Azevedo Sette's
Specialists Ebooks
1st edition | 2023

Azevedo Sette
ADVOGADOS

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PREFACE

For the 5th year in a row we have gathered part of the women professionals at our firm to celebrate the achievements of other women over time and throughout history, by writing articles on relevant law subject matters in Brazil. On the International Women´s Day, we have released an ebook containing articles written by lawyers of our firm addressing topics such as artificial intelligence, ESG, and *res judicata* in tax matters, among many other subjects that affect the daily lives of people and companies. This is the first English edition and I am very proud to be expanding our reach!

We value the quality of this team of women, who are lawyers and interns who represent today around 58% of the legal staff of Azevedo Sette. We live in a contradictory world of advances and setbacks. We have frightening rates of physical, verbal, and psychological violence against women (among other groups), but, at the same time, so many professionals going beyond infinity in their achievements in the most varied areas of activity. These achievements always need to be celebrated so that we do not forget the stumbling blocks. In order to continue crossing borders, we also need more serenity, weighting, and dialogue.

I am happy that this project is growing and gaining wings, and even happier to be alongside so many excellent professionals who agreed to contribute to this project and share the journey in the business world. We have come a long way and we are going even further together! I thank all the 38 participating authors (67 authors in the Portuguese version), the reviewers Ingrid Bandeira Santos, Natália Meirelles Barros and Gabriel Santiago Carneiro Figueiredo, our one #heforshe, the intern Vitor Emmanuel Viana Antunes Dantas, who contributed to one article, in addition to our marketing team that produced this material.

We hope it is an enjoyable reading!

**Ana is partner in Corporate M&A practice at Azevedo Sette Advogados, creator and coordinator of the project, mother of Helena and Luisa.*

Ana Paula Terra

Latest editions

SUMMARY

Technology, Privacy and Data Protection

ESG - Environmental, Social Responsibility and Corporate Governance

Infrastructure and Natural Resources

Wealth Planning

CHATGPT: THE RISKS OF THE FUTURE THAT IS NOW OUR PRESENT

A new technology has gone viral, over the last months, in different parts of the world: an interactive virtual robot capable of composing texts, music, answering to the most varied questions on the most diverse topics, preparing petitions, poetry and jokes, in addition to being able to be used as a virtual assistant and other applications of Artificial Intelligence (AI). Recently, in Brazil, it was even used for preparing the Bill 36/2023, in the state of Santa Catarina. We are talking about ChatGPT, a Chabot (computer program simulating and processing human conversations) developed by the American startup OpenAI, launched in November 2022. In addition to OpenAI, other companies, such as Google and Microsoft, have been announcing their own AI-based Chatbots ("Bard" and "Sydney", respectively).

"ChatGPT", means "Chat Generative Pre-trained Transformer". Intelligence is capable of generating dialogues similar to those developed between humans, using billions of data points, based on parameters entered by the user, thus allowing interactions with real people. No wonder it reached more than 1 million users in its free trial version in just one week from its release.

Parallel to the "fever" of ChatGPT, some questions about the reliability of its answers emerged, in addition to discussions on ethics, protection of personal data, intellectual property, civil liability, impacts on education and on work/production modes, terrorism, discrimination, among others.

One of the main issues that can be identified when interacting with ChatGPT is related to the lack of human attributes, after all, the technology is a robot using artificial intelligence for continual learning (through the interactions it receives), without, however, having understanding and accuracy of what it reports. Thus, it is possible that the presented results contain factual errors, lack of common sense or logic, distorted humor, discriminatory biases, among other issues. One example**[1]** was a response that ChatGPT provided with "evidence to support that the Earth is flat". Another example occurred in consultation with an excerpt written by Guimarães Rosa in the work *The Devil to Pay in the Backlands*, in which, when completed by ChatGPT, it referred to "oak", a tree that is not mentioned in the book**[2]**.

The use of tools like ChatGPT also enhances the debate on the secondary processing of personal data for purposes other than those for which they were obtained, a discussion involving principles and grounds of data protection laws around the world. We will see in a short period discussions about the existence of a legal basis for processing information when coming from databases used to form artificial intelligence. But that is not all. Still in terms of personal data protection, it is necessary to pay attention to information security. OpenAI itself informs, in its frequently asked questions (FAQ), that ChatGPT conversations can be seen and warns the user not to share sensitive information**[3]**. Finally, because ChatGPT is an open source robot, people with technical knowledge can (i) access and modify the code and use it in a harmful way; (ii) use information obtained to send phishing emails (those that appear to be from a known source, but are not, through which personal information is sought to be illegally obtained); (iii) make use of malware (software used to steal or hijack data); and (iv) use botnets (computer networks used to carry out attacks such as those that take down websites)**[4]**.

We will also find discussions when the subject is the production of content and its authorship. Must anyone who uses ChatGPT to write a book chapter indicate, in their document, that the content was created using the platform? If the content at hand is for a consumer relationship, should the author, based on the duty of transparency provided for in the Consumer Protection Code, make this note? And in the example mentioned at the beginning of this paper, could the member of parliament, due to the public principles of government transparency, use the tool to generate the bill? Countless discussions will arise on this matter, and we all need to be ready to face them.

It is undeniable, however, that technology can bring countless benefits to society. And, on our side, we wanted to know from the artificial intelligence itself what it thinks about this matter, so we asked ChatGPT the following question:

“Hello, chat! Good morning. I’m writing a paper about the use of ChatGPT and I would like to know if you think that the use of its technology can bring risks to the population, that is, is there any negative point in using this technology?”.

That was what the technology answered:

“Sure, I will try to explain it more simply! ChatGPT is a technology that can be very useful for people to get information, clarify doubts and get support on different subjects. However, there are some negative points to consider. An issue is that ChatGPT can be biased and stereotyped because it is trained on information provided by users. This means that if the people providing this information are not diverse enough, the model can reproduce and amplify biases and stereotypes. Another issue is that ChatGPT can handle sensitive information, such as medical or financial. If this information is not adequately protected, privacy violations may result. Finally, ChatGPT is an artificial intelligence-based model that may produce responses that are not accurate or relevant to a given situation. It is important to ensure that people using ChatGPT are accountable for the information they provide. As I said before, many of these risks can be managed with proper design and development practices. As a language model, ChatGPT has the potential to improve people’s lives, as long as it is used responsibly and conscientiously.”

Looking to the near future, it will be important to follow the development of

regulations being prepared in Brazil (Bill 872/2021, pending progress in the Senate), in Europe (Artificial Intelligence Act from the European Commission) and in the rest of the world regarding the use of artificial intelligence. In addition, evidently, to all the discussion produced by civil society, academics and regulated sectors.

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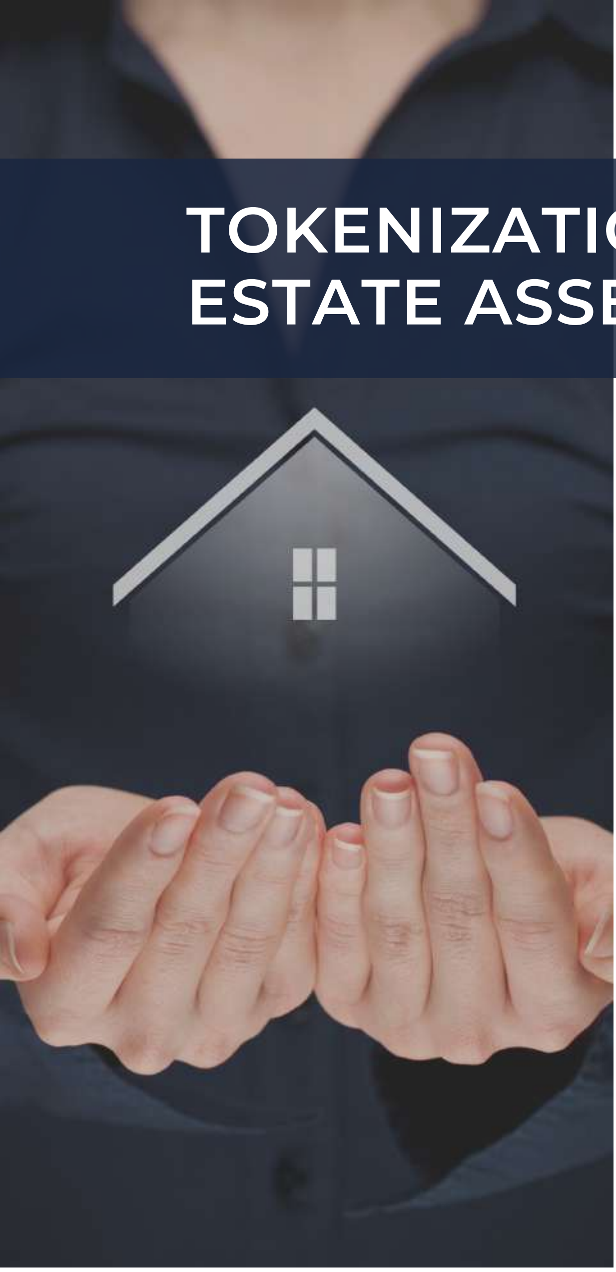
TOKENIZATION OF REAL ESTATE ASSETS



INTRODUCTION

Great technological revolutions have been happening even in more traditional market sectors, which also affects the real estate market.

In this article, we will analyze the concepts, possibilities and, more specifically, the possible inevitability of the tokenization of real estate assets, activity that will become increasingly relevant in the coming years.

BLOCKCHAIN TECHNOLOGY [OR INFORMATION STORAGE METHODOLOGY]

Before introducing and dealing with the phenomenon of real estate *tokenization*, it is necessary to deal with basic technological concepts, important for a better understanding of the subject. The first of these is the Blockchain technology, a new tool that will revolutionize our trading habits.

The word "*Blockchain*" literally means "a chain made of blocks" and has an objective function: to allow the exchange of information between users quickly, without third parties, as well as to ensure the inviolability of data that is essential to the business. It contains encryption that prevents modifying transaction details, using the logic of data blocks that talk to each other, forming a secure information chain, as if it were "an immutable and shared ledger that facilitates the process of recording transactions and controlling assets in a business network[1]."

Blockchain uses the *hash* function – a type of mathematical data transformation algorithm, considered a check digit – in each block of information processed and, in all blocks, already processed or that will still be processed, so that the previous block is based on the *hash* of the previous block and so on, causing the "block chain" or the "DNA chain" to be directly interconnected. With this, any information that is modified will be detected because it is not compatible with all data blocks, which guarantees the reliability of *Blockchain technology*.

In practice, it is not necessary for a central entity (private or public) to attest the veracity of the data – in theory, a decentralized network could replace the management of a real estate registry.

TURNING REAL ESTATE INTO *TOKENS*

Blockchain technology allows goods of various types to be tracked and traded on a blockchain network, reducing risks as well as costs for everyone involved. However, for this new tool to be used, the object to be transacted must be translated into a kind of key, a digital representation of its economic value: the *token*.

Tokens are also known to be cryptoactive, i.e., belonging to a class of digital assets, protected by cryptography – such as, for example, *Blockchain* technology – enabling a more secure transaction. They have the objective of representing physical goods in the digital environment, to enable their commercialization through *Smart Contracts* – self-executing computer contracts or protocols through algorithms created especially for this purpose, authenticated with a qualified digital signature, with the identification of the parties and in decentralized networks.

In the same way as physical goods, tokens are classified into fungible and nonfungible as to the definition of their nature and form of trading, showing us their ability to merge, divide or be exchanged without modifying the original value. There are currently four main species of tokens:the original value. There are currently four main species of tokens:

In this sense, the *tokenization* procedure will start for the “digitization of ownership” of the property, creating a digital signature for the object, from the necessary certified signature of the owner, thus being able to be digitized in a *Blockchain* technology network with linkage to its owner. Once the real estate *token* is protected by an encryption system, it can be traded safely and quickly, as it will not need third parties, ensuring its security against fraud, as the technologies previously adopted have lent themselves to this role.

THE TOKENIZATION AND PROSPECTS IN THE BRAZILIAN REAL ESTATE MARKET

Real estate transactions are naturally delicate and require special attention. In Brazil, there is a consolidated registration system based on the binomial deed and registration in the record of the property, a document that contains all the information about the owners and about the property itself. Of course, transaction records are made in chronological and orderly sequence, and the data cannot be deleted or modified, a concept very similar to that of Blockchain technology itself. However, Brazil suffers the lack of standardization of Real Estate Registry Offices, which makes room for the application of the *tokenization* of real estate assets.

