

## ANTENOR MADRUGA IS BM&A'S NEW PARTNER IN BRASÍLIA

**Main practices areas of BARBOSA,  
MÜSSNICH & ARAGÃO ATTORNEYS:**

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Real Estate Law  
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Third Sector  
Energy

In order to expand its presence in Brasília and strengthen its practice in the superior courts, regulatory agencies and government departments, Barbosa, Müssnich & Aragão called on Antenor Madruga, who recently joined the firm's office in Brasília as a new partner. With more than 10 years' experience in the Department of Federal Attorneys, where he acted as Federal Counsel, Assistant to the Federal Prosecutor General and chief Prosecutor responsible for federal litigation in Brasília, Antenor Madruga is the ideal person to spearhead the growth of BM&A's practice in the Brasília region, investing both in the services demanded by the region's emerging economy and the new needs of public and private clients, including services to diplomatic representations and international agencies.



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Another area that Madruga will develop is the recovery of assets for the private sector, taking advantage of his experience at the Ministry of Justice's Department of Asset Recovery and International Legal Cooperation from 2003 to 2006. While head of the Department, Madruga coordinated and implemented the National Strategy for Prevention of Money Laundering and Cooperation, which involved more than 60 public and private institutions. The expertise Madruga gained during his work in the Department will certainly benefit BM&A's clients. "The growth of international legal cooperation in recent years has opened up opportunities for both the private and the public sectors to obtain information and recover assets from other jurisdictions, even the most protectionist tax havens, significantly increasing the effectiveness of anti-fraud initiatives," Madruga comments.

The changes in international legal cooperation have also begun to be felt in Brasília, where the Special Court of the Superior Tribunal of Justice (STJ) authorized the disclosure of legally protected information by means of letters rogatory, despite the absence of an international agreement providing for disclosure. Since Constitutional Amendment 45/2004 came into force, the STJ has had jurisdiction to homologate foreign decisions and approve execution of letters rogatory. The case concerned letters rogatory sent to Brazil by the Belgian courts, in connection with an investigation into alleged money laundering by a Brazilian businessman. "This is an extremely important decision, which marks a considerable advance on the decisions issued by the Supreme Federal Tribunal, which held that the disclosure of legally-protected information was executory in nature and therefore could not be granted under letters rogatory." In Madruga's view, as well as the opinion of Justice Luiz Fux, with whom the other members of the Special Court of the STJ agreed, letters rogatory are a means of communication between the authorities of different countries, requesting international cooperation in order to achieve effective exercise of their jurisdictional powers, which is essential to the exercise of each State's sovereignty.

Under Madruga's leadership, BM&A's Brasília office will also focus on providing services to foreign states and international agencies represented in Brasília. This area demands specialized knowledge of international law, particularly in matters related to the immunity from jurisdiction enjoyed by sovereign states and international agencies, the subject matter of Antenor Madruga's doctoral dissertation, which he defended before the Department of International Law of the University of São Paulo, and two cases in which he acted as counsel while at the head of the international section of the Department of Federal Attorneys.

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## VALUE-ADDED TAX ON IMPORTED OIL INDUSTRY GOODS

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The discovery of new oil and natural gas reserves in the Santos Basin and the Ninth Round of Public Bidding for exploration licences is the backdrop to a revival of the debate over the application of ICMS (*Imposto sobre Circulação de Mercadorias e Serviços*, a value-added tax) to goods imported for the oil industry. ICMS Agreement 112/2007, which came into force at the beginning of October 2007, authorizes the states of Ceará, Pernambuco, Rio de Janeiro and Rio Grande do Norte to revoke the tax benefit granted under ICMS Agreement 58/99 for goods to be used in producing, refining or processing oil or natural gas.

The benefit provided for under ICMS Agreement 58, which has been in force since 1999, allows the states which signed the agreement to grant exemption from ICMS on customs clearance of goods imported under the special importation regime for certain oil industry-related assets, REPETRO, which was established by Federal Decree 4543/02.

