January 27, 2003

CROSS-BORDER INSOLVENCIES AND RESTRUCTURINGS IN BRAZIL

Thomas Benes Felsberg[*]

EXECUTIVE SUMMARY

The failure of a multinational corporation can create multinational legal problems in achieving an orderly approach to the reorganization or liquidation of a debtor company. Around the world, bankruptcy law has not been uniformly adopted or applied, in its substance or its procedures. In the case of the Federative Republic of Brazil ("Brazil"), like many other jurisdictions, the legal system is forced to deal with modern international bankruptcy concepts with outdated domestic legislation.

Brazilian law takes a mostly territorial approach to cross-border insolvency cases. The Bankruptcy Law does not provide for the recognition of, or cooperation with, parallel proceedings in other jurisdictions. A simultaneous, on-going bankruptcy proceeding outside of Brazil, with respect to the same debtor or the same assets, will have no legal effect on the Brazilian proceedings. As a result, the resolution of procedural issues of jurisdiction, both personal and subject matter, and of the recognition of foreign judgments will be determinative in a cross-border insolvency involving any Brazilian interests or obligations.

Brazilian courts will take jurisdiction over bankruptcy or insolvency matters involving Brazilian businesses. The basis for jurisdiction under Brazilian law is Article 7 of the Bankruptcy Law, which specifically provides that the principal location of the business of a company (*principal estabelecimento*) shall determine jurisdiction of the proceedings. A court in Brazil will also take jurisdiction over a local branch or subsidiary of a foreign company doing business in Brazil or if the insolvent company owns real estate in Brazil.

The case of jurisdiction based on non-real estate assets alone is not contemplated by the current statutes. Generally, these grounds should be considered insufficient for the granting of jurisdiction in a bankruptcy or insolvency case. This lack of clarity, however, creates opportunity for debate among legal scholars.

---

[*] Thomas Benes Felsberg is the Managing Partner of the law firm Felsberg e Associados, São Paulo, Brazil. © 2003. All rights reserved. Contact Information: Av. Paulista, 1294, 2nd Floor, São Paulo, SP 01310-915, Brazil; Tel. (55)(11) 3141-9100; Email: thomasfelsberg@felsberg.com.br; Web: www.felsberg.com.br.

With respect to a number of pressing cross-border issues, the state of the law is not clear. Some legal scholars refer to the prior Civil Procedure Code of 1939, which contains selected provisions relating to foreign bankruptcy matters. The extent of the application though is the subject of debate as general inconsistencies with the current Civil Procedure Code and Bankruptcy Law could result. Without clear direction in the law and with little published precedent in cases of foreign bankruptcies, Brazilian legal scholars have advocated varying approaches in analyzing jurisdiction, judgment enforcement and related issues. Most of these issues are still open to interpretation.

The Introductory Law of the Civil Code and the Internal Regulations of the Federal Supreme Court govern generally the recognition of foreign judgments. Insolvency and bankruptcy decisions often do not qualify for recognition, mostly failing because the Brazilian party was not served properly, jurisdiction in a foreign court was not appropriate under Brazilian law, or because the decision was not final and would still be subject to appeal. The time factor involved in the recognition of any such foreign bankruptcy decisions has the potential to frustrate the process, providing opportunity to those creditors who take advantage of the long delay by bringing a separate collection action in Brazil.

Despite this general lack of clarity, the Code of Bustamante of 1928 addresses a number of procedural issues for bankruptcy matters as between signatory states, which includes Brazil and most other Latin American states. In particular, with certain exceptions, the Code of Bustamente provides important precedent for the automatic recognition and enforcement of foreign bankruptcy decisions.

The need for a clear legal framework for cross-border insolvencies is one faced by most nations. In order to assist states coordinate their local bankruptcy laws with those of other states, UNCITRAL developed the Model Law on Cross-Border Insolvency. This approach recognizes the great difficulty in achieving the international consensus required to adopt and ratify a treaty, which would otherwise require substantial agreement on all relevant details.

In the absence of specific legislation in many cases, civil courts in Brazil are currently employing a variety of techniques to address some of the complicated international bankruptcy issues before them. This mix of legal approaches frequently results in inadequate and inharmonious consequences, which in the end hinders the rescue of financially-troubled businesses. The lack of transparency, predictability and consistency creates a significant risk factor for foreign investment and commerce. This legal uncertainty may have real economic consequences for the development and maintenance of international business and finance in Brazil. In light of these considerations, Brazil would be well served to adopt coordinating legislation based on the Model Law, specially now at a time the new insolvency law is being discussed in Congress and the current draft simply repeats existing legislation on this subject matter without addressing the issues of international insolvency.

