



When the rules of the game change

by David Thorley

David Thorley hears the story of one of the most complex cross-border mergers and share listings in recent memory, amid a collision of Swiss and Brazilian cultures, from the lawyers that pulled it off

When Brazil's securities regulator, the CVM, changed its regulations on who may issue Brazilian Depository Receipts (BDRs) on the São Paulo stock exchange at the start of the year, it set in motion a rolling snowball of a transaction for airport retailer Dufry, which grew to such intensity and complexity it became one of the most intricate that even some of the most experienced lawyers involved ever worked on.

The Swiss company had listed its South American subsidiary on Bovespa in 2006. Though Bermuda-incorporated, the company's operations were in Brazil, and under the CVM's new rules only companies with more than 50 per cent of their assets outside Brazil would be allowed to issue new BDRs, whereas before the percentage was not an issue.

So Dufry's general counsel, Pascal Duclos, leading a legal team spread across the globe, came up with a solution: Dufry would merge its South American subsidiary into the overall Swiss company, thus ensuring that comfortably more than half the business's assets would be held away from Brazil. It seems ingeniously simple, but Duclos' idea set in train a series of necessary sub-transactions and regulatory compliance requirements that would grow to labyrinthine complexity.

While the idea of merging came from Duclos, the solution to the regulatory problem Dufry faced 'came from the legal team. At the same time I was in São Paulo [where he would spend the next six months], and I discussed it with [Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados partner] Carlos Mello, and we discussed the principle and how it would work, and from there we moved from one issue to another,' Duclos explains.

Mello had advised Dufry on its Bovespa listing in 2006, and Duclos had no hesitation in returning to Mattos Filho when he needed a firm that knew Dufry's business inside out. Duclos says: 'We went to the market leader. At the time, they had more than half of the market for IPOs. You can't do it with a law firm that does it once a month or

once every other week. When we had to structure the new transaction, we went to the people who had helped us the first time.'

From the initial idea of merging the South American company into the Swiss one, the transaction sprawled. A capital increase in the Swiss company was necessary to fund the merger, and while the South American company's shareholding on Bovespa and the Luxembourg markets had to be cancelled, the Swiss parent's had to be listed on the São Paulo stock exchange. Then the Brazilian holders of BDRs in the South American company (which disappeared with the merger) had to be compensated with new shares in Dufry, which in turn had to be listed on Bovespa and the Swiss stock exchange. At the same time, the company and its legal advisers had to renegotiate some of the terms of the group's syndicated loan facility, which had clauses to bar the company from this kind of merger activity. Furthermore the team had to make regulatory filings in three jurisdictions in two separate languages, and cope with the fact that Brazil's rules for reporting such transactions were overhauled halfway through the process. Alan Dickson, partner with Dufry's Bermudan counsel Conyers Dill & Pearman, says, 'careful co-operation between Bermudan, Swiss and Brazilian legal counsel was required to take account of the laws of all three jurisdictions'.

While Mello helped Duclos develop the concept of the merger, and oversaw the transaction from Mattos Filho's side of the deal, it was a comparatively new partner, Pablo Sorj, who handled the bulk of the day-to-day work. Duclos speaks very highly of Sorj's dedication to the deal, as evidenced by his hard work, availability at weekends and late at night, and willingness to travel frequently, and at short notice, from his base in Rio de Janeiro to the São Paulo seat of negotiations.

From Sorj's point of view, as well as the apparently endless intricacies of the deal structure, the clash of business and regulatory cultures between Switzerland and Brazil presented a challenge to each of the legal teams, with the question of whose law should take precedence never far from the surface: 'There were a lot of issues in terms of conflict of law and applicable law, and a lot of legal teams involved, so we had to decide when to apply rule X or Y.

'Of course, we took a more conservative route than we needed to, and I think that did pay off in terms of market recognition,' he adds. The conservative route – filing information as frequently, and in as much detail as the most stringent regulatory regime demanded – seemed the only practicable choice, given the wide divergences between the Swiss, Luxembourg, Brazilian and Bermudan regulatory regimes.

This caused some confusion among the Brazilian authorities, with Duclos having to field calls from the CVM to explain the transaction and answer concerns. Mello says: 'The disclosure requirements for ownership are more complex in Brazil than in Switzerland. We had several meetings with the governing body of the CVM to explain the deal and to ensure that from the beginning they were happy with the deal.'

