
NORTON JOURNAL OF BANKRUPTCY LAW AND PRACTICE

Volume 28, Number 5
Issued in October 2019

Foreword; Prize in International Insolvency Studies, 2019

Debt restructuring in the UK and Spain: Is the grass still greener on the other side?
By Jente Dengler

When Deference Makes A Difference: The Role of U.S. Courts In Cross-Border Bankruptcies
By Fabio Weinberg Crocco

Analyzing the Causes of Retail Insolvencies Around the World
By Eric Danner, Ulf Pecharlscheck, Wesley Roslyn-Smith, and Evan Zucker

Why Few Are Using Brazil's Extrajudicial Restructuring Option
By Glauco da Rocha, Marcelo Godke Veiga, and Matthew I. Kramer



THOMSON
REUTERS

NORTON JOURNAL OF BANKRUPTCY LAW AND PRACTICE

Vol. 28, No. 5(2019)

Issued in October 2019

Foreword from International Insolvency Institute	458
Debt restructuring in the UK and Spain: Is the grass still greener on the other side? By Jente Dengler	460
When Deference Makes A Difference: The Role of U.S. Courts in Cross-Border Bankruptcies By Fabio Weinberg Crocco	567
Analyzing the Causes of Retail Insolvencies Around the World By Eric Danner, Ulf Pechartscheck, Wesley Roslyn-Smith, and Evan Zucker	620
Why Few Are Using Brazil's Extrajudicial Restructuring Option By Glauco da Rocha, Marcelo Godke Veiga, and Matthew I. Kramer	629

Norton Journal of Bankruptcy Law & Practice (USPS 012-091), (ISSN 1059-048X) is published bimonthly, six times per year, by Thomson Reuters, 610 Opperman Drive, Eagan, MN 55123. Subscription Price: \$2,520 annually. Periodicals postage paid at St. Paul, MN, and additional mailing offices. Postmaster: send address changes to Journal of Bankruptcy Law & Practice, PO Box 64526, St. Paul, MN 55164-0526.

Managing Editor, Norton Journal of Bankruptcy Law and Practice, Thomson Reuters, kathryn.copeland@thomsonreuters.com.

For Customer Assistance Call 1-800-328-4880

Mat #42156193

Why Few Are Using Brazil's Extrajudicial Restructuring Option

By Glauco da Rocha, Marcelo Godke Veiga, and Matthew I. Kramer

1. Introduction

The Brazilian legislature and bankruptcy professionals have been very focused on creating an efficient system for companies to either reorganize or liquidate both in and out of court. One option offered by the legislature for struggling companies is the extrajudicial restructuring, a hybrid process that combines out-of-court compromise with judicial oversight. While the goals of the extrajudicial restructuring are laudable, few companies utilize the process. This article endeavors to answer why this unique process is utilized so infrequently.

To its credit the Brazilian legislature has recognized that Brazil's insolvency laws¹ must be efficient.² On the one hand, the insolvency laws must enable unviable companies to be properly liquidated. On the other hand, the laws must enable viable companies to survive.³ It is quite difficult to know, *ex ante*, which companies should be effectively saved, but the law should be drafted to provide mechanisms to rescue the right companies.⁴ In addition, an efficient law can help reduce the cost of capital of companies which will certainly benefit society as a whole, and will serve as an incentive for investment and thereby encourage entrepreneurship and risk-taking, increasing economic competitiveness and generating wealth.⁵ These goals are the underpinnings of Brazil's extrajudicial restructuring process.

Yet why have so few companies utilized the extrajudicial option? Our conclusion, explored in detail below, is that, despite a significant period of time since enactment of the extrajudicial restructuring, the process suffers from a number of uncertainties, making it difficult for companies to predict a successful outcome. In reaching this conclusion, we explore (i) the Brazilian legislature's quest to create an efficient restructuring process, (ii) the Brazilian bankruptcy framework, (iii) a comparison between reorganization methods under Brazilian law; (iv) extrajudicial reorganizations in the LRE system; and (v) conclusion.

2. Creating an Efficient Bankruptcy Process

The law has an important role in relation to companies in financial distress. The law must provide an efficient means to assist companies in financial crisis.⁶ The law should promote the financial reorganization of viable companies and enable swift liquidations of those companies that cannot survive.⁷ It should be noted that even though the legislature attempts to create systems that lead to economic efficiency, this does not always happen. Often the legislature's intent to structure the law in a way to save financially

troubled companies prolongs the life of companies that are better suited for liquidation.⁸ In any event, the goal should be to reduce the cost of capital and debt load of struggling companies so that they may reorganize.⁹

Well written laws are important but not necessarily sufficient to enable companies to survive.¹⁰ In an ideal world, it would not be necessary to rely on the State to administer insolvency proceedings since the debtors themselves could, in theory, promote the sale of their assets to satisfy creditor claims.¹¹ Contracts could similarly be drafted to protect creditors once a company falters, which could theoretically render judicial restructurings unnecessary.¹² Thus, for example, a debtor company could offer certain creditors equity in exchange for releasing their claims without the need for costly court intervention, which could increase creditor recoveries.¹³ This decentralized framework, however, has inherent pitfalls as there would be no single playing field where the rules are known and accepted. Further, there is always the possibility that one or a few creditors will reject a privately negotiated proposal.¹⁴ Yet another issue with privately negotiated proposals is the uncertainties creditors face in determining whether they can achieve superior recoveries by accepting the company's out-of-court proposal or awaiting the outcome of a bankruptcy proceeding.¹⁵ Thus, many scholars conclude that the State plays a vital role in creating efficiencies for companies to restructure.¹⁶ Indeed, the requirement that companies must abide by the restructuring laws creates efficiencies in and of itself.¹⁷

3. The Brazilian Bankruptcy Framework

In Brazil the statutory bankruptcy framework is generally set forth in the LRE.¹⁸ The LRE governs both judicial and extrajudicial reorganizations (other than private contracts to modify debt obligations). A company's decision to engage in a judicial or extrajudicial reorganization is not an easy decision. In short, private agreements—although they may deal with the restructuring of the company—usually take care of isolated acts related to the renegotiation of certain debts between the debtor and its creditors. Extrajudicial reorganization, on the other hand, is intended to deal with the company's economic-financial crisis and to allow the company to be reorganized in a more streamlined process than a judicial reorganization.¹⁹

In theory creditors and debtors are able to foresee, at least in part, the outcome of a reorganization process, which should dictate their behavior in a cost-effective manner. Nevertheless, as in the United States, judicial restructurings are expensive, time consuming and sometimes unpredictable.²⁰ As a result the Brazilian legislature created extrajudicial alternatives to the judicial restructuring.

