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EDITORIAL NOTE

With this third edition, the Brazilian Legal Society at NYU School of Law continues its commitment to expanding the dialogue between Brazilian law and international legal debates. Building on the success of the first two editions, this year's editorial team once again sought contributions from professionals and researchers attentive to the intersections between Brazil, the United States, and other global contexts.

The call for papers elicited a strong response: the Editorial Committee received nineteen articles for review. In accordance with the guidelines governing the Third Edition, all submitted papers were reviewed and evaluated by a panel of three (3) qualified NYU-alumni attorneys prior to publication. From that process, seven articles were selected for this issue.

This third edition of the BLS Annual Review brings together those seven articles exploring contemporary issues in Brazilian law and its intersections with the United States. Ana Clara Mattos Alves dos Santos examines third-party funding in Brazil through a study of judicial and arbitral cases; Juliana dos Santos Mendonça analyzes whether the bankruptcy court holds exclusive jurisdiction to pierce the corporate veil of the bankruptcy estate; Pedro Henrique Hernandez Argentina and Leonardo Bortolozzo Rossi discuss Brazil's "Dirty List" as a due diligence tool to combat modern slavery; Oscar Guillermo Farah Osorio examines the taxation of international stablecoin transfers under the IOF-Câmbio; Luis Felipe Spinelli, Luiza Coelho Guindani, and Matheus Gadonski Stortti Rosa revisit the Sociedade em Conta de Participação as an unincorporated investment structure for startups; Carolina Bouchardet draws lessons from the U.S. Big Tech governance experience for Brazil's corporate law reform; and Rafael Falcetta Correa addresses U.S. estate tax planning for Brazilian nonresident aliens with U.S. citizen or resident children.

Each piece offers a distinct perspective, and together we hope this issue contributes insights into Brazilian legal practice and shows how debates emerging from Brazil can engage with and inspire discussions elsewhere. This publication forms part of the broader set of initiatives promoted by the Brazilian Legal Society throughout the academic year, aimed at producing knowledge and strengthening the bridge between the Brazilian and American legal communities.

Being at NYU offers a unique academic and professional opportunity — and also a responsibility: to amplify Brazilian voices in the global debate and to celebrate the plurality and creativity that characterize Brazilian legal thought. May this edition reflect that commitment.

We wish you an excellent reading.

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ARTICLE

THIRD-PARTY FUNDING IN BRAZIL: A STUDY OF BRAZILIAN JUDICIAL AND ARBITRAL CASES

Ana Clara Mattos Alves dos Santos¹

Abstract: Brazil currently has no specific legislation regulating litigation finance. Nevertheless, the market for third-party funding has grown in the country for approximately ten years. Against this backdrop, this paper analyzes, based on case law, how judicial and arbitral tribunals view (i) the legality of this practice in Brazil; and (ii) the duty to disclose the full funding agreement. Based on this case analysis, the paper concludes that (i) arbitral tribunals in CAM-B3 proceedings confirm the validity and enforceability of funding agreements, whereas, in the Brazilian courts, there are cases in which such agreements have been declared ineffective; and (ii) CAM-B3 arbitral tribunals have consistently held that disclosure of the agreement is unnecessary for purposes of assessing potential conflicts of interest. On the other hand, in the Brazilian courts, the Brazilian Federal Supreme Court ordered disclosure of such agreements where public interest was at issue.

Keywords: Third-Party Funding. Investment Funds. Arbitration. Distressed Assets. Capital Markets. Financial Markets.

Resumo: O Brasil atualmente não possui uma legislação específica para regulação do financiamento de litígios. No entanto, o mercado de financiamento de litígios por terceiros tem crescido no país há cerca de dez anos. Nesse contexto, este artigo analisa, com base em julgados, a visão dos tribunais judiciais e arbitrais acerca (i) da legalidade dessa prática no país; e (ii) o dever de revelação da íntegra do contrato de financiamento. Com base nessa análise de casos, conclui-se que (i) os tribunais arbitrais em procedimentos da CAM-B3 reconhecem a validade e eficácia dos contratos de financiamento, enquanto na esfera judicial, há casos nos quais os contratos foram declarados ineficazes; e (ii) os tribunais arbitrais da CAM-B3 adotam entendimento pacífico acerca da desnecessidade de apresentação do contrato para fins de análise de potenciais conflitos de interesse. Por outro lado, no judiciário, o Supremo Tribunal Federal determinou a apresentação dos contratos quando existe interesse público em discussão.

Palavras-chave: Financiamento de Litígios por Terceiros. Fundos de Investimento. Arbitragem. Ativos Estressados. Mercado de Capitais. Mercado Financeiro.

I. INTRODUCTION

According to the International Council for Commercial Arbitration (ICCA), third-party funding may be understood as "an entity that has no interest in the underlying merits of a dispute but provides funding or resources for the purpose of financing the legal costs and expenses of an international arbitration."² João Castro also defines third-party funding as "the contract by which an economic actor agrees to finance the costs of a judicial or arbitral dispute

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²International Council for Commercial Arbitration [ICCA], REPORT OF THE ICCA-QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION (2018), <https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf>.

or to advance part of the potential proceeds of litigation, in exchange for a percentage of the dispute's economic result."³

Litigation funding may be more advantageous than other financing methods, such as bank loans, for three main reasons. First, in litigation funding, if the outcome of the litigation is unfavorable, the funded party does not have to reimburse the amount invested in the claim. Second, the funder may also contribute to the litigation through its know-how and network of law firms and legal experts. Third, by resorting to funding, companies can use available cash to invest in their products rather than allocating those resources to the costs of the case. Accordingly, litigation funding may serve as an alternative source of financial relief.⁴

From the perspective of investment fund managers, litigation funding represents another option for diversifying an asset portfolio and maximizing returns, particularly in lower-interest-rate environments.⁵ In addition, it is an investment uncorrelated with traditional economic risks because the success of the investment depends on three main factors: the success of the arguments asserted, the probability of payment by the counterparty, and the duration of the claim.⁶

In Brazil, there has been an increase in the number of asset managers operating in the distressed-assets segment, which includes litigation finance. In 2015, there were approximately five managers in this market in Brazil. Nine years later, that number had grown to forty-five managers.⁷ The Arbitration in Numbers Report stated that, in 2022 and 2023, there were fourteen active cases before Brazilian arbitral institutions with third-party funding: eleven before the Market Arbitration Chamber (CAM-B3), a chamber created in Brazil to resolve disputes involving publicly held companies listed on the Brazilian Stock Exchange (B3); two before the Center for Arbitration and Mediation of the Brazil-Canada Chamber of Commerce (CAM-CCBC); and one before the International Court of Arbitration (ICC).⁸

In this context, this paper analyzes Brazilian judicial and arbitral cases involving third-party funding to identify how courts and arbitral tribunals have addressed the validity and enforceability of these agreements, as well as the duty to disclose such agreements in their entirety (**Sections II and III**). Based on these cases, the paper draws two conclusions regarding the validity and enforceability of these agreements in Brazil and the limits of disclosure (**Section IV**).

II. JUDICIAL CASES

³João Mendes de Oliveira Castro, *O Financiamento de Litígios no Sistema de Solução de Controvérsias* [Litigation Funding in the Dispute Resolution System], in *LITIGATION FINANCE E SPECIAL SITUATIONS RB-1.1* (Guilherme Setoguti J. Pereira ed., 2023). <<https://next-proview.thomsonreuters.com/launchapp/title/rt/monografias/305345040/v1/page/V>>.

⁴Debora Visconte & Marianna Falconi Marra, *Apontamentos Sobre o Third Party Funding e Special Situations* [Notes on Third-Party Funding and Special Situations], in *LITIGATION FINANCE E SPECIAL SITUATIONS RB-5.1* (Guilherme Setoguti J. Pereira ed., 2023). <<https://next-proview.thomsonreuters.com/launchapp/title/rt/monografias/305345040/v1/page/V>>.

⁵Camila Du Plessis Lang, *Financiamento de Litígio: Estruturas e Tendências Atuais* [Litigation Funding: Current Structures and Trends], in *LITIGATION FINANCE E SPECIAL SITUATIONS RB-2.1* (Guilherme Setoguti J. Pereira ed., 2023). <<https://next-proview.thomsonreuters.com/launchapp/title/rt/monografias/305345040/v1/page/V>>.

⁶Isac Costa, *Como Comprar uma Briga: Variáveis Econômicas e Arranjos Jurídicos para Projetos de Litigation Finance no Brasil* [How to Buy a Fight: Economic Variables and Legal Arrangements for Litigation Finance Projects in Brazil], in *LITIGATION FINANCE E SPECIAL SITUATIONS RB-4.1* (Guilherme Setoguti J. Pereira ed., 2023). <<https://next-proview.thomsonreuters.com/launchapp/title/rt/monografias/305345040/v1/page/V>>.

⁷Fernanda Guimarães, *GESTORAS DE INVESTIMENTOS ALTERNATIVOS CRESCEM E TÊM MAIS DE R\$13 BILHÕES* [Alternative Investment Managers Grow and Have More than R\$13 Billion], *Valor Econômico* (Aug. 21, 2024), <<https://valor.globo.com/financas/noticia/2024/08/21/gestoras-de-investimentos-alternativos-crescem-e-tem-mais-de-r-13-bilhoes.ghtml>>.

⁸Selma Ferreira Lemes, *ARBITRAGEM EM NÚMEROS -- PESQUISA 2022/2023* [Arbitration in Numbers -- 2022/2023 Survey], at 16 (2024). <<https://canalarbitragem.com.br/wp-content/uploads/2024/12/Arbitragem-em-Numeros-2024.pdf>>.

a. Braskem Shareholder v. Odebrecht Group (Novonor)

On September 19, 2018, a minority shareholder of Braskem filed a damages action against companies of the Odebrecht Group (currently known as Novonor), in their capacity as Braskem's controlling shareholders. The purpose of the action was to obtain an order requiring the controlling shareholders to pay approximately US\$625,040,000.00 in damages to Braskem, based on alleged losses suffered by Braskem because of abusive acts by the Odebrecht Group that led to Braskem's involvement in the Operation Car Wash (Operação Lava-Jato), a corruption scheme.

The minority shareholder argued that Odebrecht Group had committed a series of breaches of its duties of care, including appointing corrupt officers; directing those officers to engage in corrupt acts in the conduct of Braskem's business; and approving Braskem's accounts despite being aware of those irregularities. This case was the first opportunity in which Brazilian courts ruled on the validity and enforceability of a litigation funding agreement.

Initially, on May 17, 2022, the judge of the Second Business and Arbitration Conflicts Court ordered the shareholder to clarify (i) whether the hiring of lawyers, legal experts, and other costs for filing the action were paid from the shareholder's own assets; (ii) whether there was a group of persons participating in the funding of the action and in any economic benefit arising from a potential favorable damages award; and (iii) the identity of those potential funders.⁹

The shareholder clarified that the legal opinions had been funded by "PSS Kyros Fundo de Investimento em Direitos Creditórios - Não Padronizados", a fund managed by Prisma Capital, a Brazilian asset manager founded in 2017.¹⁰ The judge then ordered the shareholder to disclose the funding agreement, under penalty of a fine for bad-faith litigation.¹¹ The shareholder filed an interlocutory appeal against that decision.

On September 20, 2022, the Court of Appeals of São Paulo reversed the decision ordering disclosure. According to the Court, "there is no impediment to a minority shareholder seeking financial assistance from third parties to share the high costs and risks of litigation." In addition, the Court waived production of the agreement because (i) the existence of funding "did not undermine the appellant's status as a minority shareholder [...]" or the appellant's standing to file the action; and (ii) "the inquiry into the identity of the funders of the procedural expenses" would be "entirely irrelevant."¹²

On October 27, 2025, the Brazilian Superior Court of Justice confirmed the Court of Appeals' decision on the ground that "the documentation filed by the respondent [i.e., the minority shareholder] would be sufficient to characterize the means used to finance the litigation and, therefore, it was incumbent on the appellants [i.e., the Odebrecht Group] to produce evidence to the contrary."¹³

b. EGESA Engenharia S.A. and Leste v. EGESA's Creditors

More recently, on August 13, 2024, the Court of Appeals of Minas Gerais issued a decision rendering ineffective the transfer of credit rights under a litigation funding agreement between EGESA Engenharia S.A. and "Leste Black

⁹Court of Appeals of São Paulo, Civil Procedure 1097498-46.2018.8.26.0100, Second Business and Arbitration Conflicts Court, Judge Eduardo Palma Pellegrinelli, decided on May 17, 2022, at 9.949-9.950.

¹⁰Prisma Capital, <<https://www.prismacapital.com>>.

¹¹Court of Appeals of São Paulo, Civil Procedure 1097498-46.2018.8.26.0100, Second Business and Arbitration Conflicts Court, Judge Eduardo Palma Pellegrinelli, decided on June 29, 2022, at 10.068-10.069.

¹²Court of Appeals of São Paulo, Interlocutory Appeal 2153411-63.2022.8.26.0000, Rapporteur Justice Natan Zelinski de Arruda, Second Reserved Chamber for Business Law, decided on Sept. 20, 2022, at 344-351.

¹³Superior Court of Justice, REsp 2.171.569/SP, Rapporteur Justice Humberto Martins, Third Chamber, decided on Oct. 27, 2025.

Belt Fundo de Investimento em Direitos Creditórios Não Padronizados",¹⁴ a fund managed by Leste, an alternative asset manager founded in 2014 in Rio de Janeiro.¹⁵

The commercial relationship between EGESA and Leste began on November 14, 2017, when the parties signed a funding agreement in the amount of US\$1,071,360.00 to cover EGESA's expenses in arbitral proceedings against Petrobras (i.e., Arbitral Proceedings 25/2015/SEC6 and 48/2014/SEC1). Subsequently, on May 27, 2021, EGESA and Leste signed a new funding agreement, in the amount of US\$456,320.00, to cover new costs in the arbitral proceedings. If EGESA prevailed in the cases, the fund managed by Leste would receive 4% of the credit rights arising from the arbitrations.

The Court of Appeals of Minas Gerais declared the funding agreement signed by the parties on May 27, 2021, to be ineffective for four reasons. First, the 2021 agreement was not a continuation of the 2017 agreement because the assignees of the credits were different: in the first agreement, the assignee was Leste Disputes LLC; in the second, it was "Leste Black Belt Fundo de Investimento em Direitos Creditórios Não Padronizados." Second, the 2021 agreement contained "no mention of an amendment, continuity, or contractual connection." Third, when Leste signed the 2021 funding agreement, it included a reservation that any encumbrances created over the credit rights arising from the arbitrations would have to be approved by Leste, failing which the agreement could be terminated. Fourth, Leste had a duty of diligence to analyze in advance the basis of the credit rights in the cases.

Despite the declaration that the agreement was ineffective, the Court of Appeals of Minas Gerais stated the legality of litigation finance: "there is no discussion at the level of validity, especially as to this mechanism of a third-party funding [...]. Although there is no express statutory provision for the institute, it is a recognized commercial practice [...]."¹⁶

c. Brazilian Municipalities v. BHP Group

Third-party funding was the subject of discussions before the Brazilian Federal Supreme Court in 2024. In this case, municipalities in the states of Minas Gerais, Espírito Santo, and Bahia filed damages actions against the BHP Group in foreign jurisdictions seeking payment abroad of US\$48,348,000,000.00 for the harm caused in Brazil by the collapse of the Mariana dam. To file those actions, the municipalities signed agreements with law firms in other countries, including Pogust Goodhead.¹⁷ According to the Brazilian Mining Institute (Instituto Brasileiro de Mineração - IBRAM), the agreements contained "provisions for remuneration of counsel through high percentages of the damages award."¹⁸

On October 12, 2024, Flávio Dino, Justice of the Brazilian Federal Supreme Court, preliminarily ordered that "the Municipalities [...], as proponents of claims before foreign courts, produce any agreements entered into with law firms in other countries," and that they not "make payment of attorneys' fees relating to lawsuits before foreign courts without prior examination of legality by the sovereign institutions of the Brazilian State, especially this STF."¹⁹

¹⁴Court of Appeals of Minas Gerais, Appeal 5097018-55.2022.8.13.0024, Rapporteur Justice Marcelo de Oliveira Milagres, Eighteenth Civil Chamber, decided on Aug. 13, 2024.

¹⁵Leste Group, <<https://www.leste.com/our-approach/>>.

¹⁶Court of Appeals of Minas Gerais, *supra* note 14, at 6-8.

¹⁷Carolina Ingizza, *Escritório que Defende Vítimas de Mariana Capta US\$552,5 Milhões para Litigar* [Law Firm Representing Mariana Victims Raises US\$552.5 Million to Litigate], *JOTA* (Oct. 2, 2023), <https://www.jota.info/justica/escritorio-que-defende-vitimas-de-mariana-capta-us-5525-milhoes-para-litigar>.

¹⁸Federal Supreme Court, ADPF-MC 1.178, Rapporteur Justice Flávio Dino, decided on Oct. 12, 2024, at 9, *confirmed by* Federal Supreme Court, ADPF-MC 1.178, Plenary, decided on Nov. 6, 2024.

¹⁹*Id.* at 19.

According to Justice Flávio Dino, the order requiring production of the funding agreements was based on (i) the "prohibition, in principle, on the payment by public entities of so-called success fees," in accordance with Federal Supreme Court precedents; and (ii) the fact that the execution of those funding agreements "would have consequences for a portion of national public assets and for the effective and full reparation of harm perpetrated on Brazilian soil."²⁰

III. ARBITRAL CASES

In arbitration, because arbitral proceedings are generally confidential, the use and acceptance of third-party funding in arbitration can be identified in two methods: (i) through administrative guidelines issued by Brazilian arbitral institutions; and (ii) through summaries of decisions published by the Câmara de Arbitragem do Mercado (CAM-B3), an arbitral institution used by publicly held companies listed on B3, the Brazilian stock exchange.

As to administrative guidelines (*item i*), since 2016, arbitral institutions have issued guidelines requesting that parties disclose, at the earliest opportunity, the existence of third-party funding, including the name and qualifications of the funder. Based on this information, arbitral institutions assess the existence of potential conflicts of interest among the parties, the funder, and the arbitral tribunal, and notify the opposing party of the funding agreement.

In this regard, reference can be made to Administrative Resolution 18/2016 of the Center for Arbitration and Mediation of the Brazil-Canada Chamber of Commerce (CAM-CCBC),²¹ Administrative Resolution 14/2020 of the Business Mediation and Arbitration Chamber -- Brazil (CAMARB),²² and Article 11(7) of the Rules of Arbitration of the International Chamber of Commerce (ICC).²³

In addition to these administrative guidelines, CAM-B3's digest of arbitral awards also reflects the understanding adopted by arbitral tribunals constituted in CAM-B3-administered proceedings on litigation finance (*item ii*).²⁴

On April 22, 2019, in an arbitral proceeding commenced against Petrobras, the arbitral tribunal ordered disclosure of the funders' "names and addresses," given information that the parties "were being funded by law firms based abroad, indicating their names and addresses." The arbitral tribunal also denied the request for "production of the agreements entered into with the funders," on the ground that they concerned "a matter unrelated to the proceeding and covered by confidentiality."²⁵

²⁰Federal Supreme Court, *supra* note 18, at 10.

²¹Center for Arbitration and Mediation of the Brazil-Canada Chamber of Commerce (CAM-CCBC), *Administrative Resolution 18/2016*, art. 4 ("In order to avoid potential conflicts of interest, CAM-CCBC recommends that the parties report the existence of third-party funding to CAM-CCBC at the earliest opportunity. The complete qualification of the funder should be included in this communication.").

²²Brazilian Chamber of Mediation and Arbitration (CAMARB), *Administrative Resolution 14/2020*, arts. 3.1--3.2 ("The existence of a Third-Party Funder may, in the parties' view, raise doubts as to the impartiality and independence of the arbitrators and any experts, given the possibility of professional or academic ties, relationships, or connections between them and the Third-Party Funder that may create conflicts of interest. Thus, in order to avoid conflicts of interest between the arbitrators, the experts, and the Third-Party Funder, CAMARB recommends that the funded party disclose, at the first opportunity, the existence and complete qualification of the Third-Party Funder.").

²³International Chamber of Commerce (ICC), *Arbitration Rules*, art. 11(7) (2021) ("In order to assist prospective arbitrators and arbitrators in complying with their duties under Articles 11(2) and 11(3), each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration.").

²⁴Market Arbitration Chamber (CAM-B3), EMENTÁRIO DE SENTENÇAS ARBITRAIS DA CÂMARA DO MERCADO [Digest of Arbitral Awards of the Market Chamber], 7th ed., <<https://www.camaradomercado.com.br/pt-br/ementario.html>>.

²⁵Market Arbitration Chamber (CAM-B3), Summary 33.1.2.2019 (Apr. 22, 2019), in EMENTÁRIO DE SENTENÇAS ARBITRAIS DA CÂMARA DO MERCADO [Digest of Arbitral Awards of the Market Chamber], 7th ed.

