THE LEGAL FRAMEWORK FOR CROSS-BORDER INSOLVENCY IN BRAZIL

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I. INTRODUCTION

Brazil is the fifth largest country in the world, in both population and territory.[1] As such, it should be no surprise that many of the world's largest multinational companies keep subsidiaries or assets in the country.[2] Brazil is also home to its own large, multi-billion, transnational companies.[3] Given the existence of several multinational companies operating in the country, legal problems of a cross-border nature are bound to exist. However, the country's legal institutions often fail to provide solutions to such issues.[4] The legal framework for cross-border insolvency is one of the most prominent examples of this malfunction.

The global initiative, promoted by institutions such as the World Bank, the International Monetary Fund (IMF), and the

1. CENTRAL INTELLIGENCE AGENCY [CIA], THE WORLD FACTBOOK: BRAZIL, https://www.cia.gov/library/publications/the-world-factbook/geos/br.html#Geo (last visited Nov. 5, 2009).

2. E.g., Toyota do Brasil Ltda.; McDonald's Comercio de Alimentos Ltda.; Ernst & Young Auditores Independentes S/C Ltda.

3. *See* U.N. CONFERENCE ON TRADE & DEV. [UNCTAD], WORLD INVESTMENT REPORT: TRANSNATIONAL CORPORATIONS AND THE INFRASTRUCTURE CHALLENGE at 223–25, U.N. Sales No. E.08.II.D.23 (2008). According to UNCTAD, as of 2006, Brazil had three companies among the top 100 non-financial transnational companies from developing countries that were ranked by foreign assets. *Id.* Forbes magazine reported that, as of 2008, Brazil was home to thirty-four of the world's 2000 largest companies. *See* Forbes.com, *The Global 2000*, Apr. 8, 2009, http://www.forbes.comlists/2009/18/global-09_The-Global-2000_Counrty.html. Also, according to Fortune Magazine, five of the top 500 companies are headquartered in Brazil. *See Global 500: Countries – Brazil*, CNN, 2008, http://money.cnn.com/magazines/fortune/global500/2008/countries/Brazil.html.

4. *See* THE WORLD BANK, DOING BUSINESS 2009: COMPARING REGULATION IN 181 ECONOMICS, at 93, 110, 130 (2008) (comparing Brazil, which is considered to be the 125th easiest country out of 181 for doing business, to Russia (ranked 120th) and India (ranked 122nd).

United Nations Commission on International Trade Law (UNCITRAL), to reform the insolvency laws was, in the beginning of the decade, one of the main influences on the modernization of Brazilian bankruptcy legislation.[5] This initiative praised the adoption of international bankruptcy legislation, and specifically the UNCITRAL Model Law on Cross-Border Insolvency.[6] However, this particular matter did not land on fertile soil in Brazil. As a result, the law reform failed to incorporate not only the Model Law, but it also completely overlooked any and all transnational aspects of bankruptcy.

Despite being the focus of worldwide attention, cross-border insolvency is still a neglected issue among Brazilian scholars and legal practitioners.[7] This inattention did not arise in recent times—the study of cross-border insolvencies was not a particular focus of interest by Brazilian scholars in the entire past century.[8] Additionally, the enactment of a new corporate bankruptcy act in 2005 was unable to provoke wider discussions on this matter.[9] Lawmakers and most legal scholars have,

5. *See* Mauro Rodrigues Penteado, Comment, *in* COMENTÁRIOS À LEI DE RECUPERAÇÃO DE EMPRESAS E FALÊNCIA 56 (Francisco Satiro de Souza Junior & Antonio Sergio A. De Moraes Pitombo ed., 2006). The World Bank Standard for Insolvency and Creditor Rights Systems, as well as the UNCITRAL Legislative Guide on Insolvency Law, influenced the reform of the corporate bankruptcy legislation in Brazil. *Id.*

6. *See* THE WORLD BANK, PRINCIPLES AND GUIDELINES FOR EFFECTIVE INSOLVENCY AND CREDITOR RIGHTS SYSTEMS at 52-3 (2001), http://www.worldbank.org/ifa/rosc_icr.html; U.N. COMM'N ON INT'L TRADE LAW [UNCITRAL], LEGISLATIVE GUIDE ON INSOLVENCY LAW at 14, U.N. Sales No. E.05.V.10 (2004).

7. There are, however, in abundant Brazilian academic works, authors who have dedicated themselves to the study of cross-border insolvency issues and who have produced substantial work on such matters. *See, e.g.*, BEAT WALTER RECHSTEINER, DIREITO FALIMENTAR INTERNACIONAL E MERCOSUL (Juarez De Oliveira ed., 2000); Thomas Benes Felsberg, *Cross-border Insolvencies and Restructurings in Brazil*, 31 INT'L BUS. LAW. 109, 109 (2003); Fernando Locatelli, *International Trade and Insolvency Law: Is the UNCITRAL Model Law on Cross-Border Insolvency an Answer for Brazil? (An Economic Analysis of its Benefits on International Trade)*, 14 LAW & BUS. REV. AM. 313, 314 (2008); J. A. Penalva Santos, *A Falência no Direito Internacional e o Mercosul*, *in* A NOVA LEI DE FALÊNCIAS E DE RECUPERAÇÃO DE EMPRESAS—LEI Nº 11.101/05 525 (Paulo Penalva Santos ed., 2006).

8. 4 TRAJANO DE MIRANDA VALVERDE, COMENTÁRIOS À LEI DE FALÊNCIAS 69 (2d ed. 1955) (criticizing the poor literature on the subject).

9. *See* Beat Walter Rechsteiner, *A Insolvência Internacional sob a Perspectiva do*

therefore, failed to notice that cross-border insolvency is a question of paramount significance for the Brazilian economy.

As a result of being neglected for decades, the Brazilian framework on cross-border insolvency is a very confusing one. In such circumstances, the transnational impact of an insolvency proceeding is affected by a tangled net of outdated and partly revoked statutes. In addition to this disorder, there are no consistent judicial precedents that may be used as trustworthy guidelines for a cross-border insolvency case.[10] As such, international aspects of insolvencies are dealt with on a case-by-case basis, thereby challenging the creativity of lawyers, judges and practitioners.

The purpose of this Article is to explore the Brazilian international insolvency framework and to identify its major shortcomings where reform may be welcome. After a very brief overview of cross-border insolvency theory and its international practice, I will provide a glance at Brazilian bankruptcy rules and then proceed to the examination of its international aspects. I will analyze the existing legislation in the country, and summarize two cases with relevant cross-border aspects, so that the general structure of Brazilian international insolvency law can be illustrated.

II. The Growing Importance of Cross-Border Provisions

Cross-border insolvency has gained worldwide importance over the last thirty years and as such, has become a major issue in international private law.[11] In fact, transnational bankruptcies require countries to make at least two decisions.

Direito Brasileiro, *in* DIREITO FALIMENTAR E A NOVA LEI DE FALÊNCIAS E RECUPERAÇÃO DE EMPRESAS 670, 675 (Luiz Fernando Valente de Paiva ed., 2005) (describing the failure of the Brazilian law reform to deal with cross-border insolvencies); *see also* Thomas Benes Felsberg & Paulo Fernando Campana Filho, *Corporate Bankruptcy and Reorganization in Brazil: National and Cross-border Perspectives*, NORTON ANN. REV. OF INT'L INSOLVENCY 275, 293 (2009).

10. *See* RECHSTEINER, *supra* note 7, at 76 (dealing with the scenario of Brazilian cross-border insolvencies).

11. Douglas G. Boshkoff, *Some Gloomy Thoughts Concerning Cross-Border Insolvencies*, 72 WASH. U. L. Q. 931, 933 (1994); Jacob S. Ziegel, *Corporate Groups and Crossborder Insolvencies: A Canada-United States Perspective*, 7 FORDHAM J. CORP. & FIN. L. 367, 367–68 (2001).

The first decision involves choice of forum—which court, of which country (or countries), is to have jurisdiction over the assets of the debtor?[12] Once the authority of the court is set, the body of rules to govern the matter must be chosen.[13] The distinction between choice of forum and choice of law is not always well defined in cross-border insolvencies; it is often assumed that applicable law will be that of the forum[14]—the so-called *lex fori concursus* paradigm. Accordingly, instead of dealing with the consequences of such a distinction, cross-border insolvencies frequently turn the focus from academic analysis to pragmatic issues.[15]

Insolvency with foreign creditors brings perplexities, both theoretically and in real world practice, regarding what concerns difference of treatment.[16] In such a context, the biggest quandary may come from insolvencies in which not only the creditors, but also the debtor's assets, are spread among many countries. After all, bankruptcy is, by its very nature, a collective enforcement proceeding. Assets, credits, and debts—in sum, the whole economic life of a debtor—are at stake in an insolvency proceeding.[17] If the whole of assets, debts, and credits are concentrated in one country, a local insolvency proceeding, under the command of one single court, is sufficient for collection and distribution purposes.[18] But what happens, or what should happen, in instances where many countries are involved is a puzzling question.

Although international bankruptcies were discussed in past centuries, their relevance outside the academia was negligible—

12. Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 459 (1991).

13. *Id.*

14. *Id.*

15. *Id.* at 458.

16. *See* Kurt H. Nadelmann, *Foreign and Domestic Creditors in Bankruptcy Proceedings: Remnants of Discrimination?*, 91 U. PA. L. REV. 601, 601 (1943); Kurt H. Nadelmann, *Discrimination in Foreign Bankruptcy Laws Against Non-Domestic Creditors*, 47 AM. BANKR. L.J. 147, 147 (1973).

17. *See* BRIAN A. BLUM, BANKRUPTCY AND DEBTOR/CREDITOR—EXAMPLES AND EXPLANATIONS 87 (4th ed. 2006) (describing the collective aspects of bankruptcy).

18. *See* JONA ISRAEL, EUROPEAN CROSS-BORDER INSOLVENCY REGULATION 29 (2005).

the topic was just a complicated question of private international law.[19] In fact, until the late 1970s, international bankruptcy was still considered to be a very intricate academic subject of minor practical significance.[20] Not surprisingly, insolvencies that involved two or more jurisdictions were extremely rare at the time.[21]

However, the fact that numerous multinational companies with assets spread over many countries became insolvent in the last few decades triggered an unprecedented interest in cross-border insolvency. It became not only a matter of justice in deciding how to divide assets so that some creditors, due to their location, do not get any preferential treatment over the others, but also an issue of efficiency in determining how to maximize the distribution of proceeds and how to maintain the going concern value of a multinational company whose assets are spread worldwide. Propelled by such rising practical problems, academic disputes among theorists gained new breadth.

A. Universalism and territoriality

Since the 18th century and over the course of the 19th and 20th centuries, the handful of scholars who dedicated themselves to researching this complicated matter were generally divided between two academic models—universalism and territoriality. These models developed from the ancient theory of statutes formulated in Northern Italy during the late Middle Ages.[22] Commentators held in high esteem, such as Bartolus de Saxoferrato and Baldus de Ubaldis, helped develop such a theory.[23] According to the theory of statutes, a conflict of laws is resolved by the application of *statuta personalia* or *statute realia*.[24] A rule of law whose nature was of *statuta*

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19. *See* Joseph D. Becker, *Transnational Insolvency Transformed*, 29 AM. J. COMP. L. 706, 707 (1981).

20. *See id.* at 706–07.

21. *Id.* at 706 (noting that transnational insolvencies were "rare birds" and citing the long hiatus between the *Swedish Match* and *Herstatt* cases).

22. *See* KURT LIPSTEIN, PRINCIPLES OF THE CONFLICT OF LAWS NATIONAL AND INTERNATIONAL 7, 9 (1981).

23. *Id.*

24. *Id.* at 8.

personalia would be applied to a person regardless of his location—just like a shadow, the rule would follow the person everywhere.[25] *Statuta realia*, on the other hand, usually governed the property of objects.[26] Rights *in rem* would be regulated by the law of location.[27] Nevertheless, the theory of statutes was long abandoned, but it gave birth to the principles of universality and territoriality which went on to govern cross-border insolvency (and develop of private international law as well).[28]

Universalism, or universality, is the cross-border insolvency academic model that, at its purest form, encompasses one single bankruptcy proceeding in the home country of the debtor, with worldwide jurisdiction over the debtor's assets and obligations in applying asset distribution schemes among creditors according to the "one law, one court" maxim.[29] Under a universalist system, the law of the home country (*lex fori concursus*) is the only applicable one, regardless of the location of the assets or of the creditors.[30]

Territorialism, or territoriality, is the opposite model. Under a territorial system, countries have exclusive jurisdiction over the assets located within their territories.[31] This model is also sometimes depreciatively called "the grab rule,"[32] which implies that national courts grasp the assets within their reach. A strictly territorialist system implies as many insolvency proceedings as the countries involved. In the absence of specific regulation governing cross-border insolvencies, territoriality is

25. *Id.*

26. *See id.* (stating that the *statuta realia*, which governs objects, "applies to all assets situated within its jurisdiction").

27. *Id.*

28. *See generally* M. E. Thaller, *Quelques Mots sur la Faillite des Commerçants en Droit International Privé (I)*, *in* 10 ANNALES DE DROIT COMMERCIAL, FRANÇAIS, ÉTRANGER ET INTERNATIONAL (1888) (discussing the theories of territoriality and universality).

29. Frederick Tung, *Is International Bankruptcy Possible?*, 23 MICH. J. INT'L L. 31, 32–35 (2001).

30. *Id.* at 34–35.

31. *Id.* at 34.

32. Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOKLYN J. INT'L L. 499, 513 (1991).

the applicable rule. After all, the territorial principle, as the absolute authority over a delimited region, derives directly from the concept of sovereignty[33] and is a basic principle of international law.[34]

The symmetrical distribution of assets, however, due to its compliance with the ancient *par condicio creditorum* principle, has made universalism the favorite theoretical model in the academic environment.[35] This favoritism has made itself clear for well over a century.[36] Market symmetry is the just outcome in an insolvency proceeding. Universalism offers some additional advantages, as it deals with the global operations of a multinational corporation. A multinational corporation may be sold in its entirety in a universal proceeding, preserving the going concern value and maximizing the proceeds to be distributed. This unified sale would also encompass lower costs than the multiplicity of transactions that would be required under a territorial system. In addition, the reorganization of a multinational company would require cross-border coordination to such an extent that it would only be workable under universalism.[37]

Universalism also has its weaknesses, and those happen to reflect the main strengths of territoriality. Uncertainty and unpredictability are the main shortcomings of universalism. The home country of a multinational company, which is the criteria for determining both jurisdiction and applicable law in a universalist system, is not always clear and is prone to manipulation.[38] The adoption of the center of main interests

33. *See* Ian F. Fletcher, *The European Convention on Insolvency Proceedings: Choice-of-Law Provisions*, 33 TEX. INT'L L.J. 119, 123 (1998).

34. Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216, 2218 (2000).

35. *See* Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2283 (2000).

36. *See* John Lowell, *Conflict of Laws as Applied to Assignments for Creditors*, 1 HARV. L. REV. 259, 264 (1888).

37. *See* Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 706–08 (1999) (detailing the claimed advantages of universalism).

38. *See id.* at 709–25 (describing the shortcomings of universalism, especially of the "home country" standard).

(COMI) standard by the European Union and by UNCITRAL was meant to solve this problem, but it did not fare well in the real world.[39] Cases such as *Maxwell*, *BCCI*, and *Eurofood* are plain illustrations of the choice of forum troubles prevalent in a universalism system.[40] Territoriality is not, of course, completely immune to forum shopping, but it does dramatically reduce its incidence. This protection against manipulation is probably the *pièce de résistance* of the territorial model. Under a territorial system, there is the possibility of transferring assets from one country to another; however, that is a much more difficult and limited manipulation measure.[41] In addition, territoriality provides for the unbalanced protection of local creditors,[42] which is something hard to justify as a principle to be followed, but it may provide lasting advantages that could justify the principle, especially considering that individual creditors (such as ex-workers and consumers) might not have enough resources to litigate abroad, as opposed to banks or large suppliers.

The competing principles of universalism and territorialism have fought a long battle over the last couple of centuries, as scholars struggled to develop arguments in order to make their preferred academic model triumph over the other. The battle has undoubtedly become more intense in the last three decades. In the beginning, countries were, of course, territorial. They were all sovereign nations and they did not accept any sort of foreign interference in their affairs. Universalism has long been considered to be a chimera: how would it be possible for one court to have worldwide control over the assets of a debtor,

39. *See* John A. E. Pottow, *The Myth (and Realities) of Forum Shopping in Transnational Insolvency*, 32 BROOK. J. INT'L L. 785, 791–802 (2007) (discussing the center of main interests [COMI]).

40. *See* LoPucki, *supra* note 37, at 713–15 (discussing the examples of *Maxwell* and *BCCI*).

41. *See* Andrew T. Guzmán, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177, 2214 (2000) (discussing the strategy of moving assets from one country to another); LoPucki, *supra* note 34, at 2241–42.

42. *See* LoPucki, *supra* note 34, at 2240, 2244–45 (stating that the level of error and deception would be higher in a universalist system than in a territorial one because in a universalist system creditors have to search the debtor's corporate records to determine what bankruptcy system the court elected to use).

regardless of the court's location? That would require international cooperation to a degree which has long been considered unattainable.[43] However, despite such an enormous obstacle, universalism has certainly gained ground in the past few decades.

B. Theoretical models and the practice

Amid this fierce battle, intermediate academic models have arisen. The strength of these models is believed to reside in their more practical and realistic approach.[44] Instead of defending an ideal framework of cross-border insolvencies, some scholars and practitioners have constructed complex and sophisticated structures, which are far more accommodating to real life experiences. It should be noted that these conciliatory models can hardly be considered to be brand-new creations of the second half of the 20th century. In fact, they were developed during past centuries by prominent scholars such as Jitta.[45]

However, the real life experience that prompted the full throttle development of these models began to show its relevance since the insolvency of Herstatt that followed the 1973 oil crisis.[46] Uncertainty after the insolvency of the German bank Herstatt triggered the enactment of significant cross-border insolvency rules oriented at the achievement of practical results,[47] thereby implying the abandonment of ideal models in favor of a more down-to-earth approach.

The more these middle-of-the-road models developed—accompanied by significant legislative efforts, such as §304 of the U.S. Bankruptcy Code and the numerous (unsuccessful)

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43. *See* Tung, *supra* note 29, at 33 (making use of game theory analysis to sustain that "universalism will not work," and that such a model is "politically implausible and likely impossible").

44. *See* Kent Anderson, *The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience*, 21 U. PA. J. INT'L ECON. L. 679, 691 (2000).

45. *See generally* D. JOSEPHUS JITTA, LA CODIFICATION DU DROIT INTERNATIONAL DE LA FAILLITE (1895).

46. *See* Joseph D. Becker, *International Insolvency: The Case of Herstatt*, 62 A.B.A. J. 1290, 1291, 1295 (1976).

47. *See* Kurt H. Nadelmann, *Rehabilitating International Bankruptcy Law: Lessons Taught by Herstatt and Company*, 52 N.Y.U. L. REV. 1, 3–4 (1977).

attempts to adopt a European convention[48]—the more scholars and practitioners perceived that universalism and territoriality, in their pure forms, were unfeasible in an imperfect and asymmetrical world.

In this environment, several new intermediate models were adopted. Called by many names—secondary bankruptcies,[49] measured universality,[50] modified universalism,[51] coordinated universality,[52] and cooperative territoriality[53]—these models, adopted in real cross-border cases and enacted in laws around the world, featured different levels of complexity. The models have proven much less naive than the pure models. The vast majority of them make use of multiple insolvency proceedings, sometimes with different levels of hierarchy coordinated more or less tightly, to reach a *de facto* universalism.[54] In fact, most authors tend to describe their proposed models as a form of universalism, perhaps due to the pejorative connotation that the term "territoriality" has gained over the years.[55] Modified universalism, for instance, has been described as a model that pursues the efficiency of universalism by making use of the flexibility of territoriality.[56]

48. *See* Paul J. Omar, *Genesis of the European Initiative in Insolvency Law*, 12 INT'L INSOLVENCY REV. 147, 147 (2003) (discussing the history behind the adoption of the 2000 European Insolvency Regulation).

49. *See generally* MIGUEL VIRGOS & ETIENNE SCHMIT, REPORT ON THE CONVENTION ON INSOLVENCY PROCEEDINGS 14, 19–23 (1996), http://aei.pitt.edu/952/.

50. Donald Trautman et al., *Four Models for International Bankruptcy*, 41 AM. J. COMP. L. 573, 576 (1993).

51. Westbrook, *supra* note 32, at 513.

52. Bob Wessels, *The European Union Insolvency Regulation: An Overview with Transatlantic Elaborations*, *in* ANN. SURV. OF BANKR. L. 494 (2003).

53. LoPucki, *supra* note 37, at 742.

54. *See* IAN F. FLETCHER, INSOLVENCY IN PRIVATE INTERNATIONAL LAW 15–17 (2d ed. 2005) (referring to the "Internationalist Principle" as a compromise between universalism and territorialism in insolvency proceedings). Although universalism is still the preferred model among cross-border insolvency scholars, there has been a movement towards a more practical approach. *See id.* at 15. The idea behind these models is that a *de facto* universalism could be reached by cooperation among countries without violating the integrity of different legal systems. *See id.* at 15–17.

55. LoPucki, *supra* note 37, at 742.

56. Anderson, *supra* note 44, at 691.

The now extinct §304 of the U.S. Bankruptcy Code adopted, at the time of its enactment in 1978, the ancillary proceedings approach. Ancillary proceedings were created with the purpose of collecting assets and then surrendering them to a main foreign procedure. This approach was labeled "modified universalism" by Professor Jay Westbrook.[57] The European Union has traditionally preferred to adopt full bankruptcy proceedings, called "secondary proceedings," which are aimed at distributing assets among local creditors before submitting the remaining values to the main insolvency proceeding.[58] Professor Westbrook considered the European approach of mixing primary (or main) and secondary (or non-main) proceedings to be a form of modified universalism.[59] In contrast, Professor Bob Wessels prefers to call such a model coordinated universalism, a system in which the plurality of proceedings are brought together to take into account the economic unity of the debtor.[60]

Professor LoPucki emphasizes the opposite model, the system that he calls cooperative territoriality. The idea behind such a system is that the concept of territoriality in cross-border insolvency proceedings would become so dilapidated that the territory-based multiple insolvency proceedings would become uncoordinated and non-cooperative—courts would just "grab" all assets within reach and distribute them among local creditors, frustrating any kind of international teamwork.[61] Such a refusal to cooperate would counteract the ability to obtain a fair collection and distribution of assets among worldwide creditors. To avoid this biased concept, LoPucki developed a model of

57. Westbrook, *supra* note 32, at 517.

58. *See* LoPucki, *supra* note 37, at 732–33; Jay Lawrence Westbrook, *Multinational Enterprises in General Default: Chapter 15, The ALI Principles and the EU Insolvency Regulation*, 76 AM. BANKR. L.J. 1, 34–35 (2002) (identifying the "split personality" of the EU insolvency proceeding).

59. *See* Westbrook, *supra* note 58, at 33–38 (2002) (discussing the interplay between primary and secondary proceedings in the European system); Jay Lawrence Westbrook, *Universal Priorities*, 33 TEX. INT'L L.J. 27, 28 (1998) [hereinafter Westbrook, *Universal Priorities*]; Jay Lawrence Westbrook, *Creating International Insolvency Law*, 70 AM. BANKR. L.J. 563, 573–74 (1996) [hereinafter Westbrook, *Creating International Insolvency Law*].

60. *See* Wessels, *supra* note 52, at 481, 494.

61. *See* LoPucki, *supra* note 37, at 742–43.

territoriality to serve as a platform for international collaboration.[62] Cooperation would be stimulated by the extinction of what LoPucki calls the universalist tension, which threatens to take away a portion of a country's sovereignty.[63] Under a system of cooperative territoriality, there would be multiple, full insolvency proceedings, one in each jurisdiction, and no one would be considered primary or secondary.[64] Each proceeding would be able to protect its own creditors by distributing the proceeds of local assets among them.[65] Each of the proceedings would decide whether to liquidate or to reorganize the assets in question.[66] Cooperative territoriality is set apart from "traditional" territoriality because it would entail enhanced assistance among the proceedings.[67] Mutual aid would therefore be its characteristic mark. This lesser form of territoriality should, nonetheless, still be considered territoriality.

The evolution of cross-border insolvency matters was certainly not confined to the academic books, as the furious combat between theoretical models might suggest. In the last twenty years, remarkable progress has been made in properly regulating cross-border insolvency. In 1997, the General Assembly of the United Nations adopted the UNCITRAL Model Law on Cross-Border Insolvency, thereby enacting it in several countries with differing legal traditions, including the United States, the United Kingdom, Japan, Australia, Mexico, and South Africa.[68] In addition, following the fruitless convention-drafting efforts, the Council Regulation (EC) 1346 of 29 May 2000 entered into force in 2002, providing a common cross-border insolvency framework for the European Community, with

62. *Id.* at 742.
63. *Id.* at 750.
64. *Id.* at 742.
65. *See id.* at 751.
66. *Id.* at 742–43.
67. *See id.* at 750 (describing some examples of the possible assistance).
68. UNCITRAL, STATUS 1997—MODEL LAW ON CROSS-BORDER INSOLVENCY (2009), http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (providing a current list of countries that have adopted the Model Law).

the sole exception of Denmark.[69] The last two decades have seen the flourishing of sets of principles and guidelines, drafted, in most part, by private institutions and organizations dealing with the matter. Such guidelines and principles include the Model International Insolvency Cooperation Act (MIICA) in 1988[70] and the Concordat in 1996,[71] both of which were developed by the International Bar Association (IBA), and the American Law Institute (ALI) Transnational Insolvency Project, drafted jointly with the International Insolvency Institute (III) in 2000.[72] In addition, cross-border insolvency cooperation protocols, typically used by common law jurisdictions, became rather popular following the example of the *Maxwell* case.[73] Cross-border insolvency provisions have become a common feature even for those countries that did not incorporate the UNCITRAL Model Law.

III. BRAZILIAN INSOLVENCY SYSTEM

Before proceeding to an overview of the Brazilian cross-border insolvency legal regime, perhaps it is advisable to say a few words on the Brazilian national insolvency system. After all, insolvency systems greatly differ from country to country, and they may have different purposes as well as a handful of dissimilar features.[74] This specificity makes it important to draw a brief outline of Brazilian insolvency law.

Brazil, being a Roman law country, follows the Latin legal tradition, inherited from the French Commercial Code of the 19th century, of separating the insolvency of merchants and

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69. Council Regulation 1346/2000, 2000 O.J. (L 160) 1 (EC).

70. Elizabeth K. Somers, *The Model International Insolvency Cooperation Act: An International Proposal for Domestic Legislation*, 6 AM. U. J. INT'L L. & POL'Y 677, 678 (1991).

71. Anne Nielson et al., *The Cross-Border Insolvency Concordat: Principles to Facilitate the Resolution of International Insolvencies*, 70 AM. BANKR. L.J. 533, 534–35 (1996).

72. Jay Lawrence Westbrook, *The Transnational Insolvency Project of the American Law Institute*, 17 CONN. J. INT'L L. 99, 99 (2001).

73. Evan D. Flaschen & Ronald J. Silverman, *Cross-Border Insolvency Cooperation Protocols*, 33 TEX. INT'L L.J. 587, 589–90 (1998).

