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PRE-INSOLVENCY MEDIATION IN ADVANCE OF REORGANIZATION PROCEEDINGS IN BRAZIL AND URGENT PREVENTIVE RELIEF

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INTRODUCTION

This article aims to address, albeit briefly, a recent change in the Brazilian bankruptcy system that has the potential to accelerate a cultural change and modify the way business reorganization proceedings are managed in Brazil, whether preventing the filing of proceedings that can be avoided, or helping to ensure that the reorganization proceedings, when unavoidable, have a greater probability of success.

In Brazil, during the 60-year term of the old Bankruptcy Law (Decree-Law nº 7.661/45), debtors who requested their creditors to propose debt renegotiation were committing an act of bankruptcy, which allowed any creditor to file a bankruptcy request against the debtor and force a decree of its liquidation. This was one of the main reasons why there was no negotiation culture to prevent the bankruptcy of a company in financial difficulties. The scenario slowly began to change after the enactment of Law No. 11,101, dated February 9, 2005 (“Bankruptcy and Reorganization Law” or “BRL”), which allowed and encouraged the renegotiation of debts between debtors and creditors, upon the introduction of the reorganization proceedings.

On the other hand, a "litigation culture" has always been a part of Brazilian society, even though the legal system has provided rules allowing parties to enter into a composition since the independence of the Republic.[1]

Thus, the systematic adoption of adequate dispute resolution methods (such as conciliation and mediation) calls for a true cultural change, which cannot be implemented through issuance of laws only. This is an evolutionary process in which litigation leaves room for social pacification. Accordingly, entrepreneurs should recognize the economic benefits of avoiding disputes[2] or solving them quickly, efficiently, and as economically as possible, preserving the pre-existing relationship with the counterparty.

In an insolvency scenario, where multiple interests are at stake and cooperation is fundamental for successful collective bargaining, the adoption of suitable dispute resolution methods seems even more relevant.

However, since the enactment of the BRL, the lack of a consolidated and comprehensive culture encouraging negotiation in situations of economic and financial crisis has become an obstacle to the use of adequate dispute resolution methods. In fact, there is still great resistance to the adoption of these methods and even certain difficulties in engaging creditors in negotiations with the debtor to avoid the filing of a reorganization proceeding. This explains, in great part, the underutilization of out of court reorganization ("Out-of-Court Reorganization)", which is basically court confirmation of a restructuring plan privately negotiated with creditors.

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[1] Federal Constitution of March 25, 1824: "Article 161. No proceedings shall start without a proven attempt to reach a conciliation agreement" (BRASIL. *Constituição Política do Império do Brasil*, *de 25 de março de 1824*. Manda observar a Constituição Política do Império, offerecida e jurada por Sua Magestade o Imperador. Rio de Janeiro: Coleção de Leis do Império do Brasil, 1824. v. 1, p. 7. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao24.htm. Accessed on 24 June 2021).

[2] "Initially, it should be clarified that the negotiation in a reorganization proceeding has a peculiar nature, since – in traditional proceedings – the parties intend to obtain some type of gain and, as we have exhaustively seen, satisfy their interests to a greater or lesser extent. On the other hand, the parties involved in a reorganization procedure have – at first – the intention of avoiding, or reducing, losses" (MOTONAGA, Alexandre. A negociação e a nova legislação falimentar: a construção de um novo paradigma. *In*: PAIVA, Luiz Fernando Valente de (coord.). *Direito falimentar e a nova Lei de Falências e Recuperação de Empresas.* São Paulo: Quartier Latin, 2005. p. 712).

In this context, on August 23, 2016, the approval was timely and relevant of Resolution No. 45 by the Council of Federal Justice, at the 1st Conference on Prevention and Out-of-Court Resolution of Disputes, which recognized that "mediation and conciliation are compatible with judicial reorganization, out-of-court reorganization and the bankruptcy of the entrepreneur and the business ...".[3-4]

From that moment on, mediation, widely used in other legal areas, was formally encouraged to be adopted as a mechanism to prevent and solve disputes in connection with bankruptcy-related issues.[5]

In the same way, by means of Recommendation No. 58 of October 22, 2019 ("CNJ Recommendation No. 58 of 2019"), the National Council of Justice ("CNJ") recommended that "judges responsible for processing and reviewing of cases related to corporate reorganization and bankruptcy, from specialized lower courts or other courts, should encourage the use of mediation whenever possible".