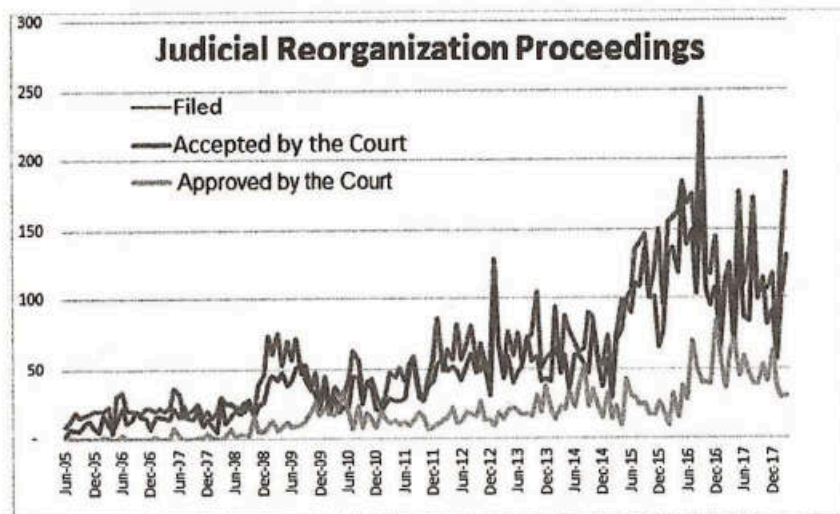
Currently, there are three alternatives for companies in financial distress to seek reorganization: (i) private agreements (article 167 of LRE), (ii) extrajudicial reorganization (article 161 of LRE), which includes "homologated" and "authoritative" extrajudicial proceedings, and (iii) judicial reorganization (articles 47 et seq. of LRE).²¹

There are two types of extrajudicial reorganizations, homologated and

authoritative. These reorganizations enable the debtor to seek approval of a plan that binds some but not all of its creditors. A homologated reorganization is akin to a prepackaged bankruptcy case where the creditors bound by the plan have already agreed and signed the plan before filing the case. The court generally rubber stamps the plan and then creditors are bound by the plan. In an authoritative reorganization, the debtor seeks approval of the plan without cooperation of some of its creditors. The debtor requires 60% of the creditors to vote in favor of the plan in order for the plan to be approved. In a judicial reorganization, the debtor seeks to confirm a plan that binds all creditors. The debtor similarly requires 60% of creditors to vote in favor of the plan. The court's role is limited to approving or rejecting the plan. These alternatives will be discussed in detail below.

4. Comparison Between Reorganization Methods under Brazilian Law

Currently, there has been a significant increase in the number of judicial reorganizations, especially in the last three years, linked to the recent financial crisis that devastated Brazil. This may be easily seen in the chart below, elaborated with data gathered by Serasa Experian, a Brazilian credit bureau and financial data provider.²²



The number of extrajudicial reorganizations is surprisingly small in comparison to the number of judicial reorganizations over the same period of time. From June 2005 to November 2014, only 69 extrajudicial reorganizations were filed, out of which 27 were homologated.²³ In addition, in a consultation held before the 1st and 2nd Specialized Bankruptcy and Judicial Reorganization Courts of the Region of São Paulo/SP in 2018, only 16 extrajudicial reorganizations were found since the enactment of LRE in 2005. The small number of extrajudicial reorganizations is surprising and unimpressive compared to the volume of judicial reorganizations, which

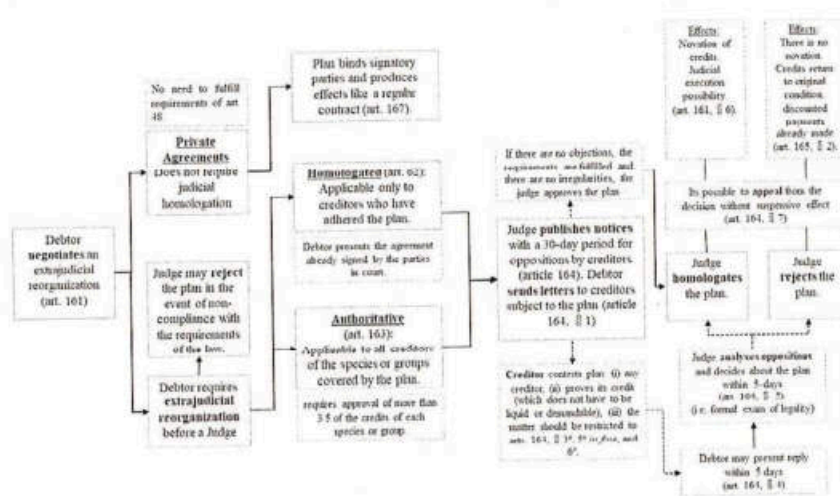
reveals difficulties in the use of extrajudicial reorganizations. The number of private agreements is impossible to specify, since they are not publicly tracked.

What are, under Brazilian law, a company's incentives and disincentives in choosing one of these restructuring options?

In relation to private agreements, the following can be said: (i) they do not require judicial approval; (ii) they are enforceable by courts upon a breach by either party; (iii) they cover only those who are signatories to the agreement and not third parties; and (iv) they require buy-in by the particular creditor to be bound by the agreement.

Comparatively, regarding extrajudicial reorganizations: (i) they are more easily enforceable than private agreements because the extrajudicial process involves judicial approval of the reorganization plan pursuant to articles 162 to 165 of LRE, as well as a forum for those challenging the plan to be heard (article 164, paragraph 5, LRE);²⁴ (ii) the court-approved plan is an enforceable judicial instrument (art. 161, paragraph 6); (iii) in the authoritative extrajudicial proceeding case, a dissident minority of creditors may be forced to accept the plan (article 163, LRE);²⁵ (iv) the automatic stay applies only to creditors who are subject to the extrajudicial plan (article 161, paragraph 4, of LRE); (v) the sale of a business in the course of the extrajudicial proceeding may take place as provided in article 142 of the LRE (judicial auction or closed offers), and (v) the debtor remains subject to the LRE's crimes regime (article 180 of LRE).²⁶

The following flow chart assists in identifying the procedures related to extrajudicial reorganizations and private agreements mentioned above:²⁷



Often a debtor seeking to privately negotiate with creditors incurs additional debts and guarantees that aggravate the debtor's financial health. If, however, the debtor does not negotiate with its creditors, the creditors will

likely disclose the debtor's financial problems to the public in general, which could significantly impact the company's prospects of remaining in business.

