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## Cross-Border Insolvencies in Brazil: An Overview of the New Provisions Incorporating the 1997 UNCITRAL Model Law

Paulo Fernando Campana Filho, Partner, Veirano Advogados, São Paulo, Brazil

### Synopsis

A broad reform to Brazilian insolvency legislation introduced new rules regarding cross-border insolvencies through the incorporation of the 1997 UNCITRAL Model Law ('Model Law') with modifications. This matter has been neglected for decades in Brazil and the new provisions are set to drastically change the Brazilian restructuring & insolvency framework. The new rules allow Brazilian courts ('Courts') to recognise foreign main and non-main insolvency proceedings and to grant appropriate relief. Courts are now empowered to cooperate and communicate directly with foreign authorities and there are also provisions aimed at the coordination of concurrent insolvency proceedings. In all these instances, Courts are authorised to exercise a wide range of discretion. As a result, Brazil finally has suitable provisions to deal with cross-border insolvencies.

### 1. The reform of the Brazilian insolvency law and new provisions on cross-border cases

New rules on cross-border insolvencies came into force in Brazil as part of a comprehensive reform to insolvency legislation. On 24 December 2020, Law 14,112 was enacted to amend Law 11,101 of 2005, featuring several new provisions to update existing legislation and to address the needs and expectations of debtors and creditors.<sup>1</sup> It was the most significant reform to insolvency legislation in 15 years and is expected to considerably improve certain key aspects.

Law 11,101, enacted in 2005, provides for three types of insolvency proceedings for entities engaged in business activities:<sup>2</sup> the (i) judicial reorganisation; (ii) pre-packaged reorganisation; and (iii) bankruptcy

liquidation. A judicial reorganisation is a debtor-in-possession court-supervised proceeding in which the debtor submits and negotiates a plan to be approved by a qualified majority of its creditors while a stay of proceedings is in course – its general structure resembles a Chapter 11 case under the US Bankruptcy Code. A pre-packaged reorganisation consists of a debtor-in-possession proceeding in which the debtor submits to the Court a plan already negotiated and approved by a majority in a class or group of creditors, with the purpose of obtaining court confirmation. A bankruptcy liquidation is a court proceeding in which a court-appointed judicial administrator is trusted with the task of collecting and selling the assets of the debtor (which is removed from office); the proceeds from the sale are distributed to creditors as payment of their claims, according to a priority rule set forth by law.

One purpose of the 2020 reform is to address a few shortcomings of the 2005 legislation<sup>3</sup> by improving the efficiency of insolvency legislation generally through the inclusion of provisions that allow for swifter court proceedings, balanced negotiations between debtors and creditors and which provide more legal certainty to investors. To elaborate, the new provisions provide for, among other matters: (i) higher priority to debtor-in-possession financings; (ii) objective criteria for Courts to allow substantive consolidation; (iii) higher speed and flexibility for sales of assets; (iv) the possibility of creditors submitting an alternative plan of reorganisation without the consent of the debtor; and (v) a fresh start for bankrupt debtors. Whilst Law 11,101 remains in force and effect, the 2020 reform has changed it in such a way that the resulting amended legislation will have a material impact on the way future insolvency proceedings are handled.

Among the new rules introduced by the 2020 reform, there is an entire chapter (Chapter VI-A, ranging

### Notes

- 1 Law 11,101, as amended by Law 14,112, can be consulted online at <[www.planalto.gov.br/ccivil\\_03/\\_ato2004-2006/2005/lei/111101.htm](http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2005/lei/111101.htm)>.
- 2 An overview of Brazilian insolvency law prior to the reform can be found in T. B. Felsberg and P. F. Campana Filho, 'Corporate Bankruptcy and Reorganization in Brazil: National and Cross-border Perspectives', in B. Leonard (ed.), *Norton Annual Review of International Insolvency 2009 edition* (Thomson Reuters/West, Eagan, 2009), 275–300.
- 3 For an overview of some of the limitations of the 2005 legislation, see G. Colombo and T. B. Junqueira, 'Ten Years of the Brazilian Bankruptcy Law: Some Lessons Learned and Some Wishes for Improvement', (2016) 1 *Emerging Markets Restructuring Journal* 11, 11–16.

