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EDITOR'S NOTE: THIRD-PARTY RELEASES
Victoria Prussen Spears

PURDUE PHARMA RULING BY U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT: NOT THE LAST WORD
Michael L. Cook

IN RE BOY SCOUTS OF AMERICA AND DELAWARE BSA, LLC: DELAWARE DISTRICT COURT AFFIRMS BANKRUPTCY COURT'S APPROVAL OF THIRD-PARTY RELEASES
David S. Meyer, William L. Wallander, Steven M. Abramowitz, Paul E. Heath, George R. Howard, Lauren R. Kanzer, Jessica C. Peet, Bradley Foxman and Katherine Drell Grissel

WHEN CAN AN INDIVIDUAL CLOSE A SUBCHAPTER V CASE AFTER PLAN CONFIRMATION?
Michael J. Lichtenstein and Hope Gouterman

PROPOSAL, NEGOTIATION, AND APPROVAL OF A REORGANIZATION PLAN UNDER BRAZILIAN BANKRUPTCY LAW – PART II
Paulo Fernando Campana Filho

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Editor's Note: Third-Party Releases
Victoria Prussen Spears 249

***Purdue Pharma* Ruling by U.S. Court of Appeals for the Second Circuit: Not the Last Word**
Michael L. Cook 251

***In re Boy Scouts of America and Delaware BSA, LLC*: Delaware District Court Affirms Bankruptcy Court's Approval of Third-Party Releases**
David S. Meyer, William L. Wallander, Steven M. Abramowitz, Paul E. Heath, George R. Howard, Lauren R. Kanzer, Jessica C. Peet, Bradley Foxman and Katherine Drell Grissel 255

When Can an Individual Close a Subchapter V Case After Plan Confirmation?
Michael J. Lichtenstein and Hope Gouterman 262

Proposal, Negotiation, and Approval of a Reorganization Plan Under Brazilian Bankruptcy Law – Part II
Paulo Fernando Campana Filho 269

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

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 this second part, the author discusses creditors and claims, proposing and negotiating the plan, deliberations at creditors' meetings, and more.*

6 Creditors and Claims

The end goal of the reorganization proceeding is the approval and confirmation of a plan, binding on all affected creditors, and providing for the payment of their claims and for the restructuring of the debtor's activities.[150] As creditors are separated into classes for the purposes of voting the plan, the rules and procedures related to recognition and classification of claims are key to the negotiations. After all, the bargaining power of a creditor – and its likelihood to influence the outcome of the restructuring – derives from its relative position in relation to the total amount of impaired claims. The rules relating to allowance and classification of claims are briefly described below.

6.1 How Creditors Are Divided Into Classes

Affected creditors are mandatorily divided into the following four classes of claims for the purposes of voting on the plan: (a) labor creditors; (b) secured creditors (i.e., those secured by pledges and mortgages, and so considered up to the value of the collateral); (c) unsecured creditors (encompassing all claims not included in the other classes, including the deficiency claim of secured

* Paulo Fernando Campana Filho. Bachelor of Laws, University of São Paulo; Master of Laws, University of Coimbra; Doctor of Laws, University of São Paulo; attorney in São Paulo. Partner at Campana Pacca Advogados in São Paulo. The author may be contacted at paulocampana@campanapacca.com.br.

[150] Colombo and Junqueira, supra note 23 at 11. (Footnote numbering continues from Part I.)

creditors); and (d) creditors which qualify as "micro" and small-sized businesses under Brazilian law.[151] The plan must be approved in each class of claims to be confirmed by the court (unless the cram down requirements set forth by law are met).[152]

Unlike in other countries, the debtor cannot propose a different separation of classes for the purposes of deliberating on a plan; these four categories are provided by law and shall be respected.[153] The separation of classes in a judicial reorganization follows different criteria from the one established in a bankruptcy liquidation.[154] For instance, in a liquidation, the value of labor-related claims is limited to 150 minimum wages per creditor,[155] while such restriction does not apply in a judicial reorganization. The class of unsecured creditors in a judicial reorganization includes claims which, in a bankruptcy liquidation, are subordinated and therefore junior to other unsecured credits.[156]

Even though the four classes are fixed and cannot be modified for voting purposes, it is common for reorganization plans to treat creditors allocated in the same class differently. This is because, as these classes are defined by law, combine claims entitled to different priorities in a bankruptcy liquidation, and do not take factual circumstances of each case into consideration, they may group together creditors with very dissimilar economic interests.[157] There have been discussions, especially in the academic field,[158] on whether creditors should be further grouped in subclasses of claims for the purposes of voting, thereby mirroring the treatment provided to them under the reorganization plan.[159]

6.2 Verification of Claims

The amount and classification of each claim is determined in a somewhat lengthy verification process, the importance of which cannot be overstated. The

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[151] Article 41. See item 3.5.

[152] Articles 45 and 58.

[153] Sheila Christina Neder Cerezetti, A Recuperação Judicial da Sociedade por Ações: O Princípio da Preservação da Empresa na Lei de Recuperação e Falência 285-291 (2012).

[154] Id. at 284.

[155] Article 83, I.

[156] Cf. articles 41, III, and 83, VI and VIII.

[157] Sheila C. Neder Cerezetti, O Passo Seguinte ao Enunciado 57: Em Defesa da Votação nas Subclasses, 13 Revista Comercialista 24, 24 (2015); Cerezetti, supra note 153 at 283-284.

[158] Cerezetti, supra note 157 at 26.

[159] Cf. Cerezetti, supra note 157. See item 12.1.

allowance, amount, and classification, of the claims are key to forming the majorities that will ultimately approve or reject the reorganization plan.

The debtor shall submit an initial list of claims at the time of filing, allocating creditors in each of the four classes.[160] The list is made public following the commencement decision,[161] and creditors have 15 days to submit to the judicial administrator their proofs of claims (if their amount is not listed) or to challenge the amount or classification of their listed claims.[162] The judicial administrator will then prepare, within 45 days, a second list of claims, based on information submitted by the creditors and provided by the debtor.[163] Creditors are allowed to submit a late proof of claim, but, in this case, and except for holders of labor claims, they will have to pay court costs and will not have voting rights at the creditors' meeting.[164]

The list of creditors prepared by the judicial administrator is then published, and any party – including creditors and the debtor, but also the Public Attorney Office – may challenge it before the court within 10 days.[165] Each challenge to the list of claims will be handled in separate court records,[166] and the court will decide after hearing the relevant parties and producing evidence, when appropriate.[167] Such decisions may be subject to appeal.[168] After all challenges are resolved, the judicial administrator will prepare a final list of claims, to be confirmed by the court, which is supposed to serve as the basis for the deliberations on the plan and for payment of the creditors.[169]

As the verification process can take long, the voting on the plan is frequently taken based on the current list of creditors (usually the one prepared by the judicial administrator).[170] In any case, the deliberation at a creditors' meeting is final and cannot be altered or nullified by any further modification in the list of claims.[171] Also, the court cannot order the postponement or suspension of

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[160] Article 51, III.

[161] Article 52, §1, III.

[162] Article 7, §1.

[163] Article 7, §2.

[164] Article 10, §1.

[165] Article 8, chapeau.

[166] Article 8, §1.

[167] Article 15.

[168] Article 17.

[169] Article 18.

[170] Article 39, chapeau.

[171] Article 39, §2.

the creditors' meeting because of a pending discussion over the existence, amount, or classification, of a claim.[172] Whenever there is significant litigation over the matter, creditors and debtors may seek injunctions either for the court to recognize certain amount or classification of claims in advance of the creditors' meeting or to order the judicial administrator to collect votes considering different voting scenarios so the judge can later decide which one should prevail.[173]

6.3 Assignment of Claims

Creditors are free to assign their claims to other creditors or to third parties,[174] provided that the rules set forth by law are complied with. Pursuant to the Brazilian Civil Code, the assignment shall be made either by means of a private instrument or a public deed.[175] The assignment will only become opposable to the debtor after it is formally notified or acknowledged it in writing.[176] Unless otherwise provided in the agreement, the assignment is made without recourse to the assignor,[177] which, however, is responsible for the existence of the claim.[178]

In addition to these general provisions of the Civil Code, Law 10,101 establishes that any assignment of a claim affected by a judicial reorganization, or any commitment to assign such a claim, shall be immediately informed to

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[172] Article 40.

[173] Ricardo Tepedino, Comentários aos Artigos 40 a 46, 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) (Paulo Fernando Campos Salles de Toledo ed., 2021), comments to article 40; Costa and Melo, supra note 29 at 199.

