Corporate Bankruptcy and Reorganization in Brazil: National and Cross-border Perspectives

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I. INTRODUCTION

Until recently Brazil had an obsolete insolvency law. The old statute, which took effect shortly before the end of World War II and which was later modified by certain labor and tax law statutes, provided no incentive for the restructuring of viable businesses or for the liquidation and winding up of companies that were not viable. The net result was that insolvent entities were allowed to linger on, creating inefficiencies in the economy and pressuring viable business by forcing them to compete with entities which were incapable or unwilling to comply with their tax, labor, environmental, and consumer obligations.

The present article contains an introduction to the subject. Part I outlines the main features of the new Insolvency Law, and Part II deals with the lack of cross-border provisions in Brazil and the need for reform.

II. FEATURES OF THE BRAZILIAN INSOLVENCY LAW

A. A global wave of bankruptcy law reform

The Brazilian Insolvency Law reform is part of a wider attempt to modernize bankruptcy systems around the world. Since the 1990s, several international organizations such as the World Bank, the International Monetary Fund (IMF), and the United

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1On this subject, see the comments by Mauro Rodrigues Penteado in Francisco Satiro de Souza Junior and Antonio Sérico A. de Moraes Pitombo, Comentários à Lei de Recuperação de Empresas e Falência 55 (2006), 56.
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Nations Commission on International Trade Law (UNCITRAL) have promoted the establishment of an efficient legal framework to address insolvency around the world. Due to the globalization of capital markets, the lack of predictability in the face of insolvency in one country could foster instability in the global market and restrict the access of that country to financial resources. The abovementioned international organizations have published guidelines to help countries build effective insolvency systems and have strongly encouraged the adoption of best practices in this area. That is the case in the World Bank's Principles and Guidelines for Effective Insolvency and Creditor Rights Systems (2001) and the UNCITRAL Legislative Guide on Insolvency Law (2004).

By adopting the standards promoted by these international organizations, countries enhance their ability to act effectively in the global financial market, granting them access to important funds at a lower cost. A strong link between secured credits and the insolvency law is considered a key component of a functional credit structure.

The various guidelines provide principles to be followed in order to reach the desired levels of predictability, confidence, and efficiency. Insolvency law obviously benefits from the existence of a proper legal and institutional framework, allowing for an efficient recovery of credits affected by the insolvency of debtors. Concern over bankruptcy reform certainly existed in Brazil, which, not unlike other countries, had an outdated insolvency system. Brazilian insolvency law reform is in line with the guidelines provided by international organizations, as it aims to increase efficiency by boosting credit recovery and provides support for the continued existence and operations of viable businesses.

B. A historical overview of the Brazilian insolvency system

Corporate insolvency has been regulated in Brazil since 1756 when the country was still a Portuguese colony. It was not until 1850, almost 30 years after the country became independent, that Brazil enacted its own corporate insolvency system as part of the Commercial Code. This occurred more than 60 years before the enactment of its first Civil Code in 1916. The Commercial Code was a consolidation of private law, inspired by the French legal system, applicable only to merchants and, therefore, also the insolvency regime available to them. The enactment of the

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2 See, for instance, Malcolm Rowat, Reforming Insolvency Systems in Latin America, Public Policy for the Private Sector, n. 187 (June 1999).
3 The Brazilian Commercial Code was heavily influenced by the French Commercial Code of 1808.

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Commercial Code gave birth to a long tradition in Brazilian law—not yet extinguished—of separating the insolvency of merchants and of nonmerchants.  

Under the Commercial Code, creditors could file a petition for liquidation in any court—commercial courts were extinguished shortly after their creation. The criterion for a merchant to be considered bankrupt was the French standard of “cessation des paiements” (nonpayment of debts). Insolvency proceedings under the Code were, however, reputedly inefficient, being slow, complicated, and expensive. A major reform in insolvency law was consolidated in 1890, this time inspired by Swiss law, replacing the “cessation des paiements” by the failure to pay debts on the due date or acting in a manner which characterized insolvency. These standards have remained very much the same until the present day.

The Commercial Code also introduced alternatives to liquidation which were, however, modest in scope, as they were unable to avoid involuntary bankruptcy petitions. A debtor could get a moratorium to pay his debts if he momentarily lacked cash due to extraordinary conditions. The only remedy for the insolvent debtor was the so called “concordata,” a simple agreement between the debtor and his creditors. In 1890, Decree 917 established the Belgian-inspired “concordat preventif” (concordata preventiva) as an alternative to involuntary liquidation proceedings. Frauds and abuses in the following decades gave rise to a reform that would dramatically change the insolvency proceedings in Brazil.

The enactment of the 1945 Insolvency Law was meant to be a solution to the problems of the then existing insolvency system. Under the new law, concordata was the only alternative to liquidation (falência), and it could be requested by the debtor prior to or in the course of a liquidation proceeding. Concordata, in the 1945 law, suffered a remarkable metamorphosis. It was no longer an agreement with creditors; it became a right of any

4Consumer debtors and civil associations and partnerships not involved in business activities are subject to civil insolvency procedures. A civil insolvency procedure under Brazilian law is essentially a liquidation procedure as it provides no means for reorganization. The criterion of civil insolvency under the Code of Civil Procedure is the standard of cessation des paiements. Governmental entities, public-private joint-stock companies, and financial institutions are also excluded from standard insolvency proceedings.

5On the substitution of the bankruptcy criterion in the Brazilian insolvency system, see J. C. Sampaio de Lacerda, Manual de Direito Falimentar 45-46 (13th ed. 1996).

6Cf. Penteado, Comentários à Lei de Recuperação de Empresas e Falência at 62–63.
debtor, regardless of creditors' approval. The debtor could opt between reducing or postponing the payment to unsecured creditors within very strict limits, defined by the law, which could not be varied. Creditors had the right to oppose a concordata only if formal requirements prescribed by the law were not met. However, creditors were not permitted to vote to approve a restructuring. The rigidity of such concordata made it useless in almost all situations. In addition, labor and tax laws gave preference to credits held by employees and the tax collector, regardless of their value; both labor and tax credits had preference over the secured creditors. These features totally alienated creditors from the insolvency proceedings, which, as a result, became slow, bureaucratic, and corrupt. Credit recovery was virtually impossible since, after the inflated labor and tax credits were recovered, there was nothing left for the other creditors.

In its later years, the Brazilian 1945 Insolvency Law had become useless, allowing, as mentioned above, insolvent companies to linger on as living dead entities, creating a burden for the economy and increasing the cost of credit. Reform of the 1945 Insolvency Law was initially proposed in the early 90s, but was only approved in 2005, when Law 11,101 was finally enacted.

