Travel insurance

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Levy & Salomão Advogados partner Ana Carolina Monguilod and associate Marcelo Vieira Rechtman look at the rules for Brazilian companies contracting foreign insurance.

The World Trade Organization (WTO) has recently revised its projections for world trade growth in 2010 upwards to 13.5 per cent, with Brazil taking an increasing role in international trade. Under this scenario, a frequent point of concern most Brazilian companies performing business transactions abroad are facing is the determination of the boundaries where Brazilian regulators would allow them to take out insurance abroad from foreign insurers. This is a particularly relevant issue for Brazilian companies with subsidiaries or assets outside Brazil importing goods to the country, or even performing international business deals which would require insurance.

Over the last three years, many relevant changes have been implemented in Brazilian insurance and reinsurance regulations as a result of the enactment of the Complementary Law No 126 in 2007. One of the most significant changes was the innovative granting of permission for companies that are established in Brazil to contract insurance from foreign insurers for risks outside Brazilian territory.

Under the old regime of Decree-Law No 73 of 1966, all companies and individuals headquartered or domiciled in Brazil were required to contract with the local insurance industry the totality of their risks, except for particular cases where the local industry could not offer the required insurance cover, or when the offer would be against the national interests of Brazil. Even in such exceptional cases, the placement of insurance abroad would be intermediated by the state-controlled reinsurer, IRB Brasil Resseguros, and would be subject to consistent regulatory requirements.

The 2007 law changed this scenario by excluding the cases where the insured risk was not located in Brazil from the referred restriction, with exceptions made for mandatory insurance covers. In other words, Brazilian companies and individuals are now allowed to contract with foreign insurance companies, without the intermediation of IRB or the need of a prior authorisation, insurance policies related to most of the risks involving their assets and transactions abroad, provided those risks are not listed as subject to mandatory insurance, pursuant to Brazilian law.

The most significant list of mandatory insurance risks is set forth in decree-law 73/66 and includes: personal damages to individuals in commercial aircrafts; civil liability of the owner of aircrafts and of air transporters; civil liability of the constructor of buildings in urban areas for damages to people and goods; assets given in guarantee of loans and finances granted by government financial institutions; performance bonds of the constructor or developer of real estate projects; the guarantee of payment by the borrower of funds in building constructions, including the real estate guarantee; risks of buildings divided in individual properties (eg apartment buildings); fire and transport of goods belonging to companies when located or transported inside Brazil, with an exception made to Brazilian government risks; insurance for export credits whenever deemed necessary by the CNSP upon prior consult to the National Council of Foreign Trade (Concex); damages caused to individuals by land vehicles and ships, or by their cargo, being those individuals transported or not by those vehicles and ships; and civil liability of transporters in land, sea, oceans, rivers or lakes to damages to their cargo. For those risks that are subject to mandatory insurance, the obligation to contract the appropriate insurance with domestic insurers still applies to companies and individuals headquartered or domiciled in Brazil, as well as to foreign entities which are performing in Brazil those activities that are described in this decree-law.

As a general rule, a risk is considered to be located outside Brazil when its economical and physical damages would occur outside Brazilian borders (eg damages to a property located in a foreign country or resulting from a claim in a foreign court).

If a Brazilian company uses this prerogative to take insurance outside Brazil, it must report the contract to the Brazilian supervisory authority, the Superintendence of Private Insurance (Susep) within 60 days of beginning of the insurance coverage. The company must also make all the transaction documents available for further

inspection by Susep.

The remittance of premium payments by the local companies to foreign insurers abroad and the receipt of the insurance indemnities from abroad by the first is governed by the regulations for the foreign currency exchange market and of international capitals (RMCCI) issued by the Brazilian Central Bank. RMCCI requires such payments to be made by foreign currency exchange agreements with a commercial bank authorised in Brazil to perform such transactions and, in case of amounts exceeding US$3,000, with the presentation of information and documents related to the transaction, such as the names of parties involved, justification for the payment and documents related to the insurance being contracted.

Alternatively, the premium payments may be performed by the local companies with reserves legally maintained by those companies abroad and the insurance indemnities may be received in bank accounts held by local companies abroad, provided the same are reported to Brazil's federal revenue office, the SRF.

The taxes applicable to foreign insurance transactions are currently a matter of great discussion with Brazilian tax authorities. Some of the current applicable taxes are being challenged by industry representatives and associations, so that it is possible that such rules will be revised in the near future.

The current official understanding of SRF is that the insurance premium payments should be treated as payments for services and, therefore, subject to the withholding income tax (WHT) levied at the rate of 25 per cent of the premium. In our view, however, this tax should be charged at the rate of 15 per cent; we are of the opinion that this rate should be raised to 25 per cent only when the foreign beneficiary of this payment is located in a jurisdiction that has been black-listed as a tax haven (being possibly avoided in the case the payment is made to an insurance company located in a country that has signed a double taxation treaty with Brazil).

In addition, the social contributions on imports (Cofins and PIS) should apply at the rate of 9.25 per cent on a tax base corresponding to 15 per cent of the amount paid, credited, delivered, employed or remitted abroad. Even though we are of the opinion that it is unconstitutional for these contributions to be levied on insurance premiums, as the effective tax burden is fairly low (approximately 1.39 per cent), taxpayers are unlikely to dispute it.

Both the WHT and the social contributions on imports shall be paid by the Brazilian resident who hires the foreign insurance. In the case of the WHT, the Brazilian resident will be responsible for withholding and paying the income tax that is owed by the foreign beneficiary of the insurance premium (who is the WHT's taxpayer). Should the Brazilian resident bear this tax cost, the tax base will have to be grossed-up. Regarding the PIS and COFINS, these taxes are owed by the Brazilian resident, who is the actual taxpayer of these social contributions.

Insurance transactions are also potentially subject to the financial transactions tax on insurance (IOF-Seguros), which is generally levied at the rate of 7.38 per cent (lower rates may apply to specific transactions). Although the IOF-Seguros taxpayer is the insured person, the insurance company or the financial institution hired to charge the insurance premium is responsible for withholding and paying this tax. In view of that, there could be some controversy as to who is actually responsible for paying this tax in the case of foreign insurances.

Finally, foreign exchange transactions performed by institutions authorised to deal with foreign exchange are potentially subject to a tax on foreign exchange transactions (IOF-Câmbio). Such rate currently varies from 0 per cent to 5.38 per cent, but most transactions are subject to a 0.38 per cent rate. As a result, the foreign exchange transaction carried out with the purpose of remitting the insurance premium abroad should be expected to be subject to a 0.38 per cent IOF-Câmbio assessment.

Concerning the remittances of insurance indemnities by the foreign insurer to the local insured person, such amounts would also be subject to the above mentioned tax on foreign currency exchange transactions levied at the rate of 0.38 per cent.

As a general rule, the indemnity received by resident individuals is not subject to income tax in Brazil. However, as there may be some controversy regarding this taxation depending on how the insurance was structured, as

well as there may be some debate on the taxation of indemnities received by Brazilian companies, this matter should be reviewed on a case by case basis.

The relaxation of the Brazilian rules governing the contracting of insurance abroad by Brazilian companies is a great step towards the market liberalisation and to competition increase. However, it is essential for companies making use of such prerogative to be prepared to identify the situations where this prerogative would apply and to be able to comply with all the regulatory, foreign exchange and tax matters involved in the same.

Comments

There are currently no comments.