Cross-Border Insolvency in Brazil: A Case for the Model Law

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Abstract

Brazil is in the midst of a severe, multi-year recession. Unemployment and inflation are high, while consumer confidence and global demand for Brazilian commodities have dropped. These economic difficulties have been accompanied (and perhaps compounded) by political issues, including the impeachment of President Dilma Rousseff and the investigation into potential bribery at Petróleo Brasileiro S.A. – Petrobras, the state-controlled oil company. The cumulative impact of Brazil's prolonged difficulties has been significant. All three major credit ratings firms have downgraded Brazil's sovereign debt to "junk" levels, and there has been a sharp increase in Brazilian companies that have pursued insolvency proceedings. Indeed, 2016 saw a year over year increase of 44.8% in the number of companies petitioning for judicial reorganization in Brazil.

In assessing how to improve conditions in Brazil, there has been significant focus on measures being contemplated by current President Michel Temer, including austerity and efforts to reform Brazil's labor and tax laws. By contrast, little attention has been paid to the potential benefits of proposed legislative bills that are currently before the Brazilian National Congress (collectively, the "Bills") and that are intended to substantially adopt the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law"). This paper examines the potential impact that adoption of the Model Law (or a modified version thereof) through passage of one or more of the Bills may have on cross-border restructurings involving Brazilian companies, including whether the Model Law might facilitate such restructurings and thereby assist in the rehabilitation of such companies and the Brazilian economy as a whole.

I. Introduction – The Brazilian Economy in Crisis

Brazil is in the midst of a deep recession.[2] The country's growth rate has decelerated steadily since the start of this decade, from an average annual rate of 4.5% between 2006 and 2010 to 2.1% between 2011 and 2014.[3] The Brazilian economy, the largest in Latin America

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[2] *See Brazil: Overview*, World Bank, http://www.worldbank.org/en/country/brazil/overview (last visited Jan. 4, 2017).

[3] *Id.*

and one of the largest in the world, shrank 3.8% in 2015,[4] and an additional 2.9% year-on-year through the third quarter of 2016.[5] In August 2016, wages declined 3% while the unemployment rate rose to 11.8%, up from 8.7% the prior year.[6] Moreover, as of January 2017, all three major credit ratings firms had downgraded Brazil's sovereign debt to "junk" levels,[7] and 2016 saw a year-over-year increase of 44.8% in the number of companies petitioning for judicial reorganization in Brazil.[8]

Brazil's economic crisis has been attributed to several macro- and micro-economic factors, including declining demand for Brazilian commodities, declining commodities prices, a shift in global financial market sentiment away from emerging market economies, and a combination of domestic factors (e.g., domestic demand, high levels of public spending, high interest rates, and increasing inflation).[9] The crisis has also overlapped with (and perhaps been compounded by) several recent political issues.[10] These have included the ongoing investigation into corruption at Petróleo Brasileiro S.A. – Petrobras ("Petrobras"), the state-controlled oil company,[11] and the impeachment of President Dilma Rousseff,[12] who was succeeded by President Michel Temer in August 2016.

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4 Patrick Gillespie, *Brazil Hit by More Punches amid Historic Recession*, CNN Money (Oct. 4, 2016), http://money.cnn.com/2016/10/04/news/economy/brazil-economy-jobs-crisis/; *see also* Int'l Monetary Fund, *World Economic Outlook October 2016: Subdued Demand – Symptoms and Remedies* 22 (2016), http://www.imf.org/external/pubs/ft/weo/2016/02/pdf/text.pdf.

5 Joanna Taborda, *Brazil GDP Shrinks 2.9% YoY in Q3*, Trading Econ. (Nov. 30, 2016), http://www.tradingeconomics.com/brazil/gdp-growth-annual.

6 *See* Gillespie, *supra* note 4.