Viewed in this light, an extrajudicial reorganization is useful for the debtor who wants to avoid opportunistic behavior by certain creditors but is unwilling engage in the full judicial reorganization process.²⁸ Indeed, judicial reorganization is less flexible than the two extrajudicial models. A judicial reorganization must include "all existing creditors at the date of the application, even if they have not matured" (art. 49, LRE), except those expressly excluded by the LRE.

An advantage of the extrajudicial reorganization is its flexibility in resolving some but not all creditor claims. The debtor may even enter into several different plans at the same time (as in the case of *Odebrecht Óleo e Gás*),²⁹ with different creditors. In contrast, judicial reorganizations, by definition, contain much more judicial involvement and creditor oversight of the debtor's affairs, including the general meeting of creditors (art. 35, I and II, LRE) and the appointment of a creditors' committee (art. 27, I and II, LRE, art. 22, I, II and III, LRE). Also, there is a much greater (and even periodic) accountability to the court, which is not the case in an extrajudicial reorganization (arts. 51 and 52, IV, LRE). This all leads to increased costs and time in the restructuring process. While judicial restructurings have a stay period of 180 days (paragraph 4, article 6, LRE), courts routinely extend this deadline given the typical complexities of the cases.³⁰ There is also the need to include the language "in judicial reorganization" in the corporate debtor's name (article 69, LRE), the risk of removal and replacement of the debtor's management (article 64, LRE), and the risk of liquidation if the plan is not approved (article 73, LRE).

On the other hand, the stay period in a judicial reorganization is broader than in the extrajudicial reorganization, tolling "the statute of limitations and suspending all actions and executions against the debtor" (article. 6, LRE),³¹ which provides greater bargaining power for the debtor to negotiate with the creditors during the first 180 days of the bankruptcy filing. Further, a purchaser of a debtor's assets in a judicial reorganization cannot be subject to successor liability, including any pre-sale tax, labor or tort liability of the debtor, (articles 60, 66 and 141, II, LRE) whereas the purchaser of a debtor's assets in an extrajudicial restructuring takes the assets subject to the debtor's obligations related to the asset sold. This is a substantial advantage in relation to the extrajudicial reorganization, since it serves as a stimulus for those interested in acquiring assets of the debtor in crisis to do so.

Although it can be said that judicial reorganization is being used more than other modalities, it cannot be said that it is necessarily the best remedy for the company in financial crisis. Each case must be evaluated according to its particular circumstances because each restructuring options contains different remedies.

The table below summarizes the differences between the restructuring options:

WHY FEW ARE USING BRAZIL'S EXTRAJUDICIAL RESTRUCTURING OPTION

Type	Private Agreements	Extrajudicial Reorganization		Judicial Reorganization
		Homologated	Authoritative	
Degree of court involvement	None	Low	Medium	High
Enforceability	Extrajudicial Enforcement Instrument	Judicial Enforcement Instrument	Judicial Enforcement Instrument	Judicial Enforcement Instrument
Form of company business and assets sale	Normal	According to restructuring plan or judicial auction or closed proposal	According to restructuring plan or judicial auction or closed proposal	According to restructuring plan or judicial auction or closed proposal
Possibility of imposition on a dissident minority	No	No	Yes	Yes
Accountability regime	Civil liability	Civil liability	Civil liability and special criminal offences of the LRE	Civil liability and special criminal offences of the LRE
Disclosure of financial information	No	No	Yes, on the proposal	Yes, periodically
Scope for including creditors	Flexible	Flexible	Flexible	Inflexible: all creditors
Expression added to Corporate Name	Unchanged	Unchanged	Unchanged	"Under Judicial Reorganization"
Risk of removal of the debtor's manager	None	None	None	Yes

Type	Private Agreements	Extrajudicial Reorganization		Judicial Reorganization
		Homologated	Authoritative	
Risk of conversion into bankruptcy	None	None. Obstacle to bankruptcy petition for creditors subject to the plan	None. Obstacle to bankruptcy petition for creditors subject to the plan	Yes, if plan is rejected
Suspension of actions and foreclosures (stay period)	None	Only for subject creditors	Only for subject creditors	For all creditors. 180 days.
Succession in disposal of assets	Succession of the acquirer	Succession of the acquirer	Succession of the acquirer	Non-succession of the acquirer
Declaration of ineffectiveness by decree of bankruptcy	Unprotected	Unprotected	Unprotected	Protected

These differences are relevant when evaluating the reorganization model to be chosen, indicating, according to the conditions of the case, whether it is more advisable to promote a private agreement, extrajudicial reorganization or judicial reorganization for the company in crisis.

5. Extrajudicial Reorganizations in the LRE System

As previously discussed, the actual volume of private agreements is not known (article 167, LRE). The number of extrajudicial reorganizations (articles 161 et seq. of LRE) has remained fairly constant over the last several years, while the number of requests for judicial reorganization has doubled in the last three years. Why has the extrajudicial reorganization, with all of its inherent flexibility as compared to the judicial reorganization, been so little utilized by distressed companies? Below, we analyze the main issues of the extrajudicial reorganization, which include the following: (i) the scope of the extrajudicial plan; (ii) incomplete automatic stay; (iii) "postulatory legitimation" (plan exclusivity); (iv) obtaining creditor signatures; (v) changes of the extrajudicial reorganization plan; (vi) species and groups of creditors; and (vii) successor liability of the acquirer. None of these issues are well defined in the LRE, which causes legal uncertainty to those interested in making use of the extrajudicial reorganization procedure.

