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ADVOGADOS

PRINCIPAL ASPECTS OF THE CVM INSTRUCTION Nº 391/03

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On the 16th of July 2003, the Federal Securities Commission (Comissão de Valores Mobiliários - "CVM") published the CVM Instruction No391 that regulates the organization, operation, and administration of investment funds with shares, known by the market as private equity funds ("FPE")

The FPE is a fund exclusively targeted at qualified investors, founded in the form of restricted membership. The funds raised by the FPE will be invested in the acquisition of stocks, debentures, rights to subscription, or other securities and chattels that are convertible to or exchangeable for shares of stocks issued by companies of either closed or open capital stock, with effective participation in the decision-making processes of the company. This is an interesting alternative, albeit indirectly, for investing in closed-capital companies by private pension funds with restricted ownership, who are authorized to make investments in these companies exclusively by means of funds, according to the dispositions of Resolution No 2829/2001.

The companies with restricted ownership that are the object of investments by the FPE, however, will adopt the basic rules of corporate governance established in the CVM Instruction Nº 391/2003, which also stipulates that the FPE should exercise influence in the definition of the strategic policy and in the management of companied in which it has invested, principally by means of naming some of the members of the Board of Directors.

The CVM Instruction Nº 391/2003 is an advance in many ways. By dealing with a vehicle of investment destined solely to qualified investors, the CVM decided to relax the rules that are usually established for securities chattels to allow the shareholders, the administrator and manager of the FPE to be able to establish the regulation of the majority of the norms that govern their relations.

One of the innovations established in the CVM Instruction No 391/2003 is the automatic attainment of registration with just the protocol of the CVM for certain documents that prove the constitution of the FPE. Another novelty introduced was the possibility that the investment be made in the form of an obligation of payment of capital signed by the investor and the way by which the administrator of the fund makes calls for capital.

The CVM allowed the FPE to invest funds in companies that are undergoing recovery and restructuring processes, this includes the admission of payments of capital of the quotas of the funds in assets or rights, including credits, as long as such assets and rights directly related to the process of recovery of the company that is the object of the investment and its respective amounts are backed up by an appraisal made by a specialized company.

Another innovation is the possibility that the quota holders may vote in the shareholders' meetings by means of written or electronic communications, as long as the desire to do so is expressed before the meeting and the provision of the regulation is noted.

The CVM Instruction Nº 391/2003, besides the FPE, allows for the constitution of investments funds in quotas of private equity funds ("FICFPE"), which should invest at least 90% (ninety per cent) of their capital in quotas of the FPEs, as well as in quotas of investment funds in new companies.

Having in mind the market had previously been using the structure of funds of investment in securities and other chattels to structure private equity investments, the Instruction allowed the administrators of these funds to call shareholders' meetings, with a quorum confirmed, in order to decide about the transformation to an FPE or FICFPE.

STOCK OPTION PLANS

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Stock Option Plans, widely used by American companies and lately by Brazilian companies (especially for senior management), are still little known and discussed by the Labor Courts, being also scarce any doctrine about the subject.

The São Paulo Labor Courts, in a labor complaint filed by an ex-employee of Microsoft, handed down a pioneering decision with respect to the juridical nature of the value calculated for the employee-beneficiary of the Stock Option Plan, with the lower court judge understanding the characteristic of salary for the amount received by the employee (deserving, therefore, its impact on the payment of vacation, thirteenth salary, and FGTS).

The aforementioned decision has recently been revised by the Regional Labor Tribunal of São Paulo, with the Author of the Decision, Judge Sérgio Pinto Martins understanding that the exercise of the option to purchase stock involved risk, so one is dealing with a financial operation on the stock market. As another basis for the decision, the Author of the Decision, under the circumstances, understands that the value received cannot be equated with any of the payments always considered to be salaries (i.e., bonuses, gratifications, profit-sharing), especially because considerations are not being dealt with.

Taking into consideration the understandings commented above and the idiosyncrasies of the different Stock Option Plans, upon the implementation of such Plans, the company should take every precaution necessary to minimize eventual labor-related risks that might result from them.

ON-LINE ATTACHMENT

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On the 30th of July 2002, the Supreme Labor Court, the Central Bank, and the Febraban (Brazilian Federation of Banks) signed an agreement that promises to facilitate and improve the execution of labor proceedings.

