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IN THIS ISSUE

ARTICLES

Contributions to this publication are always welcome and should be sent to the **Publication and Newsletter Editor**:

Carlos del Rio Santiso
carlos.delrio@creel.mx

This update is intended to provide general information regarding recent developments in the Latin American region. The views expressed in this publication are those of the contributors, and not necessarily those of the International Bar Association.

International Bar Association
4th Floor, 10 St Bride Street,
London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090, Fax: +44 (0)20 7842 0091
www.ibanet.org

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From the Co-Chairs

Carlos Dominguez
Senior Co-Chair
Hoet Pelaez Castillo & Duque, Caracas
cdominguez@hpcd.com

David Gutierrez
Co-Chair
BLP Abogados, San Jose
dgutierrez@blplegal.com

The Latin American Regional Forum (LARF), covering all countries in Latin America, as well as Mexico, Puerto Rico, and Spanish-speaking areas of the Caribbean, provides a focus for all IBA activities in the region.

2016 was an outstanding year for the Latin American Regional Forum and the community. The Forum was engaged – as sponsor or co-sponsor – in several conferences, seminars, training sessions and lectures, namely the Biennial IBA LARF conference held on 9–11 March, Rio de Janeiro; the 19th Annual Transnational Crime Conference, held on 11–13 May, Panama City; the 12th Annual Mid-Year Competition Conference, held on 16–17 May, Mexico City; the 3rd Annual Corporate Governance Conference, held on 3–4 November, Miami; the Bar Leaders' Summit Open Session on The Future of Continuous Legal Education, held on 9 March, Rio de Janeiro; and the Latin American Regional Forum Training Course for Young Lawyers, held on 9 March, Rio de Janeiro.

The LARF also participated in the IBA Annual Conference in Washington, sponsoring or co-sponsoring the following panels:

- Crime and punishment? How foreign and local corruption laws and their enforcement are impacting the business environment and legal profession in Latin America.
- The world invests in North America and North America invests in the world.
- 2005—2015: was that a successful decade? A hard look at the impact of foreign financing (private and multilateral) in Latin America.

2017 looks to be a year full of possibilities. In the following months, the LARF will be engaged in the following conferences, seminars, trainings and lectures:

- Mergers and Acquisitions in Latin America Conference: New opportunities in a changing scenario, 15–17 March, Buenos Aires presented by the LARF and the Corporate and M&A Law Committee;
- 9th Annual Real Estate Investments Conference, 29-31 March, Rio de Janeiro presented by the Real Estate Committee;
- 5th Biennial Technology Law Conference: Technology beyond the bounds: enterprise benefits and social and regulatory limits, 17–19 May, São Paulo presented by the Technology Law Committee;
- Maritime and Transport Law Conference: Shipping, energy and commodities – Legal challenges in offshore, ports and sea carriage, 7–8 June, Rio de Janeiro presented by the Maritime and Transport Law Committee;
- Anti-Corruption and Compliance in Latin America Conference, 9–10 November, São Paulo presented by the Anti-Corruption Committee;
- Bar Leaders' Summit Open Session on Anti-Corruption, 15 March, Buenos Aires presented by the Bar Issues Commission; and
- Latin American Regional Forum Training Course for Young Lawyers, 15 March, Buenos Aires presented by the LARF.

The LARF is also eager to participate in the IBA Annual Conference in Sydney, Australia, 8–13 October, 2017.

There, the Forum will have its traditional lunch, which for years has been regarded among the most successful gatherings at these annual conferences.

As LARF Co-Chairs, we are very proud of the tremendous work done by this remarkable group of people throughout the year, and we invite you to get involved in future LARF activities.

We hope you enjoy this publication and look forward to seeing you at our future events.

Juan Manuel Mercant

Outgoing Publication and Newsletter Editor

Guyer & Regules, Montevideo

jmmercant@guyer.com.uy

From the Editor

Once again we are very pleased to present a new edition of the Forums's Update.

This edition features plentiful, very interesting articles from all the corners of the Americas: four covering Latin America in general, three from Argentina, one from the Cayman Islands/British Virgin Islands, one from Bolivia, one from Uruguay, four from Brazil, two from Mexico and four from Peru.

This edition features the article that won the Alberto Laseras scholarship, penned by Clarice Cortez Andrade of Demarest, Brazil.

Aside from the rich geographical backgrounds, the articles treat a vast array of thought provoking subjects such as: how to deal with regulatory compliance, the forecast of 2017 in Latin America; farming contracts in Bolivia; financing renewable energy projects in Uruguay; criminal bribery considerations in Argentina; infrastructure public–private projects in Argentina; recent developments in ICC arbitration; the Mexican natural gas market; impact investing in Latin America; new developments of private equity and venture capital in Brazil; land rights of foreigners to rural property in Brazil; law firms in a corruption fighting environment; startups in Mexico; the future of administrative law; the trans Pacific Cooperation Agreement and pharmaceutical patents; Peruvian insurance law; Chinese access to the Peruvian financial market; challenges of international trade under Trump; and non-recourse assignment of accounts receivable.

My position as Editor has been an excellent vantage point from which to see the growing consciousness in Latin American affairs that is successfully being channelled through the LARF and its activities. A regional awareness springs from the excellent written contributions that we increasingly receive and that have the double advantage of advancing the regional consciousness, and contributing to the individual growth of contributors and their firms.

In light of all the above, we hope you enjoy the issue and invite you as LARF members to send us your contributions to future editions so as to help us continue building an ever more transparent and efficient business and legal climate in the Latin American region.

Forum Officers

Co-Chairs

Carlos Dominguez
Hoet Pelaez Castillo & Duque, Caracas
cdominguez@hpcd.com

David Gutierrez
BLP Abogados, San Jose
dgutierrez@blplegal.com

Senior Vice Chair

Carolina Zang
Zang Bergel & Viñes Abogados, Buenos Aires
c.zang@zbv.com.ar

Vice Chairs

Juan Carlos de los Heros
Estudio Echecopar, Lima
juancarlos.delosheros@bakermckenzie.com

Juan Carlos Rocha
Philippi Prietocarrizosa Ferrero DU & Uria, Bogota
juan.rocha@ppulegal.com

Luis Carlos Rodrigo Prado
Rodrigo Elias & Medrano Abogados, Lima
lcrodrigop@estudiorodrigo.com

Secretary

Estif Aparicio
Arias Fabrega & Fabrega, Panama City
eaparicio@arifa.com

Scholarship Officer

Benjamin Grebe
Prieto Abogados, Santiago
bgrebe@prieto.cl

Membership Officer

Francisco J Roggero
Bullo Abogados, Buenos Aires
froggero@ebullo.com.ar

Conference Quality Officer

Juan Manuel Mercant
Guyer & Regules, Montevideo
jmmercant@guyer.com.uy

Publication and Newsletter Editor

Carlos del Rio Santiso
Creel, Garcia-Cuellar, Aiza y Enriquez, Mexico City
carlos.delrio@creel.mx

Corporate Counsel Forum Liaison Officer

Pablo Artagaveytia
Marval O'Farrell & Mairal, Buenos Aires
paa@marval.com

Special Projects Officer

Paulo Coelho da Rocha
Demarest Advogados, São Paulo

Website Officer

Jose Visoso Lomelin
Galicia Abogados, Mexico City
jvisoso@galicia.com.mx

Regional Fora Liaison Officer

Agustin Mayer
Ferrere, Montevideo
amayer@ferrere.com

Young Lawyers Initiatives Officer

Elysangela de Oliveira Rabelo
TozziniFreire Advogados, São Paulo
erabelo@tozzinifreire.com.br

Latin American Regional Forum Advisory Board

Members

Arturo Alessandri
Alessandri, Santiago
arturo@alessandri.cl

Claudio Undurraga
Prieto Abogados, Santiago
cundurraga@prieto.cl

Daniel del Rio
Basham Ringe y Correa, Mexico City
daniel.delrio@basham.com.mx

Eduardo Sanguinetti
Sanguinetti & Asociados, Montevideo
esanguinetti@sanguinetti.uy

Eugenio Hurtado-Segovia
Ramirez Gutierrez-Azpe Rodriguez-Rivero y Hurtado, Mexico City
eugenio.hurtado@rgrhmx.com

Fernando Pelaez-Pier
Hoet Pelaez Castillo & Duque, Caracas
fpelaez@hpcd.com

Francisco Illanes
Cariola Diez Perez-Cotapos & Cia, Santiago
fjillanes@cariola.cl

Guido Santiago Tawil
M & M Bomchil, Buenos Aires
guido.tawil@bomchil.com

Horacio Bernardes Neto
Motta Fernandes Rocha Advogados, São Paulo
horacio.bernardes@mottafernandes.com.br

Jaime Herrera
Posse Herrera Ruiz, Bogota
jaime.herrera@phrlegal.com

Lisandro Allende
A&F Allende Ferrante Abogados, Buenos Aires
lallende@allendeferrante.com

Marcela Hughes
Hughes & Hughes, Montevideo
mhughes@hughes.com.uy

Moira Huggard-Caine
TozziniFreire Advogados, São Paulo
mhuggardcaine@tozzinifreire.com.br

Pablo Iacobelli
Carey, Santiago
piacobelli@carey.cl

Ricardo C Veirano
Veirano Advogados, São Paulo
ricardo.veirano@veirano.com.br

LPD Administrator

Susan Burkert
International Bar Association
susan.burkert@int-bar.org

ARTICLES

Luciana Aquino-Hagedorn
Goodwinlaw, New York
laquinohagedorn@goodwinlaw.com

Impact investing: an opportunity for Latin America

Summary

Impact investing, a type of responsible investing, is a new and growing market. Impact investors seek financial returns and a measurable, beneficial social or environmental impact. Currently, most such investments happen in developed countries. If Latin American countries attract more of these investments, they will be able to increase the capital available to address social and environmental issues while developing local entrepreneurs and fund managers.

Introduction

An increasing number of investors are concerned with the long-term effects of their actions on the environment and on society in general. Long-term investors, for instance, are concerned with the effects of climate change and of social issues – such as inequality, corruption and mass migration – on their investments. Responsible investing is the investment management industry's answer to these concerns. There are various ways to invest responsibly: exclusionary screening; environmental, social and governance (ESG) integration; and, most recently, impact investing. Each one springs from different motivations and investment goals, so each one has a different approach. Impact investing is now gaining momentum. It is a way to deploy more capital to social and environmental issues and reduce the government's burden in these areas. Impact investing can attract more investments to Latin America, and it can be an effective instrument of long-term development and social change.

The most traditional responsible investing approach is 'exclusionary screening'. In this case, the investor instructs the asset manager not to invest in certain companies. Typical exclusions are companies that produce tobacco or weapons, or companies that have been involved in human rights violations, corruption or environmental damage. Divestment strategies fall into this category, and investors have tried to use them as agents of change. A common example of this strategy was the divestment from South African stocks during the apartheid years and, now, divestment from fossil fuels. The effectiveness of divestment as an agent of change or as a way of solving environmental and social issues is, however, the subject of an ongoing debate.

As a sort of corollary to the exclusionary screening and divestment strategies, investors have found ways to consider the social and environmental performance of their investments. A prominent example is the United Nations Principles of Responsible Investment (UN PRI). By signing the UN PRI, institutional investors and asset managers commit to incorporate ESG factors in their investment decision and ownership practices. Approximately 1,400 asset owners, investment managers and service providers representing US$59tn in assets under management have signed the UN PRI. The principles are voluntary and aspirational and are designed for large, diversified institutional investors that operate within a traditional fiduciary framework.[1] This approach helps identify those investments that have a better performance in ESG and helps investors identify and address problems in those areas in the investments that they already own. Integrating ESG in the investment process, an investor may choose to invest in a company that manufactures a certain product in a way that pollutes less than its competitors, even if it may be less profitable in the short term. Impact investments take this approach one step further. These are investments made into companies, organisations and funds with the intention to generate social and environmental impact alongside a financial return.

Impact investments can be made in both emerging and developed markets, and target a range of returns from below market to market rate, depending upon the circumstances.[2] For an impact investment to be successful, the impact goal of the investment has to be achieved and be measurable. For example, if the impact goal is to reduce blindness in a given community by developing a cheaper and simpler way of doing eye surgery, the managers will have to be able to show the investors the reduction in blindness in that community and provide a profit to the investor.

Common investment themes in impact investing are conservation, climate change, renewable energy, resource efficiency, infrastructure, food and agriculture, healthcare, education, financial inclusion and housing. These types of investments can be done in different ways. Some examples include: investments in financial institutions that invest in organisations with social or environmental objectives; bonds that raise capital for social or conservation enterprises; and private investment funds that invest in social impact enterprises or in real assets for conservation, sustainable forestry or agriculture.

To determine which investments to make in order to have an impact, it is important to understand the characteristics and needs of the location where the investment will take place. The themes can vary depending on whether the investment is in a developed economy or in an emerging market, or in an urban or a rural community. One of the main benefits of these types of investments is that by developing a market solution to social and environmental problems, they can be more efficient and self-sustaining than solutions provided by governments or charities. In many cases, the solutions developed through impact investing may be scalable and useful in other places with similar needs.

The size of the impact investment market is difficult to measure because it is quite new and there is not yet a consensus on what should be included in the market. A 2015 study by J P Morgan and the Global Impact Investing Network (GIIN) estimates that currently US$60bn is invested in impact investments; 63 per cent of it is managed by fund managers and 18 per cent by developmental financial institutions. Almost all of the assets (90 per cent) are managed by asset managers based in developed countries; 40 per cent of the investments are in North America and only 11 per cent in Latin America and the Caribbean.[3] The Organisation for Economic Co-operation and Development (OECD) estimates that impact investing's potential can be significant due to the growing interest among foundations, mainstream investors and the younger generations of high net worth individuals who are expected to direct nearly US$6tn towards social issues over the next 50 years.[4] A study by the Aspen Network of Development Entrepreneurs, the Latin American Private Equity & Venture Capital Association and LGT Impact Ventures (Latam Impact Study), reports that US$1.3bn was invested in 522 impact investment deals in 2014 and 2015, mostly in Mexico, Colombia and Brazil. The Latam Impact Study indicates that the top sectors for investment in that same period were financial inclusion, agriculture and health.[5]

In Latin America, multilateral organisations like the Multilateral Investment Fund (MIF), an affiliate of the Inter-American Bank, have been active impact investors through their investments in local venture capital funds. The MIF mission is to support development led by the private sector to benefit poor and low-income populations and help them access tools to increase their income. It provides capital to local venture capital fund managers to invest in companies in markets such as health, education, renewable energy, agribusiness, housing, and Fintech. A study on the impact of venture capital in Latin America found that venture capital-backed companies incentivise formalisation of employment; promote economic mobility through incremental raises in average salaries; and tend to be proactive in terms of social and environmental responsibility.[6]

Many of the challenges of impact investment result purely from its early stage and are common to developed and emerging economies. There are few managers with track records and the deals are often small. Thus, there is a small pipeline of deals, and these deals consequently have relatively high transaction costs, which reduce rates of return. The work of foundations and institutions such as the MIF in this area is therefore of great importance for developing this area of investment, because it helps emerging managers to develop a track record while working with reputable organisations and allowing them to gain credibility to raise future funds to make larger investments.

In addition, it is critical for the

development of impact investments as a mainstream investment sector to develop an effective way to measure the environmental or social outcome. Currently, Impact Reporting and Investment Standards (IRIS), B Impact Assessment (BIA) and Global Impact Investment Rating System (GIIRS) are among the most popular ones. IRIS metrics are designed to measure the social, environmental and financial performance of an investment.[7] The BIA is a tool to assess a company's overall social and environmental performance. Companies and funds that use the BIA can be recognised for their performance by electing to become a certified B Corporation or GIIRS rated.[8] The Latam Impact Study reports that impact investors in Latin America found that the most common challenge of impact measurement was the high cost and the limited resources to implement metrics.[9]

Another important factor for the development of this sector is to have an economic and legal environment that enables the success of these investments. On this point, developed market-oriented economies have an advantage because they have sophisticated financial markets and legal frameworks that help entrepreneurs in general. Emerging markets generally lack those legal and financial frameworks, and have additional challenges. These relate to property rights, weak legal enforcement, and difficulties with exiting and liquidating companies that failed. All of these can further limit the development of the sector. Some of these issues can be managed, however, by structuring the investment funds in foreign jurisdictions that have a more developed investment management industry, or by structuring investments in the local companies as convertible debt or subordinated debt, rather than equity.

Investments that generate economic and social and environmental returns are attracting a growing number of investors globally. Latin American countries have been receiving a small number of these, and there is a growing opportunity. An increase of these types of investments in the region can increase the amount of capital available to address environmental and social issues, and help develop solutions tailored to local needs by local entrepreneurs.

Notes

1 See www.unpri.org, accessed on 1 November 2016.
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4 OECD (2015), 'Social Impact Investment: Building the Evidence Base', Preliminary Version, 17.
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6 O H Farfan, S Garcia-Robles, R Granda and C Landsberger (2012), 'Venture Capital: Driving Development in Latin America'.
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9 Aspen et al, 47.

Challenges and possible scenarios of international trade policies under Trump's presidency

Gonzalo Bernal Neumann[1]
Estudio Echecopar, Lima
gonzalo.bernal@bakermckenzie.com

The international trading structure is now facing increasing uncertainty. In recent decades, the global liberal trade regime has been strengthening its ties not only to the North Western Hemisphere but also has been influencing the entire world. However, this does not mean that its foundations have been unsusceptible to rejection from emerging mercantilism movements, incipient protectionism initiatives, or governments that have not noticed its benefits reducing trade barriers and increasing living standards. These sets of detractors have been growing, disrupting the actual dynamics of the current international trade order and challenging its very inner nature and structure.

The relevance of the World Trade

Organization (WTO) is undeniable – the multilateral institution that negotiates, promotes and rules international trade, for the liberalisation of tariffs and non-tariffs measures, reduction of costs for consumers, and mitigation of poverty. Nevertheless, it has been criticised for becoming sluggish, not moving in the path of the 21st century. The single-undertaking criteria for negotiations ('nothing is agreed until everything is agreed'); the inflexible consensus rule; the lack of a clear direct effect of WTO rules over parties; the inefficiencies of its dispute settlement mechanism (eg, delays and long timetables, ineffective trade sanctions); and the isolation syndrome over some relevant non-trade matters, are some problems that have to be resolved, pointing to institutional reform.

The WTO predicament has boosted many mega-regional and bilateral agreements, trying to 'take the wheel' and continue the process of openness and elimination of obstacles to trade. Rather than the useless discussion of whether regional or bilateral integration is a building or stumbling rock for multilateralism, its coexistence is a reality. The Transatlantic Trade and Investment Partnership (TTIP) between the United States and European Union and the Transpacific Partnership Agreement (TPP) between 12 Asia-Pacific countries[2] are huge exponents of deeper integration having a significant potential to boost trade liberalisation behind the border and promote the harmonisation of their regulations.

A number of studies – with enough data or not – nonetheless suggest negative outcomes, such as trade diversion from more efficient producers outside these mega-agreements to less efficient exporters within these mega-agreements. Additionally, other critics considered them 'job killers', or a threat to global freedom of expression and basic access to medicine and information, among other unproven arguments.

Under this context, Donald Trump, current US President, on his first day of duty decided to sign an executive order withdrawing its country from the TPP. Moved more by political rather than economic will, Mr Trump sent an enormous warning to the international trade system status quo: the US, the former lead model of globalisation and the main promoter of global economic integration, is adopting a new role based on populism. Imposition of tariffs for Mexican-originating goods and the renegotiation of the North American Free Trade Agreement (NAFTA)[3] are part of his agenda, regardless of the fact that those issues may be violating the national treatment rule[4] – one of the fundamental principles of the WTO/GATT under Article III.2[5], or are legally impossible. Still there is an open question of whether the President is able to withdraw the US from NAFTA without congressional approval.

From a political perspective, there is some belief that Trump is bluffing, using a negotiating strategy by forcing TPP country members to accept substantial amendments to the agreement or negotiate one-on-one deals with individual countries. On the other hand, Trump considers the TPP 'the worst deal for the USA'. Either one idea or the other, these actions have generated uncertainty for the stakeholders – governments, organisations and industry – that are struggling to understand whether or not they are at risk.

The key question is whether international trade policies and the legal framework are so fragile that a single mercantilism/protectionism activist country member of the system can bring it crashing down. It should not be. However, just because the US has turned its back on multilateralism, does not mean other countries will follow suit.

Openness shall prevail: shaping future scenarios

Regardless of what the US does, governments shall continue to seek further integration through an institutionally reformed WTO – multilateralism is known to contain economic and efficient advantages by avoiding free riders – or with mega-trade agreements, which include non-traditional trade issues (eg, e-commerce, development, labour) and they are also favourable for developing countries because through them, they gain leverage to obtain more benefits from bigger economies than one-on-one bilateral negotiations. Taking into account these options, it is easier and more tangible in the short or medium term to drive mega-agreements than it is to restructure the bureaucracy installed in Geneva.

