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# Global Anti-Corruption Developments

CLAUDIUS O. SOKENU AND ARTHUR LUK

*The authors analyze recent anti-corruption developments around the globe.*

**E**nforcement agencies around the world continue to focus on alleged corruption.

## DEVELOPMENTS IN THE UNITED KINGDOM

In the first half of 2012, enforcement agencies in the United Kingdom continued developing policies to prevent, investigate, and prosecute foreign fraud and corruption. Recent Serious Fraud Office (“SFO”) and Financial Services Authority (“FSA”) actions appear to suggest that both agencies intend to play a role in the continuing fight against corruption. But the scope and efficacy of this role remains subject to debate. There have been few prosecutions under the United Kingdom’s Bribery Act and instead, the SFO has taken a more collaborative approach, though the appointment of a new director for the SFO, David Green, may result in more aggressive prosecutions in the future.

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## **David Green Becomes New SFO Director**

On April 23, 2012, David Green QC succeeded Richard Alderman as director of the SFO.<sup>1</sup> He is a respected criminal barrister with 25 years of experience as both a prosecutor and defense counsel. In 2004, he became the first director of the Revenue and Customs Prosecutions Office (“RCPO”), which was established to prosecute tax, drug, money laundering, and import/export offenses. Green served as the RCPO’s director for six years until, in 2010, the agency merged with the Crown Prosecution Service (“CPS”). Subsequently, Green became director of the CPS Central Fraud Group. A year later in 2011, Green returned to private practice before being appointed director of the SFO.<sup>2</sup> His appointment is for a four-year term.

Under Alderman, the SFO went through a steady shift toward more consensual methods of dealing with unlawful corporate conduct using self-reporting, plea negotiations, and civil settlements as alternatives to criminal prosecutions of corruption cases. Whether the SFO under Green’s leadership will move away from settled outcomes toward more traditional methods of investigation and prosecution of corporate fraud remains to be seen. Such a shift would be in line with recommendations made in the report issued by the Organisation for Economic Co-operation and Development (“OECD”) Working Group on Bribery in International Transactions, discussed further below.

Green joined the SFO at a time when its resources are under severe pressure. The SFO has suffered budget cuts that may contribute to the lack of prosecutions under the Bribery Act.<sup>3</sup>

## **DPAs: A Possible New Enforcement Tool in the SFO’s Arsenal**

Solicitor General Edward Garnier QC recently announced the commencement of a consultation process regarding draft legislation authorizing the use of deferred-prosecution agreements (“DPAs”) in the United Kingdom, which will be introduced in the next parliament.<sup>4</sup> According to the consultation paper, under a proposed DPA in the United Kingdom, “a prosecutor would lay but would not immediately proceed with criminal charges against a commercial organisation pending successful compliance with tough requirements such as financial penalties, restitution for victims, confiscation

of the profits of wrongdoing and measures to prevent future offending.”<sup>5</sup> The consultation paper identifies two “key principles” that DPAs will need to fulfill to be effective: transparency — “provid[ing] a process which encourages potential defendants to discuss ‘without prejudice’ and to ensure that the operation of justice is transparent to the public” — and consistency — “ensur[ing] both prosecutor and commercial organisation are working from common principles when entering into the DPA process, and [giving] both an indication of the likely package of terms, including a penalty, which a court would approve.”<sup>6</sup>

Under the current system in the United Kingdom, after prosecutors negotiate plea agreements, the agreements must be reviewed in court. Judges have the discretion to accept or reject such agreements but, unlike in the United States, there is no role for prosecutors to weigh in on the discussion of sentencing. Companies that currently enter into plea agreements with the SFO do so with greater uncertainty as to whether the courts will accept those agreements in sentencing or that the admissions made will not later be used as evidence against them in a trial.

