EXPECT FOCUS®

LEGAL ISSUES AND DEVELOPMENTS FROM CARLTON FIELDS

INTERNATIONAL | VOLUME II, AUGUST 2016

RULES OF THE (INTERNATIONAL) ROAD:

Choosing and Appointing a Distributor

- The Long Road Ahead for the UK and Europe
- Brexit's Impact on the Insurance Industry
- The Public-Private Partnership as a New Tool for Infrastructure Development in Argentina
- Streamlined Procedures for Authenticating Documents in Brazil

CARLTON FIELDS

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Post-*Daimler*: Are Non-U.S. Companies Safe from Suit in U.S. Courts? What if the Non-U.S. Parent Registers to Do Business in a State?

BY BRUCE J. BERMAN & STEPHANIE A. FICHERA

For decades, U.S. courts have been preferred venues for plaintiffs' lawyers seeking to sue non-U.S. companies. This is due to the perception that American juries award vastly greater recoveries than those outside the United States, and also because of the expansive discovery opportunities U.S. courts offer (despite recent efforts to narrow federal discovery rules, discovery is unlikely to be limited anytime soon). However, globalization, which makes highly-desirable U.S. markets accessible to non-U.S. providers of goods and services, has enhanced concerns over the consequences of offshore companies availing themselves of the U.S. market.

Perhaps surprisingly, U.S. courts have been slow to provide guidance. The U.S. Supreme Court did not issue its decision in *Daimler AG v. Bauman* (clarifying the Court's 2011 decision in *Goodyear Dunlop Tires Opns, S.A. v. Brown*), until early 2014. *Daimler* declined to permit the exercise of personal general jurisdiction over the parent company (the German Mercedes manufacturer) of a U.S. subsidiary (MBUSA in a case where Argentine plaintiffs sought to sue the German company for claims arising out of activities in Argentina). The Court essentially ruled that if a company is not (1) incorporated in, or (2) headquartered in the United States, it cannot be sued here for any claim unrelated to specific conduct by the foreign company in the United States.

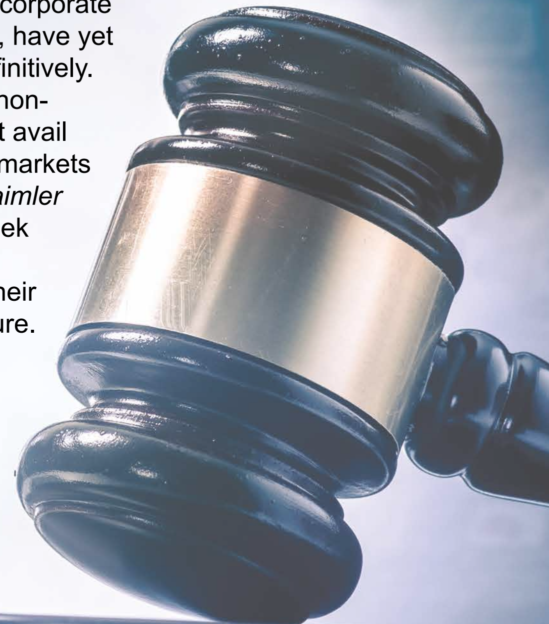
The *Daimler* decision appears to have inspired confidence that non-U.S. companies need no longer be so concerned about being hauled into U.S. courts they deem hostile—even where they establish local U.S. subsidiaries to conduct business important, or even critical, to the parent company's business. Such confidence may, or may not, be warranted.

First, it is important to understand the difference between general and specific jurisdiction. Generally, pursuant to specific jurisdiction, a non-U.S. company can always be sued in the United States in the federal or local courts of a state where it has engaged in activity, or to which it has directed activity, for claims arising out of such conduct. The *Daimler* case addressed only general jurisdiction, the ability of a U.S. court to exercise personal jurisdiction over a non-U.S. company on *any* claim, irrespective of the situs of the conduct. That question turns on U.S. constitutional principles analyzed in *Daimler*. But the *Daimler* analysis occurred where the plaintiff sought to justify jurisdiction on an "agency" theory, claiming Mercedes' U.S. subsidiary was the German manufacturing company's agent, and thus a representative through which the non-U.S. parent could be sued. The Supreme Court ultimately rejected that argument.

