

FEDERAL SUPREME COURT CONFIRMS CONSTITUTIONALITY OF PETROLEUM LAW

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During a plenary session held on March 16, the Federal Supreme Court (STF), by majority vote, found the Direct Unconstitutionality Action (ADI) 3273, filed by the Governor of the State of Paraná, Roberto Requião to lack grounds. The goal of such action was to obtain a declaration of unconstitutionality of several provisions of Law 9478/97 (article 26, main section and paragraph 3; article 28, I and III; article 37, sole paragraph and I; article 43, sole paragraph and II; article 51; and article 60), known as "Petroleum Law".

As informed in BM&A Review No. 7, the settlement of the matter by STF was fundamentally important to the definition of the current monopoly framework relating to the activities of survey and exploration of petroleum and natural gas, which was toned down by Constitutional Amendment 9/95.

Before the session held on March 16, Justice Carlos Ayres Britto, the reporting judge on the action, had voted for the unconstitutionality of such law, which led to a situation of legal uncertainty that permeated the oil and gas sector. For over six years, the law contested by the Governor of Paraná had been a regulatory milestone for that sector. According to the abovementioned Justice, the oil extracted in Brazil is subject to a federal monopoly and, consequently, the ownership of such oil could not be conveyed to concessionaires, as determined by the contested law. Besides, in his opinion, the National Petroleum Agency (ANP) could not establish conditions for the "sale" of oil exploration areas because only the Federal Government had the necessary authority to do so.

During a prior session, Justice Marco Aurélio had also voiced his opinion on the partial unconstitutionality of the aforementioned law, affirming that the Federal Government holds a monopoly on the oil sector and that the Federal Constitution grants to private companies only the possibility of exploring the reservoirs, while "the conveyance of ownership of oil reservoirs to private entities was inadmissible". However, Justice Marco Aurélio considered the main section of article 60 of the contested law to be constitutional, since he believes that ANP should indeed control the activity. According to Justice Marco Aurélio, the purpose of the institution of ANP, which is the regulatory body of the sector, was to avoid abusive practices by private companies as well as to address antitrust and corporate concentration matters.

Once the trial was resumed, Justice Eros Grau disagreed with the reporting justice and declared the constitutionality of Law 9478/97. In his opinion, the Federal Government petroleum monopoly remains unchanged, since the contested law only provides for the conveyance of the ownership of exploration rights to private entities. He pondered that, even though concessionaires are the owners of the products resulting from the exploration of oil reservoirs, such entities cannot freely dispose of mineral products, since they must abide by the established policies and are subject to the control of ANP. According to Justice Grau, Constitutional Amendment 9/95 made the oil exploration system more flexible, authorizing non-constitutional lawmakers to establish legal conditions for the execution of exploration contracts. Thus, this is not a case of suppression of the Federal Government monopoly, but rather a mere evolution on the rules governing the exploration of mineral assets.

Justices Carlos Velloso, Cezar Peluso, Gilmar Mendes, Ellen Gracie, Sepúlveda Pertence and Nelson Jobim seconded the opinion voiced by Justice Grau.

Justice Joaquim Barbosa voted for the partial upholding of the action. He considered that there is no unconstitutionality in the fact that the law grants to concessionaires the ownership of the extracted petroleum, arguing that the exploration area is then returned to the Federal Government in its

entirety: “This type of agreement represents a political decision of the lawmaker, representing an opportunity to make the Federal Government monopoly set forth in Constitutional Amendment 9/95 more flexible”. On the other hand, Justice Barbosa seconded the opinion of the Reporting Justice with regard to the unconstitutionality of paragraph 3 of article 26 of Law 9478/97, which deals with the automatic approval of plans and projects relating to the development and production of the concessionaire if ANP fails to address such plans and projects within 180 days, which, in the opinion of the Reporting Justice, is was a provision that violated the constitutional requirement of motivation for administrative decisions.

