A Comeback for Super-Preferred Shares?

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More than a decade ago, I wrote in BMA Review 42 (July–September 2013) about the usefulness of super-preferred shares in Brazilian corporate law. At the time, I noted that the predominance of the Novo Mercado special listing segment had resulted in a certain disregard for preferred shares, and more broadly for any structure that upset the symmetry between voting power and cash flow rights within companies.

Since then, the debate around super-preferred shares has advanced little, though there have been some notable moments. One was CVM Administrative Proceeding RJ-2013/5993, in which the CVM, Brazil's securities and exchange commission, dealt with the question of whether the Brazilian Corporations Law imposes a limit on the economic advantages that can be granted to preferred shares.

The case involved Azul S.A. (a Brazilian airline), whose bylaws provided that preferred shares would carry the right to: (a) be included in any tender offer at a price 75 times higher than the price per common share paid to the controlling shareholder; (b) 75 times the value attributed to common shares on liquidation of the company; and (c) dividends 75 times greater than those paid per common share.

At the time, the CVM's Public Companies Supervision Branch (*SEP – Superintendência de Empresas Públicas*) argued that the company's bylaws violated article 15§2 of the Corporations Law. In the SEP's view, the Law required equivalence between the number of shares issued and the capital contributed to the company. Fortunately, that interpretation did not prevail: the Commissioners of the CVM rejected the argument and approved the issuance of super-preferred shares.

Although Azul ultimately decided not to go ahead with its IPO, its efforts bore fruit. A year after the CVM's decision, Gol Linhas Aéreas Inteligentes S.A., another airline, became the first publicly-traded company to issue super-preferred shares. Today, at least three companies – Track&Field (a sports clothing and equipment retailer), Gol, and Azul – use super-preferred shares in their capital structures.

Over the course of my career, I've been involved in numerous complex corporate transactions that required separating voting rights from cash flow rights. In many of these cases, super-preferred shares proved to be effective tools, capable of reconciling the interests of controlling shareholders with the project financiers' requirements for protection and security.

That's why I believe that, when used appropriately and creatively, preferred shares – and super-preferred shares – offer significant flexibility in structuring a company's capital. They also represent an efficient alternative for capitalization, despite the fact that they are little used in practice, and have been overshadowed to some extent by multiple voting shares, which were introduced by Law 14.195/2021 (albeit with restrictions that discourage companies from going public). It is up to us, as lawyers, advocate for legitimate corporate arrangements that shareholders have freely chosen, and to use those arrangements whenever they align with our clients' interests and objectives.

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