7 *See* Jeffrey T. Lewis, *Fitch Downgrades Brazil to Junk, With Negative Outlook*, Wall St. J. (Dec. 16, 2015), http://www.wsj.com/articles/fitch-downgrades-brazil-to-junk-with-negative-outlook-1450278607; Marla Dickerson & Rogerio Jelmayer, *Moody's Cuts Brazil's Rating to Junk*, Wall St. J. (Feb. 24, 2016), http://www.wsj.com/articles/moodys-cuts-brazils-rating-to-junk-1456320186; Paul Kiernan & Paulo Trevisani, *S&P Cuts Brazil's Debt Rating to Junk*, Wall St. J. (Sept. 9, 2015), http://www.wsj.com/articles/s-p-drops-brazil-debt-rating-one-notch-to-junk-1441838102.

8 Ana Mano, *Brazilian Bankruptcy Filings at 11-Year High–Experian*, Reuters (Jan. 3, 2017), http://www.reuters.com/article/brazil-bankruptcy-serasa-idUSL1N1ET0VU.

9 *See What Is Driving Brazil's Economic Downturn?*, ECB Econ. Bull., Feb. 4, 2016, at 16-18, https://www.ecb.europa.eu/pub/pdf/ecbu/eb201601.en.pdf.

10 *See id.* at 18 (stating that uncertainties on fiscal policy and political difficulties "might further reduce confidence" in Brazil's economy going forward); John Lyons, *Brazil Economic Woes Deepen Amid Political Crisis*, Wall St. J. (Mar. 25, 2016), http://www.wsj.com/articles/brazil-economic-woes-deepen-amid-political-crisis-1458946356 (citing Samar Maziad, a senior analyst at Moody's Investors Service, as stating that the "interaction between political crisis and the economic outcomes have become self-reinforcing").

11 *See What Is Driving Brazil's Economic Downturn?*, *supra* note 9, at 18 ("[Petrobras] had to cut investment by 33% in both 2014 and 2015 to adjust to lower oil prices and also in response to a widespread corruption case, triggering confidence effects throughout the economy. The direct and indirect effects of the decline in investment by Petrobras have been estimated by Brazil's Ministry of Finance to have subtracted around 2 percentage points from GDP growth in 2015.").

Given the significant obstacles that Brazil continues to face, there has been considerable focus on measures that might be taken to improve the country's economic condition. Much of the commentary in this regard has, unsurprisingly, focused on measures that have been implemented or are being contemplated by the government to help steer Brazil's economy out of recession.[13] Such measures include austerity initiatives and potential reforms to Brazil's labor and social security laws and tax code.[14] By contrast, little attention has been paid to Bill No. PL 1.572/2011 ("Bill 1.572/2011")[15] and other proposed legislative bills[16] (the "Sparse Legislation" and, together with Bill 1.572/2011, the "Bills"), which are currently before the Brazilian National Congress. Passage of one or more of the Bills, with certain necessary amendments, would ultimately result in adoption of the UNCITRAL[17] Model Law on Cross-Border Insolvency (the "Model Law") in modified form,[18] which, in turn, could provide for more predictable outcomes to creditors and investors of distressed Brazilian businesses with cross-border operations, thereby encouraging investment and promoting business recoveries.

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[12] Rousseff was indicted in August 2016 on charges of manipulating the federal budget in violation of fiscal responsibility laws. *See* Simon Romero, *Dilma Rousseff Is Ousted as Brazil's President in Impeachment Vote*, N.Y. Times (Aug. 31, 2016), http://www.nytimes.com/2016/09/01/world/americas/brazil-dilma-rousseff-impeached-removed-president.html.

[13] *See, e.g.*, *Brazil's Economy: Nowhere to Go But Up*, Economist (June 4, 2016), http://www.economist.com/news/americas/21699948-interim-government-proposes-some-reforms-nowhere-go-up; Allison Fedirka, *Why Brazil's Economy May Be Headed for Recovery*, Geopolitical Futures (July 15, 2016), https://geopoliticalfutures.com/why-brazils-economy-may-be-headed-for-recovery/; Mike Hugman, *Brazil's Economy Is Seeing the Light at the End of the Tunnel*, Institutional Investor (Sept. 1, 2016), http://www.institutionalinvestor.com/gmtl/3582575/brazils-economy-is-seeing-the-light-at-the-end-of-the-tunnel.html#.WHKydNIo7Z6.

[14] *See Brazil's Economy: Nowhere to Go But Up*, *supra* note 13.