[174] A creditor cannot assign its claim to the debtor, as this would result in payment of the claim, in violation of the pari passu principle. Although law imposes no limitation as to whether a claim can be assigned to shareholders of the debtor company, the assignee would have voting restrictions in this case (pursuant to article 43). See Gabriel Saad Kik Buschinelli, Sheila Christina Neder Cerezetti & Emanuelle Urbano Maffioletti, Cessão de Crédito na Recuperação Judicial, in Dez Anos da Lei n.o 11.101/2005: Estudos Sobre a Lei de Recuperação e Falência (Edição Kindle), 328-330 (2015).

[175] Article 288 of the Civil Code.

[176] Article 290 of the Civil Code.

[177] Article 296 of the Civil Code.

[178] Article 295 of the Civil Code.

the court.[179] This requirement aims to ensure that the voting rights are exercised by the actual holder of the claim.[180]

6.4 Claims in Foreign Currency

Claims denominated in foreign currencies shall be listed as such in the creditors' list. The claim will only be converted to Brazilian reals for the purpose of voting at the creditors' meeting[181] to enable the counting of votes.[182] The conversion shall be made according to the official sell exchange rate disclosed by the Brazilian Central Bank, based on the average quotes of financial institutions, on the last business day prior to the meeting.[183] If the reorganization is converted into a bankruptcy liquidation, then the claims denominated in foreign currency shall be converted to Brazilian reals pursuant to the exchange rate as of the date of the bankruptcy decree.[184]

6.5 Noteholders

There is no statutory provision for how holders of notes issued in the U.S. shall be handled in a judicial reorganization, and such matter is decided by the court on a case-to-case basis. However, there is a somewhat consistent – although not uniform[185] – body of court precedents which provide some clearance on how noteholders shall proceed.

The trustee of the notes is usually listed as a single creditor for the full amount of the claim under the issuance.[186] Individual noteholders are not automatically identified as creditors nor assigned voting rights at the creditors' meeting.[187] As such, the indenture trustee can petition in court and represent

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[179] Article 39, §7.

[180] Sacramone, supra note 33 at 226.

[181] Article 38, sole paragraph.

[182] Cf. Erasmo Valladão A. e N. França & Marcelo Vieira von Adamek, Comentários aos Artigos 35 a 39, 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) (Paulo Fernando Campos Salles de Toledo ed., 2021), comments to article 38.

[183] Article 38. See Id., comments to article 38.

[184] Article 77.

[185] Cooper et al., supra note 23 at 164.

[186] Cf. Jeffrey M. Anapolsky & Jessica F. Woods, Pitfalls in Brazilian Bankruptcy Law for International Bond Investors, 8 J. Bus. & Tech. L. 397, 496 (2013).

[187] Id. at 408.

all noteholders in the reorganization proceeding.[188] It is up to the trustee to participate in the claim verification process, and to submit, whenever appropriate, a proof of claim or an objection to the list of creditors, on behalf of the collectivity of noteholders (in respect to the total amount of the notes).[189] Meanwhile, holders are free to keep trading their notes without the need of meeting any of the requirements for assignment of claims under Brazilian law.

The noteholders who wish to be recognized as individual creditors in the reorganization proceeding and have the right to petition in court and to vote at the creditors' meeting must go through a process of segregating their notes from those represented by the trustee.[190] This "individualization" procedure is established by the judge in each case, and is usually provided for in a notice published, by order of the court, in advance of the creditors' meeting. It typically involves the submission of proof of holding of notes – which may be, for instance, a certificate of holder and a screenshot showing the current position.[191] The noteholders which successfully individualize their claims against the debtor are entitled to participate in the reorganization proceeding and exercise their rights as creditors (including to cast a vote on the plan).[192]

All the other holders, which did not individualize their claims – because they failed to obtain the required documentation on a timely manner or did not show any interest to participate as individual creditors – will be represented by the trustee.[193] Due to the restrictions applied to the trustee by the U.S. Trust Indenture Act of 1939, the trustee is likely to take a passive role on the negotiations and therefore to abstain from voting on the plan for the remainder of the notes.[194] As a result, noteholders who wish to actively engage into negotiations follow the individualization process determined by the court.

7 Proposing and Negotiating the Plan

Much like in a Chapter 11 bankruptcy, the plan is the heart of the reorganization in Brazil.[195] The plan provides for the restructuring measures

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[188] Id. at 409.

[189] Id.

[190] Id. at 406.

[191] On the documentation required and on issues that were faced by noteholders in certain specific cases, see id. at 410-411.

[192] Cooper et al., supra note 23 at 164.

[193] Anapolsky and Woods, supra note 186 at 409.

[194] Id. at 409-410. Cf. Cooper et al., supra note 23 at 164-165.

[195] SCALZILLI, SPINELLI, AND TELLECHEA, supra note 105 at 442.

aimed at keeping the business afloat and for the treatment of the creditors. During the judicial reorganization, and pursuant to the rules of Law 11,101, the plan is filed, negotiated, and submitted to voting.

The dynamics of proposing and negotiating the plan – including the bargaining power of debtor and creditors – have been significantly modified by the law reform, as it allowed creditors to propose, under certain circumstances, an alternative plan. However, the legal mechanics for proposal and negotiation of the debtor's plan remained largely unaltered and will be briefly analyzed below.

7.1 Filing of the Plan

The debtor shall file the reorganization plan in court within 60 calendar days from the date in which the commencement decision is published in the official gazette.[196] The debtor has the exclusive right to file the plan, and any modification to it must have its consent.[197] The amended law allows creditors to file an alternative plan (and to submit modifications to it), a possibility only applicable after the debtor's plan was rejected or not submitted to voting within an exclusivity period of a maximum of 360 days.[198]

If the debtor fails to submit the plan within the 60-day deadline, the court will convert the reorganization into a bankruptcy liquidation.[199] In many cases, the plan submitted by the debtor is just a placeholder, preceded by little or no negotiation with creditors, and only to comply with the deadline.[200] This first draft is expected to be significantly modified during the negotiations between debtors and creditors prior to the plan being voted.

Even if it is intended to not be the final version, the plan originally submitted must show the economic viability of the debtor and shall be accompanied by an economic and financial report and by an appraisal report of all the debtors' assets, each of them duly signed by a qualified professional or a by specialized entity.[201]

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[196] Article 53, chapeau.

[197] Cf. Thomas Benes Felsberg & Fabiana Bruno Solano Pereira, Plano dos Credores: Aspectos Polêmicos, in Direito da Empresa em Crise: Temas Atuais Sobre Recuperação Empresarial e Falência no Brasil 167, 168 (Matheus Martins Costa Mombach & Paulo Fernando Campana Filho eds., 2022).

[198] Id. Cf. item 9.

[199] Article 53, chapeau.

[200] Cooper, Cestero, and Soltman, supra note 2 at 33.

[201] Article 53, III.

7.2 Judicial Administrator's Report on the Plan

In most cases, the court and the judicial administrator do not scrutinize the documentation submitted to check if it is adequate or if it provides sufficient information to the creditors.[202] The debtor is not required to present a disclosure statement or any additional information in respect to the plan or to its activities other than the aforementioned economic and financial report and the appraisal report of the assets.[203] Creditors may request additional information on the proposed restructuring mechanisms to the judicial administrator[204] or directly to the debtor.

The 2020 law reform introduced a new provision establishing that the judicial administrator shall submit a report to the court on the reorganization plan within 15 days from the date in which it is submitted to the court.[205] According to such provision, in the report, the judicial administrator shall inspect the accuracy and the conformity of the information provided by the debtor.[206] The depth of this inspection that the judicial administrator shall conduct has been subject to different interpretations by commentators. According to some commentators, the judicial administrator shall inform whether there are any illegal provisions in the plan and in the attached reports in respect to the proposed restructuring.[207] The report of the judicial administrator shall also provide information to creditors in respect to the restructuring mechanisms, enabling them to decide whether to vote in favor or against the plan.[208]

7.3 Objections to the Plan

After the plan is filed, the court will order the publication of a notice informing all creditors that the draft is available for public consultation in the

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[202] Cf. Cerezetti, supra note 153 at 305–307; Cooper, Cestero, and Soltman, supra note 2 at 33.

[203] Cf. Cerezetti, supra note 153 at 306–307.

[204] Cf. item 5.2.

[205] Article 22, II, "h".

[206] Article 22, II, "h".

