- FELSBERG ADVOGADOS

SHIP ARREST VS. BRAZILIAN INSOLVENCY PROCEEDINGS





IN-COURT RESTRUCTURINGS IN BRAZIL



IN-COURT RESTRUCTURINGS IN BRAZIL

An in-court (or judicial) restructuring provides viable means to a financially distressed company to overcome a financial and economic crisis with the protection of the Court.

Conditions and Requirements for Triggering the Judicial Restructuring:

A judicial restructuring process may be commenced by any financially distressed company that has been regularly performing its activities for more than two years and that complies with the following requirements:

- The applicant is not subject to a liquidation procedure;
 - The applicant has not filed for judicial restructuring during the previous five years; and
 - The applicant, its controlling shareholders and/or its managers or officers have not been convicted of any bankruptcy crime.



IN-COURT RESTRUCTURINGS IN BRAZIL

Main consequences arising from the Judicial Restructuring:

- Debtor-in-Possession: during the judicial restructuring, debtor may continue the administration of the business under the supervision of the creditors' committee (if one is appointed) and with the assistance of the judicial administrator (an individual or company to be appointed by the Court).
- Debtor will not be allowed to sell or encumber fixed assets unless authorized by the court.
 - Stay Period: for 180 days all proceedings aiming at the collection of debts from the applicant are stayed.
 - The applicant will submit to the creditors a Recovery Plan, that will be negotiated and voted in a General Creditors' Meeting. If approved the debts will be paid in accordance with the Plan. If not the company will be liquidated (bankruptcy).
 - All the secured or unsecured creditors existing by the time of the filing of the proceedings are subject to the Plan. Exceptions: tax credits, fiduciary owners, chattel mortgages, advances on currency exchange contracts ("ACCs"), lease agreements, and post-petition obligations.



EXTRAJUDICIAL RESTRUCTURINGS IN BRAZIL



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EXTRAJUDICIAL RESTRUCTURINGS IN BRAZIL

• It is an alternative to the in-court restructuring proceeding

- The individual or legal entity that is in financial distress may contact its creditors (or all creditors of a determined class) to present and discuss a prepack restructuring plan aimed at obtaining more favorable terms and conditions for the payment of its debts (the "restructuring plan").
 - If 60% of creditors agree with the plan, the debtor can file a prepack restructuring to cram down the remaining claims/classes.

• Conditions and Requirements for the Extrajudicial Restructuring:

- A prepack restructuring process may be commenced by any financially distressed party that has been regularly performing its activities for more than two years and complies with the following requirements:
 - The applicant is not under liquidation;
 - The applicant has not filed for judicial restructuring during the previous five years; and
 - The applicant, its controlling shareholders and its managers have not been convicted of any bankruptcy crime.



EXTRAJUDICIAL RESTRUCTURINGS IN BRAZIL

- Excluded Claims: Tax claims, labor claims, fiduciary owners and Advances on Currency Exchange Contracts (ACC) claims are not subject to the prepack restructuring plan.
- Classes of claims against which the plan will be enforceable, even if they fail to agree to it:
 - Secured creditors;
- Unsecured creditors;

- Group of claims with same nature, or similar conditions of payment;
 - The restructuring plan will be confirmed by the court if approved by at least three-fifths of each class of creditors.





LIQUIDATION PROCEEDINGS IN BRAZIL



LIQUIDATION PROCEEDINGS IN BRAZIL

Aims to liquidate the assets of the bankrupt party and use the proceeds to pay the creditors according to their respective priorities, whilst preserving and optimizing the productive use of its assets and resources to the extent possible.

• Conditions and Requirements for Triggering the Bankruptcy

- Does not comply with any obligation under the restructuring;
- Does not indicate any assets to guarantee the judicial collection of a certain and undisputable debt;
- Commits fraudulent acts and/or commences selling relevant assets without the creditors' consent;
- Abandons the business without leaving an officer to manage it;

• Bankruptcy may be filed by:

- The insolvent individual or entity;
- His or her heirs;
- Its shareholders; or
- Any unpaid creditor of the insolvent individual or entity.



SHIPARRESTVS.INSOLVENCYPROCEEDINGS



SHIP ARREST VS. INSOLVENCY PROCEEDINGS

• In-court Restructuring Proceedings:

- During the stay-period no arrest is expected to be allowed for secured or unsecured credits subject to the proceedings.
- Even after the stay-period, or even in relation to credits not subject to the proceedings, arrests may be barred by court whenever compromising to essential assets.

• Extrajudicial Restructuring:

- Court precedents stating that stay-period only affects the credits covered by the Plan. However, arrests may be barred by court whenever able to compromise essential assets.
- Bankruptcy:
 - Arrests are virtually impossible. However, third-part owners of assets in possession of the Bankruptcy Estate may demand the return of their assets (*e.g.*, lessors, fiduciary owners, etc.).

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SHIP ARREST VS. INSOLVENCY PROCEEDINGS – RECENT CASES

- Ecovix Construções Oceânicas S.A.
 - Brazilian shipyard currently in an in-court judicial restructuring proceeding. Financial exposition: R\$ 9.35 Billion (i.e. USD 2.53 Billion).
 - Arrest/seizure of assets avoided under protection of Court.
- OGX Companies
 - Oil & Gas companies belonging to the OSX Group (group of companies of the Brazilian entrepreneur Eike Batista) in an in-court judicial restructuring proceeding until August 2017. Financial exposition: R\$ 11.2 Billion (i.e. USD 3.04 Billion).
 - Arrest/seizure of the FPSO OGX-3, owned by OGX 3 Leasing B.V., based on a claim of USD 500 Million.
 - Arrest/seizure admitted: OGX 3 Leasing B.V. is a Dutch company not subject to the Brazilian restructuring Court proceedings.





