

ELEMENTS OF BANKRUPTCY LAW AND BUSINESS RESCUE IN BRAZIL

By **Luiz Fernando VALENTE DE PAIVA**, Vice-Président of TMA, Sao Paulo, Brazil. Co-head of the corporate restructuring team of Pinheiro Neto Advogados

BACKGROUND AND HISTORY IN BRIEF

Culminating more than a decade of debates, the Brazilian government enacted the *Nova Lei de Falências e Recuperação de Empresas*, Law N° 11,101 (“Brazilian Bankruptcy Law” or “BBL”),¹ which was published on 9 February 2005 and came into effect on 9 June 2005. It was the first major overhaul of Brazil’s corporate insolvency laws in sixty years. The BBL replaced the previous bankruptcy law, i.e. Decree-Law 7,661 (“Prior Bankruptcy Law”), which had been in force since 1945. The BBL represents a significant change in the principles and in the form of activity of the various players involved in bankruptcy and reorganisation processes in Brazil. Most ancient practices are now abandoned as society increasingly adapts itself to the new stimuli incorporated into the Brazilian legal system by the BBL, which has completed a decade in 2015.

One of the primary aims of the BBL is to provide financially distressed but economically viable companies with the opportunity to restructure their operations through market-based solutions directly negotiated with creditors. The public policy underlying the reforms is expressed in article 47 of the BBL, which states that the new law seeks to make it possible for debtors to overcome their economic and financial crises while maintaining the production source, the employment of workers, and the interests of creditors, thus enabling debtors to continue the operation of their businesses, preserve the social function of their companies, and foster economic activity². Other important goals include maximising the value of the debtor’s assets for the benefit of creditors and achieving flexible and equitable treatment among creditors³.

¹ Concurrently, Brazil enacted Supplementary Law n° 118/05, which summarizes relevant aspects of Brazil’s tax laws with the BBL.

² BBL, Chapter III, Section. 1, art. 47.

³ The BBL relaxes the principle requiring debtors to provide identical treatment for each claim existing within a particular class of claims (*par conditio creditorum*). A good example of the application of this new concept is the Judicial Reorganisation of Stampafare Embalagem Ltda. In this case, the largest creditor-supplier possessed an “in rem guarantee” claim (the equivalent of a secured claim) against the debtor. The creditor-supplier agreed to support a proposed reorganisation plan in which a significant portion of its claim would be paid after all other creditors (including creditors in classes lower in priority of repayment in the event of a Bankruptcy Liquidation) received their distributions in full under the plan. Also, the creditor-

The previous statute had numerous fundamental weaknesses, such as prohibiting debtors from negotiating plans of reorganisation directly with their creditors. Under the Prior Bankruptcy Law, a negotiation could be sanctioned with what was referred to as an “act of bankruptcy.”⁴ These acts automatically opened the door to a bankruptcy petition against the debtor, which could be decreed independently of the debtor’s economic condition – that is to say, even if it were solvent. It also granted debtors a very limited debt discharge. For example, the *concordata* was the sole court-supervised reorganisation proceeding under the Prior Bankruptcy Law.⁵

The debt discharge available to debtors pursuing a *concordata* was restricted to a statutorily prescribed percentage of unsecured claims⁶, and since the *concordata* was based on the principle of *par conditio creditorum*, a debtor was required to provide identical treatment to all interests of different creditors. Consequently, few debtors were able to shed sufficient amounts of debt to restructure their operations successfully. Consequently, bankruptcy liquidations comprised the vast majority of insolvency proceedings under the former law. Another glaring deficiency of the Prior Bankruptcy Law was the absence of incentives for debtors to reorganise with speed and efficiency.

Another shortcoming of the Prior Bankruptcy Law was the limited safeguards for secured creditors in a bankruptcy liquidation where insufficient assets existed to pay all claims in full. Unlike the layers of protection afforded to holders of secured claims under the US Bankruptcy Code, the Prior Bankruptcy Law generally prevented secured creditors in Brazil from enforcing pre-petition guarantees or redeeming the collateral securing a

supplier and another supplier agreed to extend credit lines to the debtor and a bank provided “post-petition” financing. The proposed plan was approved by the vast majority creditors and confirmed by the court. Besides, and in line with the flexibility idea, current jurisprudence admits the payment of unsecured creditors before secured ones in certain circumstances. In fact, several plans of reorganisation approved in the past three years contemplated the possibility to pay “strategic creditors” with priority to other creditors, regardless of their credit quality.

⁴ Despite this prohibition, the attempt to prevent negotiation between debtors and creditors, as introduced in the Brazilian legal system by the Prior Bankruptcy Law, did not work out since debtors frequently negotiated through fronting parties the assignment of credits at a discount that was not always the same for all creditors. This means that there have always been negotiations between debtors and creditors, albeit outside the realm of the law.

⁵ The *concordata* was based, in part, on the principle of *par conditio creditorum*, that is, the requirement that a debtor provide identical treatment to all claims or interests within a particular class of claims.

⁶ In its most basic form, a preventive *concordata* (a form of the *concordata*) granted debtors a discharge for a percentage of unsecured claims determined by a statutory formula (capped at a maximum of 50 percent of total unsecured claims). However, the discharge provided by the preventive *concordata* was potentially illusory. Debtors were limited to a 24-month period from commencement of a preventive *concordata* to make the required payments to holders of unsecured claims, and the allowable percentage discharge decreased during this 24-month period, depending on the date that the debtor actually made payment (e.g., the allowed discharge was 50 percent of total unsecured claims if payment was made at the beginning of the preventive *concordata*) and decreased to no discharge (if the debtor was unable to pay claimants until the end of the 24-month period).

loan. The primary source of this problem was the priority scheme for claims.

Under the Prior Bankruptcy Law, secured claims were placed lower in priority than two classes of potentially unlimited claims – labour claims (first priority) and tax claims (second priority). Since labour claims and tax claims are frequently enormous in Brazil, there were generally few assets remaining in a debtor’s estate to satisfy secured claims. As a result, Brazilian lenders incurred tremendous losses due to loan defaults in bankruptcy. Furthermore, the Prior Bankruptcy Law failed to protect purchasers of assets in bankruptcy from successor liability.