INTRODUCTION

In this era of high-profile bankruptcies of large multinational corporations, focus is once again brought to the complicated, and often inconsistent, regimes that govern cross-border insolvencies. In the case of Brazil, like many other jurisdictions, the legal system is in somewhat of a challenging transitional period, forced to deal with modern international bankruptcy concepts with outdated domestic legislation. In many instances, the most significant cross-border legal and procedural concerns are not addressed in the current legislation.

Nonetheless, the current legislative framework has been applied in numerous multi-jurisdictional insolvency and restructuring cases, applying general concepts of conflicts-of-law principles, to the extent available under the Introductory Law to the Brazilian Civil Code. Until the specific concerns of cross-border insolvencies are addressed through effective new legislation in Brazil, representation of affected parties requires the creative use of existing remedies and procedures generally available at law. Unfortunately, this approach does not afford the affected international parties the same measures of certainty or transparency that would otherwise be expected in modern bankruptcy procedures.

This Article shall review the rights and remedies currently available (and not available) under Brazilian law to parties in a cross-border bankruptcy. First, this Article shall set forth the general issues of cross-border bankruptcies and the applicable Brazilian bankruptcy law and procedures. In connection therewith, this Article shall summarize the most relevant legal remedies for the recognition and the enforcement of foreign judgments, as well as certain important procedural issues that relate to foreign bankruptcy enforcement matters. This Article shall also review some of the opportunities for improvement in the existing legal framework, and provide comparison to certain relevant areas of the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvency (the "Model Law"). In addition, this Article shall make recommendations for the adoption and the implementation of effective bankruptcy legislation, consistent with the international standards set forth in the Model Law.

GENERAL ISSUES AFFECTING CROSS-BORDER INSOLVENCIES

Introduction

The failure of a multinational corporation can create multinational problems in achieving the necessary orderly approach to reorganization or liquidation of a debtor company, and its multi-jurisdictional assets and obligations. Around the world, bankruptcy law has not been uniformly adopted or applied, in its substance or procedures; and, with limited exceptions, domestic bankruptcy procedures generally do not allow for coordination with other courts in other countries.

As a result, in most cross-border insolvency cases, the main complicating factors include many of the following:

- first, the existence of the debtor's assets in more then one jurisdiction;
- second, the inconsistent recognition of foreign bankruptcy proceedings;
- third, the difficult access to courts in foreign jurisdictions, which may be required to obtain relief in the main action;
- fourth, the necessity for cooperation among judiciaries on bankruptcy matters; and
- fifth, the lack of harmonization of proceedings filed by one debtor in multiple jurisdictions.

These factors inevitably lead to overlapping and conflicting actions and procedures on the part of courts in different countries. Without universal norms to guide most courts, the bankruptcy and reorganization processes are ultimately frustrated in delivering resolution—which is much of the promise of these regimes in the first place and which is their anticipated role in the orderly maintenance of commerce. These impeding factors have become evident to legal observers; and growing emphasis on developing cross-border enforcement procedures has been a priority for the international bankruptcy bar in the last decade.[1] Regardless, local adoption of multilateral bankruptcy processes is in the earliest stages, and, in fact, the practice is still unilateral in most jurisdictions, with a possible exception of the European Community, as noted below.

Universality vs. Territoriality

In response to these complicating factors, national lawmakers and judges typically elect one of two approaches in the analysis of their respective roles: first, the universal approach (*i.e.* all affected interests should be taken into account); or second, the territorial approach (*i.e.* only domestic or local interests should be taken into account).[2] Not surprisingly, the approach will vary widely from jurisdiction to jurisdiction, and may include some combination of both approaches.

The principle of universality provides that a corporate bankruptcy is a single and universal event, across jurisdictions. The underlying belief is that the fragmented jurisdictional approach creates differential treatment with respect to the assets, and their distribution among creditors, as well as with respect to the rights generally of the creditors, and even the debtor, from jurisdiction to jurisdiction.

Under the universality principle, all the assets of a debtor, no matter where they may be located, may be used to settle obligations wherever they may be located, in such a manner that all creditors within the same class shall be treated equally vis-à-vis the bankrupt party. For these purposes, the bankrupt party, and its world-wide affiliates, are considered a single debtor. On the other hand, the counter-argument of some critics is that this approach would only be fully effective if all the interested countries applied the same laws and procedures, without favoring any specific party, and this event is unlikely. It is true that to effect properly the principle of universality adequate communication and coordination across jurisdictions, and to some extent harmonization, is necessary. Universality is not necessarily an issue of conforming substantive laws in all cases, but may often be an issue of coordinating procedures to prevent conflicting, redundant or inequitable outcomes. Modern examples of the growing support for the universal approach, to varying degrees, include the European Regulation on Insolvency Proceedings, effective in the European Union in May of 2002,[3] and the development of the Model Law, which has slowly been accepted in some jurisdictions in modified form.

