

BANKS TAKE THE LEAD IN REDUCING LABOR LIABILITIES

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Major Brazilian banks have adopted a new approach to managing their labor liabilities. On June 1, 2004, Itaú announced that it was abandoning more than 500 pending appeals; on September 28, 2004, Caixa Econômica Federal (Brazil's federal savings and loan bank) said that it intended to withdraw more than 700 appeals in course before the Superior Labor Court (the "SLC", Brazil's highest court in labor matters); Bradesco and Banco do Brasil have been following the same strategy since the middle of 2003.

SLC Chief Justice Vantuil Abdala believes that the labor liability reduction policy adopted by the banks could be motivated by the SLC's publication of its list of companies with the highest numbers of proceedings before the court, since "having their names appear in our annual ranking is hardly an honorable thing for the companies." In fact, of the highest-ranked 12 state-owned and private companies, seven are financial institutions.

Even so, the new trend in management of labor liabilities reflects a change in attitude rather than a desire not to head up the SLC's ranking. The backdrop to this "culture" of liability reduction is, on one hand, a decrease in the direct and indirect costs associated with lawsuits – especially those in which the chances of success are remote because they involve issues that have long been settled by the labor courts – and, on the other hand, an improvement in liquidity ratios and, consequently, in the banks' market value.

The significant labor liabilities carried by most of Brazil's financial institutions compromises their liquidity ratios. In simplified, practical terms, the liquidity of a company can be measured by its current ratio - total current assets divided by total current liabilities. The current ratio shows how liquid the company is or, in other words, its capacity to pay its debts. The higher the company's current ratio, the better its market value.

For example, if a bank has current assets of R\$2,000,000 and current liabilities of R\$700,000, of which R\$500,000 represents labor liabilities, its current ratio would be 2.85. However, if the bank decides to use some of its assets to reduce its current labor liabilities, say from R\$500,000 to R\$100,000, the current ratio immediately goes up to 5.33.

In this respect, the Brazilian market has been following in the footsteps of more mature markets, where analysts and investors give greater value to companies that have good corporate governance practices. Aside from increasing liquidity, reduction or elimination of labor liabilities indicates compliance with the law and harmonious relations with employees, which contribute to a better evaluation of the company's future.

The banks' new attitude to their labor liabilities is expected to encourage other companies to rethink their current strategies for managing labor liabilities through a critical assessment of which cases are worth pursuing and efficient employment planning to prevent new liabilities from arising.

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TAX PLANNING: INTERNATIONAL TREATY VS INTERNAL LAW

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On August 25, 2004, the 1st Panel of the Superior Court of Justice (“SCJ”, Brazil’s highest court for non-constitutional matters) issued its decision in an appeal brought by Volvo do Brasil Veículos Ltda. The court found that international treaties prevail over internal law, with the reporting justice, Teori Zavascki, dissenting.

Many tax planning strategies used by companies depend on the application of rules under tax treaties signed by Brazil to avoid double taxation, even though the treaties derogate from internal Brazilian tax legislation, in order to produce the desired effects.

In this scenario, two possibilities arise. Where the internal law is already in force when the treaty becomes effective, the internal law is automatically set aside; however, when an internal law is passed after the treaty is already in effect, doubt arises as to which prevails over the other. Because the Brazilian Federal Constitution (“FC”) is not clear on this question, there are judicial decisions on both sides of the question.

In principle, it is both natural and logical to conclude that treaties have greater force, in light of the principle of customary international law, *pacta sunt servanda*. That principle is confirmed in article 27 of the Vienna Convention on the Law of Treaties, which establishes that no State may invoke provisions of internal law to justify its failure to perform its international obligations. Still, the Convention has not yet been sanctioned by the Brazilian Congress, although Brazil is a party to the Convention.