But *Daimler* did not address, among other things, circumstances that might constitute a waiver of any objection to personal jurisdiction. Under longstanding U.S. law, subject matter jurisdiction (the ability of the court to entertain a specific type of controversy) cannot be waived; but *personal* jurisdiction can always be waived. So what happens, for example, if the non-U.S. company, in order to conduct specific, narrowly focused activities in a U.S. state, is compelled to register to do business, and to do that, must appoint an agent specifically to accept service of process directed to the foreign company? Can the foreign company now be sued for conduct *unrelated* to any in-state activity based on consented-to in-state service of process on the appointed designated agent?

The answer is not so clear. Indeed, relatively recently in Delaware, two federal judges reached opposite conclusions. The issue was resolved only this year by the Delaware Supreme Court in *Genuine Parts Co. v. Cepec*. The Delaware court reasoned that its state's registration statute could not be read "as a broad consent to personal jurisdiction in any cause of action, however unrelated to the foreign corporation's activities in Delaware." But this case interprets Delaware's statute only. The court recognized that all 50 states and the District of Columbia have enacted their own registration statutes, all requiring foreign corporations to register and appoint an in-state agent for service of process. And while disagreeing on the outcome of cases in other states, the court conceded that, even post-*Daimler,* some courts have held "that implied consent by virtue of simple registration ... remains a constitutionally valid basis for general jurisdiction over a nonresident corporation."

Daimler addressed facts particularly unsympathetic to the most liberal jurisdictional principles. Future decisions will likely test its holding under more compelling facts. And waiver/consent issues, such as those presented by corporate registration statutes, have yet to be addressed definitively. For these reasons, non-U.S. companies that avail themselves of U.S. markets should approach *Daimler* with caution, and seek advice from U.S. counsel to assess their jurisdictional exposure.



Rules of the (International) Road: Choosing and Appointing a Distributor

BY ANDREW J. (JOSH) MARKUS

Appointing an agent to sell to businesses in your chosen country on your company's behalf may be a good first step toward penetrating a foreign market, as we previously discussed in Rules of the (International) Road: Make and Informed Decision on Agency, *Expect Focus International*, Winter 2016. But you may choose to appoint a distributor instead. This article discusses this option, which represents a greater commitment.

Benefits

There are numerous reasons to appoint a distributor, which can enable you to make better margins than you would selling through an agent:

- No physical presence needed in the country
- You sell to the distributor in the United States
- The distributor is responsible for:
  - Shipping the products to the country
  - Importing them into the country
  - All associated freight and insurance costs
  - Import and customs duties
- The distributor pays you for the goods so there is no need to worry about whether buyers in the country pay for your product

Pitfalls

If your products damage consumers inside the country, you are exposed to lawsuits. Product liability insurance is one possible answer. Additionally, when you end your relationship with a distributor whose territory is outside the United States, you risk being required to pay a severance type payment. That applies whether the distributor was at fault or not. In at least one jurisdiction, Puerto Rico, once you choose a distributor you are, by law, stuck with them. So as when choosing an agent, choose your distributor wisely.

Distribution Agreements

It is often preferable, depending on the location of the distributor's territory, to have a written distribution agreement. Frequently, a company already has a preferred distribution agreement. While some companies simply use that one agreement worldwide, it is best not to. Because each country's laws are different, your terms of sale, restrictions on territory, termination provisions,

and other provisions may be unenforceable in the applicable country. Certain restrictions such as prohibitions on selling competing goods and discounting, and requirements regarding minimum pricing may be deemed matters of public policy and not permitted under local law. So, we recommend clients have us engage a lawyer in the applicable country to conduct a limited review of the specific issues and advise us on how to tweak the agreement to comply with local law.

A distribution agreement should always contain the terms and conditions on which you are supplying goods to your distributor. These should include payment, delivery, and return terms; and provisions that address what happens if payment is late or not made at all, or catastrophic events prohibit you from providing all or some of the merchandise. It is also important that the agreement address how disputes will be resolved.

