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Proposal, Negotiation, and Approval of a Reorganization Plan Under Brazilian Bankruptcy Law – Part III

By Paulo Fernando Campana Filho*

In this multi-part article, the author provides a brief description of the process of proposing, negotiating, and approving a reorganization plan under Brazilian law, especially after the enactment of a law reform in 2020 that significantly changed the legislation to make it more efficient and less debtor friendly. In the first part, published in the July-August 2023 issue of Pratt's Journal of Bankruptcy Law*, the author provided an overview of insolvency legislation in Brazil and discussed pre-filing negotiations and the initiation of a court-supervised reorganization. In the second part, published in the September 2023 issue of* Pratt's Journal of Bankruptcy Law*, the author discussed creditors and claims, proposing and negotiating the plan, deliberations at creditors' meetings, and more. In this third and final part, the author describes the contents of a reorganization plan, treatment of creditors, and post-confirmation matters.*

11 The Contents of a Reorganization Plan

The plan shall describe how the debtor intends to pursue its recovery,[421] including the maintenance of its business activity and the payment of the affected creditors. The plan may contain any restructuring mechanisms permitted by law,[422] which may include, for instance, debt haircuts, repayment in installments, modification of interest rates, debt-for-equity conversion, capital increase, change of corporate control, sales of assets, or new financing.[423]

11.1 Debt Restructuring

The reorganization plan may contain a substantial debt restructuring, such as a haircut on the principal amount, a reduction on the interest rates, or an extension of the due dates of payment.[424] In fact, it is, by a wide margin, the

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[421] SACRAMONE, supra note 33 at 288. (Footnote numbering continues from Part II.)

[422] Souza Junior, supra note 29 at 311.

[423] A non-comprehensive list of possible restructuring mechanisms can be found in article 50. See also SCALZILLI, SPINELLI, AND TELLECHEA, supra note 105 at 444–452.

[424] SACRAMONE, supra note 33 at 290.

most common restructuring mechanism. An analysis of 174 reorganization proceedings in the state of Paraná concluded that 99.46% of the plans provided for an extension of the maturity date and 72.41%, for a haircut on the principal amount.[425] Another research, conducted in the state of São Paulo, found that 82.7% of the plans contained a haircut for the class of unsecured creditors.[426] The average haircut for such class on these cases was 70.8% and the reorganization plans provided that the unsecured debt would be paid in an average 9 years.[427] In 78.6% of the cases, the plan provided for the accrual of interest rates for unsecured claims, with an average of 4% per year.[428] As these researches show, in many cases, creditors accept massive haircuts while shareholders retain their equity participation intact.[429]

The plan may contain a cash sweep or a Dutch auction mechanism to allow payments to be made in advance; it may also provide for the creation of a collateral package in favor of a group of creditors, which may be governed by an inter-creditor agreement. The creation of a security interest in favor of pre-existing debt within a reorganization plan is not susceptible to claw-black if the debtor is later subject to a bankruptcy liquidation[430] – a risk that exists if such a collateral package is granted in the context of a private restructuring, for instance.[431]

The debtor usually does not issue new debt instruments, in which case the plan itself would work as an enforcement title for all impaired claims. In this respect, the confirmation decision equals to a judgment awarding creditors the payment terms provided for in the plan and therefore can be enforced before a court of law.[432] In some cases, however, especially when creditors, such as

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[425] Eduardo Mattos & José Marcelo Martins Proença, O inferno São os Outros: Análise Comparativa Empírica entre as Causas de Pedir em Recuperações Judiciais e as Medidas Propostas nos Planos de Recuperação, ResearchGate 13–14 (2020), https://www.researchgate.net/publication/339953389_O_inferno_sao_os_outros_analise_comparativa_empirica_entre_as_causas_de_pedir_em_recuperacoes_judiciais_e_as_medidas_propostas_nos_planos_de_recuperacao (last visited Jan 17, 2023).

[426] Ivo Waisberg et al., Atualização da 2a Fase do Observatório de Insolvência: Recuperação Judicial no Estado de São Paulo, in Reforma da Lei de Recuperação e Falência (Lei n. 14.112/2020) 31, 75 (Ronaldo Vasconcelos et al. eds., 2021).

[427] Id.

[428] Id.

[429] Colombo and Junqueira, supra note 23 at 12.