With the new system of electronic execution, the attachment of the bank account of the judgment debtor, which previously was done by means of a request drawn up by the Labor Court and sent to the bank where the judgment debtor had his account, may now be done by means of an order of attachment sent by the Central Bank to the computer clearing center of the bank where the attachment is being made.

The procedure of on-line attachment is automatic, with the intention of facilitating its execution and preventing the bank managers from informing the judgment debtors that an attachment order exists and, consequently, withdrawals of funds are made before the order arrives and the blockage goes into effect.

The agreement, however, should not modify what the legislation determines about the necessity of prior notification of the judgment debtor to either pay or to guarantee the execution. The "on-line" attachment, as well as the attachment that was made by means of written notice, should only be used in the hypothesis that the judgment debtor, despite having knowledge of the approval of the calculations and notified to deposit the value of the condemnation, should fail to comply with the determination of the law.

With on-line attachment, the importance of systematic monitoring of the pending executions is increased, especially in the cases that the company, notified to deposit the amount of the execution, opts to designate assets for attachment as a guarantee of execution, this procedure, to be sure, is common and frequent in proceedings of the Labor Courts.

This is because the indication by the debtor of assets for the guarantee of execution could be refused by the creditor, keeping in mind that, in accordance with the legal gradation stipulated in article 655 of the Code of Civil Procedure, the attachment should preferentially be made on money. Thus, only by systematic monitoring of executions, companies may be alerted in advance about any disagreement of creditors with respect to the designation of assets offered for attachment and, consequently, of the risk of the decision for on-line attachment.

5 YEARS OF PRIVATIZATION OF TELEBRÁS

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In August it will be five years since the federal telecommunications companies that were part of the Telebrás System were privatized.

The fifth anniversary of the privatization of the Telebrás System is more than a mere commemorative date of what was the most significant privatization process in Latin America, responsible for the deposit of more than US$ 22,000,000,000 in the public coffers.

Besides the natural evaluation that is done of the sector of post-privatization telecommunications, the five-year period represents for the controllers of the privatized concessionaires the end of the restriction imposed by law on the transferal of the controlling interest or of the concession itself, which could not only shake up the sector of telecommunications but also the Brazilian equities market.

As is known, Telecommunicações Brasileiras S.A. - Telebrás was a mixed capital corporation that controlled practically all of the concessionaires of fixed and mobile telephony in the Country. During many years, the stock issued by Telebrás were the most heavily traded of the Brazilian stock exchanges, having also exercised an outstanding role on the New York Stock Exchange.

The privatization of the Telebrás System was preceded by a broad institutional reform of the telecommunications sector, with the approval of Constitutional Amendment No 08/95 – which inserted into the text of the Constitution the provision for exploitation of telecommunications services by means of authorization, concession, or permission and the creation of the regulating agency – and followed by the approval of Law No 9.472 of the 16th of July of 1997, the General Law of Telecommunications – LGT that established the regulatory framework for the restructuring of the Brazilian telecommunications sector and, consequently, for the privatization of the Telebrás System.

This institutional reform was based on two fundamental principles, to wit: the introduction of competition in a market up until then characterized as a state monopoly, and the universalization of access to the services, and had as its objective (i) fortify the role as regulator of the State, eliminating its role as a business; (ii) increase and improve the services offered; (iii) create attractive investment opportunities and technological and industrial development in a competitive environment; (iv) create conditions so that the development of the sector is in tune with the goals of social development of the Country; and, finally, (v) maximize the sales value of the federal companies of telecommunications.

The process of privatization itself was begun with the partial breakup of the concessionaires, with the intent to segregate, in new companies, the assets inherent to mobile telephone services. Then Telebrás itself was the object of a partial breakup that resulted in the constitution of twelve new companies, of which four were to control concessionaires of fixed telephone services, including Embratel, and eight, the concessionaires of mobile telephone services, all this in accordance with the so-called General Plan of Authorizations - PGO, approved by the Decree no 2.534/98.

It is important to remember that in 1997, the Law no 9.457 introduced significant alterations in the Law of Business Corporations (Law no 6.404/76) that contributed decisively to the creation of a legal environment favorable to the process of restructuring and privatization of the Telebrás System.