In dealing with fundamental rights and freedoms, article 5 §§1 and 2 of the FC expressly attributes hierarchical superiority to treaties, through a general provision for their full reception, which is consistent with the monistic theory of international and domestic law. In other words, treaties are valid in themselves and create rights directly, not as internal law, and the Constitution therefore rejects dualism and the doctrine of transformation. Problems arise, however, in interpreting the scope of article 5. According to renowned legal scholars, taxation is encompassed by constitutional rights and freedoms, not only because the FC itself so provides (article 150 caput), but because rights and freedoms – such as the right to private property, the freedom to engage in business and the prohibition against confiscation – are directly affected by the way they are taxed.

Even at the level of ordinary legislation, it is possible to argue both for and against the supremacy of treaties over internal law, within the terms of article 2 of the Law of Introduction to the Civil Code (LICC), in view of the criteria for the resolution of antinomies (the existence of two conflicting rules applicable to the same case) in tax matters. Historically, they are: (1) the hierarchy of laws, a criterion that cannot be unambiguously applied in the case at hand, due to the lacuna in the Constitution; (2) the chronology of laws, under which the more recent law prevails; and (3) the specificity of laws, under which the more specific law prevails over the more general. Here again, however, another impasse is created because of the absence of a clear hierarchy between the laws. While chronology would favor internal law, the criterion of specificity would result in application of the treaty. Nevertheless, a solution may be found in article 98 of the National Tax Code (“NTC”), which gives primacy to treaties.

However, even article 98 NTC raises doubts as to its interpretation. According to some scholars, the article is not intended to make treaties hierarchically superior to internal law, since such an interpretation would be contrary to the FC. For this school of thought, the provision simply declares that the criterion of specificity will apply in matters of taxation, which is consistent with article 2 LICC. Thus, the specificity of legislation, not its hierarchical relationship, would be the correct criterion for resolution of the issue: even if the treaty and the internal law were hierarchically equal, the treaty would apply because of its specific character.

Given the controversies in the literature and the practical importance of these questions where taxation is concerned, it is essential to keep a close watch on the courts’ treatment of the matter, especially since the famous decision by the Supreme Federal Court (Brazil’s highest court for constitutional matters) in Extraordinary Appeal RE 80004/77. In that case, which dealt with debt instruments, the full court held that international treaties and conventions do not prevail over the express provisions of subsequent legislation, because the later internal law is the most recent expression of the legislator’s intention. Although this precedent continued to influence Brazilian courts until the mid-1990s, it is possible to glimpse a change in the courts’ position, as illustrated by the Superior Court of Justice’s recent decision, referred to above.

In fact, the precedents of the Supreme Federal Court invoked in the Volvo do Brasil appeal antedate the FC and do not deal directly with tax law. The more recent judgments of the Superior Court of Justice and other courts, finding that treaties do prevail over internal law in matters of taxation, therefore may be gaining on the older Supreme Federal Court decisions.

Tax planning arrangements predicated on rules established in international treaties have thus found stronger support in recent precedents, although the question of whether treaties prevail over internal law is still controversial and supplies Brazilian tax authorities with ample arguments to challenge such arrangements.

SIGNS OF RENEWAL IN BRAZILIAN LAW ON SECURITY INTERESTS

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The internationalization of the economy, resulting in larger and more complex business transactions, has increasingly revealed the obsolescence of the system of security interests Brazilian attorneys learned from their Civil Law codes and textbooks. Specialists in the area are unanimous in their view that the law on security interests must be reformed if Brazilians are to enjoy a lower cost of credit and consistent economic growth.

In this international scenario, the limited changes introduced by the new Civil Code are simply not sufficient. One of the more innovative changes introduced by the new code is the express provision for pledge of rights – a mechanism that is essential in the public services infrastructure sector, where receivables owed by users to the service provider can serve as security in project financing. In general, however, Brazil's security interests system remains outdated, based as it is on the premise that land is still the most valuable asset, with the result that value of security interests in personal property is largely ignored by the legislation.

