Atualidades

THEORY AND PRAGMATISM OF GOVERNANCE REFORM IN BUSINESS REORGANIZATION: A CASE STUDY OF BRAZIL

Gustavo Oliva Galizzi

Introduction. Part I – The Brazilian Model of Business Reorganization and the Belief in Management Replacement: A – Management Replacement through the Debtor's Unilateral Proposal; B – Management Replacement through Minority Shareholders' Initiative; C – Management Replacement as Recommended in the Creditor's Alternative Reorganization Plan; D – Court-Ordered Management Removal and Appointment of Trustee. Part II – The Participation of the Creditors in the Governance Structure of the Debtor Company: A – The Creation of Board Structures; B – Appointment of Creditors' Representatives through Class Voting; C – Veto Rights over Substantial Corporate Decisions; D – Debt Capitalization. Conclusion. References.

Introduction

The new Brazilian Bankruptcy Act (Act 11.101/2005), originally a bill that took ten years to be enacted by the National Congress, has introduced very important changes to the country's legal, economic and social arenas. Partially influenced by the American bankruptcy model, which has regulated business reorganizations since 1978, the new act represents, in the normative scenario, the transition from the concept of bankruptcy as liquidation to that of bankruptcy as a reorganization means. Whereas formerly liquidation of the business was the norm, nowadays much more emphasis is placed on the role of reorganization for crisis-stricken companies, to the benefit not only of its shareholders but also of its employees, consumers, creditors and society as a whole.

The new act mostly seeks to ensure that only economically feasible companies, momentarily in the midst of some financial turmoil, be allowed to undergo some restructuring while keeping their employees and meeting payments to creditors, rather than selling off company assets. By extinguishing *concordata*[1] while creating, in

1. The expression *concordata* derives from the Latin word *concordatus*, from the verb form *concordare* meaning agreement, deal, treaty. Under the former Brazilian Bankruptcy Act, a *concordata* referred to the agreement to which the debtor could have recourse in order to avoid bankruptcy or to halt the progress thereof, provided that certain legal conditions were met and upon the filing with the court of a unilateral proposal for the partial or total liquidation of the company's debts. *See* Luiz Tzirulnik, *Direito Falimentar* (1997) at 233. The company's creditors had no say in these proceedings. The court only had to ascertain that the debtor had met all the necessary legal requirements (such as

turn, the figure of judicial reorganization,[2] the new act widens its scope and allows for the flexibility of corporate restructuring processes, by providing several mechanisms to tackle the debtor company's financial and economic difficulties.

The mechanisms prescribed by the new Brazilian Bankruptcy Act[3] focus primarily on the financial and managerial reform of the debtor company.[4] As far as the mechanisms of managerial reform are concerned, especially noteworthy is the possibility of reorganizing the architecture of management, through either a court-ordered removal (Article 64 of the BBA) or the replacement of corporate officers and directors (Article 50, IV of the BBA). The theoretical framework of such instruments is grounded on the principle of disassociation between the company and the owner thereof, regarded by most scholars to be one of the essential pillars of the new Brazilian bankruptcy law.

This paper argues that a belief in replacing the company's management as an essential reorganization mechanism, even if accompanied by other steps,[5] is unfounded. Several factors corroborate this claim. One is the high level of concentration between ownership and control in Brazilian corporations, which hampers the replacement of corporate officers by the

possessing over 50% more assets than the liabilities represented by unsecured creditors) in order to grant a *concordata*. Failure to comply with such requirements would mean the immediate declaration of bankruptcy by the court.

2. As alternative to judicial reorganization, the Brazilian Bankruptcy Act also provides for an out-of-court restructuring procedure, through a plan presented by the debtor at a creditors' meeting. Judicial reorganization, on the other hand, seeks to resolve the economic-financial crisis by means of a lawsuit.

3. Hereinafter referred to as BBA.

4. Such mechanisms are prescribed by Article 50 of the Bankruptcy Act and are complemented by Article 64, which governs the hypothesis of judicial removal of management. On the whole, the means of recovery provided for in the Brazilian Bankruptcy Act, which are not *strict, but rather purely exemplificative*, can be subdivided into two general groups depending on the enforcement and results sought:

DIRECT OR INDIRECT FINANCIAL RESTRUCTURING	ESSENTIALLY MANAGERIAL ESTRUCTURING
• Granting of grace periods and special conditions for the settlement of overdue and soon-to-be due liabilities (Article 50, I); • Corporate structural operations (Article 50, II); • Capital raising (Article 50, VI); • Transfer or lease of the establishment (Article 50, VII); • Renegotiation of labor liabilities (Article 50, VIII); • Payment in kind or novation (Article 50, IX); • Constitution of a creditors' partnership (Article 50, X); • Partial sale of assets (Article 50, XI); • Equalization of financial obligations (Article 50, XII); • Company usufruct (Article 50, XIII); • Issuance of securities (Article 50, XV); • Securitization (Article 50, XVI).	• Change in the corporate control (Article 50, III); • Replacement of management (Article 50, IV); • Removal of management by court order (Article 64); • Grant to the creditors of the right to vote for the appointment of directors separately and of veto rights regarding certain issues (Article 50, V); • Shared management (Article 50, XIV).

5. Management restructuring alone is not a reorganization mechanism. In theory, it must be accompanied by structural and financial changes in the company so that it can be deemed effective.

board of directors (when existing).[6] Moreover, the reality carried over from other legal systems, especially the American one, shows that the court-ordered removal of the failing enterprise's management and the consequent appointment of a trustee are not always effective from an economic standpoint, and is therefore only granted under rare circumstances.

Management replacement is even more unusual in the reorganization processes of small and mid-sized companies, in which ownership and control are even more closely connected.

Taking that into account, the Paper also suggests that, alternatively to the replacement/removal of management, the involvement of creditors in the governance structure of the debtor company can be a more effective and feasible instrument within the reach of them to provide a more successful management and consequently improve the economic performance of the company as it surfaces from bankruptcy.

During the pendency of the reorganization case, creditors replace shareholders as the focal point in the governance system of the failing enterprise. This shift in the governance system places the creditors in the role of the group entitled to hold the residual authority over business decisions. As the residual claimants of the firm during reorganization, creditors should take a more activist approach to governance issues by participating in the governance structure of the failing enterprise.

Part I of the Paper discusses the hypotheses of management replacement as provided for and allowed by the Brazilian Bankruptcy Act and suggests that the emphasis placed on them as an essential step towards recovery is overrated. The study comments on the experience of the American bankruptcy law, when applicable to the Brazilian reality.

