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Not-for-profit Associations and Brazil's Business Restructuring and Bankruptcy Law: How the caselaw has evolved

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Although the courts have been taking a more flexible approach to the types of organizations that can seek the protection of Brazil's Business Restructuring and Bankruptcy Law ("BRBL", Law 11.101/2005), extending its reach to civil associations, the Superior Court of Justice ("STJ", Superior Tribunal de Justiça, the highest court in non-constitutional matters) recently issued a decision that goes contrary to this trend.

The BRBL provides that only business proprietors and business companies have standing to apply to the courts for supervised or unsupervised restructuring of their enterprises (referred to in Brazil as "judicial" and "extrajudicial" restructuring) or be declared bankrupt. Moreover, the legislator expressly excluded certain entities from the effects and benefits of the BRBL, even if those entities engage in business activities.[1]

Although at first glance it may seem that the legislator intended to leave no room for interpretations beyond the literal text of the BRBL, over the years the scope of the legislation has increased through court decision, broadening the types of entities that can benefit from it. The scope of the BRBL's application is thus a question both of its provisions and how those provisions have been interpreted by the courts, and the question is particularly important for civil associations.

The leading case on the issue is the Hospital Casa de Portugal case – the first in Brazil in which a not-for-profit civil association applied for judicial restructuring. At first instance, the judge certified the debtor's Judicial Restructuring Plan, but Rio de Janeiro Court of Appeal overturned that decision, based on the Hospital's form of organization and the fact that it was registered in the Civil Register of Legal Persons rather than the Commercial Registry.

This decision was subsequently reversed by the STJ, which ordered the judicial restructuring to proceed, in light of the applicant's social function and the importance of preserving the Hospital's economic activity and the jobs it created. The main grounds for the STJ's decision were not, however, its interpretation of the BRBL but rather its acknowledgement of a fait accompli, since the Plan was being carried out when the STJ judged the appeal.

Despite the importance and influence of the Hospital Casa de Portugal case, its particularities must also be considered.

Since the STJ's decision in that case, civil associations have put forward a wide range ot arguments to support their applications, including: the absence of an express prohibition against judicial or extrajudicial restructuring of civil associations; the social function they perform; their role as economic agents, generating wealth, jobs, income and taxes; and the fact that from a substantive point of view they are business organizations, although formally they are structured as civil associations.

Although many courts, at both first and second instance, have accepted applications by civil associations for restructuring under the BRBL,[2] neither scholars nor the courts are unanimous on the issue. Some commentators and precedents argue that the protection offered by the BRBL should be restricted to business proprietors and business companies, and that the rules cannot be relaxed to include other types of organization, despite the importance of the debtor organization's social function or the impact of its financial crisis on the economy.[3]

This, in fact, was the view adopted by a majority of the STJ's 3rd Panel in a very recent case. The court held that not-for-profit civil associations and foundations are not entitled to the benefits of the BRFL. The Justices ruled that the application for restructuring at issue in the appeal could not be processed because the BRBL does not include such organizations among the entities to which the legislation applies, and that "granting judicial restructuring to not-for-profit entities that already enjoy exemptions from taxes would amount to imposing a new charge on Brazilian society, without any study of the economic and competition impacts that the measure could generate."[4]

This most recent decision by the STJ is likely to have an impact on the lower courts and the trend toward broadening the application of the BRBL to encompass non-business entities. Above all, it underscores the importance of considering the particular circumstances of each case.

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NOTES

[1] The organizations excluded under article 2 of the BRBL are public or private financial institutions, credit cooperatives, consortiums, supplementary pension entities, health plan operators (other than those run by medical cooperatives), insurance companies, capitalization companies and other entities equated to such entities by law.

[2] Some associations that have taken advantage of the protection offered by the BRBL São exemplos de associações que se valeram da proteção conferida pela LRF a Universidade Candido Mendes, o Hospital do Amparo Feminino e, a despeito de suas especificidades, o Figueirense Futebol Clube e a Associação Chapecoense de Futebol.

[3] SACRAMONE, Marcelo Barbosa. Comentários à Lei de Recuperação de Empresas e Falência. Digital book. 5th ed. São Paulo: SaraivaJur, 2024, p. 14.

[4] STJ, 3rd Panel, Appeal REsp 2.026.250/MG, Justice Ricardo Villas Bôas Cueva reporting, judged October 1, 2024, published DJe October 4, 2024. Our translation. See also: STJ, 3rd Panel, Appeal REsp 2.036.410/MG, Justice Ricardo Villas Bôas Cueva reporting, judged October 1, 2024, published DJe October 4,

2024; STJ, 3rd Panel, Appeal REsp 2.038.048/MG, Justice Ricardo Villas Bôas Cueva reporting, judged October 1, 2024, published DJe October 4, 2024; e STJ, 3rd Panel, Appeal REsp 2.155.284/MG, Justice Ricardo Villas Bôas Cueva reporting, judged October 1, 2024, published DJe October 4, 2024.

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