from article 167-A to 167-Y) that covers cross-border insolvencies, a matter which has not been addressed by Brazilian legislation for some time. In fact, the matter had last been addressed by Brazilian legislation during the first half of the 20th century by way of the 1939 Code of Civil Procedure, which was later revoked in 1973. The Bustamante Code, a treaty signed in 1928, governing private international law between fifteen Latin American countries, contains rules on cross-border insolvencies and remains in full force and effect, but its application is restricted to signatory jurisdictions. Accordingly, prior to the 2020 reform, the enforcement of foreign judgments was primarily governed by the 2015 Code of Civil Procedure and by Decree-Law 4,657, a concise piece of legislation enacted in 1942 that deals with conflict of laws, which were largely silent on cross-border insolvencies. It should not come as a surprise that Brazilian legislation on cross-border insolvencies was broadly considered to be rather confusing and inadequate prior to the 2020 reform.<sup>4</sup>

The new provisions contained in Chapter VI-A, as brought by the 2020 reform, incorporate the Model Law with modifications that do not change its purpose or its mechanics in any material way. Following the enactment of these rules, Courts are empowered to recognise foreign insolvency proceedings and to cooperate with foreign authorities in these matters. We set out a brief description of these new provisions below.

## 2. Access to Courts, recognition of foreign main and non-main insolvency proceedings and granting of relief

The new provisions contain a streamlined procedure, based on the Model Law, to allow Courts to recognise foreign insolvency proceedings. Under the previous rules, any request for recognition of a foreign judgment commencing an insolvency proceeding of a debtor would have to be submitted to an exequatur proceeding before the Superior Court of Justice. As the rules were largely inadequate, such requests would

take time to be analysed and, in nearly all cases, enforcement of a foreign insolvency judgment was denied. Although it was theoretically possible to have a foreign judgment commencing an insolvency proceeding enforced in Brazil, in practice any such attempt would end up being considered by Courts to be in violation of public policy or national sovereignty.<sup>5</sup> Now, after the reform, recognition of a foreign proceeding is expected to be simple and expeditious, and Courts shall adopt a narrow approach by only refusing to apply cross-border provisions when their application would manifestly violate public policy.<sup>6</sup>

Under the new provisions, a foreign representative appointed in a foreign proceeding can petition directly to the Courts.<sup>7</sup> Foreign creditors also have standing to appear before Courts, and Brazilian law ensures that they receive national treatment under local proceedings.<sup>8</sup> However, Brazilian law provides that only a foreign representative is authorised to file an application for recognition of a foreign insolvency proceeding (in which it was appointed) before the competent Court.<sup>9</sup> The application for recognition should be accompanied by: (i) a copy of the foreign judgment ordering the commencement of the foreign proceeding or the appointment of the foreign representative; or (ii) a certificate issued by a foreign authority attesting the existence of the foreign proceeding and the appointment of the foreign representative; or (iii) any other document accepted as evidence by the Court.<sup>10</sup> All documents in a foreign language should be translated to Portuguese,<sup>11</sup> and the Court can presume their authenticity regardless of any legalisation.<sup>12</sup> Upon filing an application for recognition, and until the Court makes a decision on whether to recognise the foreign proceeding, the Court has discretion to grant urgent provisional relief – such as a temporary stay of proceedings, for instance – that is deemed to be required to protect the interests of the bankrupt estate or to ensure the efficient administration of the proceedings.<sup>13</sup>

Courts will recognise a foreign insolvency proceeding as either a foreign main proceeding or a foreign non-main proceeding if the requirements for recognition are present.<sup>14</sup> A foreign main proceeding is one filed in the country where the debtor has its centre of

