

BARBOSA, MÜSSNICH & ARAGÃO ADVOGADOS IS AWARDED DCI PRIZE

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After 10 years of existence, Barbosa, Müssnich & Aragão Advogados solidified its name in the market. Its renowned excellence in mergers and acquisitions has been extended to all areas of law, such as corporate, tax, antitrust, judicial litigation, arbitration, environmental, administrative, intellectual property and capital markets, among others. The Firm's characteristic of solving complex problems in a creative fashion, with technique and in a short period of time, resulted in the award of the DCI 2005 prize for the most admired law firm in the country. The prize, which was awarded after research and interviews carried out by a business newspaper during this past year with over 2500 businessmen, places the firm side by side with large companies such as Petrobrás, Nestlé, Votorantim and Embraer.

It is with pride that the Firm credits this prize to its clients and collaborators — the people truly responsible for the acknowledgment of the Firm's work. Since it is always seeking quality and excellence, Barbosa, Müssnich & Aragão Advogados invests in professionals with the best business expertise in the market to join their team, which is involved in assisting in the legal aspects of the largest deals accomplished in Brazil.

In this edition of BMA Review, the reader shall become acquainted with the work and legal and business thoughts of six attorneys who contributed to the growth of the firm during this past decade. For their effort and merit, they were all promoted partners of the firm in September.

Alex Cukier was the Firm's first trainee. He graduated from Pontifícia Universidade Católica de Rio de Janeiro (PUC/RJ) and his practice area is corporate law.

Alexandre Couto Silva graduated in Law from the Universidade Federal of Minas Gerais (UFMG) and in Business Administration from the Pontifícia Universidade Católica of Minas Gerais. Currently, he is a candidate for a doctorate degree from UFMG. His practice area is corporate law.

Andrei Furtado Fernandes graduated in Law from the Universidade Estadual of Rio de Janeiro (UERJ). His area of practice is tax law and he coordinates the tax litigation department of the firm.

Luiz Felipe Tenório graduated in Law from the Universidade Cândido Mendes and his area of practice is labor law.

Mauro Teixeira Sampaio graduated in Law from UERJ and his practice area is corporate law.

Tatiana Malamud graduated in Law from UERJ and obtained an LL.M degree at the University of Columbia in New York. Her area of practice is banking law and capital markets.

The promotion of these six young attorneys to partners of Barbosa, Müssnich & Aragão Advogados and the Firm achieving public recognition through the award of the DCI prize are both signs of the evolution of a team that plans its strategy for success for the following 10 years, with a certainty of a firm that started out with 12 attorneys and that today has 22 partners, 133 attorneys and 80 trainees working in all areas of corporate law.



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RECENT CHANGES IN THE RULES PERTAINING TO SECURITIES OFFERINGS IN THE UNITED STATES – THE QUIET PERIOD BECOMES MORE FLEXIBLE

Tatiana Malamud | tm@bmalaw.com.br

In 1933, the United States enacted the Securities Act, a law developed in reaction to the stock market crash of 1929, after which the country entered a profound depression. In general, the Securities Act has the purpose of making sure investors receive sufficient information about the securities offered in the market and of preventing the occurrence of fraud in the sale of such securities. The Securities and Exchange Commission (SEC) was created subsequently by the Securities Exchange Act of 1934, with the purpose of establishing the regulation of the markets and disclosure of information.

Based on the rules introduced by the Securities Act and the Securities Exchange Act, every offering of securities in the United States or aimed at American investors, in principle, should be registered with the SEC. In order to do so, there is a presumption that (i) all activities related to a securities offering, even if indirectly related, would be, in a broad sense, an offering, included therein any statements by the issuer, whether through the press or not, and (ii) all information disclosed in connection with the offering or that would promote an offering would be, in a broad sense, a prospectus, comprising sale materials, the contents of a website or even an interview in a newspaper. Both the offerings and the prospectus, in such a broad sense, would have to be subject to SEC rules. In light of the communication restrictions, this period of time became known as the “quiet period”.

