International Commerce

September 2013

LATIN AMERICA BULLETIN

Welcome to the latest edition of our Latin America Bulletin, which focuses on key issues in international commerce across the region.

In this edition, we start by reviewing the liberalisation of the Colombian insurance market and the important opportunities it presents for foreign insurers. In our second article we examine the principle of 'comity' between different foreign courts and how the case of *SulAmerica v Enesa* demonstrates the fine balance that is required in its application – a key warning for all businesses. We go on summarise the recent major reforms being implemented in Brazilian anti-dumping investigations. Finally, we look at the IRB's long awaited privatisation and the potential implications for the Brazilian insurance market.

Should you require any further information or assistance on any of the issues dealt with here, please do not hesitate to contact any of the contributors to this Bulletin or your usual contact at HFW.

Jeremy Shebson, Partner & São Paulo Office Head

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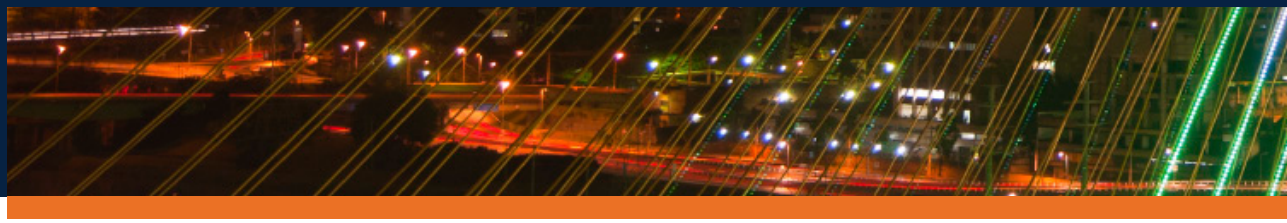

Colombia - market liberalisation

On 15 July 2013, Law 1328 of 2009 came into force in Colombia. The law imposes three main changes to the previous regulatory system which will assist in the liberalisation of the Colombian insurance market and which represent an excellent opportunity for foreign insurers not domiciled in Colombia. The new rules, combined with the dual effect of economic growth and increased insurance penetration, make Colombia a very attractive jurisdiction for foreign reinsurers.

Firstly, foreign insurers are now able to offer insurance for international maritime transport, international commercial aviation and space launch and transportation, including satellites, on a direct basis. Such insurance, known as "MAT", may only cover the risks associated with the goods being transported, including the insurance of the vehicle or vessel and any liability arising in connection with the same.

In order to solicit business under the above rule, a foreign insurer must be registered with the registry of foreign insurers in Colombia - named RAIMAT, based on its Spanish acronym - which was set up by the local Financial Regulator (Superintendencia Financiera de Colombia or "SFC") in June 2013. RAIMAT will provide a means for Colombian consumers of insurance to access information in order to make an assessment of the quality, suitability, experience and professionalism of the foreign insurer.

The foreign insurer must file information and documents with the SFC which will be recorded at RAIMAT, including a certificate issued by the competent authority where the company is incorporated confirming that the insurer is authorized to offer insurance in the relevant lines of business, audited financial statements showing that the applicant meets minimum solvency requirements for local insurance companies in Colombia as well as for the lines of business it plans to offer, and a certification issued by an international credit rating company that complies with minimum credit ratings required by insurance financial regulations.

The individual registration of Lloyd's Syndicates will not be necessary as the market can be registered as a whole. Foreign brokers will be able to offer MAT insurance on behalf of foreign insurers registered with RAIMAT provided that they are authorised to do so by the foreign insurer and notification is given by the foreign insurer to the SFC.

Secondly, all Colombian residents (natural persons and corporations) are now able to purchase insurance directly from international markets - without any requirement for fronting - save for in the following circumstances, where insurance must be purchased locally from Colombian insurance companies:

- Insurance that is mandatory under Colombian law.
- Insurance where the policy holder, insured person or loss payee is a public entity. The government will be able to establish the events and conditions in which state entities can contract insurance with foreign insurance companies.
- Insurance related to social security obligations such as pension insurance for invalidity and death, annuities or worker's compensation risks.