This because the corporate law included breakups among the subjects that include the right of withdrawal to minority shareholders, allowing them to receive the value of reimbursement of their shares. Besides this, corporate law established the obligation to make a public offering for the acquisition of the shares of the minority shareholders, for the buyers of control of the open capital companies. With the reform introduced by the Law no 9.457/97, both the breakups were left out of the list of subjects that could result in that right of withdrawal and also the obligation to make a public offering for the acquisition of shares in the event of sale of control of open capital companies, which, it should be noted, was re-introduced, in another context, by the Law no 10.303/01.

With the end of the prohibition of the transferal of control of the concessionaires and taking into consideration the present situation of the Brazilian and world economies, movements towards the consolidation of the concessionaire companies and of other suppliers of telecommunications services is to be expected, with the necessary mention of the discriminatory powers attributed by the LGT to ANATEL to prohibit transfers of control that result in the control, directly or indirectly, of concessionaires that operate in separate regions of PGO by the same stockholder or group of stockholders, because the PGO always has to be obeyed.

Therefore, if from the regulatory point of view it becomes possible to sell the control of the privatized companies, the corporate legislation, in turn, conditions this operation to the realization of a public offering for the acquisition of the shares by the minority stockholders of the company whose control has been sold, under the terms of article 254-A of the Law no 6.404/76.

Once identified the trend forwards consolidation of the companies of the telecommunications sector, it becomes relevant at this time, to broaden the concept of capital control

adopted by the regulatory agency, with the intention of permitting movements of consolidation that would be healthy and relevant to the growth of the sector, without however, putting in risk the objectives set forth by the LGT, notably with respect to the increase and improvements of the services offered, and for the creation of attractive opportunities for investment and technological and industrial development in a competitive environment and, also, the creation of conditions for the development of the sector being in tune with the goals for social development of the Country.

Having passed five years since privatization, we understand that a good deal of the objectives established by the institutional reform of the sector of Brazilian telecommunications is being achieved. However, there is still much to be done to stimulate its development, principally with respect to the creation of a healthy competitive environment, which generates benefits for the users of the services, without resulting in losses for the companies.

At this level, questions such as interconnection, unbundling of networks, portability, among others, come to occupy noteworthy positions in the order of matters to be discussed and resolved so as to allow the strengthening of the sector and, consequently, the success of the transition of exploitation of telecommunications services in Brazil to private initiative.

In order to confront such themes, it is important to keep in mind that, during state management of the Brazilian communications substantial investments were made in the construction of almost all of the telecommunications networks that exist in the Country. Equally important, after privatization, the new controllers of the privatized companies also made significant investments with the objective of serving not just the existing repressed demand but also the goals for the universalization of services established by ANATEL.

It should be further noted that the companies that were part of the Telebrás System exploit both fixed and mobile telephone services by means of concessions authorized by the Union, while the further companies, including the so-called "mirror" companies - authorized to operate in the same regions as those of the concessionaires - are owners of authorizations for the rendering of services. In this sense, the concessionaire companies are the owners of reversible assets that make up the principal telecommunications networks of the Country and, in order to create a competitive and health environment in the sector, it is necessary to guarantee to the other companies the right to use the telecommunications networks in commutative conditions, notably the so-called "last mile" which, translated, means the final stretch of the network that allows access to clients and that, technically is known as unbundling.

According to the exposition of motives of the legislative proposal that was converted into the LGT, the regulatory framework of the telecommunications sector possesses, as one of its guiding principles, the creation of basic rules for fair competition, which permits the conclusion that if, on the one hand, it is fundamental for the competition to have access to the networks and the last mile, on the other hand, for it to be fair, adequate compensation must be established. So it is that the subjective value consubstantiated in the meaning of the expression fair competition should be translated into rules that recognize the right of access to the reversible assets of the concession to all other suppliers of telecommunications services, by means of compensatory payments that should be determined based on parameters that take into consideration also the investments made in modernization and technological updating of the telecommunications networks.

One concludes that the five years of privatization of the Telebrás System have resulted in the need to confront the complex task to reinforce the effective application of legal principles that are the basis of the reform of the telecommunications sector, and that should be pursued at all times by the State and by the regulatory agency so as to promote development and free competition in the sector without losing sight of the necessary guardianship of the public interest that is inherent in it.

