

## CHANGES IN CIVIL PROCEDURE AND JUDICIAL CULTURE AFFECT BUSINESS PRACTICES

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When the Brazilian Code of Civil Procedure was adopted in 1973, the need for procedural rules that would allow for effective and rapid solutions to disputes was already much discussed. Since then, many constitutional amendments and bills to improve the judicial process have been drafted and debated, and some have been adopted, such as the Arbitration Law of 1996, the reform of the Judiciary introduced by Constitutional Amendment 45/2004 and the more recent legislation that made changes to the enforcement of judicial decisions and certain types of debts.

These changes are not limited to the law, however. "Not only has the law evolved, but there has been a revolution in judicial culture, resulting in significant changes in judicial proceedings and in the routines and practices of judges, lawyers and parties," observes attorney Luiz Fernando Fraga, a partner of Barbosa, Müssnich & Aragão Advogados who practices in the area of civil litigation. According to Fraga, "as a part of this cultural change, the Judiciary has reconsidered some of its traditional stances on such questions as the right to free access to the courts, the right to a full defense and the right to appeal."

As an example, Fraga points to the favorable way Brazilian courts have dealt with arbitration, and are beginning to deal with mediation, which already enjoys considerable prestige in other countries. He adds that "arbitration, which Brazilian judges used to see as a restriction of the right to free access to the courts, is now considered to be a powerful ally in finding quick and effective resolution of the disputes that naturally arise in a complex society. With specific legislation on arbitration, and the courts' acceptance of this alternative for the resolution of disputes, especially in the last five years, arbitration has quickly become a routine part of business deals, finding its way into a wide range of contracts and establishing itself as a very common method for efficient and effective dispute resolution."

Another example of the cultural and legal changes in judicial process Fraga mentions is the strong trend in recent years to limit the parties' exercise of their rights to a full defense and to appeal. He notes that the trend can be seen not only in restrictions on the use of delaying tactics, but also in the limitations on the immediate effects of filing a defense, as in the case of execution proceedings, and on appeals against decisions that are made in the course of a case.

"Ten years ago, the courts considered the right to the fullest possible defense and the right to appeal to be almost sacred, even at the cost of very long delays. These days, the courts are much more interested in efficiency and effectiveness. It's clear that the law and the courts themselves have chosen to place more value on rapid and effective decision-making, and have reinterpreted principles that were formerly considered to be close to absolute," Fraga observes. He mentions, as examples of this change in attitude, the legislative reforms that made restatements of precedents by Brazil's highest courts binding, restatements of precedents that can act as a bar to appeals, preliminary judgments to dismiss, "on-line" attachments, the repercussions for appeals on constitutional issues and the new system of interlocutory appeals.

In summary, these changes in the law and judicial culture are establishing new procedural parameters that directly affect the enforcement and enforceability of contractual obligations and influence business practices in general, as the business community adapts to the new reality emerging in Brazil's courts.



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## CVM ISSUES NEW RULES ON COERCIVE FINES

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After public consultation, on April 30, 2007 the Brazilian Securities Commission (*Comissão de Valores Mobiliários – CVM*) issued CVM Instruction 452, which revokes CVM Instruction 273/98 and establishes more detailed rules on the application of coercive fines by the Commission.

While the new rules do not change the cases in the CVM may impose coercive fines, they do clarify some of the controversial aspects of the earlier Instruction. Minor changes had been made to CVM Instruction 273/98 in 2004 and 2007, but those amendments were not sufficient to resolve the various controversies that arose during the time Instruction 273/98 was in force, and were resolved on a case-by-case basis by decisions issued by the full Commission.

Coercive fines are one of the means available to the CVM to ensure that those subject to its jurisdiction comply with their obligations under the legislation and regulations in a timely fashion. The fines are charged on a daily basis, and can reach R\$ 5,000 per day of delay, limited to 60 consecutive days.

Coercive fines apply in cases where (i) market agents registered with the CVM fail to comply with reporting requirements; and (ii) any person fails to comply with cease-and-desist orders issued by the CVM. A major innovation introduced by CVM Instruction 452/07 is the division of coercive fines into two classes, “ordinary” fines for failure to comply with reporting requirements and “extraordinary” fines for non-compliance with cease-and-desist orders, with a specific regime for each class of fine.