C. In pursuit of efficiency

The new Insolvency Law enacted in 2005 represented the most important reform of the country's insolvency system in 60 years. It promoted a complete revision of the insolvency system, and as such, it was welcomed by most scholars, lawyers, courts, and businesses.

The focus of the law is to preserve the company whenever possible or to liquidate it when its continued operation is impossible. The decision to reorganize or to liquidate belongs to the debtor in conjunction with the majority of creditors. The role of the courts is to supervise the proceedings, avoiding distortions, inequalities, and the violation of any laws. The law recognizes the "going concern" value of a company, and therefore, both in a reorganization and in a liquidation proceeding, there are provisions which

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7 Decree-Law 7661, 21 June 1945, Title X, Sections 1–2.
8 On the evolution of Brazilian restructuring measures, see Rubens Requiao, Curso de Direito Falimentar 7–9 (7th ed. 1985). An overview of the old Bankruptcy Law may be found at Thomas B. Felsberg and Troy Francis Petit, Brazil, 2004 Annual Survey of Bankruptcy Law at 551 (West 2004).
9 This is the statement of article 47 of Law 11,101, which introduces the chapter dedicated to corporate reorganization. The principle of "preservation of viable businesses" as the focus of the new Insolvency Law has been emphasized by some of the country's leading scholars. See, for instance, Calixto Salomão Filho, Recuperação de Empresas e Interesse Social, in Francisco Satiro de Souza Jr. & Antônio Sérgio A. de Moraes Pitombo, Comentários à Lei de Recuperação de Empresas e Falência 41 (2006).
allow the preservation of operations for viable businesses. In addition, the preservation of viable businesses benefits stakeholders as it protects jobs, helps increase the GDP, and provides for the payment of taxes. By recognizing that insolvency is first and foremost an issue to be resolved by debtor and creditors, the new law has become an efficient instrument to deal with many varied and complex situations and has been applied in numerous cases in a constructive manner. The number of cases that have been filed since the new law was enacted bears witness to the positive impact of the new law.

D. Court-supervised reorganization: the judicial restructuring

The most important addition to the Brazilian insolvency system is perhaps the judicial restructuring (recuperação judicial), a court-supervised restructuring proceeding, consisting of an arrangement between debtor and creditors, clearly inspired by Chapter 11 of the U.S. Bankruptcy Code. It is also the most used restructuring mechanism provided by the new law, as over 500 companies have used this measure since the new insolvency statute was enacted.

A debtor in financial difficulties may file for judicial restructuring under Law 11,101. There are a few notable exceptions: financial institutions, insurance companies, cooperatives, and government-owned entities may not file for restructuring. It should also be noted that a creditor cannot initiate a restructuring proceeding in Brazil.

There are, however, eligibility requirements that must be met for a business debtor to file for restructuring. The first step in assessing whether the insolvent entity may file for rehabilitation is to verify that it engages in a trade or business and thus is considered a merchant debtor. In addition, only business debtors in operation for at least the last two years are entitled to petition for both judicial and extrajudicial restructuring. A debtor that

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10 On the subject, see Thomas Benes Felsberg, As Novas Modalidades de Recuperação de Empresas, Valor Econômico, Jan. 16, 2008, E2.


12 For a description of the Brazilian judicial restructuring, see Thomas Benes Felsberg and Andrea Acerbi, Brazil, in Insolvency & Restructuring 2008, 41 (Bruce Leonard ed., 2008); Thomas Benes Felsberg, Brazil, in Collier International Business Insolvency Guide 2007 ¶16 (Richard F. Broude, Daniel M. Glosband and Adam C. Rogoff ed., 2007); and Thomas Benes Felsberg, Steven Kargman and Andrea Acerbi, Brazil Overhauls Restructuring Regime, Int'l Fin. L. Rev. (January 2006), at 40.

13 See article 48 of Law 11,101.
has a plan confirmed by court within the last five years cannot file again for judicial restructuring.

The petition for restructuring must include a statement of the causes of the financial distress, financial statements, and a listing of creditors and claims, among other information and documents. Once these requirements are met, the court grants a decision opening the judicial restructuring and orders the stay of proceedings against the debtor (with a few exceptions) for a period of 180 days.\textsuperscript{14}

The new law provides that, during the course of a judicial restructuring, the debtor shall generally continue to be in charge of the administration and management of the company (the debtor-in-possession provision). The court has, however, the authority to remove the debtor-in-possession where it determines that the debtor-in-possession has performed illegal acts or otherwise has taken certain actions that may be detrimental to the business or interests of the debtor. If a debtor-in-possession is removed by the court, a judicial manager, appointed in a general meeting of creditors—the deliberative body in a restructuring proceeding—takes over the administration of the business.\textsuperscript{15}

A judicial administrator is appointed by the court upon the opening of a judicial restructuring. The judicial administrator's role in a restructuring proceeding is to supervise the debtor in the management of its business, submitting to the court monthly reports on the debtor's activities and on the performance of the restructuring plan. In turn, the judicial administrator is supervised by the judge and, if such is the case, by the creditors' committee. The committee of creditors is an optional body which may be constituted in the general meeting of creditors in order to oversee the restructuring process.\textsuperscript{16}

\textbf{E. The restructuring plan}

The debtor is required to submit a judicial restructuring plan which encompasses most prepetition claims (even those which are not due; postfiling claims, however, are not subject to it), within 60 days of the court decision commencing the proceeding.\textsuperscript{17} If the debtor fails to submit the restructuring plan within this period of time, the court will declare it bankrupt, and a liquidation proceeding is opened. A creditor may not submit a restructuring plan; he may only propose amendments to it. However, no modification may be adopted over an objection of the debtor.

\textsuperscript{14}Article 6 of Law 11,101.

\textsuperscript{15}Article 64 of Law 11,101.

\textsuperscript{16}Articles 26 and 27 of Law 11,101.

\textsuperscript{17}Article 53 of Law 11,101.
Consequently, the judicial restructuring requires the debtor's cooperation and consent.18 The judicial restructuring plan must contain evidence of the viability of the business (a feasibility requirement) and a detailed description of the recovery process. It must also be accompanied by a financial and economic report, along with an appraisal of the entity's assets, done by a legally authorized professional or by a specialized company. The plan may include a virtually unlimited number of reorganization mechanisms, including payment extensions, the partial or total sale of assets, leasing of assets or business units, mergers and acquisitions, change of corporate control, increase of capital stock, issuance of securities, replacement of administrators, formation of wholly-owned subsidiaries to which the business can be transferred, employee buyouts, and transfer of assets to creditors. There are certain limits, though, in regard to the renegotiation of labor claims. Labor claims of a strictly salary nature that become due within the three months preceding the filing must be paid within 30 days, up to the limit of five minimum wages (about US $1,200 as of September 2008).19 The remaining prepetition labor claims must be paid within one year.

