# Cross-border insolvency and the Brazilian experience (so far): comments on the recent adoption of the UNCITRAL Model law on cross-border insolvency

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*Abstract:*

This article examines Brazil's recent adoption of the UNCITRAL Model Law on Cross-Border Insolvency, which displaced the territorial model that had long governed Brazilian insolvency proceedings in favour of modified universalism. Drawing on the body of case law developed before the reform – including the OGX, Oi, OAS, Schahin, and Constellation reorganisation proceedings – it shows how Brazilian courts had already begun asserting jurisdiction over foreign entities within domestically-managed corporate groups through an expansive reading of Article 3 of the Brazilian Bankruptcy Law. The article then analyses the first applications of the new framework in the LATAM Airlines and Prosafe cases, arguing that the principal interpretative difficulty for Brazilian judges, insolvency practitioners, prosecutors and lawyers lies in resisting the temptation to equate the domestic notion of principal place of business with the autonomous, internationally-rooted concept of centre of main interests. Finally, it proposes the adoption of a protocol or a soft-law instrument, to govern judicial cooperation between Brazilian and European Union courts, and identifies Brazil's broader stance on non-main proceedings – anchored on the mere presence of assets in Brazil – as a potentially valuable feature of the new regime.

**Keywords**: cross-border insolvency; competent venue; Brazilian experience; UNCITRAL Model Law on Cross-Border Insolvency; cooperation and coordination between Brazil and the European Union.

## *A. Introduction*

Cross-border insolvency (or transnational insolvency) is an expression used to encompass insolvency, bankruptcy, and rescue proceedings involving more than one jurisdiction, when the debtor (or group of debtors), its creditors, or its assets have links with the legal framework from two or more countries. A necessary premise for the success of a cross-border insolvency case is the existence of legal instruments (or case law) that allow cooperation and coordination between different jurisdictions.

At its inception, the Brazilian Bankruptcy Law (Federal Law No. 11,101/2005) did not have any provisions to address cross-border issues. Its main innovation over previous legislation was the introduction of rescue proceedings (judicial and extrajudicial reorganisation), mostly inspired by Chapter 11 of the United States Bankruptcy Code (U.S.C., Title 11), intended to guarantee the continuity and preservation of viable companies undergoing a financial or economic crisis, safeguarding jobs, and the redistribution of wealth.

The only provision remotely related to cross-border insolvency cases in the original version of the Brazilian Bankruptcy Law was the final part of Article 3, which recognised the jurisdiction of Brazilian courts for the filing of judicial or extrajudicial reorganisation 'of the branch of a company that has its head office outside Brazil'. Furthermore, Article 12 of the Introductory Statute to the Rules of Brazilian Law (Federal Decree-Law No. 4,657/1942, as amended) adopted a territorial model, stating that 'the Brazilian judicial authority is competent when the defendant is domiciled in Brazil or when the obligation has to be fulfilled here' and that 'it is up to the Brazilian judicial authority to hear about the actions related to property located in Brazil'.

As is well known, territorialism is a theoretical model that determines the exclusive jurisdiction of the country where the debtor's assets are located, with the consequent application of local rules.[1] According to this model, a debtor would need to file insolvency proceedings in each of the countries where its assets, branches, and affiliated companies are located, with the submission of such proceedings to the local legal systems.[2]

On the other hand, the theoretical model of universalism affirms that the country in which the debtor has its 'home' has jurisdiction over the debtor's insolvency proceeding at the global level, extending its effects to the legal systems of other countries.[3] Thus, the legislation of the place of

1 See LoPucki, p. 701. See also McCormack, p. 172. See also Toledo/Satiro/Satiro/Campana Filho, p. 123–124.
2 See Campana Filho, p. 88.
3 See Perin Júnior, p. 104. See also Toledo/Satiro/Satiro/Campana Filho, p. 123–124.

filing would be applicable on a global scale, affecting the debtor's assets, branches, and affiliated companies, regardless of the country in which they are located.[4]

Each model has its shortcomings, which has led to different proposals with more balanced solutions for transnational insolvency, such as 'modified universalism', 'cooperative territorialism', or 'coordinated universalism', among others. The UNCITRAL Model Law on Cross-Border Insolvency ('MLCBI') adopted the modified universalism model, which prescribes a global approach in which a country leads the insolvency proceeding, where the debtor's centre of main interests ('COMI') is located, which is recognised and made effective in all countries in which the debtor has establishments.[5] Therefore, cooperation and communication between jurisdictions are essential in this system.[6]

Through the reform recently enacted by Federal Law No. 14,112/2020, made effective on 23.01.2021, the Brazilian Bankruptcy Law adopted the MLCBI in Articles 167-A through 167-Y, with its mechanisms for international cooperation, coordination and communication, expressly allowing recognition of main insolvency proceedings at the debtor's centre of main interests and non-main proceedings where the debtor has foreign affiliates with an establishment, or even assets, as Brazil adopted a broader view toward recognition of non-main proceedings. This places Brazil in a better position to cooperate in cross-border cases involving companies based in the European Union, the United States, and many other countries around the world.

The recent change meant the adoption of a modified universalism model instead of the territorialism model that had ruled for decades in Brazil. There is no doubt that this change in legislation was necessary for Brazil to modernise its bankruptcy and rescue regimes, but it also meant that Brazilian courts, insolvency practitioners, and attorneys had to fundamentally change the way they viewed cross-border cases and learn how to cooperate, coordinate, and communicate with foreign jurisdictions.

With this in mind, the first part of this paper shows what Brazilian courts are used to in terms of finding the competent venues in bankruptcy and rescue cases involving corporate groups with foreign entities. The second

4 See Campana Filho, p. 86.
5 See Mevorach, p. 227.
6 These are true principles of transnational insolvency, without which it would be impossible to conduct multiple proceedings efficiently. See Bork, p. 44–72. See also Fletcher, p. 482–483.

part, in turn, discusses the adoption (rather, transplant) of the MLCBI by Brazilian legislation, considering the little experience that Brazilian courts have had since the enactment of the recent reform, only to conclude that insolvency professionals and Brazilian judges will need to become acquainted (especially through the sharing of experiences) in the seemingly foreign language that is cross-border insolvency. The third part suggests the adoption of a protocol or a soft-law instrument to further cooperation and coordination in cross-border insolvency cases involving companies or corporate groups with ties to Brazil and the European Union.

### *B. What Brazilian courts are used to: the definition of the competent venue according to the Brazilian Bankruptcy Law*

In the Brazilian Bankruptcy Law, Article 3 states that the debtor's principal place of business (or 'principal establishment', according to the literal translation) defines the competent venue to process a bankruptcy or a reorganisation proceeding.