This development represents an important change. Under the previous rules, Colombian nationals and residents were obliged to buy their insurance products from locally incorporated insurance companies, however they can now seek and negotiate insurance cover from foreign insurance markets directly, within the limits prescribed by Law 1328 of 2009. Foreign insurance companies do however need to proceed cautiously as this rule does not expressly entitle them to solicit insurance in Colombia directly or through a third party, unless such insurance is in respect of MAT risks, as outlined above.

Thirdly, foreign insurance companies are allowed to establish branches in order to operate as a local insurer and conduct the business of insurance, subject to various regulatory requirements including the following:

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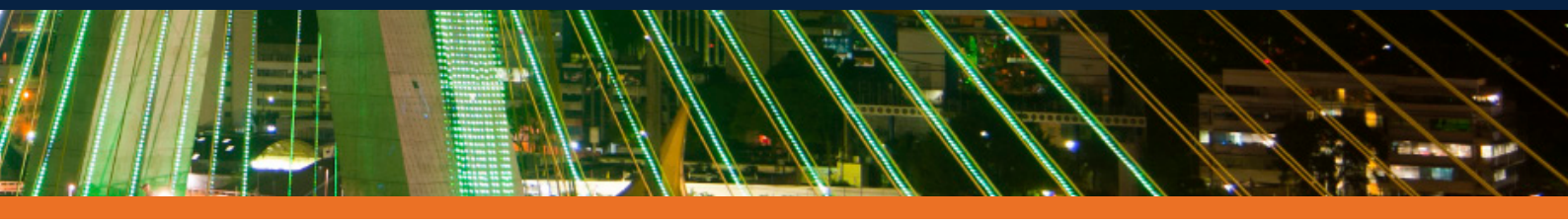

- The branch will be subject to supervision by the Superintendence of Finance.
- The branch must comply with the incorporation requirements that are established for local insurers.
- The foreign insurance company will, at all times, be liable for the obligations assumed by the branch in Colombia.

This development entitles foreign insurers to obtain a local presence and develop business in Colombia without having to incorporate or buy a local insurance company subject to the provisions outlined above.

Conclusions

The new rules are intended to address a perceived lack of local insurance capacity which is a consequence of a prolonged period of economic expansion in Colombia. It is too early to say how the local and international insurance markets will respond to these developments. However it is possible to make the following general assertions.

From the perspective of the domestic insurance market, the new rules pose risks and challenges. On the one hand, increased competition and the absence of any requirement for a fronting company is likely to lead to reduced premiums, at least in the short term. It is also anticipated that the local market will respond by improving their products and services especially in relation to claims. Local insurers say that they can offer a level of security to their policy holders which foreign insurers cannot provide for the following reasons:

- Under the new rules, policyholders face additional risks when purchasing their insurance products abroad, since foreign insurers will not be considered to be Colombian financial institutions for financial consumer protection matters.
- Therefore, in principle, the SFC will not supervise the activities of foreign insurance companies or entertain claims filed by insureds against them based on the breach of financial consumer protection statutes; however the Financial Regulator may suspend or cancel a foreign reinsurer's registration at RAIMAT.
- Foreign insurers will also not have a direct physical presence in Colombia, unless they establish a local branch, and this has given rise to concern in the event a dispute arises.

From the perspective of foreign insurers, the new rules represent an exciting liberalisation of the local Colombian insurance market.

From the perspective of foreign insurers, the new rules represent an exciting liberalisation of the local Colombian insurance market. This is in marked contrast to other Latin American insurance markets, in particular Brazil and Argentina, where some critics say that the local rules have the effect of protecting the interests of local insurance and reinsurance companies and keeping premium income in the country for as long as possible.

A version of this article appeared in Insurance Day in September 2013.

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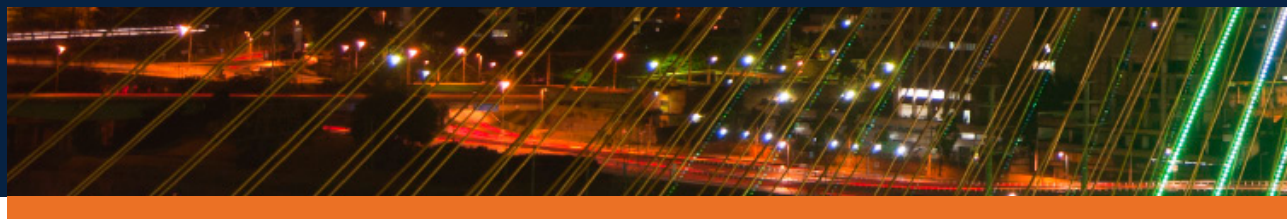
The principle of comity and *SulAmerica v Enesa*

