CHANGES AND CONVERGENCE OF BANKRUPTCY LAW: RECENT EXPERIENCE IN BRAZIL

ABSTRACT: *Bankruptcy regimes across the globe have been constantly changing in response to new market demands and the evolution of insolvency law principles and objectives. Part of the academic community argues that such changes may lead to a convergence of domestic bankruptcy laws, as a result of globalization and market integration. Scholars have reviewed the phenomena of changes and convergence of bankruptcy laws in Europe, East Asia and Africa. However, little attention has been given to Latin American countries, such as Brazil. This paper aims at contributing to the discussion on changes and convergence of bankruptcy law, by focusing on four recent experiences within the Brazilian legal system. This paper concludes that there are indicia of a continuous convergence of Brazilian bankruptcy law with foreign and international norms, as changes in Brazilian bankruptcy law have increasingly mirrored the law and practice of certain metropolitan nations, as well as global norms and soft laws developed by international organizations and standard setting bodies. This paper further discusses the diverse array of processes through which convergence has taken place in Brazilian bankruptcy law, as well as the main driving forces underlying this convergence, such as the increasing influence of cross-border investments and international market players.*

TABLE OF CONTENTS

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INTRODUCTION

Although bankruptcy law is known to be as old as the existence of debt,[1] its principles, goals, and rules have not remained static over time. Bankruptcy regimes have changed dramatically since their first codifications, in order to conform with new market demands, creditor-debtor arrangements, and the role of enterprises. More recently, in view of an increasing volume of cross-border transactions, these drivers for change in bankruptcy systems have shared a certain degree of similarity across the globe, thus fostering similar changes in local bankruptcy laws to address similar demands.[2] A closer look at these changes, however, is necessary to investigate the process through which bankruptcy laws have been changing, to which direction domestic bankruptcy laws have been heading, and, in this regard, whether such routes of changes have been leading domestic bankruptcy laws to the same (or at least close) destinations.

Part of the academic community has advanced the idea that domestic corporate laws tend to converge over time, as a result of, *inter alia*, a Darwinist process that selects the most effective rules to deal with current issues in a globalized society.[3] An evidence of such convergence theory in the bankruptcy setting may well be the law reforms undergone over the last decades by several nations, which shifted their bankruptcy laws away from a punitive system towards the insolvent debtor, to a bankruptcy regime aimed at preserving the debtor's viable businesses.[4] These reforms towards convergence can be implemented through a diverse array of processes, and several actors can play a major role on advancing bankruptcy standards and patterns of change. Legal implants are known to be the process that is often applied when it comes to convergence of laws, as many nations may have incentives to borrow legal frameworks from jurisdictions that have already experienced peaks of their institutional learning curve.[5] In addition, the rise of global initiatives to shape

[1] Thomas H. Jackson, *Logic and the Limits of Bankruptcy Law* 1 (2001), and sources cited therein.

[2] *See, e.g.*, Patrick E. Mears & Sujal Pandya, *Convergence in National and International Insolvency Laws since 2002*, 7 Insolvency & Restructuring INT'l 12 (2013), and sources cited therein, including Christoph Paulus, *Comparison of National and International Insolvency Law: A Story of Success* (When citing Prof. Christoph Paulus, the authors point out that "Professor Paulus offers a series of specific observations about the then existing trend in insolvency law that, as he noted, had 'in the last few years.... moved in a remarkable way into the center of general interest and, in doing so, has become the object of studies about comparative which only ten years ago would not have been thought possible'. According to Paulus, insolvency law worldwide had received 'a push...that had led to a worldwide convergence in this field of law today'.").

[3] *See* Katharina Pistor, *Patterns of Legal Change: Shareholders and Creditor Rights in Transition Economies* 3-6 (Columbia Law School, Working Paper, 2000), and sources cited therein. *See also* Henry Hansmann & Reiner Kraakman, *The End of History for Corporate Law*, *in* Jeffrey N. Gordon & Mark Roe, Convergence and Persistence in Corporate Governance 33-68 (Cambridge University Press, 2004). *See also* Ronald J. Gilson, *Globalizing corporate governance: convergence of form or function*, in Jeffrey N. Gordon & Mark Roe, Convergence and Persistence in Corporate Governance 128-160 (Cambridge University Press, 2004).

[4] *See, e.g.*, Patrick E. Mears & Sujal Pandya, *supra* note 2.

[5] *See* Martin Gelter & Geneviève Helleringer, *Opportunity Makes a Thief: Corporate Opportunities as Legal Transplant and Convergence in Corporate Law* 102-105 (ECGI Working Paper Series in Law, Working Paper No. 378/2017, 2021).

corporate governance arrangements led by international organizations, such as publications of model laws and legal directives, have also prompted the academia to consider the rise of a purportedly global corporate law, characterized by the adoption of uniform standards of law across the globe.[6]

A related sociological theory has reviewed the topic of changes in bankruptcy laws through so-called recursivity cycles, whereby bankruptcy law reforms are prompted by domestic forces and international initiatives in a recursive way.[7] According to this theory, scholars, lawmakers, international organizations, bankruptcy practitioners and other relevant players may drive changes in bankruptcy at national and international levels, which affect domestic lawmaking and global norm making processes, thus leading to more uniform bankruptcy laws around the world.[8] Some case studies on the application of such recursivity cycles and potential convergence of bankruptcy laws have been published with respect to countries in East Asia[9] and Africa,[10] but little attention has been given to South America countries, including Brazil.

In this regard, this paper aims at contributing to the discussion on convergence of bankruptcy laws by reviewing recent experiences of changes in Brazilian bankruptcy law and practice. Since the enactment of Law No. 11,101 in February of 2005 (the "Brazilian Bankruptcy Act"), Brazilian bankruptcy law has shared similar principles, concepts, protections and mechanisms with the U.S. Bankruptcy Code and soft laws created by international organizations, thus bringing Brazilian bankruptcy law closer to such foreign and global standards. These include the promotion of a coordinated negotiation between debtor and creditors, resulting in the deliberation and eventual confirmation of a plan of reorganization, which is negotiated under the stay of enforcement actions against the debtor and the supervision of a bankruptcy court. Over the last years, several bankruptcy cases have tested Brazilian Bankruptcy Law in practice under this new legal framework. The application of the law on the book has led to a substantial evolvement of Brazilian bankruptcy law and practice. Such evolvement has been generally achieved as a response to incompleteness or contradictions in the law on the book faced by bankruptcy practitioners, judges, scholars and market players. In many instances, such responses continued to mirror foreign and international standards, thus approaching even more the Brazilian bankruptcy law with foreign and international norms. Although the proposition that recent changes in Brazilian bankruptcy law have led to a convergence with foreign and

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[6] Mariana Pargendler, *The Rise of International Corporate Law* (ECGI Working Paper Series in Law, Working Paper No. 555/2020, 2020).

[7] Terence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, AJS Volume 112 Number 4 (January 2007): 1135–1202.

[8] *See id*.

[9] *See id* at 1154-1171.

[10] Damiola Odetola, *Contesting the Trend Towards the Globalisation of Laws in Corporate Bankruptcy: The Experience in Africa* (2018) (unpublished manuscript) (on file with International Insolvency Institute).

international standards may sound natural do Brazilian practitioners, this topic has not yet been the focus of a comprehensive study by the academia.

In view of this, the purpose of this paper is to assess whether Brazilian bankruptcy law and practice have been continuously converging with foreign and international standards since the enactment of the Brazilian Bankruptcy Act, as a result of the influence of the law and practice of metropolitan nations, international organizations and standard setting bodies. By reviewing four recent changes in Brazilian bankruptcy law and practice, this qualitative research aims at clarifying (i) the main actors that have influenced on legal changes, (ii) the foreign and/or international legal standards that Brazilian bankruptcy law and practice have been mirroring and converging, and (iii) the process and the means according to which these changes have been implemented into Brazilian bankruptcy law and practice. This research does not aim at discussing the alleged advantages or disadvantages of each of these changes, neither does it aim at rejecting any parallel movement of divergence in Brazilian bankruptcy law. The cases reviewed in this study are presented with the purpose of exemplifying convergence of Brazilian bankruptcy law with foreign and international standards.

Chapter I provides an overview of the academic debate on changes of laws, by summarizing the views of the academia on the path-dependence (or divergence) and convergence theories. Chapter I also discusses the main legal processes through which convergence can be implemented, notably by the legal transplant and the legal implant phenomena, with a focus on convergence of domestic bankruptcy laws. A summary of recent findings of the academia on the purportedly rise of an international corporate law, as well as the recursivity cycles that have explained changes in bankruptcy laws, is also provided.

Chapter II provides a general overview of the Brazilian bankruptcy law and its development over the last years. In this regard, this paper summarizes the main aspects of the bankruptcy procedures provided under the Brazilian Bankruptcy Act, as well as recent developments in Brazilian bankruptcy practice, including the influence of foreign market players and foreign practitioners on recent restructuring transactions.

Finally, Chapter III presents four cases of convergence of Brazilian bankruptcy law and practice with foreign and international standards, notably the mechanism of bondholders' votes in restructuring procedures, creditors' ability to propose a competing plan of reorganization, rules governing pre-insolvency workouts, and the adoption of the UNCITRAL Model Law on Cross-Border Insolvency into the Brazilian Bankruptcy Act. These cases illustrate a variety of ways through which changes and convergence have been implemented into Brazilian bankruptcy law, as well as the main actors involved in each of these changes, and the main sources of change.

I. THEORETICAL OVERVIEW

This chapter aims at presenting the necessary academic foundations to clarify how, and to what direction, bankruptcy law has been changing over time. In this regard, this chapter consolidates relevant legal theories and the academic discussion on divergence and convergence of corporate governance law, the phenomenon of legal transplants, the rise of international corporate law, and legal implants of international patterns into domestic law. The purpose of this chapter is not to provide an exhaustive summary of the academic work on such topics, but rather to provide the reader with the necessary academic foundations on which the findings of this paper rely.

a. Path-dependence and convergence theories

Today, virtually every nation has a body of rules that govern and shape market players' behaviors by incentivizing, restraining or simply coordinating conducts among social agents.[11] As societies progress and new investment designs arise, such rules tend to change, in an attempt to address new values and market concerns. Corporate and private law, therefore, are a fluid science that is in constant change either as a response to new demands, or as a tool for incentivizing or discouraging new (in)appropriate conducts.

Academic scholarship on comparative and corporate law has recently studied the phenomenon of changes in corporate laws, especially as regards to the direction that domestic corporate laws are heading to, and whether domestic corporate laws tend to diverge or converge over time. In this regard, some authors support the so-called path-dependence theory (also known as the persistence theory), which suggests that domestic legal regimes tend to diverge, as a result of historical differences in socioeconomic characteristics of their respective countries,[12] including differences in corporate ownership structures.[13] This view further proposes that internal characteristics of a nation at a certain point in time may continue to exercise influence on the path of legal change in such jurisdiction, even though economies, business practices and living standards in different countries have converged as a result of globalization.[14] Therefore, according to this view, even though market integration may exercise a natural influence on the convergence of corporate law, institutional constraints or political conditions may prevent a formal corporate law uniformization.[15]

An opposite view, however, supports the theory that globalization and recent market integration have driven convergence of corporate domestic laws towards a uniform pattern. Hansmann and Kraakman propose that standard legal models have been adopted in different jurisdictions either because of logic (that is, because of a consensus among

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[11] *See generally* Gillian K. Hadfield & Barry R. Weingast, *What Is Law - A Coordination Model of the Characteristics of Legal Order*, 4 J. LEGAL Analysis 471 (2012).

[12] Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance* 127-170 (Stanford Law Review, Nov., 1999, Vol. 52, No. 1) (Nov., 1999).

[13] *Id.* at 139-153.

[14] Katharina Pistor 3-4, *supra* note 3 ("Proponents of the divergence, or path dependence, hypothesis argue that even if the corporate law was harmonised across countries, other legal rules (tax laws, codetermination legislation etc.) and institutional constraints (financial structure, existing ownership structure of firms), or simply political considerations would stand in the way of convergence").

