BMA INAUGURATES NEW OFFICES AND EXPANDS PRACTICE IN BRASÍLIA

New offices and new practice areas: after 15 years in Brasilia, BMA has increased its presence and augmented its portfolio of services in Brazil’s capital to meet growing demand in the market. A cocktail party was held on May 9, 2017 to inaugurate the new offices and mark the new phase in the firm’s practice.

In addition to their well-known work before the Superior Courts, the BMA DF team, led by partner André Macedo, will now devote even more attention to Enforcement Law matters. The Enforcement Law team represents clients before the Public Prosecution Service (Ministério Público), the Federal Budget Oversight Board (Tribunal de Contas da União), and the Ministry of Transparency, Inspection and Control (Ministério da Transparência, Fiscalização e Controle da União), collaborating with the firm’s other practice areas. The objective is to offer legal services that excel not only in quality but in helping clients to deal with the particular demands and complexities found in the nation’s capital.

The Enforcement Law team is also active in administrative misconduct actions, public civil inquiries, actions for annulment and applications for judicial review of enforcement decisions made by independent administrative entities and regulatory agencies.

Before the Federal Budget Oversight Board, BMA defends clients’ interests in representations, complaints and special review of accounts proceedings. In the case of the Ministry of Transparency, Oversight and Control, the team acts in administrative proceedings to determine liability for corrupt acts, provided for under Brazil’s Anti-corruption Law.

BMA DF’s dedicated work in administrative enforcement proceedings, along with the lawyers’ participation in events related to this area of the law, has produced very positive results. “Expansion of the Brasília office came about from the conjunction of two factors: the quality and experience of the team, on one hand, and on the other, a steady increase in the demand for services specific to the environment in the country’s capital,” observes André Macedo.

In the Superior Courts practice area, BMA continues to assist clients in matters involving the Superior Court of Justice (Superior Tribunal de Justiça, the highest court in civil and criminal law matters), the National Justice Council (Conselho Nacional de Justiça, responsible for overseeing the Brazilian judicial system), and the Supreme Federal Court (Supremo Tribunal Federal, Brazil’s constitutional court). “Our attorneys have solid experience before these authorities, and are skilled in preparing appellate briefs, infographics, and other material, attending in chambers, oral argument and public hearings,” Macedo explains.
In an interview, the partner André Macedo talks about the activities of the office in Brasilia.

1. What drove the expansion of the Brasília office into new practice areas?

BMA has been present in Brasília for many years, but we felt the need to expand our practice in response to increasing demand from clients. The need for expertise in judicial review of the legality of enforcement decisions made by independent government bodies and regulatory agencies, and clients’ growing concern with anticorruption compliance matters are a couple of the factors that drove the increased demand for specialized legal support. Brazil’s capital is a very specific environment, requiring detailed knowledge of the issues and various jurisdictions involved, and BMA has the expertise to assist clients in these matters.

2. What does the Enforcement Law practice area offer clients?

Matters involving Enforcement Law are especially complex because the same set of facts can expose companies to sanctions and liability before various authorities and agencies. This area of the law involves the Anticorruption Law, the Government Contracting Law and the Administrative Misconduct Law, which still do not form a logical and rational system. For companies, the climate at the moment lacks legal certainty and rationality.

3. Why does the Enforcement Law practice area work in conjunction with other areas in the firm?

BMA has always focused on a multidisciplinary strategy to provide its clients with complete legal services that address the complexities of each matter. Enforcement Law involves various fronts: the Public Prosecution Service, the Budget Oversight Board, the Controller-General’s Office and Regulatory Agencies. This means that dialogue and collaboration with practice areas such as Competition Law, Corporate Ethics, and Infrastructure and Regulatory and Government Affairs is essential to arriving at the best solutions for clients’ problems.

4. What is the main factor that distinguishes BMA’s well-established Superior Courts practice?

Our Superior Courts team stands out for its solid knowledge of the issues at stake and our attention to precedents, allowing us to formulate legal theories on issues of interest to our clients in a way that promotes uniformity and rationality in decisions made by the state and federal courts. There is still a lot of uncertainty in the first- and second-instance courts on how to apply and interpret theories adopted by the highest courts. This is a constant concern for companies’ legal departments, and having the right legal support is essential to achieving the best results.

