

MERGERS AND ACQUISITIONS GROWTH TO CONTINUE IN 2007

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2006 was a historical year for the area of mergers and acquisitions in Brazil with over 500 Mergers and Acquisitions (M&A) operations, which led to the second-highest volume, in dollars, since 2000, when this type of operation was fueled by the dotcom bubble. In response to a survey carried out by one of the main sources of global financial market information, Thomson Financial, in December 2006, with over a thousand M&A professionals, half of those interviewed said that they expected a significant increase in mergers and acquisitions over the next six months. Out of the less optimistic respondents, 41% believe that the current levels will at least be maintained. Since the global volume of M&As during 2006 was US\$ 3.8 trillion - 38% higher than 2005 - 2007 should be an excellent year.

In 2006, in Brazil, the financial sector was very vibrant. Barbosa, Müssnich & Aragão Advogados took part in a number of the most important operations in the sector, such as the negotiations between Banco Pactual and UBS, which involved over US\$ 2.6 billion, and the transaction between the investment fund Opus and the country's largest brokerage firm, Ágora.

Mauro Teixeira Sampaio, a partner in the corporate department that took part in several M&A operations in 2006, believes that the sector will increase even further in 2007. "In addition to the financial sector, the real-estate area, with an increased participation of foreign investors, should witness many M&A operations", said the lawyer. According to him, the sectors of technology, energy and telecommunications should also undergo an increase in M&A operations, as those markets get consolidated.

According to Mauro Sampaio, last year saw the beginning of a trend that should be consolidated in 2007: Brazilian companies going shopping abroad. Among the reasons for this innovation are the strengthening of the real, which improved the purchase power of local companies and large fund-raising operations carried out via Stock Exchange.

In this scenario, it is expected that Brazil will increase its participation in the global M&A market (a hesitant 2% in 2006), according to the Thomson Financial survey. "With modern regulatory rules, a solid financial system, favorable international scenario and the trust of foreign investors reflected in the successive drops in Risco Brasil, such expectation should come true", says the lawyer.



*Mauro Teixeira Sampaio:
Partner of the Corporate Department*

NEW AMENDMENTS TO THE CODE OF CIVIL PROCEDURE SEEK TO HASTEN EXECUTION ACTIONS

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Law No. 11382/2006, which came into effect on January 22, amends several rules of the Code of Civil Procedure with the clear purpose of hastening execution actions, including several specific innovations relating to extrajudicial enforcement instruments (which include, among others, promissory notes, trade acceptance bills, debentures, checks and several contracts, especially those with guarantees).

Please note that this law is part of a legislative trend that, particularly over the last decade, has attempted to hasten lawsuits in general and especially execution actions (please refer to our 15 and 17 issues, of January/February and May/June 2006, respectively).

Please find below a summarized list of the most relevant amendments brought about by the above mentioned law.

In order to prevent debtors from disposing of their assets, the law now allows creditors to obtain a certificate upon filing the execution action and record such certificate with the applicable real-estate registry or other registries relating to assets that are subject to seizure or attachment.

The impossibility to attach revenues resulting from work-related activities, such as salaries and fees was reinforced, except for cases of attachment to ensure the payment of alimony, as established before.

The deadline for payment of the debt was increased from 24 hours to three days. The listing of assets to be attached is now a prerogative of creditor, who can include such list in the initial petition of the execution action. In order to make attachment and summons procedures easier, the law authorized the court official, in cases where debtors fail to make payments, to use the second counterpart of the summons order to immediately seize and evaluate the assets, serving process on debtor at the same time, preferably on debtor's attorney.

The procedure known as online-attachment, which was already being accepted by the courts and accelerates considerably the attachment of cash deposited in bank accounts or financial investments, is now specifically provided under the law. Besides, in order to ensure the effectiveness of the execution, the law established that the judge can now request information from the Central Bank of Brazil with regard to the existence of financial assets in the name of debtor and, immediately, order the unavailability thereof, up to the amount under execution, in order to prevent debtor from disposing of such assets.