On November 14, 2007, the State of Rio de Janeiro published SEF Resolution 82, incorporating the terms of ICMS Agreement 112/2007 into state law, with retroactive effect to October 22, 2007. However, the Resolution maintained the benefits under ICMS Agreement 58/99 for goods that enter Brazil temporarily (no more than 24 months) for use in the production of oil and natural gas. With the ratification of ICMS Agreement 112/2007, the way is open for the States to collect ICMS on importation of these goods.

ICMS Agreement 130, which was published on November 28, 2007 but was rejected by the state of Ceará, provides for a specific tax treatment on importation of these goods, by authorizing the signatory states to concede an exemption or reduction in ICMS on goods imported for use in exploration or production facilities. As a result, Brazilian states can, at least in theory, collect ICMS on the importation of oil industry-related goods in the same way they collect ICMS on any other imported goods. In practice, however, the states' powers to collect ICMS on oil-related imported goods may not be as broad as they appear.

One limitation is the nature of the legal transaction under which the goods are imported. In practice, most of the contracts entered into by the oil industry are not sales agreements, and because ownership of the goods is not transferred, ICMS, which applies to the circulation of goods, does not attach. In a recent decision, for example, the Supreme Federal Court found that a lease of aircraft was not a transaction giving rise to circulation of goods, and that ICMS did not apply to the transaction (RE 461.968/SP).

Another issue to be considered is timing. The states clearly intend to collect ICMS immediately, in the absence of legal provisions creating ICMS exemptions or reductions, such as ICMS Agreement 58/99. However, the immediate attachment of ICMS to goods imported for the oil industry is questionable.

The states base their argument for immediate collection of ICMS on the fact that the revocation of an exemption is not the same as the creation of a new tax, but simply the return of a tax that was suspended, and that therefore the tax attaches as soon as the revocation comes into force. According to the tax authorities, therefore, upon revocation of the exemption under ICMS Agreement 58/99, they are not bound by the principle of prospective application of taxes.

Under Brazilian law, however, the principle of prospective application of taxes is a broad one, under which new taxes, or increased taxes, cannot have effect in the fiscal year in which they were created, and even then may not apply prior to 90 days from the publication of the legislation that created them. Although the Federal Constitution refers only to the creation of new taxes and the increase of existing taxes, with no mention of revocation of tax exemptions, the National Tax Code does refer to revocation of tax exemptions in art. 104 (III). It is true that art. 104 (III) of the National Tax Code refers expressly to taxes on income and property, but the principle of prospective application applied only to those taxes under the previous constitution.

A last point relates to the State of Rio de Janeiro, which has legislation dealing specifically with importation of equipment for the oil industry (the Valentim Law). Some companies in the oil industry challenged the constitutionality of the Law, given the terms of ICMS Agreement 58/99, and the appeal court of Rio de Janeiro suspended the effects of the legislation. The companies that benefit from the court of appeal's decision can argue that the Valentim Law, which deals specifically with the ICMS Law, does not produce effects against them, and therefore ICMS does not apply to the equipment they import.

Given that ICMS Agreement 130 will not be ratified, the states will likely reject ICMS Agreement 58/99 and begin to charge ICMS at full rates on goods imported for use in the oil industry, particularly Rio de Janeiro. However, there are good legal arguments to challenge the immediate application of ICMS on such goods, and even to challenge the constitutionality of the tax, given that the goods are imported temporarily under lease agreements, and have not been bought and sold.

## THE SUPREME FEDERAL TRIBUNAL AND THE “GENERAL REPERCUSSION” REQUIREMENT

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The requirement that appeals to the Supreme Federal Tribunal (SFT) have a general repercussion was introduced by Constitutional Amendment 45/04, in the context of the recent reform of the Brazilian Judiciary, and is now found in articles 543-A and 543-B of the Code of Civil Procedure, added by Law 11,418/06.

