

COMITÉ MARITIME INTERNATIONAL

International Working Group on Cross Border Insolvency

ANSWERS ACCORDING TO THE BRAZILIAN LEGISLATION

QUESTIONNAIRE

SECTION 1

CROSS-BORDER MARITIME INSOLVENCY ISSUES

Part 1 – General Insolvency Principles Applicable to Foreign Creditors

1. Has your country adopted any specific rules on cross-border insolvency (such as the UNCITRAL Model Law or any specific domestic, bilateral or multilateral instrument)? If so, please provide a general description based on the topics discussed in this questionnaire.

Brazil has a specific law for bankruptcy and judicial and extrajudicial reorganization proceedings, which is Federal Law n. 11.101, of 2005. It does not focus on specific rules on international or cross-border insolvency, instead giving a general outline on the proceedings used when insolvency arises. The major understanding is that Law n. 11.101/2005 is also applicable when a foreign creditor is involved.

As of October 19th, 2012, Brazil has internalized UNCITRAL, which is to say we have adopted it as an internal law through legislative Decree number 538/2012. However, in order to be applicable within the country, a presidential decree is still necessary.

2. Do your laws recognize the standing of a foreign creditor or other person (such as a foreign flag authority of a locally domiciled ship owner or a foreign administrator of insolvency proceedings) to start or oppose an insolvency proceeding in respect of a local ship operator or in respect of assets located locally? If so, describe in detail those rights or

restrictions upon such rights of such entities which differ from those of local creditors, insolvency administrators or public authorities.

Brazilian law does recognize the standing of a foreign creditor to start insolvency proceedings within our courts. With regard to restrictions, Federal Law n. 11.101/2005 makes one distinction only between the legitimacy of national creditors and that of international creditors. Article 97 states that:

The following may request the insolvency of a debtor:

- I – the debtor himself, according to articles 105 to 107 of this law;
- II – the surviving spouse, any heir of the debtor or the executor/administrator;
- III – the unit holder or the shareholder of the debtor in the way indicated by the constitutive act of a company;
- IV – any creditor;

§1º If a company, the creditor shall present a certificate of the Public Record of Companies capable of attesting the regularity of its activities;

§2º The creditor that is not domiciled in Brazil shall present a guarantee relating to the costs and to the payment of the compensation referred to in article 101 of this law.

According to paragraph two, a creditor that is not a resident of Brazil, be it a company or a natural person, has legitimacy to request the insolvency of a debtor before a court as long as he presents along with the complaint, a previous monetary guarantee of the legal costs of the suit as well as of the compensation referred to in article 101 (malice: starting the proceeding knowing it was unfounded).

It deserves notice that, if the creditor is not a resident, the monetary guarantee that relates to the damages of acting with malice is due even before the lawsuit is received and the claim analyzed.

3. Do your laws have a procedure for supervising the activities in your country of a foreign insolvency administrator?

Brazilian law states that an insolvency administrator has to be a reputable professional acting as a lawyer, an economist, a company administrator, an accountant or a

specialized company. The law however does not make any distinctions relating to that person's nationality.

Even in the absence of further requirements, since the insolvency administrator will work directly with the judge responsible for the insolvency proceedings, he tends to be somebody in whom the judge has confidence.

That factor, along with the tasks that he is expected to perform makes it highly improbable that such person could live somewhere else other than Brazil. It doesn't mean though that the administrator could not be of another nationality, as long as he fulfills all of the prerequisites.

That being said, the law has specific provisions regarding the supervision of the activities of the insolvency administrator, regardless of nationality. Brazilian law determines that the administrator will not have full autonomy, which is to say that he shall not be at liberty to take whatever measures he intends to without communicating the creditors or the judge. The administrator has a legal duty to account for all measures taken as well as to request the judge's authorization for specific ones, such as hiring personnel.

4. If an administrator is unwilling to pursue a claim by the insolvent ship operator, can foreign creditors apply to an insolvency tribunal for a transfer of the subject matter of the claim from the state of the insolvent ship operator or group of creditors?

In Brazil there is not a Tribunal with the specific goal of resolving claims arising from insolvency disputes. What is created, depending on the organizational choices of each member state of the federation, is a specific court to which any claims involving the insolvency or judicial recovery of a company are distributed. That court, however, remains under the jurisdiction of the ordinary State's Tribunal.

5. Do your laws permit foreign creditors to apply to a court for supervisory orders if they consider the administrator is acting inefficiently or wrongly? If so, describe the procedure generally.

As mentioned in the answer for question n. 2, there is no proper distinction between Brazilian and foreign creditors. The only legal safeguard measure is for the creditor who lives abroad to pay a guarantee before the bankruptcy procedure commences.

Therefore, if the administrator acts wrongly or inefficiently any creditors can apply to the bankruptcy court judge for the application of the due sanctions. For instance, in case of late presentation of the estate reports, the judicial administrator may be prosecuted for the crime of disobedience to a public authority. He would then be deposed and all reports and accounts would be reorganized by a substitute.

The administrator will only be remunerated for the approved accounts. However, if he renounces for no relevant reason or is deposed for negligence or malice, no remuneration will be received for the services.