[207] Sacramone, supra note 33 at 177; Felipe Denki Belém Pacheco, As Novas Funções do Administrador Judicial com a Reforma da Lei e Seus Desafios, in Reforma da Lei de Recuperação e Falência (Lei n. 14.112/2020) 435, 447–448 (Ronaldo Vasconcelos et al. eds., 2021); Costa and Melo, supra note 29 at 168–169.

[208] Joice Ruiz Bernier, Administrador Judicial: Impactos na Responsabilidade Civil e na Remuneração em Face das Novas Funções Atribuídas pela Lei 14.112/20, in Reforma da Lei de Recuperação e Falência (Lei n. 14.112/2020) 413, 418 (Ronaldo Vasconcelos et al. eds., 2021).

court records.[209] Creditors will have 30 calendar days, counting from the publication of such notice, or from the publication of the notice containing the list of creditors prepared by the judicial administrator, whichever is published latter, to submit objections to the proposed plan.[210]

If there are no objections filed, then the court will issue a decision confirming the plan.[211] In this case, there is a presumption that all creditors agreed to the plan.[212] Should there be any objection to the plan – which is frequently the case, as the initial draft may be just a placeholder[213] – the court will call a creditors' meeting to deliberate on its approval.[214] The creditors will then vote on the plan and the court will confirm it if approved by the required majorities.[215]

Although debated, it is generally accepted that any creditor, including those whose claims are under discussion and pending a court decision, have standing to file an objection to the plan.[216] The contents that an objection must have are also a matter of discussion.[217] Some courts accept that the objection is a simple manifestation of the creditor stating its opposition to the plan, while others require that it includes the reasons of disagreement with the proposed restructuring.[218] For this reason, creditors usually prepare a more robust objection, clearly asserting the motives for not accepting the debtor's proposal.

7.4 Negotiation of the Plan

The debtor typically negotiates the terms of the restructuring, on an informal basis, with the largest creditors (or with those whose vote is key for approval of the plan), either on an individual basis or with an "ad hoc" group.[219] Official creditors' committees are rarely formed in Brazil, and even in the cases in which

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[209] Article 53, sole paragraph.

[210] Article 55, chapeau and sole paragraph.

[211] Article 58, chapeau.

[212] Sacramone, supra note 33 at 335.

[213] Cf. item 7.1.

[214] Article 56, chapeau.

[215] Cf. item 8 and 10.

[216] Manoel Justino Bezerra Filho & Eronides A. Rodrigues dos Santos, Lei de Recuperação de Empresas e Falência: Lei 11.101/2005 Comentada Artigo por Artigo (15 ed. 2021), comments to article 56; Sacramone, supra note 33 at 333.

[217] Bezerra Filho and Santos, supra note 215, comments to article 55.

[218] Id., comments to article 55.

[219] Cf. item 8.6.

they are created, they do not have the role to negotiate the restructuring terms.[220] Plus, official creditors' committees, when formed, are not representative of the largest claims, a factor which would, in any case, limit their bargaining power.

The debtor is not required to negotiate with every creditor, although each of them has the right to propose amendments to the plan (which may or may not be accepted), to petition in court, to speak to ask questions at the creditors' meeting, and to exercise its right to vote. The negotiations are usually carried out in private in advance of the creditors' meeting, so the plan is expected to be (nearly) in its final form when such meeting is convened.

Following the law reform, the judicial administrator has the role to supervise the course and the regularity of the negotiations between debtor and creditors.[221] The judicial administrator also shall ensure that the debtor and the creditors do not adopt measures which are useless, or which delay or harm the regular course of the negotiations.[222] Finally, the judicial administrator shall ensure that the negotiations between debtor and creditors are governed by the terms agreed between the parties, or, in the absence of such an agreement, by rules proposed by the judicial administrator and confirmed by the court.[223] In respect to these new provisions, it is generally understood that the judicial administrator shall indicate the benefits of a consensual resolution to disputes and shall seek to facilitate agreements, but that it cannot impose rules for the negotiations if the parties are not willing to talk.[224]

7.5 Amendments to the Plan

The reorganization plan, after being submitted to the court, can be amended at any time prior to being submitted to voting, including during the creditors' meeting.[225] So, while the plan shall be submitted within 60 days from the commencement decision,[226] the debtor and the creditors can further negotiate the restructuring terms and modify the plan to reflect any agreement.[227]

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[220] Cf. article 27, I and II, and item 8.6.

[221] Article 22, II, "e".

[222] Article 22, II, "f".

[223] Article 22, II, "g".

[224] Fontana, Macedo, and Barbosa, supra note 120 at 190–191; Sacramone, supra note 33 at 177–178.

[225] Article 56, §3. Cf. Sacramone, supra note 33 at 336.

[226] Cf. item 5.

[227] Sacramone, supra note 33 at 335.

Any amendment to the plan – even those requested by the creditors – must be necessarily accepted by the debtor.[228] This provision has been heavily criticized over the years, as it provided leverage to shareholders to preserve equity in the debtor company at the expense of the recovery of claims.[229] In the amended legislation, this rule applies only to the plan proposed by the debtor. Plans proposed by creditors do not require the consent of the debtor for being submitted or modified.[230]

If the plan is altered at the creditors' meeting, such amendments cannot adversely modify exclusively the rights of those not attending.[231] The modification can reduce the rights of creditors not attending the meeting, provided that such a provision is extended to all those comprehended in the respective class, including those present at the occasion.[232] The reasoning is that, in this case, the creditors attending the creditors' meeting can negotiate such amendment and will have the right to vote on the plan, therefore reducing the risk of the absent ones being unfairly discriminated.[233]

In any case, some courts require that any significant modification to the plan is submitted to the court records in advance of the creditors' meeting (or of any resumption thereof). The reason for this is to allow creditors sufficient time to analyze the amended provisions and to obtain the required internal approvals so they can cast a vote either in favor or against the plan.[234]

7.6 Plan Support Agreement

In some cases,[235] before the plan is submitted to voting, the debtor and a group of creditors negotiate and execute a plan support agreement. The purpose of a plan support agreement is to establish the basic terms and conditions for

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[228] Article 56, §3.

[229] Cooper et al., supra note 23 at 162.

[230] Cf. item 9.

[231] Article 56, §3.

[232] Sacramone, supra note 33 at 336; CEREZETTI, supra note 153 at 323–325.

[233] Sacramone, supra note 33 at 336.

[234] Id.

[235] Cf. Giuliano Colombo et al., Cross-Border Insolvency in Brazil: A Case for the Model Law, 20 (2017), http://www.uncitral.org/pdf/english/congress/Papers_for_Congress/117-COLOMBO_KAYE_LANGEN_LUTKUS_SHIRLEY_and_TURETSKY-_Cross-Border_Insolvency_in_Brazil.pdf.

the restructuring to which both debtor and certain creditors agree.[236] The plan support agreement typically provides that the debtor and creditors will support the proposed plan and will refrain from soliciting any amendments.[237] As such, the creditors will be bound to vote in favor of the plan at the creditors' meeting, provided that the debtor submits the documentation that properly reflects the agreed restructuring terms.[238]

8 Deliberations at Creditors' Meetings

Creditors deliberate on any matter of their interest – including the plan of reorganization or the sale of non-current assets of the debtor – at creditors' meetings.[239] A creditors' meeting is an assembly, presided over by the judicial administrator,[240] in which all affected creditors are entitled to participate. As the chair of the creditors' meeting,[241] the judicial administrator will appoint one of the creditors' representatives to serve as secretary and prepare the minutes,[242] to give the floor to any participant wishing to speak, and to collect all votes at the deliberations.[243]

Although Law 11,101 contains no provision restricting the judge to take part on creditors' meetings, this seldom happens. After the meeting is finished, the judicial administrator will submit the minutes to the court, accompanied with a list of all attending creditors, within 48 hours.[244] The court will then decide on the confirmation of the deliberations of the creditors' meeting, whenever necessary (including on the approval or rejection of the reorganization plan).

8.1 Calling and Convening a Creditors' Meeting

A creditors' meeting shall be called by the court, with at least 15 days in advance for the first call,[245] by means of publication of a public notice, at the

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[236] Isaac Sasson, Judicial Review of Plan Support Agreements: A Review and Analysis, 9 N.Y.U. J.L. & Liberty 850, 851 (2015).

[237] Id.

[238] Id.

[239] Article 35, I.

[240] Article 37, chapeau.

[241] Article 37, chapeau.

[242] Article 37, chapeau.

[243] França and Adamek, supra note 182, comments to article 37.

