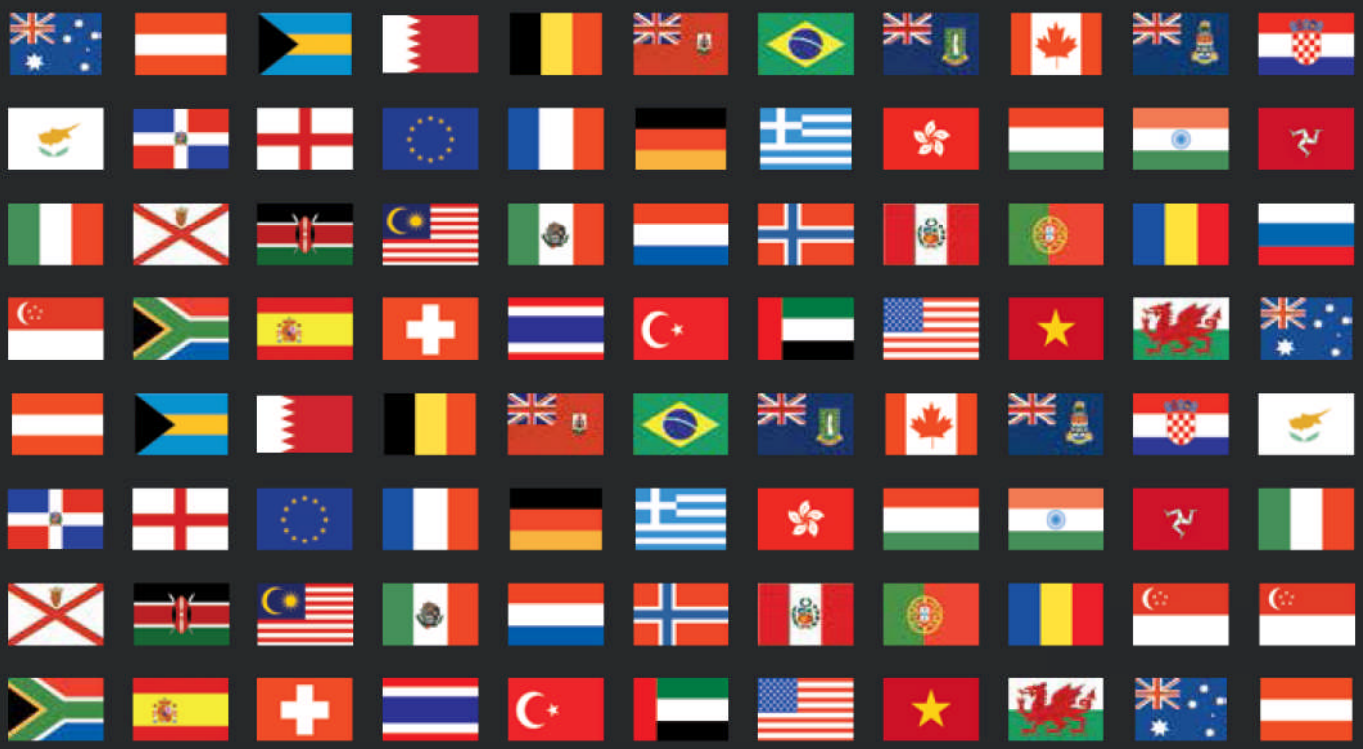
Restructuring & Insolvency

Contributing editors
Catherine Balmond and Katharina Crinson



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GETTING THE DEAL THROUGH

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Restructuring & Insolvency 2018

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Brazil

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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

In Brazil, the main applicable law to corporate insolvencies and reorganisations is Federal Law No. 11,101/2005, known as the Brazilian Bankruptcy and Restructuring Law (BRL), which was enacted on 9 February 2005 and came into effect on 9 June 2005, bringing significant changes to the legal treatment of Brazilian companies that are insolvent or facing financial difficulties.

2 Excluded entities and excluded assets

What entities are excluded from customary insolvency or reorganisation proceedings and what legislation applies to them? What assets are excluded or exempt from claims of creditors?

Under the common denomination of 'debtors', BRL specifies that both 'individual businessmen' and 'business companies' are subject to its provisions. BRL also specifies that it shall not apply to state-owned and mixed-capital companies. Also exempted from the BRL are financial institutions, credit unions, social security entities, health-plan operators, insurance companies and other similar entities. Each of these entities have special regulation for insolvency matters.

In a judicial reorganisation, the debtor company may freely run its business, except that the sale of any assets that belong to the company's permanent assets can only be performed with judicial authorisation. Creditors that are not subject to the proceeding may enforce their credit and seizure assets, however, only the judicial reorganisation court may decide on the destination of the debtor company's assets, even if it was seizure by other court. In forced liquidation proceedings, all assets must be collected and sold by the judicial administrator, except those that are no longer property of the debtor because of fiduciary transfer of assets.

3 Public enterprises

What procedures are followed in the insolvency of a government-owned enterprise? What remedies do creditors of insolvent public enterprises have?

State-owned and mixed-capital companies are expressly excluded from BRL. However, many scholars and practitioners defend that they should be subject to BRL, as the Brazilian Federal Constitution provides that state-owned and mixed-capital companies shall receive the same legal treatment accorded to private companies, including commercial, labour and tax rights and obligations.

4 Protection for large financial institutions

Has your country enacted legislation to deal with the financial difficulties of institutions that are considered 'too big to fail'?

Brazil has no specific legislation to deal with financial difficulties of institutions considered 'too big to fail'.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

According to BRL, the competent court to ratify out-of-court reorganisation plans, rule judicial reorganisation proceedings or declare the forced liquidation of a company is the estate court of where the main establishment of the company is located. Some judicial districts have courts that are specialised in insolvency proceedings (Bankruptcy Courts), but if not, the proceedings must be conducted by regular civil state courts.

