

2010: WARMING UP FOR THE WORLD CUP AND THE OLYMPICS

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2010 is expected to see the start of investment in infrastructure projects and other large deals driven by two events that will take place in Brazil in a not-too-distant future: the 2014 World Cup and the 2016 Summer Olympics. Given BM&A Advogados' role in the major transactions that have occurred recently in Brazil and its work advising in large energy, petroleum and construction projects, joined to its expertise in sports and entertainment law, the firm is paying close attention to these upcoming world events.

BM&A is the 2014 World Cup Organizing Committee's adviser on the various legal issues involved in organizing and holding the Confederations Cup in 2013 and the World Cup in 2014. According to partner Francisco Müssnich, the experience gained by the law firm in these projects makes BM&A especially able to develop innovative corporate and tax solutions for national and international companies interested in taking advantage of the investment opportunities offered by these sports events, and to assist in government investments. "We can offer our clients the most efficient and creative structures in public-private partnerships, project finance and real estate investment funds," says Müssnich.

BM&A's 15 years of practice in Rio de Janeiro also give its attorneys a special focus on the revitalization of the city and the urban transformations required for both the World Cup and the Olympics. "The port area and the west zone are going through a real estate boom. These changes will certainly encourage companies that left Rio de Janeiro in the 70s and 80s, such as financial service firms, to return to the city," believes Müssnich.

The Brazilian media recently reported that the federal government intends to make about R\$25 billion available for infrastructure projects, including the refurbishment of public and private stadiums, through the Brazilian Development bank, BNDES. International consultants forecast a total investment, both public and private, in the order of R\$100 billion, taking into account investments that are not directly related to the games, such as the high-speed train between Rio de Janeiro and São Paulo.



Francisco Müssnich: we can provide innovative corporate and tax solutions tailored to the sports market

Amir Bocayuva, the partner who heads BM&A's sports and entertainment law area, believes that regardless of the amount of money involved, the two sports events will be important milestones in the country's development: "BM&A has a head start and we are more than ready to lend our experience and expertise to companies interested in participating in these enterprises."

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A NEW REGULATORY FRAMEWORK FOR MINING IN BRAZIL

Luis Sergio Soares Mamari Filho | lsm@bmalaw.com.br

The new legislation that will govern the mining sector in Brazil has already generated much discussion. It is a subject that generates considerable interest, not only among professionals in the mining field, but also in other segments of society, given that mining is one of Brazil's natural vocations. Many believe that the current legislation on the various mining regimes is over-focused on the procedures for obtaining mining licenses and does not sufficiently protect the mechanisms for effective use of mining rights, and that it is time to update the law.

Although the text of the bill that will be discussed in Congress has not yet been disclosed, according to the information disclosed to date by official agencies, one of the objectives of the new model is to improve the action of the State in the regulatory process, in order to ensure that mineral deposits are used to their full potential, increase competitiveness among companies in the market and promote the addition of value in the productive chain.

Of all the potential changes, the creation of a regulatory agency seems to be the central issue. However, replacing the National Department of Mineral Production with a new independent agency will only improve licensing and control procedures if the new entity is given the material and human resources it will need to accomplish its institutional mission.

A second important change relates to the term of exploration licenses. Contrary to the position taken by the drafters of the new legislation, reducing the term of licenses can have adverse effects, since uncertainty as to whether exploration licenses will be renewed can discourage the high levels of investment that are usually required for mineral exploration.

Another innovation is the grant of production licenses under a contract, on terms proposed by the Ministry of Mines and Energy at the time the Production Plan (Plano de Aproveitamento Econômico) is approved. One defect that can already be identified in the contractual model is that the producer will only know the exact contractual terms and conditions for production after the exploration work has been completed, when the assessment of the economic viability of the deposit is usually performed.

It seems that some questions will not be addressed by the new mining code, such as mining on indigenous lands and in areas bordering other countries, extraction of mineral substances that are under a government monopoly (nuclear minerals) and the charging of financial compensation for the use of mineral resources. Ideally, these issues should also be dealt with in the new legislation that will govern the sector.

Two "bottlenecks" that have often hampered progress in the mining industry should also be mentioned: environmental licensing and the unreliable logistics solutions currently available.

Despite the potential conflicts of jurisdiction among the various governmental bodies responsible for proposing policies on transportation and preservation of the environment, any change in the legislation that does not take these factors into account is likely to result in a partial solution only.

Another important point is that existing regulations that are not inconsistent with the new code will remain in force and so will continue to have an important role in the development of the market.

In the market, the feeling is that stocks of various commodities have reached more comfortable levels, and that while demand might be down in the next few years, the consumption incentives offered by some countries could contribute to renewed growth in the mining sector. It is precisely this scenario that Brazilian legislation must prepare for.