In this context, there are several broad options for TPP member countries and other economies that should be taken into account to uphold the international trade law system.

TPP 12 'minus one' or TPP 2.0: a new scheme to go further

Regarding the future of TTP, it is clear that without the participation of the US, its ratification is becoming more complicated. Section 30.5 of the TPP text points out that, under this circumstance, the agreement would only come into force if at least six of the original signatories in 2013, which together account for at least 85 per cent of the combined gross domestic product, have notified in writing of the completion of its ratification. Due to the large size of the US economy, it has become harder for the rest of the signatories to get that number, blocking its entry into force.

The TPP is too worthy and large to let it die. It is ambitious in terms of economic significance, scale of its liberalisation, and flexibility. It was the opportunity to promote comprehensive harmonisation of regulations among all their economies, breaking new ground on issues thus far not negotiated at the multilateral level. TPP represents the '21st century free trade agreement', with innovative outlines of economic liberalisation, focused on not only the tariff reduction of products but also on the elimination of non-tariff trade barriers, based on specific sectors (sanitary, phytosanitary, cosmetic, industrial, among others). Their members – especially the Latin-American economies (Peru, Mexico, Chile) – will benefit from the opportunity to integrate into global value chains resulting in economic growth.

For this reason, TPP countries shall be pushing ahead with the trade deal, rather than throwing away what they have done and achieved over the last ten years.

An alternative is a TPP 12 'minus one': to modify the ratification framework and to maintain the other signatory countries, leaving aside the US. Be reminded that the TPP started as an agreement of a small group of countries made up by the P4 (Chile, Singapore, New Zealand and Brunei). Under the last Asia-Pacific Economic Cooperation (APEC) summit celebrated in Lima, Peruvian officials brought up this possibility, taking the plunge and leading this backup plan. Moreover, the Australian Prime Minister recently held talks with Canada, Mexico, Japan, New Zealand, Singapore, Malaysia, Chile and Peru to salvage the deal without US involvement. There are some negative 'competing factors' for this scenario, among them the future re-negotiation of NAFTA between Mexico, Canada and the US. It should be noted, however, that in addition to the negative political factors, it shall be considered the legal modification of the text regarding its ratification and the re-negotiation of some preferences granted when the US was within the negotiating economies.

Another option is a TPP 2.0: castling the US with a country with a similar market. Somebody said China? It has been suggested in diverse forums that China, since Trump's protectionist stance, will not waste the opportunity to become the new leader of free trade, opening doors not only leading the new TTP, but also receiving foreign investments that are not welcome any more in the US (Mexico and Canada are the first in line). Most experts have said that this scenario has an unlikely outcome. China is keen to promote the Regional Comprehensive Economic Partnership (RCEP[5]), the 'alternative' to the TPP, which is a 'tailor-made' agreement for them, originally designed to soften the negative shock that TPP would generate for them. Without the TPP, it is very unlikely that all their efforts under the RCEP will slow down to start a new project – even more if the said project was originally thought to pull out China from setting out the rules of global commerce in the Pacific.

Among these alternatives, the most realistic is the first option. Theoretically, a TTP 'minus one' has fewer political and legal implications than a TPP 2.0. Its probability of success will be based on the willingness of the signatory economies to continue with the progress made so far.

Free Trade Area of the Asia-Pacific: time to get real?

Besides TPP or RCEP, the Free Trade Area of the Asia-Pacific (FTAAP) has been a mostly aspirational, plurilateral trade proposal under the APEC forum roughly a decade ago. The FTAAP intends to comply with a series of goals that lead to an open exchange in the Asia-Pacific region. In the long-term, it will reduce trade barriers, foster investment and promote the free flow of goods, services and capital between country members. These issues are known as the 'Bogor Goals' and should be achieved by 2020.

Since 2014, China has been a driving force behind FTAAP as a competitor to TPP, when they chaired the annual summit that year.

After the US withdrawal of TPP, FTAAP could be an alternative for continuing drafting global commerce rules. To make it a real choice, however, it should be noted that: (i) the diversity and the economic development gap of its members – as it happens with the WTO system – is more of an entanglement than an advantage; and (ii) it remains an aspirational agreement, bogged down without a comprehensive strategy focused on a 'Post-Bogor Goal Era'.

Even with these adversities, the possibility of boosting this agreement should continue to be explored. Recall that FTAAP can generate eight times more profit than the TPP, obtaining about US$2tn by 2025; three times more profit than the Association of South East Asian Nations (ASEAN).

Pacific Alliance: unveiling potential actions for LATAM countries

The Pacific Alliance (PA), set up by Mexico, Colombia, Chile and Peru, is the new rising star on the block. PA countries have a combined population of 200 million and together account for half of Latin America's exports and around 35 per cent of the region's GDP. With an open regionalism scheme, it is by far the best shot, not only for PA countries but also for LATAM to lead trade liberalisation, and move forward commodity reliance to diversification of exportations.

Moreover, the PA has untapped potential because it is a 'living' trading platform, that not only includes what is established in its Additional Protocol (text that encompasses all the ordinary trade-related topics), but also makes it possible to explore other non-traditional trade topics; for example, the regulatory harmonisation of healthcare, life sciences and cosmetic products, therefore deepening integration of their financial markets, fostering fiscal transparency, and tackling piracy and money-laundering, among other relevant issues.

In this regard, there are important reasons that LATAM countries and their commercial partners turn over the PA as a strategic source of business. Unforeseen pathways can be displayed under this impressive coalition. These are some potential actions to be taken by AP counties in the short- to middle-term, to build up a more outward-looking model for Latin America and other regions:

- Pursue trade collaboration with other LATAM integrations as Mercosur, looking up for a merger in the future. Even if the latter is not straightforward, AP countries shall identify a common and agreed understanding of collaboration in any area within trade matters. One relevant issue could be trade facilitation (eg, easing border restrictions, expediting the movement, releasing the clearance of goods), boosted by the forthcoming innovative WTO Trade Facilitation Agreement.
- Have in mind negotiating as a bloc with external partners, principally with Australia, Malaysia, New Zealand or Vietnam (former TPP members that have not signed a free trade agreement with Peru, Colombia and Mexico yet) or with RCEP. Moreover, start drafting a comprehensive strategy with their observers – that currently are more than 40 – creating working groups with them to bear specific concerns.
- Be innovative, try to discuss and negotiate unique and unexplored trade issues over the agenda. Following a wave of corruption scandals implicating government officials across Latin America, PA could be an outstanding forum to design guidelines to eliminate corruption through enhanced cooperation in extradition, judicial assistance, and more flexible legal processes to recover illicit proceeds of corruption and other financial crime. Another interesting development, from the academic or legal side, could be the right of private individuals or non-governmental organisations to have direct access to the AP trade dispute settlement system. Chapter 17 of the PA Additional Protocol establishes than only member states would have the right to request consultations and initiate dispute settlements for any controversy. With simple amendments in Chapter 17, the AP could empower non-state actors to raise claims under the dispute settlement, achieving and providing a vital reform for stakeholders and their right to fully preserve their interests independently. The Andean Community Court of Justice is an example of this scheme, being pragmatically acceptable under international trade law.

Isolated waves of trade protectionism block the competitive and productive advantages generated in recent decades by the international trade system. Economies, especially those in LATAM, should be prepared to continue the opening process, either with or without the TPP.

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Notes

1 Senior Associate Lawyer, Estudio Echecopar – Baker McKenzie Lima office, member firm of Baker McKenzie International; professor at the Pontificia Universidad Católica del Perú. Special thanks to Francesca de Souza Ferreira, who supported me with the research for this article.

2 The Trans-Pacific Partnership (TPP) is a regional free trade agreement that pursues establishment of the rules of commerce between the US, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

3 Trilateral Free Trade Agreement between USA, Mexico, and Canada.

4 Imported and locally-produced goods should be treated equally — at least after the foreign goods have entered the market.

5 '[Foreign products] shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.'

6 Free trade agreement (FTA) under negotiations between the ten member states of the ASEAN (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam) and the six states with which ASEAN has existing free trade agreements (Australia, China, India, Japan, South Korea and New Zealand).

Rebeca Mosquera[1]

Hughes Hubbard & Reed, New York

rebeca.mosquera@hugheshubbard.com

Francisco J Muñoz[2]

Rattagan Macchiavello & Arocena, Buenos Aires

fjm@rmlex.com

Recent developments in International Criminal Court Arbitration

Summary

This paper aims to provide practitioners and arbitrators with a brief explanation of the amendments to the International Criminal Court (ICC) Rules on Arbitration that took effect on 1 March 2017.

These amendments are significant for the region because the ICC International Court of Arbitration is one of the most-used arbitral institutions in Latin America.

Latin American litigators and users of the Arbitration Rules of the ICC institution may have to consider that small claims will be subject to the new Expedited Procedure Rules set forth in section 30 of the New ICC Rules. Drafters should be very careful at the time of negotiating the terms of the arbitration clause in order to determine what their clients desire for future arbitration proceedings.

In our opinion, the most important modification to the ICC Rules is the Expedited Procedure. We believe that this procedure will make arbitration proceedings faster and reduce costs. Expedited Procedure will contribute to the development of arbitration in the region.

Main amendments in the New ICC Rules

The amendments to the ICC Rules on Arbitration (the 'Rules' or the 'New ICC Rules') were approved in October 2016, and took effect on 1 March 2017.

The New ICC Rules aim, particularly, to enhance transparency and efficiency of ICC arbitrations, as well as to institute expedited proceedings for claims under US$2m.

Transparency

A significant change in the ICC Rules of Arbitration is found in Article 11(4) of the 2012 ICC Rules, which provided in relevant part, that:

> 'The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final, and *the reasons for such decisions shall not be communicated.*'[3] [emphasis added].

The New ICC Rules remove the limitation set forth in Article 11(4) of the 2012 ICC Rules; therefore, upon request from one of the parties,[4] the ICC International Court of Arbitration (the 'ICC Court' or the 'Court') will communicate its reasons in the appointment, confirmation, challenge or replacement of arbitrators.[5] This step forward to promote transparency and accountability is in line with the Court's policy adopted in October 2015.[6]

Similarly, and with the goal to further transparency and accountability, the New ICC Rules require the Court to provide explanations for its decision on jurisdiction[7] and decisions on consolidation of arbitrations.[8]

Efficiency

Further amendments to the ICC Rules include reducing the time the parties and the arbitral tribunal are given to sign the Terms of Reference and transmit them to the ICC Court.

Article 23(2) of the 2012 ICC Rules provided that:

> 'The Terms of Reference shall be signed by the parties and the arbitral tribunal. *Within two months* of the date on which the file has been transmitted to it, the arbitral tribunal shall transmit to the Court the Terms of Reference signed by it and by the parties. The Court may extend this time limit pursuant to a reasoned request from the arbitral tribunal or on its own initiative if it decides it is necessary to do so.'[9] [emphasis added].

Pursuant to the New ICC Rules, the parties and the arbitral tribunal only have 30 days from the date on which the file is transmitted to the tribunal to sign the Terms of Reference and transmit them to the ICC Court.[10]

This amendment aims to shorten the time spent in the initial stages of the arbitration. Still, the Court retains its right to extend the time limit upon request from the arbitral tribunal, or if it determines that an extension is needed.[11]

Expedited proceedings

Finally, as mentioned above, it is our opinion that the most significant change to the ICC Rules is contained in the implementation of expedited procedure provisions.

Succinctly, the expedited proceedings apply to all disputes under US$2m, unless the parties have expressly opted out. In the case where a dispute exceeds the US$2m threshold, parties have the option to opt-in.[12] The New ICC Rules expedited proceedings are explained in detail below.

Expedited Procedure Rules set forth in the New ICC Rules

1. The Expedited Procedure is one of many measures that the ICC is taking to improve time and cost efficiency. During recent decades, parties have been claiming for faster and cheaper procedures to resolve their disputes. These two issues – time and costs – were the main criticism to arbitration. The ICC introduced this new procedure with the aim to provide parties with a tool to satisfy their needs.
   Briefly, Expedited Procedure Rules set a fast-track proceeding for small claims. The tribunal, composed by a sole arbitrator, has to render an award within six months after the date the case management conference is held. The reduction of the overall time of the proceeding and the appointment of a one-member tribunal significantly reduce the costs of the proceeding.
2. Section 30 sets forth that this new procedure will be applicable to: (i) disputes that do not exceed US$2m; and (ii) disputes included in arbitration agreements that concluded after the new rules entered into force. This procedure may also apply to disputes exceeding US$2m if the parties so agree.
   The New ICC Rules also sets that the Expedited Procedure is mandatory for dispute that does not exceed US$2m. However, parties may choose to opt out of the Expedited Procedure but they must do so explicitly.
3. The salient characteristics of the Expedited Procedure are: (i) the arbitral tribunal must render its award within six months after the date on which the case management conference was held; (ii) the ICC is entitled to appoint a sole arbitrator despite what parties set in the arbitration clause; (iii) fees are calculated on a reduced scale of costs; (iv) the arbitration is empowered not to allow requests of production of evidence; (v) the terms of reference rule in section 23 may not be applicable to the proceeding; and, (vi) the tribunal should schedule a case management conference with the parties within 15 days from the date the file was submitted to the tribunal.
   The arbitral tribunal – and the ICC as well – may have to face some challenges while implementing the Expedited Procedure. Particularly, the arbitral tribunal must be sufficiently able to ensure the adopted terms of the proceeding do not violate due process rules under the law of the seat of arbitration.[13] Under the terms of the New ICC Rules, the arbitral tribunal may limit the evidence to be produced during the arbitration proceeding. Additionally, there may be some inconsistencies in the terms of the arbitration clause and the Expedited Procedure Rules. These inconsistencies may lead the arbitration clause to be considered null. The nullity of the arbitration clause may provide the loser party with grounds to vacate the award under the New York Convention of 1958.[14] Therefore, the arbitral tribunal must render a valid award ensuring parties have enough opportunities to present their case, including the possibility to produce the evidence that supports their case.[15]
4. Legal scholars found that the terms of the Expedited Procedure could affect main principles of international arbitration, especially party autonomy. Legal scholars cast some doubt on section 30 (1) that provides, ‘by agreeing to arbitration under the Rules, the parties agree that this Article 30 and the Expedited Procedure Rules set forth in Appendix VI (collectively the “Expedited Procedure Provisions”) shall take precedence over any contrary terms of the arbitration agreement’.[16]
   Legal scholars also cast some doubt on article 2(1) of Appendix VI of the New ICC Rules that provides, ‘The Court may, notwithstanding any contrary provision of the arbitration agreement, appoint a sole arbitrator’.

The main argument against these provisions is that party autonomy is limited. The Expedited Procedure will be applicable in cases that parties do not opt out of it explicitly. The appointment of a sole arbitrator is imposed on parties even if parties agree on the contrary.[17] Many other scholars consider that parties accept the Expedited Procedure and the appointment of a sole arbitrator when they agree to arbitrate their disputes under ICC Rules. Additionally, party autonomy is protected by ICC Rules because ICC Rules allow parties to opt out of the Expedited Procedure, and, therefore, the appointment of a sole arbitrator. In our opinion, the second theory should prevail.

The consent given by the parties to submit their disputes to an ICC arbitral tribunal under ICC Rules should be interpreted broadly. Consent by the parties to the ICC Rules necessarily involves knowing all the terms and conditions of said rules.

Moreover, parties choose ICC Rules and arbitral tribunal knowing that the system would be efficient and the resolution of the dispute would be expedited. The New ICC Rules incorporates this Expedited Procedure with the aim to accelerate the proceedings, the purpose being in the same page as the will of the parties. Precedents support this last theory.

The Singapore High Court dealt with a similar case in the *AQZ v ARA* case. In said precedent, the judge decided not to set aside an award rendered by a sole arbitrator despite the parties' agreement to appoint a three-member tribunal. The plaintiff's argument – that the tribunal was not composed according to the agreement of the parties – was dismissed by the judge.[18]

Drafters play a significant role for future litigation and the way the arbitration will be carried out. Drafters should be very careful when drafting the arbitration clause. If parties want to opt out of the application of section 30(1) and section 2(1) of the ICC Rules, drafters must include said decision expressly in the arbitration clause. Summarising, drafters of contracts should not leave the arbitration clause as a 'midnight clause'.

Conclusion

We believe that the new ICC Rules are a good approach by the ICC to increase transparency and efficiency of arbitration proceedings.

Expedited Procedure is a good answer to parties' claims to reduce costs and optimise overall timing of arbitration proceedings for small claims.

Arbitrators in Expedited Procedures should be very careful when conducting the proceedings and rendering their awards, to ensure parties have the opportunity to present their case properly according to the law of the seat of the arbitration.

Notes

1 Rebeca E Mosquera is an associate in Hughes Hubbard & Reed's Litigation and Arbitration groups in New York. She is a dual-qualified lawyer in the Republic of Panama and New York. Ms Mosquera represents US and international clients, including energy, maritime transportation, construction and telecommunication services companies in complex commercial disputes. Rebeca has been involved in a variety of matters involving Latin American countries in investment and bilateral treaty disputes.

2 Francisco Muñoz is an associate in Rattagan Macchiavello & Arocena's Dispute Resolution team, based in Buenos Aires. He has participated in insolvency proceedings, complex litigation and arbitration cases. In 2013, he worked as a researcher at UNIDROIT, Rome. In 2013 he joined the Paris office of Shearman & Sterling as a foreign trainee in its International Arbitration team. He worked in international arbitration proceedings under the Rules of ICC, ICSID and SCC, with focus on expropriation, international contracts, and energy.

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4 The 2012 ICC Rules required that all reasoned decisions were only communicated with the consent of all parties.

5 Article 11(4) of the New ICC Rules reads now, in pertinent part, that '[t]he decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final'. It removes the provision that such decisions were not to be communicated to the parties. See ICC Rules of Arbitration 2017, Art 11(4), https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration (last visited on 12 February 2017).

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The future of administrative law

Lenin Navarro Moreno[1]

Navarro Abogados

navaro17@hotmail.com

Summary

Latin America, immersed in a globalised world, has a French-inspired administrative law (AL) that regulates major infrastructure and controls main investments in critical sectors of the economy, such as oil, mining, telecommunications, electricity, etc. The most difficult cases and complex litigation are closely related to AL, and analysed not only under local law but international law.

The *droit administratif* (DA) has indisputable validity in the domestic conception, nevertheless hesitations arise in comparative law and international adjudication because of its exorbitant privileges. This analysis focuses on the evolution of AL, taking into account the *jus cogens* and universal principles of law.

Introduction

The two major legal traditions in the world are civil law and common law, with a range of variants and mixtures. Both systems, in different figuration and scope, have influenced the creation of modern AL. Notably, the AL of the United States is neither equivalent, nor is it a literal translation of the French DA. In fact, they likely share nothing more than the denomination. The DA is a relatively new branch of law, its doctrines of unilateral privileges, not predicted by the general principles of law, have existed for no more than 300 years.

Civil law, developed on the basis of the *corpus iuris civilis,* reflects the culmination of all Roman legal doctrines and dogmata advanced since its foundation in 753 BC.[2] Roman law established principles of universal validity, inter alia*: stare decisis, pacta sunt servanda, bona fides, etc*. Adopted in continental Europe, Latin America and other world territories, Roman law was transformed into 'positive law'.

In spite of the magnificent development of civil law, AL was not originated from any Roman doctrine. Rome founded its public power basically over the will of a tyrant. No Roman emperor ruled over a system of public administration because, when the emperor governed, no law limited his power.[3]

In contrast, common law's legal practices and judicial decisions emerged subsequent to the Norman Conquest in 1066 AD.[4] The common law developed during the Middle Ages had great progress in branches; that is, criminal law, procedural law, contract law, torts, etc. Notably absent from common law attention was public administration. A likely reason for this absence is that, during the Middle Ages, the infallibility and indefectibility of the ruler (the King can do no wrong/*rex non potest peccare*)[5] was consecrated akin to supreme principle.

In 1653, during the Republic of Oliver Cromwell, the Instrument of Government promulgated through Parliament, limiting authoritarianism. However, neither Instrument of Government, nor the Bill of Rights of 1688, instituted a system of AL similar to the modern French system.

In contrast to the hegemonic centuries of totalitarianism, the history of constitutionalism and organised public administration is extremely short; the modern liberal democracy successfully limited public power, lamentably democracy was relegated for centuries and almost forgotten. Three historic milestones allowed the renaissance of the original Greek conception of democracy. These events were: 1) The English Bill of Rights (1689); 2) The US Declaration of Independence (1776); and 3) The French Declaration (1789).

The extinction of feudal monarchy, in addition to the creation of the French Council of State (successor to the King's Council/*Conseil du Roi*) in 1799 by Napoléon,[6] started the conception of DA, presently accepted law in Latin America. The Council of State was designed as the legal adviser to the executive power and the 'Supreme Court' of administrative justice.