The right to appeal is usually derived from the BRL and Brazilian Code of Civil Proceeding, if all the requirements are fulfilled; there is no need of permission to appeal. To file an appeal, the appellant must pay judicial fees (that vary from state to state).

Types of liquidation and reorganisation processes

6 Voluntary liquidations

What are the requirements for a debtor commencing a voluntary liquidation case and what are the effects?

According to BRL, debtors that are facing an economical and financial crisis and do not meet the requirements to request its judicial reorganisation must request their own forced liquidation. The debtor company must present the reasons why it believes that the business is no longer viable and present the following documents:

- accounting statements for the last three financial years and those drawn up especially to support the forced liquidation request, prepared in strict accordance with applicable corporation law and consisting necessarily of:
  - balance sheet;
  - accrued income statement;
  - profit and loss statement as from the last financial year; and
  - cash flow statement;
- list of creditors, stating their address and the amount, kind and rating of the respective claims;
- list of properties and rights constituting the assets, with an estimate of the respective value and title documents;
- evidence of his status as businessman, articles of association or bylaws in effect, or if there are none a list of all partners, their addresses and their personal assets;
- the mandatory books and accounting documents required by law; and
- list of senior managers during the last five years, with their respective addresses, offices and equity holdings.

If the request is accepted by the Bankruptcy Court, the forced liquidation will be decreed. In this case, the debtor is removed from its activities and the existing assets are collected and sold by the judicial administrator named by the court. Any proceeds derived from the sale of assets are distributed among the creditors according to a preference order established by law. The claims demanding liquid amounts against the debtor company are suspended and transferred to the Bankruptcy Court.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

The debtor that meets certain conditions specified in BRL may apply for a judicial reorganisation proceeding. The debtor must be facing an economical and financial crisis and:

- it shall not be bankrupt, and if it has been, the resulting liabilities shall have been discharged by final and conclusive decision;
- it shall not have engaged in judicial reorganisation within the last five years;
- it shall not have engaged in judicial reorganisation, within the last eight years, based on the special plan provided for Small Business; and
- it shall not have been convicted or does not have, as a senior manager or controlling partner, a person convicted of any of the crimes provided for herein.

Also, the request must be accompanied by several documents, such as:

- a statement of the causes of the debtor's equity condition and the reasons for the economic and financial crisis;
- accounting statements for the last three financial years and those drawn up especially to support the petition, prepared in strict compliance with applicable corporation law and consisting necessarily of:
  - the balance sheet;
  - accrued income statement;
  - income statement as from the last financial year; and
  - management report on cash flow and projection thereof;
- a full itemised list of creditors, including those under an obligation to do or to give, stating the address, type, rating and updated amount of the respective claim, and specifying its origin and schedule of payments as well as showing the accounting records on each pending transaction;
- a full list of employees, stating the respective functions, salaries, indemnities and other amounts to which they are entitled, with the corresponding accrual months, and specifying amounts pending payment;
- certificate of debtor's good standing at the Public Registry of Companies, coupled with updated articles of incorporation and minutes of appointment of current senior managers;
- a list of private assets of the debtor's controlling partners and senior managers;
- updated statements of debtor's bank accounts and of any financial investments of any kind, including those in investment funds or on stock exchanges, issued by the respective financial institutions;
- certificates of the protest offices in the judicial district of the debtor's domicile or headquarters and branches; and
- a list, signed by the debtor, of all lawsuits in which he or she figures as a party, including labour-related suits, with an estimate of the respective disputed amounts.

If the application is in proper form, the court will authorise the initiation of judicial restructuring proceeding. A public notice will then be included in the Official Gazette containing, among others: a summary of the request made by the debtor; a list of creditors; and a warning about the applicable term for any challenges to the list of creditors, including requests for adjustments and inclusions.

A judicial administrator will be nominated by the court to manage the proceeding; there is a 180 day stay period for claims subject to the proceeding (the ones existing at the date of the filing, whether matured or not, with few exceptions provided by law); and in principle, there will be no change in management. In certain circumstances, however, managers shall be removed from their positions, including when: there are indicia of bankruptcy crimes; they have acted with wilful misconduct or engaged in fraudulent schemes against creditors; they have been making personal expenditures that are not compatible with their income; or their removal is specified in the reorganisation plan.

The debtor company shall submit a reorganisation plan within 60 days from the publication of the court order authorising the initiation of the proceeding, to be analysed and accepted or not by the creditors.

8 Successful reorganisations

How are creditors classified for purposes of a reorganisation plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability, and, if so, in what circumstances?

Any reorganisation plan must be approved by the following four categories of creditors in a General Meeting of Creditors:

- labour creditors and creditors from accidents at work;
- secured creditors;
- unsecured creditors, creditors with special or general preference, and subordinated creditors; and
- small business creditors.

In the first and fourth classes of creditors (labour and small business), approval is achieved with the favourable vote of the majority of creditors present at the meeting, regardless of the amount of their credits. In the other two classes (secured and unsecured), approval is achieved with the favourable vote of both creditors representing more than half of the credit amounts represented at the meeting and the majority of creditors present at the meeting.

If certain vote combinations specified in BRL are recorded in the general meeting of creditors, the court may grant the judicial restructuring, even when the plan was not approved pursuant to the quorum requirements explained above, if some requirements are fulfilled (cram dawn).

This classification of creditors only exists for purposes of a general meeting of creditors. The reorganisation plan may provide different classes of creditors, provided that it must treat equally creditors in the same conditions.

