

Client Alert

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SBM Offshore N.V. signs five party \$340M leniency agreement to resolve Petrobras bribery allegations in Brazil

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SBM Offshore N.V. has reached a \$340M settlement with both criminal and administrative prosecutors in Brazil to resolve allegations of bribery relating to the Petrobras scandal, the first deal of its kind in Brazil and a notable development within the rapidly evolving compliance regime of South America's largest economy.

On Friday 15 July 2016, SBM Offshore N.V. (SBM) signed a leniency agreement with Petróleo Brasileiro S.A. (Petrobras) and a number of Brazilian government agencies, agreeing to pay \$340M to resolve allegations that SBM won contracts from Petrobras, the Brazilian state-owned oil company, as a result of bribery. The leniency agreement is the first such agreement in Brazil resolving both criminal and administrative charges and, as a result, marks a significant step forward in resolving allegations made against companies implicated in Brazil's Petrobras scandal.

Brazil's compliance regime has historically been considered to be inefficient with a somewhat light touch; indeed, the CEO and Chief Compliance Officer of SBM settled corruption charges in 2014 by paying a relatively modest fine without any admission of guilt (as set out in more detail below). However, the SBM settlement provides an early indication that Brazil has a new found appetite for enforcement matched by an ability to stand up to companies accused of bribery and negotiate high value settlements.

BACKGROUND AND PREVIOUS SETTLEMENTS

SBM, which provides oil and gas companies with floating production systems and counts Petrobras as one of its biggest customers, was accused of operating a "pay to play" scheme between 1996-2012 in order to persuade influential decision-makers at the Brazilian behemoth to award high value contracts to the company. The leniency agreement negotiations began in March 2015 with a deal being agreed upon in May 2016. However, the signing of the deal was delayed by two months following the Brazilian Senate's decision to commence the impeachment trial of Dilma Rousseff, the former president. For further information on the current political and economic situation in Brazil, please see [our client alert dated June 2016](#).

SBM had previously reached a \$240M settlement with Office of the Dutch Public Prosecutor in 2014, resolving allegations that it bribed government officials in Angola, Equatorial Guinea, and Brazil (in relation to Petrobras). At the same time the U.S. Department of Justice (DoJ) issued a declination in respect of SBM; however, this proved to be short-lived as the DoJ reopened its investigation into the company in February 2016.

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Separately, prosecutors in Rio de Janeiro accused Bruno Chabas (SBM's CEO) and Sietze Hepkema (SBM's Chief Compliance Officer) of concealing information in order to allow the perpetrators of SBM's bribery within Brazil to avoid detection. These allegations were resolved out of court in January 2016, with Mr. Chabas and Mr. Hepkema each paying a settlement of \$77,000 but not admitting guilt.

TERMS OF THE SETTLEMENT

The leniency agreement consists of a five party agreement between: (i) SBM; (ii) the General Counsel for the Republic (Advocacia Geral da União); (iii) the Public Prosecutor's Office (Ministério Público); (iv) Petrobras; and (v) the Ministry of Transparency, Oversight and Control (Ministério da Transparência, Fiscalização e Controle), which recently assumed responsibility from the now defunct Office of the Comptroller General as Brazil's main administrative anti-corruption authority.

Under the terms of the agreement, SBM agreed to pay Petrobras \$149.2M upfront and to reduce future performance bonuses owed by Petrobras to SBM for services provided during the period 2016-2030 by 95 per cent nominally valued at \$179M with a current market value of \$112M. In addition, SBM agreed to pay \$6.8M to each of the Public Prosecutor's Office and the Council of Control of Financial Activities. Under the terms of the agreement, SBM must also cooperate with prosecutions undertaken by the Ministry of Transport and the Public Prosecutor's Office against third parties in relation to the Petrobras scandal and improve its Brazilian internal compliance system. In return, SBM is granted full discharge and exemption from legal actions relating to its actions in Brazil between 1996-2012 and all related Petrobras investigations, and is now able to bid for new contracts with Petrobras. The leniency agreement was viewed as a favorable result for SBM by investors, with the company's share price rising 15.3 per cent after news of the settlement was released.

Parallels can be drawn between the emergence of leniency agreements in Brazil and the fledgling use of deferred prosecution agreements (DPAs) in the UK. As we previously reported in our 2 December, 2015 [client alert](#), the UK approved its first DPA in late 2015, with the second following on 8 July 2016. Both UK DPAs and Brazilian leniency agreements are tools used in cases of bribery and both involve an agreed settlement between the company under investigation and the government which results in the charges being dropped. In addition, both require the company under investigation to continue to provide the investigating authorities with its full co-operation and to implement improvements regarding its existing anti-bribery and corruption controls, policies and procedures. Whilst these tools are groundbreaking in the UK and Brazil, respectively, both clearly have their foundations in the considerably more mature U.S. DPA regime, where anti-corruption authorities have been using DPAs to great effect for over two decades.

COMMENTARY

This agreement is likely to be considered a positive step forward for companies implicated in the Petrobras scandal as it provides the clearest evidence yet that the various administrative and criminal prosecutors within Brazil are able to work to reach negotiated plea bargains in a timely manner that suit each investigating party and which are acceptable to the implicated company. It was previously thought that Brazil's federal prosecutors and administrative anti-corruption authorities would struggle to reach an agreeable settlement among themselves, predominately as a result of criminal prosecutors being unable to share confidential information obtained during their investigations with their administrative colleagues. However, this deal illustrates that the Public Prosecutor's

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Office and the Ministry of Transparency, Oversight and Control are able to work together, which creates an obvious advantage for companies in a similar predicament to SBM who are seeking to resolve their investigations with due haste.

This case also delivers further insight into the rapid evolution of investigative and prosecutorial strategies in Brazil. Many of Deltan Dallagnol's team of prosecutors, responsible for unravelling the Petrobras scandal, were educated in the U.S., at institutions such as Harvard and Cornell, before returning to Brazil.¹ The implementation of plea bargains in a number of cases relating to the Petrobras scandal affords clear evidence of the U.S. legal system's influence on these domestic proceedings. Commentators have suggested that this is part of a general changing mindset in Brazil and within the Brazilian legal system. There is a belief in some areas of Brazil that the most effective tools available to prosecutors in foreign jurisdictions should be implemented locally to provide Brazil's anti-corruption regime with real teeth in order to bring perpetrators to justice.

On the other hand, there are suggestions that whilst Brazil is employing the tools of more developed anti-corruption jurisdictions, it lacks the protections to ensure that the tools are used fairly; those under investigation provide information and plead guilty when asked, but possibly because they fear that their rights would be (or already have been) ignored were they to refuse. In particular, there are concerns that certain methods implemented by crusading Judge Sérgio Moro fall foul of due process; critics within the government believe that his zealotry has resulted in him abusing his power. In January 2016 over 100 lawyers representing dozens of defendants published a manifesto accusing "SuperMoro" of conducting investigations in breach of their clients' due process right, preferring to give the quick results demanded by the general public. Academics of the University of São Paulo have gone as far as to say that Moro is paving "a way towards the end of the democratic rule of law".²

It will be interesting to monitor Brazil's use of leniency agreements going forward, not only to understand whether they develop into a popular and effective tool against corruption but also to address the growing concerns in relation to how Brazil's judges and prosecutors treat the individuals involved.

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¹ <http://www.wsj.com/articles/how-brazils-nine-horsemen-cracked-petrobras-bribery-scandal-1428334221>.

² <https://www.theguardian.com/commentisfree/2016/mar/18/brazil-judiciary-democracy-sergio-moro-impeach-dilma-rousseff>.

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