Since the establishment of liberal regimes and the prevalent application of rule of law/*la primauté du droit,* a question arose: Who should control and prosecute the public administration? In France, the Public Administration itself judged the administration. Thus, public administration was designed to be a judge in its own cause. In spite of this trend, the executive in a liberal regime was intended to be under the law; although initially, loftier powers were envisioned, that is adjudication and normative creation (ie, quasi-judicial and quasi-legislative).

DA was shaped to be self-sufficient, unifying the power of rule-making, adjudication and enforcement. Thereby, the public administration may create, modify or extend rights (subjective and *erga omnes*) under the presumption of legality, without the necessity (*post* or *ante)* of judicial analysis or decision. These superpowers were known in French and Spanish as '*autotutela*'.

Autotutela is a unilateral privilege that avoids judicial intervention. This gives to the executive an exclusive authority to enforce its decisions. Those powers are applied via its own regulations that are presumed legal (*praesumptio juris tantum*), nonetheless theoretically could contravene the law or the constitution. In most continental legislations, there were exceptional constitutional remedies designed to annul or modify the administrative regulations that potentially oppose the hierarchy of law.

In contrast, in common law, there was a clear division of powers that permits for review of decisions made by the executive. Thereby in the US, the powers of the president were limited by the constitutional establishment of 'checks and balances' and judicial review.[7] AL establishes rules for the creation and operation of agencies, the substantive applicable rules, and the relationships with citizens. Further, the creation of agencies is also correlated to the concept of federalism, developed by US Constitutional Law. This signifies, inter alia, that executive orders regulating federal agencies are not similar to an executive decree under DA.

In the AL of the US there is nothing analogous to the superpower of the so-called *autotutela.*[8] An illustration of this may be found in the Administrative Procedure Act[9], in referring to the creation of Federal Regulations. In 1984, the US Supreme Court further ruled the power of federal agencies in the landmark *Chevron US (1984)*,[10] where the Court introduced the doctrine of 'administrative deference'.

Thus, although the civil and common law each contain the term 'administrative law', the elements, connotation, scope and effects have no effective comparison. In other words, there is a same denomination with different definition and no proper equivalent.

In Latin America, AL governs a broad spectrum of issues including the largest investments, infrastructure projects, mining, oil, electricity, telecommunications, transport, etc. The most complex and costly disputes; for example, those referred to international investment arbitration, are deeply rooted to the application of AL.

In international law there is an increasing antagonism between the presumed 'legality' of local AL and the non-derogable validity of international standards. These international canons include fair and equitable treatment,[11] most-favoured nation treatment,[12] national treatment,[13] protection and compensation against expropriation,[14] and defence against denial of justice.[15] These elemental principles date back to ancient Greece, and today relay to the most basic foundations of natural law and international customary law.

Under the DA, a '*concesión*',[16] involves, for example, the construction, administration, use and exploitation of maritime, terrestrial or aerial infrastructure used for the provision of a public service. It is ruled by the use of '*potestades exorbitantes implícitas/l'exorbitance du droit des actes administratifs unilatéraux'* (extraordinary powers). Hypothetically, a *concesión* could be terminated unilaterally in advance without the prior intervention of a judge. An investment referred to as a *concesión* can be expropriated, or the investor may be exposed to pecuniary sanctions without the intervention of a judicial authority or third adjudicator.

Historically, international law had exemplified that a state can act in commercial matters (*jus negotti)* or sovereign aspects (*jus imperium*). *Ab initio*, *jus imperium* were used, *verbi gratia*, to collect or impose taxes for public defence and common welfare, nevertheless when the state does business as any other profitable enterprise it theoretically should be assimilated to a private entity. Here the inquiry becomes whether states doing commercial transactions should be insulated by quasi-royal privileges (judge of own dispute). Should states have the authority to enforce decisions without judicial intervention, have the power of seizure, the clout to use physical force, the power to impose periodic penalty payments, and other unilateral attributions denominated '*apremios*'?[17]

The imposition of unilateral and unequal conditions in administrative practice could be presumed legal under a particular system. However, an international tribunal or international court of human rights,in some cases may deem that these practices are neither fair, nor acceptable under international due process of law.

Administrative decisions, taken into context of local regulation, should not necessarily take into consideration international standards. Analysing these actions on a case-by-case basis would require hundreds of pages. However, *prima facie*, international law limits the exorbitant powers of administrative law in *jus negotti* activities (lucrative businesses). Subjective or arbitrary acts, taken under the diffuse and controversial figure of '*actos de mera discracionalidad*' (discretionarily as keystone of public decisions), are also limited under international law.

The international casuistry, directly or indirectly, has been questioned whether administrative law complies or is subordinate to the ancient and broad principles of law: a) *nemo judex idoneus in propria causa est*; b) *nemo judex in parte sua*; c) *nemo judex in re sua*.

Thus, the following questions arise in international law:

- Is there a conflict of interest in being a judge of your own cause, while simultaneously imposing unilateral and disproportionate rules for that effect?
- Are unilateral and exorbitant powers subordinate to modern international law and *jus cogens*?
- Can institutions historically based on the *Conseil du Roi* (feudal and monarchical) coexist with modern law?
- Is that practice in accordance with the evolution of constitutional law?

The future of local AL will be influenced by international law. There will be significant changes motivated as a result of pressure from international decisions, by the application of local constitutional remedies, and development of comparative law that entails the unification of the *pro homine* law.

Notes

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4 See: Ross Perry, *Common-law Pleading: its History and Principles*, (Boston, 1897).
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6 See: Frank Maloy Anderson, *The constitutions and other select documents illustrative of the history of France*, (Minneapolis: The H W Wilson company, 1904).
7 See: *Marbury v Madison*, 5 US 137, 138 (1803).
8 See: Charles Sumner Lobingier, *Administrative Law and Droit Administratif*, (Penn Law Review, August 1942).
9 The Administrative Procedure Act (1946).
10 *Chevron USA, Inc v Natural Resources Defense Council, Inc*, 467 US 837 (1984).
11 Eg, *Occidental Petroleum Corporation v The Republic of Ecuador*, ICSID Case No ARB/06/11 (5 October 2012), discusses the mentioned standard.
12 Eg, *Gold Reserve Inc v Venezuela* (ICSID Case No ARB(AF)/09/1), discusses the mentioned standard.
13 Eg, *Midland and Tate & Lyle Ingredients Americas, Inc v United Mexican States* (ICSID Case No ARB(AF)/04/5), discusses the mentioned standard.
14 Eg, *Repsol, SA and Repsol Butano, SA v Argentine Republic, ICSID Case No* ARB/12/38, discusses the mentioned standard.
15 Eg, *SAUR International v Argentine Republic* (ICSID Case No ARB/04/4), discusses the mentioned standard.
16 *Black's Law Dictionary* defines 'concession' as: 'A grant; ordinarily applied to the grant of specific privileges by a government'; French and Spanish grants in Louisiana.
17 *Apremio* means compulsory, in relation to the use of force.

Myriam Acuna

Mitrani Caballero Ojam & Ruiz Moreno Abogados, Buenos Aires

myriam.acuna@mcolex.com

Argentina

Argentina enacts new public–private partnership regime aimed at promoting infrastructure development

Introduction

Through Law No 27,328, published in the *Official Gazette* on 30 November 2016, Argentina adopted a new legislation on Public–Private Partnerships (PPP) aimed at promoting foreign direct investment and facilitating balanced and predictable cooperation between the public and private sectors in a wide variety of areas, including infrastructure.

The new PPP regime is modelled on regulatory frameworks used in other Latin American countries, such as Chile, Colombia, Mexico, Peru and Uruguay, and was discussed with local business associations, multilateral entities and law firms.

The new PPP Act provides general guidance principles and certain mandatory terms that must be included in any PPP contract. It is expected that the Executive Branch and other applicable government bodies and entities will subsequently issue implementing regulation as well as project-specific tender terms.

Main features of the PPP regime

The main features of the new PPP regime are as follows:

Broad purpose

Government bodies and entities may enter into PPP contracts with private parties in connection with the development of projects relating to infrastructure, housing, services, production, applied research and technological innovation.

Eligible activities include the design, construction, expansion, improvement, exploitation, operation and financing of projects, and the supply of equipment and other goods.

Flexible legal structure

PPPs may be structured through either incorporated or unincorporated joint ventures, and the government is allowed to hold equity stakes in any special purpose vehicles so created.

Special purpose vehicles and financial trusts channelling the PPP will be permitted to seek financing through public offerings of securities.

Extended term

PPP contracts may last up to 35 years, including any extensions of the initial term.

Enhanced protection to private contractors

The PPP regime is intended to limit government rights in connection with public contracting and to enhance protection of developers and lenders. Government prerogatives will also be subject to limitations that have been established normatively or contractually.

In addition, the PPP regime imposes an obligation on governments to adequately compensate any unilateral variation of the agreement in order to preserve the economic balance of the original contract and ensure bankability of the project. The government power to unilaterally amend the project terms will be limited to 20 per cent of the total contract value.

The PPP contract may allocate risks between the parties, including risks arising from government action, force majeure and early termination. The contract may also ensure a minimum guaranteed income to the contractor.

Also, the government may not terminate the contract for illegality without court approval.

Private contractors may assign all or part of the PPP contract to eligible third parties once 20 per cent of the original term has elapsed or 20 per cent of the committed investment has been made.

Exclusion from the current public procurement framework

The PPP regime is designed to be an alternative to existing public procurement regimes.

PPP contracts are excluded from the application of certain laws and regulations that grant to government parties special prerogatives that are not generally available to other parties (such as the Public Works Act No 13,064, the Concession of Public Works Act No 17,520 and the General Public Procurement Regime governed by Decree 1023/2001).

PPP contracts are also expressly excluded from the application of legal provisions prohibiting indexation of debts and permitting cancellation with local currency of foreign currency denominated obligations.

The liability of the parties to a PPP contract will be governed by the terms and conditions agreed between them and by the Argentine Civil and Commercial Code.

Full compensation for early termination

In case of early termination, the PPP regime provides that the contractor must receive, prior to any such early termination, full compensation as may be determined through the valuation methodology and determination procedures set forth in the implementing regulation and applicable tender terms.

The compensation may not be lower than the amount of the unamortised portion of investment in the project and must ensure the repayment of any third-party financing.

PPP contracts are expressly excluded from all legislation restricting government liability or excluding compensation for lost profits in the event of early termination on public interest grounds.

Transparent and fair contractor selection process

The PPP regime requires a transparent, public, competitive and fair procurement process.

Accordingly, government bodies and entities must follow a public tender process, domestic or international as appropriate, to select the private counterparties to a PPP contract.

The PPP regime empowers the Executive Branch to follow a competitive dialogue mechanism, allowing pre-qualified contractors to participate and collaborate in the drafting of the tender terms. Such novel mechanism has already been used in the recent renewable energy tender.

The government must promote the participation of small and medium-sized companies and national industry and work. In addition, PPP contracts must ensure that one-third of the goods and services supplied to a PPP project are Argentine sourced. The Executive Branch may, however, grant exemptions on a case-by-case basis.

Broad choice of financing credit enhancement structures

PPP projects are expected to be financed through a combination of government budget allocations, development agency loans, and project and bank financing.

To improve bankability, the PPP regime allows, with prior congressional approval, the allocation or transfer of assets, funds and tax revenues (including to newly-created or existing trusts) to finance or secure payment obligations under the PPP contracts.

The new regime also permits the issuance or contracting of guarantees or other credit support mechanisms, the granting of step-in rights to lenders, and the creation of any type of security interest.

Environmental preservation

PPP projects must be structured with a view to promoting the preservation and protection of the environment. As a result, the Ministry of Environmental and Sustainable Development must be consulted prior to the approval of any PPP project.

Arbitration as a dispute resolution mechanism

Any disputes arising from PPP agreements may be settled through domestic or international arbitration; however, international arbitration before foreign arbitral tribunals may only be agreed upon with prior approval by the Executive Branch and subsequent notice to Congress.

In no event may the local courts revise the findings of an arbitral tribunal.

If so stipulated under the applicable tender terms, the government party must continue making payments while the dispute is ongoing, but the funds subject to dispute must be deposited in escrow until the dispute is finally resolved.

Government oversight

The PPP Act creates a PPP unit within the Executive Branch that will be in charge of providing assistance to the Executive Branch in the development and regulation of PPP projects and disseminating information on PPP tenders and contracts. The PPP unit may also assist government procurement agencies in the design and structuring of PPP projects.

In addition, the PPP Act creates a specialised congressional committee to monitor performance of PPP projects and compliance with the PPP regime.

Concluding remarks

It remains to be seen whether the new regime will be successful in attracting and channelling private investment in public infrastructure. Although many of the specifics are left to the implementing regulations and there is significant room for improvement, this new piece of legislation is undoubtedly positive and constitutes a clear signal that Argentina is open for business.

Cristian JP Mitrani
Mitrani Caballero Ojam & Ruiz Moreno Abogados, Buenos Aires
cristian.mitrani@mcolex.com

Maria Paula Diaz
Mitrani Caballero Ojam & Ruiz Moreno Abogados, Buenos Aires
maria.paula.diaz@mcolex.com

Criminal liability of legal entities for crimes against public administration and transnational bribery

Summary

A Bill on Criminal Liability of Legal Entities for Crimes against Public Administration and Transnational Bribery has been submitted to Argentinean National Congress. The Bill creates an independent system of criminal liability for legal persons for crimes against public administration (bribery) and transnational bribery. The Bill proposes extremely severe criminal sanctions on legal entities, for crimes committed in its name, interest or on their behalf, and with the potential of benefiting the legal entity, provided that the wrongdoing was the result of the legal entities' ineffective control. To implement such control, the Bill requires the adoption by legal entities of an 'integrity programme'.

Introduction

On 20 October 2016, the Anti-Corruption Office sent a bill to the National Congress regulating the criminal liability of legal entities for crimes against the public administration (bribery) and for transnational bribery, set forth in Article 258 *bis* of the Penal Code.

Enacting a law along these lines will be Argentina's reply to demands from international organisations requesting stronger ethics, anti-corruption and organised crime controls. Furthermore, it will provide the domestic legal system with rules aligned with those adopted by many countries worldwide, such as Brazil, Germany, the United Kingdom and the United States for fighting against transnational bribery and preventing local corruption.

The adoption of such legislation will require companies to implement integrity and compliance programs intended to avoid incidents of corruption, sanction any actual occurrences of corruption and deploy a series of preventive measures that include the review of the selection processes of service providers (especially intermediary services), training programs for employees and third parties to whom the legal entity is related, and ongoing monitoring of such persons' activities.

The adoption of internal policies and procedures to avoid, detect, redress and report potential corruption incidents, and the appointment of a body in charge of implementing the policies and procedures, will be essential to comply with the requirements of such new legislation and to avoid or mitigate the adverse effects of any potential future violations.

Transnational bribery – extended jurisdiction

Although transnational bribery had already been introduced into the Criminal Code (Article 285 *bis*) as a result of the adoption by Argentina of the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, in order for it to be effectively applied, it is necessary for Argentine courts to have jurisdiction to investigate Argentine nationals for bribery of foreign public officials perpetrated outside Argentine borders. Thus, by awarding extraterritorial recognition to transnational bribery, a crime can be prosecuted even if it is committed in a foreign country – something unusual under traditional criminal law but fundamental to the successful implementation of the anti-corruption laws in Argentina.

The Bill contains a proposed amendment to Section 1 of the Criminal Code extending jurisdiction in favour of local courts in connection with crimes committed abroad by agents or employees of the Argentine government in the performance of their duties. Such extended jurisdiction will also apply to the crime under Article 285 *bis* committed abroad by Argentine citizens or legal entities domiciled in the Argentine Republic, or by establishments or branches that a legal entity may have in Argentina. Accordingly, if the officer of a local company or Argentine branch of a foreign company bribes a foreign public official outside Argentine borders, Argentine courts would have jurisdiction to investigate and punish the crime described in Article 285 *bis*.

Subject matter of the rule – actions by dependents

The crimes covered by the Bill are those governed by Title XI, Book II of the Criminal Code, which includes bribery and influence peddling, negotiations incompatible with public office, illicit enrichment, prevarication, and the crime of fraud against public administration provided by Article 174, Section 5 of the Criminal Code. The Bill provides that a legal person will be liable for crimes against the public administration and transnational bribery if they are committed in its name, interest or on its behalf and with the potential of benefiting the legal entity, provided that the crime is the result of ineffective controls on the part of the legal entity.

In the circumstances described above, the legal entity will be liable if the crime was committed by its owners, partners, shareholders or associates capable of exerting influence on the company's decisions; its attorneys-in-fact, representatives, directors, managers or any other employee serving under their supervision or direction; and even its concessionaires or representative in a trust agreement. Further, it may also be responsible for the actions of its suppliers, contractors, agents, distributors and any other individual or legal entity to whom it may be contractually related. Hence, the categories of persons that could result in a legal entity's criminal liability is very broad, and while some of them may be subject to direct control and supervision, others may only be subject to remote and indirect oversight (eg, suppliers and other third parties). Punitive measures applied to such circumstances raise serious questions about its reasonability and legitimacy.

Integrity programme

According to the Bill, the adoption of an integrity programme which complies with, among others, the following conditions, could qualify as a 'control' system and potentially exempt a legal entity from liability:

1. the adoption of a Code of Ethics, and policies and procedures applicable to all employees that effectively prevent corruption cases;
2. the implementation of special procedures to prevent violations in connection with tenders, bids and administrative contracts entered into with government entities;
3. the extension of the Code of Ethics and policies to all third parties to whom the legal person may be related (suppliers, agents, distributors, etc);
4. the carrying out of frequent risk analyses to regularly adapt the integrity

programme;

5. the creation of internal reporting mechanisms, coupled with a policy that protects reporting persons;
6. the existence of procedures for verifying the integrity and reputation of third parties or business partners (suppliers, agents, intermediaries, etc), also known as due diligence processes;
7. ongoing monitoring and assessment of the effectiveness of the integrity programme; and
8. the appointment of a company employee to be in charge of the development, coordination and supervision of the integrity programme.

The contents of the prevention programme set forth in the Bill do not materially deviate from the international trend, and even though the scope of some of the standards may need to be fine-tuned, they reflect the criteria that multinational companies subject to laws such as the US Foreign Corrupt Practices Act or the UK Bribery Act, have been adopting over the past few years.

Effective cooperation agreements

The Bill provides for the possibility of reaching a leniency agreement between the Attorney General's Office and the legal entity involved in any of the crimes identified in sections 2 and 3 above, whereby the latter agrees to comply with certain obligations in exchange for suspension of the prosecution. To be eligible for such an agreement, it is essential for the legal entity to have cooperated and revealed useful, new information to the investigators, enabling the collection of evidence which helps to clarify the crime and identify its perpetrators or accomplices. The agreement may include, among others, the following provisions:

1. payment of a fine of one-third of the amount that would have been payable had it been convicted;
2. restitution of the things or profits obtained as a result of the crime;
3. application of disciplinary measures against the persons engaging in the corrupt behaviour;
4. adoption of an integrity programme, and
5. cooperation with authorities in investigating other corruption cases.

The information provided in the investigation will be confidential, and the execution of the leniency agreement will not entail an acknowledgment of guilt by the entity. The judge may accept or reject the agreement and, in the former case, will be in charge of overseeing compliance with its terms.

Criminal sanctions

The criminal sanctions provided in the Bill include:

1. fines between one per cent and 20 per cent of the annual gross income of the legal entity for the year immediately preceding the year during which the crime was committed;[1]
2. suspension of activities, in whole or in part for a term of up to ten years;
3. suspension of the use of patents and trademarks for a term of up to ten years;
4. publication, in whole or in part, of the conviction in the Official Gazette and two newspapers of nationwide circulation;
5. loss or suspension of any government benefits or subsidies to which the legal person may be entitled;
6. prohibition from participating in public tenders or bids or other government-related activities for a term of up to ten years; and
7. cancellation of the registration of the legal entity if the legal entity was formed to commit the crime or if the commission of the crime is the legal entity's main activity.

To determine the applicable criminal sanction, the following considerations, among others, will be taken into account: (a) the number and positions of the persons involved; (b) the seriousness of the violation; (c) the cooperation offered to resolve the case; and (d) the legal entity's size, nature and economic capacity.

The Bill provides that controlling companies will be jointly and severally liable for compensating any damages that were caused and for the pecuniary criminal sanctions imposed on its controlled entities. It also provides that in the event of absorption, transformation, spin-offs or other corporate restructuring, the legal entity's responsibility will be transferred to the resulting legal entity, except in the event that appropriate measures have been adopted to learn about the entity's economic and legal situation and corrective measures have been implemented when considered necessary.

