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Litigation and Conflict Resolution

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Real Estate

Finance and Capital Markets

Intellectual Property

Recovery of Distressed Businesses

Corporate

Employment, Labor and Pension Law

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BM&A INVESTS IN INTERNATIONAL TRADE PRACTICE AREA

In response to increasingly sophisticated market demands, Barbosa, Müssnich & Aragão – BM&A decided to invest in the International Trade practice, bringing back to Brazil Adriana Dantas, who is known internationally for her work in the area. The initiative arises out of the growing importance of foreign trade for companies that do business in the Brazilian market, and the need for highly specialized legal support to deal with the increasing number of trade barriers and disputes that these businesses face.



Adriana Dantas: partner of the International Trade practice area

Adriana has practiced law in London and Geneva, and for the last five years she has been working in the United States – one of the most developed jurisdictions in international trade law – where she represented Brazilian and multinational companies in various proceedings before the American, European, Indian and Chinese authorities.

The International Trade group will assist clients in customs matters and issues related to international trade and tariff and non-tariff barriers that affect access to Brazilian and international markets. The group's specialists also have great experience in international trade disputes.

"The World Trade Organization agreements, which were made part of Brazilian law, came into effect in 1994, but Brazilian industries have been slow to recognize the opportunities that the WTO rules offer," explains BM&A's new partner.

The Brazilian rules that affect international trade are constantly changing, in an effort to increase the efficiency of measures adopted to defend industry sectors. Among these initiatives is a set of measures to foster national production and export of goods produced in Brazil. Trade defense actions to protect Brazilian industries are expected to increase, and will affect the interests of both exporters and importers. In addition, the internationalization of some sectors of the Brazilian economy have made them more vulnerable to tariff and non-tariff barriers adopted by Brazil's trading partners, requiring a strategic analysis of the impacts of these rules on the business of Brazilian multinationals.

Adriana acknowledges that the increase in protectionism around the world represents a big challenge, especially for the export sectors of the Brazilian economy, which only recently began to operate internationally, but she points out that BM&A is fully equipped to act in all aspects of international trade and provide effective legal support to its clients. The firm had been providing services related to customs and international trade matters to various companies, and has now opted to expand its team by engaging highly-qualified specialists with extensive international experience.

The leader of the new practice area will continue to work together with partners Barbara Rosenberg and Antenor Madruga, who both have experience in international legal matters.

To mark its investment in this practice area, BM&A hosted a round table on December 7th in São Paulo to discuss the perspectives for 2012 in the area of trade defense and the rules that affect international trade. The former Director of the WTO's Legal Affairs Division, Bruce Wilson, took part in the event.

THE ICC'S NEW ARBITRATION RULES

Fourteen years after the last revision, the International Chamber of Commerce has released its new arbitration rules, which will come into force on January 1st, 2012.

The revised rules are the result of two years of work, coordinated by the ICC's Arbitration Commission, by a Task Force of nearly 200 members, and a smaller drafting committee composed of 20 members from 14 countries on 5 different continents, including members of the Court of Arbitration, the Secretariat, lawyers, arbitrators and in-house counsel.

There was no urgent or overriding reason to amend the rules: the ICC remains the world's premier arbitration institution.¹ The revision was intended simply to include new tools and address the demands on arbitration practice that had arisen since 1998.

There are three main innovations: (a) the "emergency arbitrator", (b) the case management provisions, and (c) the rules on cases involving multiple parties and multiple agreements.

After the new rules come into effect, a party that requires urgent relief can apply to an emergency arbitrator, even before the arbitral panel is formed (Article 29.1).

The emergency arbitrator, who may not be an arbitrator in any arbitration related to the dispute (Appendix V, Article 2(6)), is appointed by the President of the ICC Court of Arbitration (Court) within two days (Appendix V, Article 2(1)). The emergency arbitrator's decision on the urgent relief must be issued with 15 days (Appendix V, Article 6(4)), and the parties are bound to comply with it (Article 29(2)), although the arbitral tribunal, once appointed, may modify, terminate or annul the order (Article 29(3)).