Less than one year later, on January 15, 2020, another CAM-B3 arbitral tribunal granted the "request that one of the Claimants confirm who the managers of the funded fund are" and concluded that the "terms of the funding agreement for purposes of verifying conflicts of interest" were irrelevant, as there was no "argument capable of justifying an exceptional circumstance in the specific case that would warrant disclosure of the content of that funding agreement."²⁶

Consistent with those decisions, in 2023 another arbitral tribunal ordered disclosure of the "identity of the third-party funder and its beneficiaries" in a corporate arbitration involving a publicly held company. The arbitral tribunal further concluded that "the production of the funding agreement between the party and the third-party funder is entirely unnecessary, because it has no impact on the assessment of the independence and impartiality of the members of the Arbitral Tribunal and its secretary."²⁷

Finally, in another corporate arbitration decided in 2023, the arbitral tribunal maintained the interpretation that "[c]onsidering that the identity of the third-party funder and its beneficiaries have already been disclosed, production of the funding agreement between the party and the third-party funder is entirely unnecessary." The arbitral tribunal reiterated that the agreement's terms "have no impact on the assessment of the independence and impartiality of the members of the Arbitral Tribunal and its secretary."^{28,29}

IV. CONCLUSIONS

Based on the cases analyzed, two conclusions can be drawn. The first concerns tribunals' acceptance of third-party funding as a commercial practice. The arbitral decisions rendered in CAM-B3 demonstrate that there is no divergence as to the validity and enforceability of funding agreements.

However, in the state courts, the enforceability of funding agreements has been questioned. Although the decisions confirm the legality of this market practice in Brazil, the Brazilian Federal Supreme Court questioned the validity and enforceability of these agreements due to the impossibility of establishing success fees in agreements entered into with the public administration (Brazilian Municipalities v. BHP Group). Similarly, the Court of Appeals of Minas Gerais, while stating that such agreements between private parties are valid, reiterated that the asset manager bears the burden of analyzing the existence of extrajudicial executions predating the execution of funding agreements, under penalty of having the agreement declared ineffective to protect the rights of other creditors.

The second conclusion concerns disclosure of the terms of the funding agreement. In CAM-B3 proceedings, arbitral tribunals have consistently held that disclosure of the agreement is unnecessary for purposes of assessing potential conflicts of interest. On the other hand, the Brazilian Federal Supreme Court ordered disclosure of the terms based on a national public interest that went beyond the merely private relationship between the parties.

²⁶Market Arbitration Chamber (CAM-B3), Summary 42.1.3.2020 (Jan. 15, 2020), in EMENTÁRIO DE SENTENÇAS ARBITRAIS DA CÂMARA DO MERCADO [Digest of Arbitral Awards of the Market Chamber], 7th ed.

²⁷Market Arbitration Chamber (CAM-B3), Summary 80.1.6.2023 (June 15, 2023), in EMENTÁRIO DE SENTENÇAS ARBITRAIS DA CÂMARA DO MERCADO [Digest of Arbitral Awards of the Market Chamber], 7th ed.

²⁸Market Arbitration Chamber (CAM-B3), Summary 86.1.7.2024 (Sept. 5, 2023), in EMENTÁRIO DE SENTENÇAS ARBITRAIS DA CÂMARA DO MERCADO [Digest of Arbitral Awards of the Market Chamber], 7th ed.

²⁹The understanding applied in CAM-B3 proceedings is similar to that adopted in the United States. See Andrew Roberts, *Practical Insights on Third-Party Funding -- United States of America*, Practical Insights on Arbitral Procedure, Kluwer Arbitration, <<https://www.kluwerarbitration.com/document/kli-kapp-piap-tpf-us>>.

Finally, although there are still few decisions addressing litigation finance in Brazil, the cases demonstrate greater predictability regarding the validity and enforceability of third-party funding in arbitration compared with Brazilian courts.

ARTICLE

DOES THE BANKRUPTCY COURT HAVE EXCLUSIVE JURISDICTION TO ANALYZE MOTIONS TO PIERCE THE CORPORATE VEIL OF THE BANKRUPTCY ESTATE?

Juliana dos Santos Mendonça³⁰

Abstract: This article aims to examine, from a bankruptcy law perspective, whether the general provisions of Law No. 11,101/2005 and the recent ruling on the Issue n. 1232 of General Repercussion by the Federal Supreme Court provide grounds for upholding the exclusive jurisdiction of the bankruptcy court in analyzing motions to pierce the corporate veil involving bankrupt corporations.

Keywords: Bankruptcy - Corporate veil piercing -- Jurisdiction - Universal bankruptcy court - Par conditio creditorum - Procedural speed - Procedural economy - Labor courts

Resumo: Este trabalho tem como objetivo examinar, sob a perspectiva falimentar, se as disposições gerais da Lei nº 11.101/2005 e o recente julgamento do Tema 1232 de Repercussão Geral do Supremo Tribunal Federal oferecem elementos para sustentar a competência exclusiva do juízo falimentar no processamento de incidentes de desconsideração da personalidade jurídica envolvendo sociedades falidas.

Palavras-chave: Falência - Desconsideração da personalidade jurídica - Competência - Juízo universal - Par conditio creditorum - Celeridade processual - Economia processual - Justiça do Trabalho

Introduction

Although the enactment of Law No. 14,112/2020, which reformed bankruptcy law in Brazil (the "Reform Law"), was widely praised for putting an end to the discussion held on whether the disregard doctrine could be applied in bankruptcy proceedings³¹, it also raised an important question: does its regulation under this provision imply that the "bankruptcy court has indivisible jurisdiction and is competent to hear" (article 76 of Law No. 11,101/2005, "LRF") all incidents involving the corporate veil piercing of the bankrupt entity?

This issue becomes even more intricate with respect to potential claims for corporate veil piercing brought by labor creditors, given that the Labor Courts retain jurisdiction to analyze labor-related claims up to the stage of liquidation of the credit (article 6, §2, of the LRF). Accordingly, considering that an incident for the disregard of legal entity may be initiated at any stage of the legal proceeding (article 134 of the Code of Civil Procedure), the question

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³¹COELHO, Fábio Ulhoa. *Comentários à Lei de falências e de recuperação de empresas* 14. ed. São Paulo: Thomson Reuters Brasil, 2021. § Art. 82-a. p. 304.

arises whether, during the cognizance phase, claimants of labor claims may request the Labor Court to pierce the corporate veil of the bankruptcy estate.

This matter has been the subject of intense debate in the higher courts, and the recent decision rendered by the Federal Supreme Court ("STF") on Theme 1232 of General Repercussion might shed a light into a possible solution for the problem.

1. THE INCORPORATION OF THE CORPORATE VEIL PIERCING IN THE BANKRUPTCY PROCEEDINGS

With the enactment of the Reform Law, in 2021, article 82-A of the LRF was amended to expressly settle the previous debate regarding the applicability of the doctrine in bankruptcy proceedings³².

Although the formalization was highly praised for finally putting an end to the discussion regarding the applicability of the disregard doctrine to bankruptcy proceedings, the writing left an unanswered question: when said article stated that "*the piercing of the corporate veil of the bankrupt company, for the purpose of holding third parties, the group, a partner, or a director liable for the company's obligations, may only be ordered by the bankruptcy court in accordance with Article 50 of Law 10,406*", does that mean that the bankruptcy court is the only one that holds jurisdiction to analyze motions to pierce the corporate veil against the bankruptcy estate? Or does it solely mean that when the bankruptcy court analyzes motions to pierce the corporate veil it must obey to the requirements of Article 50 of Law 10,406 (the Civil Code)? The matter remains unanswered.

2. PRINCIPLES AT ODDS

It is well established that Labor Law constitutes a branch of social law³³, in which state protection is "directed in a particularly specific manner toward subordinate workers - that is, laborers and employees"³⁴ by reason of their structural vulnerability.

This rationale is no different with respect to piercing the corporate veil. Indeed, even before the disregard doctrine was formally codified in either the Consumer Protection Code or the Civil Code, Brazilian labor case law had already recognized the possibility of holding shareholders personally liable for corporate debts on the basis of article 2, §2, of the Consolidation of Labor Laws³⁵.

³²DIAS, Maria Rita Rebello Pinho. A desconsideração da personalidade jurídica e a extensão da falência: alterações promovidas pela Lei nº 14.112/20. In: SCALZILLI, João Pedro (coord.); BERNIER, Joice Ruiz (coord.). *O Administrador Judicial e a Reforma da Lei 11.101/2005*. São Paulo: Grupo Almedina, 2022. *E-book*. p. 719.

³³According to Professor Cesarino Júnior, social law is the legal system designed to protect the underprivileged. (CESARINO JÚNIOR, Antônio Ferreira. *Evolução do Direito Social Brasileiro*. *Revista da Faculdade de Direito, Universidade de São Paulo*, São Paulo, v. 47, pp. 185--206, 1951. p. 186).

³⁴CESARINO JÚNIOR, Antônio Ferreira. *Evolução do Direito Social Brasileiro*. *Revista da Faculdade de Direito, Universidade de São Paulo*, São Paulo, v. 47, pp. 185--206, 1951. p. 186.

³⁵In that regard: TOMAZETTE, Marlon. Cinquenta Tons de Responsabilização: A ampliação da aplicação do incidente de desconsideração da personalidade para outros casos de responsabilização. In: ADAMEK, Marcelo Vieira von (coord.); CONTI, André Nunes (coord.). *Desconsideração da personalidade jurídica: Pressupostos. Consequências. Casuística*. v. 2. 1. ed. São Paulo: Quartier Latin, 2024. p. 135 e BARAÚNA, Augusto Cezar Ferreira De; TEIXEIRA, Ivo Massuete Oliveira. Desconsideração da personalidade jurídica trabalhista à luz do novo código de processo civil. *Revista do Direito do Trabalho e Meio Ambiente do Trabalho*. Brasília. v. 2. n. 1. pp. 57-76. Jan/Jun. 2016. p. 58.

Nevertheless, from a strictly bankruptcy-law perspective, it is possible to analyze - in light of the principle of the universality of bankruptcy jurisdiction - which court is best suited to accommodate the broader set of interests surrounding the subjective bankruptcy estate.

Article 76 of the LRF provides that "the bankruptcy court is indivisible and competent to hear all actions concerning the assets, interests, and business affairs of the bankrupt debtor." The indivisibility of bankruptcy jurisdiction means that the bankruptcy court is the sole court competent to analyze claims brought against the bankrupt debtor³⁶. Its universality, in turn, means that "the judge overseeing the bankruptcy proceeding is, in principle, competent to analyze all actions in which the bankruptcy estate has an interest"³⁷.

Such universality derives from the fact that all creditors become subject to the bankruptcy decree, which requires them to file their claims within the bankruptcy proceeding in order to receive payment³⁸, pursuant to articles 126, 99(IV), and 7, §1, of the LRF.

Since bankruptcy aims at the liquidation of the debtor's assets and the collective satisfaction of creditors, it follows logically that the court before which the bankruptcy proceeding is pending should centralize jurisdiction over related disputes, thereby enabling it to resolve controversies connected to the bankruptcy process with the necessary expertise and procedural efficiency³⁹.

Rules concentrating jurisdiction before the bankruptcy court are neither novel nor unique to Brazilian law. In the United States, for example, Chapter 11 proceedings are likewise governed by a principle of centralization of disputes affecting the debtor's rights before the Bankruptcy Court⁴⁰, while individual enforcement actions are generally stayed⁴¹.

Under U.S. bankruptcy law, bankruptcy judges are responsible for determining whether disputes involving the debtor qualify as "core" or "non-core" proceedings⁴². The bankruptcy court's authority over core matters is broad, whereas its authority over non-core matters is more limited⁴³.

In Brazil, it is likewise well established that the universality of bankruptcy jurisdiction admits exceptions - most notably with respect to the Labor Courts, which retain constitutional jurisdiction over labor claims pursuant to article 114 of the Federal Constitution and article 76 of the LRF.

It is precisely for this reason that the debate concerning jurisdiction over veil-piercing claims brought by labor creditors against bankrupt companies is so particularly complex.

³⁶SACRAMONE, Marcelo Barbosa. *Comentários à Lei de Recuperação de Empresa e Falência*. 6. ed. Rio de Janeiro: Saraiva Jur, 2025. E-book. p. 407 (Access through Proview).

³⁷BEZERRA FILHO, Manoel Justino; BEZERRA, Adriano Ribeiro Lyra; SANTOS, Eronides Aparecido Rodrigues dos. *Lei de recuperação de empresas e falência: Lei 11.101/2005: comentada artigo por artigo*. 8. ed. em e-book baseada na 17. ed. impressa. São Paulo: Thomson Reuters Brasil, 2025. § Art. 76. N.p. (Access through Proview).

³⁸NEGRÃO, Ricardo. *Falência e Recuperação de Empresas*. 7. ed. Rio de Janeiro: Saraiva Jur, 2022. E-book. p. 21.

³⁹MENDONÇA, José Xavier Carvalho de. *Tratado de Direito Comercial Brasileiro: Livro V -- Da Falência e da Concordata Preventiva*. Atualizada por Roberto Carvalho de Mendonça. v. VII. 6. Ed. Rio de Janeiro: Freitas Bastos, 1960. p. 259.

⁴⁰DALEY, Paul Patrick.; SHUSTER JUNIOR, George W. Bankruptcy Court Jurisdiction. *DePaul Business & Commercial Law Journal*, vol. 3, no. 3, Primavera de 2005, pp. 383-436. DePaul University. p. 435.

⁴¹MUSSMAN, William Edward; RIESENFELD, Stefan Albrecht. Jurisdiction in Bankruptcy. *Law and Contemporary Problems*. Durham, Carolina do Norte. v. 13, n. 1, 1948, pp. 88-113. Duke University. p. 105.

⁴²DALEY, Paul Patrick.; SHUSTER JUNIOR, George W. Bankruptcy Court Jurisdiction. *DePaul Business & Commercial Law Journal*, vol. 3, no. 3, Primavera de 2005, pp. 383-436. DePaul University. p. 391.

⁴³*Ibidem*.

3. THE MATTER IN THE SUPREME COURTS

Of the three superior courts with jurisdiction to address the issue examined in this article, only the Superior Court of Justice (Superior Tribunal de Justiça, "STJ") has settled its position on the matter. In August 2024, in the adjudication of Jurisdictional Conflict No. 200775/SP, Justice Nancy Andrighi, the original reporting Justice, concluded that, following the enactment of the Reform Law, the legislative had not only regulated the procedure for piercing the corporate veil within bankruptcy proceedings, but had also established a rule of exclusive jurisdiction. In her view, such exclusivity was justified because any different interpretation would violate the *par conditio creditorum* - that is, the "equal treatment within the same class"⁴⁴ of creditors - and would be inconsistent with the mandatory submission of labor claims within bankruptcy proceedings⁴⁵.

Justice Antônio Carlos Ferreira subsequently issued a concurring opinion that ultimately prevailed. He argued that, despite the ambiguous wording of the statutory provision, article 82-A of LRF did not establish exclusive jurisdiction in favor of the bankruptcy court. Rather, the provision merely clarified that piercing the corporate veil is distinct from extending the effects of bankruptcy, while also setting forth the rules to be observed by the court when analyzing such requests.

In addition, the Justice emphasized that any attachment of shareholders' assets in labor proceedings would neither affect the bankruptcy estate nor prejudice other creditors, since such measures would not affect the assets of the bankrupt company itself. The prevailing position adopted in Jurisdictional Conflict No. 200775/SP is consistent with several other decisions rendered by STJ⁴⁶.

STF, in turn, has not yet addressed the merits of the issue with the full court. Nevertheless, two single-justice decisions have already been rendered on the matter, reaching divergent conclusions⁴⁷.

In June 2025, STF came close to addressing the merits of the issue. However, the jurisdictional conflict at issue - Interlocutory Appeal in Jurisdictional Conflict No. 8.318/BA - was dismissed without consideration of the merits because Justice Flávio Dino, in a position later followed by the majority of the Court, held that no actual jurisdictional conflict existed, given that only one of the courts involved had ruled on its own jurisdiction. Accordingly, neither a positive nor a negative conflict of jurisdiction was deemed to exist⁴⁸.

Nonetheless, in *obiter dictum*, several Justices previewed their positions on the merits. While Justice Flávio Dino signaled agreement with the understanding adopted by the STJ, Justices Gilmar Mendes, Cristiano Zanin, André Mendonça, Dias Toffoli and Nunes Marques indicated that, in their view, article 82-A of the LRF conferred exclusive jurisdiction upon the bankruptcy court to analyze veil-piercing claims involving bankrupt companies.

⁴⁴SACRAMONE, Marcelo Barbosa. *Comentários à Lei de Recuperação de Empresa e Falência*. 6. ed. Rio de Janeiro: SRV, 2025. *E-book*. p. 407 (Access through Minha Biblioteca Digital).

⁴⁵BRAZIL, STJ, Jurisdictional Conflict No. 200775/SP, Justice Antônio Carlos Ferreira, Second Section, judged in August 28, 2024, published in September, 11, 2024.

⁴⁶In this regard: BRAZIL, STJ, Internal appeal in the motion for clarification on the jurisdictional conflict No.200215/GO, Second Section, Justice Daniela Teixeira, judged in September 10, 2025 published in September, 15, 2025; BRAZIL, STJ, Internal appeal in the motion for clarification on the jurisdictional conflict No.201133/RN, Second Section, Justice Daniela Teixeira, judged in September 10, 2025, published in September, 15, 2025; BRAZIL, STJ, Internal appeal on the jurisdictional conflict No. 190942/GO, Second Section, Justice Otávio de Noronha, judged in May, 30, 2025, published in June 5th, 2023.

⁴⁷BRAZIL, STF, Constitutional appeal against dilatory or abusive acts of the judge No. 83.535/SP, Justice Gilmar Mendes, Sole decision, judged in September 2nd, 2025, published in September 3rd, 2025.

⁴⁸BRAZIL, STF, Internal interlocutory appeal on the jurisdictional conflict 8.318/BA, Justice Flávio Dino, Full Court, judged in June 16th, 2025, published in August 15, 2025.

Finally, before the Supreme Labor Court (Tribunal Superior do Trabalho, "TST"), the issue remains highly contentious. Last year, Topic No. 26 was admitted for review under the repetitive appeals procedure in Appeal No. 0024462-27.2023.5.24.0000⁴⁹ in order to determine whether: (i) the Labor Courts may process and adjudicate veil-piercing proceedings involving companies undergoing judicial reorganization, while continuing enforcement proceedings against the shareholders; (ii) such jurisdiction survives the amendments introduced by the Reform Law; and (iii) where a company is undergoing judicial reorganization, the specific framework established by the LRF displaces the proof of abuse of the legal entity, as in regular civil proceedings.

The need to settle the issue is justified by the fact that, since the enactment of the Reform Law, TST has issued decisions in both directions - concerning both bankrupt companies and companies undergoing judicial reorganization. Decisions upholding the Labor Courts' jurisdiction to analyze veil-piercing claims involving bankrupt companies relied on reasoning similar to that adopted by the STJ, particularly regarding the absence of attachment of the bankrupt company's assets and the lack of any statutory rule establishing exclusive jurisdiction over the matter⁵⁰.

By contrast, decisions holding that the Labor Courts lost jurisdiction over the matter following the enactment of the Reform Law conclude that TST's former understanding must be revised in light of the legislative amendments introduced into the LRF⁵¹.

However, before TST was able to render a decision on the matter, STF analyzed the Theme 1232 of General Repercussion, which ultimately has a direct impact on discussions regarding the bankruptcy court's jurisdiction to review motions to pierce the corporate veil of the bankrupt company.

4. THE RECENT RESOLUTION OF STF'S THEME OF GENERAL REPERCUSSION 1232 AND THE GLIMPSES OF A SOLUTION TO THE MATTER AT HAND

The decision rendered by STF in the Theme 1232 of General Repercussion⁵² stated that partners can only be held liable by a company's labor debts in the enforcement proceeding of labor credits if (i) they were originally a part on the cognizance phase, with basis on the 2nd article of Consolidation of Labor Laws or (ii) if the corporate veil of the company is pierced under the circumstances listed in the article 50 of the Civil Code.

Therefore, by extension, STF has decided that the disregard of the legal entity in the Labor Courts also obey the called "teoria maior"⁵³ of the corporate veil piercing, that demands proof of abuse of the legal entity to be enforced -- exactly like in bankruptcy proceedings (article 82-A of LRF).

⁴⁹BRAZIL, TST, Appeal 0024462-27.2023.5.24.0000, Justice Amaury Rodrigues Pinto Jr, judged in April 30, 2025, published in May 6th, 2025.

⁵⁰In this regard: BRAZIL, TST, Appeal 192600-41.2002.5.02.0020, 7th Pannel, Justice Alexandre de Souza Agra Belmonte, judged in April 19, 2023, published in April 28, 2023 e BRAZIL, TST, Interlocutory appeal in the appeal No. 744-64.2019.5.23.0001, 5th Pannel, Justice Morgana de Almeida Richa, judged in September 6th, 2023, published in September 11, 2023.