74. *See* Stijn Claessens & Leora F. Klapper, *Bankruptcy around the World: Explanations of Its Relative Use*, 7 AM. L. & ECON. REV. 253, 254 (2005).

non-merchants.[75] Entrepreneurship (*empresa*)—i.e., the commercial activity—is a concept well developed by Brazilian legal scholars and has become, in the course of the 20th century, the criteria to differentiate merchants and non-merchants.[76] Due to this distinction, there are different insolvency proceedings for those who are engaged in business activities and for those who are not.[77] In both cases, however, Brazil adopts a procedural approach to insolvency.[78]

A. Consumer insolvency

If a non-merchant (e.g., a consumer or a civil association) becomes insolvent, he is subject to a civil insolvency proceeding, which is a form of liquidation involving the collection and distribution of assets, as currently regulated by the 1973 Code of Civil Procedure (*Código de Processo Civil*), which provides no reorganization for consumers.[79] Brazil does not follow the European trend (mainly French) of providing a specific regulation for repayment of consumer debt.[80] Scholars frequently support a complete overhaul of the Brazilian system of consumer insolvency and the consequent adoption of the French approach for regulating consumer over-indebtedness.[81]

Under the Code of Civil Procedure, all the assets of a consumer debtor—with the exception of the assets which are

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75. *See* RUBENS REQUIÃO, 1 CURSO DE DIREITO FALIMENTAR 29 (10th ed. 1986); Felsberg & Campana Filho, *supra* note 9, at 276–77.

76. *See* Lei 10,406, Jan. 10, 2002 (Brazil), art. 966 (the Brazilian Civil Code, adopting this approach of distinguishing between merchants and non-merchants).

77. Luiz Bernardo Gomide & José Roberto de Castro Neves, *Commercial Financing and Insolvency Law in Brazil*, 2 SW. J. L. & TRADE AM. 123, 144 (1995).

78. *See* FÁBIO KONDER COMPARATO, ASPECTOS JURÍDICOS DA MACRO-EMPRÊSA 101–02 (1970) (criticizing this approach).

79. *See* Lei 5,869, Jan. 11, 1973 (Brazil), Book V, art. 748-53 [hereinafter 1973 Code of Civil Procedure]; *see also* Gomide & Neves, *supra* note 77, at 144–45, for a brief discussion of the civil insolvency process.

80. *See generally* Cláudia Lima Marques, *Sugestões Para uma Lei Sobre o Tratamento do Superendividamento de Pessoas Físicas em Contratos de Crédito ao Consumo: Proposições com Base em Pesquisa Empírica de 100 Casos no Rio Grande do Sul*, *in* 56 REVISTA DE DIREITO DO CONSUMIDOR 11, 37–43 (2005) (discussing the possible benefits of adopting a French-style consumer debt repayment system in Brazil).

81. *See id.* at 17.

essential for maintaining a minimum standard of living for him and for his family (such as the house)—are collected and sold in a public auction for payment of the creditors.[82] Discharge is granted only after five years after the distribution of the proceeds and the termination of the insolvency proceeding.[83] Until the debtor is discharged from its obligations, any newly-acquired asset will be sold for the payment of the debt.[84] The debtor and the creditors may reach an agreement in order to provide for alternative forms of payment and to terminate the civil insolvency proceeding.[85] There must be no opposition of any of the creditors to such an arrangement—i.e., all of them must consent—in order for it to be confirmed by the court and to become binding.[86]

B. *Corporate insolvency*

Merchants (e.g., corporations), however, are subject to proceedings regulated by specific statutory law. This statutory law is codified in the 2005 Bankruptcy and Corporate Rescue Act (*Lei de Recuperação de Empresas e Falências*), the law that replaced the aging 1945 Bankruptcy Act (*Lei de Falências*), which was, at the time, on the verge of celebrating six decades of existence.[87] The 1945 Bankruptcy Act was heavily criticized, especially during its later years, for its noticeable inefficiency as recovery rates were very low[88] and huge amounts of resources were wasted due to the dismantlement of potentially profitable

82. 1973 Code of Civil Procedure, *supra* note 79, art. 751, 752, 766, 773.

83. *Id.* art. 778.

84. *Id.* art. 775.

85. *Id.* art. 783.

86. *Id.*

87. OTTO EDUARDO FONSECA LOBO, ET AL., THE AMERICAS RESTRUCTURING AND INSOLVENCY GUIDE 234 (2008/2009). Although sixty years is a period of time that pales in comparison to the two centuries of the French Civil Code or even the more than eighty years in which the first Brazilian Civil Code remained in force, it is nevertheless a large gap between two bankruptcy acts.

88. *See* Gloria Angélica Cantú, *Reforming Brazilian Insolvency Law*, 17 CONN. J. INT'L L. 49 (2001). For an overview of the Brazilian 1945 Bankruptcy Act, *see generally* Antonio Mendes, *A Brief Incursion into Bankruptcy and the Enforcement of Creditor's Rights in Brazil*, 16 NW. J. INT'L L. & BUS. 107 (1995).

companies.[89] Given this situation, the focus of the law reform was to improve the effectiveness on both credit recovery and the maintenance of the going concern value.[90]

Before the enactment of the new act in 2005, Brazilian law had historically provided for two types of corporate insolvency proceedings: bankruptcy (i.e., liquidation) and composition. Composition was introduced by the Brazilian Commercial Code (*Código Comercial*) in 1850 under the name *concordata*, a regime that was severely modified in 1945.[91] Although the roots of composition schemes may be traced down to the Roman Empire, they became highly utilized among merchants in Medieval Italy.[92] Creditors would agree with debtors to receive less for their claims—such was the *concordato*.[93] These arrangements were spread over the medieval fairs of Europe[94] and they were eventually incorporated into the 1808 Napoleonic Commercial Code as *concordats*.[95] As in European countries, under the Brazilian Commercial Code and also under the legislation that would follow it, composition was an agreement between the debtor and its unsecured creditors, and the dissenting creditors were bound if the holders of the majority of claims agreed to be paid under different conditions.[96] However, under the 1945 Act, composition was turned into something very different. Upon request, the court would grant favorable payment conditions to the debtor—to extend payment deadlines

89. *See generally* RUBENS REQUIÃO, 2 CURSO DE DIREITO FALIMENTAR 247–58 (8th ed. 1986) (proposing reform of the 1945 bankruptcy legislation that would put greater emphasis on the recovery of companies).

90. Cantú, *supra* note 88, at 56.

91. *See generally* REQUIÃO, *supra* note 89, at 7–9 (detailing the evolution of Brazilian corporate reorganization measures); J. C. SAMPAIO DE LACERDA, MANUAL DE DIREITO FALIMENTAR 31–33 (12th ed. 1985) (same).

92. Israel Treiman, *Majority Control in Compositions: Its Historical Origins and Development*, 24 VA. L. REV. 507, 508–10 (1938).

93. *Id*. at 510.

94. *Id*.

95. *Id.*; Jérôme Sgard, *Do Legal Origins Matter? The Case of Bankruptcy Law in Europe (1808–1914)*, http://www.helsinki.fi/iehc2006/papers2/Sgard.pdf.

96. *See* Felsberg & Campana Filho, *supra* note 9, at 277–78.

or to reduce the total amount of debt.[97] The debtor was not allowed to propose a scheme of payment different from those set forth in the act.[98] The court, in turn, had no discretion to grant or deny such conditions, for once the debtor fulfilled all the legal requirements, composition was conceded.[99] The conditions of payment were mandatory to all unsecured creditors, regardless of their approval.[100] Creditors could pose an objection to the proposed composition scheme based on the non-fulfillment of formal requirements, but they could not oppose the economic circumstances of payment.[101] This is the reason why this post-1945 composition was widely called a "legal favor" to the debtor. The judicial control over the proceeding occurred because it became usual for minorities to require additional payments in order to get out of the way and to approve a composition scheme, and the 1945 law took the control away from creditors.[102] The introduction of the court-ordered composition was, nonetheless, heavily criticized from its inception. The lack of participation led creditors to lose interest in composition proceedings, providing dishonest debtors with plenty of room for fraud.[103]

Despite all the problems brought by the old statute—after all, both liquidation and composition procedures led to very poor recovery rates—the law reform had a difficult birth. The first draft was proposed to the Brazilian Congress in 1993, but it was dramatically amended during subsequent years.[104] When the 2005 Bankruptcy Act was finally enacted, it was deemed to be heavily inspired by the French insolvency law and by the U.S. Bankruptcy Code.[105] The composition schemes were dropped,

97. *See* Decreto-Lei 7,661, Jun. 21, 1945 (Brazil), tit. X, §§ II & III [hereinafter 1945 Bankruptcy Law].

98. *See* Felsberg & Campana Filho, *supra* note 9, at 277–78.

99. *See id.* at 278.

100. *Id.*

101. *Id.*

102. *See id.*; 1945 Bankruptcy Law, *supra* note 97 (explaining how the judiciary took control previously held by creditors).

103. *See* Felsberg & Campana Filho, *supra* note 9, at 278.

104. Cantú, *supra* note 88, at 55–56.

105. *See generally* Eduardo Secchi Munhoz, Comment, *in* COMENTÁRIOS À LEI DE RECUPERAÇÃO DE EMPRESAS E FALÊNCIA 287 (Francisco Satiro de Souza Junior & Antonio Sergio A. De Moraes Pitombo ed., 2006).

and Brazil adopted a kind of reorganization proceeding aimed at rescuing companies through a mechanism that shares similarities with the one found in U.S. Chapter 11.[106] The Brazilian law provides for court-supervised rescue[107] as well as expedited reorganizations with pre-packaged rescue plans.[108] A special rescue proceeding for small companies is also present.[109] A company which files for an in-court rescue—no creditor is entitled to file such a petition[110]—has all enforcement actions against it stayed for 180 days upon the opening of such a proceeding.[111] During this period, it may negotiate a repayment plan—similar to a Chapter 11 plan of reorganization—with its creditors while it generally remains in control of its own affairs.[112] The plan is submitted for approval on a class-based vote carried out in a creditors' meeting.[113] If the plan is approved by the required majorities and is confirmed by the court, the company is allowed to survive.[114] Once confirmed by the court, the plan is mandatory as to all creditors, even the dissenting ones.[115] Rejection of the plan, however, entails the liquidation of the debtor company,[116] unless the court is able to apply the cram down provisions of the Bankruptcy Act and

106. *See* Lei 11,101, Feb. 9, 2005 (Brazil), Ch. III [hereinafter Brazilian Bankruptcy Act].

107. *Id.* ch. III, sec. III.

108. *See* Otto Eduardo Fonseca Lobo et al., *Varig Airlines: Flying the Friendly Skies of Brazil's New Bankruptcy Law with Help from Old §340*, 26 AM. BANKR. INST. J. 42, 43 (2007) (discussing reorganization plans that span several months, not years).

109. *See* Felsberg & Campana Filho, *supra* note 9, at 284.

110. *See* Brazilian Bankruptcy Act, *supra* note 106, ch. III, sec. I, art. 48.

111. *Id.* ch. II, sec. I, art. 6, §4 (providing rules on stay of proceedings).

112. 11 U.S.C. (2009). This provision is similar to the "debtor-in-possession" adopted in the Chapter 11 of the U.S. Bankruptcy Code. *See* Maria Brouwer, *Reorganization in US and European Bankruptcy Law*, 22 EUR. J. LAW ECON. 5, 8 (2006). The debtor may, however, be replaced by an administrator in some circumstances. Brazilian Bankruptcy Act, *supra* note 106, ch. III, section IV, art. 64.

113. *See* Felsberg & Campana Filho, *supra* note 9, at 282.

114. *Id.* (explaining rules for class-based voting and court confirmation of reorganization plans).

115. *Id.*

116. Brazilian Bankruptcy Act, *supra* note 106, ch. III, sec. IV, art. 56, §4.

confirm the plan despite the disapproving vote of one class of creditors.[117]

Liquidation (called *falência*, deriving from the French *faillitè* since the introduction of the early commercial legislation in the country) is a proceeding aimed at collecting and distributing the assets of the debtor among its creditors, while considering the priority of claims and the proportional allocation of the earnings.[118] The liquidation proceeding was enhanced in the 2005 legislation: a trustee takes the management of the company and whenever possible, he has the duty to take the necessary steps to keep the business running and to avoid dissipating any value. This is a stark contrast to the old law, while allowed trustees to close businesses right away. Under the new law, discharge is only conceded after five years following the termination of the liquidation proceeding (a period of time which is extended to ten years if the debtor is found guilty of a bankruptcy crime) or after at least half of the amount of the unsecured claims are paid.[119]

In any case, preservation of the going concern value should be sought. The law provides the means to facilitate the sale of the activity itself (if the company goes into liquidation) or of a branch or separate productive unit.[120] The acquirer of the activity will not be held liable for the obligations of the company, as the paid amount is destined to pay the creditors.[121]

The law also has several exceptions to the application of its own provisions. Rights *in rem*—usually pledges and mortgages—are all packed together in the same class and are bound by the majority rules in a corporate rescue proceeding.[122] All holders of pledges and mortgages, regardless of their relative differences, are put together in the same pool. Some kinds of securities, however—notably the ones that transfer the legal ownership of an asset without transferring its possession—are

117. *See* Felsberg & Campana Filho, *supra* note 9, at 282.

118. Brazilian Bankruptcy Act, *supra* note 106, ch. V.

119. *Id.* sec. XII, art. 158.

120. *See id.*, ch. III, sec. X; *see also id.*, ch. III, sec. IV, art. 60 (corporate reorganization proceedings).

121. *Id.* ch. V, sec. X, art. 141 (II); *id.* ch. III, sec. IV, art. 60.