[430] Article 131.

[431] Article 129, III.

[432] Article 59, §1.

noteholders, are willing to negotiate their claims in the secondary market, the plan may provide that the debtor will issue new debt instruments.

11.2 Debt-for-Equity Conversion

Debt-for-equity conversions were rare prior to the law reform for at least two reasons.[433] In many cases, controlling shareholders were reluctant to accept giving up corporate control, especially when creditors had, at the time, no tools available to approve a reorganization plan without the debtor's consent.[434] Plus, creditors were not keen to have their claim converted into equity as they would have the risk of having certain claims against the debtor – especially labor or tax debt – spilling over to their own assets.[435] Despite this concern, there were some debt-for-equity conversions in high profile cases such as Lupatech,[436] OGX,[437] and Oi.[438] In other cases, such as in the Odebrecht Óleo e Gás restructuring,[439] hybrid securities and quasi-equity instruments were issued, allowing creditors to participate in distributions.

The law reform included an express provision in Law 11,101 establishing that the plan may contemplate a debt-for-equity swap as a means of restructuring.[440] Plus, the mere possibility of creditors being able to propose and approve plans without the debtor's consent may become an useful tool, during the negotiations, to compel shareholders to accept debt-for-equity conversions from the beginning.[441] The amended law also provides that third-party creditors, investors, or officers, shall not have successor liability or be held liable for any claims against the debtor as a result of a debt-for-equity conversion[442] – a rule which may mitigate concerns that existed under previous legislation.[443]

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[433] Paiva, supra note 17.

[434] Id. See, in this respect, the negotiations and the outcome of the Oi restructuring, in Cooper, Cestero, and Mosier, supra note 20 at 215–218.

[435] Paiva, supra note 17; Souza Junior, supra note 29 at 312.

[436] In the Lupatech case, the debt-for-equity swap was approved under a pre-packaged reorganization plan. Cf. Cooper, Cestero, and Oliveira, supra note 57 at 336.

[437] Colombo et al., supra note 234 at 20–21.

[438] Cerezetti, supra note 295, comments to article 56.

[439] Cooper, Cestero, and Oliveira, supra note 57 at 331.

[440] Article 50, XVII.

[441] Bechara and Scorza, supra note 30 at 12.

[442] Article 50, §3.

[443] Cf. Bechara and Scorza, supra note 30 at 13; Souza Junior, supra note 29 at 312–313.

As shareholders are not bound by the plan, they can be heavily diluted but not fully wiped out, even if their equity participation is worthless, unless they agree to such a provision (or unless creditors envisage another legal structure which allows them to capture the full spectrum of the debtor's value). If the creditors' plan provides for a debt-for-equity conversion, resulting in the change of control of the debtor, the shareholders are allowed to exercise their right to withdraw from the company.[444] Should this happen, it is possible that there is dispute on whether shareholders have any equity value left in the debtor company and which should be reimbursed to them – a possibility that exists, at least in theory, because, under Brazilian law, there is no insolvency test as a requirement for filing for reorganization.[445]

11.3 Sale of Assets

The debtor can sell a branch or an isolate production unit free and clear of all liabilities under the terms of a court-approved plan of reorganization.[446] This possibility was widely considered a major improvement over previous legislation,[447] and was further enhanced by the 2020 law reform to increase security to acquirers and facilitate the sales process.[448] A research conducted in the State of São Paulo before the law reform showed that at least 18.8% of the reorganization plans provided for sales free and clear.[449]

Under the new provisions, the reorganization plan can provide for the judicial sale of a branch or an isolate production unit,[450] and the property sold under these terms shall be free and clear and the acquirer will not bear successor liability of any kind, including of an environmental, regulatory, administrative, criminal, anticorruption, tax, or labor nature.[451] The sale is not free and clear if the acquirer is a shareholder of the debtor or a related entity or person acting with the purpose of avoiding the successor liability.[452]

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[444] Article 56, §7.

[445] Cf. item 4.1.

[446] Article 60.

[447] Luiz Fernando Valente de Paiva & Giuliano Colombo, Venda de Ativos na Recuperação Judicial: Desafios e Oportunidades, in 10 Anos da Lei de Recuperação de Empresas e Falências: Reflexões sobre a Reestruturação Empresarial no Brasil 267 (2015).

[448] Cf. Bechara and Scorza, supra note 30.

