

## AN ARBITRATION CLAUSE MAY REDUCE DEADLINE TO APPLY FOR COMPANY REHABILITATION PLAN

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Co-author of the bill that resulted in the Arbitration Law, Pedro Batista Martins, a consultant of Barbosa, Müssnich & Aragão Advogados, defends the inclusion of an arbitration clause in the rehabilitation plans of companies. His thesis, recently presented at a seminar at the Escola da Magistratura do Estado do Rio de Janeiro, upon invitation of Judge Esteves Torres, was very well accepted by the judges who deal, on a daily basis, with bankruptcy and concordata proceedings (equivalent to chapter 11 proceedings).

In practice, arbitration would accelerate possible questionings during the course of the judicial or extrajudicial restructuring, since, comparatively, and due to the absence of resources, its procedural progress is faster.

According to the new company rehabilitation law, once the judge has granted the judicial rehabilitation, after the approval of the rehabilitation plan, a two-year period begins during which the non-compliance with any obligation by the debtor shall give rise to the transformation of the state of judicial rehabilitation into bankruptcy. "It is of extreme importance that possible controversies which have arisen with respect to the time and manner of implementation of measures provided in the rehabilitation plan be satisfactory and solved in a timely manner, in such a way as to avoid that the purpose intended by the parties be frustrated, in other words, to overcome the economic and financial crisis that affected the debtor company, ensuring that its businesses and transactions continue and that employees be maintained", says Martins. On the other hand, such controversies should not immediately result in the breach of the obligation assumed, which would necessarily drive the debtor company into bankruptcy.

If arbitration is included in the judicial rehabilitation plans, the decisions would then be taken by an expert arbitrator chosen upon mutual agreement among those involved in the processes, which, in addition to relieving the ordinary court system, already swamped by millions of lawsuits, achieves the final purpose of the new bankruptcy law, which is to solve the problems of companies that are having a difficult time with the payment to creditors, thus guaranteeing a healthy economic environment.

Considered one of the 34 top Latin American arbitration experts, according to a research conducted by the English magazine *Latin Lawyer*, which interviewed attorneys, legal scholars and businessmen from the region and from Europe, Martins understands the theory and practice behind arbitration proceedings profoundly. As former in-house counsel of large companies such as Globo Cabo Holding, Texaco and Embratel, the attorney acknowledges the growth of his practice area. "The participation of countries from Latin America has grown very much in one of the most important arbitration chambers in the world: the International Court of Arbitration of the International Chamber of Commerce (ICC) in Paris", he says.

"Despite the myth that arbitration is expensive, if we took into consideration the time spent on a lawsuit in the courts and the possible damages this might cause to a company, especially to short term investors, we realize that arbitration emerges as a more agile and even less expensive possibility, not to mention the guarantee to privacy of the acts and the possibility of the arbitration proceeding being conducted by an expert on the matter subject to discussion", affirms Martins.



*Pedro Batista Martins, arbitration area consultant*

## EMPLOYERS PAYING FOR PROFESSIONAL CONTINUING EDUCATION COURSES

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The advances in globalization and the speed of technological development are making ever-growing demands on companies for skilled labor. Machines, which were previously operated by simple workers, today demand specific capacity and training to be handled. Equally, business strategies have been requiring a growing preparation from their managers and officers, who, more frequently than not, see themselves being forced to participate in specialization courses in order to manage to maintain themselves up to date and active in the work market.

In such scenario, the payment of such professional continuing education courses by the companies unveils a salutary initiative for both parties to the labor contract. On the one side, the employee benefits by acquiring skills, thus becoming a more valued professional after concluding the course and, on the other, the employer then adds value to its products and services, which are then offered to the market with greater quality.

However, in practice, it is common that employees, qualified and valued after having concluded the courses paid for them by their employers, abandon their positions, seduced by job offers made by competing companies. In light of this, one question arises: is it possible to demand that the worker stay with the company after having concluded the course, so that the investment is reverted to the benefit of the employer?