CVM Instruction 452/07 also establishes clear rules regarding the possibility of imposing both coercive and punitive fines on the offender. Unlike coercive fines, punitive fines are not intended to induce prompt fulfillment of administrative orders or legal and regulatory obligations, but to punish non-compliance. Punitive fines may only be imposed after a proceeding to determine whether an offense has been committed, in which the accused party’s rights to due process and a full defense are respected.

In the past, the practice of the various branches of the CVM with respect to the imposition of both coercive and punitive fines was unclear, to the extent that no criteria from the commencement of an and it was impossible to extract consistent criteria for the CVM’s decision to bring a punitive administrative proceeding in addition to imposing coercive fines, which generated a significant degree of legal insecurity.

The CVM’s new Instruction limits the application of both coercive fines and punitive administrative proceedings to more serious cases.

Within the same spirit, the new rules provide that the application of ordinary fines will, in general, exclude the bringing of administrative proceedings against the offender. Only in cases

where there is a risk of damage to the market or to investors can the superintendent of the branch responsible for imposing coercive fines decide to bring a punitive administrative proceeding rather than impose an ordinary fine. Furthermore, only when it appears that delay in fulfilling reporting requirements is part of a broader non-compliant conduct can the CVM impose coercive fines and bring a punitive administrative proceeding against the offender.

The rules for extraordinary fines are just the opposite: where extraordinary fines apply, the CVM will also bring a punitive extraordinary proceeding. Only exceptionally may the superintendent of the relevant branch of the CVM decide not to commence an administrative proceeding, if he or she concludes that the offender’s conduct did not result in real damage to the market or to investors.

Whether extraordinary or ordinary, fines begin to run only from the date on which the offender is formally notified of the fine.

This provision, in particular, addresses an old and recurring complaint concerning the CVM’s former practice of imposing fines prior to any contact with interested party, based on article 1 §2 of CVM Instruction 273, which provided that fines run from the day following the deadline for compliance, without need for notice. The legality of this procedure was challenged in the courts and, to avoid further disputes, it was changed by CVM Instruction 447/07.

As a result, ordinary fines can no longer be imposed if the obligation is fulfilled before notice is given to the interested party, even if compliance is late. This rule reflects the nature of coercive fines, which are intended not to punish but to induce compliance with legal obligations. Once the obligation is fulfilled, there is no longer any reason to impose a fine. Likewise, when a market agent’s registration with the CVM is suspended or cancelled, no fine can be imposed, even if the agent failed to comply with obligations while registered with the CVM.

Notice of fines (and other notices provided for in the Instruction), which formerly had to be sent by registered letter with proof of delivery, can now be sent by fax, e-mail, ordinary letter with proof of receipt signed by the addressee and even personal delivery by a CVM public servant, in urgent cases.

Lastly, CVM Instruction 452/07, like the former CVM Instruction 273/98, provides for an appeal to the Commission from decisions to apply coercive fines, within 10 days of receipt of the notice of fine. CVM Instruction 452/07, however, gives the superintendent of the branch that imposed the fine new powers to stay enforcement of the fine pending the appeal, at the request of the appealing party or *ex officio*.

## DRAFTING CONTRACTS TO TAKE ADVANTAGE OF THE NEW RULES GOVERNING EXECUTION PROCEEDINGS

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The need for an effective and rapid judicial process has been discussed for many years, in the legal world, and especially in the business world. The last five years have seen important changes in the Code of Civil Procedure directed to improving the efficiency of Brazil's courts.

One of the major reforms, introduced by Law 11,382/2006, relates to the enforcement of certain obligations evidenced in documents that constitute "extra-judicial title" to commence execution proceedings. Even prior to the reform, execution proceedings based on extra-judicial title (such as bills of exchange and other documents evidencing a certain and liquid debt, provided they meet certain formalities) were generally quicker than actions to enforce other types of obligations, since creditor could proceed directly to the execution phase, rather than first bringing an ordinary action to have the debt recognized by the court. The changes introduced by Law 11,382/2006 promise to make executions based on extra-judicial title more efficient, and in this article we consider some provisions that could be included in contracts to take advantage of the legislative reforms. It should be noted, however, that these provisions are not established in the legislation, nor have they been considered by the courts.