6. Do your laws permit foreign creditors to commence legal proceedings against administrators if they consider the administrator has acted negligently or wrongly?

There's no need for the filing of a specific claim as the judge will be responsible for the substitution of the negligent administrator. A petition exposing the reasons why the administrator is acting wrongly would be sufficient for the judge to remove him, accordingly to the previous answer. However, nothing prevents the creditors of commencing legal proceedings if they consider they were personally damaged by the bad administration.

7. If a foreign creditor or claimant against a ship operator foresees it will suffer a loss or commercial disadvantage because of the appointment of a private receiver or the way the private receiver is acting, does such a foreign claimant have any legal remedies against the receiver, such as applying to a court for supervisory orders or to put the ship operator into bankruptcy?

There is no provision for private receivership in the Brazilian legal system - but only the appointment of a court indicated administrator.

On that note, it deserves notice that Brazilian legislation does not permit the replacement of that administrator on the basis of a suspicion of possible commercial

loss. There are formal requirements for replacing the professional appointed as the administrator. Those are related to the preservation of the insolvent's inventory, such as the ones mentioned in the answers to questions 5 (five) and 6 (six).

8. Do your laws permit assertion of insolvency generally over any asset of an insolvent ship operator domiciled in your country? Please comment whether this scope of jurisdiction differs between a ship of your country's registry owned by persons domiciled in your country or a ship of another flag owned by persons domiciled in your country.

Brazilian Bankruptcy legislation adopts the principle of universality. According to that principle, if the insolvent company's headquarter is located abroad, the only competent court to assert its bankruptcy is the one situated where the company keeps its main establishment in Brazil (Law n. 11.101/2005, article 3). Therefore, if the ship operator is a company with its main establishment situated in a specific Brazilian city, that city's bankruptcy court will have jurisdiction to judge the insolvency process. A Ship's actual flag is irrelevant for matters of jurisdiction.

9. Do any legal or procedural requirements have to be followed to ensure the insolvent ship operator or the insolvency administrator identifies all known foreign creditors?

Although there's no specific procedure concerning foreign creditors, Brazilian Bankruptcy Law (Law n. 11.101/2005) establishes that in order to identify all creditors the judicial administrator will be responsible for verifying all credits based on the business ledgers, commercial or taxes documents or documents provided by the creditors (article 7). Specialized companies and professional assistance can be requested.

Next, the administrator shall publish on the Official Judicial Journal a list comprising all creditors found in the insolvent company's books, documents and registries. The creditors will then have a 15 days deadline to whether petition their inclusion in the proceeding or impugn the credits listed.

If the debtor is the one to initiate the proceedings he will be responsible for submitting the list of creditors.

10. Do your laws require administrators of insolvency proceedings to give notice of the proceedings to foreign creditors? As a general practice, how is such notice given to foreign creditors?

According to Law n. 11.101/2005, article 22, I, a, it is of the administrator's duties to send mail to the creditors informing the corporate recovery demand or bankruptcy assertion's initial date and the nature, amount and classification of the credit.

11. Do your laws require administrators of insolvency proceedings to give notice of time bars for filing of claims to foreign creditors? As a general practice, how is such notice given to creditors?

Brazilian legislation does not require that the administrator gives notice of time bars for foreign creditors. As a general practice, a list of all creditors is compiled by the administrator and such list is published in the Official Judicial Journal. Creditors will then have a 15 days deadline to contest or require their inclusion in the procedure, as explained in question n. 9 (nine).

12. If the insolvent business is a ship owner, do your laws require notice of insolvency proceedings to be given to the ship registrar for domestically registered vessels?

No notice of insolvency is supposed to be given to the registrar. It is relevant to notice, though, that prior to any sale of a vessel, the seller must present an assertion of inexistence of insolvency procedures. The assertion is provided by the ship registrar which in Brazil is the Port Authority or the Maritime Court (for vessels over 100 tons).

13. Do your laws require notice of insolvency proceedings to be given diplomatic or consular officials of the flag states of foreign registered vessels which are assets of a local insolvent ship operator?

There is no such requirement in Brazilian laws.

14. If a foreign creditor later learns of the existence of insolvency proceedings, is the foreign creditor permitted to file late claims or have a right claim against any of the assets of the insolvent ship operator which have not been distributed to creditors?

Once the administrator has concluded the credit verification based on tax and commercial documents research, the final list of creditors shall be published on the official judicial diary.

Creditors will then have 15 days to whether demonstrate their intention to be included on the list or present disagreements concerning the debts verified.

If the deadline is disrespected, the creditors' manifestations are considered belated. However it is possible to request the rectification of the row of creditors to the bankruptcy court judge in order to include the belated creditors in it. Those will receive their credits like the other creditors but, as a consequence for their delay, they won't be entitled to vote on general assemblies' deliberations or to benefit from eventual values distribution.

15. Please describe the conflict of laws rules for recognition of foreign maritime claims in insolvency proceedings. For example, if the claim is a maritime lien under the law of the place where the claim arose but not in the country where the insolvency proceeding is being conducted, will the insolvency administrator or tribunal recognize the foreign maritime lien?