Historically, the notion of domicile as the place of a merchant's principal place of business in Brazilian law has clear roots in French legal tradition, particularly the Napoleonic Code of 1804, which defined domicile not merely in commercial or credit terms but as the locus of a person's central social and legal relations – an idea traceable to French law as early as the seventeenth century and echoed elsewhere in Europe, such as in Italian law's concept of *sede principale*. Against this background, it was natural for the Brazilian Commercial Code of the imperial period to treat the merchant's domicile as a reference to the principal place of business, a conception that later evolved into the explicit replacement of 'domicile' with 'principal establishment' in rules governing jurisdiction for insolvency proceedings. This shift responded to the practical reality that a single merchant might carry on multiple economic activities in different locations, requiring the law to select one point of reference for the application of insolvency regimes. The legislative choice of the principal place of business proved effective, especially as Brazilian law came to recognise the possibility of multiple domiciles or establishments for procedural and other purposes, while reserving the principal one as decisive for insolvency matters.[7]

7 See Galdino, p. 186–187.

The imperial conception of jurisdiction based on the debtor's principal place of business was not only preserved but reaffirmed throughout the republican period, as successive reforms of Brazilian bankruptcy law consistently maintained – and in practice strengthened – this criterion, from Federal Decree No. 917 of 1890 through the legislation of 1902, 1903, 1908, 1929, 1942, and its long consolidation in Federal Decree-Law No. 7,661 of 1945, which remained in force for sixty years, until its replacement by Article 3 of Federal Law No. 11,101 of 2005 (the Brazilian Bankruptcy Law), which once again entrusted jurisdiction for insolvency and rescue proceedings to the court of the debtor's principal place of business. The remarkable continuity of this rule, repeatedly scrutinized and reaffirmed by legislators, courts, and legal scholarship in light of the economic importance of insolvency law, suggests that it represents either a particularly sound solution or, at least, the most effective one yet devised.[8]

The rule in Article 3 of the Brazilian Bankruptcy Law aims to identify territorial competence within Brazil's jurisdiction, although it might be akin to the notion of the centre of main interests in cross-border insolvency. The principal place of business is often interpreted by case law as the place of management and control or the place of business and operations,[9] whereas the company's registered office by itself, though taken into consideration, may be discarded as a relevant standard in this regard, if other factors are present.

Article 3 does not expressly define the criteria that must be adopted to ascertain the debtor's principal place of business, which makes it more appropriate to characterise the debtor's main establishment from a 'measurement of the externalization of concrete acts, constituting, therefore, a matter of fact, to be appreciated in light of the specific case by the judge, when accepting their competence'.[10] At the end of the day, verification of the principal place of business depends on a case-by-case analysis,[11] as '[t]here is no formula to determine it. In each case, it is up to the judiciary to identify which establishment has predominance over the business structure'.[12]

8 See Galdino, p. 187–189.
9 See Galdino, p. 194.
10 See Campinho, p. 34.
11 See Galdino, p. 193.
12 See Mamede, p. 25. See also Fazzio Junior, p. 56.

Therefore, the standard of the principal place of business is flexible and must be ascertained based on the factual circumstances of each case.[13] Thus, in order to determine the principal place of business of a company or a corporate group, the debtor, before filing for reorganisation, and the Brazilian courts, when ruling on such filing, should consider and weigh the importance of the following non-exclusive and non-cumulative factors: (i) the concentration of the debtor's, or debtor group's, greatest volume of business, and its most important establishment from an economic point of view (e.g., the source of most of its revenue), its economic centre;[14] (ii) the decision-making centre, the place from which the most important strategic, financial and administrative decisions and orders emanate;[15]

13 The Brazilian Superior Court of Justice (in line with an approach previously prevailing at the Brazilian Supreme Court) has traditionally understood the court of the principal place of business to correspond to the company's decision-making centre in insolvency proceedings; however, over the past decade, some precedents have shown a shift toward identifying jurisdiction by reference to the economic centre, sometimes displacing the decision-making centre and at other times combining both criteria. As a result, after a period in which the decision-making centre clearly predominated as the defining element of the principal place of business, current case law reflects a coexistence of decisions that adhere to that criterion and others that favour the economic centre. See Galdino, p. 203.

14 See Brazilian Supreme Court 18.02.1977 – Conflict of Jurisdiction No. 6.025/SP, Justice Antonio Neder, Full Court (affirming that the principal place of business 'is not the one to which the company's bylaws confer the title of principal, but rather the one that concretely constitutes the living body, the vital centre of the debtor's main commercial activities – the seat or nucleus of the business in its throbbing material existence'). See also Brazilian Superior Court of Justice 22.02.2017 – Internal Appeal in the Conflict of Jurisdiction No. 147.714/SP, Justice Luis Felipe Salomão, 2nd Section (stating that 'pursuant to article 3 of Law No. 11,101/2005, the competent forum for the processing of judicial reorganisation and the declaration of bankruptcy is the one where the main establishment of the company is located, thus considered the place with the greatest volume of business, that is, the most important place of the business activity from an economic point of view'). See also Brazilian Superior Court of Justice 20.10.2020 – Internal Appeal in the Motion for Clarification in Conflict of Jurisdiction No. 172.719/RS, Justice Raul Araújo, 2nd Section. See also Brazilian Superior Court of Justice 26.09.2018 – Internal Appeal in the Conflict of Jurisdiction No. 157.969/RS, Justice Ricardo Villas Bôas Cueva, 2nd Section.

15 See Brazilian Supreme Court 22.11.1944 – Conflict of Jurisdiction No. 1.529/SP, Justice Orozimbo Nonato, Full Court (affirming that 'what characterizes the principal establishment is not the volume of business nor the importance of commercial activity; rather, with or without those elements, it is the establishment that centralizes administration (...) from which the direction of commercial life radiates'). See also São Paulo Court of Appeals 09.12.2013 – Interlocutory Appeal No. 0015219–05.2013.8.26.0000, Judge Tasso Duarte de Melo, 2nd Reserved Chamber of Corpo-

(iii) the location where most business and industrial activities are carried out;[16] (iv) the location of the debtor's, or the debtor group's, management (e.g., the place from which the directors and managers run the business activity);[17] (v) the place where the majority of employees and creditors is located, or where the debtor's books and accounting are found;[18] (vi) the location of most assets and production facilities owned by the debtor, or the debtor group;[19] (vii) the place where the debtor, or the debtor group, enters into most contracts with governmental entities;[20] (viii) the place where the objectives of the Brazilian Bankruptcy Law will be fulfilled with greater

rate Law. See also Paraná Court of Appeals 12.02.2014 – Interlocutory Appeal No. 1050315–2, Judge Renato Lopes de Paiva, 17th Civil Chamber.

16 See São Paulo Court of Appeals 14.09.2016. – Interlocutory Appeal No. 2132999–24.2016.8.26.0000, Judge Alexandre Marcondes, 2nd Reserved Chamber of Corporate Law. See also Rio Grande do Sul Court of Appeals 26.04.2017 – Interlocutory Appeal No. 70071561328, Judge Léo Romi Pilau Júnior, 5th Civil Chamber. See also Paraná Court of Appeals 23.03.2016 – Interlocutory Appeal No. 1359265–9, Judge Lauri Caetano da Silva, 17th Civil Chamber. And in light of the previous Bankruptcy Law (Federal Decree-Law No. 7,661/1945), see Barreto Filho, p. 145.

17 See São Paulo Court of Appeals 04.12.2012 – Interlocutory Appeal No. 0190084–41.2012.8.26.0000, Judge Ricardo Negrão, 2nd Reserved Chamber of Corporate Law (affirming that the '[d]emonstration that the place of board deliberations, management and other administrative, executive and legislative activities take place in Ribeirão Pires. In addition, the largest productive body that make up the objective and corporate aspects of the company is located in that city'). See also Rio de Janeiro Court of Appeals 12.03.2014 – Interlocutory Appeal No. 0064637–04.2013.8.19.0000, Judge Gilberto Guarino, 14th Civil Chamber.