⁵¹For example: BRAZIL, TST, Interlocutory appeal in the appeal 0000006-29.2017.5.09.0133, 8th Pannel, Justice Sergio Pinto Martins, judged in October 4th, 2024, published in October 9, 2024 e BRAZIL, TST, Interlocutory appeal in the appeal 10046-49.2019.5.03.0042, 6th Pannel, Justice Katia Magalhaes Arruda, judged in May 25, 2023, published in May 26, 2023.

⁵²BRAZIL, STF, Extraordinary Appeal 1387795, Full Court, Justice Dias Toffoli, judged in October 10, 2025, published October 17, 2025.

⁵³"The 'teoria maior' of the disregard doctrine, general rule of the brazilian legal system, can not be applied solely based on the fact that the company is insolvent an can not pay its debts. There is a demand here that beyond the proof of insolvency, the creditor must also proof either deviation of purpose of the legal entity (subjective theory of the disregard doctrine), or the asset fraud (objective theory of the disregard theory)" (BRASIL, Superior Tribunal de Justiça, REsp 279.273/SP, Terceira Turma, Rel. para acórdão Min. Nancy Andrichi, j. 4.12.2003, DJ 29.3.2004.)

Thus, considering that, in the light of the recent statement rendered in the Theme 1232 of General Repercussion, in regards to motion to pierce the corporate veil, the same rules apply both to labor and bankruptcy courts, the same facts that could allegedly be considered abusive in the first, could also be classified as abusive in the latter.

In this scenario, the argument presented by STJ that there is no violation to the principle of *par conditio creditorum* with the possibility of labor courts holding jurisdiction to motion to pierce the corporate veil of bankruptcy states, because there are no estates' assets being seized, falls apart.

In light of the alleged abusive act, even if the assets do not belong to the bankruptcy estate, they could, in theory, become part of the bankruptcy estate -- as in the pool assets that are made available to the body of creditors under the bankruptcy proceeding. By consequence, the *par conditio creditorum* establishes that all creditors, and not only a few labor creditors, should benefit from the imposition of financial liability to the partners or former administrators of the bankruptcy estate.

After all, accordingly, the body of creditors, understood as the collective pool of interests held by the bankrupt debtor's creditors⁵⁴, has a clear interest in participating in veil-piercing proceedings brought against the bankrupt company⁵⁵, since such proceedings may ultimately lead to the expansion of the objective bankruptcy estate - *i.e.*, the pool of assets subject to the bankruptcy proceeding⁵⁶.

Thus, as noted by Professor Luiz Paiva, piercing the corporate veil in the context of bankruptcy "can under no circumstances exclusively or preferentially benefit the creditor who initiated the veil-piercing proceeding"⁵⁷. Rather, any amounts recovered through a favorable judgment in such proceedings - or through any settlement reached therein - must be incorporated into the objective bankruptcy estate "and distributed among creditors in accordance with the classification and payment priority rules established by the Brazilian Bankruptcy and Restructuring Law"⁵⁸.

Professor Renato Castro, in turn, argues that the violation of the *par conditio creditorum* would arise from granting an advantage to labor creditors who succeed in veil-piercing claims before the Labor Courts "through the direct attachment of the shareholders' assets," since such creditors could potentially satisfy their claims "to the detriment of the legally established order of payment"⁵⁹.

In other words, although the assets targeted through veil piercing do not, strictly speaking, belong to the bankrupt company - which would, at first glance, appear to preclude the bankruptcy court's jurisdiction - the possible existence of abuse of the corporate form may justify expanding the objective bankruptcy estate through the inclusion of the

⁵⁴COELHO, Fábio Ulhoa. *Comentários à Lei de falências e de recuperação de empresas*. 14. ed. São Paulo: Thomson Reuters Brasil, 2021. § Art. 76. p. 295.

⁵⁵PAIVA, Luiz Fernando Valente de; CARRIÇO, Bruno Ferreira. Da atuação dos credores em IDPJ em processos de falência - do cenário atual e das perspectivas ante o Projeto de Lei 03/2024. In: ADAMEK, Marcelo Vieira von (coord.); CONTI, André Nunes (coord.). *Desconsideração da personalidade jurídica: Pressupostos. Consequências. Casuística*. v. 2. 1. ed. São Paulo: Quartier Latin, 2024. pp. 382-383.

⁵⁶SACRAMONE, Marcelo Barbosa. *Comentários à Lei de Recuperação de Empresa e Falência*. 6. ed. Rio de Janeiro: Saraiva Jur, 2025. E-book. p. 56 (Acesso via Minha Biblioteca Digital).

⁵⁷PAIVA, Luiz Fernando Valente de; CARRIÇO, Bruno Ferreira. Da atuação dos credores em IDPJ em processos de falência - do cenário atual e das perspectivas ante o Projeto de Lei 03/2024. In: ADAMEK, Marcelo Vieira von (coord.); CONTI, André Nunes (coord.). *Desconsideração da personalidade jurídica: Pressupostos. Consequências. Casuística*. v. 2. 1. ed. São Paulo: Quartier Latin, 2024. p. 382.

⁵⁸*Ibidem*.

⁵⁹CASTRO, Renato Rossetti Vallim de. O incidente de desconsideração da personalidade jurídica por débitos trabalhistas de sociedades em recuperação judicial: uma análise da jurisprudência dos tribunais superiores. *Migalhas*, São Paulo, 2025. Disponível em: <<https://www.migalhas.com.br/depeso/441053/desconsideracao-da-personalidade-juridica-trabalhista-em-recuperacao>>. Acesso em: 21 nov. 2025.

shareholders' assets within the bankruptcy pool, a result that is plainly in the interest of all creditors of the bankrupt company.

Accordingly, given the interest of the body of creditors in ensuring that all creditors - rather than only a select group of them - benefit from the imposition of patrimonial liability upon the shareholders for the debts of the bankrupt company, and considering that "[a]ny interpretation that offends, restricts, or nullifies"⁶⁰ equality among creditors "must be rejected"⁶¹, it appears that the principle of the universality of the bankruptcy court's jurisdiction should prevail so as to avoid any violation of the *par conditio creditorum*. This, in turn, entails the exclusive jurisdiction of the bankruptcy court to adjudicate veil-piercing claims involving bankrupt companies.

5. CONCLUSIONS

In short, STF's recent ruling in Theme 1232 of General Repercussion has significantly reshaped the debate surrounding jurisdiction over veil-piercing claims involving bankrupt companies - particularly when raised within labor proceedings - by reinforcing the applicability of the abuse standard set forth in article 50 of the Civil Code within labor proceedings, thereby bringing labor and bankruptcy veil-piercing regimes substantially closer together. In this context, the discussion has acquired renewed urgency at the end of 2025 and is likely to remain at the center of judicial and academic attention in the coming years, especially given the submission of Topic No. 26 for review under the repetitive appeals procedure in TST and the pending poll of Law Project 5.610/2025.

⁶⁰MENDONÇA, José Xavier Carvalho de. *Tratado de Direito Comercial Brasileiro: Livro V -- Da Falência e da Concordata Preventiva*. Atualizada por Roberto Carvalho de Mendonça. v. VII. 6. Ed. Rio de Janeiro: Freitas Bastos, 1960. p. 159.

⁶¹*Ibidem*.

ARTICLE

Brazil's 'Dirty List' as a Due Diligence Tool to Combat Modern Slavery

Pedro Henrique Hernandez Argentina⁶² | Leonardo Bortolozzo Rossi⁶³

Abstract: Modern slavery is a multifaceted phenomenon incorporating international, regional, and national norms. It encompasses several actors, including the State and multinational corporations. Its occurrence in global supply chains has pressured the latter to adopt preventive measures in their operations, known as due diligence. This study aims to present the concept of modern slavery from both an international and a Brazilian perspective, given that Brazil is regarded as an advanced country in the regulation of modern slavery. Internationally, the analysis draws on a doctrinal examination of norms from both the International Labour Organization (ILO) and the United Nations (UN). From the Brazilian perspective, the study examines the issue through the framework of the Brazilian Penal Code and the Federal Constitution. Furthermore, this paper seeks to examine the so-called 'Dirty List' published by the Brazilian Ministry of Labour and Employment, demonstrating how this list may be regarded as a significant mechanism within corporate risk assessment reports --- commonly referred to as due diligence processes --- which are employed to prevent risks arising from relationships with third parties in business activities.

Keywords: Dirty List; modern slavery; slave-like labor; due diligence; compliance.

Resumo: A escravidão moderna é um fenômeno multifacetado que envolve normas internacionais, regionais e nacionais. Abrange diversos atores, incluindo o Estado e as empresas multinacionais. Sua ocorrência nas cadeias de abastecimento globais tem pressionado estas últimas a adotarem medidas preventivas em suas operações, conhecidas como devida diligência. Este estudo tem como objetivo apresentar o conceito de escravidão moderna tanto de uma perspectiva internacional quanto brasileira, uma vez que o Brasil é considerado um país avançado na regulamentação da escravidão moderna. Internacionalmente, a análise baseia-se em um exame doutrinário das normas tanto da Organização Internacional do Trabalho (OIT) quanto das Nações Unidas (ONU). Da perspectiva brasileira, o estudo examina a questão por meio do marco do Código Penal Brasileiro e da Constituição Federal. Além disso, este artigo busca examinar a chamada "Lista Suja", publicada pelo Ministério do Trabalho e Emprego do Brasil, demonstrando como essa lista pode ser considerada um mecanismo significativo nos relatórios de avaliação de risco corporativo -- - comumente chamados de processos de due diligence --- que são empregados para prevenir riscos decorrentes de relações com terceiros nas atividades empresariais.

Palavras-chave: Lista Suja; escravidão moderna; trabalho análogo à escravidão; due diligence; compliance.

1. INTRODUCTION

Modern slavery remains a tragic reality, affecting vulnerable individuals across numerous countries worldwide. The severity of this issue becomes even more evident when institutions such as the United Nations (UN) and the International Labour Organization (ILO) address the matter, presenting alarming data that indicate a disturbing increase in the number of reported cases.

The International Labour Organization also conducts several studies and publishes reports containing alarming data on the rates of modern slavery. According to the most recent surveys, approximately 27.6 million people are

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subjected to forced labor, many of whom are women and girls⁶⁴. Regarding the profits generated through this activity, estimates indicate gains reaching approximately 236 billion dollars⁶⁵, these high figures represent the difference between what employers actually pay workers and what should be paid under decent working conditions, that is, in the absence of forced labour⁶⁶.

Within the ILO framework, both Convention No. 29 of 1930 and Convention No. 105 of 1957 provide a concept of forced labour, understood as a current form of modern slavery, defined as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.

In Brazil, this issue is examined and defined as a condition analogous to slavery, receiving legal protection under both Brazilian criminal law and the Federal Constitution. In this context, the present study aims to present these concepts from both of the aforementioned perspectives, namely the international approach and the Brazilian national perspective.

In view of the importance of combating this phenomenon, Brazil has established a mechanism known as the 'Dirty List', which consists of a registry of employers identified as subjecting their workers to conditions that characterize modern slavery per Brazilian Law. This list is administered by the Ministry of Labour and Employment and is published every six months.

Companies that maintain a robust compliance program and conduct risk assessments through due diligence mechanisms may use the consultation of the 'Dirty List' as one of their sources for risk analysis, with the purpose of preventing involvement with third parties identified on the list and severing relationships and incentives associated with modern slavery.

In light of this, this paper seeks to answer the following research question: what is the scope of international norms on modern slavery in the policies, regulations, and legislation of Brazil? Methodologically, it employs a doctrinal analysis focusing on this two-tier framework --- international and Brazilian --- while also drawing on primary sources, including a critical analysis of ILO Conventions and Brazilian norms.

In the first section, modern slavery will be analysed through the lens of the International Labour Organization (ILO), with the aim of providing an international perspective on the issue. Subsequently, in the second section, the study intends to address labor conditions analogous to slavery in Brazil.

Following these contextualizations, the objective is to present the mechanism known as the 'Dirty List', as well as to demonstrate how this registry may be used as an important compliance tool, constituting an essential source within due diligence reports in order to prevent relationships with third parties that may pose risks in this regard.

2. MODERN SLAVERY ACCORDING TO INTERNATIONAL ORGANIZATIONS

As previously mentioned, modern slavery has long been a subject of international debate, and combating it has been a priority for major institutions such as the International Labour Organization (ILO). Accordingly, this section

⁶⁴International Labour Organization, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* 2 (2022), <https://www.ilo.org/publications/major-publications/global-estimates-modern-slavery-forced-labour-and-forced-marriage> (last visited May 8, 2026).

⁶⁵International Labour Organization, *Profits and Poverty: The Economics of Forced Labour* 1 (2024), <https://www.ilo.org/publications/major-publications/profits-and-poverty-economics-forced-labour> (last visited May 9, 2026).

⁶⁶Id. at 13.

aims to address important concepts established in the Convention No. 29 of the International Labour Organization (1930)

The International Labour Organization (ILO) is an international agency with global impact whose primary objective is to promote and protect labor rights, as well as to seek improved working conditions. Among its various functions, the ILO holds the authority to establish international labor standards through the adoption of instruments known as conventions⁶⁷.

One of the main instruments aimed at combating modern slavery is the Forced Labour Convention, 1930 (No. 29), also known as Convention No. 29. In its Article 2, the Convention defines the concept of forced or compulsory labour as: '[...] all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'⁶⁸.

Therefore, the definition provided by the International Labour Organization (ILO) is based on three key elements that characterize modern slavery: work, menace, and involuntariness. These concepts are also further elaborated by the ILO. According to the organization, 'work' (or service) refers to any type of labor, including that performed within the informal economy; "menace" refers to any form of punishment or penalty that may be used to compel an individual to work; and 'involuntariness' contrasts with the notion of voluntariness, in the sense that the work is performed without the free and informed consent of the individual⁶⁹.

In sum, for the occurrence of forced labour, two cumulative requirements are necessary: the threat of a penalty for work (1) which the person did not express their free and unconditional will to perform (2). Beyond exploitation, the concept of forced labour encompasses the notion of coercion.

Jean Allain⁷⁰ argues that the first requirement --- the threat of a penalty --- encompasses the loss of rights and privileges. Thus, it must be understood broadly, in relation to the right to free choice of employment. The second requirement is linked to consent, as it refers to the voluntary offer of labour, through which the inalienable character of free labour is reaffirmed. Both requirements constantly overlap, making it difficult to categorise the exact occurrence of each in a concrete case.

The definition was reaffirmed in ILO Convention No. 105 on the Abolition of Forced Labour of 1957. The Convention obliges ratifying Member States to adopt measures for the abolition of forced labour (Article 1). Beyond these two core conventions conceptualising forced labour, there are ILO Conventions directed at specific sectors of economic activity.⁷¹ The following section will present the Brazilian perspective on this unlawful practice.

2.1. Labour analogous to slavery in Brazil

To conceptualize modern slavery in Brazil, the present study proposes its definition based on two national legal instruments: the Federal Constitution and the Brazilian Penal Code.

⁶⁷See Constitution of the International Labour Organization art. 19, <https://www.ilo.org/sites/default/files/2024-04/ILO%20Constitution-2021-%5BJUR-210720-001%5D-Web-EN.pdf> (last visited May 24, 2026).

⁶⁸International Labour Organization, *Forced Labour Convention, 1930 (No. 29)*, https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029 (last visited May 7, 2026).

⁶⁹International Labour Organization, *What Is Forced Labour?*, <https://www.ilo.org/topics/forced-labour-modern-slavery-and-trafficking-persons/what-forced-labour> (last visited May 8, 2026).

⁷⁰Jean Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* 144--55 (Martinus Nijhoff Publishers 2013).

⁷¹Among these, Convention No. 176 on Safety and Health in Mines, Convention No. 181 on Private Employment Agencies, Convention No. 188 on Work in Fishing, and Convention No. 191 on a Safe and Healthy Working Environment all reaffirm in their preambles the obligation to eradicate all forms of forced labour.

Article 1 of the Constitution of the Federative Republic of Brazil sets out the foundations that constitute the cornerstone of the Democratic Rule of Law. Among these foundational principles are human dignity and the social value of labour⁷².

Another relevant provision of the Brazilian Federal Constitution is Article 5, entitled 'Fundamental Rights and Guarantees', which consolidates the fundamental rights and guarantees of the human person. According to item III, '[...] no one shall be subjected to torture or to inhuman or degrading treatment'⁷³. It is also important to highlight Article 7 of the Constitution, which concerns 'social rights'⁷⁴ and sets out a list of provisions outlining the rights afforded to workers. The social rights enumerated in this article establish protections for workers, as well as ensuring access to decent work.

To combat labour exploitation and situations analogous to slavery, the Brazilian Federal Constitution establishes Article 243. This provision states that rural and urban properties identified as involving labour conditions analogous to slavery may be subject to State sanctions, such as expropriation. Furthermore, any assets seized as a result of such unlawful practices shall be confiscated and allocated to specific social purposes⁷⁵.

Another Brazilian legal instrument that supports the fight against labor conditions analogous to slavery is the Brazilian Penal Code, which classifies such practices as a criminal offense. Therefore, slave labor should not be understood solely from a labor law perspective, as noted in the study *Slave Labor in Brazil's Meat Industry*, which states that 'slave labour cannot be seen merely as a violation of labour laws. It is defined as a crime against human dignity under Article 149 of the Brazilian Penal Code'⁷⁶.

The Brazilian Penal Code defines which conducts are considered crimes in the country, as well as establishing the corresponding sanctions applicable in each specific situation, serving as the foundation of criminal law in Brazil.

Regarding labor conditions analogous to slavery, the Brazilian Penal Code establishes a specific provision on the matter in Article 149. Brazilian criminal law classifies as conditions analogous to slavery subjecting a worker to forced labor or exhaustive working hours, as well as to degrading working conditions. The provision also includes as forms of slave-like labor situations in which the worker's freedom of movement is restricted through the withholding of transportation means, with the purpose of preventing their departure from the workplace. The same unlawful condition is characterized when the workplace is under constant and oppressive surveillance, or when the employer confiscates the worker's personal documents or belongings in order to prevent them from leaving the work environment⁷⁷.

In 2003, the Brazilian Congress amended the provision of the Brazilian Penal Code addressing this practice, in order to more comprehensively define the crime of labor analogous to slavery. In this sense, the article incorporated the various situations mentioned above. According to Silva, '[...] Article 149 added situations that damage human

⁷²Constitution of the Federative Republic of Brazil art. 1, III--IV (1988), English version published in 2022, at 14, https://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/brazil_federal_constitution.pdf (last visited May 9, 2026).

⁷³Id. at 16. Article 5, subparagraph III.

⁷⁴Id. at 16. Article 7.

⁷⁵Id. at 205. Article 243 in its entirety: 'Article 243. Rural and urban properties in any region of the country where illegal plantations of psychotropic plants are found or the exploitation of slave labor is uncovered, as defined by law, shall be expropriated and assigned to agrarian reform and to low-income housing programs, with no indemnity to the owner and without prejudice to other sanctions set forth by law, with due regard, when appropriate, for the provisions of Article 5. (CA 81, 2014) Sole paragraph. Any and all goods of economic value seized as a result of illegal traffic of narcotics and similar drugs and of the exploitation of slave labor shall be confiscated and shall revert to a special fund for a specific purpose, as the law provides. (CA 81, 2014).

⁷⁶Repórter Brasil, *Slave Labor in Brazil's Meat Industry* 5 (2021), <https://reporterbrasil.org.br/wp-content/uploads/2021/01/Monitor-8-Slave-labor-in-Brazils-meat-industry.pdf> (last visited May 9, 2026).

⁷⁷Código Penal [C.P.] art. 149 (Braz.) (Decree-Law No. 2,848, of Dec. 7, 1940), https://www.planalto.gov.br/ccivil_03/decreto-lei/del2848compilado.htm (last visited May 9, 2026).

dignity: debt, exhausting journeys, degrading work conditions, intense surveillance, retention of documents or personal possessions, and restraints on transportation use⁷⁸.

Thus, this section aimed to present concepts related to modern slavery from two perspectives: an international one and a Brazilian one. In this regard, the international discussion addressed concepts developed by the International Labour Organization and the United Nations. In relation to the concept adopted in Brazil and its legal framework within the country, legislative instruments that incorporate the fight against modern slavery were examined, namely the Federal Constitution and the Brazilian Penal Code.

3. BRAZIL'S "DIRTY LIST" AS A RESEARCH TOOL IN DUE DILIGENCE INVESTIGATIONS

To combat labor conditions analogous to slavery, Brazil has a mechanism known as the 'Dirty List' under the responsibility of the Ministry of Labour and Employment. Initially, it is necessary to explain what the Ministry of Labour and Employment is and how it operates; it is, therefore, a body of the Brazilian Federal Government whose various functions include the formulation and implementation of public policies related to labor and employment.

In this context, the Ministry of Labour and Employment performs its functions through labour inspectors, who conduct inspections to verify compliance with labour regulations and, as part of this process, assess working conditions. This same authority is responsible for maintaining the so-called 'Dirty List'.