The possibility of obtaining interim or conservatory relief from the ICC is not entirely new. The current rules provide for a "pre-arbitral referee procedure", which allows the parties to request urgent relief from a "referee". However, aside from being more complex, the current pre-arbitral referee procedure is available only to parties that expressly "opt in". In contrast, under the new rules the emergency arbitrator provision will apply to all parties that enter into arbitration agreements after December 31, 2011, unless they expressly "opt out" (Article 26(6)(b)).

The second major change in the rules is the provision for a case management conference between the arbitrators and the parties at the beginning of the proceeding to determine the issues to be resolved, procedural measures and the timetable for the case.

The conference, which can be held by telephone or video, is intended to increase the efficiency and reduce the costs of the arbitration, and to that end, any of the "Techniques for Controlling Time and Costs in Arbitration", reproduced in part in the rules (Articles 22(1) and 24(1); Appendix IV), can be used.

The third innovation in the rules concerns arbitrations involving multiple parties or agreements. Unlike the current rules, the new rules contain detailed provisions on the matter.

When multiple agreements are involved, the new rules allow the parties to make their claims in a single arbitration, even if the claims are based on more than one agreement (Article 9). However, a single arbitration proceeding will be permitted only if the arbitration agreements are compatible and the parties are agreed that the claims may be resolved in a single arbitration (Article 6(4)(ii)).

The new rules also provide that any of the parties may join an additional party to the arbitration by means of a "request for joinder" (Article 7). However, this request will be granted only if the Court determines that the additional party is bound by an arbitration agreement (Article 6(4)(i)). Once joined, the additional party may, together with the claimant(s) or respondent(s), appoint an arbitrator to the panel (Article 12(7)).

The possibility of joining additional parties is limited in time, however: once any arbitrator has been appointed or confirmed, additional parties may only be joined if all parties, including the additional party, agree (Article 7(1)).

Lastly, the new rules contain provisions on the consolidation of parallel arbitrations. Consolidation can occur only at the request of one of the parties, and if (i) all parties agree, (ii) the claims are based on the same arbitration agreement, or (iii) the claims are based on more than one arbitration agreement, but the arbitration agreements are compatible and the arbitrations involve the same parties and the same legal relationship (Article 10).

¹See "2010 International Arbitration Survey: Choices in International Arbitration", p. 23.

BRAZIL'S MULTIYEAR PLAN, INFRASTRUCTURE, AND PRIVATE SECTOR PARTICIPATION IN LARGE PROJECTS

Brazil's National Congress is currently debating the bill that will establish the Federal Multiyear Plan for 2012 to 2015 (2012-2015 Plan). The Plan, which was drawn up under the guidance of the Ministry of Planning, is the strategic governmental planning instrument that defines guidelines, objectives and goals which will enable implementation and management of public policies, direct the definition of priorities and help promote sustainable development, according to article 3 of the Plan bill.

The 2012-2015 Plan organizes government action under two types of programs, the "Thematic Programs" and the "Management, Maintenance and Services Programs". The Thematic Programs establish the guidelines for the State's provision of goods and services to the population, which the second group of programs deal with actions directed to the support, management and maintenance of government activities.

For those who are interested in the development of Brazil's infrastructure, the 2012-2015 Plan, and particularly its Appendix I, reveals that the next three years will be full of opportunities for developing large projects. Very sizeable investment is planned in various sectors.

The 2012-2015 Plan contemplates investment in highway, inland waterway, railway, and maritime transportation, civil aviation, electrical energy, fuels, oil and gas, mining and mineral processing, risk management and disaster response, communications, housing, basic sanitation, and urban mobility and traffic.

The numbers are impressive. In the oil and gas sector, two rounds of bidding for pre-salt areas are planned, as well as seven bids for areas located in mature basins and marginal fields. As for airports, the objective is to increase terminal capacity to serve 205 million passengers per year and 2.4 million tons of air cargo. The railway network is to increase by 4,546 km. In the highway transportation sector, 2,234 km will be turned over the private sector under concessions, and 1,207 km of highways and international bridges are to be built at Brazil's borders. Something in the neighbourhood of R\$19 billion is to be spent on sewage and water supply systems.