The plan may provide for the release of non-debtor parties, such as guarantors, however, there is a discussions if it is applicable to all creditors, even those that did not approve the plan or made a specific reservation that does not accepted such clause, or only to those that approved the plan or accepted the provision.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

Any creditor may request the forced liquidation of a debtor in certain circumstances, including the following:

- failure by the debtor to comply with payment obligations in excess of 40 times the prevailing Brazilian minimum wage, provided that a protest with a public registry has been lodged with respect to the corresponding indebtedness. To reach the above threshold, two or more creditors can combine their credits;
- existence of debt collection proceedings against the debtor where no assets have been attached or no money has been deposited to secure payment of the relevant obligations;
- the debtor has been engaged in actions such as unjustified sales of assets or fraudulent schemes against the interests of creditors; and
- failure by the debtor to comply with obligations under a judicial reorganisation plan.

The debtor company will be notified about the request, and will have the opportunity to pay the owed amount, request judicial reorganisation or present a defence. If the defence is not accepted and the other possibilities are not accomplished by the debtor company, its forced liquidation will be decreed and the same effects mentioned in question 6 will take place.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

In Brazil, only the debtor company may request the commencement of its judicial reorganisation proceeding, there is no possibility of creditors doing so.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

Any debtor that meets certain conditions specified in the BRL may propose and negotiate with its creditors an expedited reorganisation plan, also called out-of-court reorganisation plan, and request its judicial ratification, with the possibility of enforceability towards each category affected by the plan who did not adhere to it, if three-fifths of all creditors encompassed by the plan adhere to it.

In other words, despite being deemed 'out-of-court', the plan must be ratified by a Bankruptcy Court to bind creditors who did not adhere to the plan. This does not mean that the plan will be conducted within the context of court proceedings. It just needs to be judicially ratified.

Once the debtor requests the ratification of the plan, the creditors will have the opportunity to challenge such ratification. Nevertheless, any challenges may be based solely on an alleged illegality or a failure by the debtor to comply with all necessary legal requisites or formalities.

If the challenges are not accepted by the court, the out-of-court reorganisation plan will be ratified and be applicable to all creditors affected in the plan, provided the quorum is obtained. The plan's provisions and obligations are judicially enforceable after the ratification decision.

12 Unsuccessful reorganisations

How is a proposed reorganisation defeated and what is the effect of a reorganisation plan not being approved? What if the debtor fails to perform a plan?

If the debtor company fails to present a reorganisation plan in due time, its forced liquidation must be decreed. If the reorganisation plan is presented, creditors will be informed about the reorganisation plan and the applicable term to challenge the plan through a public notice. If any objection to the proposed plan is submitted by any creditor, the court shall call a general meeting of creditors. In the meeting, creditors may approve the plan as originally proposed, approve a modified version of the plan, as long as there is no opposition from the debtor and no harm to absent creditors, or reject the plan, in which case the debtor should be declared bankrupt (as forced liquidation).

If the debtor company fails to perform the plan while the proceeding is still running, its forced liquidation should be decreed (but this usually does not happen, and the debtor company is given a chance to present a new plan); if the debtor company fails to perform the plan after the end of the reorganisation proceeding, the creditor may enforce the credit or request the forced liquidation in a independent proceeding.

13 Corporate procedures

Are there corporate procedures for the dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

Yes, the Brazilian corporate legislation provides for a winding-up proceeding. Technically, the winding up of a Brazilian company is the termination of the corporate entity itself. Therefore, normally the winding up encompasses three steps: dissolution triggering event; liquidation of all company's assets and liabilities; and termination of the legal entity and cancellation of Board of Trade entries and other enrollments with authorities.

According to Brazilian law, a company may be dissolved for several different reasons, such as:

- expiry of company's term, unless the company remains for a undefined term;
- quotaholders' or shareholders' resolution, according to specific quorums;
- lack of business operational authorisation;
- judicial annulment of incorporation;
- exhaustion of corporate purpose, or the same is held impossible; or
- upon dissolution conditions if provided for in the articles of association.

Finally, the law also provides for the termination without dissolution or even liquidation, in case of transformation, merger, consolidation or split. In such cases, the law provides for specific succession for the assets and liabilities of the terminated company, and on the protection of creditors rights.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

Judicial reorganisation proceedings shall remain in place until all obligations specified in the plan maturing within two years are fully complied with by the debtor. If the debtor fails to comply with any obligation within such period, its forced liquidation shall be declared. Any obligation unfulfilled after the proceeding termination entitles creditors to initiate collection proceedings or request the declaration of the debtors' forced liquidation.

Verifying that all obligations maturing within two years were fulfilled, the court shall order the termination of judicial restructuring proceeding. Although no longer subject to court proceedings, the debtor remains liable for all obligations specified in the plan that are still outstanding.

Regarding forced liquidation proceedings, after being judicially decreed, the debtor company will be liquidated so that its assets can be attached and sold by the judicial administrator, and the amount obtained will pay the creditors. Only after the extinguishment of all obligations may the shareholders request the rehabilitation of the company, to be allowed to explore its activity once again.

All the debtor company's obligations will be considered extinguished if it is able to pay all of its debts, if it is able to pay up to 50 per cent of its unsecured debts, after five years of the end of the proceeding, or after 10 years of the end of the proceeding if there was any conviction for a bankruptcy crime.