The 'Dirty List' consists of an official registry that discloses individuals and legal entities identified as exploiting workers and subjecting them to conditions analogous to slavery.

This registry of employers was created in 2003⁷⁹ as one of the measures integrated into national policies to combat modern slavery, and in 2020 its constitutionality was confirmed by the Supremo Tribunal Federal⁸⁰. Currently, the 'Dirty List' is regulated by Interministerial Ordinance No. 18 of 2024⁸¹. The list is published on a semiannual basis, and its purpose is to promote greater transparency regarding inspection actions and enforcement measures in the fight against modern slavery⁸². In its most recent edition (April 2026), the list includes 169 employers, comprising 102 individuals and 67 legal entities⁸³.

For an employer to be included in the list, an administrative procedure is conducted by the same Ministry mentioned above. The entire process follows specific stages that ensure the rights to full defense and adversarial proceedings. In this regard, following inspections carried out by labor inspectors and the identification of irregularities, the employer is issued violation notices and, from that moment onward, becomes subject to an administrative proceeding.

⁷⁸Nauber Gavski da Silva, Brazil's Dirty List of Slave Labor: A Cat and Mouse Legal Dispute, 7 Int'l Lab. Rts. Case L. 175, 175 (2021), <https://doi.org/10.1163/24056901-07020011> (last visited May 9, 2026).

⁷⁹*Id.*

⁸⁰Repórter Brasil, *supra* note 15, at 7.

⁸¹Official Journal of the Union. *Interministerial administrative order No. 18*. Portuguese version available at <https://www.gov.br/trabalho-e-emprego/pt-br/assuntos/inspecao-do-trabalho/portaria-interministerial-mte-mdhc-mir-n-18-2024.pdf>.

⁸²Ministry of Labor and Employment, *MTE Updates "Dirty List" of Labor Analogous to Slavery with 169 New Employers* [original in Portuguese] (Apr. 2026), <https://www.gov.br/trabalho-e-emprego/pt-br/noticias-e-conteudo/2026/abril/mte-atualiza-201clista-suja201d-do-trabalho-analogo-a-escravidao-com-169-novos-empregadores> (last visited May 10, 2026).

⁸³Ministry of Labor and Employment, *List of Employers Who Have Subjected Workers to Conditions Analogous to Slavery* [original in Portuguese], https://www.gov.br/trabalho-e-emprego/pt-br/assuntos/inspecao-do-trabalho/areas-de-atuacao/cadastro_de_empregadores.pdf (last visited May 10, 2026).

At this stage, the employer may submit a defense. The name is only included in the 'Dirty List' after the conclusion of the administrative proceeding, when no further appeals are possible. Inclusion in the registry lasts for two years, and removal requires the employer to pay the imposed fines and regularize the labor conditions and violations identified⁸⁴. Among the consequences for employers listed, the Bureau of International Labor Affairs notes that 'listed companies are banned from acquiring credit from state-owned banks and may be refused credit from some private banks'⁸⁵.

Thus, the 'Dirty List' constitutes an important mechanism in Brazil for encouraging and combating cases of labor analogous to slavery. The list serves as a tool for the disclosure of offending employers, thereby helping to reduce impunity and promote transparency. The following section will examine how this list can be understood as an instrument through which companies may safeguard their supply chains, ensuring that they maintain relationships only with third parties that do not engage in or tolerate any form of modern slavery.

5. CONCLUSION

Therefore, this article aimed to present the registry of employers identified as engaging in modern slavery practices in Brazil, commonly known as the 'Dirty List', which constitutes an important mechanism for enforcement and transparency in the country.

The list is a widely used tool in due diligence research, which aims to assess corporate risks in relationships with third parties. It may therefore be used as a screening mechanism to ensure that there is no involvement with companies or employers that profit from this pernicious and devastating practice known as modern slavery.

In this sense, modern slavery is a phenomenon that violates not only labor rights but also human rights, negatively impacting society by generating exorbitant profits through work performed under inhumane conditions, and it must therefore be prevented.

Thus, in addition to State-led measures, it is necessary for companies to act in concert, particularly by monitoring their value chains, in order to prevent and combat situations of labor analogous to slavery, ensuring that workers whose rights have been violated may gain access to decent and fair work.

⁸⁴See Annie Kelly, Brazil's "Dirty List" Names and Shames Companies Involved in Slave Labour, *The Guardian* (July 13, 2013), <https://www.theguardian.com/sustainable-business/brazil-dirty-list-names-shames-slave-labour> (last visited May 6, 2026).

⁸⁵Bureau of International Labor Affairs, *Example in Action: Government's Role in Multistakeholder Initiatives: Brazil's "Dirty List" and the Institute of the National Pact for the Eradication of Slave Labor*, <https://www.dol.gov/agencies/ilab/sourcingstrong/steps-to-a-social-compliance-system/step-1-engage-stakeholders/example-in-action-governments-role-in-multistakeholder-initiatives-brazils-dirty-list-and-the-institute-of-the-nation> (last visited May 6, 2026).

ARTICLE

INTERNATIONAL STABLECOIN TRANSFERS AND THE FOREIGN EXCHANGE TAX (IOF-CÂMBIO): TO REGULATE IS NOT TO TAX

Oscar Guillermo Farah Osorio⁸⁶

Abstract: This study examines the classification of stablecoins as virtual assets and the relationship between such transfers, the foreign exchange regime and the Legal Framework for Virtual Assets, to demonstrate that the substance of Articles 63, II, and 64, II, of the National Tax Code---which are based on national currency, foreign currency, or a document representing such currency---does not provide sufficient semantic coverage to apply to them. The inclusion of these transactions within the regulatory framework of the foreign exchange market by BCB Resolution No. 521/2025 does not alter this conclusion, nor could the Federal Government do so by analogy, as the Federal Supreme Court recognized in a recent similar case.

Keywords: stablecoins; IOF-Câmbio;; foreign exchange market; principle of legality.

Resumo: Este estudo examina a qualificação das stablecoins como ativos virtuais e a relação entre tais transferências, o regime cambial e o Marco Legal dos Ativos Virtuais, para demonstrar que a materialidade dos artigos 63, II, e 64, II, do Código Tributário Nacional --- ancorada em moeda nacional, estrangeira ou documento que a represente --- não possui cobertura semântica suficiente para alcançá-las. A inclusão dessas operações no arcabouço regulatório do mercado de câmbio pela Resolução BCB nº 521/2025 não altera essa conclusão, nem poderia a União fazê-lo por analogia, como reconheceu o Supremo Tribunal Federal em caso semelhante recente.

Palavras-chave: stablecoins; IOF-Câmbio;; mercado de câmbio; princípio da legalidade.

1. INTRODUCTION

International money transfers have historically been mediated, requiring institutions authorized to operate in the foreign exchange market, conversion between sovereign currencies, and formalities allowing the Central Bank and tax authorities to monitor them. Blockchain-based networks changed this premise: value can now cross jurisdictions without any sovereign currency circulating in the transaction.

It was in this space that stablecoins took hold. Designed to maintain a relatively stable value relative to a specific reference asset---typically the U.S. dollar---they combine economic predictability with the settlement speed of distributed networks.

The user profile has followed this shift: what was once concentrated within the native cryptoasset ecosystem has reached established companies, which now incorporate stablecoins into funds-transfer products and as a gateway to

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Decentralized Finance ("DeFi"), "an umbrella term that designates a ...variety of financial transactions using cryptocurrencies, such as lending, borrowing, trading, paying, saving, and insuring".⁸⁷.

This article examines the international transfer of stablecoins from a Brazilian legal perspective and argues that the IOF-Câmbio tax cannot be levied on such transactions.

2. ACCELERATED ADOPTION OF STABLECOINS IN BRAZIL

Stablecoins have moved from a peripheral role in the cryptoasset market to an infrastructure for transferring and settling funds. Data released by the Federal Revenue Service under RFB Normative Instruction No. 1,888/2019 indicate that the total volume of cryptoasset transactions reported in Brazil rose from approximately R\$ 416 billion in 2024 to R\$ 505 billion in 2025. More relevant is the breakdown⁸⁸.

While Bitcoin transactions declined from approximately R\$ 57 billion to R\$ 48 billion during the same period, USDT alone accounted for about R\$ 327 billion in 2025, equivalent to nearly 65% of the total reported financial volume. USDC more than doubled its volume, rising from approximately R\$ 15 billion to R\$ 33 billion^{89 90}.

These figures reveal a qualitative shift: speculative investment alone no longer explains the growth of the Brazilian cryptoasset market, since stablecoins increasingly serve as instruments for payments and international transfers. How, then, should they be classified under Brazilian law?

3. STABLECOINS: PAYMENT FUNCTION, NATURE OF A VIRTUAL ASSET

Cryptoassets are commonly examined by the economic functions they perform---store of value, utility or access, speculation, the last being the case of many memecoins⁹¹. The categories are not mutually exclusive⁹². It is within this functional context that stablecoins should first be understood.

These are digital assets designed to maintain a relatively stable value relative to a specific asset or reference unit. In the case of USDT and USDC, for example, the aim is to maintain a ratio close to 1:1 with the U.S. dollar, with a redemption obligation⁹³. Unlike Bitcoin, therefore, price stability does not stem from the asset's programmed scarcity but is a central feature of the arrangement itself, as conceived by its issuer.

⁸⁷Jamie Kim, *Regulation of Decentralized Systems: A Study of Uniswap*, 35 Harv. J.L. & Tech. 333, 335--36 (2021).

⁸⁸Special Secretariat of the Brazilian Federal Revenue Service, *Cryptoassets: Open Data Report and General Information* (Apr. 15, 2026), http://www.gov.br/receitafederal/pt-br/assuntos/orientacao-tributaria/declaracoes-e-demonstrativos/criptoativos/arquivos/criptoativos_dados_abertos_20260415.pdf.

⁸⁹Id.

⁹⁰Cassio Gusson, "Brazilians Have Already Purchased \$14.68 Billion in Cryptocurrencies in 2026, a 135% Increase, According to the Central Bank of Brazil," Cointelegraph Brazil (July 29, 2026), cointelegraph.com.br/news/brazilians-have-already-purchased-us-1468-billion-in-cryptocurrencies

⁹¹Justin Wales, *The Crypto Legal Handbook* 105 (2d ed. 2025).

⁹²For this reason, the economic criterion is not always the most appropriate in certain circumstances and may evolve over the years, as seen in the securities field, where an asset may initially be classified as security and later no longer play such a predominant role. For an overview of the evolution of a cryptoasset under securities regulation, see M. Todd Henderson & Max Raskin, "A Regulatory Classification of Digital Assets: Toward an Operational Howey Test for Cryptocurrencies, ICOs, and Other Digital Assets," 2019 Colum. Bus. L. Rev. 444 (2019).

⁹³Jason Gottlieb, Will Roth & Vani Upadhyaya, *GENIUS Act: A Regulatory First Step, Not the Final Word*, 40 Wash. Law. 18 (2025). *Not the Final Word*, 40 Wash. Law. 18 (2025).

This explains their growing use as payment instruments and for international transfers: relative price stability combined with settlement over blockchain-based networks cuts costs, accelerates settlement, and dispenses with the intermediaries traditionally involved in cross-border payments.

The ability to function as a means of payment, however, does not make a stablecoin a currency: the distinction between economic function and legal nature is pivotal, and various assets may perform functions traditionally associated with currency---medium of exchange, unit of account, store of value---without acquiring a legal monetary nature.

Brazilian law rests on a legal conception of currency. Under Article 1 of Law No. 9,069/1995, the Brazilian Real is the unit of the National Monetary System, holding legal tender status and discharging power---attributes that do not stem from the economic acceptance of an instrument by private agents, but from a true state monopoly.

As José Tadeu De Chiara developed, the national currency is not a thing, but an ideal unit produced by the language of law itself, to which the legal system attributes legal tender status and compulsory circulation, prohibiting its refusal as payment for any debt within the national territory.⁹⁴ As the only means permitted for domestic exchanges and payments, it immediately confers liquidity on its holder.⁹⁵ This ideal unit is also the reference standard for expressing prices and quantifying credit and debt relationships.⁹⁶

Stablecoins are not issued by any government and do not grant their holders general discharging power to settle monetary obligations---in which respect they do not differ from other cryptoassets.

Nor are they foreign currency. As De Chiara points out, foreign currency is subject to the legal tender status of the national currency: on entering the national territory it loses, domestically, its status as currency, precisely because it is not legal tender here, becoming a special commodity which, so as not to usurp the functions of the national currency, can neither circulate freely nor be exchanged directly for other goods.⁹⁷

Hence, he concludes, in a foreign exchange contract---structured essentially as a purchase and sale---foreign currency appears strictly as the commodity sold for a price expressed in the country's currency.⁹⁸⁹⁹

Tax legislation reinforces the distinction: RFB Normative Instruction No. 1,888/2019 defined a cryptoasset as a "digital representation of value," usable as an "instrument for transferring value," while expressly noting that it is not legal tender.

Transferring value is therefore inherent in the regulatory definition of a cryptoasset and does not transform it into currency. The same applies to equating a dollar-pegged stablecoin with the dollar: pursuing economic parity does not confer the legal nature of the reference asset. Being pegged to the dollar does not make it a dollar---a stablecoin is neither the ideal unit prescribed by Brazilian law nor the sovereign currency of another state, but an asset that references the dollar as a parameter of stability.

⁹⁴José Tadeu De Chiara, *Money and the Legal Order* 38--39, 48, 58, 149 (1986) (Ph.D. dissertation, University of São Paulo).

⁹⁵De Chiara, *supra* note 12, at 28, 71, 149.

⁹⁶De Chiara, *supra* note 12, at 51, 58.

⁹⁷De Chiara, *supra* note 12, at 151.

⁹⁸De Chiara, *supra* note 12, at 152.

⁹⁹According to De Chiara, as a consequence of the "relative commodity" nature of foreign currency, Decree-Law No. 857/1969 declares clauses requiring payment in foreign currency null and void, permitting its use only as a unit of account or index in exceptional cases, such as those related to foreign trade and the on lending of foreign loans; even in these cases, the conversion and actual payment must be settled in the equivalent amount in national currency (De Chiara, *supra* note 12, at 177), , a provision that remains in force in the Civil Code, in Art. 318, but has been mitigated by the Central Bank of Brazil through the changes introduced by the new Foreign Exchange Framework, in Article 13.

The Legal Framework for Virtual Assets (Law No. 14,478/2022) now provides explicit statutory provisions. Its Article 3 defines a virtual asset as a "digital representation of value that can be traded or transferred by electronic means and used to make payments or for investment purposes." More relevant here is that the legislature defined the concept by exclusion, expressly removing from its scope national and foreign currencies, electronic money, certain instruments granting access to products or services, and representations of assets whose issuance, bookkeeping, trading, or settlement the law already governs.

As a conclusion, stablecoins are neither national nor foreign currency: they are virtual assets, an autonomous legal category expressly recognized by Brazilian law since Law No. 14,478/2022, whose legal effects for holders are outlined in the terms of use established by their issuers.

4. THE PRIVATE AND CONTRACTUAL NATURE OF STABLECOINS

Unlike sovereign currency, whose existence, issuance, and discharging power arise from the state's legal system, stablecoins such as USDT and USDC result from eminently private arrangements and carry their issuer's risk.

Tether's and Circle's terms of use are illustrative¹⁰⁰. Both expressly rule out characterizing their respective tokens as fiat currency or legal tender and make the issuance and redemption mechanisms contingent upon compliance with contractual, registration, and regulatory requirements¹⁰¹. The right to demand conversion into dollars does not arise from merely holding the token; it depends on conditions set by the issuer¹⁰².

This private nature also appears in the powers reserved for issuers: the USDC and USDT terms provide, in varying circumstances, for blocking addresses, freezing assets, suspending operations, and restricting redemptions¹⁰³. Whatever their scope, such powers show that the token's legal content depends on a private relationship governed by the issuer's rules. Examined closely, those rights preclude characterizing these assets as currency.

Two features of both arrangements are decisive: the absence of an unrestricted right to redemption by the mere token holder, since Circle and Tether reserve direct redemption for verified customers, so that those who acquire the tokens through third parties may have no contractual relationship with the issuer; and subjective and territorial restrictions on acquisition, holding, circulation, and redemption, including on the basis of residence or sanctions regimes.

There is, therefore, a fundamental difference between economic denomination and legal identity. A USDC may represent one dollar economically and trade close to US\$1.00, but the two are legally distinct: one is a digital asset issued by a private entity under its own arrangement; the other, sovereign currency of the U.S. monetary system.

¹⁰⁰<https://www.circle.com/legal/usdc-terms> and <https://tether.to/en/legal/>, last accessed on August 10, 2026.

¹⁰¹See, regarding USDC, *Circle Terms of Service*, §§ 1 (*About USDC*), 2 (*Scope of USDC and Key Terms*), 3 (*Applicable Laws and Regulations*), 4 (*Eligibility; Limitations*), 6 (*AML and CTF Compliance*), 7 (*USA PATRIOT Act Notification*), 13 (*Risk Factors & Disclosures*)---particularly "*Blocked Addresses & Forfeited Funds*," "*No Deposit Insurance*," and "*Claim on Funds*"---and 33 (*State-Specific Disclosures -- New York*); and, with regard to USDT, *Tether Terms of Service*, §§ 3 (*Restrictions on Prohibited Persons*), 4.1 (*About Tether Tokens -- Issuances and Redemptions*), 9 (*Due Diligence Generally, Anti-Money Laundering and Counter-Terrorist Financing, and Sharing of Information*), and 11.17 (*Your Representations and Warranties*), which govern, among other aspects, eligibility, conditions and limitations on redemption, compliance obligations, and the nature of the rights held by the respective holders.

¹⁰²See *Circle, USDC Terms*, §§ 2 (*Scope of USDC and Key Terms*), 7 (*USA PATRIOT Act Notification*), and 13 (*Risk Factors & Disclosures -- Claim on Funds*); *Tether, Token Terms of Sale and Service*, §§ 4.1 (*About Tether Tokens -- Issuances and Redemptions*) and 9 (*Due Diligence Generally, Anti-Money Laundering and Counter-Terrorist Financing, and Sharing of Information*).

¹⁰³See also *Circle, USDC Terms*, § 13 (*Risk Factors & Disclosures -- Blocked Addresses & Forfeited Funds*); *Tether, Token Terms of Sale and Service*, §§ 5.1 (*Suspension of Services*) and 8 (*Prohibited Uses*).

5. REGULATION AND INNOVATION IN THE FOREIGN EXCHANGE MARKET

Regulation of the Brazilian foreign exchange market is distributed among agencies with complementary responsibilities, the Central Bank of Brazil ("BCB") being charged with regulating and supervising the market and the institutions authorized to operate in it¹⁰⁴.

Law No. 14,286/2021, the New Legal Framework for Foreign Exchange, modernized that regime and expanded the scope of CMN and BCB regulations, allowing sub-statutory rules to adapt to new forms of international fund transfers.

Law No. 14,478/2022, the Legal Framework for Virtual Assets ("MLAV"), belongs to this context. Rather than exhaustively regulating every activity involving these assets, it set guidelines for regulating virtual asset service providers and empowered the Executive Branch and the regulator to develop specific rules.

Two legislative choices deserve attention. The first, already examined, lies in Article 3 of the MLAV: by defining "virtual asset" by exclusion, the law recognized that these assets can perform the economic function of payment and transfer of value without thereby acquiring the legal status of currency.

The second concerns the relationship between virtual assets and the foreign exchange market. Article 7, V, of the MLAV empowered the regulator designated by the Executive Branch to establish when activities involving virtual assets would fall within the foreign exchange market or under the rules on Brazilian capital abroad and foreign capital in the country. Their inclusion therefore did not follow automatically from the statute: the legislature affirmed the conceptual autonomy of virtual assets while leaving that determination to the regulator.

This framework was implemented by the BCB with the issuance, in November 2025, of BCB Resolution No. 521/2025, effective as of February 2, 2026. The regulation introduced specific provisions into BCB Resolution No. 277 governing so-called "*international payments or transfers using virtual assets*." Under the terms of Article 76-B, this activity encompasses both settlement through a change in ownership of virtual assets between residents and non-residents---or between non-residents---and the sending or receiving of virtual assets from or to foreign countries¹⁰⁵.

The approach is noteworthy. Whatever criticism the BCB's handling of other aspects of virtual asset regulation may attract, here the solution shows how law should respond to a technological reality that does not fit preexisting categories. Instead of resorting to analogy, equating virtual assets with foreign currency, or presuming a symbolic foreign exchange transaction, the regulator recognized that these assets permit international payments and transfers through a change in ownership or the sending and receiving of the asset itself, without conceptually converting it into its reference currency. Rather than forcing a new phenomenon into an old category, it created one of its own: "international payment or transfer using virtual assets."