[15] Lucian Arye Bebchuk & Mark J. Roe, *supra* note 12.

scholars and commentators in law that such model is more effective than its alternatives), because of example (that is, because predominant economies adopt such model) or because of competition (that is, because the most efficient model supersedes less efficient ones).[16] In this regard, cross-border investments, the integration and influence of foreign advisors and practitioners, and the work of international organization and standard setting bodies have played an important role on the convergence of corporate law, including with respect to the laws of emerging economies.[17] [18]

On this topic, Gilson has classified the convergence of corporate law into functional, formal and contractual convergence. Functional convergence occurs when legal practitioners apply globalized or foreign rules of corporate law into domestic law without formally undergoing a law reform process, as existing institutions are flexible enough to accommodate such globalized or foreign standards;[19] this would be the case if a jurisdiction does not have formal rules governing the bankruptcy of enterprise groups, but courts adopt badges and criteria used in foreign law to respond to internal needs. Formal convergence occurs when a formal law reform is required in order for a foreign standard to be applied in a certain jurisdiction;[20] this would be the case, for example, if lawmakers have to amend an existing bankruptcy act to add rules on cross-border insolvency, assuming that, without such amendment, courts would not have legal grounds to deal with the recognition of a foreign main insolvency proceeding within its jurisdiction. Finally, contractual convergence occurs when globalized or foreign rules are embedded into contracts, as existing institutions require a certain degree of formality in order to accommodate such rules, but political circumstances prevent a formal legal reform;[21] this would be the case, for example, if creditors and debtors agree to implement standards of the U.S. Chapter 11 absolute priority rule into foreign plans of reorganization, even though local bankruptcy law does not formally provide for an absolute priority rule, but does not prohibit it either.

b. Legal transplants and legal implants as a means to achieve convergence

Convergence of corporate law can be achieved through different processes. The main process investigated by academic scholarship is the legal transplant of a certain law

[16] Henry Hansmann & Reiner Kraakman 45-48, *supra* note 3.

[17] *See* Mariana Pargendler, *Corporate governance in emerging markets*, Oxford Handbook of Corporate Law and Governance (Jeffrey N. Gordon & Wolf-Georg Ringe eds.), Forthcoming, FGV Direito SP Research Paper Series No.17.

[18] The trend of convergence of corporate law reached its peak in the 1990s and the early 2000s, when European nations were influenced by the corporate governance movement and enacted laws intended to appeal the interests of shareholders. *See* Martin Gelter & Genevieve Helleringer 99, *supra* note 5.

[19] Ronald J. Gilson 137-140, *supra* note 3.

[20] *Id.* at 142-146.

[21] *Id.* at 146-151.

from one jurisdiction to another. [22] While certain laws are created and developed through an organic and internal political process, driven by demands of original social interactions and institutional needs, others are imported from foreign jurisdictions. In this regard, a legal transplant occurs when a nation borrows a legal regime from a jurisdiction where such legal regime has been originally created. [23] Thus, to a certain extent, legal transplant repels the theory according to which the law of each nation should be specifically designed according to such nation's particularities, such as government, history and culture.[24] Instead, legal transplant aims at quickly giving the importing jurisdiction a quasi-off-the-shelf model to deal with local demands, thus avoiding the costs and burden of creating an original legal regime. This is the case, for instance, of jurisdictions that underwent major bankruptcy law reforms, and imported patterns and rules from jurisdictions where a mature bankruptcy system had already been established, such as the U.S. Bankruptcy Code.

Legal transplants are known to exist since the existence of law.[25] Historically, although some legal regimes have been easily transplanted on the book,[26] empirical data shows that there are numerous variants at play that may determine the effectiveness of legal transplantation in practice.[27] Empirical research shows that a legal regime tends to be more effective in countries where such legal regime has been developed internally through a "learning through practice" process, as a result of the influence of legal advisors, lawmakers and other interested parties.[28] In this regard, nations that have created their laws internally (origin countries) are expected to develop more effective institutions, as their

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[22] Academic scholarship does not usually address the intersection between legal transplant (which is the focus of comparative law studies) and convergence of law (which is the focus of corporate law studies). In this paper, we support the idea that legal transplants are one of the processes through which convergence of corporate law is achieved. This view is consistent with the idea advanced by Gelter and Helleringer. *See* Martin Gelter & Genevieve Helleringer 102, *supra* note 5.

[23] *See* Alan Watson, *Legal Transplants: An Approach to Comparative Law* (1974), University of Georgia Press. *See also* John W. Cairns, *Watson, Walton, and the History of Legal Transplants*. 41 Ga. J. Int'l & Comp. L. 637.

[24] This theory has been sustained by Montesquieu in "L'Esprit des Lois" (1748), who advanced the idea that it was wrong to import foreign laws into borrowing jurisdictions. *See* Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, *The Transplant Effect*, The American Journal of Comparative Law, Winter, 2003, Vol. 51, No. 1 (Winter, 2003) 163-203.

[25] Alan Watson, *supra* note 23. In particular, a major legal transplant movement occurred in the nineteenth and early twentieth century, when European law has been exported to nations in North America, Latin America, Asia and Africa. *See* Daniel Berkowitz et. al., *supra* note 24.

[26] *See* John W. Cairns 640, *supra* note 23.

[27] *See* La Porta, et al., *Law and Finance*, JPE 106.6 (1998): 1113-1155. *See also* Daniel Berkowitz et. al., *supra* note 24.

[28] *See* Daniel Berkowitz et. al. 189, *supra* note 24 ("Where law develops internally through a process of trial and error, innovation and correction, and with the participation and involvement of users of the law, legal professionals and other interested parties, legal institutions tend to be highly effective. By contrast, where foreign law is imposed and legal evolution is external rather than internal, legal institutions tend to be much weak").

laws were tailor-made in response to particular socioeconomic needs and demands. By contrast, nations that have imported foreign laws (borrowing countries) tend to develop less efficient institutions, as the meaning of such laws may not suit their socioeconomic conditions. In these cases, borrowed laws are either not applied, or applied with an intent that is different from the intent for which it has been created in the origin country.[29]

In certain cases, legal transplants are accompanied by relevant adaptions to reflect the borrowing country's socioeconomic reality and demands. Changes to the borrowed law often show that lawmakers have taken domestic legal practice into consideration when enacting the borrowed law, in an attempt to increase its receptiveness and effectiveness. Berkowitz, Pistor and Richard have provided empirical evidence that countries that have made appropriate adaptations to the transplanted law in order to conform with their domestic reality, or that have historical ties with the respective origin country, tend to develop more effective institutions than countries that have not implemented changes to the transplanted law, or that do not have historical ties with the origin country.[30] This supports the idea that legal transplants, if accompanied by the appropriate internal adaptions to reflect the borrowing nation's socioeconomic demands, can be an effective tool to provide borrowing countries with optimally designed institutions. In particular, effectiveness through legal transplant can be achieved in cases where legal practice fosters an internal development and adaption of such law, in a way to conform the transplanted law with domestic conditions.[31]

On a related approach, academic scholarship has also investigated an additional phenomenon that entails convergence of corporate law, named as legal implant. This theory shifts the focus away from a comparative law perspective (that is, the idea that laws from one jurisdiction are transplanted into another) to an approach where international organizations and standard setting bodies are original drivers of changes in corporate domestic laws. Pargendler points out that efforts from the International Monetary Fund, the World Bank, the United Nations and other international organizations have sought to promote coordination and convergence of domestic corporate laws, shaping what it is called as the international corporate law. Therefore, this theory proposes that the adoption of foreign law into another jurisdiction is not the only way through which domestic laws

[29] This is called by Berkowitz, Pistor and Richard as the transplant effect ("We propose that countries that have developed their formal legal order internally have a comparative advantage in developing effective legal institutions over countries on which a foreign formal legal order was imposed externally. Internal development can take advantage of new solutions economic agents develop in response to new challenges and existing constraints"). *See* Daniel Berkowitz et. al. 170, *supra* note 24.

[30] *See* Martin Gelter & Genevieve Helleringer 105, *supra* note 5 ("A legal transplant cannot be expected to engineer a solution fully compatible with the host jurisdiction. It should be expected to take on a life of its own in its new host, in the form of a legal irritant interacting with the local legal culture. Hence, the fact that French or German solutions do not exactly follow an identified model does not mean that they cannot result from an importation. On the contrary, adaptation provides evidence for successful importation, as the debate on transplant strategy shows").

[31] *See* Daniel Berkowitz et. al., *supra* note 24.

are converged. Instead, the work of relevant international players set the trend of internal legal changes, leading to more unified legal regimes across the globe.[32]

c. *Creation, changes and convergence of bankruptcy law*

Academic scholarship on sociology has advanced the theory that the influence of international organizations and standard setting bodies on changes of domestic bankruptcy laws, along with political internal processes, have led to convergence of insolvency regimes around the world. Halliday and Carruthers propose that the convergence of domestic bankruptcy laws towards similar global patterns is driven by recursivity cycles that involves both domestic lawmaking and global norm making.[33] At the national level, an internal recursivity cycle occurs when practitioners, scholars or local institutions encounter a contradiction, incompleteness or tension in existing bankruptcy law, and such contradiction, incompleteness or tension trigger political efforts to carry out a bankruptcy law reform that amends statutes or changes case law, thus settling the respective contradiction, incompleteness or tension.[34] Such changes are often triggered by a specific event, such as a crisis or a relevant experience in legal practice.[35] At the international level, a recursivity cycle occurs when patterns in domestic bankruptcy laws (originally created through an internal recursivity cycle) prompt international organizations, government representatives, business groups, corporations, association of professionals, among others, to influence on and persuade nations to adopt such patterns of bankruptcy law into their jurisdiction. Such influence and persuasion can be exercised through many different ways, such as the publication of recommendations, model laws, nations' meetings and economic coercion.[36]

Recursivity cycles at national and international levels are connected to each other, since internal law reforms can prompt the actors at the international level to influence and persuade other countries to adopt same domestic legal patterns. Also, influence and persuasion by international actors can prompt national practitioners and lawmakers to implement law reforms at the domestic level. In this regard, Halliday and Carruthers account that convergence of bankruptcy law is ultimately driven by (i) national recursivity cycles of lawmaking and legal practice, (ii) iterative cycles of norm making at the international setting, and (iii) the intersection of the national and the international cycles, where national lawmaking influences international norm making, and vice versa.[37]

Five actors have been identified by Halliday and Carruthers as the main drivers for global norm making at the international setting. Firstly, *clubs of nations*, such as the G7,

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[32] *See* Mariana Pargendler, *supra* note 6.

[33] *See* Terence C. Halliday & Bruce G. Carruthers 1146-1153, *supra* note 7.

[34] *Id*.

[35] *Id.*

[36] *Id.*

[37] *Id.*

G22 and the Organization for Economic Cooperation and Development ("OECD") have played an important role on conveying to representatives of world leading economies the importance of adopting robust insolvency regimes.[38] In 1998, the G22 Working Group on International Financial Crisis was a forum for discussion about the framework of domestic bankruptcy law, including mechanisms to facilitate orderly debt workouts, cooperation among creditors and asset sales in bankruptcy.[39]

Secondly, *international financial institutions*, such as the International Monetary Fund ("IMF"), the World Bank and regional development banks, have been working on diagnosing existing domestic bankruptcy laws on the book and their respective effectiveness in practice, as well as on prescribing appropriate legal changes to enhance internal insolvency regimes, with the support and feedback of the international expert community.[40] Numerous are the initiatives led by international financial institutions in this regard, encompassing studies on domestic bankruptcy laws of either developed or emerging economies. For instance, in 1999, the IMF published the 'Orderly and Effective Insolvency Proceedings', as a result of its ongoing efforts to promote efficient insolvency regimes among the IMF's members.[41] In this guide, the IMF adopts a prescriptive approach, by recommending normative models of insolvency systems, including rules on both liquidation, rehabilitation procedures (e.g., standing to file for bankruptcy, stay of enforcement proceedings, treatment of collateral and secured claims) and cross-border insolvency. In addition, the World Bank has coordinated various task forces and fora on discussion and improvement of insolvency regimes globally. In 2001, as a response to the 1997-98 financial crisis in emerging market, the World Bank published the first edition of the 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (the "Principles"), which consolidates benchmarks, best practices and principles to achieve effective insolvency regimes and creditor-debtor relations.[42] Since then, the World Bank has counted with the assistance of experts and has convened various working groups focused on reviewing and updating the Principles, including the 2004 Forum on Insolvency in Latin America. Revised versions of the Principles were published in 2005, 2011, 2015 and 2021. In parallel with the Principles, the World Bank has also published studies on corporate out-of-court workouts,[43] comparative assessment of Latin America insolvency systems,[44]

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[38] *Id.* at 1175-1176.