Comity is a principle of legal reciprocity by which the courts of different nations are required to acknowledge that one nation will recognise the validity and effect of the executive, legislative and judicial acts of the other nation. One aspect of the principle is that it is not for a court in one jurisdiction to decide on a matter that is properly within the jurisdiction of another court, thereby limiting the risk of irreconcilable judgments.

As the case of *SulAmerica v Enesa* demonstrates, the principle of comity can be a very finely balanced issue. This case involved parallel and almost concurrent applications by the parties to the London Commercial Court and the 9th Civil Court of São Paulo. The parties sought clarification on the applicable law of an agreement to arbitrate in London contained in an insurance policy with an express law and jurisdiction clause in favour of Brazil.

Separability of arbitration agreement

As a matter of English law, an arbitration clause is regarded as separable from the host contract (see section 7 of the Arbitration Act 1996), in the sense that it has an existence separate from that of the contract in



which it was found. This is called the doctrine of separability.

The doctrine exists to allow an arbitral tribunal to rule on issues concerning the existence and validity of the main contract (e.g. repudiation, illegality, mistake) without facing allegations that it had no jurisdiction to act. It follows that arbitration may be governed by a different law to the law that governs the host contract. Although this state of affairs is not unusual under English law, the same principle may not exist under the laws of other countries, alternatively the same principle may apply but be rendered ineffective for other reasons.

Under the laws of Brazil, the same principle does exist (see article 8 of the Brazilian Arbitration Act), although it has never been ruled upon by the Courts.

The dispute in *SulAmerica v Enesa*

The dispute in *SulAmerica v Enesa* arose in connection with the construction of a hydro-electric generating plant in Brazil known as the Greenfield Hydro Project. In March 2011 certain incidents occurred which led the insured, Enesa, to make claims under two substantially similar policies (the Policy). The insurers declined liability on the grounds that the losses were uninsured or excluded by express terms of the Policy and there had been a material alteration in the circumstances disclosed to them at inception of which they had not been notified as required by one of the conditions.

The Policy contained the following clauses:

- A law and jurisdiction clause providing that the Policy will be governed exclusively by the laws of Brazil and that any disputes arising under, out of or in connection with the Policy shall be subject to the exclusive jurisdiction of the Courts of Brazil (condition 7).

- A mediation clause providing, inter alia, that if any dispute or difference of whatsoever nature arises out of or in connection with the Policy including any question regarding its existence, validity or termination, the parties undertake that prior to a reference to arbitration, they *"will seek to have the Dispute resolved amicably by mediation"* (condition 11).

- An arbitration clause providing, inter alia, that in case the insured and the insurer shall fail to agree as to the amount to be paid under the Policy through mediation, such dispute shall be referred to arbitration under ARIAS arbitration rules and that the seat of the arbitration shall be London, England (condition 12).

The following sequence of events unfolded:

- The insurer gave notice of arbitration in accordance with condition 12 of the Policy.

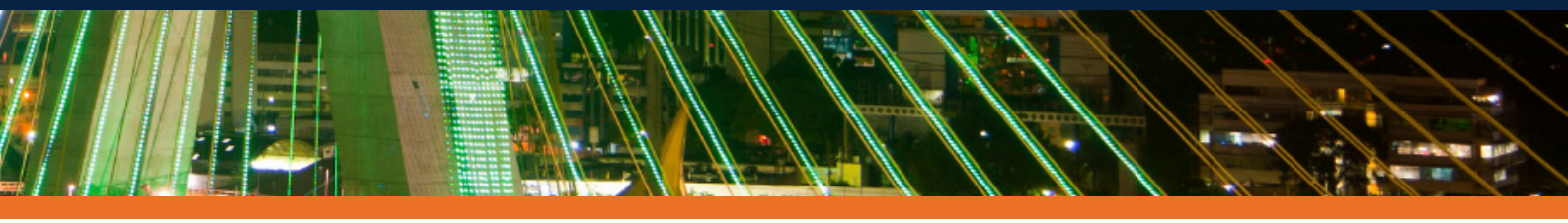
- The insured started proceedings in Brazil contesting the efficacy of the arbitration agreement on the grounds that the Policy was an *"adhesion"* contract under Brazilian law and, pursuant to Article 4 of the Brazilian Arbitration Act (inter alia), could only be invoked with their consent.