Therefore, two legally distinct categories now coexist within the foreign exchange regulatory framework: foreign exchange transactions proper, involving domestic and foreign currencies; and international transfers of virtual assets, subject to the same regulatory perimeter by virtue of specific legal and regulatory provisions, which shows that Law

¹⁰⁴See Law No. 4,595/1964, Articles 2, 9, and 10 (CMN and BCB competences over monetary and credit policy, foreign exchange transactions, and supervision of the National Financial System); RFB Normative Instruction No. 1,888/2019 (reporting of cryptoasset transactions) and Decree No. 6,306/2007 (IOF); Law No. 9,613/1998, Article 14, and Law No. 13,974/2020 (COAF).

¹⁰⁵Art. 76-B. For the purposes of this Resolution, an international payment or transfer involving virtual assets is: I -- a payment or transfer settled through a change in ownership of virtual assets between a resident and a non-resident, or between non-residents; or II -- the receipt or sending, from or to abroad, of virtual assets owned by the same natural or legal person.

No. 14,478/2022 preserved the distinction between currency and virtual assets, and BCB Resolution No. 521/2025 respected that legislative choice.

6. THE IMPOSSIBILITY OF LEVYING IOF-FOREIGN EXCHANGE ON INTERNATIONAL TRANSFERS OF STABLECOINS

The regulatory inclusion of transfers involving virtual assets in the foreign exchange market raises a second, legally distinct question: whether such transactions are subject to the IOF-Câmbio tax. The answer must be based on the constitutional and legal substance of the tax.

Although commonly called the "Tax on Financial Transactions," the IOF is not a generic tax on financial transactions. Article 153, V, of the Constitution authorizes the Federal Government to tax four categories: credit, foreign exchange, and insurance transactions, and those relating to securities¹⁰⁶. Article 63 of the National Tax Code ("CTN") reflects that limitation, establishing a separate taxable event for each category. The reference to "transactions" is itself relevant: these are transactions in the legal sense---bilateral legal transactions bearing the characteristics specific to each category.

In the specific case of the IOF-Câmbio, Article 63, II, of the CTN provides that the taxable event occurs upon the completion of the transaction *"through the delivery of domestic or foreign currency, or a document representing it, or its making available to the interested party in an amount equivalent to the foreign or domestic currency delivered or made available by the latter."*

Similarly, Article 64, II, establishes as the basis for calculation *"the respective amount in national currency, received, delivered, or made available."* The materiality chosen by the supplementary legislator is thus structured around a legal transaction involving currency.

The international transfer of a stablecoin falls into none of these categories. As shown, stablecoins are not national currency---they are not the monetary unit established by Brazilian law and have neither legal tender status nor compulsory circulation---nor foreign currency: they do not correspond to another state's sovereign currency, but are virtual assets that may adopt it as a stability benchmark¹⁰⁷.

Nor can they be classified as a "document representing" currency: a USDC or USDT token does not become, merely by pursuing parity with the dollar, a document representing dollars made available to its holder¹⁰⁸.

The difficulty of extending the IOF-Câmbio to this new reality thus precedes any discussion of tax expediency: it is a question of legality and of identifying the taxable event.

As Humberto Ávila warns, the interpreter must avoid "slippage of meaning": abandoning the normative sense of the terms describing the taxable event for their supposed economic sense¹⁰⁹. The situation democratically chosen by the legislature as necessary and sufficient for the taxable event is thereby replaced by another, constructed ex post by the enforcer¹¹⁰.

¹⁰⁶Roberto Quiroga Mosquera, *Taxation in the Financial and Capital Markets* 102--04 (2nd ed. 1999).

¹⁰⁷Marcio Pedrosa Junior, *Taxation of the Digital Economy: IOF-Exchange Tax on Transactions Involving Stablecoins*, 60 *Revista Direito Tributário Atual* 227, 245 (2025).

¹⁰⁸Marcio Pedrosa Junior, *supra* note 30, at 245.

¹⁰⁹Humberto Ávila, *Substantive Tax Legality: Content, Criteria, and Scope of the Duty of Determination* 91 (4th ed. 2026).

¹¹⁰Ávila, *supra* note 32, at 92--93.

That is precisely what would occur if "foreign exchange transaction"---defined by the CTN by reference to the delivery or provision of currency---came to encompass any mechanism technologically capable of producing an economic result similar to an international transfer of foreign currency.

The extrafiscal nature of the IOF does not alter this conclusion. Article 153, paragraph 1, of the Constitution does grant the Executive Branch flexibility to alter the tax rates, precisely because of the regulatory functions the tax performs, but that flexibility is not authorization to redefine its material elements.

The Supreme Federal Court recently drew this distinction in its joint ruling on ADIs 7,827 and 7,839 and ADC 96, examining the attempt to subject receivables discounting known as "*risco sacado*" to the IOF-Credit tax¹¹¹. In rejecting that application, the Court held that a decree could not, by analogy, transform a commercial relationship into a credit transaction absent statutory basis. The Executive's regulatory authority over the IOF stops at the taxable event defined by the legislature; it cannot reach legal transactions distinct from those the statute describes¹¹².

The reasoning applies directly here: just as including an activity within the financial sector does not convert it into a credit transaction, subjecting it to the foreign exchange framework does not convert it into a foreign exchange transaction for tax purposes. BCB Resolution No. 521/2025 did not even make that equivalence---it created a separate category. It is not for the tax interpreter to make the equivalence that the regulator, expressly authorized by the legislature, declined to make.

6.1. OBJECTIONS FROM PRECEDENTS AND THE PROHIBITION ON ANALOGY

Two lines of precedent might be invoked against this conclusion; neither displaces it. The first stems from administrative precedents on the use of U.S. Treasury securities in structures later classified as foreign exchange transactions, raised by Márcio Pedrosa Junior under the heading of "Blue Chip Swaps" as disguised transactions.¹¹³

The discussion centered on buying securities with reais and selling them abroad for dollars, with part of the administrative case law upholding the IOF-Câmbio on the grounds that T-Bills, given their liquidity and convertibility, could be treated as foreign currency, provided the transaction was not a sham concealing foreign exchange remittances.¹¹⁴

These precedents do not support the conclusion that every international transfer of liquid or foreign-currency-denominated assets constitutes a foreign exchange transaction; they underscore the need to identify the legal transactions actually carried out and, in certain cases, turned on evidence of simulation.

Take a resident transferring USDC from a wallet held in Brazil to another of his own abroad. Before the transfer his assets contain USDC; after it, they still do. There was no delivery of reais against dollars, no acquisition of foreign currency, no dollars made available to the holder. What occurred was the international transfer of the virtual asset

¹¹¹Supreme Federal Court (S.T.F.), Preliminary Injunction in Declaratory Action on Constitutionality No. 96/DF (joint decision with ADI 7,827 and ADI 7,839), Reporting Justice: Justice Alexandre de Moraes, July 16, 2025 (Brazil).

¹¹²See pages 17--19 of the single-judge decision, which recognized that "*the introduction of a new basis for taxation, without prior legal provision to support it, constitutes a clear violation of the principle of tax legality (Art. 150, I, of the Federal Constitution).*" **S.T.F., supra note 35, at 17--19.

¹¹³Márcio Pedrosa Junior, supra note 30, at 243--44.

¹¹⁴See, regarding transactions involving *T-Bills* and *blue-chip swaps*, Administrative Council of Tax Appeals, Superior Chamber of Tax Appeals, 3rd Panel, Judgment No. 9303-001.805, Case No. 16327.002091/2005-98, *Colgate-Palmolive Indústria e Comércio Ltda. v. National Treasury* (Jan. 31, 2012); Administrative Council of Tax Appeals, Third Judgment Section, 4th Chamber, 1st Ordinary Panel, Judgment No. 3401-004.436, Case No. 16327.002111/2005-21, *Construtora Andrade Gutierrez S.A. v. National Treasury* (March 20, 2018); Second Taxpayers' Council, Second Chamber, Judgment No. 202-18.237, Case No. 16327.002114/2005-64, *Construtora Norberto Odebrecht S.A. v. Federal Revenue Service Adjudication Office in Campinas--SP* (Aug. 15, 2007); Administrative Council of Tax Appeals, Superior Chamber of Tax Appeals, 3rd Panel, Judgment No. 9303-001.863, Case No. 16327.002089/2005-19, *Braskem S.A. v. National Treasury* (March 6, 2012).

itself, precisely the activity the BCB now governs as an autonomous category, even if it is later sold in the destination country.

The second line of precedent concerns so-called "symbolic exchange." In the *Autometal* case¹¹⁵ and the *Springs Global* case¹¹⁶, both under the now-extinct CPMF, the Court upheld taxation of transactions without physical movement of foreign currency, recognizing a "book-entry circulation of currency." One might argue that the same logic reaches transfers of virtual assets, where currency likewise does not physically circulate.

The objection overlooks a central element of those precedents: in the cases decided by the STJ there were formally contracted foreign exchange transactions. As the regulations then in force required, the parties entered into simultaneous foreign exchange contracts representing, in book-entry form, the inflow and outflow of funds---in corporate reorganizations and international stock swaps, for example¹¹⁷.

In the transfer of virtual assets the phenomenon is different: the entry in the DLT does not represent dollars that entered or left the country; if 10,000 units of USDC change addresses, it is those units that circulate, with no underlying symbolic contract by which reais are sold and dollars acquired. The BCB could have replicated that technique and required foreign exchange contracts representing the inflow or outflow; it did not, creating instead a separate category.

To reach these transactions merely because they permit the international transfer of value, or because certain stablecoins economically replicate the dollar, would substitute the economic outcome of the transaction for the legal elements chosen by the CTN---Ávila's "shift in meaning," abandoning the transaction the legislature described in favor of another that is economically similar but lacks its constitutive elements. It is precisely here that the prohibition in Article 108, paragraph 1, of the CTN operates: analogy has a place in the legal system, but it cannot result in a tax levy not provided for by law¹¹⁸.

7. CONCLUSION

This study distinguishes three levels of classification often conflated in the analysis of international transfers made with stablecoins. Legally, stablecoins are not national or foreign currency: they are virtual assets, which Article 3 of Law No. 14,478/2022 expressly distinguishes from currency, and whose stability derives from a private arrangement set by the issuer. From a regulatory standpoint, BCB Resolution No. 521/2025 created a separate category---international payments or transfers using virtual assets---subjecting certain transactions to the foreign exchange framework for supervisory purposes, without converting the asset into foreign currency. Economic function does not by itself determine legal classification, and regulatory classification does not by itself determine tax materiality.

¹¹⁵Superior Court of Justice (S.T.J.), Special Appeal No. 1.671.357/SP, Second Panel, *Autometal S/A v. National Treasury*, Reporting Justice: Justice Mauro Campbell Marques, Nov. 9, 2021, published in the Official Gazette on Nov. 12, 2021 (Brazil).

¹¹⁶S.T.J., Special Appeal No. 1,316,221/SP, Second Panel, *Springs Global Participações S/A v. National Treasury*, Reporting Justice: Justice Mauro Campbell Marques, Dec. 15, 2015, D.J.e. Dec. 18, 2015 (Brazil).

¹¹⁷It should be noted that the roles are reversed here compared to the example given in the loan agreement, where the creditor is the foreign party; this is irrelevant for the application of the CPMF, given that there is a clear exchange of assets measurable in cash in both cases, which require the same symbolic exchange entry that characterizes the book circulation of currency. See S.T.J., *supra* note 41, ¶ 3 (headnote).

¹¹⁸Heleno Taveira Tôrres, IOF on Government Securities Transactions and the Prohibition on Analogy with Foreign Exchange Transactions: The Case of "T-Bills," in *Tax Law and the Financial and Capital Markets* 245 (Roberto Quiroga Mosquera, ed., 2009): "*The State cannot tax based on 'intentions,' but only on specific legal facts. This is the rationale behind the prohibition contained in Article 108, paragraph 1, of the National Tax Code, which states: 'The use of analogy may not result in the imposition of a tax not provided for by law.'*"

From a tax perspective, the materiality of Articles 63 and 64 of the CTN is based on the delivery or provision of currency, such that regulatory inclusion is not sufficient, in light of the principle of legality, to cover transactions settled exclusively in virtual assets. This is neither an exemption nor a loophole: the tax simply lacks semantic coverage, and analogy cannot fill that gap, as Article 108, paragraph 1, of the CTN prohibits. Hence the conclusion: the IOF-Câmbio tax cannot be levied on international transfers settled exclusively in stablecoins by decree, ordinance, or regulatory act of any kind, and, until the CTN is amended by a complementary law of national scope, any attempt to do so will bear the same legal defect recognized by the Federal Supreme Court in ADIs 7,827 and 7,839 and ADC 96.

ARTICLE

Rethinking Investment Structures in Startups: The *Sociedade em Conta de Participação* as an Unincorporated Alternative in Brazil

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Abstract: This article examines the *Sociedade em Conta de Participação* (a form of unincorporated joint venture -- "SCP") as an alternative legal structure for investments in startups in Brazil. It analyses the SCP's contractual nature, operational flexibility, and allocation of rights, obligations, and risks between general and silent partners, assessing its suitability for startups and emerging companies. It argues that the SCP may reconcile simplified structuring with a relevant degree of investor protection, offering a suitable alternative under the latest changes in the Brazilian investment landscape, including tighter liquidity conditions, higher capital costs, and the growing demand for flexible investment arrangements. In addition, the paper assesses the increasing relevance of the SCP in cross-border transactions, particularly in view of the modernization of Brazil's foreign exchange framework, which has facilitated the participation of foreign investors in contractual investment structures. The essay concludes that the SCP should not be viewed merely as a traditional or auxiliary legal instrument, but rather as a flexible mechanism for addressing current transactional demands within the Brazilian startup ecosystem.

Keywords: *Sociedade em Conta de Participação*; Startups; Investment Arrangements; Foreign Investment; Brazil.

Resumo: O presente artigo examina a sociedade em conta de participação ("SCP") como estrutura jurídica alternativa para investimentos em startups no Brasil. Para tanto, analisa sua natureza contratual, sua flexibilidade operacional e a distribuição de direitos, obrigações e riscos entre os sócios ostensivos e sócios participantes, a fim de avaliar sua adequação ao contexto de startups/empresas emergentes. O texto argumenta que a SCP pode conciliar uma estruturação simplificada com um nível relevante de proteção ao investidor, oferecendo uma alternativa adequada diante das mudanças recentes no cenário de investimentos brasileiro, incluindo condições de liquidez mais restritas, custo de capital mais elevado e a crescente demanda por arranjos de investimento flexíveis. Além disso, examina-se a relevância crescente da SCP em operações cross-border, especialmente diante da modernização do regime cambial brasileiro, que tem facilitado a participação de investidores estrangeiros em estruturas contratuais de investimento. Conclui-se que a SCP não deve ser compreendida apenas como instrumento tradicional ou acessório, mas como mecanismo flexível para atender às atuais demandas econômicas, regulatórias e negociais do ecossistema brasileiro de startups.

Palavras-chave: *Sociedade em Conta de Participação*; Startups; Estruturas de Investimento; Investimento Estrangeiro; Brasil.

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1. Introduction

Structuring investment in startups requires legal mechanisms capable of reconciling flexibility, speed, and investor protection -- an equation that traditional corporate models do not always solve satisfactorily. This challenge is particularly acute in Brazil's startup ecosystem, which has expanded significantly in recent years and is marked by business models shaped by innovation, constant adaptation, and rapid scaling¹²²⁻¹²³. For this very reason, startups often face legal challenges in connection with corporate structuring and fundraising, as conventional legal vehicles are not always suited to their risk profile, operational needs, or the level of speed required in such transactions. Attracting capital depends not only on favorable economic conditions, but also on the availability of legal structures capable of accommodating the specific needs of innovative businesses while providing a sufficient level of legal certainty to investors.

This discussion becomes more relevant in light of the broader role of capital inflows in fostering innovation and long-term economic development in Brazil. This broader economic context is reflected in the fact that, in 2025, Brazil ranked as the world's third-largest destination for foreign direct investment, receiving US\$ 77 billion in inflows¹²⁴, and, in April 2026, foreign direct investment reached US\$ 79.2 billion over the preceding 12 months¹²⁵, underscoring the continued relevance of external capital to the Brazilian economy. Figures of this magnitude are not merely macroeconomic indicators; they also highlight the practical importance of maintaining a legal and regulatory environment that is capable of attracting capital efficiently.

Founders and investors have increasingly sought alternative structures, particularly with respect to capital raising and internal governance. Tighter liquidity conditions, higher capital costs, reduced exit opportunities, and the growing sophistication of investment transactions have increased the demand for flexible legal arrangements capable of supporting project-based or hybrid investment structures¹²⁶. Among these, a specific form of unincorporated joint venture (*Sociedade em Conta de Participação* -- "SCP"), which is widely used in European and Latin jurisdictions despite lacking a perfect counterpart in common law systems, deserves particular attention. Its contractual nature enables the combination of operational simplicity with an appropriate degree of investor protection and also allows the parties to tailor the allocation of risks to the specific characteristics of the venture.

Against this backdrop, the central question addressed in this paper is whether, and to what extent, the SCP may serve as a legally adequate and practically efficient structure for investments in startups in Brazil under current economic and regulatory conditions. Despite certain practical and regulatory constraints, the SCP should be reassessed as a flexible and strategically relevant mechanism capable of responding to current economic, regulatory, and transactional demands within the Brazilian startup ecosystem, including in cross-border transactions.

2. Legal Nature and Internal Structure

¹²²Sebrae Startups. Sebrae Startups Report Brasil 2025. Available at: <https://valor.globo.com/patrocinado/dino/noticia/2024/06/10/numero-de-startups-cresce-e-chega-a-mais-de-12-mil-no-brasil.ghtml>. Last visited May 28, 2026.

¹²³Art. 4. BRAZIL. Complementary Law No. 182, of 2021. Establishes the legal framework for startups and innovative entrepreneurship. Available at: https://www.planalto.gov.br/ccivil_03/leis/lcp/lcp182.htm. Last visited May 28, 2026.

¹²⁴CNN Brasil. OECD: Brazil was the third-largest destination of foreign direct investment in 2025. Available at: <https://www.cnnbrasil.com.br/economia/mercado/ocde-brasil-foi-terceiro-maior-destino-dos-investimentos-diretos-em-2025/>. Last visited May 28, 2026.

¹²⁵Central Bank of Brazil. External Sector Statistics. Available at: <https://www.bcb.gov.br/estatisticas/estatisticassetorexterno>. Last visited May 28, 2026.

¹²⁶Exame. Liquidity once again dictates startup investment dynamics. Available at: <https://exame.com/bussola/liquidez-volta-a-ditar-o-jogo-dos-investimentos-em-startups/>. Last visited May 28, 2026.

The SCP is governed by articles 991 to 996 of the Brazilian Civil Code, and is understood as a partnership of a contractual nature, without legal personality¹²⁷. In legal terms, it allows one or more parties to contribute funds and other assets to a business venture carried out by one of the parties in its own name, with the purpose of sharing any economic results obtained¹²⁸.

The structure of the SCP is built around these two distinct roles and presupposes the existence of two types of partners: (i) the general partner, who, in addition to contributing resources, carries out the specific transaction or economic activity set forth in the purpose of the SCP in its own name, assuming full responsibility for the obligations arising from it; and (ii) the investor or silent partner, whose main role is to invest in the SCP, contributing resources to the general partner with the expectation of a financial return if the venture succeeds, and not appearing on a day-to-day basis before third parties. Under article 991 of the Brazilian Civil Code, the activity constituting the purpose of the SCP is carried out exclusively by the general partner, in its individual name and under its sole responsibility, while the silent partner remains confined to the internal sphere of the arrangement. In practical terms, this means that the SCP operates externally as if only the general partner existed.

Although the SCP does not have separate legal personality, the law recognizes a special pool of assets linked to the activity carried out in the name of the general partner, the effects of which are restricted to the partners of the SCP (article 994 of the Brazilian Civil Code). This special pool of assets remains part of the general partner's patrimony vis-à-vis third parties, meaning that the general partner remains liable for obligations incurred in connection with the venture.

In addition, the SCP does not have formal management bodies, so the general partner is responsible for conducting the business and assuming the rights and obligations related to the common venture. The silent partner may, however, assist in the internal management of the SCP, and the parties may also agree that certain matters will be subject to joint decision-making or to the affirmative vote of one of the partners¹²⁹. In dealings with third parties, the silent partner may act only if expressly qualified as the general partner's subordinate or attorney-in-fact, otherwise, it may incur personal liability for the obligations it undertakes¹³⁰. Any direct interference by the silent partner in the SCP's external relations may result in the decharacterization of the contractual arrangement and, consequently, in joint and several liability for the obligations in which the silent partner intervenes, under the sole paragraph of article 993 of the Brazilian Civil Code.