Likewise the minority shareholders in Dufry's South American operation resolved to follow CVM regulations, even where – strictly speaking – they did not apply. Although Dufry SA was incorporated in Bermuda, a special committee of the company's board of directors was convened with a majority of independent members, according to the CVM's rule on Brazilian-incorporated businesses, with **Pinheiro Neto Advogados** appointed as one of its legal advisers.



Vânia Moyano

Vânia Moyano, who worked on the committee's side of the deal, says: 'We were retained to help the committee analyse the merger, and we had several meetings to discuss the financial position of the parties involved and the rights the minority shareholders would have when they became BDR holders in the Swiss company.'

Culture clash

Although, from the Bermudan firm's perspective, Alan Dickson describes 'a collegial approach' between the law firms, with counsel dotted all over the world and each with its own special expertise, tensions were likely. Duclos found himself faced with two vastly differing sets of legal advisers, each with a clear but overlapping sense of their place in the deal. He explains: 'The Swiss people really believed it was a Swiss deal. Everything was Swiss: the merger agreement and capital increase were subject to Swiss law and the surviving company was a Swiss company. But on the Brazilian side, they said, 'we have to compensate Brazilian investors, and the issuance of BDRs is a matter of Brazilian law', which had to be compensated and the only Swiss part was whether to compensate the Brazilian investors with Swiss shares.'

Dufry turned to Swiss firm Homburger for advice on the Swiss law portions of the deal. From Zurich, partner Frank Gerhard's perspective is that the deal 'was prepared from here. The client asked me to be the watchdog of what was happening in Brazil. That was a difficulty. Pascal said to me: 'I want you to bring the Swiss perspective into the deal.'

This seems to have been easier said than done, as Gerhard discovered: 'There is obviously a cultural clash between the way things are done,' he says. 'As an example, you would expect that the deal closed simultaneously in Switzerland and Brazil, but the merger closed in Switzerland on 23 March, but the company Dufry AG was not yet registered as a BDR issuer in Brazil at that time, so we had the securities issued by the absorbed company, which were still trading even though the company didn't exist.' It would be almost another month before the deal closed in Brazil.

'Brazil is a very different animal from Switzerland,' says Sorj, adding that Homburger 'were able to understand this very early in the process'.

Duclos saw that: 'The two law firms are very different in culture and in their working processes. The most important difference between the firms was the management of priorities and deadlines. In Switzerland, when you have a deadline, you try to be ahead of the deadline, but deadlines in Brazil are more flexible concepts and depend on priorities.'

Duclos says: 'My job was to speak to them both, explain the different cultures and ensure the process moved slowly.'

But, whatever the differences between the firms and business cultures, what emerged was a transaction which marked a series of firsts for the Brazilian market. As well as being the first cross-border merger of a publicly listed company in Brazil, the deal also saw Dufry becoming the first non-Brazilian multinational company to list on Bovespa, as well the first issuer of BDRs to engage in a merger, and the first company to register a BDR programme complying with the listing rules for those securities which came into force at the start of 2010.

This procession of landmarks inevitably meant that the deal structure was unique in a number of its aspects, leaving the law firms involved inheriting structures they can replicate with other clients seeking to follow the path Dufry has now trodden.

With Dufry's share merger completed after just six months of negotiations, a benchmark for time as well as method has been posted.

Mello sees some opportunities to replicate the deal, but is cautious about their extent. 'Of course law firms live on their experience, and I'm sure some of the things we did on Dufry will come up again, but you can't transfer it wholesale from one deal to another,' he says.

But his partner Sorj appears to see greater opportunities, saying: 'I think we can replicate the transaction. Of course there will be different parties and partners involved, and the state of the markets and the CVM, and the extent to which we could use the disclosure rules in Brazil' would feed into how much the firm is able to reproduce the deal.

Duclos is proud to think that people want to duplicate a deal which he led. Now he believes the precedent that has been set can be developed by the foreign companies that follow in Dufry's footsteps. 'Everyone involved was able to say, 'we are the first one to do it'. After that, people will come, they will see how we did it. They can make it cheaper, faster, more efficient, but we are still the first, even though we spent much more money and much more time.

'We hope that people who followed us onto Bovespa in 2006 will also follow the path we have established in 2010,' he says.