The Bill provides for the following aggravating circumstances: (i) that the crime has been committed with the senior management's intervention, knowledge or tolerance; (ii) that the crime results in serious social or environmental consequences, or ones which affect the provision of any public utility service; and (iii) that the crime was committed on more than one occasion. In any of these scenarios, the Bill provides for an increase in the minimum of the fine to ten per cent of annual gross income for the year immediately preceding the date of the crime. It is important to note that corruption crimes are frequently the result of actions repeated over time and that, in most cases, they are not committed by an employee alone, but with their superiors' acquiescence. The aggravating circumstances included in the Bill could mean that the exceptions usually established as aggravating circumstances become the general rule, given the frequency with which they occur in corruption cases.

In contrast, the Bill provides for a reduction of the maximum fine to five per cent of gross income (making it clear that in no case will the fine be below one per cent) where the entity has effectively cooperated and provided evidence as set forth above.

Other provisions of the Bill

The Bill provides for the creation of a 'National Registry of Convicted Companies' to be administered by the Anti-Corruption Office through its webpage, which will show a list of companies that have been convicted by a final judgment. The publication will be maintained until the convicted company has fully complied with all criminal sanctions imposed or 'as part of an effective cooperation agreement' (technically, there would be no conviction in this last case, making some specific clarification necessary in order to understand if the cooperation agreement will also be published in the Registry).

Note

1 The Bill makes clear that in these cases there will be no application of the rule under which the voluntary payment of the fine, where the crime is punishable by a fine, will cause the expiration of the criminal action if paid before commencement of the investigation process.

New procurement rules for Argentina's federal public administration

Paula Omodeo
Estudio Beccar Varela, Buenos Aires
pomodeo@ebv.com.ar

Summary

The purpose of this article is to highlight the principal changes to the rules and procedures governing national public procurements in Argentina, introduced by Decree 1030/2016 on 16 September 2016. The new Regulation does not introduce substantial changes to its predecessor, although it does include some relevant modifications.

Introduction

In September 2016, the government of Argentina modified some of the rules and procedures governing national public procurement. What follows is a brief primer on the principal changes.

On 16 September 2016, the National Executive issued Decree No 1030/20126 modifying Decree 892/2012. The latter implemented the regulation of Delegated Decree No 1023/2001 of the General Regime for Public Procurement (GRPP), issued on 13 August 2001, by the federal executive branch by exercising legislative powers delegated to it by the legislature under the terms of Section 76 of the Federal Constitution.

The GRPP and its Regulation are applicable to certain contracts entered into by the central administration – the federal executive branch, its ministries and departments as well as any other central government bodies – and its agencies, including social security institutions (Section 2, GRPP).

The new Regulation does not introduce substantial changes to its predecessor, although it does include some relevant modifications.

Regarding its scope of application, the replaced Decree's provisions remain, although national universities are now included (Section 2). Furthermore, international public procurements executed by foreign contracting operational units along with those contracts entered into by the State Asset's Administration Agency will be subject to their own regulation (Section 3).

Also, the Federal Administration of Public Revenue (AFIP in Spanish) will need to provide information regarding breaches of tax and provisional law to the National Procurement Office (NPO), to verify bidders are authorised to enter into contracts with the State (Section 5). The NPO is a body subordinated to the federal executive that serves as the governing entity for the GRPP and its Regulation.

Regarding modifications, the amounts considered to determine the types of contract required have been modified (ie, public bid, abbreviated procedure or direct award; Section 9).

Current types of contracts have been maintained, although Integral Projects Contests have been introduced for cases in which particular conditions cannot be specified and it is necessary to find solution proposals. As for new modalities of application, electronic procurement has been significantly amended (Sections 31 to 34), establishing that the NPO is the body entrusted to put it into practice. Also, the simplified procedure has been eliminated.

Regarding offers, the new Regulation establishes that the requirements to be fulfilled must be included in the tender documents, which must list specific remediable and non-remediable causes for dismissal (Section 56). Also, an important incorporation is that alternative offers will always be accepted.

As a cause of ineligibility, the following issues have been included: a foreign conviction with a final judgment over bribe issues under the terms of the Organisation for Economic Co-operation and Development (OECD) Agreement, and being part of the World Bank's List of Disabled over Corrupt Practices (Section 68, subsections 'H' and 'I').

Strictly regarding procedure, administrative deadlines have been reduced, along with penalties for delays.

It is important to point out that the Decree incorporates clauses related to renegotiation (regarding supply contracts when external and supervening circumstances affect contractual balance in a decisive way) and mutual agreed termination (Sections 96 and 97).

Finally, the Competent Authority is entitled to include in the tender documents a mechanism of dispute resolution between jurisdictions, entities and suppliers, to solve disputes arising within the selection procedure, execution, interpretation, termination, inexistence, ineffectiveness or invalidity of the contract (Sections 115).

Bolivia

José Manuel Canelas

CR y F Abogados, Santa Cruz

jose@rojas-lawfirm.com

Contract farming in Bolivia

Summary

Contract farming has raised attention in recent years as a means for rural development, alleviation of poverty, creation of opportunities for farmers, and food security. This article explains the key aspects of contract farming and highlights legislation in Bolivia.

The production between an agricultural producer and a buyer is established through a written or verbal agreement. Under a contract farming scheme, producers can hold the ownership of their land, which is their main working capital and the foundation of their cultural, political and social identity.

Contract farming is seen as a relationship of reciprocal rights and obligations, since buyers obtain crops under an established standard of quantity and quality, by granting producers advance payments, inputs and technical assistance.

This kind of transaction has proven to be a useful tool for rural development, as farmers integrate into the markets, and obtain better yields and income. At the same time, contract farming may be seen as a less invasive form of investment than land acquisition.

Under a successful contract farming scheme, crops reach required standards for their commercialisation in international markets at a substantial higher price, including a premium for possible certifications such as 'fair trade', 'organic', or compliance with fair labour conditions.

The work of millions of small and medium farmers worldwide is organised around cooperative associations that sell their produce through contracts. In 2012 the United Nations declared that year as the International Year of Cooperatives, mentioning that agricultural cooperative associations are essential for improving food security, the reduction of poverty, and the creation of employment and opportunities. In Bolivia, the legal framework has been designed to help and recognise rural cooperative associations, particularly those of indigenous origin.[1]

While efforts for improving food security and the standard of living of farmers tend to focus on economic factors, contract farming allows us to focus on legal aspects as well. In that sense, the International Institute for the Unification of Private Law (UNIDROIT) published, together with the International Fund for Agricultural Development (IFAD) and Food and Agriculture Organization of the United Nations (FAO), the 'Legal Guide on Contract Farming' (2015), with the aim of improving the contractual relationships between agricultural producers and buyers.

In most countries contract farming is not specifically regulated.[2] In Bolivia the only specific regulation on contract farming is found in the cane industry, where farmers deliver their produce to a mill, by way of a '*maquila*' contract, which allows them to retain ownership of the goods throughout the transformation process, and collectively negotiate a future sale price.[3] Regulation in other sectors in Bolivia, such as the dairy and soy business, could bring positive results, since there are many producers and few buyers, which creates a scenario of potential violations of contract and competition legal principles. At the same time, in the high lands of the Altiplano, where agriculture is dominated by associations of small and medium indigenous farmers, contract relations, being verbal or written, involve the complexity of cultural differences between producers and buyers.

In general, the Bolivian model seeks to preserve and rehabilitate (at least in theory) peasants and indigenous uses and customs. In that sense, regulation has been enacted to articulate a model of plural economy and legal pluralism, which aims to recognise alternative forms of production and association, and legal self-determination.[4] At the same time, the state has issued environmental regulations, such as the Law on the Rights of Mother Earth, granting rights to the ecosystem.

In the financial sector, financial institutions have to grant agricultural loans to small and medium farmers, using stored produce, or executed forward delivery contracts, as collaterals.[5] However, the legal insecurity regarding land tenure, and the impossibility in many cases to use it as collateral, remain a core problem. The lack of coordination between state entities and incompetent data management force many land owners and farmers to endless regularisation processes, which is at least part of the reason why Bolivia is in the 143rd position out of 189 in the 'Doing Business Report' of 2016 for registering a property. This of course makes it difficult to use land as collateral. Access to credit becomes even harder for small producers, because the Constitution forbids small agricultural lands to be seized.[6]

Regarding land extension, the Constitution establishes a cap of 5,000 hectares per person. Companies may have larger extensions, provided that the division of the total extension among the number of stockholders is equal to or less than 5,000 hectares.[7] There is no clarity as to what happens if one stockholder owns the majority of stocks, or incorporates more than one company.

Notes

1 The Political Constitution establishes a model of plural economy, highlighting the importance of peasant, indigenous and communitarian modes of production (see for instance the preamble of the Constitution, and articles 306 and 307). Following the Constitution, see Law on the Agricultural Communitarian Productive Revolution (Ley de Revolución Productiva Comunitaria Agropecuaria; 2011), and Law on Economic Peasant, Original and Indigenous Organisations, and Economic Communitarian Organisations (Ley de Organizaciones económicas campesinas, indígena originarias – OECAS y de Organizaciones económicas comunitarias – OECOM; 2013).

2 'Different countries have arrived at different definitions and conceptions of contract farming, and have chosen to regulate it in very different ways' (C Pultrone, (2012), 'An overview of contract farming: Legal issues and challenges', *Unif L Rev*, 17, 263). However, there is some evidence that most domestic legal frameworks would address and regulate contract farming specifically as such.

3 See Law No 307 on the Cane Cluster (Ley del Complejo Productovo de la Caña de Azúcar; 2012), and the Supreme Decree No 1554 that regulates Law No 307 (2013).

4 See for instance, Preamble of the Constitution, and articles 1, 178, 306 and 311, as well as Law on Autonomy and Decentralisation (Ley Marco de Autonomías y Descentralización; 2010).

5 See for instance, Law on Financial Services No 393, and regulation enacted by the Financial Regulatory Agency (Autoridad del Sistema Financiero-Asfi; www.asfi.gob.bo), and the Productive Development Bank (Banco de Desarrollo Productivo; www.bdp.com.bo).

6 Article 394.

7 Article 315 of the Constitution.

Luanda Backheuser

De Luca Derenusson Schuttof e Azevedo, São Paulo

luandabackheuser@ddsa.com.br

Camilla Redoschi de Souza Brandão

De Luca Derenusson Schuttof e Azevedo, São Paulo

camillabrandao@ddsa.com.br

Brazil

Brief summary for the acquisition by foreigners, and Brazilian entities controlled by foreigners, of rural property in Brazil with legal assurance

Considering each country has its own legal system and unique aspects to real estate property purchase, this paper aims to present basic notions about the acquisition of rural estate property in Brazil by foreigners and Brazilian entities controlled by foreigners. The myths and truths regarding the purchase by foreigners and Brazilian entities controlled by foreigners will be approached to provide basic but essential knowledge about real estate property purchase in Brazil and ensure it will be used properly, and will not become a problem in future.

Introduction

The choice of Brazil is justified as, in the last 12 months, real estate prices increased by an average of 0.65 per cent. The inflation measured by the Broad Consumer Price Index (IPCA) should close the same period with an increase of 5.49 per cent, according to the Brazilian Central Bank: in other words, when the effect of inflation is considered, the index shows that real estate should have a real price drop of 4.58 per cent.[1]

To briefly present the Brazilian aspects relating to the acquisition of a rural area by foreigners and Brazilian entities controlled by foreigners, it is important to outline the real estate system and applicable legislation.

Real estate property in Brazil

The main sources of law related to real estate can be found in the Federal Constitution of 5 October 1988 ('Brazilian Federal Constitution' or 'Magna Carta'), Law No 10.406/2002 ('Brazilian Civil Code'), Law No 10.257/2001 ('Urban Properties Rules Law'), Law No 4.504/1964 ('Rural Properties Rules Law') and Law No 5.709/1971 'Acquisition of Rural Property by Foreigners Law').

It is important to mention that, although the right to own real estate in Brazil is guaranteed by the Brazilian Federal Constitution, ownership rights are not absolute since it is subject to restrictions on land use and to the principle of the social function of property (in Portuguese, *Função Social da Propriedade*), which establishes that the property not used in accordance with what its social purpose may be is subject to an expropriation procedure by relevant authorities.

The ownership of a given real estate property is formalised by the title of the land duly registered before the Real Estate Registry Office in charge of a given territorial jurisdiction. In this sense, it is assumed that if the transfer of title is not registered, as mentioned, it is not possible to declare that the acquirer is the legal owner, being qualified only as mere possessor.

Taking into account the above considerations, foreigners may acquire urban real estate properties in Brazil in the same conditions applied to national individuals and/or companies. However, specific conditions may be applied when the real estate property to be acquired is located in a rural zone, near to the Brazilian coast or borders, or with respect to specific regions designated as areas of national security.

Therefore, considering the relevance of this matter, this paper will present a legal background related to the restrictions imposed for the acquisition of Brazilian rural properties by foreigners and Brazilian entities controlled by foreigners.

Foreigners' restrictions with respect to the acquisition of rural properties in Brazil

Brazilian regulation over the purchase of land by foreigners was first brought into force by the Brazilian Federal Constitution of 1967, which not only authorised the government to control the acquisition of rural properties by foreigners, but also authorised the government to regulate such acquisitions by nationals, in order to assure the achievement of the policies set forth as goals by the government; that is, integrity of the national territory, maintenance of national security, and fair distribution of the properties. It is important to point out that this Federal Constitution did not prohibit or create restrictions to the acquisition of rural properties by foreigners.

With the Acquisition of Rural Property by Foreigners Law, regulated by Decree No 74.965/74, several restrictions and peculiarities to the acquisition of rural properties by foreigners were created; for example, restrictions about the size of properties to be acquired and about the purpose that will be given to the land.

In short, it is possible to state that:

> 'Brazilian Law did not intend to prohibit acquisition of rural real estate property by foreign companies. It chose to allow it under regulation intended to control occupation of rural areas by such companies. Accordingly, acquisition of rural real estate property by such companies is sometimes referred to as full purchase because it is conditioned to the execution of an agricultural or industrial project. In turn, there is no limit for acquisition of real estate by foreign legal entities. Article 3, which limits purchases to 50 modules, refers to purchases by individuals'.[2]

Based on that, in acquisitions of rural properties by foreigners, the restrictions set forth by the Acquisition of Rural Property by Foreigners Law should be strictly followed, and the deed of purchase that shall be drawn up by the notary public must contain all elements provided for as per the Acquisition of Rural Property by Foreigners Law under penalty of being deemed null and void.[3]

Please be informed that paragraph one to Article 1 of the Acquisition of Rural Property by Foreigners Law equalises foreign-controlled Brazilian companies to foreigners for matters of acquisition of rural properties.

After that, the discussion about the purchase of rural property by foreigners gained new momentum in the 1980s, with the promulgation of the Brazilian Federal Constitution. Questions about the acceptance or not to the Acquisition of Rural Property by Foreigners Law by the Brazilian Federal Constitution were raised and, given that the Magna Carta provided for different treatment between domestic persons and companies on one side, and foreigners on the other (particularly in article 190[4]), it is possible to conclude that the Acquisition of Rural Property by Foreigners Law was accepted, once there were legal grounds to impose distinctions and restrictions to the acquisition of properties by foreign companies under the new constitutional regime.[5] This position is inclusive, followed by the best doctrines, as well as the Superior Courts.[6]

However, the acceptance to the Acquisition of Rural Property by Foreigners Law cannot be related to its entirety. At first, under the new premises set forth by the Brazilian Federal Constitution, in particular those set forth in Article 171, the differences between Brazilian companies with domestic equity on one hand, and Brazilian companies with foreign equity on the other, has significantly changed. Despite defining restrictions for Brazilian companies with foreign equity, the Federal Constitution of 1988 provided for cases where Brazilian companies with domestic equity should be awarded better conditions if engaging in competition with Brazilian companies with foreign equity.

As a result, the restriction provided for in paragraph one to Article 1 of the Acquisition of Rural Property by Foreigners Law mentioned above had its effectiveness removed to the Brazilian legal system, as it violates the concept of Article 171.

This was also the understanding advocated in the first opinion submitted by the General Attorneys' Office on the matter (Opinion no AGU/LA-04/94, of 7 June 1994).

In view of the foregoing, and upon the enactment of the Federal Constitution of 1988, the Acquisition of Rural Property by Foreigners Law was accepted into the new legal structure, except for paragraph one to Article 1 thereof, which was deemed conflicting with Article 171 of the Federal Constitution.

Opinion CGU/AGU No 01/2008-RVJ of 3 September 2008

For a long time and due to an ideological perspective, the Brazilian federal government has shown its intention to reexamine and change its opinion specifically regarding the acquisition of rural properties by Brazilian entities controlled by foreigners. In this sense, on 3 September 2008, after a series of meetings held between the Ministry of Justice, the General Attorneys' Office and the Ministry of Internal Affairs, the General Attorneys' Office issued a new opinion on the acquisition of rural properties by foreign-controlled companies ('Opinion') but, as this Opinion was not ratified by the President, it did not create a binding understanding for all offices and bureaus subject to the coordination of the Executive Branch.

However, on 19 August 2010, the Ministry of Internal Affairs submitted a new opinion for President's review (CGU/AGU No 01/2008-RVJ), and it was ratified by the Brazilian President. Therefore, as of 19 August 2010, executive offices have to comply with the understanding of the CGU/AGU No 01/2008-RVJ, in order to consider Paragraph One to Article One of Law No 5,709/71 duly accepted by the new constitutional environment.

Under the new analysis, the correct construction of the constitutional provisions points out six arguments that sustain the acceptance of paragraph one of Article 1 of the Acquisition of Rural Property by Foreigners Law (which equalises foreign-controlled Brazilian companies to foreigners for matters of acquisition of rural properties):

(i) the compatibility of Paragraph One of Article One of the Acquisition of Rural Property by Foreigners Law with Article 171, II of the Federal Constitution;
(ii) the compatibility of Paragraph One of Article One of the Acquisition of Rural Property by Foreigners Law with Article 190 of the Federal Constitution;
(iii) the acceptance of paragraph One of Article One of the Acquisition of Rural Property by Foreigners Law by the Sovereignty Principle;
(iv) the compatibility of Paragraph One of

Article One of the Acquisition of Rural Property by Foreigners Law with Article 172 of the Federal Constitution;

(v) the compatibility of Paragraph One of Article One of the Acquisition of Rural Property by Foreigners Law with Article 5 of the Federal Constitution; and

(vi) the legislative process of passing of Law No 8.629/93.

Final comments

Up to the present, the understanding in favour of the receipt of paragraph one to Article 1 of the Acquisition of Rural Property by Foreigners Law, in light of the Federal Constitution of 1988 and, consequently, the equality of a Brazilian company whose majority of the capital stock is in the hands of non-resident foreigners or foreign legal entities not authorised to operate in Brazil to foreign companies is in force.

However, due to the need to open the country to foreign investments, especially in the agribusiness market, there are currently several bills of law being reviewed by the committees at Congress that attenuate the restrictions for Brazilian companies with foreign equity to buy rural land.

Notes

1 See http://exame.abril.com.br/seu-dinheiro/precos-de-imoveis-tem-queda-real-de-458-nos-ultimos-12-meses.

2 Olavo A de Lima Rocha, *O Imóvel Rural e o Estrangeiro* (São Paulo: LTr 1999), 104.

3 'With respect to nullity provided for in the legislation that regulates foreigners' purchase of rural real estate property, defects and deficiencies of legal actions performed in default to a restrictive rule are null and void for all legal purposes, be it as regards defects in substance, be its as regards defects in form, which virtually eliminates the possibility of annulment or curing of actions performed in violation to the law. As a result, provisions contained in Law 5.709 such as: a public deed of indenture being of essence to the transaction (Arts 8 and 9); prior consent from the CSN for borders and national security areas (Article 7); limitation of areas to individuals and legal entities (Article 3 and 12); residence, for individuals and authorisation, for legal entities, as essential requirements (Article 1); registry office's requirement of special enrolment of purchase of rural land (Article 10) entail that failure to meet the legal provisions and its requirements lead to nullity and penalties pursuant to Articles 11 and 15 of Law No 5.709 and Article 6 of Law No 6.634, of May 2, 1979' (Vicente Cavalcanti Cysneiros, *Direito Agrário no Brasil – Aquisição de Imóvel Rural Estrangeiro* (Brasília: Fundação Petrônio Portella – MJ, 1982, 99).

4 Article 190: 'The Law shall regulate and limit acquisition or leasing or rural real estate property by foreign individuals and legal entities and shall establish the instances that shall depend on authorization by the National Congress.'

5 The new wording provides for a similar text to paragraph 34 of Article 153 of the Federal Constitution of 1967. However, we shall note that the restriction for the leasing of properties was added. Some restrictions to Brazilian people and companies were definitely excluded from the text, granting them full right to purchase rural properties.

6 Superior Court of Justice, Appeal for Clarification of Ruling in Writ of Mandamus No 5831/SP, Reporting, Justice José Delgado, First Panel, tried on 05/23/1997, DJ 08/18/1997 p 37781.

