
Brazil D&O Update: Impeachment and Car Wash Operation

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On 31 August, Brazil's President Dilma Rousseff was removed from office as part of the impeachment process. This process began on 2 December 2015, after reports that the President had breached fiscal laws by moving government funds between budgets. It also followed a very high rate of discontentment with her government, as a consequence of the deep economic crisis that affected the country in the period following her re-election.

Over the same period, Brazil witnessed its biggest operation against government corruption, the so called Car Wash Operation, which investigated a number of improper acts allegedly committed by the President's allies, which in turn, added fuel to the impeachment process.

The Car Wash Operation, carried out by the Federal Police, has investigated several companies (both public and private), politicians and political parties, and convicted many political players and executives. Although this was not the first operation of the Federal Police aiming to fight corruption, it seems to be the most comprehensive one, considering its range of targets, that multiply as the investigation goes deeper.

As a result, many executives and board members of companies involved in corruption schemes have hired defence attorneys, charging very high fees, in order to try to avoid convictions, having personal assets blocked or even paying bail.

The corruption has highlighted to directors and officers of corporations throughout the country the importance of having D&O insurance. Those with D&O cover are also now asking the insurance companies to increase the sums insured so that they have adequate levels of cover.

The increase in D&O claims and the increased demand for D&O cover in Brazil have resulted in higher premiums. D&O premiums are significantly higher now for construction companies and those connected to the oil and gas industries because these companies are the most involved in public contracts and are more likely to be investigated for corruption.

According to SUSEP (the Brazilian Private Insurance Agency), the amount paid as compensation for D&O claims in 2014 was BRL 129,292,617, against BRL 227,630,980 paid as direct premium in the same year. In 2015, the amount paid for claims increased to BRL 141,356,502 and the direct premium amounted to BRL 368,142,282. In the first semester of 2016, insurers have already paid BRL 48,373,616 in claims against BRL 165,095,827 worth of premium.

The insurance market has also seen an expansion of risks which are expressly excluded by the policies as well as the use of stricter criteria to underwrite new D&O policies. The questionnaires, for instance, now provide specific queries related to the Car Wash Operation in order to assess whether any director is being investigated or is likely to be prosecuted.

In addition, some new policies are totally excluding corruption cases from coverage in order to avoid the risk of exposure to future defence costs, while others are including "carve-back" clauses which suppress the exclusion for corruption cases if the investigated person is found not guilty at the end of the procedure. In the "carve back" situation, there would be no advance payment, but only reimbursement for the defence costs after the final judicial decision.

There are also exclusions regarding any event that might be related to the Operation Car Wash or harmful acts against the Public Administration.

Companies listed in the US stock market are also having difficulties issuing and/or renewing D&O policies in Brazil, as a result of their exposure to class actions filed by American investors, which are becoming more common lately.

In summary, Brazil is currently witnessing an expansion of D&O insurance following heightened public awareness of the risks facing directors and officers as a result of the investigations into corruption and subsequent prosecutions. D&O insurers are updating their wordings and underwriting process in order to adapt to the difficulties in Brazil and the increase in claims.