[449] Waisberg et al., supra note 426 at 70.

[450] Article 60, chapeau.

[451] Article 60, sole paragraph.

[452] Article 141, §1.

Under previous legislation, as there was no clear definition on what an isolate production unit was, they were usually shaped according to the convenience of debtor, creditor, and potential acquirers.[453] There have been several discussions on whether an isolate production unit could comprise individual properties or even the bulk of the assets of the debtor. Some would argue that the sale should encompass an establishment of the debtor and that assets should remain to ensure the preservation of its business activities and the payment of unimpaired claims.[454] The amended law clarifies this issue and provides a very broad definition of what an isolate production unit is[455] – it may include any assets, rights, or property of any nature, either tangible or not, either piecemeal or as a going concern, including equity participation.[456] A common configuration for the sale is the transference to the acquirer of the shares of a wholly-owned subsidiary of the debtor, specifically incorporated to receive the assets that comprise the production unit.

The branch or isolate production unit may be sold under (a) a formal judicial auction, which may take place either on-site or online; (b) a structured competitive sales process conducted by a specialized and reputable agent and detailed in the reorganization plan; or (c) any other mean approved pursuant to the law[457] (the inclusion of this possibility by the reform has triggered new discussions on whether a sale conducted privately should also be accepted).[458] In several cases – such as in the reorganization proceedings of OAS, Abengoa, Oi, Renova, and Estre[459] – courts have accepted that a stalking horse bidder may have certain competitive advantages over other bidders (such as a break-up fee to cover its expenses and a right to match or top the best offer) as

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[453] Bechara and Scorza, supra note 30 at 10–11.

[454] Id.; Paiva and Colombo, supra note 444 at 272. In respect of such discussions, from an academic perspective, see Paulo Fernando Campos Salles de Toledo & Bruno Poppa, UPI e Estabelecimento: Uma Visão Crítica, in Direito das Empresas em Crise: Problemas e Soluções 265 (Paulo Fernando Campos Salles Toledo & Francisco Satiro eds., 2012).

[455] Cf. Bechara and Scorza, supra note 30 at 11; Paulo Fernando Campos Salles de Toledo & Glauco da Rocha, Alienação de Ativos na Recuperação Judicial e na Falência: Alterações Promovidas pela Lei Federal n. 14.112/20, in Direito da Empresa em Crise: Temas Atuais Sobre Recuperação Empresarial e Falência no Brasil 85, 90 (Matheus Martins Costa Mombach & Paulo Fernando Campana Filho eds., 2022).

[456] Article 60-A, chapeau.

[457] Article 142, chapeau.

[458] Toledo and Rocha, supra note 452 at 92.

[459] Bechara and Scorza, supra note 30 at 13.

compensation for making a public bid in advance of an auction and therefore setting the floor purchase price for the sale of the production unit.[460]

In any case, the Public Attorney Office and the tax authorities shall be notified of the sale.[461] If the sale, even when provided in the plan, results in a de facto liquidation of the debtor (with the transference of substantially all its assets), in prejudice of the creditors not affected by the judicial reorganization, notably the tax authority, the court will convert the case in a bankruptcy liquidation.[462] This de facto liquidation occurs when, after the sale, there are no sufficient assets, rights, or cashflow for the debtor to maintain its economic activities and to fulfill its obligations.[463] In this case, law provides that the sale will be preserved, but the court will order all the proceeds arising from the transaction to be frozen and the creditors to restore any amounts received.[464] Such amounts will be distributed pursuant to the legal priority rule under the bankruptcy liquidation.[465]

11.4 Financing

Although new money can be crucial for companies under financial stress,[466] few debtors under judicial reorganization have been able to obtain financing since the enactment of Law 11,101.[467] While OGX successfully secured

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[460] Paiva and Colombo, supra note 444 at 277–279; Bechara and Scorza, supra note 30 at 13.

[461] Article 142, §7.

[462] Article 73, VI.

[463] Article 73, §3.

[464] Article 73, §2.

[465] On the substantial liquidation in prejudice to creditors, see Toledo and Rocha, supra note 452.