[39] *See* International Monetary Fund, *Report of the Working Group on International Financial Crisis* (1998).

[40] *See* Terence C. Halliday & Bruce G. Carruthers 1176-1182, *supra* note 7.

[41] *See* International Monetary Fund, *Orderly and Effective Insolvency Proceedings* (1999).

[42] World Bank, *Principles for Effective Insolvency and Creditor/Debtor Regimes*, 2021 Edition. World Bank, Washington, DC. © World Bank. https://openknowledge.worldbank.org/handle/10986/35506 License: CC BY 3.0 IGO.

[43] World Bank Group, *A Toolkit for Out-of-Court Workouts*, 2017. World Bank, Washington, DC. © World Bank. https://openknowledge.worldbank.org/handle/10986/28953 License: CC BY 3.0 IGO."

[44] Malcolm Rowat & José Astigarraga, *Latin American Insolvency Systems*, World Bank Technical Paper No. 433, The International Bank for Reconstruction and Development (1999).

domestic bankruptcy law of certain counties (e.g., Argentina, Chile, Bulgaria, Lithuania and Czech Republic),[45] and has recently focused on insolvency regimes for micro and small enterprises.[46]

Thirdly, *international governance organizations*, such as the United Nations, have also labored to provide a worldwide and uniform benchmark to countries in connection with their local bankruptcy laws. International governance organizations are considered to be of great value in shaping standards for domestic bankruptcy law, given the high level of representativeness of their member-states, and the greater influence that those organizations can exercise on lawmakers.[47] The United Nations Commission on International Trade Law (the "UNCITRAL") has published numerous recommendations and model laws for countries, such as the UNCITRAL Legislative Guide on Insolvency Law (first edition published in 2004) and the UNCITRAL Model Law on Cross-border Insolvency (first edition published in 1997). UNCITRAL's publications are comprehensive and most of them are prepared in form of statutory language, followed by UNCITRAL's commentary and justification. The methodology adopted by UNCITRAL to draft and approve its publications is highly participatory, including by means of sessions of the working group on insolvency law (Working Group V). UNCITRAL's recommendations have proven to be effective, as many nations have relied on them when changing or creating their internal bankruptcy laws.

Fourthly, *associations of professionals* have gathered insolvency practitioners across countries and have participated in recent efforts of global norm making in insolvency law.[48] The International Federation of Insolvency Practitioners ("INSOL") is considered to be one of the most influential associations of bankruptcy professionals. It currently gathers over ten thousand insolvency professionals worldwide (including lawyers, accountants, judges and scholars), and it has been involved in the drafting of major recommendations, including in UNCITRAL's model laws and the principles of the 1998 G22's work on international financial crisis.[49] Other associations of professionals also

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[45] World Bank. *Chile : Insolvency and Creditor Rights Systems*. 2004. Washington DC. © World Bank. https://openknowledge.worldbank.org/handle/10986/14421 License: CC BY 3.0 IGO.; World Bank, *Argentina : Insolvency and Creditor Rights Systems*, 2002. Washington, DC. © World Bank. https://openknowledge.worldbank.org/handle/10986/14997 License: CC BY 3.0 IGO.; World Bank, *Lithuania : Insolvency and Creditor Rights Systems*, 2002. Washington, DC. © World Bank. https://openknowledge.worldbank.org/handle/10986/15091 License: CC BY 3.0 IGO.; Johnson, Gordon W., *Insolvency and Creditor Rights Systems : Czech Republic*, 2001. World Bank: Washington, DC. © World Bank. https://openknowledge.worldbank.org/handle/10986/14991 License: CC BY 3.0 IGO.

[46] World Bank Group, *Report on the Treatment of MSME Insolvency*, 2017. World Bank, Washington, DC. © World Bank. https://openknowledge.worldbank.org/handle/10986/26709 License: CC BY 3.0 IGO

[47] *See* Terence C. Halliday & Bruce G. Carruthers 1185-1186, *supra* note 7. *See also* Christoph G. Paulus, Keynote Address: Global Insolvency Law and the Role of Multinational Institutions, in Brooklyn Journal of International Law, Vol. 32, Issue 3, Symposium: Bankruptcy in the Global Village: The Second Decade.

[48] *See* Terence C. Halliday & Bruce G. Carruthers 1182-1184, *supra* note 7.

[49] *Id.*

exercise major influence on works concerning the change and convergence of bankruptcy laws, such as the International Bar Association ("IBA") and the Turnaround Management Association ("TMA").

Finally, *certain metropolitan nations*, especially the United States, have had relevant roles in elevating their principles of bankruptcy law to the world at large.[50] Halliday and Carruthers argue that it is an undisputed fact that the United States has been a relevant actor in setting the trend of global norms of insolvency law, because of its large experience with corporate reorganization and the intense participation of U.S. lawyers and the U.S. Treasury in initiatives led by the IMF, the World Bank and UNCITRAL.[51]

The influence exercised by actors involved in recursivity cycles suggests that global bankruptcy norm making is consistent with the theory on legal implants advanced by Pargendler, according to which some models of corporate law have been implemented into certain jurisdictions more than others because of the influence of international organizations and standard setting bodies in global norm making. Pargendler named such phenomenon as the rise of international corporate law, and sustained that it is a "fragmented, diverse, highly networked, and dynamic" process.[52] Initiatives and publications by the World Bank, the IMF, clubs of nations and associations of professionals focused on insolvency law share similarities with the work of international organizations and standard setting bodies on international corporate law presented by Pargendler, thus suggesting a growing movement towards legal implants of global insolvency standards and the rise of an international bankruptcy law.

Over the last years, traces of convergence of bankruptcy law as a result of recursivity cycles, either in the form of legal implants of global norms of insolvency law, or in the form of direct legal transplant of another country's domestic law, have been observed in Africa,[53] Asia[54] and Europe.[55] Odetola provides evidence that selected sub-Saharan countries have been undergoing law reforms that have been receptive to implanted norms of international bankruptcy law (including the UNCITRAL's Model Law on Cross-Border Insolvency) and transplanted rules of foreign jurisdictions. In particular, law reforms in certain sub-Saharan countries have shown a lingering influence by countries with which they share historical ties, as is the case with Mozambique that transplanted the Brazilian Bankruptcy Act.[56] On a related study, Halliday and Carruthers propose that recursivity cycles and the influence of internationals organizations have driven changes in local bankruptcy laws and practice of Indonesia and Korea, while China has been reluctant

[50] *Id.* at 1186-1187.

[51] *Id.*

[52] *See* Mariana Pargendler 43, *supra* note 6.

[53] *See* Damiola Odetola, *supra* note 10.

[54] *See* Terence C. Halliday & Bruce G. Carruthers 1182-1184, *supra* note 7.

[55] *See* Patrick E. Mears & Sujal Pandya, *supra* note 2.

[56] Damiola Odetola 47, *supra* note 10.

to absorb the global patterns into its insolvency regime.[57] Convergence of bankruptcy law in Europe has also been the focus of certain studies.[58] Mears and Pandya refuted the idea that European insolvency regimes are focused on the liquidation of insolvent companies, and concluded that domestic bankruptcy laws in Europe embraced the trend of convergence with global standards since 2002.[59] Little attention, however, has been given on this topic to Latin American countries, including Brazil, which bankruptcy law resembles features of certain metropolitan nations and soft law created by key international organizations and standard setting bodies.

II. Brazilian Bankruptcy Law and Practice

In 2005, Brazilian bankruptcy law underwent a major reform through the enactment of the Brazilian Bankruptcy Act, as part of certain international organizations' wider efforts to modernize insolvency regimes across the globe.[60] This reform shifted the Brazilian insolvency regime away from an obsolete system that provided no incentives for the rehabilitation of viable companies,[61] to a regime that fostered reorganization of viable businesses and the preservation of the debtors' activities.[62] The Brazilian Bankruptcy Act introduced procedures for a coordinated negotiation among debtors and creditors and bolstered creditors' participation in the debtor's restructuring, in many parts resembling features of the Chapter 11 of the U.S. Bankruptcy Code[63] and other standards promoted by

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[57] *See* Terence C. Halliday & Bruce G. Carruthers 1187-1197, *supra* note 7.

[58] *See generally* Sarah Paterson, *The Adaptive Capacity of Markets and Convergence in Law: UK High Yield Issuers, US Investors and Insolvency Law*, 78 MOD. L. REV. 431 (2015). *See also* Pierre-Cyrille Hautcoeur & Paolo Di Martino, *Bankruptcy Law and Practice in Historical Perspective: A European Comparative View* (C.1880-1913). *See also* Jerome Sgard, *Do legal origins matter? The case of bankruptcy laws in Europe 1808-1914*, in European Review of Economic History Vol. 10, No. 3, Globalisation and Financial Intermediaries (December 2006).

[59] Patrick E. Mears & Sujal Pandya, *supra* note 2.

[60] Thomas Benes Felsberg & Paulo Fernando Campana Filho, *Corporate Bankruptcy and Reorganization in Brazil: National and Cross-border Perspectives* 275 (Norton Annual Review of International Insolvency, 2009).

[61] Before the enactment of the Brazilian Bankruptcy Act, Brazilian bankruptcy law was governed by Decree No. 7,661/1945 (the "Bankruptcy Decree"). The obsoleteness of the Bankruptcy Decree was also recognized by international organizations, including the World Bank ("The laws are old. Mexico and Brazil have insolvency schemes that date back from the 1940's."). *See* Malcolm Rowat & José Astigarraga 8, *supra* note 44.

[62] Article 47 of the Brazilian Bankruptcy Act embeds the principle of preservation of the debtor's business, which is considered to be the backbone of the Brazilian bankruptcy law.

[63] *See* In re OAS S.A., 533 B.R. 83, 103, 2015 BL 222922, at *19 (Bankr. S.D.N.Y. 2015) ("As explained by the OAS Debtors' Brazilian insolvency law expert, Brazil has a comprehensive bankruptcy law that in many ways mirrors our own."); *see also* In re Oi S.A., 587 B.R. 253, 269, 2018 BL 242347, at *15 (Bankr. S.D.N.Y. 2018) ("But this and other courts have found that Brazilian bankruptcy law is consistent with U.S. policy and provides to creditors meaningful protections similar to those provided under U.S. law. See, e.g., In re Rede, 515 B.R. at 98 (rejecting argument that Brazilian bankruptcy proceedings there violated Section 1506 and concluding that "Brazilian bankruptcy law meets our fundamental standards of fairness and accords with the

global initiatives, such as the World Bank's Principles and Guidelines for Effective Insolvency and Creditor Rights Systems.

In particular, the Brazilian Bankruptcy Act provides two formal procedures for corporate restructuring (namely, the *recuperação judicial* and the *recuperação extrajudicial* procedures) and a liquidation procedure designed for non-viable companies (*falência*). The *recuperação judicial* procedure is the most common relief sought by companies enduring a financial crisis in Brazil and the most analogous procedure to the U.S. Chapter 11 under Brazilian law. Under a *recuperação judicial*, the debtor remains in possession of its assets and under control of its business activities. As a rule, the debtor is protected by a stay relief, which shields the estate from enforcement and other collection actions for a certain period of time.[64] While protected by the stay, debtor and creditors engage in negotiations around the debtor's plan of reorganization, which typically provides for a variety of restructuring measures, including the discharge of obligations, the terms and conditions for repayment of claims, potential issuance of new debt and free and clear asset sales. In principle, every claim existing as of the filing date, even if not due, is discharged by the confirmation of the plan, except for certain safe-harbor claims, including tax claims and claims secured by specific collaterals under Brazilian law (*alienação fudiciária*). For purposes of deliberation on the plan of reorganization, the creditors are divided into four classes: holders of labor-related claims, holders of secured claims, holders of unsecured claims, and micro and small enterprises.[65] In order to be approved by the general deliberation rule, all classes have to vote in favor of the plan at a certain meeting of creditors pursuant to a certain requisite majority[66] (this assumes that all classes are impaired under the plan). If approval is not obtained pursuant to such general majority rule,

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course of civilized jurisprudence."); In re OAS S.A., 533 B.R. 83 , 103 (Bankr. S.D.N.Y. 2015) (noting that "Brazil has a comprehensive bankruptcy law that in many ways mirrors our own" and agreeing with the Rede decision that Brazilian bankruptcy law is not contrary to U.S. public policy)").