In Part II, a case is made for the involvement of creditors in the governance structure of the debtor company as part of the overall effort to revitalize the enterprise. The Paper concludes restating that management replacement is a very exceptional restructuring measure and that the involvement of creditors in the running of the failing enterprise may be a more viable instrument for them to influence the debtor's business decisions during the reorganization case.

Part I – The Brazilian Model of Business Reorganization and the Belief in Management Replacement

The new Brazilian Bankruptcy Act finally introduces into the national legal system the figure of judicial reorganization of economically feasible companies. As previously mentioned, Brazilian legislators have sought to enable the economic reemergence of the enterprise, ensuring payment to the creditors, job stability and the conservation of the many interests that gravitate towards the business concern, as intended in Article 47 of the BBA.[7] Somewhat inspired by the US bankruptcy legislation, Chapter 3 of the Brazilian counterpart governs judicial reorganization, which can be equaled, by way of hermeneutics, to the well-known Chapter 11 of the United States Bankruptcy Code (Title 11, United States Code).[8]

6. Pursuant to Article 138 of Act 6.404/76, which governs both closely-held and publicly-held companies in Brazil, management of the company will be incumbent on the board of directors and the officers or on the officers only, according to its articles of incorporation. Public companies and those with authorized capital will necessarily have a board of directors, whereas closely-held companies need not have one, unless expressly stated in their articles of incorporation.

7. Article 47 of the BBA sets forth that: "Judicial reorganization seeks to enable a debtor company to overcome its economic financial crisis, so as to allow the continuity of the concern, the maintenance of jobs and the protection of the creditors' interests, thus preserving the company, along with its social function, and fostering economic activity".

8. Again, it is worth mentioning that as an alternative to judicial reorganization, Chapter 6 of

As regards its content, the Brazilian model of judicial reorganization is eminently focused on the managerial and financial restructuring of the firm. This Paper examines the mechanisms of managerial restructuring only. More specifically, the study concentrates on the instruments of removal and replacement of management of the debt-ridden company. Such instruments can be summarized as follows: a) replacement of management by means of a unilateral proposal by the debtor (Articles 50, IV and 53 of the BBA); b) replacement of management through an initiative by the minority shareholders (Article 50, IV of the BBA); c) replacement of management as recommended in the creditors' alternative reorganization plan (Articles 50, IV and 55 of the BBA); d) removal of management through a court order, with a subsequent appointment of a trustee by the court (Articles and 65 of the BBA).

Such steps incorporate, in the normative sphere, a common sense that had permeated the academic scene since the Brazilian National Congress began to discuss the bill to reform the former bankruptcy act. It became commonplace for the books and articles on bankruptcy law to suggest that one of the cornerstones of the new act should be the possibility of disassociation between the company and the owners thereof.[9] The rationale behind such claim is simple: in theory, disassociation promotes the removal of the company's leading people without necessarily interrupting the economic activity, thus preventing bad management from bringing about the dissolution of the business. Supporters believe that the reasons for the economic financial crisis stem from mismanagement. Replacing management, therefore, should be the very first step towards restructuring the company.[10]

Even though this assertion may appear to bear some theoretical logic or a legal meaning, in practice it does not. In the next four topics, this Paper analyzes each of the hypotheses of management replacement as suggested and allowed by the Brazilian law and demonstrates that the faith on them as an essential reorganization mechanism of the failing enterprise is unwarranted.

A – Management Replacement through the Debtor's Unilateral Proposal

In Brazil, management replacement through the debtor's unilateral proposal seems very unlikely. Under the BBA, the debtor, and not the creditors, is the incumbent party to file the reorganization plan (Article 53 of the BBA) and as such it would appear to be highly unlikely that the debtor would come before a court of law and admit that the reorganization of its business depends upon a management replacement. Not even the most optimistic creditors or minority shareholders dissatisfied with the present management composition would keenly expect the debtor to voluntarily put forward a unilateral replacement proposal.

Conversely, in the U.S. management replacement willingly brought on by the debtor is quite common. Lynn M. LoPucki and William C. Whitford conducted an

the Brazilian Act addresses the out-of-court reorganization procedure, which is comparable to what Americans refer to as a prepackaged plan, i.e. a bankruptcy plan of reorganization negotiated and accepted by the creditors prior to the commencement of the bankruptcy case.

9. *See*, for example: Waldo Fazzio Júnior, *Nova Lei de Falência e Recuperação de Empresas* (2005); Maria Celeste Morais Guimarães, *Recuperação Judicial de Empresas: Direito Concursal Contemporâneo* (2001); Frederico Augusto Monte Simionato, "A reforma da lei da falências frente à reorganização econômica da empresa", *RDM* 108 (1997). The latter categorically claims that disassociation between the company and its owner is the cornerstone of the new Brazilian bankruptcy law, because it is this very distinction that will enable the removal of the company's management without interrupting the functional activity of the company. As such, the concept of company would outweigh the concept of owner. The latter could then be immediately removed so that the reorganization plan could be effectively carried out. *Supra*, at 43.

10. *See* Fazzio Júnior, *supra* note 10, at 176.

empirical study of the forty-three largest publicly held companies to file and complete a bankruptcy reorganization case in the United States between 1979 and 1988.[11] Management replacement by the board of directors often took place in the cases studied.[12] In fact, in the period starting eighteen months before filing and ending six months after confirmation of the plan, there was at least one replacement of CEO in thirty-nine out of forty-three cases (91% of the total number of cases). In thirty-one of these cases (72% of the total number of cases) there was at least one replacement of CEO pending a Chapter 11 case, or contemplated by the plan of reorganization.

Replacement of corporate officers is common in the US due to a greater separation between control and ownership in US companies. That characteristic of the American capital market allows for less interaction among shareholders, board of directors and corporate officers, which facilitates a replacement of the latter by the former. It is worth mentioning that while CEOs are commonly replaced, the same cannot be said of the board of directors. In fact, the board of directors is usually kept unaltered during the Chapter 11 reorganization case, as will be depicted in the next topic.

The replacement of corporate officers in Brazilian companies is not feasible, at least not as conducted in the US. Unlike the American reality, the capital market in Brazil is characterized by a high rate of concentration between ownership and control. Brazilian publicly held companies are often family-owned ones, in which a controlling shareholder takes on the roles of both owner and manager.[13] In an empirical study conducted in 2002, Valadares and Leal found that in a sample of 325 Brazilian publicly-held companies, 203 (62.5%) of them have a single shareholder that owns on average 74% of the voting shares. Of the remaining 37.5% of firms in the sample, the largest shareholder owns on average 32% of the voting shares. Considering the entire sample, the main shareholder retains on average 58% of the voting capital, while the three largest shareholders own 78% and the five largest shareholders 82%.[14]

This high rate of concentration between ownership and control in publicly held companies is dwarfed by an even higher rate in closely-held corporations and in limited liability companies,[15] both of which are by far in greater number in Brazil. In such companies, the owner exerts a direct and strong influence on the running of the economic activities. A unilateral proposal by the debtor to change or remove management is virtually unlikely. Such companies, as a rule, are but an extension of the direct and undisputed will of the controlling group, which is also part of management.