Although the restructuring plan provides for the payment of creditors, there are some claims which are legally not subject to it. First, tax claims, which generally constitute the bulk of the debts of a distressed company in Brazil, are not subject to the plan. Law 11,101 foresees the possibility of installment plans for the payment of judicial claims of debtors under judicial restructuring, as provided in specific legislation.20 Other claims are also excluded from the judicial restructuring proceeding. Some contracts transfer the legal ownership of an asset to a third party, although the possession remains with the debtor. Claims derived from these contracts are not subject to a restructuring plan and are entitled to separate satisfaction. Such is the case of claims derived from a specific type of leasing transaction called "arrendamento mercantil,"21 from chattel mortgages (alienacao fiduciaria)
ciária em garantia),\textsuperscript{22} or from advances of foreign exchange contracts (adiantamento de contrato de câmbio).\textsuperscript{23}

\textbf{F. Approval and confirmation of restructuring plan}

The law establishes class-based voting for approval of a judicial restructuring plan. For purposes of voting on the judicial restructuring plan proposed by the debtor, creditors are divided into three classes.\textsuperscript{24} The first class consists of holders of labor-related claims; the second, holders of secured claims; and the third, holders of unsecured claims, either privileged, nonprivileged, or subordinated. The plan must be approved by all three classes of creditors at a specially called general meeting of creditors. Only creditors who are present at the meeting are considered for vote counting. Approval of the class of labor-related claims requires the favorable vote of the majority of creditors attending the meeting, regardless of the amount of their claims. In the two remaining classes (secured and unsecured claims), the plan must not only be approved by a simple majority of creditors present in each respective class but also by the creditors holding the majority of the value of credits within each such class.

Once the plan is approved in the general meeting of creditors, it is confirmed by the judge. Court confirmation makes the plan binding to all creditors, including the dissenting ones. A restructuring plan rejected in one of the three classes of creditors may still be confirmed by court by means of the “cram down” provisions of the Insolvency Law. There is a series of cumulative requisites that must be met in order for the cramming down of the plan: holders of a simple majority of the total claims subject to the plan must vote for approval; two out of three classes must approve the plan (if there are only two classes, the plan must be approved by just one); at least one-third (33.3\%) of the creditors in the dissenting class must vote for the plan; and, finally, the plan must not entail different treatment (i.e., does not discriminate unfairly) among the creditors of the rejecting class.\textsuperscript{25}

After the plan is confirmed by court, the debtor remains under

\textsuperscript{22}A chattel mortgage transfers to the creditor the ownership and constructive possession of a certain property, irrespective of the effective delivery of such property. The debtor thus becomes an actual possessor and trustee of such property with all the related responsibilities and duties, pursuant to civil and criminal law. During the term of the agreement, the title to the property remains with the creditor until the price is completely paid by the debtor.

\textsuperscript{23}The amount delivered to the debtor in domestic currency resulting from an advance on an export exchange contract is subject to restitution, provided that the full term of the transaction, including any extensions, does not exceed the term established in the specific rules stipulated by the proper authority.

\textsuperscript{24}See article 41 of Law 11,101.

\textsuperscript{25}Article 58 of Law 11,101. On cram down provisions, see comments by Eduardo Secchi Munhoz, in Francisco Satiro de Souza Jr. & Antônio Sérgio A.
judicial restructuring until all obligations established therein which become due for up to two years have been performed. 26 During this period, the nonperformance of any obligation established in the plan entails the conversion of the restructuring to a bankruptcy, in which case the creditors have their original rights and guarantees restituted. After the termination of this 2-year period, the nonperformance of any obligation entitles any creditor to enforce its right (as set forth in the plan) or file for the bankruptcy of the debtor. 27

G. Restructuring mechanisms

The Insolvency Law contains a handful of mechanisms designed to encourage the successful restructuring of a business. First, it provides that, in the event of a final declaration of bankruptcy, outstanding credits derived from loans and supplies made available to the debtor during the restructuring period enjoy an absolute preference over all other claims. In addition, prefiling claims of creditors who continue to supply materials and resources to the debtor during the restructuring period will also have a general privilege over other prefiling claims, up to the amount of postfiling credit. 28 This “super-priority” given to postpetition creditors encourages the continuing supply of goods and services to the debtor.

The rule is also intended as an incentive for financial institutions to provide so-called debtor-in-possession (DIP) financing, as it considerably reduces the credit risk. 29 Available financing to insolvent or nearly insolvent debtors may be particularly critical in the context of reorganizations in which an effort is made to preserve the business. As such, under Brazilian law, fresh funds made available to entities being restructured through a judicial restructuring enjoy an absolute repayment priority over prefiling claims in the event of the bankruptcy of the company. This is a major improvement in relation to the prior law, under which lenders were reluctant to finance distressed companies. This unavailability of new credit was yet another factor that made it very difficult for insolvent companies to achieve a successful reorganization under the previous law.

Second, Law 11,101 makes it is possible for a restructuring plan to provide for the sale of a branch or a productive unit of the debtor company without the purchaser succeeding to any of the

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29 On this, see Felaberg, Kargman, and Acerbi, Int’l Fin. L. Rev. (January 2006) at 40.
debtor's pre-existing obligations.\textsuperscript{30} This provision overcomes one of the major obstacles to the reorganization of insolvent companies posed by the prior bankruptcy law, under which any potential acquirer would less inclined to buy a business unit in these conditions due to the likelihood of assuming all the predecessor's labor, tax, and social security liabilities.

H. **Court-supervised reorganization for small businesses**\textsuperscript{31}

Law 11,101 contains a specific section for dealing with the restructuring of small businesses, a feature unknown to the prior insolvency law.\textsuperscript{32} Companies which are classified, according to Brazilian law, as micro or small companies are entitled to file for a simplified special restructuring proceeding and to submit a special restructuring plan for court confirmation.

The special restructuring plan extends solely to unsecured creditors, with a few exceptions. It must provide for installment payments, in equal and successive monthly amounts, for up to three years with the first installment paid within 180 days from the filing. Although the debtor remains in possession under the special proceeding, it needs court authorization for increasing expenses or hiring employees. Once these requirements are met, the plan is confirmed by court without even being submitted to creditors' approval. However, if creditors who hold the majority of the unsecured claims file objections to the plan, the court is bound to reject it and to proclaim the debtor to be bankrupt.