The proposed investments will generate many business opportunities for companies in these sectors, but effective implementation of

the 2012-2015 Plan will depend on the all-important question of financing.

Although the 2012-2015 Plan is essentially a government program, the government's interest in attracting private sector players to help finance the projects is clear. Indeed, the Presidential message that presented the 2012-2015 Plan specifically refers to the government's objective of expanding private sector participation: "Another challenge that the Brazilian economy faces is to increase private sources of financing for long-term projects, especially from the debt and equity markets. The role of the National Economic and Social Development Bank (BNDES), the Bank of Brazil (BB) and the Federal Savings and Loan Bank (CEF) in this long-term financing will continue to be fundamental, but will decrease as private sources of financing strengthen."¹

The government's intentions to increase the range of opportunities for private financing of projects have not been left on the drawing board. As noted in an earlier edition of the *BMA Review*,² over the last few years the government has developed some interesting mechanisms to promote the private sector's share in financing large infrastructure projects. Two of those mechanisms are especially relevant to the topic of this article.

The first is the Infrastructure Private Equity Funds, or FIP-IEs, governed by Law 11,478/07. Investment in FIP-IEs, which must be made through special-purpose companies created to carry out infrastructure projects, offers a number of tax advantages for fund investors. One of those advantages is the zero-rate tax on profit generated by the sale of fund units held by individuals. Profit made on the sale of fund units by legal entities is taxed at only 15%.

Similarly, Law 12,431/11 provides for debentures issued by infrastructure SPCs. The tax rate on income received by individuals from these "infrastructure debentures" is zero, effectively making it tax-free, while income from infrastructure debentures earned by legal entities is taxed at a rate of only 15%.

All in all, the infrastructure sector in Brazil gives every sign of being a promising source of business for the next few years, both for sector companies and for national and international investors.

¹ Translation of an extract from the Presidential Message that presented the Bill for the 2012-2015 Plan to Congress. Available in Portuguese at www.planejamento.gov.br.

² See the article written by Anna Carolina Malta and Rafael Gonçalves de Carvalho in *BMA Review* nº 33.

STJ CONFIRMS CAPITAL GAINS EXEMPTION ON SHARE SALES

In the first half of 2011, the 1st Section of the Superior Court of Justice (*Superior Tribunal de Justiça* – STJ), which is responsible for ensuring the uniformity of decisions involving federal tax legislation, confirmed that individual taxpayers are entitled to the exemption from tax on capital gains generated by the sale of shareholdings provided for in Decree-Law 1510/76.

Under Decree-Law 1510/76, which was repealed at the end of 1988, capital gains from the sales of shares are exempt from income tax if the sale is made at least five years after the date of acquisition. The clear purpose of the tax benefit was to stimulate investment in Brazilian companies while at the same time discouraging speculative trades.

After examining a number of appeals, the STJ concluded that the tax exemption under Decree-Law 1510/76 was conditional and onerous, and therefore generated an acquired right in individuals who fulfilled the requirement of maintaining their shareholdings for at least five years while the legislation was in effect. The STJ thus protected these taxpayers from the effects of the repeal of the exemption by Law 7713/88.

In short, the STJ decided that capital gains on the sale of shares acquired before 1984 are exempt from tax, even when the sale occurs after 1988.

The STJ's decision was not made under the rules governing repetitive appeals and therefore is not binding for other appeals and proceedings. Still, the decision is an important precedent and will almost certainly be followed by federal courts throughout the country.

The Administrative Tax Appeals Council has also issued various decisions in favour of the taxpayer on this issue. Brazil's highest court, the Supreme Federal Court (*Supremo Tribunal Federal* – STF) has not yet issued any judgment on the question, but historically the STF tends to protect acquired rights to tax exemptions that depend on the taxpayer's fulfillment of certain conditions (Restatement of Precedents 544).