### Notes

- 4 For an overview of Brazilian rules on cross-border insolvency prior to the reform, see T. B. Felsberg, 'Cross-Border Insolvencies and Restructurings in Brazil', (2003) 31 *International Business Lawyer* 109; P. F. Campana Filho, 'The Legal Framework for Cross-Border Insolvency in Brazil', (2009) 32 *Houston Journal of International Law* 97.
- 5 On this matter, see Campana Filho, 'The Legal Framework for Cross-Border Insolvency in Brazil', 143–146.
- 6 Art. 167-A, paragraph 4, of Law 11,101.
- 7 Art. 167-F of Law 11,101.
- 8 Art. 167-G of Law 11,101.
- 9 Art. 167-H of Law 11,101.
- 10 Art. 167-H, paragraph 1, of Law 11,101.
- 11 Art. 167-H, paragraph 3, of Law, 11,101.
- 12 Art. 167-I, II, of Law 11,101.
- 13 Art. 167-L of Law 11,101.
- 14 Art. 167-J of Law 11,101.

main interests.<sup>15</sup> Courts are entitled to presume, unless there is evidence to the contrary, that the centre of main interests corresponds to the debtor's domicile, in the case of individuals, or its registered office, in the case of entities.<sup>16</sup> However, Courts are not entitled to make such a presumption if the debtor has transferred or otherwise manipulated its centre of main interests for the purpose of assigning jurisdiction to another country.<sup>17</sup> A foreign non-main proceeding is one filed in a country where the debtor has assets or an establishment.<sup>18</sup> The distinction between foreign main and non-main insolvency proceedings is important because, as with the Model Law, the effects of recognition are different in each case.

Recognition of a foreign main proceeding triggers the following mandatory, automatic effects: (i) a stay of enforcement actions as well as of individual actions of creditors aimed at collecting debt (in terms equivalent to, and with the same exceptions of, a stay ordered in a local proceeding); (ii) a suspension of the statute of limitations regarding any enforcement proceedings against the debtor; and (iii) the ineffectiveness of any transfer of non-current assets of the debtor without prior court authorisation.<sup>19</sup> Upon recognition of a foreign main or non-main proceeding, Courts have a broad discretion to order, at the request of the foreign representative, any relief deemed appropriate to protect the assets of the debtor or the interests of the creditors.<sup>20</sup> Courts also have the discretion to order the turnover of local assets to a foreign representative so that distributions to the creditors can be made pursuant to the rules of the foreign proceeding, provided that the interests of the creditors domiciled in Brazil are adequately protected.<sup>21</sup> In comparison, the recognition of foreign non-main proceedings has no automatic effect and any relief granted by a Court or measure taken by the foreign representative shall be restricted to local assets that, according to Brazilian law, shall be submitted to such foreign non-main proceedings, or information about such assets).<sup>22</sup>

Any discretionary relief granted (whether provisional at the time of application for recognition, or definitive at the time of recognition of a foreign proceeding) may be modified or terminated by a Court, on its own motion or at the request of the foreign representative or of any party in interest.<sup>23</sup> The purpose of this provision is to allow Courts discretion to strike a balance between relief granted to a foreign representative and the interests of the local parties affected.<sup>24</sup> Whenever granting, modifying, or terminating such discretionary relief, Courts shall consider whether the interests of the debtor, its creditors and any third parties, are adequately protected.<sup>25</sup>

Upon recognition of a foreign proceeding, whether main or non-main, the foreign representative will have standing to intervene in any local proceeding in which the debtor is a party,<sup>26</sup> to file for bankruptcy liquidation of the debtor in Brazil, and to participate in any local insolvency proceeding involving such debtor.<sup>27</sup> For this purpose, the debtor will be deemed insolvent upon recognition of the foreign main proceeding, therefore enabling any interested party (including the foreign representative, the debtor or its creditors) to file for bankruptcy liquidation.<sup>28</sup> In addition, upon recognition of a foreign main or non-main proceeding, the foreign representative may file any measures to seek the ineffectiveness or annulment of certain transactions performed by the debtor, pursuant to the provisions of Brazilian law.<sup>29</sup>