For example, the previous statute did not contain a provision comparable to §363 under the US Bankruptcy Code nor to article 60, single paragraph, of the BBL, which generally authorises the sale of a debtor’s assets “free and clear” of all interests. Rather, investors purchasing assets through insolvency proceedings in Brazil were saddled with successor liability for labour claims and tax claims related to such assets that accrued during the debtor’s period of ownership. Because the actual amounts of such claims were not generally known or capable of accurate estimation at the time of a sale, investors avoided purchasing assets from debtors. Consequently, the Prior Bankruptcy Law hampered the development of any meaningful market in Brazil for the sale of assets in bankruptcy⁷.

The BBL is guided by the basic principle that debtors generally possess greater social value as a going concern than they do from the piecemeal sale of their assets through forced liquidations. Accordingly, a key component of the BBL is the creation of two new legal proceedings, the *Recuperação Judicial* (“Judicial Reorganisation”) and the *Recuperação Extrajudicial* (“Out-of-Court” or “Pre-package Reorganisation”), both of which authorise debtors to obtain court confirmation of reorganisation plans negotiated directly with their creditors. The introduction of these two new reorganisation options is an acknowledgement in Brazil that the role of the courts in overseeing corporate insolvency proceedings should be limited to clearing the obstacles that prevent debtors from achieving market solutions to financial and economic crisis, with the Superior Court of Justice’s acknowledgement of the courts’ role being limited to review of the lawfulness of the chosen procedures⁸. In other words, the BBL recognises that the judiciary is not the best body to find the *means* of reorganisation for a company in distress, and limits its role (when compared to the Prior Bankruptcy Law) to conducting the process of negotiation between debtors and creditors in accordance with the terms and within the limits prescribed by law.

⁷ L. PAIVA, C. JARVINEN, “The New Bankruptcy and Restructuring Law in Brazil”, *28th Annual Current Developments in Bankruptcy & Reorganization*, volume two, Practising Law Institute, 2006.

⁸ For instance, please refer to the Superior Court of Justice’s precedent REsp no. 1,314,209 – SP, ruled by the 3rd panel, justice Nancy Andrichi, ruled on 5.22.12.

The BBL represented a leap ahead in the Brazilian bankruptcy legislation and brought it closer to the best bankruptcy laws in force, such as that of the United States and of certain European countries. In short, it provided debtors with more effective mechanisms to protect their business (as compared to the old *concordata*) and with greater flexibility in designing reorganisation strategies. It also increased safeguards for secured creditors; broadened creditors' involvement in the reorganisation process; and improved creditors' ability to recover their credits. Additionally, it turned acquisitions of parts of distressed companies increasingly attractive, by furthering their legal security through a free and clear acquisition structure.

Despite the improvements introduced by the BBL, it is a fact that several factors have contributed to the difficulties and uncertainties that arose in the initial period of application of the BBL: (1) the Judiciary's poor understanding of its new role; (2) the fact that few judges were specialised in bankruptcy, reorganisation practices and economic aspects involved in insolvency proceedings; and (3) the fact that, since the bankruptcy law is federal, its application is a duty and a function of the courts of the states (Brazilian political subdivisions), which results in the judges of small legal districts having to apply it. Within the Brazilian territory, these uncertainties will undoubtedly be overcome as these new legal tools and regimes are used repeatedly.

MAIN SOURCES⁹

Brazil has no unified legislation to regulate insolvency regimes. There are two basic regimes: one for business companies and sole proprietorships and another for non-business associations and companies and natural persons (including consumers).

The BBL regulates out-of-court reorganisation, judicial reorganisation and bankruptcy for companies and businesspersons. The insolvency of natural persons or non-business associations is ruled by the Brazilian Civil Code ("CC"); the rules of insolvency procedure are set forth in the Civil Procedure Code ("CPC").

Financial institutions, in turn, are only partially subject to the regime set forth in the BBL, since in addition to not being allowed to claim the protection of a judicial or extrajudicial reorganisation, they can only be adjudged bankrupt after having been submitted to an intervention and/or extrajudicial liquidation conducted by the Central Bank of Brazil in the manner prescribed in Law No. 6024 of March 13, 1974.

There are also some legal entities that are not subject to any of the abovementioned regimes but rather to extrajudicial liquidations established in the specific laws that regulate their

⁹ Legislation (unified legislation or fragmented), precedents, main handbooks.

respective activities, such as, for instance, the law that governs cooperatives' activities.

Finally, there are laws that regulate other matters but that produce profound effects on the activity or the reorganisation of companies in distress. Supplementary Law No. 118, which amends and adds new provisions to the National Tax Code (Law No. 5,172 of 25 October 1966) so that it conforms with the BBL is a case in point.

Because of their importance, this work will address only the first two regimes mentioned above, contemplated by the BBL and by the Civil Code, with emphasis on the former.

§ 1 – SECURITY AND ENFORCEMENT OF CREDITOR RIGHTS IN GENERAL¹⁰

Brazilian law establishes the following types of security for immovable property:

– **Mortgage:** The debtor (or a third party on its behalf) grants right *in rem* to the creditor for immovable property. If the debt is not paid, the creditor can ask the court to sell the mortgaged property (at a public auction or by adjudication), and the proceeds are used to pay the amount owed.

– **Antichresis pledge:** With this specific type of pledge, the debtor transfers possession of income-earning property to the creditor, who can retain it and receive any income from it until the debt is discharged. The property can belong to either the debtor or a third party.

As for movable property, a pledge is the type of security prescribed by law.

– **Pledge:** Movable property is transferred by a debtor (or a third party on its behalf) to the creditor (or its representative) as security for a debt. Stocks, rights and credit instruments (such as trade acceptance bills and promissory notes) can also be pledged. The types of security above entitle their holders to be treated as creditors guaranteed by a security interest in the event of judicial or extrajudicial reorganisation or even bankruptcy of the debtor.

– **Fiduciary Lien:** In addition to these types of security, Brazilian law grants certain privileges to the creditor holding a fiduciary lien over movable or immovable assets or a fiduciary lien over rights to movable assets, particularly negotiable instruments. The claims held by these creditors are not subject to judicial or extrajudicial reorganisation or to bankruptcy of the debtor because the respective creditors have the right to claim return of the secured assets to satisfy their credits through sale of the respective security.

In a fiduciary lien, title to movable and immovable property is transferred to the creditor. The debtor can retain physical possession of the property and legal title is returned if and when it pays the debt in full, as agreed in the contract. Rights and credit

¹⁰ Forms of security acknowledged by the system.

instruments can also be subject to a fiduciary lien in transactions carried out under the National Financial System. This type of security is also available for immovable property.