CVM INSTRUCTION 478 GIVES FIIS MORE FLEXIBILITY IN THEIR INVESTMENTS

Alexandre Couto Silva | acs@bmalaw.com.br
Roberto Mendes de Freitas | rmf@bmalaw.com.br

On September 11, 2009, the Brazilian Securities Commission (Comissão de Valores Mobiliários – CVM) approved Instruction 478, amending the rules on Real Estate Investment Funds, or FIIs (Fundos de Investimento Imobiliário) as they are known in Brazil.

According to the CVM, the purpose of Instruction 478/2009 is to improve certain of the rules under CVM Instruction 472/2008. The main change made by the new instruction is that the evaluation report for assets acquired by the funds no longer needs to be submitted to the general meeting of fund unitholders. The other two changes are simply drafting corrections.

Despite the apparent simplicity of the changes made by CVM Instruction 478/2009, the amendment represents another important initiative by the CVM to make FIIs more flexible and expand their use by investors.

Even before issuing Instruction 478/2009, the CVM had taken an extraordinary step toward making FIIs more attractive and effective: CVM Instruction 472/2008, which was published in October 2008, implemented various changes to make the rules governing the creation and operation of FIIs more flexible. The most important innovation made by CVM Instruction 472/2008 was, without question, the many new investment options given to FIIs, which can now invest in a wide range of assets such as shares, debentures, investment fund units (provided the issuing or trading of the units has been authorized by the CVM, and the issuers' predominant activity is a real estate-related activity permitted for FIIs), shares in special purpose entities in the real estate sector, units in other FIIs, real estate receivables and units in Receivables Investment Funds (Fundos de Investimento em Direitos Creditórios – FIDC).

However, while CVM Instruction 472/2008 gave the managers of FIIs many more investment options, it also imposed a significant obstacle by requiring that any and all changes to the fund's portfolio had to be approved by the unitholders in meeting. In response to a suggestion made by market organizations, which requested a more flexible investment structure, the CVM issued Instruction 478/2009 to remove the requirement for approval by the unitholders in meeting of the evaluation report for rights and assets acquired by FIIs.

According to the notice for Public Hearing 06/2009, which disclosed the proposed text of Instruction 478/2009, the CVM's objective was to align the rules for FIIs with those applicable under Law 6404/76 (the Brazilian Corporations Law), which requires shareholder approval of evaluation reports only on formation of a company's capital.

CVM Instruction 478/2009 thus allows FIIs to adopt a more dynamic management style, giving fund managers greater latitude in buying and selling assets.

Although the change does not especially favor FIIs created to carry out specific real estate projects, the removal of the requirement to hold a general meeting of unitholders to approve evaluation reports for assets to be acquired by the fund will certainly benefit FIIs that have a more dynamic profile and a diversified investment portfolio, and allow them to take better advantage of the seasonal opportunities that are typical of the real estate market.

In short, CVM Instruction 478/2009 adds to the revitalization of FIIs begun with CVM Instruction 472/2008, since this newest instruction eliminates one of the main barriers to taking full advantage of the investment options conferred by CVM Instruction 472/2008.

The practical effect of these changes in the regulations can be seen by comparing the number of FIIs launched in 2008 and in 2009. In 2008, the value of FII offerings was R\$616.86 million, while in 2009, the value exceeded R\$3.44 billion, counting registered primary and secondary offerings as well as offerings under registrations waivers: an increase of about 550%. From another perspective, FII offerings in 2009 accounted for 44% of FII launches over the decade, given that FII offerings from 2000 to 2008 totaled R\$ 4.39 billion.

Clearly, the innovations in Brazilian real estate market, and especially the more flexible FII, will permit even greater growth in the sector over the next years. The increased interest of pension funds and, especially, of foreign investors in investments that represent not only promising returns and but also good corporate governance will likely be the primary sources of funds for new FIIs, which now have a wider range of investment options and a more flexible and efficient structure for managing their investments.

NEW RULES ON PUBLICATION OF STATEMENTS OF MATERIAL FACT

Rafael Padilha Calábria | rpc@bmalaw.com.br
Felipe Guimarães Rosa Bom | fgb@bmalaw.com.br

In 2009, the Corporate Finance department of Brazil's Securities Commission (Comissão de Valores Mobiliários – CVM) quietly changed the rules on publication of statements of material fact by publicly-traded companies.

Formerly, the Corporate Finance department (Superintendência de Relações com Empresas - SEP) had taken the position that publicly-traded companies were required to publish their statements of material fact in the official gazette for the place of the company's headquarters and in a widely-circulated newspaper. The reasoning behind the SEP's position was that disclosure of material facts is an obligation imposed by art. 157§4 of the Brazilian Corporations Law (Law 6404/1976) and statements of material fact should therefore be published in accordance with art. 289 of that Law.