### 3. Cooperation between courts in cross-border insolvency cases and coordination of concurrent proceedings

The 2020 reform brings about new rules that authorise Courts to exercise broad discretion to cooperate in cross-border insolvency cases. Courts will now be able to engage in direct communication with foreign authorities and to coordinate concurrent proceedings regarding the same debtor. Courts generally had a poor

#### Notes

15 Art. 167-B, II, of Law 11,101.

16 Art. 167-I, III, of Law 11,101.

17 Art. 167-J, paragraph 2, of Law 11,101.

18 Art. 167-B, III, of Law 11,101.

19 Art. 167-M of Law 11,101.

20 Art. 167-N of Law 11,101.

21 Art. 167-N, paragraph 1, of Law 11,101.

22 Art. 167-N, paragraph 2, of Law 11,101.

23 Art. 167-O, paragraph 2, of Law 11,101.

24 UNCITRAL, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (United Nations, New York, 2014), 90.

25 Art. 167-O of Law 11,101.

26 Art. 167-F, paragraph 2, III, of Law 11,101.

27 Art. 167-F, paragraph 2, I and II, of Law 11,101.

28 Art. 167-U of Law 11,101.

29 Art. 167-O, paragraph 3, of Law 11,101.

track-record of cooperating in such circumstances due to the lack of express statutory authorisation.<sup>30</sup>

Courts and judicial administrators (who are appointed by Courts in local insolvency cases) will now cooperate to the fullest extent possible with foreign authorities and foreign representatives to pursue the objectives of the reformed insolvency legislation.<sup>31</sup> Courts may communicate directly with foreign authorities or foreign representatives, or request information or assistance directly from them, without having to resort to letters rogatory or other formalities.<sup>32</sup> Judicial administrators are also entitled to take part in similar communication efforts.<sup>33</sup> Courts have broad discretion to implement cooperation by any appropriate means, including approval of a protocol or agreement concerning coordination of proceedings related to the same debtor.<sup>34</sup> Cross-border insolvency protocols have become an important tool to successfully promote the coordination of insolvency proceedings spread over multiple jurisdictions,<sup>35</sup> and the possibility of Courts entering into such agreements represents a major leap forward.

There are also new rules that provide specific measures for the coordination of concurrent insolvency proceedings regarding the same debtor. Such rules cover coordination between a local insolvency proceeding and one or multiple foreign proceedings. The underlying principle of these rules is that a main insolvency proceeding should have worldwide reach, with truly universal effects, whilst non-main proceedings should be mostly restricted to local assets.

As such, after a foreign main insolvency proceeding has already been recognised, a local insolvency proceeding may only be filed if the debtor has assets or an establishment in Brazil.<sup>36</sup> Such local proceeding will be restricted to the assets or the establishment of the debtor located in Brazil and may only affect other assets to the extent necessary to implement cooperation and coordination with the foreign main proceeding.<sup>37</sup> These restrictions do not apply if a local insolvency proceeding is filed after recognition of a non-main insolvency proceeding.

In addition, Courts have the discretion to adjust any relief to a foreign proceeding to make it coherent with a local insolvency proceeding. Accordingly, in such cases, there will be no automatic relief upon recognition

of a foreign main insolvency proceeding. The Court will only grant relief to a foreign insolvency proceeding, whether main or non-main, if consistent with the local insolvency proceeding already in course.<sup>38</sup> And, if a local insolvency proceeding is filed after a foreign insolvency proceeding, whether main or non-main, is pending recognition or has already been recognised, the Court will review any relief already granted to such foreign proceeding and modify or terminate it if found to be inconsistent with the local proceeding.<sup>39</sup>

If there are multiple foreign insolvency proceedings regarding the same debtor, Courts will coordinate and take necessary measures to ensure the priority of foreign main proceedings over foreign non-main proceedings. Courts will only grant relief to a foreign non-main proceeding if such relief is consistent with the foreign main proceeding. In addition, when a foreign main proceeding is recognised, Courts shall review any relief already granted to a foreign non-main proceeding and modify or terminate it if inconsistencies are found. If there are two foreign non-main insolvency proceedings pending regarding the same debtor, Courts have the discretion to grant, modify, or terminate any relief in order to facilitate the coordination between them.

