

## LUIZ ANTONIO CAMPOS BECOMES A PARTNER OF BARBOSA, MÜSSNICH & ARAGÃO

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The Brazilian securities market underwent a profound process of evolution in the last few years. The focal point of such evolution was to ensure more agility and transparency to market practices, which benefited from suitable protections and instruments to enable their development. Such transformation, in the regulatory field, took place mainly through ordinances issued by the Securities Commission (*"Comissão de Valores Mobiliários - CVM"*), such as 358, which deals with disclosure statements; 361, which deals with Public Offerings (POs); 400, which deals with the public distribution of securities; and 409, which consolidated the rules governing investment funds.

Luiz Antonio de Sampaio Campos, the new partner of Barbosa Müssnich & Aragão Advogados, was Director of CVM from December 2000 to November 2004, when he was actively involved with the enactment of the aforementioned ordinances and with the market regulation reform carried out by CVM, which enabled a higher degree of harmony and transparency to transactions. His expertise in matters relating to securities market regulation represents an important addition to the Firm's tradition of excellence in legal assistance rendered to publicly held corporations, intermediaries and asset managers, especially with regard to matters involving corporate law and capital markets.

Campos is pleased to find out that many of those regulations were well received and are currently being applied by the market, such as the one relating to public offerings of shares, cancellation of registration and public offering of distribution of shares, which, soon after the enactment of Ordinance 400, are facing a period of intense activity.

According to the attorney, in addition to the public offering of distribution of shares and debentures, a strong trend in the market is represented by Investment Funds in Credit Rights (*"Fundos de Investimentos em Direitos Creditórios"* - FIDIC). Such funds include portfolios of receivables, which are instruments of credit held by one company against another as a result of the extension of loans, which offer the investor a profitability that is higher than the fluctuation of interest rates relating to Interbank Deposit Certificates *"Certificado de Depósito Interbancário"* - CDI), with a low volatility index. CVM created FIDIC in Ordinance 356, and improved such fund through Ordinance 393, in 2003. Those adjustments transformed the fund into a cheaper financing option.

In June, during the 3<sup>rd</sup> Conference on Investment Funds of the National Association of Investment Banks (Anbid), in which he was a guest speaker, Campos defended the enactment of specific rules to protect investment funds. "The Brazilian investment fund market is large enough and important enough to merit the creation of such resources", he said. According to Campos, the worst problem now is that funds' regulations are based on Civil Code rules on condominiums. And the discussions address the liability of quotaholders. "The law should make it clear that the quotaholder cannot be held liable for the net worth of the fund", says Campos. Even though the potential for an actual challenging relating to the liability of quotaholders is still small, as a result of the characteristics of the Brazilian market (low government bond leverage and a passive posture), Campos believes that the natural evolution of businesses into an increased market aggressiveness may bring about that kind of challenging, which the law should anticipate and tackle.



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## BIOSAFETY LAW REGULATES THE USE OF GENETICALLY MODIFIED ORGANISMS

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The Biosafety Law (Law No. 11105, of March 24, 2005) was finally sanctioned. Such law deals with a controversial matter, involving the use of genetically modified organisms and embryonic stem cells.

The law establishes safety rules and inspection mechanisms that apply to the construction, cropping, production, handling, shipment, transference, imports, exports, storage, research, marketing, consumption, releases into the environment and disposal of genetically modified organisms and other substances deriving thereof. Activities involving genetically modified organisms (GMO) must be authorized by the National Biosafety Commission (CTNBio), in compliance with the guidelines set forth in the legal text and subsequent amendments thereto.

Activities and projects involving GMO and any substance deriving thereof, relating to educational activities involving the handling of living organisms, scientific research, technological development and industrial production can only be performed by public entities and by private entities that receive a permit by CTNBio and accept liability for the risks inherent to such activities. Said activities and projects cannot be developed by individuals acting in an autonomous and independent manner.

According to the law, public and private organizations, either local, foreign or international, that finance or sponsor the aforementioned activities or projects must require the submittal of a Biosafety Quality Assurance Certificate issued by CTNBio, under penalty of becoming co-liable for any potential effects that may arise out of the breach of said rules. It is important to note that the liability for damages to third parties or environmental damages is objective in nature, and can be characterized regardless of evidence of fault.