122. *Id.* ch. II, § IV, art. 41, II.

not subject to a rescue plan and are entitled to a separate satisfaction.[123] This is achieved through legal mechanisms which create super-guarantees. It is usual for banks to be the recipients of the legal ownership of an asset or the right to a claim, and such assets or rights remain in trust with the debtor, who retains the property only after the credit is fully paid. This legal construction allows these secured claims to be enforced regardless of the existence of a corporate rescue proceeding.[124] Tax claims are also legally excluded from rescue plans.[125] In addition, there are some creditors whose claims are not even submitted to liquidation proceedings but that may be enforced under all circumstances, especially the financial claims derived from advances on foreign currency exchange contracts.[126]

However, despite all of the outlined changes, the 2005 Bankruptcy Act, similarly to its predecessor, did not provide clear rules for cross-border insolvency. Not only did it ignore the existence of the UNCITRAL Model Law on Cross-Border Insolvency, which was adopted in 1997, but it also overlooked the issues created by §304 of the U.S. Bankruptcy Code and the European Regulation. The legacy of a long-time disregard for cross-border insolvency issues has been a very lacking and confusing legal framework. Legal history certainly plays a vital part on this matter. Brazil was not always so deficient of rules on cross-border insolvency, but at some point, it clearly lost track of these affairs. We must now go back to where it all started.

IV. THE RULES ON CROSS-BORDER INSOLVENCY IN BRAZIL

I have stated that the Brazilian system of cross-border insolvency rules is a very confusing and lacking one.[127] However, this has not always been the case. Brazil has a rich legislative history in regulating cross-border insolvency matters,

123. *Id.* ch. III, sec. I, art. 49, §§ 3, 4.

124. Assets which are necessary to the continuity of the debtor's business activities cannot be removed by the guaranteed creditor during the stay period. *Id*. art. 49, sec. 3.

125. *Id.* ch. II, sec. I, art. 6, §7; ch. III, sec. IV, art. 57.

126. *Id.* ch. V, sec. III, art. 86 (II).

127. *See supra* §1 Introduction.

but, at some point during the 20th century, it lost track of the achievements in this area. In this part, I will outline the succession of rules on cross-border insolvency that have been enacted in Brazil since its independence from Portugal.

A. *The early history of Brazilian cross-border insolvency rules*

The first Brazilian rules on cross-border insolvency date back to the 19th century, and as such, the country may be considered one of the pioneers on regulating the matter.[128] The Commercial Code of 1850 did not refer at all to the international aspects of bankruptcies. Decree 6.982 was enacted in 1878—a bit more than half a century after the country's declaration of independence—to regulate the enforceability of foreign judgments, and it was the first body of rules that provided for such a matter in the country.[129] Brazil, then still a monarchy governed by an Emperor, D. Pedro II, adopted universality.[130] However, the then Minister of Justice, Counselor Lafayette, in charge of drafting the act, believed that there should be some restrictions to the principle of universality.[131]

According to the decree, local courts could recognize a foreign judgment, provided that the debtor was not domiciled or established in Brazil and that the reciprocity requirement (*comitas gentium*) was met.[132] The local establishment of the debtor was deemed to be excluded from the foreign bankruptcy.[133] In addition, national creditors could only be bound by foreign bankruptcy proceedings once they were properly summoned.[134] Trustees appointed in foreign proceedings were recognized by Brazilian courts, but they could

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128. 3 HAROLDO VALLADÃO, DIREITO INTERNACIONAL PRIVADO 40 (1979).

129. *Id.*; 2 OSCAR TENÓRIO, DIREITO INTERNACIONAL PRIVADO 261 (9th ed. 1970).

130. *See* CIA, *supra* note 1 (stating that Brazil was a monarchy from 1822 until 1889 when it became a republic); *see* Felsberg & Campana Filho, *supra* note 9, at 294.

131. 8 J. X. CARVALHO DE MENDONÇA, TRATADO DE DIREITO COMERCIAL BRASILEIRO 471–72 (7th. ed. 1962). Lafayette actually believed Brazil could not advance as much as Italy in regulating cross-border insolvency. *See* VALVERDE, *supra* note 8, at 65–66.

132. *See* VALLADÃO, *supra* note 128, at 41.

133. *See* MENDONÇA, *supra* note 131, at 472.

134. *Id.*

only enforce creditors' rights after the recognition of the foreign judgment.[135] Local secured creditors could still enforce their securities, despite the recognition of a foreign bankruptcy, and only the remaining amount would be destined to the universal proceeding.[136] Unsecured creditors could also proceed with the enforcement actions, which had already begun at the time of the recognition.[137] The decree could be considered the state-of-the-art in international bankruptcies.[138]

In 1890, Decree 917 (the Bankruptcy Act) modified Decree 6.982, and while it basically reproduced the prior legislation,[139] it also enacted some new provisions. First and foremost, it dropped the reciprocity requirement.[140] Comity would never be adopted again as a requirement for a foreign bankruptcy judgment to be recognized in the country.[141] Decree 917 also enacted a provision requiring a locally domiciled debtor to be a Brazilian national in order to obstruct the recognition of a foreign judgment. As such, a local court was authorized to recognize a foreign bankruptcy proceeding against a foreign (but not a Brazilian) debtor domiciled in Brazil.[142] The need for a *cautio judicatum solvi*, a deposit security for costs, was also abolished.[143] In addition, the 1890 Bankruptcy Act incorporated the rules for cross-border insolvency set forth in articles 35–47 of the Montevideo Treaty on Commercial International Law.[144] After the enactment of the decree, the law on cross-border insolvency was reformed very frequently in 1902, 1908 and 1929.[145]

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135. VALLADÃO, *supra* note 128, at 41.

136. MENDONÇA, *supra* note 131, at 472.

137. VALLADÃO, *supra* note 128, at 41.

138. *Id.* at 40–41.

139. AMÍLCAR DE CASTRO, DIREITO INTERNACIONAL PRIVADO 576–77 (5th ed. 1997).

140. *See* VALLADÃO, *supra* note 128, at 41.

141. MENDONÇA, *supra* note 131, at 473.

142. VALLADÃO, *supra* note 128, at 41.

143. *Id.*

144. MENDONÇA, *supra* note 131, at 473.

145. VALLADÃO, *supra* note 128, at 41; CASTRO, *supra* note 139, at 501; TENÓRIO, *supra* note 129, at 261–62.

Act 859, enacted in 1902, actually did not change Decree 917, merely reproducing its provisions.[146] Act 2.024, enacted in 1908, followed the very same principles of the prior legislation.[147] A foreign bankruptcy decision could be formally recognized in Brazil, unless it referred to a Brazilian debtor domiciled in Brazil or it was considered to be against public policy.[148] Local establishments were, once again, not affected by such recognition. Legal representatives of the bankruptcy estate, however, were empowered to take any preventive and conservative measures in the country regardless of the existence of formal recognition of their situation by a Brazilian court.[149] The rules on enforceability of secured claims and unsecured claims (provided that the creditors of the latter claims had already filed suit) remained unchanged. A new provision, of substantial content, was added: the classification of claims should follow the hierarchy set forth in local law.[150] Given such rules, once the foreign bankruptcy was recognized in Brazil, a restricted universal system would take place. However, as a prominent commentator would notice,[151] the impact of such restrictions would eventually blow away any potential advantage of universalism, and such a conclusion may be extended to every piece of legislation on cross-border insolvency enacted in the country.

Another reform came in December 1929 with the enactment of Act 5.746.[152] This act embraced, once again, a restricted universality principle. In order to have effect in the country, a

146. MENDONÇA, *supra* note 131, at 473.

147. *Id.*

148. *Id.*

149. *Id.* at 474.

150. VALLADÃO, *supra* note 128, at 41.

151. *See* MENDONÇA, *supra* note 131, at 475–76. Four restrictions were appointed as being remnants of territoriality. *Id*. First, any local establishment was excluded from the bankruptcy proceeding. *Id.* at 475. Second, the classification of claims would follow local law. *Id*. Third, secured creditors domiciled in Brazil could still enforce their securities regardless of the existence or recognition of a foreign bankruptcy. *Id.* Fourth, enforcement actions already filed by unsecured creditors domiciled in Brazil were not suspended with the recognition of the foreign judgment. *Id*. at 476.

152. *See* CLÓVIS BEVILAQUA, PRINCÍPIOS ELEMENTARES DE DIREITO INTERNACIONAL PRIVADO 445–46 (2d ed. 1934) (discussing the rules brought by such act).

court decision opening a proceeding had to be formally recognized, although, as in the prior law, the legal representatives of the estate were allowed to act to the certain extent necessary to protect the assets of the debtor.[153] Secured claims were, once more, unaffected by the recognition of foreign bankruptcy, as were unsecured claims, which were already subject to an enforcement action at the time of concession of *exequatur*.[154] A distinct and separate establishment located in Brazil was not subject to the foreign bankruptcy, to the benefit of local creditors, a feature which was, again, quite similar to the ones found in prior legislation.[155] However, after the full satisfaction of local claims, the resulting proceeds—if any remained—were destined to pay the creditors of the foreign proceeding.[156] Act 5.746 also brought new and important rules. It dropped the Brazilian nationality requirement in denying recognition to a foreign bankruptcy.[157] As such, all merchants domiciled in Brazil, regardless of their nationalities, could only be subject to local bankruptcy proceedings. This provision was considered to be aligned with the constitutional rules regarding the equal treatment of nationals and foreigners.[158]

Brazilian rules were, at the time, keeping some pace with international trends, even if not with the most advanced legal thinking. The rules kept changing over the course of the years, but not to a great extent, as all acts and decrees that followed each other contemplated a modest form of universalism. 1929, however, marked the beginning of the alteration to this landscape. Act 5.746, was, in fact, the last of its kind, as no other piece of legislation properly dealt with the international aspects of bankruptcy.[159] The country suffered a considerable downturn in this respect as it advanced into the 20th century. Just before cross-border insolvency became a major issue, Brazilian law

153. *Id.* at 445.
154. *Id.* at 445–46.
155. *Id.*
156. *Id.* at 446.
157. VALLADÃO, *supra* note 128, at 41.
158. *Id.*
159. VALLADÃO, *supra* note 128, at 41–42.

abandoned its vanguard position and went on to assume a very timid approach to regulating it.

Due to its neglect for over half a century, the cross-border insolvency situation in Brazil became rather obscure as years went by. While several acts followed each other in partially regulating the matter, none of them provided a complete, clear, and definitive outline of cross-border insolvencies. Old acts were not expressly revoked, and their enforceability became questionable as new acts entered into force. The matter is therefore spread over many bodies of rules.[160] Some of these acts—and they happen to be just the most recent ones—have absolutely no provisions on the matter. A solution to the arising problem cannot be found in any of the most up-to-date acts, unless a great deal of creativity is used.[161]

It is difficult to illustrate the complete framework of cross-border insolvency in Brazil without clearly understanding the whole plethora of relevant acts. I will provide a brief analysis of the Brazilian acts on insolvency and on the conflict of laws that has entered into force in the last eighty years.

B. The Havana Convention on Private International Law

The history of a puzzled Brazilian cross-border insolvency framework begins in 1929, when Brazil ratified the Bustamante Code, an annex to the Havana Convention on Private International Law that was signed into law in 1928. The Code of Private International Law was officially named after its creator, the Cuban jurist Antonio Sánchez de Bustamante y Sirven, during the Sixth International Conference of American States held in 1928.[162] The Conference, which also approved the Code with amendments, was presided over by Bustamante himself.[163]

The Bustamante Code of Private International Law was an ambitious and monumental piece of work that intended to

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160. RECHSTEINER, *supra* note 7, at 87.

161. *See generally* Felsberg, *supra* note 7 (analyzing the cross-border insolvency situation in Brazil).

162. *See* James Brown Scott, *The Sixth International Conference of American States*, 12 INT'L CONCILIATION 273, 305, 307 (1928).

163. *See* BOB WESSELS, INTERNATIONAL INSOLVENCY LAW 39 (2006).

govern all aspects of cross-border relations among individuals and legal entities.[164] It was a Pan-American initiative intended to harmonize conflict of laws issues. As such, it was ratified by fifteen of the then twenty-one Latin American countries—six had reservations[165]—and became applicable among all signatories.[166] Although the most notable exception was the United States (which was represented at the Conference), the Code also failed to enter into force in other large countries, including Mexico, Argentina, and Colombia.[167] In fact, only Brazil and another fourteen Latin American countries—which, together, did not account for the whole of the Brazilian population—approved the Code.[168] Therefore, the range of application of the Bustamante Code was somewhat restricted, and this limitation turned out to be a huge disappointment for a convention which was intended to unify the rules on conflict of laws in the Americas. Additionally, the Code was widely criticized for having somewhat vague and unclear provisions which permitted a fairly broad interpretation.

The Bustamante Code contains several rules on cross-border insolvencies, including one title, spread over three chapters and nine articles (out of 437), entirely dedicated to this issue, and separate provisions concerning international jurisdiction on the matter. For this reason, the Bustamante Code was even called "the other great bankruptcy treaty now in force in Latin America" by Professor Kurt Nadelmann in the 1940s.[169] The enactment of the Code marked the last time in Brazilian legislative history that a single body of rules provided rules for both choice of forum and choice of law on cross-border insolvencies.

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164. *See generally* Ernest G. Lorenzen, *The Pan-American Code of Private International Law*, 4 TUL. L. REV. 499 (1930) (describing a general view of the Code provisions).

165. Kurt H. Nadelmann, *The Need for Revision of the Bustamante Code on Private International Law*, 65 AM. J. INT'L L. 782, 782 (1971).

166. WESSELS, *supra* note 163, at 39.

167. *Id.*

168. *Id.*

169. Kurt H. Nadelmann, *Bankruptcy Treaties*, 93 U. PA. L. REV. 58, 70 (1944). The first bankruptcy treaty in force, according to Nadelmann, was the Treaty of Montevideo. *Id.* at 69.