5. How has lawyers’ work changed, now that Superior Court precedents are binding?

There is much more focus on legal theories – statements of the law on a particular issue – than before. A client can have actions pending in various states, all dealing with the same issue, and the Superior Court’s decision will weigh heavily in determining the outcome of the cases, according to the new Code of Civil Procedure. A good example of this situation is consumer law cases involving banks, telecoms and airlines. It’s fair to say that there has been a movement from the quantitative to the qualitative in our work, because the Superior Court’s adoption of legal theories resolves discrepancies in decisions in the various states of the federation, and provides greater security and foreseeability for clients’ business.
BMA INAUGURATES NEW OFFICES IN BRASÍLIA

On May 9, 2017, partner André Macedo and his team welcomed more than 150 guests at a cocktail party held to inaugurate BMA - Barbosa, Müssnich, Aragão’s new offices in Brasília. Current and former members of BMA, along with clients, friends, journalists and distinguished members of the capital’s legal community attended the event.

Designed by architect Sérgio Borges of Atiwa, the new 684m² office is located in a strategic region of Brasília, close to the State Courts, the Federal Courts, and the Administrative Tax Appeals Council – CARF.

BMA DF’s new address is SHS Quadra 6, Conjunto A, Bloco E, 19º andar – Complexo Brasil 21, Asa Sul, Brasília. 

BMA PROMOTES NEW PARTNERS

May 19, 2017, BMA - Barbosa, Müssnich, Aragão promoted seven lawyers to partner. In São Paulo, Daniel Loria, of the Tax practice area, Luciana Marsal and Helio Alvarez, both members of the firm’s Corporate Law and M&A practice, and Marcos Antonio Exposto, from the Competition Law team were promoted. In Rio de Janeiro, the new partners are José Guilherme Berman from the Infrastructure, Regulatory and Government Affairs area, Rafael Castilho, from Litigation and Arbitration, and Vitor Butruce, a member of the Research team.

A member of the firm since 2005, Daniel Loria’s practice focuses on tax issues related to mergers and acquisitions, corporate reorganization, debt restructuring, and project financing, and tax advisory work, especially with respect to direct taxes, for Brazilian and multinational companies. Hélio Alvarez has a 17-year history with BMA. He works in mergers and acquisitions, private equity transactions, and general corporate matters such as sales, restructurings and organization of new enterprises. Partner Luciana Marsal, who has worked with BMA for 13 years, acts for publicly-held and closely-held companies in corporate restructurings and in national and international transactions, including mergers and acquisitions and joint ventures in the retail, real estate and infrastructure sectors. Marcos Exposto, who joined BMA in 2003, has vast experience in merger proceedings before Brazil’s competition authority, CADE, involving both national and international parties, and in multijurisdictional merger control proceedings. He also acts in anticompetitive conduct matters such as cartel investigations, investigations of unilateral conduct and negotiations for administrative settlements.

José Guilherme Berman, who joined BMA six years ago, has proven experience in government contracting and public bidding procedures and in Public Law litigation. Partner Rafael Castilho has worked with BMA since 2005 and has extensive experience in arbitrations and complex business and civil litigation. He is particularly active in corporate, contractual and international disputes. Vitor Butruce joined BMA in 2003. His work in the Research area brings together advanced studies in private law with practical experience in analyzing complex legal issues, especially in transactions and disputes related to business contracts, corporate relations, wealth management and succession planning, and multidisciplinary projects.
OUTSOURCING AND TEMPORARY WORK: A NEW ERA?

Legislation dealing specifically with the important topic of outsourcing is both welcome and necessary, but it’s not clear that Brazil’s new Law 13.429 has put an end to all controversy over the question. Only time will tell what position the Labor Courts will adopt and whether the legislation will bring more clarity and certainty to outsourcing.

For decades, outsourcing was governed by a Súmula, or Restatement of Precedents, issued by the highest labor court, the Superior Labor Appeals Court (TST – Superior Tribunal do Trabalho). The Restatement of Precedents, originally numbered 256 and later 331, was given a broad and even ideological interpretation by labor courts of all instances.