Thus, at the end of the trial, by majority vote, STF found the ADI to lack grounds and concluded that all of the challenged provisions of Law 9478/97 were indeed constitutional. The timing of the decision is opportune, since it ensures the maintenance of current contracts and lends the stability the sector needed to attract more investments.

THE FOREIGN EXCHANGE MARKET AND NEW EXPORT RULES

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Recently, with the enactment of the National Monetary Council (“CMN”) Resolution 3265, of March 4, 2005, the Floating Rate Exchange Market and the Free Rate Exchange Market were integrated into one single Exchange Market. Consequently, the Central Bank of Brazil (“BACEN”) enacted Circular 3280, on March 9, 2005, and instituted the Foreign Exchange and International Capital Market Regulation (“RMCCI”), which establishes new rules to broaden and facilitate the access of natural and legal persons to transactions of purchase and sale of foreign currency and international remittances in reais, regardless of the nature and value of such transactions, provided that the legality of the transaction, the economic fundament thereof, as well as the liabilities set forth in the corresponding documents are all complied with.

With the enactment of RMCCI, natural and legal persons can purchase and sell foreign currency, with no limitation as to value, for the following purposes: (i) constitution of “funds available abroad” (disponibilidades no exterior); (ii) direct investment, including investments relating to foreign share call options, in the case of natural persons; (iii) investments in the financial market; (iv) loans to entities domiciled abroad; and (v) other investments. The return to the country of the funds resulting from the disposal of direct investments abroad is no longer mandatory and such funds can now be freely reinvested abroad.

Another innovation relates to the lack of restrictions on (i) the tendering of guarantees abroad by non-financial legal entities headquartered in the country; and (ii) the tendering of guarantees to companies receiving Brazilian investments abroad, by their corresponding domestic investors. Under the former structure, such transactions were conditional on the approval of BACEN.

The new regulation changed significantly the rules relating to international remittances of reais. Previously only deposits of domestic currency in an account held in the country by a financial institution headquartered abroad could be freely converted into foreign currency to be remitted abroad, regardless of the nature or amount of such remittance, even

if the funds belonged to third parties. In the case of accounts held by entities other than financial institutions, there were severe restrictions on the conversion of funds to be remitted abroad and, consequently, most of such remittances were carried out via accounts held by foreign financial institutions.

With the enactment of CMN Resolution 3265/2005, any balance remaining in domestic current accounts held by non-residents (financial institutions or otherwise) can be converted into foreign currency and remitted abroad, provided that such funds belong to the holder of the account and the remittance is not carried out on behalf of third parties. If, on the one hand, the domestic accounts held by foreign financial institutions can no longer be used for purposes of remittance of funds abroad, on the other hand, any non-resident (natural or legal person) that holds an account in the country can remit its own funds abroad in an easier manner.

CMN Resolution 3266/2005 was also enacted on March 5, 2005. Such Resolution addresses the receipt of funds resulting from Brazilian exports. In general lines, the entry of the funds resulting from export transactions must be carried out within 210 days as of the loading of the goods, and exchange coverage is only required at the deadline. Under the former system, the foreign currency had to enter the country by the deadline for the payment of the transaction agreed upon by exporter and importer, as per the corresponding export documents and according to the foreign exchange contract.

Despite the evident evolution in the procedures involved, the new rules abide by the current foreign exchange and capital market laws, which remain unaltered. Therefore, the following legal premises were maintained: (i) mandatory use of Brazilian currency in local transactions between Brazilian parties; (ii) registration of certain foreign exchange transactions with the Central Bank of Brazil; (iii) formalization of transactions by means of foreign exchange contracts; (iv) mandatory entry into Brazil of funds raised abroad for purposes of foreign capital registration dealt with in Law 4131/1962; (v) mandatory payment of Brazilian imports; and (vi) prohibition against private settlement of credits.