Using the right International Commercial Terms (Incoterms) is critical. As previously discussed in Rules of the (International) Road: Make and Informed Decision on Agency, *Expect Focus International*, Winter 2016, these rules, promulgated by the International Chamber of Commerce, specify shipment and delivery obligations.

Sellers commonly misuse the free on board (FOB) Incoterm, using it when goods are being shipped by air, or when they designate delivery at the seller's factory. As a seller, a company should determine exactly what it wants to agree to do and then choose the correct Incoterm. For instance, if a seller will make the goods available at its warehouse or factory for pickup and transport by the distributor, it might want to make the goods available ex works (EXW) warehouse (specifying where) so everyone's duties are clear. That way, there will be no unexpected expenses for the seller and insurance will cover the goods without gaps—assuming the distributor complies with the EXW obligations.

Note that the Uniform Commercial Code, the uniform law applying to sales of goods, specifies its own "Incoterms." We suggest using the ICC 2010 version Incoterms for international sales.

Distribution agreements raise numerous considerations beyond the basics discussed here. We will address more nuanced concerns in future articles. For a short checklist that covers some major aspects of the distribution relationship, see: http://goo.gl/QpsGvA.

Brexit and International IP: Changes are Coming

BY WILLIAM GILTINAN & JILL SARNOFF RIOLA

Surprising many commentators and pundits, the UK voted to exit the European Union. That exit raises questions as to whether IP filings made through the European offices will continue to provide protection in the UK during and after the exit process. While changes are coming, the good news is that the exit process will take a long time to finalize, during which the status quo should be maintained. During that process, we believe existing European IP filings will continue to be enforced in the UK. So, while it is important for IP holders to watch this issue, no immediate action is needed.

For some time, IP holders have taken advantage of centralized filings in Europe. Trademarks could be protected across Europe by filing a single application in the European Union International Property Office (formerly OHIM), and patent applicants could file a single application in the European Patent Office. As the UK prepares to exit the European Union (EU), IP holders who require protection in the UK must evaluate whether prior European filings will remain sufficient to protect them in the UK, and whether, going forward, they should file separately in the UK in addition to filing in the European IP offices.

As to patents, little is likely to change for most clients. The European Patent Office (EPO) is not an EU institution. It was created as a result of a separate treaty (the European Patent Convention). A country can be part of the European Patent Convention, without being an EU member (the commonly cited example is Switzerland). As to patent applications filed through the EPO, little is expected to change with respect to enforcement in the UK. The UK's status will simply be similar to that of Switzerland.

However, things may change more dramatically with respect to the new Unitary Patent and Unified Patent Court. This relatively new development in European patent law, an EU creation, is intended to create a single enforcement mechanism for patents across European countries. The exit's impact on the unitary patent movement is unclear. But, given its nascent state, there is likely to be little or no practical impact for most clients. Clients that hoped to take advantage of the unitary patent will, however, be well advised to continue with separate UK filings or EPC filings while the uncertainty created by Brexit works itself out.

Regarding trademarks, changes are likely, but not for some time given that the exit process is expected to take several years. Holders of Community Trade Mark (CTM) and international registrations that designate the CTM/EU in lieu of the UK are still able to enforce those registrations in the UK during the exit process. Once the exit is complete, it is unclear how it will impact the enforceability of such registrations in the UK going forward. The UK could pass legislation that converts preexisting CTM registrations into UK national registrations (no doubt with a fee), thereby preserving rights in the UK for those registration holders. Likewise, the international authority could add a designation for the UK to any registration that previously designated the EU. Only time will tell how such issues play out. But the mechanism is less important than the result—that former CTM and international registrations will remain enforceable in the UK until the exit is finalized. There are strong policy reasons to ensure that result.

Given the uncertainty created by the Brexit vote, we expect many clients will consider filing separate applications in the UK and in the EU International Property Office going forward (or designating both the EU and the UK in international applications). That approach is safer given that this situation is unprecedented. Whether it ultimately proves necessary remains to be seen. Clients with upcoming filings in Europe will thus have to balance the importance of the filing to their business with the additional cost of a national UK filing going forward. For clients that consider the UK an important market for their products or services, filing UK-specific applications is likely the best approach.