5.1. The Scope of the Extrajudicial Plan is Limited

In the case of homologation (prepackaged) reorganization (article 162), only those creditors who voluntarily agree to the plan are bound to it. In the case of the authoritative reorganization (article 163), only the classes of creditors *covered* by the Plan, including the dissenting minority, will be bound by the plan, as long as at least three-fifths of the creditors of each class of the plan accept the plan.³²

As a general rule the debtor is free to choose the creditors he intends to bind to the extrajudicial reorganization. The extrajudicial reorganization may, in theory, cover all creditors. There are exceptions, however, including taxing authorities, employees, personal injury claimants, parties to certain real estate contracts, and certain commercial lessors.³³ The LRE (article 161, paragraph 1) does not appear to allow these creditors to be bound by an extrajudicial plan, but an open question exists whether these creditors could voluntarily submit themselves to an extrajudicial plan.

As an example, in the case of the *IGB Eletrônica* (an extrajudicial case), the court held that (i) the dissident creditor covered by the plan (in the authoritative reorganization under article 163, LRE) is subject to the plan of reorganization and cannot further enforce its rights against the debtor,³⁴ and (ii) creditors not subject to the reorganization plan may continue enforcement efforts.³⁵ In the case of the extrajudicial reorganization, the court has discretion to apply the stay to creditor enforcement efforts.

Certain scholars have opined that "nothing prevents [these creditors who are beyond the reach of the extrajudicial plan] to enter into parallel agreements with the debtor, as provided for in article 167 of LRE (. . .), provided that the limits established by the legislation regulating each type of relationship are respected (for example, in the case of tax creditors, the transaction is only allowed under the terms of the specific law)".³⁶ This is another factor that may be interesting in determining whether the debtor will make use of extrajudicial reorganization, private agreements or judicial reorganization.

5.2. The Automatic Stay is Discretionary in Extrajudicial Reorganizations

In a judicial reorganization, the blanket suspension of actions and executions against the debtor is an important ally of the company in crisis, because it gives the debtor room to negotiate a plan while suspending creditor collection efforts. In a judicial reorganization, the suspension occurs for only 180 days (article 6, paragraph 4, LRE), although courts routinely extend this deadline.

Unlike judicial reorganizations, Article 161, paragraph 4, LRE, provides that the request for extrajudicial reorganization "shall **not** lead to suspension of rights, actions or executions, nor the impossibility of filing for bankruptcy by creditors not subject to the extrajudicial reorganization plan" (emphasis added).³⁷ The automatic stay applies only to those creditors subject to the extrajudicial plan. Since, in most cases, creditors have already expressed their willingness to go along with the plan, there is little dispute as to the ap-

plicability of the automatic stay by consenting creditors.³⁸ Nevertheless, the time for which the automatic stay will remain varies depending upon the facts and circumstances. Courts have applied the automatic stay in extrajudicial cases on certain occasions. In *Colombo's Group* extrajudicial reorganization, for example, the court applied the 180-day stay period, the same applicable to judicial reorganizations.³⁹ Since the LRE does not provide a specific stay period in extrajudicial restructurings, it is generally understood that the automatic stay applies until approval or rejection of the extrajudicial reorganization plan by the court as to creditors subject to the plan. But since this stay period is not well defined by law, it promotes legal uncertainty which disincentives the use of extrajudicial reorganization procedures.

5.3. Postulatory Legitimation (Plan Exclusivity) is Too Restrictive in Extrajudicial Proceedings

Just as in a judicial reorganization, only the debtor is entitled to propose an extrajudicial reorganization (art. 162 and 163). To do so, the debtor must comply with the same requirements of judicial reorganization (articles 1, 48 and 161).⁴⁰ So, among other restrictions and requirements, a debtor cannot avail itself of the extrajudicial process if it currently has "pending a judicial reorganization" or "if it had a judicial or extrajudicial reorganization within the last two years."⁴¹ This two-year restriction seems excessive. It should be pointed out that the law allows the debtor to submit simultaneous requests for extrajudicial reorganization (multiple plans covering different creditors).⁴² The law authorizes the debtor to submit a new plan after the court rejects the plan pursuant to paragraph 8 of article 164, LRE.

5.4. There Are No Clearly Defined Rules to Amend Approved Extrajudicial Plans.

Another point to consider is whether an extrajudicial plan may be modified post-confirmation.

The first case was *Rainha das Noivas* (Jayme Wainberg S/A).⁴³ In this case the debtor's extrajudicial reorganization plan was to sell real estate to pay creditors. However, before the approval of the plan by the Court, the prospective acquirer decided not to close the deal, and the debtor found another interested purchaser. The Court, based upon article 164, paragraph 8, of the LRE,⁴⁴ decided to reject the plan and ordered the debtor to present a new one within 30 days to obtain creditor approval.⁴⁵ The debtor obtained the approval of more than 60% of the creditor suppliers and presented a new plan, with a new buyer for the real estate, and the Court approved the plan.

The second case, *IGB Eletrônica*, dealt with an amendment of the plan after its approval by the Court. In this case an amendment of the plan extending the payment period was approved by more than 60% of the creditors, according to article 163, LRE. The Court ruled that the debtor should prove why he could not satisfy the plan terms and that the creditors accepted the amended plan.⁴⁶ The debtor ultimately failed to perform under the plan and the extrajudicial proceeding was terminated.⁴⁷ Although the outcome was unsuccessful, the case is important because it demonstrates that Courts are

willing to amend the plan after approval by the Court provided creditor approval is obtained.

5.5. "Species" and "Groups" of Creditors Creates Confusion in the Extrajudicial Process

Another issue that routinely occurs in extrajudicial proceedings is the classification of creditors between *species* and *groups*, pursuant to paragraph 1 of article 163 of the LRE.⁴⁸ The legislator, in regulating the manner, scope and establishment of a *quorum* for approval of the extrajudicial authoritative reorganization, established two criteria for the organization of creditors: (i) a broader one, referring to creditors holding credit of the same *kind*; and (ii) a more restrictive one, which covers a *group* of creditors of the same nature and subject to similar payment terms. These requirements are not clearly set forth in the LRE. These requirements should be clarified by the Courts as more extrajudicial filings occur.

5.6. The Extrajudicial Process Has No Clear Rule on Successor Liability

In judicial reorganizations, there is generally no successor liability of the acquirer, whether assets are acquired piecemeal or whole.⁴⁹ For extrajudicial reorganizations, however, the purchaser may be subject to liability as the debtor's successor in interest. Successor liability has been found where an entity has purchased a debtor's subsidiary or a bundle of assets comprising a so called "isolated productive unit", such as a factory or a manufacturing plant, from the debtor.⁵⁰ Debtors who wish to sell assets in an insolvency proceeding are much less likely to choose an extrajudicial proceeding because it is more difficult to shed the debtor's assets of liabilities.