- The insurers made an application without notice to the Commercial Court in London seeking an injunction to restrain the insured from pursuing the proceedings in Brazil. The without notice injunction was granted and later upheld by the Court after hearing arguments from both sides.

- In the context of the proceedings in Brazil, the insured applied for and eventually obtained from the court in São Paulo an injunction restraining the insurers from resorting to arbitration in order to pursue a claim for a declaration that they were not liable under the Policy.

- The insurers tried to overturn the anti-arbitration injunction before the Appellate Court of São Paulo. The Appellate Court upheld the injunction ordering insurers to refrain from continuing the arbitration proceedings in London. The decision was based on the *"possible ineffectiveness"* of the arbitration provision under Brazilian law, on the basis that the insured's express consent to arbitration had not been obtained, as required by Article 4 of the Brazilian Arbitration Act. The court adopted the reasoning that the less *"traumatic"* path to resolve the dispute would be to suspend the arbitration proceedings pending a decision of the Brazilian Courts on the issue of whether the arbitration clause was effective.

- The insured then appealed to the Court of Appeal in London against the order continuing the anti-suit injunction. The Court of Appeal decided on the following inter-connected issues:



- What is the proper law of the arbitration agreement? The parties' express agreement that the Policy was to be governed by the laws of Brazil supported an argument that the proper law governing the arbitration agreement was, impliedly, the law of Brazil. However the Court of Appeal held the implied law of the arbitration agreement to be English law on the basis of *"two powerful"* factors which pointed the other way:

- As the parties must have been aware, the choice of another country as the seat of arbitration inevitably imports an acceptance that the arbitration law of that country will apply to the proceedings. Therefore the parties must have foreseen and intended that the provisions of the Arbitration Act 1996 would apply to any arbitration under the policies. This suggested that the parties intended English law to govern all aspects of the arbitration agreement.

- The *"possible existence"* of a rule under Brazilian law that arbitration could only be invoked with the consent of the insured would significantly undermine the arbitration agreement and, in the absence of evidence to the contrary, suggested that the parties did not intend the arbitration agreement to be governed by Brazilian law.

- Is Mediation a condition precedent to arbitration? The insured argued that it was and since the condition precedent had not been satisfied, insurers had not validly commenced an arbitration which called for protection by an injunction. The court held that condition 11 did not constitute a legally effective pre-condition to arbitration, principally because it was too uncertain as it did not set out a defined mediation process or refer to any specific procedure.

- What is the scope of the arbitration agreement i.e. does the reference to "amount" limit the scope of the agreement to disputes about the amount to be paid as opposed to liability? The court held that a failure to agree as to the *"amount"* to be paid under a policy included a dispute about whether any sum was due under the policies as all, and therefore included matters of liability and coverage.

Comments

Having invested a very considerable amount of time and no doubt cost in attempting to clarify the law applicable to the agreement to arbitrate, the irreconcilable decisions of the Courts left the parties in *SulAmerica v Enesa* case in the invidious position of being unable to proceed in either jurisdiction without being in contempt of court in the other country - if the insured were to proceed with its case in Brazil, it would be in contempt of the English Court and if insurers were to proceed with their case in England, they would be in contempt of the Brazilian Court.

In order to avoid this type of problem arising in the future, policy drafters should pay attention to include an express choice of law governing their arbitration agreements. Also, clear and unambiguous language must be used to ensure that the agreed procedure for resolving disputes remains effective, including in relation to the separability of the arbitration agreement, if applicable. It is also important to ensure that escalating dispute resolution clauses are carefully drafted and clearly prescribed to ensure that each stage is certain, effective and enforceable.

In our next edition, we shall be discussing the operation and validity of arbitration clauses under Brazilian law.

