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NEWSLETTER
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_ Publication of Normative Instruction DREI Nr. 76, dated March 9, 2020, regarding procedures to be adopted by Boards of Trade for preventing money laundering and terrorism financing

On March 9th, 2020, the Brazilian National Department of Business Registration and Integration (DREI) issued Normative Instruction Nr. 76 ("IN DREI 76"), which provides the policies, procedures and controls to be adopted by Boards of Trade to comply with the provisions of Law Nr. 9,613/98, regarding the prevention of money laundering and terrorism financing activities and Law Nr. 13,810/19, regarding the compliance with United Nations Security Council determinations regarding unavailability of assets.

IN DREI 76, which comes into force on July 1st, 2020, provides that each Board of Trade must establish and implement their own procedures and controls to prevent money laundering and terrorism financing. Article 2 of said normative instruction sets forth the following minimum procedures that must be adopted by each Board of Trade:

i. *to identify the customers and others involved in the filings presented before the Board of Trade, including the ultimate beneficial owner;*
ii. *to identify situations that should be notified to the Financial Activities Control Council (COAF), pursuant to article 11 of Law Nr. 9,613/1998;*
iii. *to identify politically exposed persons (PEP), under the terms defined by COAF;*
iv. *to identify the existence of determinations issued by the United Nations Security Council regarding the unavailability of assets owned by individuals and/or legal entities which are subject to the sanctions referred to in Law Nr. 13,810, 2019 and*
v. *to periodically verify the effectiveness of the procedures and internal controls adopted (by the Boards of Trade).*

Article 3 of IN DREI 76 lists certain situations that should be specially monitored, selected and analyzed by the Boards of Trade and, if considered suspicious, reported by them to COAF.

Among the situations listed as suspicious, the following stand out (i) incorporation of more than 1 legal entity, in less than 6 months, by the same individual or legal entity or which has the same manager or attorney-in-fact; (ii) registration of a legal entity, whose quotaholders, shareholders, attorneys-in-fact or managers are domiciled in locations characterized as a tax heaven; (iii) registration of a company in which a minor, a person deemed incapable or a person over 80 years of age is a quotaholder or shareholder; (iv) registration of a legal entity with a capital stock that is flagrantly incongruous or incompatible with its corporate purpose; (v) registration of different legal entities incorporated at the same address, without an economic justification; (vi) frequent changes in the company's corporate structure or purpose without apparent justification.

The Boards of Trade have not yet commented on the procedures that will be adopted by them to comply with the provisions of IN DREI 76.

IN DREI 76 CAN BE ACCESSED IN PORTUGUESE AT:

http://www.mdic.gov.br/images/REPOSITORIO/SEMPE/DREI/INs_EM_VIGOR/IN_DREI_76_2020.pdf

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_ Publication of Provisional Measure Nr. 931/20 and Brazilian Securities and Exchange Commission Resolution Nr. 849/20

Considering COVID-19 pandemic and its impact on economic activity, more specifically in the fulfillment of obligations by limited liability companies and corporations, Brazilian Federal Government enacted Provisional Measure Nr. 931/2020 ("MP 931") and, following such legal document, the Brazilian Securities and Exchange Commission ("CVM") published CVM Resolution Nr. 849/2020 ("Resolution 849"), which extends several deadlines for periodic obligations related to publicly-held corporations. We highlight below the main provisions:

- Ordinary Shareholders' Meeting: the term to hold these meetings was extended for an additional term of 3 months, i.e. they must be held within 7 months from the end of the fiscal year.

- Term of Office of Members of Management: extended until the Ordinary Shareholders' Meeting or until the Board of Directors' meeting that follows the Ordinary Shareholders' Meeting, as the case may be.

- Digital Shareholders' Meeting: CVM may authorize publicly-held corporations to hold digital meetings. With this regard, CVM has already issued a public consultation regarding a new regulation on this matter ("CVM Public Consultation"). DREI, which regulates limited liability companies and privately-held corporations, has just issued Normative Instruction 79 ("DREI IN 79"), which regulates digital meeting and the digital voting process applicable to these entities.

- Dividends: The Company's Board of Directors or, in its absence, the Board of Officers may declare dividends, until the Ordinary's Shareholders Meeting is held, regardless of the provisions sets forth in the company's By-Laws.