Last, IP harmonization and related laws across Europe are likely to suffer. Over time it is likely that UK law regarding issues such as privacy, database rights, trade secret protection, etc. will develop more independently. This could lead to inconsistencies that require attention in licensing agreements and enforcement strategies. In addition, choice of law and choice of venue clauses in contracts implicating IP issues will need to be reviewed as this situation develops, particularly given that the enforceability of decisions by UK courts in EU countries, and the enforceability of decisions of EU courts in the UK will be changing.

We will continue to monitor this situation and its impact on our client's filings and regulatory concerns. If you have questions about how Brexit might impact your European IP protection, please contact us so that we can assist. In the meantime, clients should:

- Review their current trademark filings in Europe and determine which are likely to raise enforcement concerns in the UK;
- Consider national UK filings for upcoming trademark applications;
- Carefully review any license agreements with impacts in the UK to determine if clauses in those licenses relying on EU remedies, or defining territory based on EU membership, need to be amended;
- Evaluate choice of law, choice of venue, and remedies clauses in any license or similar agreement with parties in the UK or the EU;
- Analyze license agreement royalty calculations to determine how royalty streams are likely to be impacted by changes in taxes or duties for items sold in, or exported from, the UK; and
- Review any applicable enforcement decisions that contemplate pan-EU remedies.

BREXIT'S IMPACT ON THE INSURANCE INDUSTRY

BY BARRY LEIGH WEISSMAN

Following the UK's historic vote to leave the EU, numerous questions have arisen, including whether the UK will really leave the EU and whether Scotland and Northern Ireland (both of which voted to remain in the EU) will have their own referendums to leave the UK. At this early stage in the process, U.S. insurance companies lack the information needed to make decisions. But they have much to consider, including the following.

Domicile for European Business. Should insurance companies immediately seek another EU country to domicile their European business or take a wait-and-see approach? U.S. companies that use London as their European base may find a move is necessary to maintain unfettered access to the EU. As English-speaking nations, Scotland and/or Northern Ireland may become attractive options. Additionally, these two countries may seek to enact tax and related legislation to entice companies from London to their cities.

Solvency II. The Solvency II Directive ("Solvency II") codifies and harmonizes EU insurance regulation and primarily concerns the amount of capital EU insurance companies are required to hold to reduce the risk of insolvency. Under Solvency II, the solvency regimes of countries outside the EU are assessed to determine whether they are "equivalent" to those of the EU. If the UK does leave the EU, it would, absent a contrary agreement, no longer be an equivalent country, putting it on similar footing with the United States, which, likewise, is not equivalent.

Companies with UK parents. With the pound losing strength, the financial stability of the entire entity could be endangered. Enterprise risk management systems will need to be examined and adjusted. These are just some considerations for companies with UK parents.

Some Additional Considerations

- Cybersecurity
- Data privacy issues (e.g., which standard will be followed the UK, the EU, both, or another country's?)
- Will the UK—or Ireland—remain on the National Association of Insurance Commissioners' list qualified foreign jurisdictions?
- Tax implications once the UK is no longer part of the EU VAT system
- Will the UK vary its anti-money laundering directive and if so what will be the impact on entities doing business in the UK?

Conclusion

The only certainty is that the relationship between the UK and the EU will change at some point in various ways. For now, the best strategy is to allow the politicians and government entities to adjust and determine their strategies. This can really only occur once the UK elects a new prime minister.

Changes in Cuba May Impact the Insurance Industry

BY BARRY LEIGH WEISSMAN

While much remains to be determined, the recent easing of U.S. restrictions on travel to and trade with Cuba may bring opportunities for U.S. and global insurance companies. However, many questions and obstacles remain. This article touches on some of them.

