

Plea Bargaining Agreements: The impact on D&O coverage in Brazil

Published 25 May 2016

Operation Car Wash, the investigation ordered by the Brazilian Supreme Court into the alleged corruption within Brazil's state oil company, Petrobras, continues and its impact is now being felt within the highest levels of the nation's businesses and the government.

Currently, many plea bargaining agreements are being entered between defendants (directors and officers of big construction companies) and prosecutors. As we consider in more detail below, these agreements may present coverage issues for D&O insurers, specifically whether insurers should pay the defence costs of the many directors, officers and managers of construction companies implicated in the corruption scandal.

In Brazil, plea bargaining agreements are governed by Law no. 12.850/2013. These agreements are used in white collar crime investigations, as a means of obtaining the necessary evidence that may assist the investigation carried out by the police and bringing criminal proceedings.

Such agreements will be considered where an individual confesses to committing a crime and they also:

- Identify others in the criminal organization and the crimes committed by them;
- Reveals the hierarchical structure and the division of the activities within the criminal organisation;
- Prevents crimes that would have been perpetrated by the criminal organisation;
- Leads to the total or partial recovery of the profit or benefit obtained by the criminal organisation;
- And/or prevents physical harm;

In return for providing this information voluntarily, the individual will receive a reduction in the sentence that would otherwise be imposed by the criminal court or granted a judicial pardon. The plea bargain agreement reached between the parties must be approved by the judge.

Brazilian D&O insurance policies usually exclude cover in cases where an insured admits committing an illegal act, as it is not intended to provide cover for bad-faith or fraudulent acts.

Difficulties therefore arise where the insured executes a plea bargain agreement with the public prosecutor, in which the insured admits participation in criminal activities and knowledge about the investigated crimes. Each case will depend on what allegations are made against the insured, the specific D&O policy wording and how any admissions by the insured are phrased, but it is possible that an unequivocal admission may trigger the policy exclusion and result in no insurance cover being provided in respect of the acts identified in the plea bargain agreement.

The terms of plea bargain agreements are not publicised in Brazil, and the accused's name, qualification, image and other personal information is kept confidential until the criminal proceedings are filed. In practice, therefore, this means that the insurer will only become aware of the existence of the plea bargain agreement at a late stage, probably after significant defence costs have already been advanced.

Once the plea bargain agreement is made available and the admission confirmed, insurers are likely to cease paying any further defence costs and may be entitled to seek to recover any costs already paid, although recovery may be difficult in practice.

Given the likelihood of disputes arising between insurers and insureds over plea bargain agreements, we recommend that D&O insurers operating in the Brazil market carefully review their D&O wordings and consider whether to include a specific exclusion with regard to plea bargain agreements, irrespective of whether there is an admission of guilt or not.

Authors



William Allison

London - Walbrook

wallison@dacbeachcroft.com