Conflict of laws in the Brazilian jurisdiction are regulated by the rules of the Decree n. 4.657/1942. According to those rules, goods and relations concerning them are regulated by the law of the country in which they are located.

When it comes to qualifying and ruling obligations, Brazilian law applies the law of the country in which that obligation was contracted (art. 9, Decree 4.657/1942).

Specifically regarding lien, Brazilian law states that it shall be ruled by the law of the domicile of the person in whose possession the good is found (article 8, paragraph 2, Decree 4.657/1942).

Hence, if the lien is recognized by the Brazilian bankruptcy court, it will follow the order of credits set out by Article 83 of Law n. 11.101/2005.

16. Apart from the characterization and priority of claims, are there any other procedural differences in the handling of claims between those by foreign creditors and those by local creditors? With reference to the types of claims listed in the table, please describe any differences in detail.

A foreign creditor may initiate insolvency proceedings against a Brazilian debtor. If the creditor is not domiciled in Brazil, he shall pay a cautionary sum as described in article 97, IV, §2º of the Code of Civil Procedure and article 101 of Federal Law nº 11.101/2005. However, if there are treaties of international cooperation and jurisdictional assistance, the members of those countries are exempt from paying such amount (for instance the Protocol of Las Leñas, signed by Brazil, Argentina, Paraguay and Uruguay). In terms of competition within the proceedings, there is no difference made between a foreign creditor and a local one.

A factor that deserves notice is that Brazilian jurisdiction is absolute when it comes to the insolvency of a debtor whose goods are located in Brazilian territory. That means that there is no possibility of initiating insolvency proceedings against a debtor whose goods are located in Brazil in any country other than Brazil. Brazilian jurisdiction is exclusive regardless of the kind of proceeding in the following situations: whenever the debtor has its main establishment in Brazil, has any real estate or a branch office in Brazilian territory. However, starting an insolvency proceeding in Brazil will not be possible if the debtors main establishment is abroad and he does not have any branch offices in Brazil, only owning movable assets in Brazilian territory (such as ships).

Brazilian courts tend to recognize and ratify foreign insolvency judgments that fit into the legal prerequisites if they cannot be included in the situations mentioned above. Up until 2004, ratification was done by the Supreme Court, however, that power was transferred to the Superior Court.

In regard to the specific claims indicated in the table, there is not a procedural difference to be observed according to the type of claim. Whether the creditor holds a secured claim or an unsecured claim the judicial insolvency procedure will be the same.

17. Does your law recognize rights of claims to property rights, sale and enforcement given by foreign law to particular types of creditors, such as, for example, to financial institutions or spouses for their entitlement to business property interests of the other spouse on separation and divorce?

The recognition of the credit will depend on the compatibility it holds with Brazilian law. Factors such as the nature of the asset and the nature of the guarantee would have to be taken under consideration. If such claim is commonly accepted under Brazilian jurisdiction there will be no problem recognizing its applicability. The priority order of Article 83 is related to the credits' nature.

18. Is the recognition of foreign arbitral awards for purposes of proof of claim in insolvency proceedings different from the recognition of foreign arbitral awards for general legal purpose? Please explain any differences.

The procedures for arbitral awards recognition are predicted in Law n. 9.307/1996 (Brazilian Arbitration Law, UNCITRAL model based). No distinction is made between insolvency and general legal matters awards. Both follow the same proceedings.

19. If the insolvent ship operator is a state-owned enterprise, are there any differences in the rights or procedures available to a foreign creditor under your country's insolvency law?

The Brazilian Bankruptcy law does not apply to public companies or societies whose capital is both public and private (article 2, I). Hence, the State itself is supposed to adopt the necessary measures to go through its enterprise economic crisis and fulfill contractual obligations. It will also be responsible for unpaid debts, even if it includes acting as a part in judicial processes.

20. Do your laws permit the administrator of a foreign insolvency proceeding to publish notices of such proceedings in local news media or to communicate directly with local creditors concerning proofs of claim and payment of any recoveries in the insolvency proceeding? If

there any legal restrictions on direct handling of claims by foreign administrators, please provide details.

According to the Brazilian Bankruptcy and Recovery Law, any publication ordered by the judge shall take place in the Official Judicial Journal. However, when the size and importance of a company thus requires, it can be ordered that such publication take place in highly circulated newspapers (article 191). That initiative however, is not taken by the administrator, instead being within the realm of activities expected of the judge.

There are two specific instances where the proceedings are published in the general media and those are: the sale of any of the insolvent company's assets and the debtor's request of recognition of satisfaction of all debts that would lead to the extinction of the proceedings.

Once legal insolvency proceedings commence, all contact between creditors, debtor and administrator is made through the judge, that is to say there is no provision for the direct handling of claims by the administrator, foreign or local.

21. Will your country's court recognize a request for the recognition of foreign insolvency proceedings?

The procedure for recognition and application of foreign judgments inside of Brazilian jurisdiction is the same for all decisions, regardless of the issue dealt with. According to the 45th constitutional amendment, it is one of the attributions of the Superior Court of Justice to ratify any decisions originated from a foreign court.