At the same time, the general rule, provided for in article 1,146 of the Civil Code, imposes on the purchaser of a company's assets the liability for the company's debts prior to the sale closing. The National Tax Code provides that there shall be no successor liability in connection with a judicial reorganization sale but makes no mention of extrajudicial reorganization sales. Finally, Articles 10 and 448 of the Consolidation of Labor Laws protects the rights of employees to be paid by a successor.

Also, a debtor in an extrajudicial proceeding is limited in proposing a plan that may impact creditors who are not subject to the plan. For instance, a court would likely reject a plan that provides for the sale of substantially all of a debtor's assets in an extrajudicial proceeding because the plan would significantly affect all of the debtor's creditors, including creditors who are not subject to the plan. For this reason, paragraph 2 of article 161 of the LRE provides that the plan cannot provide "unfavorable treatment to creditors who are not subject to it."

6. Conclusion

In its quest to create a more efficient restructuring process, the Brazilian legislature enacted the extrajudicial restructuring option. While this option was designed to facilitate a "fast track" restructuring, the process remains

replete with uncertainties for debtor companies. Each extrajudicial restructuring is highly dependent upon creditor buy-in to the debtor's proposed plan. Further, judges are often required to borrow rules applicable to the judicial restructuring process to fill in the legislative gaps. The extrajudicial process contains numerous disincentives, such as successor liability to entities purchasing debtor assets. Further, the extrajudicial process fails to provide companies with a clear exit strategy. Until the issues explored in this paper are addressed by the Brazilian legislature, the extrajudicial process will remain a laudable legislative goal with few participants.

7. References

AGHION, Philippe, HART, Oliver, MOORE, John. The economics of bankruptcy reform. *Journal of Law, Economics, & Organization*, v. 8, n. 3, pp. 523-546, 1992.

BAIRD, Douglas G., RASMUSSEN, Robert K. The end of bankruptcy. *Stanford Law Review*, v. 55, n. 3, pp. 751-789, 2002.

BEZERRA FILHO, Manoel Justino. *Lei de Recuperação de Empresas e Falências Comentada — Lei 11.101/2005*, 11^o Ed., São Paulo, Editora Revista dos Tribunais, 2015.

BRANCH, Ben. Streamlining the bankruptcy process. *Financial management*, v. 27, n. 2, pp. 57-69, 1998.

CEREZETTI, Sheila C. Neder. Breves notas sobre a recuperação extrajudicial de empresas no Brasil. In: Miguel Pestana de Vasconcelos (coord.), *Falência, Insolvência e recuperação de empresas — I.º congresso de Direito Comercial das Faculdades de Direito da Universidade do Porto, de S. Paulo e de Macau, Porto, FDUP, 2017*.

CHATTERJEE, Sris, DHILLON, Upinder S. and RAMIREZ, Gabriel G. Resolution of financial distress: debt restructurings via chapter 11, prepackaged bankruptcies, and workouts. *Financial Management*, v. 25, n. 1, pp. 5-18, 1996.

FRANKS, Julian, R., NYBORG Kjell G. Control rights, debt structure, and the loss of private benefits: the case of the U.K. insolvency code. *The Review of Financial Studies*, v. 9, n. 4, pp. 1.165-1.210, 1996.

FRANKS, Julian, R., NYBORG, Kjell. G., TOROUS, Walter. N. A comparison of US, UK and German insolvency codes. *Financial management*, v. 25, n. 3, pp. 86-101, 1996.

GARNER, Bryan. A. *Black's law dictionary*. 8^a Ed., St. Paul, MN: Thomson West, 2004.

KAISER, Kevin M. J. European bankruptcy laws: implications for corporations facing financial distress. *Financial Management*, v. 25, n.3, pp. 67-85, 1996.

MARTINS, Glauco Alves. *A Recuperação Extrajudicial na Lei 11.101/2005 e a Experiência do Direito Comparado em Acordos Preventivos Extrajudiciais*. Dissertação de Mestrado.—Faculdade de Direito da Universidade de São Paulo, 2009.

PAIVA, Luiz Fernando Valente de. *Da Recuperação Extrajudicial*. In

Direito Falimentar e a Nova Lei de Falências e Recuperação de Empresas - São Paulo: Quartier Latin, pp. 559/594.

PENTEADO, Mauro Rodrigues. Comentários à Lei de Recuperação de Empresas e Falência. 2ª ed., Coord. Francisco Satiro de Souza Júnior e Antonio Sérgio A. de Moraes Pitombo. - São Paulo: Editora Revista dos Tribunais, 2007.

PENALVA SANTOS, Paulo. Aspectos Polêmicos da Recuperação Extrajudicial. RDC N° 73—Set-Out/2011.

POSNER, Eric. A. Law and social norms. Cambridge: Harvard University Press, 2002.

POVEL, Paul. Optimal "soft" or "tough" bankruptcy procedures. *Journal of Law, Economics, & Organization*, v. 15, n. 3, pp. 659-684, 1999.

SCALZILLI, João Pedro. SPINELLI, Luis Felipe. TELLECHEA, Rodrigo. Recuperação de empresas e falência: teoria e prática da Lei 11.101/2005. São Paulo, Almedina, 2016.

SICA, Lúcia Paula Pires Pinto. Recuperação Extrajudicial de Empresas—Desenvolvimento do Direito de Recuperação de Empresas Brasileiro. Doctoral Thesis—Faculdade de Direito da Universidade de São Paulo, 2009.

SOUZA JR., Francisco Satiro. Comentários à Lei de Recuperação de Empresas e Falência. 2ª ed., Coord. Francisco Satiro de Souza Júnior e Antonio Sérgio A. de Moraes Pitombo. - São Paulo: Editora Revista dos Tribunais, 2007.

SCHWARTZ, Alan. Bankruptcy workouts and debt contracts. *The Journal of Law & Economics*, v. 36, n. 1, pp. 595-632, 1993.

SCHWARTZ, Alan. A normative theory of business bankruptcy. *Virginia Law Review*, v. 91, n. 5, pp. 1199-1265, 2005.