In support of DPAs, Garnier stated that encouraging companies to self-report allows prosecutors to better spend their resources elsewhere while allowing the government to bring more wrongdoers to justice. In his view, DPAs — which reportedly have Director Green’s backing as well — would support this goal of using resources more effectively “on those cases where a prosecution is in the public interest.”<sup>7</sup>

### **Mabey & Johnson: Moving Beyond Traditional Adversarial Approaches**

On January 13, 2012, the SFO announced that it had obtained an Order for Mabey Engineering Holdings Ltd. (“Mabey”), sole shareholder of Mabey & Johnson (“M&J”), to pay back over £130,000 (approximately US \$160,000) in dividend payments it derived from contracts M&J won.<sup>8</sup> M&J had admitted to overseas corruption and breaching United Nations sanctions, and two of its former directors were convicted of making illegal payments in breach of United Nations sanctions. This is the first time the SFO has sought payments already distributed as dividends to investors. Moreover, Mabey was unaware of any illicit behavior by M&J, yet it was,

nonetheless, forced to forfeit dividends it derived from its ownership of M&J.

The SFO's action potentially has broad implications. For example, investors in United Kingdom companies found to have violated the Bribery Act may be forced to pay back dividends derived from the United Kingdom companies, even if the investors are completely unaware of the United Kingdom companies' conduct. Though the SFO has not issued any guidance regarding the circumstances in which it will seek repayment from holding companies, Mabey's forfeiture serves as another reminder of the importance of conducting adequate due diligence and maintaining effective compliance programs at the subsidiary level.

### **Private Swiss Bank and Former Money-Laundering Reporting Officer Fined by FSA**

On May 16, 2012, the FSA fined Habib Bank AG Zurich ("Habib") £525,000 (approximately US \$825,000) and its former money laundering reporting officer Syed Itrat Hussain ("Hussain") £17,500 (approximately US \$27,500), for failure to exercise reasonable care in establishing and maintaining adequate anti-money laundering ("AML") systems and controls.<sup>9</sup>

"Habib is a privately-owned Swiss bank with twelve branches in the United Kingdom [serving] approximately 15,500 customers."<sup>10</sup> The FSA's investigation revealed that during the three-year period between December 15, 2007 and November 15, 2010, Habib allegedly "failed to establish and maintain adequate controls for assessing the level of money laundering risk posed by its customers."<sup>11</sup> "In particular, Habib maintained a high-risk country list which excluded certain high-risk countries" in which it had offices.<sup>12</sup> Habib did not employ any measures to combat the high risks of money laundering that were presented. "Approximately 45% of [Habib's] customers were based outside the United Kingdom and about half of its deposits came from jurisdictions which ... had less stringent AML requirements or were perceived to have higher levels of corruption than the United Kingdom," according to independent international organizations.<sup>13</sup> The FSA found that "Habib failed to conduct adequate enhanced due diligence for its higher risk customers."<sup>14</sup>

Hussain, Habib's former money-laundering reporting officer, was fined £17,500 for failing to ensure that Habib had adequate anti-money-laundering systems. According to the FSA, both Habib and Hussain received a 30

percent reduction in their penalties for early settlement. Without this reduction, the FSA reported that Habib and Hussain would have paid £750,000 and £25,000, respectively.<sup>15</sup>

### **Bruce Allan Hall Extradited from Australia**

Bruce Allan Hall, an Australian national, was extradited and charged at Westminster Magistrates Court with corruption offenses relating to contracts for the supply of goods and services to a Bahraini company from 1998 to 2006.<sup>16</sup> Hall is alleged to have received bribes [while he was] an employee of Aluminum Bahrain B.S.C. (“Alba”), a smelting company in Bahrain, in connection with contracts to supply goods and services to Alba.<sup>17</sup> Hall is charged with conspiracy and substantive corruption counts under the Prevention of Corruption Act, and money laundering under the Proceeds of Crime Act, the predecessors of the Bribery Act which came into effect after the conduct at issue occurred.