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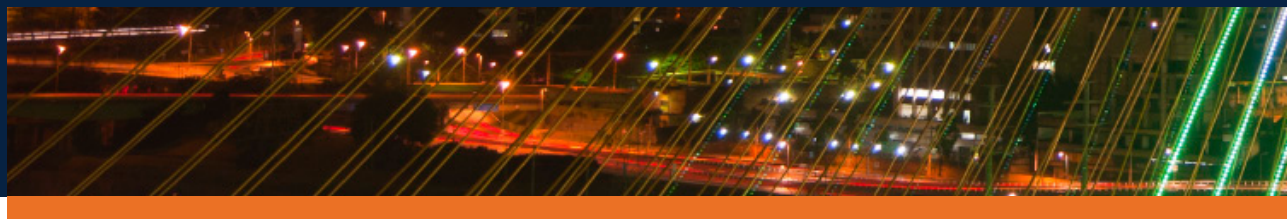
The winds of change in Brazilian anti-dumping law

Major reforms have arrived for Brazilian anti-dumping investigations.

In recent years, a growing number of developing countries have been conducting trade remedy proceedings (i.e. anti-dumping, anti-subsidy and safeguard investigations) at an accelerating rate. Brazil is no exception to this trend. In light of the increased frequency of such proceedings, recent reports have suggested that the Brazilian Government has been seeking to make Brazilian trade defence mechanisms clearer to complainants, and decrease the costs associated with participating in Brazilian anti-dumping investigations.

Accordingly, on 29 July 2013, the Brazilian Government published in the Official Gazette Decree No. 8,058/2013 (the New Anti-Dumping Regulation), which updated the country's anti-dumping legislation.



The New Anti-Dumping Regulation will come into force on 1 October 2013, and will introduce specific changes to the procedures governing Brazilian anti-dumping investigations, highlights of which are outlined below.

Mandatory preliminary determinations

An important reform is that the Department of Trade Remedies of the Ministry of Development, Industry, and Foreign Trade (DECOM) will be required to publish, within 120 days following the date of initiation of the investigation, a preliminary determination report. This means that DECOM must publish a provisional conclusion regarding the existence of dumping, material injury, and a causal link. This report may result in the application of provisional anti-dumping duties for up to 6 months by the Brazilian Chamber of Foreign Trade (CAMEX). By contrast, under Decree No. 1,602/1995 (the Former Anti-Dumping Regulation), DECOM was not mandated to publish preliminary determinations.

Shortening of investigation timeframes

Another major change introduced by the New Anti-Dumping Regulation is that certain procedural timeframes for Brazilian anti-dumping investigations have been shortened. First, the New Anti-Dumping Regulation establishes a deadline of 60 days for the Brazilian authorities to review a complaint from domestic producers requesting the initiation of an anti-dumping investigation. Where *prima facie* evidence of dumping, material injury to the domestic industry, and a causal link between the dumping and material injury has been provided by the complainants, and no additional information has been requested from the complainants by DECOM, an anti-dumping investigation may be initiated within 15-30 days following the submission of the complaint. This contrasts with Brazil's Former Anti-Dumping Regulation, under which there were no time limits for the review of complaints, and anti-dumping investigations were usually initiated within 3-6 months of the date of filing of a complaint.

Second, according to the New Anti-Dumping Regulation, Brazilian anti-dumping investigations must be concluded within 10 months, although exceptions may be accorded under special circumstances. This contrasts with the time limit of 12-15 months from the date of initiation of the investigation under the Former Anti-Dumping Regulation.

Increased clarity of procedure and new guidelines regarding key concepts

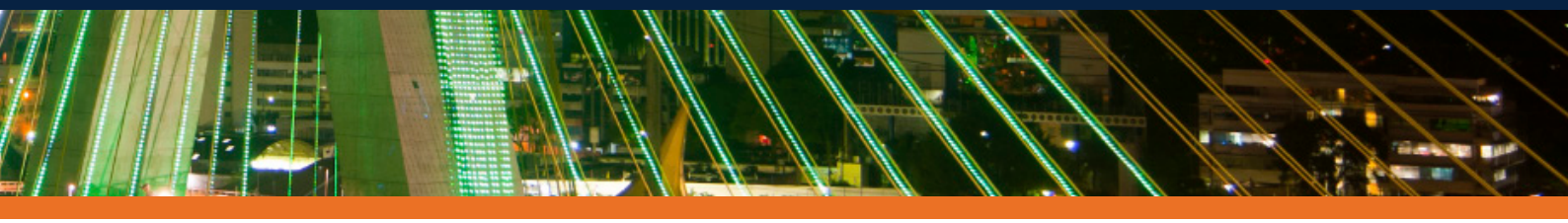
The New Anti-Dumping Regulation provides increased clarity regarding certain procedural steps pertaining to Brazilian anti-dumping investigations. Notably, the New Anti-Dumping Regulation details certain requirements which must be met before the Brazilian authorities will accept a complaint requesting the initiation of an anti-dumping investigation.