18 See Rio de Janeiro Court of Appeals 12.12.2018 – Interlocutory Appeal No. 0051631–51.2018.8.19.0000, Judge Luiz Fernando de Andrade Pinto, 25th Civil Chamber. See also Paraná Court of Appeals 03.05.2017 – Conflict of Jurisdiction No. 1605387–5, Judge Marcelo Gobbo Dalla Dea, 18th Civil Chamber. See also Rio Grande do Sul Court of Appeals 14.07.2016 – Interlocutory Appeal No. 70067378414, Judge Rinez da Trindade, 6th Civil Chamber. See also São Paulo Court of Appeals 26.06.2012 – Interlocutory Appeal No. 0281187–66.2011.8.26.0000, Judge Pereira Calças, 1st Reserved Chamber of Corporate Law. See also Coelho, p. 54–55.

19 See Rio de Janeiro Court of Appeals 25.06.2019 – Interlocutory Appeal No. 0022766–81.2019.8.19.0000, Judge Geórgia de Carvalho Lima, 12th Civil Chamber. See also Goiás Court of Appeals 05.11.2014 -Conflict of Jurisdiction No. 149608–61.2014.8.09.0000, Judge Gerson Santana Cintra, 1st Civil Section. See also Toledo/Abrão/Toledo, p. 13–14.

20 See Rio Grande do Sul Court of Appeals 26.06.2014 – Interlocutory Appeal No. 70060247848, Judge Jorge Luiz Lopes do Canto, 5th Civil Chamber.

chances of success;[21] and/or (ix) the statutory or contractual headquarters of the debtor.[22]

All these factors must be evaluated by the debtor before filing for judicial or extrajudicial reorganisation, or for voluntary bankruptcy, as well as by the court when considering such a request, in an attempt to confirm whether the principal place of business is actually located under its jurisdiction. However, some of these factors are more relevant (and therefore have a greater weight in the ruling of the court that recognises its competence) and others less.

On the one hand, the statutory or contractual headquarters, for example, is considered the least important factor in determining the principal place of business because of the ease of manipulation by the debtor. On the other hand, substantive factors, such as where the company or corporate group concentrates its largest volume of business (e.g., the origin of most of its revenue, where most of its contracts are executed), or the place from which the business is run by management, are considered as important factors in determining where the debtor's rescue or bankruptcy proceeding must be carried out. Substantive factors cannot be easily manipulated by the debtor, as they point to the place where it pursues its business activities, produces/sells goods, and/or provides services.

When analysing the principal place of business for a company or a corporate group with operations spread across several districts, or even states, the decision-making centre may be considered a more relevant factor. When the economic activities (e.g., industrial complex, distribution centre) are located in one district or state, and the administrative office in another, the location of activities may be considered more significant.[23] At first glance, it seems that the factors related to economic turnover are the most relevant, but in a situation in which there is more than one establishment or business entity of equal relevance to the company, the location of the other factors may be important to ascertain which is the principal place of business.

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21 See Minas Gerais Court of Appeals 19.06.2012 – Interlocutory Appeal No. 1.0707.11.009662 – 5/001, Judge Oliveira Firmo, 7th Civil Chamber.

22 See Brazilian Superior Court of Justice 09.112016 – Conflict of Jurisdiction No. 146.579/MG, Justice Paulo de Tarso Sanseverino, 2nd Section. See also Rio Grande do Sul Court of Appeals 28.03.2018 – Conflict of Jurisdiction No. 70075788356, Judge Jorge Luiz Lopes do Canto, 5th Civil Chamber.

23 See Saunders, Minnesota L. Rev. May 2006, 1475.

In addition, it is important to keep in mind whether the choice of the principal place of business may cause any type of damage to creditors, employees, and other stakeholders. Consider the example of a rescue proceeding filed in a district deep in the interior of the Amazon rainforest, accessible only by boat and with an unstable Internet connection, with most creditors located in different districts spread out across the largest state in Brazil. In this case, if the decision-making centre is in a district that allows greater inclusion and participation of the actors in the reorganisation process, this criterion should have more weight when deciding where to file the rescue proceeding.

If, after evaluating all the factors, the judge finds that more than one location could meet the standard of the principal place of business, 'the court of the place of the establishment where the judicial reorganisation action was filed must be considered competent',[24] in order to avoid any harm to the debtor resulting from delays caused by the change of venues. Similarly, in cases in which another establishment could be only marginally more relevant, the proceeding should remain where it is, in order to protect the effectiveness of the rescue process and avoid damages to the debtor, its creditors, and other stakeholders.

As stated by the former President of the Brazilian Supreme Court, Justice Luiz Fux, the 'judge has the duty to examine the immediate and systemic consequences that their ruling will produce in reality, because, by exercising their decision-making power in the concrete cases they are faced with, judges allocate scarce resources'.[25] The analysis, it must be reiterated, should be carried out in each case, with regard to its specificities and peculiarities.

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 (seen as a whole, and not the entities individually, according to Brazilian practice) has its principal place of business in Brazil, the court will find itself competent to process the rescue proceeding. Should, then, Brazilian courts hold jurisdiction to process rescue proceedings that involve foreign entities? A body of case law has been formed in Brazil to answer precisely this question.

24 See Ayoub/Cavalli, p. 92.

25 See Brazilian Supreme Court 12.03.2019 – AgRg Pet No. 8.002, Justice Luiz Fux, 1st Chamber.

## I. The Brazilian experience with cross-border cases before the recent reform to the Brazilian Bankruptcy Law

The leading case in transnational insolvency matters is the OGX Group's reorganisation proceeding, specifically regarding the recognition of Brazilian jurisdiction over foreign entities. Two Brazilian companies (OGX Petróleo e Gás Participações S/A and OGX Petróleo e Gás S/A) and two foreign companies (OGX International GmBH and OGX Austria GmBH, both with seats in Austria) filed a petition for reorganisation in Brazil. The companies were members of the same corporate group, with interconnected operations in the oil and gas sector.

In summary, the OGX Group was organised as follows: OGX Petróleo e Gás Participações S/A was the holding and non-operating company, parent of OGX Petróleo e Gás S/A with 99.99 % ownership of its capital structure. In addition, it also directly and fully exercised control over OGX International GmBH and OGX Austria GmBH. The group's administrative offices and business activities were located in Brazil. Meanwhile, the foreign companies were used to attract financing and investments overseas, in order to fund the operation in Brazilian oil fields.

At first, the Brazilian judge did not grant the joint processing of the reorganisation proceeding, grounded on the argument that the Brazilian court did not have jurisdiction over foreign companies.

The OGX Group appealed from this order on the following basis: (i) the absence of a legal provision does not imply a prohibition on the joint processing of the judicial reorganisation of transnational corporate groups; (ii) the court of the location of the corporate group's principal place of business holds jurisdiction to process the rescue proceeding for the entire corporate group; and (iii) the joint processing of the OGX Group's reorganisation does not imply a violation of Austrian sovereignty or legislation, as the country's laws allow the adoption of the unified proceeding in Brazil.

The Rio de Janeiro Court of Appeals accepted OGX Group's arguments for recognising the common corporate structure between Brazilian and Austrian companies and affirmed that the foreign companies were only vehicles for obtaining financing abroad – resources that would be directed to the Brazilian operation. The Rio de Janeiro Court of Appeals, according to Judge Gilberto Guarino's winning opinion, also adopted the following arguments to grant the processing of the judicial reorganisation of the OGX Group: (i) the foreign entities were subsidiaries of the Brazilian companies; (ii) all plaintiffs were part of the same corporate group, with its principal place of business and centre of operations located in Brazil, when considered as a whole, and not individually; (iii) without bankruptcy protection for the foreign companies, the group's restructuring efforts could be defeated, due to the possibility of foreign orders seizing the group's assets and the difficulty of carrying out operations at the international level; and (iv) Austrian legislation recognises the effects of the foreign reorganisation proceeding.[26]

Therefore, the Rio de Janeiro Court of Appeals granted the appeal to revoke the lower court judge's order that rejected the application for rescue made by the Austrian companies and determined the joint processing of the judicial reorganisation of the OGX Group companies.