The new criterion for admission of appeals to the SFT arises out of the SFT's jurisdiction, as Brazil's highest court, to protect and uphold the Federal Constitution. The concept of general repercussion is intended to ensure that only questions that are truly relevant to Brazilian society are heard by the court, improving the effectiveness and efficiency of the SFT's work by excluding appeals that reflect only the unsuccessful party's unwillingness to accept defeat. The requirement of general repercussion thus delimits the scope of the SFT's general jurisdiction to ensure the constitutionality of state action, since its specific jurisdiction is already defined by the exhaustive list of entities that may bring actions for a declaration of unconstitutionality in art. 103 of the Federal Constitution.

The requirement of general repercussion differs from both the petition for a writ of certiorari adopted by the Supreme Court of the United States and the former Argument on Relevance imposed under Amendment no. 3 to the SFT's Rules. The difference lies in the fact that while certiorari and the Argument on Relevance require the appellant to show the relevance of the issue under appeal, the court may deny leave without giving reasons for its decision. In the case of general repercussion, the STF is bound by article 93(IX) of the Federal Constitution, which requires that all judicial decisions must be supported by reasons, on pain of nullity.

Under articles 543-A and B of the Code of Civil Procedure, the court must consider the importance of the case from an economic, political, social and legal point of view in determining whether it meets the requirement of general repercussion, and appeals that have a general repercussion in any one of these aspects will meet the requirement. Furthermore, the appellant must demonstrate that the questions raised in the appeal transcend the interests of the parties, and have an impact that goes beyond the confines of the particular case, as required under art. 322 of the SFT's Rules.

Although the elements that demonstrate the general repercussion of a case are subjective in nature, both the legal literature and the precedents have imposed limits on the concept, which facilitate the decision-makers' task.

In its economic aspect, general repercussion is demonstrated by the impact of the case on national economic policy, the productive sector, essential public services (collective transportation, telephone services, energy, basic sanitation) or the development of the private sector. A general repercussion will also be considered to be present when the STF's decision will create a leading precedent by granting a right that could be claimed by a considerable number of persons. A case will also have a general economic repercussion when it concerns a violation of Title VII of the Federal Constitution, “The Economic and Financial Order”, covering arts. 170 to 191.

A case will have a general social repercussion when the issues it raises involve collective or general rights protected by the Constitution in matters of education, housing, health or social security, or, in other words, the issues that can be raised in citizens' actions, public civil actions and petitions for judicial review in the collective interest. The case must also affect the actual circumstances of a significant number of people. The same criterion applies in cases of substitution of parties where, for example, an employers' association represents all its affiliated companies. In effect, this aspect is similar to the requirement that the case transcend the interests of the parties, in that the decision will produce effects beyond the appellant and respondent in the appeal.

On the legal plane, a general repercussion will be shown to exist when the issue involves the interpretation or scope of a legal concept or principle of law. It will also exist when the constitutionality of legislation has been challenged in the courts for good reasons, or when the court below has found that legislation is unconstitutional. In this context, article 543-A §3 of the Code of Civil Procedure, which provides that a case will have a general repercussion when it challenges a decision contrary to one of the SFT's Restatement of Precedents (*Súmula*) or the dominant position in the court's precedents, is simply a more objective statement of one of the circumstances in which a case can be considered to have a general legal repercussion.

Lastly, an appeal will have a general repercussion on the political life of the nation when the subject matter of the case affects Brazil's relations with other countries or international organizations, relates to conflicts between public political entities or involves public economic policy or governmental directives.

## BM&A wins 2007 Client Choice Award

The Client Choice Awards given by the International Law Office recognize the best law firms in 46 countries around the world. Barbosa, Müssnich & Aragão Advogados was chosen as the best Brazilian law firm in 2007. The criteria for the awards consider the quality of the services provided and the law firms' ability to add real value to their clients' business, in comparison with other players in the market. The 2007 winners were chosen from more than 1300 individual assessments received from corporate counsel worldwide.

## Brasken and Mexico's Televisa Group win awards for good corporate governance

Brazilian petrochemical company Braskem and Mexico's Televisa Group came out the winners in the second edition of the Affinitas Award for Good Corporate Governance in Latin America. The awards were delivered on November 22, 2007 at the 9<sup>th</sup> Latibex Forum. Latibex is a segment of the Spanish stock market, where securities in leading Latin American companies are traded in Euros. Affinitas is an alliance of law firms in Spain, Portugal and Latin America, including Barbosa, Müssnich & Aragão Advogados in Brazil.