TOLEDO, Paulo Fernando Campos Salles de. A Empresa em Crise no Direito Francês e Americano. Dissertação de mestrado—Faculdade de Direito da Universidade de São Paulo, 1987.

WARREN, Elizabeth and WESTBROOK, Jay L. (Feb. 2005). Contracting out of bankruptcy: an empirical intervention. *Harvard Law Review*, v. 118, n. 4, pp. 1997-1254, 2005.

WHITE, Michelle J. Corporate bankruptcy as a filtering device: chapter 11 reorganizations and out-of-court debt restructurings. *Journal of Law, Economics, & Organization*, v. 10, n. 2, pp. 268-295, 1994.

NOTES:

¹Brazilian insolvency and reorganization procedures are governed by Law No. 11,101, dated February 9, 2005, also known as Lei de Recuperação de Empresas e Falência (the "LRE").

²AGHION, Philippe. HART, Oliver, MOORE, John. The economics of bankruptcy reform. *Journal of Law, Economics, & Organization*, v. 8, n. 3, pp. 523-546, 1992; WHITE, Michelle J. Corporate bankruptcy as a filtering device: chapter 11 reorganizations and out-of-court debt restructurings. *Journal of Law, Economics, & Organization*, v. 10, n. 2, pp. 269-

270, 1994.

³CHATTERJEE, Sris, DHILLON, Upinder S., & RAMIREZ, Gabriel G. Resolution of financial distress: debt restructurings via chapter 11, prepackaged bankruptcies, and workouts. *Financial Management*, v. 25, n. 1, pp. 6-7, 1996.

⁴WHITE, Michelle J. Corporate bankruptcy as a filtering device: chapter 11 reorganizations and out-of-court debt restructurings. *Journal of Law, Economics, & Organization*, v. 10, n. 2, pp. 268-270, 1994.

⁵SCHWARTZ, Alan. A normative theory of business bankruptcy. *Virginia Law Review*, v. 91, n. 5, pp. 1203-1206, 2005.

⁶AGHION, Philippe, HART, Oliver, MOORE, John. The economics of bankruptcy reform. *Journal of Law, Economics, & Organization*, v. 8, n. 3, pp. 523-524, 1992.

⁷CHATTERJEE, Sris, DHILLON, Upinder S., & RAMIREZ, Gabriel G. Resolution of financial distress: debt restructurings via chapter 11, prepackaged bankruptcies, and workouts. *Financial Management*, v. 25, n. 1, pp. 6-7, 1996. WHITE, Michelle J. Corporate bankruptcy as a filtering device: chapter 11 reorganizations and out-of-court debt restructurings. *Journal of Law, Economics, & Organization*, v. 10, n. 2, pp. 275-278, 1994.

⁸CHATTERJEE, Sris, DHILLON, Upinder S., & RAMIREZ, Gabriel G. Resolution of financial distress: debt restructurings via chapter 11, prepackaged bankruptcies, and workouts. *Financial Management*, v. 25, n. 1, p. 7, 1996. See also WHITE, Michelle J. Corporate bankruptcy as a filtering device: chapter 11 reorganizations and out-of-court debt restructurings. *Journal of Law, Economics, & Organization*, v. 10, n. 2, p. 269, 1994.

⁹SCHWARTZ, Alan. A normative theory of business bankruptcy. *Virginia Law Review*, v. 91, n. 5, pp. 1221-1222, 2005.

¹⁰AGHION, Philippe, HART, Oliver, MOORE, John. The economics of bankruptcy reform. *Journal of Law, Economics, & Organization*, v. 8, n. 3, p. 532, 1992.

¹¹AGHION, Philippe, HART, Oliver, MOORE, John. The economics of bankruptcy reform. *Journal of Law, Economics, & Organization*, v. 8, n. 3, p. 532, 1992.

¹²AGHION, Philippe, HART, Oliver, MOORE, John. The economics of bankruptcy reform. *Journal of Law, Economics, & Organization*, v. 8, n. 3, pp. 532-533, 1992.

¹³SCHWARTZ, Alan. Bankruptcy workouts and debt contracts. *The Journal of Law & Economics*, v. 36, n. 1, p. 615, 1993.

¹⁴SCHWARTZ, Alan. Bankruptcy workouts and debt contracts. *The Journal of Law & Economics*, v. 36, n. 1, pp. 612-613, 1993.

¹⁵This situation is akin to the "prisoner's dilemma". The "prisoners' dilemma" is "[a] logical problem—often used by law-and-economics scholars to illustrate the effect of cooperative behavior—involving two prisoners who are being separately questioned about their participation in a crime: (1) if both confess, they will each receive a 5-year sentence; (2) if neither confesses, they will each receive a 3-year sentence; and (3) if one confesses but the other does not, the confessing prisoner will receive a 1-year sentence while the silent prisoner will receive a 10-year sentence." Posner, in a generic way, explains that the "prisoners' dilemma" emerges as a problem of collective human behavior. According to the author, "[t]his story contains several familiar lessons. First, it illustrates an old lesson about the problem of cooperation. Even though two people would obtain mutual gains by cooperating, they will not be able to cooperate if they must act simultaneously. This problem is called the prisoner's dilemma or the collective action problem"; GARNER, Bryan A. *Black's law dictionary*. 8th Ed., St. Paul, MN: Thomson West, 2004, p. 1.233. V., aind, POSNER, Eric. A. *Law and social norms*. Cambridge: Harvard University Press, 2002, pp. 12.

¹⁶AGHION, Philippe, HART, Oliver, MOORE, John. The economics of bankruptcy reform. *Journal of Law, Economics, & Organization*, v. 8, n. 3, p. 533, 1992.

¹⁷WARREN, Elizabeth & WESTBROOK, Jay L. (Feb. 2005). Contracting out of bankruptcy: an empirical intervention. *Harvard Law Review*, v. 118, n. 4, p. 1200, 2005.

¹⁸It is important to note that there are specific schemes for some types of companies. For example, Law 6,024 dated March 13, 1974 deals with the intervention and liquidation of financial institutions.