§ 2 – REGULATORY FRAMEWORK¹¹

Insolvency proceedings, especially those governed by the BBL, as well as civil insolvency proceedings, fall under the exclusive authority of the state courts. Each Brazilian state has its own state courts and, as a rule, most Brazilian cities have state courts. Judges in small judicial districts rule over all types of disputes, including those involving family law, criminal law and insolvency. In larger judicial districts, where there are more judges, there is usually a certain degree of specialisation, with judges being granted authority to rule over more specific matters. However, very few judicial districts have judges specialising in insolvency matters (e.g. Rio de Janeiro) and few appellate courts (which decide appeals filed against first-instance decisions) have specialised chambers to review insolvency matters (e.g. Sao Paulo).

Thus, considering that, as a rule, the authority to process an insolvency case falls on the court in the judicial district where the main establishment of the debtor is located or in his domicile (in cases dealing with consumer insolvency), most insolvency cases are decided by judges not specialised in insolvency matters.

There is also no specific regulation for insolvency professionals in Brazil. It is incumbent on the judge to appoint the trustee and set his fees, subject to certain criteria prescribed by law. Under the BBL, the trustee is not appointed by one of the largest creditors, as happens in civil insolvency proceedings (and in bankruptcy proceedings governed by the repealed Bankruptcy Law). The current rule, as stipulated in the BBL, determines that the trustee must be a reputable professional, preferably a lawyer, economist, business manager or accountant, or a specialised legal entity and will serve as the legal agent of the debtor's estate.

In the judicial reorganisation proceedings governed by the BBL, the trustee acts as a mere inspector of the debtor's activity, not interfering in any way with the decisions relating to the debtor's management, regardless of its notable influence in the procedure. In bankruptcy and civil insolvency, however, the trustee is responsible for managing the assets and defending the interests of the bankrupt.

The judge reviewing the cases governed by the BBL or civil insolvency cases does not interfere with the engagement of other

¹¹ Regulator/ supervisor, regulation of insolvency practitioners, role of judiciary in insolvency related matters (both liquidation and rescue). Professional qualifications, and disciplinary arrangements for insolvency practitioners, to which practitioners are subject (lawyers/accountants/other – e.g. directly authorised). (Code of ethics, trust accounts etc.). The judicial structures in place to deal with insolvency matters, in addition to the “role” of the judiciary (i.e. special insolvency or commercial courts/combined jurisdiction/administrative officials/other).

professionals involved in the proceeding, whether lawyers and/or financial advisors of the debtor or advisors of the creditors. On the other hand, the creditors must pay the expenses of their representatives, including expenses relating to the creditors' committee.

§ 3 – CONSUMER BANKRUPTCY AND/OR NON-BUSINESS INSOLVENCY IN BRAZIL¹²

As noted above, the insolvency of natural persons (which includes consumers) or non-business associations is ruled by the CC, and the rules of insolvency procedure are set forth in the CPC. These rules only apply to natural persons and to non-business entities; merchants, business companies or company insolvency events are governed by specific legislation (“BBL”).

An individual (“Debtor”) becomes insolvent when his debts are greater than his assets. Differently from the BBL, where insolvency is held to occur when the business entity or merchant does not meet its payments obligations as and when due, the insolvency of natural persons follows an economic concept where the assets *vs.* debts relation is key to determine whether a Debtor is insolvent.

The law is lacking in effective rescue mechanisms for the debtor, which is required to liquidate its assets to pay its liabilities. The only rescue remedy available to the insolvent debtor is weak and of almost no practical use, as it requires the agreement of all creditors and may only be triggered at a certain point of the insolvency proceeding, a phase that, in practice, occurs many years after the insolvency is adjudicated.

For the Debtor and his creditors, the effects of insolvency are similar to those in the liquidation of a business entity. In fact, a declaration of insolvency triggers the composition among all creditors on equal condition (*par conditio creditorum*), observing any distinctions in terms of credit quality. Upon declaration of insolvency, a Debtor's assets and obligations make up the insolvency estate (“Estate”). The declaration of insolvency also causes an acceleration of the Debtors' obligations, and the Debtor is removed from management of his own assets until the Estate is entirely paid. All of the Debtors' assets¹³ are collected and liquidated, and the proceeds are earmarked for payment of the Estate.

The insolvency court appoints a trustee from among the major creditors of the Estate (“Trustee”). It is incumbent on the Trustee, acting under the insolvency court supervision: to manage, gather and sell Estate assets; to represent the Estate in

¹² Topic written jointly with Thiago Braga Junqueira.

¹³ Only the assets eligible to attachment may be collected. CC states a few assets which are not eligible for attachment, including the residence of the debtor's family. This protection, however, does not apply in cases of collection of debt resulting from a loan taken out to finance the purchase of the house.

any type of judicial or extrajudicial proceeding; to adopt all measures necessary to defend the Estate's interests; and to settle Estate claims. The Trustee is entitled to fees as determined by the insolvency court. The Trustee must use the proceeds of asset liquidation to settle all of the Estate obligations.

The Estate comprises all the credits held against the Debtor, and the ranking of creditors is quite similar to the ranking established by the BBL – except for the absence of a cap on the privilege given to labour credits, and for the fact that tax credits rank above secured credits (please see item 6.1.3 for the treatment given to creditors under the BBL). If the proceeds available at the Estate for distribution to a certain class of creditors are insufficient to fully serve and pay all claims of that specific class, these funds must be proportionally distributed and allocated among the creditors according to the value of their claims in the respective class.

As a rule, the Debtor is discharged only upon settlement of all claims against the Estate. If the asset liquidation proceeds are insufficient to settle the entire Estate, the Debtor will remain liable for outstanding debts during five years from the liquidation closing decision. During this period, any asset acquired by the Debtor will be part of the Estate and liquidated to pay the remaining creditors.

In short, the law does not provide the debtor with efficient rescue remedies or with a fresh start. As a result, the debtor ends up being placed on the margins of society, seeking informal jobs (if a natural person) that allow him not to declare his income, having no access to financing instruments, and no longer acquiring assets in his name. On the other hand, because the outcome of the civil insolvency proceeding usually generates no or practically no percentage of credit recovery for creditors, they end up by opting against initiating a civil insolvency proceeding against a debtor when there are no assets to be pledged to satisfy the individual enforcement carried out by the respective creditor. These factors make of civil insolvency a remedy practically not used in Brazil.