### **Former Innospec CEO Pleads Guilty to Corruption**

On June 11, 2012, the SFO announced that Paul Jennings, former CEO of Innospec Limited (“Innospec”), a British subsidiary of Innospec Inc., pled guilty to two counts of conspiracy to corrupt in a London court.<sup>18</sup> According to the SFO, Jennings gave or agreed to give corrupt payments to public officials and other agents of the governments of Indonesia and Iraq as inducements to secure, or as rewards for having secured, contracts for the supply of Innospec products. The payments to Indonesia were made between February 14, 2002 and December 31, 2008, and the payments to Iraq were made between January 1, 2003 and January 31, 2008.<sup>19</sup> Jennings was also charged with conspiring to defraud Ethyl Corporation by making payments to government officials and other agents of Iraq as an inducement to ensure unfavorable test results on Ethyl Corporation’s products.<sup>20</sup>

The SFO reported that two other former senior executives, Miltos Papachristos, former Regional Sales Director for the Asia-Pacific region for Innospec, and Dennis Kerrison, former Innospec CEO, entered not guilty pleas for similar allegations.<sup>21</sup> Together, they are charged with one count of conspiring to corrupt for giving or agreeing to give corrupt payments to public

officials and other agents of the government of Indonesia as inducements to secure, or as rewards for having secured, contracts from the Indonesian government for the supply of its products, including Tetraethyl Lead by Innospec.<sup>22</sup> The payments were made between February 14, 2002 and December 31, 2008.<sup>23</sup>

Jennings's guilty plea is the third conviction in the long-running Innospec corruption investigation. Ousama Naaman, an Innospec agent in Iraq, pled guilty in the United States to conspiracy to violate and violating the FCPA and was sentenced to 30 months imprisonment.<sup>24</sup> Former Innospec Global Sales and Marketing Director, Dr. David Turner, pleaded guilty to conspiracy to corrupt charges in a London court in January 2012.<sup>25</sup> Turner is currently awaiting sentencing.

### **OECD Working Group Calls for Transparency**

Although the United Kingdom has taken steps to increase enforcement of foreign bribery, concerns still remain about transparency as the SFO has been criticized for its emerging practice of settling cases behind closed doors. The OECD Working Group on Bribery issued a report on March 30, 2012, regarding the United Kingdom's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Report").<sup>26</sup> The OECD Report commends the United Kingdom for the "significant increase" in its enforcement activity. Despite the increased enforcement activity, however, the Report outlines a number of concerns regarding transparency in bribery cases.<sup>27</sup>

In its Report, the OECD states that the SFO is not providing enough information about civil settlements and that in some cases it was "unclear" how the SFO and defendants "arrived at" the agreed penalty amount.<sup>28</sup> The Working Group is concerned that, in order "to settle foreign bribery cases, United Kingdom authorities are increasingly relying on civil recovery orders which require less judicial oversight and are less transparent than criminal plea agreements."<sup>29</sup> With less information made publicly available by authorities in settlements, the OECD believes that the United Kingdom deprives the public of the details necessary to assess whether the sanctions imposed "are effective, proportionate, and dissuasive,"<sup>30</sup> and misses an opportunity to provide guidance on, and raise public awareness of, foreign bribery-related issues.



The OECD Report recommends that authorities should publicly disclose information relating to civil settlements of foreign bribery cases, including detailed information of all the key facts, as well as disclosure of the court documents and the settlement agreement itself. If DPAs become a new United Kingdom enforcement tool, these agreements may contain the detail the OECD's Report recommends.<sup>31</sup> In March, Alderman said that transparency is an important issue and that "the resolution of the case will need to be in open court.... The facts are going to need to be explained in detail in open court and documents placed on websites. The judge will need to give a judgment so that the public can see what has happened and can see that the judge has agreed to the proposals."<sup>32</sup>

In addition, the OECD Report recommends that the United Kingdom avoid confidentiality agreements with defendants that prevent the disclosure of settlement information. Although confidentiality agreements encourage the resolution of investigations, their usefulness as a deterrent for future conduct is minimized. The OECD Report recommends that the United Kingdom clarify the meaning of "reasonable and proportionate" hospitality and promotional expenditures and that the United Kingdom move towards "zero tolerance" of facilitation payments, which are not exempt under the Bribery Act.<sup>33</sup>

It remains to be seen whether the United Kingdom will implement all of the recommendations, as there are still unimplemented recommendations of the OECD Working Group dating back to 2005 and 2008.

