



INTERNATIONAL INSOLVENCY INSTITUTE

Eighteenth Annual International Insolvency Conference

New York, NY

*III NextGen Leadership Program and
Class VII Induction*

**COURT-TO-COURT COMMUNICATION IN CROSS-
BORDER INSOLVENCY CASES**

By

Gilberto Gornati

Thomaz Bastos Waisberg Kurzweil
São Paulo, Brazil

September 23 - 25, 2018

Court-to-Court Communication: reasons why the Brazilian Courts are not involved in the development of protocols.

Gilberto Gornati¹

1. Introduction

Court-to-Court Communication is an important step for the development of cross-border proceedings relating to insolvency law. Through specific protocols and guidelines on the matter, stakeholders and judges should be more efficiently connected to solve insolvency cases which pertain to more than one jurisdiction. Cooperation and a coordinated work effort among different courts and jurisdictions in which insolvency proceedings are being conducted may beget better balance to the information asymmetry which confounds all involved parties.

The main reason to use such protocols and guidelines is that only insolvency proceedings opened in more than one jurisdiction are the aim of this subject. With this in mind, few cases in Brazil – which encompass great amounts of indebtedness – would be eligible to establish a specific protocol or guidelines on court-to-court communication. As a result, unfortunately, Brazilian courts are not ready to do so.

The analysis of some of the reasons that have contributed to the current state of events in Brazil is better understood when seen in light of two perspectives: one from the Brazilian companies that have offshore activities and the other from the view of foreign companies that have subsidiaries in Brazil.

Based on the widely accepted assumption raised above that Brazilian courts are not ready to develop protocols and guidelines on court-to-court communication and the aforementioned two folded perspectives regarding insolvency cases opened in Brazil, this paper discusses issues inserted under the subject of cross border insolvency proceedings.

2. Recent cross border cases opened before Brazilian jurisdiction (Brazilian based companies)

Recent insolvency cases opened in Brazil potentially would have ended with a more efficient result on the outcome to stakeholders and on the preservation and maximization of debtors' business, but foreign courts were not able to be involved due to the lack of specific protocols with Brazilian courts. Namely *OAS* (a private owned engineering and infrastructure company) with subsidiaries in least five different jurisdictions, *Schahin* (a private owned oil & gas industry) with companies in at least 3 different jurisdictions, *Oi Brasil Telecom* (a private owned telecom company) involving at least 3 different jurisdictions, would have had more efficient judicial decisions to protect assets and to assure a better recovery to creditors, but once Brazil did not enact the

¹ Partner of Thomaz Bastos, Waisberg, Kurzweil Sociedade de Advogados in São Paulo, Brazil. Professor at the Law School of Fundação Getúlio Vargas in São Paulo, Brazil.

UNCITRAL Model Law on cross border insolvency, nor establish any protocols and guidelines on court-to-court communication, no official discussion took place among judges involved in such cases.

Two problems may be raised by using those cases as paradigms for future issues. Even though the amount of indebtedness was high (OAS around USD 4 billion, Schahin around USD 1,5 billion and Oi Brasil around USD 20 billion), foreign creditors were bondholders with unsecured titles and mainly distressed funds that bought such credits in the current distressed markets existent basically in the US and most of the assets of such companies were not under the US jurisdiction, but Brazilian.

The main insolvency proceedings were opened in Brazil and Brazilian courts recognized its jurisdictional power over companies' assets and over the judicial proceeding, which led to the opening of the recognition of cross border proceedings before US courts in order to only obtain the recognition of the competence of Brazilian jurisdiction and the US legal system is favorable (and efficient on such matter) to recognize the proceeding opened in the foreign jurisdiction.

Judges in Brazil would have celebrated protocols and guidelines on court-to-court communication to identify the powers and owners of the bonds, for example, mainly because the issuance of bonds and the understanding their inner workings within financial and capital markets are not subjects well versed by Brazilian courts.

The Lupatech case (a private owned company that rendered services to Petrobras – Brazilian biggest company on the Oil & Gas sector) would have faced an easier solution to identify if adherent creditors to its plan of out-of-court reorganization (*recuperação extrajudicial*), mostly bondholders, really were the owners of such bonds and were dully empowered to grant powers of attorney in Brazil in order to execute and adhere the plan. The Brazilian judge that was involved in this case had to overcome some difficulties to understand the mechanics of the issuance of bonds and the identification of bondholders in order to approve that plan.

But everything comes down to one crucial point on this matter: notwithstanding the fact that Brazilian courts do face, from time to time, insolvency cases with recognition proceedings under foreign jurisdictions – mainly in the US and the Courts of the State of New York – those cases are not involving companies with high valued assets located in foreign jurisdictions, nor do they affect creditors with secured credits over collaterals and/or assets located in foreign jurisdictions. Mainly only creditors that are distressed funds are involved seeking a credit recovery based on a different perspective of return on assets/return on equity math. In other words, the relevance of foreign jurisdictions to solve such cases is not a deciding factor.

