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PRE-PACKAGED PLANS IN LATIN AMERICA

Pre-Packaged Reorganizations in Brazil

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Pre-packaged, or expedited, reorganizations (also called out-of-court reorganizations, “*recuperações extrajudiciais*”, by the Brazilian Insolvency Law) are a major innovation introduced by the bankruptcy law reform carried out in 2005 and which resulted in Law 11,101/2005. Under the previous legislation, any repayment plan proposed by the debtor to a group of creditors could be considered an act of bankruptcy and could lead to the opening of a liquidation proceeding.

Under the reformed law, any business debtor (either a company or a merchant) who fulfills the requirements to file a court-supervised reorganization proceeding (a “Judicial Restructuring” which is in many respects similar to a US Chapter 11 proceeding) is also entitled to propose a pre-packaged plan to its creditors and to submit such plan to court confirmation (an “Out-of-Court Restructuring”). However, the debtor may not propose an Out-of-Court Restructuring if a Judicial Restructuring is already in course or if another reorganization plan (either pre-packaged or not) has been confirmed during the preceding two years.

Any claim, secured or unsecured, matured or not, existing at the time of the filing, may be subject to such a pre-packaged plan, with the exception of labor-related claims and claims not subject to a regular reorganization proceeding (tax claims and certain kinds of secured claims such as chattel mortgages, advances on exchange contracts (ACCs), leasing and conditional sales). Post-filing claims are also not subject to the plan. Creditors not subject to an Out-of-Court Restructuring may still enforce their claims against the debtor who has filed for an expedited reorganization. Although there is not an automatic stay of proceedings upon the filing of an Out-of-Court Restructuring, as is the case in a Judicial Restructuring, it is possible to obtain from the Restructuring Court an order to suspend any proceedings to enforce credits subject to the reorganization.

The pre-packaged reorganization plan may address one or more classes of

claims, or one or more group of creditors of the same nature or with similar economic interests, and subject to similar conditions of payment. All creditors belonging to the same class or group must receive the same treatment under the plan.

Law 11,101/2005 provides for two kinds of pre-packaged reorganization plans which may be submitted for court confirmation:

- i) A plan which is only binding for the signatory creditors;
 - ii) A plan approved and signed by at least 60% of the claims in a class, or group of claims, which, upon court confirmation, becomes binding and obligatory to all the creditors in such a class or group. Together with the plan, the debtor must also present to the Restructuring Court a rather complete list of documents evidencing the the financial and economic situation of the insolvent company. The Law imposes some limits on the negotiation of the claims in an Out-of-Court Restructuring:
- The replacement of any security interest on collateral shall only be permitted upon the approval of the secured creditor;
 - The exchange variation of foreign currency-denominated claims may not be eliminated by the Plan without the express approval of the affected creditors. Pre-packaged plans are also more limited than reorganization plans approved by creditors in a Judicial Restructuring. As an example, the sale of an isolated productive unit free and clear of the debtor's past obligations is only possible in a Judicial Restructuring, but not under an Out-of-Court Restructuring.

After the petition for court confirmation has been filed, the Restructuring Court shall order the publication of a notice to give creditors the opportunity to challenge the Plan, and the debtor must shall also send a letter to all creditors which are subject to the Plan with the same purpose. Creditors may challenge the Plan within 30 days of the publication of the notice and the Restructuring Court, after hearing the debtor, rules in order to decide the issues raised. If the court rejects the

plan, the debtor may file another Plan, and, if the court confirms the Plan, it becomes binding for all creditors who are subject to it.

Out-of-Court restructurings are far less used than Judicial Restructurings. In certain instances, after obtaining approval from the required majorities, a debtor will usually start a new round of negotiations with the affected minority creditors in order to obtain their consent, in order to avoid filing, which is in every stakeholder's best interest. In addition to court proceedings, a debtor may also propose to any of its creditors, or to a group of them, any measure aiming to restructure its debt or to reorganize its activity. A private settlement between the debtor and its creditors may be reached and shall be valid and binding on a contractual basis, regardless of court confirmation.