

_ STJ acknowledges the enforcement of electronic agreements digitally executed only by the contracting parties

On May 15th, 2018, the 3rd Panel of the Brazilian Superior Court of Justice (“STJ”) decided, by majority of votes, in favor of Appeal No. 1,495,920-DF filed by the Federal Economists Foundation (“FUNCEF”), in order to determine the legality of the enforcement proceedings related to an electronic agreement executed only by the contracting parties, regardless of the fact that no witness had signed it (“REsp”).

FUNCEF had appealed against the decision issued by the Federal District and Territories’ Court of Appeal, which confirmed the termination of the foreclosure proceedings FUNCEF had filed to collect amounts due upon a loan agreement electronically signed. The lower courts argued that it was not possible to acknowledge the enforcement of this loan agreement, since it had only been signed by the contracting parties, without the presence of two witnesses, considering that the witnesses’ presence is an indispensable requirement to deem any agreement executed in Brazil as an extrajudicial enforceable title.

THE REPORTING JUDGE DECIDED DIFFERENTLY AND SUSTAINED THAT (I) ELECTRONIC AGREEMENTS ARE EXECUTED UNDER DIFFERENT BASIS WHEN COMPARED TO THOSE USUALLY APPLICABLE TO PHYSICALLY EXECUTED AGREEMENTS, AND (II) THE DIGITAL SIGNATURE CARRIED OUT IN ACCORDANCE WITH THE “PUBLIC KEY SYSTEMS” ESTABLISHED BY PROVISIONAL MEASURE No. 2.200-1 / 2001, AIMS AT CERTIFYING THROUGH A THIRD PARTY

(CERTIFYING AUTHORITY) THAT CERTAIN USER HAS INDEED EXECUTED AN ESPECIFIC AGREEMENT. THEREFORE, DUE TO THIS NEW VERIFICATION INSTRUMENT, IT IS POSSIBLE TO ACKNOWLEDGE THE ENFORCEMENT OF ELECTRONIC AGREEMENTS. THE MAJORITY OF THE MEMBERS OF THE PANEL FOLLOWED THE REPORTING JUDGE’S VOTE.

Judge Ricardo Villas Bôas Cuevas diverged from the reporting judge, arguing that even though the agreement was electronic, the foreclosure proceedings had been filed physically and, due to the way such contract was presented in the foreclosure proceedings, it had lost its auditability, and, therefore, it would not be possible to enforce it as an extrajudicial enforceable instrument. These arguments did not prevail in the STJ decision.

THE ACKNOWLEDGEMENT THAT AN ELECTRONIC AGREEMENT IS ENFORCEABLE, EVEN IF NOT SIGNED BY TWO WITNESSES, REASSURES THE INSTRUMENTALITY OF THIS REQUIREMENT SET BY THE BRAZILIAN CIVIL LEGISLATION AND INCREASES LEGAL SECURITY IN THE EXECUTION OF ELECTRONIC AGREEMENTS, AS THE PARTIES CAN DIRECTLY FILE A FORECLOSURE PROCEEDING IN CASE OF BREACH, WITH NO NEED TO PRIORLY FILE A COGNITIVE PROCEEDING TO OBTAIN AN ENFORCEABLE INSTRUMENT. IN THIS REGARD, THE ELECTRONIC AGREEMENT ITSELF REPRESENTS AN ENFORCEABLE, CERTAIN AND RELIABLE INSTRUMENT.

MORE INFORMATION CAN BE ACCESSED IN PORTUGUESE AT:

https://ww2.stj.jus.br/processo/revista/inteiroteor/?num_registro=201402953009&dt_publicacao=07/06/2018

_ CVM decides on the trade of securities by third parties hired by a company during blackout periods

On April 24th, 2018, the Board of the Brazilian Securities and Exchange Commission (“CVM”) decided on the trade of securities during blackout periods by third parties hired by a company to acquire its shares.

The proceeding was initiated by an appeal filed by an investment bank (“Consulting Party”) in order to obtain a uniform understanding ON the extension of the blackout periods set forth in the Normative Ruling No. 358 issued by CVM on January 3rd, 2002, as amended (“ICVM 358”), in view of the divergence expressed by CVM’s technical area when questioned about this matter. In the appeal, the Consulting Party argued that the hired third party should not be forbidden from trading shares issued by the company during blackout periods provided that (i) at the time the third party is hired, the company is not itself forbidden from trading its shares, and (ii) at the time the trades are carried out, the third party is not aware of the facts that caused the blackout period.

CVM reporting director in this case, Gustavo Machado Gonzalez, sustained, in a vote followed by the majority of CVM board members, that: (i) **the third party hired by a company is not forbidden from negotiating during blackout periods, provided that it**

has no access to relevant and privileged information; (ii) **there is no absolute prohibition of the negotiation during blackout periods as the Article 13 of ICVM 358 is a set of assumption rules;** (iii) trades carried out by a third party on behalf of the company are deemed as indirect transactions according to article 20 of ICVM 358 and, therefore, if they are carried out during any blackout period pursuant to Article 13 of ICVM 358, such transactions are subject to the referred assumption rules; and (iv) CVM may assume that the necessary elements of an insider trading type of transaction are demonstrated and that the burden to show enough evidence on the contrary lies on the interested party.

FURTHER, THE REPORTING DIRECTOR REASSURED THAT DELEGATING POWERS TO A THIRD PARTY TO NEGOTIATE, ON BEHALF OF THE COMPANY, ITS OWN SHARES WILL ONLY AVOID THE ASSUMPTIONS SET FORTH IN ARTICLE 13 OF ICVM 358 IF IT IS EFFECTIVELY DEMONSTRATED BY THE COMPANY AND THE HIRED THIRD PARTY THAT THERE WERE ENOUGH GUIDELINES TO GUARANTEE THE COMPLIANCE OF THE TRANSACTIONS WITH THE APPLICABLE REGULATION.

MORE INFORMATION CAN BE ACCESSED IN PORTUGUESE AT:

http://www.cvm.gov.br/decisooes/2018/20180424_R1.html