Travel Insurance

Americans may now travel to Cuba for one of 12 purposes[1] without a specific license from the U.S. Office of Foreign Assets Control (OFAC).[2] However, even though the United States is now allowing travel, the Cuban government requires that all travelers have insurance to cover any medical expenses incurred while in Cuba.[3]

Insurance companies domiciled in the United States selling insurance to U.S. citizens traveling to Cuba are authorized to pay for services involving health insurance, life insurance, travel insurance, and emergency medical services in Cuba.[4] However, as tourist travel is still banned, U.S. insurance companies can only provide insurance for those persons authorized to travel to Cuba for one of the 12 enumerated purposes, or under a specific OFAC permit. Any medical bills that are incurred in Cuba must be settled prior to leaving Cuba. Medical facilities in Cuba do not accept health and/or medical insurance plans unless they specifically provide insurance for travel to Cuba (your regular health insurance policy will not pay for services in Cuba, as discussed below). Travel insurance sold by U.S. companies will be able to directly dispense payments to medical and assistance service providers in Cuba.

U.S. domiciled insurers are authorized to issue policies and pay claims for non-U.S. nationals traveling to or within Cuba if the non-U.S. national has purchased a global policy—a policy not issued specifically for travel to Cuba[5]—prior to visiting Cuba. However, beyond these specific global health, life, or travel insurance policies authorized by 31 C.F.R. §515.580, U.S. insurers are not permitted to issue policies or pay claims for non-U.S. persons traveling to Cuba.[6]

Marine Insurance

U.S. insurance companies/underwriters may now also provide vessel insurance to boaters engaging in authorized activity in Cuba. On July 20, Novamar, a specialist in the marine and yacht insurance segment, announced it is offering a policy for U.S.-flag yachts navigating Cuban waters. Vessels $50,000 in value or greater are eligible for coverage. Cuba endorsement premiums start at $500. The limit on stays is 14 calendar days.

Business Insurance Coverages

The following are compulsory business insurance coverages for those opening businesses in Cuba:

- workers' compensation (Cuban social security—not handled by the insurance market);
- medical expenses insurance for visitors to Cuba or those temporarily residing in the country; and
- third-party automobile liability for foreign residents (including diplomats) and for vehicles carrying either freight or people.

Third-party auto insurance coverage is not required to obtain a driver's license in Cuba for personal use. However, if you are not a Cuban citizen or are providing services such as transportation of goods or people the Ministry of Transport will require third-party coverage.

Cuban Foreign Investment Law No. 118 requires that joint ventures and foreign-owned companies insure all property and casualty risks.[7] To favor the Cuban insurance market, the law requires that Cuban insurers be given the first opportunity to provide this coverage.[8] However, if the Cuban insurers "do not offer terms that align with international markets," foreign insurers can step in. Regardless, however, the insurers must comply with Cuba's Ministry of Finance and the Cuban Insurance Regulator (SSC) rules.[9] With only two domestic insurance companies presently operating in Cuba, an influx of investment could ultimately result in business for foreign insurers. However, the difficulties associated with an underdeveloped insurance market in Cuba may impede joint ventures or foreign investment in the country altogether. Unfortunately, there has been no guidance provided as to how one would obtain Ministry of Finance or SSC permission to gain the clearance required to obtain insurance from the international marketplace, or as to how a non-Cuban insurer would be permitted to provide such insurance for foreign companies in Cuba.

The new OFAC FAQs make clear that U.S. reinsurers cannot participate in arrangements for which the underlying activity[10] is not authorized, such as providing coverage for a foreign company offering investment opportunities in Cuban state-owned enterprises. In other words, U.S. reinsurers may be prohibited from participating even if the foreign company is operating lawfully, simply because the foreign company is not operating under an authorization from OFAC.

However OFAC states explicitly that providing cargo insurance is authorized as long as the underlying export transaction itself is authorized, and that an authorization to offer insurance coverage allows for the payment and settlement of claims under the policy.

Cuban Carriers

There are only two operational carriers in Cuba: Esicuba and ESEN, subsidiaries of the state-owned holding company Caudal. Esicuba is the only writer of general liability as well as the majority of property policies, with the exception of agriculture. ESEN covers liability coverage for motorized vehicles, as well as being the only writer for agriculture and life insurance in Cuba. Asistur is one of the only national brokers and Intermar is one of the only loss adjusters; both are also subsidiaries of Caudal.