[15] A non-final version of Bill 1.572/2011, which may be modified as part of the legislative process, is available at http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra;jsessionid=C1F3745BC9AD7808B10AB3ECE11AE3AB.proposicoesWebExterno2?codteor=1476929&filename=Tramitacao-PL+1572/2011 (text only available in Portuguese).

[16] Non-final versions of Bill No. 487/2013 and Bill No. 3741/2015, which may be modified as part of the legislative process, are available at http://www.senado.leg.br/atividade/rotinas/materia/getPDF.asp?t=141614&tp=1 (text only available in Portuguese) and http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=1417078&filename=Tramitacao-PL+3741/2015 (text only available in Portuguese).

[17] UNCITRAL is the United Nations Commission on International Trade Law. The General Assembly established UNCITRAL in 1966 and gave it the general mandate "to further the progressive harmonization and unification of the law of international trade." *Origin, Mandate and Composition of UNCITRAL*, UNCITRAL: U.N. Comm'n on Int'l Trade Law, http://www.uncitral.org/uncitral/en/about/origin.html (last visited Jan. 4, 2017). UNCITRAL is composed of sixty member states elected by the General Assembly for staggered six-year terms. *Id.*; *see also* UNCITRAL: U.N. Comm'n on Int'l Trade Law, *A Guide to UNCITRAL: Basic Facts about the United Nations Commission on International Trade Law* (2013), http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf.

[18] For the text of the Model Law, *see* UNCITRAL: U.N. Comm'n on Int'l Trade Law, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* 3-16 (2014), http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf ("*UNCITRAL Model Law*").

This paper examines the potential impact that adoption of the Model Law (or a modified version thereof), through passage of one or more of the Bills, may have on cross-border restructurings involving Brazilian companies. To that end, Part II below describes the current Brazilian bankruptcy law and how cross-border insolvencies are conceptually addressed by Brazilian courts. Part III introduces the Model Law as an alternative approach to handling cross-border insolvency proceedings. Part IV discusses the Bills, which, if adopted with certain amendments, would represent a shift to the framework outlined in the Model Law. Part V analyzes several major cross-border restructurings that have proceeded under Brazil's current bankruptcy law, with a particular emphasis on the cross-border issues that arose in each such restructuring and how those issues may have been addressed differently under the Model Law. Finally, Part VI summarizes the main cross-border issues that arise under the BBL (defined below) and discusses several benefits to Brazil in adopting the Model Law. Part VI concludes that Brazil's adoption of the Model Law (or a modified version thereof), through passage of one or more of the Bills, may facilitate international restructurings involving Brazilian companies and may thereby assist in the rehabilitation of such companies and the wider Brazilian economy. Part VI further proposes that UNCITRAL undertake a study examining the impact of the Model Law on the economies of the jurisdictions in which it has been adopted. Such a study could be used, both, to assist jurisdictions currently considering adopting the Model Law and to determine whether further enhancements to the Model Law are desirable.

II. The Current Brazilian Bankruptcy Law

In February 2005, Brazil enacted the current Brazilian Bankruptcy Law – Law 11,101 of 2005 (the "BBL"). The BBL replaced Brazil's prior liquidation-oriented bankruptcy regime (which had been in place for sixty years) with a new insolvency system that "embrace[s] modern underlying principles of corporate restructuring designed and directed to rescue distressed but viable businesses."[19] The prior system provided (a) limited safeguards for secured creditors, (b) no meaningful role for unsecured creditors, and (c) no means of protection against successor liability for purchasers of assets in bankruptcy proceedings.[20] Under Brazil's prior bankruptcy law, claims of secured creditors were afforded lower priority than labor claims (first priority) and tax claims (second priority).[21] Moreover, under the prior regime, distressed companies' only option to reorganize was under rigid legal procedures (*concordata*) that prescribed limited fixed repayment plans to unsecured creditors.[22] The prescribed repayment plans together with a prohibition on creditor negotiations often resulted in high default rates in instances in which the

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[19] Giuliano Colombo & Thiago Braga Junqueira, *Ten Years of the Brazilian Bankruptcy Law: Some Lessons Learned and Some Wishes for Improvement*, Emerging Mkts. Restructuring J., Spring 2016, at 11, https://www.clearygottlieb.com/~/media/cgsh/files/emerging-markets-restructuring-journal/debut-issue-2016/15060205-emerging-markets-journalr10.pdf.