Now that the STJ has confirmed that the capital gains exemption under Decree-Law applies to post-1988 sales, individuals holding shares acquired before 1984 should check to see whether the exemption on capital gains applies to them, so that they can take advantage of the benefit when they sell their positions.

THE COURTS' VIEW ON INTERNET PROVIDER LIABILITY

Brazil now has the fifth largest number of internet users, following only China, the U.S., India and Japan. It is estimated that the volume of e-commerce sales jumped from half a million in 2001 to 20 million in 2011, with an average annual growth of more than 30%.¹

In the absence of specific legislation dealing with the liability of internet service providers for offences committed by users – such as violations of intellectual property rights, personality rights, and consumer rights, especially in the case of e-sales to consumers – the Brazilian courts have been compelled to find solutions to the problems that arrive at their doorstep.

In general, Brazilian courts have taken the position that providers of content, hosting and access services are not obligated to vet content before it is placed on the internet. According to this line of precedents, internet service providers are only liable for content generated by third parties when they fail to promptly eliminate content that contains an identified violation.

According to decisions issued by the Superior Court of Justice (*Superior Tribunal de Justiça*, Brazil's highest court on non-constitutional matters), internet service providers: (i) do not have objective liability for offending information inserted on their sites by third parties; (ii) as a rule, cannot be obligated to inspect, in advance, the content of information posted by users; (iii) must promptly remove offending information from the site, as soon as they have clear knowledge of its existence, on pain of liability for any loss caused; (iv) must maintain a system of user identification that is at least minimally effective.

However, these guidelines do not give internet providers a general exemption from liability for the flow of information on their sites. Internet providers' main duty is to remove offending content promptly, once they become aware of it. The main Brazilian sites now have specific areas that can be used to report infractions, and rules on proof of the alleged right, and the identification of the users and the infraction. The effectiveness of this type of mechanism has been an important factor in promoting amicable resolution of disputes arising out of internet content.

While Bill 2126/11, which will establish the legal framework for internet use in Brazil, awaits debate in Brazil's House of Representatives, the first recourse against violations committed on the internet is to report them to the internet provider, so that it can take steps to remove the offending content. If the internet provider fails to resolve the problem, without good reason, it can be held liable for losses.

¹ Statistical information made available by eBit – www.e-commerce.org.br – in November 2011.

THE BUSINESS LAW CHAMBERS OF THE SÃO PAULO STATE COURT OF APPEAL

Continuing the trend to create specialized chambers to decide cases involving specific areas of the law that began with the Environmental Chamber and the Bankruptcy and Reorganization Chamber, the Court of Appeal (*Tribunal de Justiça*) created a Business Law Chamber, which began operating on August 16, 2011.

Initially, only one chamber specializing in business law cases was contemplated, but on November 9, 2011, the *Órgão Especial*, a committee of the Court's members appointed to deal with administrative and jurisdictional matters, decided to unite the Business Law Chamber and the Bankruptcy and Reorganization Chamber to form two Business Law Chambers, since both chambers specialize in business law issues, and a number of judges had been appointed to both chambers.

The original Business Law Chamber is headed by Justice Romeu Ricupero. The remaining members of the chamber are Manoel de Queiroz Pereira Calças, José Reynaldo Peixoto de Souza, Ricardo José Negrão Nogueira and Enio Santarelli Zuliani. The chamber formerly reserved for bankruptcy and reorganization cases is led by Justice Hamilton Elliot Akel, and includes Justices Manoel de Queiroz Pereira Calças, José Araldo da Costa Telles, Romeu Ricupero, Ricardo José Negrão Nogueira and Roberto Nussinkis Mac Cracken (alternate).

The Business Law Chambers have jurisdiction over matters governed by Book II of the Special Part of the Civil Code (articles 966 to 1195 – The Law of Enterprises), the Corporations Law (Law 6404/76), the Industrial Property Law (Law 9279/96) and the Franchise Law (Law 8955/94). According to the Court of Appeal's own statistics, in 2010, there were 2509 appeals involving these matters. With the unification of the chambers, the two chambers will now also hear appeals involving Law 11,101/05, which governs bankruptcies and judicial and extrajudicial organizations.