## Four new partners at BM&A

BM&A has four new partners: Alexandre Seguin, a tax specialist, Antenor Madruga, in civil litigation, Camila Goldberg, in the firm's Financial and Capital Markets group, and Monique Mavignier, in the corporate area.

## THE CONTROVERSY OVER THE TIME PERIOD FOR PAYMENT OF MONEY JUDGMENTS

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Law 11,232 of December 22, 2005, was introduced to reform the procedures for execution of judgment in order to give the judgment creditor effective means to obtain payment of the amount awarded. One of the changes made by Law 11,232/05 was to add article 475-J to the Code of Civil Procedure, which provides that "if a debtor found liable by judgment to pay a sum certain, or an amount that has already been liquidated, fails to make payment within fifteen (15) days, the amount awarded by judgment shall be increased by a fine of ten percent."

The provision raises a question: when does the time period begin to run? The controversy continues after more than a year, and the courts have accepted a wide variety of theories.

Some have taken the position that the court of first instance must issue specific notice to pay, through publication of notice in the official gazette to the debtor's counsel. Other decisions have found that the time period does not begin to run until notice to pay is issued by the court of first instance and is served on the debtor, by a court official or by letter. Yet other precedents take the line that the 15-day time period begins to run only after (i) the creditor applies for execution of judgment, submitting a statement of calculation of the debt; and (ii) notice to pay has been issued to the debtor, by publication in the official gazette addressed to the debtor's counsel.

Recently, the Superior Tribunal of Justice (STJ) held that specific notice to pay is not necessary, and that the creditor need not apply for execution of judgment in order for the time period to begin to run (Special Appeal 954.859-RS). The court took the position that the 15 days start running from the moment that judgment can be executed: either (i) when notice is published in the official gazette, addressed to the debtor's counsel, that judgment has become final, or (ii) when an appeal is filed that does not have the effect of staying execution of judgment. The question is still not settled, but this recent judgment of the STJ is a strong indication of the direction the law will take.

## THE MINIMUM CAPITAL REQUIRED FOR INSURANCE COMPANIES

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On December 26, 2006, the National Private Insurance Council (*Conselho Nacional de Seguros Privados – CNSP*), the government agency responsible for insurance and private pension plan policies in Brazil, issued CNSP Resolution no. 155, establishing more rigorous rules on the minimum capital requirements companies must meet to be authorized to operate as insurers.

Currently, the minimum capital requirements for insurance companies in Brazil is determined according to their line of products and the geographical regions in which they are authorized to operate. Under CNSP Resolution 73/2002, for example, insurers authorized to operate throughout Brazil must have a capital of no less than R\$7.2 million.

The new minimum capital established under CNSP Resolution no. 155 is composed of a fixed amount of capital, termed the “base capital”, and a variable amount of capital, termed the “additional capital”. Both the base and the additional capital must be maintained at all times in order for the company to operate as an insurer. The solvency margin currently required of insurers will be replaced by new requirements imposed by the modified minimum capital, except in the case of health insurers.

The base capital requirement is the sum of a fixed amount of R\$1.2 million, related to authorization to do business in the non-life (general) and life insurance sectors, and a variable amount established according to the regions in which the insurer is authorized to operate. The maximum base capital is R\$15 million, for insurance companies authorized to do business throughout Brazil. The additional capital will serve to guarantee risks inherent to insurers’ business activities and will be determined in accordance with specific regulations to be issued by the Superintendent of Private Insurance (SUSEP) and the CNSP. With the exception of subscription risk, no regulations have yet been issued on the calculation of the amount to be included in additional capital to cover market, credit, operating and legal risks of insurance companies.

Under CNSP Resolution 158/2006, insurers that develop their own model for assessment of subscription risks will be allowed to adopt comparatively lower factors for insurance premiums and retained losses when calculating the additional

capital component of their minimum capital, while companies without an internal model will have to adopt higher factors.