Comparative law can be useful in assessing how far Brazil has fallen behind other countries in the area of security interests. A prime example is the United States, where personal property security interests were revolutionized with the 1972 revision of the Uniform Commercial Code and later improved under the 1998 revision. Significant advances were made in the speed and efficiency with which personal property security interests can be created, registered and enforced. The description of property given as security, for example, is now more generic, eliminating the need for continual updates where property is subject to constant change, as in the case of a farmer's herd of cattle or a company's computer equipment.

Even legal systems that are very similar to Brazil's, such as Portugal's, have a more dynamic law on security interests. In Portugal security mechanisms such as the independent guarantee are the subject of intense debate, while in Brazil they are relatively unknown. In an independent guarantee, the guarantor undertakes to pay a certain sum in case of default on the principal obligation, but the guarantee is not an accessory to the principal obligation or dependent on it in anyway. Another type of guarantee is the comfort letter, which generally consist in a commitment addressed to a financial institution, setting out the terms under which a parent company will assume liability for obligations contracted by related companies.

Changes in the treatment of distressed debtors are another factor that calls for a revision of the Brazilian system of security interests. These days, it is recognized that the debtor should be allowed to continue in business whenever possible, both in the interests of the economy as a whole, and in the creditors' own interests, given that their chances of being paid in full increase if the debtor is still operating.

There is draft legislation that reflects this trend. Bill 4.376/93 (examined by Francisco Müssnich and Laura Bumachar in

BM&A Review no. 4 and by Tatiana Malamud and Alexandre Ramos Coelho in the most recent edition), once sanctioned, will govern bankruptcies in Brazil. The Bill encourages rehabilitation of companies in distress and introduces other innovations, such as putting tax debts, currently privileged, on a par with debts with real security, thus eliminating a significant obstacle to debt renegotiation.

Another prospect for change is the bill on public-private partnerships (PPPs) now before the Brazilian Congress. Substitute Bill 10/98 (the earlier bill was commented on by Francisco Müssnich and Álvaro Palma de Jorge in BM&A Review no. 3) shows a more dynamic treatment of security interest in providing that the special purpose company created by the private investor under a PPP can use receivables under the partnership agreements as security for financing arrangements, as long as the security does not compromise the continuity of the works and services under the PPP.

Bill 3.253/2004, dealing with the reform of the execution process, represents yet another step forward, as Luiz Fernando Fraga and Mario Gelli pointed out in the most recent edition of BM&A Review. Speeding up the execution process is essential to ensuring a healthy, functional system of security interests. Lastly, the newly-enacted Law 10.931 of August 2, 2004, examined in BM&A Review no. 5 by Christiane Scabell Höhn, should be mentioned. This new and innovative legislation answers an overriding need in current legal life: the protection of consumers. Article 53 of the law amends the Condominiums and Real Estate Developments Law to provide that property and rights forming part of the "segregated assets" attached to a real estate development project can only be given as security in a financing transaction if the financing is used exclusively in the development project.

In the meantime, practitioners have not been slow to adapt new types of security mechanisms to the Brazilian context. Negative pledges and *pari passu* clauses are seen more and more frequently in Brazil, for example. Through negative pledges, creditors seek to prevent their debtors from creating new liens on their property, while in *pari passu* clauses, debtors will typically undertake to ensure that their creditors' debt has priority over any new debt the debtor might contract. Although such clauses create merely personal obligations, they illustrate a trend toward the use of "apparent guarantees" to reinforce traditional security interests.

The gap between the law in practice and the law on the books is especially worrying where security interests are concerned. For this reason, the legislative changes described above are especially positive, since they reveal a movement toward reducing the distance between the facts and the law. Only through legal reform can the risks of a lack of congruity – and corresponding lack of efficiency – between business transactions and the legal framework that supports them be eliminated.

LIMITED LIABILITY COMPANIES: QUOTAHOLDERS' AGREEMENTS CAN MITIGATE THE EXCESSES OF THE NEW CIVIL CODE

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Many of the innumerable criticisms directed at the new Civil Code ("CC") refer to the decision-making system established for limited liability companies. Article 1076 of the CC divides the majorities required for approval into three categories: (i) at least $\frac{2}{3}$ of the company's capital; (ii) an absolute majority of the company's capital; and (iii) a simple majority.