Nonadmitted insurance and fronting operations do not appear to be permitted in Cuba. While the law dictates that insurance must be purchased from a local insurer, as discussed above, it also provides for international insurers to be able to provide coverage but does not explain how that will be accomplished. In 2013 Brazilian insurer Capemisa announced it applied to become the first private insurer in Cuba. However, despite the fact that it reported it had received authorization to sell travel insurance in 2015, the company's website says it has temporarily suspended offering an insurance product in Cuba and expects to re-launch soon.

[1] 31 C.F.R § 515.560(a)(1)(12). [2] *Fact Sheet: Treasury and Commerce Announce Regulatory Amendments to the Cuba Sanctions*, U.S. DEPARTMENT OF TREASURY (Jan. 15, 2015), *available at* https://www.treasury.gov/press-center/press-releases/Pages/jl9740.aspx. [3] *Insurance Information for Travelers to Cuba*, CUBA TOURIST BOARD IN CANADA, *available at* http://gocuba.ca/client/news/show.php?news_id=17. [4] 31 C.F.R. § 515.560, Note 2. [5] 31 C.F.R. § 515.580; *Frequently Asked Questions Related to Cuba*, U.S. DEPARTMENT OF THE TREASURY (2016), available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwirpsq_xNDNAhVFGx4KHXy6CpQQFggcMAA&url=https%3A%2F%2Fwww.treasury.gov%2Fresource-center%2Fsanctions%2FPrograms%2FDocuments%2Fcuba_faqs_new.pdf&usg=AFQjCNEvwPHMXlDs7MnbL7QQHNfwCXnXIw&bvm=bv.125801520,d.dmo. [6] *Id.* [7] *Id.* [8] *Id.* [9] *Id.* [10] 31 C.F.R. § 515.573(d).

STREAMLINED PROCEDURES FOR AUTHENTICATING DOCUMENTS IN BRAZIL

BY JASON P. JONES

Brazil has become the 111th contracting state to the 1961 Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents (the "Convention"). The text of the Convention was approved by the Brazilian Federal Congress in July 2015 and enacted by Decree No. 8660 on January 29. In Brazil, the National Council of Justice (Conselho Nacional de Justiça) will be responsible for regulating the application of the Convention, which takes effect August 14.

Brazil's accession to the Convention will facilitate cross border legal and business transactions with the United States (and other signatory countries) by eliminating the consular authentication process (also known as "consularization" or "consular seal"). Essentially, consular authentication is an endorsement by local Brazilian diplomatic authorities to certify that documents are legitimate. This is typically accomplished by certifying the signature on the document itself or by certifying the signature of the public notary who certified the signature. This elaborate process requires that a document issued in the United States be (1) notarized by a public notary, (2) then verified by a county clerk, (3) then legalized by a Brazilian diplomatic office located in the United States. The document must also be translated under oath into Portuguese and registered in the National Public Registry of Deeds and Documents upon its arrival in Brazil.

However, once the Convention takes effect, Brazil will use the "apostille system," which greatly simplifies and reduces the costs associated with public document circulation and acceptance between countries that are parties to the Convention. An apostille, a certificate issued by a designated authority in a country where the Convention is in force, consolidates the information required to validate a public document into one document. It certifies the authenticity of the signature and the capacity in which the person signing the document acted, and identifies the seal/stamp which the document bears. In the United States, federal public documents may be authenticated with an apostille issued by the U.S. Department of State. Documents issued at the state level may be authenticated by an apostille issued by the competent authority in each state. Generally, this is the Secretary of State of the state.

The implications of Brazil's participation in the Convention are significant. In addition to facilitating cross border transactions, the Convention will benefit many U.S. and Brazilian individuals and families who live, travel, and work between the two countries. The streamlined procedure will expedite the transfer of, among other things, birth certificates, school records, adoption orders, and documents submitted in support of visa applications.

Current legalization procedures control until the Convention takes effect.