[466] Leonardo Adriano Ribeiro Dias, Financiamento na Recuperação Judicial e na Falência 339 (2014); Eduardo Secchi Munhoz, Financiamento e Investimento na Recuperação Judicial, in Dez Anos da Lei n.o 11.101/2005: Estudos sobre a Lei de Recuperação e Falência (Edição Kindle) (Sheila C. Neder Cerezetti & Emanuelle Urbano Mafioletti eds., 2015); Thomas Benes Felsberg & Paulo Fernando Campana Filho, O Desafio do Financiamento das Empresas em Recuperação Judicial, in Direito dos Negócios Aplicado, Vol. 1, 273–274 (Elias Marques Medeiros Neto & Adalberto Simão Filho eds., 2015).

[467] Fabiana Bruno Solano Pereira, Comentários aos Artigos 69-A a 69-F, in Comentários à Lei de Recuperação de Empresas (Atualizada de Acordo com a Lei 14.112/2020, Inclusive com os Vetos Afastados e com as Alterações à Lei 10.522/2002) 477, 480 (Paulo Fernando Campos Salles de Toledo ed., 2021).

debtor-in-possession (DIP) financing within its restructuring,[468] for instance, OAS was unable to follow a similar path when a potential lender withdrew after an unfavorable court decision.[469] The 2020 law reform intended to encourage such financing, providing new rules for making DIP loans more secure for potential investors.

Under the new rules, the court can authorize the debtor undergoing a reorganization proceeding to obtain DIP financing, which can be secured by a fiduciary lien over unencumbered assets of the debtor or of third parties, with the purpose of funding its activities and the expenses related to the restructuring or the preservation of assets.[470] The effects of the court decision authorizing the loan (as well as its preference and collateral) prevail even if such decision is later reversed, provided that the amounts have already been disbursed.[471] The DIP loan can be extended by any individual or entity, including shareholders of the debtor or related companies.[472]

The DIP loan has a super-priority if the reorganization is later converted into a bankruptcy liquidation and is paid before nearly any other claim.[473] If the reorganization is converted into a liquidation before the full amount is disbursed, the loan agreement is automatically terminated and the lender shall not be compelled to extend any additional sum to the debtor.[474] In this case, the lender shall benefit from the seniority granted to the DIP loan in respect to any amount disbursed to the debtor prior to the bankruptcy decree.[475]

The court may authorize the creation of a subordinated lien over assets already granted as collateral to other creditors (and regardless of their approval).[476] This provision is not applicable if the collateral is under the form

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[468] Colombo et al., supra note 234 at 20.

[469] Leonardo Adriano Ribeiro Dias, Renata Martins de Oliveira Amado & Joana Gomes Baptista Bontempo, Seção IV-A: Do Financiamento do Devedor e do Grupo Devedor Durante a Recuperação Judicial. Arts 69-A a 69-F, in Comentários à Lei de Recuperação de Empresas e Falência 397, 403 (Joana Gomes Baptista Bontempo, Maria Fabiana Seoane Dominguez Sant'Ana, & Mayara Roth Isfer Osna eds., 2022).

[470] Article 69-A.

[471] Article 69-B.

[472] Article 69-F.

[473] Article 84, I-B.

[474] Article 69-D, chapeau.

[475] Article 69-D, sole paragraph.

[476] Article 69-C, chapeau.

of a fiduciary lien (alienação fiduciária em garantia),[477] the most widespread form of security interest in Brazil. Even after the law reform, the court cannot authorize the creation of a priming lien over assets already encumbered – and the absence of such a possibility has been criticized by academics and practitioners.[478]

Although Law 11,101 provides that the DIP loan shall be authorized by a court decision, it has been argued that the inclusion, in the reorganization plan approved by the creditors and confirmed by the court, of a provision allowing the obtention of such financing, would deliver the same (or even a higher) level of protection to the lender.[479]

11.5 Releases

The reorganization plan creates a novation which discharges the new debt and replaces it by new debt.[480] Such novation is conditional to the obligations lad down in the plan being complied with during a supervision period following court confirmation.[481] If the debtor fails to fulfill such obligations within this period (and fails to remedy the situation by approving an amendment to the plan), the court will convert the reorganization into a bankruptcy liquidation, in which case all affected outstanding obligations will be restored to their original terms and conditions.[482] As a result of the release of the original debt, the Superior Court of Justice ruled that all enforcement actions against the debtor, in respect to affected claims, shall be dismissed following court confirmation of the plan.[483]

While the debtor is discharged, creditors can still pursue their claims against third party guarantors.[484] It is common for financial institutions – recurring large creditors in reorganizations – to provide loans guaranteed by officers or shareholders of the debtor.[485] As it could be expected, many reorganization

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[477] Article 69-C, §2.