The Code provided for the harmonization of cross-border insolvency proceedings among the signatory countries.[170] The Code adopted the principles of unity and universality[171] to a certain extent by embracing a modified form of universalism in both cross-border liquidations and compositions, and Brazil never made a reservation to such provisions.[172] The first and second chapters dedicated to this matter were even named "Unity of Bankruptcy or Insolvency" and "Universality of Bankruptcy or Insolvency, and their Effects."[173] The articles dedicated to this subject addressed both jurisdictional and choice of law rules.

Under the rules of the Code, if a debtor has only one civil or commercial domicile, he may be subject to only one insolvency proceeding, either a liquidation or a composition.[174] Hence, the stay of proceedings ordered by the relevant court is valid and binding elsewhere inside the boundaries of the signatory countries.[175] In addition, the discharge of the obligations of the debtor, granted by the court of his domicile, has universal effects. Consequently, universalism is the applicable principle in these situations[176]—the assets of the debtor, regardless of their location, are subject to just one insolvency proceeding.

The situation was different, however, in the case of the debtor maintaining several commercial establishments in more than one of the contracting countries, provided that, from an economic point of view, these establishments were entirely separate. In such a case, there may be as many insolvency proceedings as there are establishments.[177] The Code was inconsequential if one of the establishments was the home

170. Felsberg, *supra* note 7, at 110.

171. WESSELS, *supra* note 163, at 39.

172. *See* Code of Private International Law, annexed to the Havana Convention on Private International Law, 86 L.N.T.S. 1950, tit. 9 (1929) [hereinafter Bustamante Code] (discussing the articles of the Code relevant to cross-border bankruptcy and insolvency which set forth principles of unity and universalism and the lack of reservations from Brazil).

173. *Id.* tit. 9, ch. I, II.

174. *Id.* ch. I, art. 414.

175. *See id.* ch. I, art. 416.

176. *See* VALVERDE, *supra* note 8, at 78–79.

177. Bustamante Code, *supra* note 172, tit. 9, ch. I, art. 415.

country or the center of the main interests of the debtor, and did not provide for the existence of primary and secondary insolvency proceedings. There were, in fact, no rules for the coordination of multiple proceedings. In this respect, the Code did not even provide for one court to surrender the surplus of one proceeding to another.[178]

The existence of diverse, non-economically connected establishments was the criterion for authorizing the opening of local insolvency proceedings of equal hierarchy. To determine under what grounds an establishment may be properly considered economically autonomous is, however, a matter subject to court interpretation. The Code contains no criteria for verifying what constitutes an economically independent establishment, nor does it provide rules for deciding conflicts of jurisdictions that may arise from divergent understandings of the definition. According to Bustamante, an establishment is economically separate from another when it has diverse organization, accounting, operations, and resources, and such a distinction is reflected as a separate legal personality on the relevant registrars of companies.[179] However, not even Bustamante's scholarly authority was enough to make his interpretation of his Code binding, and the provision regarding separate establishments ended up being an important exception to the universal rule, thus benefitting local creditors.[180]

Choice of forum rules are also present in the Bustamante Code. A voluntary bankruptcy petition must be filed in the domicile of the debtor.[181] Involuntary bankruptcy petitions may be filed before any court.[182] The court that considers itself competent shall have jurisdiction over the bankrupt debtor.[183] Should there be any conflict of jurisdiction, the domicile of the debtor is preferred, as usually demanded by the debtor himself

178. *See* FLETCHER, *supra* note 54, at 287.

179. 3 ANTONIO SÁNCHEZ DE BUSTAMANTE Y SIRVEN, DERECHO INTERNACIONAL PRIVADO 276 (3d ed. 1943).

180. *See* VALVERDE, *supra* note 8, at 82–83.

181. *See* Bustamante Code, *supra* note 172, tit. 2, ch. I, art. 328.

182. *Id.* art. 329.

183. *Id.*

or by the majority of the creditors.[184] Scholars and commentators have expressed disapproval of these rules due to the possibility of fraud and forum shopping.[185] The Code remains unclear regarding conflicts of jurisdiction whereby none of the courts are located in the domicile of the debtor.[186]

The Code also set the extraterritorial effects of a universal insolvency proceeding.[187] It had powerful rules obliging a contracting State to recognize the extraterritorial effects of bankruptcies.[188] A court decision establishing the incapacity of an insolvent debtor must be recognized in the other countries after formalities of registration and publicity are met.[189] A bankruptcy proceeding opened by the court in the domicile of the debtor must be recognized by the other jurisdictions according to the terms set in the Code.[190] The bankruptcy administrator or trustee appointed in one jurisdiction has extraterritorial powers to act.[191] Unlike in a declaration of bankruptcy, a foreign court, without the need of a prior formal proceeding, automatically recognizes the trustee, although he might be required to prove his position.[192] The trustee is not allowed, however, to enforce the rights of the creditors before the formal recognition of the bankruptcy judgment.[193]

As a rule of thumb, the applicable law is the law of the country in which the proceeding is opened (*lex fori concursus*)—including on the rules of avoidance[194] and discharge.[195] The application of the same rules of avoidance on a plurality of countries has been called a symptom of "unqualified

184. *Id.*

185. *See* VALVERDE, *supra* note 8, at 104–05 (critiquing the choice of forum rules for opening the door to fraud and forum shopping).

186. *See id.* at 105.

187. *See* WESSELS, *supra* note 163, at 39.

188. FLETCHER, *supra* note 54, at 287.

189. Bustamante Code, *supra* note 172, tit. 9, ch. II, art. 416.

190. *Id.* art. 417.

191. *Id.* art. 418.

192. *See id.*

193. *See* VALVERDE, *supra* note 8, at 105–06.

194. *See* Bustamante Code, *supra* note 172, tit. 9, ch. II, art. 419.

195. *Id.* ch. III, art. 422.

universalism" by Professor Ian Fletcher; although unifying the annulment of transactions makes logical sense, it is a provision that may harm parties acting in good faith (if the deal was valid and legitimate under local law).[196] A deviation of the application of *lex fori concursus* occurs in cases involving rights *in rem*, which are subject to the law of the country in which they are located (*lex situs*).[197] Composition schemes are also granted extraterritorial effects, but they do not affect dissenting secured creditors.[198] This rule does not take into consideration the unique composition procedures that would become effective in Brazil after the enactment of the 1945 Bankruptcy Act.[199]

Although the rules provided by the Code show a strong tendency towards universalism—they lean less towards local protectionism than other Latin American treaties on the subject[200]—they still have sturdy roots in territoriality due to the significant exception of the economically separated establishments.[201] In fact, the biggest difference between the Bustamante Code and the treaties that had developed in Europe is the allowance of an autonomous bankruptcy proceeding for each separate establishment.[202] Such an exception, though, is one of the main reasons the application of universalism is severely restricted under the Code.[203]

On the whole, the Bustamante Code has been widely considered a moderate failure, especially due to its inability to harmonize cross-border provisions with the two legal systems present in America. Following the creation of the Organization of American States (OAS) in 1948, several attempts have been made to revise the Code and to propose a new codification on private international law. However, the failure of the Inter-American Judicial Committee of the OAS to gather support for

196. *See* FLETCHER, *supra* note 54, at 288–89.
197. *See* Bustamante Code, *supra* note 172, tit. 9, ch. II, art. 420.
198. *Id.* ch.III, art. 421.
199. *See supra* notes 97, 103 and accompanying text.
200. *See* Nadelmann, *supra* note 169, at 70.
201. *See* VALVERDE, *supra* note 8, at 97.
202. *See* Nadelmann, *supra* note 169, at 71.
203. *See* VALVERDE, *supra* note 8, at 97.

its draft of the Code on private international law led to the abandonment of the project in favor of sectored codification.[204]

In Brazil, the application of the Code has been controversial since the beginning. Authors have discussed whether it would be preferable to apply pre-existing national laws or the treaty.[205] The applicability of the Bustamante Code only to signatory countries[206] gave rise to a double system of private international law in Brazil, which is highly undesirable due to the double system's immense ability of creating doubt.[207] In addition, new general rules regarding conflict of laws were enacted only a decade later, and such rules contradicted the Code in some respects.[208] Such detachment from the general rules made the Code look like an isolated episode in Brazilian private international law. In fact, the Code has never inspired much confidence and its fate was deemed to be abandonment.[209]

Given such a background, it should be no surprise that local courts have seldom applied the Bustamante Code since its enactment; instead, they have often preferred to base their decisions on national laws.[210] It should be noted, however, that this is not always the case. The Brazilian Supreme Court once applied the Code to regulate a matter involving Portugal, a non-

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204. *See* SECRETARIAT FOR LEGAL AFFAIRS, ORGANIZATION OF AMERICAN STATES, THE HISTORY OF CIDIP PROCESS (2009), http://www.oas.org/DIL/PrivateIntLaw-HistDevPriLaw-Eng.htm.

205. *Cf*. Oswaldo Murgel Rezende, *O Código de Direito Internacional Privado Pan-Americano em Conflito com o Código Civil Brasileiro* 165, *in* REVISTA DE JURISPRUDÊNCIA BRASILEIRA (May 1931); *see also* 1 PONTES DE MIRANDA, TRATADO DE DIREITO INTERNACIONAL PRIVADO 131 (1935).

206. *Cf*. Bustamante Code, *supra* note 172, art. 2 ("Foreigners belonging to any of the contracting States shall also enjoy in the territory of the others identical guarantees with those of nationals . . .").

207. *See* CASTRO, *supra* note 139, at 301; OSCAR TENÓRIO, DIREITO INTERNACIONAL PRIVADO 130 (10th ed. 1970).

208. *See* Chin Kim & Gretchen Cowen, *The Recognition and Enforcement of Foreign Judgments under Brazilian Law and the Uniform Foreign Money-Judgments Recognition Act*, 5 TRANSNAT'L LAW. 725, 732 (1992); Kurt H. Nadelmann, *The Question of Revision of the Bustamante Code*, 57 AM. J. INT'L L. 384, 387 (1963).

209. CASTRO, *supra* note 139, at 303.

210. *See* IRINEU STRENGER, DIREITO INTERNACIONAL PRIVADO 185 (4th ed. 2000). Brazilian courts have preferred to apply pre-existing national rules instead of the Bustamante Code. *See id*.

signatory country.[211] The court then supported an interpretation that broadened the scope of the Code.[212] According to the decision, the Code, a body of rules pertaining to Brazilian law, should be applicable to everyone, regardless of their nationality, and it had become more than just a treaty which binds only the signatories in the eyes of the Supreme Court.[213] This interpretation of the Code was in accordance with the legal thinking of some prominent national and international commentators.[214] Nonetheless, the decision did not set foot for precedent on the subject, for court decisions in Brazil (as in continental Europe) are case specific and binding only upon the parties. In later decades, Brazilian superior courts rarely mentioned the Bustamante Code in their decisions. The decisions that refer to the Code normally justify its non-application due to the Code's revocation by later rules that regulate a specific subject in a different manner; however, there is no mention in such cases of the Code being completely revoked, as if courts attempted to avoid such an issue.[215]

Due to this habit of ignoring Code's provisions, as well as the sheer obsolescence of the Code's rules, some scholars claim that the Code has fallen into total disuse and thus, has become unenforceable—a rare case of application of the desuetude doctrine (*desuetudo*) in Brazil.[216] Some claim that the Code might have been revoked when new legislation on the conflict of laws was enacted[217] due to the tenet of interpretation stating that *lex posterior derogat lex prior*.[218] The application of the

211. Supremo Tribunal Federal (Supreme Federal Court), *Sentença Estrangeira nº 993* (Brazil), 136 Revista dos Tribunais 824.

212. *Id.*

213. *Id.*

214. *See* JACOB DOLINGER, DIREITO INTERNACIONAL PRIVADO: PARTE GERAL 76–78 (6th ed. 2001). Indeed, although the Bustamante Code was only meant to bind the contracting parties, some courts have looked at its provisions as a guide in conflict related rules. *See* Nadelmann, *supra* note 165, at 790.

215. *See* Superior Tribunal de Justiça (Superior Court of Justice), Recurso Ordinário em Habeas Corpus (Appeal on a Habeas Corpus), RHC 853 / BA, 1990/0011171-4 (Brazil).

216. *See* CASTRO, *supra* note 139, at 303.

217. *See* DOLINGER, *supra* note 214, at 76.

218. *See* Decreto-Lei 4,567, Sept. 4, 1942 (Brazil), arts. 7, 2 [hereinafter

Code, however, could be considered specific to the signatory countries, and the tenet *lex specialis derogat lex generalis* could be evoked. In addition, others maintain that the Code, an outcome of a treaty, cannot be revoked by statutory provisions. As Brazil has never denounced the Havana Convention,[219] the Code is still theoretically enforceable.

C. The 1939 Code of Civil Procedure

A decade after the Bustamante Code entered into force, Brazil enacted its Code of Civil Procedure.[220] This Code was innovative because it created rules regarding cross-border insolvencies, a matter which had been traditionally resolved by insolvency legislation.[221]

The Code of Civil Procedure adopted a more territorial oriented approach than the Bustamante Code and was thus in accordance with prior bankruptcy legislation.[222] It must also be noted that the 1939 Code of Civil Procedure addressed only liquidation proceedings and therefore did not make a reference to compositions. The provisions of the 1939 Code were also limited to procedural aspects (i.e. conflict of jurisdictions) and did not cover conflict of laws issues. As it is generally understood, cross-border insolvencies are, in most cases, regulated by *lex fori concursus*, and choice of law is therefore a consequence of choice of forum.[223] Even if such an issue is considered, the 1939 Code of Civil Procedure left out relevant rules and disarticulated the Brazilian system of international bankruptcies.[224]

According to this Code, a foreign decision to open a bankruptcy proceeding against a Brazilian debtor domiciled in

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Introductory Act].

219. *See* CASTRO, *supra* note 139, at 303.

