

THE NEW BRAZILIAN CROSS-BORDER INSOLVENCY FRAMEWORK AND THE ADOPTION OF THE JIN GUIDELINES FOR DIRECT COMMUNICATION AND COOPERATION BETWEEN COURTS

The impact of technological innovations and behavioral changes are directly reflected on the way justice is handed out. The Covid-19 pandemic ended up having the effect of bringing about a rapid acceleration and improvement of the use of digital tools by the Courts, with the aim of keeping Justice fully operational, even during health-related measures of social distancing.

The activities of the Judiciary Branch in Brazil went uninterrupted even during the most critical periods of social distancing measures imposed by the COVID-19 pandemic, due to the virtualization of jurisdictional activities. Regarding to the Courts with jurisdiction over bankruptcy and judicial reorganization proceedings, the National Council of Justice issued, in March 2020, the Recommendation n.63, advising the judges on how to handle insolvency cases in the lights of the pandemic, in order to mitigate its impacts over the companies, incentivizing decisions like prioritized analyses of creditors and debtors' withdrawal requests; suspension of in-person general meetings of creditors, converting them into online meetings; extension of the stay period; incentive to authorize the presentation of modified judicial reorganization plans in the event of impossibility of complying with the original plan; and virtual oversight of the activities of companies under reorganization, by the judicial administrator/trustee.

Along the same lines, Brazil's National Council of Justice, in October 2020, also approved Resolution n.345, which allows State Courts to adopt 100% digital courts, with the processing of judicial proceedings exclusively via electronic and remote means, without the parties' having to appear in person at any time or for any procedural act.

Amidst all the changes compulsorily imposed by the Covid-19 pandemic, such as those mentioned above, there was also a greater concern with the situation of companies in financial distress, which bolstered the processing of the project of Bill to reform Brazil's Reorganization and Bankruptcy Law, culminating with the enactment of Law 14112/2020 (in force since January 23, 2021), which promoted a substantial change in the Brazilian insolvency framework, seeking to modernize the legal instruments for dealing with the company's financial difficulties, including the full adoption of the Uncitral Model Law for cross-border insolvencies.

The reform of the Brazilian insolvency legislation and the regulatory acts issued by the National Council of Justice are aimed at improving the business environment, unlocking the nation's economy, and collaborating toward better governance in judicial reorganization and bankruptcy processes, thus resulting in improvements in Brazilian indicators in the World Bank's "Doing Business" Report.

In this reform scenario – and in view of Brazil's adopting the Uncitral Model Law for cross-border insolvencies – the National Council of Justice issued Resolution n.394¹ of May 18, 2021, which institutes rules on cooperation and direct communication with foreign insolvency courts for the processing and judging cross-border insolvency proceedings.

In practice, CNJ Resolution n.394 has adopted the rules of communication and cooperation amongst courts, insolvency representatives and other parties involved in cross-border insolvency proceedings, proposed by the Judicial Insolvency Network (JIN) Guidelines. Brazil has become the 16th jurisdiction to be included on the list of courts that have adopted the JIN Guidelines (<http://www.jin-global.org/jin-guidelines.html>)².

¹ <https://atos.cnj.jus.br/atos/detalhar/3956>

² The JIN was established in October 2016 by a group of judges from England and Wales, Australia, Bermuda, British Virgin Islands, Canada, Cayman Islands, Singapore, and the USA. The JIN Guidelines "address key aspects of and the modalities for communication and cooperation amongst courts, insolvency representatives and other parties involved

In this regard, when signing insolvency protocols for direct communication and cooperation, Brazilian judges must observe the following guidelines:

I – court-to-court communication for the purpose of coordinating or deciding on material or procedural issues may be carried out by any means that allow for the participation of the parties as observers, save for exceptional situations to be defined in the insolvency protocol, whereby the parties will not have any participation in the act;

II – in the event of participation by the parties, they must be summonsed / subpoenaed to the act no less than 5 (five) days in advance, except in cases of court-recognized urgency;

III – the communications referred to in item I, when public, shall be recorded and shall be freely accessible to the parties to the suit; and

IV – the place and time of communication between the courts will be defined by mutual agreement by the courts themselves.

The courts may hold joint hearings, if they deem it appropriate and pertinent to the achievement of the cooperation goals, pursuant to the rules defined in the insolvency protocol and in fulfillment of the guidelines contained in the cooperation guide and direct communication between insolvency courts of the Judicial Insolvency Network (JIN).

We conclude that the Brazilian reform of the insolvency legislation, along with the regulatory acts issued by the National Council of Justice, have begun to widely admit the use of technological tools and online environments in dealing with the company's financial distress. Likewise, the adoption of the cross-border insolvency regulation and the rules of best practices proposed by the JIN Guidelines for direct communication and cooperation have made the business environment in Brazil more internationalized and transparent. Thus, it

in cross-border insolvency proceedings, including the conduct of joint hearings. The overarching aim of the JIN Guidelines is the preservation of enterprise value and the reduction of legal costs.

is assumed that there will be greater legal certainty and efficiency in dealing with the companies in financial difficulties, favoring investment and the attraction of foreign capital for business development in Brazil.