As a result of this development and after the enactment of Law No. 14,112 of December 24, 2020 ("Law No. 14,112 of 2020"), the BRL now has a section, which, despite being concise, is fully dedicated to conciliation and mediation, preliminary or incidental to

[3] COUNCIL OF FEDERAL JUSTICE. Statement No. 45. 1st Conference on Prevention and Extrajudicial Resolution of Disputes. Brasília, 2016. Available at: https://www.cjf.jus.br/enunciados/enunciado/900. Accessed on September 2, 2021.

[4] Andréa Galhardo Palma recognises that the pre-insolvency mediation procedure introduced by Law No. 14,112 of 2020 is also compatible with reorganization (Mediation in judicial reorganization and its inclusion in Bankruptcy Law (as amended by Law No. 14,112 of December 25, 2020). *In:* VASCONCELOS, Ronaldo *et al*. (coord.). *Reforma de Lei de Recuperação e Falência* (Lei nº 14.112/20). São Paulo: Ed. IASP, 2021. p. 293).

[5] Mediation had already been successfully tried in isolated insolvency proceedings, especially in large proceedings, such as those relating to the *Varig* case, and even became a subject taught by the Public Prosecutor's Office in courses in 2005 and 2006, in a partnership with Getulio Vargas Foundation, with a view to training judges and prosecutors to apply the BRL.

the judicial reorganization proceedings ("Judicial Reorganization"),[6-7] which are also applicable to bankruptcy and Out-of-Court Reorganization proceedings.[8]

This is the context of pre-insolvency mediation proceedings in advance of judicial reorganization proceedings ("Pre-Insolvency Mediation"), provided for in article 20-B, IV of LREF, as well as the urgent preventive relief measure ("Urgent Preventive Relief"), which may be used by the debtor to stay enforcement proceedings for up to 60 days ("Stay Period Injunction"), pursuant to article 20-B, paragraph 1 of the BRL.

PRE-INSOLVENCY MEDIATION

Pre-Insolvency Mediation, set out in article 20-B, IV of the BRL, is a preliminary mediation proceeding[9] for negotiation of debts and respective payment terms between the company in financial difficulty and its creditors, before the filing for Judicial or Out-of-Court Reorganization.

Scope. The primary scope of a Pre-Insolvency Mediation is the renegotiation of debts between the debtor and its creditors to prevent the filing for reorganization. It is also

[6] Section II-A, articles 20-A to 20-D of LREF.

[7] "It should be noted that the mediation scope provided for in CNJ Recommendation No. 58 of 2019 is greater than its scope provided for Law No. 14,112 of 2020, although the provisions that take care of its application are mere examples. The law seems to emphasize judicial mediation, although it also mentions the 'specialised chamber'." (CUEVA, Ricardo Villa Boas. Sistemas de pré-insolvência empresarial – mediação e conciliação antecedentes na Lei n.º 14.11/2020. *In:* SALOMÃO, Luis Felipe et al. (coord.). *Recuperação de empresas e falência*: diálogos entre a doutrina e a jurisprudência. São Paulo: Atlas, 2021. p. 202).

[8] In this regard, there are several provisions set out in Chapter II of the BRL that apply to Out-of-Court Reorganizations. The poor legislative technique in these provisions is explained by the dynamics of the legislative procedures and the introduction of several improvements only in the final phase of the legislative process, in which more extensive amendment to the wording of the bill could impair the improvements. Between opting to be restricted to technical accuracy or to introduce improvements, fortunately the legislator opted for the second, leaving to legal writings and court precedents the task of interpreting and making compatible the provisions with due regard for the legislator's intention.