As of December 1st, amendments to the Securities Act, approved by the SEC on June 29, 2005, became effective. Such amendments made communication rules regarding public offerings more flexible. The indiscriminate prior control by the SEC would no longer be necessary, in light of the access to information which is currently available to the investors, especially with respect to certain issuers, which are well known to the public at large. The SEC also recognized that certain legal restrictions prevented the legitimate access to certain relevant information by the investor when making a decision.

The Sarbanes-Oxley Act of 2002 enhanced the availability and quality of information. Created as a response to the Enron and WorldCom scandals, the referred to Act imposed a series of obligations and responsibilities on companies, including the disclosure of transactions not reflected in their financial statements, the formation of audit committees, the implementation of internal control mechanisms, the disclosure of information “in real time” and criminal liability for breach of obligations.

Therefore, since today the market disposes of more information, more rapidly and with greater quality, the need

to reform the concepts dated back to the period following the stock market crisis in the 1930s was admitted.

Among one of the several changes, the new rules broadened the scope of written information related to the offering, which could be disclosed before the respective registration was granted, as well as by the press, even if, in some cases, the submission of material to the SEC was required. Such communications are also known as “free writing prospectuses”.

The issuers qualified as “well-known seasoned issuers” (WKSIs) — whose information is already widely and regularly disclosed to the market, because of the large volume of securities of its issuance offered to the public and outstanding in the market — may now disclose, at any time, any type of communication, whether verbal or written, provided certain conditions are complied with.

After a request for registration has been submitted to the SEC, any issuers or participants in the offering may make use of verbal or written communications (“free writing prospectuses”), provided certain conditions are complied with and provided it may be necessary to submit such material to the Commission, without prejudice to the liability for the contents of what were disclosed.

All of the issuers that have a registration with the SEC may continue to periodically disclose the information usually disclosed in the course of its business (“factual business information”), in addition to “forward-looking information”. The issuers that are not registered with the SEC may also continue to disclose information regarding their businesses, as long as it is directed to people such as clients and suppliers, which are not potential investors of the company.

It is worth noting that most of the new rules contain eligibility requisites. Special purpose companies, for instance, may not benefit from such more flexible rules.

The matter is especially important to the extent that the legislation of capital markets in the United States served as a basis for the development of regulations of several other jurisdictions. Therefore, it can be said that the reforms currently implemented shall encourage other securities commissions to adopt criteria to make the disclosure of information more flexible, according to the circumstances and category of the issuing company. Once the reasons that brought on the reform are understood and once the conditions and criteria for more flexible rules are stipulated, this seems to be a beneficial measure seeking to modernize the systems in place until today.

THE REACH OF THE POWER OF SURVEILLANCE OVER INVESTED COMPANIES

Alexandre Couto Silva | acs@bmalaw.com.br

The reach of the power of surveillance of the audit committee (conselho fiscal), in relation to invested companies is an issue that creates controversy among managers and members of audit committees of investing corporations. The discussion assumes greater relevance for companies that have an equity accounting income far greater than their operational income. This is quite a common situation in companies that, in addition to directly performing operational activities, have as a predominant corporate purpose the participation in other companies.

Members of audit committees each have an individual power-duty to monitor the actions of company managers, as well as to verify the compliance with their legal duties and those duties set forth in their by-laws, such as the ones provided in article 163, I, of Law no. 6,404/1976 – Brazilian Corporations Law (“BCL”). In addition, such members must perform their duties with care, dedication and attention, since non-complying with their duty of diligence may result in liability for the non-complying member of the audit committee, for the damages resulting therefrom, as provided by article 165 of the BCL.

As a manner of making the performance of their surveillance duties feasible, members of the audit committee were attributed with the authority to individually request clarifications or information from management, provided they pertain to such surveilling duty (article 163, paragraph 2 of the BCL). In this context, one may argue, therefore, that, with the purpose of performing their legal functions, in relation to the company to which they were elected, the member of the audit committee of the investing company that holds the relevant shareholding in another company should have access to certain information and documents of the relevant invested companies, whether they are controlled or associated (coligada), over the management of which the investing company has influence or in which it holds 20% or more of the corporate capital.