One of the basic principles of our Constitution is that of freedom to work, pursuant to which “one is free to exercise any work, job or profession”. From such rule, one extracts the following premise: one may not interfere with the prerogative that a worker has in binding or unbinding him or herself from a given company, by means of a labor contract. This means acknowledging the fact that the employer does not possess the means to avoid that the employee resign after concluding the continuing education course offered to him or her.

Even though the employer may not require that the employee continue bound after the conclusion of the course, nothing impedes that the former demand from the latter a fair indemnification of the investment made. In this respect, notwithstanding that the Brazilian labor legislation does not specifically provide for the possibility of recovery in such cases, the right to reimbursement of the investment made with a continuing education course is not ignored by our Law.

This is how a military government employee, for instance, is obligated to reimburse the government when he or she resigns until three years after the conclusion of the qualification course abroad paid by the government. Such rule could, however, be applied to this case by analogy, based on the Consolidation of Labor Laws (Consolidação das Leis do Trabalho), as provided by its article 8.

Following the same reasoning, it would also be possible to justify the reimbursement request based on the good faith principle. By paying for the continuing education studies for its employee, a company is creating legitimate expectations of being able to count on his or her labor after the conclusion of the qualification period. Consequently, by foiling such expectation, the employee generates damages to the company and such damages are essentially indemnifiable.

Although there are good arguments in favor of the employer’s position, one must emphasize that, in such cases, the success of the reimbursement request is connected to compliance with some essential premises.

Firstly, it is useful to prove that the professional continuing education course effectively contributed to the employee’s qualification. Such pre-requisite is measured according to the market value of the employee’s labor after he or she concluded training. In the event the addition is minimal or null, it would then become more difficult to request the reimbursement of the expenses incurred.

It is also necessary that the participation in the continuing education course was not mandatory, i.e., that the employee’s will was determinant in the option to take the course – either by spontaneously pursuing the company’s help or by accepting an offer made by the company, or yet by becoming a candidate to the opportunity offered to all of the employees or to those that belong to the same category.

Finally, it is extremely recommendable that the parties enter into legal instruments dealing with not only the period of time in which the employee shall be bound to the company, but also the possibility and manner in which the payment shall be made in the event of resignation. In this particular item, one may also establish parameters for the progressive amortization of the amount of the investment made in relation to the employee.

Specifically with respect to the deadline during which the employee would be prohibited from terminating the agreement, such deadline should be reasonable, in other words, compatible with the position occupied by such employee at the company, his or her remuneration and the degree of specialization obtained. The larger such three factors, the more justifiable it becomes to increase the deadline to bind the employee.

Even if the labor courts caselaw is still scarce in regard to this issue, we believe that, in light of the premises described above, employers can count on relative legal security to continue investing in the qualification of their professionals that, in the end, is reverted into benefits for all of the parties of the labor relationship.

## LAW NO. 11,196/05 AND THE AMENDMENTS TO THE BIDDING AND CONCESSION LAWS

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The so-called “Good Provisional Measure”, recently converted into Law no. 11,196/2005, became national news due to the series of tax measures it promoted. As emphasized at the time, its adoption sought to lessen tax burdens applicable on certain economic activities. However, in addition to such preponderant aspects, important amendments were introduced in the contracting regime of the Public Administration and in the rules that regulate the concession of public services.

The first amendment undergone by Law no. 8,666/93 (Bidding Law) was the introduction of a new resolution criteria in the procedures for the acquisition of goods and services by the Public Administration, which is — based on equal conditions — preference shall be granted to those produced or rendered by companies that invest in technology research and development in Brazil.