The Public-Private Partnership as a New Tool for Infrastructure Development in Argentina

BY SANTIAGO CARREGAL, LORENA SCHIARITI & ENRIQUE VERAMENDI OF MARVAL, O'FARRELL & MAIRAL, WITH THE PARTICIPATION OF ANDREW J. (JOSH) MARKUS

The Federal Executive Branch (known by the Spanish acronym, PEN) of the Argentine government recently submitted to the Argentine Congress a bill seeking approval of a new Public-Private Partnership (PPP) framework. This regime is seen as a new legal tool to help address the country's existing infrastructure deficit and make banks and multilateral lending agencies more interested in financing public works.

Congress is expected to discuss this initiative in the coming weeks and, if approved, the new legal framework for PPPs may be applied to several infrastructure projects throughout Argentina.

PPPs and their strategic importance

The lack of investment in Argentina's infrastructure is so deep and the need for capital, technology, management, and resources to overcome this deficit is so massive that neither the public nor private sector alone can provide a solution. The Argentine government is, accordingly, seeking ways to provide the infrastructure required for the country's needs.

In the United States, the need for infrastructure repair and improvement is also deep and massive. State governments have used the PPP model to encourage private investment in infrastructure as an alternative to the standard model of public procurement. It has been argued that models involving an enhanced role for the private sector, with a single private sector organization taking responsibility for most aspects of service provisions for a given project, could yield an improved allocation of risk and allow for accelerated project completion while maintaining public accountability for essential aspects of service provision.

Both the U.S. and Argentine governments were well aware of PPPs' use in the U.K. during the early seventies. Until then, the classic conception of public contracting, with the private sector providing a service directly to the public sector on a bid basis, prevailed. With the advent of PPPs, the model shifted to a sharing of responsibility and risk. The greatest advantage for the public sector is that the works are financed by the private sector. The works are paid for over time by the state through a periodical fee in consideration for the service provided by the private party as long as the service meets pre-established standards. This not only defers the budgetary impact of the project's cost, but also promotes intergenerational solidarity in its financing.

PPPs are an alternative to the classic public works contracting system in Argentina in which the state usually designs, finances, operates and pays, while the private party only builds. The framework submitted by the PEN also implies a shift in the traditional paradigm on public contracts, as it excludes or limits the public law prerogatives of the administration (including, the power to unilaterally modify the contract; to terminate it for reasons of public interest; to force the private contractor to continue with the performance of the contract despite the state's lack of compliance as to its own obligations; and the limitation of state liability).

In Argentina, two regulations were previously enacted to govern PPPs, neither of which was ultimately used: Decree No. 1299/2000 and Decree No. 967/2005. The first was an excellent framework but because of the vagaries of timing as to both the international economy and Argentine politics, it was never used. The second resulted in a deficient regulation despite having been issued in an excellent international context with an abundance of capital available for emerging markets and historically favorable trade terms for Argentina.

Main provisions of the Executive Branch's PPP bill

The bill submitted by the PEN represents a substantial improvement over the current PPP framework established by Decree No. 967/2005.

The new framework includes many elements that were included in Decree No. 1299/00. For instance, it allows contracts to be assigned, thereby permitting structured financing for projects.

The bill is relatively short and allows for its provisions to be implemented through its subsequent regulations. It also allows the project to be governed by the terms of the solicitation of bids and the ultimate concession agreement.

The bill also defines PPPs broadly. They can include contracts for construction, supply, maintenance, management and/or operation of projects and thus, are not limited to infrastructure projects.

The bill's main provisions follow:

Alternative regime. PPPs constitute an alternative regime for public works contracting depending on what the public authority deems the most efficient way to accomplish a public project. Traditional methods of accomplishing public projects are not precluded.

Regulatory framework. The legal framework will be completed through the implementing regulations as well as the bidding terms and the provisions of

the contract. Neither the Public Works Law No. 13,064, nor the Concession of Public Works Law No. 17,520, nor the Public Procurement Decree No. 1023/01 will be applicable to projects governed by the PPP regime.

