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IN THIS ISSUE

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Final comments

Admittedly, efforts have already been made by the registers of real estate registry offices and their representative entities, yet it has not been possible to implement the SREI in Brazil as a whole, whether to computerise the recording procedures or support the interconnection of all offices in the country with the judiciary, government and private users.

Moreover, the interconnection of data demands the uniform operation of SREI all over the national territory and, in a country such as Brazil, with so much political, economic and social diversity, a lot of care should be taken to guarantee that the access to ownership certificates through electronic media is not able to generate disparities related to obtaining the real estate registry, considering procedures for computerisation could be developed under different conditions in districts closer to more developed regions.

Surely the access to electronic means and new technologies will not be achieved all over the country in a short time, even though an important step forward has been noticed.

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Real estate developers and judicial reorganisation in Brazil

The real estate market in Brazil is going through a severe crisis, which has resulted in large developers filing for judicial reorganisation. Usually, a judicial reorganisation request encompasses not only the developer but also all the companies of its corporate organisation. In this sense, the developer is generally part of a larger corporate structure formed by a holding company, with participation in specific purpose companies (*sociedades de propósito específico* (SPEs)), which are the projects themselves. Thus, the projects are all included in a single judicial reorganisation request.

On 12 June 2017, the Court of São Paulo, addressing the issue for the first time, excluded from the judicial reorganisation procedure SPEs under the regime of segregated assets (*patrimônio de afetação*).

The regime of segregated assets was created recently. The bankruptcy of Encol in 1999 – Encol was the largest developer in Brazil at the time – caused damage to 40,000 families. For the strategy of the company, new projects were financing older projects. When the offer of units was superior to the capacity of the market to buy new projects, the bankruptcy of the company was unavoidable.

As a response, a new regime was created: the regime of segregated assets, included by Law No 10,931/2004, which included Articles 31-A to 31-F of Law No 4,591/1964. Under this regime, the developer can isolate its assets, credits, debts and liabilities related to a specific project in order to ensure that segregated assets will revert to the same project and not to other aspects of the company/developer.

The segregated asset regime does not extend to other assets, rights and obligations of the developer or other segregated assets, and such assets are liable solely by debts and obligations related to the respective project.

The Appellate Court of São Paulo acknowledged that the segregated asset regime protects not only the purchasers of the units of the respective project, as a weaker part of the relationship, but also the credit that was responsible for the development of the venture, for the increase of the market.

In this specific case, the developer had 16 projects under the segregated estate regime. Although Brazilian law has specific rules for the segregated estate regime in the case of bankruptcy, there is no provision regarding judicial reorganisation, and, considering

the lack of a ruling, the lower court judge ordered the 'substantial consolidation' of all companies under the same reorganisation, including SPEs, except for the 16 projects under the segregated estate regime.

This means that the judge did not accept the filing of only one reorganisation plan for all the companies, and the developer had to file one reorganisation plan for each of the 16 projects under the segregated estate regime, in addition to one plan for all other companies. However, the developer presented an appeal requesting that the 'substantial consolidation' of the reorganisation reached all projects, independently of having segregated assets.

The Court of São Paulo then decided on the incompatibility between the judicial reorganisation and Law No 4,591/1964 (law on real estate developments) because the latter restricts the autonomy of the developer in relation to all purchasers.

In this sense, pursuant to Law No 4,591/1964, in the case of the bankruptcy of the developer, through the Committee of Representatives, purchasers may choose to continue the project or liquidate it, with the sale of the segregated asset. They may also resolve on the continuation of the construction under its own administration, or on the sale of the land, accessions and other assets of the affected estate.

In view of such a legal provision, the court understood that:

> 'the unilateral option of the developer for the filing for judicial recovery cannot be considered as a decision against the purchasers… The logic of the system, in short, is that, once the developer loses the conditions for conducting the project, the acquirers themselves assume that task, either through the removal of the former (with or without segregated assets) or by the most radical alternative of its liquidation (exclusive of the projects where there is a segregated asset).'[1]

Although purchasers are those most interested in the effective conclusion of a real estate project because purchasers of units do not have pecuniary credit to be submitted to the reorganisation, they will not even participate, which is incompatible with Law No 4,591/1964.