[64] The stay of enforcement and collection actions brought against the debtor shall initially last for one hundred and eighty days. This period may be extended. Article 6, §4, of the Brazilian Bankruptcy Act permits that the Bankruptcy Court extends such period for an additional period of one hundred and eighty days, provided that the debtor has not caused delay in the process.

[65] The rules on classes of creditors under the Brazilian Bankruptcy Act and the respective pervasive effects caused by such rules have been the focus of studies by the academic community in Brazil. In this regard, *see* Sheila C Neder Cerezetti, *As Classes de Credores como Técnica de Organização de Interesses: em Defesa da Alteração da Disciplina das Classes na Recuperação Judicial*, in Paulo Fernando Campos Salles de Toledo and Francisco Satiro (eds), *Direito da Empresas em Crise: Problemas e Soluções* (Quartier Latin 2012).

[66] A plan of reorganization is considered accepted by each of the secured creditors' class and unsecured creditors' class when cumulatively (a) the majority in number of creditors present at the meeting of creditors (quantitative test) and (b) the majority in amount of claims present at the meeting of creditors (qualitative test), vote to accept the plan of reorganization. In other words, the plan must be approved in each respective secured and unsecured class by simple majority of creditors present (vote per head) and, cumulatively, by the majority in amount of the claims present at the meeting of creditors (dollar amount vote). In the labor and small and micro enterprises classes, the approval is secured by the favorable vote of only the majority of creditors attending the meeting of creditors in each class (vote per head only).

the plan of reorganization can be crammed-down by the Bankruptcy Court, provided that certain requirements are met.[67] In the event the plan is approved by the creditors pursuant to either the general rule or the cram-down rule, the Bankruptcy Court may enter an order confirming the terms of the plan and, therefore, discharging the applicable prepetition claims.[68] Following the confirmation order, the Bankruptcy Court may order the debtor to remain under Court supervision for a period of up to two years counted as from the confirmation order.[69] Conversely, in case the plan is rejected by the creditors, the Court-appointed trustee shall put for voting at the creditors' meeting the possibility for creditors to present an alternative plan within thirty days counted from such deliberation. In case (i) the creditors do not approve the presentation of such alternative plan, or (ii) such alternative plan, if presented, is ultimately rejected by the creditors, the Bankruptcy Court shall adjudicate debtor's liquidation.

Similar to the *recuperação judicial* procedure, the *recuperação extrajudicial* is also designed to promote the debtor's restructuring through a formal judicial proceeding, capable of impairing any holdout creditor or any other creditor that has not expressly consented with the terms of the reorganization plan. The main goal of the *recuperação extrajudicial* is to provide an expedited confirmation of a plan of reorganization previously negotiated and eventually accepted by creditors holding at least more than a half of the claims of each class or group of creditors (of the same nature) impaired by such plan. A *recuperação extrajudicial* tends to be a more straightforward and expedite process. Upon filing by the debtor of the plan of reorganization with the express consent of the required supporting creditors, the Bankruptcy Court shall provide a notice to all affected creditors for submission of any objections to the to the plan within thirty days as from the publication of the notice. The set of available objections is narrow and should deal mostly with procedural aspects of the *recuperação extrajudicial* and the plan of reorganization. After the debtor's response to the objections (if any), the Bankruptcy Court shall then resolve

[67] The cram down rule provides that a Bankruptcy Court may confirm a plan of reorganization provided that the following requirements are cumulatively met: (a) the plan has obtained the favorable vote of the simple majority in total amount of claims of all the creditors present at the meeting of creditors, regardless of the division by classes; (b) the plan has been accepted by the other classes (except the dissenting class) pursuant to the general majority rule; (c) the plan has obtained the favorable vote of at least one-third of the creditors in the dissenting class, pursuant to the general majority rule; and (d) the plan does not discriminate on creditors unfairly within the same class.

[68] In practice, the Bankruptcy Court is expected to review the terms and conditions of the plan of reorganization and decide on whether the provisions of the plan comply with general principles under Brazilian law, according to civil law principles and recent case law on the topic. It may be the case that the Bankruptcy Court enter an order confirming only part of the plan of reorganization, and declaring certain clauses null and void (typically clauses that provide for an unfair treatment for creditors, or that provide for an immaterial recovery). Moreover, it may also be the case that the Bankruptcy Court (or the Court of Appeals, as applicable) determine that the debtor propose an amended version of the plan of reorganization for new deliberation among creditors.

[69] In practice, this period has been usually extended by Bankruptcy Courts.

potential disputes and confirm or reject the plan, provided that, in the latter, parties should return to the *status quo ante*.

Finally, the Brazilian Bankruptcy Act provides for a liquidation procedure (*falência*) designed for non-viable companies. The *falência* can be either voluntarily or involuntarily commenced, or it can be the result of a conversion from a *recuperação judicial* into a liquidation procedure given, *inter alia*, the rejection or the non-compliance of a plan of reorganization. If the Bankruptcy Court accepts the *falência* request and ultimately adjudicate the debtor's liquidation, the bankrupt company's directors and officers are immediately removed from their respective seats and replaced by a Court-appointed trustee. The bankrupt company's activities are generally shut down with a view to preserve and maximize the productive use of goods, assets and production resources of the bankrupt estate, assets are scheduled and liquidated, and the proceeds are distributed pursuant to a certain ranking of priorities.

Since the enactment of the Brazilian Bankruptcy Act, Brazilian bankruptcy practice has grown substantially, which paved the way for a more welcoming environment for domestic and foreign distressed investments. In this regard, foreign banks, foreign investment funds, foreign hedge funds and foreign private equity firms have played a major role in mega Brazilian bankruptcy cases filed over the course of the last years, acting as relevant creditors or key strategic investors in *recuperação judicial* or *recuperação extrajudicial* cases. These key foreign players have implemented various investment strategies and have influenced on restructuring processes in different manners. In particular, the increased involvement of international players in Brazilian restructurings have led to a more internationalized bankruptcy practice, and has contributed to increase sophistication in the bankruptcy system in all aspects.

There are various ways through which foreign investors can act in Brazilian bankruptcy matters. While most hedge funds tend to focus in short-term investments and assure sufficient fund liquidity, secured creditors and private equity firms may focus on long-term horizon strategies, typically aiming at recovering their investments through the debtor's going concern value or through loan-to-own transactions. Other investment strategies usually pursued by such players include the acquisition and trading of debt (usually in the form of bonds), the purchase of equity pre or post restructuring, DIP loans or purchase of the debtor's assets through a free and clear sale.[70] Naturally, the implementation of such investments in the context of bankruptcy cases tends to follow the interests, practice and viewpoint of such foreign players.[71] As they usually carry previous

[70] *See generally* Rosenberg & Riela, *Hedge Funds: The New Masters of the Bankruptcy Universe*, 17 Norton J. Bankr. L. & Prac. 5 (2008).

[71] Some investors in the Brazilian distressed market have publicly shared their experience and opinion on certain aspects of Brazilian bankruptcy law and practice. *See* Ted S. Lodge, Op-Ed: Oi restructuring heightens the need for stronger governance, in Latin Finance (2018), available at: https://www.latinfinance.com/daily-briefs/2018/10/24/op-ed-oi-restructuring-heightens-the-need-for-stronger-governance. The author is a partner and the global head of restructurings and turnarounds of GoldenTree Asset Management, an asset management firm that had a key participation in the restructuring the author comments about.

experience in similar investments implemented abroad, investments by such players in Brazilian bankruptcy cases tend to resemble the investments implemented by the same players in foreign jurisdiction, pursuant to the limits and perils of the Brazilian bankruptcy law. TABLE I of this paper illustrates the participation of key foreign entities in selected *recuperação judicial* and *recuperação extrajudicial* cases, all of which are included among the largest restructurings ever implemented in Brazil.

In large *recuperação judicial* and *recuperação extrajudicial* cases, foreign creditors and investors are usually advised by a team of financial advisors, as well as local and international legal counsels.[72] In this regard, various law firms have specialized in advising foreign market players in connection with Brazilian restructuring matters. The work of foreign legal advisors on domestic restructuring transactions and the interplay between foreign and local advisors enable an easier implementation of foreign legal concepts, mechanisms and arrangements into the Brazilian bankruptcy law.[73] In this regard, U.S. lawyers have usually shared their views on and suggestions for changes of the Brazilian insolvency regime, taking into account a comparative analysis with the U.S. Bankruptcy Code and restructuring practice.[74] For illustrative purposes, TABLE II of this paper lists certain engagements of foreign legal advisors in large Brazilian *recuperação judicial* or *recuperação extrajudicial* cases.

The development of the Brazilian legal market in corporate restructuring and bankruptcy has also fostered the creation of associations of professionals in the nation. These associations have had a major function to gather bankruptcy practitioners and to promote fora of discussions about bankruptcy law and practice. Through the organization of events, educational programs, publication of materials and promotion of networking, these associations of professionals play a major role on the developments and changes of the insolvency regime in Brazil. For instance, in 2009, the Turnaround Management Association created a Brazilian affiliate ("TMA-Brazil"), as a reflection of a market that

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[72] The Brazilian bar association (*Ordem dos Advogados do Brasil*) expressly prohibits foreign law firms to give legal advice on Brazilian law and to litigate in Brazilian judicial proceedings under the *Provimento No. 91/2000*. Therefore, foreign law firms usually work alongside Brazilian law firms in *recuperação judicial* and in *recuperação extrajudicial* cases, providing clients with advice in connection with foreign law and Brazilian law.

[73] See Chapter I.

[74] *See, e.g.,* Francisco L. Cestero & Daniel J. Soltman, *The Fight for Bondholder Suffrage in Brazilian Restructurings*, *in* 12 Pratt's Journal of Bankruptcy Law 38 (2016). *See also* Richard J. Cooper, Francisco L. Cestero, Jesse W. Mosier & Daniel J. Soltman, *The Brazilian Insolvency Regime: Some Modest Suggestions—Part I*, in 12 Pratt's Journal of Bankruptcy Law 81 (2016). *See also* Richard J. Cooper, Francisco L. Cestero, Jesse W. Mosier & Daniel J. Soltman, *The Brazilian Insolvency Regime: Some Modest Suggestions—Part II*, in 12 Pratt's Journal of Bankruptcy Law 160 (2016). *See also* Richard J. Cooper, Francisco L. Cestero & Daniel J. Soltman, *Insolvency Reform in Brazil: An Opportunity Too Important to Squander*, in 14 Pratt's Journal of Bankruptcy Law 29 (2018). *See also* Richard J. Cooper, Francisco L. Cestero & Jesse W. Mosier, *Oi S.A.: The Saga of Latin America's Largest Private Sector In-Court Restructuring*, in 14 Pratt's Journal of Bankruptcy Law 209 (2018). *See also* Richard J. Cooper, Francisco L. Cestero & Jonathan Mendes de Oliveira, *Odebrecht Oil & Gas and the Use of Brazilian Extrajudicial Reorganization in Cross-Border Restructurings*, in 14 Pratt's Journal of Bankruptcy Law 328 (2018).

was "striving for best practices in turnaround management, for continuous evaluation of Brazil's new bankruptcy law, and for networking and training that [would] include all professionals involved in corporate restructuring".[75] TMA-Brazil is partnered with INSOL, which has also worked on educational and networking events in Brazil. In particular, TMA-Brazil holds weekly talks and an annual conference that gathers not only Brazilian restructuring professionals, but also foreign legal advisors and Judges. In 2009, 2013 and 2017, INSOL held seminars in Rio de Janeiro and in São Paulo on insolvency in Latin America. Other associations of professionals have also been in the forefront of discussions on the development of Brazilian bankruptcy law, such as the 'Instituto Brasileiro de Estudos de Recuperação de Empresas (IBR) – Brazil' ("IBR"),[76] which is also partnered with INSOL, and the recently created 'CMR – Centro de Mulheres na Reestruturação Empresarial', an association of women professionals in restructuring and bankruptcy in Brazil.