In addition, the New Anti-Dumping Regulation clarifies the procedural jurisdiction of the three authorities involved in Brazilian anti-dumping investigations and related proceedings: DECOM; the Secretariat of Foreign Trade of the Ministry of Development, Industry, and Foreign Trade ("SECEX"); and CAMEX, an inter-ministerial body comprised of the Chief of Staff of the President and representatives of six additional ministries.

Finally, the New Anti-Dumping Regulation also provides clearer guidelines regarding the determination of crucial elements in anti-dumping investigations, such as "like product", "normal value", and "injury" to the domestic industry.

Non-market economy countries

Another innovation of the New Anti-Dumping Regulation is guidelines concerning the legal regime applicable to "non-market economy" (NME) countries. NME countries are those in which the central government has a complete or substantially complete monopoly over trade, and domestic prices are generally fixed by the State. Under such circumstances, WTO law recognises that it may be inappropriate to make a direct comparison between the export prices of exporting producers located in that country, and domestic market prices in the ordinary course of trade (i.e. the normal value) in the same country. Accordingly, WTO law (e.g. Article 2.2 of the WTO Anti-Dumping Agreement) grants the investigating authorities of importing countries significant discretion in the calculation of the normal value of products exported from such NME countries. In this regard, the methodology employed by the Brazilian authorities for determining the dumping margins for exporting producers located in NME countries is substantially different than that



used in investigations involving exporting producers based in market economy countries.

In the context of investigations concerning NME countries, the New Anti-Dumping Regulation contains objective criteria which must be taken into account by the Brazilian authorities when determining: a) whether a particular exporting producer conducts its activities under market economy conditions; and b) whether the specific economic sector in which an exporting producer operates has qualities equivalent to those of market economy sectors. In keeping with a key reform theme inherent in the New Anti-Dumping Regulation, these provisions aim to increase the transparency of Brazilian anti-dumping investigations involving NME countries.

New shipper reviews

Finally, the New Anti-Dumping Regulation establishes specific review procedures which were not contained in the Former Anti-Dumping Regulation. One example is the procedure for "new shipper" reviews. A new shipper review may be requested by a company which did not export to Brazil the product targeted by a particular Brazilian anti-dumping investigation during the period of investigation on which anti-dumping measures were based. The purpose of the review is to assess an individual dumping margin for such a company, and thus establish an individual anti-dumping duty rate. In certain jurisdictions, such as the EU, these rates are typically lower than the residual anti-dumping duty rates established for exporting producers (i.e. the anti-dumping duty rates established for companies which have not received individual dumping margins).

Concluding thoughts

It should be noted that Brazil's New Anti-Dumping Regulation contains a provision which establishes that any complaints requesting the initiation of an anti-dumping investigation filed under the Former Anti-Dumping Regulation will remain subject to the legal provisions of the Former Regulation. Many such cases have indeed already been initiated—there are currently well over thirty anti-dumping investigations being carried out by the Brazilian government, of which three high-profile cases involve the steel industry. The particular steel products being investigated include heavy plates from China, South Korea, South Africa, and Ukraine; cold-rolled steel from China, Finland, Germany, South Korea, Taiwan and Vietnam; and carbon steel seamless pipe from China. Armed with the New Anti-Dumping Regulation, Brazil appears poised to continue its anti-dumping investigations of such high-value commodity sectors.