NEW PARTNERS

BM&A has two new partners: Amir Bocayuva, in the area of Corporate Law, and Gabriel Troianelli, in Taxation Law. The Office now has 15 partners and 107 associates.

Amir works in the areas of Commercial Law, Corporate Law and Sport Law. He participated in important capital operations such as the restructuring and privatization of the companies of the Telebrás System; the incorporation of the telecommunications companies controlled by the Tele Centro Sul (presently Brasil Telecom); the acquisition and subsequent incorporation by Brasil Telecom of the Companhia Riograndense de Telecomunicações - CRT. He has done postgraduate work in Sportive Law and, in 2001, was the Vice President for Legal Affairs for Flamengo.

Gabriel holds a Doctorate in Public Law from UERJ. Master in Taxation Law by UCAM and is a Professor of the Postgraduate Course at FGV. He published the books Compensation of the Taxes Not Owed, Comments on the New Clauses of the CTN, the LC 104, Incentives by Sectors and the Credit Bonus of the IPI.

NEW CIVIL CODE AND THE JUDICIARY ACTIVISM IN THE REALM OF CONTRACTS

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The contract is the legal basis for business activities. Its study, although formally inserted in the domain of Civil Law, does not belong exclusively to it. On the contrary, the complexity of the Law of Obligations allows its dogma to influence, to a greater or lesser scale, all branches of the law. Hence, the magnitude of the effects of the recent entrance into force of the new Civil Code, in which the Law of Obligations becomes a legislative point of reference a set of principles that up to then had not had a definite and broad acceptance in the ordering of the Brazilian legal system: (i) the economic equilibrium of contractual payments (articles 157, 317, and 478); (ii) the social function of the contract (article 421 and article 2.035 single paragraph); and (iii) the objective good will (article 422).

In the case of the Brazilian Civil Code, the impact is particularly significant. Accompanying the trends of the more recent compilations, the Law 10.406/02 employs the legislative technique of the so-called general clauses. Contrary to regulation by fattspecie - which implies the prior and analytic configuration of facts and the most common cases - the technique of general clauses confers upon the judge a broad margin for rulings, whereby the legislator attributed to common law the creation of the typical groups to be limited by the general clauses. Therefore the normative density of the general clauses is not given a priori; on the contrary, it is constructed by means of a permanent legal identification of new cases that deserve the same treatment.

From the point of view of contractual practice, the introduction of norms establishing general principles such as those referred to - without defining beforehand the domain of the cases to which they apply nor the sanctions resulting from their disregard - run the risk of leading to an excessive and precisely because of this totalitarian legal activism. Indeed, if it is true that the technique of general causes guarantees a greater mobility to the legal system, approximating the judge to the concrete case, it is no less true that it has, as a counterbalance, a lower predictability of solutions. In this context, legal consultation in the development of contracts becomes more important that ever so that whenever possible, they should anticipate legal solutions and from the beginning determine conventional criteria that orient, for each particular contractual relation, the application of the principles and the general clauses that contain them.

Note, for example, the principle of economic equilibrium that authorizes judicial review of contracts in case of a rupture of equivalence between payments. The law does not define the facts to be considered, for the effect of the application of article 478, such as "unexpected" events, which can only be determined on a case-by-case basis examined in the light of the intentions of the parties elaborated in the contractual program (article 112). Thus it is recommended that in the document itself, the parties define beforehand the hypotheses, removing from them the "unexpectedness." With a more and more detailed and precise version of the agreement, it will be possible to mitigate the effect of dangerous effects of an inordinate judiciary activism, maintaining under the control of the parties the determination of hypotheses and even the criteria themselves for the revision (negotiated) of the contract

PROTOCOL OF CARTAGENA

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The Cartagena Protocol on Biosafety for the Convention on Biological Diversity, adopted in January 2000 in Montreal — Canada, will enter into force on the 11th September 2003, in the signatory nations, due to its recent ratification by Palau. Even though Brazil still has neither signed nor ratified the Protocol, on the 22nd May, the President of the Republic sent to the National Congress a proposal for the inclusion of Brazil in the Protocol, as was promised in his program of government.