FIFTEEN YEARS OF DOUBT AS TO THE REACH OF THE CONSUMER PROTECTION CODE

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In force since March 1990, the Consumer Protection Code has played a leading role in the intense transformation that the Brazilian Contract Laws have undergone during that time. Reversal of the burden of proof, strict liability of the supplier, nullity of clauses that breach objective good faith principles: many are the innovations brought about by Law 8078, and both courts and scholars have put plenty of effort into – successfully – settling the many controversies involving the application of said provisions. The fifteen years of effectiveness of the Consumer Protection Code, however, were not enough to settle the most fundamental of the doubts: after all, what relations are subject to the special law?

The first hint has a legislative origin, and can be found in the Consumer Protection Code itself – specifically in articles 2 and 3, which include definitions of the concepts of consumer and supplier. The Consumer Protection Code also establishes the concepts of “products” and “services”, thus facilitating the interpretation of the law. Nonetheless, the Code fails to clarify the exact meaning of purchasing or using the product or service as an “end user”, which is the expression used to define the concept of consumer and considered by the doctrine to be a key definition in understanding the matter.

In an attempt to make the vague concept of “end user” clearer, authors tend to follow two main trends: “maximalism” and “finalism”. Maximalists seek to expand the reach of the definition of consumption relation, while finalists seek to reduce the reach of such expression – an option that entails important practical repercussions in light of the protective character of the Consumer Protection Code.

For maximalists, it is enough that the ultimate purpose be factual, i.e., that a product is taken from the market to be used by the consumer. The Superior Court of Justice has adopted such thesis on occasion, such as in the case when the court decided that both the farmer that purchases manure to use in his crop and the company that purchases water supplied by a public concessionaire to process and sell fish are in fact consumers. The same line of thought was adopted in the case of a food manufacturer that hired the services of an IT support provider to meet its internal control needs. In all of the cases described above, the court decided that the original product or service was not transformed or incorporated into the end product or service.

Nonetheless, finalists consider that, in addition to the factual purpose, it is necessary to ascertain the economic purpose of the asset so that one can actually determine the concept of end user. The Superior Court of Justice has adopted such stricter definition when denying Consumer Protection Code applicability, for example, to cases of loans granted for purposes of improving business activities, which was deemed to be a “managerial purpose”. According to the finalists, the applicability of the Code should be restricted to the protection of consumers per se: thus the code should not apply to cases where the professional nature of the purchaser is verified, i.e., when the product or service can, in any manner, be considered an

input of the product or service to be supplied to the end consumer.

In the many other instances when the Superior Court of Justice denies applicability of the Consumer Protection Code, the reason invoked is usually the economic status of the parties (particularly the parties that, due to their scale, are denied the status of consumers), or the special nature of certain relations, such as the ones involving leases. With regard to financial institutions, as informed in BM&A Review No. 5, the Superior Court of Justice has come to the conclusion that the Consumer Protection Code is applicable – despite the fact that there is a Direct Unconstitutionality Action pending a decision by the Federal Supreme Court, in which the opposite opinion is argued.

In summary, in borderline cases the Superior Court of Justice has indicated that it tends to broaden the reach of the Consumer Protection Code. That was the case of the trial of Special Appeal 661145, which resulted in the unanimous decision that was published in March 2005. Reporting Justice Jorge Scartezzini, of the 4th Panel, accepted the exceptional application of the Consumer Protection Code “provided that, in the actual case, the technical, legal or economic vulnerability” of the contracting party was demonstrated. In his vote, which he referred to as “a toning down on the finalist interpretation”, the reporting justice argued that “in light of the actual vulnerability of the purchaser [...] such purchaser should be considered a consumer”, regardless of the professional character thereof. However, in that case, due to the lack of discussion by the lower courts on the vulnerability of appellant – an apparel manufacturer that claimed an undue discontinuance of its electricity supply – the Consumer Protection Code did not apply.