The contractual flexibility inherent in the SCP makes it essential for the agreement to regulate the parties' relationship with particular care, especially given the absence of formal decision-making bodies. The contract between the partners should therefore set out, with sufficient precision, the rights and obligations of each party, the nature and extent of their contributions, the oversight mechanisms available to the silent partner, and the rules governing the allocation of profits and losses. It should be noted that the SCP's nature implies a limited liability of the silent

¹²⁷The contractual nature of a SCP does not prevent its classification as a company, as it contains all essential elements set forth in Art. 981 of the Brazilian Civil Code, notwithstanding the absence of legal personality. See SPINELLI, Luis Felipe; SCALZILLI, João Pedro; CORRADINI, Luiz Eduardo Malta; TELLECHEA, Rodrigo. *Contrato de investimento coletivo como modalidade de sociedade em conta de participação*. Revista de Direito Bancário e do Mercado de Capitais, vol. 61. São Paulo: Revista dos Tribunais, 2023, p. 2.

¹²⁸GONÇALVES NETO, Alfredo de Assis. *Direito de Empresa: Comentários aos Artigos 966 a 1.195 do Código Civil*. 11th ed. São Paulo: Thomson Reuters, 2023, pp. 189--190.

¹²⁹SPINELLI, Luis Felipe; SCALZILLI, João Pedro; TELLECHEA, Rodrigo. *Sociedade em Conta de Participação*. 2nd ed. São Paulo: Almedina, 2023, p. 105.

¹³⁰WALD, Arnaldo. *Comentários ao Novo Código Civil*. Vol. 14. Coordination by Sálvio de Figueiredo Teixeira. Rio de Janeiro: Forense, 2005, pp. 105--106.

partner¹³¹, although the parties may contractually provide for a different allocation of liability under specific circumstances.

3. The SCP in Startup Investment Transactions

In practical terms, when a startup investment is structured through an SCP, the investor will typically assume the role of silent partner and the invested startup the role of general partner. It functions as an economic exposure mechanism: the arrangement allows the investor to participate in the economic upside of the business without becoming a shareholder of the startup or assuming responsibility for its management decisions. Significantly, the Supplementary Law No. 182/2021 ("Brazilian Startup Legal Framework") expressly provides that a party that has made an investment through an SCP will not be deemed part of the startup's corporate capital, thereby reinforcing the legal separateness between the investment and the company's equity structure.

The use of the SCP in startup investment transactions is especially attractive insofar as it allows the investors the possibility of financial return without assuming (unless otherwise negotiated by the parties) the traditional risks of a corporate vehicle, as the investor will not become a public shareholder¹³². This feature is relevant in early-stage transactions, in which investors often seek participation in the economic upside of the business while avoiding the publicity and governance implications associated with direct equity participation. This may be particularly useful where the parties wish to preserve confidentiality regarding the economic terms of the investment, avoid immediate changes to the company's cap table, or postpone a definitive corporate reorganization until the business reaches a mature stage. Additionally, it constitutes an investment mechanism that affords a relative degree of protection to the investor, who is unlikely to be held liable for the venture's debts in the event of its failure, being limited instead to the loss of the amount invested.

From a transaction standpoint, the SCP also stands out for its relative speed and simplicity of implementation. Because it does not require the incorporation of a separate legal entity or extensive corporate formalities or bureaucracy, the SCP may be quickly structured with significantly lower costs than ordinary corporate vehicles. The main administrative step is obtaining a specific Corporate Taxpayer Identification Number (CNPJ) registration for tax and compliance purposes¹³³. No costs other than those related to coordinating and negotiating the agreement governing the SCP are involved, and the SCP may be created and dissolved far more directly than other forms of incorporated companies, as there are no additional requirements.¹³⁴

However, the attractiveness of the SCP has important limits. The main constraint lies not in corporate law, but in taxation. Under Brazilian law, the adoption of an SCP is incompatible with the "*Simples Nacional*" Brazilian tax regime¹³⁵, which may prevent the startup, in its capacity as general partner, from remaining subject to the simplified tax system. As a result, startups might bear a significant increase in structuring costs which could also compromise the economic feasibility of the venture¹³⁶. That said, this limitation should be assessed in context, as the *Simples*

¹³¹BRAZIL. Court of Justice of the State of Rio Grande do Sul. Civil Appeal No. 5000847-74.2022.8.21.0101. Appellant: Viva Urbanismo Ltda. Appellee: Maria da Conceição Keller et al. Rapporteur: Dilso Domingos Pereira. Porto Alegre, June 28, 2023.

¹³²MIMICA, Rafael Medeiros; FINKELSTEIN, Maria Eugênia Reis. *A aquisição de participação societária em startups: algumas considerações*. Revista de Direito Bancário e do Mercado de Capitais, vol. 96. São Paulo: Revista dos Tribunais, 2022, p. 7.

¹³³Annex I. BRAZIL. Federal Revenue Service. Normative Instruction RFB No. 2,119, of December 6, 2022. Provides for the National Registry of Legal Entities (CNPJ).

¹³⁴There is nothing preventing the parties from registering the agreement before the Registry of Deeds and Documents, thus ensuring greater legal certainty and evidentiary enforceability of the negotiated terms.

¹³⁵Art. 30, §3. BRAZIL. Complementary Law No. 123/2006.

¹³⁶SILVA FILHO, Emanuel Lima da. *Contratos de Investimento em Startups: Os Riscos do Investidor-Anjo*. São Paulo: Quartier Latin, 2019, p. 63.

Nacional regime is inherently subject to several restrictions, including limitations on company size and on corporate structures involving participation by other legal entities, such that, in many cases, startups adopting more sophisticated investment arrangements would likely already fall outside its scope, regardless of the use of an SCP.

Moreover, although the SCP is an unincorporated partnership, it is treated as equivalent to legal entities for purposes of determining results and taxing the profits calculated and distributed¹³⁷⁻¹³⁸. The general partner will be responsible for complying with tax and ancillary obligations of the SCP, as well as for keeping the books of the SCP's activities. These books must be separate from those of the general partners¹³⁹. This requirement does not exclude the need for the silent partner to keep records of the investment in its own accounting books, in accordance with the applicable legislation. Thus, the SCP does not eliminate formal burdens altogether; rather, it reallocates them in a way that may be acceptable in some transactions and burdensome in others.

4. Regulatory Context and the Renewed Relevance of the SCP

The SCP's relevance has increased in the context of cross-border transactions, particularly following recent regulatory developments. Historically, foreign investment in Brazil tended to favor equity participation, due in part to the formalistic nature of the regulatory framework and the legal certainty associated with registered ownership. This scenario has evolved with the enactment of Law No. 14,286/2021 ("Brazilian Foreign Exchange Law"), and subsequent regulations issued by the Central Bank of Brazil (Resolutions No. 278/2022 and No. 348/2023, particularly with respect to SCPs), which introduced a more flexible and unified framework for foreign exchange operations. Under the current regime, the emphasis has shifted from the formal nature of the investment vehicle to the proper registration and classification of capital flows.

In this context, the SCP emerges as a viable alternative for foreign investors, notwithstanding its prior regulatory restrictions. Provided that capital contributions are properly registered, non-resident investors may participate in Brazilian economic activities through contractual arrangements without necessarily acquiring equity participation. The SCP thus enables the structuring of investments that combine economic exposure with contractual flexibility, particularly in transactions where immediate corporate involvement is not required.

At the same time, the Brazilian tax reform, introduced by Constitutional Amendment No. 132/2023 and further regulated by Supplementary Law No. 214/2025, adds complexity to the use of SCPs in investment structures. The reform introduces structural changes that affect the entire chain of consumption of goods and services, including modifications to the tax calculation system, tax bases and rates, which may produce differentiated impacts depending on the activity carried out -- potentially positive in certain industrial and commercial contexts, but generally more significant for real estate and service-driven businesses. Under the new framework, SCPs may, depending on the tax regime adopted, either remain outside taxpayer status for Tax on Goods and Services (IBS) and the Contribution on Goods and Services (CBS), with the tax burden concentrated on the general partner, or become taxpayers subject to their own bookkeeping and compliance obligations¹⁴⁰.

These developments ultimately reshape the analytical framework through which SCPs should be assessed. While regulatory changes have expanded their admissibility in cross-border structures, the tax treatment now assumes a

¹³⁷ Arts. 160--161. BRAZIL. Decree No. 9,580, of 2018 (Income Tax Regulation).

¹³⁸ Art. 6. BRAZIL. Federal Revenue Service. Normative Instruction RFB No. 1,700, of December 14, 2017.

¹³⁹ Art. 269. BRAZIL. Decree No. 9,580, of 2018 (Income Tax Regulation).

¹⁴⁰ A thorough examination of the Brazilian tax reform and its effects on SCPs falls outside the scope of this paper, as it would entail a comprehensive analysis deserving of separate treatment. Accordingly, the references herein are merely intended to acknowledge the legislative changes introduced by Constitutional Amendment No. 132/2023 and Supplementary Law No. 214/2025, and to briefly situate their possible implications for the structuring of these investment arrangements.

central role in determining their economic viability. As a result, the use of SCPs can no longer be evaluated solely on the basis of their contractual flexibility or structural simplicity, but must instead reflect a coordinated analysis of regulatory permissibility and tax outcomes.

5. Conclusion

The SCP stands as a strategic and effective legal alternative for structuring investments in startups, offering the contracting parties an agile, flexible, and less costly solution when compared with traditional corporate models. Nevertheless, its high degree of flexibility underscores the need for investors to negotiate the terms and conditions of the SCP with caution and technical rigor. A failure in doing so may result in a source of legal uncertainty for the parties involved.

As a general rule, there is a separation between the management of the SCP, carried out by the general partner, and the contribution of funds made by the silent partner, which is especially advantageous in the context of startup investments, insofar as it mitigates the risks normally associated with this type of transaction. However, this separation may be adjusted through negotiation, requiring strong contractual discipline, especially with respect to the liability of the partners of the SCP, the rules for profit distribution and loss absorption, and the delineation of management powers, given the absence of management bodies.

In any case, especially in the startup environment, which demands speed and low structuring costs, the SCP may play a strategic role in fundraising, allowing the interests of investors, startups, and their own founders to be accommodated, provided that it is negotiated with caution and with a risk allocation compatible with the venture. Thus, despite certain restrictions inherent to its formation, the model certainly presents advantages that should be considered when structuring new businesses.

This conclusion must also be understood in light of Brazil's evolving regulatory environment. Recent developments in foreign exchange regulation have broadened the admissibility of contractual investment structures, while tax reforms have introduced new variables that directly affect their economic outcomes. In this scenario, the SCP's growing relevance is not merely a function of its inherent contractual flexibility, but also of its ability to operate within an evolving regulatory and tax framework. Its effective use, therefore, requires not only careful contractual design, but also a coordinated assessment of the broader legal environment in which it is embedded.

ARTICLE

Governance Architecture and Its Discontents: What the U.S. Big Tech Experience Can Teach Brazil's Corporate Law Reform Moment

Carolina Bouchardet¹⁴¹

Abstract: This paper examines Brazil's ongoing reform of its Corporations Law through the lens of U.S. corporate governance history and its culmination in Big Tech. It illustrates how the United States repeatedly reformed companies' disclosure and internal procedures while leaving the architecture of corporate power to private ordering. The youngest Big Tech cohort exploited that permissiveness, adopting the formalities of governance best-practices while voiding their substance through entrenched founder control. The paper contends that Brazil's recent reforms risk reproducing this pattern by legal transplants without adequate legislative deliberation or attention to its own market peculiarities. Law 14,195/2021 advances governance best practices yet introduces supervoting shares conceived for dispersed ownership into a market defined by concentrated control, and Bill 2,925/2023 imports U.S. private-enforcement tools whose limitations are already apparent. As Brazil approaches a decisive regulatory moment in 2026, the article draws three lessons for lawmakers and regulators: disclosure and internal procedures reform cannot compensate for permissiveness in corporate distribution of power; imported governance tools must be adapted to local market conditions; and ESG commitments are meaningful only where governance creates real accountability.

Keywords: corporate governance; supervoting shares (dual-class); Big Tech; Brazilian Corporations Law reform; legal transplants; concentrated ownership.

Resumo: Este artigo examina a reforma em curso da Lei das Sociedades Anônimas brasileira à luz da história da governança corporativa norte-americana culminando nas Big Techs. Tal histórico ilustra como os Estados Unidos reformaram sucessivamente a divulgação de informações (disclosure) e procedimentos internos das companhias, deixando, contudo, a arquitetura do poder societário à regulação privada. A geração mais recente das Big Techs explorou essa permissividade, adotando formalidades de boas práticas de governança corporativa enquanto lhes esvaziava a substância por meio do controle entrincheirado dos fundadores. O artigo sustenta que as recentes reformas brasileiras correm o risco de reproduzir esse padrão por meio da importação de institutos jurídicos sem deliberação legislativa adequada nem atenção às peculiaridades do mercado nacional. A Lei 14.195/2021 promove boas práticas de governança, mas introduz o voto plural -- concebido para contextos de dispersão acionária -- em um mercado conhecido pela concentração do controle; e o PL 2.925/2023 importa instrumentos norte-americanos de enforcement privado cujas limitações já são evidentes. À medida que o Brasil se aproxima de um momento regulatório decisivo em 2026, o artigo extrai três lições para legisladores e reguladores: reformas de disclosure e procedimento não compensam a permissividade na distribuição de poder; instrumentos de governança importados devem ser adaptados às condições do mercado local; e compromissos ESG só têm significado onde a governança produz responsabilização efetiva.

Palavras-chave: governança corporativa; ações com voto plural (dual-class); Big Tech; reforma da Lei de Sociedades por Ações; importação de institutos; controle concentrado.

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1. Introduction

Brazil is in the midst of an important governance design moment. Over the last 5 years, the reform of Law 6,404/1976 -- the Brazilian Corporations Law -- is advancing on two simultaneous fronts: **(1)** Law 14,195/2021, in force since 2021, which introduced both governance-tightening measures and supervoting shares into Brazilian law, and **(2)** Bill 2,925/2023¹⁴², yet to be examined by the Senate, which proposes new liability, disclosure, and enforcement mechanisms. To evaluate these choices, this paper turns to the jurisdiction whose corporate governance trajectory has been most extensively tested by the concentration of corporate power: the United States.

The U.S. experience is examined here through the lens of Big Tech, firms that draw scholarly and regulatory attention for their economic concentration and, nowadays, political influence. That power rests partly on external factors -- such as Section 230's liability shield, network effects that allowed massive market dominance, and a decade of zero-bound interest rates that made growth-over-profit capitalization strategies economically rational. But it has also been afforded by their corporate architectures. A study of such companies illuminates how governance tools designed to discipline corporate power can be defused through corporate law affordances themselves (dual-class, CEO/Chair cumulation, debt-over-equity capitalization) and through regulatory blind spots that previous reform waves left unaddressed.

Given this, drawing on the historical evolution of U.S. corporate governance until its culmination in the Big Tech ascension, this paper critically examines Brazil's recent legislative trajectory and contends that importing governance frameworks designed for a different market, without internalizing the lessons of their failure and specificities of the internal reality, risks replicating the governance as form vs. as substance pathology demonstrated by Big Tech.

2. The Arc of U.S. Corporate Governance: A History of Oscillation

The history of U.S. corporate governance is a history of oscillations between crisis and legal reform that pursued procedural enhancements without ever touching the design of corporate power. Such trend is mostly informed by U.S. liberal tradition¹⁴³, that sees the internal governance of companies as a matter for private ordering, away from State interference. On that premise, the State's proper role in capital markets is to regulate information flows, not to prescribe how corporations distribute voting rights or regulate the internal exercise of authority.

The foundational design choice was made in the 1930s. The Great Depression discredited the concentrated corporate power of the "robber barons" era and prompted mass divestiture, transforming U.S. capital markets into a

¹⁴²PL 2,925/2023 refers to the corporate governance reform bill introduced by the Ministry of Finance in June 2023, proposing amendments to Laws 6,385/1976 and 6,404/1976. Under that designation the bill has been discussed in Brazilian corporate law commentary since its presentation to the Chamber of Deputies. In early 2025, PL 2,925/2023 was formally attached (apensado) to PL 1,817/2022 and subsequently to PL 3,899/2012, a bill establishing the National Policy for Circular Economy, which served as the legislative vehicle for the combined package approved by the Chamber of Deputies on October 29, 2025. Upon transmission to the Federal Senate, the bill received the designation PL 5,662/2025 and has since been redesignated as Substitutivo da Câmara dos Deputados ao Projeto de Lei nº 1,874/2022. This paper cites the corporate governance provisions throughout as PL 2,925/2023, consistent with established usage in Brazilian legal commentary, and references the bill's current Senate status as of the date of writing.

¹⁴³See David Vogel, *Why Businessmen Distrust Their State: The Political Consciousness of American Corporate Executives*, 8 Brit. J. Pol. Sci. 45 (1978) (tracing American corporate executives' distinctive hostility to the state to a Lockean political culture that, lacking a feudal past or a serious socialist challenge, casts public power as a threat to liberty rather than its guarantor). That political-cultural inheritance helps explain why American regulation of the corporation has favored mandatory disclosure over direct state intervention in corporate structure. Such regulatory choice -- a defining feature of American capital-markets law since the New Deal disclosure statutes -- was later elaborated and defended on efficiency grounds. See John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 Va. L. Rev. 717 (1984).

landscape of dispersed ownership¹⁴⁴ where professional managers had wide discretion and limited accountability, while dispersed and passive shareholders lacked the information and coordination to discipline them.¹⁴⁵ The Securities Act of 1933, the Securities Exchange Act of 1934, and the creation of the SEC addressed this problem through mandatory disclosure rules rather than intervening directly in corporation's governance settings.¹⁴⁶

In 1988, the SEC attempted a more direct intervention: Rule 19c-4 prohibited dual-class recapitalization -- i.e. listed companies from issuing securities that diluted the voting rights of existing shareholders.¹⁴⁷ However, the D.C. Circuit struck the rule down in *Business Roundtable v. SEC* (1990), holding that the SEC had exceeded its statutory authority "because the rule directly controls the substantive allocation of powers among classes of shareholders".¹⁴⁸ The decision confirmed: the federal government's role was to regulate information, not internal allocation of power. Sarbanes-Oxley (SOX) (2002) and Dodd-Frank (2010) repeated this pattern under different crises. SOX reformed audit oversight, stipulated CEO/CFO certification of financial statements, enhanced internal controls, and imposed new criminal penalties for fraud. Dodd-Frank expanded shareholder voice through say-on-pay and proxy access -- then made say-on-pay non-binding and watched proxy access struck down by the D.C. Circuit in *Business Roundtable v. SEC* (2011)¹⁴⁹ applying the same logic as 1990. All such reforms were backward-looking and procedural: they addressed the specific governance failures that corporate scandals such as Enron's had made visible (audit capture, disclosure manipulation, board passivity in financial oversight) through the enhancement of internal corporate procedures. But the fundamental architecture of corporate power -- who controls the vote, who selects the board, who can be removed and by whom -- remained untouched. By the 2000s, the technology founders who designed their governance arrangements in this environment were able to manage the legal permissiveness to entrench power.

3. Big Tech: Governance Form vs. Substance

For present purposes, "Big Tech" refers to Alphabet, Apple, Meta, Amazon, and Microsoft.¹⁵⁰ They illustrate the gap between governance form and governance substance through the usage of corporate law permissiveness.

The analytically useful feature of this group is the generational divide that runs through it. The older cohort -- Apple (IPO 1980), Microsoft (IPO 1986), and Amazon (IPO 1997) -- went public under conventional governance expectations: single-class shares, CEO/Chair separation maintained for most of their corporate history, and no single individual holding controlling voting power. At Apple and Microsoft, the largest shareholders today are predominantly index-driven asset managers -- BlackRock, Vanguard, and State Street.¹⁵¹ At Amazon, founder Jeff Bezos retains less than 10% of shares.¹⁵² These companies became trillion-dollar enterprises without dual-class stocks, founder voting

¹⁴⁴Marco Becht & J. Bradford DeLong, *Why There Has Been So Little Block Holding in America?*, in *A History of Corporate Governance Around the World: Family Business Groups to Professional Managers* 613, 613--16 (Randall K. Morck ed., 2007).

¹⁴⁵Adolf A. Berle & Gardiner C. Means, *The Modern Corporation and Private Property* (1932).

¹⁴⁶Securities Act of 1933, ch. 38, 48 Stat. 74 (codified at 15 U.S.C. §§ 77a--77aa); Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified at 15 U.S.C. §§ 78a--78pp).

¹⁴⁷Jill E. Fisch & Steven Davidoff Solomon, *Dual Class Stock* 4 (European Corporate Governance Inst., Working Paper No. 23-21, 2023), <https://www.ecgi.global/sites/default/files/working_papers/documents/dualclassstock.pdf>.

¹⁴⁸*Business Roundtable v. SEC*, 905 F.2d 406 (D.C. Cir. 1990).

¹⁴⁹*Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011) (vacating Rule 14a-11, the proxy-access rule, as arbitrary and capricious for the Commission's failure to assess adequately the rule's economic effects).

¹⁵⁰The five companies comprising the GAFAM acronym, as is standard. See Pauline Affeldt & Reinhold Kesler, *Big Tech Acquisitions -- Towards Empirical Evidence*, 12 J. Eur. Competition L. & Prac. 471 (2021).