However, in a circular dealing with procedures to be followed by publicly-traded companies (OFÍCIOCIRCULAR/ CVM/ SEP/Nº002/2009), the SEP stated that publication of statements of material fact in the official gazette is not necessary.

The change in the SEP's interpretation of the law is due to a decision by the CVM in Administrative Proceeding no. RJ2006/1574, judged on August 22, 2006. In that proceeding, the CVM adopted the reasoning in the opinion given by the then President of the CVM, Marcelo Trindade. According to the opinion, art. 157§4 of the Brazilian Corporations Law imposes an obligation to disclose material facts, but not to publish them, since throughout the Law the term "disclosure" is associated with obligations to inform, communicate and report information, while "publication" is used in a more narrow sense to impose a certain type of publicity.

The opinion finds that Law 6385/76 delegates powers to the CVM to determine how material facts occurring in publicly-traded companies should be disclosed, and the CVM exercised those powers in issuing CVM Instruction 358/2002. Thus, the obligation to publish statements of material fact does not arise under the Brazilian Corporations Law, but under CVM Instruction 358/2002, which provides that such statements must be published in the widely-circulated newspaper normally used by the company, but does not require publication in the official gazette.

According to the Commissioners of the CVM, not only is the requirement to publish statements of material fact in the official gazette not imposed by any legislative provision, it works against companies' efforts to reduce costs.

For these reasons, the SEP now takes the position that publication of statements of material fact in a widely-circulated newspaper is sufficient, and publicly-traded companies no longer need to publish in the federal or state official gazette.

In November 2009, of the 15 most-traded companies on BM&FBOVESPA, seven companies published their statements of material fact in both the official gazette and in a widely-circulated newspaper, while the other eight published their statements in newspapers only.

The CVM's new position on publication of statements of material fact represents a significant savings in publication costs, as well as faster publication of such statements, given that the deadlines for submission in large newspapers are much more flexible than the official press.

CVM INSTRUCTION 480: A NEW REALITY FOR PUBLICLY-TRADED COMPANIES

Anna Carolina de Oliveira Malta | aco@bmalaw.com.br
Juliana Paiva Guimarães | jpg@bmalaw.com.br

At the end of 2009, the Brazilian Securities Commission (CVM) issued Instruction 480, replacing Instruction 202 and establishing new rules on registration and periodic reporting requirements applicable to issuers of securities. It brings Brazilian rules close to international standards, particularly those recommended by the International Organization of Securities Commissions (IOSCO).

The new "Reference Form" (FR) created by the Instruction will contain complete and current information on the issuer,

and prospectuses for public offerings will now be limited to information on the offering and the value of the offered securities.

The changes will make it possible to review and improve information on a regular basis, with the help of the entire market, resulting in an increase in the quality of the information provided and a reduction in the cost of providing it, altering the dynamics of the relationship between issuers and their advisers.

ENVIRONMENTAL COMPLIANCE FOR RURAL PROPERTIES AND FEDERAL DECREE 7029/09

Pedro Lehmann Baracui | plb@bmalaw.com.br
Miguel Franco Frohlich | mff@bmalaw.com.br

On December 11, 2009, Decree 7029/09 was published, creating the Federal Environmental Compliance Support Program for Rural Properties, known as the “Mais Ambiente” (More Environment) Program.

Owners and possessors of rural properties can join the program any time up to December 11, 2012 by signing “Terms of Adherence and Commitment”, under which the beneficiary makes a commitment to the Brazilian Institute of the Environment and Renewable Natural Resources (IBAMA), or other environmental agency participating in the Mais Ambiente Program, to recuperate, restore or maintain Permanent Preservation Areas and to register Legal Reserves, so as to bring their properties into compliance with the Forest Code.

In exchange, rural property owners and possessors will gain a number of advantages. With the exception of fines that have been confirmed by a final decision at the administrative level, fines imposed for environmental damage to Permanent Preservation Areas and Legal Reserves caused prior to the publication of Decree 7029/09 will be suspended, and converted into services to preserve, improve or recuperate the environment after the commitments made under the Terms of Adherence and Commitment have been performed in full.

Likewise, no penalties will be imposed on rural property owners and possessors for environmental offences committed prior to the publication of Decree 7029/09 but which have not been the subject of a fine.

Decree 7029/09 addresses in part concerns expressed by the agribusiness sector, which believes that reforms to the Forest Code are necessary. According to sector representatives, bringing rural properties into compliance with environmental legislation under the current rules (especially with respect to Permanent Preservation Areas and Legal Reserves) would have a significant effect on agricultural production. Environmental activists take the position that changes to the system established under the Forest Code would be a regression.