The new wording of the Bidding Law, in regard to the disposition of real estate properties, exempts a bidding procedure when the occupant of a public property has made it productive through his or her work or of that of its family; provided, however, the requisites provided in Law no. 6,383/76 are complied with, which provide for vacant properties. Still in regard to real estate properties, as of the enactment of Law no. 11,196/2005, the Public Administration may grant a deed of property or an in rem right to use, exempted the bidding procedure, to an individual that, pursuant to the law, has implemented the minimal conditions of agriculture and housing in a rural area, on a property of at least 100 hectares, located in the Legal Amazon region. Having complied with such conditions, legislative authorization is exempted. However, other restrictions were imposed by the rule with the purpose of preserving the environment and impeding the constitution of large properties without complying with the bidding procedure.

Still with respect to Law no. 8,666/93, as amended, the bidding procedure for the provision of goods and services, produced or rendered in Brazil, which cumulatively involve the following, may be exempted: (i) highly complex technology; and (ii) attributes related to national defense, depending on an opinion from a commission especially designated by the highest authority of the acquiring administrative agency.

Regarding Law no. 8,987/95 (Concessions Law), with the new wording granted by Law no. 11.196/2005, the agency in charge of the concession may, under the conditions established in the agreement, authorize the assumption of control of the concessionaire by its financing company with the intention of promoting financial restructuring and ensuring the continuity of the provision of the services, just

as provided in the PPPs Law (Public-Private Partnerships). In order to do so, the Public Administration shall demand that the financing companies comply with the requirements of legal and fiscal good standing and may amend or waive the requirements for technical capacity and financial solvency, maintaining all other obligations of the concessionaire and its controlling shareholders.

Also in relation to the Concessions Law, an article was included providing for the inversion of qualification and judgment phases, as provided in the PPPs Law. In such context, once the classification of the proposals is concluded or the offering of bids, the most well classified bidders shall have their envelopes opened containing the documents related to the bidder’s qualification, in order to verify that the conditions established in the invitation to bid have been complied with. Once the documents are in accordance with the requirements, the bidder is declared winner, without having to open the envelopes and checking the qualification documents of the other bidders. On the contrary, the qualification documents of the company classified in second place shall be examined and, so on, successively, until one of the participants of the bid complies with the parameters established in the invitation to bid.

Another important amendment is the express provision in relation to the possibility of a concession contract providing for the implementation of private mechanisms for dispute resolution related to the contract or resulting therefrom – including arbitration, which shall be carried out in Brazil and in Portuguese, provided the terms of Law no. 9,307/96 are complied with.

As of the date Law no. 11.196/2005 becomes effective, as a way to guarantee the long term loan agreements – those which obligations have an average term greater than five years – entered into with the scope of ensuring the investments related to the concession contracts, in any of its modalities, the concessionaires may assign to the lending party, in a fiduciary capacity, part of its future operational credits, provided the conditions contained in this law are complied with.

Lastly, one may note that the amendments introduced, especially with respect to the Concessions Law, sought to grant more legal security to the investor involved in the contracts entered into by the Public Administration, it being clear that the legislator’s intention was to harmonize the text of the Concessions Law with the PPPs Law, as a way to guarantee that the first projects developed based on such law, expected for the year of 2006, may be successful.

## AMENDMENT TO THE CODE OF CIVIL PROCEDURE QUICKENS COMPLIANCE WITH AWARD-GRANTING DECISIONS

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Published on December 23, 2005, Law no. 11,232/2005 amended in the Code of Civil Procedure the treatment granted to the so-called enforcement of judicial instruments, creating a new system for the phase involving compliance with award-granting decisions involving the payment of fixed amounts. A result of the conversion of Bill no. 3,253/2004, which was the object of BM&A Review no. 6, the referred to law, which shall become effective 6 months after it has been published, is one more step in the gradual change through which the admittedly archaic procedural legislation has been going through, in search of a more rapid and effective process to solve judicial controversies.

Among the changes, one that deserves to be emphasized is the one that establishes that it shall no longer be necessary for the creditor to begin a new procedure in order to collect its credit and it shall be sufficient, in the same process in which the respective acknowledgement occurred, for the creditor to request that the debtor effect immediate payment. Such provision gains even more relevance when one considers that, in light of it, it shall no longer be necessary, in principle, to carry out another service of process of the debtor so that it may pay the debt recognized in the award, since, in the event of spontaneous non-payment in the period of 15 days, the amount of the award shall be automatically accrued by a fine of 10% and, upon the creditor's request, an attachment order for the debtor's assets shall be immediately issued.