[244] Article 37, §7.

[245] Article 36, chapeau.

request of the debtor, of the judicial administrator,[246] of the creditors' committee (whenever formed),[247] or of creditors representing at least 25% of the affected claims.[248] The public notice must include the place, date, and time, of the meeting, the matters to be deliberated, and how creditors can obtain a copy of the reorganization plan in case it is submitted to voting at the occasion.[249] The debtor shall bear all costs related to calling and convening the creditors' meeting, except if it is requested by creditors or by the creditors' committee.[250]

The meeting will be convened on first call with the attendance of creditors holding at least 50% of the claims, in amount, in each class of claims.[251] Creditors with no voting rights – such as shareholders of the debtor – can attend the creditors' meeting but are not considered for verifying this threshold.[252] If the attendance quorum is not met, the creditors' meeting will be convened on second call, with any number of creditors,[253] and which must take place at least 5 days after the date stipulated for the first call.[254] According to Law 11,101, the creditors' meeting shall be held no later than 150 days after the commencement decision[255] – a deadline which is frequently overlooked as there is no legal consequence for its non-observance.[256]

To participate, creditors or their authorized representatives must attend the meeting.[257] The creditor who wishes to be represented by its attorney shall, within 24 hours prior to the meeting (or another deadline established by the court), send the appropriate documents, evidencing the representative powers to specifically vote at the creditors' meeting, to the judicial administrator, or indicate the pages in the court dockets where such documents can be found.[258]

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[246] Article 22, I, "g".

[247] Article 27, I, "e".

[248] Article 36, §2.

[249] Article 36, chapeau.

[250] Article 36, §3.

[251] Article 37, §2.

[252] Article 43, chapeau. See item 8.4. Cf. Sacramone, supra note 33 at 215.

[253] Article 37, §2.

[254] Article 36, II.

[255] Article 56, §1.

[256] Cf. Sacramone, supra note 33 at 335.

[257] Article 37, §4.

[258] Article 37, §4. Cf. Sacramone, supra note 33 at 216; Costa and Melo, supra note 29 at 196.

The purpose of this rule is to provide the judicial administrator with the necessary time to review the documentation without causing any unnecessary delays in convening the creditors' meeting.[259] Failure to meet this deadline will result in the creditors' representative being prevented from attending the meeting.

8.2 Suspending and Resuming a Creditors' Meeting

Despite the absence of a legal provision, courts have long accepted that the creditors' meeting can be suspended and resumed later. A suspension is usually requested when the reorganization plan is not yet ready to be put to vote – i.e., debtor and creditors have not yet reached an agreement on the restructuring terms and further negotiations and internal approvals are still required and cannot be concluded or obtained at the same date.

It is generally accepted that a suspension shall be approved by creditors holding a simple majority of the claims attending the meeting.[260] Although the creditors' meeting can be postponed for as many times as required, the law reform introduced a provision according to which it shall necessary close within a limit of 90 days from the date in which it was convened.[261] This provision aimed at avoiding that creditors' meetings be constantly postponed and extended indefinitely.

As the resumption is a continuation of the creditors' meeting and not a new one, the formalities related to publishing a call notice and to verifying the attendance quorum are dismissed.[262] When the creditors' meeting is resumed after a suspension, only creditors who were present at the original convenance can participate; no newcomers are allowed.[263] For this reason, creditors who are absent have their bargaining power drastically reduced even if the plan is put to vote in a further resumption of the meeting. If a creditor who attended the meeting has assigned a claim in the meantime, the assignee is entitled to take part when it resumes. In addition, it is generally not required that the same representative who attended the first meeting is present at the resumptions; once the creditor is authorized to participate, it may replace the participants.

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[259] SACRAMONE, supra note 33 at 218.

[260] Id. at 220.

[261] Article 56, §9.

[262] SACRAMONE, supra note 33 at 220; França and Adamek, supra note 182, comments to article 37.

[263] SACRAMONE, supra note 33 at 220; França and Adamek, supra note 182, comments to article 37.

8.3 In-Person and Virtual Meetings

Since the enactment of Law 11,101, the creditors' meetings were held in person – usually at a venue at the city where the court proceeding takes place and with sufficient room to accommodate all expected participants (such as the debtor's headquarters, a conference hall, or an auditorium).[264] However, due to societal restrictions during the COVID-19 pandemic in 2020, many creditors' meetings were held remotely, with the employment of electronic means and communication platforms, using audio, video, and chat tools.[265] Those "virtual" meetings became widespread as they are significantly more economical (as they do not require physical space) and facilitate the participation of creditors scattered all over a continental-sized country who might otherwise have to bear travel costs.[266]

Following these precedents, creditors' meetings can be held in person or via electronically means (or a mix of both). In addition, a new provision introduced by the law reform determines that the creditors' meeting can be replaced by voting through electronic means which faithfully reproduce the procedure held at a creditors' meeting,[267] further validating the court precedents established during the pandemic.[268] Although a creditors' meeting held online can save time and costs and enable the attendance of smaller claimholders, it does not significantly modify the negotiation and approval process. In fact, the judicial administrator shall supervise the voting process and shall issue a report attesting its regularity and conformity to the requirements set forth by law; the court will confirm the deliberation after reviewing it and hearing the Public Attorney Office.[269]

8.4 Matters to Be Deliberated

The creditors' meeting can deliberate on nearly any matter of interest of the creditors, including, for instance, the withdrawal from the reorganization proceeding, the creation of a creditors' committee, or the sale of non-current

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[264] Cf. Costa and Melo, supra note 29 at 194.

[265] João Pedro Scalzilli, Luis Felipe Spinelli & Rodrigo Tellechea, Pandemia, Crise Econômica e Lei de Insolvência 52–55 (2020); Costa and Melo, supra note 29 at 194; Sacramone, supra note 33.

[266] Costa and Melo, supra note 29 at 200.

[267] Article 39, §4, II.

[268] Sacramone, supra note 33 at 226.

[269] Article 45-A, §4.

assets of the debtor.[270] The creditors can also deliberate, by a simple majority voting, on the suspension of the creditors' meeting to be resumed on another date.[271]

The creditors' meeting cannot deliberate on the appointment, removal, or replacement, of the judicial administrator.[272] This possibility was vetoed by the Brazilian Congress, and, as a result, the court has the exclusive power to decide on who will serve as judicial administrator.[273] The creditors' meeting can, however, decide on the person to be appointed as judicial manager to conduct the debtor's activities when the court removes management of the debtor company.[274] The managers of the debtor will be removed by the court if such there is a strong indication of a bankruptcy crime, if they act fraudulently or in bad faith against the interests of the creditors, if the company keeps excessive and unjustified expenses, if such removal is provided for in the reorganization plan, or in other situations provided by law.[275]

In most cases – except on certain matters such as approval of the plan – deliberations are taken when approved by holders of more than 50% of the claims, in amount, among those attending the creditors meeting.[276] The shareholders of the debtor, as well as affiliated, controlling or controlled companies, or those in which shareholders hold more than 10% of the capital stock, may participate at the creditors' meeting without the right to speak or to vote.[277] The same rule applies to certain close relatives of the debtor (when an individual), of the controlling shareholder, or of a member of the board of directors, auditing committee, or of the advisory board, as well as any company in which these people exercise such roles.[278] In addition, creditors who attend the meeting and who abstain from voting are also not considered for calculating the majority. The most significant matter to be put to vote at a creditors'

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[270] Article 35, I.

[271] Cf. item 8.2.

[272] Sacramone, supra note 33 at 207.

[273] Id.

[274] Article 35, I, "e".

[275] Article 64.

[276] Article 42.

[277] Article 43, chapeau.

[278] Article 43, sole paragraph. See additional comments in item 10.1, regarding to voting on the plan, which are also applicable to any deliberations of the creditors in general.

meeting is the plan of reorganization, which, as mentioned, requires specific thresholds for approval.[279]

8.5 Creditors' Committee

The creditors may, at a meeting, deliberate to create a formal creditors' committee with a monitoring role over the proceeding and over the activities of the debtor.[280] The creditors' committee, if created, shall, among other matters, review the accounts presented by the judicial administrator;[281] submit a monthly report on the management of the debtor's activities;[282] and supervise the compliance with the approved plan.[283] Law does not ascribe to the creditors' committee any role in preparing or negotiating the plan.[284]

The creditors' committee may have up to four members, being one appointed by each class of claims.[285] If creditors in a specific class decide not to appoint a member, then the committee will function only with the members appointed by the other classes.[286] The members of the creditors' committee are not remunerated by the debtor, but any expenses while carrying out their activities and authorized by the court will be reimbursed.[287] Although not remunerated, the members of the creditors' committee are subject to some of the same responsibilities as the judicial administrator: they may be removed by the court in some situations[288] and may be held personally liable for any damage caused due to negligence or willful misconduct.[289] The risks associated with the role frequently discourage creditors to take part in creditors' committees.[290]

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[279] Cf. item 10.1.