One possibility is for the parties to indicate, at the time they enter into the contract, the attorneys to whom any notices, include notice of process, should be addressed. For the creditor, this measure could result in a more efficient process in any enforcement action. The debtor, for his part, would be assured that any proceedings would be in the care of a legal professional from the moment the action is filed, allowing for the fullest defense.

Another possibility is for the parties to agree, in the contract itself, what assets will serve as security in any action for enforcement of monetary obligations. Specifying the assets subject to attachment could avoid the often lengthy disputes over what property can or should be attached, resulting a faster and more effective guarantee for the creditor (since it can be assumed that the specified assets will have significant liquidity) and greater certainty for debtor, who could use the contractually-indicated assets as a shield against more onerous claims.

Contracting parties also have the possibility of determining how any assets that may be attached in enforcement proceedings will be realized. For example, the parties could specify the manner in which the assets will be realized (transfer of ownership to the creditor, private sale of the assets, or public auction), and the details of the procedure to be followed (time periods, choice of brokers or auctioneers, etc.). Along the same lines, the parties could decide on the specialists who would be responsible for realizing the assets and establish the criteria for evaluation, such as the market indicators that should be taken into consideration and the estimated value of the assets at the time the contract was made. Provisions of this type could well contribute to a rapid and satisfactory conclusion to the process.

The parties could also provide in the contract that in the event of an action to enforce a monetary obligation, the defendant would have the right not to present a defense but instead deposit 30% of the debt into court and require payment in installments of the remainder. The parties could even stipulate the period of time over which installments would be paid, the interest rate and the index to be used for adjustment for inflation. In this arrangement, the creditor would avoid the expense and delay of a defended action, while the debtor would have the assurance that payment over time of the debt would be accepted by the creditor.

Lastly, the parties could specify in their contract the points that they consider to be "relevant grounds" in any dispute over the enforceability of their contractual obligations. This possibility could work to the advantage of both parties, since the "relevant issues" could influence the court's decision on whether to stay execution of the debt by reason of the defense filed by the debtor.

## Affinitas takes part in INTA conference

The intellectual property teams of the members firms of Affinitas, an alliance of law firms located in the Spanish Peninsula and Latin America which includes Barbosa, Müssnich & Aragão (BM&A) belongs, were present at the International Trademark Association – INTA conference held in Chicago from April 30<sup>th</sup> to May 2<sup>nd</sup>. During the event, Affinitas hosted a cocktail party for the more than 300 conference participants. BM&A was represented by the leader of its IP group, Laura Fragomeni.

## A NEW POSITION ON THE REQUIREMENT TO OFFER SECURITY FOR CONTESTED TAX ASSESSMENTS IN ADMINISTRATIVE APPEALS

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On March 28, 2007, the full panel of Brazil's Supreme Federal Tribunal (SFT) declared that article 126§§1 and 2 of Law 8213/91, as amended by Law 9639/98, were unconstitutional. In Appeals 388.359, 389.383 and 390.513, the court accepted the taxpayers' argument that they could not be compelled to provide security for contested debts in order to pursue appeals against first instance administrative decisions by the National Social Security Institute (*Instituto Nacional de Seguro Social – INSS*).

With only Justice Sepúlveda Pertence dissenting, the court reversed its earlier position on the constitutionality of the requirement to the deposit the amount of the tax debt a prerequisite to administrative appeals, deciding in favor of taxpayers' fundamental rights and guarantees: the right to access to the second instance of jurisdiction at the administrative level, the right to a full defense and the right to petition.

At the same time, the full panel of the court issued judgment in a constitutional reference (ADI 1.976) on article 32 of Provisional Measure 1699/41-98, which was converted into Law 10,522/2002 (article 32§2), which in turn amended article 33§2 of Decree 70,235/72, dealing with the requirement to offer assets as security in administrative appeals against decisions by the Federal Revenue Secretariat. The court declared the provision to be constitutional and, unlike its decisions in the INSS appeals referred to above, the decision in the constitutional reference has effects for all taxpayers and binds the government and its agencies, including the Federal Revenue Secretariat.

As a result of the STF's decision, new administrative appeals involving federal tax debts (with the exception of social security debts) are now being processed without any requirement for the taxpayer to prove prior deposit of the amount in dispute or the offer of assets as security for the debt. A similar position has been adopted revenue services in various states, such as Rio de Janeiro, São Paulo and Minas Gerais, and taxpayers have been allowed to withdraw deposits made in connection with pending administrative appeals.