[20] Christopher Andrew Jarvinen et al., *The International Scene: Bankruptcy Reform Coming to Brazil,* Am. Bankr. Inst. J., Dec./Jan. 2005, at 32.

[21] *Id*.

[22] *See* Jeffrey M. Anapolsky & Jessica F. Woods, *Pitfalls in Brazilian Bankruptcy Law for International Bond Investors*, 8 J. Bus. & Tech. L. 397, 399-400 & nn.17, 21 (2013) (citing Decreto-Lei No. 7.661, de 21 de Junho de 1945, Diario Oficial da Uniao [D.O.U.] de 21.6.1945 (Braz.) (repealed 2005), translated in http://www.translation-source.com/posts/brazilian-legislation-available-in-english).

debtor was otherwise potentially viable.[23] As a result, many potentially viable companies had no choice but to liquidate.[24]

By contrast, the BBL was designed to provide distressed companies with the opportunities and tools to restructure their obligations and operations, and to continue as going concerns through the use of rehabilitation and reorganization procedures. Most notably, the BBL introduced an in-court judicial reorganization (*recuperação judicial*) ("RJ") regime.[25] RJ proceedings are similar to Chapter 11 cases under Title 11 of the United States Code (the "U.S. Bankruptcy Code"). In this regard, RJ provides a debtor with protection from enforcement and other actions for a period of time while the debtor formulates and negotiates a plan of reorganization with its creditors. The plan of reorganization will generally rescale the debtor's operations and modify the debt (and, eventually, the equity) component of the debtor's capital structure. Upon approval and confirmation of the plan of reorganization, the pre-petition claims against the debtor are generally discharged. RJ proceedings, therefore, allow debtors to successfully restructure their obligations and continue as going concerns, while protecting creditor interests and fostering investments and asset sales.[26] Accordingly, most commentators agree that the BBL represents a significant improvement over the prior regime for debtors and creditors alike.[27]

Despite its significant comparative benefits, the BBL (like its predecessor) does not itself contemplate, or have provisions to address, cross-border restructurings involving proceedings in multiple jurisdictions.[28] Instead, Brazilian insolvency courts generally follow the principle of territoriality.[29] Under the territoriality principle, a Brazilian court is deemed to have exclusive jurisdiction over the debtor and all of its assets located in Brazil, and any foreign decision regarding a Brazilian debtor's property and/or creditors is deemed to have little or no authority in Brazil.[30] Moreover, under the principle of territoriality, a Brazilian insolvency proceeding will

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[23] *Id.* at 400 n.21.

[24] *Id.*

[25] Colombo & Junqueira, *supra* note 19, at 11.

[26] *Id.* at 12.

[27] *Id.* at 11.

[28] *See generally* Lei No. 11.101, de 9 de Fevereiro de 2005, Diário Oficial da União [D.O.U.] de 9.2.2005 (Braz.).

[29] 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. of Am. 313, 338 (2008). As more fully discussed below, proceedings in which the Bustamante Code (defined below) is applicable represent a narrow exception to Brazil's adherence to the principle of territoriality in the insolvency context. *Id.* at 339 ("[A]pplication of the Bustamante Code has been almost nonexistent because the main flow of investment is from or is legally connected with other jurisdictions, rather than investors being located in the signatory states of the code.").

[30] *See id.* at 338; *see also* Nora Wouters & Alla Raykin, *Corporate Group Cross-Border Insolvencies Between the United States & European Union: Legal & Economic Developments*, 29 Emory Bankr. Dev. J. 387, 390 (2013) ("Territorialism imposes no single law but relies on each jurisdiction to apply its own laws. It subjects a multinational debtor to parallel proceedings in each country in which its assets are located, but each country's court's jurisdiction does not extend beyond the country's borders.").

