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Brazilian Code of Civil Procedure amended to expedite enforcement proceedings

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By Fabiana Bruno

On January 20, 2007, a new law regarding the enforcement of extrajudicial instruments became effective in Brazil, thereby bringing to an end the reform of enforcement/execution proceedings in the Brazilian legal system. This new law brought about significant changes to the respective judicial proceedings, making them more effective, rapid and better adjusted to Brazil's social reality, and hence optimizing the mechanisms of credit recovery. In short, the new enforcement/execution proceedings shall enhance the local economy and increase investment opportunities.

Before the new law, Brazil was renowned for its slackness towards debtors, due to several breaches in the law that permitted them to cause numerous incidents in the execution proceedings, thereby suspending their normal course. Indeed, it was not uncommon for an execution action to take several years to come to an end – not always in a satisfactory manner for the creditor.

The reform of the execution proceedings therefore aims not only to discourage such delaying tactics but also to stimulate payment of the credit, by offering discounts and the opportunity to pay his/her debt in installments for the debtor.

One of the most significant improvements of the new law concerns the attachment of assets and its effects. Creditors used to have the responsibility for indicating which of the debtor's assets were to secure the execution proceedings. Despite the efforts of the creditors, the tools to locate such assets were inefficient. To make matters worse, the initial term for the debtor's defense used to begin with the attachment. As a result, the execution was usually suspended due to lack of attachment.

The new law provides a significant breakthrough since the debtor is responsible for both the attachment and the development of the proceedings. Firstly, a penalty of 20% of the amount in dispute may be imposed on the debtor if he/she does not indicate assets for attachment. Moreover, a further 20% penalty can be imposed by the judge if the purpose of the debtor's defense is clearly to delay the proceedings. Finally, the term for the debtor to file his/her defense is now counted as from service having been effected and no longer suspends the development of the proceeding.

Another important change introduced by the new execution law is the regulation of the so-called "on-line attachment", which is the on-line attachment of cash and financial investments maintained in the debtor's bank accounts. The new law treats such mechanism as a priority in the order of assets to be attached.

Further, a turn around has occurred in the legal forms of expropriation of the debtor's assets. Under the old system, the only mechanism to expropriate assets was to sell them at auction, which was not efficient and was easily manipulated by the parties, so that it resulted in the sale of the assets for an insignificant amount. The new law favors the transfer of assets to the creditor. If he/she does not choose this option, the judge can determine the private sale of the assets, by the creditor himself or a broker. Finally, the third option available to the creditor is the auction itself, which can be on-line.

For all of these aspects, the new execution law represents a leap in the development of the Brazilian legal system regarding credit recovery and opens a new perspective to prevent the traditional lenient attitude of the debtor.

Further information on the reform of Brazilian enforcement/execution proceedings may be obtained directly from Fabiana Bruno at fabianabruno@felsberg.com.br.

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