

## Going Broke in Brazil

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People, companies and even whole countries seem to be going insolvent left and right these days, so I thought something on insolvency and bankruptcy would be in order. Who knows what we will have to translate tomorrow—if we are not bankrupt ourselves, that is.

What happens to people who cannot pay their debts in Brazil very much depends on whether they are *comerciantes*, *instituições financeiras* or *neither*.

### Comerciantes [traders, merchants]

Roughly defined, a *comerciante* is someone who sells something tangible, no matter who made it. So, the term includes people who sell what they buy from others as well as those who sell what they make themselves, such as manufacturers.

A *comerciante* is a *trader*, a *merchant*, as I said in a previous article for the *Translation Journal*. Trade—or commerce, whatever you prefer—is regulated by the *Código Comercial* [Commercial Code], a quaint law of 1850, that begins *The Lord Pedro II, by the grace of God and unanimous acclamation of the people, constitutional Emperor and perpetual defender of Brazil...* and makes several mentions to *súditos do Império* [subjects of the Empire] as well as to *tropeiros* [drivers of mule packs]. Much of it is still in force, but Part Three, on *Quebras* [“Crashes”] has been repealed.

*Quebra* is still used: the 1929 crash is a *quebra de 1929*, but *direito falimentar* is the current expression for *insolvency law*. Basically, the law that regulates commercial insolvency matters these days is the *Lei de Falências*, which, by the way, is not a *Lei* proper [Law, Act], but a *Decreto-Lei* (DL 7661/45). A *decreto-lei* is a *decree-law*. Don't laugh *decree-law* off as Brazenglish—the word is in any good dictionary. *Brazenglish* isn't, but that is another matter.

DL 7661/45 provides for two modes of dealing with insolvency: *falência* [bankruptcy] and *concordata* [arrangement, composition].

## Falência [Bankruptcy]

*Falência* is very drastic: after the debtor *é declarado falido* [adjudged bankrupt] o juiz nomeia um síndico [the court appoints a trustee in bankruptcy] who arrecada os bens [takes possession of the assets], creditors *habilitam-se* [assert their claims] apresentando declarações de crédito [filing proof of claim], the assets are *vendidos em hasta pública* [publicly auctioned], creditors are paid off from the proceeds, the business is *liquidado* [liquidated]. Finis.

## Atos falimentares [Acts of bankruptcy]

In some cases, bankruptcy proceedings are commenced if the debtor shows signs that it will go bankrupt, for instance, by disposing of assets in a manner that appears to be reckless or fraudulent.

Usually, however, proceedings are triggered by the inability to pay a bill. If a merchant fails to *pagar um título* [pay a bill] the *título* may be *enviado para protesto* [the bill may go for protest]. This is done by sending the bill to a *cartório de protestos* [protests notary] who *aponta o título* [notes the bill]. The debtor is then *notificado* [notified] by mail that the bill must be paid within 24 hours or else. To preserve privacy, the notice comes in an unmarked envelope of a type that anybody can recognize from a mile away. If the bill is not paid, it is *protestado* [protested] and can be used to commence bankruptcy proceedings.

In most cases, *protestar* is used colloquially instead of *enviar para protesto* and *pagar no protesto* is used to mean that a bill was paid to the notary, to *prevent protest*. This is done by running to the bank, buying a *cheque administrativo* (cashier's check, manager's check) and then running to the notary to pay the bill. Otherwise, the bill will be protested and the debtor's name will be included in several registers of bad apples.

In such case, when the bill is paid, the debtor can hire a firm that will *limpar o nome* (exclude the name from the bad-debtor registers). This is legal and debtors themselves can do it, but hiring an expert is more expedient.

Formerly, there were collection outfits who used trumpet-blowing, drum-beating clowns for the purpose of embarrassing debtors into disbursing the necessary funds. The collector, in full clown garb, would park a car outside the debtor's premises and use trumpet, drum, loudspeaker and several other means to inform the whole neighborhood that John Doe, of 13, Skidrow was a good-for-nothing who owed money

to the Mr. J. Roe, an honest merchant. This is now illegal. It was supposed to be very effective.