The evidence, therefore, suggests that even in the case of a publicly held company the replacement of corporate officers through a unilateral proposal by the debtor

11. *See* Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. Pa. L. Rev. 669 (1993), at 723-726.

12. In the United States, corporate officers are appointed to their offices by the board of directors, which has also the power to replace them.

13. Hence the rumor that agency problems in Brazil occur not between management and shareholders but between controlling shareholders and minority shareholders. *See* Erica Gorga, *Does culture matter for corporate governance? A case study of Brazil* (Stanford Law School, John M. Olin Program In Law and Economics, Working Paper 257, May 2003), *available in* Social Science Research Network *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=410701.

14. *See* Sílvia Mourthé Valadares & Ricardo Pereira Câmara Leal, *Ownership and Control Structure of Brazilian Companies* (2000), *available in* Social Science Research Network *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=213409. The difference between voting capital and total capital of a Brazilian company is due to the existence of non-voting preferred shares that help constitute the total capital.

15. The expression "limited liability company" is used in this Paper as a free translation for *sociedades limitadas* (Ltdas.).

will be most uncommon in Brazil. The rationale behind this claim can be easily explained as follows: the greater the integration between ownership and control, the greater the influence and active participation by the owner in the running of the businesses and the slighter the possibility of a proposal of management reorganization on his part, the owner/manager/debtor.

B – Management Replacement through Minority Shareholders' Initiative[16]

Waldo Fazzio Junior suggests the possibility of management replacement through an initiative (via a shareholders' meeting) by the minority shareholders. According to the Brazilian author, management replacement can occur in those cases in which the minority shareholders, away from the running of the business and from the decision making center, realize that the economic-financial crisis is due to disastrous management and, having insufficient bargain power to set the company back on its tracks, decide to seek such relief in court.[17]

The issue is not as simple as it seems and some difficulties must be pointed out. The machinery of corporate democracy is cumbersome, and serious questions have been raised about its effectiveness in enabling shareholders to compel (or at least try to compel) management to serve shareholders' interests. But whether or not shareholders can make effective use of their right to control management through voting, in the financially healthy corporation there seems to be no doubt that *at least such right exists*. However, once the corporation has become insolvent and filed for reorganization, the shareholders' *right* to control the corporation through voting becomes problematic.

In the United States, while some courts continue to state that "the right to compel a shareholders' meeting for the purpose of electing a new board subsists during reorganization proceedings",[18] they add that the right may be enjoined in cases of "clear abuse." What constitutes "clear abuse" is not clear.[19] As Lynn M. LoPucki and William C. Whitford show,[20] the case law generally attempts to distinguish cases in which the shareholders seek to replace management in order to improve their leverage in bargaining, which is not considered abuse, from cases in which the shareholders' attempt to replace management threatens the success of the reorganization case, which is considered abuse.[21]

16. An initial remark must be made regarding this topic and it has to do with the execution of the alternative analyzed herein. Although the topic envisions the possibility of a management replacement through an initiative by the minority shareholders, via a shareholders' meeting, ultimately a court order will be required to enforce such replacement. Therefore, it must be made clear that the title "Management Replacement through Minority Shareholders' Initiative" proposed for the topic solely reflects the parties' initiative rather than the manner through which the action is performed. It should also be considered that although the BBA does not expressly provide for the possibility of management replacement through a minority shareholders' initiative, Article 50, IV does allow for it as it generically mentions management replacement as a means of judicial reorganization of the crisis-stricken company.

17. *See* Fazzio Junior, *supra* note 10, at 148.

18. *See Mainville Corp. v. Equity Sec. Holders Com (In re Johns-Manville Corp.)*, 801 F.2d 60, 64 (2d Cir. 1986) (citing *Van Siclen v. Bush (In re Bush Terminal Co.)*, 78 F. 2d 662, 664 (2d Cir. 1935)).

19. *See In re Johns-Manville Corp.*, 801 F. 2d 60. On remand, the bankruptcy court enjoined the shareholder meeting in that case. A number of articles also discuss this question. *See*, for example, Mark E. Budnitz, *Chapter 11 Business Reorganizations and Shareholder Meetings: Will the Meeting Please Come to Order, Or Should the Meeting Be Canceled Altogether?*, 58 Geo. Wash. L. Rev. 1214 (1990) (noting that "several courts have denied shareholder meeting requests upon finding that the meeting would constitute a clear abuse of the traditional-director relationship"). *See also* Anna Y. Chou, *Corporate Governance in Chapter 11: Electing a New Board*, 65 Am. Bankr. L. J. 559, 560-89 (1991).

20. *See* LoPucki and Whitford, *supra* note 12, at 696.

21. *See In re Johns-Manville Corp.*, 801 F.2d at 64-67; *In re Potter Instruments Co.*, 593 F.2d 470, 475 (2d Cir. 1979).

This line of cases makes the ability of shareholders of a reorganizing company to hold a meeting to replace management highly problematic. Accordingly, the election of a new board of directors during a Chapter 11 reorganization case is an uncommon event in the US. In fact, courts usually do not permit the replacement of a board of directors by election if such a replacement jeopardizes the overall success of the reorganization.

One of the few cases in which a shareholders' meeting was allowed to take place by the US courts is *Saxon Industries, Inc. v. NKFW Partners (In re Saxon Industries)*.[22] In *Saxon*, the bankruptcy court approved an equity holder's request to engage special counsel to represent it in a Delaware chancery court action seeking to compel an annual meeting of shareholders. The *Saxon* court noted that shareholders were entitled to pursue all available alternatives to assert their rights against the debtor, including the election of directors.[23] That ruling, however, is not representational of most U.S. case law.

More often than not, courts will enjoin shareholders from calling a meeting for the stated purpose of installing new management that would seek a better deal for them. For example, in *In re Johns-Manville*[24] the bankruptcy court concluded that a new management with a mandate to drive a harder bargain on behalf of shareholders would find it impossible to obtain the agreement of creditors. The effect of trying, according to the court, would have been further delay and, if the new management refused ultimately to accept the deal already offered by creditors, the reorganization of the company would possibly fail and the ultimate result would be its liquidation. On that basis, the court enjoined the meeting.