The development of the Brazilian insolvency environment has also resulted in sophistication of the Brazilian judiciary in connection with bankruptcy related cases. Since the enactment of the Brazilian Bankruptcy Act, the education of judges to deal with bankruptcy cases has always been a point of concern among bankruptcy practitioners, as the effectiveness of the Brazilian insolvency regime relied on the capacity of judges to properly apply the Brazilian Bankruptcy Act.[77] In Brazil, bankruptcy cases are heard by state judges according to the venue rules of the Brazilian Bankruptcy Act.[78] The creation of specialized state courts in bankruptcy with subject-matter jurisdiction is not mandatory, and thereby many bankruptcy cases are heard by generalist state judges. Data shows that approximately 68.9% of bankruptcy cases are processed before non-bankruptcy-specialized courts.[79] However, there is an increasing effort from Brazil's National Counsel of Justice to educate judges to deal with bankruptcy cases and to create bankruptcy specialized courts. In 2018, Brazil's National Counsel of Justice created an ad hoc working group aimed at discussing and recommending measures to modernize and promote

[75] *See* Turnaround Management Association, *TMA-Brazil leaders tell of vision for their new affiliate* (2009), https://turnaround.org/cmaextras/2Q09FINAL.pdf. *See also* Eduardo Lemos, *Latin America: Another step in TMA's growth* (2009), https://turnaround.org/cmaextras/1Q09FINAL.pdf.

[76] *See* https://ibrbrasil.com.br.

[77] In this regard, in 2009, the first President of TMA-Brazil stated: "The biggest challenge now is a cultural one. Educating managers, lawyers, bankers and judges on turnaround management is critical, as many of these professional bodies are yet to be freed from old degenerative corporate habits and to be acquainted with best corporate renwal practices". Eduardo Lemos, *Latin America: Another step in TMA's growth* (2009), https://turnaround.org/cmaextras/1Q09FINAL.pdf.. *See also* Baldinoti, Bruno & Zerbini, Maiara., *A Instituição de Varas Especializadas em Recuperação Judicial e (Auto)Falência sob a Ótica da Terceira Onda Renovatória, in* Revista Estudo & Debate (2018).

[78] Article 3 of the Brazilian Bankruptcy Act provides that competent judges to hear bankruptcy cases shall be the judges of the bench located in the debtor's main business premise.

[79] Waisberg, Ivo and Sacramone, Marcelo and Nunes, Marcelo Guedes and Corrêa, Fernando, *Judicial Restructuring in the Courts of São Paulo - Second Phase of Insolvency Monitor* 11 (Recuperação Judicial no Estado de São Paulo – 2ª Fase do Observatório de Insolvência) (2019).

effectiveness of the Brazilian judiciary in connection with restructuring and bankruptcy cases. This effort resulted in a formal recommendation for State Courts to create bankruptcy specialized courts at both the lower and appellate levels in accordance with certain thresholds and criteria.[80]

There is a growing trend in State Courts of Justice to create bankruptcy specialized courts with exclusive subject-matter jurisdiction to hear bankruptcy-related cases. In 2005, right after the enactment of the Brazilian Bankruptcy Act, the São Paulo State Court of Justice created the first two bankruptcy specialized courts at the lower level that have exclusive subject-matter jurisdiction to hear bankruptcy cases filed in the district of São Paulo (a third court was also created in 2017). In 2011, the São Paulo State Court of Justice created one bankruptcy specialized court at the appellate level that have exclusive subject-matter jurisdiction to hear appeals filed in connection with bankruptcy cases in the state of São Paulo.[81] The Rio de Janeiro State Court of Justice also counts with courts specialized in corporate law that have subject-matter jurisdiction to hear bankruptcy cases filed in the district of Rio de Janeiro, and courts of appeal that have exclusive subject-matter jurisdiction to hear appeals filed in connection with bankruptcy cases pending in the State of Rio de Janeiro. Most recently, the Minas Gerais State Court of Justice also created a bankruptcy specialized court at the appellate level to hear appeals filed in connection with bankruptcy cases pending in the state of Minas Gerais.[82]

III. CHANGES AND CONVERGENCE OF BRAZILIAN BANKRUPTCY LAW

Since the enactment of the Brazilian Bankruptcy Act, Brazilian bankruptcy law and practice have gone through numerous changes as a result of modernization and sophistication of the Brazilian restructuring market. These changes are generally brought to the Brazilian bankruptcy system by a number of different actors, including foreign and local advisors, scholars, law makers, and international organizations and standard setting bodies. While many of these changes are observable in functional or contractual forms only, other changes are a result of a formal legislative reform. Most importantly for purpose of this paper, many of these changes are transplanted from foreign law or foreign legal practice, or implanted from global rules of insolvency law published by international organizations and standard setting bodies, in order to address local demands. Such legal transplants and legal implants, therefore, may be an indicium that, over time, Brazilian bankruptcy law has been converging with foreign and international legal standards of insolvency law.

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[80] *Conselho Nacional de Justiça*, Recommendation No. 56, October 22, 2019, https://atos.cnj.jus.br/atos/detalhar/3068.

[81] In 2011, the specialized court in bankruptcy at the appellate level was merged with the specialized courts in corporate law at the appellate level. Today, the merged courts are named 1st and 2nd Courts Reserved for Corporate Law.

[82] *See* Poder Judiciário do Estado de Minas Gerais, Tribunal de Justiça, Resolução No. 977/2021, http://www8.tjmg.jus.br/institucional/at/pdf/re09772021.pdf.

In this regard, this chapter provides qualitative data on recent changes in Brazilian bankruptcy law and practice as a result of either a legal transplant or a legal implant. In particular, this chapter presents four cases in Brazilian insolvency regime that have shown a trend for convergence of Brazilian bankruptcy law with foreign and international standards, each of which has been sparked by different demands or interests, and has been brought by different actors in different forms. This chapter is not intended to discuss the advantages, disadvantages or efficiency of each of these changes, but rather to provide the reader with evidence on certain cases of convergence in Brazilian bankruptcy law. In addition, this chapter neither aims at denying changes that may suggest a divergence of Brazilian bankruptcy law with foreign or international standards, nor it aims at asserting that convergence has prevailed over divergence. Rather, the purpose of this chapter is to assert that there are indicia that Brazilian bankruptcy law is leaning towards a convergence with foreign and international legal patterns.

a. Bondholders' right to vote in bankruptcy cases

Brazilian Bankruptcy Act provides that certain deliberations by creditors in connection with *recuperação judicial* or *falência* cases shall take place at a general meeting of creditors, including the deliberation on the acceptance or rejection by the creditors of the debtor's plan of reorganization.[83] In this regard, the Brazilian Bankruptcy Act provides that only the creditors listed in official lists of creditors and liabilities filed in the bankruptcy case,[84] or creditors who either have had their claims recognized in an ancillary proofs of claim procedure or have obtained relief to reserve the amount of their claims, shall have the right to vote at the meeting of creditors. Logically, only these creditors shall have the right to vote on the debtor's plan of reorganization.

This rule may present no or little controversy in cases where the creditor is the beneficial owner of their claims. However, this rule gets a little more problematic when the person listed in the official lists of creditors is an agent or a trustee representing the beneficial owners of the claim, as it is the case when indenture trustees are listed on the official lists of creditors and liabilities for the face value of the bond issuance, on behalf of all the bondholders, who are the beneficial owners under the bond indenture.

[83] *See* Chapter II. On this, tt is worth noting that Article 39 §4 of the Brazilian Bankruptcy Act provides that deliberations at the general meeting of creditors can be replaced by adhesion terms signed by the creditors, deliberations on a digital platform or any other mechanism accepted by the bankruptcy court.

[84] Article 39 of the Brazilian Bankruptcy Act provides that the persons listed in the general list of creditors shall have the right to vote at the meeting of creditors. This list is considered to be the final list of liabilities and is rarely concluded by the meeting of creditors that deliberates on the debtor's plan of reorganization. In the absence of the general list of creditors, the persons listed in the court-appointed judicial administrator's list of creditors shall have the right to vote. In the absence of the court-appointed judicial administrator's list of creditors, the persons listed in the debtor's list of creditors shall have the right to vote. Data shows that court-appointed judicial administrators have presented their list of creditors in 85.2% of bankruptcy cases (considering only cases that the creditors have already deliberated on the debtor's plan of reorganization). *See* Waisberg et. al. 24, *supra* note 79.

As a practical matter, given that bonds are publicly traded on the secondary market, the debtor and the court-appointed judicial administrator usually do not have full control over the identity of bondholders or their respective holding position at the time of the filing of the list of creditors and at the time of the deliberation on the plan of reorganization. In view of this, the debtor and the court-appointed judicial administrator usually list the indenture trustee as a single creditor in their official lists of creditors for the face value of the bond issuance on behalf of all bondholders. In principle, from a Brazilian bankruptcy law perspective only, this should give the right for the indenture trustee to either accept or reject the plan on a single vote, that is, voting on behalf of all bondholders. Nonetheless, there are practical and legal constraints under U.S. law and under the bonds indenture that may limit the indenture trustee's authority and ability to approve a plan of reorganization on behalf of bondholders. §316(b) of the Trust Indenture Act ("TIA") provides that, except under certain circumstances, "the right of any holder of any indenture security to receive payment of the principal amount of and interest on such indenture security […] shall not be impaired or affected without the consent of such holder". [85] This suggests that, unless the indenture trustee gets the consent from each and every bondholder to approve a plan that impairs such bondholders' right of payment, the indenture trustee cannot approve the plan of reorganization on behalf of bondholders. Practically speaking, it is next to impossible for an indenture trustee to get express consent from all bondholders with a plan of reorganization.[86] In addition, §315(d)(3) of the TIA provides a safe harbor for indenture trustee's liability only with respect to actions or omissions taken "in good faith in accordance with the direction of the [majority] of holders".[87] In many instances, organized groups of bondholders do not hold the majority of the bonds, discouraging the indenture trustee to vote in favor of a plan of reorganization based on the express consent of a steering group, but technically a minority of bondholders. Furthermore, the N.Y. Law Model Indenture, which is typically used as a reference in bonds issuance by Brazilian companies, does not provide an express duty of or authorization for the indenture to vote on the acceptance or rejection of a plan of reorganization, and ultimately discourages the indenture trustee to take any actions with its own funds that may pose risks without explicitly authorization from bondholders.[88] In view of this, as a practical matter, indenture trustees have been hesitant to vote at general meeting of creditors in Brazil, especially to

[85] *See* Mark J. Roe, *The Voting Prohibition in Bond Workouts* 232-279 (Yale Law Journal, Vol. 97, 1987).

[86] On this same rationale, in 2012, the 2nd Bankruptcy Court of São Paulo designated the vote of the Bank of New York Mellon on rejecting the plan of reorganization of Rede Energia, acting as indenture trustee for certain bonds issued by Rede Energia, on the basis that the indenture trustee lacked authority under the bonds indenture to deliberate on the plan of reorganization.

[87] *See* Jeffrey M. Anapolsky, & Jessica F. Woods, *Pitfalls in Brazilian Bankruptcy Law for International Bond Investors*, 8 J. Bus. & Tech. L. 397 (2013). *See also* Mark J. Roe 250-252, *supra* note 85.

[88] *See* Francisco L. Cestero & Daniel J. Soltman, *The Fight for Bondholder Suffrage in Brazilian Restructurings*, *in* 12 Pratt's Journal of Bankruptcy Law 38 (2016).

approve a plan of reorganization that provides new payment conditions in connection with the bonds.[89]

In principle, this creates an intriguing paradox in Brazilian insolvency system: while indenture trustees have legal and practical impediments that limit their ability and discourage them to vote on behalf of all bondholders in Brazilian bankruptcy cases, bondholders cannot in principle individually deliberate on the plan of reorganization, as they are not initially and individually listed in the official lists of creditors presented by the debtor or the court-appointed trustee in the bankruptcy case. Under these conditions, organized groups of bondholders, typically in the form of ad hoc committees, would be prevented in principle from using the voting rights attached to their claims as a leverage in connection with the negotiations around the plan of reorganization.