DIAGRAM

Payment tokens	**Asset tokens**
It's the cryptocurrencies	Representations of physical or digital assets, such as real estate
Utility tokens	**Security tokens**
Used to access services or platforms	Representations of financial assets, such as quotas or corporate shares, having a security

Blockchain, if used by all parties that conduct real estate registrations, would make this process much more secure and verifiable, just as costs could be drastically reduced in the face of the representation of real estate by digital tokens, with certified signatures from their owners.

In Brazil, as mentioned by Keirns (2017), the cities of Pelotas and Morro Redondo, in Rio Grande do Sul, are hosting tests of real estate records using *Blockchain technology*[2]. The founder of Ubiquity – a company pioneering in offering this type of service – informs that the first real estate registration using the platform was held in Pelotas, on March 30, 2017.

Currently, there are no in-depth discussions about the legislative regulation of tokenization in Brazil, but owners are beginning to emerge increasingly interested in using this technology in their businesses and ensuring faster and safer real estate investments.

Apart from the benefits of standardization, speed and cost reduction, the tokenization of real estate assets will inevitably bring problems to be faced, since there will be difficulties in requiring everyone to adapt to the new scenario and the obligation of digital certification; but it will also bring new business possibilities.

CONCLUSION

The concepts presented may seem very far from the current reality, especially in the face of Brazilian real estate legislation. However, the technology is advancing in large steps and there is no doubt that the *tokenization* of real estate assets will gain more and more evidence and will be increasingly discussed and materialized, restructuring the real estate market in Brazil and other countries.

It is a fact that, when analyzing these hypotheses of real estate *tokenization*, there is a lack of exhaustive and general regulation of these operations, whether from a legal or even from a notarial and registry point of view. There will be a long way to go for there to exist, in addition to financial security – guaranteed by Blockchain technology –, legal certainty and efficient instruments for the use and advancement of this technology in the real estate market. It is important to note that there are opportunities for gains, investment, and visibility.

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POSSIBILITY OF PAYING IN THE CAPITAL STOCK WITH CRYPTO ASSETS

In recent years, the crypto asset market has grown significantly around the world, attracting the attention of investors and entrepreneurs looking for new forms of financing and investment. One of the most current discussions is about the possibility of using crypto assets for the payment of the share capital of companies. But what does this mean?

When forming a company, partners need to provide funds for the opening of business and start of operations, which we call payment of capital stock. Share capital can be considered as the set of resources contributed by the partners, in exchange for social participation, with which the company counts on to develop its activities, in order to ensure that it has sufficient resources to operate and grow**[1]**.

The initial capital is formed by the contribution of all partners upon subscription and payment of quotas/shares and must be expressed in Brazilian currency, notwithstanding that it may be constituted with any kind of assets, tangible or intangible, susceptible to cash valuation**[2]**, as provided for in article 7 of Law No. 6.404, of December 15, 1976 ("Corporation Law") and article 997, item III of Law No. 10.406, of January 10, 2002 ("Civil Code").

In this regard, given the evolution of the global society and the progress of technology, with the creation of new goods and rights with economic value, the possibility of paying in the capital stock with crypto assets present itself as another interesting alternative of capitalization for companies. The question then arises about the possibility, legality, and feasibility of using cryptocurrencies**[3]** for the constitution of the capital stock of a company.

The concept of cryptocurrency was created in 2009 with Bitcoin, with the aim of acting as a substitute for common money, but without intermediaries, decentralized and in limited quantities, consequently diminishing the power of banks, central banks, and governments.

As the crypto market has expanded, attracting more and more individual and institutional

investors, there has been a growing need for regulation by government bodies and the traditional financial system in order to provide greater security for those using these assets.

Although not yet properly regulated in Brazil, cryptocurrencies are on the radar of institutions such as the Central Bank of Brazil (BACEN), the Brazilian Securities and Exchange Commission (CVM) and the Brazilian Federal Revenue Service (RFB).

BACEN merely explained that *“virtual currencies are not issued or guaranteed by any monetary authority, so they are not guaranteed to be converted into sovereign currencies, nor are they backed by real assets of any kind, [...] nor are they confused with the definition of electronic money referred to in Law No. 12.865, of October 9, 2013”***[4]**.

The CVM, in turn, reported that cryptocurrencies, *“depending on the economic context of their issuance and the rights granted to investors, may represent securities, under the terms of art. 2 of Law 6,385/76"***[5]**.

The RFB defined crypto assets, a category that includes cryptocurrencies, as *“the digital representation of value denominated in its own unit of account, the price of which can be expressed in local or foreign sovereign currency, transacted electronically using encryption and distributed record technologies, which can be used as a form of investment, instrument of transfer of values or access to services, and which does not constitute legal currency"***[6]**.

Since these entities recognize cryptocurrencies, effectively, as assets, it is appropriate to admit, in the corporate sphere, the possibility of their use for the purpose of paying in capital stock. However, it is important to note that the use of crypto assets in the payment of social capital is still a topic under discussion and that there are some issues that need to be considered.

A potential obstacle to the operation would be the legal requirement that the assets contributed as payment of share capital are compatible with the corporate purpose**[7]**, that is, they must contribute to the development of the company's economic activity. However, due to the degree of liquidity of crypto assets and their usefulness, albeit limited, as a means of payment, it can be inferred that this issue would not represent a significant impediment.

As doubts still remained, the Board of Trade of the State of São Paulo formalized a public consultation before the Ministry of Economy, thus, the National Department of Business Registration and Integration (DREI), through circular letter SEI No. 4081/2020/ME, of December 1, 2020, responded to the consultation regarding the possibility of using cryptocurrencies as a means of payment for corporate transactions and payment of capital of companies.

The DREI, in line with the RFB’s manifestations, understood that cryptocurrencies are *"intangible assets"***[8]**, which, in this condition, can be used to pay in share capital, with no prohibition to do so, and the formalities required by legislation to pay in capital with movable assets must be complied with in relation to each corporate type. The resolution also considered the provisions of the Economic Freedom Law**[9]** in the sense of having as a premise the interpretation of civil corporate law, the preservation of private autonomy and the free formation of corporate companies.

Thus, regarding the operationalization of this payment, considering limited liability companies and joint-stock companies, there are two different situations.

In limited liability companies, payment with crypto assets must be made through an amendment to the articles of incorporation, and no appraisal report proving the value attributed by the partners to the assets is required, as provided for in Normative Instruction DREI 81/2020**[10]**. In this case, the valuation of cryptocurrencies is at the discretion of the partners and can be based on any parameter (acquisition cost, market value on a specific date, etc.).

In the case of corporations, the capital increase, as a rule, will occur by resolution of the extraordinary general meeting, and the assets that will be used in the payment must be evaluated by 3 (three) experts or by a specialized company, as provided for in article 8 of the Corporation Law and Normative Instruction DREI 81/2020[11]. In this context, the pay-in becomes a little more difficult to operationalize since the volatility of the crypto asset market makes it difficult to price it, therefore, the identification of competent experts and a satisfactory method of evaluation can be a challenge**[12]**. A possible way out would be to pre-establish the mechanics of valuation, avoiding future controversies between the partners.

Once the regulatory issues have been overcome, that is, once all legal guarantees of acceptance of the cryptocurrency as an effective asset are obtained, and the premise set out in this article has been validated, it is concluded that, although there are still some points to be clarified, the DREI’s position represents a regulatory advance, especially with regard to the corporate perspective, as it clarifies how the commercial registry authorities should interpret crypto assets.

It is worth mentioning that, besides gathering financial resources for the creation and operation of the company, as exposed above, the capital stock has, among others, the function of protecting creditors. This is because it serves as a sign of commitment of the partners or shareholders to the company. However, the capital stock is not an absolute guarantee of protection, since it can be diluted or reduced over time.

The volatility of cryptocurrencies could be a weakness for creditors, since market instability may be an issue for the availability of the company's capital, given that crypto-assets have historically been susceptible to sudden falls in their market value**[13]**, which makes it difficult to precisely estimate the value of the equity capital. This volatility can create uncertainty and risks for lenders, in view of the possibility of cryptocurrencies losing value.

However, some measures can be employed to mitigate these uncertainties, such as the adoption of risk management policies, the use of more stable cryptocurrencies, and the defining clear criteria for the evaluation of the equity value.

Moreover, it is crucial to emphasize that share capital is not the only guarantee for creditors, and that other factors such as the company's general financial situation, cash flow quality, solvency, and liquidity should also be considered. Therefore, it is essential that creditors evaluate not only the share capital, but also the balance sheet and financial statements of the company as a whole, in order to verify its ability to pay.

In performing the previously mentioned analysis, creditors should consider, in addition to accounting data, the market conditions in which the company operates, the competition, the products or services quality, the management and other variables relevant to its performance, making it possible to obtain a more complete view of the financial situation and the risk involved.

Therefore, it is necessary that the creditors and the companies carefully evaluate the possibilities involved in this process, always seeking the guidance of specialists on the subject, in order to minimize as much as possible the risks associated with these operations.

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[6] Item 3, "Das Definições", Normative Instructrion 1.888/2019

[7] Article 117, § 1°, "h", of the Corporations Law.

[8] DREI uses as arguments articles 997 of CC and 7 of the Corporations Law.

[9] Art. 3, V and art. 4, VII of the Law of Economic Freedom (Law 13.874/2019).

[10] Item 4.3.4 of Chapter II of Annex IV.

[11] Item 5 of Chapter II of Annex V.

[12] Various entities have been making efforts to define a method for pricing crypto assets. The director of research on allocation of assets at T. Rowe Price Group, Stefan Hubrich, suggests taht the price of cyptocurrencies must be calculated from their market value in face of the volume in dollars of the transactions in blockchain, adopting, for that, a period of four months, instead of twelve months normally used for stocks, due to the limited quantity of historic data. In this regard: https://www.lexmachinae.com/2018/05/17/criptomoedas-integralizacao-capital-social/;? https://www.valor.com.br/financas/5217243/o-que-esta-por-tras-da-precificacao-do-bitcoin. Access on 6 March 2023.

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Regulation of Artificial Intelligence in Brazil: searching balance between advances in the application of artificial intelligence and the protection of human rights

Digital transformation is increasingly present in everyone's daily routine, as well as the application of Artificial Intelligence, whether through the use of applications for automated translations, traffic control in cities, personalized recommendations for each individual, or, more recently, the so-called "ChatGPT", among other situations. As a result, aiming to ensure the development and propulsion of Artificial Intelligence and all the benefits it may bring, Bills No. 5.051 of 2019, 21 of 2020 and 872 of 2021 and the Substitute Wording are being processed in the Federal Senate, prepared by a commission of jurists on the subject, as detailed below. The purpose is to regulate the use of Artificial Intelligence in Brazil in line with principles enshrined in the international sphere of respect for human rights, non-discrimination, data privacy and free enterprise.

BACKGROUND

Artificial Intelligence was provided in Bill No. 21 of 2020 as a computational system that, based on predefined objectives, can make predictions, recommendations and even make decisions that can influence real or virtual environments ("**Artificial Intelligence**" or "**AI**"). The discussion about AI is global and extremely relevant, as its use has a direct impact on society, as shown in the examples mentioned above. As a result, several international organizations discuss its regulation in a cross-functional way. After all, legal provisions must be in line with the development of technology. Examples that can be brought are: **(i)** the Report by OECD - Organization for Economic Cooperation and Development, in 2016, which showed concern about the implementation of Artificial Intelligence, as it could generate unemployment, increase the distortion in income distribution and the possible compromise of results due to the lack of human supervision; furthermore, **(ii)** in 2019, the European Union published a Reliable Ethics Guide for AI, highlighting the need to centralize AI policy on human beings, based on Human Rights; and, finally, **(iii)** UNESCO proposed, in 2021, an agreement on ethics in the use of Artificial Intelligence with the signature of 193 countries, seeking to restrict the excessive use of this mechanism.

BRAZIL

In Brazil, the discussion about regulation was reflected in three Bills (numbered 5051 of 2019, 21 of 2020 and 872 of 2021) on this matter, raising formal concern with the subject. In view of the evolution of the matter and, especially, of the international experience, a commission, composed mainly of jurists, was installed in March 2022, promoting the discussion on the subject of Artificial Intelligence through meetings, seminars and public hearings, culminating with the delivery to the President of the Senate of a Substitutive Wording for the aforementioned Bills, with just over 40 papers and with the purpose of instructing the appreciation of the bills mentioned above. The Final Report was approved on December 6, 2022, and it presents an approach regarding the ethical limits of the use of artificial intelligence, even approaching the European regulation on the subject, in addition to including and integrating civil society, academy and sectoral organizations into the discussion (such as health centers and innovation laboratories etc.). On December 9, 2022, the Substitutive Wording was published in the Gazette of the Federal Senate, with the purpose of instructing the appreciation by the Federal Senate of PL 5051/19, PL 21/20 and PL 872/21.