[478] Dias, Amado, and Bontempo, supra note 466 at 405–406; Sacramone, supra note 33 at 389.

[479] Pereira, supra note 464, comments to article 69-A.

[480] Article 59, chapeau.

[481] Article 61, §1. See Sacramone, supra note 33 at 353. Cf. item 13.

[482] Article 61, §2. Cf. Id.

[483] Cerezetti, supra note 295, comments to article 59.

[484] Article 49, §1. See Sacramone, supra note 33 at 352–353; Cerezetti, supra note 295, comments to article 59.

[485] Bezerra Filho and Santos, supra note 215, at 316-C.

plans provide for the release of guarantors; a research conducted in the state of São Paulo concluded that 11.1% of the plans contained such a provision.[486]

The possibility of the reorganization plan creating releases in favor of third parties has been a debated matter over the years since the enactment of Law 11,101, with scholars and practitioners presenting compelling arguments for each side.[487] Although the matter is still subject to debate, courts tend to accept that the plan can only release a third party guarantor if the respective creditor specifically accepts such provision – i.e., dissenting creditors cannot be bound in this respect and may still enforce their guarantees.[488] In the case of a plan proposed by creditors, the guarantees granted by individuals shall be released in relation to all those who supported or voted in favor of the plan.[489]

12 Treatment of Creditors

Although all affected claims may be impaired, in some cases, the plan submitted to deliberation does not alter the original terms and conditions of some claims (including the amount, the due dates, the interest rates, and the monetary adjustment).[490] Creditors holding such unimpaired claims have no voting rights and are not considered when counting approval thresholds (i.e., they are not deemed to have accepted nor rejected the plan).[491] All impaired claims entitle their holders to a vote (except when held by related parties)[492] and shall be have their payment terms addressed in the plan.

12.1 Different Treatment of Creditors in the Same Class

While pari passu treatment of creditors is a recurring principle of insolvency law, Law 11,101 does not contain a specific provision requiring a reorganization plan to provide equal treatment to creditors allocated in the same class of claims.[493] Academics have long discussed whether equal treatment of similarly situated creditors should be considered a core principle in reorganizations

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[486] Waisberg et al., supra note 426 at 71.

[487] Cerezetti, supra note 295, comments to article 59; Bezerra Filho and Santos, supra note 215, at 316-A to 316-D.

[488] Cerezetti, supra note 295, comments to article 59.

[489] Article 56, §6, V. See item 9.4.

[490] Article 45, §3.

[491] Article 45, §3.

[492] Cf. item 10.3.

[493] Cerezetti, supra note 153 at 365–366; Batista et al., supra note 381 at 228; Thiago Dias Costa, Recuperação Judicial e Igualdade Entre Credores 31; 107 (2018).

despite the lack of an explicit statutory provision.[494] Despite the controversy, this matter was not addressed by the 2020 law reform.

Plus, Law 11,101 contains no express rule establishing a priority of payments among classes of claims within a reorganization proceeding.[495] The observance of a priority rule is not a requirement not even for cramming down a dissenting class of claims.[496] Still, some creditors may have increased bargaining power to negotiate the plan due to their relative position as holders of claims which would be considered members of a senior class in a bankruptcy liquidation.[497]

The absence of rules on the treatment of creditors allows the plan a great deal of flexibility and facilitates the approval process.[498] The fact that creditors entitled to different priorities in a bankruptcy liquidation proceeding are grouped together for the purposes of voting a reorganization plan further complicates any attempt to promote consistency of treatment among them.[499]

Courts around the country have adopted different criteria to determine whether a plan can provide different treatment to creditors in the same class.[500] Following an event which took place in 2012, the Council of Federal Justice, a supervising body of the judiciary, published a set of guidelines on matters related to business law, which courts are encouraged to follow. According to Guideline 57, the reorganization plan shall provide equal treatment to creditors within the same class which share similar interests in respect to the nature or amount of the claim or in respect to another criterion justified by the proponent of the plan and accepted by the court.[501] Although such guideline is not binding, it has been adopted by many courts nationwide.[502] However, even in such cases where the guideline is adopted, the outcome is sub-optimal not only because differentiating criteria may be too loosely defined, but mainly

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494 Cerezetti, supra note 153 at 366–368; Costa, supra note 490 at 31–38, 108.