I. **Expedited reorganization: The extrajudicial restructuring**\textsuperscript{33}

The possibility of out-of-court restructurings are one of the most important innovations introduced by Law 11,101.\textsuperscript{34} Under the former insolvency law, calling one or more creditors to privately renegotiate debts could cause the debtor to be declared bankrupt. In practice, many informal pacts were made between debtors and creditors, but there was no legal mechanism to bind the minorities which dissented from the proposed arrangements.

\textsuperscript{30} Article 60 of Law 11,101.

\textsuperscript{31} On judicial restructurings for small businesses, see Felsberg and Acerbi, Brazil, in Insolvency & Restructuring 2008 at 41, and Felsberg, Brazil, in Collier International Business Insolvency Guide 2007 ¶ 16.

\textsuperscript{32} Articles 70, 71 and 71 of Law 11,101.

\textsuperscript{33} On this subject, see Felsberg, Brazil, in Collier International Business Insolvency Guide 2007 ¶ 16; and Felsberg and Acerbi, Brazil, in Insolvency & Restructuring 2008 at 41.

\textsuperscript{34} On out-of-court restructurings under Law 11,101, see comments by Francisco Satiro de Souza Jr. in Francisco Satiro de Souza Junior and Antônio Sérgio A. de Moraes Pitombo, Comentários à Lei de Recuperação de Empresas e Falência 511 (2006), 512.
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Under the new law, debtors (but, again, not creditors) are entitled to file for extrajudicial restructuring, which is a legal mechanism for court confirmation of out-of-court arrangements between debtor and creditors. A debtor may propose an extrajudicial restructuring plan to one or more classes of creditors or groups of creditors which share similar economic interests—a feature not permitted in judicial restructuring plans. If at least three-fifths (60%) of claims belonging to any class or group of creditors approve the plan, it becomes binding to all creditors in such class or group upon court confirmation, even the dissenting ones. In any case, the agreement is an enforceable instrument as of the date of signature, binding all signatory parties even if it is not confirmed by court (just like every contract).

Any credit, secured or unsecured, matured or not, may be subject to the effects of extrajudicial restructuring, with the exception of labor and tax claims. It must be noted that the holders of claims that are excluded from judicial restructurings may not be subject to an extrajudicial restructuring. The restructuring plan may provide virtually any type of arrangement, provided it does not entail any unfavorable treatment to creditors that are not subject to it.

The requisites for a debtor to commence an extrajudicial restructuring proceeding share similarities with those set for the judicial restructuring. The debtor must not have been declared bankrupt, and if there was a past bankruptcy, the remaining liabilities must have already been declared extinguished by a final court decision. In addition, the debtor must not have any judicial restructuring plan pending approval or court confirmation and must not have a judicial or extrajudicial plan confirmed in the last two years. Finally, the debtor, or any of its officers and controlling partners, must not have been convicted of any bankruptcy crimes in the past. Once these requisites are met, the debtor may file for extrajudicial restructuring, by submitting a prepackaged plan that has already been approved by a majority of creditors for court confirmation.

After the filing, the creditors affected by the plan cannot file for involuntary bankruptcy of the debtor, nor can they continue to enforce their claims. The court allows any interested party to present a case for not having the plan confirmed. Then the judge hands down the decision confirming or rejecting the plan. The court proceeding is designed simply to cram down the plan on non-adhering creditors.

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35 de Souza Junior and de Moraes Pitombo, Comentários à Lei de Recuperação de Empresas e Falência 511 (2006), 512.
36 Article 162 of Law 11,101.
37 Article 163 of Law 11,101.
38 Article 161 of Law 11,101.
Extrajudicial restructurings may be an alternative suitable to cases where the company's tax and labor indebtedness are not relevant in view of its overall situation, and where the renegotiation of certain categories of debts (for example, suppliers or financial creditors) would be sufficient to enable the company's recovery. This fast-track option is considerably less complicated than a judicial restructuring in which the insolvency proceeding is conducted by the judge and in which the management of the business is supervised by a court-appointed administrator throughout the proceeding. In addition, failure to have a pre-packaged restructuring plan approved and ratified by the court does not cause any adverse consequences, while not having a judicial restructuring plan approved causes the debtor to be liquidated.

Despite its potential advantages, extrajudicial restructurings are still a legal mechanism far less used by debtors than judicial restructurings.

**J. Bankruptcy**

Apart from restructuring measures, Law 11,101 also provides for liquidation proceedings which generally result in all debts being accelerated and all assets being collected and sold to pay creditors to the fullest extent possible.

Under Brazilian law, both debtor and creditors may request the opening of a bankruptcy (liquidation) proceeding. In addition, the surviving spouse, the heir of the debtor (if it is a person), or a partner or shareholder (if it is a company) are entitled to file for bankruptcy. There is also the possibility, as stated above, of conversion of a restructuring proceeding to a bankruptcy by a court decision.

Voluntary bankruptcy filings are very rare in Brazil. However, according to Law 11,101, the debtor undergoing an economic and financial crisis who does not meet the requirements to file for judicial restructuring shall petition the court for bankruptcy, stating the reasons for the impossibility of continuing his business activities and presenting the legally required documents.

Upon the filing of an involuntary bankruptcy petition, the debtor is summoned to defend itself, stating the reasons why it considers the creditor's request to be groundless. The debtor may

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39 On a description of bankruptcy proceedings in Brazil under Law 11,101, see Felsberg and Acerbi, Insolvency & Restructuring 2008 at 41; Felsberg, Kargman and Acerbi, Int'l Fin. L. Rev. (January 2006), at 40; and Felsberg, Brazil, in Collier International Business Insolvency Guide 2007 ¶ 16.

40 Article 97 of Law 11,101.
also defend itself by requesting the opening of a judicial restructuring, given the requisites for such filing are met.\textsuperscript{41}

The court declares the bankruptcy of the debtor who does not pay debts that exceed 40 monthly minimum wages (about US $9,000 as of September 2008) on the due date; does not pay a debt in an enforcement action; or performs certain acts which indicate improper conduct of business and according to which the debtor is presumably insolvent—such as liquidating assets hastily or resorting to ruinous or fraudulent means to make payments, simulating the transfer of its assets in order to harm creditors' rights, or abandoning its establishment.\textsuperscript{42} The bankruptcy court has absolute and exclusive jurisdiction over the debtor and its creditors.

\textbf{K. Effects of a bankruptcy declaration}

Upon the declaration of bankruptcy, the court appoints a judicial administrator—preferably a lawyer, an economist, a business manager, an accountant, or a specialized entity—which is responsible for managing the bankrupt estate or company until its liquidation is complete. The judicial administrator has essentially the same duties as a trustee, including the authority to represent the bankrupt estate before government entities and initiate litigation against third parties. The role of the judicial administrator in a bankruptcy proceeding is thus much wider and more interfering than in a judicial restructuring. The bankruptcy court supervises all actions of the judicial administrator.