Some of the main matters discussed were: (i) the risk approach, (ii) guidance regarding the use and development of this technology - providing for the existence of an authority for implementation, inspection and consequent imposition of administrative sanctions and (iii) the need for the coexistence of privacy rights (recently raised to the level of a fundamental right) and non-discrimination, in the face of this technological paradigm, under penalty of sanctions.

With regard to *risk*, it is important to note that it would be directly proportional to the obligations arising from the use of Artificial Intelligence, according to three categories, namely: (i) the use of unacceptable or excessive risk AI should be prohibited; (ii) high-risk use could be made, but it depends on prior assessment of the impacts caused; and, finally, (iii) the low-risk use, which could be widely carried out, but must comply with the general provisions of the regulation. For risk classification, it should be observed the criteria established in the Substitutive Wording.

Still, the *civil liability* regime was also addressed, being related to the degree of risk of Artificial Intelligences. In this regard, pursuant to the Report, high-risk AIs would give rise to strict liability for the supplier and operator of the technology and, those that do not fit into this niche, could be subject to a presumption of guilt, shifting the burden of proof in favor of the victim. With regard to the application of sanctions, a relevant concern was also mentioned: the care to avoid double penalties, in the case of an incident that involves both the rules of the General Data Protection Law and the regulatory framework at hand (due to the great intersection between subjects).

Due to the specificity that the use of AI can achieve, the guidance regarding the regulation of the use and development of this technology was that it should be sectoral. To this end, many of the members of the Commission that prepared the Substitutive Wording suggested the need for multisector governance mechanisms, allying the Government with companies, academy and civil society.

Regarding the need for coexistence of advances in AI and human rights, administrative sanctions were provided, ranging from simple warnings to a simple fine (limited to 50 million Reais per violation) - in the case of a legal entity governed by private law, fine of 2% of the revenue of its group or conglomerate in Brazil in the last fiscal year, excluding taxes. Furthermore, other possible forms of sanction would be: publicizing the infraction, exclusion from the regulatory sandbox regime[1], suspension (partial or total, provisory or final) of development and prohibition of processing certain databases.

Finally, ethics was also considered in the preparation of the presented Report, since Artificial Intelligence may come to integrate high-risk situations, such as hiring new employees, the decision of entry of people into a certain country, or of choosing an emergency vacancy in a given hospital. Therefore, the Substitutive wording was concerned with considering the Brazilian Artificial Intelligence Strategy (EBIA), established by Ordinance MCTI No. 4617, from April 6, 2021, and amended by Ordinance MCTI No. 4979, from July 13, 2021, which aims to ensure the explanation and interpretation of decisions taken by this intelligence, in addition to the General Data Protection Law, since Article 20 provides that the data subject has the right to request a review of decisions taken solely by automated treatment, when aimed at defining the personal, professional, consumption or credit profile, as well as aspects of his/her personality. Based on these parameters, we seek to allow the use of Artificial Intelligence respecting the centrality of the human person, respect for human rights and democratic values, privacy and data protection.

COMPARATIVE LAW

Compared to other countries, it should be stressed that Germany published, in 2018, the Artificial Intelligence Strategy of the German Federal Government, which provided the establishment of a German observatory for Artificial Intelligence, also revealing support for the creation of similar structures in Europe and in the world. With regard to the legal environment, a legal framework has not yet been signed, however, like Brazil, the country established a Commission in 2020 to develop studies ensuring the transparent, understandable and safe use of AI through legislation.

Australia, in turn, has already created the National AI Center, linked to the National Science Agency of Australia, seeking thereby to strengthen Artificial Intelligence in the country, attract new investments and help small and medium-sized companies in AI development.

In 2019, the National AI Strategy of Denmark determined that the development and use of artificial intelligence should comply with the relevant legislative framework, and consequently with the basic principles of the general data protection regulation.

The United States are also in a situation similar to Brazil, with the creation of the National Advisory Committee on Artificial Intelligence, which has the task of advising both the President and the National Office regarding the National AI Initiative. Furthermore, a regulatory framework deserves to be highlighted - Executive Order No. 13859 of 2019, which in its Section 6 provides guidelines for the Regulation of Artificial Intelligence Applications, determining that the heads of all agencies must inform the development of regulatory approaches and not regulations on industries using AI to align innovation with respect for civil liberties, privacy, and American values. Based on this, a memorandum was created and open to comments by civil society before its finalization.

In this regard, Brazil walks in line with countries with significant influence on the matter, seeking to align the country's technological development, based on the development policies of Artificial Intelligence, without failing, however, to consider civil rights, risks and consequent forms of imposing liability.

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“FROM TRASH TO PROFIT”
Part I - Circular Economy as a strategic path for the productive sector

The incorporation of practices of environmental sustainability, social inclusion and governance in the corporate environment represents basic principles of the Brazilian legal system, which establishes as principles the defense of the environment, of free enterprise, and respect for inequalities/equality among citizens. At the moment, Brazilian companies already demonstrate an extra and ultra vision to comply with the legislation, through the insertion and adoption of relevant actions in this field, either by voluntary initiatives or by influence of stakeholders.

There is an already consolidated culture that prevents them from “falling into the temptation” of doing only the obvious things permitted by law, without going beyond that. Companies that rely on external capital know that if they do not adopt practices consistent with stakeholder demands, they can have many losses “in investor ratings, ranking positions, stock prices”.

In this context, efficiency in waste management has gained, once and for all, space in the strategic vision of companies, within an economic model of sustainable development. Faced with the challenges to reduce exorbitant amounts of waste originating from the production process (from the most diverse sectors), it was necessary to think of innovative projects for the optimization of production and consumption (and why not recycling and reuse?).

One of the solutions found to face this challenge is through a circular economic model capable of combining sustainable economic development, which preserves natural resources, enhances production, reduces impacts by accumulating waste and using finite stocks, following a renewable cycle.

With technological evolution and changes/innovations in market demands, what was considered "waste" at a certain time in the production cycle, or at a certain time, may be considered "input" or "by-product".

In this logic, the productive sector has strived and adopted an environmentally coherent posture with public policies and their principles, changing paradigms to overcome the current model and incorporate environmental strategies into their agendas. The hot topic of the day is Circular Economy!

Among the waste management mechanisms provided for in the National Solid Waste Policy (Law no. 12.305/2010), “reverse logistics” is the *“instrument of economic and social development characterized by a set of actions, procedures and means designed to enable the collection and return of solid waste to the business sector, for reuse, in its cycle or in other production cycles, or other environmentally appropriate final destination”*.

Thus, reverse logistics is an important instrument for reducing costs, since it enables the reuse and consumption of waste arising from the production process in industrial operation, generating new opportunities. Through recycling, industrial products, after being consumed and discarded, return to the production chain. This logistics flow is one of the proposals of the Circular Economy.

Therefore, the idea of Circular Economy is precisely the use of waste in the production process as inputs or by-products, so that only the types of waste that cannot, in fact and to date, be reintegrated into the production chain are disposed of in an environmentally appropriate way.

Consequently, in addition to reducing costs, there will be reuse and recycling of materials, reduction of waste, greater generation of value, new opportunities for investments and development of new technologies, with the repeated promotion of research in academia, in search of technical-scientific, environmental, and economically sustainable solutions.

A successeful case in this aspect with traces of the Circular Economy is the use of "circular inputs", thus understood as inputs/products/waste that can be or have been recycled and subsequently reused in the next production cycles, increasing their longevity, and reducing dependence on non-renewable resources.

A great example to mention is the company Nexa Resources**[1]**, which constantly invests in innovation, collaboration, and technology projects to optimize its operations, company growth and cost reduction. Likewise, Farm Rio store adopts the responsible and circular fashion model and transforms the fabrics of production leftovers or defective pieces into new clothing collections**[2]**.

In this field, the immediate questions that arise are: how, after all, is Circular Economy used as a business model by the productive sector? Are there magic and pre-defined formulas that can be adopted indiscriminately in the production front?

The first step in the transition from linear to circular logic is to analyze the opportunities for innovation in companies' business models, enabling the creation of better processes, products, and services, and expanding the value proposition, capturing value lost by all stakeholders throughout the product lifecycle.

Therefore, there are several ways to implement this mechanism, depending, of course, on strategic decisions by the company, based on the understanding or redefinition of its role before society. The benefits and returns are easily identified. However, as it will be briefly discussed, there are also several challenges**[3]** to be faced to an effective implementation.

Among the benefits, we can mention (i) the

feasible improvement in the financial business performance through implementing more conscious actions in management, avoiding waste and ensuring a better use of resources; (ii) positive brand image and consumer loyalty[4]; (iii) investor trust[5]; and (iv) greater engagement of employees who seek, according to recent sectoral research, not only adequate salaries, but also work environments and employers who have a greater purpose with the community and the environment.

Given the above, it is clear that the implementation of measures linked to the circular economy of raw materials and goods of economic value represents a real paradigm shift in corporate relations among investors, communities, government and companies and, therefore, has been considered part of the financial strategy of many organizations, which will provide highlights in the market and the expansion of new businesses or market niches, as well as the addition of value in numerous production cycles, reducing dependence on the use of non-renewable natural resources.

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[4] A study published by “First Insight[3]” at the beginning of 2020 found that generation Z, born between 1995 and 2010, makes their purchasing decisions based on sustainable practices, that is, based on ESG standards . The survey also found that 62% of this generation's participants prefer to buy from sustainable brands and 73% expect retailers and companies to become more aware. As a result, in addition to ensuring consumer loyalty, access to new markets and the new demands of new market niches is gained, diversifying products.

[5] Financial institutions accompanying the movement have already started to adopt lines of credit, financing programs and interest reduction for companies that adopt sustainable, ultra and extra practices requested by environmental agencies, as is the case of Banco Santander, BNDES and Banco Mundial. A famous case reported in recent months was that of the mining company Sigma, which secured a US$ 45 million loan from the Société Générale bank for its lithium project, having obtained good conditions due to the adoption of ESG practices by the company, such as “Green Mining” and “Local Community.

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“FROM TRASH TO PROFIT”
Part II - Circular Economy as a new economic model, its confluence with ESG practices and its challenges

Circular economy has been increasingly recognized as a new business model that can bring significant benefits to society, businesses, and the environment. This is because, as seen in Part I of this article, in short, the circular economy focuses on maximizing the use of renewable resources, minimizing waste, and promoting the regeneration of natural resources.

This new business model is closely related to ESG (*Environmental, social, and corporate governance*)**[1]**, since both focus on promoting sustainable practices in all business areas, so that the implementation of the circular economy and, consequently, the implementation of sustainable practices, can bring significant benefits**[2]** to both the company and society.

In addition, circular economy plays an important role in reducing climate change**[3]**, since, as discussed in the article ***“From Trash to Profit” Part I - Circular Economy as a strategic path for the productive sector”***, it seeks to maximize the efficiency of the use of resources and minimize the waste of materials, energy and non-renewable natural resources, promoting, among others, the use of renewable energy sources, protection of natural ecosystems, reduction of waste of food and raw materials, as well as harnessing more sustainable technological innovations.

In Brazil, circular economy is directly related to the National Solid Waste Policy (“PNRs”)**[4]**, since the practices and principles of circular economy are aligned with the objectives and guidelines of this standard. The integration of these two approaches has brought significant benefits to society, such as: reducing the demand for natural resources, reducing the emission of greenhouse gases or even neutralizing polluting gases from the entire production chain and generating jobs and income through recycling and reuse/reuse of materials.

Although it is an important and necessary concept for environmental sustainability, the

implementation of circular economy in Brazil faces several challenges, such as:

(i) Lack of awareness and throwaway culture: Many people and businesses are still unaware of the benefits of circular economy and continue to dispose of waste inappropriately. The culture of excessive consumption is also a challenge for the implementation of circular economy.

(ii) Lack of investment in infrastructure and technology to support the transition from a linear economy to a circular economy. The implementation of the latter requires the use of advanced technologies to ensure efficiency in resource management and material recycling, in addition to the need to invest in waste collection and processing infrastructure, to ensure that materials can be recycled and reintroduced into the production chain.

(iii) Insufficient regulation and dependence on the government for environmental regularization of projects: The lack of clear and specific regulation for circular economy makes it difficult for companies and organizations to implement this model. In addition, depending on the production flow that one wishes to implement, it is necessary to regularize (environmental licensing) with the competent environmental agencies, which can hinder or prevent the execution of the project; and

(iv) Difficult integration of circular economy into the production chain: The implementation of circular economy requires a change in the way companies think and operate, which can be difficult to integrate into the existing production chain. This may require the collaboration of suppliers and business partners to ensure the effectiveness of the circular model.