495 Costa, supra note 490 at 84, 97–98.

496 Cf. item 10.2.

497 Costa, supra note 490 at 89.

498 Id. at 136.

499 Batista et al., supra note 381 at 218; Sheila Christina Neder Cerezetti, As Classes de Credores como Técnica de Organização de Interesses: Em Defesa da Alteração da Disciplina das Classes na Recuperação Judicial, in Direito das Empresas em Crise: Problemas e Soluções 367, 371–373 (Paulo Fernando Campos Salles Toledo & Francisco Satiro eds., 2012); Cerezetti, supra note 153 at 376.

500 Cf. Cerezetti, supra note 157 at 26.

501 Id. at 25.

502 Costa, supra note 490 at 132.

because those creditors who received a favorable treatment may still have the voting power to approve the plan within the class.[503]

12.2 Treatment of Creditors in Each Class

Although law does not provide for a ranking of classes within a reorganization, and even claims allocated together may be treated differently in many circumstances,[504] it is common that the plan follows certain common-sense fairness criteria such as providing (a) better treatment to classes which would rank senior in a bankruptcy liquidation; and (b) similar treatment to members of the same class of claims, unless there is reason to justify granting some preferences. Plus, there are specific rules that limit the plan's ability to modify certain claims.

Pursuant to law, the plan shall provide that labor claims will be paid within one year from court confirmation.[505] This deadline can be extended for two additional years, for a total of three, if the plan cumulatively meets the three following requirements: (a) provides for guarantees which the court deems adequate; (b) is approved by the required majorities in the class of labor claims; and (c) provides for the payment of labor claims in full, with no haircut.[506] In addition, the plan shall provide for the payment, within 30 days from court confirmation, of the claims of a strictly salary nature due 3 months or less prior to filing, up to the limit of 5 minimum wages per creditor.[507] As these legal provisions are meant to protect employees, it is possible that some courts loosen these requirements in certain situations, such as when labor claims are held by third parties other than current or former employees. In most cases, however, the reorganization plan provides for the full payment of labor claims.[508]

In respect to the class of secured claims, law contains no rule establishing that the treatment assigned to the creditor shall be consistent with its collateral. However, law determines that the plan cannot provide for the release of collateral except if approved by the relevant creditor.[509] This provision may be

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[503] Cerezetti, supra note 157 at 25–26.

[504] Cf. item 12.1.

[505] Article 54, chapeau.

[506] Article 54, paragraph 2.

[507] Article 54, paragraph 1.

[508] COSTA, supra note 490 at 86.

[509] Article 50, §1.

strategically used by secured creditors to negotiate with the debtor, by allowing the collateral to be released in exchange for improvement payment conditions of the underlying claim.[510]

Law 11,101 includes no requirement in relation to the class of unsecured creditors. Due to its residual nature, it is usually the class that brings together the largest number of creditors.[511] Creditors with different economic interests – banks, suppliers, consumers, governmental authorities, or noteholders – are allocated in this class of claims if they do not meet the requirements for being in any of the other three classes.[512] The plan may include different payment provisions to accommodate the variety of interests allocated in this class.[513] In many cases, holders of small claims are paid upfront, with the purpose of cleaning up these pocket-size amounts to save operational costs.[514] In other occasions, the plan may provide for a menu of options for creditors to choose from.

There is also no legal requirement in respect to treatment of the creditors which qualify as micro and small businesses.[515] This fourth class of claims was introduced by a 2014 amendment to Law 11,101 and brings together creditors which were formally allocated in the unsecured class.[516] As such creditors usually represent a small percentage of the debt, and are assigned to a particular class, many plans provide more favorable payment conditions to their claims than those offered to general unsecured creditors.[517]

12.3 Strategic Suppliers and DIP Lenders

In many cases, the plan provides for the preferential payment of creditors who agree to continue doing business with the debtor, thereby facilitating the preservation of its activities.[518] This may be the case of suppliers who keep

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[510] Costa, supra note 490 at 89.

[511] Id. at 91–92.

[512] Id. at 92–93.

[513] Cf. item 12.1. See also Id. at 93.