Law firms in a corruption-fighting environment

Valdo Cestari de Rizzo

Lobo & de Rizzo Advogados, São Paulo

valdo.derizzo@loboderizzo.com.br

Upon acceptance of writing this article, it took me a few days to decide on a topic related to the practice of law in Brazil that could be of interest to the community of lawyers worldwide.

The inspiring insight came when I read an interview with the former President of the International Bar Association (IBA) David W Rivkin, recently published by the *Latin Lawyer* magazine, where David talks about his recent trip to our continent, this time to Chile and Argentina, to speak with some notable local lawyers about his plan to battle corruption in judiciaries across the world. The initiative, which is led by the IBA and attempts to understand the types of corruption that affect the judicial system and proposes steps to counter it, is quite welcome, especially in Brazil, where many ethical values are currently being questioned.

The genesis of the issue, corruption, is without doubt a subject that is currently at the centre of the Brazilian public's attention. The corruption scandals that the Federal Police and the Federal Public Prosecutor's Office in Brazil have been unravelling have been printed on the front pages of the most influential newspapers around the world.

An underworld has been revealed to the Brazilian public which, in my opinion, not even the most malicious and suspicious minds could have imagined had been installed within the Brazilian state.

If we take as a basis the indictments and charges that have been reported, it does not seem reckless to assume that the recently democratically-elected governments in Brazil not only allowed but, above all, made use of corruption to achieve their goals, whatever they might be.

The sad news pieces broadcast daily by the Brazilian press are revealing state governors who have amassed fortunes; former Brazilian presidents that have benefited themselves with a wide range of favours from companies that depend directly on the government to develop their businesses; 'agents of political parties', who collect fortunes from companies that maintain direct interests with the government to finance their campaigns; and, inter alia, Brazilian senators who have their expenses paid for by private government contractors. In sum, a tangle of interests and webs of corruption are being unveiled by young prosecutors and judges, who have demonstrated such willingness and (why not say it?), courage, which has turned them into popular idols of a nation used to seeing their rulers and politicians enrich themselves throughout their public careers and go on unpunished by our judicial system.

In addition to the solid legal education of these young members of the judicial system, I dare say that the fact that they belong to the first generation of legal professionals who have been educated under the rule of law with a foundation on a democratic system gave them confidence in the institutions to which they have entrusted their careers. As a result of this talent and preparation, and because of the varied and numerous crimes committed, their actions and decisions have received much-deserved support from the higher courts, despite the violent pressure Brazilian politicians (and probably their 'sponsors') have exercised to discredit and even demoralise these young prosecutors and judges.

There are a few jokes and innuendos that we Brazilians have sometimes been subjected to, to the effect that 'Brazil can't do any better', and that 'Brazil is just like that', and so on. As I have had numerous opportunities to highlight, sometimes speaking to audiences abroad, I do not hide my embarrassment with what is going on in our country, but I have great pride in the treatment that the individuals and entities involved in these scandals have received from our authorities. These corruption scandals involve not only Brazilian companies, but also many multinational companies that, apparently, upon coming across environments more receptive to corruption, adopt these irregular practices, believing in the impunity that, we hope, will one day just be a bitter reminder of a past that should be banned forever.

I must emphasise that I am very proud to see that a young nation which has experienced democracy only for a few decades, and with so many complexities like Brazil, is taking care of its own problems in accordance with the rule of law within its institutions, without any aggression to the rules established by the Federal Constitution.

It is obvious that the most significant victims of this corruption are the numerous Brazilian children who have no access to better quality public education, the impoverished among us who, when seeking out medical treatment in public hospitals, must cope with obsolete hospitals that have no basic equipment or medicines and poor infrastructure. In sum, many of the problems that a young nation has to face in order for its citizens to have a dignified life and to enable them to raise their children in a better environment.

Changing the subject slightly to leave the political sphere and enter the arena of our readers, I would like to share with my colleagues my thoughts with regard to some changes that the practice of law has come to face in recent years. Such changes, I believe, were heavily influenced by this genuine moral crisis that the business environment (and, without a doubt, the political environment) in Brazil has been going through since the beginning of this century. The reader may rest assured that such issues have always somehow underpinned the local business environment, but not with such intensity and frequency.

This weakening of the of the business customs should not be seen as a coincidence, but the result of the erosion, by society, of the ethical values that we lawyers swore to defend when we received our licence to practise.

I dare not speak of corruption in the judicial system, for several reasons. The first and most obvious reason is that, because of my area of practice (M&A), I rarely work in litigation. However, I could not disregard the numerous criticisms of the courts from colleagues who I consider to be free from suspicion. Still, without dwelling too long on the subject, I also consider these to be very serious accusations, which I would not dare to explore. I just hope that David's initiative also reaches Brazil, where I am sure it will gain strong support from the legal community.

But let us go on to transactional practice, which many colleagues believe to be immune to this environment. In addition to the changes that transactional practice has gone through in recent decades, be it because of the new needs of our clients, or because of increased competition (which, in my view, is very beneficial to the development of transactional practice in Brazil), I am convinced that the corrupt environment of the Brazilian economy has devalued the lawyer's role, despite the fact that we live in a legal system that is more complex and sophisticated than the legal environment in which I began my career in the 1980s.

Accordingly, when we compare an M&A transaction (regardless of the amounts involved) conducted in the 1980s with a transaction conducted in this second decade of the 21st century, we come across a list of issues that are considered much more complex than what we used to see in the 1980s. Environmental issues, competition issues, capital market regulations, to name a few, when there were any, were much simpler in the 1980s and 1990s than they are today. Thus, it would be natural for our role to be more valued today than it was when that environment was less complex and sophisticated.

In spite of this, I believe that, in an environment where (as we are discovering) in many deals, especially those involving the government (on a federal, state and municipal level and in its various facets, such as public companies, development banks and the pension funds of these state-owned enterprises, which I personally consider to be a branch of the state), the cards may be marked and, as a consequence, the agreements behind the scenes may end up prevailing over the talent and creativity of lawyers seeking out solutions that meet their clients' interests. In sum, shouldn't we ask ourselves if we are really in charge of such transactions?

However, the impacts are not limited to this affront to our sense of professionalism, morality and ethics.

The effects of this scenario on our profession and, consequently, on our firms, are certainly much more harmful than we can imagine. In an environment where the law as practised by ethical lawyers who value talent and the quality of their services are thought equivalent to those lawyers who simply 'reach the goals', all those values that we revere and on which we have built and maintain our profession are reduced to a low level, when not simply ignored. Lawyers who 'do not disturb' are sometimes more valued than those lawyers who understand the complexity of the situations and warn their clients about the real risks that companies committed to ethical values have an obligation to avoid.

These implications directly affect the values that we prize in our firms and, consequently, the training that we provide to our young lawyers, which, in my view, is one of the most important roles we play as lawyers and as individuals in the business of practising law.

I am certain that many of my colleagues, with whom I share the highest values of our profession, are aware of the challenges facing business law in a complex environment, such as the one in which the Brazilian economy has developed into in this century. It is not currently enough to simply observe all the rules of ethics and to value our profession. We have to profess and disseminate these values in order for there to be no doubt regarding which side we are on and thereby pass on to future generations the values that allow our profession to deal with one of the most sacred values of modern society: justice.

André de Godoy Fernandes
Mattos Engelberg Advogados, São Paulo
andre.fernandes@mattosengelberg.com.br

New developments in private equity and venture capital

Summary

This article provides a brief overview of the private equity industry in Brazil and updates on the regulatory environment of equity investment funds (*Fundos de Investimento em Participações*, or FIPs in Portuguese) considering the new rules issued in August 2016 by the Brazilian Securities Commission.

Introduction

The private equity industry in Brazil is relatively new, as it is in a number of other developing economies. Private equity had a surge in the mid-1990s, and only more recently gained importance in Brazil as an investment method (risk capital) and source of financing for companies (as an alternative to loan financing).

Private equity transactions can provide seed capital for a business project in the development stage, startup capital to establish a business, early-stage capital as the business gets going and even bridge financing as a business prepares for a potential public offering.

Private equity is a medium to long-term investment in companies with high growth potential. Venture capital, on the other hand, is a method of investing in companies in their early operational or development stage.

Both types of investment have certain aspects in common, including:

- administration of private investor funds;
- investment in equity interests (shares or other securities convertible or swappable for shares) in publicly traded and closely held companies during different stages of their development;
- participation in the management of the companies that are invested in to help them grow; and
- divestment through the sale of equity interest after a given period (normally from five to ten years), obtaining an attractive profit.

Brazilian private equity and venture capital funds currently invest billions of reals. According to information from KPMG and the Brazilian Private Equity & Venture Capital Association (*Associação Brasileira de Private Equity & Venture Capital*), or ABVCAP,[1] the invested capital of these funds has grown consistently in recent years, from R$100.2bn in 2013, to R$126.9bn in 2014, to R$153.2bn in 2015. In 2015, 57 per cent of total invested capital originated abroad, which was a slight increase from 56 per cent in 2014.

Additionally, private equity and venture capital funds are responsible for a significant percentage of transactions to acquire equity interests in Brazil. According to information from PricewaterhouseCoopers,[2] in 2015, private equity funds participated in 221 of the total of 742 transactions counted. This was a one per cent decrease from 2014, when these funds participated in 224 transactions. During the first six months of 2016, private equity and venture capital funds participated in only 54 of a total of 287 of these transactions in Brazil. This was a significant reduction, down 63 per cent from the same period in 2015.

Regulation of private equity and venture capital

The first regulations governing private equity and venture capital funds in Brazil were issued by the Brazilian Securities Commission (*Comissão de Valores Mobiliários*), or CVM, which is the agency responsible for regulating the Brazilian capital market, with Instruction 209 of 1994, which governs Emerging Company Mutual Investment Funds (*Fundos Mútuos de Investimento em Empresas Emergentes*), or FMIEEs.

Later, in 2003, the legal structuring of private equity and venture capital funds was helped when a new legal entity called an Equity Investment Fund (*Fundo de Investimento em Participações*), or FIP, was created by CVM Instruction 391. Unlike FMIEEs, which had limited applicability because they were intended for the specific purpose of holding an equity interest in emerging companies, FIPs were more flexible because they could be used to make various types of investments, including in assets related to emerging companies. There was no limit on the size of the company invested in.

CVM Instructions 406 of 2004 and 460 of 2007 created new types of FIPs: Infrastructure Equity Investment Funds (*Fundo de Investimento em Participações em Infraestrutura*), or FIP-IE, and Equity Funds for Investment in Intensive Economic Production in Research and Development (*Fundo de Investimento em Participação na Produção Econômica Intensiva em Pesquisa e Inovação*), or FIP-PD&I.

Finally, in 2005, Brazilian Securities Commission Instruction 415 amended Instruction 2009 of 1994 and dealt with Investment Funds in Innovative Emerging Companies (*Fundos de Investimento em Empresas Emergentes Inovadoras*), or FIEEIs.

Initial regulation of FIPs

Because of its importance, it is appropriate to analyse in a little more detail CVM Instruction 391 of 2003, which created rules for establishing, operating and administrating FIPs.

Under Instruction 391, the main characteristics of FIPs are:

1. FIPs must be structured as closed-end *condominium*, with a pre-established date for termination, and must be registered with the CVM, which is the body responsible for authorising their operation. The fund's name must include the words '*Fundo de Investimento em Participaçoes*' [Equity Investment Fund].
2. FIPs can acquire shares, debentures, warrants or other securities convertible or swappable for shares issued by publicly traded (listed) or closely held corporations (*sociedades por ações*); FIPs cannot, however, invest their funds abroad, in the acquisition of real estate properties, or to subscribe for or acquire their own shares. FIPs cannot conduct transactions with derivatives, except if the transaction is exclusively to hedge assets, and they cannot make or receive loans, except under the circumstances defined by the Brazilian Securities Commission.
3. When FIPs invest in closely held corporations, these entities must adopt minimum corporate governance rules. These rules include, among other things: (a) no founders' shares; (b) a unified term in office of one year for the board of directors; (c) availability for inspection of agreements with related parties, shareholders' agreements and stock option programmes; (d) use of the arbitration board to resolve corporate conflicts; and (e) annual audits by independent auditors registered with the Brazilian Securities Commission. The corporations invested in can be listed for trading only on the special segment of stock exchanges or organised, over-the-counter markets, such as the Differentiated Levels of Corporate Governance of the São Paulo Stock Exchange.
4. FIPs must participate in determining the strategic policy and in the management of the corporations invested in, particularly by appointing members to the board of directors. For this purpose, FIPs can (a) hold shares that are part of the respective controlling block; (b) sign shareholders' agreements; and (c) enter into other agreements that ensure their influence in determining the strategic policy and participation in the management of the company invested in.
5. An FIP's administrator must be a corporate entity authorised by the Brazilian Securities Commission to work in the administration of securities portfolios. The same entity can serve as the fund's administrator and portfolio manager. Alternatively, the fund administrator can hire a third party to serve as the portfolio manager. This third party must also be authorised to serve as portfolio administrator by the CVM. The fund's administrator and the portfolio manager will be liable for losses suffered by the quotaholders when they result from negligence or willful misconduct, with a violation of the law, of the rules issued by the Brazilian Securities Commission or of the fund's by-laws.
6. FIP quotas can be distributed through public or private issuance. When they are distributed through private issuance, the quotas can be traded only privately and the administrator is responsible for proving that the acquiring party is a 'qualified investor'. When they are placed through public issuance, the quotas can be traded privately, on a stock exchange or on an organised, over-the-counter market.

New regulations governing FIPs

To unify and improve existing regulations governing FIPs, after a long consultation process, the Brazilian Securities Commission issued Instruction number 578 ('Instruction 578') at the end of August 2016. Instruction 578 governs the establishment, operation and administration of FIPs and revokes CVM Instructions 391, 209, 406 and 460, among others.

The main changes introduced by Instruction 578 include:

1. Mandatory classification of FIPs according to the composition of their portfolios and an indication of their category in their name: FIP – Seed Capital; FIP – Emerging Companies; FIP – Infrastructure (FIP-IE); FIP – Intensive Economic Production in Research and Development FIP-PD&I; and FIP – Multi-strategy.
2. The possibility of investing in simple debentures (not convertible into shares), limited to 33 per cent of the capital subscribed for, with no such limit for FIP-IE and FIP-PD&I funds.
3. The possibility of making Advances for a Future Capital Increase (*Adiantamentos para Futuro Aumento de Capital*), or AFAC, in the companies that are part of its portfolio, as long as certain conditions are met.
4. The possibility of investing in certain assets abroad, which are of the same economic nature as the other FIP assets, limited to 20 per cent of the subscribed capital (with no such limitation for FIP – Multi-strategy funds in certain cases).
5. The possibility of FIP – Seed Capital and FIP – Multi-strategy funds investing in limited-liability companies.
6. Greater flexibility in the requirement for influence on the companies invested in, with the FIP not having to participate in the company's decision-making process: (a) when the FIP's investment is reduced to less than half of the percentage originally invested and comes to represent less than 15 per cent of the capital invested; or (b) when the book value of the investment has been reduced to zero and quotaholders representing the majority of the FIP's quotas give their approval at a general meeting.
7. The possibility of obtaining loans from development agencies that financially support the fund, limited to an amount equivalent to 30 per cent of the FIP's assets and with the possibility of using the funds to pay in quotas that quotaholders have subscribed for but not paid in.
8. Authorisation to create classes of quotas with different voting and economic-financial rights, depending on the type of investor.
9. Permission for any FIP to invest in quotas of other funds from the same category.
10. Broadening of the FIP's administrator's responsibilities and obligations with regard to hiring services related to an investment or disinvestment, as well as its activities for the pricing of the fund's investments.
11. Removal of the obligation to have a joint liability clause in the agreement between the FIP's administrator and portfolio manager.
12. An increase in the deadline for disclosing semi-annual and annual information, from 60 and 120 days, respectively, to 150 days.

Supplementary to the new FIP regulations, the CVM also published Instruction 579 ('Instruction 579') at the end of August 2016. Instruction 579 deals with the preparation and publication of FIP financial statements. As a general rule, FIPs must use the accounting criteria for recognising, classifying and measuring assets and liabilities, for recognising revenue and for allocating expenses, as well as the requirements for disclosure, that are provided for in the accounting standards issued by the CVM that are applicable to publicly traded companies. Among other things, Instruction 579 provides for the creation of specific requirements for classifying FIPs in investment entities and the application of accounting standards and standards for measuring assets according to that classification.

FIPs must adapt to Instruction 578: (a) within 12 months of the date of its publication; or (b) immediately, if an already-operating FIP begins a public offering of quotas. Instruction 579 will apply to the accounting periods beginning on or after 1 January 2017.

Emerging Company Investment Funds that are already in existence can continue operating without adapting to the new rules. However, the date for the termination of their operation cannot be extended unless the companies invested in comply with the new regulations.

With the publication of Instructions 578 and 579, the CVM is seeking to modernise FIP regulations and encourage private equity and venture capital funds to invest in Brazilian companies. There is no doubt that strengthening the private equity and venture capital industry can provide a viable alternative for capitalising new companies and small and medium-sized ones. Private equity and venture capital investments also tend to improve the management of the companies being invested in, with the implementation of good corporate governance practices, and to create value for those companies by developing their business and increasing their profitability.

Notes

1 See www.abvcap.com.br/pesquisas/estudos.aspx.

2 See www.pwc.com.br/pt/estudos/servicos/deals/fusoes-aquisicoes.html.

Regulatory issues: how to deal with compliance

Clarice Andrade
Demarest Advogados, San Pablo
ccortez@demarest.com.br

Introduction

Compliance policies have gained relevance for the execution of any successful business around the globe. More and more companies now require their business partners to have compliance policies in place, take compliance training and even have third parties to agree to comply with their own rules in order to make a deal. This is especially true in Brazil, where numerous corruption schemes have emerged in the last few years, leading to a major political and economic crisis.

Compliance programmes are both market and business requirements in view of the vast consequences of an infraction in a company's business. Just see how many companies have gone through a corporate restructure after a BCCA or Foreign Corrupt Practices Act (FCPA) infraction.[1]

The aim of this article is to analyse the compliance aspects that should be examined during mergers and acquisitions (M&A) due diligence, considering common questions raised by businesses that are subject to compliance regulation, such as: what should be investigated during a compliance due diligence? What should the buyer evaluate in the seller's compliance policies? What are the benefits of having a well-structured compliance programme? And lastly, how does that affect an M&A operation? The answers to those questions are detailed below.

Compliance in M&A operations

When a company is acquiring another, it should be aware of the risks involved in the transaction that will be transferred to the new controller, including compliance risks. The problem is that these risks are not as clear as 'typical' risks, such as labour or litigation risks, which are usually documented and calculated.

The role of compliance in an M&A operation is twofold: executing a compliance due diligence to verify the seller's conformity to the applicable norms and policies; and following the rules while conducting the due diligence.

Compliance risks rely on the existence and efficiency of a compliance programme and should be evaluated by means of a compliance due diligence. This will frequently include checking the company's public records (tax and commercial registers, legal claims), reviewing processes and documentation, visiting establishments, and interviewing employees and third parties.

This requires access to a great amount of the seller's sensitive data at a point where the parties are still evaluating the possibility of a deal; thus, the parties should reach an agreement about what information they wish to share/analyse and to what extent, how this information sharing is taking place, which costs will be borne by whom, rights and obligations, and confidentiality obligations. This should be formalised and signed by both parties, giving the seller enough safety to share information and plenty of material for the buyer to proceed with the deal.

Should the buyer find indicators that the seller (a direct employee or someone on the seller's behalf) is involved in an illegal transaction, the buyer should evaluate what measures should be taken in order to mitigate its liability: requiring the buyer to completely cease the infraction in case the acquisition is done; (re)structuring the compliance programme; removing the responsible individuals from the company; and notifying the authorities (voluntary self-disclosure).

The buyer should also make a cold analysis of the impact of this infraction in the seller's price and image before the market, which could jeopardise the deal as a whole. It is common that buyers are taken by the heat of the moment and end up ignoring or giving little importance to red flags that are revealed along the due diligence.

In the event the infractions committed by the seller are detected by the authorities, the buyer could be liable for those infractions if it consciously ignored it or did not execute a sufficient analysis of the information provided. If, however, the buyer proves it conducted a thorough due diligence and took appropriate measures to mitigate the discovered risks, it could be exonerated. It is important to keep records and documents that corroborate with the buyer's defence.

Either way, the buyer should always be careful when examining the seller's assets and risks. The growing inspection of anti-corruption measures around the globe has increased the spectrum and price of the due diligence process, especially because compliance risks are not so easily identifiable.