[280] Article 27, I and II.

[281] Article 27, I, "a".

[282] Article 27, II, "a".

[283] Article 27, II, "b".

[284] Article 27, I and II. Cf. Thomas Benes Felsberg & Victoria Vaccari Villela Boacnin, Comentários aos Artigos 26 a 34, 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), 199–200 (Paulo Fernando Campos Salles de Toledo ed., 2021).

[285] Article 26, chapeau.

[286] Article 26, §1.

[287] Article 29.

[288] Article 31.

[289] Article 32.

[290] Felsberg and Boacnin, supra note 283, comments to article 32.

Formal creditors' committees are seldom created in Brazilian judicial reorganization proceedings.[291] When the matter is submitted for deliberation, creditors usually vote against the creation of a creditors' committee, due to several factors such as its limited role, the lack of remuneration, the risks involved, and the absence of a consistent practice of creditors in collectively pursuing their interests.[292] Instead, it is common, especially in high profile cases, for the largest creditors (usually financial institutions) to create an informal group – not bound by the legal duties and responsibilities of a formal creditors' committee – to jointly negotiate the restructuring terms with the debtor. Labor creditors – which may not hold large claims but are high in priority – are often represented in negotiations by the labor union or a common attorney. In cases involving debt issued abroad, it is frequent that an "ad hoc" group of noteholders is formed and hires a financial and a legal advisor to represent their interests in the negotiations with the debtor.[293]

8.6 Terms of Acceptance

Any deliberation of the creditors' meeting (including on the reorganization plan) can be replaced by terms of acceptance signed by creditors that fulfill the majority required by law (or by any other document with a written manifestation that evidences the adhesion of such creditors).[294] The terms of acceptance should be accompanied by documents attesting the representative powers of their signatories (or the indication of the pages in the court dockets where such documents can be found), so their regularity can be duly verified by the judicial administrator.[295]

In this case, the quorum requirements for approval of the deliberation are calculated based on all creditors allowed in the reorganization (and not only those attending the creditors' meeting, which does not even take place).[296] Considering that several creditors are expected to be absent from or to abstain from voting at the creditors' meeting (and therefore they are not be counted as

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[291] Id. at 197–199; Bezerra Filho and Santos, supra note 215, comments to article 26.

[292] Cf. Felsberg and Boacnin, supra note 283 at 197.

[293] Cf., for instance, the role of the groups of noteholders informally created in the Oi reorganization, in Cooper, Cestero, and Mosier, supra note 20. See also item 6.5.

[294] Article 39, §4, I, 45-A, chapeau and §1, and 56-A. Cf. Sacramone, supra note 33 at 225.

[295] Costa and Melo, supra note 29 at 209.

[296] Sheila C. Neder Cerezetti, Comentários aos Artigos 55 a 59, 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) (Paulo Fernando Campos Salles de Toledo ed., 2021), comments to article 56-A.

votes for or against the deliberation), then the approval thresholds may be significantly higher when terms of acceptance are used.[297]

The debtor can submit the terms of acceptance to the court up to 5 days in advance of the creditors' meeting called to deliberate on the reorganization plan.[298] In this case, the court will immediately dismiss the creditors' meeting and will notify the creditors to submit any oppositions within 10 days.[299] The opposition can only refer to the lack of approval thresholds, non-compliance of the procedure established by law, irregularities in the terms of acceptance, or irregularities or illegalities of the plan.[300] If any creditor files such an opposition, the court will notify the debtor to respond in 10 days and the judicial administrator to submit its opinion in further 5 days.[301] If the court rejects the usage of terms of acceptance, a creditors' meeting shall take place instead.[302]

9 Creditors' Alternative Plans

The 2020 reform introduced the possibility of creditors submitting and approving an alternative reorganization plan, without the need of the debtor's consent.[303] The lack of this feature was one of the most criticized aspects of Law 11,101, as the requirement that the debtor consented to the plan allowed too much bargaining power to the shareholders, who frequently kept equity value in the company while creditors were left with a sub-optimal solution, often having to accept a haircut in their claims.[304] While creditors could opt to reject the plan proposed by the debtor, the alternative was not compelling: the court would convert reorganization into a bankruptcy liquidation, typically a long-lasting, inefficient, and value-destructive proceeding, which frequently

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[297] Id., comments to article 56-A.

[298] Article 56-A, chapeau.

[299] Article 56-A, §1.

[300] Article 56-A, §3.

[301] Article 56-A, §2.

[302] Cerezetti, supra note 295, comments to article 56-A; Costa and Melo, supra note 29 at 254.

[303] Campana Filho, Langen, and Garbugio, supra note 31 at 199; Felsberg and Pereira, supra note 197 at 167.

[304] Cooper, Cestero, and Soltman, supra note 2 at 29–30; Colombo and Junqueira, supra note 23 at 12; Campana Filho, Langen, and Garbugio, supra note 31 at 188–189. Cf. item 2.1.

resulted in very low recovery rates.[305] As a result, a recurrent outcome of reorganization proceedings was an approved plan that failed to meet creditors' expectations and that contributed to Brazil's reputation as a debtor-friendly country.[306]

This was addressed in the law reform not only by attempting to make the bankruptcy liquidation proceeding more expedite and efficient (therefore creating a more attractive alternative to an agreed restructuring), but also by allowing creditors to file an alternative reorganization plan in certain situations.[307] The first high profile case in which these rules were employed was the Samarco reorganization.[308] As the legal provisions are new, and have not been tested thoroughly, some questions remain in respect to their applicability. However, expectations are high that the creditors' plan work as envisaged, not only by providing an alternative for the restructuring but also by compelling the debtor to offer better payment conditions and more acceptable terms from the beginning.[309]

9.1 When a Creditors' Plan Can Be Filed

The alternative plan can be filed upon the occurrence of any of two different situations: (a) the expiration of the debtor's stay period without its plan being approved by the creditors, or (b) the rejection of the debtor's plan at a creditors' meeting.[310]

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[305] Cooper, Cestero, and Soltman, supra note 2 at 29–31; Campana Filho, Langen, and Garbugio, supra note 31 at 204.

[306] Cooper, Cestero, and Soltman, supra note 2 at 29.

[307] Before Law 11,101 was enacted, in 2005, there were several attempts to amend the draft bill to include the possibility of creditors, by means of the creditors' meeting or the creditors' committee, proposing an alternative plan. However, these attempts were unfruitful and, as a result, until 2020, the debtor was the only legitimate party to propose the plan. Cf. Cerezetti, supra note 295 at 365–366.

[308] Tatiana Bautzer, Brazilian Miner Samarco Creditors Reject Debt Restructuring Proposal, Reuters, Apr. 18, 2022, https://www.reuters.com/article/samarco-miner-restructuring-idUSKCN2N423B; Tatiana Bautzer, Vale-BHP JV Samarco's Financial Creditors Plan to Take Over the Company, Reuters, May 18, 2022, https://www.reuters.com/article/samarco-miner-restructuring-idUSKCN2N423B.

[309] Felsberg and Pereira, supra note 197 at 169; Campana Filho, Langen, and Garbugio, supra note 31 at 204.

[310] Campana Filho, Langen, and Garbugio, supra note 31 at 200.

Creditors do not have the right to file the initial draft of the plan, as this prerogative belongs to the debtor.[311] If the debtor fails to submit the plan during the 60-day deadline, the court will order the conversion of the reorganization into a bankruptcy liquidation[312] – creditors do not obtain the right to file an alternative in this case as well. This debtor's exclusivity to propose the plan, and to approve any modification to it, lasts until the occurrence of any of the two situations referred to above.