Similar business structures were observed in the judicial reorganisation of the OAS Group, with business activities in construction and real estate development,[27] and the Sete Brasil Group, a service provider in the oil and gas industry.[28] In both the OAS Group and the Sete Brasil Group rescue proceedings, Brazilian courts have recognised their jurisdiction over foreign subsidiaries because they were used in a financing structure around a corporate group that had its main establishment and centre of operations in Brazil.

In another relevant case, one of the entities in the Schahin Group was an English subsidiary that owned a drilling vessel located in Brazil, which was leased to Petrobras. It was the group's only asset that rendered any proceeds to the ailing corporate group situated in Brazil. Once again, the Brazilian court recognised its jurisdiction, due to the close relationship between the companies, the location of the asset, and the sheer necessity for the lease agreement to continue to inject funds towards the payment of creditors and guarantee the survival of the business.[29]

26 See Rio de Janeiro Court of Appeals 19.02.2014 – Interlocutory Appeal No. 0064658–77.2013.8.19.0000, Judge Gilberto Guarino, 14th Civil Chamber.

27 See São Paulo Court of Appeals 31.08.2015 – Interlocutory Appeal No. 2084295–14.2015.8.26.0000, Judge Carlos Alberto Garbi, 2nd Reserved Chamber of Corporate Law.

28 See Rio de Janeiro Court of Appeals 07.02.2017 – Interlocutory Appeal No. 0034171–22.2016.8.19.0000, Judge Carlos Eduardo Moreira da Silva, 22nd Civil Chamber.

29 See São Paulo Court of Appeals 13.03.2017 – Interlocutory Appeal No. 2106998–36.2015.8.26.0000, Judge Caio Marcelo Mendes de Oliveira, 2nd Reserved Chamber of Corporate Law.

As the cases kept coming, the Brazilian courts continued to find themselves holding jurisdiction to process the rescue proceedings of foreign entities, in an interpretation of Article 3 of the Brazilian Bankruptcy Law. One of the most important cross-border insolvency cases in Brazil is the well-known judicial reorganisation of the telecommunications giant Oi Group. The petition for reorganisation was filed in a Rio de Janeiro court, which included two Dutch companies and foreign entities used to secure investments directed toward the conglomerate's activities in Brazil. Similar to the other cases mentioned earlier, the Brazilian court recognised its jurisdiction over the foreign companies and admitted them to the reorganisation proceeding, based on the grounds that, like in the OGX Group case, they were financing vehicles used to obtain investments overseas and remit them to the Brazilian operations.[30] The Rio de Janeiro court also mentioned provisions from the MLCBI as the basis for the decision, although it had not yet been adopted by Brazil.

At the same time, a suspension of payments was filed before a Dutch court in order to halt any actions or executions by 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. Notwithstanding, the Brazilian court did not acknowledge this decision and reaffirmed its jurisdiction over the Dutch companies. The discussion was submitted 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 New York court found that the Dutch companies' 'nerve centre and headquarters [we]re clearly located in Brazil', and that it 'ha[d] no operations or business independent of the Oi Group and [wa]s operated within the Oi Group as part of a single, integrated economic unit'. The New York court also affirmed that the 'Oi Group, in turn, [wa]s headquartered and managed from the principal executive office of Oi in Rio de Janeiro, Brazil', and with 'every aspect of the Oi Group's operations, finances, cor-

30 See Rio de Janeiro Court of Appeals 31.03.2017 – Interlocutory Appeal No. 0051668–49.2016.8.19.0000, Judge Cezar Augusto Rodrigues Costa, 8th Civil Chamber.

porate management, employee management and payroll, and short- and long-term strategic planning directed from Brazil'.[31-32]

The New York court's conclusion, however, was based on an individual analysis of each of the companies' centres of main interests, and since the foreign entities served only as special purpose vehicles to attract investment to the corporate group's main activities in Brazil, the foreign main proceeding was found to be the one under Brazilian jurisdiction.

Another relevant case was the rescue proceeding for the Constellation Group, the owner of drilling rigs, and a service provider in the oil and gas industry. Similar to the Schahin Group, the Rio de Janeiro Court of Appeals found that foreign entities that had assets (e.g., drill ships and rigs) located in Brazil (even if indirectly owned) should also be subject to the Brazilian judicial reorganisation proceeding.[33] This time, the Brazilian court made an individual assessment of each company's principal place of business, instead of looking only at the big picture of the entire group.

Despite explicit legal provisions regulating the subject, Brazilian case law has construed Article 3 of the Brazilian Bankruptcy Law to allow foreign companies to seek judicial reorganisation or extrajudicial reorganisation in Brazil when, despite their formal incorporation abroad, their principal place of business is effectively located in the country. In the aforementioned leading cases, Brazilian courts have asserted jurisdiction over foreign subsidiaries that functioned as financing or asset-holding vehicles within cor-

31 See United States Bankruptcy Court for the Southern District of New York 12.04.2017 – In re Oi Brasil Holdings Coöperatief U.A. (Bankr. S.D.N.Y. 2017).

32 Over the past several months, the Oi Group sought to shift the U.S. aspect of its cross-border restructuring away from the Chapter 15 recognition of its Brazilian judicial reorganization toward a full Chapter 11 bankruptcy case in the United States. In July 2025, the company filed a motion before the New York court requesting termination of the Chapter 15 proceeding that has recognised and given effect to its Brazilian judicial reorganisation, arguing that ending such proceeding would clear the way for a standalone Chapter 11 filing to address substantial liabilities that cannot be restructured under Brazilian law (in a possible attempt to restructure amounts provided as a DIP loan in Brazil) and to provide broader creditor protections and liquidity options. However, in early October 2025 the New York court denied Oi's request to terminate the Chapter 15 recognition and dismiss the Chapter 15 case, leaving that proceeding in place and complicating any direct move into Chapter 11.

33 See Rio de Janeiro Court of Appeals 26.03.2019 – Interlocutory Appeal No. 0070417–46.2018.8.19.0000, Judge Eduardo Gusmão Alves de Brito Neto, 16$^{th}$ Civil Chamber. See also Rio de Janeiro Court of Appeals 04.06.2019 – Motion for Clarification No. 0070417–46.2018.8.19.0000, Judge Eduardo Gusmão Alves de Brito Neto, 16$^{th}$ Civil Chamber.

porate groups whose strategic management, operational centre, and economic activities were concentrated in Brazil, or whose key assets were located there. Whether through a group-wide analysis or, in more recent decisions, an individual assessment of each entity's centre of main interests, the courts have consistently emphasised substance over form, allowing foreign entities to be included in Brazilian rescue proceedings so long as their principal place of business – or equivalent decision-making and operational nexus – was found to be in Brazil.[34]

However, even with the growing number of cases with cross-border ties, most Brazilian courts may not be familiar with the legal framework brought about by the recent adoption of the MLCBI.