§ 4 – CORPORATE BANKRUPTCY (BUSINESS INSOLVENCY)

The BBL offers two alternatives for insolvent companies to obtain court confirmation of reorganisation plans negotiated directly with their creditors, via *recuperação judicial* (judicial reorganisation), which is somehow similar to the Chapter 11 protection of the United States Bankruptcy Code (“US Bankruptcy Code”) and *recuperação extrajudicial* (out-of-court reorganisation). The BBL also preserves a revised *falência* (bankruptcy liquidation), which is analogous to Chapter 7 proceeding under the United States Bankruptcy Code.

– Who may petition for bankruptcy or reorganisation: Every business company and business person labelled as “debtor” qualifies for bankruptcy and reorganisation. Government-owned

entities and mixed-capital companies do not fall within the regimes prescribed by the BBL. The “*de facto* business entity” may have its bankruptcy declared, but cannot apply for judicial or out-of-court reorganisation.

– Who may not petition for bankruptcy or reorganisation: Government-owned or private financial institutions; Public or private financial institutions; Credit unions; Purchasing pools; Private pension entities; Health care plan companies; Insurance companies; Special savings companies; Any other comparable entities.

A) Liquidation (bankruptcy)

Liquidation aims to end a debtor’s business activities by preserving and optimising the company’s goods, assets, and production sources so that they can be used to settle debts in a stated order of priority (BBL, article 75). It is a procedure analogous to Chapter 7 under the US Bankruptcy Code.

1) *Eligibility and requirements*

Liquidation may be requested if a company fails to pay its debt¹⁴ as and when due. Alternatively, an applicant can prove that the debtor has committed an act that characterises its bankruptcy, within a certain period established by law, unless that act is part of a judicial reorganisation plan. Acts that characterise a bankruptcy include:

Failing to pay, set aside or attach assets within twenty-four hours in enforcement proceedings; Liquidating assets prematurely; Making payments fraudulently; Conveying, or attempting to convey, any assets to a third party (which may include other creditors) with the object of delaying payments or defrauding creditors; Transferring an establishment to a third party (which may be a creditor) without the consent of all creditors and without reserving sufficient assets to settle all liabilities; Simulating the transfer of a principal establishment with the purpose of circumventing the law, or harming a creditor; Giving or increasing a guarantee to a creditor for an existing debt, without reserving sufficient assets to settle all liabilities; For an individual business debtor: absenting himself without leaving a qualified representative with sufficient funds to pay creditors; abandoning an establishment; or attempting to hide the location of his place of domicile, his headquarters or his principal establishment from the authorities; and/or Failing to perform an obligation under a judicial reorganisation plan within the required period.

A financially distressed company may voluntarily file for bankruptcy liquidation if it demonstrates that its business is unfeasible. In practical terms, debtors only opt for bankruptcy

¹⁴ To see who is eligible to bankruptcy, please see item § 4 above.

when their economic activity is no longer viable, or is beyond recovery. Even so, lawyers recommend voluntary bankruptcy only in exceptional cases, because of the risks existing in Brazil with regard to personal liability of officers and shareholders for labour, taxation and social security obligations or for damage to the environment and consumers, also considering that the authorities will investigate into mismanagement and bankruptcy crimes once bankruptcy is decreed.

Once a petition for involuntary bankruptcy is filed with the court, the debtor must pay the debt owed, and/or submit a defence, within ten days. To avoid liquidation, the debtor may also file for judicial reorganisation within the same period (please see item 6.2.1 below).

If a defence is not filed or is rejected and/or the debtor has not paid the debt, a bankruptcy decree is granted, and a court-appointed trustee will replace the debtor's directors and officers.

Gathering and appraisal of the debtor's assets (including real properties or movable assets subject to *in rem* guarantees) must occur promptly after the trustee is appointed. The debtor's assets must be realised in an expeditious manner to maximise value (preferably, as a going-concern or in blocks) and the proceeds will be earmarked to pay the creditors claims.¹⁵ The debtor's assets and liabilities make up the bankruptcy estate.

Once a schedule of assets has been prepared, assets are sold. The court orders this to be done by public auction, sealed bids or public proclamation, depending on the advice provided by the trustee and by the committee of creditors (if there is one). The risk of tax, labour and social security succession does not apply to any judicial sale carried out under bankruptcy proceedings (Article 60, single paragraph, of the BBL and Supplementary Law No. 118). Creditors are paid in the statutory order of priority set forth under article 83 of the BBL.

2) Directors' liability: fraudulent, reckless insolvent trading, etc¹⁶

The shareholders and senior managers of a bankrupt company can be personally liable for labour, social security and tax obligations, depending on the type of company, and the conduct and actions of the senior managers.

The bankruptcy court verifies the liabilities of partners, controllers and officers of a bankrupt company, irrespective of whether assets have been liquidated or whether there is any evidence showing that the debtor's assets are not sufficient to meet liabilities. The court can, on its own initiative or at the

¹⁵ L. PAIVA, C. JÄRVINEN, "Current Developments Under The New Bankruptcy and Restructuring Law in Brazil," at *30th Annual Current Developments in Bankruptcy & Reorganization*, volume two, Practising Law Institute.

¹⁶ Original excerpt by L. PAIVA and P. COSTA, extracted from the Brazil chapter of the *Restructuring and Insolvency Handbook, 2005/2006*, Fourth Edition, Practical Law Company, as adapted and supplemented for this work.

request of interested parties, order that the defendants' private assets (at a value sufficient to cover the damage caused) be frozen, until a liability is eventually determined. A criminal investigation into the commitment of bankruptcy crimes may be instated.

The corporate veil can be disregarded so that shareholders (including parent companies) and senior managers can also be held liable for the company's debts in cases of fraud, abuse of control or equity confusion.

Certain acts performed during the voidability period (*termo legal*) (except when performed in accordance with the judicial reorganisation plan) are declared ineffective or revoked in relation to the bankruptcy estate, regardless of whether the parties were aware of the financial condition of the debtor or had the intention of defrauding creditors. These include, among others: payment of debts not yet due; payment of due debts in a manner that is not provided for under the respective instrument; creation of a security interest for an existing debt.

Completed transactions can be undone if they were performed fraudulently, irrespective of the period which has elapsed since their occurrence.

3) Rules of distribution (secured and unsecured creditors as well as priorities)

All debts become due at the time of bankruptcy. If this is before the due date in the original agreement, interest owed is reduced proportionately. All foreign currency-denominated claims are converted into domestic currency, at the exchange rate on the date of the bankruptcy decree. Debts due by the date of the bankruptcy decree are offset against claims in favour of the debtor, with priority over all other creditors; agreements to settle National Financial System obligations can be terminated early by the non-bankrupt party; and claims in favour of the debtor can be offset against claims in favour of the non-bankrupt party.