The resulting chaos merits a few words. A good example is a case in which the Labor Prosecution Service (and some labor judges) took the position that a pulp and paper company could not legally hire the services of a transportation company to transport timber after it had been cut because the fact that transporting the timber from the tree farm to the factory was essential to the business meant that the service could not be performed by anyone other than the pulp and paper company’s own employees. And the cases that follow this line of reasoning are innumerable.

Even without legislation on the matter, one point became certain: in Brazil a company could not contract out services that related to it business’s core activity, and there was a significant risk in outsourcing services that could be considered to be essential. Only secondary services, such as janitorial, maintenance, and security services, could be outsourced without a significant risk that the legality of the outsourcing would be questioned.

Finally, on 31 March 2017, Law 13.429 was promulgated. The legislation deals not only with outsourcing but also amends some provisions of the legislation on temporary work.

The first change introduced by the Law is that outsourcing will only be recognized as valid under the legislation if the services are outsourced to a legal entity that “hires, compensates and directs the work performed by its workers, or subcontracts other companies to perform those services.” The new element is that the outsourced company can hire another company to perform the service contract, and will accommodate the increasingly common arrangement where an outsourcing management firm is hired to manage a business’s outsourced services.

The Law also makes it possible to validate arrangements under which the partners or shareholders of the business provide services to the company, or “core activities” are outsourced, by providing that no employment relationship is created between the workers or partners of a service company, regardless of the economic sector in which it operates, and the client company. At the same time, the Law opens a door to a restrictive interpretation of this provision by stating that the services to be provided must be “determinate” and “specific”, without giving a definition to those concepts.

Under the new legislation, the outsourced services may be performed on the premises of the client company or elsewhere, as agreed between the parties, but the client company is responsible for ensuring that the outsourced workers work in safe and hygienic conditions.

The Law confirms that position taken by the Labor Courts that the client company has secondary liability for the employment and social security obligations owed by the service company to its workers with respect to the services provided to the client.

There is no question that Law 13.429 represents a solid step forward, but it’s still too early to tell how the Labor Courts will interpret the new provisions and what interpretative maneuvers they might perform to avoid recognizing the validity of contracts that outsource core or “non-specialized” services (“non-specialized” being a possible interpretation of “determinate and specific”). We also believe that it would be quite risky to hire, through a legal entity, professionals who will, in the end, provide services essentially in the same way employees would (so that all the essential elements of employment are present), expecting that the outsourcing model is risk-free and cannot be challenged by either the workers themselves or by labor standards inspectors. It would be equally risky for companies to think that administrative settlements they have made with the Ministry of Labor (known as TACs in Brazil) regarding outsourcing no longer apply. The specifics of each case must be examined before arriving at any conclusions.

As for temporary work, although Law 13.429 maintains the requirements that must be met to hire temporary staff (temporary substitution of permanent personnel or transitory increase in demand for services), it now requires the client company to extend to the workers provided by the temporary staff company the same medical support and meals it furnishes to its own employees, and allows temporary work contracts to have a term of 180 days, consecutive or not, with the possibility of renewing for another 90 days, if the demand for temporary workers continues. As with outsourcing, the client company is secondarily liable for the employment and social security obligations owed to the temporary workers with respect to the period in which they provide services.

The increased term of temporary work contracts and the possibility of a renewal will be a relief for companies that turn to temporary staff to cover employees on maternity or temporary disability leave, because temporary workers’ contracts could expire the permanent employees returned from leave, creating various problems for the company.
FOREIGN INVESTMENT BY INDIVIDUALS RESIDENT IN BRAZIL: THE REOPENING OF THE ASSET REPATRIATION PROGRAM AND WEALTH MANAGEMENT

Law 13.428 and related regulations reopened Brazil’s Asset Repatriation Program (RERCT – Regime Especial de Regularização Cambial e Tributária), and individual taxpayers will have until 30 July 2017 to declare assets held abroad that are licit in origin that are either undeclared or incorrectly declared. The program is essentially a new edition, with a few changes, of the 2016 program, which drew 25 thousand taxpayers holding assets in excess of BRL 160 billion.