In contrast to the provisions of the former insolvency law, under Law 11,101, the bankruptcy court is no longer in charge of deciding all issues related to the bankruptcy proceeding. A general meeting of creditors may be called upon the declaration of bankruptcy so as to form a creditors' committee. The creditors' committee is a consulting body entitled to supervise the judicial administrator's activities and to make recommendations regarding the administration of the estate.

The decision declaring the debtor bankrupt also forbids any act of disposition or encumbrance of the debtor's assets without prior court authorization, unless this act is part of the debtor's regular business (provided that the court authorized the temporary maintenance of the bankrupt's business).

In addition, at the time that a debtor is declared bankrupt, any undecided or pending individual actions or collection suits filed by creditors, secured or not, with regard to rights and interests in the bankrupt estate, including those of private creditors of a general partner of the bankrupt company, are automatically stayed.

\textsuperscript{41}Article 95 of Law 11,101.

\textsuperscript{42}Article 94 of Law 11,101.
Only actions claiming indeterminate amounts continue, for the sole purpose of determining the amount owed by the estate.

L. **Collection and disposal of assets**

Following the declaration of bankruptcy, all of the assets that are in possession of the debtor are collected. The court may authorize the judicial administrator to temporarily carry on the business or may determine the sealing off of the debtor's establishment, whenever there is a risk to the preservation of the assets of the bankrupt estate or of the creditors' interests.

There may be third party assets in the possession of the debtor as a result of some rights in rem (such as chattel mortgages) or a contractual relationship (such as advances on foreign exchange contracts). The alleged owner of such assets is entitled to recover possession by means of a restitution claim. A restitution claim makes the property in question unavailable. Such property is returned to its owner in kind or, in the event that this is not possible, in cash. The latter would occur, for example, when the property is sold to a third party on a bona fide basis. Owners are allowed to reclaim an amount from the estate corresponding to the value of the property.

Any creditor, the Public Attorney's Office, or the judicial administrator may file (an actio pauliana) suit to void fraudulent transactions entered into by and between the debtor and third parties in order to harm the rights of creditors and cause damages to the estate.

In addition, certain acts performed by the bankrupt party, usually carried out in the 90 days that preceded the declaration of bankruptcy (the suspect period), are void whether or not their purpose was to defraud. Such is the case of payment of debts not yet fallen due or of constitution of in rem guarantees in connection with debts contracted previously. The ineffectiveness of these acts may be declared by court on its own initiative.

After the assets of the debtor are collected, they are sold for the payment of creditors' claims. Law 11,101 provides an order of preference in which to dispose of assets in order to keep the "going concern" value of the business intact. The order of preference is as follows: disposal of the company, with the sale of its establishments in block; disposal of the company, with the sale of its branches or manufacturing plants separately; disposal of the assets constituting each of the establishments; and disposal of the assets piecemeal. The disposal of a firm or of one of its units

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44 Article 85 of Law 11,101.
45 Article 130 of Law 11,101.
46 Article 129 of Law 11,101.
may be considered a method of reorganization through liquidation, since it keeps the business running. In addition, this rule aims to increase the general rate of credit recovery in bankruptcy proceedings.

The assets are sold through public auction unless the general meeting of creditors determines otherwise. The disposed assets are free of any burden, and the purchaser does not succeed in the debtor's obligations, including its tax and labor-related liabilities. However, this rule does not apply when the purchaser is a partner or a controlled company of the bankrupt entity, a direct or collateral relative of the bankrupt debtor or of a partner of the bankrupt company, or an agent of the bankrupt debtor with the intent to defraud the succession.

As a rule of thumb, officers and directors are not personally liable for obligations incurred by virtue of administrative acts performed in the normal course of business on behalf of the corporation, unless they act recklessly, negligently, incompetently, fraudulently, or beyond the scope of their powers (ultra vires). In most cases, partners and shareholders are not liable for the obligations of the corporate entities. There are exceptions to this rule, such as when the legal entity is being used for fraudulent purposes. The possibility of such fraudulent practices leads to the application of the doctrine of disregard of the corporate entity. In such cases, the corporate veil is pierced, and the partners and shareholders are held liable as if the corporate entity did not exist.

M. Payment of creditors

After the list of creditors presented by the debtor is made public, creditors are allowed to submit their proof of claims or any differences with regard to the listed claims, should there be any inaccuracies. The proof of claim or declaration of credit, an independent procedure whereby a creditor presents documentation to the court quantifying the amount and classifying the nature of its credit for purposes of determining amount, privilege and subordination of claims. A creditor may also file an opposition objecting to the amount, privilege, or subordination of a claim as declared by the debtor. A creditor must file a proof of claim whenever its claim has not been included or was included in an inexact manner in the public notice containing the list of creditors presented by the debtor.

All claims are subject to challenge by the creditors' committee, any creditor, the debtor or his partners, or the Public Attorney's Office. Creditors whose claims are challenged shall be notified to

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47 Articles 46 and 145 of Law 11,101.
answer the challenge. The judge shall decide on the allowance or
disallowance of an challenged claim. The resulting general list of
creditors, drawn up by the court, has their claims classified pur­
suant the priority rule.

The order of preference is as follows: labor-related claims (up
to the limit of 150 monthly minimum wages per creditor); secured
claims (up to the value of the security); tax claims (except for tax
fines); special privileged claims; general privileged claims;
unsecured claims; contractual penalties and administrative and
criminal fines (including tax fines); and subordinate claims (usu­
ally claims belonging to partners and officers of the debtor
company). Under the previous law, tax claims had preference
over secured claims, and labor-related claims had unlimited
privilege.

Some claims are given a super-priority over the listed ones,
such as fees payable to the judicial administrator, expenses with
the bankruptcy proceeding, and obligations incurred by the bank­
rupt estate.

Furthermore, Law 11,101 states that labor related claims of a
strictly salary nature falling due during the three months prior
to the decree of bankruptcy, to a limit of five monthly minimum
wages per worker, shall be paid as soon as cash is available.

Law 11,101 also permits offsetting of debts and credits between
the bankrupt party and its creditors. There are, however, some
exceptions to this rule: claims transferred after the decree of
bankruptcy, except in the event of succession by consolidation,
merger, spin-off or death; and claims, even if previously fallen
daue, transferred when the debtor's economic and financial distress
was already known or whose transfer was effected fraudulently
or maliciously.