The power to do so belongs to the President of the Court who is at liberty to ratify it observing the following prerequisites: the judgment was delivered by a competent authority in the country of origin; both parties were properly notified of the proceedings; there is no further possibility of appeals of any kind; the authenticity of the judgment was certified by a Brazilian consul and the party presented a translated version of such judgment that was done by a sworn translator.

22. Will such a request be recognized if it comes directly from a foreign trustee in bankruptcy, liquidator or administrator, or does the request have to be in the form of a letter of request issued by the foreign bankruptcy tribunal?

The ratification procedure has to be initiated by any interested person, through a lawyer. They will do so through a petition addressed to the President of the Superior Court of Justice that shall be delivered to the court.

23. What legal standards do your country's courts apply for the purpose of recognition of foreign insolvency proceedings? Please provide details.

As answered in question 21, there are four pre-requisites to the recognition of foreign proceedings in the Brazilian jurisdiction:

- a) the judgment has to have been delivered by a competent authority in the country of origin;
- b) both parties must have been properly notified of the proceedings;
- c) there can be no further possibility of appeals of any kind;
- d) the authenticity of the judgment has to have been certified by a Brazilian consul and the party has to have presented a translated version of such judgment done by a sworn translator.

24. Do your laws have a procedure for a request for the recognition by a foreign insolvency administrator or insolvency court of a local insolvency proceeding? Are such requests generally made by the administrator or the insolvency court? Generally describe the procedure.

There is no such procedure. The recognition of a Brazilian insolvency proceeding must be requested directly to the foreign insolvency court.

25. Can an administrator of insolvency proceedings request the courts of your country for assistance in obtaining recognition of insolvency proceedings of foreign insolvency administrators or foreign courts? Generally describe the procedure.

No. The proceedings follow the system of foreign sentence recognition described in the answer to question 21.

26. Will your courts enforce any compulsory transfer of a contractual obligation involving a vessel formerly owned by an insolvent ship operator, if this contractual obligation affects parties located in your country?

Brazilian introductory law to the Civil Rights Code delimitates which legislation applies to conflict of laws. According to article 9 the law applied to obligations is the law from the country where that obligation was entered into; paragraph 2 of that same article states that the obligations' constitution place will be that of its proposer's domicile.

Brazilian courts will only enforce the obligation if the local law is the one applicable, accordingly to the mentioned article.

27. Does your legal system have a procedure for the coordination of concurrent insolvency proceedings involving maritime assets, insolvent ship operators or creditors in your country and abroad? Is this procedure set out in laws or regulations or has it been developed through practice of insolvency tribunals? Please provide details including any generally used precedent forms of procedural orders.

Brazilian Bankruptcy and Insolvency law does not have a specific procedure for coordinating local and foreign insolvency procedures. All that is predicted is how to ratify foreign procedures as well as specific competency – when a procedure has to be led by the Brazilian authorities and when it can be done by foreign courts, as explained in previous answers.

28. Is your country a party to any bilateral or multilateral agreements for the coordination of multi-country insolvency proceedings or the recognition of foreign insolvency proceedings? Please list such agreements.

Brazil is signatory of the Montevideo Treaty (1889), that regulates international bankruptcy, but it wasn't ratified, which means its rules are not recognized within national legislation.

Hence, the only international agreement specifically comprising foreign insolvency proceedings Brazil is party to is the Bustamante Code (1928) along with Bolivia, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, Salvador and Venezuela. The code was elaborated during the Convention of Havana, in Cuba, and adopts the principles of unity of jurisdiction and universality of the bankruptcy declaration effects.

29. Have any provisions of your insolvency law created legal uncertainty or difficulties in the administration of cross-border maritime insolvencies? Please refer to any legal commentary or case law.

There is no notorious case in which Brazilian insolvency law created difficulties or uncertainty in cross border proceedings. However, there are certain points that could be worked on.

As explained in the questions above, the procedure for the bankruptcy of a debtor in Brazil is mainly concerned with the borders of the country, which is to say that publications take place in journals of national circulation and there is no specific notice given across borders. That is a specific point that could use further developing.

Since there is no connection between a procedure started in Brazil and one from another jurisdiction, a party risks conflicting judgments. The issue is magnified considering that once a foreign judgment is ratified by the Superior Court, the Brazilian suit that has not yet been finalized automatically loses its object. On the other hand, a definitive judgment before a Brazilian court will hinder the ratification of a foreign procedure by the Superior Court.

SECTION II

GENERAL MARITIME INSOLVENCY ISSUES

Part 7 General Insolvency Issues Applicable to Ship Operators and Maritime Property

30. Are ships registered in your country or ship operators incorporated in your country subject to insolvency laws of general application or do your laws provide for specific rules relating to the administration of the businesses of insolvent ship operators?

There is not a specific law to be applied to shipowners and ship operators. They are subject to a general insolvency law, which is Law 11.101/2005.

31. If your laws provide for specific rules relating to the administration of the businesses of insolvent ship operators or ships under your registry as distinct from assets of commercial enterprises generally, please provide details of how these rules applying to ships or ship operators differ from general insolvency administration.