In contrast, the principle of territoriality considers only the legal effects in the country in which the bankruptcy was filed and in which certain assets are located. The proceedings are treated

---

[1] See., e.g., the Cross-Border Insolvency Concordat (1995), a project adopted by the Council of the Section on Business Law of the IBA, Committee J.

[2] Even if a country espouses the universal approach, there may be matters in which local interests are in conflict with the broader, universal interests, and therefore such local interests may addressed through the application of a public policy exception, or excepted or covered by specific legislation.

[3] The Regulation generally deals with conflicts of law rules, mutual recognition of judicial decrees and orders and other procedural aspects. The Regulation does not attempt to harmonize the substantive law of the underlying national insolvency laws. The Regulation, however, allows for a number of local (or territorial) exceptions, such as secured creditors´rights, contracts relating to real property, certain rights of set-off and employee rights, among others.

as separate and distinct from those in other jurisdictions. This approach may be characterized as benefiting local parties to the detriment of foreign parties, when viewing the estate and claims in their entirety. Those who advocate this principle, however, argue that it is unlikely that cross-border controversies would be equitably resolved, and that local interests should be protected over foreign ones. It is worth noting, however, that this principle is quickly losing ground to those who promote universality, simply due to the modern reality of international markets and the globalization of businesses; and in many cases, fairness and the facts of the case dictate that the court looks outside of its jurisdiction for an equitable resolution.

The absence of a comprehensive legal infrastructure for bankruptcy matters can lead to some worst case scenarios for debtors and creditors alike. To the extent that there is a lack of communication and coordination among courts and administrators from relevant jurisdictions, it is more likely that assets would be dissipated, fraudulently concealed, or possibly liquidated without reference to other more advantageous solutions. As a result, not only is the ability of creditors to receive payment diminished, but so is the possibility of rescuing financially viable businesses and saving jobs. Moreover, the absence of predictability in the handling of cross-border insolvency cases may impede capital flow and is a disincentive to cross-border investment.

In Brazil, the bankruptcy approach is decidedly territorial, but is complemented by certain civil procedural measures attempting to address some of the more universal aspects. Most of the complicating issues above, however, are not addressed by Brazilian law. In fact, the effect of the Bankruptcy Law is such that local and foreign proceedings are separate and distinct; and in territorial fashion, with only few exceptions, local courts preside over the disposition and distribution of local assets, irrespective of any parallel or secondary proceedings.

Brazil is certainly not alone on these issues, but it is worth defining ways in which relevant Brazilian law could be updated to meet the needs of a global economy, in which Brazil needs to participate fully. In fact, these factors provide Brazil with an opportunity to be a leader among emerging markets in an area of increasing commercial importance internationally. Brazil does have a legal tradition which includes international cooperation. It should be noted that Brazil is party to a number of multilateral and bilateral treaties covering areas of law such as civil, commercial, labor and administrative law.

Code of Bustamante

Among the treaties ratified by Brazil is the Code of Bustamante of 1928 (the Inter-American Convention on Private International Law), a treaty among fifteen Latin American countries, which in fact covers international bankruptcy and *concordata* proceedings.[4] Unfortunately, the Code is limited to these signatory jurisdictions within Latin America, and its practical application has been somewhat limited.

The Code of Bustamante provides a modest starting point for the introduction of some universality principles in Brazil, applying principles that attempt to effect equal treatment among creditors of member states.[5] The Code creates some uniformity of procedure among its signatory states, particularly with respect to jurisdiction and enforcement matters. Specifically, the Code of Bustamante provides that the debtor´s domicile shall determine jurisidiction for the following cases:

---

[4] The Code was enacted in Brazil by Decree-Law No. 18, 871, dated August 13, 1929.