With two Business Law Chambers now functioning, the Court of Appeal's decisions on business law issues should not only be more consistent, but also reflect a deeper understanding of the law, since the cases will be decided by judges who have greater familiarity with the legal concepts and principles of this area of the law. The end result should be a greater degree of predictability in the Court's judgments. According to Justice Manoel de Queiroz Pereira Calças, who spoke at the inaugural session of the Business Law Chamber, the chamber "will permit legal certainty to be achieved in the interpretation of commercial law. We expect an improvement in the Court's exercise of its jurisdiction, and commercial law will now have a specialized interpretation that reflects its status as an independent branch of private law."

The two business law chambers should also be able to process appeals faster, especially in this initial period, since only appeals filed after the chambers were created will be judged by them. Earlier appeals will remain in the ordinary chambers of the Court's Private Law Section. BM&A's litigators, who often act on behalf of clients in cases involving business law issues, have noted that the Business Law Chambers' hearing schedule tends to be shorter, and their judgment sessions quicker, than in the ordinary chambers.

Although only a few sessions of the new Business Law Chamber have been held to date, since the chamber sits only twice a month, the greater part of its judgments have dealt with contracts and intellectual property, with a smaller number of decisions on corporate law.

THE NEW LEGISLATION ON NOTICE OF TERMINATION OF EMPLOYMENT

Under article 7(XXI) of the Federal Constitution, employees in Brazil are entitled to advance notice of termination of their employment without cause, in proportion to the length of their service, with a minimum of 30 days. Until recently, the constitutional minimum of 30 days applied to all workers, regardless of their length of service, unless a collective bargaining agreement or individual contract of employment increased the notice period.

On October 11th, Federal Law 12,506 was published. The new legislation extends the notice period by adding three days for each complete year of service to the minimum of 30 days. Now, for example, an employee who has worked for 10 complete years for the same employer will be entitled to 60 days' notice: the minimum of 30 days plus 3 days for the 10 years of service (10 [years] × 3 [days]).

The new notice period is limited to 90 days, which will apply in the case of employees who have 20 years of service or more with the same employer.

Although the rules for calculating the notice period are clear, the new legislation raises a number of questions as to how the notice period will apply in practice.

The first question relates to the application of the Law in time. In order to respect acquired rights and the employment contracts in effect at the time the Law was sanctioned, the new rules should apply only to employment that is terminated after the Law came into effect. However, many workers' unions have asserted – mistakenly, in our view – that the new legislation should apply to workers who were already serving their notice period when the Law came into force, and that they are therefore entitled to a longer notice period, in proportion to the length of their employment.

A second issue is whether the longer notice period should be included in employees' length of service. Under the former legislation, it was clear that workers continued to be employed during the notice period, and therefore were entitled to all the rights and benefits of employment, such as contributions to the Severance Guarantee Fund (FGTS), 13th salary, and accrual of vacation. If the additional days of notice will extend the period of employment, employers will bear extra costs when employees are dismissed without cause.

The most controversial issue, however, is whether the new rules on notice apply to employees who resign from employment, as well as to employers who dismiss employees.

Under the former legislation, notice of termination of employment was reciprocal. In other words, the employer was required to give employees 30 days' notice of termination of employment, and employees who wished to resign from employment were required to do the same. According to the principle of reciprocity, employees should also give notice of their intention to leave their employment in proportion to the length of their service. However, since the new legislation does not expressly state that proportional notice must be given to employers as well as by employers, some commentators have concluded that the old rule of 30 days' notice applies when employees resign.

Businesses should be aware of the practical difficulties they may face when terminating workers' employment after October 10, 2011. Answers to the questions raised by Law 12,506 will only come in time, as cases involving the new legislation are submitted to the labor courts for resolution.

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