These arguments also apply to the Brazilian legal context, for they are not related to specific aspects of the American bankruptcy legislation. On the contrary, their logic can be justified by a general principle of bankruptcy law: during business reorganization cases, the creditors in general, and not the shareholders, are the real parties in interest. In fact, from the moment the debtor company files for reorganization, collective interest, including that of creditors, outweighs shareholders' interests, as implicit suggested in Article 47 of the BBA.[25] Thus, only under exceptional circumstances must the court grant a replacement of management through a minority shareholders' initiative *above the remaining interests of creditors and the collectivity as a whole*.

There is one last reason why one should not sustain such a misguided belief in this alternative. Since shareholders generally have little to gain in reorganization cases, they have little incentive to assure that the debtor makes prudent decisions. It is worth remembering, in this context, that shareholders' meetings in Brazil are characterized by the absenteeism of minority shareholders and are generally a mere formality to validate the majority shareholder's will.[26] Bearing in mind that this is the predominant description of a Brazilian company in its regular state of solvency, envision the same company going through reorganization, a period during which shareholders usually have next to nothing to gain. The relative inexistence of incentives to monitor the debtor's decisions and the cultural[27] reluctance of the Brazilian minority shareholders to attend meetings and discuss issues of interest to the company are factors that, in practice, do nothing but ham-

22. *See Saxon Indus., Inc. v. NKFW Partners*, 39 B.R. 49 (Bankr. S.D.N.Y. 1984).

23. *Supra* note 23, at 50.

24. *See Manville Corp. v. Equity Sec. Holders Comm. (In re Johns-Manville Corp.)*, 66 B.R. 517, 542 (Bankr. S.D.N.Y. 1986).

25. *Supra* note 8.

26. *See* Osmar Brina Correa-Lima, *Sociedades Anônimas* (2004).

27. As a matter of fact, the reluctance of minority shareholders to attend shareholders' meetings in Brazil is not only a cultural issue but also a collective action problem.

per management's replacement through minority shareholders' initiative.

C – Management Replacement as Recommended in the Creditor's Alternative Reorganization Plan

Article 56 of the Brazilian Bankruptcy Act entitles any creditor to object to the debtor's reorganization plan, in which case the court must convene a general meeting of creditors to deliberate on it. The same Article in its Paragraph 3 sets forth that the reorganization plan can be amended, as long as the debtor expressly agrees with it. This prerogative of the Act allows any creditor, upon the objection to the reorganization plan, to postulate the debtor's management restructuring, as a compromise in order to assent to the reorganization proposal drawn up by the debtor company.[28]

According to the authors who suggest this alternative, the proposal for management restructuring by the creditors would function as a "currency", at least in theory. That is because, pursuant to Article 56, Paragraph 4 of the BBA, if the creditors should reject the reorganization plan, the court must immediately declare the debtor's bankruptcy. An "all or nothing" sort of logic applies here: either the debtor agrees to the proposal for management restructuring included in the alternative plan put forward by the creditors or the creditors reject the reorganization plan initially put forward by the debtor, which will culminate in the declaration of bankruptcy for the failing concern.

There is, however, a fallacy to this argument. Based upon empirical evidence, Fábio Ulhoa Coelho remarks that the risk of bankruptcy in Brazil does not intimidate the debtor as much as it does the creditors. To the latter, failure of the debtor will mean the loss of the credit, whereas the grant of judicial reorganization may, in the end, ensure that at least some of it will be received.[29] Thus, due to the strict link between the dismissal of judicial reorganization and the declaration of bankruptcy, it is only natural that creditors, fearing the worst (i.e. the liquidation of the company) should succumb to the debtor's will to maintain the company's original management structure. Such will is justified due to the fact that in Brazil, as previously mentioned, the controlling shareholder generally takes on the roles of owner and manager.

The practical outcome of all of this should be the following: even if the debtor does not assent to the creditors' proposal as required under Article 56, Paragraph 3 of the BBA, the creditors will succumb to the debtor's will, for fear of a bankruptcy declaration. Therefore, this alternative is unlikely to reach the results intended by the legislator, and it would seem unjustifiable to have faith in it.

D – Court-Ordered Management Removal and Appointment of Trustee

The present alternative may be the one that instills the greatest belief in those that view management replacement as an essential mechanism of reorganization of the debtor and, in this line of thought, one of the pillars of the new Brazilian bankruptcy law. Article 64 of the BBA states that, during the reorganization case, managers will be kept at the helm of the business activity, *unless*: a) they have been convicted of larceny, or an economic crime; b) there is strong indication of their having committed a bankruptcy-related crime; c) there is evidence of deceitful, simulated or fraudulent act against the interests of the creditors; d) their conduct is incompatible with the economic financial crisis of the company, such as the unjustified loss of capital or serious omissions towards the creditors; e) they refuse to provide information re-

28. *See* Fazzio Junior, *supra* note 10, at. 148.

29. Fabio Ulhoa Coelho, *Comentários à Nova Lei de Falências e de Recuperação de Empresas* (2005), at XIII-XIV.

quested by the court-appointed trustee or committee, impeding inspections or audits; f) their replacement is provided for in the approved plan of judicial reorganization.

Upon determining the dismissal of the debtor company's management, the court must convene a creditors' meeting to elect an independent trustee. Pursuant to Article 65 of the BBA, the trustee is the one who will run the company during the reorganization case and who will be in charge of implementing the judicial reorganization plan, after it has been approved. Moreover, he will become the legal representative of the debtor company regarding management related acts (signing documents, hiring services, purchasing input and so forth).

Similarly, the United States Bankruptcy Code provides for the possibility of removing debtor's management with the subsequent appointment of a trustee. As a matter of fact, in the US, even if a court denies shareholders the right to elect directors because creditors are the real parties in interest (as noted above in Subtitle 1-B), no mechanism exists by which the creditors can themselves elect directors. The formal method for creditors to bring about a change in management is, indeed, to move for appointment of a trustee. Section 1108 of the United States Bankruptcy Code provides that unless the court, on request of a party in interest and after notice and a hearing, orders otherwise, a trustee may be appointed to operate the debtor's business.

However, notwithstanding section 1108's use of the word "trustee", strong evidence shows that the debtor *will remain in control* of the business in most Chapter 11 cases.[30] Pre-bankruptcy management *will continue* to operate the business as a "debtor in possession" unless a request is made for the appointment of an independent trustee and the court, after notice and a hearing, grants the request. Appointment of a trustee is really very unusual in a Chapter 11 case. Ordinarily, the debtor in possession keeps exercising the managerial functions, and the old managers stay in place.[31]

That can be explained in light of some business considerations: Who should serve as a trustee in reorganization cases? Are lawyers prepared to run a troubled business? What about appointing an outstanding, experienced businessperson as a trustee? Even an outstanding, experienced businessperson is going to need time to familiarize him/herself with the particular business under reorganization. And, if s/he is such an outstanding, experienced businessperson, why is s/he available in the market to serve as a trustee? More specifically, why isn't s/he already running some other business?