generally only consider companies and assets located in Brazil.[31] Given the increasingly global nature of business restructurings and Brazil's place in the world economy, general adherence to the territoriality principle coupled with the BBL's lack of cross-border provisions may be seen as creating a significant gap in Brazil's current restructuring regime.[32] Indeed, as more fully described below, Brazilian courts have often felt compelled to adopt *ad hoc* measures to address the realities of multi-jurisdictional restructurings. Although such judicial pragmatism has contributed to the significant successes of several international restructurings involving Brazilian companies, compelled reliance on *ad hoc* measures does not provide companies or interested parties with the same level of predictability as codified legislation.[33] Thus, the current Brazilian insolvency regime may involve an unnecessary level of uncertainty.[34]

III. The Model Law

UNCITRAL adopted the Model Law in 1997.[35] The Model Law was designed to assist sovereign governments in supplementing their insolvency laws by providing a modern framework for addressing cross-border insolvency proceedings.[36] The Model Law does not attempt to unify the substantive insolvency laws of different countries, but instead incorporates a

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[31] *See* Locatelli, *supra* note 29, at 338; *see also* Wouters & Raykin, *supra* note 30, at 390.

[32] *See* Steven T. Kargman, *Emerging Economies and Cross-Border Insolvency Regimes: Missing BRICs in the International Insolvency Architecture (Part I)*, Insolvency & Restructuring Int'l, Sept. 2012, at 8, 10 (describing the BBL as providing "no clear roadmap for handling cross-border insolvencies in Brazil" and maintaining "the uncertainty and unpredictability that existed under the old law with respect to multi-jurisdictional insolvencies that include a Brazilian component"); Paulo Fernando Campana Filho, *The Legal Framework for Cross-Border Insolvency in Brazil*, 32 Hous. J. Int'l L. 97, 150 (2009) ("The lack of cross-border provisions is indeed one of the main deficiencies of the [BBL]. . . . As a consequence, the existing provisions are definitely outdated and not on par with the ongoing worldwide bankruptcy reform.").

[33] *See* Campana Filho, *supra* note 32, at 149-50 ("The cooperative approach . . . developed on an ad hoc basis without any supporting rule is not . . . 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.").

[34] *Id.*

[35] *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency* ¶ 1, *in UNCITRAL Model Law*, *supra* note 18, at 19.

[36] *Id.* In its *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency*, UNCITRAL notes that "[t]he increasing incidence of cross-border insolvencies reflects the continuing global expansion of trade and investment," but "national insolvency laws by and large have not kept pace with the trend, and they are often ill-equipped to deal with cases of a cross border nature." *Id.* ¶ 5, at 20. The resulting "inadequate and inharmonious legal approaches … hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, impede the protection of the assets of the insolvent debtor against dissipation, and hinder the maximization of the value of those assets." *Id.* ¶ 5, at 20-21. "[T]he absence of predictability in the handling of cross-border insolvency cases impedes capital flow and is a disincentive to cross-border investment." *Id.* ¶ 5, at 21.

modern modified universalist regime[37] that is focused on encouraging cooperation and coordination between jurisdictions.[38] The Model Law's stated purpose is:

> to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:
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> (a) [c]ooperation between the courts and other competent authorities of [the adopting] State and foreign States involved in cases of cross-border insolvency;
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> (b) [g]reater legal certainty for trade and investment;
>
> (c) [f]air and efficient administration of cross border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
>
> (d) [p]rotection and maximization of the value of the debtor's assets; and
>
> (e) [f]acilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.[39]

A central feature of the Model Law is a streamlined procedure for the representative of a debtor in a foreign insolvency proceeding – the foreign representative – to obtain recognition of the foreign proceeding and apply for relief from domestic courts in aid of that proceeding.[40] The Model Law provides for two types of proceedings: (a) foreign main proceedings and (b) foreign non-main proceedings. A foreign main proceeding is a foreign proceeding taking place in the state in which the debtor has its center of main interests ("COMI").[41] A foreign non-main proceeding is a foreign proceeding, other than a main proceeding, taking place in a state in which

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[37] *See* Wouters & Raykin, *supra* note 30, at 389-90 (explaining that universalism is a "diametrically opposed approach[] to cross border insolvencies" from territorialism; "[u]nder universalism, all proceedings would take place in a centralized court and proceedings would be subject to a single law"); *see also* Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 Brook. J. Int'l L. 499, 515 (1991) (noting that "[u]niversali[sm] . . . has long been accepted as the proper goal of international bankruptcy law by leading writers"). "'[Modified universalism] accepts the central premise of universalism, that assets should be collected and distributed on a worldwide basis, but reserves to local courts the discretion to evaluate the fairness of the home country procedures and to protect the interest of local creditors.'" Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 Mich. L. Rev. 2276, 2301 (2000) (alteration in original) (citation omitted).