The forced liquidation proceeding is a case of total judicial dissolution of the company. If, after the selling of all assets and the payment of creditors, there is any amount left – which is very difficult to determine – this amount will be given to the shareholders in proportion to their participation in the company's equity.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

There is no specific condition that defines a company as 'insolvent' and the analysis of a 'insolvency state' that justify the insolvencies and reorganisations is more related to an economical crisis the company may be facing and to its inability to pay its creditors in a timely fashion. However, generally, a company is considered insolvent if its debts exceed its assets.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

According to BRL, debtors that are facing an economical and financial crisis and do not meet the requirements to request its judicial reorganisation must request the declaration of their own forced liquidation. However, BRL does not provide for any penalty or liabilities for the debtor company that does not file for its own forced liquidation. There are also no specific consequences if a company carries on business while insolvent.

Directors and officers

17 Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

Please refer to question 16. There is no consequence for directors and officers if a company carries on business while insolvent, however, the liability on the insolvency state may be assessed in accordance with the Brazilian corporate legislation.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

In forced liquidation proceedings, shareholders, controlling shareholders, directors and executive officers may be considered liable for debts or acts if the court considers that some requirements were fulfilled.

Regarding this topic, BRL provides that the Bankruptcy Court may investigate and determine shareholders, controlling shareholders, directors and executive officers' liabilities if it verifies that they performed any act or omission that contravenes Brazilian Law – such as corporate laws, tax laws, labour laws, among others – regardless of the collection of the assets and impossibility to pay all the creditors of the company.

As an example, the Brazilian Corporate Law sets forth, in its section 116, the definition and the rules of the conduct that shall be observed by the controlling shareholder, and section 117 provides the liability rule applicable to the controlling shareholder. Also, section 153 and following provides the duties of the company's directors and executive officers, and in case of violation of such duties or illegal acts in conducting social businesses, the managers shall be deemed liable for their acts.

So, in principle, if the company's shareholders or managers have contravened one of the sections mentioned above, there is a possibility that the court holds them responsible for certain obligations or acts, even if they are pre-bankruptcy actions.

BRL also predicts that in those cases, a responsibility lawsuit will begin in the Bankruptcy Court, and in this lawsuit, the defendant's assets can be blocked in a compatible amount to the damage caused, until final judgment. The term for the filling of such lawsuit is two years after the decision that ends the forced liquidation proceeding becomes unappealable.

Apart from that, based on section 50 of Brazilian Civil Code, the Court may disregard the company's corporate veil, if it considers that there was an abuse of its legal personality (in case of equity confusion and misuse of purpose). In this case, the shareholders would be considered liable for all the company's debts.

Finally, the public prosecutor may understand that the shareholders, officers or directors committed a bankruptcy crime and file a criminal action, considering that section 179 of the BRL determines that the shareholders, executive officers, directors and counselors will be equivalent to the debtor company for the criminal effects of the BRL. Also, BRL sets out several criminal offences related to bankruptcy, which penalties can vary from one to six years of imprisonment, plus fine.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

The directors' duties do not shift to creditors when a judicial reorganisation proceeding is filed. In the course of judicial reorganisation proceedings, in principle there will be no change in management. Therefore, the managers of the debtor will retain their positions, although working under the supervision of the creditors' committee (if any) and a judicial administrator appointed by the court.

In certain circumstances, however, managers shall be removed from their positions, including when:

- there are indicia of bankruptcy crimes;
- they have acted with willful misconduct or engaged in fraudulent schemes against creditors;
- they have been making personal expenditures that are not compatible with their income; or
- their removal is specified in the reorganisation plan.

When regulating the removal of managers, BRL initially states that they shall be replaced as provided for in the corporate documents of the debtor or in the reorganisation plan. But immediately following this provision, it provides another solution to the same scenario by specifying that the general meeting of creditors shall appoint a judicial manager.

In forced liquidation proceedings, the debtor (either an individual businessperson or a company) is removed from its activities and the existing assets are attached and sold by a judicial administrator (which may continue activities if it is understood by the bankruptcy court to be beneficial for the creditors). Any proceeds derived from the sale of assets are distributed among different creditors according to a preference order established by law. Therefore, the directors are removed and substituted by the judicial administrator.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

Please refer to question 19 above. In judicial reorganisation proceeding, the directors retain their positions and may exercise all powers; however, permanent assets can only be sold with judicial authorisation and credits subject to the proceeding cannot be paid.

In forced liquidation proceedings, the directors are removed from their post and substituted by the judicial administrator; therefore, they have no powers.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?

In judicial reorganisation proceedings, a suspension of 180 days shall apply to all legal proceedings in course against the debtor, in relation to debts that are subjected to the proceeding. Upon the expiry of such term, all creditors regain the right to initiate or proceed with their lawsuits against the debtor. In practice, this term tends to be extended by the Bankruptcy Court. In forced liquidation proceedings, there is also the provision of suspension of all legal proceedings in course against the debtor indefinitely, once all creditors must be paid within the proceeding, in accordance to a legal preference order.

There are two exceptions to the suspension rule: lawsuits where there are no pre-defined amounts being claimed, and labour claims, which shall continue their course in the Labour Court until the applicable labour credits are defined. In these two cases, the competent court may send an order to the court in charge of the restructuring proceedings establishing an estimated amount to be reserved in the names of the relevant creditors. Once such amounts are finally determined, they shall be included as credits in the restructuring proceedings.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities?

The debtor company can carry on its business activities during reorganisation. The sale of permanent assets may only occur if provided in the approved and ratified reorganisation plan or if authorised by the Bankruptcy Court after the debtor company has proven the need of such sale and the creditors' committee (if there is any) has also agreed.

The creditors who supply goods or services to the debtor company after the filing for reorganisation will not be subject to the proceedings and the credits originated after the filing may be enforced, and in case of forced liquidation, will have priority of payment. The creditors, if not in a creditors' committee, have no active role in supervising the debtor's business activities.

23 Post-filing credit

May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is or can be given to such loans or credit?