Because the repercussions of the segregation of assets are expressly foreseen in the case of bankruptcy but both Law No 11,101/2005 and Law No 4,591/1964 are silent regarding judicial recovery, several doctrinal positions have arisen. The Court of São Paulo resolved the discussion through systematic logic: the law sets forth that in the event of a bankruptcy (which is more serious than judicial reorganisation), not only are the segregated assets preserved, but also the relations and obligations involving the developer, in their essence, as if the bankruptcy did not exist, and therefore, it is not logical that the judicial reorganisation (a 'less grave' measure) subjects creditors of projects with segregated assets to the modification of their rights, with a change of substance or form of payment.

Finally, the Court of São Paulo did not limit incompatibility only in relation to SPEs with segregated assets, recognising that a reorganisation is incompatible with the situation of all SPEs, except for SPEs with works already completed. Whatever the incorporation regime, with or without segregated assets, the autonomy of the developer with respect to purchasers is limited by law.[2]

Accordingly, the legal reorganisation of the developer cannot prevent purchasers from exercising their legally established prerogatives, and, therefore, real estate developers cannot decide on their own to file for judicial reorganisation, and purchasers must always take decisions regarding the problems that the project may face. It is possible, however, for acquirers themselves to decide on the judicial recovery of SPEs.

The court firmly rejected the justification of a single fund for the developer to justify the substantial consolidation sought in the judicial reorganisation. This confusion of assets should be understood as an anomaly in the functioning of group companies, and the processing of the judicial reorganisation cannot be a 'reward'. The equity segregation justified by the constitution of an SPE for each venture was aimed at the impossibility of joint action, cross-guarantees, transfers of resources between SPEs and the holding company, and single fund adoption, which are circumstances that led to the collapse of Encol.

However, the discussion is far from over. In January 2017, the largest judicial reorganisation involving developers was filed, with more than 500 SPEs. Certainly, new court decisions will arise out of conflicts deriving from such reorganisations, as well as new developments, on running SPEs with or without segregated assets that have been excluded from judicial reorganisation.

The Court of São Paulo decided, with a view to guaranteeing the real estate market, to ensure that judicial reorganisation will not jeopardise new market operations, for the safety of buyers and financiers.

Notes

1 Interlocutory Appeal No 2236772-85.2016.8.26.0000, 2nd Business Chamber Câmara, reporting Judge Fabio Tabosa, judged on 12 June 2017.
2 Interlocutory Appeal No 2218060-47.2016.0000, 2nd Business Chamber Câmara, reporting Judge Fabio Tabosa, judged on 12 June 2017.

CHILE

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Amendment to Decree with Force of Law No 458 of 1975: Law No 21,014 of 26 May 2017

Law No 21,014 of 26 May 2017 (the 'Law') was recently published and entered into force in Chile. It amends the seventh clause of Article 18 of Decree with Force of Law No 458 of 1975, issued by the Ministry of Housing and Urban Development, commonly known as the General Law of Urbanism and Construction (GLUC), which, in essence, incorporates new requirements for construction companies or real estate.

In full knowledge of the operations that our clients handle, we want to briefly communicate the most important effects that this modification implies for the operations and businesses of construction and real estate companies.

In this sense, the Law replaces the aforementioned subsection with the following:

> 'Article 18: The owner and first seller will be obliged to include in the public deed of sale, a list containing the individualisation of the architect who performed the architecture project, the professional who carried out the structural calculation project, the professional in charge of the works, the professionals in charge of the specialties projects, as well as the technical inspector of the works (TIW), the independent reviewer of the construction works, and the reviewer of the structural calculation project, and where appropriate, whomever could hold responsibility according to this law. In the case of legal persons, their legal representatives must be identified. The conditions offered in the advertising *and the information that is given to the buyer* will be understood as incorporated in the contract of sale. *Such information shall clearly state the total and useful surface area of the unit (s) being offered, that of its terraces, warehouses and parking lots…*' [emphasis author's own to indicate the text introduced by the Law].

In effect, as of 27 May 2017, construction and real estate companies are required to expressly include the useful and total surface area information of the saleable units that make up real estate projects in all their sales, advertising and promotion materials, as well as on their websites and other advertising media.

The legal initiative aims to make the information transparent during the negotiation stage and preliminary agreements of sale in order to protect buyers because they are in a more vulnerable position during negotiations with large construction companies or real estate companies.

In that sense, in the processing of the law, the importance of giving an essential character to the promotions and/or specifications that relate to the design, square metres and of course, construction of dwellings is reiterated, with the purpose that these aspects are understood as being incorporated into the final sales contract or deed.

Regarding practical effects, we must distinguish two main elements: the first relates to whether the requirement of the new Law refers only to incorporating such surface information in advertising material, or if it is also necessary to include it in the promissory sales and/or sales contracts; and, the second