Once the required minimum capital is calculated, insurance companies must show that their adjusted net equity is equal to or greater than the minimum capital requirement. Starting January 1, 2008, the adjusted net equity of insurance companies will be compared to their required minimum capital, in accordance with regulations to be issued by CNSP and SUSEP. If CNSP and SUSEP have not issued the relevant regulations by January 1, 2008, capital adequacy will be determined by comparing insurers’ adjusted net equity to the greater of the solvency margins currently in force and the minimum capital required under Resolutions issued by CNSP in December 2006.

Any capital inadequacies revealed by the comparison must be cured as follows: (i) at least 30% of the insufficiency by the first anniversary of the complementary regulations; (ii) at least 60% by the second anniversary; and (iii) 100% by the third anniversary. Measures that insurance companies can take to solve their capital insufficiencies include a reduction in their level of business, by ceasing to do business in certain regions and no longer offering high-risk product lines, increasing their level of reinsurance, capitalizing accumulated profits, increasing their net equity, or a combination of these measures.

Insurance companies will be required to show compliance with the new minimum capital requirements by submitting trial balance sheets to SUSEP every six months, and will be subject to penalties that range from recuperation plans to cancellation of their authorization to operate, depending on the degree of non-compliance.

Both CNSP Resolutions nos. 155 and 158 reflect preventive regulatory mechanisms adopted by SUSEP to bring Brazilian insurers into line with the standards of care and risk management practiced internationally, such those recommended by the International Association of Insurance Supervisors, to which Brazil belongs. Stricter capital adequacy requirements, implemented through a risk-based capital model, represent an important step toward ensuring that risk management in Brazilian insurers meets the best practices adopted in the international insurance market.

## CADE AND EXECUTIVES' LIABILITY FOR COMPETITION OFFENCES

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On September 19, 2007, the Administrative Council for Economic Defence (CADE) in full session concluded that various security services companies were guilty of acting as a cartel in their participation in public bidding procedures for government contracts. Not only did CADE impose fines of up to 20% of the security companies' revenues, it also fined the individuals involved. Without going into the merits of CADE's decision, the case is particularly interesting for two reasons.

CADE's decision in the security services cartel case is the first in an investigation initiated by means of the Leniency Agreements provided for under the Competition Defence Law. When CADE determined that the Leniency Agreement had been fulfilled, it declared that the cooperating company and its officer were no longer subject to punishment, releasing them from criminal and administrative liability, and thus conferring a certain degree of legal security on Leniency Agreements. The second reason the case attracts the interest of those who follow CADE's decisions is that it reflects a significant change in the council's position on the liability of individuals for corporate offences.

In previous cases, Brazilian antitrust authorities would only impose penalties on individuals who had personal involvement in anticompetitive practices (ranging from cartels to exclusivity contracts), regardless of whether the individuals were formally occupied the position of officer or director of the company found guilty of anticompetitive conduct. Thus, directors, officers and legal representatives would find themselves implicated in investigations and subject to administrative sanctions only if the authorities were able to prove (unusually beyond doubt) that they were personally involved in the anticompetitive conduct.

In this case, however, upon finding that the participation of certain companies in a cartel to defraud government contracting procedures, CADE imposed penalties on both the entities and their officers, even though the administrative proceeding did not produce any evidence that the officers had been personally involved in the illegal practices. The main argument put forward to support this new position is that a company is a legal fiction and as such could not have committed an illegal act except through a natural person, and accordingly the natural person must be held liable.

This decision, together with the debate among the councillors at the session, marks a change in direction for CADE: it appears that corporate officers and legal representatives will now be held personally liable for the illegal acts of their companies, even in the absence of proof of their involvement in the anticompetitive practice. The decision reverses the burden of proof, and officers face having to prove that they were not involved in the conduct in order to escape liability.

The Competition Defence Law does not contain any specific provision that could furnish a definitive answer to the question of executives' liability, and the silence of the legislation on this point is likely to feed continuing debate and challenges of administrative decisions imposing liability on executives in the absence of proof of their direct involvement, especially given the presumption of innocence contained in the Federal Constitution and the principle of due legal process.

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