The company under reorganisation may continue its ordinary activities unless otherwise ordered by the court, which includes obtaining unsecured financing, so the debtor company does not need to obtain any approval towards the court to receive loans. Secured financing need to be judicially authorised if the security is a permanent assets. BRL does not establish any special rights or preferences derived from financing obtained during the course of a judicial reorganisation – in case of forced liquidation, it will be equal to other debts acquired by the debtor company during the reorganisation, although the reorganisation plan may provide some preference to attract potential investors. The type of security granted is very important to determine the rank of the credit related to the new loans.

24 Sale of assets

In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets?

The reorganisation plan may provide for a judicial sale of branches or individual going concerns belonging to the debtor. This also occurs in forced liquidation proceedings. The judicial sale may take the form of an auction, be effected through proposals submitted in sealed envelopes, or be a combination of the former two options.

Once the judicial sale is effected, the relevant branch or going concern will, in principle, be free and clear of any liens and encumbrances, and the purchaser will not succeed the debtor with respect to any indebtedness. As a consequence, creditors will not be able to claim any amount from the purchasers of branches or going concerns, and the corresponding assets will not be attached to satisfy their credits. Therefore, creditors will simply retain their original claims against the debtor.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

BRL does not provide a 'stalking horse' or credit bidding, but these mechanisms have been recently used in sale proceedings, especially if provided in a judicial reorganisation plan and approved by the creditors. Credit bidding may also occur if the credit bidder is an assignee of the original secured creditor and if the amount of the credit is reduced in the amount of the purchase price.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party? What happens if a debtor breaches the contract after the insolvency case is opened?

The debtor company under reorganisation continues its business activities and directors and officers are not removed from their positions, as a rule. Also, BRL has no provision on termination of contracts in case of judicial reorganisation. Therefore, the debtor can reject or disclaim an unfavourable contract, but it must follow the contractual rules regarding the reasons of the rejection and the proceeding for it. If the debtor breaches the contract after the reorganisation is opened, the other party may use the contractual remedies, such as filing a claim and obtaining a credit right, if applicable, and this credit will not be subject to the reorganisation and may be enforced against the debtor company.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

In case of judicial reorganisation proceedings, the IP licensor or the debtor company may only terminate the debtor's right to use it if the contractual provisions allow it to do so, and the contractual provisions and remedies must be observed. Also, the provisions of termination caused solely by the filing of the judicial reorganisation tend to be considered null by Brazilian courts. In a forced liquidation proceeding, the judicial administrator may opt to maintain the agreement if it reduces or avoids the increase of the debts or if it helps to maintain and preserve the debtor company's assets, but it will not be able to terminate the agreement and continue to use the IP for the benefit of the estate.

28 Personal data

Where personal information or customer data collected by a company in liquidation or reorganisation is valuable, are there any restrictions in your country on the use of that information or its transfer to a purchaser?

There is no restriction in BRL about the use of personal information or customer data collected in an insolvency proceeding or the transfer of those information, as an asset, to a purchaser.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Arbitration is not used specifically in insolvency proceedings, but is often used in commercial disputes and claims between parties. The arbitration claims involving the debtor company generally are not suspended in case of judicial reorganisation, because in arbitration commonly there are no pre-defined amounts being claimed (exception for the stay period).

Creditor remedies

30 Creditors' enforcement

Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

Seizure of assets is not possible outside of court proceedings. In case of fiduciary sale of assets, the creditor has the right of repossession of the property in the event of default, through administrative proceedings and after an auction, if no acceptable bids are presented.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

In a judicial reorganisation proceeding, unsecured creditors are a specific class of creditors, and are paid according to the provisions of the approved and ratified reorganisation plan. In a forced liquidation proceeding, unsecured creditors are the sixth in the ranking of creditors for payment purposes, which is applied after the payment of priority creditors.

If there is no insolvency proceeding, unsecured creditors may collect or enforce their credits with different proceedings according to each type of debt instrument. Certain instruments allow the creditor to file an enforcement proceeding, which is less time consuming and provides for the possibility of pre-judgment attachment of assets. Regular collection lawsuits are more time consuming and do not allow pre-judgment attachment of assets. There is the possibility, however, of obtaining temporary restraining orders, if requirements are fulfilled.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are the liquidator's reporting obligations?

The creditors are first notified, through a public notice, about the decision that authorises the processing of the judicial reorganisation or the decision that decrees the forced liquidation, containing the list of creditors presented by the debtor company. After that, they are again notified about the list of creditors presented by the judicial administrator. Then, the creditors will be notified about the presentation of the reorganisation plan, as applicable, and also about any general meeting of creditors that is scheduled. Any and all decisions of the proceedings are also published in the official gazette.

General meetings of creditors may be called upon request of the Bankruptcy Court, the Judicial Administrator, creditors' committee or creditors holding at least 25 per cent of the claims in a determined class of creditors. General meetings of creditors are also called to discuss and vote on the reorganisation plan proposal and in other specific events provided in the BRL.

The judicial administrator has several duties and obligations, both in judicial reorganisations and forced liquidation proceedings, provided in section 22 of BRL, including presenting monthly reports on the debtor company's activities, as well as providing any information requested by the Bankruptcy Court or the creditors.

33 Creditor representation

What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?

BRL contemplates an optional creditors' committee, and must be constituted of one creditor of the labour class, one creditor of the secure class, one creditor of unsecured class and one creditor of the micro businesses class. However, the creditors' committee is rarely constituted in Brazil, as creditors can vote, negotiate and take part in the proceedings even if they are not in the creditors' committee. Additionally, members of the creditors' committee can be held liable for the outcome of the proceedings (even if they do not have an intention to harm third parties, creditors or the debtor company). The expenses of the committee may be paid by the debtor company.