220. Introductory Act, *supra* note 218; Decreto-Lei 18,871, Aug. 13, 1929 (Brazil) (promulgating the Bustamante Code).

221. VALLADÃO, *supra* note 128, at 42.

222. *See* VALVERDE, *supra* note 8, at 80.

223. *See* Westbrook, *supra* note 12, at 459.

224. *See* VALVERDE, *supra* note 8, at 73 (discussing the relevant 1939 Code provisions).

Brazil could not be recognized by a national court.[225] This is the equivalent of saying that Brazilian courts have exclusive jurisdiction over national debtors domiciled in the country. Such a provision was considered unconstitutional by some commentators due to the unjustified differentiation between nationals and foreigners.[226] According to those authors, the Brazilian Constitution would be incompatible with such a rule, and as a result, foreign bankruptcy judgments against both national and foreign creditors, provided that they are domiciled in the country, would be inadmissible.[227]

The 1939 Code, however, authorized the recognition of foreign judgments in the case of debtors domiciled abroad.[228] Such decisions were enforceable in Brazil only after they were formally recognized (i.e., if they complied with all of the rules set out by the Code for the ratification of foreign judgments).[229] The many requisites for the concession of an *exequatur* were of a mostly formal nature—the decision must obey the procedural rules of the country in which it was taken, it must be definitive and not subject to modification of any kind, and it has to be authenticated by an embassy authority and accompanied by an official translation.[230] Additionally, the foreign decision must comply with Brazilian public policy, morality and sovereignty[231]—Brazil adopted the French standard of *ordre public* as a reason to deny recognition of foreign court orders.

The general rule regarding the universal effects of a recognized foreign judgment had some exceptions. First, the judicial administrators, trustees, and supervisors appointed by foreign courts could act and require recognition before a Brazilian court even without recognition of the foreign

225. Decreto-Lei 1,608, Sept. 18, 1939 (Brazil), tit. II, art. 786 [hereinafter 1939 Code of Civil Procedure].

226. VALVERDE, *supra* note 8, at 80.

227. *Id. at* 80–81.

228. 1939 Code of Civil Procedure, *supra* note 225, tit. II, art. 787.

229. *Id.*

230. *Id.* art. 791 (providing for the requirements for homologation of a foreign judgment).

231. *Id.* art. 792.

judgment.[232] Second, the collection and sale of local assets of the debtor required, in addition to the recognition, prior authorization of a local court, and the conformity with national rules of procedure.[233] Third, local creditors who had filed an enforcement action prior to the decision recognizing the foreign judgment were not subject to the stay of proceedings and might still collect the debtor's assets.[234] This third exception shows a clear preference for local creditors.[235] The third exception may have also swallowed the rule, for the recognition process was bureaucratic and time consuming, and creditors had plenty of time, if they wished, to file enforcement actions against the debtor in order to seize his assets before the foreign judgment became enforceable in Brazil.

The 1939 Code also contemplates a third hypothesis, one in which the debtor is established in more than one country. The debtor who had an establishment in Brazil might have his foreign bankruptcy recognized, but to little practical effect. Such recognition did not affect the local establishment of the debtor. As a consequence, local courts ended up having exclusive jurisdiction over the local assets of the debtor.[236]

Brazilian courts can recognize composition schemes that are confirmed by foreign courts, provided that the requisites for the concession of *exequatur* are met. However, only local creditors that were called to take part of the proceeding were affected by such a decision.[237] The rationale behind this rule was that creditors cannot be obligated by such a decision if they did not have the chance to participate in the discussions and to vote on the composition scheme.[238]

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232. *Id.* art. 787(I).

233. *Id.* art. 787(II).

234. *Id.* art. 787(III).

235. *See* VALVERDE, *supra* note 8, at 86.

236. 1939 Code of Civil Procedure, *supra* note 225, tit. II, art. 788.

237. *Id.* art. 789.

238. Composition schemes suffered a radical reform in 1945. *See* text accompanying note 97. However, the provision of the 1939 Code of Civil Procedure remained unchanged. This might have caused problems in the qualification of the foreign compositions, as they were totally different from the Brazilian proceedings. However, no record has been found of this issue ever coming up.

Domestic rules on cross-border insolvencies have experienced little change over the years.[239] Some of the provisions of the 1939 Code clash with the rules set out in the Bustamante Code. Convergence exists to a certain extent, as both Codes adopt domicile as a criterion for determining jurisdiction, allow the recognition of foreign judgments, permit the trustee to take action even before the recognition, and provide for the opening of a local proceeding in the case of local establishments.

However, there are also significant divergences among the Codes. For instance, the Code of Civil Procedure is silent regarding the separate enforceability of local securities if a foreign bankruptcy is recognized. Additionally, the Code of Civil Procedure does not provide for the stay of the proceedings already in course, thereby potentially annulling any impact of the universalist recognition rule. As a result, the 1939 Code of Civil Procedure might be considered more territorially oriented than the Bustamante Code.

D. The 1942 Act of Introduction to the Civil Code

The first Brazilian Civil Code (*Código Civil*) was enacted in 1916 and came into effect in 1917.[240] Attached to the Civil Code is a separate piece of legislation called *Lei de Introdução ao Código Civil*, which translates to the Act of Introduction to the Civil Code.[241] This act created, in just a handful of articles, general rules regarding conflicts of law in time and space.

This particular act was superseded in 1942 by a new Act of Introduction to the Civil Code[242] that was strongly influenced by Italian law[243]. The new act was heavily criticized for being

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239. Most rules regarding the recognition of foreign proceedings and the exceptions contained in the 1939 Code of Civil Procedure were also present in prior legislation. *See* text accompanying notes 129 to 157.

240. JOSEPH WHELESS, CIVIL CODE OF BRAZIL xv–xvi (1920).

241. Inacio de Carvalho Neto, *O Código Civil e a Lei de Introduçao ao Código Civil* [The Civil Code and the Introduction Law to the Civil Code], Revista Bonijuris, Apr. 2007, at 1.

242. *See* STRENGER, *supra* note 210, at 342–43 (detailing the evolution of the rules on private international law in Brazil).

243. Kim & Cowen, *supra* note 208, at 729–30.

concise, if not laconic; its nineteen articles paled in comparison to the over 400 articles of the verbose Bustamante Code, which was enacted less than two decades earlier. As a result of its succinctness, the Introductory Act was unable to cover the rules for choice of law and choice of forum in many regards, including cross-border insolvencies. Due to the lack of specific provisions regarding cross-border insolvencies, they are subject to the general rule under such legislation. The generic conflict of laws rules of the Act of Introduction are, however, inadequate to deal with the complicated nature of cross-border insolvency. For example, legal capacity is regulated by the law of the domicile[244]—a departure from the previous act, which set the law of nationality as the applicable rule in such a situation. The assets of a person, however, are subject to the law of the country where they are situated,[245] and proceedings involving immovable assets located in Brazil are subject to the local jurisdiction.[246] Obligations, on the other hand, are subject to the law of the country where they were formed.[247]

Insolvency is a matter that involves legal capacity, assets, and obligations. According to the provisions of the Act of Introduction, and taking into consideration the fact that insolvencies involve so many issues, a cross-border proceeding may be regulated by the law of the domicile, the law regarding assets, or the law of the obligations. The selection of applicable law in the case of cross-border insolvency would thus depend on court interpretation of the legal nature of bankruptcies. In such a context, it is significant to note the difficulties that legal scholars have had categorizing insolvency proceedings over the course of time.[248]

Given such a scenario, it would be tricky for a judge to decide, based on the Act of Introduction, the limits of his court's jurisdiction and the consequent applicable law. Furthermore, a judge in the Supreme Court (which was entitled to the

244. Introductory Act, *supra* note 218, art. 7.

245. *Id.* art. 8.

246. *Id.* art. 12, §1.

247. *Id.* art. 9.

248. *See* notes 23–28 and accompanying text.

recognition of foreign judgments at the time)[249] might also find it difficult to grant *exequatur* to a decision of a court in another jurisdiction which has opened an insolvency proceeding, as 1939 Code of Civil Procedure[250] states that such recognition would have to respect national sovereignty, public policy, and morality.[251]

As a result, the legal framework dealing with cross-border insolvencies in the Introductory Act is utterly inadequate. Since the Introductory Act does not explicitly revoke either the Bustamante Code or the 1939 Code of Civil Procedure, both remained applicable. In addition, the more recent 1942 Introductory Act, as a universal law (*lex generalis*), does not implicitly revoke the specific cross-border insolvency provisions of the Bustamante Code (the application of which is restricted to the signatory countries) nor those of the 1939 Code of Civil Procedure (which provides for rules on choice of forum on the matter), both of which qualify as special law (*lex specialis*).

While both the Bustamante Code and the 1939 Code of Civil Procedure were later revoked or, at best, infrequently applied, the Introductory Act remains, without a doubt, fully enforceable, while the attempts to update Brazilian legislation on the conflict of laws—including a major project in 1961[252]—have thus far been frustrated.

E. The 1945 Bankruptcy Act

Similarly to the Introductory Act, the 1945 Bankruptcy Act contains no references to cross-border insolvency. The 1945 Act abandons the Brazilian tradition according to which corporate

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249. Introductory Act, *supra* note 218, art. 15(e).

250. *See* text accompanying note 231.

251. Introductory Act, *supra* note 218, art. 17.

252. *See generally* 1 HAROLDO VALLADÃO, DIREITO INTERNACIONAL PRIVADO 503 (4th ed. 1974). The project was drafted by Professor Haroldo Valladão and originally had ninety-one articles. *Id.* Although much more modest in scope than the Bustamante Code, it was more specific and technical than the 1942 Introductory Act. *Id.* It also contained rules on cross-border insolvency. *Id.* In art. 66, sec. 2(e), the project provided for the exclusive jurisdiction of local courts over merchant debtors domiciled in Brazil or which had an establishment in Brazil. *Id.* This was explicitly considered to be a matter of public policy. *Id.*

bankruptcy rules contemplate specific conflict of law provisions.[253] This should be of no surprise because the Code of Civil Procedure had only six years before regulated the matter in a completely different way.[254]

The law contains a provision stating that an insolvency proceeding should be requested before the court of the place where the debtor has his main establishment or the principal place of business (*estabelecimento principal*), a rule that is somewhat similar to the very debated and controversial COMI standard.[255] The same provision also asserts that if the main establishment is located abroad, a local proceeding should be opened before the court that has jurisdiction over the establishment of the Brazilian affiliate.[256] The Bankruptcy Act does not actually define the meaning of "main establishment," but *estabelecimento* has traditionally been considered, at least in Brazilian legal tradition, to be the pool of assets employed on the development of a business activity, a notion similar to the French *fonds de commerce* and to the Italian *azienda*.[257] As a result, Brazilian courts would have jurisdiction over such a local pool of assets. Therefore, the rule contained in the 1945 Bankruptcy Act takes a territorial approach.[258]

The 1945 Bankruptcy Act rules may be interpreted as being unrelated to conflict of laws. In fact, these are rules that are meant to regulate internal jurisdictional matters. As such, their scope is to determine which national court has power over the assets of the debtor, rather than to establish rules of

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253. TENÓRIO, *supra* note 129, at 262.

254. VALLADÃO, *supra* note 128, at 42.

255. Brazilian Bakruptcy Act, *supra* note 106, ch. I, art. 3; *see* Westbrook, *Creating International Insolvency Law*, *supra* note 59, at 572; *see also* text accompanying notes 38–39 (discussing principal place of business standard).

256. 1945 Bankruptcy Act, *supra* note 97, tit. I, sec. II, art. 7.

257. *See, e.g.*, WALTER CAIRNS & ROBERT MCKEON, INTRODUCTION TO FRENCH LAW 87 (1995) (explaining the relevant French law). *See generally* OSCAR BARRETO FILHO, TEORIA DO ESTABELECIMENTO COMERCIAL (2d ed. 1988) (indicating the relevant Brazilian law). The expressions *estabelecimento comercial* in Portuguese, *fonds de commerce* in French, and *azienda* in Italian, cannot be properly translated to English. They mean a collectivity of assets, but also include the way in which those assets are organized in order to attract customers. *Id*.

258. *See* T*ENÓRIO*, *supra* note 129, at 262.

international jurisdiction.[259] Under these circumstances, the provisions of the 1945 Bankruptcy Act would not be contradictory to prior law (*lex prior*) concerning cross-border jurisdictional matters (such as the 1939 Code of Civil Procedure and the Introductory Law), which would then remain entirely applicable. However, some may argue that the rules on jurisdictional matters contained in the 1945 Bankruptcy Act were also meant to address international issues.[260] Whether the rules contained in the 1945 Bankruptcy Code revoked the 1939 Code of Civil Procedure provisions is a matter open for discussion. In any case, the local establishment of the debtor would not be affected by a foreign bankruptcy and would receive the same treatment as a separate entity; the 1939 Code of Civil Procedure and the 1945 Bankruptcy Act are aligned on such an issue.[261]

The 1945 Brazilian Act contains rules which were undisputedly drafted to address international issues. Primarily, rules regarding foreign currency state that such currency must be converted to the national currency in a liquidation proceeding.[262] Additionally, the 1945 Act provides that a creditor domiciled in another country can only file for a liquidation proceeding in Brazil once he makes a prior deposit in an effort to ensure payment of court costs and any indemnification that might arise due to bad faith litigation.[263] These procedural rules definitely were not crafted to protect foreign creditors.

F. The 1973 Code of Civil Procedure

The 1939 Code of Civil Procedure was eventually withdrawn by the enactment of the 1973 Code of Civil Procedure. The 1973 Code, being *lex posteriori*, revoked all contrary provisions

259. *See* LACERDA, *supra* note 91, at 307 (stating that the 1945 Bankruptcy Act made no provisions for cross-border insolvency); VALVERDE, *supra* note 8, at 96–98 (discussing the preference that should be given to jurisdictions where the debtor's principle place of business is located); *see also* TENÓRIO, *supra* note 129, at 262–63.