Acquiring a company involved in compliance infractions could seem like a good deal when its price is depreciated in the market, but could ultimately backfire and stain the buyer's image in the market. As noted by Paulo Rocha:[2]

> 'Opportunities in markets in transition such as Brazil bring higher risks. Shareholders that wish to entertain sale proposals would also benefit from adopting higher compliance standards which will reduce such risks and ultimately allow for a higher price for their businesses.'

Whether you are buying or selling, it is necessary to uncover these breaches and remediate by means of a meticulous review of the instruments adopted by the seller. This is when compliance due diligences come under the spotlight.

Compliance due diligence

One of the points to be analysed in a compliance due diligence and a good indicator of the seller's good standing is the existence of a compliance programme. A compliance programme is the backbone of a company's culture and will ultimately define how its employees behave towards delicate circumstances that could result in infractions.

Hence it is essential that a potential buyer analyses whether the seller has a compliance programme in place and whether this programme contains adequate and sufficient measures.

Elements

A compliance programme should be robust enough to contain adequate proceedings and responses to avoid, prevent, monitor and sanction potential infractions. It shouldn't be expected to avoid all kinds of infractions, but rather to identify them promptly and determine organised procedures to minimise their risk.

The diverse nature of businesses together with the growing globalisation of markets and deals makes it incredibly difficult to assess all risks a company is subject to. Each company faces different situations every day, arising from their activities, markets where they act and their clients and business partners' peculiarities.

In this context, it is vital to discuss the challenges faced by those who act on the company's behalf, such as employees and third parties. Understanding the specific circumstances of the business will help identify and rank the most relevant risks related to the company's activities and develop a plan for mitigation.

Although there is no single solution for structuring a compliance programme, many international and governmental bodies agree on five features which indicate the company's commitment to observe and follow the rules. These features should be examined by the buyer during an M&A due diligence to verify whether the seller's existing compliance policies are robust enough to mitigate the risks it is exposed to.

Commitment by high-level executives

One main aspect to be considered regarding compliance policies is whether they are supported by high-level executives.

Compliance policies should be implemented 'top-down'; executed with the support of high-level executives; and widespread to the whole company. The behaviour of high-level executives will set the tone of the company's culture for all-level employees and outsiders – third parties, distributors, representatives, clients and market.

If the executives seem to disregard the compliance policies, showing lack of commitment to it, the employees will feel that these policies only work on paper and follow the lead. In this situation, the policies will be void and will not work for the company's benefit.

Executives may express their commitment by participating in compliance trainings, helping to broadcast the company's policies and procedures, reiterating the company's values in speeches and disseminating press releases. Also, it is especially important that everyone knows and attests that executives are not 'protected' because of their occupation and are equally liable for infractions.

The buyer should investigate what the employees think about executive involvement and commitment and how the executives behave outside of the corporate environment. This will show if the company is truly dedicated to its policies and if it is indeed intertwined with its culture. Therefore, anyone who works for this company or wishes to develop or maintain business relations with it should adjust to this culture and comply with the applicable rules.

Analysis of profile and risks

The main objective of structuring a compliance programme is to mitigate the risks of undesired conducts.[3] For such, it is essential to know which conducts and risks are trying to be avoided and understand how they work.

This means knowing what the main activities executed by the company are, which ones are subject to the most serious risks, what parties are involved in these activities, what are the usual circumstances and procedures, what inspections is it subject to, what has gone or could go wrong during its execution and other relevant aspects that could help in developing a mitigation plan.

These risks could be linked to external factors, such as the company's segment, governmental relationship, business model or cultural aspects; and/or internal factors, such as history of investigations, level of turnover and poor knowledge of the company's policies. It is possible that the main risks do not result from a company's primary activity; or that certain procedures that have been used for years are currently non-compliant with the applicable norms.

This is an essential step for gathering information and developing a database for the compliance programme. The recovered information will support the design of effective internal controls for detection, prevention and sanction.

Rules and proceedings

Once the main risks are mapped, a company should determine appropriate rules, standards and proceedings to be followed in each case to avoid those risks. The company should have specific proceedings designed for areas that are more exposed – considering the activities executed and those who execute them, including accessible language and medium.

In addition to these specific proceedings related to the company's day-to-day activities, a company should also set processes to be followed on specific situations; that is, situations that are not part of the business core but could occur occasionally. This includes governmental relations, hiring third parties, gifts and hosting, accounting, M&A, sponsorship and donations.

The balance here is essential: if the rules are too strict or too bureaucratic, it could cause the employees to ignore or deliberately disregard it. The aim is to track enough information to enable control and detection, without asking so much that people feel it is an obstacle to business and feel discouraged to comply. The rules should be explained clearly and objectively so that everyone is able to follow the preferred process.

Department responsible for inspection

Another factor to consider is whether the company has a department that is responsible for inspecting and implementing the programme, and has sufficient authority and autonomy to do so. This is the authority responsible for receiving, investigating and responding to accusations submitted via the reporting channel.

That means not only having well-trained personnel responsible for this task, but also having enough resources allocated to this department so that these people are able to execute their work properly. The structure of this body should be assessed case by case, considering the company's specific risks, size and budget.

The compliance department must have enough autonomy to process and apply the appropriate sanctions without risk of retaliation or oppression. For this reason, it is appropriate to place it below a high-level administration body (to whom it will report), such as the board of directors or audit committee.

Continued monitoring

Because the practices, rules and traditions are subject to constant change, it is necessary to frequently monitor the application and effectiveness of the compliance programme in order to adjust it to the supervening needs. This is also the opportunity to revisit procedures and verify flaws, infractions and compliance with the applicable rules.

Monitoring can be executed by means of regular internal investigations, due diligence processes, analysis of reports drafted by the company itself or governmental and regulatory agencies, in addition to the complaints received via reporting channels. The frequency and detail of the instruments adopted should be determined according to the specific needs of the company; it should, however, be stricter for areas with higher exposure to risk.

Regardless of the monitoring instruments adopted by the company, the buyer should address the following questions:

- Has the seller ever reviewed its policies? How frequently?
- Is the department objective and impartial?
- Do monitoring processes contemplate all of the areas involved in the compliance policies?
- Were the results pointed to in previous monitoring processes considered and corrected?
- How is the company responding to the issues identified in the monitoring programme?
- Is there an action plan for correction and is someone responsible for the inspection of that plan?

The answers to those questions should help in identifying how committed the seller is to cover the breaches and constantly improve its compliance policies.

Benefits

A well-structured compliance programme shows that the company is committed to comply with the applicable rules, which is seen in a good light by the authorities. Also, organised processes and policies mean that the company gathers and maintains sufficient information about its activities and transactions, preparing to provide this information if requested. Hence the buyer can also benefit from conducting a detailed compliance due diligence, showing willingness to review practices and proceedings before acquiring a company.

It would be unrealistic to expect that every single person working for every company would manage to walk the line all the time. Instead, public authorities expect companies to put in place appropriate measures[4] to detect and prevent these infractions, providing the authorities with assistance with their self-regulatory devices. The same goes for buyers: authorities expect buyers to conduct a sufficient due diligence according to the budget, time and availability of documents, in order to identify and mitigate potential risks.

The benefits offered will vary according to the applicable law; however, it commonly involves the public authority diminishing the sanctions applied to the company or even celebrating non-prosecution agreements.

The BCCA followed the FCPA's lead, providing mitigated sanctions for those who voluntarily self-disclose. BCCA expressly states that the following actions can reduce the applicable fine: (i) level of cooperation of the private entity – one to 1.5 per cent; (ii) existence and application of an 'integrity programme' (compliance programme) – one to four per cent; and (iii) voluntary self-disclosure, before the filing of an administrative proceeding regarding the same infraction – two per cent.[5]

In Brazil leniency agreements and accomplice testimonies are popular instruments that allow that those who come forward to admit their wrongdoing and commit to help the authorities benefit in their administrative, civil and criminal proceedings.[6]

Under Brazilian law, it is possible to execute leniency agreements for anti-corruption and anti-competitive infractions.[7] In both cases, the company should help identify other parties involved and provide documents and information that support the existence of the investigated infraction. It is also required that the company is the first one to come forward,[8] admits to having participated, fully ceases its participation and cooperates with the authorities.

Accomplice testimonies are only available for natural persons, for it involves criminal liability (not applicable to legal persons in Brazil). A person could have his or her penalty reduced by up to two-thirds if he or she provides one or more of the following pieces of information: identification of other parties involved and crimes committed by them; disclosure of the hierarchic structure of the criminal organisation and task division; prevention of new criminal infractions; total or partial recovery of the product or result of the crimes; and location the victim with his or her physical integrity preserved.

Final considerations

There are several benefits to maintaining a well-structured compliance programme. Investing in compliance policies reveals the company has a mid to long-term commitment to keep business clean. This increases its credibility before other businesses and clients. Moreover, companies can benefit from their compliance policies in case of investigation or prosecution for an infraction.

Thus, buyers should be careful when evaluating a potential acquisition, considering the potential negative effects of a compliance infraction within their businesses. Analysing the seller's compliance policies properly during an acquisition can protect the buyer from liability.

Compliance is taking a central role in businesses as domestic and foreign authorities increase inspection and regulation. Companies are not only required to comply with internal rules, but also with norms enacted by different foreign officials by whom they are subject of inspection. The spectrum of regulated actions is becoming broader and companies could be held liable for actions they were not aware of.

With the growing consciousness about anti-corruption measures, it is no longer acceptable that a company does not maintain adequate procedures designed to prevent undesirable conducts. Simple actions can do a great deal for prevention and also allow mitigation benefits for a company. In the end, the benefits of compliance overcome the benefits of non-compliance.

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International Compliance Association – **www.int-comp.org**

Organisation for Economic Co-operation and Development (OECD) – **www.oecd.org**

Notes

1 One of the most emblematic cases is Wal-Mart's, where the company is said to have spent over US$600m to close a long-running FCPA investigation, see: www.bloomberg.com/news/articles/2016-10-06/wal-mart-said-to-balk-at-paying-600-million-plus-in-bribe-case, accessed on 16 November 2016.

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3 As in: Bruno Maeda, 'Programas de Compliance Anticorrupção: importância e elementos essenciais', in Alessandra Del Debbio, Bruno Carneiro Maeda, Carlos Henrique da Silva Ayres (Eds), *Temas de anticorrupção e Compliance*, (Rio de Janeiro: Elsevier, 2013), 186.

4 'Appropriate', according to the company's peculiarities.

5 The specific rules are set out in Decree No 8,420/2015, which regulates BCCA.

6 It is, however, not available for infractions under Improbity Law, such as illicit enrichment of public agents.

7 Law No 12,846/13 (BBCA) and Law No 12,529/11 (Competition Law).

8 If not, it could have its benefits reduced or not be able to sign an agreement at all.

Cayman Islands/British Virgin Islands

Mark Adams
Campbells, Cayman Islands
madams@campbellslegal.com

Philipp Neumann
Campbells, British Virgin Islands
pneumann@campbellslegal.com

2017 – a year for cautious optimism in Latin America?

Economic context

Latin America endured a challenging year in 2016. A combination of political crises and depressed oil prices meant that the region's gross domestic product (GDP) contracted by more than one per cent.

However, there would appear to be consensus that 2017 will be a better year. Commodity prices are anticipated to improve, and GDP is expected to expand by a similar percentage (if not more) than last year's drop, which was the biggest for more than five years.

Although overall deal flows were less in 2016, particularly in the venture capital and start-up sectors, the last quarter of the year and the beginning of 2017 have, so far, reflected the gradual change in the direction of the tide.

Cayman Islands developments

In the Cayman Islands, instructions from onshore (frequently through United States and LATAM law firms) have started to pick up.

One of the most common structures employed in this space is the 'flip-up'. This is where the founders of, say, a Brazilian start-up, will contribute their shares in that vehicle to a Delaware or Cayman corporate, with additional contributions and exchanges (if required) so that the final structure will comprise:

- a Cayman Islands holding company;
- a wholly-owned Delaware LLC intermediate vehicle; and
- (in the current example) the Brazilian company, wholly-owned by the Delaware LLC.

This enables investors to subscribe for shares in the Cayman company, allowing them to take advantage of the tax neutral position and regulatory flexibility offered by the Cayman Islands as a premier offshore jurisdiction. It is hoped that these structures will continue to prevail during 2017 as the Latin American economy expands again.

Campbells has considerable expertise in this field. We recently advised IguanaFix, an Argentine start-up, on a capital raising round involving an investment by Temasek Holdings.

British Virgin Islands developments

We have also seen an increasing demand for the use of British Virgin Islands (BVI) companies as holding companies within structures relating to real estate situated in the US, ultimately owned by Latin American clients.

It is also worth mentioning that the two new investment funds vehicles that were introduced in the BVI in 2015, being the approved fund and the incubator fund, gained traction in 2016.

By way of background, the BVI Government and the private sector have developed such new regulated fund vehicles to cater for family and friends structures and start-up investment managers, both of which are less regulated than other BVI investment funds, and offer simplified opportunities to pool investments on a more cost-efficient basis.

In this context, we have also seen increased interest in using the approved manager, a regulated vehicle for investment fund managers, which works well in conjunction with the approved fund and incubator fund, and also with Cayman investment funds.

It is anticipated that the current BVI Partnership Act will soon be replaced by a more modern and business-friendly piece of legislation.

Campbells

Campbells has offices in the Cayman Islands, the BVI and Hong Kong.

Together with our corporate service provider businesses in the Cayman Islands (Campbells Corporate Services Limited) and the BVI (Campbells Corporate Services (BVI) Limited), we are well-placed to provide full-service advice on all aspects of Cayman Islands and BVI law.

Colombia

Current challenges in Colombian labour and employment law

Mirna Wilches in collaboration with María Alejandra Anaya

Chapman & Asociados, Barranquilla

mirna.wilches@chapmanyasociados.com

maria.anaya@chapmanyasociados.com

Summary

Recently, the Colombian government has been facing major social issues that are potentially challenging the way our national legal system works. Although obligations derived from free trade agreements have always occupied a pivotal place in this area, outsourcing services are having greater impacts on Colombian society at present, because they are particularly affecting the domestic labour and employment regulation in force. In fact, outsourcing processes are currently defying the rigidity of Colombian employment law.

Introduction

This article aims to explain how outsourcing processes are useful, not only to reduce companies' operational costs, but also to satisfy unceasing labour demands in the Colombian post-conflict era. To do so, we will explain broadly the generalities of outsourcing in Colombia and its imminent effects on Colombian society today.

Outsourcing in Colombia: brief overview

In the last few decades, companies have been motivated to adapt their business administration's strategies to a more competitive and unstable context, due to the consolidation of new technologies and globalising trends, as well as the positioning of neoliberalism. In light of these circumstances, a new business organisation system has been favoured: outsourcing.

According to Troaca (2012), the outsourcing process is a comprehensive strategy used by companies to acquire competitive advantages and increased performance. This process can be applied in an international context as well as in a local one.

While international outsourcing implies the acquisition of material inputs or services from organisations located in other countries, the local outsourcing process is developed within the same jurisdiction, so that the companies obtain raw materials and services through different suppliers located in the same country. Even if they differ on geographical terms, their common asset is the delocalisation of labours and the division of production.

This particular system is special because it looks for the segmentation or externalisation of some productive processes through the collaboration of different companies, which are, in principle, independent of each other.

For fulfilling this purpose, entrepreneurs turn to outsource, decentralise or subcontract functions and activities, using a particular model of work organisation by which companies achieve their productive purposes by means of third-party workers. This process is characterised by:

- The segmentation of activities that in principle are part of a single production cycle. The company seeking to divide its operation is called the 'client'.
- The hiring of specialised companies or external suppliers by the client. These specialised companies are called 'contractors'.
- The coordination of activities by the clients, which are finally the beneficiaries of the work or service. Although segmented, the clients do not lose control over the operation (Ermida, 2009).

In Colombia, we can find a wide range of advantages for both the companies and the employees.

Advantages for companies

On the one hand, the great advantages of outsourcing are the increase of companies' competitiveness and efficiency, since these organisations will be focusing on executing solely the activities they have expertise on. The reduction of labour and operating costs is another crucial advantage.

On the other hand, one of the major negative issues concerning outsourcing is the fact that the workers could not be so well trained, so it could negatively affect the quality of production.

Although these organisational models tend to be linked to delimited tendencies or sectors, many of these correspond to real efforts of productive modernisation, as Octavio Racciatti (1997) points out. This kind of model cannot be outlawed but rather properly regulated, by observing people's civil rights and liberties.

Advantages for employees

Among the advantages for workers, we can find that subcontracting work may appear as an opportunity to create jobs, according to the Report of the 85th Session of the International Labour Conference on 'Subcontracting Work' in 1997. In addition, it is an instrument of flexibility, since it gives the possibility to workers to conciliate some personal activities with the duties of work.

Besides, subcontracted workers (employees of the contractor) could have the possibility to work directly with the company that initially outsourced some of its production's processes (the client), because this latter enterprise will prefer hiring the workers its staff already knows and with whom they have a prior relationship and experience, instead of going through a selection process from the beginning when there are new vacancies.

Therefore, we can find employment opportunities at the specialised organisations who offer outsourcing services (contractors), and also eventually or on a short-term scale, at the companies that tend to outsource some of their productive activities (clients).

General Colombian regulation on outsourcing

In Colombian labour and employment law, outsourcing, decentralisation or subcontracting is fully regulated.

On one side, Article 34 of the Colombian Labour Code regulates the 'independent contractors', which is a juridical figure available for employers that allows them to subcontract with third parties the execution of one or more activities. In this case, the organisation that provides execution of the activities is catalogued as an 'independent contractor' and, therefore, it is categorised as the true employer, being therefore responsible for all the risks derived from it. The subordination of the personnel of this independent contractor must always be exercised exclusively by it, who must provide the services with autonomy and independence.

On the other side, there is another possibility for companies to use the workforce of third parties, to perform its activities, which is by contracting with Temporary Service Companies (TSC) ('EST' in Spanish), in order to get more employees under its subordination who serve at their facilities but under the responsibility of the TSC, as their true employer. Therefore, these latter companies provide workers to the clients while managing their salaries, remuneration and labour rights. It should be clear that there is no labour relation between the client and the workers.

This legal scheme is regulated in Article 77 of Law 50 of 1990, which establishes that these kinds of agreements between TCS and companies can only be signed in the following events:

- in the case of occasional, accidental or transitory work;
- when it is required to replace personnel on vacation, in use of a licence, or on medical or maternity leave; or
- to meet increases in production, transportation, sales of products or merchandise, seasonal periods of harvests and in the provision of services, for a term of six months, extendable for up to six further months.

In addition, subcontracted workers or employees provided by external contractors have the same rights as the dependent workers or those who are working directly with the client, in terms of wages, benefits, schedules and working hours, among other factors.

In spite of the benefits of these kinds of contracts, the inspection control implemented by the Ministry of Labour is quite rigid, and thus it could also reduce the advantages of outsourcing. In recent years, for example, this entity undertook many investigations against companies that used outsourced schemes, tending to take into account the negative aspects of outsourcing, rather than the positives.

Outsourcing impacts in the Colombian post-conflict era

The recent peace deal signed between the government of Colombia and the Revolutionary Armed Forces of Colombia ('FARC') brings great challenges to traditional labour and employment law.

In fact, there would be more people who would continuously seek work. Therefore, the Colombian government, as well as private companies, will have to increase investment in the country, attempting to create more new businesses and to satisfy the labour demand. The main challenge of the legal system in this regard will be the need to encourage formalisation of labour relations between organisations and former guerrillas.

Even if there are different types of labour contracts in Colombia, it is expected that companies will turn to special, but not that well-paid, agreements to formalise the relationship. 'Learning contracts' (*Contrato de aprendizaje*), for example, are highly expected to be used, because they have not only a training phase but also a practical stage in which the 'learners' must apply the knowledge acquired in the latter stage.

Even though this contract could be pertinent according to the past situation of former combatants, the learning contract is categorised as 'a special contract in labour law', so its effects are not similar or comparable to labour contracts. For instance, the wages and economic benefits derived from labour agreements do not apply to learning contracts and the remuneration for learners is not high.

From this perspective, we find that outsourcing could be of great use to face this problem. Even though outsourcing is sometimes criticised, it is well-known that it can also create opportunities for formal employment, as already explained.

According to the International Labour Office (2015), this process can generate a wide range of jobs for people who are commonly marginalised when accessing formal jobs, such as women, indigenous people, migrants and young workers. For the Colombian case, we can include former guerrilla combatants in this listing.

At this point, it is important to clarify that subcontracted workers do have a labour relation with their specialised outsourcing organisation (contractors), even when they execute their functions at the client's facilities. As aforementioned, Colombian labour law demands that every person who owes a labour agreement with another party must be a creditor of all the benefits and prerogatives established by law.

For these reasons, outsourcing could not only be a better option to reintegrate these people back into society, but also to actually formalise their eventual labour relations properly and to pay them according to the social circumstances.

This situation provokes great challenges for Colombian labour law, because eventually the government would have to make the use of outsourcing contracts more flexible or adaptable to such circumstances.