When faced with this incompleteness and contradiction in Brazilian bankruptcy law, bankruptcy courts and practitioners have worked on measures to deal with the problem, ultimately aiming at giving individual bondholders the right to deliberate on the plan of reorganization individually, similar to the law and practice in U.S. Chapter 11 cases.[90] In 2012, Centrais Elétricas do Pará ("CELPA"), a Brazilian electricity company, filed for *recuperação judicial* with the Thirteenth Civil Court of Belém in Pará, Brazil. The organized group of bondholders of CELPA, formed exclusively by foreign investors, held 45% of the total amount of CELPA's bond issuance. Given that the group did not hold the majority of bonds, the indenture trustee refused to take action in connection with the bankruptcy case, in view of the liability risk with respect to undiscovered bondholders. In this regard, the organized group of bondholders implemented a then unprecedented claim individualization procedure with the bankruptcy court, whereby their claims have been identified and segregated from the total claim amount originally listed on behalf of the indenture trustee. As a result of the individualization of their claims, the organized group of bondholders could vote on the plan of reorganization, and thereby had the opportunity to actively participate in the *recuperação judicial* case.[91]

Since then, the individualization of bondholders' claims has become common practice in *recuperação judicial* cases in which bonds indentures have been impaired as part of the plan of reorganization. In 2015, the Second Working Group on Commercial

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[89] *See id.* ("In recuperação judicial proceedings, trustees have generally been hesitant to vote on behalf of Bondholders given the ambiguities regarding their authority."). *See also* Jeffrey M. Anapolsky, & Jessica F. Woods, *Pitfalls in Brazilian Bankruptcy Law for International Bond Investors,* 8 J. Bus. & Tech. L. 397 (2013) ("Due to uncertainty surrounding their role and duties in a chapter 11 case,71 indenture trustees often act in a manner that prioritizes minimizing liability for themselves over advocating the best interests of the bondholders.").

[90] *See* Jeffrey M. Anapolsky, & Jessica F. Woods, *supra* note 87 (on the right of a bondholder to vote on a plan of reorganization in a Chapter 11 case, the authors clarify that "Because the Bankruptcy Code limits those entitled to vote on a plan of reorganization to "holder[s] of a[n allowed] claim or interest" and defines "claim" as a "right to payment," courts have held that "it is the beneficial holder [i.e., the individual bondholder], not a holder of record (i.e., the indenture trustee), who has the 'claim' and the 'right to payment,'" and, thus, the right to vote on a plan of reorganization.").

[91] *Id.* at 412-413.

Law ('II Jornada de Direito Comercial') published a declaration recognizing the possibility of individualization of bondholders' claims in bankruptcy cases upon judicial authorization.[92] Over the last years, bondholders' individualization procedures have been implemented in large *recuperação judicial* cases, such as the *recuperação judicial* of the OGX Group, the OAS Group, the Oi Group and the Odebrecht Group.[93] In all of these cases, organized groups of bondholders have been advised by international counsels, in addition to Brazilian lawyers,[94] who have jointly led the claims individualization procedures.

According to recent practice, in order for a bondholder to individualize their claims from the aggregate claim listed on behalf of the indenture trustee, bankruptcy courts have ordered that the bondholder submit (i) an officer's certificate attesting their holdings, accompanied with the relevant documentation that evidences ownership of the bonds (typically a screen-shot of the funds' holding positions) , (ii) an officer's certificate attesting their signatory powers to execute relevant documentation, and (iii) a power of attorney granting powers to Brazilian lawyers to act on their behalf. These documents are usually executed by the bondholders' foreign representatives, and thereby notarized and apostilled according to the competent notary in the bondholder's jurisdiction. Usually, proper notice is given by the bankruptcy court to bondholders regarding the individualization procedure and respective deadlines. Also, the indenture trustee typically contributes the process, by sending relevant correspondence to bondholders in connection with the individualization procedures.

The implementation of individualization procedures with respect to bondholders' claim in Brazilian bankruptcy cases is representative of a change and modernization in Brazilian bankruptcy practice that has been adopted to resolve an incompleteness and contradiction of Brazilian bankruptcy law. The recognition of bondholders' right to individually vote on a plan of reorganization resembles the practice in U.S. Chapter 11 cases, which, according to Cestero and Soltman, "is so far-fetched that no litigant is likely to [contest it]".[95] In this regard, the interests of foreign creditors and the work of U.S. lawyers played a major role on transplanting the U.S. legal practice of bondholders' individual right to vote on a plan of reorganization. This may well be a case, therefore, of functional convergence of Brazilian bankruptcy law with the U.S. Chapter 11 practice,[96]

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[92] II Jornada de Direito Comercial (Second Working Group on Commercial Law), Enunciado 76 (Announcement 76) (2015).

[93] *See* Table I.

[94] *See* Table II.

[95] See Francisco L. Cestero & Daniel J. Soltman 38-39, *supra* note 88 ("In a Chapter 11 proceeding, a Bondholder has a clearly path to voting its individual holdings; procedures are well-established, rights are provided for in the U.S. Bankruptcy Code, and any objection to a Bondholder's right to vote individually on a plan of reorganization is so far-fetched that no litigant is likely to make such an argument").

[96] *See* Chapter II(a).

influenced by the work of foreign creditors, investors and legal advisors, in an attempt to settle an incompleteness originally present in Brazilian bankruptcy law.

b. Competing plan of reorganization

The original text of the Brazilian Bankruptcy Act, as enacted in 2005, provided that the debtor had an exclusive right to propose and submit a plan of reorganization for the creditors' deliberation at the general meeting of creditors throughout the pendency of the case. There was no provision in the Brazilian Bankruptcy Act allowing the bankruptcy court to terminate such exclusivity, or to give the same right to creditors or parties in interest. Upon the bankruptcy court's order opening the *recuperação judicial* case, the debtor had sixty days to file a plan of reorganization in the records, under penalty of conversion of the *recuperação judicial* into liquidation (*falência*). In practice, the plan of reorganization was then subject to further negotiations among the debtor, creditors and parties in interest, and the debtor could file revised versions of the plan of reorganization for the creditors' consideration up until the final deliberation at the general meeting of creditors. In principle, the general meeting of creditors had to take place in one hundred and fifty days as from the order that opened the *recuperação judicial* case, but in practice it could be adjourned to the extent the debtor needed more time to further revise the plan and get approval from the requisite majority of the creditors. Given that the debtor could modify the original version of the plan of reorganization and could adjourn the general meeting of creditors to buy more time to negotiate the plan, the sixty-day deadline did not put pressure on the debtor to propose a credible plan of reorganization at the outset.[97] Thus, in many instances, the debtor filed a pro-forma plan of reorganization, which was subject to material modifications as a result of further negotiations with creditors. The creditors were left only with the ability to negotiate the plan and push for better restructuring terms in exchange of a favorable vote on the plan, but lacked the right to formally propose a competing plan of reorganization for creditors' deliberation at the general meeting of creditors.

U.S. lawyers who handled Brazilian bankruptcy matters viewed the creditors' inability to propose a competing plan of reorganization as a very limited alternative to creditors and a major problem in the Brazilian insolvency system.[98] With such inability in place, the only leverage left for dissenting creditors was to vote for the rejection of the plan of reorganization. However, in the event dissenting creditors did not support the debtor's plan, the debtor could still get the approval of the plan with the favorable vote of the requisite majority of creditors. Even if the debtor could not get the approval of the requisite majority, the rejection of the plan would in principle entail the conversion of the

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[97] André Moraes Marques & Rafael Nicoletti Zenedin, *Uma Análise Comparativa do Direito de Propor o Plano de Recuperação Judicial à Luz das Legislações Americana e Brasileira*, in André Chateaubriand Martins & Márcia Yagui, Recuperação Judicial: Análise Comparada Brasil – Estados Unidos (Almedina. 2020).

[98] *See* Richard J. Cooper, Francisco L. Cestero, Jesse W. Mosier & Daniel J. Soltman 162-163, *supra* note 74.

recuperação judicial case into liquidation (f*alência*), which is generally seen as a bad outcome for creditors, as it oftentimes reduces the creditors' recovery prospects *vis a vis* a viable plan that would preserve the debtor's going concern value.[99]

The U.S. Bankruptcy Code provides a different mechanism that, under certain circumstances, might give creditors the right to formally propose a competing plan of reorganization for formal deliberation by the creditors. In a Chapter 11 case, the debtor initially enjoys an exclusive prerogative to propose a plan of reorganization during the first one hundred and twenty days of the Chapter 11 case counted as from the petition date in a voluntary Chapter 11 case, or from an order for relief in an involuntary Chapter 11 case.[100] The creditors, any party in interest, a creditors' committee or an equity security holders' committee may propose a competing plan of reorganization only if (i) a trustee has been appointed under the Chapter 11 case; (ii) the debtor has not filed a plan of reorganization within the one hundred and twenty day exclusivity period; or (iii) the debtor has not solicited approval for the proposed plan of reorganization within the first one hundred and eighty days counted as from the petition date in a voluntary Chapter 11 case, or from an order for relief in an involuntary Chapter 11 case.[101] The one hundred and twenty day period for the debtor to propose a plan of reorganization and the one hundred and eighty day period for the debtor to solicit approval of the plan of reorganization can be reduced or extended by the bankruptcy court for cause, upon request of a party in interest.[102]

Recent case law in the U.S. has given great latitude for bankruptcy judges to decide, on a case-by-case basis, whether there is cause to reduce or extend the exclusivity periods.[103] In short, bankruptcy courts have considered nine factors when deciding on whether to extend, reduce or terminate the debtor's exclusivity periods: (1) size and complexity of case, (2) necessity of sufficient time to permit debtor to negotiate a plan of reorganization and prepare adequate information, (3) existence of good faith progress

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[99] *See* André Moraes Marques & Rafael Nicoletti Zenedin, *supra* note 97.

[100] U.S. 11 Code §1121(a): The debtor may file a plan with a petition commencing a voluntary case, or at any time in a voluntary case or an involuntary case. §1121(b): Except as otherwise provided in this section, only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter.

[101] U.S. 11 Code §1121(c): Any party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may file a plan if and only if— (1) a trustee has been appointed under this chapter; (2) the debtor has not filed a plan before 120 days after the date of the order for relief under this chapter; or (3) the debtor has not filed a plan that has been accepted, before 180 days after the date of the order for relief under this chapter, by each class of claims or interests that is impaired under the plan.

[102] U.S. 11 Code, § 1121(d)(1): Subject to paragraph (2), on request of a party in interest made within the respective periods specified in subsections (b) and (c) of this section and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referred to in this section. § 1121(d)(2): (A) The 120-day period specified in paragraph (1) may not be extended beyond a date that is 18 months after the date of the order for relief under this chapter. (B) The 180-day period specified in paragraph (1) may not be extended beyond a date that is 20 months after the date of the order for relief under this chapter.

[103] *See* In re Geriatrics Nursing Home, Inc., 187 B.R. 128 (D.N.J. 1995).

toward reorganization, (4) fact that debtor is paying its bills as they become due, (5) whether debtor has demonstrated reasonable prospects for filing a viable plan, (6) whether debtor has made progress in negotiations with its creditors, (7) amount of time which has elapsed in the case, (8) whether debtor is seeking an extension of exclusivity in order to pressure creditors to submit to debtor's reorganization demands, and (9) whether an unresolved contingency exists.[104] In addition, bankruptcy courts have found cause for terminating the debtor's exclusive period to propose a plan of reorganization when there is evidence of gross mismanagement of the debtor's operations or of acrimonious feeling between debtor's principals which stands as obstacle to debtor's successful reorganization.[105]

In 2016, the discussions about the creditors' inability to propose a competing plan of reorganization under a *recuperação judicial* case got some traction in Brazil, after a certain ad hoc group of bondholders, advised by local and foreign legal advisors,[106] formally proposed a competing plan of reorganization in the Oi Group's *recuperação judicial* case, the then largest *recuperação judicial* ever filed in Brazil. In that case, the group of bondholders alleged that plan of reorganization originally proposed by the debtor privileged the debtor's equity holders to the detriment of the creditors. With this, the group of bondholders, formally exclusively by foreign funds, teamed up with a foreign strategic investor and proposed a competing plan that provided a capital injection into the debtor and better recovery terms for creditors.[107] Eventually, the bondholders' competing plan of reorganization lost traction, and there was no decision on the merits in connection with the possibility of the creditors to formally submit a competing plan of reorganization for creditors' deliberation at a *recuperação judicial* case.

