Outsourcing — An Endless Source of Conflict in Brazil

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ACC recently organised a seminar in Brazil about labour and employment issues related to “outsourcing” in Brazil. It proved to be a success in terms of audience attendance and review. Outsourcing is a hot topic in Brazil and, in some cases, may pose liabilities and litigation for companies.

For illustrative purposes, unofficial data shows that in Brazil there are more than 10 million workers who could be classified as directly or indirectly “outsourced.” Unofficial data also shows there are currently 5,000-plus labour claims revolving around outsourcing in the Superior Labour Court alone.

In this article, “outsourcing” stands for the hiring of an individual (self-employed worker) or a legal entity (specialised company) to perform certain services for the hiring company (service taker).

The legal framework

Brazil is a civil law country. This means that the rights of employers and employees are set out in two main statutes: the 1988 Federal Constitution and the 1943 Consolidated Labour Laws (known, in Brazil, as CLT). Collective agreements and specific laws on certain matters and ordinances can also establish rights and obligations.

In general, court decisions, however relevant, do not operate as binding precedents (unlike what happens in common law countries). This does not hold true for Brazilian labour courts, though. In the last decades, the Superior Labour Court and the Regional Labour Courts have increasingly issued “statements” that eventually work as binding precedents for want of specific legislation.

For example, the CLT regulates labour and employment relations in its 900-odd articles. The Superior Labour Court alone has issued more “statements” (at different levels) than the number of articles in the CLT.
Thus, there is no law or statute specifically regulating the subcontracting of general services with third-party legal entities/individuals. Nor are there significant laws/regulations governing the transfer of undertakings. These matters have only been expressly addressed in Statement 331 of the Superior Labour Court.

This lack of specific legislation results in an endless source of conflict and litigation involving companies, workers and authorities.

**Understanding Statement 331**

Statement 331 of the Superior Labour Court has a limited and prohibitive view of outsourcing. According to the statement, outsourcing is permitted only when the underlying services: (i) are related to the non-core activities/business of the service taker; and (ii) are rendered under no personal relation or subordination between the service provider (or the persons linked to the contractor) and the service taker.

The hiring of services without regard to the guidelines of said statement may result in acknowledgement of an employment status between the service providers’ workers and the service taker.

In other words, when a company hives off its activities, they must refer to its non-core business and establish an actual and effective independence between the company receiving the services and the service providers, thus ideally avoiding: (a) subordination; (b) the personal nature of the work; and (c) an exclusivity status between the service provider and the service taker.

Even if outsourcing is deemed valid on the terms mentioned above, the service taker has vicarious liability for the wages and labour entitlements of workers if their service provider defaults. It means that, if the contractor does not comply with labour and social security obligations relating to its employees/workers, the service taker will have to do so.

Moreover, in a public hearing held on 4–5 October 2011, the Superior Labour Court established some additional theoretical frameworks on the subject that should be taken into consideration when dealing with the legality of outsourcing:

- the distinction between intermediation of labour (i.e., agency workers) and rendering of services. The Superior Labour Court tends to accept and validate the rendering of services in detriment to the intermediation of labour;
- the legality of intermediation of labour (i.e., agency workers), provided that it does not characterize subordination or personal nature of work; and
- the service taker has objective vicarious liability for the wages and labour entitlements of workers if their service provider defaults. It means that, regardless of the reason of default, the service taker will be vicariously liable.

In another recent public event held in April 2013, the Chief Justice of the Superior Labour Court signalled that the court has no intention of reviewing Statement 331 in the near future.

**The core business issue**

As summarized above, the core business of the service taker is one of the main issues to validate outsourcing in Brazil. Broadly, the Superior Labour Court holds that companies cannot outsource their core activities. With all due respect, however, the discussion about core activities seems a bit outdated.

In theory, the core business of a company expresses its “main” or “essential” activity. But it is very difficult to define what is core and what is non-core. Two companies can have similar core businesses but specialise in very specific fields of such core activities. Strictly according to Statement 331, one of these companies could not hire the other, under the risk of outsourcing core activities.

The Brazilian employment authorities have intensified investigations into companies to verify the status and scope of outsourcing. Furthermore, the contractors’ workers have increasingly sued service takers for acknowledgement of direct employment status.

In some cases, the government authorities (e.g., the Public Prosecutor Office and the audi-
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These characteristics suggest that the bill would be favourable to service takers (by eliminating the discussions about core activity), while also protecting workers through mechanisms to ensure payment of their labour-related rights.

The bill offers a quantum leap forward in outsourcing regulations, but it has been under congressional scrutiny for almost 10 years, and the prospects for its eventual passage into law are bleak, despite Mabel’s optimism.

Meanwhile, Brazilian companies must cope with outdated Statement 331 of the Superior Labour Court.

Mitigating your outsourcing risk

The risk explained above cannot be eliminated, but several recommendations can be made to mitigate it. Above all, a company’s bylaws or articles of association should be tailored to address only the company’s core business. Further, every hiring of service providers or vendors should be analysed vis-à-vis these limits and prohibitions. If possible, court disputes should be brought by trade associations representing all companies in a specific segment, thus avoiding unnecessary exposure of a specific company. These are just a few recommendations on how to mitigate a potential litigation.

In conclusion, legal departments and in-house lawyers should pay close attention to a company’s outsourcing of services. As explained above, this is a constant source of litigation and discussions that may translate into a significant exposure.

Legislative bill

Legislative Bill 4330/2004, sponsored by congressman Sandro Mabel, seeks to regulate outsourcing activity in Brazil. The bill puts an end to discussions about core/non-core activities by authorising outsourcing activity in any field of business.

On the other hand, the bill contains detailed rules about the liabilities of the service taker, ranging from vicarious to joint liability (depending on several elements to be observed between the parties during the agreement).

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