If the disposal of assets is sufficient for the payment of all
claims, the debtor is discharged of its obligations. The obligations
are also extinguished in the event of payment, after the sale of
all assets, of at least half of the unsecured claims. Otherwise, the
debtor's liabilities are extinguished five years after the termina­
tion of the bankruptcy proceeding. If, however, the debtor is
convicted of a bankruptcy crime, its liabilities remain for 10
years. The debtor may petition the bankruptcy court to have its

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49 Article 83 of Law 11,101.
50 Article 84 of Law 11,101.
51 Article 151 of Law 11,101.
52 Article 122 of Law 11,101.
obligations declared extinguished should any of these events take place.\textsuperscript{53}

\textbf{N. \textit{Shortcomings of the Insolvency Law}}

The experience of the Brazilian Insolvency Law shows that certain of its features could be amended and that there is room for improvement. Among the shortcomings that have been recognized so far, the following are noteworthy:

- The scope of application of the Insolvency Law should be broadened to include cooperatives, nonentrepreneurial entities, and companies controlled by the federal, state, and municipal governments (the so-called mixed-economy companies).
- Rules regarding debtor-in-possession (DIP) financing should be enhanced in order to encourage this activity. Accounting and tax rules applicable to financial institutions should be more flexible and abolish disincentives for restructuring activities.
- Creditors currently excluded from reorganization proceedings should be subject to both judicial and extrajudicial restructurings in special classes but also subject to the majority rules which are also applicable to the other classes of creditors.
- A statute should regulate the activity of a judicial administrator in insolvency cases, protecting them against the consequences of good faith errors but punishing their eventual willful misconduct or gross negligence. A special tax treatment for tax liabilities of insolvent entities should be enacted.
- Rules applicable to cross-border insolvencies should be enacted. (This issue will be addressed in the following part.)

\textbf{III. \textit{CROSS-BORDER INSOLVENCY ISSUES}}\textsuperscript{54}

\textbf{A. \textit{General issues affecting cross-border insolvencies}}

The failure of a multinational corporation may create international problems in achieving the necessary systematic approach to reorganization or liquidation of a debtor company and its multijurisdictional assets and liabilities. Around the world, bankruptcy law has not been adopted or applied on a uniform basis, in its substance or procedures; and until recently, domestic bankruptcy procedures did not allow for coordination with other courts in other countries.

Some complicating factors that may arise in cross-border

\textsuperscript{53}See articles 158, 159, and 160 of Law 11,101 on rules for discharge.

\textsuperscript{54}See Thomas Benes Felsberg, Cross-border Insolvencies and Restructurings in Brazil, \textit{Int'l Bus. Lawyer} (June 2003) at 109.
Norton Annual Review of International Insolvency

Insolvency cases include the existence of assets of the debtor in more than one jurisdiction; the inconsistent recognition of foreign bankruptcy proceedings; difficult access to courts in foreign jurisdictions, which may be required to obtain relief in the main action; necessity for cooperation among judiciaries on bankruptcy matters; and the lack of harmonization of proceedings filed by one debtor in multiple jurisdictions.

These factors have lead to overlapping and conflicting actions and procedures on the part of courts in different countries. Without universal rules to guide courts, the bankruptcy and reorganization processes are ultimately frustrated in delivering resolution, which is much of the promise of these regimes in the first place and which is their anticipated role in the orderly maintenance of commerce. These impeding factors have become evident to legal observers in the last decades.

B. Universality vs. Territoriality

There are two opposite approaches in the analysis of cross-border insolvencies: universality and territoriality. The approach will vary widely from jurisdiction to jurisdiction and may include some combination of both approaches.

According to the principle of universality, an insolvency proceeding is a single and universal event across jurisdictions. The underlying belief is that the fragmented jurisdictional approach leads to discriminating treatment among creditors. Under the universal approach, all of the assets of a debtor, regardless of their location, may be used to settle all of its obligations, wherever they may be situated, in such a manner that all creditors in a given position are treated equally vis-à-vis the bankrupt party. For these purposes, the bankrupt party and its worldwide affiliates are reputed a single debtor.

This approach would, on the view of its critics, only be fully effective if all the interested countries applied the same laws and procedures without favoring any specific party, and this event is unlikely. The principle of universality requires adequate communication and coordination across jurisdictions as well as some degree of harmonization. Universality is not necessarily an issue of conforming substantive laws in all cases but may often be an issue of coordinating procedures to prevent conflicting, redundant, or inequitable outcomes.

In contrast, according to the territorial approach, an insolvency proceeding is not recognized and has no legal effects beyond the borders of the country in which it was opened. Each proceeding is treated as separate and distinct from the proceedings in other jurisdictions. This approach may be characterized as benefiting local parties to the detriment of foreign parties, when viewing the estate and claims in their entirety. The advocates of this principle argue that it is unlikely that cross-border controversies
would be equitably resolved and that local interests should be
protected over foreign ones. Territoriality is quickly losing ground
to those who promote universality, especially due to the prolifer­
ation of international markets and the globalization of businesses;
and in many cases, fairness and the facts of the case dictate that
the court looks outside of its jurisdiction for an equitable
resolution.

C. Cross-border insolvencies in Brazil

The predominance of the universal approach has become clear
in the last decade with the adoption of the UNCITRAL Model
Law on Cross-Border Insolvency and the enactment of the
European Regulation on Insolvency Proceedings and U.S.
Chapter 15.

In Brazil, despite the law reform, the bankruptcy approach
continues to be decidedly territorial, although it is complemented
by certain civil procedural measures attempting to address some
of the more universal aspects. Brazilian law, however, does not
address the most complicated issues brought by cross-border
insolvencies.

In fact, the effect of the Brazilian insolvency provisions is such
that local and foreign proceedings are separate and distinct; and
in territorial fashion, with only few exceptions, local courts
preside over the disposition and distribution of local assets, irre­
respectively of any parallel or secondary proceedings.

Brazil is certainly not alone on these issues, but it is worth
defining ways in which relevant Brazilian law could be updated
to meet the needs of a global economy. The absence of a
comprehensive legal infrastructure for bankruptcy matters is
likely to lead to situations in which assets would be dissipated,
fraudulently concealed, or possibly liquidated without addressing
the possibility of other most advantageous solutions. This sce­
nario diminishes the amount received by creditors and the pos­
sibility of restructuring viable businesses.