The creditors' committee has the following duties, among others:

- monitor the activities carried out by the debtor and the judicial administrator and present monthly reports about them;
- inform the court in case it detects any violation or harm of the creditors' rights;
- monitor the fulfilment of the restructuring plan; and
- when managers are removed and until the restructuring plan is approved, request court authorisations for sales of assets, borrowings and the creation of security interests to ensure the continuation of business activities.

34 Enforcement of estate's rights

If the liquidator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong? Can they be assigned to a third party?

In a forced liquidation proceeding, creditors may not pursue the estate's remedies, as the judicial administrator represents the bankrupt estate to pursue remedies against third parties. The fruits of the remedies belong to the bankrupt estate and will be used to pay the creditors according to the legal order of payment. In a judicial reorganisation proceeding, there is no bankruptcy estate and the debtor company continues to operate its activities.

35 Claims

How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Can claims for contingent or unliquidated amounts be recognised? Are there provisions on the transfer of claims and must transfers be disclosed? How are the amounts of such claims determined?

In both judicial reorganisation and forced liquidation proceedings, the creditors have the possibility of presenting a statement of credit to the judicial administrator against the first list of creditors presented by the debtor company and published through a public notice, to discuss the amount and classification of its credit. The term for presentation is 15 days. The judicial administrator will analyse the statement of credits and a new list of creditors will be published.

Then, the creditors have the possibility of presenting a proof of claim to the Bankruptcy Court in 10 days that will analyse such claims and decide on the definite amount and classification of the credits. If the creditors do not present the statement of credit in due term, it will be considered a late statement of credit and be processed as a proof of claim. The creditor may present an interlocutory appeal against the judicial decision of its proof of claim. The transfer of claims is possible and must follow the requirements of the Brazilian Civil Code, including the claim for contingent or unliquidated amounts, which will be determined in specific lawsuits.

36 Set-off and netting

To what extent may creditors exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

The credits that are submitted to the reorganisation proceeding cannot, in principle, be offset with credits of the debtor company, once that, according to the Brazilian Civil Code, the offset is a way of extinction (payment) of debts, and according to BRL, no creditor can be paid to the detriment of other creditors that are also submitted to the proceeding; this can even be considered a bankruptcy crime. On the other hand, in a reorganisation proceeding, credits that are not submitted to the proceeding may be, as a rule, offset.

In a forced liquidation proceeding, the offset is possible. The debts that can be offset are the ones owed by the debtor company until the date of the judicial decree of the forced liquidation, and the Brazilian Civil Code must be followed for carrying out such offset. However, the offset is not possible with debts existing after the decree of the forced liquidation (with exception of cases of merger, incorporation, split or death), and with credits that were transferred when the insolvency situation was already known or related to fraud or intention to harm. Generally, under a forced liquidation proceeding, the offset of debts does not require court approval.

37 Modifying creditors' rights

May the court change the rank (priority) of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

In terms of a forced liquidation proceeding, the court may not change the rank of a creditor's claim, as such rank is determined by BRL. In case of a judicial reorganisation proceeding, there is no rank of claims, but classes of creditors that will be paid according to the provisions of the approved and ratified judicial reorganisation plan.

38 Priority claims

Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?

In judicial reorganisation proceedings, there is no other privileged or priority claims, considering that all credits subject to the proceeding will be paid according to the provisions of the approved and judicially reorganisation plan.

In forced liquidation proceedings, credits secured by fiduciary transfer of assets and credits derived from business with the debtor companies after the request for judicial reorganisation may be considered privileged, considering they will be paid before the creditors in the rank of payment. In the rank of payment, only employee-related claims have priority over creditors secured by mortgage or pledge. Also, please refer to question 43.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

There is no specific provision in BRL regarding termination of employment agreements. In the judicial restructuring proceeding, considering that the debtor company continues to practice its business activities, the employments agreements remain in force and may be terminated by the regular legal hypotheses (dismissal with just cause, dismissal without cause, employee's resignation and indirect dismissal). In case of forced liquidation proceeding, with the sale of the debtor company's assets, all employment agreements of the encompassed employees will be automatically terminated and new agreements must be entered into with the purchaser, if the purchaser has such intention.

40 Pension claims

What remedies exist for pension-related claims against employers in insolvency or reorganisation proceedings and what priorities attach to such claims?

In Brazil, entities that must pay pension-related claims, such as the government and financial institution, are not allowed to file reorganisations and may not be liquidated under BRL.

41 Environmental problems and liabilities

Where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Environmental problems are not subject to reorganisation proceedings and must be dealt with directly by the debtor company, that is not exempt from its environmental obligations of controlling and remediating damaged caused. Environmental liabilities of shareholders, directors, officers and third parties will be determined by specific environmental laws, with no possibility of being imposed on creditors.

42 Liabilities that survive insolvency or reorganisation proceedings

Do any liabilities of a debtor survive an insolvency or a reorganisation?

In a judicial reorganisation proceeding, any credit that exists on the date of filing, even if it has not matured, is covered by the proceeding and cannot be enforced by the creditor within the stay period. However, some specific types of credits are excluded from proceedings and may be immediately enforced upon; this means that these liabilities remain intact. The credits are: tax credits, creditors with title to assets and foreign exchange advancements credits. Credits that are subject to the proceeding will be paid according to the reorganisation plan and are due until its payment. If not paid in due time while the proceeding is still running, it may cause the decree of forced liquidation; if not paid in due time after the end of the proceeding, the credit may be enforced.