Moreover, it will have great impacts on learning agreements to improve contractual conditions in order to benefit learners' positions; for example, better wages, incomes and profits.

The Colombian post-conflict era will bring great changes and challenges to our national legal system, and labour and employment law is no exception.

Conclusions and recommendations

Social phenomena in Colombia are challenging the conditions by which labour and employment law is applied. The traditional rigidity used when it comes to supervise and control labour agreements would have an immediate change in the short term. The strictness or severity of our national regulation would not be useful to satisfy social demands or to respond to the conditions in post-conflict Colombia.

Thus, it is expected that the Colombian government will increase flexibility in regulation, especially of those concerning agreements different from labour contracts (learning contracts) and the outsourcing option as well. However, it is very important to acknowledge that in regard to outsourcing, this flexibility must be implemented while fully observing the following aspects, among others:

1. There must be solidarity between the parties involved: clients and contractors. They both need to be responsible for responding to all workers' labour rights.
2. It is important to maintain equal wages and prerogatives for subcontracted employees in comparison to the conditions established for direct or dependent workers.
3. It is crucial to defend the right of association for contractors' workers.
4. It is important to increase compliance with minimum rights and special guarantees and restrictions for the informality of contractors and their workers.

Taking this into account, we must consider outsourcing as a phenomenon that is here to stay in our labour market. It is also prone to having an even greater presence, due to the competitive circumstances of our society. No-one can deny that the tendency is that services such as surveillance, food supply and transportation, among others, are naturally outsourced by companies, which makes it unthinkable to exclude such a situation from the scope of labour law regulation.

It is particularly predictable that outsourcing can be very convenient for facing the huge social challenges in Colombia at this time. We are not aiming to deformalise labour relations with employees, but rather to adapt our norms to our needs, so that we can provide more jobs and opportunities in this important phase while complying with fundamental rights.

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Mexico

Mexico: a fertile ground for startups and entrepreneurs

Bernardo Espinosa Aranda
Creel Abogados, Mexico City
bernardo.espinosa@creelabogados.com

Introduction

As a consequence of globalisation, together with a new culture that is triggering people to seek self-employment rather than the typical 1990s 'hard-working' culture, Mexico's government is willing to encourage the formation of entities and businesses, ease the current taxpaying bureaucratic obligations, and enrol the whole population onto the taxpaying system. Therefore, this Mexican pioneering plan to kill various birds with one stone has taken the form of multiple reforms that intend to smooth company incorporations and register non-taxpayers. Needless to say, the Mexican government will directly benefit from these reforms.

The intention of this article is to briefly explain the practical concepts of the two main reforms and structures that promote and regulate start-ups, entrepreneurs and individuals running small and medium-sized enterprises (SMEs), together with self-employed individuals, regardless of the economic situation: *Sociedades por Acciones Simplificadas* (Simplified Stock Corporations (SAS)); and Tax Incorporation Regime (*Régimen de Incorporación Fiscal* (RIF)).

SAS

Even though both of the above purposes are related to each other, it is necessary to explain each separately. Regarding the first item, on 14 March 2016, it was published in the *Mexican Official Gazette* the creation of a sole-stockholder or multi-stockholder legal entity called 'Simplified Stock Corporations'. Before these reforms, sole-stockholder entities were not allowed in Mexico, and in addition to the usual business complications, their incorporation requires a long and expensive formality – costing approximately US$700 and often taking more than two weeks. Unlike the other civil and commercial entities, SAS is a new commercial entity that has a faster, cheaper and simplified incorporation process, which can be carried out online by any individual who is already duly registered with the tax authorities.

Disappointingly, this reform tried to run before it could walk, creating in some locations a de facto impossibility to incorporate these SAS, due to the new and innovated online requirements – only a few registries are able to overcome this recording challenge. It is not possible to predict when these registries will be fully operational.

In spite of the abovementioned limitation, SAS entities also face numerous disadvantages against few advantages. The latter are only the cost, time and the sole-stockholder modality, versus the first that can be summarised in the lack of a legal guidance, which may easily result in a non-efficient, and in some cases, illegal operation.

Non-SAS entities may only be incorporated before a notary public or certified officer (who in Mexico are authorised lawyers), who on a case-by-case basis design the agreement that fits the intentions of the stockholders, together with an explanation of the corresponding legal and tax implications. SAS entities are incorporated with 'one-size-fits-all' by-laws, rather than adapting the needs from the stockholders to the right agreement.

Furthermore, as SAS by-laws cannot be amended to fit the stockholder's needs, corporate and economic rights are equal to all stockholders (considering the SAS is incorporated by more than one stockholder). This lack of legal guidance and self-corporate governance may not only generate multiple consequences when facing both legal and tax obligations, but may result in corporate disagreements.

As a matter of fact, it is obvious that SAS intend to regulate individuals who carry out SMEs, together with entrepreneurs, start-ups and individuals who want to render their services without corporate protection. SAS stockholders may only be individuals. In this regard, SAS are limited to a total annual revenue of $5m Mexican pesos (approximately US$250,000). When exceeding this revenue, the SAS shall transform to any other commercial entity.

Almost all commercial companies, including SAS, create a patrimonial protection for their stockholders, because they are only liable up to the amount of their participation in the company. In this regard, SAS does create a free structure for individuals who render services to diversify and minimise the risk of almost any of their obligations. This is to say, it is very likely for corporate veil discussions to have new, short-term progress.

SAS are a revolutionary structure under Mexican law, and assuming that the online platforms are fully operational, SAS entities are not common in the Mexican market, and their simplicity is causing lawyers and accountants to advise to incorporate a non-SAS entity before incorporating a SAS entity.

Régimen de Incorporación Fiscal

By contrast to the SAS, the Mexican government also created a set of various tax incentives that regularise the lack of registration of a considerable number of individuals before the tax authorities. Among these incentives, the government created the *Régimen de Incorporación Fiscal* (RIF), which is a new tax regime for individuals who render services that do not require any scholarly degree, and that fulfil a set of requirements, which for the purposes of this article, can be shortened to the following: maximum income of the previous fiscal year of $2m Mexican pesos (approximately US$100,000); activities not involved with real estate transactions; and stockholders of any civil or commercial entities, among others.

The most attractive characteristic of the RIF is the deduction of the income tax up to a 100 per cent for the first year, 90 per cent for the second year, 80 per cent for the third year, and progressively decreasing up to the tenth year, together with an online bi-monthly tax return filing obligation.

In this regard, since 2013 – when it was announced that the RIF would be included in the tax regulations – a considerable number of individuals registered to such regime and have moved to a better tax regime, or registered before the tax authorities for the first time. Entrepreneurs, start-ups and people who render services as individuals and not through a company easily, and on an almost a tax-free basis, may effortlessly register (and, in many cases, legalise) and comply with its tax obligations.

In reality, RIF had such impact on Mexican taxpayers that up to 31 March 2015, there were 4,356,478 taxpayers registered under the RIF, and up to 31 December 2016, a total of 4,708,228 taxpayers had registered under this regime.

Much like SAS, RIF faces a challenge when using online platforms. The lack of technical knowledge in many cases by the taxpayers under this regime may easily result in a breach of their obligations; however, tax authorities are making constant effort to create a straightforward system, providing RIF taxpayers with the basic technical education, together with easy-to-read complying manuals, computers in the tax authorities' offices with the necessary assistance, and various free courses.

In contrast to previous tax returns obligations, it is turning out for RIF, and almost any tax regime for individuals, to easily comply with any obligation with no experience and knowledge whatsoever, rather than avoiding its tax payments obligations.

Future expectations

Even when the briefly described regimes in this article demonstrate governments' will to not only regularise non-taxpayers, but promote self-employment and business creation, many parts of Mexico, for economic and geographical reasons, are not ready to speed up these reforms.

Although it is expected that for the near future the SAS will raise the corporate veil progress, today it seems like a window to carry out fraud and breach contracts with no direct personal liability whatsoever. SAS innovative structure is the first step for easier company creation. Take as an example a recent university graduate who has no labour experience, and is able to easily start a business, or a couple of start-ups who have limited investment funds and will be able to start a business without risking an important part of their assets for its incorporation, and as the case may be, for its dissolution.

Despite the above, Mexico is becoming a fertile environment for start-ups and entrepreneurs. For one thing, SAS is a breakthrough for commercial entities in Mexico, and in the near future it will have to be regulated with tougher control. On the other hand, at the same time, RIF without a doubt is resulting in a regime that makes it easier to pay taxes rather than avoiding them.

The Mexican natural gas revolution – CENAGAS open season and the liberalisation of natural gas prices

Eduardo Marquez Certucha
Sidley Austin, Houston
emarquez@sidley.com

Background

In 1995, Mexico opened to the private sector the participation in natural gas midstream activities such as transport, distribution, and storage. The 1995 reform terminated the vertically-integrated monopoly of the Mexican state in natural gas supply. However, the rates for transportation of natural gas remained regulated by the Energy Regulatory Commission. The modern Energy Reform that began in 2012 established the vertical disintegration of strategic activities in the energy supply chain by forbidding natural gas transportation permit-holders to market the gas.[1] In other words, the Pemex pipeline infrastructure was transferred to a newly created government agency named *El Centro Nacional de Control del Gas Natural* (CENAGAS), which would manage and operate the Pemex pipeline system. As a result of such transfer, CENAGAS integrated what is now called the Natural Gas Transportation and Storage System (SISTRANGAS), Mexico's largest pipeline infrastructure system that runs throughout 20 states with an approximate length of 10,068km and an estimated capacity of 6,307MMcfd (million cubic feet per day).[2]

Open season

In 2017 CENAGAS will hold SISTRANGAS' first 'open season', through which market participants will be able to reserve natural gas transportation capacity in the pipelines that were formerly owned by Pemex. The first process to assign reserved capacity was done through the so-called 'EPE Round', which was a preferential round made to the now productive state-owned companies Pemex and Comisión Federal de Electricidad (CFE). Pursuant to the public Data Room available for this first open season, the total capacity available is 2,109MMcfd, which excludes the 2,463MMcfd assigned on the EPE Round and the 1,592MMcfd reserved for the Independent Power Purchasers.[3]

This first open season will allow users to reserve capacity for an initial term of 12 months; however, it is expected that during the second semester of 2017, an additional open season will be effectuated, where initial agreements are contemplated for a three-year term. As to the timeline, the period for request for services has been extended to 10 March and the results will be published during the week of 8–12 May. The final agreements are expected to be signed by 16 June and the beginning of operations has been set to 1 July 2017.[4]

Secondary market and price liberalisation

Once the capacity is assigned, the users will have the right to (re)assign partially or totally the capacity that they no longer need or use. In general, such assignments will be done through transparent bids or open seasons managed by CENAGAS and in accordance with the general terms and conditions governing the provision of the services. This process of secondary assignments is the actual creation of the secondary market for capacity of natural gas.

The Mexican government hopes that the reserve of capacity by private companies on SISTRANGAS and the creation of the secondary market will eventually cause the pipeline network to expand and to compete with the 'First Hand Sales' (*ventas a primera mano,* or VPM) which is the regulated maximum price that was inherited from the 1995 reform and that regulates the first sale of natural gas made in Mexico by Pemex or any other third party on behalf of the Mexican state, that is done after: (1) the processing of gas in the refineries; (2) the receipt points of imported products; or (3) the receipt points directly from the production fields.[5]

As discussed, this first open season is a further step in liberalising natural gas prices through the creation of a secondary market that will eventually cause Pemex not to be subject to the VPM and therefore, natural gas prices will be determined based on supply and demand. Furthermore, if the open season and liberalisation of the natural gas market succeeds, the creation of these secondary markets of gas and capacity will eventually trigger the development of other important legal and economic products that have not been exploited in full by the players of the Mexican energy market, such as derivatives and over-the-counter (OTC) products.

A bumpy road ahead – the Mexican government lack of credibility and the Trump administration

Mexico faces profound issues regarding its ethos for the successful implementation of the natural gas secondary market and energy (oil and gas) price liberalisation. Recent political maneouvres such as President Peña Nieto's decision to continue removing subsidies in petrol prices (nationwide discontent was not only because of the price increase, but because it contradicted Peña Nieto's prior promises) have shown that the Mexican energy sector will not be able to liberalise its prices until two important things happen: (1) with regards to natural gas, the strengthening and maturity of a secondary natural gas market which can only be achieved through time and active participation of different market players (including participation in the SISTRANGAS open season); and (2) most importantly, the government has to earn its credibility by not expecting its citizens to pay all the costs of the energy reform, but that such costs are also paid by an important reduction of government privileges, excessive government operational expenses, and corruption on its highest levels.

Here are some final thoughts to consider that relate to the current uncertainty of the Mexico–US relationship with the new Trump administration. Would the Mexican natural gas market be forced to grow internally (perhaps even to foster its own production) and reach adulthood prematurely if the renegotiation of treaties such as the North American Free Trade Agreement (NAFTA) or the imposition of a border tax have unintended consequences in energy trade between Mexico and the United States? According to the US Energy Information Administration,[6] Mexico accounts for about 60 per cent of US natural gas exports, as well as five per cent of total US natural gas production, so if a border tax is imposed, will Mexico retaliate and perhaps increase taxes or other fees to the energy companies that have invested heavily in Mexico's demand for US natural gas?

Notes

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Peru

Controversy: non-recourse assignment of accounts receivables

Gonzalo La Torre Osterling
Estudio Rodrigo Elías & Medrano, Lima
glatorre@estudiorodrigo.com

Summary

The enactment of Law No 30532, which seeks to promote the development of the capital market, has raised great controversy regarding income tax matters in Peru. Although Law No 30532 has established specific provisions, related to the use of the so called 'tradable invoices', which seek to promote their use as a financing option for small and medium-sized enterprises, it has also generated severe differences between them and other types of non-recourse assignment of accounts receivables, regarding income tax, which may discourage their use.

Introduction

Non-recourse assignment of accounts receivables has increasingly become a popular financing option for small and medium-sized enterprises in Peru. In the last couple of years, several companies that offer these financing options have begun operating in Peru and the market has substantially increased, reducing interest rates. In this context, the use of factoring has seen a rapid rise, especially due to the use of electronic invoices since non-recourse assignment of accounts receivables is now commonly carried out using the so-called 'tradable invoices'.

In 2007 the government enacted Supreme Decree No 219-2007-EF, which set forth that – for Peruvian tax purposes – the difference between the face value and the discount value of the non-recourse assignment of accounts receivables shall be considered by the acquirer of the credit as deemed income arising from the provision of services. This Supreme Decree raised several questions for various reasons. In the first place, the Peruvian Constitution sets forth a legality principle for the creation and regulation of certain tax matters. Indeed, the creation of taxable events cannot be introduced by a Supreme Decree, due to the fact that this regulation, although binding, does not have legal status.

Furthermore, the abovementioned Supreme Decree indicated that the difference between the face value and the discount value of the assignment of accounts receivables shall be considered by the acquirer as a taxable income. This also raised several queries, since in non-recourse assignment of accounts receivables the face value of the account is not necessarily the real income that will be eventually received by the transferee. In other words, acquiring an asset (a receivable) at a low cost would generate a taxable event.

However, in practice, and mainly because of its lack of legality, tax experts have conveyed that this Supreme Decree was not applicable.

Since 2015 the government has been working thoroughly to amend the legislation regarding non-recourse assignment of accounts receivables and tradable invoices to promote their use and allow greater access for small and medium-sized enterprises to financing.

In this context, the new Peruvian government has sought to promote certain aspects of growth and development, including economic reactivation and formalisation, citizen security, fight against corruption, and water and sanitation services, among others. In line with these goals, Parliament enacted Law No 30532 (hereinafter, Law 30532), also referred to as the Law to promote the development of the capital market, to give a special treatment to income obtained from certain financial instruments to contribute to the development of the capital market. Legislation regarding non-recourse assignment of accounts receivables and, especially, tradable invoices were considered among the amendments introduced by Law 30352.

On 31 December 2016, Law 30532 was published in the *Official Gazette*. Pursuant to such law, a special treatment was granted to the non-recourse assignment of accounts receivables performed through tradable invoices. The law indicates that income obtained by the invoice's acquirer is equal to the difference between the face value and the discount value of the assignment (following the same criterion established by Supreme Decree No 219-2007-EF), and is subject to Income Tax at a rate of five per cent, provided that the acquirer is a Peruvian domiciled individual or a non-domiciled single person company (otherwise the applicable rate would be 30 per cent).

Additionally, the debtor of the tradable invoice must withhold the applicable income tax upon payment of the receivable. For this purpose, the acquirer must inform the withholding agent of the price of the receivable represented in the tradable income. Hence, if the assignment was performed by transferring a tradable invoice, such rules would apply. It is worth noting that pursuant to Law 30352, the income is determined upon the payment of the credit exclusively with regard to transfer of tradable invoices (in order to promote this kind of transaction).

On the contrary, Law 30352 provides the legal status that the rules set forth in Supreme Decree No 219-2007-EF required (hence, rectifying the violation of the legality principle), since it mentions in its Second Complementary Final Provision that the rules provided in the Second Complementary Final Provision of Supreme Decree No 219-2007 shall 'continue' to apply as long as they are in line with Law 30532.

Therefore, in all the other cases of non-recourse assignment of accounts receivables (different from the tradable invoices), the acquirer of the credit shall recognise a taxable income at the moment the assignment is executed (before the receivable is effectively collectable).

In this scenario, in the first place, the applicable tax rate to such operations would be 30 per cent, introducing a great contrast with the one applicable to the assignment of tradable invoices. On the other hand, the taxable event shall be recognised at the moment the assignment of the credit is executed. This may discourage the use of non-recourse assignment of accounts receivables which are not performed through tradable invoices.

Furthermore, the First Complementary Amending Provision of Law 30532 introduces a new 'source rule' in the Peruvian Income Tax Law, according to which income derived from non-recourse assignments of accounts receivables shall be regarded as 'Peruvian source' income subject to income tax in Peru, provided that the transferor of the account receivable or the debtor is a Peruvian resident taxpayer. This is relevant for non-domiciled taxpayers (acquiring receivables), which are subject only to their Peruvian source income.

Despite the discussion on the legality of the Supreme Decree No 219-2007-EF, before the introduction of the abovementioned amendment – by Law 30532 – it was not clear whether this kind of deemed income qualified as a Peruvian source of income as the Peruvian Income Tax Law considered as such, among others, the income generated by funds located or used within the country. Hence, the new law seeks to provide a clearer scope for individuals and entities who perform the assignment of accounts receivables.

Conclusion

In conclusion, although the law seeks to promote the use of tradable invoices and its provisions should achieve this goal, it has left all the other forms of non-recourse assignment of accounts receivables under the general rules provided in the Peruvian Income Tax Law. This generates severe differences between both, since the applicable tax rate for all the other forms of non-recourse assignment of accounts receivables would be of 30 per cent, discouraging the use of non-recourse assignment of accounts receivables which are not performed through tradable invoices. As far as we understand, this is a subject which is under revaluation by the government.

Chinese banks access the Peruvian financial market: adapting to a new order

Jose Tam
Rodrigo Elías & Medrano Abogados, Lima
jtam@estudiorodrigo.com

Fernando Hurtado de Mendoza
Rodrigo Elías & Medrano Abogados, Lima
fhdemendoza@estudiorodrigo.com

Summary

The recently elected Peruvian government is seeking to attract further foreign investment into the country's financial sector. The General Banking Law in force in Peru has legal barriers to the entry of new financial or insurance companies, based on limitations on ownership as to avoid market concentration. These restrictions had a particular impact on Chinese banks due to their state-ownership structure. Through Legislative Decree No 1321, enacted in early 2017, these restrictions have become inapplicable to local banks incorporated in Peru by a foreign banking company included in the List of First Category Banks. The main Chinese banks may be found within this list, thus enabling the investment into Peru of several Chinese banking companies.

Background

On 9 December 1996, the General Law of the Peruvian Financial and Insurance System[1] (the 'General Banking Law') was published in the Official Gazette *El Peruano*, governing the local activities of financial and insurance companies. Although this piece of legislation carried a legal framework which was consistent with the global trend and Basel standards, it was discussed and enacted at a time in which Peru was starting to liberate its markets after a long period of recession and monetary chaos. Indeed, the General Banking Law was proposed, discussed and issued in a period of transition into an open economy. Furthermore, it was conceived at a moment in which Peru, and Latin America as a whole, were initiating their full insertion into a global economy, where the most relevant foreign investors were not only those entities closer to the region, but also companies who offered interesting investment plans regardless of their geographical location.

While the maturity and solvency of the Peruvian banking system was in the process of being boosted by the General Banking Law, the Chinese financial sector was continuing with the strengthening of its main players as per a set of measures designed and implemented in the People's Republic of China over the course of the previous years. It was only a matter of time before a strong Chinese bank landed in Peruvian territory, when in 2012 the Industrial and Commercial Bank of China (ICBC) set up in Peru, starting operations in 2014 to serve both Peruvian clients with interest in China, and Chinese clients with interest in Peru. Naturally, the local activities of ICBC are governed by the General Banking Law.