The law also provided for the possibility of replacement of the attached asset when such asset is deemed to have low liquidity. And, as a condition for the submittal of a real estate property as replacement, debtor's spouse must now consent to such submittal. Also with regard to the replacement of the attached asset, the new law establishes that the debtor can submit a letter of bank guarantee or bond, provided that such instruments shall secure the payment of the entire debt plus 30%.

The ability of creditor to acquire the attached assets was expanded, with the possibility of creditor requesting the conveyance of such assets to its ownership as payment of the executed credit, provided that the offered price shall not be lower than the evaluated price. If the value of the asset(s) is higher than the credit, then the creditor can deposit the difference, which can be withdrawn by the debtor. If the value of the asset(s) is lower than the credit, then the execution shall be carried on with regard to the remaining amount. Such right can also be exercised by the creditor who has been granted a real guarantee (such as mortgage or pledge), by concurrent creditors who have been granted a pledge over the same asset, in addition to spouses, parents or children of debtor.

The prior submittal of court guarantee is no longer a requirement to the presentation of debtor's defense (motion to stay execution). Motions to stay execution will no longer have staying effects (causing the suspension of the execution), except when the execution could cause to debtor grave and hard-to-repair damages, and provided that the execution has been secured by sufficient attachment, deposit or seizure.

In order to make the rules that govern execution actions more rigorous, the judge can now impose a fine if the debtor files a motion to stay execution with the sole purpose of delaying the procedures.

Debtors are not authorized to request, within the deadline for the submittal of a motion to stay execution and provided that the credit subject to the execution is recognized, that the court grant the deposit of 30% of the debt (including court costs and attorney's fees) and the payment of the remaining amount in up to six monthly installments.

An analysis of the amendments brought about by the abovementioned Law No. 11382/2006 leads to the conclusion that such law consolidates a trend that was already being adopted by the courts, which was to create mechanisms to hasten court executions, making such procedures faster and more effective.

SHAREHOLDING DISPERSION: POSSIBLE MATTERS TO BE ADDRESSED IN BRAZIL

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One of the matters that has been discussed in the Brazilian corporate scenario, involving corporate governance, is the dispersion of control of publicly-held companies in the capital market. Several new matters have been in corporate agendas, requiring clarifications, guidance and solutions from lawyers, economists and specialists in the matter. Such matters include: the most efficient control model in publicly-held companies (concentrated or diffuse); the best governance structure within the model; hostile takeovers and the use of poison pills; the actual attendance of shareholders during meetings; and the need for legislative reforms in light of such changes.

Even though it is still in its embryonic stage, the trend towards the dispersion of control of Brazilian companies began back in 2005 with the operation involving Lojas Renner, which was followed by Embraer, Diagnósticos da América, Submarino and Perdigão. This trend presents risks and benefits and seems to have three main explanations: a mature Brazilian capital market that reached, in 2006, the eightieth global position in share placements (29 operations during the year); the discovery of a “way out” through stock market as a means of “disinvestment”, especially for private equity funds and, finally, the conclusion that the dispersion represents good administration practice.

Historically, hostile takeovers have been one of the main advantages relating to dispersed-capital companies. When a company disperses its control, it faces an increased difficulty in replacing inefficient officers, which could lead to a loss of the business’ added value, affecting the price of the shares and turning the company into an easy target for hostile takeovers. Therefore, this control model requires a high degree of efficiency and transparency, since, once the business hits a rough patch, either its officers are fired or the net worth of the company drops and it ends up being acquired by another. That is capitalism at its essence.

Another matter relating to the dispersion of shareholding control relates to the use of poison pills. Such maneuver must be used with caution, since, even though in certain cases the poison pill can be beneficial to the company and its shareholders, in other cases it can prevent the company from being purchased by third parties and perpetuate the life of inefficient officers in the company. This problem was one of the reasons that led the European Commission to advise European companies against the use of poison pills.