[9] Mediation is a flexible, efficient, quick, and potentially economical alternative dispute resolution method, based on confidentiality, through which the parties re-establish communication, identify conflicts and seek consensual solutions that meet several interests involved, having the assistance of an independent and impartial professional, who has no decision-making power and acts as a mediator for the parties. (BONASSA, Fátima Cristina; PACHIKOSKI, Sílvia Rodrigues. Mediação em processos de recuperação judicial. *Revista do Advogado*, São Paulo, n. 150, p. 63, jun. 2021. BONILHA, Alessandra Fachada. A mediação como ferramenta de gestão e otimização de resultado da recuperação judicial. *Revista de Arbitragem e Mediação*, São Paulo, ano 15, v. 57, p. 395, abr./jun. 2018.)

called preventive mediation, as it can avoid the filing for reorganization.[10] Nothing prevents Pre-Insolvency Mediation going beyond mere debt renegotiation and being expanded to include other measures that assist the debtor in its financial recovery, including a comprehensive plan containing other means of reorganization, such as sale of assets, replacement of guarantees, and obtaining new credit facilities, among other possibilities. In practice, however, it seems unlikely that the scope of Pre-Insolvency Mediation may be expanded because there is no legal certainty for the performance of these transactions in case of a potential future bankruptcy liquidation of the debtor.[11]

Impaired Creditors. The BRL establishes that certain creditors are not impaired by Judicial and Out-of-Court Reorganization. However, it does not force or prevent creditors from participating in the Pre-Insolvency Mediation because of the nature of their credits. In our view, any creditor may voluntarily participate in a Pre-Insolvency Mediation, even if the respective credit is not subject to a potential reorganization of the debtor. Although the BRL is silent in this regard, in principle, the debtor should appoint the creditors with whom it intends to negotiate, as not all creditors subject to the potential reorganization should necessarily be included in the Pre-Insolvency Mediation.[12]

Proceedings. Paragraph 1 of article 20-B of the BRL establishes that the Pre-Insolvency Mediation should be held at the Judicial Centre for Conflict Resolution and Citizenship ("CEJUSC") of the competent court or "of the"[13] specialized chamber

[10] "The expression 'preliminary', used by the legislator, can give the wrong impression that the act would be preparatory to the submission of the request for judicial reorganization. The objective intention of the law, however, is that, if the pre-procedural mediation (*i.e.,* preliminary) is successful, the reorganization procedure is disregarded in view of the successful restructuring of the company's debts, making the Courts free from unnecessary proceedings." (SCHMIDT, Gustavo da Rocha; BUMACHAR, Juliana. Sistema de pré-insolvência empresarial – mediação e conciliação antecedentes. *In:* SALOMÃO, Luis Felipe *et al.* (coord.). *Recuperação de empresas e falência*: diálogos entre a doutrina e a jurisprudência. São Paulo: Atlas, 2021. p. 219.

[11] In general, the BRL does not provide that such transactions, carried out within the scope of the Pre-Insolvency Mediation proceedings, will be protected against succession of debtor's obligations and/or will be considered valid or privileged in the event of the subsequent bankruptcy of the debtor, as the case may be.

[12] It is worth asking whether, after Pre-Insolvency Mediation proceedings are initiated, the debtor could request the inclusion of other creditors in the procedure or, even, whether creditors which have not initially been included by the debtor could claim their own inclusion. Because of the voluntary nature of mediation, it seems to us that such events would be possible, provided that the parties already included in the Pre-Insolvency Mediation agree with such measures, observing, in any case, the right of dissenting parties to withdraw from the procedure at any time.

[13] The wording of paragraph 1 of article 20-B of LRFE was unfortunate in mentioning that Pre-Insolvency Mediation that authorizes the granting of Urgent Preventive Relief is the one in progress at the CEJUSC of the

("Specialized Chamber")[14-15] only in cases where the debtor intends to claim an Urgent Preventive Relief to stay the enforcement proceedings by a Stay Period Injunction.