Legal barrier to Chinese banks

Attracting foreign investment from different investors coming from the same jurisdiction – encouraged by the success of their predecessors arriving thereto – is a good sign of the attractiveness of an emerging economy. However, this was not the case with Chinese banks settling in Peru. Article 55 of the General Banking Law contains a restriction on the ownership of shares which, in practice, meant that only one bank from the People's Republic of China was allowed to operate in Peruvian territory. This statute states that the shareholders who, directly or indirectly, hold a majority stake of a financial or insurance company may not hold, directly or indirectly, more than five per cent of the shares of another company of the same nature. According to the General Banking Law's glossary, 'majority shareholders' are those who hold at least a sixth of a company's share capital.

The rationale behind Article 55 is to avoid the pernicious effects of a financial market where ownership is concentrated on a low number of agents, such as the increase in interest rates for the banking industry and the lack of incentives to introduce innovations to the benefit of clients. Naturally, back in 1996 the Peruvian Congress did not envisage that the restriction imposed by said Article would pose an entry barrier to the Chinese banks who followed the arrival of ICBC into Peru, taking into account the ownership structure of the main banking entities[2] from the People's Republic of China. Indeed, the most important Chinese banks are characterised by being state-owned enterprises, as occurs with many of the principal companies of the Asian country – thus meaning that they share a common majority shareholder.

Customising the financial sector

In 2017, with a firm and consolidated entry into the global economy and with China as one of the most important investors and trade partners of the Republic of Peru, the government most recently in office limited the restrictions posed by Article 55, among others.

Through Legislative Decree No 1321, which came into force on 6 January 2017, the Thirty-third Final and Complementary Provision of the General Banking Law was incorporated. This provision sets forth that the limitations contained in Article 55 shall not apply when a local bank is incorporated in Peru by a foreign banking company included in the List of First Category Banks published by the Peruvian Central Reserve Bank,[3] or by a local banking company that meets the criteria employed by the Peruvian Central Reserve Bank to determine the aforesaid list.

In our opinion, it is not a coincidence that Circular No 022-2016-BCRP containing the current List of First Category Banks includes the five main Chinese banking companies, thus enabling those entities to operate in the Peruvian financial market despite having the Chinese state as a common shareholder.

Conclusion

Regardless of economic considerations that are not relevant to the purpose of this article, based on the legal response of the authors of Legislative Decree No 1321, it seems that the strength of the Chinese financial system has contributed to leaving aside historical concerns about the setbacks that may be brought by a concentrated banking system in a particular country – not to say that these may have been proven wrong. Although the aforesaid statute has reserved the possibility to enact regulations that impose further requisites to access this exceptional treatment, apparently the Peruvian government in office is expecting that the local financial sector replicates on the other side of the globe the behaviour learned from China, promoting competition with a view to enable access to credits at lower rates, regardless of banking ownership.

Notes

1 In 2005 its scope was extended to also cover the regulation of the local private pension fund management system.

2 In addition to the ICBC, this includes the Bank of China, the Agricultural Bank of China, the China Construction Bank and the Communication Bank of China.

3 It is of note that according to the Thirty-third Final and Complementary Provision of the General Banking Law, in case a bank is removed from the List of First Category Banks, the investments that have already taken place will not be affected.

Positions behind the Peruvian Law of Insurance Contracts

Fernando Hurtado de Mendoza
Rodrigo Elias & Medrano Abogados, Lima
fhdemendoza@estudiorodrigo.com

Summary

The Peruvian Law of Insurance Contracts has adopted a protective position with regard to the insured parties, expressed through a set of legal provisions related to the interpretation, content and coverage derived from the insurance contact. These provisions are a source of concern to insurance companies.

The Peruvian Law of Insurance Contracts (Ley del Contrato de Seguro No 29946) has been in force since May 2013. It is a legal instrument of an imperative nature, which is applicable to insurance contracts, including those related to the coverage of large risks. Throughout its 139 articles, this law carries a set of provisions that reveal a protectionist approach in favour of the insured, some of which are not only related to contractual provisions, but also to coverage issues, as shall be described below.

With regard to contractual provisions, the Law of Insurance Contracts sets forth mandatory rules for the interpretation of insurance contracts. For instance, if there is an ambiguity therein, according to the law, the corresponding contractual provision must be interpreted in terms that are most favourable for the insured. Likewise, the clauses that impose expiration on the rights of the insured must be construed restrictively and the burdens imposed on the insured must be reasonable. The abovementioned interpretation rules are the cornerstone that inspires other legal stipulations following the protectionist position of the Law of Insurance Contracts in favour of the insured.

The law under comment also contains a non-exhaustive list of contractual provisions that are absolutely forbidden from being included in an insurance contract, which would be declared null and as not incorporated, should they be included. Examples of these provisions are: clauses that impose the loss of rights for the insured for breach of burdens that are not related, or proportional to the damage for which compensation is sought of obligations that are excessively difficult or impossible to execute; and non-compliance of laws, rules or regulations, unless the violation corresponds to a crime or produces the loss.

Continuing with the regulation of insurance contracts, the law under comment has undermined the effectiveness of early termination clauses by establishing that the right of early termination (unavailable to health and life insurance, among others) shall not be exercised in an abusive manner by the insurer, against bona fide principles and when a loss is imminent.

In connection to coverage issues, regulations concerning the term that the insurer has to examine and approve the loss have been criticised for being excessively favourable to the insured. The Law of Insurance Contracts has determined that the loss is deemed to be consented once the insurance company approves, or does not reject, the loss agreement in a ten-day period from the time such instrument signed by the insured is notified to the insurer. If no adjustment contract exists, then the loss is consented once 30 days pass after all documents required by the policy for payment of the loss have been presented, without the insurer objecting the amount claimed.

Although some extensions may proceed to extend the abovementioned terms, there is not much clarity to them and, certainly, these deadlines for adjustment are considered inadequately short, especially when considering that these provisions also apply to the insurance of large risks.

Another coverage issue governed by the Law of Insurance Contracts that reveals its overprotective trend is the regulation of life insurance. The law states that the conscious and voluntary suicide of the person whose life is insured liberates the insurer, unless the contract has been in force uninterruptedly for two years. This is just a final example of the approach that Congress has given to the regulation of insurance contracts in Peru.

Jesús Cuba
OMC Abogados & Consultores, Lima
marketing@omcabogados.com.pe

The Trans Pacific Economic Cooperation Agreement – the conflict between right to health and protection of pharmaceutical patents in Peru: truth or myth?

Summary

In Peru, a few local and international organisations such as medical non-governmental organisations (NGO)s, are arguing that the United States would have made abusive approaches to the other countries of the agreement and are demanding articles in the Trans Pacific Economic Cooperation Agreement that go beyond what was agreed.

Peru recognises the right to the protection of patents since 1993 and its legislation protects intellectual property for a period of 20 years, giving inventors the right of exclusive exploitation of their inventions, and allowing them to recover the considerable investment made in their research.

However, the right to health is inalienable and is applicable to all people, regardless of their social, economic, cultural or racial status, to access to comprehensive medical attention.

The Trans-Pacific Partnership (TPP) or Trans Pacific Partnership Agreement (TPPA) is a trade agreement between 12 Pacific Rim countries: Chile, Peru, Mexico, the US, Canada, Vietnam, Singapore, Malaysia, Brunei Darussalam, Australia, New Zealand and Japan.

The first milestone in this agreement, initially known as Pacific Three Closer Economic Partnership (P3-CEP), was put by Chile, New Zealand and Singapore in the Asia-Pacific Economic Cooperation (APEC) Summit of 2002, held in Mexico. Brunei Darussalam joined this group in 2005, thus the agreement became known as P4. Then, in 2006, New Zealand proposed to Peru to accede to P4. However, the true impetus of the TPP occurred in 2008, when the US joined and Peru and Australia – during the APEC Leaders Meeting held in Lima – in announcing their intention to join the member countries (these accepted the inclusion of Peru the following year). In 2010, negotiations began, and Malaysia joined in the third round of these, while Vietnam formalised their participation. Finally, already in advanced negotiations, Mexico and Canada were admitted as members in 2012, and in 2013 Japan joined. For its conclusion, the TPP required 19 rounds of negotiations, 14 meetings of heads negotiators and technical groups,
14 ministers of trade, and five leaders of state.

The TPP has two major objectives:

1. Build an inclusive and high-quality TPP that is supportive of economic growth, development and the generation of employment of its 12 member countries.
2. Convert the TPP in the base instrument for the future construction of a Free Trade Area of the Asia Pacific (FTAAP).

Right to health

The right to health is inalienable and is applicable to all people, regardless of their social, economic, cultural or racial status. This refers to the fact that the person has as an innate condition, the right to enjoy a suitable environment for the preservation of their health, access to comprehensive medical attention, respect for the concept of the health–disease process and their worldview.

The right to health includes the below key elements, which are interrelated.

Availability

This refers to having enough health facilities, human resources (recital doctors, professionals, technicians and skilled health personnel) and programmes that include the basic determinants of health, such as safe and potable water, and adequate sanitary conditions.

Accessibility

This means that health facilities, goods and services have a system of admission for all without discrimination, with emphasis on the most vulnerable and marginalised groups of the population. This implies:

a) Physical accessibility: health facilities, goods and services must be within safe physical reach for all sections of the population, as well as the underlying determinants of health, such as safe and potable water, must be accessible intra-domiciliary or be found within a reasonable geographical distance, even regarding rural areas.

b) Economic accessibility (affordability): payments for healthcare services and services related to the underlying determinants of health should be based on the principle of equity and be proportionate to the financial income of households.

c) Access to information: includes the right of the patient to receive and request all the information required for their situation and the treatment he/she will receive. It also involves the right to receive and impart information and ideas about health issues. However, access to information should not undermine the right to confidentiality of personal data.

Acceptability

All health facilities and services must respect medical ethics and culturally accepted criteria. In addition, they should be sensitive to the requirements of the genus and the cycle of life. The patient has the right to accept or not accept the diagnosis and the treatment proposed by the health personnel.

Quality

A modern infrastructure and per the demands of the public user, as well as the equipment and inputs, must be of last generation technology from a scientific and medical point of view; the staff must be trained; and must be provided with safe drinking water and adequate sanitary conditions. Part of the quality of health services is respectful treatment, appropriate and timely to people demanding attention.

The World Health Organization (WTO) has pointed out that, 'the enjoyment of the highest possible level of health that can be achieved is one of the fundamental rights of every human being'. This maximum degree of health is achieved if you have access to a system of health protection that will give all people the same opportunities.

But not all people can achieve an optimum level of health. In many developing countries there are marginalised and vulnerable social groups who are less likely to enjoy the right to health, becoming victims of laws and policies that aggravate the marginalisation and hinder further access to prevention and care services.

Health system in Peru

One of the main problems in many countries of the world is the access to public health services. This topic is directly linked to the right to health.

Health in Peru is characterised by a complex epidemiological profile in which communicable diseases and chronic diseases, which affect all socioeconomic strata, coexist. The state is facing these problems with achievements still being very limited because, among other reasons, it has not been able to ensure access to medicines that enable people to prevent, reduce or control these problems with success.[1]

This is due to our public health system, which is characterised by major fragmentation and segmentation: on the one hand we have the central government (through the hospitals of the Health Ministry, the Regional Health Directorate and the regional governments), and on the other, Social Health Insurance – EsSalud (Ministry of Labour and Employment Promotion), the Armed Forces Health Service (Ministry of Defence) and the Health Service of the National Police of Peru (MININTER), which operate autonomously. Accordingly, each system operates independently, with its own rules and networks of suppliers, and attends different populations.[2]

TPP: pharmaceutical patents and the right to health

A few local and international organisations, such as medical NGOs, are arguing that the TPP hides serious dangers for universal access to medicines, which would undermine public health. This point of view is based on the assertion that the United States would have made abusive approaches to the other countries of the agreement and demanded articles in the TPP that go beyond what was agreed.

We should note that we do not agree with that position, due to the logic of the patent system, which is to give inventors and innovators a right to exclusive exploitation of their invention for a period of time that would allow them to recover the considerable investment in research required to develop each new product.

For more than a century our country has recognised the right to the protection of patents. Also, it should be noted that since 1993, the Peruvian legislation protects intellectual property for a period of 20 years – patents of all kinds of inventions, including pharmaceuticals.

Furthermore, in November 2001 the WTO issued the Declaration on the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement and Public Health, which affirms that the TRIPS Agreement should be interpreted and implemented to protect public health and promote access to medicines for all.[3]

Finally, the provisions relating to pharmaceutical products of the TPP facilitate both the development of innovation in the field of medicines, as well as the availability of generic medicines, without prejudice to the deadlines that the parties required for the implementation of those provisions. It also includes provisions relating to the protection of test data and other undisclosed data submitted for marketing approval of a new pharmaceutical product. It reaffirms the commitment made by parties in the WTO Ministerial Declaration on the TRIPS Agreement and Public Health (2001), and that the parties are not prevented from taking measures to protect public health, including cases of epidemics such as HIV/AIDS.

Conclusion

In conclusion, we can say that the problem raised due to the price increases and the prohibition of entry of generic medicines into Peru, between the drug patents and the right to health, is a myth supported by some sectors that are against the TPP.

The problem of the price increase in medicines is not for chapters about intellectual property of the different free trade agreements signed by our country, among them the TPP, but in these two situations:

1. In the structure of the public health system that is disseminated in different entities that do not work together to improve the quality of service.
2. Cumbersome and bureaucratic administrative procedures for the import and obtaining of health records cause the price to increase due to the delay of the entities responsible for the respective authorisations.

The TPP does not affect the access of Peruvians to medicines. On the contrary, it clearly sets out the obligations in the field of patents and test data protection, as well as their duration deadlines. This makes the Peruvian market more attractive to producers of medicinal products of the last generation. On the other hand, in addition to the obligations established by the TPP, it also includes provisions that allow the setting of exceptions and limitations to such obligations, which leave space for the development of internal policies regarding access to public health.

Notes

1 Gerardo Valladares Alcade, 'Evaluation of the Potential Effects on Access to Medicines of the Free Trade Treaty Being Negotiated with the United States of America', Lima, April 2005, available at: www.minsa.gob.pe/portada/Especiales/TLC-MINSA/EstudioTLCSalud_ResumenEjecutivo.pdf, accessed 10 March 2017.

2 Essalud and ILO: Peruvian Health System, 'Current situation and strategies to guide the extension of contributory coverage', Lima, 2013, 43.

3 Carlos Correa, 'Implications of the Doha Declaration on the TRIPS Agreement and public health', available at: http://apps.who.int/medicinedocs/pdf/s4904s/s4904s.pdf, accessed 13 March 2017.

Uruguay

Financing renewable projects in Uruguay: the local security package

Beatriz Spiess
Guyer & Regules, Montevideo
bspiess@guyer.com.uy

Summary

An overview is provided in the article of the main aspects of the securities available to financers of renewable energy projects in Uruguay; a market that is in constant growth, being a key player in the country's energy policy.

Introduction

Ten years ago, a substantial change was made by the Uruguayan Executive Power in the country's energy policy. The new goals were: to achieve the development of renewable resources to diversify the energy matrix and to obtain independence from hydrocarbon-exporting countries, while simultaneously ensuring environmental sustainability and preservation. The implementation of such policy was a success and the renewable energy sector became one of the most relevant sectors within our economy to attract a large amount of the unprecedented flow of foreign investment that has been arriving in Uruguay during the last five years.

The financing of those renewable energy projects brought a refreshing challenge from a legal standpoint: traditional international project finance security packages had to be adapted to the local regulations. All actors involved faced a learning curve. Foreign financing entities and multilaterals had to understand and learn which guarantees were feasible under Uruguayan law and which not; local counsels had a key role in proposing and drafting local alternatives that could provide as much comfort as possible to financing parties; and all local counterparties to a project special purpose vehicle (SPV) (including the *Administración Nacional de Usinas y Trasmisiones Eléctricas* (UTE), the Uruguayan public utility company that was to be the offtaker under the power purchase agreements (PPAs)) had to become accustomed to being affected by the project's financing.

It was clear quite soon into the process that Uruguay has several strong positive aspects as a jurisdiction for the development and financing of these projects. Some of the key matters that made it attractive to both equity and financing investors include:

- No restrictions in general to the nationality of shareholders in local companies (except in a few specific industries).
- Companies can assume debt in any foreign currency and the guarantees can also be granted in foreign currency.
- Repatriation of funds is absolutely free in whichever currency: there is no restriction or limit, nor is it subject to exchange rate control.
- Respect for the legal system. The country has very safe, transparent registry systems; there is a clear expropriation regime under which no private property is expropriated without due process and payment of compensation, and the judicial power is an independent power.
- Low corruption index: Uruguay actually heads the list of least corrupted countries in South America according to Transparency International's latest report.[1]
- Power purchase agreements (PPAs) were signed after a competitive and transparent bid process.
- The country has been awarded investment grade and all obligations assumed by UTE are backed up by the state.

However, local regulation provided some downsides that had to be overcome. For starters, under Uruguayan law, the concept of a generic all-asset pledge (standard and widely used in the United States) does not exist. Depending on the particular asset, either a mortgage or a pledge can be granted, but in any case, the asset has to be fully identified in the agreement.

Secondly, the legal regime does not contemplate direct step-in rights, nor self-help remedies in case of foreclosure. A creditor cannot directly take control of the debtor's assets, but rather a foreclosing judicial procedure has to take place. Assets pledged or mortgaged need to be sold in a public auction, although the creditor can be a bidder in said auctions and apply its credit to the payment of the price.

Finally, being a civil law country, the legal regime is subject to many formalities: many guarantees have to be authorised by or require participation from a Uruguayan Notary Public, whose fees are in many cases significant and make it impossible in other cases to have counter copies of documents signed (most closings in Uruguay are still physical, all-parties present closings); documents to be filed or presented to court need to be in Spanish or else translated by a Uruguayan Public Translator; and powers of attorney and other documents signed abroad need to be apostilled or legalised.

By now, however, almost at the end of that learning curve, there is quite a standard approach to security packages of a renewable project's financing, which has been accepted by developers, investors and contracting parties.

Share Pledge Agreement

The shares of the local SPV developing the project are pledged in favour of the financing entities. This pledge typically covers all current and future shares and the shares are kept in escrow by an escrow agent. The agreement is not filed, but it requires the execution of the share pledge agreement, endorsement of the shares, delivery to the escrow agent and certain annotations in the SPV's corporate books. The agreement is typically incorporated into a Uruguayan Notary Public's Record.

Equipment pledge

The equipment and machinery of the project is pledged. Such a pledge agreement has to identify each piece of equipment being pledged, the location of the same and, once executed, it is filed with the Non-Delivery Pledge Registry. It requires notarial certification of signatures by a Uruguayan Notary Public. This pledge can be granted only when title and possession to each equipment/machinery duly identified and described has been transferred to the SPV and is located in the project site. Usually this is not the case with projects under construction, in which case a Promise to Pledge is signed.

Accounts pledge

Again, a separate pledge is signed identifying the SPV's local bank accounts to be pledged. This pledge is not registered, but the agreement is incorporated into a Uruguayan Notary Public's Record.

General credits assignment

The credits that the SPV may have under relevant contracts are assigned in guarantee, subject to the condition precedent that a default occurs. Aside from signing the agreement, notices have to be made to each counterparty of the assigned contracts who must acknowledge said assignment. The agreement is incorporated into a Uruguayan Notary Public's Book.

General contracts assignment

All relevant contracts entered into by the SPV are assigned in guarantee to the financing entities, subject to the condition precedent that a default occurs. Notice to each counterparty has to be made so that they acknowledge the assignment. The agreement is generally incorporated into a Uruguayan Notary Public's Record.

PPA assignment

The PPA and the interconnection agreement are assigned in guarantee to the lender, subject to the condition precedent that a default occurs. Notice to UTE has to be made so that UTE acknowledges the assignment. The agreement is incorporated into a Uruguayan Notary Public's Record.

PPA credit assignment

The SPV's credits under the PPA and the interconnection agreement are assigned to the lender subject to the condition precedent that a default occurs. Notice to UTE is also required and the agreement is incorporated into a Uruguayan Notary Public's Record.

Land lease assignment agreements

Usually, the SPV would enter into lease agreements with the landowners to secure the land for the project site. Those contracts are assigned in guarantee to the financing entities subject to the condition precedent that a default occurs. Notice and consent from the landowners is needed. This guarantee is perfected by filing the assignment in the Real Estate Property Registry and it requires prior notarial certification of signatures by Uruguayan Public Notary. If the land is owned by the SPV, then a mortgage could be signed and filed.

1 See www.transparency.org/news/feature/corruption_perceptios_index_2016#table, accessed 13 March 2017.