### **Survey Finds United Kingdom Bribery Act Foreign to United Kingdom Middle Managers**

The OECD's observation that the United Kingdom should seek opportunities to raise awareness of foreign bribery related issues finds additional support in a report released by the Fraud, Investigations and Disputes Services Team at Ernst & Young. Its survey of 1,000 middle managers revealed that only 28 percent of middle managers in the United Kingdom have heard of the Bribery Act, meaning the vast majority — 72 percent of middle managers who participated in the survey — have not. Moreover, of the 28 percent, only 55 percent felt they had received adequate training on the Act.<sup>34</sup> John Smart, partner at Ernst & Young, suggests that the lack of any reported cases may

have given organizations a false sense of security, with some underestimating their exposure to bribery risks, others failing to see any urgency in ensuring their organizations are compliant, or others not feeling sufficiently educated to offer their staff guidance.<sup>35</sup>

## **CHINA OPENS ACCESS TO A CENTRALIZED DATABASE OF BRIBERY CONVICTIONS**

Effective May 1, 2011, the Chinese government amended its criminal laws to make it a criminal offense for Chinese nationals and companies to bribe officials of foreign governments or international public organizations. In February 2012, China's Supreme People's Procuratorate ("SPP") took another step in the fight against corruption. The SPP, in partnership with other Chinese agencies, announced that, with respect to individual and corporate convictions, it was "opening access to its centralized database of bribery convictions."<sup>36</sup> Businesses operating in China now have a new avenue to check companies and/or individuals with whom they do business for prior bribery convictions, in one centralized database, rather than checking databases in individual provinces. The SPP will also disqualify anyone in its database of bribery convictions from bidding on government projects.

## **RUSSIA ACCEDES TO OECD CONVENTION AGAINST BRIBERY**

According to Transparency International, Russia ranks as one of the most corrupt countries in the world.<sup>37</sup> However, Russia has taken significant steps toward the adoption of global anti-corruption standards. In May 2011, Russia enacted a law outlawing foreign bribery and giving prosecutors the authority to seek large fines for bribery and corruption.<sup>38</sup> As a result, the OECD invited Russia to join its Convention Against Bribery, and on April 17, 2012, Russia became the 39th nation to accede to the Convention.<sup>39</sup>

The OECD is now conducting systematic reviews of Russia's implementation of anti-bribery laws. These evaluations are part of the process for Russia to gain full admission to the OECD.<sup>40</sup> Russia received its first evaluation in March 2012, with the OECD recommending that Russia (i) "clearly criminalizes offering or promising a bribe, not just the actual payment of one," (ii)

cover third parties under the bribery offense, and (iii) implement measures to allow for seizure of illicit assets.<sup>41</sup>

Whether this rhetoric translates into real changes to the culture of corruption in Russia remains to be seen. Vladimir Putin — whose record on corruption has recently drawn the ire of many Russian protesters — returns to the presidency this year, succeeding former President Dmitri Medvedev, who championed several anti-corruption initiatives that even he admitted produced “little success.”<sup>42</sup> However, the need to quell civil unrest and attract more international investment may cause Putin to implement meaningful reform.