In forced liquidation proceedings, only credits secured by fiduciary sale of assets are excluded from the proceeding – they must, however, file a request for restitution in the proceeding to repossess the assets given in guarantee and that does not belong to the debtor company anymore. All the debtor company's obligations will be considered extinguished if it is able to pay all of its debts, if it is able to pay up to 50 per cent of its unsecured debts, after five years from the end of the proceeding, or after 10 years of the end of the proceeding if there was any conviction for a bankruptcy crime.

The reorganisation plan presented by a debtor company may provide for a judicial sale of branches or business units belonging to the debtor, which can also occur in a forced liquidation proceeding.

A judicial sale, according to section 1425 of the BRL, may: take the form of an auction; be effected through proposals submitted in sealed envelopes; or be a combination of these two options.

Once a judicial sale is effected, the relevant branch or business unit will be free and clear of any liens and encumbrances, and the purchaser will not succeed to the debtor with respect to any indebtedness. As a consequence, the creditors of the debtor company are not able to claim any amounts from the purchasers of branches or business units, and the corresponding assets cannot be enforced upon to satisfy the debt.

43 Distributions

How and when are distributions made to creditors in liquidations and reorganisations?

In reorganisation proceedings, creditors that are subject to those proceedings will be paid according to the approved and ratified reorganisation plan. In the forced liquidation proceeding, creditors will be paid with the proceeds of the sale of the debtor company's assets according to the legal order of payment, below:

- labour claims of up to 150 times the prevailing minimum wage for each creditor, and claims deriving from accidents at work;
- secured credits up to the value of the relevant collateral;
- tax debts;
- credits with special privileges;
- credits with general privileges;
- unsecured credits;
- contractual penalties, tax penalties and fines deriving from violations of legal provisions; and
- subordinated credits (as considered by law or agreement, and shareholders' and certain managers' credits).

Some credits should be prioritised and paid before all of those mentioned above, in the order set forth below:

- the compensation payable to the trustee and his or her assistants, and labour-related claims or occupational accident claims referring to services rendered after the decree of the forced liquidation;
- sums provided to the bankruptcy estate by the creditors;
- expenses with schedules, management, asset sale and distribution of the proceeds, as well as court costs of the forced liquidation proceedings;
- court costs with respect to actions and enforcement suits found against the bankruptcy estate; and
- obligations resulting from valid legal acts performed and contracts agreed during the judicial restructuring proceeding, such as loans and continuity of supply, or after the decree of the forced liquidation, and taxes relating to triggering events postdating the decree of the forced liquidation.

In addition, if the debtor is in possession of assets (including money) that belong to third parties at the time the forced liquidation is decreed (by a leasing or fiduciary sale agreement or advance of foreign exchange currency agreement, for example), rightful owners may request restitution of their assets before the payment of any creditor, which may be understood also as a priority over the order of preference of BRL. This is the case because such assets (which may include money) are understood by law and case law to not belong to the debtor, and, therefore, cannot be included as part of the bankruptcy estate.

Security

44 Secured lending and credit (immoveables)

What principal types of security are taken on immoveable (real) property?

The two main types of security taken on immoveable (real) property are mortgage and fiduciary transfer of assets. In case of a mortgage, the debtor maintains the property of the asset and will only lose it if

the credit is enforced and the asset is sold in a judicial auction or adjudicated by the creditor. In case of fiduciary transfer, the property is transferred to the creditor and it has the right of repossession of the property in the event of default. Both securities must be duly registered and give the creditor special treatment in case of judicial reorganisation or forced liquidation proceedings.

In a judicial reorganisation proceeding, creditors secured by mortgage or pledge are a specific class of creditors and will be paid according to the provisions of the approved and ratified reorganisation plan; and in a forced liquidation proceeding these creditors are the second in the ranking of creditors for payment purposes, which is applied after the payment of priority creditors. Credits secured by fiduciary transfer of assets are not subject to judicial reorganisation or forced liquidation proceedings, meaning that they may enforce the respective contracts and securities even if the debtor company is facing an insolvency proceeding.

45 Secured lending and credit (moveables)

What principal types of security are taken on moveable (personal) property?

The two main types of security taken on moveable (personal) property are pledge and fiduciary transfer of assets. In case of a pledge, the debtor maintains the property of the asset and will only lose it if the credit is enforced and the asset is sold in a judicial auction or adjudicated by the creditor. In case of fiduciary transfer, the property is transferred to the creditor and it has the right of repossession of the property in the event of default. These securities also give the creditor special treatment in case of judicial reorganisation or forced liquidation proceedings.

In a judicial reorganisation proceeding, creditors secured by mortgage or pledge are a specific class of creditor and will be paid according to the provisions of the approved and ratified reorganisation plan; and in a forced liquidation proceeding these creditors are the second in the ranking of creditors for payment purposes, which is applied after the payment of priority creditors. Credits secured by fiduciary transfer of assets are not subject to judicial reorganisation or forced liquidation proceedings, meaning that they may enforce the respective contracts and securities even if the debtor company is facing an insolvency proceeding.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

BRL contains a list of actions that shall produce no effects with respect to the bankruptcy estate, regardless of whether the parties were aware of the financial difficulties facing the debtor or whether there was any fraudulent intent. Such actions are deemed incompatible with the reasoning underlying the BRL. Accordingly, they may be disregarded automatically by the court or at the request of any interested party.

Actions considered ineffective include, for instance:

- payment of unmatured debts during the suspect period;
- payment of overdue debts effected during the suspect period in a manner that is different from what was established in the original agreement;
- the creation of security interests during the suspect period to secure payment of pre-existing indebtedness; and
- donations and other equivalent actions effected within the period of two years preceding the forced liquidation.

In addition to those actions deemed automatically ineffective, any action aimed at intentionally defrauding creditors may be revoked. In this case, however, the party seeking the revocation must prove, in a separate lawsuit, that there was a fraudulent scheme arranged between the debtor and a third party, and that the bankruptcy estate actually suffered damages as a result of such scheme.

