

Attachment of investment fund units: the implications of the Superior Court of Justice's decision

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At the end of 2022, Brazil's Superior Court of Justice (STJ – Superior Tribunal de Justiça, the highest court in non-constitutional matters) took the position that attachment of units in an investment fund, as security for a debt under collection, does not transfer to the execution creditor the risk inherent in the investment or, consequently, ownership rights in the units. Any fluctuation of the value of the units subject to attachment, therefore, does not affect the creditor, either to the creditor's advantage or detriment, and consequently any growth in the value of the fund unit will not be passed on to the execution creditor (Appeal REsp 1.885.119/RJ).

On the facts of the case considered by the STJ's Third Panel, the execution debtor had filed an interlocutory appeal to the Rio de Janeiro Court of Appeal (TJRJ – Tribunal de Justiça do Estado do Rio de Janeiro) in the course of proceedings to enforce judgment, against a decision requiring the execution debtor to pay over to the execution creditor the amount by which the fund units had increased in value from the time of attachment to the time the units were sold by order of the court.

In its decision on the interlocutory appeal, the TJRJ concluded that the execution creditor was entitled to the value that the attached units had attained. In the court's view, in attaching the fund units, the execution creditor had become party to the investment transaction, assuming the position of investor, and was therefore subject to the risks inherent in the investment.

The execution debtor appealed to the STJ, which reversed the TJRJ's decision. According to the STJ's Third Panel, the execution creditor was not entitled to the amount by which the units had increased in value.

The Third Panel reasoned that an attachment of property does not affect the debtor's ownership rights in the attached property, and gives the execution creditor only a right of preference over the property, and the right to enforce the debt against it, even if the property is sold or transferred to another party. Ownership of the attached property can therefore be transferred to the execution creditor only by voluntary act of the execution debtor, by inheritance, or on sale of the property by order of the courts to satisfy the debt under execution. In cases such as the one before the court, the execution debtor remains the owner of the fund units until they are sold by order of the court, and continues to benefit or suffer from the risks of the investment.

The STJ also based its decision on the specific characteristics of investment fund units. Under article 11 of Instruction 555/2014, issued by Brazil's securities commission, the CVM (the same provision can be found in article 14 of CVM

Resolution 175, which revoked Instruction 555), units are undivided co-ownership interests in the investment fund (subject to the various classes of units, if any), and confer on the unit holder rights and obligations governed by the fund's regulation. Each investor therefore holds a right of redemption, proportionate to the investor's undivided interest in the assets composing the fund's portfolio, and thus assumes the risk of the assets' performance.

The investor's assumption of the risk associated with investment fund units can also be seen in article 15 of CVM Instruction 555/2014, which provides that the unit holders are liable if the fund's net worth is negative.

In fact, the legislator appears to have intended to make holders of fund units liable for any losses accruing to the units, although that liability can be limited in accordance with the fund's regulation, according to article 18 of CVM Resolution 175. It is precisely because of this assumption of risk and attribution of liability that the STJ came to the conclusion that since the execution creditor was not subject to the risk of loss associated with the attached fund units, it was equally not entitled to enjoy the benefits.

In any event, making an execution creditor subject to the risks associated with the investments made by the fund would defeat the primary purpose of attachments, which is to ensure that the debt under collection is paid in full.

The same idea can be extracted from article 850 of the Code of Civil Procedure, which allows attachments to be extended or reduced if, in the course of the execution proceedings, the market value of the attached property undergoes significant change. In other words, the CCP contemplates that debts under execution should be paid in full, and the execution process in itself should not generate either profit or loss for the execution creditor.

Although the STJ did not expressly compare attachment of investment fund units to the attachment of other types of property, the court did make it clear that an attachment of fund units does not differ in kind from the attachment of assets that are not equity securities. In other words, execution creditors' rights are limited to amount of the debt under collection (adjusted for inflation and interest, as applicable).

At the same time, it must be kept in mind that the STJ's decision dealt with an attachment ordered by the court, and not security interests granted by contract, such as pledges and fiduciary assignments. In the case of contractual security, the terms of the instrument granting could provide, for example, that distributions of profits made to investment fund unitholders will be used to pay down the debt secured.

Essentially, the STJ ruled that where a debt under collection is secured by an attachment of units in an investment fund, the execution creditor does not assume the position of an investor in the fund: both the rules of civil procedure and the investment fund regulations make it clear that the execution debtor continues to be exposed to risks of the investment until the units are effectively sold by court order, suffering any losses and, equally, enjoying any gains from the investment.

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