- Filing of corporate acts before the Boards of Trade: the deadline for filing corporate acts executed as of February 16th, 2020 shall be counted from the date when the respective Board of Trade reestablishes its services.

Specifically for publicly-held corporations, the deadline for the disclosure of their Financial Statements, the annual update of their Reference Form (*Formulário de Referência*), the annual update of their Registration Form (*Formulário Cadastral*) and of their Corporate Governance Report (*Informe de Governança Corporativa*) was extended for an additional period of 2 months. Moreover, the deadline for the disclosure of their quarterly information form - ITR for the 1st quarter of 2020 was postponed in 45 days, pursuant to CVM Instruction Nr. 480/09.

MP 931, DELIBERATION 849, CVM PUBLIC CONSULTATION AND DREI IN 79 CAN BE ACCESSED THROUGH THE LINKS BELOW, RESPECTIVELY:

http://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2020/Mpv/mpv931.htm

http://www.cvm.gov.br/legislacao/deliberacoes/deli0800/deli849.html

http://www.cvm.gov.br/audiencias_publicas/ap_sdm/2020/sdm0320.html

http://www.in.gov.br/web/dou/-/instrucao-normativa-drei-n-79-de-14-de-abril-de-2020-252498337

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_ MAC clauses (material adverse effect) in M&A agreements and the coronavirus crisis

Material adverse effect clauses, known as MAC clauses, are usually used in merger and acquisition agreements as a preventive tool to achieve the results desired by the parties. Such clause must specify any events that may cause a material adverse effect on the activities, financial or operational situation of the target company between the signing of the agreements and the closing of the transaction which, in case they occur, may generate relevant losses to the potential investor, as well as must specify the metrics negotiated by the parties to deal with this risk, which may even include the non-closing of the transaction.

Due to COVID-19, many investors who were in the middle of negotiations, specially between signing and closing of the transaction, have questioned the possibility of MAC clauses provided in the agreement encompass the effects caused by the pandemic, which, depending on the negotiated terms, could allow the investor to withdraw from the transaction.

In cases where the MAC clause is not provided in the sale and purchase agreement, parties can evaluate the applicability of article 478 of the Brazilian Civil Code, which allows the a party to terminate an agreement if the obligations of one of the parties become excessively costly, with extreme advantage to the other, due to extraordinary and unpredictable events.

Moreover, in times of uncertainty, such as the one we are experiencing now, it is important to also review the provisions of the Brazilian Civil Code on general agreement provisions, which sets forth that the following principles shall prevail in the interpretation of contractual provisions: minimum intervention and exceptional agreement amendment, as well as the principle of the parties autonomy to execute agreements.

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_ Legal possibilities for deferral and retention of dividends

Due to COVID-19, many companies are uncertain on how to proceed with the distribution and payment of dividends. In a situation of global quarantine and forecasts of recession at worrying levels, controlling shareholders and members of management question how to proceed to avoid the breach of the obligation to distribute dividends and, at the same time, to maintain the company's financial health. In these cases, there are three legal possibilities to be considered: the retention of mandatory dividends, the postponement of the payment of dividends and the retention of profits.

The possibility of retaining mandatory dividends is provided for in art. 202, §4 of the Brazilian Corporate Law, which constitutes a legal exception for cases in which the management bodies inform the Ordinary Shareholders' Meeting that such distribution is incompatible with the corporation's financial situation. The Audit Committee (*Conselho Fiscal*), if in operation, must issue an opinion on this information and, for publicly-held corporations, its managers will forward to CVM, within 5 days of the shareholders' meeting, a justified explanation on the information given to the shareholders. In this case, profits that are not distributed should be recorded as a special profit reserve and, if not absorbed by losses in subsequent years, should be paid as dividends as soon as the company's financial situation allows.

In view of the difficulty in demonstrating such incompatibility due to an uncertain future economic crisis, there are companies evaluating the possibility of postponing the payment of dividends. Under the Brazilian Corporate Law, the legal term for dividend payment is 60 days from the date in which they are approved, unless otherwise decided by the shareholders' meeting, provided that, in any case, they are paid within the fiscal year they were approved. Thus, it would be possible to propose to the shareholders the approval of the dividends and the postponement of its payment until the end of 2020 fiscal year, in order to give management time to analyze the concrete effects of COVID-19 on the company.