The Brazilian insolvency and reorganization law does not create any difference when it comes to the treatment given to the administration of an insolvent company and the insolvency proceedings to which they are subjected. There is not any specific set of rules to be applied to maritime insolvency proceedings.

32. Is there a monetary or asset value threshold for the application of various forms of insolvency procedure? For example, is there a form of simplified insolvency administration for ship operators with assets of limited value?

According to Brazilian legislation, the overall insolvency procedure is the same regardless of the total value of a company's assets. The difference between companies with assets of a smaller value is only made when it comes to the plan for the judicial reorganization of such companies.

33. Do rights to commence insolvency proceedings or insolvency procedures differ if the debtor ship operator is a natural person as distinct from a legal entity? Describe any differences generally.

Firstly, it must be noted that Brazilian Insolvency Law (11.101/2005) applies not to legal entities or natural persons, instead, it applies to “businessmen and business companies” (article 1, Law 11.101/2005).

The differentiation is of importance because according to Brazilian civil law, a person or a legal entity will be considered a business if it performs, professionally, an organized economic activity for the production or circulation of goods or services.

If that is done by a legal entity, than that entity will be considered a business company; if it is performed by a person, that person will be considered a businessman. So, one can conclude that the difference exists with regard to the activity performed, not to the nature of the person.

If the debtor is a natural person and cannot be considered a businessman, than in order to commence insolvency procedures, the creditor shall apply the provisions of the Civil Rights Code regarding civil insolvency.

However, a ship operator will most likely always be a business, whether they are a natural person or an entity as they will be performing professionally, an organized economic activity for the production or circulation of goods or services.

One final point must be clarified and that is that there are specific debtors (businessman/business entities) to whom the Brazilian Bankruptcy Law does not apply. According to article 2nd, the law does not apply to government-owned entities and mixed-capital companies and to public or private financial institutions, credit unions, consortia, supplementary pension companies, health care plan companies, insurance companies, special savings companies and other organizations held equivalent by law to those listed above.

34. If creditors are asserting claims against all or substantially all the assets of an insolvent ship operator, does this result in distinct or additional procedural or legal requirements?

When creditors file for bankruptcy proceedings in the terms provided by Brazilian legislation, there is no possibility of choosing which of the debtor's assets they would like to be affected. As the opening of such proceedings can only happen if the amount of the debts surpasses the net worth of the debtor's assets, it must involve all of those assets.

35. Are insolvency procedures administered by courts of general jurisdiction, or by specialized courts or tribunals exercising commercial or insolvency jurisdiction?

Initially, it is worth mentioning that Brazilian jurisdiction is divided between Federal, State, Military, Labor and Electoral Courts and Tribunals. Military, Labor and Electoral jurisdictions are very specialized, judging only specific claims directly relating to those matters.

State and Federal jurisdiction, however, are relatively wider, allowing for a variety of matters to be brought by parties.

Jurisdiction for federal judges is defined in article 109 of the Brazilian Constitution, and according to item one of such article, federal judges are competent to judge claims in which the Union, any of its agencies or any government owned entity has an interest, be it in the condition of defendant, plaintiff, assistant or opponent, unless the claim relates to insolvency or labor accident and excluding those that are subject to the jurisdiction of Electoral or Labor Tribunals, amongst other. That means that any insolvency claim shall be initiated before state courts.

However, there is no specific Tribunal specialized on insolvency procedures.

That being said, specific bankruptcy and judicial recovery courts can be created based on location criteria, that is to say, depending on the region's necessity.

If there are very few insolvency claims in a certain city, for instance, those claims will be judged by the regular civil court, for in that case, the respective State Tribunal won't create a specialized court if there's no need for it do so. On the other hand, if the insolvency court does exist, insolvency procedures subject to its jurisdiction must be commenced there.

36. Describe generally the threshold tests set out in your law for the status of insolvency.

The threshold tests are defined by Article 94 (Law n. 11.010/2005), according to which, bankruptcy shall be decreed of the debtor who:

- without a relevant reason under the law does not pay on the due date a liquid obligation materialized under a protested execution instrument or instruments, the sum of which exceeds the equivalent of forty (40) minimum wages on the date of the petition in bankruptcy;
- executed for any liquid amount, does not pay, does not deposit and does not appoint sufficient assets for attachment within the legal term;
- performs any of the following acts, unless they are part of a judicial reorganization plan:
 - (a) liquidating his assets precipitately or resorting to ruinous or fraudulent means to make payments;
 - (b) carrying out or by unequivocal acts attempting to carry out, with the object of delaying payments or defrauding creditors, a simulated transaction or the disposal of part or all of his assets to a third party, whether or not a creditor;
 - (c) transferring an establishment to a third party, whether or not a creditor, without the consent of all the creditors and without keeping sufficient assets to settle his liabilities;
 - (d) simulating the transfer of his principal establishment with the object of circumventing the law or inspection or to harm a creditor;
 - (e) giving or increasing a guarantee to a creditor for a debt contracted previously without keeping sufficient assets free and clear to settle his liabilities;
 - (f) absenting himself without leaving a qualified representative with sufficient funds to pay creditors, abandoning an establishment or attempting to hide from his place of domicile, the locality of his headquarters or of his principal establishment;
 - (g) failing to perform, within the established term, an obligation assumed under the judicial reorganization plan.