### *C. Brazil's adoption of the UNCITRAL Model law on cross-Border insolvency*

In some of the aforementioned cases, such as Oi Group's rescue proceeding, the debtors filed a Chapter 15 proceeding before the United States courts to recognise the Brazilian proceeding as a foreign main proceeding. This put a few Brazilian judges in a position to cooperate, coordinate, and communicate with foreign courts, despite the absence of a legal framework for cross-border insolvency matters. These judges were also exposed to foreign experience and the use of Chapter 15 to recognise foreign main and non-main proceedings. However, these were only a handful of judges that held positions in specialised bankruptcy and corporate law courts in Rio de Janeiro and São Paulo, two of the most economically important cities in Brazil; the majority of judges throughout Brazil, however, may not be specialised in bankruptcy and restructuring matters and, pursuant to the internal rules of court organisation within each state, most judges may

34 In an expert opinion issued in the context of the InterCement Group restructuring proceeding in Brazil, which included Dutch and Spanish entities, Francisco Satiro offers a divergent view, according to which Brazil's adoption of the MLCBI signals to the international community that it will exercise jurisdiction over domestic debtors and assets located within its territory, while respecting the jurisdiction of other countries over foreign debtors and assets situated abroad, and that cross-border insolvencies will be addressed through recognition of foreign proceedings and streamlined international cooperation. Satiro argues that this logic is reflected in Article 3 of the Brazilian Bankruptcy Law, which deliberately refrains from asserting jurisdiction over foreign companies headquartered outside Brazil, out of respect for foreign sovereignty, limiting Brazilian jurisdiction to entrepreneurs and business entities constituted under Brazilian law and to branches of foreign companies operating in Brazil.

be called to process bankruptcy, judicial, and extrajudicial reorganisation proceedings.

Although there is an ongoing movement to create district and regional courts that are specialised in corporate law (including bankruptcy and rescue proceedings), as well as specialised chambers in the State Courts of Appeals, Brazil may be some time away from having judges who are familiar with cross-border insolvency matters in each of its 26 states and the Federal District. This is not the only problem that a continental country like Brazil has; it is also important for insolvency practitioners, public prosecutors (which have a supervisory role in bankruptcy and rescue proceedings), and attorneys across the country to understand the fundamental notions of cross-border insolvency in order to be able to deal with cases that might arise in the future.

An important step in putting legal professionals on the same page was the adoption of the MLCBI by Articles 167-A through 167-Y of the Brazilian Bankruptcy Law. Even though a body of case law may persuade judges to adopt a certain understanding, they are not bound by precedent (except in certain specific situations), since Brazil is not a common law jurisdiction but a civil law country. This means that judges and legal professionals are used to examining the legislation first, which makes it indispensable for any important changes to a certain legal regime (such as corporate bankruptcy and rescue) to be made through the enactment of laws to ensure its widespread and uniform application.

Even then, laws may be misunderstood by legal professionals, especially when such laws may be considered foreign transplants.[35] This is because certain notions and concepts may not be entirely laid out by the law and would require further interpretation. As aptly explained by Joseph A. Schumpeter, '[t]here are no doubt concepts that bear no relation to any particular epoch or social world, such as want or choice or economic good. (...) But there are still others which by virtue of their nature cannot stand transplantation and always carry the flavour of a particular institutional framework'.[36]

35 According to Katharina Pistor, Daniel Berkowitz and Jean-François Richard: 'The fact that formal legal orders have put the key elements of the legal order in writing tends to disguise the fact that the effectiveness of these rules also rests on knowledge and understanding of these rules and their underlying values by social actors' (Pistor/Berkowitz/Richard, European Econ. Rev. 2003 (1999), 165).

36 Schumpeter, p. 169.

Often times, 'not even world best-practice solutions will work if the society will resist them or ignore them. That is why an understanding of local social norms, culture, and religion is so important'.[37] The MLCBI certainly provides best-practice solutions when it comes to regulating cross-border insolvency, but 'for the law to be effective, it must be meaningful in the context in which it is applied so citizens have an incentive to use the law and to demand institutions that work to enforce and develop the law'. Furthermore, 'judges, lawyers, politicians, and other legal intermediaries that are responsible for developing the law must be able to increase the quality of law in a way that is responsive to demand for legality'.[38]

Consider the notion of COMI as an example. The MLCBI states that '[i]n 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'. Unlike the MLCBI, Regulation (EU) 2015/848 (the European Insolvency Regulation Recast – 'EIR Recast'), provides a clear(er) definition of centre of main interests in its Article 3, item 1, according to which '[t]he centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties'. Although the verification of COMI requires a fact-specific analysis, a general guideline provided by the law may be useful for its interpretation and application by the courts.

Brazil transplanted the notion of COMI from the MLCBI, without bringing forth a clear definition as to what it would be (mirroring the MLCBI), as can be seen in Article 167-I, item III, of the Brazilian Bankruptcy Law. 'The absence of a statutory definition for a term that is not self-defining signifies that the text is open-ended, and invites development by courts, depending on facts presented, without prescription or limitation.'[39] Just as the definition of a debtor's principal place of business pursuant to Article 3 of the Brazilian Bankruptcy Law is heavily influenced by the body of case law, so is the definition of COMI.

Since the concept of COMI is open to interpretation, where would Brazilian insolvency professionals look for help to give it substantial meaning? Well, one might think that Article 3 of the Brazilian Bankruptcy Law, with the definition of principal place of business, as consolidated under

37 Dam, p. 224.

38 Pistor/Berkowitz/Richard, European Econ. Rev. 2003 (1999), 165.

39 United States Court of Appeals for the 2nd Circuit 16.04.2013 – Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.), 714 F.3d 127 (2d Cir. 2013).

years of case law, may be a good place to start. However, the notions of principal place of business and COMI are not to be confused, as they have quite different functions, the first being used domestically to define the competent venue to process a bankruptcy or rescue proceeding, while the second is used in order to ascertain which would be the foreign main proceeding in the context of cross-border insolvency.[40]

Because of its specific function, COMI should be interpreted considering its international origin, as suggested by Article 8 of the MLCBI, which states that '[i]n the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith'. When adopting the MLCBI, however, Brazil changed the meaning of this rule of interpretation: Paragraph 1 of Article 167-A of the Brazilian Bankruptcy Law provides that '[i]n interpreting the provisions of this Chapter [of Cross-Border Insolvency], regard is to be had to its objective of international cooperation, the need for uniformity in its application and the observance of good faith'.[41]

Instead of looking to the international experience and international cases in which the concept of COMI gained substance and was applied by foreign courts, it is possible that Brazilian insolvency professionals and courts (particularly those that are not specialised) will simply refer to the existing body of case law regarding the definition of principal place of business, as provided by Article 3 of the Brazilian Bankruptcy Law.[42] Some rulings may be correct (or perhaps fortunate) in ascertaining the COMI of a corporate

40 The Guide to Enactment and Interpretation of the MLCBI, the related texts published by UNCITRAL throughout the years, and the cases listed in the CLOUT database would be great sources of information for the interpretation of COMI, but most Brazilian judges may not be familiarised with these resources and/or may not be fluent in English to be able to utilise them.

41 There are scholars that argue that the provision inserted in the Brazilian Bankruptcy Law has the same meaning as the provision in the MLCBI, despite the different wording. See Scalzilli/Spinelli/Tellechea, p. 296.

42 When interpreting cross-border insolvency rules, it is not possible to utilise case law and scholarship pertaining to local matters as inspiration, but rather international case law and sources. See Hannan, p. 88.

group of an international nature,[43] while other rulings may not.[44] These decisions may cause substantial damage before they are reviewed and struck down by higher courts.