Such argumentation is based on the fact that the relevant investments in controlled or associated companies, because of the equity accounting method, directly affect the financial statements of the investing company, which is under the surveillance and responsibility of their audit committee. We are not dealing with a right to access to all of the information in connection with the invested companies.

After successive amendments to the chapter related to audit committees in the corporate legislation, currently both legal scholars and the Comissão de Valores Mobiliários (“CVM”) — the Brazilian Securities Commission — widely recognize that the surveilling authority of the audit committee, as well as the power to request clarifications or information to management, are not unlimited. The member’s competence, even if in relation to the company of which the committee is part, is limited to checking on the compliance with applicable legal and by-law provisions, not being a part of its duties, however, the examination of the merits or the convenience of the corporate business under analysis, thus relegating any possibility of the Audit Committee operating as “parallel management”.

Therefore, the requests for clarifications or information, especially when related to invested companies, should be based on good faith principles, seeking only the interests of the company, and on

the criteria of reasonableness, and may not exceed the competence of the surveilling entity.

The right, provided by law, to request clarifications or information is limited to what is necessary in order to exercise such audit committee member’s surveilling duty, in relation to the company of which the audit committee is a part. In this sense, the financial statements and other relevant accounting information of the invested company (controlled or associated) may be made available to the members of the audit committee, which are essential to the correct bookkeeping of the equity accounting in the investing company and which have been used by the investing company’s management.

The CVM’s opinion has been that the audit committee member should have access to the same information and documents to which the investing company and its respective managers and employees had access in order to prepare the financial statements of the investing company — that is, the balance sheets and the financial statements of the relevant controlled and associated companies and other information used, or to which they had access and which the management of the investing company deemed to be necessary for the preparation of its financial statements. The CVM also stated that there is no obligation for the invested companies to prepare specific documents for the audit committee of the investing company or to submit documents that have not been made available to the latter company’s management. Likewise, the CVM is of the opinion that in the event the management of the investing company informs that during the preparation of the financial statements it did not consider certain information that the audit committee member considered essential, the latter shall cast his vote contrary to the approval of the financial statements as he or she considers they were prepared without examining the necessary information.

What is being sought is not an extension of the competence of the audit committee member of the investing company to the invested companies, but only to allow that such member exercise his or her surveilling duty and opine about the financial statements of the investing company with due diligence. If such member of the audit committee of the investing company could verify the compliance with the duties provided in the law and in the by-laws, by the managers of the controlled and associated companies – a function that is exclusive to its own audit committees –, there would be an overlap of competence, which would result in double surveillance, which is not provided for in the law, nor is it reasonable.

The members of the audit committee, as well as the managers, have a duty of loyalty towards the company and should always perform their duties only with the company’s interest in mind, even if sacrificing the personal interests of the shareholders that elected them. The BCL itself defines as abusive the performance of duties by a member of the audit committee who is seeking to cause damages to the company or to its shareholders or managers, or the obtaining of advantages for him or herself or for others, to which he or she would not be entitled, and which results or which could result in damages to the company, its shareholders or managers (article 163, § 1º, of the BCL).

LIMITED LIABILITY INDIVIDUAL BUSINESSMAN

Mauro Teixeira Sampaio | mts@bmalaw.com.br

Recently, Federal Congressman Antonio Carlos Mendes Thame submitted to National Congress Bill no. 5805/05 which, once approved, will result in the creation of the limited liability individual businessman. Thus, Brazilian legislation shall be following the steps of more modern judicial systems, allowing for the exploration of commercial activities by an individual, acting through a corporate structure, with liability limited to the amount of the corporate capital that has been paid in.

The evolution of Commercial Law and its institutes has always been preceded by phenomena of an economic nature. Historically, commercial law has the purpose of regulating commercial conduct, habits and customs which, in practice, have been widely performed by society. The bill under examination is no exception.