These business considerations caused the American Congress to decide to keep the debtor in possession running the business unless a party in interest establishes a cause that would justify management replacement.[32] The United States Bankruptcy Code, in much the same way as the BBA does in Article 64, lists in § 1104 (a) some hypotheses that would justify management replacement and trustee appointment. As a matter of fact, the US Bankruptcy Code is even more generic than its Brazilian coun-

30. *See* Charles M. Elson, Paul M. Helms & James R. Moncus, *Corporate Governance Reform and Reemergence from Bankruptcy: Putting the Structure Back in Restructuring*, 55 Vand. L. Rev. 1917 (2002); Edward S. Adams, *Governance in Chapter 11 Reorganizations: Reducing Costs, Improving Results*, 73 B. U. L. Rev. 581 (1993); LoPucki & Whitford, *supra* note 10; David A. Skeel, Jr., *Doctrines and Markets: Creditors' Ball: the "New" New Corporate Governance in Chapter 11*, 152 U. Pa. L. Rev. 917 (2003); Margaret Howard, *Bankruptcy: Cases and Materials* (2005).

31. In the emphatic words of Margaret Howard: "Yes, the same folks who rode the corporation into bankruptcy in the first place". Howard, *supra* note 31, at 759.

32. The American Congress intended that a trustee be appointed only "if the protection afforded by a trustee is needed and the costs and expenses of a trustee would not be disproportionately higher than the value of the protection afforded". H.R. Rep. n. 595, 95th Cong., 1st Sess. 402 (1977).

terpart, authorizing the replacement: a) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor (§ 1104 (a) (1)); b) if such an appointment is in the interests of creditors, any equity holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor (§ 1104 (a) (2)).

Typically, courts have determined management replacement for cause if the debtor's decisions constitute gross mismanagement or incompetence,[33] if the debtor in possession engages in self-dealing transactions or there are indications of a conflict of interest,[34] if the debtor diverts estate property so that it is no longer available for creditors, either before or after filing the case,[35] or if the court determines that parties lack confidence in the debtor in possession's abilities.[36] In determining whether the second leg of 1104(a) described above is met, courts have looked to the practical realities and necessities of the case. In so doing, courts have engaged in a peculiar form of cost-benefit analysis, asking whether "the benefits derived by the appointment of a trustee outnumber the costs of the appointment",[37] or, alternatively, if the "trustee will accomplish the goals of the Chapter 11 plan more efficiently and effectively".[38]

In the majority of the cases, however, the business considerations described above cause the various parties in interest *not to try* to establish cause for the appointment of a Chapter 11 trustee. Indeed, the ability to replace the debtor in possession is ineffective in addressing the difficulties caused by a separation of ownership and control in bankruptcy.[39] And, even when the parties in interest try to move for the replacement of the debtor in possession, the US courts vehemently oppose to the request, for a number of reasons: a) courts probably accept implicit Congress's belief that reorganizations are likely to be more successful if the debtor remains in control to some degree; b) courts are sensitive to cost concerns regarding the reorganization proceeding and generally avoid appointments that increase the reorganization's overall cost;[40] c) courts may be suspicious as to the underlying motive surrounding the request for an appointment of a trustee.[41-42]

33. *See, e.g., In re Mako, Inc.*, 102 B.R. 809, 812 (Bankr. E.D. Okla. 1988), (citing *In re Brown*, 31 B.R. 583 (Bankr. D.D.C. 1983)) ("Gross mismanagement suggests some extreme ineptitude on the part of the management to the detriment of the organization").

34. *See, e.g., In re Sharon Steel Corp.*, 871 F.2d 1217, 1126 (3d Cir. 1989) (finding that violative management practices include payments to chief executive officer without consideration).

35. *See, e.g., In re Bonded Mailings, Inc.*, 20 B.R. 781, 784-86 (Bankr. E.D.N.Y. 1982) (finding that management engaged in fraudulent conduct by shifting assets among corporate debtors in an effort to confuse their records).

36. *See, e.g., In re Ionosphere Clubs, Inc.*, 113 B.R. 164, 169-71 (Bankr. S.D.N.Y. 1990); *In re Cardinal Indus., Inc.*, 109 B.R. 755, 765-66 (Bankr. S.D. Ohio 1990).

37. *In re Ionosphere Clubs*, 113 B.R. at 168; *see also In re Microwave Prod. of Am.*, 102 B.R. 666, 676 (Bankr. W.D. Tenn. 1989) (weighting the costs and benefits of appointing a disinterested trustee).

38. *See In re Parker Grande Dev., Inc.*, 64 B.R. 557, 561 (Bankr. S.D. Ind. 1986).

39. As Edward S. Adams points out: "The parties who can seek the replacement of the debtor in possession – creditors and equity holders – are unlikely to galvanize to action because they face both increased monitoring costs and an aggravated collective action problem. Even in the rare instances when claimants seek the replacement of debtors in possession, courts treat the appointment of a trustee as an 'extraordinary remedy', and infrequently replace the debtor in possession". Adams, *supra* note 31, at 620-621.

40 *See, e.g., In re Parker Grande*, 64 B.R. 557, 561 (Bankr. S.D. Ind. 1986).

41. *See, e.g., In re Stein & Day, Inc.*, 87 B.R. 290, 295 (Bankr. S.D.N.Y. 1988) (finding that

The last difficulty with the removal of the debtor is that it usually takes place late in the proceedings. As Edward S. Adams observes, the rare appointment of a trustee that does take place will usually occur after the debtor in possession has decided to proceed with the reorganization case, although the liquidation of the business may be in the other claimant's best interests. Therefore, the appointment will not completely alleviate many significant bankruptcy costs.[43]

Corroborating this claim, Lynn M. LoPucki and William C. Whitford have demonstrated that, although the American Bankruptcy Code appears to vest considerable discretion in the court to appoint trustees, in practice the appointment of a trustee is regarded by the bankruptcy courts as an extraordinary remedy to be employed reluctantly. More specifically, they found that trustees were appointed in only two of the forty-three cases (5%) in their study.[44]

Once again, this scenario is likely to be repeated in Brazil. Noticeably, the reasons why the debtor in possession stays at the helm of the business during the reorganization case are not related to specific circumstances of the American reality, such as particular aspects of its economy. On the contrary, these arguments are related to long established managerial principles, common to the operation of any business, be it established in a more economically developed country or not. In fact, this evidence is firmly grounded on general principals of business administration and finance, rather than on the specific vicissitudes of one economic center or another.