In the absence of a request for an Urgent Preventive Relief, particularly in case the debtor obtains a stand-still with the creditors directly, there is no prescribed form in the BRL, and the parties may choose to have the Pre-Insolvency Mediation at the CEJUSC of the competent court, at the Specialized Chamber or any other private chamber or even submit the case to a mediator chosen by the parties (an *Ad Hoc* Mediator).

In any case, when the Pre-Insolvency Mediation is initiated on the date of the first mediation session, the statute of limitations is stayed during such proceedings, pursuant to article 17 of the Mediation Law. According to article 28 of the same law, the proceedings shall be concluded within 60 days, unless the parties jointly request the extension of the said period.

Judicial Confirmation of Agreement. Any agreement entered into between the parties constitutes an extrajudicial enforcement instrument and, when confirmed by the court according to the terms set forth in the Civil Procedure Code, it turns into a judicial enforcement instrument, pursuant to article 20, sole paragraph, of the Mediation Law. In case of Pre-Insolvency Mediation, the potential decision confirming the agreement cannot be enforced against dissenting or absent creditors, as there is no quorum established for a

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competent court or "of the" Specialized Chamber. Such provision allows the interpretation that the Specialized Chamber would be related to the CEJUSC or, at least, that the CEJUSC jurisdiction should be attributed to or shared with the Specialized Chamber registered with the competent court. We believe that it would have been more suitable if the legislator had opted to include a provision authorizing the holding of the Pre-Insolvency Mediation proceedings at the CEJUSC of the competent court or at "the" Specialized Chamber, in order to make clear the jurisdiction of the Specialized Chamber, independently of the CEJUSC, to carry out the Pre-Insolvency Mediation proceedings. The courts should give this provision a systematic interpretation, not a literal one.

[14] The BRL does not provide for the meaning of "specialized camera". According to Paulo Furtado de Oliveira Filho, the chamber must be specialized in judicial reorganization and bankruptcy business matters and must have the capacity to act in the resolution of multilateral conflicts and be enrolled in the national registry and in the court. (OLIVEIRA FILHO, Paulo Furtado. Mediação antecedente e mediação na recuperação judicial. *Revista do Advogado*, São Paulo, n. 150, p. 211, June 2021).

[15] Pursuant to article 167 of the Civil Procedure Code, the mediation chambers shall be enrolled in a national register and in a register of the appellate court or of the regional federal court. In return for the enrolment in the courts, the chamber shall hold non-remunerated hearings within the scope of proceedings in which the legal aid benefits are granted, according to a percentage to be defined by the competent court, pursuant to article 169, paragraph 2 of Civil Procedure Code.

particular majority to impose the settlement on the minority, as in the case of the confirmation of the reorganization plan ("Plan"). In case the binding of the agreement is needed in relation to dissenting creditors, the debtor will need to seek Judicial or Out-of-Court Reorganization. In this event, the debtor may file a "pre-approved" request for reorganization, meaning that it may already have obtained the adhesion quorum required for the approval and confirmation of the Plan. There will certainly be cases in which it will not be possible to obtain the approval quorum within the short period of 60 days, but the debtor may have reached an agreement with part of its creditors, increasing the chances of concluding the negotiations during the reorganization proceedings.

Reinstatement of Rights. Moreover, if there is a Judicial or Out-of-Court Reorganization within 360 days after the composition is entered into within the Pre-Insolvency Mediation proceedings (whether confirmed by the court or not), the creditors will have their rights and guarantees reinstated to their original terms and conditions, with the deduction of any amounts paid by the debtor and with due regard for the acts validly performed during (or as a result of) the Pre-Insolvency Mediation proceedings, pursuant to the sole paragraph of article 20-C of the BRL.[16]

URGENT PREVENTIVE RELIEF IN THE PRE-INSOLVENCY MEDIATION

Article 20-B, paragraph 1 of the BRL establishes that the debtor in financial difficulty that meets the legal requirements to file for Judicial Reorganization may obtain an Urgent Preventive Relief to stay enforcements brought against it for up to 60 days, to try to enter into a composition with its creditors within the scope of the Pre-Insolvency Mediation