Creditors have the right to join as co-parties in order to complete the minimum limit for the petition in bankruptcy based on the lack of payment of a protested debt. In this event, the petition shall be supported by enforcement instruments pursuant to Article 9, sole Paragraph, accompanied by the respective protest instruments for bankruptcy purposes in accordance with specific law.

If the request is based on a frustrated execution, the petition in bankruptcy shall be supported by a certificate issued by the court where the execution is proceeding.

If the request is based on the acts described in item number 3, the petition shall describe the facts that characterize it, any evidence available to be attached and that to be produced to be specified.

37. If the threshold tests for insolvency proceedings in your country differ for a foreign ship operator with assets in your country which wishes to begin insolvency proceedings in your country, describe these differences in detail.

There is no difference between the prerequisites necessary to start insolvency proceedings if the creditors wish to start insolvency proceedings against a local or a foreign ship operator. The difference only exists when it comes to the creditor's nationality, as established by Article 97, paragraph 2 (Law n. 11.101/2005), as was explained in question 09.

38. Do your laws permit a private creditor to obtain a court order to begin insolvency proceedings against a ship operator? If so, describe generally what facts or legal grounds the creditor must show to obtain such an order.

Obtaining a court order is not mandatory in insolvency proceedings. In fact, according to Article 97, IV (Law n. 11.101/05) any creditor is entitled to commence a procedure with no need for judicial permission. The creditor will need to fulfill the same legal prerequisites that any plaintiff needs to fulfill in order to start legal proceedings: legitimacy, interest and legal possibility of the claim.

39. Do your laws permit a public authority to obtain a court order or to exercise its own jurisdiction to begin insolvency proceedings against a ship operator other than procedures available to private creditors? If so, describe generally what are the factual or legal grounds for such public authority to begin such insolvency process?

There is not such a prerogative in Brazilian legislation. Public authorities and private creditors are submitted to the same requirements concerning insolvency procedures.

40. Does a ship operator have rights to defend or oppose an insolvency proceeding begun by private creditors or public authorities? If so, describe generally what defences are available.

A debtor – ship operator or not – may present his defense against an insolvency claim (during the term for answer) by arguing the hypotheses set out by Article 96 (Law n. 11.101/05), according to which bankruptcy shall not be decreed if the respondent presents evidence of falsity of an instrument, of time-barring, of nullity of an obligation or instrument, of payment of the debt, of any other fact that extinguishes or suspends an obligation or does not legitimize the collection of an instrument, of a defect in protest or in its instrument, of cessation of corporate activities for more than two (2) years prior to the petition in bankruptcy, evidenced by a qualified document of the Company Public Registry, which shall not prevail against evidence of exercise after the registered act and finally, if he files a petition for judicial reorganization (with due regard for the legal requirements).

41. Do your laws permit a ship operator to voluntarily begin an insolvency proceeding? If so, describe generally what facts or legal grounds a ship operator must demonstrate to begin voluntary insolvency proceedings.

Yes, debtors may request their own bankruptcy assertion if they are included in the situations described by Article 105 (law n. 11.101/05) – note question 40. Hence, debtors may petition to the court for bankruptcy if they undergo an economic and financial crisis, considering they do not meet the requirements to petition for judicial reorganization, finding it impossible to continue their business activities.

42. Do creditors or any other persons with legal standing (such as public authorities, shareholders or employees of a ship operator) have rights to oppose a ship operators' voluntary insolvency proceeding? If so, describe generally what classes of persons other than creditors have such legal standing and what grounds of opposition are available.

There is no legal provision with regard to how any creditors should oppose a debtor's voluntary insolvency proceeding. In fact, if the demand has the proper instruments and is presented in due time, the judge will pronounce a decision with no need to give notice to creditors or any other persons with legal standing.

However, once one begins insolvency procedures, there is a parallel investigation of the occurrences that led up to said insolvency. The objective of such investigation is to look for the existence of possible fraud or legally punishable conduct within that time frame.

43. Do your laws provide for a time bar for filing of claims in insolvency proceedings which is different from limitation periods or prescription for commencement of maritime claims generally? If insolvency proceedings have different time bars for filing of claims, are these time bars set out in legislation or are they decided by insolvency administrators or tribunals on a case-by-case basis?

As mentioned in the previous answers, the prerequisites for starting insolvency proceedings are not specifically time related – that is to say, there is not one pre defined window of time in which bankruptcy may be requested. Also, those prerequisites are previously set out in the existing legislation.

However, in some instances, limitation periods and prescription may be of relevance. For example, one of the scenarios in which a creditor may file for the debtors bankruptcy is that in which the judicial execution of a debt is unsuccessful. In that case, if the debtor, once notified to pay, deposit or appoint sufficient assets for attachment does not do so in the legal term, the creditor may start insolvency proceedings against such debtor, but they have to wait the legal term, which, in that case, would be of 03 days (article 652, Code of Civil Procedures).