Considering the Brazilian social-economic context, it can be said, in effect, that the possibility of management removal with the subsequent appointment of a trustee will be even more unlikely than in the United States. In the abovementioned study, Lynn M. LoPucki and William C. Whitford also suggested that the appointment of trustees plays a greater role in large reorganization cases than it does in small reorganization cases.[45] That is certainly due to the higher degree of dependence between the exploitation of economic activity and the subjective attributes of those in charge of running the business in the later cases. In Brazil, where companies characteristically exhibit a highly concentrated control, oftentimes by a family, there is an even greater interplay between the exploitation of the corporate activity and the attributes of the controlling group/management. That factor makes it far more difficult to have management removed from a crisis-stricken concern going through reorganization. That leads to the conclusion that in Brazil, like in the United States, the ability to replace the debtor is ineffective in addressing the difficulties caused by a separation of ownership and control in the reorganization context.

Finally, it is worth pointing out that in relation to the permissive hypotheses of judicial management removal and the subsequent appointment of a trustee, U.S. law covers a much wider scope than its Brazilian counterpart. All the same, in view of

motion for appointment was simply a tactical response of a creditor to debtor's previous application to cite creditor for its contumacious conduct).

42. In view of that, Christopher W. Frost points out: "There are good reasons for the courts to set high standards for displacing management and appointing a trustee. One of the main reasons is the high cost such an appointment will entail. Trustees and their lawyers must be paid. Bankruptcy is an expensive proposition to begin with, and a trustee may add unnecessarily to those costs. Courts are extremely sensitive to cost issues and will be understandably reluctant to add to the number at the trough. Also, there is no assurance that a trustee who has had no prior relationship to the business of the corporation will do any better job in running the business than current management. Finally, courts must be alert to the underlying motive driving the motion for appointment". *See Running the Asylum: Governance Problems in Bankruptcy Reorganizations*, 34 Ariz. L. Rev. 89 (1992), at 123.

43. *See* Adams, *supra* note 31, at 620-621.

44. *See* LoPucki & Whitford, *supra* note 12, at 699-700.

45. *See* Lopucki & Whitford, *supra* note 12, at 700.

the delicate considerations of business order that must be addressed by the court when analyzing the request, a removal is regarded as rather an extreme procedure and seldom granted. I am led to believe that the Brazilian courts will adopt a similar stance when applying the already mentioned Article 64 to the concrete case.

As I see it, when faced with a situation of a similar nature, the judge must necessarily ask himself at least the following questions: Does the reorganization process stand a better chance of success under a different management composition? Is the trustee to be appointed prepared or experienced enough to run a troubled business? Will the costs to be borne out of the appointment of new management overtax the reorganization process of the crisis-stricken concern? Is the trustee to be nominated familiarized with the particular business under reorganization? Considering the timing factor, would the replacement of management be actually efficient for the recovery of the enterprise? In practice, the enormous complexity of these factors, added to the consequences to come out of management replacement for the future of the economic activity explored by the debtor company is most likely to lead to the application of Article 64 of the BBA only under rather exceptional circumstances.

Although in most situations the debtor's former management remains in office after the filing of the reorganization plan, management's power over the execution of the new business plan for the debtor corporation is controlled by both creditors and the judicial examiner. In effect, Article 64 of the Brazilian Bankruptcy Act states that the debtor in possession will continue to lead the company under the scrutiny of both a creditors' committee (if there is one) and the judicial examiner,[46] whose presence is mandatory in all reorganization cases in Brazil.

46. The expression "judicial examiner" is used in this Paper as a free translation for *administrador judicial*.

In a nutshell, the BBA offers five principal mechanisms to deal with the permanence of the debtor's managers in the control of the failing enterprise: a) it requires the managers to file with the court the balance sheets of the corporation during the entire period of the reorganization case (Article 52, IV); b) it requires managers contemplating some corporate actions (for instance, the sale of estate property outside the ordinary course of business) to obtain approval from the bankruptcy court (Article 66); c) it allows for the creation of creditors' committees to supervise the debtor's decision-making process (Article 26); d) it provides that during the reorganization case, non-compliance with any obligation laid down in the plan will entail the conversion of reorganization into bankruptcy (Article 61, § 1); e) it provides that the presence of the judicial examiner is mandatory in all reorganization cases (Article 22 of the BBA).

What is lacking from the spectrum of those mechanisms is a more careful attention to the participation of the creditors in the governance structure of the debtor company. In combination with the legal devices which deal with the permanence of the debtor's managers in the control of the failing enterprise, the involvement of the creditors in the governance structure of the latter is an indispensable means within the reach of them to provide a more successful management and consequently improve the economic performance of the company as it surfaces from bankruptcy. Part II of this Paper elaborates on this proposition.

Part II – The Participation of the Creditors in the Governance Structure of the Debtor Company

When a corporation becomes unable to pay its debts as they become due, bankruptcy law provides relief. The debtor company may restructure its debt and make other amendments to its capital and operating structure while temporarily shielded from the demands of creditors. Supplementing the financial restructuring, the debtor's business plan usually concentrates on restoring the company to financial health, not through debt restructuring, but through managerial decisions aimed at producing a more efficient business entity. For example, a new business plan may call for the abandonment or sale of unprofitable subsidiaries or firm components or a reduction in expenses.

In addition to the financial and managerial modifications that the debtor undertakes, special consideration should be given to governance reform. That is the context in which this Paper argues that management replacement is an exceptional rather than a routine mechanism of reorganization for crisis-stricken companies in Brazil. In view of that, alternatively to the replacement of management, some degree of participation of the creditors in the governance structure of the debtor company may be, all at once, a more feasible and efficient instrument within the reach of the creditors to ensure a more successful performance of the failing enterprise's management.

The reasons why the creditors should also take part of the governance structure of the firm during judicial restructuring are justified by the role played by this group of claimants in the reorganization context. During solvency, the corporate governance structure of any given firm usually vests discretionary authority in managers and relegates creditors to the position of contracting parties. As the corporation begins to approach insolvency, the creditors' contractual controls become more effective to grant them a somehow larger voice in the running of the firm.[47] Finally, when the firm reaches insolvency, creditors' contracts grant them more direct authority over managers and corporate law and bankruptcy law require managers to shift their allegiance from the shareholders to the creditors.