[5] Equal treatment among creditors has not been necessarily the foundation of similar commercial and civil law treaties. See, e.g., the Montevideo Treaty of 1889.

bankruptcy or *concordata* proceedings, suspension of payments or settlement and default with respect to its assets. [6] According to the Code, if a person or company has establishments in several countries, and such establishments are economically distinct, each such establishment shall be the object of a distinct bankruptcy filing.[7]

The Code of Bustamante also allows for the legal effect of bankruptcy proceedings throughout signatory countries (referred to herein as "territory-wide effect"), in respect to restrictions applicable to a bankrupt entity, provided the required formalities for registration and publicity are met.[8] In this regard, the Bustamante Code provides for the following:

- A decision regarding a bankruptcy or reorganization proceeding shall be effective in other signatory countries, provided the decision is recognized in accordance with the Bustamante Code's rules governing the recognition of foreign court decisions awards.[9]

- However, the powers and functions of the representatives of the bankrupt estate, designated in any of the signatory countries, shall have territory-wide effect without requiring any special judicial or other executory action (although the trustee would be required to prove his capacity).[10]

- The Bustamante Code applies the *lex loci concursus* as the applicable law to determine the effects of the bankruptcy or reorganization proceedings, including the nullification of fraudulent acts; however, the Code provides that the *lex rei sitae* shall govern all rights *in rem*, including secured guarantees, and establishes that the courts of the state where the *rei sitae* shall have jurisdiction over such matters[11]

- In addition, the Bustamante Code provides that the decisions regarding the reorganization of insolvent companies shall have territory-wide effect, except with respect to secured creditors, however, that do not accept the reorganization.[12]

- Finally, the Bustamante Code also provides for territory-wide effect in the rehabilitation of the bankrupt party.[13]

Although the Code of Bustamante provides for cross-border enforcement of bankruptcy matters, the Code does not address the relationship among insolvency proceedings taking place in a number of countries, nor does the Code provide a means of coordination among courts or institutions for simultaneous proceedings.

The Code of Bustamante does, however, provide some precedent for multilateral legal and procedural cooperation in this area. The adoption of modern, *universal* bankruptcy law and procedure would be consistent with this practice.

---

[6] Article 414.
[7] Article 415.
[8] Article 416.
[9] Article 417.
[10] Article 418.
[11] Articles 419 and 420.
[12] Article 421.
[13] Article 422.

THE BRAZILIAN LEGAL SYSTEM

The Brazilian Bankruptcy Law and Related Applicable Law

General Application. In Brazil, bankruptcy proceedings are mainly governed by Decree-Law No. 7,661 of June 21, 1945, otherwise known as the "Bankruptcy Law."[14] Under the Bankruptcy Law only certain entities defined as "merchants" are eligible for bankruptcy protection.[15] Thus, any person not fitting the legal concept of merchant is not eligible to seek remedy under the Bankruptcy Law. For those cases, the Civil Code insolvency procedures apply, which are, in many respects, similar to the bankruptcy proceedings.

Under the Bankruptcy Law, depending on the circumstances, a Brazilian entity in financial distress may be subjected to one of three separate proceedings: insolvency, bankruptcy or *concordata*. Generally, the first two result in all debts being accelerated, all assets being collected and sold to pay the creditors, and the business being liquidated, whereas the concordata proceeding (the "Concordata Proceeding") allows the affected entity to continue conducting business under judicial supervision while it pays its unsecured creditors in accordance with the applicable law.[16]

In a Brazilian insolvency or bankruptcy proceeding (together, the "Bankruptcy Proceeding"), the court will appoint a trustee (*síndico*) to manage the liquidation and distribution of the bankruptcy estate. All actions of the trustee are directed and supervised by the bankruptcy judge. As a result, the court has absolute authority in all affairs of the bankruptcy, including appraisals, sales of assets and the like.

In the event that a Concordata Proceeding is brought rather than a Bankruptcy Proceeding, the debtor retains the right to administer its business, and may continue to run it under the supervision of a court inspector (*comissário*), who, like the trustee, will be appointed by the court from among the major creditors. In a Concordata Proceeding filed in Brazil, all unsecured creditors will be bound equally, regardless of origin of creditor (Art. 147 of the Bankruptcy Law).

The Bankruptcy Law and Civil Code insolvency proceedings are domestic actions with Brazilian debtors and assets in mind, and creditors that present themselves to the responsible civil court in Brazil. Nonetheless, creditors before the court will be treated equally as to class, irrespective of origin.

Jurisdiction under the Bankruptcy Law. Proper jurisdiction, both personal and subject matter, may be the single most important issue in international actions of any kind, and for multinational bankruptcies this issue is not a simple one. Nonetheless, the Bankruptcy Law addresses this matter using traditional standards for domestic actions: either the action is proper for the Brazilian court to review or it is not, based principally on defined contact tests. Furthermore, in its jurisdictional analysis, the Bankruptcy Law also generally contemplates a contained bankruptcy or insolvency proceeding, either entirely subject to its jurisdiction or not.