All creditors (excluding the tax authorities) must prove their claims, or prove any discrepancy vis-à-vis the list of creditors presented by the debtor, within 15 days of a bankruptcy decree. The trustee then prepares a general list of creditors within 45 days, after which creditors may file an opposition to the list within 10 days. The general list of creditors is then ratified by the court.

1. Pursuant to article 83 of the BBL, creditors subject to bankruptcy liquidation are paid on a rateable basis in the following order: Labour (capped at 150 minimum wages per creditor) and occupational accident claims;
2. Secured claims up to the amount of the encumbered asset value;
3. Tax claims (except tax penalties);
4. Special privilege claims;

5. General privilege claims;
6. Unsecured claims ;
7. Contractual fines and pecuniary penalties for breach of administrative or criminal laws (including those of a tax nature); and
8. Subordinated claims.

The BBL specifically excludes from bankruptcy liquidation any claims or assets: Related to the owner of a fiduciary lien on movable or immovable assets (*alienação/cessão fiduciária*); Arising from a leasing agreement; or Derived from advances of money on an export exchange contract (*Adiantamento sobre Contrato de Câmbio – ACC*).

Also, article 84 of the BBL establishes that post-petition claims (*créditos extraconcursais*) have preference of payment over all other claims ranked by article 83 of the BBL. Post-petition claims include the expenses of the estate during the bankruptcy liquidation. If the bankruptcy liquidation was the result of a conversion from a judicial reorganisation, the post-petition claims include the debts incurred by the debtor during the judicial reorganisation. When a claim is guaranteed by a specific asset (i.e. *in rem* guarantee), the creditor will receive the exact amount raised by selling the respective asset. The portion of the claim beyond the respective asset's sale proceeds could qualify as an unsecured claim.

As a rule, interest is only paid if there are sufficient funds to pay the principal owed to all creditors; usually, creditors start receiving payments of the principal within a few months from sale of the estate's assets.

4) Treatment of avoidable dispositions and executory contracts

A contract continues to be performed if the trustee, upon authorization of the committee of creditors (if any), considers it in the best interests of the company. If the trustee or the committee determines that continuing a contract is detrimental to the estate, it must be terminated or set aside.

5) Position of employees

If the company continues to operate, particularly if the intention is to sell the business as a going concern, the jobs are kept and the wages resulting from the services provided after the adjudication of bankruptcy must be paid on time. Conversely, if the company's activity is discontinued as a result of the adjudication of bankruptcy, its employees will be dismissed and must file the respective labour claim with the labour courts to have their claims recognised and, after that, file their proof of credit.

Moreover, creditors holding labour claims make up a separate class for voting purposes in the general meeting of creditors and

may appoint a representative to sit on the creditors' committee, if instated. Finally, creditors holding labour claims may propose to the general meeting of creditors alternatives for realisation of assets.

B) Rescue procedure(s)

The BBL set forth two new rescue proceedings, the *recuperação judicial* (judicial reorganisation) (item 6.2.2.1 below) and the *recuperação extrajudicial* (out-of-court reorganisation) (item 6.2.4 below), both of which authorise debtors to obtain court confirmation of reorganisation plans negotiated directly with their creditors.

Judicial reorganisation

Judicial reorganisation is a court-supervised proceeding – similar to Chapter 11 reorganisations under the US Bankruptcy Code – aimed to make it possible for a debtor to overcome economic and financial difficulty, allowing it to maintain its production source, its workforce, the interests of its creditors, and to preserve the company and its social function so as to foster economic activity (Article 47, BBL).

Although it is a great step forward in relation to the former preventive bankruptcy, the process of judicial reorganisation entails a high cost, may be time consuming, and still generates a whole series of uncertainties, as the law is relatively new and has been little tested in certain aspects. Furthermore, if the plan is not approved by the creditors, there is the risk of bankruptcy being proclaimed.

Judicial reorganisation is, at present, the most wide-ranging procedure for protection of the debtor, and it is to be recommended when there is no other viable alternative (informal work-out or out-of-court reorganisation), or when the effects produced by judicial reorganisation are not minimally useful to the debtor (the creditors covered by the plan account for a very small percentage of total liabilities, for example).

In practical terms, it must be understood whether the debtor has a viable activity (a requisite for granting reorganisation), and if the plan to be proposed, once approved, will produce the necessary effects, given that various groups of creditors will not be covered by its effects. It is necessary to understand whether the debtor will be able to negotiate satisfactorily with creditors excluded from the judicial reorganisation and with any essential suppliers, and how the tax and social security liabilities can be handled.

Eligibility

A petition for judicial reorganisation can be filed with the court by a debtor (or the surviving spouse, heir or executor of an individual business debtor), or a partner or shareholder of a

debtor company. The creditors – regardless of their concern about the debtor’s need to submit to a reorganisation plan – continue to be at the mercy of any initiative taken by the debtor¹⁷.

The petition must contain a statement of the material causes of the debtor’s indebtedness and of the reasons for its economic and financial crisis; further, it must be supported by certain documents, such as:

- Accounting Statements: Accounting statements for the last three fiscal/financial years, in addition to those drawn up specially to support the petition, prepared in strict compliance with the applicable corporate legislation. Such financial statements shall necessarily include: Balance sheets; Accrued income statement; Income statement as from the last financial/fiscal year; and Management report on cash flow and projection thereof.
- List of Creditors: A complete nominal list of the creditors including those under an obligation to do or to give, specifying, for each such creditor, the origin and initial due date of credits.

Requirements

A petition is not accepted by the court if the debtor: Has not been doing business regularly for at least two years; Is bankrupt or has been bankrupt, and the resulting liabilities have not been discharged by the final decision; Has used judicial reorganisation within the previous five years; Is an individual business person who has been convicted of certain crimes, or, in the case of a company, its employees, officers or controlling partners have been convicted of certain crimes.

Summary of the process from commencement to conclusion

The documentation being in order, the court must accept the petition and processing order is granted (“Processing Order”). After the Processing Order, all claims (that are claiming an exact amount against the debtor) and enforcement proceedings against the debtor (except for the enforcement of tax-related debts) are stayed for a period of 180 calendar days. In principle, the stay period is non-extendable. However, courts have been allowing its extension upon certain conditions, notably when the debtor itself is not responsible for the delay in the reorganisation procedure. After a notice of the Processing Order is published in the official gazette, creditors are given 15 days to prove their claims or challenge the listed claims before the trustee, who is expected to analyse the claims and publish a notice setting forth the new list of creditors produced by him within 45 calendar days as from the end of the period to present a claim.