Flexibility in legal structure. The entity undertaking a project may be an existing company or a special purpose vehicle (SPV) formed solely for the purpose of undertaking the project. The PEN may have an ownership interest in the SPV. Corporations (including SPVs) created under the PPP framework can be publicly offered under the Capital Markets Law No. 26,831, a potentially important tool in seeking a wider financing net.

Flexibility in guarantee structures. The bill allows the assignment of receivables and contractual rights. It also allows insurance or other guarantees (whether from local or foreign entities) to be used. It provides for the ability to create trusts with a financial entity as trustee as a way to secure funding lent to the SPV and to assure the payment of loan funding from a segregated source. Trusts must have a specified minimum liquidity during the term of the PPP contract. Also, they must hold certain assets specified by law and may issue securities thus allowing an assured flow of funds for loan repayment.

One issue Congress must still address is that the Civil and Commercial Code requires that assignments of credits where the consideration is wholly or partially backed by fees or rates to be paid by users, must be formally notified to the users, in order for the assignment to be enforceable against third parties. This requirement should be eliminated in PPP contracts as it has previously represented an obstacle for financing projects such as toll roads or gas distribution networks where such notification was —and remains— unworkable because of the large number of users. We suggest replacing this mechanism with a publication of the assignment in the Official Gazette and, if necessary, in a newspaper in the project's jurisdiction.

Flexibility in the contractor's remuneration. Financing long-term projects in Argentine pesos, a currency exposed to inflation, is impossible unless the regime allows for price redetermination mechanisms. For this reason, the bill expressly excludes the prohibition of indexation set forth by Convertibility Law 23,928. Moreover, the parties may agree that the consideration be payable in foreign currency. The consideration structure provides the possibility of assigning funds resulting from credit operations or taxes; the creation of surface rights and/or use of any other contributions made by the state. Finally, the contractor has the right that the original economic balance of the contract be preserved. Hence, changes to the initial cost-benefit structure of the project imposed by the government within the limits permitted by law, must be compensated accordingly.

Step-in rights. Loan agreements entered by the contractor may include step-in rights, meaning that, should the borrowers default, the PPP contract will be assigned to the creditor or to eligible third parties, subject to the procedures to be established in the contract.

Possibility of appointing independent technical auditors. The parties to the contract may appoint independent technical auditors who will effectively control and monitor the execution of projects in order to determine whether the consideration paid to the party in charge of the project has accrued. The contract may specify that if the administration does not agree with the auditors' determination, this will not preclude the payment of the consideration, which will remain in a trust until the dispute is solved.

Competitive dialogue. This concept, often used in the United States, is novel in Argentina. It is a way to arrive at solutions for a contract's content when the PEN knows what it wants to achieve but is unsure what methods would be the most effective to reach its goals. By having a dialogue with the possible contracting parties, the PEN can determine which solutions are best, and formulate the final request for proposal accordingly.

Quantification of damages in case of breach by the parties. Under the new law, the parties' liability for breach of contract will be as set forth in the Argentine Civil and Commercial Code but also governed by the provisions of the bidding terms and the resulting concession contract. The damages calculation may include the possibility of lost profits damages if included in the concession contract.

Compensation for early termination. The contract will set the scope of compensation in cases of termination for reasons of public interest, as well as its determination and method of payment. All such compensation must be paid prior to the takeover of assets. Rules limiting the state's liability are inapplicable.

Dispute resolution. Arbitration. Technical or any other kinds of disputes arising out of PPP contracts may be submitted to technical panels or arbitral tribunals. This is becoming more commonly used in U.S. PPP contracts. Under the new law, review of the merits of the arbitral award by the local courts is prohibited. Arbitration may take place outside of Argentina.

Final Comments

This new regime seeks, essentially, to allow a balanced and predictable collaboration between the public and private sectors, allocating project risk in a reasonable and efficient way between the parties. Once approved by the Argentine Congress, it will represent a positive change by limiting the ability of government to override agreed contractual relations. Assuming regulations consistent with the intent of the new law, it will then be possible for Argentina to capitalize on the worldwide trend toward using public private partnerships and move forward with the construction of needed infrastructure to benefit its citizens.

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