[16] The legislator was concerned to limit the exposure of creditors, preventing those that may have entered into an agreement in the Pre-Insolvency Mediation proceedings from being subject to new discounts or extensions in case of a subsequent Judicial or Out-of-Court Reorganization, especially in an unfavourable treatment towards other creditors that have not participated in the agreement reached at the Pre-Insolvency Mediation. The intention, clearly, is to encourage creditors to participate in the Pre-Insolvency Mediation and, if possible, enter into an agreement with the debtor. However, it is possible that the parties agree to maintain the same conditions agreed in the Pre-Insolvency Mediation in case of a Judicial or Out-of-Court Reorganization, even if such proceedings are filed within 360 days. In this regard, it is not uncommon for the agreements to establish that the debtor must seek court protection and file for reorganization within a certain period of time.

proceedings, already initiated at the CEJUSC[17] of the competent court or at the Specialized Chamber.

This legal provision has been harshly criticized by scholars because it requires a court decision to grant the Urgent Preventive Relief and apply the Stay Period Injunction, which could be avoided if the law had a provision establishing that the Pre-Insolvency Mediation proceedings would be sufficient for this purpose.[18]

Urgent Preventive Relief Requirements. For an Urgent Preventive Relief to be granted, the debtor is required to evidence that (i) it has legal standing to file a petition for Judicial Reorganization; (ii) the Pre-Insolvency Mediation proceedings were initiated at the CEJUSC of the competent court or at the Specialized Chamber to try to enter into a composition with creditors; and (iii) there is threatened damage or risk to the productive outcome of the Pre-Insolvency Mediation. If the debtor fails to meet these requirements, the competent court should deny the Urgent Preventive Relief.[19-20] However, we are aware of some decisions that have granted the Urgent Preventive Relief before the debtor even initiated the Pre-Insolvency Mediation proceedings.

(i) Standing to File for Reorganization. As regards this first requirement, the debtor's financial difficulty is not enough.[21] The debtor must have legal standing to file for

[17] Article 165 of the Civil Procedure Code provides that the CEJUSCs shall be created by the competent court, in compliance with the rules of the CNJ. CNJ Resolution No. 71 of August 5, 2020 provides for the creation of business CEJUSCs and encourages the use of adequate corporate dispute resolution methods.
[18] OLIVEIRA FILHO, Paulo Furtado. Mediação antecedente e mediação na recuperação judicial. *Revista do Advogado*, São Paulo, n. 150, p. 207-214, jun. 2021.
[19] "Therefore, the Judge can clearly deny the urgent relief if the debtor cannot file for judicial reorganization or if there is no risk of damage that may be irreparable or difficult to be repaired to the debtor. ... The judge may also grant urgent relief only in part, in relation to creditors of classes II, III, IV, of article 41 of Law No. 11,101 of 2005, if it is found that the debtor's labor liabilities are insignificant and therefore the debtor will be able to overcome the crisis without causing damage to class I creditors." (OLIVEIRA FILHO, Paulo Furtado. Das conciliações e das mediações antecedentes ou incidentais aos processos de judicial reorganization. *In:* OLIVEIRA FILHO, Paulo Furtado. *Lei de Recuperação e Falência*: pontos relevantes e controversos da reforma. Indaiatuba: Foco Jurídico, 2021. p. 20.
[20] O novo instituto da negociação prévia. *In:* VASCONCELOS, Ronaldo *et al*. (coord.). *Reforma de Lei de Recuperação e Falência* (Lei nº 14.112/20). São Paulo: Ed. IASP, 2021. p. 355.
[21] In fact, the BRL neither provides for the definition of financial difficulty nor establishes how it should be proven.

Judicial Reorganization, pursuant to articles 1 and 48 of the BRL or article 25 of Law No. 14,193 of 2021 (the Football Corporation Law or SAF Law).[22]

(ii) Initiation of the Pre-Insolvency Mediation. As regards the second requirement, one should understand (a) when the Pre-Insolvency Mediation is deemed initiated and (b) which creditors should participate in the Pre-Insolvency Mediation, for the "attempt to reach a composition with creditors" to be deemed characterized.