---

[14] In addition to the Bankruptcy Law, individual provisions of the Federal Constitution, the Federal Supreme Court's Internal Regulations, and the Civil Procedure Code will impact international proceedings; and as they are generally incomplete with respect to such matters, depending on the circumstances, legal writings and precedent may have some influence on the course of the proceedings.

[15] Some merchants, according to Brazilian law, are excluded from bankruptcy procedings, such as insurance companies pursuant to Article 26 of Decree-Law No. 73/66. Moreover, under Law No. 6,024/74, financial institutions are subject to their own insolvency procedures, although bankruptcy may be a potential end result in some rare cases.

[16] It should be noted that some companies are specifically barred from filing a "concordata." These barred entities include: financial institutions; airlines; insurance companies; or cooperatives.

The Bankruptcy Law does not, however, envision parallel proceedings with respect to the same debtor in different jurisdictions, where for example a "main" proceeding and "ancillary" proceedings could run in tandem, as acknowledged by the U.S. Bankruptcy Code, for example. Nor does the Bankruptcy Law allow for the coordination of creditors or pooling of assets with bankruptcy proceedings in other countries. Parallel proceedings would suggest that jurisdiction is proper in more than one court, with respect to the same debtor and creditors, and potentially the same assets. These concepts are not present in the Bankruptcy Law. The limitations of the Bankruptcy Law structure and administration are consistent with the territorial approach adopted by the Brazilian legislature and courts, and that which the universal approach seeks to avoid, as demonstrated by the Model Law, for example.

In defining proper jurisdiction, Article 7 of the Bankruptcy Law specifically provides that the principal location of the business of a company (*principal estabelecimento*) shall determine jurisdiction of the proceedings. Consequently, according to the language of this Article, proper jurisdiction may lie in Brazil or abroad, depending on the facts at hand. In the case of a debtor principally established in Brazil, a local civil court will take jurisdiction and the legal effects of the Brazilian insolvency proceedings shall be applicable to all of the debtor´s assets, including those assets located outside of the country. A simultaneous, on-going bankruptcy proceeding outside of Brazil, with respect to the same debtor or the same assets, will have no legal effect on the Brazilian proceedings.

On the other hand, the Bankruptcy Law also provides that the presence of a local office of a foreign business within Brazil shall be sufficient to grant jurisdiction of the bankruptcy to local civil courts, thus allowing the courts to exercise territoriality with respect to foreign debtors doing business in Brazil.[17] The reach of these proceedings, however, is likewise territorial, and only the foreign debtor's assets in Brazil are subject to disposition by the court proceedings.[18] For these purposes, a branch office will be treated like any Brazilian subsidiary or legal entity.

Foreign Parties and Entities. The Civil Code, which also applies to civil matters generally, including bankruptcy matters, also exercises the territorial approach in international matters. These provisions provide further assurance that Brazilian courts will exercise their authority with respect to local operations of foreign entities.

In the event that the affected company's head office is located outside of Brazil, paragraph two of Article 75 of the Civil Code applies. This paragraph states in part: "If the company's management or board of officers operates in the company's headquarters abroad, *the domicile of the legal entity as to obligations assumed by each of its branches is the location in Brazil where its establishment operates*." (emphasis added).

Brazilian law, in some cases, does look to outside legal sources to determine internal matters. With respect to governance issues, for example, Brazilian courts will look to the home jurisdiction of a foreign corporation. Article 11 of the Decree-Law No. 4,657/42 provides that the law that governs a corporation is the law of the jurisdiction of incorporation. Thus, the legal standing of the insolvent company, the competent representative and the authorized powers of such

[17] The same rules are included in Article 3 of the proposed Bankruptcy Law, which is currently before the Brazilian Congress (Project 4,376/93, as amended).

[18] In keeping with precedent decreed by the Brazilian Supreme Court, the jurisdiction of the real estate property located in Brazil is also exclusive when regarding international bankruptcy proceedings.

representative, whatever the situation it is in, shall be governed by the law of the jurisdiction of incorporation. Nonetheless, as in all cases, any such foreign law shall not be enforced by a Brazilian court if it violates Brazilian sovereignty, public order or morality (*bons costumes*). In the absence of specific law governing cross-border insolvencies, the *lex loci* of the jurisdiction of incorporation shall apply also to issues relating to the powers of the trustee and to determine whether certain acts performed by the trustee require prior court approval.