Another important change consists in that the creditor will now have the option of choosing the debtor's assets which are to be attached, thus avoiding an unjustified delay which usually occurs with the appointment of useless assets, such as real estate properties which are already encumbered and illiquid instruments. In order to guarantee the effectiveness of the measures and of the steps to be adopted, Law no. 11,232/2005 established, in addition, that the creditor may proceed to comply with the decision wherever the assets of the debtor are located or at his current domicile.

There are other relevant changes in connection with the defense of the debtor against the creditor's enforcement rights. Currently denominated debtor's defense (*embargos*), such defense shall no longer be a new procedure and shall be a mere incident called an opposition (*impugnação*), being that, except for an express court order establishing otherwise, it shall no longer suspend the enforcement phase of the award-granting decision. This shall make the payment of the credit faster, since it shall permit, for instance, that diligences shall be carried out to evaluate the attached assets as soon as possible. It shall no longer be necessary, furthermore, that the debtor be personally ordered to submit a defense, it being sufficient that its attorney receive the order or, in lacking such an attorney, its legal representative and such order may be sent by mail. One may note that, once the defense submitted by the debtor becomes a mere incident, the decision which examines it, except when it results in the termination of the enforcement, shall not be a decision, which may be challenged no longer by an appeal (*apelação*), but by an interlocutory appeal (*agravo de instrumento*), which is an appeal which procedure and judgment are significantly more rapid than the former's.

Another aspect that may bring results that shall be felt in the court practice is related to the new system of the so-called temporary enforcement of an award-granting decision, which occurs when one intends to comply with such a decision when it is still not definitive. According to Law no. 11,232/2005, when an interlocutory appeal is pending judgment before the Superior Court of Justice (STJ) or the Federal Supreme Court (STF), the creditor may request at once the release of the deposit of the money being used to guarantee the payment of its credit, without having to submit to the courts any type of guarantee.

Award calculation, a tempestuous issue – which should precede the step of complying with an award-granting decision that does not specify the amount due to the creditor – was also the target of several amendments. The award calculation phase shall no longer be the subject of its own procedure and shall be carried out, in principle, in the case records of the main process. Just as occurred with the debtor's defense, the procedure for award calculation shall now represent a mere incident, to be resolved by means of a decision which may be challenged, as a rule, by submitting an interlocutory appeal and not an appeal (*apelação*). The new law authorizes the creditor, additionally, to immediately request the temporary calculation of a non-definitive decision, which shall anticipate the exercise of several procedural acts that, currently, may only be implemented after the appellate court or second instance decision, which is subject to an appeal that may not be stayed.

It is certain that much more shall be discussed in regard to the attainment, interpretation and effectiveness of the referred to legal provisions and, even, to the application of Law no. 11,232/2005 itself to the processes decided before the law became effective and to those that have already entered the enforcement phase. It is important to emphasize, however, that one may immediately feel, not only in terms of Law, but also in the economic development of the country itself, the positive reflexes which Law no. 11,232/2005 shall certainly have. Upon publication, another step was taken towards the reduction or at least the appeasing of the uncertainties of the Brazilian jurisdictional activities, which, among other factors, make foreign investments difficult and represent a direct influence on the policies of credit granting and the fixing of interest rates of financial institutions.