If the use of poison pills becomes widespread in Brazil, maybe certain legislative reforms will be necessary to address specific matters, in order to ensure that the market operates in an efficient manner. An increase in Public Offerings for Share Acquisitions (OPA) as a mechanism of defense against the acquisition blocks of shares, for example, could lead to a reduction in takeovers and the consequent damages to the company, its shareholders and the economic development of the country. Therefore, the fair price to be paid for control in case of an OPA should be fully discussed and based on economic surveys in order to predict the impact thereof on the market. That was what happened in Europe via the 13th Guideline. According to that guideline, each member country can, subject to certain imitations, select the criteria it will choose to calculate the premium to be paid for the control. Please note the examples of Great Britain, where the criteria of highest price paid to the controlling shareholder is used and of Italy, where the average purchase price of the shares over the preceding 12 months is calculated against the market price thereof at the time of the offer. In Brazil, the price must be at least 80% of the price paid to the controlling shareholders.

The method used to calculate the remuneration payable to officers is another source of discussion among market specialists and the cause of recent legislative reforms in other countries. The remuneration model is usually pegged to the results achieved by the company, thus causing officers to seek short-term profits, which may not be in line with medium and long term strategic interests of the company. Great Britain went through legislative reforms in an attempt to settle this problem, the last of which was concluded in 2004. Italy adopted the same line and the Collegial Syndicate reform was also concluded in 2004. Those may be valid experiences that could be analyzed in order to avoid the same kind of problem in Brazil.

Finally, it is still too early to affirm that the dispersion of control is a trend among Brazilian companies. Therefore, at this time, it would be inaccurate and imprudent to describe the problems that companies with dispersed capitals are likely to face. The fact is that, should the capital dispersion trend gain strength, many problems will arise and require adjustments and reforms in the current models, especially with regard to efficient governance practices relating to the monitoring of officers and tools to encourage shareholders to adopt a more active role in the company life.

REFLEXES OF THE NEW MICRO- AND SMALL-COMPANY REGIMEN ON LABOR RELATIONSHIPS

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In spite of its clear tax-related goal, Supplementary Law No. 123, of December 14, 2006, also known as SuperSimples, which governs the regimen applicable to micro and small companies, addresses certain labor aspects.

Before the enactment of the Supplementary Law, the rule that governed the regimen applicable to micro and small companies was Law No. 9841/99, which described micro companies as legal entities or trade companies with gross annual revenues of up to R\$ 244 thousand. Small companies, on the other hand, were the ones with gross annual revenues of between R\$ 244 thousand and R\$ 1.2 million.

Such amounts were altered by the Supplementary Law. According to the new law, micro companies are the ones whose annual gross revenues do not exceed R\$ 240 thousand, while small companies are those whose annual gross revenues are between that amount and R\$ 2.4 million – twice the limit applicable under the former law.

According to the former law, micro and small companies were exempted from posting a working-hours board at their premises and from making entries relating to the working hours of their employees on their books and records, in addition to controlling employees' arrival and departure times.

Besides, such companies were not under the obligation of hiring apprentices, recording employees' vacations in their books and records or have labor inspection books at their premises. With regard to this last matter, labor inspectors were required to provide instructions to the company when any irregularity was found, instead of immediately drawing up infraction notices. In general, infraction notices could only be drawn up if the irregularity persisted at the time of a second inspection.

However, article 89 of the Supplementary Law expressly revoked Law No. 9841/99 (known as Lei do Simples), and now it is necessary to assess whether or not the benefits granted under the former law still apply under the new one.

The first important change brought about by the new regimen relates to the control of working hours of employees hired by micro and small companies. As seen above, under the former law, such control was not necessary. Nevertheless, such benefit was not repeated in the the Supplementary Law, and, therefore, beginning on December 14, 2006, all micro and small companies were required not only to control working hours, but also to record the duration of the work day of each of their employees in their books and records. The only exception is the need to post a working-hours board at their premises, which is still exempted.

All other benefits granted under the former Lei do Simples remain practically unchanged: micro and small companies are still exempted from recording employees' vacations in their books and records, hiring employees and having a labor inspection book.