The measure is commendable, since it intends to stimulate the growth of the Brazilian economy through the development of the so-called “micro” and “small” businessmen, who, according to such illustrious congressmen (based on the data disclosed by IBGE in 2002), represent 99.2% of the companies incorporated in Brazil. The Bill seeks to regulate articles 170, item IX and 179 of the Federal Constitution of 1988, which establish differentiated judicial treatment for such businessmen, in order to simplify their administrative, tax, social security and credit obligations.

Currently, legislation provides that limited liability companies (sociedades limitadas) shall be composed of at least two partners. In this sense, the measure that limits the liability of an individual businessman is beneficial as, according to the legislation currently in force, such businessmen have unlimited liability in relation to the risk of their business, as they are not allowed to incorporate a company with limited liability on their own.

According to article 3 of the bill – making reference to article 2, II, of Law no. 9,841/99, which defines a small company –, limited liability individual businessmen shall be considered those limited liability companies with only one partner that have a gross annual income greater than R\$ 244 thousand and equal to or less than R\$ 1,2 million.

One notices that the draft bill of the General Law for Micro and Small Companies, which is making its way through Congress, corroborates and ratifies the concepts and regulations proposed by Bill no. 5,805/05.

One criticism that is made in relation to this aspect is that, by classifying limited liability individual businessmen in item II of article 2 of Law no. 9,841/99, the legislator seems to have excluded the micro-businessmen from the benefit proposed by the bill, which would be a contra-senso in relation to the constitutional guidelines they intend to regulate. It seems evident that, if the law – by regulating article 170, IX, and article 179 of the Federal Constitution – grants more advantageous treatment to small businessman, the same

treatment should be extended to the micro-businessmen. By allowing micro-businessmen to also benefit from the limited liability institute, the legislator would be achieving, with more efficiency, two effects of great value for Brazilian society, which are: firstly, the legalization of those businessmen who today operate informally and the second effect, which is a result of the first effect, an increase in tax collection by the Internal Revenue Service, as a result of the formalization and legalization of the activities performed by such businessmen.

Another aspect of the bill that deserves commenting on is in regard to its article 5. Such article provides an exemption to the publication of any corporate acts by companies classified as limited liability individual businessman. Since the corporate capital represents a guarantee to third parties against the default of obligations assumed by limited liability companies (which is where the principle of unchangeability of corporate capital originated), article 1084, paragraph 1 of the Brazilian Civil Code establishes that, once a capital reduction is approved – which, obviously, affects the interests of a company’s creditors — the unsecured creditors (credores quirografários) (in other words, those having no guarantees) of the company shall have the right to oppose such capital reduction and shall do so in 90 days, as of the publication of the minutes of the shareholders meeting that approved such act. Which would be the procedure to be adopted by the unsecured creditors of a company, in the event of a capital reduction, if such individual businessmen remain free from the obligation of disclosing their corporate acts? This is one situation, among many others, that the bill does not regulate.

Although the liability limitation for the referred to individual businessmen may bring the desired changes for the national economy, there is a need to establish rules in order to ensure adequate and efficient protection of third party interests that enter into agreements with such company. It is worth recalling that the minority shareholder is a character playing an essential role in the surveillance of acts performed by both the managers and by the controlling shareholder of a company. As there is no minority shareholder, since there would only be one partner, the interests requiring protection would be, solely and exclusively, those of third parties, which are outside the corporate body and whose only form of control of the activities and finances of said individual businessmen, even if minimal, would be exactly through the verification of the publications, especially financial statements, and such obligation is not imposed on such businessmen.

In summary, even though approval of the bill, as submitted, is a salutary measure, it seems to us that some issues deserve to be ameliorated in order for the rule, if approved, to effectively achieve its purpose: the strengthening of the micro and small businessmen, in addition to a consequent increase in national economic activities.

CAN THE GOVERNMENT BE HARMING THE PUBLIC INTEREST?

Andrei Furtado Fernandes | aff@bmalaw.com.br

The advances computers have brought to tax collection in the last few years are commendable. One national example is that today most of the income tax taxpayers submit their annual returns via Internet. A few individuals still resist, wary of the possible insecurity presented by the Internet, and others do not wish to see their information processed so rapidly, but according to statistics of the internal revenue service, the “block of absentees” gets smaller each year. Following this tendency, such group shall become so small that it may make up a special category of “fine screening” (malha-fina), until the inevitable total migration to electronic submission occurs.