In addition to the majorities established by article 1076, a number of provisions of the CC require unanimity for certain matters and, in other cases, a majority representing at least two thirds of the company's capital. Scholars point to other questions that require specific majorities, even though the Code does not expressly impose the requirement: corporate splits, mergers, amalgamations and dissolution, for example, all require approval by at least $\frac{2}{3}$ of the company's capital, and the bringing of a civil liability action against officers or directors would have to be approved by at least an absolute majority of the company's capital because it would necessarily result in the removal of the officer or director in question.

This rigid system is accused of tying the hands of limited liability companies and eliminating their (former) most attractive quality: the simplicity of the rules governing such associations and the members' freedom to regulate almost all matters of interest to the company. The forced redistribution of power within limited liability companies and the bureaucratization of their internal workings will lead to a progressive abandonment of this form of business organization, or so some believe.

Others defend a less drastic solution: to get around the CC's so-called "handcuffing" of limited liability companies, all that is needed is a quotaholders' agreement (members of a limited liability company hold "quotas", not shares, in the company's capital) that governs the exercise of voting rights through prior meetings that have different majorities than those established in the Code.

In fact, now that the debate over the legality of quotaholders' agreements within the context of limited liability companies has been overcome (a debate that originated in art. 7 §7 of the former Commercial Code, a provision that is reproduced in the sole paragraph of art. 997 CC), quotaholders' agreements among the members of limited liability companies is a common and accepted practice in the business world.

Through a quotaholders' agreement, members of a limited liability company can enter into block voting pact, where the members will meet prior to the formal members' meeting to decide how they will vote on the matters on the agenda for the formal members' meeting. With respect to the prior meeting, the parties to the quotaholders' agreement are free to establish whatever majorities for approval they wish (simple or special majorities, with provision, or not, for a casting vote in case of a tie).

Once the prior meeting has been duly held, the decision approved at prior meeting will bind all the parties to the quotaholders' agreement, who will then vote together at the formal members' meeting, in order to ensure that the majority imposed by law is reached or to prevent it from being met, as the case may be.

This mechanism, it is argued, will ensure that the majorities imposed by law are respected within the limited liability company, because the parties to the quotaholders' agreement will vote in unison, with their vote being cast in conformity with the rules established in the quotaholders' agreement. Because quotaholders' agreements are not expressly provided for by law, they fall into the category of atypical contracts, and the law governing such agreements is heavily influenced by the agreements between the shareholders of a corporation, which is the closest type of contract expressly named and regulated by legislation. Quotaholders' agreements assume the nature of a "reciprocal mandate", under which the members who were able to secure a favorable decision at the prior meeting have the power to vote all the quotas subject to the quotaholders' agreement at formal members' meeting, regardless of the position taken by the individual parties to the agreement.

This procedure is consistent with the proxy system created by the CC, in which members of limited liability companies may appoint proxies to vote at members' meetings on their behalf, without the member being required to state expressly how he or she intends to vote on the matters before the meeting. Furthermore, the system finds support in the fact that the same scheme operates successfully and without controversy in the context of corporations, even though the Brazilian Corporations Law, just like the CC, establishes special majorities for the approval of certain matters.

In fact, article 136 of the Corporations Law, like art. 1076 CC, provides that some questions must be approved by special majorities, but this has not prevented the adoption of block voting agreements and proxy voting.

Despite the CC's silence with respect to quotaholders' agreements, such pacts are a potential solution to the innumerable problems that arise in the day-to-day life of limited liability companies because of the very high, and sometimes unattainable, special majorities imposed by the Code for some corporate decisions. At the same time, it should not be forgotten that quotaholders' agreements can be turned to fraudulent ends, and the courts should be attentive to misuse. Indeed, it is the courts that, through their examination of concrete cases, can sanction or deny the use of quotaholders' agreements to mitigate the excesses of the new Civil Code.

