New bankruptcy law protects creditor and makes it difficult for mediators to act

The new Bankruptcy Law, in force since January 24, brings significant benefits to companies in a judicial reorganization, such as the financing expansion, installment payments, and the discount for payment of tax debts.

Among the main points of Law 14112/2020, in its article 142, is the attribution of some powers of the AGC (General Meeting of Creditors), which were not contemplated in the old legislation. The chance for creditors to take the initiative of proposing a recovery plan and submit it for approval also stands out.

It was not this time that the creditors' committees were empowered to approve or not hire the so-called "asset tracings" – companies charged with seeking assets from the bankrupt estate abroad. The task remains with the judicial administrator or the judge, who nowadays is responsible for choosing the company to track these assets.

The rule allows intermediaries, whose role is to ensure the company recovery and/or reimbursement of creditors, to end up receiving more than the recipients of rights. There are cases under investigation of "bounty hunters" who receive 30% to 70% of values. And there are cases of simulation of "deviated amounts" so that the intermediary can bill his commission – which is shared with the judicial administrator.

The performance of “asset tracers” has always been questioned in some of the main bankruptcy proceedings in Brazil. Banco Cruzeiro do Sul, Banco Santos, Banco Rural, Petroforte, and Fazendas Reunidas Boi Gordo are some examples. After authorizing investees against assets allegedly misappropriated from Petroforte and Banco Rural, the Cayman Justice expressed its regret when it learned of the judicial administrator's methods and criteria in colluding with an asset recovery company – OAR Brasil Consultoria.

“Regrettably, now also taken into account and as is now apparent, the allegations (…) before this Court that there was a risk of assets dilapidation as a basis also for controversial decisions, and the unprecedented rapid disclosure alters part, were false,” said Judge Anthony Smellie, from the Financial Services Division of the Grand Cayman Islands Court of Justice, in a decision of May 16, 2019. “If this Court had not been misled concerning the need for secrecy and urgency, again it is highly likely that it would not have proceeded entirely unheard of changes."

According to professor Pedro Freitas Teixeira, who assisted federal deputy Hugo Leal (PSD–RJ) in constructing the PL text that gave rise to the new law, in some cases, the bankruptcy effects have been applied to companies with limited liability, without any previous contradiction. “The mechanism of 'asset tracers' is fundamental, especially in bankruptcies, but its performance must be minimally regulated so that there are no abuses," says Freitas.

Article 82-A of the new law has a healing effect and prohibits the extension of the bankruptcy effects.

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On the other hand, it allows disregard of legal personality, provided that with the proper establishment of the IDJ – incident of disregard for legal personality. Consequently, if fraudulent practices are found, the search for assets on behalf of other companies.

Apart from all the common questions in a bankruptcy process, there were and still are many actions by creditors questioning the performance of prosecutors, judicial administrators, and even judges, especially on the hiring integrity of the “asset tracings” and their earnings.

The claims range from those questioning agreements without the knowledge of creditors, in which exorbitant gains are established for companies that track assets from the bankrupt estate abroad, to requests for the secrecy of Justice removal, which is usually made by the prosecutor, under the argument that the tracked goods can be moved and hidden in another location.

“Many creditors question not only the secrecy, which leaves them blind but also the incidence of the same company indication to track the assets – OAR Brasil Consultoria," says a lawyer involved in a bankruptcy process.

OAR, whose lawyers include Herinque Forssel and Rodrigo Kaysserlian, is the same company that acts in the aforementioned major bankruptcies and is included in the prominent lawsuits that question the fees of this type of company.

In a decision last year, in the Boi Gordo bankruptcy suit, judge Renata Mota Maciel Madeira Dezem, from the 3rd Bankruptcy and Judicial Reorganization Court of TJ-SP, dismissed the request of the judicial administrator (AJ), Gustavo Sauer, who indicated the Mubarak Advogados office to comply with the sentence for the assets capture from Bom Jardim Empreendimentos Rurais company, in the amount of BRL 20 billion.