Article 17 of the Mediation Law provides that mediation is established (rather than initiated) on the date scheduled for the first mediation meeting, when the parties should confirm their intention to participate in the mediation. In fact, there is no mediation if the parties decide not to participate therein.[23]

However, in practice, there is usually a pause between the request for initiation of the mediation and its actual establishment, which has the potential to expose the debtor to possible foreclosures by creditors. Therefore, the issue would be less of a concern if the BRL had established a requirement for granting the Urgent Preventive Relief upon the mere request for initiation of the Pre-Insolvency Mediation.[24] As there is no clear definition regarding the commencement date of the Pre-Insolvency Mediation, it seems reasonable to adopt as evidence of its initiation the issuance of the notices to creditors informing them of the request for establishment of the Pre-Insolvency Mediation made by the debtor to CEJUSC or to the Specialized Chamber, or even an invitation made by the debtor to creditors to participate in the Pre-Insolvency Mediation.

[22] Part of the legal doctrine believes that the proof of the debtor's standing to file for reorganization may be produced through the presentation of all documents required by article 51 of the BRL, which in our opinion, seems to be appropriate, to grant creditors access to relevant information for purposes of negotiation with the debtor in the scope of the Pre-Insolvency Mediation. However, we know that, in some cases, Urgent Preventive Reliefs have been granted without the presentation of such documents, based on the absence of express legal provision in this regard.

[23] Paragraph 1 of article 34 of the Mediation Law, in the chapter on composition of disputes in which a legal entity governed by public law is a party, defines that the mediation procedure is deemed established when the public body or entity issues a decision on the admissibility requirements.

[24] In view of the legal uncertainty regarding when the Pre-Insolvency Mediation initiates, the debtors seems to have a tendency to file the proceedings at the competent CEJUSCs rather than at Specialized Chambers, requesting that the mediators be appointed by the competent Court to start mediation promptly.

In any circumstance, if the CEJUSC or the Specialized Chamber holds that the admissibility requirements were not evidenced or if the Pre-Insolvency Mediation is not initiated, the Urgent Preventive Relief that may already have been granted should be immediately revoked.

As regards the characterization of "an attempted composition with creditors", the debtor must indicate which creditors will participate in the Pre-Insolvency Mediation for the legal requirement to be considered fulfilled and the Urgent Preventive Relief to be granted.

The BRL is silent in this regard, since it only requires the participation of "creditors", without indicating the minimum percentage of creditors that should join the Pre-Insolvency Mediation and without making a distinction between such creditors, either based on the nature of their credits (i.e., whether subject to reorganization or not) or their relevance in the context of a potential vote of the Plan.

In this context, the first precedents on Urgent Preventive Relief have been comprehensive, staying all enforcements against the debtor, without distinguishing creditors subject to a potential reorganization from those that would not, nor requiring proof regarding their inclusion in the Pre-Insolvency Mediation filed by the debtor.

(iii) Risk of Damage or Risk to the Useful Result. In principle, the Stay Period can be obtained within the scope of the Pre-Insolvency Mediation if agreed by the parties, without the need of any court intervention. As a matter of fact, stand-stills are a very common measure adopted during certain negotiations with more sophisticated creditors. However, to obtain the Stay Period through a judicial decision (*i.e.* a Stay Period Injunction), the debtor must evidence that the efforts endeavoured in the Pre-Insolvency Mediation are at risk of being derailed or that its useful result may be adversely affected if the Stay Period Injunction is not granted immediately.

Impaired Creditors. Once the requirements for granting the Urgent Preventive Relief are met, one must analyse which creditors will be impaired by the Stay Period Injunction. We believe that the wording of article 20-B, paragraphs 1 and 3 of the BRL should have

expressly established that the Stay Period Injunction should apply only to the enforcements of claims under negotiation in the Pre-Insolvency Mediation and that may be subject to a potential Judicial or Out-of-Court Reorganization Proceeding.