Recognition of Foreign Judgments

Introduction. The Bankruptcy Law itself does not provide enforcement mechanisms for foreign bankruptcy judgments. The Civil Code and the Supreme Court Internal Regulations address foreign judgments generally without specific reference to bankruptcy or insolvency matters.

Pursuant to Article 15 and 17 of the Introductory Law of the Civil Code and Article 217 of the Internal Regulations of the Federal Supreme Court, the recognition and enforcement of a foreign judgment in Brazil requires that certain conditions be fulfilled, which include that: (i) the judgment was rendered by a court of competent jurisdiction (both personal jurisdiction and subject matter jurisdiction) in the awarding country; (ii) the defendant had been properly served notice of the proceedings; (iii) the judgment is final in the awarding country and not subject to any appeals; (iv) the judgment does not offend Brazil's notions of sovereignty, public policy or morality; (v) the judgment has been consularized by a competent Brazilian consular authority and then translated into Portuguese by a certified translator in Brazil.

With respect to the competent jurisdiction condition, in cases where Brazilian law provides for exclusive jurisdiction of a party or matter, Brazilian courts will not recognize a foreign judgment. Thus, in the case of a debtor, with its principal place of business in Brazil, a Brazilian court will not recognize a foreign judgment; Brazilian law claims exclusive jurisdiction over such entities, pursuant to Article 7 of the Bankruptcy Law, and the Supreme Court will not ratify any such judgment. Additionally, according to the Supreme Court, real estate assets are to be considered the exclusive domain of Brazilian courts.[19] These exclusions from the foreign judgment recognition, although not uncommon in other jurisdictions, further limit any extension of the universal approach to Brazil. With respect to these parties and assets, creditors must bring their action in Brazil in order to protect their rights.

The second condition above, regarding the proper service of notice, is one of the most frequently contested requirements for the recognition of a foreign judgment against a defendant domiciled in Brazil. Since Brazil is not a party to the Hague Convention of 1965 on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters, service of process must be accomplished in accordance with Brazilian law. Therefore, and pursuant to Articles 202 to 212 of the Brazilian Civil Procedure Code, the appropriate method for serving process on a Brazilian-domiciled individual is by a rogatory letter ("Rogatory Letter").[20] Any other

---

[19] The Brazilian Supreme Court had the opportunity to make a statement regarding the recognition of foreign bankruptcy awards. The Court ruled, in the context of a bankruptcy proceeding, that it is not possible to ratify an award in Brazil for which the legal effect is only applicable to real estate located in Brazil, which has jurisdiction over such real estate property, pursuant to provisions in Article 89, Item I of the Civil Procedure Code then in effect.

[20] Brazil is a member of the Inter-American Convention on Rogatory Letters, which was signed in Panama on January 30, 1975, and ratified by Brazil on December 27, 1995. To enforce a U.S. judgment, a Rogatory Letter must be sent by the court to the Department of Justice and then on to the State Department, duly notarized, consularized by the nearest Brazilian Consulate and

method of serving a Brazilian-domiciled defendant will render the eventual foreign judgment unenforceable in Brazil. Unfortunately, this is a lengthy process often dragging on for months. There is, however, one clear exception to this rule: where the defendant has accepted the jurisdiction of a foreign court by voluntarily appearing and defending the claim.

In insolvency and bankruptcy matters, many decisions do not qualify for recognition, either because the Brazilian party was not served properly, jurisdiction in a foreign court was not appropriate under Brazilian law, or because the decision is not final and may still be subject to appeal.

The Debate Regarding Foreign Bankruptcies. Without clear direction in the law, and with little published precedent, in cases of foreign bankruptcies, beyond those referenced above, Brazilian legal scholars have advocated varying approaches in analyzing judgment enforcement and related issues. A number of issues are still open to interpretation, as the published case law regarding foreign bankruptcies is largely limited to issues of the conversion of credits held in foreign currency into domestic currency, and the statutory law does not expressly address these cases.

Legal scholars often refer to the provisions of the Civil Procedure Code of 1939, which unlike the current Civil Procedure Code includes procedures for the enforcement of foreign bankruptcy judgments specifically. These scholars argue that statutory construction provides that if prior law was not expressly overruled, it retains its force and effect. The matter is not yet entirely settled as to what extent the current Civil Procedure Code (and Bankruptcy Law) overrule or modify the terms of the Civil Procedure Code of 1939.