¹⁷ At one stage, while the bill was in Congress, the draft contained the right for creditors to call for reorganisation of the debtor as in the US Bankruptcy Code.

The debtor must present a reorganisation plan within 60 calendar days as from the Processing Order. Once the plan is presented before court, a notice must be published in the official gazette informing that the debtor has presented a reorganisation plan.

Since the reorganisation proceeding is based on a creditor-approved reorganisation plan (and creditors thus play a central role in this new regime), creditors must approve the reorganisation plan. Therefore, creditors have 30 calendar days from publication of the abovementioned notice to file oppositions to the proposed reorganisation plan.

If the plan is not opposed by any creditor, it is considered approved by tacit acceptance. However, if any creditor objects to the judicial reorganisation plan, a general meeting of creditors is convened by the judge to try to agree on a satisfactory plan. The meeting must be held within 150 days of the petition being accepted by the court.

If the meeting of creditors rejects the reorganisation plan, the judge declares the debtor bankrupt. The decision adopted by the meeting of creditors is sovereign, and the judge only acts if anything unlawful is held to occur.

Position of directors (debtor in possession and personal liability if any)

The debtor's directors and officers remain in control of the debtor's business (unless removed for cause). However, the court will appoint a trustee (administrador judicial) to oversee the debtor¹⁸. Under certain circumstances, a creditors' committee (*comité de credores*) may be formed to supervise the trustee and the debtor. The decision on whether to set up a creditors' committee falls on the general meeting of creditors.

Position of rescue practitioner : qualifications, appointment, powers and responsibilities

Please see item 4 above.

Requirements for the plan, if any, and acceptance (voting)

The reorganisation plan is a document presented in court by the debtor under judicial reorganisation, containing an analysis of its financial and economic condition, as well as evidence of economic feasibility of its business. The plan should list eligible creditors and must include the mechanisms for judicial reorganisation of the company and the proposed order and condition of distributions to creditors.

The BBL provides an illustrative list of the judicial reorganisation mechanisms that can be adopted by debtors when preparing a

¹⁸ Please see item § 2 above.

reorganisation plan, which include moratorium, debt restructuring, selling of assets, spin-off, merger or consolidation of a debtor's business operations, assignment of shares or equity holdings of a company, leasing, and even the dismissal of the controller. The debtor may use a combination of means of reorganisation in the same plan and make different proposals for different groups of creditors.

The creditors gathered at a general meeting of creditors ("GMC") to resolve on the plan may submit proposals to change it. However, the debtor must give its express consent to any changes proposed before they are included in the plan to be submitted to the GMC for a resolution.

For resolution purposes, the creditors are divided into four groups, namely:

1. Creditors with labour-related claims;
2. Creditors secured by collateral;
3. Creditors with general and special privileges, unsecured creditors, and subordinated creditors; and
4. Creditors classified as microenterprises or small companies.

All four classes of creditors must approve the final plan (with any creditors' change proposals already included). As a general rule, a proposed plan obtains creditor approval pursuant to the ordinary voting criteria, as follows:

- Class #1 and Class #4: Approves the plan by a simple majority of creditors present or represented at the GMC (i.e., per capita voting), regardless of the amount of individual claims; and
- Class #2 and Class #3: Approve the plan, per class, by creditors present or represented at the GMC holding (a) over 50% of the total amount of claims; and (b) by a simple majority of creditors (i.e., per capita voting).

If the debtor fails to obtain sufficient creditor support for a proposed plan under the general rule, a court may nevertheless confirm the plan and grant the judicial reorganisation, provided that the plan has obtained, cumulatively, at the same GMC: (1) the favourable vote of creditors representing over 50% of the amount of all claims present or represented at the GMC (regardless of the class involved); (2) the approval of at least two classes, pursuant to the ordinary voting criteria; and (3) the favourable cumulative vote of over 1/3 of the creditors in the class (or classes) that rejected the plan (computed pursuant to the ordinary voting criteria).

Votes may be cast by the persons set out in the general list of creditors; or, in the absence thereof, in the list of creditors prepared by the trustee; or else in the debtor's list of creditors, supporting the petition for judicial reorganisation. Each holder of labour claims and microenterprises/small companies is entitled to one vote within its respective class, and the class of creditors not affected by the reorganisation plan has no say at the meeting resolving on the plan.

Moratorium

As already mentioned, granting of judicial reorganisation bars any lawsuits (that are not claiming an exact amount against the debtor) and enforcements (but enforcements involving tax-related debts) against the debtor. Once the plan has been approved, there will be a conditional novation of the debtor's liabilities, in the manner established in the plan, which may include a moratorium with respect to payment terms.

In relation to the judicial reorganisation of microenterprises and small companies, the law contemplates the possibility of submitting a special plan, which does not require a general meeting of creditors, consisting basically of a moratorium for the debtor to pay its unsecured creditors in up to thirty-six monthly instalments.

Treatment of creditors and their claims

All creditors subject to the effects of the judicial reorganisation that disagree with the amount or the classification of their claims must file an opposition or an objection. The method and conditions for payment of the respective claim must be set out in the reorganisation plan.

Certain types of potentially significant claims are not subject to a judicial reorganisation, including claims arising from: (1) taxes; (2) the owner (or committed seller) of real property (*imóvel*) where the relevant agreement contains an irrevocable or irreversibility clause (including real estate developments); (3) the owner in a sale contract with title retention (*reserva de domínio*); (4) advances of money on an export exchange contract (*Adiantamento sobre Contrato de Câmbio – ACC*); (5) the owner of a fiduciary lien on movable or immovable assets, such as a fiduciary sale agreement (*alienação/cessão fiduciária*); or (6) a leasing contract (*arrendador mercantil*).

Although not subject to the effects of the judicial reorganisation and, therefore, to the effects of the automatic stay, granting of processing of the judicial reorganisation prevents creditors excluded from the judicial reorganisation from adopting, for a period of 180 days, measures aimed at removing capital goods essential for the debtor's activities. This rule does not apply to aircraft leased by airlines under judicial reorganisation, as provided for in article 199 of the BBL.

Position of shareholders/members

The main effect of the judicial reorganisation on the company's partners is the fact that the partners and certain persons related to them, although holding credits with the company under judicial reorganisation, have no voting rights at the general meeting of creditors that resolves on the plan.