With the increase in financial controls and international cooperation in the fight against money laundering, the reopening of the Asset Repatriation Program offers an alternative to those who, for a variety of reasons, hold legally-acquired assets abroad and did not join the first edition of the program.

The new Asset Repatriation Program is open to individuals and legal entities resident or domiciled Brazil on 30 June 2016 that own or owned undeclared or incorrectly declared assets on that date. The cost of remediating the tax status of the assets will be 35.25% (tax of 15% and a fine of 20.25%). Like the 2016 version, elected politicians and holders of higher public offices as at 14 January 2016, along with their relatives to the second degree, are excluded from the program.

A positive point under the new edition of the program is that it allows taxpayers to correct mistakes in the value of assets declared in the 2016 version of the program without losing the benefits of the program, as long as they pay the tax owed and late-payment charges on the difference. Law 13.428 also expressly permits taxpayers to include assets in their previous declaration, on paying the tax and fines owed on the additional amount.

The 2017 version of the Asset Repatriation Program also reinforces the criminal amnesty granted under the 2016 edition, providing that taxpayers who join the program will not be punishable for certain crimes committed on or before the date they join the program with respect to the assets declared under the program – specifically tax evasion, criminal misrepresentation, use of false documents, circumvention of currency controls, and money-laundering.

Although the Asset Repatriation Programs offer a good opportunity to remediate the tax status of offshore assets, investors who hold assets outside Brazil still have a number of reasons to be concerned about the legal structure used to manage their wealth.

For example, individuals who make direct financial investments in other countries are subject to complex rules on calculating and reporting taxable gains, and can face undesirable situations like double taxation, the impossibility of setting losses off against gains, and immediate payment of tax in Brazil while the funds are still abroad. In contrast, traditional legal structures for investment abroad, such as private companies and funds, can offer greater efficiency, in addition to legal advantages.

Many taxpayers have also revised fiduciary structures such as trusts and foundations to align them better with Brazilian legal requirements and the needs of the settlor or founder. Investors should also consider matters of inheritance and succession when structuring foreign assets, establishing criteria for the division of assets among heirs, subject to the requirements of Brazilian law. Particular care should be given to these matters because the law on important questions of succession is not settled, especially when the estate contains assets located outside the country.

Another source of concern – and incentive for implementing plans for personal wealth management – is that the States, suffering from financial pressure because of the economic crisis, may decide to increase the rates of gift and inheritance tax (ITCMD – Imposto sobre Transmissão Mortis Causa e Doação).

Given the variety of possible solutions, the best way to deal with these questions is a detailed analysis of each case, taking into consideration the owner’s interests and objectives and the various areas of the law involved in effective wealth management and succession planning. 

Hermano Barbosa, partner, Tax

The new edition of Brazil’s Asset Repatriation Program benefits taxpayers that are new to the program and those that joined the 2016 version, and serves to remind investors of the importance of a legal structure for their foreign investments that takes into account tax, succession and other considerations.
MANAGEMENT OF CONTAMINATED AREAS

Management of contaminated areas is intended to reduce to acceptable levels the risks that substances in contaminated areas present for the population and the environment.

DD 38/2017 provides greater details on the procedures and studies to be performed at each management phase (preliminary assessment, confirmatory and detailed investigations, human health and ecological risks evaluation, and so on). The rigorous preliminary evaluation, also known as Phase I, is designed to ensure a solid diagnosis, providing the basis for a more effective and less costly remediation phase.

The main new feature under DD 38/2017 are the rules on the preventive monitoring program, which must be submitted at the time the installation license is obtained when the site in question presents a potential for contamination, and when the operating license is renewed. CETESB’s approval is not needed to implement the preventive monitoring program, although the agency can require changes based on the results of the program. If the program shows that the intervention thresholds have been crossed, the party legally responsible for the site must give notice to CETESB and initiate contamination management procedures.

Another new requirement under DD 38/2017 is that Intervention Plans must include a list of the persons responsible for the plan, indicating their respective obligations, and a declaration by each of them as to the objectives and actions to be executed. Any change in the list must be communicated to CETESB.

DD 38/2017 also provides that property that has received a Certificate of Remediation (Termo de Reabilitação) subject to environmental engineering measures and institutional monitoring (usual restrictions on use of underground water) can only be transferred if the new owner presents a letter stating that it is aware of the monitoring requirements and restrictions on use.