¹⁹CEREZETTI, Sheila C. Neder. Breves notas sobre a recuperação extrajudicial de empresas no Brasil. In: Falência, Insolvência e Recuperação de Empresas. I.º congresso de Direito Comercial das Faculdades de Direito da Universidade do Porto, de S. Paulo e de Macau. Coordination: Miguel Pestana de Vasconcelos. Edition: Faculty of Law of the University of Porto. February 2017, p. 171: "But on the subject, the main emphasis must be attributed to the fact that separate agreements are mainly aimed at renegotiating specific debts between the debtor and one or a few creditors, while the extrajudicial reorganization, instituted in the field of instrument aimed at dealing with the business crisis and founded on principles such as the social function and the preservation of the company, is dedicated to allow the reorganization of the company, not only by means of renegotiation of debts but also based on real business restructuring."

²⁰SCHWARTZ, Alan. Bankruptcy workouts and debt contracts. *The Journal of Law & Economics*, v. 36, n. 1, p. 612, 1993.

²¹This study does not analyze the judicial reorganization plan for microenterprises and small businesses. This is an inexpressive hypothesis in Brazilian judicial practice, possibly due to the fixed conditions and deadlines referred to in article 71 of the LRE, absence of a *stay period* (article 71) and risk of conversion into bankruptcy (sole paragraph of article 72). The conditions are so disincentivizing that microenterprises and small businesses end up choosing to use the regular judicial reorganization procedure in almost all cases, although a simplified, specific procedure for microenterprises and small businesses is provided in LRE.

²²Available on: <https://www.serasaexperian.com.br/amplie-seus-conhecimentos/indicadores-economicos>. Accessed 04.22.2018. The "acceptance" by the court involves a formal examination regarding the fulfillment of the legal requirements for the filing of the request for judicial reorganization (article 52, LRE). The "approval" by the court occurs when: (i) the plan has not been objected to, (ii) has been approved by creditors at the meeting of creditors, or (iii) when the court applies *cram down* rules (article 58, LRE).

²³CEREZETTI, Sheila C. Neder. Breves notas sobre a recuperação extrajudicial de empresas no Brasil. In: Miguel Pestana de Vasconcelos (coord.), Falência, Insolvência e recuperação de empresas—I.º congresso de Direito Comercial das Faculdades de Direito da Universidade do Porto, de S. Paulo e de Macau, Porto, FDUP, 2017, p. 169.

²⁴CEREZETTI, Sheila C. Neder. Breves notas sobre a recuperação extrajudicial de empresas no Brasil. In: Miguel Pestana de Vasconcelos (coord.), Falência, Insolvência e recuperação de empresas—I.º congresso de Direito Comercial das Faculdades de Direito da Universidade do Porto, de S. Paulo e de Macau, Porto, FDUP, 2017, p. 172.

²⁵The subject was analyzed in the case of the IGB Eletrônica (formerly Gradiente): TJSP. AP SP 0134895-40.2010.8.26.0100, Reporting Judge: João Pazine Neto, Date of Trial: 03/25/2015, 16th Extraordinary Chamber of Private Law, Publication Date: 03/25/2015.

²⁶SCALZILLI, João Pedro, SPINELLI, Luis Felipe, TELLECHEA, Rodrigo. Recuperação de empresas e falência: teoria e prática da Lei 11.101/2005. São Paulo, Almedina, 2016, p. 374. Under the LRE, the following acts are considered crimes and should be prosecuted as such: (i) fraudulent actions leading to creditor losses in bankruptcy proceedings (article 168 of LRE); (ii) breach of enterprise secrecy or confidential data, contributing to the debtor's financial distress (article 169 of LRE); (iii) withholding information or producing false information in a reorganization or bankruptcy proceeding (article 171 of LRE); (iv) aiding and abetting certain creditors to the detriment of the rest (article 172 of LRE); (v) illegal diversion, concealment or seizure of property (article 173 of LRE); (vi) acquisition, receipt or illegal use of property belonging to the bankrupt estate (article 174 of LRE); (vii) filing claims with non-existing or illegal credit (article 175 of LRE); (viii) carrying out unauthorized activities (article 176 of LRE); (ix) unauthorized acquisition of assets belonging to a company

in judicial reorganization (article 177 of LRE); and (x) failing to prepare or maintain the company's books and records in good order (article 178 of LRE).

²⁷Flowchart based on flowchart constant in BEZERRA FILHO, Manoel Justino. *Lei de Recuperação de Empresas e Falências Comentada* — Lei 11,101 / 2005, 11^a Ed., São Paulo, Editora Revista dos Tribunais, 2015.

²⁸For a brief comparative analysis of judicial and extrajudicial reorganization, see: SCALZILLI, João Pedro. SPINELLI, Luis Felipe. TELLECHEA, Rodrigo. *Recuperação de empresas e falência: teoria e prática da Lei 11.101/2005*. São Paulo, Almedina, 2016, pp. 375–376.

²⁹Odebrecht Óleo e Gás S/A and others (Extrajudicial reorganization registered at the Court of Justice of the State of Rio de Janeiro, under no. 0121854-60.2017.8.19.0001, 4th Chamber of Business Law of the District of Rio de Janeiro/RJ), in which three extrajudicial plans were filed at the same time."

³⁰About 20% of the cases involving micro and small companies, and about 30% of the cases of medium and large companies, according to a study determined by the NEPI—Núcleo de Estudo e Pesquisa de Insolvência, together with the ABJ — Associação Brasileira de Jurimetria, regarding the judicial reorganization proposed in São Paulo/SP (COSTA, Carla Nassif Romero. ALMEIDA, Marcos. e SOLIANI, Sara. *Panorama da recuperação judicial das ME e EPP: Um estudo comparativo. 1^o Análise Exploratória do Observatório de Insolvência*, conduzida pela Associação Brasileira de Jurimetria (ABJ) e pelo Núcleo de Estudo e Pesquisa sobre Insolvência da Pontifícia Universidade Católica de São Paulo (NEPI)).

³¹Except for the following actions: actions that demand gross amounts, tax foreclosures (articles 6, paragraph 7, LRE and 187, Brazilian Tax Code), actions of creditors not subject to judicial reorganization (articles 49, paragraph 3 and 86, II, LRE), actions without economic effects (for example, declaratory actions), and, co-sponsors or members affected by the disregard of the legal entity status.

³²In this case, the non-adhering creditors of a class will also be bound to the plan of reorganization as long as at least three-fifths of that class accepts the plan.