It is important to note that, with the enactment of the SuperSimples law, micro and small companies are no longer required to inform the grantal of collective vacations to the Ministry of Labor, which is a benefit they did not have under the former law.

With regard to labor inspection, this law continues to be enforceable as a guideline, like the prior one was. But now, this guideline will only prevail if the activity or situation, by its very nature, involves a degree of risk that is compatible with such procedure. In other words, labor inspectors are now authorized to draw up infraction notices as soon as they find any irregularity in micro and small companies' activities that involve an increased degree of risk, in which case the need for two inspections will be revoked.

Still with regard to the benefits brought about by the Supplementary Law, it is important to note that micro companies with annual gross revenues of up to R\$ 36 thousand are exempted, for up to three years, from paying union contributions, as well as from paying contribution to entities defined as "third parties" in article 240 of the Federal Constitution with regard to education allowances.

The last change brought about by the Supplementary Law relates to the representation of micro and small companies before Labor Courts. The new law entitles such companies to appoint a non-employee representative, in an express exception to the consolidated Precedent of the Superior Labor Court No. 377.

The initiative of the Public Authorities to grant different treatment to different companies is indeed praiseworthy. In our opinion, this is an important mechanism to encourage the opening of jobs and the development of the country's economy.

Nevertheless, from a strict labor standpoint, we believe that the Supplementary Law could have been more audacious, in such a way as to further encourage small investors to open their own business, adopting measures such as a broader flexibilization, beginning on the joint activities of employees' and employers' unions.

That being so, the Supplementary Law should be considered as a good first step towards a future different and isonomic treatment to be granted by the Public Authorities to companies, in a gradual movement towards a much needed labor reform.

REGULATION APPLICABLE TO A REQUEST FOR REVISION BY THE COUNCIL OF APPEALS OF THE NATIONAL FINANCE SYSTEM

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Ordinance No. 10, of November 1, 2006, enacted by the Council of Appeals of the National Finance System (CRSFN), the body in charge of the final trial of cases heard by the Securities Commission and the Central Bank of Brazil, represented an important step with regard to the revision of its decisions.

Even though since 1999 a provision on the request for revision existed in the General Law of Administrative Procedures (9784/99), CRSFN not only recognized the possibility of revision of its decisions, but also consolidated its standing on its acceptability requirements.

The revision of the final decision – which, in general, does not accept appeals – is admitted not in order to hear the opposition of the punished party, but rather to repair injustices. Despite the general rule according to which final decisions are unchangeable, in exceptional cases expressly defined in the law, a revision or amendment of final decisions is acceptable.

Law No. 9784/99 states, in its article 65, that a decision shall be revised whenever “new facts or material events that could justify the inaptness of the applied penalty” are found to exist.

In general terms, both “new facts” and “material events” are events that would have prevented or reduced the penalty had they been taken into account. The difference is that a “new fact” did not exist at the time of the decision (but its later occurrence caused the penalty to become inapt), while a “material event” existed at the time of the decision but, for some reason, was not taken into account.

Ordinance No. 10 establishes the definition of “new fact” or “material event”. Even though the new rule is not far from a criminal revision, it was clearly inspired by civil-law rescissory actions, which are autonomous actions filed to reverse a final and unappealable court decision.

The following are deemed to be “new facts” or “material events”: (1) changes to the factual or legal state of affairs after the decision; (2) new evidence of lack of guilty of the penalized party or event that leads to a reduced penalty; (3) if the decision is (a) against the law or the evidence included on the case records; (b) based on depositions or documents that are legally invalid; (c) against *res judicata*; has been (d) rendered in an act of malfeasance in office, graft, bribery or lack of jurisdiction; (e) resulting from malicious misconduct or collusion between the parties to violate the law; or (f) the decision is based on factual errors, resulting from acts or documents included in the case records. The ordinance also

establishes the request will be accepted if the decision is based on law, normative rule or interpretation of a law that has been declared unconstitutional by the Federal Supreme Court.