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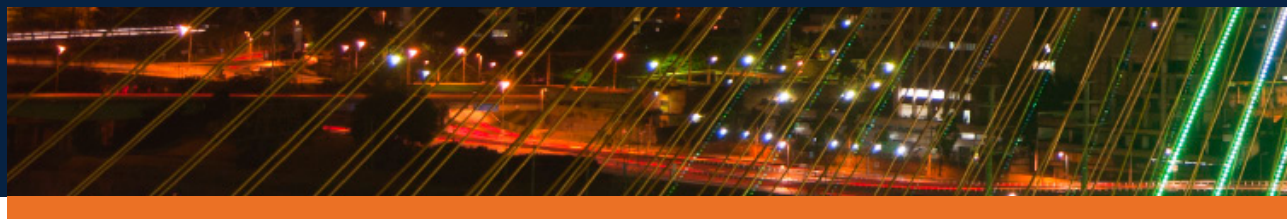
IRB's privatisation

The discussion about the IRB's privatisation has been ongoing for more than a decade. As part of the National Programme for Privatisation, there were two auction attempts in 1999 and 2000, both of which were ultimately frustrated. The 1999 auction was cancelled because there was no consensus on the rules for the functioning of the insurance market immediately after the proposed privatisation of the reinsurer. The 2000 attempt was suspended after the Supreme Court accepted a direct request for the unconstitutionality of the auction.

The IRB has taken significant steps since that time to become a 'corporate entity' as opposed to a 'government entity'. This movement was inspired, at least in part, by the need to respond to increased competition in the Brazilian reinsurance market, following the opening of the market in 2008. At the end of 2008, there were five local reinsurers, 16 admitted reinsurers and 20 occasional reinsurers duly registered with the regulator. At the start of this year, there were 14 local reinsurers, 29 admitted reinsurers and 60 occasional reinsurers.

The IRB has responded to its competition by diversifying its lines of business in the Brazilian market and embarking upon a process of internationalisation, reaching out to other Latin American and African countries. It has also kept a strong foot-hold as one the main local reinsurers in Brazil. Although IRB's gross premium share of the local reinsurance market fell from 85% in 2008 to 25% in 2010, it is currently estimated to be an impressive 40%. These positive developments are to be viewed against the current regulatory framework restricting the transfer of risk between insurance and reinsurance companies. Some critics say the framework is protectionist and is designed to give



the IRB - and arguably other local reinsurers - a competitive advantage. The process of privatisation of the IRB was re-ignited following a bid invitation published on 23 January 2013. It is being conducted by the Brazilian Development Bank, otherwise known as BNDES.

In May 2013, a shareholder agreement with the federal government was signed which regulates the relationship between shareholders, defines the company's management structure and operation and establishes IRB's governance control group. The agreement has been approved by the Administrative Counsel for Economic Defence, otherwise known as CADE, and by the country's superior audit office, the Tribunal de Contas da Uniao.

On 7 June 2013, shareholders approved an increase of the corporate capital of IRB by the issue of new common shares. Following the capital increase, the government reduced its stake from 50% and now holds a combined 48% stake in the company together with state-run BB Seguros (the insurance arm of Banco do Brasil). Itau Seguros has a 15% stake, Bradesco has a 20% stake, and Caixa Barcelona has a 3% stake. 50,000 shares held by the Brazilian Government were offered to IRB employees at a 10% discount on the ordinary subscription price of R$2,577. The Brazilian Government will hold one denominated 'golden share' which will provide it with veto power in the event of any future changes to the name, purpose and shareholding of the IRB, including any changes to the golden share rights.

The privatisation process is expected to complete at the end of September 2013. There is an expectation in the Brazilian reinsurance market that the privatisation will allow the IRB to compete in the market as a more efficient version of its former self and this, in turn, will increase market competition still further. It will also allow the IRB to venture more easily into overseas markets. It remains to be seen whether the privatisation will lead to a relaxation of the current regulatory framework, including the mandatory cession and intra-group limitation rules however the vast majority of experts in the market consider this to be unlikely.

A version of this article first appeared in Insurance Day in July 2013.
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News

HFW Senior Associate Geoffrey Conlin will be visiting London from 23 – 27 September 2013. He will be meeting with clients in the London market.

HFW Partner Fernando Albino and Legal Assistant Giselle Deiro will be visiting London week beginning 7 October 2013. They too will be meeting with clients.

Conferences and Events

ALTA Aviation Law Americas 2013, Miami
25 – 27 September 2013
Attending: Fernando Albino & Giselle Deiro

FIDES Conference 2013, Guatemala
11–12 November 2013
Attending: Geoffrey Conlin

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