some concepts that are indispensable for the comprehension of the matter:

a. **Personal data:** any information capable of leading to the identification of a person, directly or indirectly (e.g. ID, address, preferences, etc.);

b. **Data subject:** natural person to whom the personal data being processed refer;

c. **Processing:** any operation carried out with personal data, such as collection, storage, sharing, erasing, etc.;

d. **Controller:** natural person or legal entity that makes decisions about the processing of personal data;

[1]Law No. 13,709, published on August 15, 2018, modified by the Provisional Measure No. 869, published on December 27, 2018.

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e. Operator: natural person or legal entity that processes personal data in the name of controller.

It is possible to safely determine that in the employment relations the different subjects identified by the LGPD are present:

» **Data subject:** employee;

» **Controller:** employer;

» **Operator:** it can be the employer alone when it carries out the processing of its employees' personal data inside the organization (e.g. HR Dept.), or a third party (e.g. payroll processing companies).

Therefore, there will be very few situations that the LGPD will not impact a certain company, at least with respect to labor relations.

In summary, the processing of the employees' personal data happens in three different phases: pre-contractual (recruiting process), contractual (performance of the agreement) and post-contractual (termination of the agreement). Each of these phases will be addressed in the following chapters.

Pre-contractual phase: recruiting process

In the recruiting process, the candidate provides its resume, comprehending its name, address, civil status, contact details, graduation, professional history, skills, etc. These pieces of information consist of private data of the candidate and must be used solely for the purposes of selection for the job.

If the candidate does not meet the requirements for the job, his resume and any other related data must, as a general rule, be eliminated, since they were provided exclusively to be used in the recruiting process.

Besides, there are some controversial issues in this phase, such as the so-called **background-check**, which is basically a deeper investigation seeking to gather additional information of a candidate in a recruiting process.

Although this is a quite common practice in Brazil, the systematic construction of the LGPD consolidated the Higher Labor Court's understanding that it is, theoretically, possible, provided that the data to be collected are effectively necessary to evaluate the skills required for the job (e.g. Is the credit history of the candidate necessary to decide if he meets the job's requirements? In affirmative case, there is a legitimate interest of the employer to ground the collection of the information, otherwise it can be deemed as a discriminatory practice).

In addition, there must be transparency by informing the candidate, at the first opportunity during the recruiting process, about the background-check.

There are still other dangers, such as the use of the candidate's information made public in social medias and the informality of WhatsApp groups, which require extreme caution and demand a meticulous analysis case by case, so as to prevent an illicit act under the LGPD.

Contractual phase: performance of the agreement

The contractual phase starts with the signature of the employment agreement and continues during all its performance until its termination.

In this phase, it is usual to also have access to **sensitive personal data**[2], which are subject to stricter rules under the LGPD, given the potentiality to lead to discriminatory practices.

As a result, the company shall keep different routines for processing of personal data and of sensitive personal data of its employees.

It is possible to mention some **preventive measures** to be taken:

a. Obtainment of the employee's consent to process his personal data in the cases that do not fit any of the other legal grounds for the processing of data[3];

b. The consent shall be given case by case and shall specify the purpose, the duration and the way the processing will happen, among others;

c. Avoidance of generic authorizations, because they will be deemed null;

d. Obtainment of the employee's consent to process sensitive personal data.

Given the theoretical vulnerability of the employee towards the employer, the validity of his consent may be challenged. So, it is recommendable to ground the processing on the employee's consent only when it cannot fit any of the other nine grounds authorized by the LGPD.

Therefore, although it may be tempting to simply request the employee's consent for every processing of his personal data, this may be risky not only because the consent can be revoked at any time, but also because its validity is questionable.

Several companies also **outsource** the processing of their payroll, which implies the sharing of the employees' personal data with such partner. The level of care, in this situation, must be doubled, because the employer (controller) has joint liability with the operator (partner).

[2] "Sensitive personal data" comprehend personal data on racial or ethnic origin, religious belief, public opinion, affiliation to union or religious, philosophical or political organization, data relating to the health or sex life, genetic or biometric data, whenever related to a natural person.

[3] Other legal grounds for processing of personal data: (i) compliance with law, (ii) execution of public policies, (iii) study by research institutions, (iv) performance of a contract / preceding a contract, (v) regular exercise of rights, (vi) protection of life, (vii) protection of health, (viii) controller / third party's legitimate interest, and (ix) credit protection.

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The best conduct, in this case, is to revise all the contracts in place, in order to define the ones that require the employee's consent and the ones that only require his acknowledgement.

In parallel, such contracts should be amended to include safeguards so that the employees' data are duly protected by the partner, seeking to minimize or even exclude the employer's liability in the event of breach by the partner.

