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Cross-border insolvency issues in Brazil: A brief study of case law

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There is no law in Brazil concerning cross-border insolvency matters. The Brazilian Bankruptcy Code, Federal Law no. 11.101/2005, does not directly address the issues that come with insolvency cases that spread across different jurisdictions. However, where the law is lacking, the case law more than provides. In recent years, Brazilian Courts have had the opportunity to bridge the gaps and help manage insolvency proceedings involving transnational interests and multinational corporations.

The UNCITRAL Model Law was not adopted by Brazilian legislators, but the most important concept in defining the jurisdiction of a main proceeding or an ancillary proceeding may be found in the rule that determines the competent forum for the filing of an insolvency proceeding. The centre of main interests, or COMI, is established as a presumption in Article 16 of the Model Law: "In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests" (a similar provision is present in Section 1516(c) of Chapter 15 of the United States Bankruptcy Code).

In the Brazilian Bankruptcy Code, Article 3 provides that the company's principal establishment defines the competent forum to process a bankruptcy or a reorganisation proceeding. Whilst this rule may have been intended to identify a territorial competence within Brazil's jurisdiction, it stems from the same principle of the centre of main interests. The principal establishment is interpreted by jurisprudence and case law as the place of management and control or the place of business and operations, whereas the company's registered office is usually discarded as a relevant standard in such regard.

This interpretation of the principal establishment in Brazil is similar to the objective and ascertainable criteria used to rebut the presumption of the centre of main interests, such as the "location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets (…)" – In re SPhinX Ltd. (Bankr. S.D.N.Y. 2006).

The same logic has been applied by Brazilian Courts to plaintiffs that file for judicial reorganisation as a corporate group, with companies headquartered in Brazil and abroad. If the multinational conglomerate has its principal establishment in Brazil, the Court will find itself competent to process the insolvency proceeding – with the foreign entities included under its jurisdiction as well.

The first case in which this controversy came to light was the judicial reorganisation of OGX, an oil and gas company that had both its administrative offices and main activities in Brazil. The foreign companies that made up the corporate structure were used for attracting financing and investments overseas, in order to fund the operation in Brazilian oil fields. A similar business structure has been seen in the judicial reorganisation of Sete Brasil, a service provider in the oil and gas industry.
In both cases, Brazilian Courts have recognised their jurisdiction over the foreign subsidiaries considering them merely as a financing structure around a corporate group that has its main establishment and centre of operations in Brazil.

In another relevant case, the company Schahin had organised its entire activity around a foreign subsidiary that owned a drilling vessel that was located in Brazil and was leased to

Petrobras. An English LLP was the proprietor of the only asset that rendered any proceeds to the ailing company situated in Brazil – it just so happened that the same natural persons were the controlling parties of both companies. Once again, the Brazilian Court recognised its jurisdiction, due to this close relationship between the companies, the location of the asset and the utter necessity for the lease contract to continue to inject funds toward the payment of creditors and ensure the survival of the enterprise.

However, the most important cross-border insolvency case in Brazil is the well-known judicial reorganisation of the telecommunications giant Oi – also the largest proceeding of its kind in Brazil, with a debt of roughly BRL65 billion. The petition for reorganisation was filed in a Rio de Janeiro Court and it included two Dutch companies, foreign entities used for securing investments directed to the conglomerate's activities in Brazil. Much like the other cases mentioned earlier, the Brazilian Court recognised its jurisdiction over the foreign companies and admitted them into the reorganisation proceeding. It is important to emphasize that the Court observed the provisions of the UNCITRAL Model Law to substantiate its decision, despite it not being adopted by Brazilian insolvency legislation.

At the same time, a suspension of payments was filed before the Dutch Court, in order to halt any actions or executions by the foreign creditors – for the most part bondholders. The proceeding in the Netherlands took a turn for the worse and the Dutch companies were declared bankrupt. Obviously, the Brazilian Court did not acknowledge this decision and reaffirmed its jurisdiction over the Dutch entities.

The matter was submitted by the Dutch trustee to the United States Bankruptcy Court for the Southern District of New York under Chapter 15, with the purpose of recognising the Dutch bankruptcy as the foreign main proceeding for the Dutch companies. The NY Court acknowledged that the Dutch entities' "nerve centre and headquarters are clearly located in Brazil" and that it "has no operations or business independent of the Oi Group and is operated within the Oi Group as part of a single, integrated economic unit". The Court also asserted that the "Oi Group, in turn, is headquartered and managed from the principal executive office of Oi in Rio de Janeiro, Brazil, with every aspect of the Oi Group's operations, finances, corporate management, employee management and payroll, and short- and long-term strategic planning directed from Brazil" – In re Oi Brasil Holdings Coöperatief U.A. (Bankr. S.D.N.Y. 2017).

> *"Although the Brazilian Bankruptcy Code does not provide a solution for cross-border insolvency issues, Brazilian case law has stepped up to fill in the void."*

The NY Court's conclusion could not be any different: the foreign entities served only as special purpose vehicles for attracting investment to the corporate group's main activities in Brazil, therefore, the foreign main proceeding could only be the one under Brazilian jurisdiction.

Thus, although the Brazilian Bankruptcy Code does not provide a solution for cross-border insolvency issues, Brazilian case law has stepped up to fill in the void. In light of this, it is possible to conclude that Brazil would have jurisdiction over any insolvency proceeding that meets the following conditions: (i) the foreign entities are part of a corporate group that has its main establishment in Brazil, (ii) the corporate group's main establishment may be defined as the place of management and control or the place of business and operations, and either of them must be situated in Brazil, (iii) the foreign entities are used as special purpose vehicles either to (a) obtain financing or investment for the Brazilian operations, or (b) provide assets, located in Brazil, utilised in the corporate group's local operations.

The fact is, despite the legal vacuum, Brazil has been able to keep up with the international standards when it comes to cross-border insolvency issues, especially in regard to determining a corporate group's centre of main interests and the competent jurisdiction.

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