[514] Id. at 102–103.

[515] Id. at 94.

[516] Sacramone, supra note 33 at 236.

[517] Costa, supra note 490 at 95.

[518] Felipe Evaristo dos Santos Galea & Igor Silva de Lima, Credor Parceiro e o Princípio da Par Conditio Creditorum, in 10 Anos da Lei de Recuperação de Empresas e Falências: Reflexões Sobre a Reestruturação Empresarial no Brasil 139 (Luis Vasco Elias ed., 2015); Costa, supra note 490 at 103–106.

supplying goods and services to the debtor,[519] or of financial creditors which extend new money or agree to release collateral (which can, therefore, be offered to secure new financing), and which, as an incentive for doing so, are paid in better terms than other creditors in the same class.[520]

The possibility of favoring these so-called "strategic" or "collaborative" creditors, already widely accepted by courts,[521] has been addressed by the 2020 law reform. According to the revised legislation, the plan may provide different treatment to affected claims held by suppliers of goods and services which continue to supply them normally after the filing, provided that such goods or services are required for the maintenance of the business and that the differentiated treatment assigned to such creditors is adequate and reasonable regarding the upcoming commercial relationship.[522]

12.4 Claims Not Affected by the Reorganization

As mentioned, there are several claims not affected by the reorganization and which, therefore, cannot be impaired by the plan.[523] Despite not being impaired by the plan, restructuring of such claims may be important for the reorganizing debtor. The fact that many claims held by financial institutions are not affected by the reorganization was heavily criticized by academics and practitioners, as this measure might defy the pari passu principle and undermine many restructuring attempts;[524] however, this matter was not addressed in the 2020 law reform.

Creditors holding a fiduciary lien (or title to assets) may not be affected by the plan, but they cannot enforce the collateral during the stay if the underlying asset is essential to the debtor's activities.[525] Other claims are exempt from the reorganization may be enforced even during the stay of proceedings and against any assets of the debtor, including those crucial for its business – such is the case of post-petition claims and of those deriving from advances on foreign

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[519] Costa, supra note 490 at 103–104.

[520] Id. at 104–106.

[521] Sacramone, supra note 33 at 381.

[522] Article 67, sole paragraph.

[523] Cf. item 4.4.

[524] Bezerra Filho and Santos, supra note 215, comments to article 49, §§3 and 4; Felsberg and Campana Filho, supra note 6 at 291; Ivo Waisberg, O Necessário Fim dos Cresores Não Sujeitos à Recuperação Judicial, in 10 Anos da Lei de Recuperação de Empresas e Falências: Reflexões Sobre a Reestruturação Empresarial no Brasil 199 (Luis Vasco Elias ed., 2015).

[525] Cf. items 4.4 and 5.3.

exchanges and aircraft lease agreements.[526] The fact that all such claims cannot be impaired by the plan may pose a challenge to a full-fledged restructuring.[527] Such unaffected claims may be negotiated individually by the debtor with each creditor.

Tax obligations are also exempt from the reorganization,[528] which may be a significant threat to a successful reorganization, as those claims frequently represent a large portion of the debt.[529] Laws enacted in 2014 and 2020 provided for special installment plans for debtors under reorganization to pay their outstanding federal tax obligations. The debtor can adhere to governmental plans allowing payment in up to 120 monthly installments.[530] It is also possible for the debtor to propose and ultimately enter a transaction with the Attorney General of the National Treasury with the purpose of reducing the tax debt.[531] State and municipal tax claims are subject to specific legislation enacted by the relevant authorities.

13 Post-Confirmation Matters

After the plan is approved at the creditors' meeting and confirmed by the court, the debtor does not automatically emerge from reorganization. When issuing the confirmation decision, the court will decide whether the proceeding will immediately terminate or whether there will be a supervision period during which the debtor will remain under reorganization and the judicial administrator will monitor the compliance with the obligations set forth on the plan.[532] The court will determine the length of the supervision period, if any, which can be extended up to the fulfilment of the obligations set forth in the plan which are due two years following the confirmation decision.[533]

13.1 Conversion into Bankruptcy Liquidation

Law 11,101 provides that, if any obligation contained in the plan is breached during the supervision period, the court will convert reorganization into a

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526 Cf. item 4.4.

