

Client Alert

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The Brazilian Clean Companies Act – What You Need to Know

By Kevin Roberts, Ruti Smithline and Duncan Stuart Grieve

2014 is set to be Brazil's year. The FIFA World Cup is expected to bring 600,000 international visitors to 12 host cities, inject R\$25 billion (£6.6 billion) into the economy and present Brazil's vibrant culture to more than 700 million viewers worldwide. With the eyes of the world on Brazil, 2014 will also be the year that the country signals its intention to get tough on corruption; a problem which is perceived to have historically restricted economic growth and inhibited foreign investment.

On January 29, 2014, the Brazilian Clean Companies Act (**CCA**) will enter into force. The CCA is an aggressive and broadly drafted piece of legislation which represents a firm statement of intent from the Brazilian government to align itself with global trends and tackle corruption head on. Brazil is an important trading partner for many UK companies and the reverse is also true.¹ Companies doing business in Brazil should take note of the CCA and ensure that their existing compliance controls and procedures respond appropriately to its particular features. The good news is that the CCA shares several features of established anti-corruption legislation, the US Foreign Corrupt Practices Act (**FCPA**) and the UK Bribery Act (**UKBA**).

The coming into force of the CCA in January 2014 serves as a timely reminder to international businesses to check that their existing compliance procedures accord with developing international standards.

KEY FEATURES

The key features of the CCA were covered in our previous client alert dated August 6, 2013.² In short the CCA:

- applies to any legal entity, branch or office, whether domestic or foreign that does business in Brazil;
- prohibits bribes to any official (domestic or foreign) – this is anticipated to cover an individual who holds an office in the government at any level;
- prohibits other related acts such as fraud, data manipulation and the blocking of government investigations;
- prohibits facilitation payments – there is no *de minimis* exception as in the FCPA;

¹ The UK ranks ninth as a source of Foreign Direct Investment in Brazil and Brazilian Foreign Direct Investment into the UK has been growing consistently and has been greater than British investment in Brazil in three of the past four years. See <http://www.brazil.org.uk/economy/braziluk.html>.

² See Timothy W. Blakely, Ruti Smithline, Jarod G. Taylor and Kendall L. Manlove, *Brazil's New Clean Companies Act Continues Global Fight Against Corruption*, Client Alert (August 6, 2013), available at <http://www.mofo.com/files/Uploads/Images/130806-Brazils-New-Clean-Companies-Act.pdf>.

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- implements strict liability for legal entities involved in corruption – proof that the punishable act was caused by an act or omission on the part of the legal entity is sufficient to subject it to sanctions; and
- introduces harsh administrative and civil sanctions that apply directly to legal entities' income and assets.³

The broad application of the CCA clearly echoes the international reach of the FCPA and the UKBA. The CCA applies to all legal entities that do business in Brazil and imposes liability for acts committed in Brazil or abroad. The CCA's focus on government officials recalls the FCPA whilst the prohibition of facilitation payments and strict liability for legal entities are familiar features from the UKBA. Although the potential sanctions under the CCA are severe, the key difference between the CCA, the FCPA and the UKBA is that the CCA does not impose criminal liability on legal entities for acts of bribery.

STRICT LIABILITY

Unlike under the UKBA, a company cannot avoid liability under the CCA by proving that it had "adequate procedures" in place to prevent persons associated with it from committing bribery. The CCA does not have a defence of "adequate procedures". The strict liability offence for legal entities under the CCA is just that: a company will have to prove that the fee was legal or that it was unrelated to the award of business to avoid sanction. The CCA does provide for the mitigation of fines based on cooperation with the Brazilian authorities and "effective" internal compliance procedures. The criteria for evaluating internal compliance procedures are yet to be established. Companies with a robust FCPA and UKBA compliance policies will be well equipped to respond to any extra requirements.

ENFORCEMENT – RECENT EXAMPLES AND FUTURE AREAS OF FOCUS

The CCA does not have retroactive effect and will only apply to conduct post January 29, 2014. However, there are other laws that Brazilian authorities can use to prosecute individuals. Developments in 2013 clearly show that they are responding to public sentiment in Brazil and stepping up anti-corruption enforcement efforts.

MENSALÃO

The Brazilian political corruption scandal known as the *Mensalão* (big monthly stipend) has caught the attention of the international press. Congressmen have been found guilty of participation in a systematic vote-rigging scheme involving serious offences including bribery and money-laundering.⁴ The case has been rumbling on since it was uncovered in 2005. However, on November 13, 2013, the Brazilian Supreme Court surprised many by dismissing "procrastinatory" appeals and ordering that sentences should be carried out immediately. Tolerance for corrupt activity is clearly waning in Brazil.

³ Under Administrative Proceedings, fines range from 0.1% to 20% of a companies' gross annual revenue and can include special public disclosure of the decision finding that the company was involved in corruption. Under Judicial Proceedings, legal entities may be compelled to forfeit assets and rights obtained by means of corrupt practices, their business activities may be suspended, they may be prohibited from receiving incentives, subsidies, subventions, donations or loans from public entities and they may even be compulsorily dissolved.

⁴ See <http://www.economist.com/blogs/economist-explains/2013/11/economist-explains-14/print>.

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EMBRAER

In early November 2013, details of the Brazilian authorities' investigation into Embraer S.A. emerged. The Brazilian conglomerate is the world's third largest aircraft manufacturer and the investigation shows that the authorities are not shying away from pursuing big, powerful targets. The current investigation appears to be focused on a bribe paid to an official in the Dominican Republic in return for a \$90 million contract to build planes for the Dominican military.⁵

CONSTRUCTION SECTOR

The construction sector is booming in preparation for the 2014 World Cup and the 2016 Olympic Games with many multinational companies involved. Construction companies are also in the firing line following allegations that many pay bribes to tax auditors. In response, Sao Paulo's mayor has indicated that he will report offenders for investigation purposes outside Brazil and set up a website in June which allows individuals to report cases of corruption.

OVERSIGHT OF AGENTS AND CONSULTANTS

For companies doing business in Brazil, the risks involved in sectors that require significant interaction with public officials have multiplied. As with many foreign jurisdictions, multinational companies frequently employ third party agents (*despachantes* in Brazil) to assist them in navigating complex regulatory requirements. Customs brokers, for example, are compulsory for those who seek to import goods to Brazil. Tax consultancy is also common, given Brazil's labyrinthine tax system. Where local agents are engaged, compliance risk is increased. As under the UKBA and the FCPA, companies can be held liable under the CCA for the acts of agents acting on their behalf.

With a current crackdown on corruption and strict liability offences being introduced into Brazil's legislation, effective oversight by corporations employing agents in Brazil is crucial. The first step is effective due diligence on the individual or organization being hired. Particular focus should fall on the professional history of agents. If the agent is a former government official, more stringent controls are needed. Unusual terms of engagement may raise further red flags. "Success fees" and other non-standard forms of remuneration should be avoided. Contractual provisions requiring compliance with local law are advisable; however they must be backed-up with management and accounting scrutiny of the activities of local agents to ensure that the required compliance standards are adhered to.

⁵ Embraer has been subject to an FCPA investigation by US authorities since 2011 and details of the Brazilian investigation emerged following a formal request for evidence from the US by Brazilian authorities.

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