

PUBLIC CONTRACTS IN BRAZIL: WHEN AND WHY IT IS POSSIBLE TO RENEGOTIATE

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According to Brazilian Law (especially the Public Procurement Law), contracts entered by the Public Administration do not follow the same rules applicable to private contracts, *i.e.*, the public party has what are usually called “extravagant” powers, which allow it to terminate or unilaterally modify the contract, as well as to apply penalties to the contracting party in case of default or non-execution.

On the other hand, the Law grants the private party the right to an economic-financial balance of the contract in the event of force majeure, extraordinary events, or contractual amendments unilaterally imposed by the public party. Likewise, if the public party does not comply with its obligation to make the due payments for more than 90 days, the Law allows the private party to suspend the execution of its obligations, exception made to those contracts related to essential services/products (in these situations, suspension is expressly prohibited). Moreover, in case of a public calamity, public contracts cannot be suspended, even in case of default.

There is no question that the coronavirus pandemic can be considered as an unpredictable adversity, and consequently, in case of substantial increase of the price of goods, supplies or services related to a public contract, it is possible to request the revision of the original values agreed on in order to reestablish the economic-financial balance. As a final option, the parties can agree on terminating the contract without consequences. It is important to highlight, however, that the recognition of force majeure in public contracts is not automatically but, in contrary, needs to be expressly recognized either by the contracting party or by a judge. Difficulties in delivering goods for reason of problems related to the import operation are normally not considered as a force majeure event and, thus, allows the contracting party to declare the non-execution of the contract.

Brazilian government is currently allowing the postponement of payment of certain obligations related to concessions as for instance, airport concessions. However, as said before, except in cases of a judicial order, it is the Government and not the private party which has the power to establish new values or to allow the deferral of obligations.



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Labor Law

From the labor standpoint, it is important to highlight that the Consolidation of Labor Laws (CLT) was enacted in 1943 and, in the last 70 years, only small and cosmetic changes were promoted. The so-called Labor Reform was implemented in November 2017 and, finally, several improvements were made.

However, nothing changed in relation to times of calamity. In a nutshell, the law and the courts are protective to employees and, even in case of a deep financial crisis, the intervention of a Labor Union is mandatory. At this point and time, employers have the following alternatives:

- Home office work, paid leave, individual or collective vacation: represents the most conservative position since the employees will continue to receive their full payment and benefits – it is possible to sustain that certain legal deadlines might be disrespected due to the chaos caused by the Covid-19 pandemic;
- Reduction of worked hours with salary reduction: Federal Constitution establishes that salaries cannot be reduced at any circumstance. CLT, on the other hand, establishes that employers can reduce salaries in up to 25% in the event of force majeure, but case law is in the sense that such measure must encompass directors and executives, as well as a Collective Bargaining Agreement must be entered between the company and the respective labor union.
- Layoffs: CLT allows such suspension from 2 to 5 months, but there are several requirements to be followed such as the promotion of recycling courses and continuance of the benefits granting, but if the employer dismisses the employees in the following 3 months after the end of the suspension period, the employee will be entitled to receive the accrued salaries, in other words, full payment during the entire period.

It comes from the above that the legislation in force does not provide employers with flexibility to handle employment matters even in times of deep crisis. For this reason, the Federal Government will issue a Provisional Measure aiming at authorizing employers not to observe certain legal requirements (especially the approval by a Labor Union) in order to maintain employment positions, but even in this case there will be risks involved so the opinion of an expert must be taken before implementing any of the proposed alternatives.



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