BM&A in Chambers Global 2004/2005

The recently published Chambers Global 2004/2005 edition ranks BM&A among the top Brazilian law firms in four areas: Corporate/M&A, Banking & Finance, Litigation and Tax. In the Corporate/M&A area, BM&A heads up the list of leading Brazilian law firms. This year's Chambers Global includes a new section on Litigation and BM&A was selected as one of Brazil's leading litigation firms. As in previous years, partners Paulo Cezar Aragão, Francisco Müssnich and Plínio Simões Barbosa were highlighted as leading Corporate/M&A lawyers. Paulo Cezar Aragão and Francisco Müssnich were also cited as preeminent Brazilian lawyers in the Banking area.

A Boost for the Carbon Credit Market

On November 4, 2004, Russia's President, Vladimir Putin, sanctioned the law ratifying the Kyoto Protocol on reduction of greenhouse gases. In order for the Protocol to come into force, it must be ratified by 55 developed countries representing 55% of the world's carbon dioxide (CO₂) emissions, as measured in 1990. When the United States (responsible for 36.1% of CO₂ emissions) refused to ratify the treaty, the required percentage could only be reached if Russia (17.4% of CO₂ emissions) ratified the Kyoto Protocol: the industrialized countries that have ratified the protocol to date represent only 44.2% of the world's CO₂ emissions. The final step for Russia's ratification of the Protocol is the deposit of the instrument of ratification with the General Secretary of the United Nations in New York, which is expected to occur in the coming weeks. The Protocol will come into force 90 days after the delivery of the instrument of ratification. The entry into force of the Protocol is expected to give a boost to the carbon credit market.

Settled Precedents

On September 9, 2004, the Superior Court of Justice published four Restatements of Precedents, all related to contracts for provision and remuneration of financial services. Of particular interest is Restatement 297, which consolidates the Court's position that financial institutions are subject to the Consumer Defense Code. Although the Restatements were published only recently, the approved text of the Restatements was made available prior to publication and commentary on the Restatements can be found in "Superior Court of Justice: New Precedents Consolidate Contracts Case Law", BM&A Review no. 5, which examines the chief implications of the Superior Court of Justice's recent Restatements dealing with contract law.

DIGITAL SIGNATURE IN CURRENCY EXCHANGE CONTRACTS AND GOVERNMENT CONTRACTING

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In Circular no. 3234, published in April of this year, the Central Bank of Brazil authorized the use of digital signatures in currency exchange contracts. A digital signature, as defined by various Brazilian governmental institutions, is a set of mathematical procedures employing cryptographic techniques that make it possible to prove the source of a given set of computer data. The system is similar to a strongbox: without the key, it is impossible to get at the contents of the safe.

The great advantages of digital signatures are precisely certainty as to the author of a document and assurance of the document's integrity. The use of electronic certification of the digital signature of currency exchange contracts can therefore contribute to greater security in electronic transactions.

The digital certificates that "guarantee" such contracts are issued by certifying authorities accredited by the Brazilian Public Keys Institute (Infra-Estrutura de Chaves Públicas, ICP-Brazil). Aside from licensing public and private institutions to act as certification authorities, the ICP-Brazil's mission is to ensure the authenticity, integrity and legal validity of electronic documents, support applications and accredited applications that use digital certificates, so that electronic transactions can be made securely.

In the courts, digital signature and certification has also become an increasingly important tool for automating procedures, speeding up legal proceedings and reducing costs through the use of electronic documents. The Digital Signature of Government Contracts Project, which was implemented in August of this year by the courts of Rio de Janeiro, is an important advance in this area. The project allows companies to formalize contracts with the government directly through the internet, which reduces costs and streamlines the administrative process.

The number of contracts and other documents that are signed electronically is growing throughout the world and digital signatures can be expected to become an increasingly common feature of everyday life. Recent initiatives show that the assimilation of digital signatures to handwritten signatures is beginning to become a reality in Brazil, both legally and technologically.