260. *See* Felsberg, *supra* note 7, at 111.

261. *Id.*

262. 1945 Bankruptcy Law, *supra* note 97, tit. XIII, art. 213.

263. *Id.* tit. I, sec. II, art. 9(III)(c).

without expressly repealing the old Code.[264] The 1973 Code allowed some specific provisions of the old Code to remain in force, but none of them related to cross-border insolvency issues.[265] A prominent author stated that the project resulting in the 1973 Code was finished in a hurry, and thus, most rules on the effectiveness of foreign judgments were suppressed and delegated to the norms that regulate the internal organization and operation of the Supreme Court.[266] However, the internal regulation of the Supreme Court, however, has never made a single reference to cross-border insolvencies.[267]

As a result, the 1973 Code led to a unique situation whereby cross-border insolvencies were left without regulation for the first time in Brazilian legal history since 1878.[268] However, like its predecessor, the 1973 Code of Civil Procedure established international jurisdiction rules and set rules for civil insolvency proceedings for non-merchant debtors as well. However, it failed to address the cross-border insolvency matters.

As a result, it has been suggested that the rules on cross-border insolvency contained in the 1939 Code should be temporarily applicable until the enactment of proper legislation on the subject.[269] In addition, some scholars still debate whether the 1939 Code was entirely overridden by the new legislation. It is arguable that the Code theoretically remained enforceable due to the lack of express revocation, thus leaving the cross-border insolvency provisions intact.[270] Although the 1973 Code ensured that all divergent provisions that came before it were repealed (*lex posteriori derogat lex priori*), the new Code did not set out any stipulations on cross-border insolvencies that contradicted the ones enumerated in the 1939 Code. On the other hand, the 1973 Code specifically provided for the continuance of some 1939 Code rules. For instance, as the new Code clearly shows, the

264. 1973 Code of Civil Procedure, *supra* note 79, art. 1218; *see* VALLADÃO, *supra* note 128, at 42.

265. *See* 1973 Code of Civil Procedure, *supra* note 79, Book V, art. 1220.

266. VALLADÃO, *supra* note 128, at 42.

267. *Id.*

268. *Id.*

269. *Id.* at 43.

270. Felsberg, *supra* note 7, at 113; Santos, *supra* note 7, at 552.

dissolution of companies is regulated by the old Code. What about cross-border insolvencies? As the 1973 Code makes no reference to this particular regard, the enforceability of the 1939 Code may be subject to debate.[271]

The general rule governing international jurisdiction is largely inadequate to deal with insolvencies because it states that suits must be filed in the domicile of the defendant.[272] A debtor is not always a defendant, as the debtor may file a voluntary insolvency petition. As a consequence, this rule is useless for transnational insolvency cases. Other rules also seem inadequate, including the rule that grants Brazilian courts jurisdiction over obligations that must be fulfilled in Brazil.[273]

The 1973 Code of Civil Procedure also provides that Brazilian courts have exclusive jurisdiction over rights *in rem*.[274] These rights are excluded from any kind of foreign proceeding, including those related to the insolvency of a debtor. This provision may affect insolvencies since it forbids the deference of jurisdiction over rights *in rem* to a foreign bankruptcy proceeding.

In conclusion, the 1973 Code of Civil Procedure does not address cross-border insolvencies at all, and its rules are largely inappropriate to deal with such a complex matter. Thus, some Brazilian scholars claim that in the absence of specific rules, the 1939 Code of Civil Procedure remains in force in regard to cross-border insolvencies.[275]

The Code also has several rules that, while not governing the specific issue of cross-border insolvencies, have some impact on such insolvencies. One of the most important rules does not allow a Brazilian court to recognize international litispendence, meaning a court must not deny the opening of a judicial proceeding on the grounds that an equivalent proceeding has already been filed in another country.[276] As a result, a Brazilian

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271. Felsberg, *supra* note 7, at 111.
272. 1973 Code of Civil Procedure, *supra* note 79, Book I, tit. IV, ch. II, art. 88(I).
273. *Id.* art. 88(II).
274. *Id.* art. 89(I).
275. REQUIÃO, *supra* note 75, at 84–85.
276. *See* 1973 Code of Civil Procedure, *supra* note 79, Book I, tit. IV, ch. II, art. 90.

court will not refuse to open the insolvency proceeding of a foreign debtor unless the situation does not pertain to Brazilian jurisdiction or a foreign decision has already been formally recognized in Brazil under the doctrine of *res judicata*.

Another significant provision that may impact cross-border insolvencies is the procedure for recognition of foreign judgments, which is also governed by the 1973 Code of Civil Procedure. The Superior Court of Justice (*Superior Tribunal de Justiça*) has already ruled that any bankruptcy decision taken by a foreign court must be formally recognized prior to becoming effective in Brazil.[277] *Exequatur*[278] is required for a decision to be enforceable nationwide.[279] The Superior Court of Justice grants *exequatur*[280] only after a fastidious proceeding in which it analyzes whether the decision is contrary to public policy and national interests. A foreign court may also issue an order to be executed by a Brazilian court, but it must be addressed by means of a letter rogatory.[281]

A third rule that affects cross-border insolvencies is the requirement that every document written in a foreign language

277. *See* Felsberg, *supra* note 7, at 115.

278. *See* Michael Wallace Gordon, *Legal Cultures of Latin America and the United States: Conflict or Merger*, 55 FLA. L. REV. 115, 115 (2003) (mentioning *exequatur* among other European legal concepts and defining the term as the formal recognition of a foreign judgment, a feature which was common in Roman law countries).

279. 1973 Code of Civil Procedure, *supra* note 79, Book I, tit. IX, ch. III, art. 483.

280. *See* Kim & Cowen, *supra* note 208, at 739–40. The Supreme Federal Court (*Supremo Tribunal Federal*) is Brazil's constitutional court. However, it has also traditionally been the only court entitled to recognize foreign judgments under Brazilian law. A lower court has no jurisdiction over such matters. *Id.* at 728. In 2004, the Brazilian Constitution was amended and this particular role was transferred from the Supreme Federal Court to the Superior Court of Justice. Nadia de Araujo & Frederico de Valle Magalhães Marques, *Recognition of Foreign Judgments in Brazil: The Experience of the Supreme Court and the Shift to the Superior Federal Court*, 1 WORLD ARB. & MEDIATION REV. 211, 212 (2007).

281. Araujo & Marques, *supra* note 280, at 218. Any foreign decision that has to be serviced in Brazil must be submitted by means of a letter rogatory, since Brazil is not a signatory of the 1965 Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters (although Brazil is a signatory party to the Inter-American Convention on Letters Rogatory, which allows the bypassing of diplomatic channels when submitting a letter rogatory). *See* Hague Conference on Private International Law, *Status Table*, http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=17.

must be officially translated to be considered valid in court.[282] Thus, all foreign judgments, with the exception of those pronounced by courts in other Portuguese speaking countries, must be translated before they are submitted before a national court.

The bureaucratic requirements set by the Code of Civil Procedure to recognize and execute a decision issued by a foreign court are serious obstacles to efficiently solving cross-border insolvency cases. As such, parties seldom feel encouraged to file for recognition of a cross-border case on this matter, or to seek injunctions to protect or collect assets, instead preferring to use the promptly available Brazilian bankruptcy remedies.[283]

G. The 2005 Bankruptcy Act

The enactment of the 2005 Bankruptcy Act provided a unique opportunity to Brazil to resolve its cross-border insolvency issues.[284] After all, in the very same year, the UNCITRAL Model Law was adopted by the United States in the form of Chapter 15 of the Bankruptcy Code, and it had already been adopted in major economies such as those of Mexico, Japan, and South Africa.[285] The European Regulation had been enforceable for over three years when the Brazilian Bankruptcy Act came into force. Cross-border insolvency had become a major topic and was thus increasingly regulated. However, the new Brazilian legislation made no reference at all to international bankruptcies, merely discussing which court was competent to hear insolvency proceedings.[286]

In this respect, the 2005 Bankruptcy Act simply reproduced the rule contained in the previous Bankruptcy Act, even though these two pieces of legislation were separated by a gap of sixty years. The 2005 Act, similarly to its predecessor, states that an insolvency proceeding (either through liquidation or rescue)

282. Araujo & Marques, *supra* note 280, at 220.

283. Felsberg, *supra* note 7, at 113.

284. *See id.* at 113–14.

285. *See* UNCITRAL, *supra* note 68; *see* Westbrook, *Multinational Enterprises*, *supra* note 58, at 19–20.

286. *See* Rechsteiner, *supra* note 9, at 671–72.

must be opened before a court that has jurisdiction over the main establishment of the debtor.[287] Effectively, the court that has jurisdiction over the assets of the debtor (in the whole country) is the one that has jurisdiction over the debtor's main establishment.[288] However, this rule may also be applicable to govern international jurisdictional issues, for no specific rules for this particular matter exist.[289]

In the event that the debtor is a foreign multinational corporation, the insolvency proceeding must be opened in the place where a branch office exists.[290] The Act does not provide for the surrender of local assets to a foreign proceeding, nor does it offer rules for proper international coordination. It merely provides for the opening of a local proceeding which encompasses the local branch and does not consider any measures taken overseas.

In addition to lacking jurisdictional rules, Brazilian law does not have any new provisions regarding the situation of foreign creditors in local insolvency proceedings. There exist provisions relating to claims in foreign currency, regardless of the nationality of the claimholders.[291] Furthermore, there are provisions requiring creditors domiciled abroad to deposit a judicial bond before filing an involuntary liquidation petition in order to guarantee the payment of court costs, losses, and damages if such a petition is eventually ruled fraudulent.[292] Such rules are once again similar to the ones found on the 1945 Bankruptcy Act.[293]

As a result, foreign creditors are not recognized as such in Brazilian insolvency proceedings—at least not in terms of protection—and they receive, for better or for worse, exactly the same treatment as national creditors. Foreign creditors must file

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287. *Id.* at 678.

288. Felsberg, *supra* note 7, at 111.

289. *See* Rechsteiner, *supra* note 9, at 678; *see also supra* text accompanying notes 259–60 (discussing the 1945 Bankruptcy Act).

290. Brazilian Bankruptcy Act, *supra* note 106, ch. I, art. 3.

291. *See e.g.*, *id.* ch. II, sec. IV, art. 38; *id.* ch. III, sec. I, art. 50, § 1; *id.* ch. V, sec. I, art. 77; *id.* ch. VI, art. 163, §§ 3–5.

292. *Id.* ch. V, sec. IV, art. 97, § 2.

293. *See supra* note 263 and accompanying text.

their claims in Brazil in order to be recognized by the court, and their claims must be converted into the Brazilian currency according to the rules provided by the Bankruptcy Act.[294]

Therefore, the 2005 Bankruptcy Act brings no innovation to the subject. It basically replicates the provisions of prior law, which was already deficient. As such, the Act lost a valuable opportunity to improve the outdated Brazilian cross-border insolvency framework.

V. BRAZIL, A TERRITORIAL COUNTRY

The entire set of rules described above show the chaotic status of cross-border insolvency regulation in Brazil. Confusion reigns. The Bustamante Code provided a handful of rules specifically aimed at regulating cross-border insolvencies, but it may have fallen into desuetude. The 1939 Code of Civil Procedure also had provisions on the matter, but it was revoked by the enactment of the 1973 Code. Even with this revocation, the specific rules on international bankruptcy might have subsisted, who knows for sure? The 1942 Introductory Act to the Civil Code and the 1973 Code of Civil Procedure are still enforceable, but not too much help, as neither of them contains any specific rules on cross-border insolvencies. Their general provisions are absolutely inadequate to deal with the issue. The 1945 and 2005 Bankruptcy Acts were successor acts that failed to directly address the question of cross-border insolvencies and that may also contradict prior regulation.

It is of little doubt that under Brazilian law, the local forum of the main establishment has jurisdiction to open an insolvency proceeding and to submit the pool of assets of the debtor to its jurisdiction. Foreign insolvency proceedings might even be granted *exequatur* if the Superior Court of Justice understands that they are not contrary to public policy, but even in such a case, several restrictions would be applicable. For instance, local affiliates would be subject to the jurisdiction of a national court. Also, national courts have exclusive jurisdiction over any of the debtor's assets that constitute immovable property under

294. Brazilian Bankruptcy Act, *supra* note 106, ch. V, sec. I, art. 77.

Brazilian law.[295] These rules are spread over several pieces of legislation that date back to the first half of the 20th century, as described above. There is a lot of uncertainty over their applicability.

Due to the lack of clarity on Brazilian cross-border insolvency issues and the bureaucratic steps that one must take in order to recognize a foreign judgment, claimants usually prefer to open bankruptcy proceedings before a national court instead of submitting a prior recognition proceeding.[296] An insolvency procedure opened before a local court has the advantage of staying the proceedings against the debtor, a measure that usually does not take place while the process for recognition of a foreign bankruptcy is still on track.[297] Therefore, petitions for recognition of a foreign insolvency proceeding are quite rare in Brazil.

The Supreme Federal Court has already refused the possibility of recognizing a foreign bankruptcy and of surrendering local assets to another jurisdiction. During the first half of the 20th century, the Supreme Court refused to recognize a French judgment which opened a liquidation proceeding of Port of Pará, a company incorporated in accordance with the laws of France.[298] However, the reason behind such a refusal was that the company was not really established in France; it operated in Brazil, which was its *de facto* domicile. Due to this reason, the court decided that it would not recognize the foreign insolvency proceeding of a Brazilian company.[299]

Another decision dates back to 1982 and its foundations are still applicable because Brazilian regulation regarding this matter has remained nearly unaltered.[300] An insolvency

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295. RECHSTEINER, *supra* note 7, at 86–87.