### *Short digression on laws, acts, judges, courts—and rods*

Allow me a short digression here. *Juiz* is *judge*, of course, but we often say *juiz* where English requires *the court*. So the *síndico nomeado pelo juiz* is the *trustee appointed by the court*. In addition *court* often translates Brazilian *vara*: *vara de falências* [*bankruptcy court*]. *Tribunal* in Brazil is only used for appellate courts: *tribunal de recursos* [*court of appeals*]. A trial court is a *juízo de primeira instância*. *Vara* [*rod*] is an old symbol of the judicial power to compel and punish. *Debaixo de vara* is translated *by bench warrant*, and means that a bailiff is empowered to bring someone to the presence of the judge using a rod, that is, by force, if so required.

Also, a Brazilian judge is addressed as *Excelência* or *Vossa Excelência* [*your honor*]. *Meritíssimo* is not a form of address: it is a handle used before *juiz*: *o meritíssimo juiz da primeira vara de falências* [*his honor, X, of the first bankruptcy court*]. Higher court judges are referred to as *ministros* [*justices*], but they are not *Ministros de Estado* [*Ministers of State, Cabinet Members*] nor do they hold any *Ministério* (*Ministry*). A *desembargador* is a judge in an intermediate court. Sorry, I am afraid you will have to choose between *justice* and *judge* for those.

End of first digression.

### *Another short digression, now on checks*

A check is a *saque* [*draft*] against a bank account. For instance, John Doe has an account with the Second International Bank of Lower Slobovia and writes his bank a message instructing it to pay the bearer of the check, a specified third person or John Doe himself a certain amount of money and deduct the amount paid from John Doe's balance. That is a draft.

In theory, Mr. Doe can draw money from his account with a bank or with another person—his client J. Moe, for instance. In practice, nowadays, people usually draw money only from their bank accounts and use a standardized type of draft called a *cheque* [*check*] for that purpose.

Under Brazilian law, checks are *saques à vista* [*sight drafts*]. That is, the bank is required to honor a check when it is presented for payment. In practice, however, we often issue checks with the proviso that they will be *apresentados para pagamento* [*presented for payment*] at an agreed later date. Many banks even *descontam* [*discount*] those checks, in the same manner they would discount a bill.

Those are called *cheques pré-datados* in Brazil. The operation is not protected by law: it is just an agreement between creditor and debtor to which the debtor's bank is not a party. So, if the check is presented ahead of the agreed date, the bank is required to honor it and there is nothing the *sacador [drawer]* can do. If the drawer has no funds, the check will be treated as any other check that cannot be honored for lack of funds. It will be *devolvido [returned]* to the depositor.

Brazilian banks do not return *paid checks*. A *cheque* is *devolvido* because was not honored. The stamp in the back must state whether there were funds to honor the check. If John Doe issues a check and signs it John Hancock, the check will be *devolvido por diferença de assinatura [returned because signature is not correct]* but the stamp must also state whether it is covered or not. Just in case anybody starts getting ideas, you know.

How do you translate *cheque pré-datado*? In the UK they are called *post-dated checks*, US banks refer to them as *future-dated checks*. A "pre-dated check" would of course be a check dated for a date earlier than that on which it was actually issued.

All this to say that checks can be protested and often are. This is done after the bank returns it twice.

End of second digression. Back to business.

### *Concordatas [Arrangement, Compositions]*

In order to prevent bankruptcy, a company in financial distress may *pedir concordata [file a petition for composition]*. This is labeled *concordata preventiva [preventive composition]*. Under a composition Brazilian-style, the owner maintains control over the business, under the supervision of a court-appointed *comissário [commissioner, supervisor]*. In addition, the company is granted more time to pay its debts and a general reduction in the amount of its liabilities. During the *prazo da concordata [duration of the composition]* the court may adjudge the debtor bankrupt at any time. In some cases, a bankrupt is able to convince the court to convert its *falência* into a *concordata*, which is then labeled *suspensiva [suspensive]*.

