Series
COVID-19

RESTRUCTURING AND INSOLVENCY

BRAZILIAN COURTS ENCOURAGE THE USE OF MEDIATION AND CONCILIATION IN CONFLICTS RELATED TO BANKRUPTCY LAW

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Challenged by the new reality imposed by the covid-19 pandemic, agencies making up the Judiciary have been issuing a series of acts and adopting a multitude of measures that seek not only to adapt the *modus operandi* of the Judiciary in Brazil to the social isolation rules, but also to provide alternatives that allow for the prevention or rapid and less costly resolution of disputes.

Among the solutions available for business conflicts, including those related to bankruptcy law, are the initiatives taken by different courts to encourage the use of mediation and conciliation.

The courts of appeal in the states of São Paulo and Paraná were pioneers in such measures. Already in April of this year they disclosed, respectively, GC Ordinance No. 11/2020 and the creation of a new modality of Judicial Dispute Resolution Center: the Business Reorganization Cejusc.

Along the same lines, on June 24th Normative ActNo. 17/20, promulgated by the Rio de Janeiro Court of Appeals (TJRJ), was published and entered into force, aiming at the implementation of a special system for handling disputes related to business reorganization and bankruptcy, the RER, through which "businessmen, business companies," and "other economic agents" (article 1) may initiate procedures for mediating disputes arising from the covid-19 pandemic involving legal transactions for the production and circulation of goods and services.

Under the terms of Normative Act 17/20, the objective of the RER will be to promote mediation on issues related to bankruptcy law, both in the pre-litigation phase and in the midst of proceedings already initiated, regardless of the level of appeal in which they are being handled. This shall occur without the interruption of the action and deadlines provided for in Law 11,101/05 (LFR), unless there is a consensus between the parties or a supervening judicial order (article 2 and 13).

The following are included within the concept of "mediations on issues related to bankruptcy law": (i) mediation between debtor and creditors regarding the ascertainment of claims and assignment of value to assets encumbered with a security interest in the respective incidental proceedings (article 2, paragraph 1); (ii) mediation between the debtor's partners and shareholders (article 2, paragraph 4); (iii) mediation regarding the participation of regulatory entities in the judicial reorganization process, in cases involving concessionaires or permissionaires of public services and regulatory agencies; (iv) mediation on lease disputes involving real estate of companies in economic and financial difficulty (article 2, paragraph 2); (v) regarding claims created during the period of effectiveness of the state of public calamity, even if the taxable event is subsequent to the filing of the petition for judicial reorganization, in order to allow the continuity of essential services of the company in difficulty or under judicial reorganization (article 2, paragraph 7); and (vi) involving creditors not subject to judicial reorganization, pursuant to paragraph 3 of article 49 of the Bankruptcy and Reorganization Law, or other non-bankruptcy creditors.

Within the scope of these mediations, and prior to the filing of any judicial reorganization, it will be possible to negotiate the amount of the debts and the forms of payment (article 2, paragraph 8). Furthermore, in the cases in which the petition for judicial reorganization has already been filed in court by several companies in the same economic group (by means of so-called procedural consolidation), agreements between creditors and debtors shall be permitted regarding whether there will also be substantial consolidation of the reorganization, breaching the asset barriers between such companies, where a single notice to creditors and the same plan for judicial reorganization shall be prepared, etc. (article 2, paragraph 3).

Mediations on classification of debt claims are prohibited and, in any case, renegotiation of judicial reorganization plans already proposed must observe the respective classes of creditors (article 3).

Settlements obtained through these mediations must not dispense with deliberation by the general meeting of creditors with respect to the matters required by law, nor may it set aside the control of legality to be exercised by the magistrate at the time of ratification.

Also according to the Normative Act No. 17/2020, requests for establishment of mediation must be accompanied by documents essential to understanding the dispute, containing a claim and cause of action necessarily related to the consequences of the covid-19 pandemic and observing the competence of the business courts (articles 8 and 9).

Such request should be sent to the Permanent Center for Consensus Methods of Dispute Resolution (Nupemec), of

the TJRJ (e-mail *nupemec@tjrj.jus.br*), which will contact the parties involved in order to obtain everyone's consent and schedule the mediation session via videoconference. At the end of the mediation session, the judicial mediator will draw up minutes, which will be forwarded by the Nupemec to the court overseeing the case.

The initiative to implement a special arrangement that gives concrete tools to those who wish to seek a consensual resolution for certain disputes is positive not only because it is suited to the moment we are living, but also because it gives the parties an opportunity to truly consider and adopt the path of negotiation before starting litigation or even during the course of the bankruptcy process, which is often extremely lengthy.

This weighting is applicable mainly in the face of decisions such as the 2nd Circuit Court for Bankruptcy and Judicial Reorganizations of the District of São Paulo[1] rendered on the same date that Normative Act No. 17/20 was published. It proposes a re-reading of the right of access to the judiciary for companies in crisis, defending the idea that economic agents, when filing for judicial reorganization, must bear the burden of proving that they have engaged in prior settlement talks with their creditors, made reasonable proposals, without the measures adopted having been sufficient to reach a consensual resolution that would allow the crisis to be overcome. According to Judge Paulo Furtado, companies in crisis, in order to demonstrate their interest in the suit, should also prove that they considered resorting to out-of-court reorganization, a mechanism provided by the Bankruptcy and Reorganization Law which, although faster and less costly than a judicial reorganization, has not been much used.

The São Paulo court decision also appointed, since the beginning of the judicial reorganization process, a mediator to assist the group in reorganization in discussions with its stakeholders (banks, tax authorities, employees, public authorities, among others) in order to obtain adequate and quick solutions.

Faced with all these novelties, there is no doubt that the exceptional situation we are experiencing will pass, but that its impacts will leave lasting (perhaps eternal) marks on the way we deal with crises in general and the means of solving them, including conciliation and mediation, already provided for in article 3 of the New Code of Civil Procedure.

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[1]Decision dated June 24, 2020, issued in Case No. 1050778-50.2020.8.26.0100 (judicial reorganization of the Enpavi Group).