In three recent cases, creditors have also raised the argument that, because of the adoption of the MLCBI, foreign companies cannot restructure before Brazilian courts and under the Brazilian Bankruptcy Law but would be required to file for rescue proceedings in the countries in which they are registered. This line of reasoning confuses (i) the capacity of the Brazilian court to find that it holds jurisdiction to process the rescue and bankruptcy proceedings of foreign entities, as in the OGX, the Oi and the Constellation cases previously mentioned, with (ii) the assessment of COMI for the recognition of foreign main and non-main proceedings.[45] This was an argument used in the Americanas, the Cervejaria Petrópolis and the InterCement cases.[46]

This is just an example of a topic that may be inadequately interpreted by Brazilian insolvency professionals and courts, setting them apart from

43 In the Gutmen Investment Corp case, the Civil Court of Ibaiti, in the State of Paraná, found that the foreign entity's COMI was located in its formal headquarters in the British Virgin Islands, and subsequently recognised the foreign liquidation as a foreign main proceeding – there was no evidence to rebut the presumption of the debtor's COMI and suggest otherwise. See Paraná State Court 04.11.2022 – Proceeding No. 0004672–25.2021.8.16.0089, Judge Nara Meranca Bueno Pereira Pinto, Civil Court of Ibaiti.

44 In the Mercon Coffee case, filed before the 3rd Civil Court of the City of Varginha, in the State of Minas Gerais, the court granted recognition of the foreign main proceeding ongoing in the Southern District of New York, based on the newly adopted provisions of the Brazilian Bankruptcy Law. However, both the motion from the filing entity and the lower court order assessed the COMI based on the notion of principal place of business found in Article 3 of the Brazilian Bankruptcy Law. See Minas Gerais State Court – Proceeding No. 5017501–52.2023.8.13.0707, Judge Pedro Parcekian, 3rd Civil Court of the City of Varginha.

45 This confusion may also be observed in papers on the subject. See Hatanaka/Martins/Brunner/Gaspar, p. 230–231.

46 In the Americanas, the Cervejaria Petrópolis and the InterCement cases, the lower court judges have dismissed such arguments, but there is yet no ruling from the Courts of Appeals on the matter. For the Americanas case, see Rio de Janeiro State Court – Proceeding No. 0803087–20.2023.8.19.0001, Judge Paulo Assed Estefan, 4th Corporate Law Court of the City of Rio de Janeiro. For the Cervejaria Petrópolis case, see Rio de Janeiro State Court – Proceeding No. 0835616–92.2023.8.19.0001, Judge Elisabete Franco Longobardi, 5th Corporate Law Court of the City of Rio de Janeiro. For the InterCement case, see São Paulo State Court – Proceeding No. 1192002–34.2024.8.26.0100, Judge Jomar Juarez Amorim, 1st Court for Bankruptcy and Judicial Reorganisation.

their international peers.[47] Notwithstanding, as Katharina Pistor, Daniel Berkowitz, and Jean-François Richard have explained, 'for law to be effective, a demand for law must exist so that the law on the books will actually be used in practice and legal intermediaries responsible for developing the law are responsive to this demand' – which may precisely be the case of Brazil's adoption of the MLCBI, considering the need for a legal framework to address cross-border insolvency.[48] The authors go on to elucidate that '[i]f the transplant adapted the law to local conditions, or had a population that was already familiar with basic legal principles of the transplanted law, then we would expect that the law would be used'.[49]

47 In the Jason Hector Blain case, filed before the 1st Civil Court of the City of Balneário Camboriú, in the State of Santa Catarina, in which a foreign representative sought to reach assets owned directly and indirectly by a defendant in a civil insolvency case in Scotland, the Public Prosecutor's Office argued that the motion for recognition of the foreign main proceeding should not be granted, because there was no previous recognition of the efficacy of a foreign order by the Brazilian Superior Court of Justice. The lower court judge sided with the Public Prosecutor's Office and dismissed the request for recognition, based on the absence of such a ruling by the Brazilian Superior Court of Justice, and further found that the provisions of the Brazilian Bankruptcy Law for cross-border cases would not apply to civil insolvency cases involving natural persons. See Santa Catarina State Court 15.09.2023 – Proceeding No. 5014643–14.2023.8.24.0005, Judge Claudio Barbosa Fontes Filho, 1st Civil Court of the City of Balneário Camboriú. The lower court order was subject to appeal and an injunction was granted by the Santa Catarina Court of Appeals to seize assets owned by Jason Hector Blain, finding that there was no need for an order by the Brazilian Superior Court of Justice, as this was the case of recognition of a foreign main proceeding based on the newly adopted provisions for cross-border insolvency in the Brazilian Bankruptcy Law. See Santa Catarina Court of Appeals 19.12.2023 – Appeal No. 5076905–15.2023.8.24.0000, Judge Osmar Mohr, 6th Chamber of Commercial Law.

48 Though the MLCBI is not a transplant from another jurisdiction, its adoption into law in Brazil may feel like it is, due to its international nature.

49 Katharina Pistor, Daniel Berkowitz and Jean-François Richard continue to develop their reasoning: 'Because the law would be used, a strong public demand for institutions to enforce this law would follow. And, legal intermediaries that are responsible for developing and enforcing this imported law would be able to develop the law so at to match demand, because the strong demand for law would provide resources for legal change. Where these conditions are present we would expect the legal order to function just as effectively as in an origin country where the law was developed internally. However, if the law was not adapted to local conditions, or if it was imposed via colonization and the population within the transplant was not familiar with the law, then we would expect that initial demand for using these laws to be weak. Legal intermediaries would have a more difficult time developing the law to match the demand. Countries that receive the law in this fashion are thus subject

In Brazil, there are several legal professionals and judges that are specialised in bankruptcy and restructuring, many others with a keen interest in cross-border insolvency matters, and quite a few specialised courts. This familiarity with the concepts brought about by the MLCBI may be of extreme importance in the interpretation of the law, especially considering its international origin.

Nevertheless, there may be a learning curve for legal professionals while they grasp for meaning in the new provisions transplanted from the MLCBI – time, and the outstanding ability of insolvency professionals and judges in Brazil will certainly help in flattening this curve, but it will likely still be there.

The exchange of experiences at conferences and seminars, both in Brazil and abroad, may also play an important role. Events hosted by UNCITRAL, by universities and by associations such as INSOL, III, TMA, ABI, among others, in Europe and around the world, may be very useful in disseminating the knowledge foreign insolvency professionals and courts have developed on cross-border insolvency matters.

That being said, there are two instances in which the newly adopted cross-border rules have come to play and which will be addressed in more detail in this paper: the LATAM Airlines case and the Prosafe case, each with lessons to be learned by Brazilian insolvency professionals.

## I. The LATAM Airlines case: a misunderstanding of how the recognition of foreign insolvency proceedings should work

On 26.05.2020, LATAM Airlines Group S.A., owner of Brazil's and Latin America's largest airline company, filed for Chapter 11 protection before the United States Bankruptcy Court for the Southern District of New York. There was no filing for judicial reorganisation in Brazil regarding the Brazilian entity, with the rescue proceeding being carried out before the U.S. bankruptcy court.[50]

to the 'transplant effect': their legal order would function less effectively than either origins or transplants that either adapted the law to local conditions and/or had a population that was familiar with the transplanted law' (Pistor/Berkowitz/Richard, European Econ. Rev. 2003 (1999), 165).

50 Azul and GOL, two other Brazilian airlines, also chose to file for Chapter 11 bankruptcy protection in the United States. This may be in part because the United States jurisdiction makes it significantly easier to secure debtor-in-possession ('DIP')

In the meantime, Federal Law No. 14,112/2020 was enacted, and the Brazilian Bankruptcy Law was reformed, including the adoption of the MLCBI. LATAM Airlines did not petition for recognition of the Chapter 11 as a foreign main proceeding before the Brazilian courts and continued to pursue its restructuring strictly overseas.

