

Individual water metering and consumers' rights

BMA Review Special Edition: Basic Sanitation. Read about the changes made by the New Legal Framework for Basic Sanitation 02.10.2020 3 min read

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Bill 4162/2019, which became law on July 15, 2020, (the New Basic Sanitation Legal Framework, Law 14.026/2020) makes a number of changes that will have an effect on consumer relations, especially in connection with the National Basic Sanitation Guidelines, established by Law 11.445/2007.

Brazil's Superior Court of Justice (the highest court on non-constitutional matters) has taken the position that the Consumer Defense Code (CDC) applies to the provision of public services, and the New Basic Sanitation Legal Framework reinforces the importance of adequate, universal provision of basic sanitation services. Given this backdrop, some provisions included in the National Basic Sanitation Guidelines by the Framework Law could be subject to legal challenge, such as article 29 §§3 and 5, and article 45 §12, which require water consumption in condominiums to be measured individually by unit, and impose the obligation to install water meters on users.

More specifically, article 29§5 deals with exceptions to the requirement for individual water metering in cases where the building was constructed before the requirement for individual water metering was included in the Guidelines by Law 13.312/2016, or where individual metering would be impracticable for technical reasons or because it would be excessively costly. In such cases, direct negotiations must

be held with water service providers to establish the division of responsibilities, criteria for allocating consumption among units, and billing procedures.

The exceptions under article 29§5 could generate yet more litigation over issues that are already before the courts: consumers' liability for the cost of installing individual water meters, and basic sanitation service providers' right to charge for water consumption in the absence of precise

measurement. Although the law provides that users have the obligation to install water meters, the broad wording of the exceptions under §5 of article 29 opens the way to arguments that users are not subject to the obligation, or to the associated cost.

The provisions on individual water metering introduced by the New Legal Framework heighten the risk that existing precedents on these questions will be confirmed: in most cases, Brazilian courts have found that it is an abusive practice for basic sanitation service providers to charge for (i) installation of meters, because it constitutes a tie-in sale, which is prohibited by article 39(I) of the CDC and because article 40(III) of Law 11.445/2007 provides that services may be interrupted if “users refuse to allow

installation of a device for reading [the quantity] of water consumed”, which implies that the service provider has the obligation to install the meter, regardless of payment by the user, and (ii) estimated consumption of water when the service provider has failed to install individual meters (in such cases, users may be charged only the minimum rate).

Given the real possibility of litigation over provisions included in the Basic Sanitation Guidelines by the Framework Law, companies holding concessions to provide basic sanitation services should keep in mind both Brazilian consumer legislation and the precedents on individual water metering, with a view

to mitigating potential liability for damages (including non-economic damages) claimed by consumers.

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