These controversies came to the fore in July 2008, with the publication of Decree 6514/08, which established regulations under the Environmental Crimes Law and made “lack of registration of the Legal Reserve” an administrative offence subject to a fine ranging from R\$500 to R\$100,000. However, this provision was to come into force only on January 19, 2009. In practice, rural landowners and possessors were given time to bring their properties into compliance with the law before penalties could be imposed by environmental agencies.

However, in December 2009 Decree 6686/08 was issued, amending Decree 6514/08. Although the new Decree maintains the procedure of first issuing a warning to non-compliant property owners and possessors, the fine is now daily, and varies from R\$50 to R\$500 per hectare of the unregistered Legal Reserve. The Decree also extended the deadline for registering Legal Reserves to December 11, 2009. This extension gave time to the Brazilian National Congress to continue its debate on the reform of the Forest Code without rural landowners and possessors becoming subject to fines for non-registration of Legal Reserves.

The deadline was once again extended by Decree 7029/09, to June 11, 2011. It is possible that the reform of the Forest Code will be approved by National Congress by that date, which may change the regulations issued under the newest Decree. In the meantime, rural property owners who have been fined for non-compliance with the current provisions of the Forest Code still have the opportunity to bring their properties into compliance and avoid paying the fines already imposed.

RIO DE JANEIRO APPEAL COURT CONSIDERS AMBUSH MARKETING CASE

José Eduardo de V. Pieri | jvp@bmapi.com.br
Diego Mattos Osegueda | dom@bmalaw.com.br

In a recent decision by the Court of Appeal of Rio de Janeiro (Tribunal de Justiça do Estado do Rio de Janeiro – TJRJ), the Organizing Committee for the Rio 2007 Pan-American Games (CO-RIO) was successful in preventing ambush marketing by a taxi cooperative that used the “RIO 2007” logo without authorization.

Ambush marketing occurs when a company attempts to associate itself with a major sporting event without paying official sponsorship fees. In the case before the Rio de Janeiro Appeal Court, the official trademark of the 2007 Pan-American Games was used without authorization, wrongfully appropriating the prestige and notoriety of the sports event.

The Appeal Court agreed with the court of first instance that the taxi cooperative’s conduct was illegal, and that the defendant was liable to CO-RIO for damages in the amount that it should have paid for the rights to use the logo. However, the Appeal Court overturned the finding that the defendant should also pay non-economic or moral damages, on the grounds that the wrongful use of the RIO 2007 logo did not detract from CO-RIO’s image or reputation in society.

On this point, the Appeal Court’s decision did not follow the line recently taken by the Superior Court of Justice (Superior Tribunal de Justiça, Brazil’s highest court on non-constitutional matters), which held that in cases involving violation of intellectual property rights, moral damages arise out of the wrongful conduct itself, and do not need to be proved. The Rio de Janeiro Appeal Court also failed to consider the damage to CO-RIO’s image before the Pan-American Sports Organization, which requires that organizing committees implement effective measures against ambush marketing.

CO-RIO’s application to appeal this decision was denied under art. 557 of the Code of Civil Procedure, which allows the reporting justice to deny leave to appeal where the appeal is clearly groundless. Given the major sports events to be held in Brazil in the next few years, and the scarcity of judicial precedents on these questions, the Appeal Court’s decision may well generate concerns for international sports organizations, which rely on their image and reputation to obtain official sponsorships.

If on one hand the judgment in this case merits praise for its recognition that ambush marketing is an illegal practice, on the other hand the Court of Appeal could have been more zealous protecting the image of the organizing committee of the Pan-American games.

PROJECT TEAM

EDITORIAL COMMITTEE
Paulo Cezar Aragão, Francisco Antunes Maciel Müssnich, Plínio Simões Barbosa.

EXECUTIVE EDITORIAL
BM&A Pesquisa

PRODUCTION
Gabriela Petrin
Daniela Christóvão

GRAPHIC DESIGN AND LAYOUT
Soter Design

PHOTOLITHO Davanzzo
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bmareview@bmalaw.com.br

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BM&A ADVOGADOS

Belo Horizonte
Tel. (+55) (31) 3326 9200
Fax. (+55) (31) 3326 9250

Brasília
Tel. (+55) (61) 3218 0300
Fax. (+55) (61) 3218 0318

Rio de Janeiro
Tel. (+55) (21) 3824 5800
Fax. (+55) (21) 2262 5536

São Paulo
Tel. (+55) (11) 2179 4600
Fax. (+55) (11) 2179 4597

BM&A PROPRIEDADE INTELECTUAL

Rio de Janeiro
Tel. (+55) (21) 3824 5757
Fax. (+55) (21) 3824 5740

BM&A CONSULTORIA TRIBUTÁRIA

São Paulo
Tel. (+55) (11) 2179 5300
Fax. (+55) (11) 2179 5211

Rio de Janeiro
Tel. (+55) (21) 2114 7601
Fax. (+55) (21) 2114 7602

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