The last provision derived from the Model Law stipulates that a creditor who has received judgment for part-payment of its claim in a foreign proceeding shall not be satisfied under the local insolvency proceeding until creditors of the same class receive proportionally the same payment.<sup>40</sup> The purpose of this provision is to preclude creditors from 'double-dipping', which would likely lead to the unequal treatment of creditors within the same class.

The 2020 reform also introduced brand-new additional rules concerning the coordination of multiple insolvency proceedings, which are not included in the Model Law. According to such rules, the Court before which a local insolvency proceeding is pending shall provide the court of a foreign main proceeding with certain information. The information to be provided includes: (i) the value of the assets and liabilities of the debtor; (ii) a list of the allowed claims and their classification; and (iii) the amount of any outstanding balance after distribution to creditors in a bankruptcy

## Notes

30 Campana Filho, 'The Legal Framework for Cross-Border Insolvency in Brazil', 146–149.

31 Art. 167-P, head and paragraph 2, of Law 11,101.

32 Art. 167-P, paragraph 1, of Law 11,101.

33 Art. 167-P, paragraph 3, of Law 11,101.

34 Art. 167-Q of Law 11,101.

35 UNCITRAL, *Practice Guide on Cross-Border Insolvency Cooperation* (United Nations, New York, 2010), 27.

36 Art. 167-R of Law 11,101.

37 Art. 167-R of Law 11,101, paragraph 1.

38 Art. 167-S, I, of Law 11,101.

39 Art. 167-S, II, of Law 11,101.

40 Art. 167-Y of Law 11,101.

liquidation proceeding.<sup>41</sup> There are also two new rules aimed at coordinating distributions:

- The first rule is that, if creditors are not yet satisfied in a foreign proceeding (whether main or non-main), Courts will not allow for any residual value to be returned to the debtor even after creditors are fully paid in a local bankruptcy proceeding.<sup>42</sup> It seems that the purpose of this rule is to allow Courts to turn over the remaining assets to the foreign representative to carry out distributions pursuant to the foreign proceeding.
- The second rule is that a local bankruptcy liquidation proceeding may only be terminated after all foreign non-main proceedings have concluded, or no assets are left in such proceedings to be distributed to creditors.<sup>43</sup> The rationale of this provision is to allow foreign courts, in charge of non-main proceedings, to turn over remaining assets to the local bankruptcy liquidation proceeding so that additional distributions can be made.

#### 4. The dawn of a new era for cross-border insolvency in Brazil

The introduction of Chapter VI-A of Law 11,101 represents a breakthrough in legislation concerning cross-border insolvencies in Brazil. The provisions of the Model Law were incorporated with some modifications, albeit none of these modifications served to restrict the ability of Courts to exercise broad discretion or to participate in cooperation and coordination efforts regarding foreign proceedings. Courts now have proper tools to, among other matters, easily recognise foreign proceedings, evaluate the relief to be granted to a foreign representative, communicate directly with foreign authorities, and enter into cooperation agreements – concepts which were, for the most part, simply inconceivable under previous legislation. The 2020 reform ultimately puts Brazil in line with over 50 other jurisdictions that have already enacted the Model Law, with the changes broadly having been received with optimism and praise among local practitioners.

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#### Notes

41 Art. 167-V of Law 11,101.

42 Art. 167-W of Law 11,101.

43 Art. 167-X of Law 11,101.

## **International Corporate Rescue**

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