In addition to the challenges listed above, the lack of cooperation and coordination between companies can also be considered a major challenge for the efficient implementation of circular economy. This is because, for the implementation of circular economy to be effective, responsible coordination between companies and collaboration along the entire value chain is necessary, which can be difficult to achieve in a highly competitive and fragmented market.

The fact is that society has been facing the consequences of the low effectiveness of the linear model of economy. This dynamic causes a considerable increase in residual production, which aggravates the impacts on the environment and on human health.

Finally, it is concluded that circular economy can be considered a new business model and can bring significant benefits to society, companies and the environment. On the other hand, the implementation of this business model faces some challenges, such as the need for strategic changes in culture and business mindset, the lack of investment in infrastructure and technology and cooperation and coordination between companies, insufficient regulation and, finally, some difficulty on regularization before the competent environmental agencies.

Thus, there is no doubt about the need for strategic changes in the private (and public) sector that fill the lack of functionality in relation to this new economic model, in which circular economy is inserted, aiming at practical and feasible solutions to such challenges.

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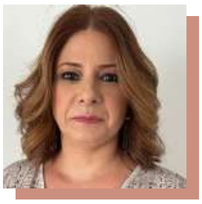

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FEMALE PARTICIPATION ON BOARDS OF DIRECTORS OF COMPANIES IN BRAZIL

The low representation of women in leadership positions in companies is a global issue drawing attention from the perspective of Environmental, Social and Corporate Governance ("ESG"). According to the study *"Women in the boardroom: A global perspective"*[1] conducted by Deloitte, "the increase of diversity contributes to a more fluid organizational culture, resulting in better business results. Companies that invest in plurality are more likely to make assertive decisions, in addition to leveraging innovation"[2]. In Brazil, out of 165 companies analyzed in the study conducted by Deloitte, only 115 had women on the board of directors. The study also concluded that, in 2021, only 10.4% of the positions on the board of directors of Brazilian companies were held by women, and that those women were present in only 4.4% of the positions of chairperson of the boards of directors. The presence of women in these positions is still disproportionate to their representativeness in society.

In a similar study conducted by SpencerStuart, the *2020 Brazil Board Index*[3], it was analyzed the trends and governance practices of 190 companies listed in the special segments of B3. It was concluded that women represented only 11.5% of the total number of board of directors members – one of the lowest percentages in the international comparison. In addition, according to the *Women Corporate Directors Foundation* (WCD), between 2021 and 2022, the number of women on boards of directors in Brazil has grown from 124 to 133, an increase of only 7%[4].

From a global perspective, it is observed that between 2015 and 2021, there was an increase of 8.9% in the percentage of women on boards of directors[5]. Europe and North America led the global average with 34.4% and 28.6% of women on boards, while Latin America only presented 12.7%. The observed increase reflects the intensification of ESG practices and government policies. Although in recent years the female presence in company management positions has increased considerably if compared to the past decades, it is still necessary to make progress.

Gender diversity on boards of directors is already a matter of political and regulatory intervention in many countries. When reviewing the percentage of women participating in boards of directors in other countries[6] – mainly in Europe and North America –, it is observed that most of the countries have affirmative policies for the appointment of women to board positions, such as the obligation for the board of directors to be composed of a minimum percentage of women, which normally ranges from 30% to 40%. Due to these policies, the participation of women on boards of directors has already increased considerably.

In Brazil, there are still no government policies in this regard. However, in the last years, two bills were presented with the purpose of establishing a quota of 30% for women on boards of directors. The bill PL 1246/2021**[7]**, prepared by the representative Tabata do Amaral, aims to create a mandatory reserve for women to participate in boards of directors of companies (publicly held corporations, state-owned companies and government controlled private companies). The PL also provides that out of the positions reserved to women, at least 15% must be held by black, lesbian, bisexual, transsexual or intersex (LBTI) women or women with disabilities. If approved, the expectation is that the positions on the board of directors should be held gradually until reaching the percentage of 30% in three years after the enactment of the law. However, the processing of the PL is pending progress in the Brazilian Congress.

While Brazilian legislation does not impose the mandatory presence of women on boards of directors, companies are adhering to other forms of incentive. 30% *ClubBrazil***[8]** - a global campaign led by directors and CEOs with the purpose of voluntarily increase gender diversity in boards of directors and executive boards, aims to (i) extinguish all boards of directors of companies listed in the segment of New Market composed exclusively of men; and (ii) reach, by 2025, the percentage of 30% of female directors in companies listed on the B3 and on the IBrX 100.

In the same way, the *UN Global Compact***[9]** Network Brazil has promoted initiatives to (i) have 30% of women holding senior leadership positions by 2025; or (ii) have 50% of women in senior leadership positions by 2030. Currently, 33 Brazilian companies have already joined the initiative. There are also programs such as the Board Diversity Program (PDeC10), promoted by B3, the Brazilian Institute of Corporate Governance (IBGC), the International Finance Corporation (IFC) and the Women Corporate Directors (WCD) Foundation, which seek to promote diversity on companies' boards of directors through the training of female directors, in order to strengthen and encourage the participation of women. These are alternative ways of encouraging the participation and presence of women in management positions.

In addition to the positive impacts on the performance, growth and reputation of companies, ensuring greater participation of women on the board of directors of companies is a way of making the corporate market more equitable and representative, as well of promoting parity between men and women in the labor market.

However, despite the gradual progresses, there is still much to be done to ensure a more balanced and inclusive representation. The effort of society and companies to increase the participation of women in these positions is essential and very relevant for the economic and social prosperity of the country.

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AMERICANAS – IT IS NOT FAULT OF COMPLIANCE, BUT OF (LACK OF) INTEGRITY

With the outbreak of the scandal that occurred in Lojas Americanas earlier this year, much was considered, among compliance professionals, about wether some kind of responsibility could be attributed to the compliance area of Americanas. It was also questioned whether there was anything that the area could or should have done, within its attributions, to avoid the materialization of the potential accounting fraud that is being investigated.

Without specifically going into what Americanas' compliance professionals could have done to avoid the scandal in question, since statements of this magnitude depend on the investigations that are still being conducted, we understand that, in principle, compliance areas of companies in general do not have effectively how to visualize the potential risk of fraud in their accounting processes. We understand, at first, that risk, internal controls and auditing areas would have the conditions and technical capabilities to detect risks of fraud and, thus, prevent their materialization.

Notwithstanding the above conclusions, we propose here a broader view, which goes beyond the definition of "which area" would have been able to detect said fraud. The question proposed here involves discussing whether the failure of companies that go through this type of scandal would not be in not adopting the principles of ethics and integrity in a genuine way, as an inherent principle of the company and of its shareholders, adopted and permeated by senior leadership.

In fact, ethics and integrity are not and should not be seen as a mere “attribution” of the compliance areas, they are values that must be exuded by senior leadership as values of the company, in a non-negotiable way. To this end, it is not enough for senior leadership to declare their “unrestricted support” to the compliance area regarding issues involving ethics and integrity. In our view, if top leadership does not “breathe” these values, they will not be introjected by the areas and employees.

To corroborate our line of reasoning, note the number of committees, bodies, and policies that large companies have. We wonder if, if these same companies had the principles of ethics and integrity as non-negotiable values that started from the top leadership – what we call the tone of the top –, would their executives feel free to not observe standards issued by regulatory bodies, exposing the company to risks of fraud and, consequently, all society and stakeholders to immeasureable losses?

The above issues are not only a daydream, a theoretical discussion or even a philosophical debate: these issues are even considered by the Comptroller General of the Union – CGU when evaluating the integrity programs of companies that are undergoing Administrative Accountability Proceedings – PAR, for the purpose of calculating the fine due by the offending company. In fact, one of the principles evaluated by CGU in this context starts from the premise that **[1]** *"the legal entity's commitment to integrity begins with the example of senior management members. In addition to participating in the implementation and supervision, senior management must express support and disseminate the Integrity Program periodically, to ensure its adoption and promote ethical culture among employees and third parties. Members of senior management are the first to set an example, through posture, speeches, topics brought to the debate in meetings and events etc. It is recommended that messages be personalized, signed by senior management members. This is important for employees and society to realize that members of senior management are personally committed to integrity, in speech and in practice."*

Finally, companies can have so many areas, committees, policies, and structures to "attempt" to demonstrate that they adopt best practices when it comes to ethics and integrity, or even "to declare" support to the top leadership. However, we think that all this "apparatus" will not be enough to prevent the company from practicing fraud at any time of its existence. This is because we believe that the principles of ethics and integrity are values that are born from their creators, from those who idealized the enterprise still in its dream stage of entrepreneur.

Once the company is implemented, and its partners embrace the mission of its initiatives, the initial spirit that created the organization with true ethics and integrity will then naturally be transmitted to senior leadership, and to be always and genuinely introjected in each of the areas and their employees. If not, the spirit of this enterprise is already born as crooked stick and will hardly be fixed when it is not true from the first moment of consecration of the company.

The compliance area comes to raise awareness throughout the organization, gradually educating all of its employees in all spheres and areas of operation of the company. However, all their actions must have firm roots in the genuine intention of the creators who establish the initial culture of the company. The compliance area can always reiterate and reinforce all the values of ethics and integrity, but if these are not with their founders from the beginning, they will hardly exist for the life of the company, and the compliance area could do little to make them persist if they never existed.

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IS THE “G” OF ESG BEING (DIS) REGARDED AS THE BASE PILLAR OF THE AGENDA IN THE CORPORATE WORLD?

To say that the theme of ESG is fashionable in the business economic scenario in Brazil and in the world is already old news. It is not of today that good corporate governance practices are encouraged by market players and reinforced by investors and market regulatory bodies. For more than 25 years this subject has become an agenda in Brazil, since the creation of the Brazilian Institute of Corporate Governance (“IBGC”) in 1995, which accompanied the economic moment of entry of foreign capital into the country and the development of an equity market. Investors sought, above all, security and reliability for their investments in Brazil.

Over the years, the Brazilian Securities and Exchange Commission (“CVM”), the Brazilian stock exchange (“B3”), other capital market regulatory bodies and the National Congress itself have improved their standards to adapt to international corporate governance parameters. The companies, in turn, had to create a structure that met the new precepts established, in addition to seeking qualification in the market according to the new indices, metrics, risk rating agencies and levels of governance complexity created by B3, to attract investors from the perspective of compliance with corporate governance standards.

Although corporate governance practices have been developed for a long time in isolation, in recent years, the agenda has been integrated with two others of equal relevance and history: environment and society. With this, the ESG agenda gained prominence in Brazil in mid-2020 with the publication of the White Paper by the World Economic Forum prepared in collaboration between the *big four*[1] and which presents a series of objective criteria for measuring ESG practices adopted by companies. About this paper, see our analysis in the article ESG: The new market trend.

Following the “boom” of the ESG agenda, discussions about *greenwashing*[2] and the failures of the processes adopted by companies have become increasingly present. This is because some companies, despite having developed internal policies, adequate compliance instruments and strengthened corporate governance mechanisms, with a view to a better qualification of risk and market position, did not bother to effectively implement the ESG culture to their executives and employees, doing only a *check the box* with the practices encouraged by the market and good marketing, disclosing the practices or even just their intention to implement.

This search for what the market calls "governance goodwill"**[3]** was enhanced and supported by the creation of certifications, seals, and indices. But in view of recent cases, we can see that these seals would not be enough to corroborate that the practices and culture that are disclosed are in fact being implemented by some companies.

As an example, one can mention the recent case involving Americanas S.A. (“Americanas”), which exposed the weaknesses of its corporate governance system and called into question the quality of audits and the inspection structure of regulatory bodies. In the specific case, Americanas exposed, in a material fact disclosed on January 11, 2023, that *inconsistencies had been "detected in accounting entries reducing the supplier account made in previous years. In a preliminary analysis, the Company's accounting area estimates that the values of the inconsistencies are of the dimension of BRL 20 billion."*

Americanas falls within the Novo Mercado, B3's listing segment that has a high level of transparency and corporate governance. In this segment, companies voluntarily commit to good governance practices, as well as to the disclosure of relevant information, with the objective of maximizing the rights of shareholders and the quality of the information provided by the company. As an example, Americanas, in its 2022 Annual Report**[4]**, recorded actions implemented from the ESG agenda, such as the composition of its board of directors formed by 43% of independent members, the realization of 350 thousand deliveries in favelas, the compensation of 100% of gas emissions from its own operations and electricity.