Regardless of the connotation adopted by the courts, it seems necessary to improve the fundamentals on which decisions on this matter are based. Only then could a debate reach a uniform valuation of the different elements – factual purpose, economic purpose, economic status of the parties – that make up the grounds of such decisions. The fifteen years of effectiveness of the Consumer Protection Code, which have seen an intense academic production, are enough to enable the higher courts to conciliate the multitude of fundamentals that are invoked in the decisions rendered by state courts, oftentimes in an indiscriminate manner.

The need to clarify the boundaries of applicability of the Consumer Protection Code has been strengthened with the enactment of the Civil Code of 2002. The high degree of approval that the Consumer Protection Code has had can be largely explained by the utter obsolescence of the former Civil Code in light of modern contractual relations. The new civil code repaired such setback, incorporating a number of principles that are part of the Consumer Protection Code, such as the principle of objective good faith. A possible consequence of the updating in the rules that govern contracts is a decrease in the “maximalist” tendencies of some judges, who are expected to address the relations covered by the Consumer Protection Code in a more restrained manner.

SUPPLEMENTARY LAW 118/05 STRENGTHENS TAX CREDIT COLLECTION TOOLS

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Supplementary Law 118/05, enacted on the same date as the new Bankruptcy Law (Law 11101/2005), changed the Brazilian Tax Code and included a number of new provisions. In addition to having halted a few of the prerogatives of tax credits relating to the bankruptcy procedure, in order to assist debtors in their recovery, it is important to note that, at the same time, said law strengthened the existing tax credit collection tools against debtors that are not subject to bankruptcy procedures, as examined in further detail below.

The first of the changes that benefit the Tax Administration was the modification of one of the events that interrupts the running of the statute of limitations in lawsuits filed by the Tax Administration to collect already-constituted tax credits. According to the former wording of article 174, item I of the Brazilian Tax Code, the running of the statute of limitations began at the time of the final constitution of the tax credit and was interrupted at the time of the valid service of process on debtor. The new wording of said item establishes that the statute of limitations set forth in article 174, item I of the Brazilian Tax Code is interrupted at the time of the decision rendered by the judge ordering the service of process in the course of a tax execution procedure.

Another change brought about by Supplementary Law 118/05 was the removal of the expression “during execution” from the wording of the main section of article 185 of the Brazilian Tax Code. Such provision deals with the assumption of fraud that arises out of the disposal or encumbering of assets or revenues by a taxpayer that has a tax credit enrolled as an overdue tax liability debt. According to the new wording of article 185 of the Brazilian Tax Code, the fraud is presumed in cases of the mere existence of debts enrolled as overdue tax liabilities, even if not yet executed, provided that debtor fails to constitute enough reserves of assets or funds to pay the debt in full.

In the same regard, article 185-A was included in the Brazilian Tax Code. Such article establishes that if the tax debtor is duly served process and fails to pay the debt or to offer assets in attachment and no attachable assets are found, the judge shall order a freeze on the assets and rights of such debtor, informing such decision by electronic means to all bodies and entities that promote the registration of transfers of such assets, which, from then on, must comply with the court order.

Pursuant to article 185-A, if no attachable assets of the debtor are found to exist after the due service of process, the judge shall send an official letter, by electronic means, to entities such as DETRAN, CVM, the Central Bank and RGI, ordering a freeze on all the assets and rights of debtor. Paragraphs 1 and 2 establish that, after the freeze on all of the assets and rights of the debtor, the entities in charge of such freeze shall send to the court a list of the frozen assets and, only then, the judge shall order the release of assets or rights up to the limit of the enforceable debt.

Finally, article 3 of Supplementary Law 118/05, instituted a new interpretation to the provision set forth in article 168, I of the Brazilian Tax Code, according to which the statute of limitations runs in five years with regard to the filing of a repayment claim relating to taxes subject to assessment by homologation. Such interpretation goes against the past decisions of the Superior Court of Justice, according to which the statute of limitations in those cases runs in 10 years. That is because the aforementioned Supplementary Law established that the interpretation of article 168 of the Brazilian Tax Code should take into account, as the initial date for the 5-year statute of limitations, the date of the undue payment of the tax credit, instead to the date of the homologation of such credit, as the Superior Court of Justice used to consider.