On the other hand, it does not seem appropriate for creditors not subject to a possible and future Judicial Reorganization to be impaired by the Urgent Preventive Relief and respective Stay Period Injunction, except for the stay of the sale of or removal from the debtor's establishment of capital goods essential to its business activity, pursuant to article 49, paragraph 3 of the BRL.[25]

Finally, we believe that if the debtor invited a creditor that may be subject to a future Judicial Reorganization to participate in the Pre-Insolvency Mediation, the said creditor must necessarily be subject to the effects of any Urgent Preventive Relief and Stay Period Injunction, even if said creditor has not joined or agreed to participate in the Pre-Insolvency Mediation.

Term of the Stay Period Injunction. Paragraph 1 of article 20-B of the BRL establishes that the Stay Period Injunction shall be effective for no more than 60 days.[26] This is the maximum period, not a fixed period. The debtor must justify the time required for the conclusion of the negotiations with the creditors in the Pre-Insolvency Mediation. Furthermore, the BRL does not expressly establish when the Stay Period Injunction starts running. As the purpose of Urgent Preventive Relief is to prevent individual creditors from taking actions that would undermine the Pre-Insolvency Mediation, we believe that the suspension must be applied immediately, regardless of notice to the parties, voiding the acts performed after the date on which the Stay Period Injunction was granted. In addition, the

[25] In this sense: BRAGANÇA, Gabriel José de Orleans e; GUERREIRO, Luís Fernando. O novo instituto da negociação prévia. *In:* VASCONCELOS, Ronaldo *et al*. (coord.). *Reforma de Lei de Recuperação e Falência* (Lei nº 14.112/20). São Paulo: Ed. IASP, 2021. p. 352.

[26] "CUEVA, Ricardo Villa Boas. Sistemas de pré-insolvência empresarial – mediação e conciliação antecedentes na Law No. 14.11/2020. *In:* SALOMÃO, Luis Felipe et al. (coord.). *Recuperação de empresas e falência*: diálogos entre a doutrina e a jurisprudência. São Paulo: Atlas, 2021. p. 204.

60-day period established in the BRL for the validity of the Stay Period Injunction is not extendable.[27]

Court Secrecy. The Pre-Insolvency Mediation is guided, among others, by the principle of confidentiality, according to article 2, VII of the Mediation Law, so that the notice on the filing of the Urgent Preventive Relief and the potential granting of the Stay Period Injunction does not interfere with the regular development of the debtor's activities, especially with regards to potential credit restrictions, interruptions in the supply of goods and services or cancellations of orders by customers.

Deduction of Stay Period Injunction's Term. Paragraph 3 of article 20-B of the BRL establishes that, upon filing for Judicial Reorganization, the Stay Period Injunction granted in the scope of Urgent Preventive Relief must be deducted from the 180-day Stay Period provided for in article 6, paragraph 4 of the BRL. The rule should also apply to Out-of-Court Reorganizations.

In our opinion, the deduction of the Stay Period Injunction term should apply even if the filing of the (Judicial or Out-of-Court) Reorganization proceedings takes place when the Urgent Preventive Relief is no longer effective (*i.e.*, after the end of the Stay Period Injunction) because the idea is that this is a new stage of the same renegotiation. In this regard, it is worth noting that paragraph 3 of article 20-B of the BRL does not restrict the possibility of deduction of the period of the Stay Period Injunction to the filing of the Judicial Reorganization in a certain period.

Reversal of the Stay Period Injunction. The BRL does not expressly address the possibility of reversal of the Stay Period Injunction. Naturally, any creditor affected thereby has the right to appeal against the decision that granted the Urgent Preventive Relief and obtain a prompt revocation of the Stay Period Injunction at a higher court. Likewise, nothing prevents the creditor from seeking the immediate reversal of the decision, even at the first-

[27] However, nothing prevents the parties from agreeing to new enforcement stays, once the Stay Period Injunction has expired.

instance court, especially if the debtor's bad faith is evidenced during the Pre-Insolvency Mediation or in the event that the mediation attempt is frustrated.[28]

In addition, the Stay Period Injunction may be partially repealed, with respect to specific creditors that should not have been initially subject to the stay, for not having been invited to participate in the Pre-Insolvency Mediation or for holding credits not subject to reorganization.