The relevant provisions of the Civil Procedure Code of 1939 are as follows:

- Foreign decisions declaring the bankruptcy of merchants domiciled in the countries where such decisions were rendered, shall, after due recognition by the Brazilian Supreme Court in the form of the Exequatur (as defined and described below), be effective as bankruptcy declarations in Brazil.[21]

- Independent of the Exequatur, and upon presentation of the foreign decision, the representatives of the bankrupt estate may obtain relief which allow them to secure rights, collect debts and file claims without having to post any bonds.[22]

- Any actions which implement bankruptcy decisions, such as the collection and sale of assets, may only be performed after the issuance of the Exequatur, and shall be governed by Brazilian law.[23]

---

translated by a Brazilian sworn translator. Once it reaches the Brazilian Ministry of Foreign Relations, it will be sent to the Ministry of Justice and from there to the Brazilian Supreme Court, where it must obtain the proper Exequatur in order to be enforceable. Thereafter, the claimant is ready to submit the Rogatory Letter to the court of competent jurisdiction. Once implemented, the Rogatory Letter should be returned to the court of origin.

[21] Article 787.

[22] Article 787, I.

[23] Article 787, II.

- All claims and law suits filed in Brazil before a foreign bankruptcy decision is recognized in the form of the Exequatur, shall continue and shall be allowed to foreclose assets of the bankrupt debtor located in Brazil.[24] Some scholars argue that the foregoing provisions, under Articles 787, 787, I and II are still in effect, but that Article 787, III was revoked by the Bankruptcy Law.

- Any foreign decision affecting a merchant domiciled in Brazil shall not, even after recognition, affect the business of such merchant located in Brazil.[25]

- Foreign court decisions allowing judicial reorganization of insolvent companies may be recognized in Brazil but shall only be effective against creditors resident in Brazil after they are duly served the correspondent summons.[26]

Regardless of the philosophical inconsistency with the current law in Brazil, some scholars argue that, based on the Civil Procedure Code of 1939, in the case where only a debtor´s chattel is present in the country, creditors should be able to bring a local action and have the opportunity to execute against the assets, irrespective of the recognition of any foreign judgment.

In this context, however, it is also important to note the potential for abuse by individual creditors regarding a foreign debtor´s chattel in Brazil in the cases where a judgment has not yet been ratified or a bankruptcy proceeding is pending in a foreign jurisdiction. Due to the limitations of the current Bankruptcy Law and Civil Code, and the lengthy time requirements, the opportunity potentially exists for individual creditors to circumvent the main bankruptcy proceeding by appropriating the Brazilian courts for their own collection ends. These abuses of process blatantly violate the principle of equal treatment of creditors in the same class, which is also an underpinning of the Brazilian bankruptcy system.

The Exequatur. The foreign judgment itself, in order to become enforceable in Brazil, must be submitted to the Brazilian Supreme Court (*Supremo Tribunal Federal*) for the issuance of an *exequatur*, an authorization granted by the Supreme Court permitting the execution of a foreign judicial act in Brazil ("Exequatur").[27] Before the issuance of an Exequatur, the defendant shall have a five-day period in which to challenge the claim. Once the Exequatur is issued, the claimant must resort to the Brazilian court of competent jurisdiction for enforcement of the foreign judgement.

In the real-life practice of law, it is not uncommon that a party does not have the time to wait for a foreign decision to be recognized by the Brazilian Supreme Court before acting. The practical complexity, investment of time and resources and legal opaqueness involved in enforcing a foreign bankruptcy judgment in Brazil may discourage creditors from attempting to consolidate actions that include Brazilian assets. With respect to such assets, legal theory (and letter of the law) may provide a remedy in many cases for consolidating an action or enforcing a foreign bankruptcy judgment, but procedural issues may have the practical effect of thwarting such recourse.

[24] Article 787, III.
[25] Article 788.
[26] Article 789.
[27] The Federal Superior Court has affirmed that a foreign bankruptcy award shall only be legally enforceable in Brazil when it is ratified by the Brazilian Supreme Court (RESP 15.708-0 – RS, 3rd Panel, j. 05/28/1996, Justice Costa Leite reporting, Court Gazette (*DJU*), 03/24/1997).

If time is a factor, a claimant may generally file an independent law suit in Brazil, provided that the remedies sought are available under Brazilian law and that the claimant has rights that are protected under Brazilian law. Unfortunately for the larger process, this situation again creates the opportunity for unequal treatment of creditors, rewarding those creditors that seek remedy outside of the organized bankruptcy process.

Ultimately, when presented with the enforcement options, the claimant will contemplate following two distinct courses of action: first, the claimant may obtain from the foreign court a Rogatory Letter requesting a Brazilian court to perform certain acts, such as serve summons, hear witnesses, deliver notice, require certain evidence to be shown or order a defendant to perform or refrain from performing certain acts; or second, file a separate law suit in Brazil in order to achieve the intended result.