Since then, Brazilian bankruptcy practitioners, lawmakers and scholars have engaged in more advanced discussions about the possibility of creditors to present a competing plan of reorganization. The discourse on such topic resulted in a formal reform of the Brazilian Bankruptcy Act effective in 2021,[108] which was generally inspired by the

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[104] *See* In re Energy Conversion Devices, Inc., 474 B.R. 503 (Bankr. E.D. Mich. 2012). *See also* In re Express One International, Inc., 194 B.R. 98, 100 (Bankr.E.D.Tex.1996).

[105] *See* In re Geriatrics Nursing Home, Inc., 187 B.R. 128 (D.N.J. 1995).

[106] The ad hoc group of bondholders was advised by Pinheiro Neto Advogados (local counsel) and by Cleary Gottlieb Steen & Hamilton, LLP (international counsel).

[107] *See UPDATE 1-Group of Oi bondholders reject in-court reorganization plan*, https://www.reuters.com/article/oi-sa-bankruptcy/update-1-group-of-oi-bondholders-reject-in-court-reorganization-plan-idUSL1N1BK0KP. *See also Egyptian investor, bondholders mull bid for Brazil's Oi - sources*, https://www.reuters.com/article/oi-sa-restructuring-sawiris/egyptian-investor-bondholders-mull-bid-for-brazils-oi-sources-idUKL1N1CR0HH.

[108] On December 24th, 2020, the Law No. 14,112, which amended material parts of the Brazilian Bankruptcy Act, was published, and on January 24th, 2021 it became effective. This legislative reform is considered to be the most relevant bankruptcy reform ever implemented in Brazil since the enactment of the Brazilian Bankruptcy Act, as it has amended provisions on, *inter alia*, pre-insolvency workouts, asset sales, DIP financing, the treatment of tax claims under bankruptcy, among others.

mechanism of the U.S. Bankruptcy Code in that relevant part. The reform provided for the termination of the debtor's exclusive right to propose a plan of reorganization upon either (i) the lack of deliberation on the plan of reorganization proposed by the debtor within the period during which the enforcement and collection actions against the debtor are stayed, that is, one hundred and eighty days counted as from the order that accepts and opens the *recuperação judicial* case (which is extendable for extra one hundred and eighty days, to the extent the debtor has not caused delay in the *recuperação judicial* case), or (ii) the rejection of the plan of reorganization proposed by the debtor at the general meeting of creditors. In both cases, the right of creditors to propose a competing plan of reorganization is only triggered if accepted by the creditors holding simple majority of the prepetition claims present at the general meeting of creditors. Therefore, unlike the provisions of the U.S. Bankruptcy Code, the termination of the debtor's exclusive period to propose a plan of reorganization is not contingent on the bankruptcy court's evaluation of cause on a case-by-case basis, but it is rather triggered by an objective set of events. In addition, the Brazilian legislator added special provisions not present in the U.S. bankruptcy system, which evidence the intent of the Brazilian legislature to conform the mechanism with local interests and the reality of the Brazilian insolvency system. In this regard, the creditors' competing plan of reorganization (i) shall provide for the release of the personal guarantees of the claims held by creditors who consent with or approve the plan, (ii) shall not impose new obligations for the debtor's shareholders, and (iii) shall not impose heavier burdens for the debtor or the debtor's shareholders than the burdens they would have in a liquidation scenario.[109]

Brazilian legal practice still has an incipient experience with the presentation of competing plans of reorganization under this new legal framework. The ongoing *recuperação judicial* of Samarco[110] is the fist and leading precedent on this topic so far. In April of 2022, the requisite majority of creditors rejected the plan of reorganization originally proposed by the debtor Samarco at Samarco's general meeting of creditors. At the same meeting, the requisite majority of creditors approved the possibility of a proposition of a competing plan of reorganization by creditors within thirty days. Up to now, the relevant labor Unions and certain relevant foreign financial creditors have proposed two different plans of reorganization in Samarco's *recuperação judicial* case. In particular, the plan of reorganization proposed by the group of foreign financial creditors has been drafted with the assistance of foreign financial advisors and U.S. lawyers,[111]

[109] The language on the prohibitions for imposition of new obligations to the debtor's shareholders, or of heavier burdens to the debtor or the debtor's shareholders, is flawed and case law has not yet developed clear indicatives of what provisions would fall into such limitation.

[110] 2ª Vara Empresarial de Belo Horizonte [2nd Business Court of Belo Horizonte, Minas Gerais], Case No. 5046520-86.2021.8.13.0024.

[111] As per the motion filed by such group of financial creditors on May 18, 2022, such creditors' competing plan of reorganization has been drafted with the support of Houlihan Lokey, Inc., acting as international financial advisor, and Davis Polk & Wardwell LLP, acting as international counsel, in addition to local financial and legal advisors.

which evidences the constant presence of foreign actors in such new legal practice of Brazilian bankruptcy law.

Although the rules adopted by the Brazilian legislator on the creditors' ability to propose a competing plan of reorganization have particularities and material differences if compared with the U.S. Bankruptcy Code, this change in the Brazilian Bankruptcy Act approached the Brazilian bankruptcy law to the U.S. bankruptcy practice, as the concept of a competing plan of reorganization, and the main underlying features (e.g., debtor's loss of its exclusivity right) have been inspired by and transplanted from the U.S. Bankruptcy Code. This may well be a case, therefore, of a formal convergence of bankruptcy law,[112] mainly driven by the demands of foreign players in the Brazilian distressed market, in which the law has not been transplanted as is, but it has reflected particularities of Brazilian internal demands.

c. Pre-insolvency procedure

The original text of the Brazilian Bankruptcy Act, as enacted in 2005, did not provide rules facilitating pre-insolvency workouts, such as provisions that creates a breathing space for the debtor to carry out out-of-court negotiations with creditors in a pre-bankruptcy-filing scenario.[113] In view of the Covid-19 financial fallout, commentators on the Brazilian bankruptcy law raised the importance of the Brazilian insolvency system to provide mechanisms that create a safe environment for such out-of-court negotiations to take place.[114] In this regard, amidst the pandemic, legislators (supported by the assistance and advice of legal scholars) have included provisions in a then existing bill of law that had the purpose of providing a mechanism for negotiation and mediation between debtors and creditors in a pre-filing situation.[115] In 2020, the competent Brazilian legislators

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[112] *See* Chapter II (a).

[113] *See* Aurelio Gurrea-Martínez, *The Future of Reorganization Procedures in the Era of Pre-Insolvency Law* (Ibero-American Institute for Law and Finance, Working Paper No. 6/2018, 2019) (When defining pre-insolvency mechanisms, the author points out the following characteristics "(i) workouts or totally out-of-court debt restructuring agreements between debtors and creditors; (ii) mediation and conciliation proceedings, in which third parties are appointed to facilitate or propose a solution, respectively; (iii) scheme of arrangements, in which some special rules regarding voting, creditor classification and approval will apply; and (iv) a [*de facto* Chapter 11], sometimes designed as a type of 'enhanced scheme of arrangement', which is a more complex restructuring procedure that includes various features of insolvency proceedings, particularly from the US Chapter 11.").

[114] *See* Ricardo Villas Boas Cueva & Daniel Carnio Costa, *Os mecanismos de pré-insolvência nos projetos de lei n. 1397/2020 e n. 4458/2020* (2020), https://www.migalhas.com.br/depeso/335268/os-mecanismos-de-pre-insolvencia-nos-pls-1397-2020-e-4458-2020. *See also* Daniel Carnio Costa, *Conciliações e mediações antecedentes: O sistema brasileiro de pré-insolvência empresarial* (2021), https://www.migalhas.com.br/coluna/insolvencia-em-foco/352248/conciliacoes-e-mediacoes-antecedentes.

[115] Bill of Law No. 4458/2020 (Br.).

approved the bill of law, which resulted in, *inter alia*, new provisions in the Brazilian Bankruptcy Act governing pre-insolvency workouts.[116]

According to the now effective Brazilian Bankruptcy Act, a debtor that meets the eligibility requirements for filing a *recuperação judicial* case can seek an antecedent urgency relief from the court to stay all the enforcement and collection actions against it, for a window of sixty days, before filing for a *recuperação judicial* case. This measure aims at shielding the debtor from creditors' enforcement actions for a certain period of time, in order to enable a coordinated negotiation with the creditors and facilitate an out-of-court workout. In the event a settlement agreement is reached, the court is expected to review it and eventually confirm it. In the event a settlement agreement is not achieved and the debtor ends up filing for a *recuperação judicial* case, the creditors return to the *status quo ante*.[117]

The amendment of the Brazilian Bankruptcy Act to provide for such pre-insolvency mechanism follows the same trend of law reforms carried out by other nations around the world.[118] In particular, the new provisions on pre-insolvency mechanism establishes a debtor-in-possession model, where the debtor's managers continue in charge of the business, and a stay of enforcement actions, similar to pre-insolvency frameworks adopted by the United Kingdom, Spain, Singapore and the European Union.[119] [120] According to scholars who were involved in the legislative process of the Brazilian Bankruptcy Act amendment,[121] the provisions recently included in the Brazilian Bankruptcy Act on pre-insolvency mechanisms have been sparked by and transplanted from the World Bank's and INSOL's Global Guide: Measures Adopted to Support Distressed Businesses through the Covid-19 Crisis,[122] the French law, the Directive (EU) 2019/1023 of the European

[116] *See supra* note 108.

[117] *See* Section II-A of the Brazilian Bankruptcy Act.

[118] *See* Aurelio Gurrea-Martínez, *supra* note 113.

[119] *Id.*

[120] The framework adopted by the Brazilian Bankruptcy Act lacks, however, other features of pre-insolvency mechanisms present in other jurisdictions, such as cross-class and intra-class cramdown, DIP financing, and non-enforceability of ipso-facto clauses. *See id*.

[121] *See* Ricardo Villas Boas Cueva & Daniel Carnio Costa, *supra* note 114. *See also* Daniel Carnio Costa, *supra* note 114.

[122] Aurelio Gurrea-Martinez, Pooja Mahan & Simon Brodie, *Global Guide: Measures Adopted to Support Distressed Businesses through the Covid-19 Crisis* (2020), https://ccla.smu.edu.sg/sites/cebcla.smu.edu.sg/files/2020-12/SGRI/Insolvency%20Responses%20in%20Times%20of%20COVID19.%20World%20Bank%20and%20INSOL.pdf. ("In some jurisdictions, there is a push for facilitation of workouts through informal mechanisms. Many countries, sometimes through their regulators, central banks or courts, are encouraging lenders to reach out-of-court agreements with debtors materially affected by Covid-19, especially when these agreements just involve a deferral of loan repayments. Jurisdictions incentivizing debt renegotiations and workouts whenever they might be needed, include Australia, China, Hong Kong, India, Malaysia, and Singapore").

Parliament and of the Council dated June 20, 2019,[123] and the UK Corporate Insolvency and Governance Act 2020.[124]

This change in the Brazilian Bankruptcy Act reflects the work of scholars and legislators, motivated by a global financial crisis and inspired by international guidelines from international organizations and associations of professional and foreign law of certain metropolitan nations. Applying the recursivity cycle theory advanced by Halliday and Carruthers to this case, the internal lawmaking process in Brazil was sparked by global norms and by foreign countries' laws in connection with rules that aim at facilitating pre-insolvency workouts through a coordinated negotiation among the debtor and its creditors. Thus, this may well be another example that suggests a trend in the Brazilian bankruptcy law making process to look at global and foreign standards, and incorporate them to domestic law with appropriate adaptations.

d. UNCITRAL Model Law on Cross-Border Insolvency

Originally, the Brazilian Bankruptcy Act, as enacted in 2005, did not incorporate the UNCITRAL Model Law on Cross-Border Insolvency, nor embedded other provisions to govern cross-border insolvencies. In principle, given the lack of effective rules on the topic, companies undergoing a main restructuring proceeding abroad were expected to resort to regular civil procedure mechanisms in Brazil to address demands within the Brazilian territory.[125] However, regular civil procedures rules governing the recognition of foreign decisions in Brazil and the compliance of Brazilian orders abroad are generally burdensome and time consuming,[126] thus not suited for demands of bankruptcy cases, which require quick responses to avoid deterioration of assets and further loss of value.