## CASELAW'S GENERAL ACCEPTANCE REGARDING THE MONTHLY CAPITALIZATION OF INTEREST RATES ON A MONTHLY BASIS FOR BANKING CONTRACTS

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An old caselaw discussion has gained new form in recent decisions rendered by the Superior Court of Justice (STJ): the legality of the practice of anatocism – the charging of interest rates over other interest rates – on a monthly basis in the scope of banking contracts. The prohibition to practice anatocism was introduced in our legal system through Decree no. 22,626/33, the so-called Usury Law. Such famous law was conceived with the purpose of repressing usury practices, among which is the application of interest rates without limitations and the capitalization of interest rates. It is of interest to transcribe the recitals of such decree in order to place into context the repressive nature of the rule: “Whereas all modern legislations adopt severe rules to govern, impede and restrain excesses practiced by usury”; “Whereas it is of the superior interest of the country’s economy that capital remuneration not be exaggerated, impeding the development of the producing classes”.

In light of article 4 of the referred to legal rule, capitalization was expressly prohibited, except for the possibility of accumulating accrued interest rates to the liquid balances in checking accounts on a yearly basis. Thus, by means of an extensive interpretation of such rule, some legal scholars defended that the capitalization on an annual basis was, generically, legal.

As of then, caselaw in connection with this issue began to emerge and later began to consolidate, culminating, initially, in precedents from the superior courts. Precedent no. 121 handed down by the Federal Supreme Court (STF) determined that “the capitalization of interest rates is prohibited, even if expressly agreed upon”, however later on, Precedent no. 93 issued by the STJ provided that “the legislation regarding rural, commercial and industrial credit certificates permits that parties covenant the capitalization of interest rates”. Following this same reasoning, caselaw was confirmed in the sense that a capitalization covenant would only be accepted if on less than a yearly basis, provided that there was a legal rule that excepted the prohibitive rule provided in the Usury Law.

Please recall that Precedent no. 93 of the STJ is prior to Provisional Measure (MP) no. 1,925/99, which today has been converted into Law no. 10,931/2004, that created Banking Credit Certificates, which also permitted, in the scope of such instruments, created according to the same pattern as the referred to certificates, the charging of interest rates over interest rates, regardless of its periodicity. With respect to the specific legal authorizations in such sense, Law no. 9, 514/97 is also worth emphasizing, since it permitted the capitalization of interest rates in debts contracted in the scope of the Real Estate Financing System.

The great legislative mark regarding this issue occurred, however, with the enactment of Provisional Measure no. 1,963-17/2000, currently re-enacted under no. 2,170-36/2001,

which article 5 has authorized the capitalization of interest rates according to the following wording: “In transactions carried out by institutions belonging to the National Financial System, the capitalization of interest rates is admissible when its periodicity is less than on a yearly basis”. Such provision is currently maintained in effect in light of article 2 of Constitutional Amendment no. 32/2001, according to which “the provisional measures issued on a date prior to the date of the publication of this amendment continue in effect until the ulterior provisional measure has revoked them explicitly or until definitive deliberation by the National Congress”.

Finalizing the chain of legal provisions regarding this issue, the Civil Code of 2002 (Law no. 10,406/2002), through its article 591, instigated the controversy then existent by generically permitting the annual capitalization of interest rates in loan agreements for economic purposes.

It was in such legal context that several judgments were then rendered by the STJ admitting monthly capitalization in credit agreements entered into by institutions belonging to the National Financial System, pursuant to the following terms: “[...] Monthly capitalization, as of the date it was covenanted, shall be applied to banking loan agreements, entered into as of March 31, 2000, the date of the first publication of article 5 of Provisional Measure no. 1,963-17/2000, currently re-enacted under no. 2.170-36/2001. The perpetuation of its effectiveness is due to article 2 of Constitutional Amendment no. 32, dated September 11, 2001[...].”

The general acceptance in a series of judgments rendered as of mid-2004 by the STJ in this sense deserves attention. In light of such judgments, so that the capitalization covenant is completely valid, one must emphasize – in addition to the existence of a permissive legal provision – the necessity of having the monthly capitalization expressly covenanted in the respective banking loan agreement.