CTNBio may waive environmental licensing procedures and Environmental Impact Studies relating to GMOs, but the requirements to obtain opinions from Brazilian Environmental and Renewable Natural Resources Institute (IBAMA) and from the National Health Agency (Anvisa) remain unchanged.

Embryonic stem cells can only be used for purposes of research and in therapeutic applications. Human cloning, for example, is expressly prohibited. However, the discussions involving this matter are expected to continue, since Direct Unconstitutionality Actions 3510 and 3526 were filed in the Federal Supreme Court, contesting the use of embryonic stem cells.

## THE IMPACT OF THE DOHA ROUND ON BRAZILIAN COMPANIES

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The World Trade Organization (WTO) deals with a range of matters that is as broad as the definition of international trade itself. Nonetheless, not every matter relating to international trade is addressed in this new round of negotiation known as the Doha Round. The purpose of this round is to further develop mutual benefits granted in the following areas: agricultural products, cotton (a matter in which Brazil has recently experienced an important victory), market access to non-agricultural products (known as NAMA), development, services and rules.

The general purpose of the NAMA negotiations is to reduce and, where appropriate, eliminate tariffs, as well as non-tariff barriers, especially with concern to products exported by developing countries (DCs). Since the general perception among negotiators is that Brazil is one of the countries that potentially receive the most benefits as a result of the advancement in agricultural negotiations and one of the main targets with regard to the granting of manufactured-good concessions, the pressure to ensure the granting of more ambitious NAMA concessions is on the rise. This

scenario is all the more accentuated when one takes into account the important agricultural development (e.g. conversion methodology on non- *ad-valorem* tariffs) achieved in May, during the pre-ministerial conference in Paris, which is expected to increase by the end of July, when a first standing is expected to be ready for the Hong Kong Ministerial Conference, to be held late this year.

In that context, it is important to note one of the inevitable results arising out of the conclusion of the round, which many representatives of the private sector seem to have overlooked: the probable reduction in Brazilian external tariff for imported products. For most of the Brazilian products, such reduction is not significant, given that the reduction applies only to the permitted limit. Since the tariff currently adopted for those products is lower, a reduced ceiling as a result of the formula will not affect the current competitive conditions.

On the other hand, there is a group of tariff lines (products) that is subject to tariffs that are at the ceiling or very close to it, i.e., any

reduction in such ceiling will necessarily bring about a reduction in the assessed tariff. The practical results of this scenario may be an abrupt drop in the tariff barrier in force for such products with the consequent invasion of foreign competitors, which would negatively affect the domestic market. The main example of such negative effect of the round may lie in the automotive and automotive parts sectors, in which a substantial part of the tariff lines is very close to the ceiling.

The Common Mercosur External Tariff, in a few cases, goes beyond the tariff levels set forth by WTO and Brazil lacks the political capital to increase such level. As agricultural negotiations advance, the possibility for any form of concession in that regard is expected to decrease. However, there are a number of alternatives that can be adopted by the affected companies. In addition to the obvious quest for increased efficiencies to face foreign competition, the Doha round itself establishes an extended implementation deadline for DCs, including Brazil, as well as some flexibility in the application of the decreasing formula.

According to the Doha Work Programme, DCs can choose between two options with regard to sensitive products: (i) applying the

formula in a partial manner on some products or (ii) not applying the formula altogether on a smaller list of products. Nonetheless, just as the elements that make up the formula have yet to be agreed upon, the criteria and percentages of such exceptional flexibility are also awaiting definition. Thus far, only the figures of 10% of the tariff lines for the first option and 5% for the second have been suggested, in addition to other quantitative restrictions. In any event, bearing in mind that a tariff reduction is unavoidable, it is fundamentally important that industries likely to be affected by the change get organized to protect their interests, since it seems unlikely that the exceptional rules will be enough to cover every one of the affected interests.

The negotiation round is ongoing and as of yet there is no definition on how the formula will affect the Brazilian tariff structure. The only certainty is that the reduction will generate negative effects for those companies that until now relied on tariff protection. The sectors that first get organized and negotiate the allocation of the exceptions with the Brazilian Government are likely to achieve better results. Clearly, those that have professional assistance on international matters are in a better position to face the battle that lies ahead.