In this sense, even with a robust corporate governance structure, having already been part of the select group of Brazilian companies that made up the Dow Jones Sustainability Index (DJSI) World**[5]** in 2021, B3's participant in the Novo Mercado segment in the indices: (i) IGCX – Corporate Governance Index, (ii) IGCT – Corporate Governance Trade Index; (iii) IGC-NM – Novo Mercado Corporate Governance Index, (iv) ISE – Corporate Sustainability Index, and with approximately 21 well-defined policies, ranging from *compliance*, suppliers, corruption, allocation of results, privacy etc., internal regulations, code of conduct, bylaws, it was not possible to avoid failure in the company's accounting processes. On the contrary, such seals may even have contributed to misleading of investors, who may have relied on these indicators as a way of attesting to whether what was disclosed by Americanas corresponded to reality.

This contradiction was criticized by experts who condemned the existence of ineffective policies. The executive and founding partner of MESA Corporate Governance, Herbert Steinberg, stated that: *“The instruments certainly exist in Americanas, otherwise it would not be in the Novo Mercado, but they are probably not lived as they need, and this is born of a checklist culture, of just lists what one has, and of not living and actually applying the governance policy.”*

Accounting fraud is nothing new in the corporate world. One of the most iconic cases in corporate history involved the then-energy giant Enron Corporation, which even motivated the tightening of compliance rules and policies around the world and was the driving force behind the Sarbanes-Oxley Act in the United States of America in 2002. Other recent cases in Brazil involving financial inconsistencies occurred with IRB Brasil and CVC. In the first, the manager Squadra Investimentos published a letter, in 2020, questioning the company's balance sheet data. Therefore, the company informed the market that it identified evidence of fraudulent management in the illegal distribution of R$60 million in bonuses to executives and employees. In the case of CVC, in 2019, more than R$360 million were found in accounting errors and misstatements with evidence of manipulation of accounting reports, omissions, concealments and frauds.

This scenario of Americanas caused a small earthquake in the structure of the capital market, which has as one of its main objectives the protection of investors, casting doubt on the responsibility of companies, auditors, regulatory bodies and the stock exchange itself. In a country such as Brazil, which has a significant regulatory framework, where publicly held companies have a legal obligation to undergo audits and market players seek to certify compliance or not with such practices, the occurrence of scandals such as these highlight the gap between disclosure and actual practice by companies. Are standards and oversight effective? Are indexes and stamps necessary or do they only contribute to greenwashing and investor misleading?

In this sense, in the Brazilian context, although timid, we can already observe CVM movements to address such events. The most recent standards issued by CVM with the ESG theme, aim precisely to curb the practice of disseminating information of this nature that does not match the reality. Resolution No. 59 provides for the need to describe the ESG practices practiced by the company, in the reference form, the main document to guide investors in their analysis (see our article on this topic by clicking here). In addition, the same standard also provides the "practice or explain" that consists of requiring companies to explain if they do not disclose the description. Resolution 175 restricts the use by investment funds of socio-environmental denominations when these funds do not seek to generate socio-environmental benefits. Internationally, the SEC is discussing the implementation of mandatory disclosure in the financial statements on climate and carbon emission aspects**[6]** and greenwashing was also the theme of the 9th OECD Forum on Green Finance and Investment 2022 held between October 5 and 7, 2022.

There is no answer to the questions that came up again after the case of Americanas and there is no international model to be followed. Without prejudice, to prevent history from repeating itself, it is essential that companies effectively adopt integrated and balanced policies. There is no point in acting as a “front”, “*checking the boxes*”, or just privileging one of the companies' pillars of support. As a well-built house, social and environmental actions (and so many others) only stand on a strong and well-structured foundation of corporate governance. The theme should be introduced and valued *from the top down,* but is only sustained if it is disseminated *from the bottom up*.

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[1] Used term to refer to the four largest auditing firms in the world, namely KPMG, EY, PwC and Delloite.

[2] Term in English that indicates the use of speeches, marketing actions, advertising using the environmental/ESG agenda when, in fact, no real and effective measures are taken in accordance with these parameters.

[3] The Governance Goodwill is a term used in the capital market to analyze the appreciation of the shares of Companies that start to adopt Corporate Governance practices. On the subject, read Revista da Unifebe n° 10 Original Article 165 RELATIONSHIP BETWEEN SHARES GOODWILL AND CORPORATE GOVERNANCE OF BRAZILIAN PUBLIC-TRAINED COMPANIES

[4] Americanas S.A. 2022 Annual Report link <https://api.mziq.com/mzfilemanager/v2/d/347dba24-05d2-479e-a775-2ea8677c50f2/09e4a963-b76c-482d-6884-864eef21a716?origin=1>

[5] The DJSI is an index that highlights companies for their social, environmental and economic management practices. The information on the participation of Americanas S.A. is laid out in its 2022 annual report.

[6] Since March 2022, the SEC has been discussing the implementation of new rules for disclosing information related to climate and carbon emissions, the rules are not yet in force, but the expectation is that they will be edited later this year, as reported the Wall Street Journal and PWC https://www.wsj.com/articles/sec-considers-easing-climate-disclosure-rules-after-investor-pushback-11675416111

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CONTRACTUAL RESPONSIBILITY IN THE EXPLOITATION OF ILLEGAL LABOR AND RISK MITIGATION

About to complete 135 years of abolition of slavery, unfortunately we were exposed to the emergence of several news about workers rescued from their labor activities for being subjected to degrading conditions and/or conditions analogous to slavery. Article 149 of the Penal Code defined the condition analogous to that of a slave as the submission of an individual to the execution of forced labor or to exhaustive working hours, either subjecting him to degrading working conditions or restricting, by any means, his mobility due to debt contracted with the employer or agent.

Recently, the discussion on the subject came to light after the operation launched by the Federal Police together with the Ministry of Labor and Employment, involving workers from wineries located in Bento Gonçalves, in Rio Grande do Sul, which released more than 200 men subjected to degrading working conditions. In 2022 alone, according to data determined by the Federal Government, the Labor Inspection rescued 2,575 workers exposed to this reality, in a total of 462 inspections carried out in that year throughout the country.

From a private and contractual perspective, it is important to note that both the company and its managers will be assigned administrative-labor responsibility due to the illegal hiring of workers. From a criminal point of view, administrators can be held liable for the criminal liability provided for in article 149 of the Criminal Code.

In addition to the direct contracting company of illegal labor, companies indirectly involved in this type of exploitation, whether by outsourcing, quartering or by any other chain of service provision, must also be attentive to accountability for exploitation of illegal labor, since the mere allegation of ignorance is not enough to rule out guilt. Currently, according to the understanding of the courts together with the labor legislation, this responsibility is characterized as subsidiary and the sanctions applied to these companies can be aggravated if it is proven that they were aware of and agreed with this type of contracting and/or did not carry out the necessary inspections on the contracted service, due to the contractual relationship established between companies.

In a recent decision issued by the Federal Court, the partners of a women's fashion company were acquitted of the charge, made by the MPF, of using slave labor, on the grounds that it was not possible to assume that the accused had knowledge of the degrading conditions in which the producers of their pieces were, since they were not responsible for the production and inspection of the manufacturing process, but only for the acquisition of the finished products.

Although, in these cases, the liability of companies may eventually be reversed in the judicial sphere, the main damages caused to the company linked to the hiring of illegal labor are related to its image and reputation in the market. For risks in this regard to be mitigated, it is essential to adopt practices that provide a higher level of security at the time of contracting, whether in the provision of services, in the acquisition of products and/or eventual outsourcing of production processes. One of these measures is the inclusion of a specific contractual clause where the contractor declares and guarantees that it treats its employees in a dignified and respectful manner, which complies with labor, criminal and civil legislation, not using workers subjected or forced to illegal conditions, such as child, forced, slave or slave-like labor, under penalty of contractual termination.

The inclusion of contractual provisions in this regard, and which provide for the declaration of suitability by the contracted party, has become increasingly common, as it protects the contracting party and enables contractual termination for default by the opposing party, with the consequent collection of a fine and compensation for losses and damages that the hiring of illegal labor may cause.

Another important point that contracting companies should note is whether the contracted company practices the payment of market values to its employees, as well as the collection of funds and labor rights, and whether the payment agreed for the contracted services is also within the market average, which demonstrates, in addition to a good faith commitment between the parties, that the workers are being properly remunerated according to the values legally provided for the type of service contracted. At the same time, nothing prevents the contracting party from creating the periodic obligation to submit additional documents by the contractor, such as vouchers and declarations, as a way of proving compliance with said obligations.

In addition to the contractual diligence, there are several mechanisms that can be used as a protective measure at the time of contracting services so that they are aligned with the law and with the standards of ethics and social responsibility of the company, such as the adoption of ESG best practices, which have been widely promoted by the market, either by the employment of committees and specialized audits in the supervision of contracted labor and creation of internal compliance policies, or by consulting official documents such as the “Dirty List”, a register promoted by the Federal Government that lists all employers administratively convicted by the Labor Prosecution Office for the exploitation of labor in a situation analogous to slavery. More information on this topic can be found in the article written by the labor team of our office at this link.

Thus, from the contractual point of view, it is of paramount importance that companies value the careful preparation of their contracts, with clear predictions on the labor theme and capable of safeguarding their rights. On the other hand, it is also essential that the private sector adopt premises and standards

capable of encouraging the fight against work carried out in a degrading manner and in conditions analogous to slavery, as well as propagating a more sustainable economic culture, focused on the environment and social, which includes the constitutional guarantee of maintaining the dignity of the human person and the social values of work.

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WORK IN CONDITIONS ANALOGOUS TO SLAVERY IN THE PRESENT TIMES – DIGITAL SLAVERY, BURNOUT AND "QUIET QUITTING"

In this article, the proposal is to talk about a topic that should be in the past, but which, unfortunately, is stamped in recent news reports and has been the target of actions by the Labor Prosecutor's Office.

When dealing with slavery or conditions analogous to slavery, we refer to the historical context and, unfortunately, to recent cases reported by the media, which are worthy of repudiation. These are regrettable and criminal situations, in which there is a total degradation of the dignity of the human person, with a curtailment of his fundamental right to freedom, leisure, life, and decent work.

While many talk about the importance of companies adopting environmental, social, and corporate governance ("ESG") practices, it amazes us in 2023 to talk about slavery, an issue that should be totally outdated.

The Labor Conventions of the International Labor Organization of the 1930s and 1957 deal with the subject and aim at the eradication of slave labor. In addition to international treaties, article 149 of the Penal Code defines work in a condition analogous to that of a slave in the following terms:

"Art. 149, Brazilian Criminal Code - To reduce someone to a condition analogous to that of a slave, whether by subjecting them to forced labor or an exhausting workday, or by subjecting them to degrading working conditions, or by restricting their locomotion by any means due to a debt contracted with the employer or agent:

Penalty - imprisonment, from two to eight years, and fine, in addition to the penalty corresponding to violence."

According to the Public Ministry of Labor (MPT), any worker who is required to work excessive hours in a habitual manner, or in unhealthy environments, without minimum health and safety conditions, is in conditions analogous to

slavery. Thus, forced labor (through exploitation, preventing them from leaving the site due to threats or debt bondage), exhaustive working hours (in an exhausting way, which can endanger the health of the employee) and degrading conditions (unhealthy, poor quality and insufficient food, mistreatment) form the requirements to designate contemporary slavery. Therefore, the meaning of slave labor gains new outlines in modern society, especially with the new look at the concept of forced labor.

Alarming data collected by the MPT report that, in the last five years, the Brazilian Labor Court judged 10,482 cases on the subject, as well as the number of actions increased 41% between the years 2020 and 2021. Since 1995, at least 57,000 workers have been removed from degrading conditions analogous to slavery. In 2021 alone, 1,415 complaints were received about slave labor, enticement and trafficking of workers, a number 70% higher than that found in 2020**[1]**.

Among the measures to eradicate slave labor and conditions analogous to it, the Federal Government, through the Ministry of Labor, makes available a list of employers who have been assessed for such practice, called a dirty list**[2]** which is accessible by any citizen.

In this line, in *Compliance* programs and even in service contracts, there are express provisions for declaration by the contractor of absence of any practices that may be considered analogous to slave labor. That is why the importance of this topic is present in all spheres of contracting, especially from third parties and suppliers.

Therefore, it is important to reflect on our current reality, especially because, with all the technological advancement and the sense of exacerbated immediacy, countless information is always received and made available, and concepts such as toxic productivity, right of disconnection, among others, give the tone of urgency to the resignification of “slavery” and “degrading work”. It seems to us that the framing as slave labor transcends the limits of the meaning of forced labor of the last century, especially as being one that restricts the right to come and go and includes physical punishments. See below.