¹⁵¹The Vanguard Group holds 9.63% and BlackRock, Inc. holds 7.10% of Apple's common stock outstanding as per 2026 Form DEF 14A. Within Microsoft, Vanguard Group holds 8.95% and BlackRock, Inc. 7.30% of common stock outstanding as of the Form DEF 14A filed in December 2025.

¹⁵²According to Amazon's 2026 Form DEF 14A, Jeff Bezos retains 8.8% of equity, besides The Vanguard Group's 7.2% stake and BlackRock, Inc.'s 5.9%.

control, and CEO and Chair continuous cumulation -- a fact that, by itself, undermines the claim that governance permissiveness is a precondition for tech-sector growth.

The newer cohort, Alphabet (IPO 2004) and Meta (IPO 2012), went public after the inflection point documented in Section 2, exploiting the legal affordances that seven decades of disclosure-not-structure regulation had left available. Both adopted dual-class shares granting founders supervoting rights. At Meta, Mark Zuckerberg holds approximately 60% of voting power with roughly 13.4% of economic ownership.¹⁵³ At Alphabet, co-founders Larry Page and Sergey Brin retain 52.3% of voting power with 6.7% equity.¹⁵⁴ In both companies, the founder has served as CEO and Chair simultaneously or has exercised *de facto* control over both positions.¹⁵⁵ The nominally independent board is selected by the controlling shareholder -- rendering the independence requirement formally compliant but substantively hollow.¹⁵⁶ This is further entrenched by financialization: rather than issuing equity, these companies increasingly capitalize through low-cost debt, preserving ownership and control intact.¹⁵⁷ Each governance instrument formally serves accountability, but operates within a setup engineered to foreclose it.

The consequences extend beyond the companies' internal structures. Index investing forces the largest institutional shareholders -- BlackRock, Vanguard, State Street -- to hold these stocks regardless of governance quality, since their funds replicate indices in which Big Tech dominates by capitalization weight.¹⁵⁸ Even active managers face pressure to maintain Big Tech exposure given these companies' outsized contribution to portfolio returns.¹⁵⁹ The result is a paradox: the institutions with the largest economic stakes have small governance leverage, either because dual-class shares render their votes meaningless (at Alphabet and Meta) or because competitive dynamics make divestment economically irrational (across all five).

This is where the failure reaches its clearest demonstration: Proxy filings show a growing number of shareholder proposals at Big Tech companies addressing environmental, social, and governance concerns. Yet, management has repeatedly recommended against these proposals across the group.¹⁶⁰ This pattern reveals the ESG paradox in its

¹⁵³Economic ownership was calculated by dividing the number of shares held by Mark Zuckerberg (342,463,325) by the total number of shares outstanding (2,538,423,304). See Meta Platforms, Inc., 2026 Form DEF 14A.

¹⁵⁴And further insulated their position in 2012 by creating a third class of non-voting shares (Class C), allowing them to dilute economic interest without diluting control.

¹⁵⁵In Meta, Zuckerberg has cumulated the CEO and Chair positions for largely the entire existence of the company. On the other hand, for most of its existence, Google's CEO position was occupied by Eric Schmidt (2001-2011) or Sundar Pichai (2015-2019 on Google and 2019-today on Alphabet). The founder Larry Page held Google's CEO position from 2011 to 2015, and Alphabet's CEO position from 2015 to 2019.

¹⁵⁶As an example, Meta's 2026 Proxy Statement indicates 11 out of the 12 Director nominees were independent (even though under Nasdaq's rules this is not required). Between them are names such as Marc Andreessen, a long-time business partner to Zuckerberg, and Dana White, an acquaintance of Donald Trump, appointed to the board in 2024, after presidential elections and notorious approximation between Zuckerberg and the republican candidate. Even so, both are categorized as independent.

¹⁵⁷Rodrigo Fernandez, Ilke Adriaans, Tobias J. Klinge & Reijer Hendrikse, *The Financialisation of Big Tech*, Centre for Research on Multinational Corporations (SOMO) (2020).

¹⁵⁸See Lucian A. Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 Colum. L. Rev. 2029 (2019) (documenting that the "Big Three" index fund managers hold shares in virtually every significant U.S. public company and that their replication-mandate business model limits governance engagement); Jan Fichtner, Eelke M. Heemskerk & Javier Garcia-Bernardo, Hidden Power of the Big Three? Passive Index Funds, Re-Concentration of Corporate Ownership, and New Financial Risk, 19 Bus. & Pol. 298 (2017) (documenting that passive index strategies produce systematic ownership concentration in large-capitalization stocks). For GAFAM's weight in the S&P 500, see S&P Dow Jones Indices, S&P 500 Index Factsheet, May 29, 2026.

¹⁵⁹See Lucian A. Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. Econ. Persp. 89, 99-101 (2017) (documenting performance pressure on institutional investors to maintain exposure to large-cap technology stocks that drive index returns).

¹⁶⁰See Meta Platforms, Inc., 2026 Form DEF 14A; Alphabet, Inc., 2026 Form DEF 14A; Apple, Inc., 2026 Form DEF 14A; Amazon, Inc., 2026 Form DEF 14A; Microsoft, Inc., 2026 Form DEF 14A. Across all companies, the Board recommended against all shareholders' proposals (some regarding disclosure on AI usage and misinformation, data privacy, human rights due diligence, and sustainability).

starkest form: the entire architecture of ESG engagement presupposes that the "G" (governance) functions as a transmission mechanism through which shareholders influence corporate conduct on "E" and "S" matters. But when governance is defused through voting concentration, board capture, and institutional investor powerlessness, ESG becomes a disclosure ritual without an accountability loop. These companies produce sustainability reports, human rights assessments, and climate commitments, while the shareholders nominally empowered to enforce those commitments lack the capacity to do so. Such pathology -- the formal compliance with governance best-practices, with a substance hollowing due to power entrenchment -- is the foreseeable consequence of a legal environment that, while refining disclosure and procedures, opted to be permissive in power distribution. Brazil should learn from this comparative experience.

4. Brazil at the Crossroads: Reform architecture and Its Limits

Brazil's recent reform of Brazilian Corporations Law¹⁶¹ -- the BCL -- unfolds on two fronts: Law 14,195/2021 and Bill 2,925/2023. This Section argues that both instruments share a single flaw -- the importation of U.S. models without adequate legislative deliberation or attention to Brazil's own market -- yet fail in different ways: Law 14,195/2021 introduces supervoting shares conceived for dispersed ownership onto a market defined by concentrated control, a mismatch rather than a remedy; while Bill 2,925/2023 imports private-enforcement tools whose gaps sever the accountability loop, reproducing the form-versus-substance pathology documented in Sections 2 and 3.

Law 14,195/2021: The Supervoting Trade-Off

Law 14,195/2021 was born from a specific political-economic motivation: improving Brazil's position in the World Bank's Doing Business rankings at a moment when the Bolsonaro administration prioritized international signals of business-friendly reform.¹⁶²⁻¹⁶³ The original text was unjustifiably introduced as a *Medida Provisória*¹⁶⁴, focused on simplifying business registration and reducing bureaucratic barriers. During its conversion into law, however, it absorbed corporate governance amendments to BCL that went beyond administrative simplification and pointed in contradictory directions.

On one front, the law introduced governance-tightening measures consistent with internationally recognized best practices: the prohibition of CEO/Chair cumulation (article 138, §3o), mandatory independent board membership (article 140, §2o), extended shareholder pre-meeting disclosure periods (article 124, §1o, I), and general meeting approval rights over significant corporate contributions to other entities (article 122, X). On the other, it inserted *ações com voto plural* -- supervoting shares -- into BCL for the first time, on a competitive-pressure rationale: that Brazilian markets needed to accommodate tech era corporate settings (founder-control) to keep promising companies from listing abroad. The result is that BCL now prohibits CEO/Chair duality yet lets a founder hold supervoting shares granting *de facto* control over the board that appoints both -- the same governance as form vs. substance trap documented in Section 2.

¹⁶¹Law 6,404/1976 (Braz.) (the Brazilian Corporations Law) [hereinafter BCL].

¹⁶²The Exposition of Reasons (Exposição de Motivos) accompanying the law expressly states the objective "To improve the business environment in Brazil, as well as positively impact the country's position in the overall ranking of the World Bank's Doing Business report." Exposição de Motivos da Medida Provisória No. 1.040/2021, <https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2021/exm/exm-mp-1040-21.pdf>.

¹⁶³Ironically, the ranking was discontinued shortly after, in September 2021, for irregularities of the reports' data, within months of the law's enactment. World Bank Group, *World Bank Group to Discontinue Doing Business Report* (Sept. 16, 2021), <<https://www.worldbank.org/pt/news/statement/2021/09/16/world-bank-group-to-discontinue-doing-business-report>>.

¹⁶⁴The original legal instrument was enacted as Medida Provisória No. 1.040/2021. A *medida provisória*, or provisional measure, is an instrument with the force of law that the President of the Republic may issue in cases of relevance and urgency of the subject matter. Constituição Federal [C.F.], art. 62, *caput* (Braz.).

Brazil, however, did not simply replicate the U.S. dual-class model. BCL imposes the limit of ten votes per share, a seven-year sunset clause, and restricts issuance to private companies or companies prior to any public listing of securities¹⁶⁵ -- evidence of comparative learning.¹⁶⁶ Nevertheless, two reflections challenge the usefulness of such reform.

First, despite five years in force, no Brazilian company has adopted *ações com voto plural* to date, which warrants scrutiny of the competitive pressure rationale that justified its adoption. The evidence is mixed. Nubank justified its NYSE listing on access to international investors and valuation multiples unavailable domestically -- factors largely independent of share-structure permissiveness -- though it adopted dual-class shares abroad that Brazilian law did not then permit. XP Investimentos, by contrast, invoked U.S. permissiveness and the capacity to preserve founder voting control as the decisive listing factor.¹⁶⁷⁻¹⁶⁸ Therefore, the two cases counsel against blanket acceptance or rejection of the competitive pressure rationale; they do not resolve whether it justifies the specific legal form "*ações com voto plural*" enacted in the Brazilian market.

Second, even assuming the competitive pressure rationale is valid, *ações com voto plural* mismatches Brazil's capital market architecture at two levels, each affecting a different population of potential users. The first population is growth-stage technology companies (the actors the competitive pressure argument assumed) whose founders risk losing majority control through successive financing rounds before or at IPO. For these, the mismatch is the Novo Mercado: B3's¹⁶⁹ highest governance tier, which admits only one-share-one-vote, is also the platform international institutional capital requires.¹⁷⁰⁻¹⁷¹ Hence a startup adopting *ações com voto plural* pre-IPO disqualifies itself from the segment that makes its shares attractive to the cross-border investors the reform meant to retain.

The second population is established private companies -- family-controlled or pre-IPO companies targeting lower governance tiers -- for whom the Novo Mercado barrier does not apply but whose market does not generate the ownership dynamics that supervoting shares were designed to address. The U.S. dual-class rationale presupposes that successive financing rounds dilute the founder until a dispersed public base at IPO can threaten managerial control. Brazilian listed companies, across all tiers, are predominantly controlled by a dominant shareholder retaining a block post-IPO, a feature that the minimum free float requirements across B3's listing segments reflect.¹⁷² A pre-IPO

¹⁶⁵Law 6,404/1976, Article 110-A (free translation): "The creation of one or more classes of common shares with multiple voting rights is permitted, not exceeding 10 (ten) votes per common share: I - in a private corporation; and II - in a publicly traded corporation, provided that the creation of the class occurs before the trading of any shares or securities convertible into shares issued by it in organized securities markets."

¹⁶⁶See, e.g., Lucian A. Bebchuk & Kobi Hamdani, *The Elusive Quest for Global Governance Standards*, 157 U. Pa. L. Rev. 1263 (2009); Council of Institutional Investors, *Petition to the SEC on Dual-Class Shares* (2018) (advocating for mandatory sunset clauses and vote caps as conditions for dual-class listings, neither of which has ever been legislated at the U.S. federal level).

¹⁶⁷See BBC News Brasil, *Por que as startups brasileiras preferem abrir capital nos EUA?*, <<https://www.bbc.com/portuguese/geral-59355081>>.

¹⁶⁸Nu Holdings Ltd., Annual Report (Form 20-F) 2025 ("Our Class B ordinary shares are entitled to 20 votes per share and our Class A ordinary shares are entitled to one vote per share."). XP Inc., by contrast, attributed its decision to list on the NYSE to the permissiveness of U.S. law, particularly the ability to preserve founders' control of the firm. See BBC News Brasil, *Por que as startups brasileiras preferem abrir capital nos EUA?*, <<https://www.bbc.com/portuguese/geral-59355081>>.

¹⁶⁹The Brazilian Stock Exchange is called Brasil, Bolsa, Balcão S.A. -- B3

¹⁷⁰In the United States, post-IPO adoption of dual-class share structures is effectively precluded not by statute but by exchange listing standards and major index inclusion policies. See NYSE Listed Company Manual § 313.00(A); Nasdaq Listing Rule 5640; S&P Dow Jones Indices, *S&P U.S. Indices Methodology* (restricting index inclusion of companies that issue shares with unequal voting rights after the effective date of those policies).

¹⁷¹B3 -- Brasil, Bolsa, Balcão, *Regulamento de Listagem do Novo Mercado*, Article 8, requiring listed companies on that segment to maintain exclusively ordinary shares (*ações ordinárias*).

¹⁷²B3's segments set only a minimum free float, not a ceiling on the controller's stake: in the Novo Mercado, shares in circulation must reach at least 20% of capital (reducible to 15% where average daily trading volume meets B3's liquidity threshold). See B3 - Brasil, Bolsa, Balcão, *Regulamento de Listagem do Novo Mercado*, art. 10 (free-float thresholds as revised by Ofício Circular 013/2023-PRE, eff. Jan. 31, 2023). By fixing only a floor for shares in circulation, the regime presupposes and accommodates controllers retaining the remaining super-majority (up to roughly 80% of capital) after listing.

adoption of *ações com voto plural* in this context adds a supervoting layer to a control position that the IPO would not have substantially threatened. The instrument addresses, with additional rigidity, a problem the Brazilian market does not produce with the intensity the competitive pressure narrative assumed.

The companies for which *ações com voto plural* could serve its stated purpose are exactly those that cannot use it without abandoning the listing tier that makes that purpose viable; the companies that can use it freely are those for which it merely insulates a control position the market would not have threatened. The absence of any adoptions to date may reflect exactly this mismatch: the instrument does not efficiently solve the problem it was designed to solve for the companies that problem affects most acutely.

Bill 2,925/2023: Private Enforcement Gains, Accountability Gaps

Bill 2,925/2023 originated as an independent reform focused on transparency in arbitration and private enforcement mechanisms in the securities market, but it was formally appended to PL 3,899/2012 -- whose primary subject is the National Circular Economy Policy -- in a maneuver designed to accelerate processing by attaching it to a vehicle with broader political support.¹⁷³ The result is a bill in which amendments to the BCL and to Law 6,385/1976 (Capital Markets Law) appear alongside provisions defining circular economy principles, recycling targets, and sustainable consumption objectives. Nonetheless, the bill's two most consequential changes to domestic corporate law address the private enforcement mechanisms on which both governance accountability and ESG implementation depend.

First, the threshold for the derivative action to pursue administrator's liability¹⁷⁴ is reduced from 5% to 2.5% of securities of the same class, or R\$50 million in holdings -- following the OECD's 2020 comparative study¹⁷⁵, which identified threshold barriers as an obstacle to minority protection. The reform is positive, but once again it exposes the legal transplant problem: Brazil's retail investor base grew from approximately 700,000 to over 5 million individual shareholders between 2018 and 2022¹⁷⁶, predominantly through equity market participation; yet neither 2.5% of a major public company's outstanding securities nor R\$50 million in holdings is accessible to that population. The threshold reduction does not recalibrate for who actually needs access.¹⁷⁷

Second, the bill introduces, for the first time, a specific collective civil action for investor damages.^{178, 179} The opt-out model automatically covers all affected investors in the same class, overcoming the coordination failures that individual litigation cannot surmount. However, two pitfalls stand out. First, while the Bill makes administrators personally liable for incorrect market disclosures, it exempts the company (except when acting as offerants in IPOs).

¹⁷³PL 2,925/2023 was formally archived and appended to PL 3,899/2012 on the grounds of thematic connection, a legislative procedure known colloquially as the *jabuti* phenomenon --- attaching substantive provisions to a faster-moving vehicle. Capital Aberto described this maneuver directly: "*Projeto de Lei das S.A. vira 'jabuti' e vai parar dentro de PL da Economia Circular*", Capital Aberto (Mar. 26, 2026), available at <<https://capitalaberto.com.br/regulamentacao/projeto-de-lei-das-s-a-vira-jabuti-e-vai-parar-dentro-de-pl-da-economia-circular/>>.

¹⁷⁴BCL art. 159, § 4º.

¹⁷⁵OECD, *Private Enforcement of Shareholder Rights: A Comparison of Selected Jurisdictions and Policy Alternatives for Brazil* (2020), prepared in partnership with the CVM and the Ministry of Economy.

¹⁷⁶B3, *Pessoas Físicas: Uma análise da evolução dos investidores na B3 - December 2022*, <<https://www.b3.com.br/data/files/60/F5/18/AD/155E6810FAAA1D68AC094EA8/Book%20PF%20-%204TRI%202022.pdf>>.

¹⁷⁷Gondim & Caires, *PL 2.925 e a ampliação da tutela privada de direitos de acionistas minoritários*, JOTA (2023), <<https://www.jota.info/opiniao-e-analise/artigos/pl-2925-e-a-ampliacao-da-tutela-privada-de-direitos-de-acionistas-minoritarios>>.

¹⁷⁸Articles 27-G--27-H proposed by the bill to be inserted in Law 6,385/1976.

¹⁷⁹Its 1989 predecessor, Law 7,913, having "never worked" in practice. See Vidigal Neto, *PL nº 3.899/2012: possíveis impactos práticos para administradores, companhias abertas e operações de M&A*, <<https://www.vidigalneto.com.br/artigos/pl-no-3-899-2012-possiveis-impactos-praticos-para-administradores-companhias-abertas-e-operacoes-de-ma-cf-tabela-comparativa-da-lei-das-s-a-e-lei-do-mercado-de-capitais>> ("considerando que a antiga ação civil pública do mercado de valores mobiliários, disciplinada pela Lei 7.913, de 7 de dezembro de 1989, jamais vingou").

The problem is administrators, lacking the financial capacity of the company, are far less likely to produce meaningful recovery in large-scale damages cases.^{180,181} Besides, D&O insurance in Brazil is far shallower than in the United States, where company liability -- funded through institutional policies designed for large-scale claims -- is what makes class action recovery viable. The exemption also creates a perverse incentive: it may deter qualified professionals from accepting board positions, further weakening the board independence that the Bill's governance framework depends upon.¹⁸²

As a second pitfall, the Brazilian Arbitration Committee (CBAr) flagged across three technical opinions that routing collective civil actions through arbitration is incompatible with an opt-out regime: arbitral tribunal constitution generates conflicts of interest multiplied across a dispersed investor class; generic condemnation cannot be efficiently liquidated within arbitration; and the cost of separate liquidation proceedings would frustrate enforcement in precisely the cases where aggregate recovery matters most.¹⁸³ CBAr then recommended expressly prohibiting arbitration for these collective actions (a correction the Senate must make or ratify by omission).

The bill situates its corporate governance amendments within a circular economy framework -- a design that presupposes ESG enforceability through enhanced shareholder action. But ESG commitments are only meaningful where governance creates real accountability. The reduction of derivative action threshold to 2.5%, the company liability exemption, and the arbitration architecture incompatible with collective recovery, severs the accountability loop before it can operate.

5. Final Considerations

The 2026 reform cycle offers Brazil a chance the United States never deliberately took: to settle the architecture of corporate power by legislative design rather than by litigation and default. Three lessons follow from the comparison. First, procedural reform cannot compensate for structural permissiveness -- disclosure and liability rules do not discipline a vote that concentration has already foreclosed. Second, imported governance tools must be adapted to local market conditions, or they solve problems Brazil does not have while neglecting those it does. Third, ESG commitments are only meaningful where governance sustains a real accountability loop. The Senate still holds the pen on Bill 2,925/2023; once these structures entrench, the political economy of reversal makes correction far harder than prevention.¹⁸⁴

¹⁸⁰IBGC, *Contribuições do IBGC ao projeto de lei 3899/2012*, <<https://ibgcsitenovo.blob.core.windows.net/ibgcsitenovo/Advocacy%20-%20Notas%20e%20Posicionamentos/2025/PL%203899.2012%20nota%20t%C3%A9cnica%20ao%20relator%20Dep.%20Luciano%20Vieira.pdf>> ("Ao restringir a responsabilidade exclusivamente aos administradores -- que não têm a mesma capacidade financeira e de execução da companhia --, o §4º compromete a possibilidade de os investidores obterem ressarcimento, de fato").