D. The Code of Bustamante

The Code of Bustamante of 1928, annexed to the Inter­
American Convention of Private International Law and signed by
15 Latin American countries, is one of the many international
treaties which Brazil ratified. The Code covers international

55On cross-border insolvency in Brazil, see Felsberg, Int'l Bus. Lawyer
(June 2003) at 109; and Felsberg, Brazil, in Collier International Business
Insolvency Guide 2007 ¶ 16.
insolvency issues. Its applicability, however, is limited to the signatory jurisdictions within Latin America.\textsuperscript{56}

Dated as it is, the Code of Bustamante provides a modest starting point for the introduction of universality principles in Brazil, applying principles that attempt to effect equal treatment among creditors of member states. The Code attempts to build some uniformity of procedure among its signatory states, particularly with respect to jurisdiction and enforcement matters. Pursuant to the Code of Bustamante, the domicile of the debtor determines jurisdiction for insolvency proceedings, suspension of payments or settlement, and default with respect to its assets.\textsuperscript{57} If the debtor has economically distinct establishments in several countries, each one of them is subject to a separate insolvency filing.\textsuperscript{58}

The Code of Bustamante allows for the legal effects of insolvency proceedings throughout the signatory countries (a territory-wide effect), in respect to restrictions applicable to a bankrupt entity, provided that the required formalities for registration and publicity are met.\textsuperscript{59} Once the decision regarding an insolvency proceeding is recognized in accordance with the provisions of the Code, it shall be effective in other signatory countries.\textsuperscript{60} The powers and functions of the representatives of the bankrupt estate, however, designated in any of the signatory countries are automatically acknowledged in other jurisdictions, regardless of formal recognition.\textsuperscript{61}

The Code of Bustamante provides for the application of lex loci concursus as the applicable law to determine the effects of the insolvency proceedings, including avoidance of fraudulent acts. However, lex rei sitae governs all rights in rem, including securities, and the local court has jurisdiction over such assets.\textsuperscript{62}

Although the Code provides for cross-border enforcement of bankruptcy matters, it does not address the relationship among insolvency proceedings taking place in a number of countries, nor does the Code provide a means of coordination among courts or institutions for simultaneous proceedings. The Code does, however, offer some precedent for multilateral legal and procedural cooperation in this area. The adoption of modern, universal bankruptcy law and procedure would be consistent with this practice.

\textsuperscript{56} On the Code of Bustamante, see Ernest G. Lorenzen, The Pan-American Code of Private International Law, 4 Tul. L. Rev. 499 (1930).
\textsuperscript{57} Article 414 of the Code of Bustamante.
\textsuperscript{58} Article 415 of the Code of Bustamante.
\textsuperscript{59} Article 416 of the Code of Bustamante.
\textsuperscript{60} See article 417 of the Code of Bustamante.
\textsuperscript{61} See article 418 of the Code of Bustamante.
\textsuperscript{62} Articles 419 and 420 of the Code of Bustamante.
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E. Jurisdiction under Brazilian insolvency law

Proper jurisdiction may be the single most important issue in international actions of any kind, and for cross-border insolvencies, it is a very complicated one. Nonetheless, Law 11,101, similarly to the former bankruptcy law, addresses this matter using traditional standards for domestic lawsuits. The court declares itself competent or not, mainly based on defined contact tests.

Law 11,101 ignores the possibility of parallel proceedings with respect to the same debtor in different jurisdictions or whether there are main and ancillary or secondary proceedings. Nor does Law 11,101 provide rules for the coordination of creditors or pooling of assets with bankruptcy proceedings in other countries. Such limitations are consistent with the territorial approach adopted by Brazilian law.

In defining proper jurisdiction, Law 11,101 provides that the main location of the business of a company (the main establishment) determines insolvency jurisdiction. As a consequence, proper jurisdiction may lie in Brazil or abroad, depending on the case. If the debtor is established in Brazil, a local court takes jurisdiction, and the legal effects of the insolvency proceeding shall be applicable to all of the assets of the debtor, including those located outside of the country. A simultaneous ongoing bankruptcy proceeding outside of Brazil, with respect to the same debtor or the same assets, has no legal effect on the Brazilian proceedings.

On the other hand, the Bankruptcy Law also provides that the presence of a local office of a foreign business within Brazil shall be sufficient to grant jurisdiction of the bankruptcy to local courts, thus allowing them to exercise territoriality with respect to foreign debtors doing business in the country. The reach of these proceedings, however, is likewise territorial, and only the foreign debtor's assets in Brazil are subject to disposition by the court proceedings. For these purposes, a branch office will be treated like any Brazilian subsidiary or legal entity.

F. Foreign debtors

The Civil Code, which also applies to civil matters in general (bankruptcy matters not excluded), also exercises the territorial approach in international matters. Such provisions present further evidence that Brazilian courts will exercise their authority with respect to local operations of foreign entities. In the event that the affected company's head office is located outside of Brazil, the Civil Code considers the place of its local establishment as its domicile.

Brazilian law, in some cases, does look to outside legal sources

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63See article 3 of Law 11,101.
to determine internal matters. With respect to governance issues, for example, Brazilian courts look to the home jurisdiction of a foreign corporation. Decree-Law 4,657 (Introductory Law of the Civil Code), enacted in 1942, provides that the law that governs a company is the law of the jurisdiction of incorporation. Thus the legal standing of the insolvent company, the competent representative, and the authorized powers of such representative, whatever the situation it is in, is governed by the law of the jurisdiction of incorporation. Nonetheless, as in all cases, a Brazilian court shall enforce no foreign law if it violates Brazilian sovereignty or public order. In the absence of specific law governing cross-border insolvencies, law of the place of incorporation shall apply also to issues relating to the powers of the judicial administrator and to determine whether certain acts performed by him require prior court approval.

G. Recognition of foreign judgments

Law 11,101, just like its predecessor, does not provide any enforcement mechanisms for foreign insolvency judgments. The rules on recognition of foreign judgments (such as the Introductory Law of the Civil Code) do not address insolvency matters.

A foreign judgment has to be submitted to the Superior Court of Justice for the issuance of an exequatur, in order for it to become enforceable in Brazil. Once the exequatur is issued, the claimant must resort to the Brazilian court of competent jurisdiction for enforcement of the foreign judgment.

Recognition and enforcement of a foreign judgment in Brazil requires certain conditions to be fulfilled. In order to comply with these requirements, the judgment must have been rendered by a court of competent jurisdiction in the awarding country; the defendant must have been properly served notice of the proceeding; the judgment is final and not subject to appeal; and it does not offend Brazil's notions of sovereignty, public policy or morality; and the decision must have been legalized by a Brazilian consular authority and officially translated into Portuguese.

In cases where Brazilian law provides for exclusive jurisdiction of a party or matter, Brazilian courts will not recognize a foreign judgment. Thus in the case of a debtor with its principal place of business in Brazil, a Brazilian court will not recognize a foreign judgment as Brazilian law claims exclusive jurisdiction over such entities. Additionally, Brazilian courts have exclusive jurisdiction over real estate property located in the country. These exclusions from the foreign judgment recognition, although not uncommon in other jurisdictions, further limit any extension of the

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64See article 15 and 17 of the Introductory Law of the Civil Code and article 217 of the Internal Regulations of the Superior Court of Justice.