The agenda of decent work, health and well-being is also one of the goals of the UN 2030 Agenda for Sustainable Development, to which Brazil is a signatory, having as one of its commitments: *Take immediate and effective measures to eradicate forced labor,* ***end modern slavery*** *and human trafficking, and ensure the prohibition and elimination of the worst forms of child labor, including the recruitment and use of child soldiers, and by 2025 end child labor in all its forms***[3]**.

The UN pact speaks of modern slavery, which connects the issues of exploitation to sex tourism, degrading work in rural areas and other forms that are currently denounced as work analogous to slave status.

However, we want **to reflect on another perspective, namely, how the new dynamics of labor and how the labor force have led us to new forms of “restriction of freedom” and to the emptying of the social function of labor**, since although distant from the original concept of slavery, in a way, modern society remains a slave, now, of time, work and the digital world.

Well, after the critical period of the COVID-19 Pandemic, we are faced with new phenomena that have permeated professional relations, many of them linked to the issue of mental health!

Why is slavery related to mental health?

The number of labor lawsuits involving mental health issues is increasing, especially due to the issue of *burnout*. There is, therefore, a new dynamic of labor relations, which raises the need for a balance of labor relations, preserving, above all, mental health. We must also mention that within the "mental health package" also comes bullying and everything related to it.

Therefore, the first reflection we make is: **how did the dynamics of professional relationships, for countless reasons, end up in this scenario, especially after the pandemic, in which mental health has become one of the biggest concerns of companies?**

The very definition of burnout refers to professional exhaustion, and when diagnosed, evidence is found in (i) hostile work environments, (ii) excess of working hours; (iii) absence of recognition for the work performed; (iv) toxic competitiveness, which does not serve for professional improvement, but rather to generate the clash between colleagues; (v) regular absence of vacation and rest periods, among other situations. **All this evidence permeates practices that could be compared to degrading work.**

And to bring even more complexity to the subject, we mention the digital revolution, which is certainly necessary, **but which has brought challenges in relation to how we deal with the digital world (and in the future metaverse – who knows?), to the point of having in labor decisions examples of condemnation for violation of the right of disconnection**[4].

In Brazil, there is no specific provision on the right to disconnect, although the decisions are based on the legal limitations of working hours and the right to leisure, however, in comparative law, we find some regulations to address the duty of disconnection. One of the first countries to regulate "*the right to disconnect was France, which in 2016 included the right to disconnect in law referring to "the right to disconnect translates as the employee's right not to be connected to their professional digital tools (computer, iPad, smartphone etc.) outside working hours (QUINTON, 2017), in order to respect the maximum working hours and minimum rest periods (RAY, 2016)*[5]*".*

In contrast to these situations that reveal professional exhaustion, **we come across the movement of "Quiet Quitting"**. Among the younger generations who have already been born under the imposition of the strictly online world, we see people increasingly disappointed with the concept of meritocracy, dealing with work models in order to compensate for the pressure and imprisonment of digital, emerging the trend called "Quiet Quitting", that is: the *professional decides to limit their tasks at work strictly to what is necessary within their function, avoiding any overload or journey that may exceed the limits of their activities*[6].

Despite the expression, in free translation for the Portuguese "silent dismissal", people in the "Quiet Quitting" movement have no intention of resigning or being dismissed. The premise of the movement is for the balance between personal and professional life, fulfilling their professional obligations, but in a way that does not impair the time for personal activities, leaving aside the concept of living to work. The very name of the trend carries a pejorative concept when it comes to the imposition of limits by workers.

The essay by the South Korean philosopher Byung-Chul Han, called "The Burnout Society ", aims to bring a reflection on the effects of demands imposed by society for constant improvement in performance and success at work. How much does this new imposed model make us slaves to our own desires, our own demands, even when stimulated by the employer? This reminds us of the very welcome ESG practices, seeking to ensure a safe and healthy work environment.

The fact is that tolerance to any type of slave labor, whether in its original form or in its new developments, must be fought, since it proves to be a violation of the law, the international treaties of the International Labor Organization (ILO) and even the UN 2030 Agenda for sustainable development. Being cautious and preventing these situations from occurring is the way to a dignified and fair working relationship.

Therefore, the agenda of the social function of work is increasingly present and the parallel that we have brought here with the theme of slavery is precisely to allow reflection on how we currently face new forms of dependencies that restrict the exercise of work as a fundamental right. Mental health, the right to disconnect and the phenomenon of "quiet quitting" are just a few examples of how society is dealing with the workforce and, therefore, the urgent need to review models and practices.

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[4] MORAL DAMAGE. RIGHT TO DISCONNECTION. CONSTITUTIONAL GUARANTEES TO HEALTH AND LEISURE. LEGAL ASSETS INHERENT TO THE EMPLOYEE. ART. 223-C OF CLT. Pursuant to art. 223-B of the CLT, off-balance sheet damage is configured when there is a moral or existential offense to an individual or legal entity, resulting from an action or omission, and health and leisure are listed in the list of legally protected assets inherent to the employee (art. 223-C, CLT). In this regard, the right to disconnect from work falls within the scope of fundamental guarantees to health and leisure (art. 6, caput, and art. 7, IV, of the Constitution of the Republic), consistent with the Principle of the Dignity of the Human Person (art. 1, III, CR), whereby work cannot be an end in itself, but rather the means for the worker to promote his subsistence and satisfy his personal needs and desires, without prejudice to rest and family and social life. If the employee's right to disconnect from work is violated, depriving him of due rest and leisure, civil reparation is applicable, pursuant to articles 186 and 927 of the Civil Code. (TRT-3 - ROT: 00102857920215030043 MG 0010285-79.2021.5.03.0043, Rapporteur: Mauro Cesar Silva, Judgment Date: 07/01/2022, Tenth Panel, Publication Date: 07/04/2022.)

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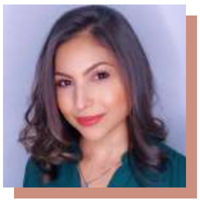

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LET'S TALK ABOUT DISCRIMINATORY DISMISSAL. NO BOUNDARIES TO JUDGE?

Without going into the merits of the judgment that will occur in the STF on the application of ILO Convention 158 and the protection of arbitrary and unjustified dismissal of employees, the fact is that, according to the current legal system, the dismissal of the unjustified worker is part of the employer's directive power, in the absence of regulation of item I, of article 7 of CR/88.

In this context, except for the legal stability provided for in firm texts of law (pregnant woman, sipper, union leader, work accident or occupational disease and cooperative leaders) or even agreed in normative instruments freely negotiated between the interested private entities, the employer is guaranteed the potestative right to extinguish the legal relationship maintained with its employees.

The general rule is the employee's right to dismissal, imposing the law in certain and determined cases a limitation on the exercise of this power, through the granting of provisional stability in employment in the situations listed above.

In a world in constant evolution, where the search for policies that create environments in which diversity is respected and inclusion promoted, the legislator was responsible for editing Law No. 9,029/1995, which with enough property prohibited the adoption of any discriminatory and limiting practice for the purpose of access to the employment relationship, or its maintenance, due to sex, origin, race, color, marital status, family situation, disability, professional rehabilitation, age, among others, except in this case, the hypotheses of protection of children and adolescents provided for in item XXXIII of art. 7 of the Federal Constitution.

Under the terms of the aforementioned law, when the rupture of the employment relationship is due to a discriminatory act, in addition to the right to compensation for the moral damage suffered, the aggrieved worker may choose to be reinstated to employment, with full reimbursement of the entire period of leave or the perception, in double, of the remuneration of the period of leave, monetarily corrected plus legal interest.

However, in the absence of legal contours on the part of the competent power, it was up to the Brazilian Labor Court once again to regulate ("for good and evil"), according to the principles of labor law, the institute of "discriminatory exemption".

With the legislative unrest that is peculiar to it, which often culminates in the invasion of the competence of other powers, the Brazilian Superior Labor Court issued the following summary entry that is currently the beacon used by the Judges in confronting the existing controversies on the subject:

*"Sum. 443 Discriminatory waiver. Assumption. Employee with severe illness. Stigma or prejudice. Right to Reinstatement. **The dismissal** of an employee with HIV or **other serious illness that raises stigma or prejudice is presumed to be discrimanatory** (g.n.)"*

From reading the above entry, it is easy to see that the provision of presumption of discrimination in the face of "another serious disease that raises stigma or prejudice" gave rise to several interpretations that brought to the operators of the law and, especially, to those who hire, a scenario of absolute legal insecurity.

This is because, not infrequently, decisions of a protective nature are made that have been guaranteeing workers stability and the possibility of maintaining their employment relationships due to the fact that they are carriers of serious illness, which are in no way related to their work activities and did not constitute the reason for their dismissals.

However, the need to curb the practice of discriminatory and prejudiced acts, which can be validly done through a regular process in which the offended party proves that the loss of his job was due to abject reasons, the fact is that Precedent 443 has been used without account or weight for the practice of true affective jurisprudence.

Assuming, that is, admitting as a real opportunity that a worker dismissed upon receipt of the severance payments guaranteed to him by law was because he has or had cancer, has schizophrenia, is in treatment for depression and anxiety (throw the first stone who was spared by the pandemic) or is a carrier of the HIV virus, guaranteeing him maintenance in employment, has implied the creation of stability that cannot be guaranteed in the current legal system.

The breadth of the summary entry is such that the presumption of discriminatory dismissal has been ideologically invoked by the judges to annul the dismissal and guarantee the employment of a worker who, by chance, at the time of his dismissal without just cause, had criminal proceedings in progress or even scheduled surgical procedure (Ex. Proc. 105500-32.2008.5.04.0101 and 0000481-92.2020.5.11.0013).

It has often been the subject of news in the official pages of the most diverse labor courts in the country the disclosure of decisions that presumed discriminatory the dismissal of an employee because he or she is or has been affected by a non-disabling illness, such as being suffering from arachnophobia or dwarfism (Proc. 0010425-50.2021.5.03.0064 and Ag-AIRR-20244-56.2019.5.04.0871).

If it is true that the Brazilian Law No. 9,029/1995 prohibits the adoption of any discriminatory practice, it is no less certain that the employer was guaranteed the prerogative to terminate the employment relationship, a right that cannot be restricted by mere jurisprudential presumption.

The dismissal is presumed to be discriminatory as a result of life's vicissitudes, through the edition and adoption of a summary entry that culminates in the dismissal of the employer with a reintegration order followed by a declaration of guarantee of employment or condemnation to double payment of the period of stability (this without temporal limitation for a large part of the unusual cases under trial), implies the expansion of the institute of “stability” by the Labor Judiciary, bumping on the principle of legality and inviting everyone to the debate always necessary.

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WORKING IN BRAZIL LIVING ABROAD - SOCIAL SECURITY AND TAX IMPACTS OF HOME WORKING

Although not so new, the contractual modality of teleworking or remote work gained strength after the social isolation resulting from the Coronavirus pandemic, at which time the need for remote work (home working) was perceived. Created with the Brazilian Labor Reform, through the introduction of a new chapter in the CLT dedicated especially to the theme, the modality aims to provide work directly from the homes of workers with the use of new information technologies, having been widely used during the pandemic, as a way to contain the spread of the virus.

This model of work proved to be very advantageous, both for companies and for the worker. From the moment the possibility of the work being performed anywhere was perceived, the worker was allowed to manage his own time dedicated to work and to save expenses with travel, generating a better quality of life for the professional. On the other hand, it enabled companies to reduce costs with the workplace and greater and better productivity of their employees, despite the loss of synergy between people working in person.

With the wide adoption of this type of employment contract, the need to improve the regulatory structure of teleworking was evidenced, which resulted in the publication of Law No. 14,442 on September 5, 2022. The legislation, in general, began to guarantee workers who work remotely the same rights as face-to-face workers, without any kind of distinction, guaranteeing them greater legal certainty.

Among the main changes, the new law stipulated that, to the employment contract of the employee admitted in Brazil who chooses to perform his duties in teleworking outside the country, Brazilian legislation must be applied, unless otherwise stipulated between the parties.

Note that, with the new regulation of distance work, the option of working in Brazil and living abroad has been simplified, without losing any benefit granted by Brazilian laws, which, it should be noted, are very well known for being extremely protective of workers' rights.

Although the new law determines that it is possible to cease to apply Brazilian legislation if a provision to the contrary is stipulated between the parties, attention must be paid, in this case, so that the contractual clauses are more beneficial to the worker, given the legal impossibility of the employee to refrain from receiving one or more amounts of a labor nature (principle of non-renounce ability of rights). In this way, it is possible, eventually, to go easily to live abroad and continue working in Brazil maintaining your employment contract with the Brazilian company. However, beware: before you go it is important to know all the rules and know all your rights.