Having in view the risk that genetically modified organisms - GMOs might offer to human health, environment, and to biodiversity, the Protocol seeks to establish a minimum level of protection for all the signatory countries regarding the commerce of the GMOs.

The Cartagena Protocol is the first binding global agreement that deals with the commerce of GMOs on an international level, so as to permit their rejection by the country that wishes to do so, as a means of precaution. Because it complies with the norms of the World Trade Organization, it will not permit retaliations by countries that disagree with its terms. The Protocol also establishes (i) norms for the transferal, handling, and use of GMOs; (ii) informative procedures prior to sale;(iii) mechanisms for the evaluation and management of risks; (iv) system for the exchange of information about biological diversity, in order to facilitate the implementation of the Protocol. Ratification of the Protocol guarantees for the developing countries priority in financial assistance for development and strengthening by future Funds for Genetic Engineering and capacity-building in biosafety, which should be bilateral or multilateral

LEGAL INTEREST RATES AND THE CONTROVERSY ABOUT THE APPLICABILITY OF THE SELIC RATE

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Few clauses of the Civil Code of 2002 ignite such controversy as article 406, which is being subjected to the most diverse interpretations. The Civil Code of 2002, contrary to its predecessor that set the legal interest rates at 6% per year (see article 1.063) and inspired by the model used in countries such as France and Portugal, opted for a floating rate, more sensitive to the fluctuations of the economy. The question then came up of knowing if the text of article 406 authorizes or not the application of the SELIC rate to legal interest rates, giving new limits to them.

On one side there are those that say article 406 authorizes the application of the benchmark rate of the System of Liquidation and Custody - SELIC, that is the average interest rates of financing operations backed by federal public securities. In favor of this rate, it is argued that its application: (i) avoids that it would be more advantageous to the debtor to postpone payment of the debt for years on end in the legal system; (ii) would not reduce the liquidity of credit, because it depends on a simple arithmetic calculation; (iii) reflects, indirectly, the inflation of the country; (iv) does not violate article 161 paragraph 1, of the CTN that fixes at 1% per month the rate on payments of arrears, "if the law does not have a different mode available," and article 406 of the Civil Code does this; (v) is not incompatible with article 591 of the Civil Code, because this clause deals with remunerative rates; (vi) does not violate article 192 paragraph 3 of the CF (Federal Constitution), that stipulates a maximum rate of 12% per year for the real interest rate, since the STF (Federal Supreme Court) itself does not consider it self-applicable, being that this clause is presently revoked by Constitutional Amendment 40 of the 29th of May of 2003.

On the other side are the legal scholars that maintain that the SELIC rate cannot be applied, in synthesis, because: (i) article 406 is limited to real interest rates, that is, the interest rate over and above the rate of inflation, and the SELIC is a rate that reflects the remuneration of investors by the purchase and sale of public securities meaning that, in the SELIC rate, not only are the real interest rate included, but also monetary correction (see STJ, 1st T, RESp. 189.188/PR Rel. Min. José Delgado, j. 17.11.1998); (ii) the SELIC rate does not serve as a secure criterion, nor is it easily understandable, which could be applicable to civil obligations because it prevents the prior knowledge of interest rates; (iii) the SELIC rate is not operational, because its use will not be viable whenever just interest or just monetary correction is calculated; (iv) it is incompatible with the rule of article 591 of the Civil Code that permits only annual capitalization of interest; (v) if the application of the SELIC rate was considered unconstitutional in tax matters, which has still not been allayed by common law, neither can it be applied to civil obligations, in the case that the solution will have to appeal to the clause of article 161, paragraph 1 of the CTN, which establishes a legal interest rate of 12% per year.

Therefore the arguments rage around the interest rates on arrears, it is necessary to wait for the understanding of common law. In the decision of Civil Law promulgated by the Center for Legal Studies of the Council of Federal Justice and coordinated by the Minister of the Supreme Court of Justice Ruy Rosado de Aguiar, was approved a declaration that repudiated the utilization of the SELIC rate, opting for the rate of 1% per month cited by the CTN for the reasons already discussed. There already are instances however of decisions in which the SELIC rate was applied in ordinary procedures of collection.

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