## STF EXPECTED TO DECLARE UNCONSTITUTIONALITY OF INCREASED PIS AND COFINS CALCULATION BASIS INSTITUTED BY LAW NO. 9718/98

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The Contribution for the Social Integration Program – PIS and the Social Security Financing Contribution – COFINS, instituted, respectively, by Supplementary Laws 07/70 and 70/91, had as their original calculation basis the sales results of a company. According to Supplementary Law No. 70/91, sales equals the gross revenues resulting from sales of goods, goods and services and services of any nature, excluding other revenues such as financial revenues, revenues generated by the sale of fixed assets and others. Nonetheless, after the enactment of Law No. 9718, on November 27, 1998, the aforementioned contributions were assessed on gross revenues, and the calculation basis thereof included all revenues earned by a company. Such increase was challenged by the taxpayers in court, given that the constitutional fundament of the contributions (article 195, item I) established that the calculation basis thereof was only the sales. Later, the constitutional provision mentioned above was amended by Constitutional Amendment No. 20, of December 15, 1998, which included said revenues among the events of levy of the Social Security contributions.

The challenging to the increase in such calculation basis is based on the fact that Law No. 9718/98 was enacted with no constitutional support, whereas the subsequent constitutional amendment could never turn such provision into a “constitutional” one. Thus, only

with the enactment of Laws Nos. 10637/02 and 10833/03, which instituted the non-cumulative system of the PIS and COFINS contributions, did the taxing of revenues acquire constitutional support in article 195, I, “b”, whose new wording includes revenues or sales as possible calculation basis of the contributions.

The Federal Regional Courts used to oppose the arguments of the taxpayers, considering that the concepts of “sales” and “gross revenues” were analogous for tax purposes. Therefore, even though the Federal Constitution at the time of the enactment of Law No. 9.718/98 only provided for the assessment of the contributions on sales, the expansion of the calculation basis to include gross revenues was not unconstitutional.

The Federal Supreme Courts is analyzing the matter through Extraordinary Appeals Nos. 346.084, 357.950, 358.273 and 390.840. During the trial of Extraordinary Appeal No. 346.084, at first three votes against the arguments of taxpayers were rendered by Justices Gilmar Mendes, Maurício Corrêa and Ilmar Galvão. Nonetheless, during the session held on May 18, when the trial of Extraordinary Appeal No. 346.084 was reinstated, Justices Cezar Peluso, Marco Aurélio, Carlos Velloso, Celso de Mello and Sepúlveda Pertence, voted to declare the unconstitutionality of the expansion of the

concept of sales established in paragraph 1 of article 3, of Law 9718/98. That being so, only one more vote is necessary to settle the matter in a manner that is favorable to taxpayers.

The trial was adjourned, and only Justices Joaquim Barbosa, Ellen Gracie and Nelson Jobim have yet to render their votes. It is important to note that the vote rendered by Justice Cezar Peluso included a transcription of the opinion rendered by the now Justice Joaquim Barbosa, who at the time of such opinion was a Federal Government Attorney, in which the unconstitutionality of the increase was defended. Therefore, it is very likely that the increase in the calculation basis of the contributions instituted by Law No. 9718/98 will be declared unconstitutional, and the filing of lawsuits to recover unduly paid taxes is expected.

## ARBITRATION AND THE PPPs

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On December 30, 2004, Law 11079 was enacted, and it instituted the guidelines concerning public biddings and agreements of Public-Private Partnerships (PPPs) involving the Public Administration (as analyzed in *BM&A Review No. 9*).

PPPs represent agreements pursuant to which the Public Administration undertakes long-term payment obligations on behalf of a private partner, in exchange for services rendered by the latter. As in any other kind of agreement, especially those involving parties that are so dissimilar, the occurrence of conflicts is to be expected.

Considering the complex nature of the projects to be developed under this type of partnership, the possibility of the adoption of arbitration is especially relevant in the settlement of conflicts resulting from the performance of the agreement and potential claims of early withdrawal from the project (article 11, III, of Law No. 11079). A number of considerations are required with regard to the possibility of adoption of arbitration to settle disputes arising out of PPPs, especially with regard to the availability of the right, the seat of the court of arbitration and the language to be used in the arbitration procedure.

Due to the indirect meeting of public interests, a lot of discussion has been ongoing about the availability of the right and, consequently, whether or not a dispute involving the Public Administration could be settled via arbitration, given that article 1 of Law No. 9307/96 (Arbitration Law) prohibits the use of arbitration procedures to settle disputes involving unavailable rights.

