

Insolvency & Restructuring - Brazil

Tribunal ruling favours debtors whose main clients are public entities

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Background

In accordance with the Constitution, companies that want to contract with government entities must participate in a tender process (Article 37, XXI). Under the Law of Tenders (Law 8,666/1993) – which governs government procurement – a company must prove that it has the necessary technical and financial qualifications and that it has regularly met its tax and labour obligations in order to participate in a bid.

According to the Law of Tenders, in order to prove that it has the necessary financial qualifications, a company must present the documents listed in Article 31 of the law. One of the listed qualifications is a clearance certificate issued by the court distribution office of the jurisdiction of the company's headquarters stating that the company has no pending bankruptcy or composition with creditors. Although the Law of Tenders mentions composition with creditors – a mechanism that was in effect at the time of the law's enactment but which was revoked by the Reorganisation and Bankruptcy Law (Law 11,101/2005) – various state appellate courts have ruled against the participation of companies undergoing court-supervised reorganisation in tenders due to the absence of a certificate of good standing.⁽¹⁾

The interpretation thus precludes the participation of companies that may be perfectly capable of supplying the needed product or service, despite undergoing reorganisation. This is aggravated by the fact that the main clients (or even the only client) of many companies are public-sector entities. Where this is the case, the lack of a certificate of good standing will likely drive the company bankrupt, defeating the whole purpose of the reorganisation process.

Superior Tribunal of Justice ruling

In February 2015 the Superior Tribunal of Justice issued an important decision⁽²⁾ addressing this question. The tribunal held that a company undergoing court-supervised reorganisation could participate in public tenders despite not presenting a certificate of good standing.

Although this decision was rendered in a regimental appeal⁽³⁾ in a suit for precautionary relief⁽⁴⁾ – meaning that the merit of the question will still be considered in the main appeal⁽⁵⁾ – at least in its summary judgment, the tribunal held that companies undergoing court-supervised reorganisation cannot be prevented from participating in a public tender simply because of the absence of the certificate specified in Article 31(II) of the Law of Tenders.

The tribunal held that where the company undergoing reorganisation is regular with all of its tax and labour obligations, the principle of preservation of the company prevails (Article 47 of Reorganisation and Bankruptcy Law). The tribunal's decision was made with application by analogy to its position on the requirement (dispensation) of a clearance certificate showing no tax debts before the grant of a court-supervised reorganisation after approval of a recovery plan by creditors (Article 57).

Comment

Observers are eagerly awaiting the tribunal's final judgment on the merit of the question to see whether it will maintain its position or impede companies undergoing court-supervised reorganisation from participating in public tenders.

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Endnotes

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(1) Sao Paulo State Court of Appeal, Interlocutory Appeal 2039315-50.2013.8.26.0000, published on May 15 2014; Espírito Santo State Court of Appeal, Interlocutory Appeal 24119002939, published on August 19 2011; and Rio Grande do Sul State Court of Appeal, Interlocutory Appeal 70057049348, published on August 18 2014.

(2) The Superior Tribunal of Justice is the highest court for non-constitutional matters. Its duties include harmonising the interpretation of federal law by the state and regional federal courts of appeal.

(3) A regimental appeal is a motion for *en banc* reconsideration of a decision by the reporting judge. Cases at the appellate level are first assigned to a reporting judge, who summarises the case for the other judges of the panel, chamber or full court and writes a leading opinion, which may or may not prevail in the final vote. The reporting judge, acting alone, can also issue certain interim remedies and rulings, subject to review by the full panel, chamber or court through the regimental appeal mechanism.

(4) Regimental Appeal in Precautionary Action 23.499/RS.

(5) Special Appeal 1471315/RS.

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