65See article 2 of Law 11,101.
universal approach to Brazil. With respect to these parties and assets, creditors must bring their action in Brazil in order to protect their rights.

The requirement regarding the proper service of notice is one of the most frequently contested requisites for the recognition of a foreign judgment against a defendant domiciled in Brazil. Since Brazil is not a party to the Hague Convention of 1965 on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters, service of process must be accomplished in accordance with Brazilian law. Therefore, the appropriate method for serving process on a Brazilian-domiciled individual is by a letter rogatory. Any other method of serving a Brazilian-domiciled defendant will render the eventual foreign judgment unenforceable in Brazil, unless the defendant accepts the jurisdiction of the foreign court by voluntarily appearing and defending the claim.

In many insolvency matters, decisions do not qualify for recognition in Brazil, either because the Brazilian party was not served properly, jurisdiction in a foreign court was not appropriate under Brazilian law, or because the decision is not final and may still be subject to appeal.

In addition, it should be noted that in the real-life practice of law, it is not uncommon that a party does not have the time to wait for a foreign decision to be recognized by the Brazilian Superior Court of Justice before acting. The claimant may generally file an independent lawsuit in Brazil instead of dealing with the legal inefficiency, opaqueness, and complexity of attempting to enforce a foreign insolvency judgment. Unfortunately, this situation favors the unequal treatment of creditors.

**H. Controversy on the applicable law**

Without clear direction in the law and with little precedent in cases of foreign insolvencies, varying approaches in analyzing judgment enforcement and related issues. A number of issues are still open to interpretation, as the published case law regarding foreign bankruptcies is largely limited to issues of the conversion of credits held in foreign currency into domestic currency, and the statutory law does not expressly address these cases.

As such, there is considerable debate over the applicability of the old Code of Civil Procedure (which dates back to 1939), which, unlike the current code (enacted in 1973), includes rules for the enforcement of foreign insolvency judgments. This interpretation is based on a theoretical construction according to which statutory rules not overridden retain its force and effect even if the body of law in which it is contained is expressly revoked. The
matter is not yet entirely settled as to what extent the current Civil Procedure Code completely overruled the Civil Procedure Code of 1939.

According to the Code of Civil Procedure of 1939, foreign decisions declaring the bankruptcy of merchants domiciled in the countries where such decisions were rendered are effective in Brazil, after due formal recognition. However, the Code allows no foreign decision to declare the bankruptcy of a debtor domiciled in Brazil.\(^{67}\)

Regardless of the philosophical inconsistency with the current law in Brazil, it may be argued that, based on the Civil Procedure Code of 1939, in the case where only a debtor's chattel is present in the country, creditors should be able to bring a local action and have the opportunity to seize assets. In this context, however, it is also important to note the potential for abuse by individual creditors regarding a foreign debtor's chattel in Brazil in the cases where a judgment has not yet been ratified or an insolvency proceeding is pending in a foreign jurisdiction. Due to the limitations of the insolvency law and Civil Code and the lengthy time requirements, an opportunity exists for individual creditors to circumvent the main insolvency proceeding. These abuses of process blatantly violate the principle of equal treatment of creditors, which is also an underpinning of the Brazilian insolvency system.

I. Foreign creditors

Brazilian law does not discriminate against foreign creditors; they are entitled to receive the same treatment as a Brazilian creditor would. Law 11,101 require foreign claims be converted into Brazilian currency, based on the exchange rate on the date that the insolvency decision is effective.\(^{68}\) It should be noted that, in judicial and extrajudicial restructurings, the exchange variation shall be maintained as a parameter for indexing the corresponding obligation.\(^{69}\) For voting purposes, however, foreign currency claims shall be converted into domestic currency.\(^{70}\)

Foreign creditors must be represented by local attorneys, and all the relevant documents drafted in a foreign language must be officially translated into Portuguese before they are presented to court.

A foreign nonresident party has to provide a judicial bond (cautio judicatum solvi) in order to secure court costs and the

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\(^{67}\)See articles 787, 788 and 789 of the Code of Civil Procedure of 1939.

\(^{68}\)Article 77 of Law 11,101.

\(^{69}\)Article 50 of Law 11,101.

\(^{70}\)Article 38 of Law 11,101.
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award. In certain cases, however, treaties regarding jurisdictional cooperation and assistance executed by Brazil or other rules may release a nonresident creditor from the payment of the judicial bond.

J. The need for cross-border insolvency reform

Law 11,101 failed to address cross-border insolvency issues in spite of having introduced significant improvements in the Brazilian insolvency system. In order to further promote international commerce and finance, Brazil should consider supplementary legislation to incorporate fundamental universality principles in the area of insolvency. Even modest improvements and clarifications to the current regime would provide substantial assistance to courts. The UNCITRAL Model Law on Cross-Border Insolvency offers helpful guidance in this respect, as its purpose is to assist nations in mutually coordinating their local insolvency laws.

The approach of the Model Law recognizes the great difficulty in achieving the international consensus required to adopt and ratify a treaty, which would otherwise require substantial agreement on all relevant details, as shown by the European Union experience. The flexibility of the Model Law—which (much like the Code of Bustamante did 80 years ago) promotes the mutual coordination among courts and representatives across multiple jurisdictions, by means of recognizing parallel proceedings, as it approaches the universality principle—would be a welcome addition to the Brazilian insolvency system.

However, in the absence of specific legislation for dealing with cross-border insolvency, as in most jurisdictions that follow Roman Law tradition, courts in Brazil employ a variety of techniques to address some of the complicated cross-border insolvency issues before them. This mix of legal approaches frequently results in inadequate and unequal decisions. This uncoordinated and local approach is not conducive to a fair and efficient administration of cross-border insolvencies and ultimately stands in the way of a process that aims to maximize the value of the assets in Brazil and abroad. By contrast, coordinated administration of cross-border insolvency cases is in the best interest of creditors and debtors, providing greater predictability and consistency in the process. Factors that contribute to the stability of commercial relations inevitably help to improve foreign investment and trade for the adopting state.

III. Conclusion

This article analyzed the Brazilian insolvency system put in place by the 2005 legislation. It provided a brief overview of the

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71Article 97, paragraph 2, of Law 11,101.
rationale of the new law, of the mechanics of the new restructuring proceedings, and of the most important changes in liquidation provisions. It has also highlighted some aspects of the law that require adjustment.

The 2005 Insolvency Law represents a major upgrade to the 1945 legislation. Law 11,101 is, therefore, in sync with some of the most relevant global developments in insolvency law and complies with the guidelines published by international organizations, such as the World Bank and UNCITRAL, although it still lacks cross-border insolvency provisions.
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