As for social security debts, the INSS continues to require proof of deposit of the amount in dispute as a condition to admitting administrative appeals against first instance decisions. However, taxpayers can challenge this requirement in the courts by means of a petition for judicial review, with probable chances of success, both to ensure that administrative appeals will be processed and to withdraw deposits made prior to the Supreme Federal Tribunal's recent decisions.

## CVM CHANGES INVESTMENT FUND REGULATIONS

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In recent years, the Brazilian government has implemented various measures to attract national and foreign investors to the Brazil's financial and capital markets. One example is the government's decision to lift the tax burden, on certain conditions, for foreign investors resident or domiciled outside Brazil (with the exception of those countries considered to be tax havens under Brazilian law) on income from investments in investment funds restricted to foreign investors and in equity investment funds, enacted in Law 11,312/2006. Following this lead, on March 30, 2007 the Brazilian Securities Commission (*Comissão de Valores Mobiliários* – CVM) published Instruction 450, amending Instruction 409/04, which governs investment funds in the Brazilian market.

According to the CVM, the changes introduced by Instruction 450 are intended to bring the regulation governing the Brazilian investment fund industry into line with the current scenario in the capital market, where lower yields on government paper – for many years the mainstay of Brazilian fixed income funds – has caused investors to migrate to variable income funds, while part of the fixed income funds' portfolios has moved to private debt instruments, among other assets that carry a higher return, but also greater risk.

Instruction 450 brings significant changes to the Brazilian investment fund market, particularly with respect to better information on the funds, greater freedom for fund managers in investing the funds' resources, and the increased liability of fund managers as a result of the greater freedom in investment decisions.

Among the changes that are intended to improve the information provided to investors on the types of investment funds, some of the more important are: (i) a reformulation of the issuer limits, with the creation of a new limit of 5% of the fund's assets for investment in issuers which are natural persons or private companies that are not financial institutions or listed companies; (ii) new limits for each type of financial asset, which apply cumulatively with the issuer limits; (iii) special rules for investment or mutual funds that have more than 50% of their assets invested in private sector debt instruments or public debt instruments issued by government entities other than the federal government of Brazil.

With respect to the greater freedom accorded to fund managers in their investment decisions, the most striking

change is that, provided certain conditions are met, any of the funds governed by Instruction 450 can now acquire foreign assets, without any restriction as to the type of investor belonging to the fund. Aside from funds classified as External Debt, which already could invest up to 100% of their resources in foreign assets, Multimarket Funds are now authorized to hold up to 20% of the fund in foreign-traded securities, while other classes of funds can now allocate up to 10% of the fund to foreign assets. However, the acquisition of assets outside Brazil by the various types of funds still depends on changes to the currency exchange legislation, since currently there is no provision for Brazilian investment funds to transfer money outside Brazil for the purpose of acquiring foreign securities.

Another measure that brings greater flexibility to investment funds is the elimination of concentration limits based on the issuer and type of asset in the case of larger financial investments and in exclusive funds, along with a reduction of the blackout period for sensitive transactions or positives to 30 days for the traditionally more conservative classes of funds, although the former period of 90 days is maintained for all other funds. However, the period can be extended to up to 180 days in exceptional cases, where authorized by the CVM.

The increase in the liability of fund managers and administrators comes as a consequence of their greater freedom. The CVM created standards of conduct for administrators and managers, in order to establish clearly the liability of each. To reinforce these liabilities, changes were made to Instruction 306, which regulates administrators of securities portfolios.

Instruction 450 came into force on the date of its publication, but investment funds have a period of 90 days to adapt to the new rules. As in the past, the CVM waive the need for a meeting of fund investors to approve the necessary changes to the fund regulations, although investors must be informed of the amendments to the fund regulations.

Instruction 450 represents a significant advance in the regulation of investment funds, in step with the increasing globalization of the sector. The CVM's policy of internationalization of Brazil's capital markets will allow not only the entry of new financial resources, but also the adoption of new instruments and new ethical standards for investment fund management and administration.