The first situation in which a creditors' plan can be filed is the expiration of the debtor's stay period. As mentioned, when ordering the commencement of the judicial reorganization, the court will determine a stay period of 180 days, extensible only once for an equal period.[313] During this 360-day period, the debtor has the exclusive right to submit the plan and must approve any proposed amendment to it.[314] If the debtor is unable to approve its reorganization plan within this timeframe, then creditors automatically obtain the right to submit and to seek approval of an alternative plan.[315] The creditors have the right to file an alternative plan within 30 days counting from the expiration of the debtor's stay.[316] Should the creditors' plan be filed, the court will determine an additional stay of proceedings for a period of 180 days, counting from the date in which the debtor's stay expired.[317] If the creditors do not submit the alternative plan within this deadline, the stay will no longer be in force and enforcement actions should be allowed to proceed.[318] However, it is possible that, even in this case, the court extends the stay with the purpose of halting creditors from taking individual measures which may adversely affect the collectivity.

The second situation which allows creditors to submit an alternative plan is the rejection of the debtor's plan. As such, if the debtor's plan is submitted to voting at the creditors' meeting and rejected (i.e., not obtaining the threshold requirements in each class), with no possibility of cramdown confirmation,

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311 Cf. item 7.1.

312 Cf. item 7.1.

313 Cf. item 5.3.

314 Article 55, S3.

315 Article 6, §4-A. Cf. Felsberg and Pereira, supra note 197 at 170–171; Igor Silva de Lima & Gustavo dos Reis Leitão, Reflexões Sobre o Plano de Credores na Reforma da Lei de Recuperação de Empresas e Falências, in Reforma da Lei de Recuperação e Falência (Lei n. 14.112/2020) 625, 633–635 (Ronaldo Vasconcelos et al. eds., 2021).

316 Article 6, §4-A, I.

317 Article 6, §4-A, II.

318 Felsberg and Pereira, supra note 197 at 171.

creditors also obtain the right to file an alternative.[319] At the same creditors' meeting in which the debtor's plan is rejected, the judicial administrator will submit a deliberation on whether holders of more than 50% of the claims, in amount, among those the attending,[320] would be willing to accept a 30-day deadline for an alternative plan to be presented.[321] It has been argued that, to ensure the regularity and transparency of the procedure, the creditors cannot submit an alternative plan at the same creditors' meeting which rejected the debtor's proposal.[322] Should the creditors' plan be filed within 30 days, the court will order the stay of proceedings to remain in force for an additional 180 days, counting from the date of the meeting in which the debtor's plan was rejected and the possibility of submission of an alternative was approved.[323] If the alternative plan is not filed within this deadline, the court is expected to convert the reorganization into a bankruptcy liquidation.[324]

9.2 Who May File the Alternative Plan

The amended Law 11,101 contains several requirements that a creditors' plan must meet, in addition to being filed within the legal deadline.[325] Law does not include any specific provision requiring that the alternative plan be filed by creditors. As such, there would be no impediment that such plan be proposed by any a creditor or by a third party.[326]

Law 11,101 requires that the alternative plan, to be considered, must have the agreement of a minimum percentage of creditors.[327] This requirement incentivizes a degree of cooperation and collaboration between creditors, who must be aligned prior to submitting a proposal, potentially making the approval of the alternative plan process faster and more straightforward.[328] It also creates

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[319] Article 56, §4.

[320] SACRAMONE, supra note 33 at 337.

[321] Article 56, §4.

[322] Marcelo Barbosa Sacramone, Aspectos Formais e Procedimentais da Apresentação do Plano Alternativo, in DIREITO DA EMPRESA EM CRISE: TEMAS ATUAIS SOBRE RECUPERAÇÃO EMPRESARIAL E FALÊNCIA NO BRASIL 151, 162–164 (Matheus Martins Costa Mombach & Paulo Fernando Campana Filho eds., 2022).

[323] Article 6, §4-A, II. Cf. Id. at 153.

[324] SACRAMONE, supra note 33 at 337–338.

[325] Cerezetti, supra note 295 at 367.

[326] Campana Filho, Langen, and Garbugio, supra note 31 at 202.

[327] Cerezetti, supra note 295 at 368.

[328] Felsberg and Pereira, supra note 197 at 173.

a barrier which prevents holders of immaterial amounts from filing alternative plans,[329] thereby inhibiting the submission of multiple proposals.[330] However, this "minimum threshold" requirement has not stopped competing plans from being filed in the Samarco case, the very first high-profile reorganization in which this provision has been put to test.

The alternative plan, to be proposed, must necessarily have the written support of creditors holding more than 25%, in amount, of all the affected claims.[331] If the possibility of submission of an alternative plan results from the rejection of the debtor's plan at a creditors' meeting, then, as an option, such alternative plan may be filed with the support, in writing, of holders of more than 35%, in amount, of the claims among those attending the meeting in which the debtor's plan was rejected.[332] The 35% threshold, as it relates those attending the meeting, may be helpful in cases in which a significant portion of the creditors is unable or unwilling to take part in the negotiations or in creditors' meetings.[333] Although law has no provision in this respect, the court may order the judicial administrator to verify the representative powers of each supporter of the plan.[334]

9.3 Access to Information

According to Brazilian law, the plan proposed by the creditors must meet the same formal requirements as the one submitted by the debtor.[335] As such, the plan must include a detailed description of the restructuring means to be employed; a demonstration of the economic feasibility; and a financial and economic report and an appraisal of the debtor's assets, subscribed by a qualified professional or by a specialized company.[336] Creditors may have limited access to information regarding the debtor's affairs to enable them to prepare a restructuring proposal and the required documentation.[337]

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[329] Id.

[330] Cerezetti, supra note 295 at 368; Campana Filho, Langen, and Garbugio, supra note 31 at 202.

[331] Article 56, §6, III, "a".

[332] Article 56, §6, III, "b".

[333] Campana Filho, Langen, and Garbugio, supra note 31 at 202.

[334] Cerezetti, supra note 295 at 368.

[335] Article 56, §6, I. Cf. Campana Filho, Langen, and Garbugio, supra note 31 at 202.

[336] Article 53.

[337] Campana Filho, Langen, and Garbugio, supra note 31 at 202; Felsberg and Pereira, supra note 197 at 172.

As a solution, creditors may request to the judicial administrator and to the court access to the necessary information, and may be granted access to confidential materials upon execution of a non-disclosure agreement.[338] As mentioned, the judicial administrator has the duty to promptly provide any information requested by the creditors[339] – and may be removed by the court if it fails to perform its obligations accordingly.[340] The judicial administrator may require the debtor or its managers to disclose any such information.[341] The managers of the debtor may be removed and replaced by a judicial manager if they refuse to provide the information requested by the judicial administrator.[342]

It should also be noted that the 30-day deadline for submission of the alternative plan with the required reports may be short[343] – and may become unfeasible if the debtor or its managers pose any difficulty in providing information. In principle, and regardless the lack of any legal provision in this respect, creditors might be able to use the same reports filed by the debtor when submitting its plan, especially if the economic and financial conditions, as well as the situation of the assets, remained unchanged.[344]

9.4 Protection of Debtor and Shareholders

In addition to the formal requirements mentioned above, Law 11,101 establishes certain protections for the debtor and its shareholders.[345] These protections are reflected in three additional requirements that the alternative plan must met.[346] The main purpose of these provisions seem to ensure that the economic situation of the debtor and of its shareholders will not be weakened with the implementation of the alternative plan.[347]

The first of these requirements is that the creditors' alternative plan cannot impose to the shareholders of the debtor new obligations not provided by law

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[338] Felsberg and Pereira, supra note 197 at 172–173.

[339] Article 22, I, "b".

[340] Felsberg and Pereira, supra note 197 at 172.

[341] Article 22, I, "d".

[342] Article 64, V.

[343] SACRAMONE, supra note 33 at 338.

[344] Id.; Campana Filho, Langen, and Garbugio, supra note 31 at 202.

[345] Cerezetti, supra note 295 at 368.

[346] Id.

[347] Cf. Id.

or in agreements already executed and in force.[348] The plan cannot establish, for instance, that the shareholders will extend financing or contribute new money to the debtor, will be kept in management of the activities,[349] or will become guarantors or co-obligors of existing debt.[350]

The second requirement is that the plan shall release all personal guarantees granted by individuals to creditors who supported the plan or who voted in favor of it.[351] Guarantees granted by entities – including companies of the same corporate group – are not affected by this provision and may remain in full force and effect.[352] Also, creditors who did not support the alternative plan in writing and voted either against the plan or abstained from voting are not required to release the personal guarantees.[353] The purpose of this provision is to allow shareholders and officers who granted personal guarantees to creditors to be released, as a counterpart to having lost control over the restructuring mechanisms and the payment of the debt.[354] This requirement does not prevent existing guarantors from voluntarily signing the alternative plan and ratifying the guarantees previously granted or waiving their right to be released.[355] In any event, this requirement may discourage certain creditors from considering alternative plans.[356]

The third requirement is that the alternative plan cannot impose to the debtor or to its shareholders a sacrifice higher than what they would face in a bankruptcy liquidation.[357] This requirement should be construed as creditors not being able to swipe any equity value left for the shareholders after full payment of all claims (including intercompany claims).[358] This provision would be applicable in the (rare) cases where the total amount of assets of the

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[348] Article 56, §6, IV.