Treatment of employees

Filing for judicial reorganisation does not produce any change in employees' rights, and the respective claims must be settled in the manner established in the reorganisation plan, subject to the legal provision that stipulates that labour claims must be settled in full within 12 months from court recognition of the judicial reorganisation plan.

Treatment of avoidable dispositions and executory contracts

The BBL has no rules dealing with the avoidance of legal transactions carried out by the debtor in the event of judicial reorganisation, only in the event of bankruptcy. Judicial reorganisation is not, per se, cause for termination and does not grant the debtor the right to terminate executory contracts.

Treatment of creditors and their claims

Filing for judicial reorganisation does not make any claim promptly enforceable; the treatment to be accorded to each affected claim must be set out in the plan of reorganisation.

Tax implications

Filing and/or granting of judicial reorganisation, or approval of the reorganisation plan, would not serve as grounds for use of losses as a tax benefit, which only occurs if the debtor is declared bankrupt. In most cases and depending on the percentage of debt recovery set out in the plan, this fact operates as a great incentive for the creditor to vote against approval of the plan so that the debtor is declared bankrupt and the creditor may take advantage of such tax benefit.

Finalisation of process: if successful and if not

Once the plan is approved and recovery is granted, the debtor continues with judicial reorganisation until all obligations established in the plan, and falling due up to two years after the start of proceedings, have been performed. In case of non-performance of any obligation, its bankruptcy will be declared, otherwise recovery is closed.¹⁹ After the two-year period, if any obligation established in the plan is not performed, the unpaid creditor can petition for specific performance or for the debtor's bankruptcy.

¹⁹ In the vast majority of reorganisation petitions filed since the BBL came into force, the two-year period was not observed, and the companies changed the originally approved wording of plans, remaining under reorganisation for an indefinite period.

1) *Informal work-outs*²⁰

Brazilian creditors usually take a dim view of group compromises; instead, they prefer to negotiate directly with the debtor.²¹ The effects of those crises that ravaged the US economy and the Brazilian energy and telecom industry in the last decade had a deep impact on negotiations by changing the behaviour in collective debt renegotiation processes.

The fact that said crises affected Brazilian companies controlled by foreign parent companies (usually more acquainted with informal work-out mechanisms), and also considering that substantial debts were then being renegotiated, had an interesting effect. Creditors and debtors joined efforts to find out solutions for payment of debts on the best conditions possible for creditors and debtors, namely: as soon as possible and in a way to preserve the business, respectively.²²

Within this context, the BBL introduced the extrajudicial reorganisation in the Brazilian insolvency system (please see item 6.2.3 below) and expressly acknowledged in its article 167²³ that the debtor could negotiate informal work-outs with creditors, all of which as a means of encouraging the negotiation of agreements with groups of creditors chosen by the debtor.

This represented a major U-turn, as the Prior Bankruptcy Law prohibited debtors from negotiating reorganisation schemes with creditors. Under the Prior Bankruptcy Law, a negotiation could be sanctioned with what was referred to as an ‘act of bankruptcy’²⁴. These acts automatically opened the door to a bankruptcy petition against the debtor, which could be decreed regardless of the debtor’s economic condition, that is to say, even if it were solvent. On the other hand, the only reorganisation structure provided for in the Prior Bankruptcy Law that has been repealed by the BBL was the application for the so-called ‘preventive *concordata*’, which was no more than a moratorium imposed by the debtor on unsecured credits. This is why this stance of imposition by the debtor is so rooted in Brazilian life, and constitutes one of the main difficulties

²⁰ Discuss generally the laws, practices and procedures pertaining to non-judicial rehabilitation, workouts and restructurings. Compare with judicial (formal) reorganisations. This should be a general discussion of the environment for such procedures. (Use of INSOL rules or London approach etc, approach of Banks.)

²¹ This topic partially reproduces the author’s views already expressed in other articles, specially in the chapter “Out-of-court Reorganisation” included in the book edited by him, titled “Direito Falimentar e a Nova Lei de Falências e Recuperação de Empresas”, *Quartier Latin*, 2005, page 561 et seq.

²² A. ARAÚJO ; L. PAIVA, “A Transparência na Lei de Falências”, *Jornal O Globo*. Rio de Janeiro, 23 jun. 2004.

²³ “Article 167. The provisions of this Chapter do not rule out other types of private settlement between the debtor and his creditors.”

²⁴ Despite this prohibition, the attempt to prevent negotiation between debtors and creditors, as introduced in the Brazilian legal system by the Prior Bankruptcy Law, did not work out since debtors frequently negotiated through fronting parties the assignment of credits at a discount that were not always the same for all creditors. This means that there have always been negotiations between debtors and creditors, albeit outside the realm of the law.

for implementation of a new type of behaviour that is necessary for use of the new mechanisms provided by the BBL.

The fact is that the increasing adhesion to informal work-out even before the BBL came into force gained momentum with the existence of a speedier procedure for obtaining ratification of a plan with a cram-down on non-adherent creditor, resulting in a stimulus to execution of several private settlements closed after the BBL came into effect.

However, the INSOL rules or London approach are far from being widely accepted and/or adopted in Brazil. The difficulty lies, in the first place, on the fact that an informal work-out assumes a voluntary adhesion by the creditors. It is a fact that in most relevant cases there is always a group of creditors that are more willing to offer a standstill to the debtor. But a creditor in possession of an automatically enforceable collateral (e.g. a fiduciary lien on receivables) would hardly give up on the right to enforce such collateral and lower its credit.

Further as regards the standstill, it is nearly impossible to have government-owned banks adhere to this arrangement, as their representatives are afraid of taking actions that could later be viewed as a waiver of rights. The difficulty is even greater when smaller banks are involved, as a default would have a far greater impact on their balance sheets. Such unresponsiveness, which oftentimes ends up shooing other banks away, could be mitigated if there were rules or regulations (issued by the Brazilian Central Bank, for instance) instructing banks to join informal work-outs and according a special accounting treatment during the standstill period. However, the fact is that, apart from the situations above, a group of creditors usually accept to take no actions against the debtor, whereas the debtor accepts to take no action that would impair the rights of creditors in general or of any specific creditor. Whenever it is possible to agree on a standstill or on an informal moratorium (without signing any document to that end), one or more banks (generally those holding the highest exposure) usually take the lead in the negotiation process. The difficulty usually lies in the agreement on sharing of expenses involved, especially with regard to hiring of financial advisors (to diagnose the debtor's condition) and of legal advisors; sharing information with creditors that have not contributed to this work is usually difficult as well. On the other hand, not always the debtor is sufficiently open to disclosure of all information necessary, whether because the debtor has something to hide or because it fears that such information may be used against it during the very negotiations (or at a later moment, if negotiations fail).