Shortly thereafter, the Public Prosecutor's Office for the state of São Paulo received a notice for the submission of proofs of claim for pre-petition credits before the U.S. bankruptcy court. With the noble aim of protecting vulnerable creditors situated in Brazil, on 22.03.2021, the Public Prosecutor's Office filed a petition before the São Paulo court to initiate a proceeding, supposedly based on the newly added cross-border rules, to foster cooperation between the Brazilian and the U.S. courts, as well as ensure that Brazilian creditors would be treated in the same way as foreign creditors, pursuant to Article 167-G of the Brazilian Bankruptcy Law (which corresponds to Article 13 of the MLCBI). The Public Prosecutor's Office argued that (i) there would be losses to Brazilian creditors, who had not been given proper notice to participate in LATAM Airlines' Chapter 11 proceeding; (ii) such losses derived from the absence of proper notice (a) by means of a letter rogatory, according to Article 105, item I, subitem i, of the Brazilian Federal Constitution, or (b) through a cross-border insolvency proceeding, with recognition of the foreign proceeding as main or non-main, in accordance with Articles 167-A through 167-Y of the Brazilian Bankruptcy Law.

As can be observed, this was neither a petition for recognition of a foreign proceeding (be it main or non-main), nor the filing of a local proceeding, since the Public Prosecutor's Office would not have standing for either of them. It was something new altogether, loosely based on the recently added cross-border rules.

financing and to restructure or reject aircraft leases, which are central to airline balance sheets. In Azul's case, the airline secured approximately US$ 1.6 billion in DIP financing under U.S. law, and the Chapter 11 framework gave Azul the authority to assume, reject, or renegotiate aircraft and engine leases in a structured, court-supervised setting, helping reduce lease costs and optimize its fleet mix, something that is far less straightforward in Brazil's judicial reorganisation system. Similarly, GOL's Chapter 11 process enabled it to obtain DIP financing of around US$ 1 billion and negotiate concessions with lessors and other creditors, smoothing the restructuring of its aircraft lease portfolio to support a more stable post-emergence capital structure. This combination of accessible new money financing and flexible lease restructuring under U.S. bankruptcy law were key drivers for Brazilian carriers opting for Chapter 11 protection, instead of using the Brazilian rescue framework.

On 30.03.2021, the São Paulo court dismissed the petition on the grounds that (i) there was no request for cooperation by a foreign authority or a foreign representative; (ii) there was no filing for recognition of a foreign main or non-main proceeding regarding LATAM Airlines Group; (iii) without recognition of a foreign proceeding, whether main or non-main, Brazilian creditors would not be affected by the outcome of the Chapter 11 restructuring process and were no worse off than if no rescue proceeding had been filed at all; and (iv) the Public Prosecutor's Office does not have standing for a request of such kind.[51]

The Public Prosecutor's Office appealed this ruling, claiming that they did not intend to petition for the recognition of a foreign proceeding but rather to initiate a channel of communication between the U.S. bankruptcy court and the Brazilian court. The São Paulo Court of Appeals confirmed the lower court ruling and mentioned, in *obiter dictum*, that the proceeding before the São Paulo court could be seen as 'a camouflaged and unwarranted intervention on a foreign court, to which it was conferred power of imperium by the exercise of sovereignty by another nation state'.[52]

The outcome, correctly interpreted the recently added cross-border rules and recognised that 'the mere existence of Brazilian creditors, or activity carried out by the debtor in Brazil, does not impose the recognition of a foreign proceeding – main or non-main – in our country; it is a strategy to be defined by the actors of the foreign proceeding'.[53] The noble efforts of the Public Prosecutor's Office on behalf of vulnerable creditors located in Brazil should be noted, but the legal framework for cooperation provided by the MLCBI is there to create uniformity (to the highest extent possible) in the way it is employed worldwide, with little room for the creation of a novel proceeding, without legal provisions or grounds to support it.

## II. The Prosafe case: the first successful experience

On 10.06.2021, the foreign representative for Prosafe SE, a service provider in the oil and gas industry, petitioned the Rio de Janeiro court for recogni-

51 São Paulo State Court 30.03.2021 – Proceeding No. 1028368–61.2021.8.26.0100, Judge Marcelo Barbosa Sacramone, 2nd Court for Bankruptcy and Judicial Reorganisation.

52 São Paulo Court of Appeals 31.08.2021 – Appeal No. 1028368–61.2021.8.26.0100, Judge Fortes Barbosa, 1st Reserved Chamber of Corporate Law.

53 Satiro/Becue/Teixeira, https://bit.ly/3CSnbVl. See also Satiro/Becue, Revista dos Tribunais 2021, 337.

tion of the company's foreign insolvency proceeding, based on the newly enacted Article 167-H of the Brazilian Bankruptcy Law. The foreign case is an application for the granting of moratorium protection submitted by Prosafe SE to the High Court of Singapore, based on the Insolvency, Restructuring, and Dissolution Act 2018 of the Republic of Singapore.

The foreign representative argued that Brazil had jurisdiction because three vessels (indirectly) owned by Prosafe SE were located near the coast of Rio de Janeiro, two of which had contracts with Petrobras, which were operated by a Brazilian entity, Prosafe Serviços Marítimos Ltda. For this reason, the recognition of the foreign proceeding in Brazil was necessary to extend the protection measures to such vessels and ensure the continuation of the group's activities in Brazil.

Furthermore, based on Article 167-L of the Brazilian Bankruptcy Law, the foreign representative requested interim relief, 'to determine the suspension of the course of any enforcement proceedings or any other measures individually taken by creditors regarding the debtor's assets'. And pursuant to Article 167-M of the Brazilian Bankruptcy Law, the foreign representative petitioned for the recognition of Prosafe SE's moratorium protection before the Singapore court as a foreign main proceeding.

On 05.07.2021, the Brazilian judge found Prosafe SE's centre of main interests to be in Singapore and recognised the moratorium protection as a foreign main proceeding, thereby granting the relief requested. According to the Rio de Janeiro court's reasoning, 'the plaintiff, although headquartered in Norway, is the parent company of a group of other companies (at least five), dedicated to the commercial exploitation of vessels, all of them headquartered in Singapore', which included 'Prosafe Rigs Pte. Ltd., sole shareholder of the Brazilian company Prosafe Serviços Marítimos Ltda'. Based on these facts, the Brazilian court found that the plaintiff's (as well as the entire corporate group's) COMI was in Singapore, 'the place where it executed most of its contracts and where it is recognised by its creditors'.[54]

The Brazilian court seems to have applied the same notions used for ascertaining a debtor's principal place of business, as used to define the competent venue within Brazil's jurisdiction, instead of assessing where the debtor's COMI, as defined by international case law and scholarship,

54 Rio de Janeiro State Court 05.07.2021 – Proceeding No. 0129945–03.2021.8.19.0001, Judge Diogo Barros Boechat, 3rd Corporate Law Court of the City of Rio de Janeiro.

actually was – a situation that later occurred in the Mercon Coffee case[55] and is likely to occur in other cases in the future. The ruling also made an assessment of the entire group's COMI, rather than an individual assessment, the former of which is not authorised by the MLCBI or the Brazilian Bankruptcy Law.[56] The decision briefly (and generally) mentioned international case law regarding the possibility of recognising moratorium protection or schemes of arrangement as foreign main proceedings, but nothing regarding the concept of COMI.