In fact, insolvency shifts the residual interest in business decisions from the shareholders to the creditors.[48] As the residual claimants of the firm during reorganization, it is logical for the creditors to have a higher degree of involvement in the governance structure of the business concern. Several means exist to employ the participation of creditors in the governance structure of the failing enterprise. These reforms, which should be implemented during the reorganization case transition, include: a) the creation of board structures; b) the appointment of creditors' representatives to the debtor's management structure through class voting; c) the concession to the creditors of veto rights over corporate decisions; d) debt capitalization. These reforms can ensure the viability of both the managerial and monitoring functions during the pendency of the restructuring process and can contribute to the financial and operational health of the enterprise that reemerges from reorganization.

47. The case law has already recognized this shift in the residual ownership of the firm during the "vicinity of insolvency". In *Credit Lyonnais Bank Nederland, N.V. v. Pathe Communications Corp.*, 1991 WL 277613 (Del.Ch.1991), Chancellor Allen stated that "At least where a corporation is operating in the vicinity of insolvency, a board of directors is not merely the agent of the residual risk bearers [that is, the shareholders], but owes its duty to the corporate enterprise".

48. From a *Law and Economics* standpoint, the residual owners are the persons whose interests are identical with those of the firm as a whole. To illustrate the theoretical allure of the residual owner approach, assume a firm with $ 100 million in assets that owes $ 30 million to secured creditors and $ 200 million to unsecured creditors. If the bankruptcy system followed the residual owner approach, it would put representatives of the unsecured creditors in control of the reorganizing firm. The secured creditors have no real interest in this reorganization because they will be paid in full in any event. The shareholders have no real interest in this reorganization because they will not be paid at all. The unsecured creditors own the "residual" – that is, whatever is left after the secured creditors have been paid in full. All of the gains and losses from actions taken during the reorganization will fall to them. They are the residual owners and so, according to the theory, the parties with the right incentives to govern during reorganization.

But who should be charged with the responsibility of implementing these reforms? First and foremost, the creditors themselves can make activist demands through the "power of the purse". Even outside bankruptcy, creditors are always vitally concerned with how well the debtor's management is performing. If management performs badly and cannot pay their debts, they will lose money. The point is that creditors are subject to varying degrees of risk of default. The degree of risk will, of course, depend on the total value of the business as compared to the amount of the debt. As the debt rises in relation to the value of the business, the risk to creditors rises. As the risk rises, the creditors will become more and more concerned with how the business is run and are likely to want increasing degrees of *control*. This risk-and-control sort of logic[49] also applies to the reorganization context, where creditors face an even higher threat of default. In view of that, through the "power of the purse", creditors may condition additional injections of capital on the debtor's acceptance of certain constraints on its power to manage.

Additionally, the directors that operate during the reorganization process can plan to make these changes. Finally, by using their monitoring power over the execution of the reorganization plan, the bankruptcy court and the judicial examiner may also intervene to incentive the establishment of new managerial and monitoring mechanisms. In the next four topics, this Paper briefly discusses the suggested mechanisms to employ the participation of creditors in the governance structure of the failing enterprise.

A – The Creation of Board Structures

It may be useful to the reorganization of the economic activity of the crisis-stricken company to modify its management structure through, for instance, the creation of a board of directors (if inexistent) or a consulting committee. The objective here is to impose some degree of intervention by the creditors upon the debtor's managerial function and grant them powers to appoint members of such board structures.

Not all Brazilian companies have a board of directors.[50] Only publicly-held companies are obligated to have one. Closely-held corporations and limited liability companies are *not* legally obligated to have a board of directors. Creating either a board of directors or a consulting committee in charge of deliberating on relevant managerial decisions and monitoring their execution is a mechanism that can facilitate the participation of creditors in the governance of the crisis-stricken company.

Of course, in order for both alternatives to work satisfactorily, it is essential that creditors have the ability to appoint at least one or more of their representatives to the board structures mentioned. As seen above, this ability to exercise some control over the operation of the debtor firm can result from the creditors' "power of the purse": as a condition of continuing to extend credit to the debtor company, creditors can bargain for the appointment of their representatives. Also, in order for the proposal to produce the desired effect, it is fundamental that the representatives to be appointed by the creditors be familiar with the type of business explored by the debt-stricken company and also have some technical knowledge of finance and economics.

Management structures' main role is to deliberate on essential corporate decisions for the benefit of the residual claimants of the firm. As shown before, outside bankruptcy, shareholders are the group entitled to hold the residual authority over business decisions. However, insolvency shifts the residual interest in business decisions from the shareholders to the creditors.

49. For an excellent explanation of the strong relationship between risk and control and its relevant importance to the exploration of economic activities *see* William A. Klein & John Coffee Jr., *Business Organization and Finance – Legal and Economic Principles* (2002).

50. *See* note 7 supra.

Thus, at least in the reorganization scenario, management must be accountable to creditors.[51] This accountability does not materialize unless the management structure is comprised of one or more creditors' representatives independent of the debtor's ones. In effect, independence promotes the kind of objectivity necessary to properly review management, and this objectivity in turn can promote thoughtful and careful decision-making by management during the reorganization case.

In addition to the board structures mentioned above, another important means to ensure management accountability is, of course, the creditor's committee. As a general rule, the BBA does not require the creation and permanent existence of the creditors' committee. Its conception is optional; it is only created when the creditors desire so. A permanent creditor's committee can be an essential instrument to monitor and discipline the firm's management, making sure that fundamental business decisions are being made in order to promote the firm's emergence and successful revival. As the chief representative of the largest group of interested parties in the reorganization case, the committee may also wield broad influence over the course of the proceedings.

B – Appointment of Creditors' Representatives through Class Voting[52]

As outlined in part I of this Paper, management replacement is not always a feasible means of reorganization. Alternatively, the inclusion of representatives of the creditors into the *existing* management structure of the debtor company may be a more plausible measure within the reach of them. If the existing management structure of the debtor company is primarily comprised of insiders, managers may not seek the creditors' best interests when making relevant business decisions during reorganization. Creditors should thus bargain to include some of their representatives into the existing management structure of the failing enterprise in order to ensure management efficient performance and accountability.

In fact, the strategic control of the firm plays a greater role in the reorganization context. The creditors must ensure that proper actions are taken and that appropriate progress towards recovery is being made. Critical control mechanisms need to be effectively allocated in the relationship between the existing management of the debtor company and the creditors. As shown above, one of those mechanisms is the creation of active and qualified board structures with the presence of creditors' representatives. Another mechanism is the appointment of creditors' representatives to the original management structure of the debtor company through class voting.