Despite the initial uncertainty that surrounded the matter, the Court of Justice of the State of Paraná, in a recent decision (Ag. N. 174.874-9, Acting Judge Fernando César Zeni, trial on May 10, 2005), considered that an award rendered by an arbitration court is compatible with managerial acts of a state-owned company that is dedicated to the development of economic activities, whereas the arbitration clause provides for a solution that is faster than a lawsuit, which benefits the very dynamics of economic relations that the Government may undertake, clearly in the best interest of the collectivity. Therefore, the current trend is to consider that matters involving the economic interest of the Government, such as

the ones that may arise out of PPPs, can indeed be settled via arbitration. Similar decisions have been rendered by judges in different Courts of Justice, such as the one in the Federal District (TJDF, Decision No. 115.813 Special Council, Reporting Justice Nancy Andrichi, DJDF of August 18, 1999, page 44).

Nonetheless, the Law states that the arbitration procedure must be “carried out in Brazil and in Portuguese”. The need to have the arbitration carried out in Brazil meets the requirement set forth in paragraph 2 of article 55, of Law No. 8666/93 (Public Bidding and Contracts Law), which defines that the main offices of the Public Administration is the place with jurisdiction to settle any disputes that may arise out of agreements involving the Public Administration. Such provision can represent an advantage, depending on the circumstances, given that according to the sole paragraph of article 34 of the Arbitration Law, the arbitration award shall be rendered in the country, and such award shall not be conditional on homologation by the Superior Court of Justice.

With respect to the language to be used in the arbitration procedure, we would be inclined to say, after a preliminary analysis of the law, that the requirement of the use of the Portuguese language represents an excessively limitation on the freedom of the parties, since it restricts the assignment of foreign arbitrators who are not fluent in Portuguese. Even though the law is recent, the possibility of translation of documents and personal depositions of witnesses have been defended in conferences, as a way to enable the appointment of foreign arbitrators, with no burden being placed on the Public Administration. However, such solution could still give rise to oppositions and it would be better if the lawmaker revised the matter, bearing in mind that the number of arbitration procedures during the first year of effectiveness of the Law of PPPs is not expected to be so high as to generate a consolidated precedent on the matter.

Finally, it is important to note that the lawmaker was right in providing for the arbitration procedure as a method of settlement of disputes, which will serve as an incentive to foreign investments and benefit the economic-financial balance of the enterprises to be developed under PPPs.

## SUPERIOR LABOR COURT APPROVES E-MAIL MONITORING

BM&A attorneys comment on the precedent that benefits employers

The First Panel of the Superior Labor Court (TST) established an important precedent involving a matter that until now had never been addressed by that Court: the acceptability of monitoring by the employer of employees' e-mails. In this case, the Court ruled that the dismissal motivated by the fact that a bank employee sent e-mail including pictures of a naked woman had cause. The lawsuit had stirred attention due to its unprecedented nature back in 2001, when it was tried by the lower court of Brasília. At that time, the court ruled that the employer had violated employee's correspondence, which represented a breach of the Federal Constitution.

However, the Regional Labor Court of the Federal District and Tocantins (10<sup>th</sup> Region), had already reversed the lower court decision, considering that the results of an investigation conducted in the corporate e-mail account of the employee constitutes acceptable evidence, since "there would be no privacy to be protected, given that the e-mail account could not be used for private matters". After the rejection of the Motion to Review, the dismissed employee filed an Interlocutory Appeal on the records of Motion to Review No. 613, which was heard on May 16 by TST. In its decision TST reinforced the acceptability of monitoring e-mail accounts opened in the name of the employee by the employer for purely professional purposes. The unanimous decision was published on June 10 and in it Reporting Justice João Oreste Dalazen ruled that this form of control on the part of the company is acceptable. According to Dalazen, employers cannot deny employees a limited use of e-mail or the Internet for private matters, as far as such use "is restricted and in compliance with the law, moral standards and decorum". Also according to the Justice, "since the employer is the owner of the corporate e-mail account, it can control it".