Lastly, it is important to highlight that a direct constitutionality lawsuit is in course before the STF against article 5, caput and sole paragraph of the referred to Provisional Measure no. 2,170-36/2001 (ADIN no. 2316-1). Reporting Justice Sydney Sanches granted the request to provisionally stay the opposed provision due to the apparent lack of the requirement of urgency for the issuance of a provisional measure and due to the occurrence of an inverse periculum in mora, by virtue of undefined effectiveness of the referred to Provisional Measure, since Constitutional Amendment (EC) no. 32/2001 and due to the possible delay in judging the merits of the lawsuits. Having recently returned to the judgment of the injunction, Justice Carlos Velloso seconded the opinion of the reporting justice and the judgment was adjourned due to a request to review the case records made by Justice Nelson Jobim.

## PROTECTION OF HIGHLY RENOWNED TRADEMARKS

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A trademark may be defined as any distinctive sign, visually perceptible, capable of distinguishing products or services of diverse origins. From such definition, one may extract one of the fundamental principles for trademark protection: the specialty principle, according to which two identical or similar trademarks, under the name of two different holders, may co-exist in the market, provided they are used to identify different products and services.

However, as established by the Brazilian law of industrial property (Law no. 9,279/96), an exception to this principle is the highly renowned trademark, which is a trademark that is so famous among consumers that it deserves special protection in all fields of businesses, regardless of the class under which it is registered. Therefore, the holder of the trademark is entitled to impede third parties from using or registering similar trademarks, even if used to identify completely distinct products or services.

One may observe that the former Industrial Property Code (Law no. 5,772/71), revoked by Law no. 9,279/96, provided for notorious trademarks. Under such system, extremely complex, a separate registration was maintained in order to impede third parties from registering identical or similar trademarks. Since, after the enactment of the new law, the regulation for the recognition of highly renowned trademarks was delayed, the National Institute of Industrial Property (INPI) was recommending those interested parties in obtaining special protection to resort to the Courts. Thus, the first trademark to be recognized as being highly renowned by the Brazilian Courts was Dakota.

In January 2004, the INPI issued Resolution no. 110/04 – which was replaced with small changes by Resolution no. 121/05, dated September 2005 –, seeking to regulate the recognition of highly renowned trademarks by the referred to Institute. Pursuant to Resolution no. 121/05, one considers a trademark to be highly renowned when it possesses an uncontestable authority, deferred knowledge and prestige, resulting from its tradition and qualification in the market and from the quality and trust it inspires, related essentially to the good image of the products or services applied thereto, exercising an accentuated magnetism, an extraordinary attracting force over the public in general, indistinctively, rising above the different markets and transcending the function to which it served originally, projecting itself to being apt to attract clients through its mere presence.

Since the referred to regulation, the applicant of the highly renowned trademark should submit to the INPI, incidentally, upon challenging or during the administrative process requesting nullity of the trademark, the appropriate evidence to prove that the trademark is highly renowned, such as: the date the trademark started being used in Brazil; the public using or the potential users of the products or services to which the trademark is applied; means for trading and disclosing the trademark in Brazil; geographic amplitude of the effective trading in Brazil and, possibly, abroad, among others.

With the referred to resolutions, only the INPI has the power to grant the highly renowned trademark status, being that the referred to institute has declared its intention to seek the annulment of the previous court decisions — mainly because the new resolutions established that the trademark being highly renowned is in effect for a determined period of time, which is five years.

During such period of time, the holder of the trademark shall be exempt from submitting new evidence of such condition in the possible complaints in granting processes of trademark rights, except for those cases in which the INPI deems it necessary. On the other hand, once the five-year deadline has lapsed, new evidence may be submitted.

Consequently, the recognition of being highly renowned differs and simplifies comparatively to the former system of notorious trademarks, as there was a system for the separate registration for such trademarks. And, as a consequence of the incidental and temporary recognition of the renowned trademark, the INPI does not intend to prepare a list of the trademarks that have already achieved such status of being highly renowned. Among the trademarks that have already been recognized as being highly renowned in the last two years by the INPI are Ninho, Fiat, Cica, 3M, Hollywood, Pirelli, McDonald's, Kibon, Moça, Aymore and Natura.

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