[123] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1023&from=PT.

[124] Available at: https://www.legislation.gov.uk/ukpga/2020/12/contents/enacted/data.htm.

[125] Paulo Fernando Campana Filho, *The Legal Framework for Cross-Border Insolvency in Brazil* 143 (Houston Journal of International Law, Vol. 32, No. 1, 2010) ("The entire set of rules described above show the chaotic status of cross border insolvency regulation in Brazil. Confusion reigns. The Bustamante Code provided a handful of rules specifically aimed at regulating cross border insolvencies, but it may have fallen into desuetude. The 1939 Code of Civil Procedure also had provisions on the matter, but it was revoked by the enactment of the 1973 Code. Even with this revocation, the specific rules on international bankruptcy might have subsisted, who knows for sure? The 1942 Introductory Act to the Civil Code and the 1973 Code of Civil Procedure are still enforceable, but not too much help, as neither of them contains any specific rules on cross-border insolvencies. Their general provisions are absolutely inadequate to deal with the issue. The 1945 and 2005 Bankruptcy Acts were successor acts that failed to directly address the question of cross border insolvencies and that may also contradict prior regulation.").

[126] The Brazilian Federal Constitution provides that the Brazilian Superior Court of Justice (the highest court for non-constitutional matters in Brazil) is competent to confirm foreign orders within the Brazilian territory. The confirmation process, however, can take months, or even years, to be concluded. In addition, the process of implementation of Brazilian orders abroad is governed by the Brazilian federal law of civil procedure, is also time-consuming, and does not meet the demands of restructuring transactions.

On the other hand, since the enactment of the Brazilian Bankruptcy Act, several Brazilian conglomerates with assets and operations abroad have filed for their main bankruptcy case before Brazilian Courts and have counted with the support of foreign courts to implement restructuring measures outside of the Brazilian territory. For instance, the *recuperação judicial* procedures of Centrais Elétricas do Pará (CELPA), the Varig group, Frigorífego Independência S.A., Rede Energia S.A., the OAS Group and the Oi Group counted with foreign special rules on cross-border insolvencies to get the cooperation of foreign courts and implement restructuring acts outside of Brazil.[127]

The demand for rules governing cross-border insolvencies, prompted by several cross-border cases presided over by Brazilian bankruptcy judges over the last years, has led to the amendment of the Brazilian Bankruptcy Act to include special provisions designed to establish cooperation and communication between bankruptcy courts and meet the demands of transborder restructurings. In 2020, special provisions based on the UNCITRAL Model Law on Cross-Border Insolvency were included in the Brazilian Bankruptcy Act with appropriate adaptations, thereby equipping Brazilian bankruptcy courts with appropriate provisions to, *inter alia*, recognize foreign main insolvency proceedings within the Brazilian territory. With this, Brazil joined the list of 48 States that have adopted the UNCITRAL Model Law on Cross-Border Insolvency as of 30th September, 2020.[128]

Brazil still has an incipient experience with the application of the UNCITRAL Model Law on Cross-Border Insolvency. In June of 2021, a bankruptcy court in Rio de Janeiro applied the new rules on cross-border insolvency for the first time in Brazil, when it recognized the Singaporean insolvency proceeding of Prosafe SE as the foreign main proceeding. In this case, the court granted the stay of enforcement actions pending in Brazil against the debtor, thus protecting three vessels that the debtor had within the Brazilian territory.[129]

The amendment of the Brazilian Bankruptcy Act to include special rules governing cross-border insolvencies, inspired by the UNCITRAL Model Law on Cross-Border Insolvencies, illustrates a formal convergence of law,[130] as a law reform was necessary to implement special mechanisms into Brazilian bankruptcy system to deal with cross-border insolvencies. This is also a case of a change in bankruptcy law that has been influenced by the increasing volume of cross-border transactions, and the influence exercised by

[127] *See* Julia Tamer Langen, *A lei modelo da UNCITRAL e a disciplina da insolvência transnacional no Brasil*, 2020 (Master's thesis, Faculdade de Direito, Universidade de São Paulo).

[128] *See* United Nations Commission on International Trade Law, Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency, 2021, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/20-06293_uncitral_mlcbi_digest_e.pdf.

[129] Ana Carolina Monteiro, *Brazil's first recognition of a foreign proceeding under the Model Law on Cross-Border Insolvency*, in Singapore Global Restructuring Initiative Blog, https://ccla.smu.edu.sg/sgri/blog/2021/08/18/brazils-first-recognition-foreign-proceeding-under-model-law-cross-border.

[130] *See* Ronald J. Gilson, *supra* note 3.

international organizations and standard setting bodies, supported by the Brazilian academic community, bankruptcy practitioners and lawmakers.

CONCLUSION

By the end of the 20th century and the beginning of the 21th century, international organizations and standard setting bodies worked on reviewing local bankruptcy laws and developing global insolvency norms that reflected their perception of the most efficient bankruptcy system at that time.[131] Concepts of this exemplar bankruptcy regime and principles, mainly inspired by the legal framework and principles of the U.S. Bankruptcy Code, were generally adopted by certain nations in an attempt to conform their insolvency systems with new market demands and global standards, such as the case of Brazil.[132] However, qualitative data suggest that, in certain cases, convergence of bankruptcy law did not stop at these major law reforms undergone by these nations to implement such model concepts into their jurisdictions. The increasing volume of cross-border transactions and growing market integration have prompted borrowing nations to continue to share bankruptcy concepts and borrow rules from foreign laws and from soft law created by international organizations that have proved to be successful in improving bankruptcy systems.

In this regard, this paper provides qualitative evidence that, after Brazil's major bankruptcy reform in 2005, Brazilian bankruptcy law and practice have continued to change towards convergence with either foreign or international models. The data presented in this research illustrate that convergence of Brazilian bankruptcy law has been observed either through practice only – in cases where a formal law reform was not necessary for the legal transplant or legal implant to take place (e.g., the recognition of bondholders' right to vote on a plan of reorganization)[133] –, or through a formal law reform, in cases where a legislative change in the Brazilian Bankruptcy Act was necessary to implement the legal transplant of foreign laws or the legal implant of global norms (e.g., the recognition of creditors' right to propose a competing plan of reorganization, rules on pre-insolvency negotiations and special rules to govern cross-border insolvencies).[134] In addition, the sources of convergence in Brazil's recent experience varied from case to case, and included either the laws of certain metropolitan nations (such as American, French and UK laws),[135] as well as global norms and soft law developed by standard setting bodies (such as the UNCITRAL Model Law on Cross-Border Insolvency).[136]

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131 *See* Chapter II (c).

132 *See* Chapter II (c).

133 *See* Chapter III (a).

134 *See* Chapter III (b), (c) and (d), respectively.

135 *See* Chapter III (a) and (b) for cases on U.S. law, and Chapter III (c) for cases on French and UK laws.

136 *See* Chapter III (d).

This paper further suggests that there are indicia that Brazilian bankruptcy law and practice have been evolving and changing towards convergence with foreign laws or global norms, due to, *inter alia*, the increasing influence of international market players in Brazilian restructuring transactions, such as the investments carried out by global entities in Brazil's distressed market and the work of international advisors in Brazilian bankruptcy matters. While this paper does not aim to deny the existence of an alleged parallel divergence movement, which should be the scope of a separate review, this research suggests that, as long as international market players continue to influence on the Brazilian bankruptcy environment, and Brazilian bankruptcy law continues to be amenable and flexible to incorporate foreign and global norms to cure deficiencies and improve its bankruptcy system, convergence of Brazilian bankruptcy law with foreign and global norms may continue to exist, thus approaching the Brazilian insolvency regime with foreign and global standards of insolvency law.

TABLE I:

Selected Recuperação Judicial and Recuperação Extrajudicial Cases and Participation of Foreign Creditors and Investors[137]

Debtors	*Total indebtedness*[138]	*Key foreign creditors*	*Key foreign creditors' claim amount*[139]	*Key foreign creditors' participation*
The Oi Group	R$ 64 billion	Groups of Bondholders (led by, *inter alia*, GoldenTree Asset Management, Benefit Street, Blackrock, Brookfield, Redwood, Capricorn, York and Citadel), and Export Credit Agencies (led by BNP Paribas, Crédit Agricole, HSBC France and Nordic Investment Bank).	R$ 34.300 billion; US$ 4.080 billion and € 5.130 billion.	Bondholders heavily negotiated the plan, which included new payment conditions and limitations on the debtors' governance. A group of bondholders also entered into a backstop agreement, and extended approximately R$ 4 billion to the debtors in consideration for certain equity interest.
Odebrecht Engenharia e Construção S.A.	US$ 3.3 billion	Bondholders (led by, inter alia, Gramercy, Alliance Bernstein, Fidelity and Pala)	US$ 2.4 billion	Bondholders heavily negotiated the plan, which provided for new payment conditions and provisions and limitations on the debtor's corporate governance.
The OAS Group	R$ 11 billion	Bondholders (led by, inter alia, King	US$ 1.8 billion	Bondholders ultimately

[137] This table is not exhaustive, as there are numerous large *recuperação judicial* and *recuperação extrajudicial* cases in which foreign creditors or invested participated that have not been listed in the table. It serves the purpose of exemplifying the participation of relevant foreign creditors and investors in a few of the most noteworthy bankruptcy cases ever filed in Brazil. All information is publicly available.

[138] Approximate figures.

[139] Approximate figures.

		Street, BNP Paribas, Dupont and JP Morgan)		purchased the debtors' most relevant asset through credit bidding.
The OGX Group	R$ 11.2 billion	Bondholders (led by, *inter alia*, Pimco, Credit Suisse, Nomura and Moneda)	R$ 2 billion	

TABLE II:

Selected Representations by Foreign Law Firms in Brazilian Recuperação Judicial and Recuperação Extrajudicial Proceedings[140]

Law firm	*Matter*	*Client*
Cleary Gottlieb Steen & Hamilton LLP	*Recuperação judicial* of Samarco Mineração S.A.	Samarco Mineração S.A. (*debtor*)
	Recuperação judicial of the Oi Group	Ad hoc creditors' committees of bondholders (*creditors*)
	Recuperação judicial of the Constellation Group	Ad hoc group of secured project finance lenders (*investors*)
	Recuperação extrajudicial of Odebrecht Engenharia e Construção S.A.	Odebrecht Engenharia e Construção S.A. (*debtor*)
	Recuperação extrajudicial of Odebrecht Oil and Gas	Ad hoc creditors' committees of bondholders (*creditors*)
	Recuperação judicial of the OGX Group	Ad hoc group of bondholders and DIP lenders (*creditors and investors*)
	Recuperação judicial of Tonon Bioenergia S.A.	Ad hoc group of a majority of unsecured and secured bondholders and certain lenders (*creditors and investors*)
Davis Polk & Wardwell LLP	*Recuperação judicial* of the Oi Group	Significant stakeholder
	Recuperação extrajudicial of Odebrecht Engenharia e Construção S.A.	Ad hoc group of bondholders (*creditors*)
	Recuperação extrajudicial of Odebrecht Oil and Gas	Odebrecht Oil and Gas (*debtor*)
	Recuperação judicial of Tonon Bioenergia S.A.	Tonon Bioenergia S.A. (*debtor*)
	Recuperação judicial of the Infinity Group	Ad hoc committee of creditors (*creditors*)

[140] This table is not exhaustive, as there are other law firms and matters that have not been listed in the table. All information has been obtained thourgh publicly available sources, including on the respective law firms' website.

Dechert LLP	*Recuperação judicial* of Samarco Mineração S.A.	Ad hoc group of noteholders (*creditors*)
	Recuperação judicial of the Oi Group	International bondholder committee (*creditors*)
	Recuperação judicial of the Constellation Group	Bondholder (*creditors*)
	Recuperação judicial of the OAS Group	Major bondholders (*creditors*)
White & Case LLP	*Recuperação judicial* of the Oi Group	The Oi Group (*debtors*)
	Recuperação judicial of the Constellation Group	The Constellation Group (*debtors*)
	Recuperação judicial of the OAS Group	The OAS Group (*debtors*)
	Recuperação judicial of the Santa Terezinha Group	Syndicate of lenders (*creditors*)