In ten years, computer and Internet advances resulted in the creation of a true arsenal of accessory electronic obligations. In order to verify the compliance of tax obligations, the fiscal agents now dispose of an immense electronic database, compulsorily fed by taxpayers and liable parties from all over the country. The mere crossing of available information has allowed for an optimization of surveillance actions, notification of taxpayers in delay, the drawing up of electronic notices of infractions, etc., helping achieve successive record breaking collections, widely disclosed by the press and Internal Revenue Service website.

However, the different systems used by the federal tax authorities need to go through a complete revision, as inconsistencies resulting from the use of different data processing softwares is generating an unusual situation: companies in compliance with their tax obligations are not able to obtain evidence of such condition.

To worsen the situation, there is the precariousness of the Taxpayers Support Centers (Centros de Atendimento ao Contribuinte (CAC), which are spread around the country and which, more often than not, are informed about the recent changes in the tax legislation by the taxpayers they are giving support to. Another aggravating factor is the current strike of the employees of the Internal Revenue Service and the Brazilian Social Security Institute (INSS), in view of the process of unification of the two entities into a “Super Revenue Service”, which has already begun. Without going into the merits of the initiative, its implementation has brought about a new range of troubles for the taxpayers interested only in demonstrating their fiscal good standing. What was already bad became worse. And it still remains the same.

We have reached a strange situation where the employees of the Internal Revenue Service and the Brazilian Social Security Institute suggest that the most rapid way of solving the pending issues and inconsistencies in the systems would be to file writs of mandamus, because with the resulting judicial orders involving an immediate examination of documents, the taxpayer would have its request immediately attended to, thus excluding its undue “pending issues” from the system.

However, more than analyzing the causes of the lack of operability, which should be attacked with severity, it is necessary to pay attention to their drastic consequences. Prevented, for any reason, from evidencing their fiscal good standing, large, medium and small companies have not been able to participate in public bids. This is damaging to the Government, which can no longer count on the largest number possible of bidders in their contracting procedures for suppliers of products and services. Thus, the lack of operability in certifying the fiscal good standing of companies directly affects the public interest. It has shot its own foot.

As a way of lessening the impact on our clients due to the lack of operability of the fiscal authorities, we are adopting some preventive measures and other repressive ones, which represent a real taskforce:

- Preventively, in the administrative scope, we are helping by systematically verifying information with the Internal Revenue Service and the Brazilian Social Security Institute, with the intention of clarifying doubts and solving the inconsistencies in their systems. In the event they occur, we act with the purpose of solving them before they cause any concrete damage to the free performance of the company’s economic activity. In order to do so, we carry out an analysis, together with the accounting department of the company, regarding the possible inconsistency found;
- Preventively, in the judicial scope, when an issue is identified that can not be promptly resolved in the administrative scope. One example is the inclusion in the federal debt roster of an alleged debt that the company disagrees with and intends to question in court. In this case, we have adopted solutions such as a prior filing of annulment lawsuits, the filing of preventive writs of mandamus, or even anticipating guarantees in precautionary measures in preparation for motions to stay fiscal executions (medidas cautelares preparatórias de embargos a execuções fiscais), which were not yet filed, in such a way as to avoid that the inertia of the Government may prevent the delivery of a document evidencing the fiscal good-standing of the company;
- Repressively, in the judicial scope, through the filing of writs of mandamus against the most diverse arbitrary acts and illegalities committed by the federal tax authorities, most of which are due to the lack of qualification and structure, to which they are submitted.

The repeated declarations by the Judicial Powers repudiating such abusive conduct, which would include making the Government take responsibility for the damages caused, would mean the beginning of the end of such practices, towards a more harmonious relationship between the tax authorities and the taxpayers.