In short, the standard domestic enforcement procedures are inadequate for multi-jurisdictional bankruptcy actions, and in fact encourage creditors to evade the main action by way of the Brazilian legal system for individual satisfaction; this facilitation by the Brazilian system, practically at least, runs counter to the principles underlying the Exaquatar, and to the very notion (theoretically) present in the Bankruptcy Law, equal treatment among creditors (*par condicio omnium creditorum*).

Further Issues. In the prioritization of claims, Brazilian law does not discriminate against foreign creditors; they are entitled to be included in a list of creditors for the Brazilian entity just as a Brazilian creditor would.

The Bankruptcy Law does not recognize foreign-denominations of debt, requiring that foreign credits be converted into Brazilian currency, based on the exchange rate on the date the bankruptcy is effective.

Foreign creditors must be represented by a Brazilian attorney, who can only act if the appropriate authority is granted in a duly executed power-of-attorney, which must be notarized, recognized and validated by the consular authority, translated in Brazil by an official translator, and registered with the appropriate Registry of Titles and Documents.

Furthermore, if the documents are drafted in a language other than Portuguese, they must be translated in Brazil by a official translator prior to being registered with the appropriate Registry of Titles and Documents.

A foreign non-resident party will have to provide a judicial bond (*cautio judicatum solvi*) to secure court costs and the award (Article 9, paragraph III, Item c of the Bankruptcy Law). In certain cases, however, treaties regarding jurisdictional cooperation and assistance executed by Brazil or other rules may release the non-resident creditor from the payment of the judicial bond.

THE OPPORTUNITY TO DEVELOP MODERN BANKRUPTCY LAW FOR BRAZIL

The Brazilian Congress has considered implementing revised bankruptcy legislation since 1993. Draft bill of Law No. 4,376-A (the "Draft Law") would establish a new Bankruptcy Law. Although the purpose is to modernize the existing Bankruptcy Law and create a system that is more effective in protecting and stimulating the restructuring of businesses, the Draft Law does not address cross-border insolvency issues. In order to promote international commerce and finance in Brazil, the Federal Government should consider legislation that incorporates certain fundamental universality principles. Even modest improvements and clarifications to the current regime would provide substantial assistance to the judiciary in participating in the international resolution of international commercial proceedings, in a way that makes sense and is consistent with the practices of other large free-market states. The Model Law provides helpful guidance in this respect.

In order to assist nations coordinate their local bankruptcy law with those of other nations, UNCITRAL developed the Model Law. This approach recognizes the great difficulty in achieving the international consensus required to adopt and ratify a treaty, which would otherwise require substantial agreement on all relevant details. The Model Law also acknowledges the complexities and divergent national approaches currently in existence, precisely the issues the Model Law seeks to begin to redress.

The Model Law is intended to apply to bankruptcy proceedings that are established in more than one adopting state. The Model Law was structured to be flexible and allows for modification to accommodate local commercial law. The main principles of the Model Law are: (a) improved procedures for the recognition of foreign proceedings; (b) participation of designated representatives in multiple proceedings; and (c) the cooperation of courts and representatives across adopting jurisdictions. Despite addressing some significant cross-border procedural issues, the Model Law does not attempt to determine the appropriate governing law for a bankruptcy case.

Unlike the Brazilian Bankruptcy Law (or the Draft Law for that matter), the Model Law also makes the distinction between main and ancillary proceedings, as the driving organizing principle is the coordinated administration of parallel proceedings. This approach typifies the universality principle. Again, to some extent, some of these principles are present in the Code of Bustamante. The historical precedent and the modern commercial practice should be strong indicators to the Brazilian legislators that the time has come to make these practices law in Brazil.

CONCLUSION

In the absence of specific legislation for dealing with cross-border insolvency, as in most civil-law jurisdictions, courts in Brazil are currently employing a variety of techniques to address some of the complicated international bankruptcy issues before them. This mix of legal approaches frequently results in inadequate and inharmonious consequences, which in the end hamper the rescue of financially troubled businesses. This uncoordinated and local approach is not conducive to a fair and efficient administration of cross-border insolvencies, and ultimately impedes the execution of a process that maintains the maximum value of the assets in Brazil and abroad. By contrast, coordinated administration of cross-border insolvency cases is in the best interest of creditors and debtors, providing greater predictability and consistency of process. Factors which contribute to the stability of commercial relations inevitably help to improve foreign investment and trade for the adopting state.