44. Do your laws permit an insolvency administrator to carry on the ship operator's business for a temporary period in order, for example, to complete voyage or charter party commitments?

During the whole procedure of bankruptcy declaration, the insolvency administrator will be in charge of the society's administration. Therefore, if the debtor is not yet considered bankrupt, its business' management will be conducted by the administrator, both judicially and economically. That includes debtors who are ship operators and their maritime contracts.

45. Do your laws permit an insolvency administrator to disclaim or otherwise set aside future contractual obligations such as charter parties or contracts of affreightment?

Not in today's law. However, the new project for Brazilian Commercial Code stipulates situations when the owner's responsibility might be limited. The new project has not received a law status yet.

46. Do your laws permit or require an insolvency administrator to compulsorily transfer contractual obligations such as contracts of affreightment or employment agreements with crew from the insolvent ship operator to the purchaser of the vessel from the estate of the insolvent owner?

According to article 141 of Federal Law 11.101/2005, when a sale of one of the assets of the bankrupt occurs, the object of the disposal shall be free of any encumbrance and the purchaser shall not succeed in the debtor's obligations, including tax-and labor-related obligations and occupational accident obligations.

Part 8 Acceleration of Remedies

47. Do your laws permit a creditor to contract for immediate repayment of an entire debt, such as future obligations under a ship mortgage, if a ship owner becomes insolvent?

There is no legal provision allowing for such a transaction. However, a creditor may judicially execute a debt without filing for the insolvency of the debtor. In that case, such creditor may ask for the attachment of a credit the debtor has with a third party (articles 671 to 676, Code of Civil Procedures).

48. If there are differences in the application of these laws to acceleration remedies by foreign creditors as distinct from local creditors, describe these differences in detail.

As there are no predictions for advanced payments under Brazilian legislation, the question does not apply.

Part 9 Classes of Claims and Creditors

49. Do your insolvency laws apply differently to differing types of claims or creditors? Please respond to this question using the attached table. For example, is a bank or financial institution permitted to enforce a ship mortgage by procedures outside of an insolvency which would not be available to a ship mortgagee other than a bank or financial institution?

When it comes to different types of credits, the way the law is applied does not differ. The only differentiation is made with regard to the order in which the payment is made, and that order is based not on the kind of company that the creditor is, but the type of credit that they hold. However, that difference will necessarily be addressed during the proceedings.

According to article 83 (Law n. 11.101/2005), the order is as follows:

- 1st: labor (up to 150 minimum wages) and occupational accident claims
- 2nd: claims with in rem guarantees (only up to the limit of the value of the asset)
- 3rd: tax claims (with the exception of fines).
- 4th: special privileged claims
- 5th: general privileged claims

6th: unsecured claims follows

7th: contractual penalties and fines originated in the breach of criminal or administrative legislation (here included tax fines)

8th: subordinate claims (provided for in law or contract and claims of partners and officers without employment bond).

50. Does the existence of an insolvency proceeding under your country's law alter the priority of creditors' claims against a ship owned or operated by an insolvent person? Please respond to this question with reference to the types of claims listed in the attached table.

See answer 49 for the priority order established by Article 83 (Law n. 11.101/2005).

51. If a shipowner commences proceedings to establish a limitation fund under the LLMC Convention or to establish a limitation fund under domestic law, describe the relationship between such fund and any insolvency proceedings involving that shipowner. For example, can creditors begin insolvency proceedings if a limitation fund has been established? Can an insolvent shipowner establish a limitation fund?

As there is no provision for the establishment of a limitation fund under the LLMC Convention in Brazilian legislation, the question does not apply.

Part 10 Proposals for Reorganization or Compromise

52. Do your laws permit an insolvent ship operator to make a proposal for the reorganization of its business or compromise of claims in which the ship operator would continue to operate into the future if the proposal is approved?

Yes. As mentioned in the previous questions, Federal Law n° 11.101/05 regulates not only insolvency proceedings, but also judicial and private reorganization proceedings, described as a procedure with the objective of enabling a debtor to overcome an economic/financial crisis allowing the maintenance of the productive source, of the

employment of the workers and of the interests of the creditors, thus promoting the preservation of the company, its social contribution and stimulation of economic activity.

However, in order to be able to start recovery procedures, a debtor must fulfill a specific set of requirements (article 48, Law 11.101/2005), such as:

- To be active in its commercial activity for the past 02 (two) years.
- To not have gone bankrupt, or, otherwise, to have the ensuing responsibilities declared extinct by a judgment no longer subject to appeal.
- Not to have received concession of judicial recovery over the course of the past 05 (five) years;
- Not to have received concession of judicial recovery based on the plan described in section V of this chapter (plan of judicial recovery for microenterprises and small businesses)
- Not have been convicted or not having, as an officer or controlling partner, a person convicted of any of the crimes provided for herein.

53. Do your laws permit such proposals to be conducted through private contractual arrangements between an insolvent ship operator and some of its creditors, or do such proposals need to be conducted under supervision of a court or with approval of all identifiable creditors?