[349] Campana Filho, Langen, and Garbugio, supra note 31 at 202.

[350] Felsberg and Pereira, supra note 197 at 174–175.

[351] Article 56, §6, V.

[352] Campana Filho, Langen, and Garbugio, supra note 31 at 203.

[353] Sacramone, supra note 321 at 203.

[354] Felsberg and Pereira, supra note 197 at 176.

[355] Id.

[356] Cerezetti, supra note 295 at 369; Henrique Ávila & Victoria Vaccari Villela Boacnin, Plano de Recuperação Judicial: Primeiros Comentários ao Plano Alternativo e Outras Alterações Relevantes Introduzidas Pela Lei No. 14.112/2020, in Reforma da Lei de Recuperação e Falência (Lei n. 14.112/2020) 649, 658 (Ronaldo Vasconcelos et al. eds., 2021).

[357] Article 56, §6, VI.

[358] Campana Filho, Langen, and Garbugio, supra note 31 at 203; Felsberg and Pereira, supra note 197 at 176–177.

debtor exceeds that of liabilities[359] – a possible scenario, as Brazilian law adopts a cash flow approach (rather than a balance sheet test) for the purposes of commencement of a bankruptcy liquidation.[360]

9.5 Negotiation and Approval of the Creditors' Plan

The alternative plan submitted by the creditors within the deadline provided by law (30 days from either the expiration of the stay or from the rejection of the debtor's plan, as the case may be)[361] is not expected to be the final version and can be further negotiated during the additional 180-day stay period ordered by the court.

The rules regarding approval and confirmation of the alternative creditors' plan are the same as the ones governing the debtor's plan.[362] The particularities are that the debtor is not required to consent to the creditors' plan (or to any modification thereof) and that the legal requirements mentioned above are met.[363] Although this may be a debated matter, creditors may vote on the plan that they proposed or supported.[364]

As there is no legal restriction, different groups of creditors may propose concurrent reorganization plans[365] – which, as noted, has actually happened in the Samarco reorganization.[366] In this case, it may be understood that creditors should be allowed to vote on the concurrent plans proposed or supported by other groups of creditors.[367] The assumption that creditors may be inclined to reject the proposals of other groups should not be considered a reason to

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[359] Campana Filho, Langen, and Garbugio, supra note 31 at 203; Felsberg and Pereira, supra note 197 at 177.

[360] As such, a creditor may file an involuntary bankruptcy liquidation petition regarding a debtor which, without a legally justifiable reason, fails to pay an obligation of more than 40 minimum wages (corresponding to approximately USD 10,000 as of January 2023) at the due date (art. 94, I). See Campana Filho, Langen, and Garbugio, supra note 31 at 203. On the difference between a cash flow and a balance sheet insolvency test, see J. B. Heaton, Solvency Tests, 62 BUS. LAW. 983 (2007).

[361] Cf. item 9.1.

[362] Cf. item 10.

[363] Cf. items 9.3 and 9.4.

[364] Felsberg and Pereira, supra note 197 at 173–174.

[365] Id. at 173; Lima and Leitão, supra note 314 at 645–646.

[366] Cf. item 9.2.

[367] Felsberg and Pereira, supra note 197 at 173–174.

prevent them from exercising their voting rights.[368] Any vote is, of course, subject to scrutiny by the court, which, at the request of an interested party, may examine the circumstances of the actual case and consider whether there has been any abuse.[369]

10 Approving and Confirming the Plan

The reorganization plan – proposed either by the debtor or by creditors – must be approved by the creditors and confirmed by the court as a requisite to becoming effective and enforceable. As a requirement for court confirmation, Law 11,101 provides that the debtor shall also submit the tax clearance certificates.[370] This requirement has been overlooked over the years, as courts have consistently dismissed the submission of such tax clearance certificates.[371] However, courts have been more stringent on this obligation since the enactment of laws that facilitated the adhesion to governmental programs that allow payment of taxes in installments.[372]

In respect to creditor approval, the plan will be confirmed by the court in three different scenarios. If no creditor files an objection to the plan submitted by the debtor, it will be confirmed by the court.[373] If there is any objection to the plan, then it must be submitted to approval by the creditors – which typically takes place at a creditors' meeting called for this purpose (although it is also possible for the approvals to be manifested by means of terms of acceptance).[374] In this case, the plan would have to be approved by the required majorities in each class of claims.[375] If the threshold is not obtained in one of the classes, the court may still confirm the plan under the cramdown provisions of Law 11,101.[376]

When issuing the decision on the confirmation, the court may still conduct further analyses, especially at the request of creditors, of the judicial adminis-

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[368] Id. at 174.

[369] Cf. item 10.3.

[370] Article 57.

[371] Thomas Benes Felsberg & Paulo Fernando Campana Filho, A Aplicação Prática da Lei de Recuperação de Empresas e Falência, in Revista de Derecho Comparado no 15: Reformas Concursales (Segunda Parte) 131, 137–138 (Julio César Rivera ed., 2009).

[372] Cf. item 12.4.

[373] Article 58, chapeau. Cf. item 7.3.

[374] Cf. item 8.

[375] Article 45. Cf. item 10.1.

[376] Article 58, §1. Cf. item 10.2.

trator, or of interested parties, on whether the approval process was regular, on whether there was abusive voting, and on whether the plan contains any provisions which violate the law and therefore should be annulled. The debtor or any creditor may file an appeal against the confirmation decision, which will be ruled by the state Court of Appeals.

As a summary, in the decision, the court will (a) confirm the plan if it has been approved by the creditors' meeting and meets all legal requirements; (b) confirm the plan, annulling certain specific provisions if they are found to be illegal; (c) dismiss confirmation of the plan if it is found to be illegal or fails to meet other legal requirements; or (d) convert the reorganization into a bankruptcy liquidation if the plan was rejected at the creditors' meeting (and there is no possibility of an alternative creditors' plan).

10.1 Threshold Requirements

As mentioned, the plan must be approved by a qualified majority of the creditors in each class of impaired claims as a requirement to being confirmed by the court. Depending on the class, the plan must be approved by a majority in number of creditors or by a majority in both number of creditors and value of claims held.

The thresholds for approval of the plan are as follows: (a) creditors which, in number, represent more than 50% of those in the class of labor-related claims;[377] (b) creditors, which, in number, represent more than 50% of those in the class of secured claims and which, simultaneously, hold more than 50% of the claims, in amount, in such class;[378] (c) creditors, which, in number, represent more than 50% of those in the class of unsecured claims and which, simultaneously, hold more than 50% of the claims, in amount, in such class;[379] and (d) creditors which, in number, represent more than 50% of those in the class of small businesses.[380]

As in any other deliberation, only those creditors attending the creditors' meeting are considered for quorum purposes.[381] In addition, creditors abstained from voting are also not considered. If the creditors' meeting is

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[377] Article 45, §2.

[378] Article 45, §1.

[379] Article 45, §1.

[380] Article 45, §2.

[381] Cf. item 8.

dismissed and the plan is approved by means of terms of acceptance, then the quorum is calculated based on the total amount of affected claims.[382]

10.2 Non-Consensual Confirmation

If the plan is not approved in each of the four classes of claims, then it may still be confirmed under the cram down provisions of Law 11,101, provided that certain requirements are cumulatively met. The Brazilian mechanism for non-consensual confirmation of a plan was partially imported from the U.S. Bankruptcy Code and has been criticized for not providing enough protection to the dissenting class.[383] Notably, Brazilian law does not require that the plan be fair and equitable – i.e., that the absolute priority rule is respected when cramming down a dissenting class of claims.[384]

The four requirements for cram down confirmation of a reorganization plan under Brazilian law are as follows: (a) the plan shall have the favorable vote of creditors holding more than 50% of all the claims present at the creditors' meeting, in amount, regardless of the class such claims belong to;[385] (b) the approval requirements (in respect to each respective class) shall have been met in all but one class of creditors (i.e., if there are four classes of claims, the plan shall have been approved in three of them; if there are three classes, the plan shall have been approved in two);[386] (c) in the dissenting class, the plan shall have obtained the favorable vote of creditors holding more than 1/3 of the claims, in number (for the classes of labor creditors and of small businesses), or in both number and amount (for the classes of secured and unsecured creditors);[387] and (d) the plan shall not discriminate among creditors in the dissenting class.[388]

In respect to the three requirements related to obtaining certain voting thresholds[389] – i.e., the approval of more than half of the overall creditors and

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[382] Cf. item 8.6.