On 28.09.2021, the foreign representative petitioned for recognition of the Singapore High Court's decision that extended the effects of the moratorium protection until 31.01.2022. The Brazilian court granted the extension under the terms of the foreign ruling. On 19.11.2021, the foreign representative informed that the Singapore High Court had ratified Prosafe SE's scheme of arrangement on 18.10.2021 and requested the recognition of the scheme of arrangement by the Brazilian court so that it would be effective in Brazil. The foreign decision was recognised by a Brazilian ruling rendered on 14.12.2021,[57] without any appeals or further discussion.

### *D. Cooperation and coordination in cross-border insolvency cases between courts in Brazil and the European Union*

Shortly after the Brazilian Bankruptcy Law was amended to include provisions on cross-border insolvency, the Brazilian National Council of Justice (*Conselho Nacional de Justiça,* or 'CNJ'), through Resolution No. 394/2021,[58] adopted the Judicial Insolvency Network's Guidelines (the JIN Guidelines), to allow for the direct cooperation and communication between Brazilian courts and foreign courts, by way of insolvency protocols – which are allowed by item IV of Article 167-Q of the Brazilian Bankruptcy Law.

Since the Brazilian National Council of Justice may issue recommendations and resolutions that are applicable to all Brazilian courts (including

55 See Minas Gerais State Court – Proceeding No. 5017501–52.2023.8.13.0707, Judge Pedro Parcekian, 3rd Civil Court of the City of Varginha.

56 See also Satiro/Becue, Revista dos Tribunais 2021, 337.

57 Rio de Janeiro State Court 14.12.2021 – Proceeding No. 0129945–03.2021.8.19.0001, Judge Luiz Alberto Carvalho Alves, 3rd Corporate Law Court of the City of Rio de Janeiro.

58 See Brazilian National Council of Justice, Resolution No. 394/2021, https://bit.ly/41Vqojf.

bankruptcy and restructuring courts), there was no need to undergo a legislative process, allowing a speedier adoption of the JIN Guidelines.

Although both the Brazilian Bankruptcy Law and EIR Recast allow courts to enter into insolvency protocols, a similar protocol to the JIN Guidelines, or even a soft-law instrument, may be useful for relations between Brazil and the European Union, with general recommendations to regulate insolvency protocols governing the cooperation and communication between Brazilian and European Union courts in cross-border insolvency proceedings involving companies with ties to Brazil and member-states of the European Union.

A protocol or soft-law instrument could be adopted rather quickly, as was the case of the adoption of the JIN Guidelines by the Brazilian National Council of Justice, and would not have to go through all the legal and political hurdles of a formal treaty.

Such a protocol or soft-law instrument could provide directives on (i) the coordination and administration of concurrent insolvency proceedings, with the possibility of joint hearings and joint orders; (ii) direct communication and cooperation between Brazilian courts and European Union courts; (iii) the sharing of information between courts without cumbersome formalities; (iv) the limits and scope of any insolvency protocol or agreement between courts; (v) guidelines for or the suggestion of a standard insolvency protocol for courts to use, with courts making adaptations and adjustments whenever needed, among other matters.

In addition to the adoption of a protocol or soft-law document, the exchange of experiences at conferences and seminars, both in Brazil and the European Union, may play a very important role in the dissemination of knowledge between Brazilian and European Union insolvency professionals and courts, with special regard to the expertise developed by the European Union on cross-border insolvency matters.

On the other hand, insolvency proceedings before European Union courts may benefit from a specificity of the Brazilian regulation on cross-border insolvency: Brazil recognises proceedings as non-main proceedings on the mere basis that a debtor's assets are present in such jurisdiction.

This slight deviation from the EIR Recast and the MLCBI may be due to Brazil's historic adoption of territorialism, but it may prove useful in cross-border proceedings in which the debtor has assets in Brazil, but not a COMI or an establishment.

The opening of a non-main proceeding in Brazil for the protection and disposal of assets, to the benefit of a foreign main proceeding and foreign creditors, may ultimately facilitate the protection and sale of such assets and the transfer of funds to the foreign main proceeding. The alternative through a letter rogatory to recognise the effectiveness of a foreign order could be considered drawn-out in time and limited in its scope, when compared to a cooperative and coordinated non-main insolvency proceeding. In a bankruptcy or rescue proceeding that may have more than one order regarding the same matter, each order would need to be internalised through a letter rogatory to become effective in Brazil, while in a non-main proceeding coordination and communication between courts, with the recognition of the effectiveness of foreign orders, would be much simpler and faster.

Moreover, having a local judge overseeing the sale and cooperating with a foreign judge may aid in expediting the sale process, since a local judge may issue orders that are effective in Brazil with the aim of overcoming bureaucratic, registry and regulatory issues, just to name a few areas from which problems may arise.

However, since the Brazilian Bankruptcy Law was only recently amended to regulate cross-border insolvency proceedings, this has not yet been extensively tested in practice. As previously mentioned in this paper, there have been only a handful of cases in Brazil that used, or at least tried to use, the new provisions concerning cross-border insolvency. Notwithstanding, the legal framework exists and may be applied, if necessary.

## *E. Conclusions*

The adoption of the UNCITRAL Model Law on Cross-Border Insolvency has been regarded as one of the great advancements of the recent reform of the Brazilian Bankruptcy Law – and it could not be seen as anything but, as this puts Brazil in a similar cross-border ecosystem as the European Union, the United States, and many other countries. However, simply putting rules in writing may not be enough: there is an indispensable need for legal professionals to specialise and continue to improve their knowledge to correctly interpret the new provisions introduced by the reform, with special consideration for its international origin.

Several legal professionals and scholars in Brazil specialise in bankruptcy and restructuring, some of which have an interest for cross-border insolvency matters, and there are a few specialised courts, especially in state capitals. This familiarity with the notions brought about by the MLCBI may lead to a better understanding of the provisions introduced by the reform.[59]

However, there are specific mechanics and open-ended concepts in the MLCBI that need to be mastered by Brazilian judges, insolvency practitioners, public prosecutors, and attorneys. The day-to-day practice, such as the LATAM Airlines and the Prosafe cases, as well as the exchange of experiences with professionals in conferences (both local and international), will play a significant role in advancing the application and interpretation of the MLCBI by Brazilian courts and legal professionals.

Another important undertaking may be the drafting and adoption of a protocol or a soft-law instrument by the European Union and Brazil, to regulate the cooperation and coordination in cross-border insolvency proceedings, which could prove to be very useful for business relations between Brazil and the European Union.

Furthermore, any endeavour to strengthen affairs between Brazil and the European Union, to further the exchange of knowledge and experience, and to promote the cooperation and coordination in insolvency proceedings should be seen as a step in the right direction and should be encouraged by scholars and specialised professionals.

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59 According to Katharina Pistor, Daniel Berkowitz and Jean-François Richard, '[t]he fact that formal legal orders have put the key elements of the legal order in writing tends to disguise the fact that the effectiveness of these rules also rests on knowledge and understanding of these rules and their underlying values by social actors. While most members of society will not, and in fact need not, be familiar with the specifics of individual rules and regulations, they are familiar with the basic concepts of the legal order. Moreover, they can rely on legal professionals as intermediaries, who have a better knowledge of the formal legal order. But even for professionals to apply a special rule, they must not only grasp the wording of that rule, but also the concept behind it, the value judgments on which its rests, and its position within the overall legal order. Even a seemingly clear law – do not steal! – raises a host of interpretative problems when applied to real world cases' (Pistor/Berkowitz/Richard, European Econ. Rev. 2003 (1999), 165).

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