527 Cooper, Brenneman, and McBride, supra note 11 at 196.

528 Cf. item 4.4.

529 Felsberg, Kargman, and Acerbi, supra note 15 at 40–41.

530 Article 10-A of Law 10,522/2002.

531 Articles 10-15 of Law 13.988/2020.

532 Article 61, chapeau.

533 Article 61, chapeau.

bankruptcy liquidation.[534] In many cases, debtor and creditors seek to reach an agreement to amend the plan and cure any default, thereby avoiding a bankruptcy liquidation, a measure which is usually allowed and even supported by the court.[535]

In any event, should the judicial reorganization be converted into a bankruptcy liquidation, creditors will have all their claims and guarantees restored to the original conditions.[536] However, in this case, the amounts already paid to the creditors will be deducted from this amount, and the acts validly performed under the reorganization plan will be preserved.[537]

13.2 Modification of the Plan

Despite the absence of a legal provision, courts have long accepted that the reorganization plan can be amended at any time during the supervision period and prior to the termination of the proceeding.[538] Courts usually authorize a plan to be amended to remedy a breach of obligations set forth therein and which would otherwise cause a conversion of the reorganization into a bankruptcy liquidation.[539]

Any amendment to the plan shall be approved by a qualified majority in each class of creditors (either at a creditors' meeting or by means of terms of acceptance).[540] The thresholds are the same as for the approval of the plan, except that any amounts already paid to creditors shall be deducted.[541] After the amendment is confirmed by the court, the modified reorganization plan will replace the original one, thereby remedying any infringed obligations.[542] The supervision period counts from the confirmation of the original plan, and does not restart after an amendment is confirmed.[543]

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[534] Article 61, §1.

[535] BEZERRA FILHO AND SANTOS, supra note 215, comments to article 61.

[536] Article 61, §2.

[537] Article 61, §2.

[538] SACRAMONE, supra note 33 at 364–365; BEZERRA FILHO AND SANTOS, supra note 215, comments to article 61.

[539] Cf. BEZERRA FILHO AND SANTOS, supra note 215, comments to article 61.

[540] SACRAMONE, supra note 33 at 365.

[541] Id.

[542] Id. at 366.

[543] Id.

If the amendment is not approved by the required majorities, the plan as originally confirmed shall remain in force.[544] As a result, in case of default of any obligation of the original plan (and which was supposed to be remedied by the rejected amended plan), the court will convert reorganization into a bankruptcy liquidation.[545]

13.3 Emerging from Reorganization

After the plan is confirmed, or after any supervision period is elapsed, the court will issue a decision terminating the reorganization.[546] In the decision, the court will also order (a) the payment of any remaining fees to the judicial administrator; (b) the verification of any pending court costs; (c) the submission of a detailed report, by the judicial administrator, within 15 days, regarding the fulfilment of the reorganization plan by the debtor; (d) the resignation of the creditors' committee, if any, and of the judicial administrator; (e) the communication to the Registrar of Companies and to the Federal Revenue.[547]

Following termination of the proceeding, any breach of the plan will no longer cause the commencement of a bankruptcy liquidation.[548] However, any creditor is still entitled to seek its rights under the plan after termination of the court proceeding.[549] In this case, it is possible for creditors not only to initiate an enforcement action against the debtor seeking any defaulted claim, but also to file for its involuntary bankruptcy based on a default of a payment obligation set forth in the plan, provided that the legal requirements for such filing are met.[550]

14 Conclusion

This article aimed at providing an overview of the legal procedure for negotiating and approving a reorganization in Brazil, considering the amendments carried out by the broad law reform enacted in 2020.

As discussed, the amended law has notably improved the reorganization proceeding in some key areas – such as strengthening creditors' rights with the

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[544] Id.

[545] Id.

[546] Article 63, chapeau.

[547] Article 63, chapeau, I to V.

[548] Sacramone, supra note 33 at 367.

[549] Article 62.

[550] Articles 62 and 94, III, "g".

possibility of proposal of an alternative plan or enhancing the prospects of recovery of a business by facilitating financing to the debtor, for instance – and many of the new provisions will be tested and construed in the coming years. As the legislation progresses, the case law develops, and the courts and practitioners become more experienced in dealing with the convolutions of restructurings, Brazilian insolvency law advances towards adopting the best practices on the subject and turning into a more predictable and more investor-friendly jurisdiction.