## AMENDMENT 3 AND THE SOCIAL SECURITY AUTHORITY'S POWER TO DETERMINE EMPLOYMENT STATUS

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On March 16, 2007, Law 11,457 (the “Super Revenue” Law, as it is commonly referred to) was published, creating the Federal Revenue Service of Brazil (*Receita Federal do Brasil*) by uniting the taxes and contributions administered by the former Federal Revenue Service (*Receita Federal*) with collection of contributions owed to the National Social Security Institute (*Instituto Nacional de Seguro Social – INSS*). While Law 11,457 was being debated, the Federal Senate proposed Amendment 3, under which the social security agents could not make determinations as to the employment status of workers in the course of audits. This prerogative would fall within the exclusive jurisdiction of the courts, according to the text of the amendment.

As it happens, Amendment 3 was vetoed by the President of the Republic, on the grounds that it would offend the separation of powers since, in theory, the action of the executive branch of government would be subordinated to authorization granted by the judicial branch. The question then is: by declaring a person to be an employee in the course of an audit, wouldn't the executive branch be usurping a power that belongs to the judicial branch of government?

The courts have not yet formed a consistent opinion on the question. In an appeal in 2005, the Superior Court of Justice (*Superior Tribunal de Justiça – STJ*) took the position that the social security authorities enjoy full powers to determine whether a person is an employee. It is important to recall that up to the end of 2004, all legal proceedings involving this matter were brought before the federal courts. However, this jurisdiction was transferred to the Labor Courts under Constitutional Amendment no. 45, and as a result the specialized courts now deal with this matter. It seems likely that the Labor Courts will take a different view from the STJ.

In fact, even after Amendment 3 was vetoed, the Labor Courts began to issue judgments finding that the social security authorities had no powers to determine the employment status of a worker during the course of an audit. For example, the Section of the Superior Labor Court (*Superior Tribunal do Trabalho*, Brazil's highest court in labor matters) that specializes in individual dispute recently found that when the social security authority determines that a freelance worker is in fact an employee, and that the status of an “independent worker” is simply a façade, in effect it is determining that there is an employment relationship between the service provider and the contracting company, an action that “is obviously an exercise of judicial power, assigned exclusively to the Courts”.

The position taken by the Superior Labor Court reflects the effervescent climate in the Congress, where representatives and senators are busy organizing bills to replace Amendment 3, so as to give the courts exclusive powers to determine when service contracts are simply shams, and, consequently, that the service provider is in fact an employee.

There is a third position, which still does not have much support, that distinguishes audits by the INSS from inspections carried out by the Labor Ministry. In this school of thought, although labor standards inspectors do not have the power to determine whether a worker is an employee, social security auditors do not suffer the same limitation, given the veto of Amendment 3.

The question is still very much open to discussion. In practice, companies with sufficient resources are challenging arbitrary decisions by social security agents in the labor courts to invalidate assessments of social security contributions on the grounds that service providers are *de facto* employees.

## ABRASCA LAUNCHES MANUAL FOR CONTROL AND DISCLOSURE OF MATERIAL INFORMATION

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On July 4, 2007, the Brazilian Association of Public Companies (*Associação Brasileira de Companhias Abertas – Abrasca*) launched its manual on the control and disclosure of material information (“Manual de Controle e Divulgação de Informações Relevantes”), containing recommendations to public companies on how to prevent leakage of confidential information (for example, material facts that have not yet been disclosed to the market) and combat insider trading.

There has, of course, been a growing emphasis on combating insider trading in Brazil in recent years, seen in the Brazilian Securities Commission’s increasingly vigorous actions to detect and sanction this illegal conduct, and in changes to the legislation and regulations. In 2001, for example, Law 10,303 amended Law 6,404/76 (the Brazilian Corporations Law) to include a new provision in art. 155 that prohibits the use of privileged information by anyone who has had access to it (and not just officers and directors), as well as Law 6,385/76, to include insider trading in the list of crimes against the capital market. The rules issued by the Brazilian Securities Commission (*Comissão de Valores Mobiliários – CVM*) on the subject (CVM Instruction 358/2002) was recently amended by CVM Instruction 449/2007, which enhanced the rules on reporting of trading in securities by officers, members of boards of directors, members of advisory bodies and committees and persons related to the issuer company. Aside from administrative and criminal sanctions, both injured investors and the Public Ministry (by means of a public civil action) can bring action to recover damages for losses suffered.

With its recently-launched Manual, Abrasca brings self-regulating measures into the fight against insider trading.