According to Laura Fragomeni, a member of BM&A's Intellectual Property team, who also specializes in matters involving IT Law, the monitoring of e-mail accounts is currently a strategic point. "With the advancement of IT, the flow of information is increasingly easier, and in this scenario, e-mail is a privileged tool". According to Laura, the intellectual assets of a company are particularly sensitive to the free flow of information enabled by the use of e-mail. "Let's imagine an advertisement campaign, for example, that

cost millions of reais in development. In a few seconds the contents of such campaign – the advertisement film, in this case – can be sent to a competitor as an e-mail attachment". Among other justifications for the monitoring, Laura mentions network overload and the risk, for the company, of being infected by viruses or facing lawsuits as a result of the spreading of e-mail containing discriminatory or offensive material.

Nonetheless, it is important to bear in mind that, despite the great repercussion that this court decision has generated, the access to e-mails sent by employees is not totally liberated now. "Monitoring cannot take place in a unjustified manner, it must be warranted", says Aline Paiva, a BM&A attorney that specializes in Labor law. "In order to avoid oppositions, it is important that the employer make sure that employees are aware of and consent to the monitoring and non-disclosure of any information obtained in this manner, preferably at the time of his or her hiring. Even related matters, such as the potential restriction on the use of webmail, should be carefully regulated". Aline also considers that it would be advisable to put in place confidentiality obligations, in addition to specific precautions and procedures to be followed by those in charge of the monitoring activities. "After all, the improper handling of private information obtained as a result of the monitoring could give rise to claims for moral damages against the employer, even by aggrieved third parties".

Bruno Lewicki, an attorney of BM&A's Research team in charge of studies on this matter, reinforces that companies need to take those precautions. "Despite the fact that TST's decision is a clear indication of the path that the Brazilian case law is likely to follow, it is only the first of its kind. Other decisions can and should come, and such decisions may not adopt similar rulings. Besides, even the May decision is bound to certain factual requirements that may be different in other cases". According to Bruno, future discussions will include matters such as the limit of the monitoring – i.e., what would be the exact definition of e-mail use that "is restricted and in compliance with the law, moral standards and decorum". Due to its increasing relevance, this matter may be subject to lawsuits filed by the Labor Public Attorneys' Office, or even an explicit legislative treatment. Bruno explains that, in Brazil, there is no specific rule dealing with e-mail control.

## UNION REFORM AND THE EFFECTS THEREOF ON EMPLOYMENT RELATIONS

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After two years of discussions carried out by the National Employment Forum (“FNT”), which was created with the purpose of seeking a consensus on the new Brazilian union model and includes representatives of employees, employers, the Ministry of Labor and Employment and the Labor Public Prosecutors’ Office, the final text of the Union Reform has been released.

Even though it was not possible to achieve a consensus with regard to every matter and, consequently, a certain degree of dissatisfaction existed for both employees and employers, one must acknowledge that the Reform, which is still pending approval by the national congress, represents an undeniable advancement when compared to the current Brazilian union model.

Among the major innovations introduced by the Reform, it is important to note the proposed gradual elimination of the union tax – which generates a compulsory deduction from paychecks corresponding to one day of work of all employees – and the immediate extinction of the confederative and assistance contribution, which, despite usually being included in collective labor agreements, are frequently challenged due to abuses on the part of the unions. In exchange for the elimination of the union tax and the confederative and assistance contributions, the final text of the Reform proposes the creation of a “collective bargaining contribution” that, as the name implies, would be a “bargaining contribution” payable to the union that enters into a collective labor agreement benefiting the employee and/or the employer.

Another innovation that deserves to be highlighted is the one that relates to the increased importance of collective bargaining, for purposes of stimulating as much as possible the understanding among employees and employers. In that regard, the final text of the Reform is in line with the recent Reform of the Judiciary Branch, which, despite having failed to put an end to the normative power of Labor Courts, established important restrictions on the public arbitration that used to be carried out by the Judiciary Branch.

According to the proposal that is part of the final text of the Reform, collective labor agreements can be in force for up to three years, after which, if no renewal occurs, the agreement shall be automatically extended for an additional 90-day period. With regard to those aspects of the Reform, the innovations are welcome. First, because of the extended term of effectiveness of the conventions, the parties shall not be required to start negotiations over every one or two years, thus, avoiding the difficulties that result from frequent negotiations. Second, because the automatic extension of the conditions of the agreement generates an environment of increased stability among employees and employers, which facilitates the execution of new agreements.

Even though the final project of the Reform may not have fully pleased employees and employers, it is unquestionable that, on the one hand, it puts an end to the outdated interventionist union model in force to this date and, on the other hand, it contributes to improve the economic environment of the country.

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