¹⁸¹*Id.* ("a experiência mostra que a responsabilidade dos administradores na esfera judicial, na prática, ocorre raramente"); *see also* Ana Carolina Rodrigues, *A Responsabilidade Civil dos Administradores de Companhias Abertas Não Financeiras por Danos Causados à Sociedade e aos Acionistas e o Desenvolvimento do Mercado de Valores Mobiliários Brasileiro* (2011) (Dissertação de Mestrado, FGV São Paulo).

¹⁸²*Id.*

¹⁸³Isabel Cantidiano, *O PL nº 2925/2023 e a ação civil coletiva de responsabilidade*, Boletim do CBAr (Dec. 10, 2025), <<https://comitebrasileirodearbitragem.substack.com/p/11-o-pl-n-29252023-e-a-acao-civil>>.

¹⁸⁴By the *political economy of reversal* I mean the asymmetry that entrenchment creates: once supermajority control and the liability and arbitration architecture are in place, their beneficiaries (controllers and the intermediaries organized around them) form a concentrated, well-resourced constituency with both the incentive and the means to defend the status quo, while the diffuse losers (minority and prospective investors) confront the ordinary collective-action barriers to mobilizing for reform. Correction must therefore overcome organized resistance that prevention never had to face.

ARTICLE

U.S. Estate Tax Planning for Brazilian Nonresident Aliens with U.S. Citizen or Resident Children: Mitigating Multi-Generational Exposure Through Strategic Trust Structures

Rafael Falcetta Correa¹⁸⁵

Abstract: Brazilian ultra-high-net-worth individuals who qualify as nonresident aliens face material U.S. estate tax exposure on assets situated in the United States. They are entitled only to a \$13,000 unified credit, which effectively shelters approximately \$60,000 of U.S.-situs property, in contrast to the \$15 million basic exclusion amount (or \$30 million with portability) available to U.S. citizens and domiciliaries. For families with U.S. citizen or resident children, the principal risk does not arise upon the initial transfer from the Brazilian parent, but rather upon the subsequent transfer from the U.S. children to their descendants. Immediate planning tools, such as holding U.S. assets through foreign corporations, acquiring U.S. life insurance, and relying on bilateral estate tax treaties (including the U.S.-Italy Treaty for eligible dual Italian-Brazilian citizens), can reduce or eliminate tax at the parent's death. However, these techniques generally require the filing of Form 706-NA and do not prevent second-generation estate tax exposure. Properly designed trusts, combined with situs restructuring, allow Brazilian families to achieve multi-generational succession without repeated U.S. estate tax while complying with Brazilian tax obligations under Brazilian Federal Law No. 14.754/2023. These structures also facilitate the long-term inflow of foreign capital into U.S. markets, as foreign companies held by the trust typically invest in U.S. equities, funds, and other domestic assets that ultimately benefit U.S. persons across generations.

Keywords: Nonresident aliens; U.S. estate tax; Brazilian high-net-worth families; Trust planning; Multi-generational succession; U.S.-Italy Estate Tax Treaty; Second-generation estate tax; Cross-border estate planning; Form 706-NA.

Resumo: Indivíduos brasileiros ultra-high-net-worth que se qualificam como não residentes estrangeiros enfrentam exposição relevante ao imposto sobre herança nos Estados Unidos em relação a bens situados naquele país. Tais indivíduos contam apenas com um crédito unificado de US\$ 13.000, que abriga efetivamente cerca de US\$ 60.000 em ativos situados nos EUA, em contraste com a exclusão básica de US\$ 15 milhões (ou US\$ 30 milhões com portabilidade) aplicável a cidadãos e domiciliados americanos. Para famílias com filhos cidadãos ou residentes nos EUA, o principal risco não decorre da transferência inicial feita pelo ascendente brasileiro, mas da transferência subsequente dos filhos nos EUA para seus descendentes. Instrumentos imediatos de planejamento, como a titularidade de ativos americanos por sociedades estrangeiras, a contratação de seguro de vida nos EUA e a utilização de tratados bilaterais de imposto sobre herança (inclusive o Tratado EUA-Itália para cidadãos ítalo-brasileiros), podem reduzir ou eliminar o imposto no falecimento do ascendente. Contudo, essas técnicas geralmente exigem a apresentação do Formulário 706-NA e não evitam a exposição ao imposto sobre herança na segunda geração. Trusts adequadamente estruturados, combinados com reestruturação de situs, permitem às famílias brasileiras realizar uma sucessão multigeracional sem a incidência repetida de imposto sobre herança nos EUA, ao mesmo tempo em que cumprem as obrigações tributárias brasileiras previstas na Lei Federal nº 14.754/2023. Essas estruturas também favorecem a entrada de capital estrangeiro nos mercados americanos no longo prazo, uma vez que sociedades estrangeiras detidas pelo trust costumam investir em ações, fundos e outros ativos americanos que, ao final, beneficiam pessoas nos EUA ao longo das gerações.

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Palavras-chave: *Imposto sobre herança nos EUA; Famílias brasileiras de alto patrimônio; Planejamento com trusts; Sucessão multigeracional; Tratado de Imposto sobre Herança EUA-Itália; Imposto sobre herança de segunda geração; Planejamento sucessório crossborder; Lei das Offshores; Formulário 706-NA.*

1. INTRODUCTION

The accelerating cross-border mobility of Brazilian high-net-worth families has produced a distinct set of succession-planning imperatives for Brazilian individuals who qualify as nonresident aliens for U.S. federal income and estate tax purposes (typically those without U.S. citizenship or lawful permanent residency who do not intend to remain in the United States indefinitely) yet who maintain, or anticipate maintaining, U.S.-person children or other beneficiaries by reason of citizenship or lawful permanent residency¹⁸⁶. Under the prevailing U.S. transfer-tax regime, the incidence of tax turns principally upon the transferor's domicile and the situs of the assets rather than the beneficiary's status. Accordingly, the receipt of an inheritance by a U.S.-person heir does not itself constitute a taxable event for U.S. income tax purposes, and any estate tax liability is imposed at the decedent level pursuant to the provisions of the Internal Revenue Code.

For a nonresident non-citizen decedent, the U.S. gross estate is confined to property situated in the United States, which is taxed at graduated rates reaching a maximum of 40%, subject only to the sharply limited unified credit afforded nonresidents under section 2102(b) of the Internal Revenue Code. That credit, fixed at \$13,000 and effectively sheltering approximately \$60,000 of U.S.-situs value, stands in marked contrast to the basic exclusion amount available to U.S. citizens and domiciliaries under section 2010 of the Internal Revenue Code, which, as adjusted for inflation and statutory amendments effective in 2026, reaches \$15,000,000 per individual or \$30,000,000 when portability of a deceased spouse's unused exclusion is taken into account. The resulting asymmetry exposes Brazilian families holding U.S. real estate, equity interests in U.S. corporations, or rights under U.S.-source compensation arrangements to material estate-tax exposure that can be mitigated only through deliberate pre-mortem structuring. This exposure is particularly acute because the tax is calculated on the fair market value of the includible U.S.-situs property at the date of death, and even moderately sized holdings frequently encountered in diversified investment portfolios or executive compensation packages can generate significant federal estate tax liabilities absent proactive planning.

2. IMMEDIATE ESTATE TAX PLANNING ALTERNATIVES FOR BRAZILIAN NONRESIDENT ALIENS

Three principal techniques have emerged to address direct exposure at the level of the Brazilian nonresident alien parent. The first involves eliminating or minimizing direct individual ownership of U.S.-situs assets by contributing them to a foreign corporation organized under Brazilian or other non-U.S. law. Shares of a foreign corporation constitute foreign-situs property and therefore fall outside the U.S. gross estate of the nonresident alien shareholder, shifting the locus of succession to the corporate level and eliminating U.S. estate tax exposure on the underlying assets. This approach, however, introduces its own complexities: dispositions of U.S. real property interests may trigger tax under the Foreign Investment in Real Property Tax Act (FIRPTA), certain income may be treated as effectively connected with a U.S. trade or business, and Brazilian tax rules governing controlled foreign entities or the reporting

¹⁸⁶Internal Revenue Code of 1986, as amended, § 7701(b) (defining resident and nonresident alien status); see also § 877A(g) (defining covered expatriate).

and attribution regime of Brazilian Law No. 14.754 of December 12, 2023 must be carefully navigated. When the foreign corporation is in turn owned by a trust, the structure often achieves both estate-tax removal and improved multi-generational governance.

The second technique centers on the acquisition of a life insurance policy issued by a U.S. insurer on the life of the nonresident alien. Proceeds of such policies are generally excluded from the decedent's U.S. gross estate under section 2105(a) of the Internal Revenue Code. Upon death, the tax-free proceeds furnish liquidity to U.S. heirs, enabling them to satisfy any estate tax liability arising from other U.S.-situs assets without the necessity of an immediate forced sale. While this solution does not eliminate the underlying tax, it materially reduces the practical burden of payment and preserves family assets that might otherwise have to be liquidated at distressed values.

The third technique relies on bilateral estate and gift tax treaties to which the United States is a party. Certain of these treaties afford qualifying residents or citizens of the treaty partner access to unified credit benefits, pro-rata exclusion amounts, or favorable situs rules that are unavailable to non-treaty nonresident aliens, thereby reducing or eliminating U.S. estate tax on U.S.-situs assets. Brazil does not maintain an estate or gift tax treaty with the United States, so this avenue of relief is unavailable to Brazilian nonresident aliens who lack qualifying status under another treaty. In particular, the United States--Italy Estate and Gift Tax Treaty can provide substantial relief for individuals who are citizens or residents of Italy¹⁸⁷. This includes numerous Brazilian families who also hold Italian citizenship. Under this treaty, qualifying Italian citizens who are not domiciled in the United States may claim a prorated unified credit. The available exemption is calculated by multiplying the full U.S. basic exclusion amount then in effect (currently \$15,000,000 for deaths occurring in 2026) by a fraction whose numerator is the fair market value of the decedent's U.S.-situs assets included in the gross estate and whose denominator is the fair market value of the decedent's entire worldwide estate (determined as if the decedent were a U.S. domiciliary). The resulting amount is treated as the decedent's available estate tax exemption for U.S. federal estate tax purposes, offering a powerful mechanism that can substantially reduce or eliminate U.S. estate tax liability for eligible dual nationals.

Even when life insurance or treaty relief is employed, the existence of U.S.-situs assets will still require the executor to file IRS Form 706-NA, if the value of those assets exceeds the \$60,000 filing threshold¹⁸⁸. Form 706-NA is the return used to report a nonresident alien decedent's U.S.-situated property, claim any applicable deductions or credits (including treaty benefits), and compute any estate tax due. In addition, U.S. real property will ordinarily require ancillary probate proceedings in the state where it is located. These requirements apply regardless of whether life insurance proceeds are available to pay any tax or whether a treaty reduces the tax liability. The three techniques described above are not mutually exclusive and may be combined, for example, by restructuring ownership of U.S. assets into a foreign corporation while also maintaining life insurance for liquidity or claiming treaty benefits where the decedent qualifies as an Italian citizen or resident, to achieve more comprehensive protection against immediate U.S. estate tax exposure. Consequently, while these three techniques can effectively address immediate exposure at the Non-U.S. parent's death, they leave untouched the far more consequential long-term exposure that arises when the same assets later pass from U.S. children to their own descendants.

3. TRUST STRUCTURES FOR MULTI-GENERATIONAL SUCCESSION

For ultra-high-net-worth Brazilian families whose children are U.S. citizens or are expected to become U.S. domiciliaries, the dominant U.S. estate tax risk is not the initial transfer from the Brazilian parent to the U.S. children. It is the subsequent transfer from those U.S. children to the grandchildren. Consider the common case of a

¹⁸⁷Convention between the United States of America and the Italian Republic for the Avoidance of Double Taxation with Respect to Taxes on Estates and Inheritances, Oct. 26, 1955.

¹⁸⁸Instructions for Form 706-NA (Rev. September 2025), United States Estate (and Generation-Skipping Transfer) Tax Return

\$100,000,000 estate passing to a single U.S. child. If the assets lack U.S. situs or have been restructured to remove U.S. situs, they may pass free of immediate U.S. estate tax. Yet upon the child's later death, the child's worldwide estate (including the inherited assets that have appreciated or generated further wealth) will be subject to U.S. estate tax at rates up to 40 percent on the value exceeding the then-applicable exclusion amount or the combined exclusion available with the child's spouse. This second-generation exposure can easily consume tens of millions of dollars and represents the true threat to intergenerational wealth preservation. The trust structures described below are designed precisely to remove assets from the taxable estates of the U.S. children and their descendants, thereby preventing the repeated application of U.S. estate tax at each generational level.

Trust-based planning has emerged as the principal vehicle through which Brazilian ultra-high-net-worth parents who qualify as nonresident aliens can achieve durable, multi-generational succession for their U.S. citizen or resident children and grandchildren while satisfying the requirements of both U.S. and Brazilian tax regimes. Two principal approaches are employed in practice. The first is a foreign revocable grantor trust under which the Brazilian nonresident settlor retains full dominion and control during life while designating U.S. children and their heirs as beneficiaries. Under the grantor-trust provisions of sections 671 and 679 of the Internal Revenue Code, all items of income, deduction, and credit are attributed directly to the settlor. Distributions to U.S.-person beneficiaries during the settlor's lifetime are therefore generally nontaxable at the beneficiary level for U.S. income tax purposes, because the income has already been taxed (or, in the case of a nonresident grantor not engaged in a U.S. trade or business, not taxed) at the grantor level. U.S. beneficiaries must nevertheless comply with extensive IRS information-reporting obligations, failure to satisfy which can result in substantial penalties. From the perspective of the U.S. beneficiaries, the structure offers clear advantages while the settlor remains alive. From the Brazilian settlor's perspective, however, distributions may attract state-level gift tax (ITCMD), as Brazilian authorities frequently characterize such transfers as gifts.

Upon the settlor's death the trust becomes irrevocable. There are generally no immediate U.S. estate tax consequences to the trust itself, assuming the assets lack U.S. situs or qualify for exclusion, although Brazilian ITCMD consequences may arise depending on the nature of the assets and the positions taken. It is frequently desirable, for U.S. tax purposes, that the trust be classified as domestic following the settlor's death, because domestic status subjects post-death income to U.S. taxation under the more favorable rules of Subchapter J, with distributions carrying out distributable net income pursuant to sections 661 through 663 of the Internal Revenue Code and avoiding the throwback regime and interest-charge mechanics that apply to foreign trusts with accumulated undistributed net income under section 667. U.S. tax classification of a trust as domestic or foreign is governed by the dual court-and-control test set forth in Treas. Reg. § 301.7701-7: a trust is domestic only if a U.S. court can exercise primary supervision over its administration and one or more U.S. persons control all substantial decisions¹⁸⁹. The trust does not automatically become domestic merely because the settlor has died. Careful drafting of fiduciary powers, protector mechanisms, and migration clauses is therefore essential if domestic classification is intended after death.

¹⁸⁹26 C.F.R. § 301.7701-7(d)(1)(ii). The term "substantial decisions" means those decisions that persons are authorized or required to make under the terms of the trust instrument and applicable law and that are not ministerial. Decisions that are ministerial include decisions regarding details such as bookkeeping, the collection of rents, and the execution of investment decisions. Substantial decisions include, but are not limited to, decisions concerning: (A) Whether and when to distribute income or corpus; (B) The amount of any distributions; (C) The selection of a beneficiary; (D) Whether a receipt is allocable to income or principal; (E) Whether to terminate the trust; (F) Whether to compromise, arbitrate, or abandon claims of the trust; (G) Whether to sue on behalf of the trust or to defend suits against the trust; (H) Whether to remove, add, or replace a trustee; (I) Whether to appoint a successor trustee to succeed a trustee who has died, resigned, or otherwise ceased to act as a trustee, even if the power to make such a decision is not accompanied by an unrestricted power to remove a trustee, unless the power to make such a decision is limited such that it cannot be exercised in a manner that would change the trust's residency from foreign to domestic, or vice versa; and (J) Investment decisions; however, if a United States person under section 7701(a)(30) hires an investment advisor for the trust, investment decisions made by the investment advisor will be considered substantial decisions controlled by the United States person if the United States person can terminate the investment advisor's power to make investment decisions at will.

The second approach utilizes an irrevocable non-grantor trust, which may be either domestic or foreign, settled for the benefit of the U.S. children and their heirs. Unlike the revocable grantor trust, this structure does not provide nontaxable treatment of distributions to U.S. beneficiaries during the settlor's lifetime. The irrevocable trust is treated as a separate taxpayer from the moment of funding, and distributions to U.S. beneficiaries are includible in their gross income to the extent of the trust's current-year distributable net income. Excess distributions may invoke the accumulation-distribution rules and the interest charge on undistributed net income under the throwback regime of section 667 of the Internal Revenue Code. From the Brazilian perspective, irrevocability generally triggers ITCMD upon the initial contribution of assets, because the settlor has made a completed gift by relinquishing control except to the limited extent expressly reserved in the governing instrument. This treatment contrasts with the revocable grantor trust, in which ITCMD is typically deferred until actual distribution or the settlor's death.

Under Brazilian Federal Law No. 14.754 of December 12, 2023 (Art, 10, § 1º), when a Brazilian tax-resident settlor irrevocably relinquishes control over an irrevocable trust, the structure generally achieves effective separation for Brazilian tax purposes. Thereafter, the trust's income and capital gains cease to be attributed to the settlor. If the beneficiaries are not Brazilian tax residents, this separation typically results in no Brazilian income tax being imposed on foreign-source income and gains generated by the trust, although Brazil-situs assets remain subject to applicable Brazilian tax rules, including those governing Brazilian-source income and ITCMD.

Both structures share a decisive advantage: assets properly contributed to the trust by the Brazilian settlor are generally not included in the U.S. beneficiaries' gross estates for U.S. estate tax purposes, provided the beneficiaries do not possess powers, such as a general power of appointment, that would cause inclusion under sections 2041 or 2042 of the Internal Revenue Code. This outcome generally enables true multi-generational, dynasty-style succession without the repeated imposition of U.S. estate tax at each generational transfer. The revocable grantor trust generally preserves nontaxable treatment of distributions during the settlor's lifetime and defers Brazilian ITCMD, while offering the settlor continued control. The irrevocable non-grantor trust produces current taxation on distributions to the extent of distributable net income and typically accelerates ITCMD at contribution, but delivers immediate separation from the settlor's estate under both U.S. and Brazilian rules. The choice between the two therefore turns on the relative importance of lifetime control and distribution flexibility, the timing of Brazilian tax costs, and the desired post-death U.S. tax classification of the trust.

These trust arrangements are particularly well suited to Brazilian families whose aggregate net worth places them in the range where second-generation exposure becomes material, typically several millions of dollars or greater. Where the amounts passing to each U.S. child are expected to remain below the \$15,000,000 basic exclusion amount (or \$30,000,000 with portability) and absent substantial subsequent growth in the children's estates, no U.S. estate tax would ordinarily arise at the children's deaths. In such circumstances the trust structure may still be warranted if the settlor wishes to make lifetime distributions through a revocable grantor trust or if the overall scale of the estate makes multi-generational exposure a meaningful concern.

4. CONCLUSION

Trust-based structures, when properly designed and combined with appropriate situs planning, represent the most effective and comprehensive solution available to Brazilian ultra-high-net-worth families seeking to preserve wealth across multiple generations while remaining fully compliant with both U.S. and Brazilian tax rules. Although immediate mitigation techniques, such as transferring U.S. assets to foreign corporations, acquiring U.S. life insurance policies, and claiming benefits under applicable estate tax treaties (including the U.S.-Italy Treaty for eligible dual nationals), can successfully address estate tax exposure at the Brazilian parent's death, these tools do not resolve the more significant and often overlooked second-generation estate tax risk. Only through carefully structured revocable

grantor trusts or irrevocable non-grantor trusts can families remove assets from the U.S. taxable estates of their children and grandchildren, thereby preventing the repeated imposition of U.S. estate tax at each generational level.

Beyond the clear advantages these structures offer to families, they also generate meaningful benefits for the United States. By facilitating the orderly and tax-efficient transfer of substantial wealth to U.S. persons, well-designed trust arrangements promote the long-term inflow of foreign capital into the U.S. economy. In practice, most ultra-high-net-worth Brazilian families that implement these structures maintain foreign companies held beneath the trust, which actively invest in U.S. equities, private investment funds, real estate, and other domestic assets. As a result, the wealth that ultimately passes to U.S. beneficiaries does not leave the United States. Instead, it continues to support American capital markets, entrepreneurship, job creation, and broader economic activity across generations. In this way, sophisticated cross-border succession planning serves not only private family objectives but also aligns with important U.S. policy interests in attracting and retaining foreign investment.

For these reasons, Brazilian ultra-high-net-worth families with U.S. citizen or resident heirs should view trust-based planning not merely as a defensive tax strategy, but as a proactive tool for both wealth preservation and the responsible deployment of capital within the United States. When implemented with careful attention to U.S. tax classification rules, Brazilian tax compliance under Federal Law No. 14.754/2023, and proper fiduciary governance, these structures provide a durable, multi-generational solution that benefits both the families involved and the U.S. economy.