Under the terms proposed in the lawsuit, AJ requested fees of 1%, the equivalent, in optimistic scenarios of asset location, to BRL 200 million. “I imagine that the superintendent did not make this calculation because if he had made, he would perhaps be more cautious when submitting a proposal in these terms to the court, without further reasoning. Here, the north is in the bankruptcy estate interest, especially the large group of creditors who await the receipt of their claims", says the judge in the decision.

According to the agreements to which the report had access, the fee charged by these asset recovery companies reaches commissions of 30% of the recovered value. By law, AJ, who hires this service abroad, can only receive 5% of bankruptcy proceedings. “An excellent deal for these companies, but a bad arrangement for creditors, who can do nothing, since when asset tracings are challenged in court, they are invariably praised by the judge for their good performance. Often about assets that they did not even locate", comments a lawyer who works in the sector.

The description is similar to that of Judge Anthony Smellie of Cayman: “OAR Consultantes Consultoria Ltda, a private investigation company, contracted (…) to assist in its investigation in Brazil and abroad, to find and 'repatriate' (…) any property belonging to anyone included in a long list of companies from Grupo Rural e Petroforte. OAR, by clause 5 of its contract (…), should be expressly reimbursed only for the contingency of recoveries, at 20% of the value and 30% of the value, depending on if it simply

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produced evidence that would allow the confiscation of known assets or whether it really discovered and helped in the recovery of unknown assets."

According to Professor Pedro Freitas Teixeira, the Legal Personality Disregard Incident, provided in the new law, will be the prior and mandatory procedure to be instituted before any measure on the third parties' assets. This incident is a separate process in which the parties involved would have the opportunity to offer their defenses against suspected embezzlement or the practice of any fraudulent act. “Nowadays, based on the result of the searches for goods carried out, the judge can be requested by AJ and authorize, without any previous contradiction, the extension of the bankruptcy effects on third parties' goods (group companies, partners, administrators or even companies that belong to the same group, but that may be involved)," explains Teixeira.

In the process in which Petroforte's bankruptcy dragged other companies with it, the Cayman Justice criticized how the disregard of the legal personality was conducted to reach alleged partners in the case, consigning that the involved parties – notably the judicial administrator appointed in the Petroforte bankruptcy, and the asset tracings company he hired, OAR – acted under a conflict of interest and did everything in their power to mislead the court to obtain an undue advantage at the expense of third parties. This is based on the high percentages both the judicial administrator and the investigating company would gain on the amounts reversed to the bankruptcy due to accepting fraud allegations.

For this reason, the new law will contribute to a point of bankruptcy that is much questioned by the parties: the disregard of the legal personality for the extension of the bankruptcy effects to limited liability company partners – as are the vast majority of Brazilian companies (the wellknown Ltdas. and S/As). Article 82-A in the Bankruptcy Law provides that "the extension of bankruptcy or its effects, in whole or in part, to limited liability partners, controllers, and administrators of the bankrupt company is prohibited. However, the disregard of legal personality is allowed".

Article 81, on the other hand, is evident in stating that it is only in companies with unlimited liability – for example, corporations and limited partnerships – that the partners could be affected by the bankruptcy decree.

Transnational insolvency
Lawyer Samantha Mendes Longo, a partner of Wald, Antunes, Vita, Longo, and Blattner Advogados, points out that the new law brings, for the first time, "positive rules on transnational insolvency, which deserve more and more attention in the face of globalization."

“The request for judicial reorganization by transnational economic groups has been more and more frequent, and it has been up to the jurisprudence to deal with the issue since there was no provision in Law 11101/05", says Samantha.

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Another meaningful change, according to the lawyer, and which is totally in line with the valorization of self-composing methods, is the forecast of the mediation and conciliation use, not only during the recovery process but also in a pre-procedural way, trying to avoid the demands and encouraging debtors and creditors to be more protagonists in the restructuring – as, indeed, was already provided in the Recommendation 58/2019 of the National Council of Justice.

“The stimulus for dialogue also occurs with the reduction of the quorum for approval of the extrajudicial recovery plan, a model still little used and that deserves to be widely developed," she defends.

Samantha also praises the law for bringing the previous finding, which is the possibility for the judge to appoint a professional he trusts to attest the actual operating conditions and the regularity of the debtor's documentation. The previous finding was already determined by several magistrates and suggested by the National Council of Justice in Recommendation 57/2019.

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