At the same time, increased use of digital signatures means that companies must give even greater attention to their computer security systems – new technologies are always accompanied by attempts to defraud them. Furthermore, the legal consequences of the growing ease of entering into transactions by means of digital signatures have not yet been thoroughly examined by the courts, and particular care should be taken in using this relatively new technology.

THE FUTURE OF THE BRAZILIAN OIL INDUSTRY ON THE SUPREME FEDERAL COURT'S DOCKET

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The Supreme Federal Court should soon resume judgment of an action for a declaration of unconstitutionality brought by the Governor of the State of Paraná. The action challenges a number of provisions of the Petroleum Law (Law 9.478/76), particularly those related to the state monopoly established in article 177 of the Federal Constitution. Mr. Justice Carlos Ayres Britto, the only member of the Court to have issued his opinion to date, would grant the action in part; Mr. Justice Marco Aurélio Mendes de Faria Mello, however, asked to examine the record of the proceeding, thus suspending the judgment process.

The Supreme Federal Court finds itself once again in the delicate position of deciding issues vital to the nation's economic development, an increasingly common occurrence in Brazil. In fact, at stake in the action are not only the entire legal framework that supported various rounds of public bids for natural gas and oil extraction conducted by the National Petroleum Agency (the "ANP" – Agência Nacional de Petróleo) since 1997, but also the validity of the legal relationships resulting from those bids, particularly the concession agreements entered into between the NPA and the private concessionaires.

The Governor of Paraná argues that the Petroleum Law, which establishes the national energy policy and governs activities related to the government's petroleum monopoly, in effect breaks the monopoly that the Constitution grants to the federal government and puts reserves of fossil fuels, essential to Brazil's development, at risk of premature depletion.

The provisions of the Petroleum Law challenged in the Governor of Paraná's action are: article 26 §3, which gives the private concessionaire ownership of "mineral resources" once they have been extracted and provides that if the ANP does not act within 180 days, development and production plans submitted by private concessionaires are deemed to have been approved; article 28 (I) and (II), which provides that concessions lapse on expiry of their term or in the events of early termination established in the concession agreements; article 37 (I), sole paragraph, which provides that the published terms and conditions of public bids must indicate the length of the extraction phase, as estimated by the ANP based

on available information, the characteristics of the block and its location; article 43, sole paragraph, which stipulates that the concession agreement must state the length of the drilling and production phase and the conditions for extension of the concession, so as to ensure that a portion of the block will revert to the government and that the amount paid for occupation of the location is increased; article 51, sole paragraph, which provides that the amount paid for occupation of the area under the public bid terms and the concession agreement shall be increased whenever the drilling and production period is extended; and article 60, which contemplates that any company incorporated under Brazilian law, with its headquarters and management in the country, may be authorized by the ANP to import and export oil and petroleum derivatives.

Because of the importance of the issues in play, various interested parties applied to intervene in the case and presented oral arguments before the full court. Although Mr. Justice Carlos Ayres Britto, who is charged as reporting justice with reporting on the case to his fellow judges and writing the first opinion, granted the preliminary injunction requested by the Governor of Paraná, suspending the application of the articles challenged in the action, it is not yet possible to predict the position the other justices of the Supreme Federal Court will take. Two relevant indicators are the fact that the preliminary injunction granted by Mr. Justice Ayres Britto was revoked by Mr. Justice Nelson Jobim, at the motion of the President of the Republic, and that the General Prosecutor of the Republic has submitted an opinion recommending that the action be dismissed.

With the adoption of Constitutional Amendment no. 9/95, the government's monopoly on exploration and extraction of oil and natural gas reserves became more flexible: the amendment permitted some activities to be carried out by the private sector under government contracts such as the concessions granted by the ANP. Now the Supreme Federal Court is faced with the task of determining the limits of that flexibility and the treatment to be given the complex of legal relationships that are based of the Petroleum Law. In short, the future of Brazil's oil industry depends on the Supreme Federal Court's decision.

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Ana Christina Marques
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GRAPHIC DESIGN AND LAYOUT

Soter Design

PHOTOLITHO

Open Publish

PRINTED BY J. Sholna

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