Initially, it should be noted that expatriates – situation in which the company is responsible for the transfer of the employee to provide services abroad – are governed by specific legislation (Law No. 7,064/82). Such legislation determines that the company must ensure to the employee, regardless of compliance with the legislation of the place of performance of the services, the rights provided for in the specific law and the application of the Brazilian labor protection legislation, where not incompatible with the specific law, this being true when more favorable than the territorial legislation in the set of rules related to each matter. Brazilian legislation also applies regarding social security and FGTS payments in the linked account, according to the actual remuneration of the employee.

In cases like these, there is already settled jurisprudence in the sense that there is no breach of the employment contract when an expatriate is transferred abroad to work for the Brazilian company in a company located abroad. In this case, the expansion of the employment contract in Brazil and Brazilian legislation must be applied to govern labor relations and charges.

As a rule, both for cases of remote work abroad at the option of the employee and by determination of the company (expatriates), the Brazilian employment contract is kept active and so is the guarantee of all labor rights provided for in Brazilian legislation, including social security and FGTS payments.

But what if the salary is paid abroad? Even if the payment of the salary is made or remitted abroad, INSS and FGTS must be calculated and collected in accordance with Brazilian legislation.

It is important to note that situations occur in which the worker starts to reside outside Brazil, continuing to provide services to the Brazilian company, but begins to provide services also to the foreign company, receiving salary from both companies (split payroll – part of the remuneration is paid by the Brazilian company and another part paid by the foreign companies of the same group). In these cases, it is common understanding that all charges should be calculated based on total remuneration.

Regarding income tax, the Brazilian company shall withhold said tax upon remittance of the employee's salary abroad, at the rate of 25%.

Now comes the doubt: if one must collect labor charges and tax in Brazil on salary received abroad, does one also have to pay taxes in the country of residence? Aiming to avoid taxation in both countries, Brazil has an agreement signed with several countries to avoid double taxation, that is, double taxation on the same labor income, so that the tax burden occurs in only one of the member countries.

The agreements to avoid double taxation generally have the provision that, when a resident in another country (other than Brazil) receives income derived from Brazil, he must include said income in the basis of calculation of the income tax of that other country, being possible the deduction of the income tax paid in Brazil. These agreements make it possible for income to be taxed only in one of the countries.

Brazil also has international Social Security agreements signed with several countries, the main objective of which is to guarantee the totalization of the periods of contribution or insurance fulfilled in the contracting countries, in order to ensure the Social Security rights provided for in the text of the agreement to the respective workers and legal dependents, resident or in transit.

In that way, in view of these agreements, the worker may use the contribution or insurance time completed in another country with which Brazil has an agreement, and vice versa, for the purpose of complying with the required grace period and other requirements for obtaining his benefit, ensuring coverage of the risks of disability, retirement, and death.

In summary, with all the remote work regulations, whether the transfer abroad required by the employee or determined by the company, it was in fact easier for the worker to live abroad and continue to provide services in Brazil, without this implying (i) loss of any labor and social security benefit granted by Brazilian laws; and (ii) double taxation of income earned by the worker, when there is an agreement to avoid double taxation between the country of residence and Brazil.

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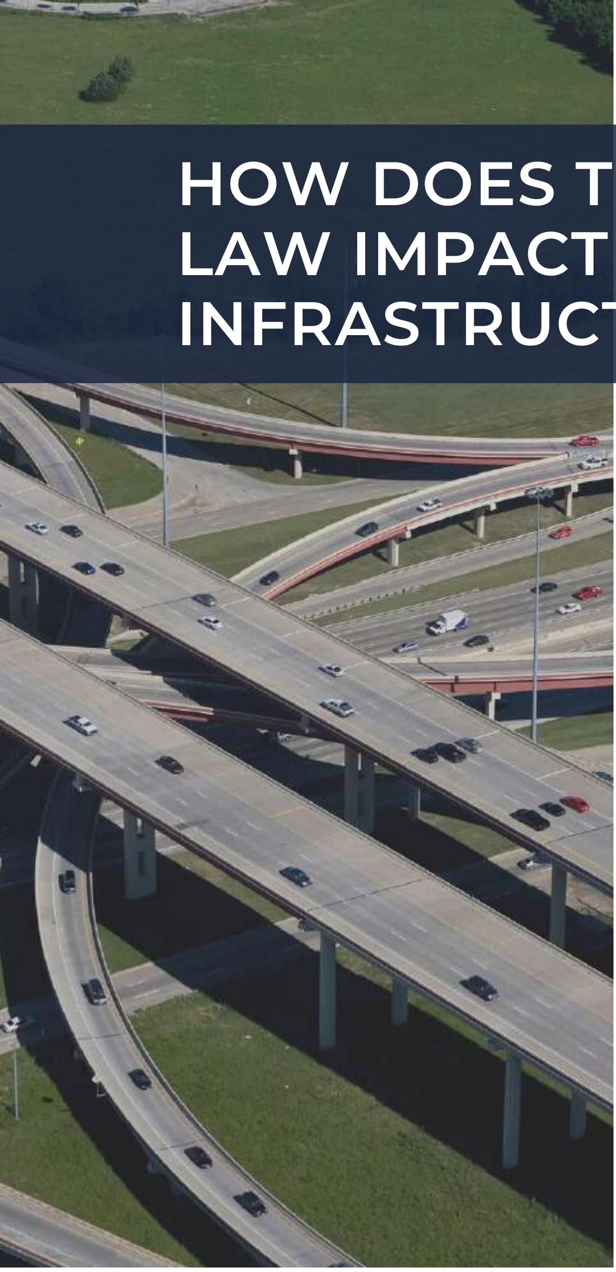
HOW DOES THE NEW BIDDING LAW IMPACT THE INFRASTRUCTURE SECTOR?



As is widely known, on April 1, 2021, Federal Law 14,133/2021 (New Bidding and Contracts Law or NLLC) was issued, introducing significant innovations in the subject of bidding and public procurement.

A simple comparative reading between the legal diploma and the one it intends to succeed – Federal Law 8,666/1993 – already shows that the provisions of the new law imply not only changes in procedural rites and infralegal regulations that govern the subject in all spheres of the federation, but also a change in organizational culture in order to rejuvenate public procurement. For this reason, the national legislature soon provided for a transition period of two years, which ends on April 1, 2023, so that the Public Administration could prepare the house before the effective application of the law**[1]**.

Although several segments of the Public Administration, especially bodies with regulatory capacity, aspire to extend the validity of the New Law on Bids and Contracts because they do not yet consider themselves fit for its imperative application, and this measure is being considered even via a bill**[2]**, the fact is that Federal Law 14,133/2021 already needs to be seen as a reality.

In this sense, the NLLC brings important changes and challenges specifically for the infrastructure sector, which need to be closely monitored and effectively addressed.

There will be, for example, the need to publicize the acts of bidding and contracting procedures in the newly created National Public Procurement Portal (PNCP), which must also be used by the bodies and entities of the Public Administration for the purpose of unified registration of bidders. Considering the high value contracts and the high number of investments involved in infrastructure bids, this measure can guarantee greater security, control, and transparency to the sector.

Associated with this, the use of electronic means in hiring – expressly encouraged by the new law – will certainly enable greater agility and transparency in competitive procedures.

In addition, NLLC inaugurates a new modality of bidding: competitive dialogue. Aimed at situations in which the contractual object – works, services or purchases – to be tendered is complex, this modality allows for a phase of discussion, between the Administration and the previously selected interested individuals, on technical, economic, and legal solutions for high-risk and high-complexity contracts. It is, therefore, an institute that can enable the selection of more advantageous projects with innovative solutions in various sectors of infrastructure that have an inherent complexity – basic sanitation, urban mobility, public lighting, among others. This mechanism can become even more effective for the sector depending on the directions that take to pacify the controversies about the applicability of this new law to concession contracts and public-private partnerships (PPPs).

Innovations about the provision of guarantee by the private partner, in the form of guaranteed insurance, in contracting works and large engineering services, also impact the infrastructure sector. In these cases, the Public Administration may require the contractor to present a policy in an amount equivalent to up to 30% of the initial value of the contract. It is also possible to provide for the obligation of the insurer, in case of default by the contractor, to assume the execution and conclude the object of the contract. In this case, either the insurer executes and concludes the contractual object, being exempt from the obligation to pay the insured amount, or pays the full amount indicated in the policy for not assuming the contractual execution. Considering that, in this sector, unfinished public works constitute an obstacle that recurrently needs to be circumvented by the Government, such changes try to straighten out the problems arising from eventual stoppages and deterioration of the works.

It should also be said that the provisions of the new law reinforce the use of alternative means of dispute resolution and, in addition, expressly ensure the possibility of establishing dispute boards (committees for prevention and resolution of conflicts), until then without provision in general contracting rules. These innovations favor the strengthening of the interest of private agents in public procurement, since the dispute resolution methods adopted and the procedures for defining the amounts eventually due to the contractor by the public partner are part of the large risks assessed by private partners before making their investments.

Changes were also introduced in the rite of the bidding procedure: the reversal of phases, for example, which constituted an exception to the rule in Federal Law 8,666/1993, becomes mandatory, except in duly motivated exceptional cases**[3]**. Thus, despite expanding the list of required qualification documents – it must be presented, for example, a declaration of compliance with the requirements of reserve of positions for people with disabilities and for rehabilitated of Social Security –, the NLLC starts to require them only from the winning bidder, unlike what provided for Federal Law 8,666/1993. This new scenario tends to make the entire bidding process faster and more dynamic, which is favorable both for potential competitors and for the Government, as well as for citizens who will benefit directly or indirectly from hiring.

From the brief overview above – which does not intend to exhaust all the changes promoted by the NLLC –, it is already possible to see that the new law intends, as far as possible, to modernize public procurement, which will have significant impacts on the infrastructure sector, with the possible attraction of more investment. In fact, the numbering of the law itself is already an “advance” in relation to the tongue lock of the famous Federal Law 8,666/1993.

However, there is no doubt that the proper functioning of the law in practice will require efforts not only from the Public Administration, but also from future bidders in the sector, to adapt to the new legal requirements. In fact, there are not few obstacles and questions that may arise as the law is being applied, but there is a strong hope that all parties involved in public procurement procedures will agree on their respective interests, so that the effective transition occurs in the least turbulent way possible.

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[1] During the transition period, the public manager is given the option of using the old or new regime, provided that different laws are not combined in the same contracting process.

[2] Bill (PL) 934/2023 attempts to extend the validity of the NLLC to December 31, 2024. It turns out that, having been presented to the Chamber of Deputies only on March 7, 2023, it is likely that, in due to the minimum regulatory deadlines, the processing and approval of the PL is not completed in both houses of the National Congress until April 1, 2023. That is, unless the extension occurs through a Provisional Measure of the Federal Executive Branch, there are great chances that the new law will be mandatorily applied from next month.

[3] Prior to the NLLC, the analysis of the qualification documents of all bidders preceded the judgment phase of their commercial proposals. With the advent of the new law, proposals are judged first, and then the documentation of the winning bidder is analyzed.