296. *See* Felsberg, *supra* note 7, at 113 (discussing the practice of filing an independent lawsuit in Brazil in lieu of waiting for foreign recognition).

297. *See* Brazilian Bankruptcy Act, *supra* note 106, ch. II, sec. I, art. 6. The stay of proceedings is only triggered by the opening of a liquidation or an in-court rescue.

298. *See* TENÓRIO, *supra* note 129, at 264.

299. *See id.*

300. Supremo Tribunal Federal (Supreme Federal Court), *Agravo Regimental nº 2,492–6*, March 3, 1982 (Brazil).

proceeding was opened in Germany, and the creditors reached an agreement. Both the German decision that declared bankruptcy and the agreement of creditors, which involved a farm located in Brazil, were submitted to the Brazilian Supreme Court for *exequatur*. The Brazilian Supreme Court denied deferring to the foreign proceeding for more than one reason. First, it decided that the agreement among creditors could not be granted *exequatur* because it had not been submitted to confirmation by a German court.[301] Second, the agreement involved immovable property (a farm) and Brazil claims exclusive jurisdiction over rights *in rem*.[302] Third, the Brazilian farm was considered to be a branch office of the foreign debtor and as such, it was subject to a local insolvency proceeding.[303] Therefore, the Supreme Court adopted a restrictive approach in this case, and refused to defer a local asset to a foreign insolvency proceeding. It is important to notice, however, that the court did not deem insolvency decisions to be unrecognizable *a priori*, instead concluding that the agreement was not enforceable in Brazil in this particular case.

Finally, the role of jurists and commentators should not be ignored, as they usually play an important part in providing valuable guidelines for the interpretation of statutory law. However, most contemporary scholars do not proclaim their views on the subject, and therefore, there is no common opinion—in the Latin tradition of a *communis opinion doctorum*—formed over issues involving cross-border insolvencies in Brazil.[304]

Accordingly, the deficiency of relevant legislation, the lack of attention by scholars, and the restraining court perspective are responsible for Brazil status as a strictly territorial country with regards to cross-border insolvencies. Even though foreign bankruptcy proceedings may be enforceable in Brazil under some circumstances, the high level of vagueness and uncertainty involved makes filing for a recognition procedure a very

301. *Id.*
302. *Id.*
303. *See id.*
304. *See* Rechsteiner, *supra* note 9, at 679.

unattractive measure for both creditors and the debtor. The opening of a local insolvency proceeding—much faster and more efficient than a recognition process—is a more appealing maneuver. Therefore, Brazil adopted territoriality.

A. *Cooperation on a case-to-case basis*

As tightly as Brazil embraces territoriality, cross-border issues stubbornly appear and must be dealt with accordingly. Thus, a cooperative model of combining territorial insolvencies emerges. Brazilian courts are not necessarily opposed to cooperation with foreign proceedings, but the lack of specific legislation is a serious obstacle which impedes broader collaboration. Cross-border cases are constructed through specialized local law firms which work together with foreign lawyers and are supported by the understanding and the collaboration of local courts. This is the only means to achieve a truly global insolvency in Brazil. This non-judicial, informal cooperation among lawyers, courts, and parties allowed for results which would not be possible under other circumstances.

Due to the lack of specific legislation, coordination may only be reached on a case-by-case basis.[305] In such cases, sovereignty is respected, and local courts do not defer to foreign insolvency proceedings. Additionally, assets are collected and divided among claimholders within a local proceeding and according to the schemes of distribution provided for by Brazilian law, and local creditors are protected. However, some degree of international coordination has been reached on several occasions. Two of the earliest, most prominent, and most publicized rescue cases in Brazil under the 2005 legislation—*Parmalat* and *Varig*—are examples of *de facto* cross-border coordination.[306] Although future cases are not bound by what happened in prior cases, their consequences will be briefly described, as they may serve as examples of the degree of cross-border insolvency cooperation allowed by Brazilian law.

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305. Perhaps it should be re-emphasized that decisions taken on isolated cases do not give rise to judicial precedents in Brazil. *See* Antonio Gidi, *Class Actions in Brazil: A Model for Civil Law Countries*, 51 Am. J. Comp. L. 311, 318–19 (2003) (explaining that civil law in general, particularly in Brazil, “leaves little room for judicial precedent”).

306. *See infra* §5B.

B. Two examples of cooperation

Parmalat, a giant Italian dairy and food corporation, famously collapsed in 2003 in what remains as one of Europe's biggest bankruptcies cases. In December 2003, at the dawn of the enactment of the Italian insolvency law reform, Parmalat SpA filed an *amministrazione straordinaria*—a reorganization proceeding for large companies[307]—before a court in Parma.[308] The European subsidiaries governed by the Regulation (CE) 1346/2000, with the well-known exception of *Eurofood*, were submitted to the Italian main proceeding, where the center of the main interests of the company was located.[309] But the Brazilian operational subsidiary (and the one which held the company's largest plant), Parmalat Brasil S.A. Indústria de Alimentos,[310] had no cross-border insolvency rules to rely upon. Parmalat Brasil eventually sought court protection by filing for a composition proceeding in 2004, which was followed by a petition for corporate rescue shortly after the 2005 law reform was enacted.[311] As a result, a local court had jurisdiction over the assets of Parmalat Brasil and applied its own law to the case, and there were no signs of recognition of a foreign insolvency proceeding whatsoever.[312] However, the interested

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307. *See Parmalat in Bankruptcy Protection*, BBC NEWS, Dec. 24, 2003, http://news.bbc.co.uk/2/hi/business/3345735.stm (discussing Parmalat filing for "so-called 'extraordinary administration'" (i.e., *amministrazione straordinaria*)). On the *amministrazione straordinaria* and on the Italian law reform that took place just before Parmalat filing for reorganization, *see* Gian Bruno Bruni, *The New Italian Law on Extraordinary Administration of Large Enterprises in Insolvency*, 9 INT'L INSOLVENCY REV. 137, 137–38 (2000).

308. John Tagliabue, *Parmalat Files for Protection From Creditors*, N.Y. TIMES, Dec. 25, 2003, at C1.

309. *See* André J. Berends, *The Eurofood Case: One Company, Two Main Insolvency Proceedings: Which One Is The Real One?*, 53 NETHERLANDS INT'L L. REV. 331, 331–32 (2006).

310. *See* Tony Smith, *The Latin America Factor in the Scandal at Parmalat*, N.Y. TIMES, Jan. 13, 2004, at W1. As a matter of fact, Parmalat Participações do Brasil held 82.0% of Parmalat Emprendimentos e Administração, which in turn, held 99.9% of Parmalat do Brasil. *See id.*

311. *See* Joel Luís Thomaz Bastos, *O Caso Parmalat*, *in* RECUPERAÇÃO DE EMPRESAS: UMA MÚLTIPLA VISÃO DA NOVA LEI 114, 114–15 (Fátima Bayma de Oliveira ed., 2006); Locatelli, *supra* note 7, at 337.

312. *See* Locatelli, *supra* note 7, at 340.

parties in different countries brought a *de facto* coordinated approach which allowed some degree of collaboration between the proceedings. Local and foreign authorities also worked together with the purpose of orchestrating the restructuring of Parmalat's global operations.[313]

A second example of cooperation involves Viação Aérea Rio Grandense S.A., also known as Varig, which became the largest Brazilian airline in the 20th century, but entered the 2000s under heavy financial distress.[314] It eventually filed for a rescue proceeding on June 17, 2005 in Rio de Janeiro, together with other companies belonging to the same corporate group, and it did so less than two weeks after the enactment of the new law.[315] Varig also sought protection before the New York Court for the Southern District of New York, under the currently revoked §304 of the U.S. Bankruptcy Code, in order to prevent aircraft located in U.S. airports from being seized.[316] Although the applicable law in Brazil contained no provision allowing cross-border cooperation, the court in Rio de Janeiro showed some degree of *de facto* collaboration with the New York court in this case. As an example of such cooperation, in September 2005, one of the Brazilian judges in charge of the Varig rescue case traveled to New York to explain to the U.S. judge the mechanics of corporate rescue in Brazil and aspects of the particular case.[317] The Brazilian court further confirmed a "contingency return plan" crafted by the U.S. court with the intent to provide for a special treatment of aircraft lessors.[318]

In these two cases, there was some degree of cooperation among courts and parties in different jurisdictions. In *Parmalat*,

313. *Id.*

314. Kevin Gaunt, *Caveat Lessor: U.S. Aircraft Financiers Beware: 11 U.S.C. § 1110 Expectations May Not Be Met in Cross Border Insolvencies*, 6–8, (Univ. of Miami Sch. of Law, Working Paper Series, 2009), *available at* http://ssrn.com/abstract=1376700.

315. *Id.* at 9.

316. Lobo, *supra* note 108, at 43. The stay of proceedings only became effective on June 22, 2005, after the court was satisfied with the documentation presented by Varig and decided to open the rescue proceeding. *Id.*

317. Steven Kargman, *The New LatAm Restructuring Landscape*, FINANCIER WORLDWIDE 1, 2 (Jan. 2009), http://www.kargmanassociates.com/KargmanFinancier Worldwide%28Jan09%29.pdf.

318. Lobo, *supra* note 108, at 72; Gaunt, *supra* note 314, at 29.

the *amministrazione straordinaria* in Italy was a main proceeding, as it was recognized as such inside the boundaries of the European Union. The §304 petition filed in the United States triggered, the opening of a case ancillary to *Varig*'s rescue proceeding. However, in neither case did Brazilian courts formally recognize these proceedings as being "main" or "ancillary." As a result, foreign decisions taken on these proceedings were not conceded *exequatur* and they produced no binding effects. In both cases, despite the law being silent and the judges not having much room for discretion, the Brazilian courts were supportive and helped reach some level of cooperation between jurisdictions. Utilizing dissimilar mechanisms to address the question, this *ad hoc* assistance achieved in the *Parmalat* and *Varig* cases may be considered to be a practical example of LoPucki's cooperative territoriality[319] or even (to a certain extent) Westbrook's modified universalism.[320] In any case, such collaboration does not conceal the troubles caused by the absence of clear rules on international bankruptcy, the uncertainty brought to both debtor and creditors, and the resulting fragility of the Brazilian legal system on such a significant matter.[321]

VI. THE NEED TO MOVE TOWARDS UNIVERSALISM

The cooperative approach constructed in the Parmalat and Varig cases, and developed on an *ad hoc* basis without any

319. Such cases may be considered to be examples of cooperative territoriality in the sense that a form of collaboration was reached by means of parallel insolvency proceedings and there was no "tension" to unify the application of rules and procedures and put all claims and assets in the same pool.

320. The court-to-court collaboration, if aimed at unifying efforts around a common global enterprise, may be deemed to be an illustration of modified universalism reached by means of parallel, unrelated insolvency proceedings. As such, should the cooperation in the *Parmalat* and *Varig* cases be interpreted as a technique to build a system of reorganization of debtor companies on a global scale, the cases might even be considered to be examples of modified universalism. In a similar pattern, Professor Westbrook has argued that the *Maxwell* case (in which insolvency proceedings took place in the United States and in the United Kingdom in cooperation with each other) was an example of application of modified universalism, and not of cooperative territoriality, despite the existence of two parallel proceedings. Westbrook, *supra* note 35, at 2322.

321. *See* Locatelli, *supra* note 7, at 340–42.

supporting rule is not, as already mentioned, the answer to the complex Brazilian cross-border insolvency framework. It may be a temporary creative workaround, but it is a fragile measure that cannot substitute for broad institutional reform.

The lack of cross-border provisions is indeed one of the main deficiencies of the 2005 Bankruptcy Act. Although Brazil is not alone in not properly regulating the matter, this panorama has started to change. Brazilian neighbor and Mercosur counterpart, Argentina, has recently passed a modern insolvency reform which contains cross-border issues;[322] Mexico and Japan incorporated the UNCITRAL Model Law on Cross-Border Insolvency in 2000;[323] and the United States enacted reform in the form of Chapter 15, which replaced §304, in 2005, shortly after the Brazilian Law entered into force.[324] Brazil has not yet adopted the UNCITRAL Model Law even though it was enacted eight years before the new Brazilian legislation.

As a consequence, the existing provisions are definitely outdated and not on par with the ongoing worldwide bankruptcy reform. The need for *exequatur* granted by a superior court, the requirement for official translations, and the denial of recognition due to public policy are bureaucratic barriers that obstruct assistance in such a context. In addition, Brazil does not yet provide for the opening of secondary or ancillary proceedings, nor does it permit the adoption of cross-border insolvency protocols, even though they have become increasingly popular internationally over the last decade. Modern features of insolvency laws—such as structure bargaining negotiation, class-based voting, cram down provisions, and even the straightforward stays of proceedings—are also completely ignored by obsolete Brazilian conflict of laws legislation. Even more critical than the absence of brand-new rules is the fact that the whole Brazilian landscape on the subject became perplexingly unintelligible as the years progressed.

Brazil is crying out for a coherent legal structure with adequate features to deal with cross-border insolvencies. Such

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322. *See* Kargman, *supra* note 317, at 2.

323. *See supra* note 285 and accompanying text.

324. *See* Westbrook, *Universal Priorities*, *supra* note 59, at 19–20.

features would include collaboration between courts, joint hearings, automatic or facilitated mechanisms for recognition of foreign proceedings, the acceptance of secondary and/or auxiliary proceedings, and cooperation protocols. A complete overhaul of the country's cross-border insolvency system, including the introduction of a consistent body of rules to regulate the matter on a straightforward and contemporary manner, would be highly desired. For this reason, the enactment of the UNCITRAL Model Law would have been a welcomed addition to the Bankruptcy Act. Although there are no visible signs of alteration of the current situation, it is about time for another law reform-the abandonment of pure territoriality and the movement towards universalism, with the adoption of clear rules for efficient cross-border cooperation.