As a starting point, the Manual reproduces CVM Instruction 358/2002, and then goes on to make a number practical recommendations for controlling confidential information within companies.

The Manual’s most significant suggestion is that public companies create a committee specifically for the internal control of information (although the function can also be assumed by an existing body within the organization), composed of the company’s investor relations officer, its investor relations manager and an executive who has responsibility for internal auditing, corporate governance or compliance.

The primary responsibilities of the internal control of information committee are to (i) map dissemination of confidential informational, (ii) maintain records of persons, departments and entities that have access to such information,

and (iii) classify information according to its degree of confidentiality or sensitivity.

The internal control of information committee also has an educational function, and would be responsible for training officers and employees on the laws and regulations in force on insider trading and treatment within the company of sensitive information, with practical guidance on the use of means of communication, the transfer of data and the printing of documents, as well as the creation and use of filters and other security mechanisms such as passwords, encrypted files and identification codes.

Another of the committee’s duties is to guide and monitor the company’s policy on insider trading, by ensuring awareness of the consequences of failure to comply with the policy and reminding management and employees of the deadlines and procedures for reporting trades in the company’s securities.

The last of the internal control of information committee functions is to ensure compliance with the company’s policies, recommending to management measures for improvement and correction where needed.

Companies that adopt the principles and recommendations contained in the Manual can sign an instrument of adherence with Abrasca, which is made public by registration in a notarial office. Adhering companies then receive the Abrasca seal of quality.

Abрасca has established a Committee for Control of Disclosure of Material Information to supervise companies that adopt the Manual. The Committee has powers to make recommendations to adhering companies, commence proceedings to investigate non-compliance with the Manual, and issue decisions in such procedures. The penalties for non-compliance are: (i) a warning, accompanied by private communication of recommended changes issued by the Committee; (ii) a public warning communicated through Abrasca’s public channels of communication; and (iii) temporary suspension of the right to use Abrasca’s seal of quality, again disclosed through Abrasca’s public channels of communication.

The market’s initial reaction to the Abrasca Manual appears to be good. According to the press, eight companies have already adopted the Manual: Banco Itaú, Perdigão, Souza Cruz, Suzano Petroquímica, Banco Bradesco, Tegma and Tavs. Abrasca’s seal is expected to give greater credibility to participating institutions, following the example of the success of the seal of quality conferred by the Brazilian Association of Investment Banks (ANBID).

\*The full text of the Manual is available at [www.abrasca.org.br](http://www.abrasca.org.br)

## THE SUPERIOR COURT OF JUSTICE EXAMINES THE LEGALITY OF REGULATIONS ISSUED BY THE NATIONAL DEPARTMENT OF MINERAL PRODUCTION

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On June 21, 2007, in an appeal (765,530/DF) brought by the National Department of Mineral Production (“NDMP”), the First Panel of the Superior Court of Justice (*Superior Tribunal de Justiça – STJ*) issued an important majority decision on the calculation of Financial Compensation for the Extraction of Mineral Resources (“FCEM”) and the mechanisms to ensure FCEM is paid. FCEM is owed to the states, the Federal District, the municipalities and federal government agencies and departments in exchange for the use of mineral resources in their respective territories. The lawsuit began with a petition for judicial review, challenging the legality and constitutionality of regulations issued by the Director-General of the NDMP: (i) Instruction 6/2000, which limits the deductions that can be made in calculating the FCEM; (ii) Instruction 7/2000, which imposes administrative sanctions on companies that fail to pay the FCEM (later revoked by Order 439 of November 21, 2003, although the challenged provisions were maintained); and (iii) Instruction 8/2000, which requires companies to fill out a monthly FCEM Calculation Record and imposes fines for failure to comply.

In the STJ’s decision, which overturned the judgment of the 1<sup>st</sup> Regional Federal Court, reporting justice Teori Albino Zavaski found that Instruction 6/2000 is legal, since it is consistent with hierarchically superior legislation in determining that the only permissible deductions in calculating FCEM are the transportation and insurance expenses shown in the sale price of the mineral product. As for Instruction 8/2000, the STJ held that it does no more than regulate the manner in which compliance with the obligation to pay FCEM will be verified, within the limits of the governing legislation and the power conferred on the Director-General of the NDMP (article 3 (IV) of Law 8876/94). With regard to Instruction 7/2000, the appeal was dismissed on procedural grounds.

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