It is worth mentioning that the decision to postpone payment of dividends is more complex if they have already been approved, since, in theory, such dividends would be an unquestionable and due debt of the company before its shareholders. However, there are precedents by CVM and São Paulo State Supreme Court on the possibility of deferring the payment of dividends already approved due to a supervening fact, i.e., in case the company's economic situation has changed in a way that paying the dividends already approved would compromise the company's operations, or even in the event of reversal of future expectations, for the purpose of preserving its social interest (according to CVM Sanctioning Administrative Procedure No. RJ2008/8046, judged on October 30th, 2018 and Civil Appeal No. 1002982-64.2017.8.26.0554).

Finally, there is also the possibility of retaining profits, **other than the mandatory dividend**, pursuant to art. 196 of Brazilian Corporate Law, which regulates the retention of profits based on a capital budget approved by the

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shareholders. The budget to be submitted for approval by the shareholder' meeting shall justify the proposed profit retention and shall indicate all sources of funds and capital investments, whether fixed or current.

In all cases, it is note-worthy that CVM is aware of the impacts that COVID-19 may have on corporations, having already approved changes in regulatory deadlines and given guidelines on the treatment and disclosure of the effects of the pandemic on financial statements, as mentioned above. In this sense, CVM has recommended in its Circular Letter SNC/SEP 02/2020 that the companies should evaluate, in each case, guidances and estimates related to the risks of COVID-19 in the preparation of their Reference Form (*Formulário de Referência*) and the need to disclose relevant facts (*Fatos Relevantes*) to the market, in order to provide information that reflects the economic reality of the company.

MORE INFORMATION ABOUT CIRCULAR LETTER SNC/SEP 02/2020 AND THE AFOREMENTIONED PRECEDENTS CAN BE ACCESSED THROUGH THE LINKS BELOW:

https://www.cdoadv.com.br/publicacoes/marco-2020/

http://www.cvm.gov.br/export/sites/cvm/sancionadores/sancionador/anexos/2018/RJ20088046_Construtora_Lix_da_Cunha.pdf

https://tinyurl.com/tor9rcu

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_ Breach of contract and force majeure in pandemic times

In a scenario of uncertain global economy, with worldwide quarantines, the possibility of contractual breach concerns both creditors and debtors. Much is discussed about the possibility of not complying with contractual requirements under COVID-19 and, moreover, if there is a legal justification for doing so. Thus, many questions about the new coronavirus' impact on contracts arise, whether it can be considered a reason of force majeure for contractual purposes and, if so, what would be its effects.

First, it is worth remembering that the concept of force majeure is provided for in art. 393 of the Brazilian Civil Code and considered a cause for debtor's liability exclusion, resulting in an exemption for indemnification obligation on the part of the debtor and the removal of the incidence of fines related to contractual default. There are three fundamental aspects of force majeure characterization: (i) unpredictability, (ii) being out of control of the parties, and (iii) making contractual compliance impossible in the contracted time, place and form.

Once the above requirements are fulfilled, it will be necessary to verify if there is no contractual provision modulating the hypotheses of force majeure and its contractual consequences. In addition, it should be analyzed whether the risk of non-compliance is linked to the nature of the contract itself and if the contract can be fulfilled in another way, outlining or mitigating the risks involved. An example of this situation would be entities that provide educational services that, in view of the prohibition to hold presential classes, opt to hold online classes to continue providing educational services to its students.

The burden is on the debtor to prove that the global effects of COVID-19 have become an insuperable difficulty to comply with the contract, even if in a mitigated way. Therefore, it is advisable that the debtor formally notifies the creditor regarding the occurrence of a force majeure event. Further, the parties shall act in good faith and negotiate alternatives for compliance with the contract or term extensions, including for reimbursement of amounts already paid, since a force majeure event cannot, in any way, authorize unjust enrichment.

At last, in international contracts, it is fundamental to analyze the applicable law and agreed dispute resolution jurisdiction, since the interpretation of force majeure may be different in other jurisdictions.

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