The list mentioned above is interpreted as being merely illustrative, and a request for revision can be filed whenever the penalty proves to be inadequate, whether because events after the decision would entail the revocation or reduction thereof or because the decision has defects that compromise its effectiveness (such as, for example, a decision that was based on false depositions). The important point is that the events that serve as fundament for the request must be enough to evidence the inaptness of the penalty.

With regard to the deadline for the submittal of such request, even though the law and the ordinance admit the filing of such request at any time, the latter limits such possibility when it states that said requests for revision must be filed before the end of the term of punishment.

The term of punishment, in a few words, is the time during which the State is able to impose the penalty on the individual due to an infraction (punitive ability of the State).

Nevertheless, in the actual case of the ordinance, the logical interpretation leads to the conclusion that the expression “before the end of the term of punishment” actually refers to the extinction of the ability of the State to enforce the penalty because such penalty has already been fulfilled (for example, if a fine has already been paid), and, thus, no request for revision is acceptable. Still, such condition for the filing of a request for revision could be challenged due to the fact that the law – a hierarchically higher rule - includes no time limit.

With regard to the parties with standing to file for revision, in addition to the individual receiving the sentence and the trial authorities, it is important to note that third parties can also do so if they have rights interests that could be affected by the decision, as can organizations, association and representatives that protect collective and diffuse interests.

Finally, if the request for revision is found to have grounds, CRSFN can either amend its decision or annul the procedure. Under no circumstance can such request increase the penalty, which is expressly stated both in the law and in the ordinance.

Now, it is time to monitor the application of the ordinance, which will certainly settle any divergences of interpretation, such as the one relating to the deadline for the filing of the request for revision.

Affinitas starts a new stage in the secondment program

Affinitas, the Ibero-American alliance of law firms from Latin America and the Iberian Peninsula, including Barbosa, Müssnich & Aragão (BM&A) in Brasil, carries out a secondment program among its lawyers, with the goal of strengthening the relationship between the member offices and enhance the exchange of knowledge among them.

In the first round of the program, BM&A sent lawyer Flavia Senna to the Mexican law firm Mijares, Angoitia, Cortés y Fuentes (MACF) and received Esperanza Motilla, who works for Garrigues, in Spain.

In the second round of the program, which takes place in February 2007, Silvia Lacerda will spend some time working for Garrigues. BM&A will welcome Miguel Flores, from MACF. Silvia began her career as a trainee in 2002 and currently works in the corporate department.

Garrigues has a new office in Poland

Garrigues, a Spanish law firm affiliated with Affinitas, started its expansion through Central and Eastern Europe. Polish law firm Fúster & Sartorius entered into an association with the Spanish firm. Garrigues also has offices in Casablanca and Shanghai.

NEW DEVELOPMENTS IN THE MATTER OF LEGAL RATES OF INTEREST IN ARREARS

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As another twist in the discussion on interest in arrears, reported in the first issue of BM&A Review, the Official Gazette of December 14, 2006 published a recent decision by the Superior Court of Justice (STJ) about article 406 of the Civil Code (Resp. 710.385/RJ) in which the court found that the Selic rate applied to legal interest in arrears, as opposed to the standing that until then had prevailed in that Court in cases of contractual civil liability, in spite of the proclivity of state courts towards the application of the rate of 1% per month – article 161, paragraph 1, of the National Tax Code (CTN). In such decision, rendered by the 1st Panel, STJ – whose standing used to alternate between the applicability of the Selic rate and the 1% rate described in CTN, depending on the nature of the case – decided to apply the Selic rate to legal rates of interest in arrears applicable to a case of moral damages awarded as a result of the undue suspension in the supply of electricity.

This was one of the few times in which STJ discussed the benefits and disadvantages of the application of the Selic rate to the legal interest in arrears, with reference to the main articles published on the matter since the enactment of the Civil Code of 2002. Said decision is far from ending the discussion on the matter. The decision, by majority of votes, was reported by Justice Denise Arruda, whose opinion was defeated, and was based on the opinion rendered by Justice Teori Albino Zavascki, who addressed the two trends about the matter and ratified the constitutionality of the Selic rate, in a opinion that was shared by Justices José Delgado and Luiz Fux.

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