The bankruptcy legal term, also known as the 'suspect period' or 'look back period', shall be set by the court upon the declaration of forced liquidation. It may retroact until 90 days before the forced liquidation request, the application for judicial restructuring later converted into forced liquidation or the first protest for non-payment lodged against the debtor.

Regarding reorganisation proceedings, there are no specific provisions under BRL to nullify or void certain acts of the debtor. However, creditors may opt to file lawsuits to nullify or void these acts in accordance with the Brazilian Civil Code and Code of Civil Procedure.

Update and trends

The current economic and political crisis in Brazil, the volatility in the global market and the rise in corporate restructurings have had no impact on Brazil's insolvency regime so far – only in the increase of the requests for judicial and out-of-court restructurings, due to the financial crisis the companies are going through.

However, these events have had significant impact on the analysis made by the courts when judging appeals related to insolvency proceedings, with stricter control over the companies and higher interference in the commercial relations of the debtor companies.

There are several legislative bills and studies on course for major alterations of the BRL, to adjust its provisions to the current – and future – Brazilian political and economic scenario. The main one is being coordinated by the Ministry of Treasury and seeks to bring more protection for investing creditors.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

In judicial reorganisation proceedings, insider claims of the debtor company's shareholders or parent, subsidiary or affiliate company will be ranked as unsecured and do not have voting rights in the general meeting of creditors. In forced liquidation proceedings, insider claims are classified as subordinated claims, which are the last in the legal order of payment.

Groups of companies

48 Groups of companies

In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?

The filing of an insolvency proceeding does not have a direct impact on a parent, subsidiary or an affiliate company of the debtor, once only the company which makes the request is considered under reorganisation or forced liquidation. However, parent, subsidiary or affiliated companies may be held responsible for the debtor company's liabilities in case of recognition of economic group and piercing of the corporate veil. The essential requirements are: abuse of the corporate veil, with deviation of the company's purpose or assets confusion between the companies. In each concrete case, the judge will analyse the presence of such requirements – these requirements are more objective than just 'fraud' or 'abuse', but the decision by the court remains very subjective.

The distribution of group company assets pro rata without regard to the assets of the individual corporate entities involved may be determined; it is called substantial consolidation and it is very common in recent judicial reorganisation proceedings.

49 Combining parent and subsidiary proceedings

In proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes?

The filing of an insolvency proceeding does not have a direct impact on a parent, subsidiary or an affiliate company of the debtor, once only the company that makes the request is considered under reorganisation or forced liquidation. There are grounds for procedurally consolidating insolvency proceedings involving related parties – it is actually common for companies of the same economic group filing together for reorganisation, and is commonly accepted by courts. However, there is case law discussion about substantively consolidating insolvency proceedings – if the reorganisation plan should or could or not be the same

– and each court has its own understanding on the matter. There is no provision under the BRL addressing the transferring of assets between countries.

International cases

50 Recognition of foreign judgments

Are foreign judgments or orders recognised and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments?

Brazil is not signatory to a treaty on international insolvency or on the recognition of foreign judgments. There are, however, provisions in Brazil that allow recognition and enforcement of foreign decisions (interlocutory or final) by the Superior Court of Justice, once legal requirements are fulfilled, but not recognition of processes themselves. The decision must be in compliance with Brazilian public policy, sovereignty and principles of morality, such as human dignity, and some formalities must be observed, such as sworn translation of the decision and notarisation or consularisation of signatures. Also, there must be an identified counterparty, that has the right to present a defence.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Brazil has not adopted the UNCITRAL Model Law or any other treaty related to cross-border or multi-jurisdictional insolvency proceedings.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

Foreign creditors are dealt with in insolvency proceedings just like Brazilian creditors, however, their corporate documents and signatures in Brazilian documents, such as power of attorneys, must be notarised, consularised and translated by a sworn translator.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

There is no provision under BRL addressing the transferring of assets between countries.

54 COMI

What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?

As already mentioned, the competent court to ratify out-of-court reorganisation plans, grant judicial reorganisation proceedings and decree the forced liquidation of a company is the court where the main establishment of the company is located. Thus, in Brazil there is no specific concept of COMI, only a reference to 'main establishment'. When interpreting this concept, the majority of scholars and court precedents indicate that the location where the company has its registered office or major office is not important, but rather the location that concentrates the centre of management or main activities of the company. It is, therefore, an economic test.

55 Cross-border cooperation

Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognise foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?

BRL, or any other Brazilian laws, do not contain any specific rules dealing with extraterritorial bankruptcy or insolvency proceedings or provisions regarding the recognition of other countries' statutory processes, unlike Chapter 15 of the US Bankruptcy Code, for example. In fact, bankruptcy and restructuring proceedings involving Brazilian companies, with their centre of main interest in Brazil, must necessarily be administered by a Brazilian court. As a result, any effects and consequences of possible ancillary or parallel proceedings in foreign jurisdictions will have to be dealt with on a case-by-case basis, subject to applicable conflicts of law provisions in cross-border matters. The cases in which foreign companies (with no subsidiaries in Brazil) have had insolvency proceedings accepted by Brazilian bankruptcy courts are specifically related to companies that are part of Brazilian economic groups, established in other countries just for investment purposes, with no operation abroad.

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56 Cross-border insolvency protocols and joint court hearings

In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

Please refer to question 55. Also, some Brazilian companies that entered into a judicial reorganisation proceeding according to Brazilian legislation have also entered into Chapter 15 proceedings in the United States, but the communication of such fact in Brazilian courts usually occurs through the debtor company itself.

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