## **BRAZIL: POSTPONEMENT OF THE CLEAN COMPANY ACT**

In 2010, with Brazil awarded the honor of hosting the 2014 FIFA World Cup, the Executive branch of the Brazilian government proposed Legal Project No. 6.826 in an attempt to bring Brazil into compliance with its obligations under the OECD Bribery Convention. Brazil’s current anti-corruption law penalizes businesses that engage in corrupt activity only by requiring them to register on a list of ineligible companies, which impedes a company from participating in public bids or entering into government contracts; it does not impose criminal liability on companies for corrupt activities taken by its employees.<sup>43</sup> Legal Project No. 6.826 seeks to expand the basis for corporate liability and to greatly increase penalties for corruption. If the proposed legislation is enacted, businesses may be held liable for the acts of their employees and agents as well as for the corrupt acts of companies they acquire.<sup>44</sup> These new bases for liability would carry much stiffer penalties, including possible fines of up to 20 percent of the offending company’s gross revenue, prohibition on borrowing from public banks, recession of government contracts, and even a suspension of activity in Brazil.<sup>45</sup> At the same time, the law would “establish credit for voluntary disclosure, cooperation, and compliance programs.”<sup>46</sup>

Some members of the private sector are resisting the legislation, focusing on the proposed imposition of strict and successor liability for companies as well as the heavy fines such liability carries. In fact, seven of the 35 amendments proposed to the bill seek to exclude strict liability for corporations.<sup>47</sup> The committee rejected all of these amendments and is now in consultation with the Executive regarding the legislation, but has yet to produce a final

version of the bill.<sup>48</sup> A failure to reach consensus may result in remission of the bill to the full House of Representatives for a vote, a process that could terminate the proposal or delay its adoption until after the OECD's 2014 working group evaluations, thereby derailing the Executive's efforts to bring Brazil into compliance with its OECD Bribery Convention obligations.<sup>49</sup>

## NOTES

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<sup>2</sup> See Green Biography, *supra* note 1.

<sup>3</sup> See Emma Rowley, *Serious Fraud Office needs proper funding, warns Tchenguiz judge*, The Telegraph (May 24, 2012), *available at* <http://www.telegraph.co.uk/finance/financial-crime/9288330/Serious-Fraud-Office-needs-proper-funding-warns-Tchenguiz-judge.html>.

<sup>4</sup> Ministry of Justice, Consultation Overview: Deferred Prosecution Agreements, *available at* [https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/consult\\_view](https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/consult_view).

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<sup>6</sup> Ministry of Justice, Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements (2012), *available at* [https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/consult\\_view](https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/consult_view).

<sup>7</sup> Government consults on proposals for deferred prosecution agreement framework, out-law.com (May 17, 2012), *available at* <http://www.out-law.com/en/articles/2012/may/government-consults-on-proposals-for-deferred-prosecution-agreements-framework/>.

<sup>8</sup> Press Release, SFO, Shareholder agrees civil recovery by SFO in Mabey & Johnson (Jan. 13, 2012), *available at* <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/shareholder-agrees-civil-recovery-by-sfo-in-mabey-johnson.aspx>.

<sup>9</sup> Press Release, FSA, FSA fines Habib Bank AG Zurich £525,000 and money laundering reporting officer £17,500 for anti-money laundering control failings (May 15, 2012), *available at* <http://www.fsa.gov.uk/library/communication/>

pr/2012/055.shtml.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Press Release, SFO, Bruce Hall charged with corruption and money laundering (Feb. 15, 2012), *available at* <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/bruce-hall-charged-with-corruption-and-money-laundering.aspx>.

<sup>17</sup> *Id.*

<sup>18</sup> Press Release, SFO, Innospec Ltd: Former CEO admits making corrupt payments (June 11, 2012) [hereinafter Jennings Press Release], *available at* <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/innospec-ltd-former-ceo-admits-making-corrupt-payments.aspx>.

<sup>19</sup> *Id.*

<sup>20</sup> Press Release, SFO, Innospec Ltd: Former Executive in Court on Fraud and Corruption Charges (Oct. 25, 2011), *available at* <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/innospec-ltd-former-executive-in-court-on-fraud-and-corruption-charges.aspx>.

<sup>21</sup> Jennings Press Release, *supra* note 18.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See Minute Entry Regarding Sentencing, *United States v. Naaman*, Case No. 1:08-CR-00246-ESH (D.D.C. Dec. 22, 2011).