[383] Cf. Cerezetti, supra note 295 at 383–389; Carolina Soares João Batista et al., A Prevalência da Vontade da Assembléia-Geral de Credores em Questão: O Cram Down e a Apreciação Judicial do Plano Aprovado por Todas as Classes, 143 Revista de Direito Mercantil, Industrial, Econômico e Financeiro 202 (2006).

[384] Cerezetti, supra note 295 at 388–389.

[385] Article 58, §1, I.

[386] Article 58, §1, II.

[387] Article 58, §1, III.

[388] Article 58, §2.

[389] Cerezetti, supra note 295, comments to article 58.

the consent of 1/3 of the dissenting class – the same rules regarding the counting of votes referred above apply.[390] As for the last requirement, Law 11,101 provides that the plan can only be crammed down if it does not entail any different treatment among creditors in the dissenting class (regardless of whether such discrimination is deemed as fair or not).[391] This requirement has been criticized by commentators as creditors who are entitled to different priorities in a bankruptcy liquidation are allocated in the same class of claims for purposes of voting in a judicial reorganization and therefore would have to be receive similar treatment.[392]

In some cases, courts have loosened the cram down requirements and confirmed the plan regardless of one of these conditions having not been fully met.[393] For instance, when a creditor, being the only member or the super-majority holder of a class of claims, can single-handedly hinder the possibility of confirmation of a plan by casting an opposing vote, some courts have applied the cram down rule despite the requirements for such not having been verified.[394]

10.3 Impediment to Voting

As mentioned in respect for deliberations in general,[395] shareholders of the debtor and other related parties – namely affiliated, parent, or controlled companies, or those in which shareholders hold more than 10% of the capital stock – do not have a right to vote on the plan.[396] Close relatives of the debtor, its controlling shareholder, officers, or members of its board of directors, auditing committee, or advisory board, as well as companies in which these people exercise any of such roles, are also not considered for voting purposes.[397]

This rule has been criticized as it suppresses the vote of minority shareholders in any reorganization plan, even when they have little or no decision-making power or influence over the debtor's affairs.[398] In addition, relatives of

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[390] Cf. item 10.1

[391] Cerezetti, supra note 295, comments to article 58.

[392] Batista et al., supra note 381 at 217–218; SCALZILLI, SPINELLI, AND TELLECHEA, supra note 105 at 468.

[393] SCALZILLI, SPINELLI, AND TELLECHEA, supra note 105 at 467.

[394] Id. at 467.

[395] Cf. item 8.4.

[396] Article 43, chapeau.

[397] Article 43, sole paragraph.

[398] SCALZILLI, SPINELLI, AND TELLECHEA, supra note 105 at 310; SACRAMONE, supra note 33 at

shareholders or officers may not have any meaningful relationship with them, which makes an impediment to vote too harsh in these cases.[399] As such, it has been argued that the voting of these creditors should only be inhibited in situations where there may be an actual conflict of interest.[400]

Although Law 11,101 contains no rule in this respect, if a conflicted creditor assigns the claim to a third party after the reorganization is filed, the assignee shall also be precluded from voting.[401] The reason for this construction is to avoid the assignment of claim to be used as a workaround to avoid the application of the rule.[402]

10.4 Abusive Voting

In some cases, courts have deemed the behavior of certain creditors abusive and therefore disregarded their opposing votes on the plan.[403] A court decided that a secured creditor which voted against the plan was being excessively individualistic and could have its vote annulled, as a bankruptcy liquidation, despite allowing full recovery of its claim, would result in creditors of other classes to be left unpaid.[404] In other situation, the court decided that the opposing vote of a secured creditor was abusive because the plan would allow a higher recovery rate than in a bankruptcy liquidation (thereby ignoring the commercial judgment of such creditor).[405] Courts have also annulled the dissenting vote of creditors who were competitors to the debtor and would prefer forcing it out of the market over recovering their claims.[406] Despite attempts to establish criteria for situations in which a vote could be declared abusive,[407] courts would rule on a case-by-case basis.

The law reform introduced a provision determining that the creditor should exercise its voting rights in its own interest and convenience, and that it could

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238; Alberto Camiña Moreira, Abuso do Credor e do Devedor 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), item 4.

399 Sacramone, supra note 33 at 241.

400 Id. at 238 and 241.

401 Id. at 242.

402 Id.

403 Cooper, Cestero, and Soltman, supra note 2 at 36, note 20; Cerezetti, supra note 295 at 389, note 77.

404 Moreira, supra note 396, item 4.

405 Cooper, Cestero, and Soltman, supra note 2 at 36, note 20.

406 Moreira, supra note 396 item 7.

407 Scalzilli, Spinelli, and Tellechea, supra note 105 at 469–472.

only be declared null by the court when manifestly used to obtain an unlawful advantage for oneself or others.[408] As such, the court should allow creditors to use their business judgment rule to determine whether the plan would be feasible and in their best economic interest.[409] The court would not have the discretion to annul opposing votes which did not pursue the preservation of the business activities of the debtor or which did not met the interests of creditors in other classes of claims.[410]

The court may declare a vote abusive when manifestly cast in bad faith or to protect hidden interests unrelated or contradictory to the satisfaction of the claim.[411] Although courts still have the discretion to determine the abusiveness of voting in each specific case,[412] law establishes certain parameters that shall be followed, and which shall restrict annulment of votes to exceptional circumstances only.[413]

10.5 Legality Issues and Annulment of the Plan

When issuing the decision on court confirmation, the court may analyze several matters, including whether (a) the creditors' meeting was regularly called and convened; (b) there is any illegality or irregularity in voting process; (c) there is any illegality in the provisions of the plan; or (d) there is any abusive voting.[414] The court cannot analyze the economic feasibility or convenience of the plan, as this decision belongs to the creditors' meeting.[415]

When analyzing these matters, the court may annul the deliberation or the plan, if it finds any illegality that undermines the restructuring.[416] In this case, the court will usually allow the submission of a new plan, without any of the illegal provisions which led to its demise, for deliberation. If the court determines that only certain specific provisions are illegal, then it may order the

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[408] Article 39, §6.

[409] SACRAMONE, supra note 33 at 229; França and Adamek, supra note 182 at 264.

[410] França and Adamek, supra note 182 at 264.

[411] Id. at 265–266; SACRAMONE, supra note 33 at 229–230.

[412] SACRAMONE, supra note 33 at 230.

[413] França and Adamek, supra note 182 at 264.

[414] SCALZILLI, SPINELLI, AND TELLECHEA, supra note 105 at 1073–1074; SACRAMONE, supra note 33 at 227–230.

[415] SCALZILLI, SPINELLI, AND TELLECHEA, supra note 105 at 1074; Cerezetti, supra note 90 at 172; Felsberg and Campana Filho, supra note 369 at 141–143.

[416] SACRAMONE, supra note 33 at 227.

cancellation of the applicable clauses, while the rest of the plan is maintained in effect.[417]

Courts around the country, however, adopt different approaches in respect to which provisions of a plan can be considered illegal. In some cases, courts find that clauses that provide for an extended grace period for payments to start, an excessive haircut on the debt, or the lack of interest rates of monetary adjustment, for instance, are illegal provisions and should lead to the plan being annulled.[418] While this is in fact a case-by-case financial analysis that should be left for the creditors instead of carried out by the court,[419] some commentators argue that certain abusive economic conditions may violate the law and the principles that govern the judicial reorganization and therefore could be cancelled and even result in the annulment of a plan.[420]

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[417] Id. at 228.

[418] Id. at 350.

[419] Felsberg and Campana Filho, supra note 369 at 143.

[420] In this respect, see Walfrido Jorge Warde Jr. & Guilherme Setoguti J. Pereira, Discricionariedade da Assembleia Geral de Credores e Poderes do Juiz na Apreciação do Plano de Recuperação Judicial, in 10 Anos da Lei de Recuperação de Empresas e Falências: Reflexões Sobre a Reestruturação Empresarial no Brasil 491 (Luis Vasco Elias ed., 2015); Sacramone, supra note 33 at 349–350.