Finally, creditors are usually reluctant to contribute fresh funds, the more so if the debtor does not have assets on which a fiduciary lien could be placed as security. In some cases, it was possible to restructure all existing guarantees by replacing former ones with new instruments shared among all creditors (as in a syndicated transaction).

In practical terms, there is an initial attempt at carrying out an informal work-out in nearly all relevant cases, especially those where public awareness of the debtor's financial straits could have a strong negative impact on its business and thus make its recovery difficult or impossible. In the Brazilian scenario, the success of any such initiative is far dependent on the situation involved and on the debtor's openness, on the profile of creditor banks (especially whether there are government-owned banks and small banks with relevant exposure) and on the respective guarantees.

Even so, there is still a strong cultural resistance against creditors negotiating out of court. It is not always possible to mobilise creditors, or, when they are mobilised, they do not react and cooperate within the timing required by the debtor. As a result of this fact, and also of the rather simple nature of legal provisions that address the chapter on out-of-court reorganisation, during these almost seven years since enactment of the BBL, we have heard of slightly over a dozen filings for out-of-court reorganisation, which is very few.

2) Treatment of pre-pack arrangements. Out-of-court reorganisation

This procedure is in many aspects similar to a “pre-package reorganisation” proceeding under Chapter 11 of the US Bankruptcy Code. Under it, a financially distressed debtor negotiates the terms of a plan of reorganisation (i.e., a “pre-package plan”), privately, with its creditors. After the debtor obtains the required creditors' support for such plan, it will start a legal proceeding aiming to obtain court ratification of the pre-package (approved) plan.

There are two types of out-of-court reorganisations:

– *Homologation of consensus (recuperação homologatória)*: This procedure can be conceptualised as a procedure by which the debtor files with the courts for homologation of an out-of-court reorganisation plan signed by all creditors subject to it. Court homologation of the plan is binding only on those parties that have entered the agreement. The only benefit of the Homologation of Consensus procedure, when compared to other private agreements (not ruled by the BBL), lies in the fact that the court homologation order constitutes an enforcement instrument (*título executivo*), which can be enforced through a “fast-track” procedure.

– *Enforcement of agreement (recuperação impositiva)*: This procedure calls for prior agreement and signature to the plan by creditors representing more than 60% of the credits of each class, type, or group of creditors subject to such plan.²⁵ For calculation of the qualifying percentage, credits denominated in foreign currency are

²⁵ This percentage is calculated on the total amount of the credits affected by the plan and not on the number of affected creditors.

converted into Brazilian currency at the exchange rate effective on the day before the plan is signed. In the Enforcement of Agreement procedure the court-recognized plan is binding on all creditors affected by the plan, whether or not they have expressly and previously agreed with it, or even manifestly expressed opposition to it. Provided the minimum percentage level of agreement has been met, the conditions specified in the plan are imposed on the creditors who did not sign it, and indeed on those who expressly rejected it. In other words, the BBL provides for a form of cram-down system.

An out-of-court reorganisation plan can be initiated by a debtor²⁶, a partner or shareholder of a debtor company, or the surviving spouse, heir or executor of an individual business debtor, if the debtor: Meets the same legal requirements as for judicial reorganisation; and Has not been subject to an out-of-court reorganisation ratified by a court within the last two years;

The debtor's directors and officers remain in control of the debtor's business and there is no court supervision.

The effects of extrajudicial reorganisation do not reach those same creditors not covered by judicial reorganisation (please see item 6.2.1.8 above), nor the holders of labour claims.

Under the BBL, the plan produces effects in relation to the debtor and creditors that are subject to it only after it has been homologated by the court. However, since the nature of an out-of-court reorganisation is contractual, the signatories to the plan may agree differently in a case of Homologation of Consensus, so that the plan produces effects before its homologation in relation to the clauses that change the amount of the debt or the payment method. However, such a provision can only bind creditors who are signatories to the plan, since in the case of Enforcement of Agreement it will only produce effects after homologation by the court for all non-signatory creditors to the plan.

The plan is not binding on the parties if it is not homologated, and in this case the creditors resume the right to demand and enforce their respective credits and claims on the original conditions. However, any release of the creditors in case the plan is not homologated in court seems to be a contractual issue and would need to be reviewed on a case-by-case basis.

The procedure, which is common to both extrajudicial reorganisation modes, is rather straightforward and usually expeditious as no interlocutory decisions are involved; adversary proceedings are limited to an opposition against court homologation of the plan.

Once the petition is distributed, creditors will have 30 days from publication of the public notice calling creditors to challenge the homologation petition for non-fulfilment of any formal requirement; the financial and economic conditions proposed by

²⁶To see who is eligible to file an out-of-court reorganisation, please see item *Eligibility* above.

the debtor cannot be challenged at this point. This is because negotiations ended before the petition was filed, and applicable conditions are those stated in the plan.

If oppositions are made, the debtor will have five days to answer. The judge will have a like period to resolve on this issue and render a decision. If a pre-package plan is not homologated by the court, the debtor may continue to operate its business, file another pre-package plan or even seek to commence a judicial reorganisation. Upon homologation, the extrajudicial reorganisation plan becomes effective as regards all creditors covered by it, whether or not dissenting creditors have adhered to the plan.

In brief, the new mechanisms tend to be on the one hand efficacious and fast, and on the other, less expensive, complex and traumatic. The judicial reorganisation tends to be adopted only when: (1) the out-of-court attempt has not been successful; (2) the profile of the debt is not appropriate for the use of out-of-court reorganisation procedures; (3) the debtor has to request and obtain a re-profiling of its tax debts; (4) the plan includes the sale of assets and there is interest in avoiding the risks of succession caused by tax and social security debts; (5) the plan contemplates acts capable of being considered ineffective in the event of adjudication of debtor's bankruptcy (i.e. liquidation) and the creditors are interested in having specific protections against future clawback/revocatory claims concerning such acts; and (6) when the plan includes adjustments of an operational nature that call for more specific monitoring or supervision.

C) Cross-border insolvency rules

The BBL does not contain provisions governing cross-border insolvency cases. Also, the Brazilian legislature is currently considering to amend the BBL to adopt a version of the Model Law on Cross-Border Insolvency that was promulgated by the United Nations Commission on International Trade Law ("UNCITRAL").