Article 4 of the Supplementary Law in question even determined that the new interpretation was to apply retroactively to repayment claims relating to taxes subject to assessment by homologation, pursuant to the determination that the provisions of article 3 were interpretative in nature.

The First Panel of the Superior Court of Justice, on the records of the Motion for Resolution of Conflict in Decision on the Records of Special Appeal 327043, is currently analyzing the possibility of application of the new interpretation to lawsuits filed by taxpayers before the enactment of the aforementioned law. Six out of the nine justices that are part of the First Panel have cast their votes stating that the new interpretation pursuant to the terms of Supplementary Law 118/05 does not apply to lawsuits currently in course. Nonetheless, the applicability of such interpretation to lawsuits filed after such date has yet to be addressed.

STRICTER CRIMINAL PROVISIONS IN THE NEW BANKRUPTCY LAW

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The new Bankruptcy Law (Law 11.101/2005) introduced considerable changes to the system that governs those crimes that, pursuant to former Decree law 7661/45, are known as “bankruptcy” crimes. Under the former legal regime, which shall remain in force until the month of June, only after the filing of the bankruptcy procedure can a criminal action commence, i.e., even if the requirements that characterize the commitment of a crime are present, such crimes could not be prosecuted before the declaration of bankruptcy.

Such situation was altered by Law 11101/2005, which amplified the possibility or prosecution of such crimes in its article 180, which states that the decision that declares bankruptcy or grants judicial or extrajudicial receivership orders is an objective punitive condition with regard to the criminal violations described in such law. Therefore, the expression “bankruptcy crimes” should no longer be used.

Penalties have also been increased. The new law provides for sentences of 2 to 6 years of confinement for all crimes described therein, and some of such penalties can be increased by up to 50%, which increases the maximum penalty to 9 years of confinement.

In that particular regard, it is possible to note an increased strictness in cases of accounting crimes. Article 168 of the new law provides for penalties of confinement of 3 to 6 years plus fine whenever debtor commits a fraudulent act that causes losses to creditors. It is important to note that such penalty can be increased by one-sixth (1/6) to one-third (1/3) if the perpetrator (i) prepares bookkeeping records or balance sheets including inaccurate data; (ii) omits, in the bookkeeping records or balance sheets, entries that should have been included therein, or alters accurate bookkeeping records or balance sheets; (iii) destroys or damages accounting or business data stored in computers or IT systems; (iv) fakes the composition of corporate capital; or (v) destroys, conceals or damages, in full or in part, mandatory accounting records. In cases where the perpetrator maintains or deals with funds in unofficial, secret accounting books, kept in addition to the required documents, paragraph 2 of such law determines that the penalty shall be increased by one-third (1/3) to one-half (1/2).

Also with regard to accounting crimes, the law provides for penalties of confinement of 1 to 2 years and fine in cases of omission on mandatory accounting documents, provided that the fact does not represent a graver crime.

Despite the severity, notably with regard to accounting crimes, the lawmaker recognized that micro- and small-scale companies should be subject to slighter penalties, due to the lower amounts such companies deal with. That is the reason why in case of bankruptcy, if no habitual fraudulent activities are found to exist, the judge can reduce the penalty of confinement by one-third (1/3) to two-thirds (2/3) and even replace such penalty with right-restricting penalties, loss of assets or community or public entity service penalties.

With regard to the other crimes, the new law provides for penalties of confinement of 2 to 4 years in cases of (i) breach of corporate confidentiality that contributes to the insolvency of debtor; (ii) disclosure of false information about debtor for purposes of causing the bankruptcy of such debtor or obtaining advantages; (iii) inducement of the court, the Public Prosecutors’ Office, the creditors, the general meeting of creditors, the Committee or the court administrator to error; (iv) siphon-off, concealment or misappropriation of assets; (v) acquisition, receipt or use, in an illicit manner, of an asset that is part of the bankrupt estate; (vi) illegal submission of a proof of claim and (vi) acquisition of the assets of debtor by the judge, member of the Public Prosecutors’ Office, court-appointed administrator, trustee, expert examiner, appraiser, court official, court clerk or auctioneer, or, with regard to the latter, any profit speculation, when they have taken part of the corresponding procedures.