Furthermore, the sharing of data may happen in several ways and with different partners, such as, health insurance, meal voucher, transport voucher, travel agencies, benefit plans, banks, etc.

Another important aspect refers to the LGPD's **applicability**, which will affect **all the employment agreements in force,** regardless of the moment they were signed, reason why, to be cost and time-efficient, the new agreements should already be adjusted and the others should be amended.

In this phase, there are also some controversial issues such as whether or not it is possible to monitor the employees by cameras, *Data Loss Prevention* (DLP) tools, *Mobile Device Management* (MDM), *key-logger, screenshots,* control of the corporate network traffic, etc. and, in affirmative case, the extent of such monitoring.

Finally, the company should revisit **all its internal routines** and, to this end, the following questions may be useful:

a. Who has access to the information that consists of personal data?

b. Are they personal data or sensitive personal data?

c. What processing has been carried out? Storage, sharing, control, etc.?

d. Do I really need to keep all those personal data?

e. Are my contracts in line with the LGPD's requirements? And what about my partners?

f. Is my personnel duly trained?

g. Do I have sufficient security programs to protect the personal data of my employees?

h. Are my policies and programs effective for the compliance with the data privacy protection?

The answers to the above questions may be helpful to understand what is going on inside the organization and how to act in order to comply with the LGPD.

Post-contractual phase: termination of the agreement

Once the employment relationship is over, the employee's personal data shall be eliminated, reserved the employer's rights to keep some of them for a certain period of time to attend inspections, to defend in labor claims and other legitimate situations authorized by the law.

Conclusion

Even though the LGPD will enter into force only in August 2020, the actions to be taken are several and the consequences for the non-compliance are relevant, not only in relation to the company's reputation in the market in the event of a leak for example, but also regarding the sanctions imposed by the LGPD, which are quite expressive (fine up to BRL 50 million among others).

Therefore, for the companies that have not yet started the procedures to be in compliance with the law, it is advisable to do so at the first possible moment, because, once the LGPD is in force, it will be important to minimally demonstrate that the company sought to comply with the required obligations, by revising its routines, good practices and compliance programs, by implementing security measures, etc., which will be taken into account in the event of an assessment and the reduction of the penalty.

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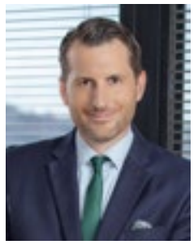

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Impact of the New Government and New Technologies on Labor Inspections

One of the many changes brought by the new government was the decision to extinguish the Labor Ministry and distribute it in other portfolios, the majority being concentrated in the Ministry of Economy, coordinated by Mr. Paulo Guedes, and with the creation of a Secretariat of Labor internally.

With this change, there was some insecurity, as many believe that this new structure would bring a certain fragility to labor relations. Although the scenario has been scary, internal representatives of the former Labor Ministry see this as an improvement for the government.

At a recent meeting involving labor auditors and the Labor Secretariat of Paraná, it was possible to verify that there is a large deficit of labor inspectors and this deficit damages the current Brazilian supervision system. However, they demonstrated that the high financial incentives for the development of new technologies, such as the e-social system and the merge of it with the data from Brazilian Federal Revenue, came to facilitate and improve the systems of Labor Inspections.

It is a fact that, with the entry of e-social, inspections will be increasingly improved and become more efficient, since through systems' reports, the e-social itself will be able to audit companies, checking for non-compliances and not requiring local visits to the companies. In addition, information previously provided on paper will be available directly in the system.

The first stages of the e-social will be system's improvement, through phases of implantation with experimental character. The government indicated that it will not impose penalties for possible non-compliance with initial deadlines, provided that it is proven by the companies that they were improving their systems during this period.

The idea of the new government is to seek cost reduction and the merger of Labor and Economy Ministries, linking the entire justice system, Central Bank and banking information, facilitates procedures so that the former Labor Ministry, now part of the Economy Ministry, identifies inappropriate company procedures, such as overtime excess and non-compliance with legal quotas.

Based on the new technologies, it is known that, from the e-social, the data informed by the companies will be easily crossed to identify nonconformities, such as inconsiderable deadlines, miscalculations and inconsistent declarations, that can lead to fines. The tendency, even, is that the installments are sent automatically to the e-mail registered in the system.

The current Brazilian situation still brings some insecurity to the Companies, since the adaptation to the new technologies must be agile and it is not known how the controls will be carried out by the new Ministry, since the systems will only analyze the updated data and that could lead to a great number of new processes, thus overburdening the internal departments of the ministry for analysis which, in many cases, would be clarified in an auditor's visit to the Company.

Therefore, companies must comply with current legislation, not only in the documentary part, but also in the internal procedures that are performed. External preventive consultancies, controls and conformities are some of the tools that companies must use to guarantee these conformities.

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