### *Insolvency, the insolvent and the family*

Insolvency was considered evidence of dishonesty or, at least, of gross incompetence. Thus, the basic idea behind bankruptcy proceedings was to rid civilized society of a bad egg and take possession of as much of his assets as possible. His family was ruined and shamed, but this served him right. If the widow and children suffered, that was considered a fitting example and an opportunity for charity. Those were the good times, as you know.

But personal unlimited liability disappeared fast after *Companhias Limitadas* were allowed in 1919. Now, the company goes bankrupt, not its owners, who keep their personal assets. However, this has not made bankruptcy any more popular and cases of *autofalência* [voluntary bankruptcy] are rare.

### *Rehabilitation, Creditors' Committees and so forth*

Bankruptcy proceedings had a sweet taste of revenge: *He didn't pay me, look what happened to him*. Lately, however, potential petitioners for bankruptcy have begun to notice that a customer is a valuable asset and that customers who have credit are customers who buy. This extraordinary conclusion led to the idea that it might be useful to preserve the insolvent business, albeit in more competent or better capitalized hands. Now, the bankruptcy act has no provision on that—but there is no prohibition against it either. This, in turn, has led to the formation of *Comitês de Credores* [Creditors' Committees] who will usually include suppliers and banks. Those committees will try to agree on a way out of the mess by appointing an administrator, usually a bank, to manage the business and keep it open and breathing. The business is then sold to willing investors who will pay part of the debt. The basic idea is that losing some money on an insolvent business is some sort investment that will keep the channel open for future sales or loans. It works. Sometimes, I mean.

Because those committees have no legal powers, they cannot bind unwilling creditors—nor the owners of the business, for that matter. However once an agreement is reached and signed by all parties, it is as enforceable as any other contract.

### *The case of the floundering bank*

Financial institutions and insurance are companies subject to a special régime: when one of them is in trouble, the *Banco Central*, (BACEN) [Central Bank—which is not the same as *Banco do Brasil S.A.*] appoints an *interventor* [conservator] who *liquida* [liquidates] the institution and sells its assets to another institution. The Central Bank seems to have a list of sick institutions and another of overhealthy ones interested in

acquiring the corpses, when time comes. The basic idea is that you cannot really close one of those institutions and leave its customers out in the cold.

## The new act

Ask any Brazilian lawyer about practically anything and they will probably tell you that there is a *projeto de lei [bill]* that will utterly change the current situation. For better or worse, depending on the subject and on the personal opinion of the lawyer. The bill has probably been *engavetada [shelved]* somewhere, but it may come off of the shelf anytime and become a law. Who knows.

There is also a new bankruptcy act in the making. Opinions about the current bill are mixed, of course. It is not dealt with here. It may be amended to death or to utter transmutation in Congress, vetoed by the President—or die on a dusty shelf, like so many other bills. So, why worry? We can cross that bridge when we come to it.

## Pessoas físicas e sociedades civis [Individuals and non-merchant corporations]

Only merchants are covered by the provisions of the bankruptcy act. *Pessoas físicas [Individuals]* thus, cannot *falir* or *entrar em concordata*. If they do not pay their bills, they can go through *insolvência civil [civil insolvency]* proceedings. Meaning that the creditors will take possession of their assets all the same, but they will not be bankrupt, but only insolvent. Any lawyer will tell you those are different things.

Non-merchant corporations, which include, for instance, service companies such as translation bureaus, cannot go bankrupt either. Creditors can and—alas—do execute the debts of those organizations and can take possession of their assets. However, there is a snag. Most of those companies are organized with limited liability. That is, creditors can take possession of the assets of the company, but not of those of the owners. In other words, I am reasonably safe: even the computer I am using belongs to me, not to my firm. Thank God and Saint Jerome.

## The usual disclaimer

Lest someone decide to sue me for dispensing lawyerly advice without appropriate qualifications, allow me to state that I was granted an HSD [High School Dropout] from a Brazilian public school in a then remote part of São Paulo City. Of laws I understand but the little that plying my trade of translator has taught me. My sole purpose in writing these articles is to provide my colleagues with some terminological guidance and have a bit of fun to boot.