<sup>25</sup> Press Release, SFO, Innospec Ltd: Former director pleads guilty to corruption (Jan. 17, 2012), *available at* <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/innospec-ltd-former-director-pleads-guilty-to-corruption.aspx>.

<sup>26</sup> OECD, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom (Mar. 2012), *available at* <http://www.oecd.org/dataoecd/52/19/50026751.pdf> [hereinafter OECD Report].

<sup>27</sup> *Id.* at 5.

<sup>28</sup> *Id.* at 20.

<sup>29</sup> *Id.* at 5.

<sup>30</sup> *Id.* at 21.

<sup>31</sup> OECD Report, *supra* note 26, at 23.

<sup>32</sup> Richard Alderman, Director, SFO, Address at the Said Business School's Seminar: Enforcing the law on fraud and corruption, does self-reporting pay? (Mar. 6, 2012), *available at* <http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2012/enforcing-the-law-on-fraud-and-corruption-does-self-reporting-pay.aspx>.

<sup>33</sup> OECD Report, *supra* note 26, at 5, 59.

<sup>34</sup> News Release, Ernst & Young, 72% of middle managers still unaware of Bribery Act, reveals Ernst & Young survey (Apr. 12, 2012), *available at* <http://www.ey.com/UK/en/Newsroom/News-releases/12-04-12---72-per-cent-of-middle-managers-still-unaware-of-Bribery-Act>.

<sup>35</sup> *Id.*

<sup>36</sup> Shan Nair, *China's fight against bribery and corruption*, Wall St. J. (May 2, 2012), *available at* [http://articles.marketwatch.com/2012-05-02/commentary/31520562\\_1\\_bribery-anti-corruption-check-companies](http://articles.marketwatch.com/2012-05-02/commentary/31520562_1_bribery-anti-corruption-check-companies).

<sup>37</sup> See Transparency International, *Bribe Payers Index 2011*, at 2 (2011), *available at* <http://bpi.transparency.org/results>.

<sup>38</sup> Joe Palazzolo, *Russia Criminalizes Foreign Bribery*, Wall St. J. (May 5, 2011), *available at* <http://blogs.wsj.com/corruption-currents/2011/05/05/russia-criminalizes-foreign-bribery/>; *see also* Press Release, OECD, OECD welcomes Russia introducing law to make foreign bribery a crime (May 5, 2011), *available at* [http://www.oecd.org/document/36/0,3746,en\\_21571361\\_44315115\\_47769508\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/36/0,3746,en_21571361_44315115_47769508_1_1_1_1,00.html).

<sup>39</sup> OECD, Russia joins OECD Anti-Bribery Convention (Feb. 17, 2012), [http://www.oecd.org/document/37/0,3746,en\\_21571361\\_44315115\\_49695141\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/37/0,3746,en_21571361_44315115_49695141_1_1_1_1,00.html).

<sup>40</sup> *Id.*

<sup>41</sup> See Samuel Rubinfeld, *OECD Begins Evaluating Russian Anti-Bribery Laws*, Wall St. J., (Mar. 22, 2012), *available at* <http://blogs.wsj.com/corruption-currents/2012/03/22/oecd-begins-evaluating-russian-anti-bribery-laws/>.

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<sup>44</sup> See Matteson Ellis, *Businesses Push Back Against Brazil Foreign Bribery Bill*, Corporate Compliance Insights, (May 16, 2012), *available at* <http://www.corporatecomplianceinsights.com/businesses-push-back-against-brazil-foreign-bribery-bill/> [hereinafter Ellis Brazil Article].

<sup>45</sup> Prestes Brazil Article, *supra*.

<sup>46</sup> See Ellis Brazil Article, *supra*.

<sup>47</sup> *Ao punir empresas, PL mira o corruptor*, Valor Econômico, (May 29, 2012), *available at* <http://www.valor.com.br/politica/2680502/ao-punir-empresas-pl-mira-o-corruptor>.

<sup>48</sup> *Id.*

<sup>49</sup> Ellis Brazil Article, *supra*.