The new rules reintroduce environmental insurance as part of the Intervention Plan, although it is not clear how environmental insurance would work in practice.

DD 38/2017 takes a stricter stance on failure to comply with its rules on management of contaminated areas. The earlier rule, DD 103/2007, emphasized “corrective actions”; in contrast, DD 38/2017 makes it clear that “failure to comply will result in administrative sanctions”. This change, together with the fact that environmental consultants can be held liable for defects in environmental studies, signals that CETESB no longer views its role in contamination management as mere guidance, and will exercise its enforcement powers.

Although DD 38/2017 applies only in the State of São Paulo, CETESB has long been the leader in management of contaminated areas, serving as a reference for other state and municipal agencies, and it would not be surprising to see other environmental agencies following in CETESB’s footsteps.
INDEMNITY AGREEMENTS: A SAFETY NET FOR OFFICERS AND DIRECTORS

Despite early signs of a return to growth, Brazil’s businesses are still feeling the effects of the economic crisis, in the form of more employment lawsuits (the fruit of mass lay-offs and cuts in benefits), tax assessments (due to the government’s attempt to bring in enough revenue to achieve a primary surplus), and restricted credit and reinforcement or enforcement of security (because of increased rates of default), among other difficulties familiar to market players. In such tumultuous economic scenario, the timing calls for a look at the protections available to corporate management in the Brazilian context.

Under modern risk management policies, D&O Insurance is one of the mainstays of protection for executives and is becoming increasingly common in the Brazil market – due, in large part, to the economic crises and generalized corruption scandals.

Although it is an essential tool for protection of the members of a company’s management, as an insurance product, D&O is necessarily limited by certain characteristics inherent to insurance, such as limits on indemnity, deductibles, and exclusions from coverage. To try to fill in the “holes” left by D&O insurance in directors’ and officers’ safety nets, many mid-size and large companies have been adopting indemnity agreements as part of the benefits package offered to executives. This instrument – often taking the form of a “comfort letter” – is a contractual obligation assumed by the company to the professional, undertaking to keep him or her harmless from any losses incurred in the lawful performance of management duties. Indemnity agreements thus seek to address a real concern in the Brazilian business environment, where it is common for administrative authorities and the courts to hold individuals liable for corporate obligations, based on doctrines such as joint liability, piercing the corporate veil, and other theories that achieve the same end.

Indemnity undertakings are also employed by publicly-traded companies (and are sometimes included in the company’s bylaws), and Brazil’s securities commission, the CVM – Comissão de Valores Mobiliários has examined them on more than one occasion. The CVM’s Commissioners have found the arrangements to be lawful, but recognized the need to better define legally-acceptable limits for indemnity agreements. The CVM was concerned to avoid abuses by executives when negotiating indemnity agreements and when invoking their protection, given the potential for a conflict of interests between the executives and the company.

As a result, although indemnity agreements are usually endowed with provisos and exclusions to prevent illegitimate use – fraudulent and grossly negligent acts are commonly excluded from the scope of the agreement, as are acts in excess of the executive’s powers – there are initiatives within the CVM to issue regulations on the matter, and indeed many companies and other private entities have asked the CVM to provide guidance to the market on this matter. Market participation in the regulatory process is indeed essential to ensure that the regulator’s intervention does not inadvertently disrupt established practices or generates further concerns.

In a recent statement on the subject, the CVM’s Office of Public Company Supervision indicated that it would like to see a number of restrictions on indemnity agreements, such as a “cap” on the indemnity (bringing agreements closer to D&O insurance) and a prohibition against coverage of awards made against the member of management, even if involving lawful acts of management, limiting coverage to payment of the costs of defense and court costs. This last suggestion is especially worrisome, since it would remove from the scope of indemnity agreements awards made against executives for the company’s employment, tax and consumer obligations, which courts often impose on executives regardless of whether the executive committed any act of management, irregular or not; in such cases the executive would have to evaluate exercising his or her right of recourse against the company, based on the general provisions on reparation of loss under the Brazilian Civil Code.