Brazilian laws allow for private reorganization of a company, however, in order for a company to be apt to start it, the same requirements that are requested for starting judicial reorganization must be met (such as mentioned in the answer to question number 52). However, if they choose to start out-of-court reorganization, certain credits cannot be included in the reorganization plan: tax or labor-related claims, occupational accident claims and claims laid out by articles 49, paragraph 3 and 86, item II (article 161, Law 11.101/05).

Article 49, paragraph 3 relates to creditors holding a position of fiduciary owner of real or personal property, financial lessor, owner or committed seller of real estate whose respective agreements include an irrevocability or irreversibility clause, including under real estate developments, or an owner under a sale agreement with title retention.

Article 86, item II, refers to claims relating to amounts delivered to the debtor, in domestic currency, resulting from an advance on an export contract, provided the full term of the transaction, including any extensions, does not exceed the term established in the specific rules of the proper authority.

54. If it is lawful to conduct a proposal through private contractual arrangements, are such private contractual arrangements affecting a ship legally binding on other claimants against that ship who have not participated in such private contractual arrangements?

Such private proposals may be binding on other claimants who have not participated in the negotiation of the recovery plan but only if it is signed by creditors representing over three-fifths (3/5) of all claims of each kind there encompassed (article 163, Law 11.101/2005), and once it is ratified by a judge.

Despite binding all creditors once ratified by a judge, that effect is only with respect to claims constituted up to the date of the petition for ratification (article 163, paragraph 1, Law 11.101/2005).

55. If a proposal is required to be conducted under supervision of a court or approval of all known creditors, please provide a general description of the reorganization procedure.

Question does not apply to the Brazilian system, as the proposal is not necessarily to be conducted under supervision of a court or subject to the approval of all known creditors.

However, if a company (or a businessman) finds itself on a financial crisis and wishes to start reorganization procedures under court supervision – or if they do not qualify for doing so without it –, it shall petition the judge of the insolvency court with its request, with the judge granting, or not, the processing of the judicial reorganization.

Here, as well as in insolvency proceedings – if granted judicial reorganization – there is to be a published list of all creditors. Such list is to be elaborated by an Administrator, appointed by the judge, who shall look over the books of the company in order to do so and have it published within 30 (thirty) days of the decision of the judge that grants reorganization.

Also, the company shall submit its reorganization plan to the court within 60 (sixty) days, containing a detailed description of the means of reorganization to be used, a statement of its economic feasibility and economic-financial and an appraisal report on the debtor's assets, signed by a legally qualified professional or specialized company. Failing to do so will result in the declaration of bankruptcy by the court.

The referred plan may be questioned by any creditor within 30 (thirty) days and if that happens, the judge shall call for a general meeting of creditors in which they will resolve on the reorganization plan.

The approved plan entails novation of all pre-petition claims, binding the debtor and all creditors that are subject to him.

The debtor shall continue under judicial reorganization until all obligations established in the plan that are due up to two (2) years after the concession of reorganization have been performed. After that period of time, in the event of nonperformance of any obligation by the debtor, any creditor may petition for execution or for their bankruptcy.

If in those two years all obligations are performed, the judge shall declare the termination of the judicial reorganization.

It deserves notice that, during the judicial reorganization, the debtor shall continue to conduct its corporate activities under the supervision of the committee (if one exists) and the trustee.

Finally, as mentioned above, the judge shall convert judicial reorganization into bankruptcy procedures if the general meeting of creditors resolves to do so, if the debtor fails the obligations contracted in the plan, when the reorganization plan is denied and if the debtor fails to deliver the plan.

56. Are secured creditors of an insolvent shipowner subject to court orders approving a reorganization or compromise?

Yes, all creditors of an insolvent shipowner are subject to the legal proceedings (Article 5), regardless of the kind of credit they hold. There are only two legal exceptions to that order. The first is when it comes to obligations contracted free of charge. The second relates to expenses incurred by the creditors in order to participate in judicial reorganization or bankruptcy (costs arising from direct litigation with the debtor cannot be inserted into that exception).

57. Do your laws permit an insolvent ship operator to transfer an insolvency proceeding into a proceeding for reorganization or compromise?

Brazilian legislation does not permit the transformation of an insolvency procedure into a proceeding for judicial reorganization if there is already a decree of insolvency.

However, once the request is made to the judge by the means of a petition from creditors, one of the available defenses to be presented by the debtor is a petition for judicial reorganization – with due regard for the legal requirements (article 96, item 7, Law 11.101/2005).

Part 11 Receiverships

58. Does your law permit a private creditor such as a ship mortgagee to take over the business of a ship operator or to sell part or all of its fleet or generally act to recover a debt without needing to commence insolvency proceedings for the benefit of all creditors?

There is no provision under Brazilian legislation allowing a private creditor to take over the business of a ship owner in order to recover a debt. However, if such creditor has started judicial proceedings to execute his debt, there may be a court order to auction goods under the debtor's property.

59. Does your law set out minimum requirements which a private receiver of an insolvent shipowner must follow such as giving notice to other registered ship mortgagees, the procedure for sale, etc.

As there is no provision under Brazilian legislation allowing private receivership (see answers to questions n. 7 and 58), the question does not apply.