Distinction between the Urgent Preventive Relief and the Advance Relief. The granting of Urgent Preventive Relief, which entails the granting of the Stay Period Injunction, should not be confused with the anticipation of the reorganization effects ("Advance Relief"), set out in paragraph 12 of article 6 of the BRL, as amended by Law No. 14,112 of 2020. Pursuant to said provision, the Advance Relief aims to (fully or partially) anticipate the effects of the processing order of the Judicial Reorganization, notably the Stay Period. The measure had been widely accepted by the doctrine and court precedents long before the recent law reform that validated it, unlike the Urgent Preventive Relief in the Pre-Insolvency Mediation to obtain the Stay Period Injunction, which is an actual innovation in the Brazilian bankruptcy legislation.

CONCLUSIONS

The shortened, hermetic, and deficient wording of Section II-A of the BRL, as amended by Law No. 14,112 of 2020, gives rise to several uncertainties and doubts regarding the Pre-Insolvency Mediation and the Urgent Preventive Relief, which shall be clarified by the doctrine and remedied by court precedents, with a view to providing legal certainty to those involved in such proceedings.

[28] Urgent Preventive Relief can be repealed when, for example, the debtor fails to present a proposal, thus showing no interest in reaching an agreement with its creditors in the scope of Pre-Insolvency Mediation. In case of reversal of Urgent Preventive Relief, the debtor will have no right to the remaining time of the Stay Period Injunction.

Although our preferences and proposals were aimed at favouring and encouraging the use of Out-of-Court Reorganization, which has a procedure already widely known and enhanced by the changes brought by Law No. 14,112 of 2020, and even though there were some doubts about the effectiveness of the Pre-Insolvency Mediation, given the short period for negotiating a possible composition and the need to file an Urgent Preventive Relief to obtain the Stay Period Injunction, it is necessary to recognize the first positive effects of the Pre-Insolvency Mediation in the context of an initial cultural evolution.[29]

On the one hand, the mere existence of a legal provision regarding Pre-Insolvency Mediation and, on the other hand, the initiation by the debtor of a Pre-Insolvency Mediation, formally indicating that it will file for reorganization if a composition with creditors under the Pre-Insolvency Mediation fails have already been producing positive effects.

There are cases in which the debtor initiated the Pre-Insolvency Mediation, but did not see the need to file an Urgent Preventive Relief, as the creditors, already demonstrating a change in their attitude, refrained from taking more drastic measures and/or filing enforcement proceedings, in order to negotiate with the debtor and/or to await the outcome of the negotiations. In some cases, compositions were entered into in the scope of Pre-Insolvency Mediation, preventing the prompt filing of the reorganization.

We expect that the doctrine and court precedents will plug the loopholes in the law, allowing us to have appropriate and successful Pre-Insolvency Mediation, so that it can be consolidated and further disseminated and used, effectively contributing to the cultural evolution necessary to overcome the “litigation culture”.

[29] “The new conciliation and mediation preliminary or incidental to the judicial reorganization proceedings (articles 20-A and 20-D of Law No. 11,101 of 2005, as amended by Law No. 14,112 of 2020), although not being in the same level of the international good practices and the proposals initially presented to the National Congress, mean a significant step towards the wide dissemination of consensual resolutions in the pre-proceedings and proceedings phases” (CUEVA, Ricardo Villa Boas. Sistemas de pré-insolvência empresarial – mediação e conciliação antecedentes na Lei n.º 14.11/2020. *In:* SALOMÃO, Luis Felipe et al. (coord.). *Recuperação de empresas e falência*: diálogos entre a doutrina e a jurisprudência. São Paulo: Atlas, 2021. p. 206).

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