³³See article 161, paragraph 1 of the LRE, which refers to Articles 49, paragraph 3 and 86, item II, as well as art. 86, II and art. 49, paragraph 3. See also SOUZA JR., Francisco Satiro. *Comentários à Lei de Recuperação de Empresas e Falência*. 2th ed., Coord. Francisco Satiro de Souza Júnior e Antonio Sérgio A. de Moraes Pitombo.—São Paulo: Editora Revista dos Tribunais, 2007, p. 524.

³⁴TJ-SP—AP SP 0134895-40.2010.8.26.0100, Reporting Judge: João Pazine Neto, Date of Trial: 25/03/2015, 16th Extraordinary Chamber of Private Law, Publication Date: 25/03/2015.

³⁵TJ-SP—AI: 22010277820158260000 SP 2201027-78.2015.8.26.0000, Reporting Judge: Carlos Henrique Miguel Trevisan, Date of Trial: 27/01/2016, 29th Chamber of Private Law, Publication Date: 28/01/2016.

³⁶SCALZILLI, João Pedro. SPINELLI, Luis Felipe. TELLECHEA, Rodrigo. *Recuperação de empresas e falência: teoria e prática da Lei 11.101/2005*. São Paulo, Almedina, 2016, p. 382.

³⁷This law originates from the U.S. Bankruptcy Code's concept of the automatic stay. "The order for relief produces, as an immediate effect, the automatic cessation of any judicial or extrajudicial measure that is being taken by a creditor to receive his credit. The phenomenon, which is not restricted to the current procedures, and also prohibits the installation of new ones (since they refer to previous credits), is called *automatic stay*." (See TOLEDO, Paulo Fernando Campos Salles de. *A Empresa em Crise no Direito Francês e Americano*. Masters Degree—Faculdade de Direito da Universidade de São Paulo, 1987, p. 22).

³⁸See TPI, Dable, Vessel, NTL, Maestra and Concer, and IGB Eletrônica (provide citations if available).

WHY FEW ARE USING BRAZIL'S EXTRAJUDICIAL RESTRUCTURING OPTION

³⁹TJSP; Interlocutory Appeal 2204224-07.2016.8.26.0000; Reporting Judge: Cesar Ciampolini; Judgment Body: 1st Chamber Reserved to Business Law; Central Civil Forum — 2nd Court of Bankruptcy and Judicial Reorganization; Date of Trial: 22/02/2017; Registration Date: 01/03/2017. In the abovementioned Odebrecht Óleo e Gás case, a preliminary injunction was obtained to suspend the actions of the creditors subject to the plan for 180 days.

⁴⁰Article 48 establishes the following requirements: (i) regular business for at least two (2) years, and therefore one cannot be an irregular or 'de facto' businessman, (ii) not be bankrupt, unless the declaratory judgment of the extinction of its obligations has been obtained and has become final, (iii) had not obtained judicial reorganization for less than five (5) years, (iv) had not obtained judicial reorganization for Microenterprises or Small Business for less than eight (8) years, (v) had not been convicted of any of the crimes included in the LRE as administrator or controlling partner.

⁴¹See Paragraph 3 of article 161, LRE.

⁴²See Odebrecht Óleo e Gás S/A case and others (Extrajudicial reorganization registered at the Court of Justice of the State of Rio de Janeiro, under No. 0121854-60.2017.8.19.0001, 4th Chamber of Business Law of the District of Rio de Janeiro/RJ).

⁴³Extrajudicial Reorganization registered in the Court of Justice of the State of Rio Grande do Sul, under CNJ no. 0358004-12.2011.8.21.0001, Business Law, Business Reorganization and Bankruptcy Chamber of Porto Alegre/RS.

⁴⁴Art. 164. (. . .) Paragraph 8 In the event of non-approval of the plan, the debtor may, once the formalities have been completed, submit a new request for the homologation of an extrajudicial reorganization plan."

⁴⁵See an excerpt from a decision set forth in the case file no. 0358004-12.2011.8.21.0001: "Pursuant to Paragraph 8 of the aforementioned article, non-approval of the plan enables the debtor to submit a new request for the approval of an extrajudicial plan, which, however, must have a new procedure, with all the legal requirements required by current legislation, which the author already announced at pages 655/658 and 710/711, since he stated that he will present a new extrajudicial reorganization plan to be submitted for approval, and requested a 30-day deadline for the contact and approval of the creditors. The current legislation does not mention the deadline for submitting the new plan, and therefore, in the concrete case, the deadline for implementing the required formalities with creditors is coherent." (Extrajudicial Reorganization registered in the Court of Justice of the State of Rio Grande do Sul, under CNJ no. 0358004-12.2011.8.21.0001, Business Law, Business Reorganization and Bankruptcy Chamber of Porto Alegre/RS).

⁴⁶TJSP; Interlocutory Appeal 2021097-37.2014.8.26.0000; Reporting Judge: Francisco Loureiro; Judgement Body: 1st Chamber Reserved to Business Law; Central Civil Forum — 2nd Court of Bankruptcy and Judicial Reorganization; Date of Trial: 08/10/2014; Registration Date: 09/10/2014.

⁴⁷TJSP; Special review according to specific court regulations 2005770-52.2014.8.26.0000; Reporting Judge: Francisco Loureiro; Judgement Body: 1st Chamber Reserved to Business Law; Central Civil Forum — 2nd Court of Bankruptcy and Judicial Reorganization; Date of Trial: 20/05/2015; Registration Date: 21/05/2015. See also: TJSP; Appeal 0016855-65.2011.8.26.0100; Reporting Judge (a): Francisco Loureiro; Judgement Body: 1st Chamber Reserved to Business Law; Central Civil Forum — 2nd Court of Bankruptcy and Judicial Reorganization; Date of Trial: 10/06/2015; Registration Date: 13/06/2015.

⁴⁸In the case of an extrajudicial reorganization with a merely rectifying nature, such a discussion does not exist, since the plan is already presented with the signature of the adherent creditors, without specifying what kind or group they would be.

⁴⁹LRE Article 141, II; see also Article 60.

⁵⁰Art. 166. If the approved extrajudicial reorganization plan involves the legal alien-

ation of subsidiaries or production units isolated from the debtor, the judge shall order its execution, observing, as appropriate, the provisions of art. 142 of this Law."