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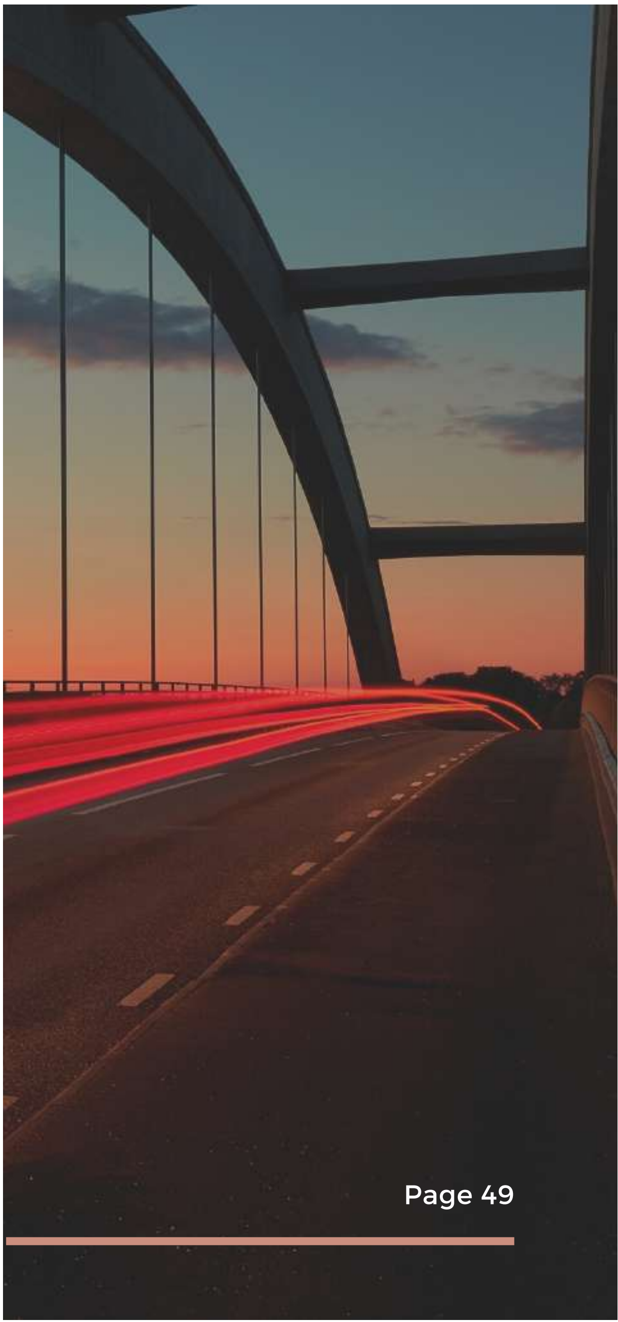
NEW BIDDING LAW: PREPARATIONS FOR THE START OF VALIDITY

Law No. 14,133, of April 1, 2021, known as the “New Bidding Law”, will enter into force effectively on December 30, 2023 (Provisional Measure No. 1,167 extends the original deadline, April 01, 2023, established in the New Bidding Law), with the repeal of Law No. 8,666/1993 (former Bidding Law), Law No. 10,520/2002, known as the Auction Law, and articles 1 to 47-A of Law No. 12,462/2011, which established the Differentiated Public Procurement Regime – RDC.

Notwithstanding the beginning of its validity, there are many topics that are the object of the New Bidding Law that, to be applied, depend on the issuance of decrees, ordinances and/or normative instructions from the Union, States, Federal District and Municipalities.



To date, relevant issues have been regulated at the federal level, such as Ordinance No. 938, of 02.02.2022, of the Special Secretariat for Debureaucratization, Management and Digital Government of then so called Ministry of Economy ("SEGES/ME"), which established the electronic catalog of standardization of purchases, services and works, within the scope of the direct federal, autarchic and foundational Public Administration, and can even be used by all federative entities. Through this regulation, there was the institution of models of notices, terms of reference, standardized contracts, and other documents for contracting services via electronic auction and through direct contracting.

Considering that the New Bidding Law provides that bids will preferably be carried out in electronic form, and the use is allowed in person, provided that the technical unfeasibility or disadvantage for the Administration in carrying out electronically is proven, there was the edition of Normative Instruction SEGES/ME No. 73, of 09.30.2022, which provides for bidding by the criterion of judgment for lower price or higher discount, in electronic form, for the contracting of goods, services and works, within the scope of the direct federal, autarchic and foundational Public Administration.

According to the regulations, the bidding will be carried out at a distance and in public session,

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through the Federal Government Purchasing System available at the electronic address www.gov.br/compras.

Also in the context of the bidding process in electronic format, we have the edition of Normative Instruction SEGES/ME No. 96, of 12.23.2022, which provides for bidding by the criterion of judgment for greater economic return, in electronic form, within the scope of the direct federal, autarchic and foundational public administration, to be adopted exclusively for the execution of efficiency contracts, thus understood those contracts that have the purpose of providing services, carrying out works and supplying goods, with the objective of providing savings to the contractor, in the form of reduction of current expenses, remunerating the contractor based on a percentage of the generated economy.

Another aspect already regulated is the structure of the Steering Committee of the National Public Procurement Network, responsible for the management of the National Public Procurement Portal ("PNCP"), which is the official website for the centralized and mandatory disclosure of the acts required by the New Bidding Law; as well as for the optional contracting by the bodies and entities of the Executive, Legislative and Judicial Powers of all federated entities (Decree No. 10.764, of 08.09.2021).

Recently there was the edition of Decree No. 11,430, of 03.08.2023, effective on March 30th of this year, which provides for the requirement, in public procurement, that at least 8% of labor vacancies must be constituted by women victims of domestic violence, in addition to establishing on the development, by the bidder, of equity actions between women and men in the work environment as a tiebreaker criterion in bids.

Vacancies for women victims of domestic violence include trans women, transvestites and other female gender possibilities and will be allocated primarily to black and brown women, observing the proportion in the federation unit where the service is provided, according to the last demographic census of the Brazilian Institute of Geography and Statistics – IBGE, and the unavailability of labor with the necessary qualification, to meet the contractual object, does not characterize non-compliance with such conditions.

As for equity actions between women and men as a tie-breaking criterion in bidding processes, the aforementioned Decree establishes that they must respect the following order: (i) measures of insertion, participation and equal professional ascent between women and men, including the proportion of women in positions of direction of the bidder; (ii) actions to promote equal opportunities and treatment between women and men in matters of employment and occupation; (iii) equal pay and wage parity between women and men; (iv) practices to prevent and confront moral and sexual harassment; (v) programs aimed at gender and race equity; and (vi) actions in health and safety at work that consider the differences between the genders.

Other issues have also been covered by regulations. However, there are many aspects that still await regulation at the federal level, such as, for example, as to the measures to be adopted by the winning bidder in contracting works, services, and large supplies (with an estimated value of more than R$ 200 million). According to the New Bidding Law, in contracts of this category, the Notice shall provide for the mandatory implementation of an integrity program by the winning bidder, within six months, counted from the execution of the contract, according to the regulation that will provide for the measures to be adopted, the form of proof and the penalties for non-compliance.

Another aspect also pending regulation refers to the payment of variable remuneration applicable to the Contractor's performance in the contracting of works, supplies and services, including engineering, based on goals, quality standards, environmental sustainability criteria and delivery deadlines defined in the bidding notice. According to the New Bidding Law, such payment may be adjusted on a percentage basis on the amount saved in each expense, when the object of the contract aims at the implementation of a rationalization process, in which case the expenses will be borne by the same budgetary credits, in the form of specific regulations, so far not edited.

Another aspect still pending regulation concerns the system of shared management, with the company, of information regarding the execution of the contract, to be offered by the PNCP. In this regard, it is awaited the regulation of how the communication will be established among the population and representatives of the Administration and the contractor designated to provide the relevant information and clarifications.

Another pending point of regulation that deserves highlighting are the procedures for verifying the occurrence of reasons for termination of the contract arising from situations such as: (i) non-compliance or irregular compliance with public notice rules or with contractual clauses, specifications, projects or deadlines; (ii) failure to comply with regular determinations issued by the authority designated to monitor and supervise its execution or by a higher authority; (iii) social change or modification of the purpose or structure of the company that restricts its ability to conclude the contract; (iv) decree of bankruptcy or civil insolvency, dissolution of the company or death of the contractor; (v) fortuitous event or *force majeure*, regularly proven, impeding the execution of the contract; among others.

All these themes may be the subject of regulations issued not only by the Union, but also by the States, Federal District and Municipalities. However, the New Bidding Law expressly indicates that these entities may apply, on an optional basis, the regulations issued or that may be issued by the Federal Government for the execution of the New Bidding Law.

While these and other aspects are not regulated, they will have limited effectiveness, despite the start of the New Bidding Law on December 30, 2023, which brings a certain legal uncertainty to the bidding processes that are to come.

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LOW BATTERY – TIME TO CHARGE

“Low battery – 1% charge remaining”. You've certainly seen this message on your phone and rushed to get a charger, right? Or, if you like technology, you may have seen this message in the electric cars that are trending in the automotive industry. But do you know how these batteries that integrate smartphones and electric cars are made? Do you know that this source of energy is due to the use of mineral resources such as lithium, nickel, and copper? You got it. Resources arising from mining activity are very present in our daily lives, but go unnoticed by the population, even at the time of that last breath of our electronic device.

And that is exactly why it is worth drawing attention to the role that mining has in the current world and mainly for contribution in the use of clean energy. Although mining has been the center of attention and discussions by the popular sense, especially about the impacts it can cause to the environment, what goes unnoticed by many is the fact that mining is the main way to generate wealth in a sustainable way to the country. Its resources are essential for the practice of many of the daily activities of the population, from the pencil used in school, the car that takes you to work or even the batteries of the cell phones that keep us always *online*.

Mining activity does not mean only exploration, without observing the sustainable character that should support its development, in compliance with the policies currently required. With respect to ESG agendas, technologies have been developed in favor of sustainable mining and aligned with the international agenda on climate change. In fact, mining represents an indispensable activity for the evolution of countries, with its recognized public utility. It would be unimaginable to live without minerals, metals, and metal compounds, essential for the life of plants, animals, and humans themselves.

In this scenario, mining activity has been highly valued and practiced for the purpose of using new energy sources, contributing to the reduction of greenhouse gases. Minerals such as nickel, copper, lithium, cobalt, niobium, titanium are great alternatives to contribute to cleaner and renewable energy sources.

And the use of these minerals will be essential for the so-called “energy transition”, which consists of replacing fossil fuels with cleaner energy sources.

This is a movement that the entire planet will need to adapt to, for the sake of the environment and sustainability. But it is worth noting that Brazil itself can be an important *player* in this transition. In addition to already having a predominantly clean matrix, the Brazilian territory is a major mineral producer, with potential reserves of rare earth elements, worldwide, also having great potential for copper and lithium production, for example.

In this context, mining has its sustainable character and can already start to be worked “at home”, since our territory is rich in relation to minerals that can contribute to the preservation of the environment and a more sustainable world, in the aspect of preventing CO2 emissions, contributing to the implementation of the international agenda on climate change.

How can we begin this transition?

For example, there has been a lot of talk these days about using lithium for battery production. But what is the real importance of this resource? The truth is that lithium has great potential in energy exchange and energy efficiency, being a highly reactive element.

The exploration of lithium has gained so much prominence today that, in August 2022, a decree was instituted to further increase research on lithium in Brazil, Decree 11,120/2022**[1]**, which aims at allowing the foreign trade operations of lithium minerals and ores and their derivatives, further boosting the production of the element in the territory.

And it is in this technological and sustainable wave that some Brazilian mining companies, for example, are already focused on the exploration and export of lithium, with production planning of thousands of tons per year, with the objective of participating in the global supply chain of electric vehicles. About this market, a *National Geographic* report demonstrated the importance of lithium, on a global level:

*“Used in batteries that power everything from smartphones to electric vehicles, global demand for lithium could increase more than 40-fold by 2040 if the world rapidly shifts from gas-powered to electric vehicles.”***[2]**

In this line, the use of Lithium for clean energy production can be a reality, mainly in the production of electric cars, since it would avoid the emission of CO2 into the atmosphere, given that there would be no burning of fossil fuels. A study prepared by the German Research Institute - IFO Institute**[3]** researched and calculated the impact that electric cars can cause, comparing the pollution produced by a Tesla Model 3 and a Mercedes C220d, with a diesel engine. This study concluded that the electric car is more environmentally friendly than a diesel-powered car if the energy used to recharge its batteries is derived from renewable sources.

On the other hand, it is necessary that this mining activity be always carried out in compliance with the sustainable nature that also underlies it. Any type of extraction of natural resources can be harmful to the environment, if it is not observed the sustainable character that should prevail in the exercise of this type of activity.

Thus, clean energy is a key point and hope for controlling the environmental damage caused to the planet. Its feasibility implies the intensive use of a wide range of minerals, also becoming a valuable and great opportunity for new businesses and challenges, mainly because there is recurrent worldwide concern about the need to reduce the impacts of human activity on rising temperatures and changing environmental conditions of the earth. There are several themes and conferences around sustainability and environmental protection. At the heart of these issues has always been the concern with the reduction of greenhouse gas (GHG) emissions generated by the energy industries, so that today they drive the decarbonization of national energy matrices, in exchange for cleaner energy.

In this context, clean energy, especially that generated by lithium batteries and electric cars, has a green light, if there is always cooperation between governments and private initiative, and can be a way to enable the responsible and proper extraction of these ores.

The awareness and development of public policies aimed at the need for sustainable development of mining is essential to ensure the development and expansion of clean and renewable energy sources not only at the national level, but also around the world. With clean energy, those batteries that keep you always online in the virtual world will also allow you to go online on the streets of the real world in a more sustainable way.

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SERIE - VOL. I - 1ST EDITION - BRAZIL, 2023

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