By linking new infusions of cash with corporate governance concessions, creditors can protect their interest and bargain for the appointment of at least one representative of them to the debtor's management structure by the means of a separate election. Once again, an insider majority would probably still control the management structure, but outside representation makes it harder for insiders to ignore or deceive creditors. At least some (or one) of the directors would be true creditors' representatives.

51. As Douglas G. Baird and Thomas H. Jackson point out "The law of corporate reorganizations should focus on identifying the residual owner, limiting agency problems in representing the residual owner, and making sure that the residual owner has control over the negotiations that the firm must make while it is restructuring". *See* Douglas G. Baird & Thomas H. Jackson, *Bargaining After the Fall and the Contours of the Absolute Priority Rule*, 55. U. Chi. L. Rev. 738, 755 (1988).

52. Conversely to the suggestion described above, the present one is based on the assumption that the debtor company has some sort of management structure already established.

C – Veto Rights over Substantial Corporate Decisions

Alternatively to the creation of board structures and the appointment of outside representatives, creditors can also bargain to have some veto rights detached from ownership over corporate decisions during the reorganization case. It is about admitting a certain degree of intervention by the creditors in the governance system of the company under reorganization, aiming at ensuring them that the objectives laid out in the reorganization plan will be striven hard for. The creditors' rights to veto businesses and operations that may increase the company's level of debt are measures that can contribute to the company's reorganization process.

The objective, again, is to constrain the discretion of managers by granting veto rights over some corporate actions to creditors, in the expectation that these actors can best determine whether proposed corporate actions will increase the economic performance of the enterprise or boost the company's level of debt.

D – Debt Capitalization

Finally, another attractive instrument to provide the creditors with some degree of control over the debtor company's governance structure is debt capitalization. Basically, a debt-capitalization operation consists of converting debt into shares of the failing enterprise. This restructuring mechanism permits the reduction of the amount of debt while increasing, in turn, the total value of the business as creditors become shareholders of the debtor company. Grating creditors with equity ownership facilitates the alignment of their interests with those of the former management and facilitates their involvement in the governance structure of the business concern.

Linking the fortunes of the creditors and the original shareholders can motivate the former to closely monitor the management of the enterprise. Upon emergence from reorganization, this alignment can ensure that the directors share the same interests as the new equity investors. In effect, by becoming equity-holders, creditors assume a personal stake in the success or failure of the enterprise. Thus, as active equity participants, they have incentive to monitor management's performance more effectively, since poor monitoring may have a direct negative impact upon their personal financial interests.

One could argue that creditors may not wish to become shareholders of a crisis-stricken company due to the higher risks involved with that choice. Moreover, creditors with higher priorities, such as secured creditors, may not want to become equity-holders and loose their privilege over other claimants. The Brazilian Bankruptcy Act resolves this problem by stating that every reform that occurs during the reorganization period is conditioned to its effectiveness. Therefore, if the reorganization fails to attain its goal, the eventual conversion of the restructuring case into liquidation would not affect the rights of those former creditors. In this case, the whole debt-capitalization operation would be disregarded and the former creditors would maintain their priorities *vis-a-vis* other ones.

Conclusion

The present Paper is not critical of the establishment of management replacement procedures by the Brazilian Bankruptcy Act. The inclusion of such measures, like in American Bankruptcy Law, is much needed as it is an indirect instrument of control and audit of the actions of the debtor running the company's business during the period of judicial reorganization. Therefore, at least for the case in point, the Brazilian Bankruptcy Act is a good statute.

What I criticize is the authorities' overrated trust in management replacement as a necessary means to reorganize a debt-ridden company. *It is not*. Management replacement is a very exceptional measure, which in practice must only be applied in extreme circumstances. The principle of disassociation between company and owner cannot be seen as one of the pillars of the new Brazilian bankruptcy law. Such an assumption carries with it a certain air of utopia, which is always the result whenever theory and practice stand so far apart.

As a result, this Paper suggests that, as an alternative to management removal/replacement, the involvement of creditors in the governance structure of the debtor company may be a more efficient and feasible instrument within the reach of them to improve the company's economic performance as it exits bankruptcy.

References

Anna Y. Chou. *Corporate Governance in Chapter 11: Electing a New Board*, 65 Am. Bankr. L. J. 559, 560-89 (1991).

Charles M. Elson, Paul M. Helms & James R. Moncus. *Corporate Governance Reform and Reemergence from Bankruptcy: Putting the Structure Back in Restructuring*, 55 Vand. L. Rev. 1917 (2002).

Christopher W. Frost. *Running the Asylum: Governance Problems in Bankruptcy Reorganizations*, 34 Ariz. L. Rev. 89 (1992).

David A. Skeel, Jr. *Doctrines and Markets: Creditors' Ball: the "New" New Corporate Governance in Chapter 11*, 152 U. Pa. L. Rev. 917 (2003).

Douglas G. Baird & Thomas H. Jackson. *Bargaining After the Fall and the Contours of the Absolute Priority Rule*, 55. U. Chi. L. Rev. 738, 755 (1988).

Edward S. Adams. *Governance in Chapter 11 Reorganizations: Reducing Costs, Improving Results*, 73 B. U. L. Rev. 581 (1993).

Erica Gorga. *Does culture matter for corporate governance? A case study of Brazil* (Stanford Law School, John M. Olin Program In Law and Economics, Working Paper 257, May 2003), *available in* Social Science Research Network *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=410701.

Fabio Ulhoa Coelho. *Comentários à Nova Lei de Falências e de Recuperação de Empresas* (2005).

Frederico Augusto Monte Simionato. "A reforma da lei de falências frente à reorganização econômica da empresa", *RDM* 108 (1997).

Luiz Tzirulnik. *Direito Falimentar* (1997).

Lynn M. LoPucki & William C. Whitford. *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. Pa. L. Rev. 669 (1993).

Margaret Howard. *Bankruptcy: Cases and Materials* (2005).

Mark E. Budnitz. *Chapter 11 Business Reorganizations and Shareholder Meetings: Will the Meeting Please Come to Order, Or Should the Meeting Be Canceled Altogether?*, 58 Geo. Wash. L. Rev. 1214 (1990).

Maria Celeste Morais Guimarães. *Recuperação Judicial de Empresas: Direito Concursal Contemporâneo* (2001).

Osmar Brina Correa-Lima. *Sociedades Anônimas* (2004).

Sílvia Mourthé Valadares & Ricardo Pereira Câmara Leal. *Ownership and Control Structure of Brazilian Companies* (2000), *available in* Social Science Research Network at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=213409.

Waldo Fazzio Júnior. *Nova Lei de Falência e Recuperação de Empresas* (2005).

William A. Klein & John Coffee Jr. *Business Organization and Finance – Legal and Economic Principles* (2002).