In addition to the penalties mentioned above, to grant advantages to creditors will be punished with a fine and 2 to 5 years of confinement, whereas the unlawful exercising of activity will be punished with 1 to 4 years of confinement and fine.

Finally, it is important to note that a sentence involving one of the crimes described in Law 11101/2005 has the following effects: (i) prohibition from exercising corporate activities; (ii) impediment to occupy a position in the board of directors, administrative council or management of corporations subject to the provisions of this Law and (iii) prohibition from managing a company pursuant to powers of attorney or tenure, in addition to the effects that are described in the Criminal Code, such as the ascertainment of the obligation to indemnify the damage caused by the crime, as well as the loss of the instruments and products of the crime. In light of the above, one can conclude that this is an extremely strict regime that requires the adoption of careful corporate management practices.

ALTERNATIVE BILL CAN CAUSE MORE CHANGE

The Commission for Economic Affairs of the Senate approved in early April the Alternative Bill to Draft Law 245/04, which, if approved, is expected to supplement the Bankruptcy Law, providing for the payment in installments, over 6 or 7 years, of the tax debts of debtors subject to court receivership orders. The idea is to include FGTS debts and environmental debts payable to IBAMA, in an attempt to facilitate the recovery of companies.

ADDITIONAL ASPECTS OF THE DISCUSSION ON THE NEW INTERPRETATION OF CADE WITH REGARD TO THE BILLINGS CRITERIA

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In a follow-up on the article published in the last BM&A Review on the new interpretation of the Administrative Council for Economic Protection (CADE) with regard to the billings criteria applicable to the ascertainment of the mandatory status of the submission of operations to the analysis of the Brazilian antitrust authorities (as per article 54 of Law 8884/94), a number of important aspects are addressed below, in light of the recent publication of a decision on the ADC/Krone Concentration Act.

The publication of such decision, when the members of CADE presented the plenary with a new take of the matter, adds a new element to the discussion, which had not been addressed thus far. That is because the vote of the reporting council member emphasizes that the new interpretation on the billing criteria must incorporate the idea that the actual or potential production of effects in the Brazilian territory must be taken in consideration in the definition of the operations subject to mandatory submission.

Thus, according to the reporting council member, "the operation shall be significant as a result of the importance of the company in the Brazilian market, depending on the magnitude of the company's billings in Brazil". It is necessary to bear in mind, according to the vote of the reporting council member, that the "billings in Brazil" figure must include, in this case, the revenues recorded as a result of all activities that affect the Brazilian territory. Therefore, revenues resulting from exports to Brazil must be taken into account.

Such conclusion seems the most appropriate since, if a certain concentration act involves a company that, despite lacking productive capabilities in the Brazil, is present in the country via exports to Brazil, the billings criteria should be able to address such situation, requiring the submission of such concentration act, since the operation can potentially bring about impacts on the competition. However, the methodology to be adopted in the calculation in Reais of the billings resulting from exports into the Brazilian territory was not addressed.

Such aspect was not addressed in the press release on the matter published in the website of CADE. The conclusion that revenues resulting from exports must be taken into account shall prevail, but until CADE enacts a precedent, a case-by-case analysis is advisable.

NEW PARTNER IN BM&A

Barbosa, Müssnich & Aragão has a new partner: Luiz Antônio Sampaio Campos, who joins the firm to strengthen the Corporate and Capital Market areas. The firm now has 16 partners and 143 associates. Luiz Antônio, a former director of the Securities and Exchange Commission (2000-2004), took part in the enactment of important rules that enabled significant restructuring in the stock market, such as CVM Instructions 361 (Public Stock Offering) and 400 (New 13).

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