If the CVM does decide to issue regulations on indemnity agreements, hopefully the market players will be involved in the process to ensure that the usefulness of indemnity agreements is preserved, since they can be an important factor in attracting and retaining talent that contributes to excellence in a company’s management.

To try to fill in the “holes” left by D&O insurance in directors’ and officers’ safety nets, many mid-size and large companies have been adopting indemnity agreements.
Brazil’s securities commission, the CVM, recently altered the rules governing Brazilian depositary receipts – BDRs. This article describes the main changes made under CVM Instruction 585 of 5 April 2017.

**Restricted Offerings of BDRs.** The new regulation included Level I and Level II Sponsored BDRs in the list of securities that can be publicly distributed in offerings exempt from registration with the CVM, under the terms of CVM Instruction (“ICVM”) 476. The change makes it easier to place these categories of BDRs in the Brazilian market, given that under the former rule they could only be placed in private sales. It should be kept in mind, however, that although BDRs are local securities that represent shares issued abroad, the priority right provided for under article 9-A of ICVM 476 is not afforded to BDRs, because such priority right is based on the pre-emptive right set forth in article 172 of the Brazilian Corporations Law, which by default does not apply to foreign issuers.¹

**Flexibility for follow-ons.** Under the terms of ICVM 480, in order to create a BDR program the issuer of the underlying shares must have its registered office outside Brazil, and hold at least 50% of its assets (as registered in its financial statements) abroad. The CVM will verify the fulfilment of such requirement at the time of registration of the relevant issuer,³ the initial registration of the relevant BDR program, and the time of any subsequent offering under the BDR program. Under the new rules, when a follow-on offering is made, the foreign-based asset requirement falls from 50% to 35%, so that the issuer can issue new BDRs in Brazil, as long as no more than 65% of the assets shown on its financial statements are located in Brazil. Traditionally, the CVM has been cautious when listing foreign issuers in Brazil, not least to prevent domestic issuers moving abroad to avoid certain investor protections afforded by Brazilian law. It is in part for that reason that the CVM maintains its discretionary power under ICVM 332 to reject applications for registration of BDR programs because “the enterprise to be carried out by the issuer is not viable or is excessively risky, or because of the poor reputation of the founders, controlling shareholders or management of the company” (our translation).

**Cancellation of registration.** Under the earlier rules, discontinuation of Level II and III BDR programs had to be approved in advance by the CVM. This procedure created a certain amount of uncertainty in the market and sometimes cancellation of BDR programs involved complex controversies over a variety of issues.⁴ Under the new rules, the stock exchanges and over-the-counter regulated markets are obliged to established detailed procedures for discontinuation of BDR programs. To give these institutions time to draw up their rules, the CVM postponed the coming into force of this specific change to 1 January 2018.

Lastly, at the public hearing held prior to issuing the new rules, the CVM stressed that the requirement for a simultaneous offering of shares in the issuer’s country of origin applies only when a Level III BDR program is first registered, and that only foreign securities representing equity interests can be used to underlie BDRs.⁵

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¹ A non-sponsored BDR is a program that is created without an agreement with the foreign issuer.
² See Mittal Steel Company N.V. (CVM RJ 2006/8200) and TecSpa StA (CVM RJ 2009/1956).
³ A foreign issuer sponsoring a Nível II or Nível III BDR program must be registered in category A.
⁴ See Telefônica S.A. (CVM RJ2009/72861).
⁵ On this issue, see the Commissioners’ majority decision in Proceeding RJ2007/8152. Commissioner Sergio Weguelin issued a minority opinion, finding that there are no “… legal impediments to issuing BDRs on the basis of debt securities linked to fluctuations in the Brazilian stock market. After setting out his arguments, the Commissioner came to the following conclusions: (i) it is possible for BDRs to be issued based on debt securities or assets of any other nature, as long as they fall within the definition of securities in article 2 of Law 6.385/76 and are issued by a publicly-traded company or equivalent having its registered office abroad; and (ii) the issuing of BDRs based on debt securities does not require specific approval by the CVM.” Article 1 of Annex 32-I to ICVM 480 continues to provide, however, that “Only shares issued by a foreign issuer may serve as the basis for depositary receipts for shares – BDRs.”