There are some judges, mainly in the Courts of the State of Sao Paulo that started a discussion with a view to set a draft of a protocol that would be discussed with other jurisdictions, but probably because lack of approval under Brazilian law of the UNCITRAL Model of Law, judges and justices are not willing to discuss the matter of court-to-court communication any further. Even though court-to-court communication protocols and guidelines obviously is a different thing altogether from UNCITRAL Model of Law, the confusion among both matters is quite regular among legal practitioners in Brazil not familiar with the subject.

3. Recent cross border cases opened abroad and before Brazilian jurisdiction (foreign companies with Brazilian subsidiaries)

Other insolvency proceedings of companies holding equity on Brazilian companies (Brazilian subsidiaries) that were opened in other jurisdictions would have benefited from the maximization of the value of debtors' assets in Brazil and greater coordination pertaining to the liquidation proceedings.

An example is the Canadian telecom company Nortel, which filed for bankruptcy in different jurisdictions, including in Brazil (filed in March 2010 before the Insolvency Court of Sao Paulo, Brazil). In 2017, Nortel insolvency proceedings in the US and Canada liquidated its assets and paid almost USD 7 billion to its creditors within eight years of the insolvency proceeding. The Brazilian wholly owned subsidiary was not involved in such liquidation. The Brazilian proceeding is still open, with no solution yet open to creditors, and Nortel Canada would receive at least USD 100 million from such Brazilian company, but no solution was developed within the past eight years of the Brazilian proceeding, even though the solution found abroad was already set among Canadian and US jurisdictions.

It is clear that most of the assets liquidated under the proceeding held by both Courts raised a total amount much higher than the one that may be raised solely under Brazilian jurisdiction, but if the courts of the State of Sao Paulo had protocols and guidelines on court-to-court communication with those other jurisdictions, Brazilian judges would be informed of the solutions and alternatives of the bankruptcy case abroad and would be prepared to better understand the role of the Brazilian subsidiary within the whole process of liquidation.

The problem of cases of Brazilian subsidiaries under insolvency proceedings is that the amounts involved are not that high as those cases discussed in section 2 above. George Soros' On Telecom it is also an example of a bankruptcy case in this basket of cases, and just as the Nortel case, have its own shareholders as the main creditors of the insolvency proceedings.

Before Brazilian insolvency law, related parties – mainly shareholders or relatives of the debtor – are last in line regarding payments after the liquidation of assets.

4. Some reasons why Brazilian jurisdiction is not involved in the development of protocols

In addition to the lack of specific protocols and guidelines celebrated with other jurisdictions and the absence of sophisticated cases which would demand a coordinated framework among different jurisdictions to protect or liquidate assets of companies under insolvency proceedings, Brazilian courts are still relegating or downright dismissing the discussion to enact of UNCITRAL Model of Law.

This issue has once more raised current attention because the Brazilian Congress is debating bill to change and modernize the current Brazilian Insolvency Code (Law 11.101/2005). In one of the

more recent proposals there is a specific insertion of a cross border chapter, based on the UNCITRAL Model of Law, which would provide the mechanisms to Brazilian judges to recognize insolvency proceedings opened in foreign jurisdictions and to enable Brazilian courts with powers to establish protocols and guidelines of cooperation and communication among different jurisdictions.

The proposed new article 167-A also establishes that the rulings rendered by Brazilian judges under the applicable matters of UNCITRAL Model of Law should consider the English version of the text, even though Brazilian Civil Procedure Code provides that any and all documents in foreign language should be considered valid before Brazilian only if reverted to Portuguese with sworn translations (article 192).

Most of the proposed changes are questionable and still under debate, but the one regarding the enact of the UNCITRAL Model of Law is considering insolvency as a different and specific branch from other legal subjects that should be observed under Brazilian jurisdiction and Brazilian Rule of Law. Concordantly, under this argument, insolvency decisions rendered by foreign jurisdictions would not need to, in order to be validated and enforceable before Brazilian Courts, go through the same bureaucratic proceedings of any other judicial decision, and after the validation and recognition of foreign decisions by Brazilian Superior Court as set forth in Brazilian Civil Procedure Code (article 960 and following articles). The barriers and obstacles created by Brazilian Legal and bureaucratic systems in a global context are incredibly cumbersome and still prevent Brazilian courts and Brazilian law makers to change the dynamics need for a better solutions to cross border cases.

All of these difficulties also result from the fact that Brazil is plagued with bureaucracy and by legal institutions that are unable to keep pace with the changes imposed by modern times or the demand for rapid decisions to complex issues. Until we get there, lets keep on working to find clever solutions to such cases.