CONSORTIUMS AND LABOR RELATIONSHIPS

Luiz Felipe Tenório | lf@bmalaw.com.br

The purpose of a consortium between companies is the joining of efforts for the attainment of common objectives resulting in the reduction of operational costs and expenses.

Even though the Brazilian Corporations Law (Law no. 6,404/76) provides that a consortium does not have its own legal identity, its incorporation and maintenance involve formalities and expenses similar to those involved in the incorporation of a company. Therefore, although they do not possess their own legal identity, they do possess a formal legal identity, which evokes a question that impacts labor relationships: should a consortium assume the role of employer of those providing it services? This question is relevant to the extent that the employees of the companies in consortium have functional histories, distinct remuneration and benefits, resulting from the culture and remuneration and benefit policies adopted by their respective employers.

If the employees of the companies in consortium become employees of the consortium, the first challenge will be to match the benefits and remuneration, in order to avoid any differentiated treatment towards employees of the same employer and, consequently, any non-compliance with the constitutional principle of isonomy. On the other hand, if the consortium is not the employer of all of those providing services to it, the issue becomes simpler, since the labor relationship shall be maintained between the employees and their respective employers, thus making the maintenance of the remuneration and benefits of each company in consortium justifiable.

Although the solution, in this case, does not find grounds in jurisprudence or in labor caselaw, it is possible to notice that solid arguments exist in order to justify that the workers either become employees of the consortium or remain linked to their respective employers.

This occurs because, if on the one hand, in favor of the consortium directly hiring employees are the circumstances that the consortium possesses the so-called formal legal identity and is the direct beneficiary of the services, on the other hand, one should emphasize the fact that a consortium has, according to legal requirements, a predetermined term of duration, which makes the situation incompatible with the principle of continuity of labor agreements.

In light of this context, the companies in consortium shall have the option to choose the hiring model which best suits its ends and objectives.

THE CVM AUTHORIZES ONLINE ADHERENCE

Alex Schatkin Cukier | asc@bmalaw.com.br

In an inquiry made by one of the largest brokerage firms in the country, the CVM collegiate authorized the implementation of a system that permits its clients to make reservation requests in public offerings, adhere to subscription lists and acquire securities, via Internet. According to a report prepared by the commissioner of the CVM, Wladimir Castelo Branco, according to the opinion of the brokerage firm, online adherence “does not represent an innovation with respect to the documents referred to above, but only a mere formal amendment, which will allow for the debureaucratization of the relationship with clients and faster deals, including a consequent increase in the volume of transactions”.

Castelo Branco recognized in his vote that, “theoretically, adopting this adherence process online to a public offering, by means of a digital reservation request and subscription list, does not appear to be incompatible with the provisions of Instructions CVM no. 387/03 and 400/03”. Therefore, there is no reason to justify denying the brokerage firm’s request.

The commissioner only emphasized that it would be appropriate if the system be submitted to a periodic outside audit, in accordance with the one performed by Bovespa, as per Instruction CVM no. 380/02. In addition, he proposed that the brokerage firm obtain, in writing, “prior authorization from its client to operate in this type of business”.

PROJECT TEAM

EDITORIAL COMMITTEE

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

EXECUTIVE EDITORIAL

BM&A Pesquisa
Daniela Christovão

PRODUCTION

Taciana Correa
Ana Christina Marques

GRAPHIC DESIGN AND LAYOUT

Soter Design

PHOTOLITHO

Davanzo

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bmareview@bmalaw.com.br

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RIO DE JANEIRO

Av. Almirante Barroso, 52
32º andar CEP 20031-000
TEL. (+55) (21) 3824 5800
FAX. (+55) (21) 2262 5536

SÃO PAULO

Av. Presidente Juscelino Kubitschek, 50 - 4º andar
CEP 04543-000
TEL. (+55) (11) 3365 4600
FAX. (+55) (11) 3365-4597

BRASÍLIA

Setor Comercial Sul,
Quadra 1 Bl.F nº 30 - 7º andar
Edifício Camargo Correa
CEP 70397-900
TEL. (+55) (61) 218-0300
FAX. (+55) (61) 218-0318