[38] *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency* ¶ 3, *in UNCITRAL Model Law*, *supra* note 18, at 19-20.

[39] *UNCITRAL Model Law on Cross-Border Insolvency pmbl*, *in UNCITRAL Model Law*, *supra* note 18, at 3.

[40] *See generally id.* art. 21, at 11-12.

[41] *Id.* art. 2(b), at 4. *See also* United Nations Commission on International Trade Law, *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*, ¶ 13(c) (2010), http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_Ebook_eng.pdf (describing COMI as "the place where the debtor conducts the administration of its interests on a regular basis and that is therefore ascertainable by third parties").

the debtor has non-transitory economic activity.[42] Generally, foreign main proceedings apply to all assets of the debtor, while foreign non-main proceedings are restricted to the assets of the debtor that are located in the state in which the non-main proceeding is occurring.[43] If a domestic court recognizes more than one foreign proceeding, it will coordinate relief in a manner that is consistent with the foreign main proceeding.[44] A complementary provision is the requirement that domestic courts cooperate "to the maximum extent possible" with foreign courts and representatives in both foreign main and non-main proceedings.[45] A key objective of the Model Law is for courts to consider the interests of creditors "and other interested persons, including the debtor" when granting or refusing relief.[46]

IV. Pending Legislation in Brazil

In recent years, commentators have called for legislation that would incorporate the Model Law (or a modified version thereof) into the BBL as a means of addressing perceived uncertainties arising from Brazil's general adherence to the principle of territoriality and the current absence of provisions in the BBL that address cross-border restructuring.[47] Such amendments, it is argued, would assist the Brazilian bankruptcy courts, who have heretofore relied upon *ad hoc* measures (as described below), to more adequately meet the needs of cross-border restructurings involving Brazilian entities and of the global economy in which Brazil is a full participant.[48] Moreover, the adoption of a modern modified universalist regime would not be unprecedented, notwithstanding Brazil's general adherence to the principle of territoriality in the insolvency context. Brazil is a signatory to the Bustamante Code of Private International Law (the "Bustamante Code"), which was adopted in 1928 and whose signatories include 15 Latin American Countries.[49] The Bustamante Code provides for the filing of a single insolvency proceeding in the court in which the debtor is domiciled, with such proceeding to have effect in all countries in which the Bustamante Code has been adopted.[50] Thus, as a signatory to the Bustamante Code, Brazil has previously demonstrated a willingness to defer to other legal regimes and/or recognize foreign proceedings in the context of cross-border insolvency.[51] The

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42 *UNCITRAL Model Law on Cross-Border Insolvency* art. 2(c), *in UNCITRAL Model Law*, *supra* note 18, at 4.

43 *Id.* art. 28-29, at 14-15.

44 *Id.* art. 30, at 15.

45 *Id.* art. 25(1), at 13.

46 *Id.* art. 22(1), at 12.

47 *See* Kargman, *supra* note 32, at 11; Locatelli, *supra* note 29, at 344-45; Campana Filho, *supra* note 32, at 149-51.

48 Locatelli, *supra* note 29, at 344-45; Campana Filho, *supra* note 32, at 149-51.

49 *See* Kurt H. Nadelmann, *Bankruptcy Treaties*, 93 U. Pa. L. Rev. 58, 70-71 (1944); *see also* Convention on Private International Law (Bustamante Code), Feb. 13, 1928, 86 L.N.T.S. 254 (English text).

50 Nadelmann, *supra* note 49, at 71; *see also* Convention on Private International Law (Bustamante Code), *supra* note 49, at 362-64.

51 Nadelmann, *supra* note 49, at 70-71.

multi-jurisdictional legal and procedural cooperation incorporated into the Bustamante Code may serve as precedent for an amended BBL that could assist the Brazilian bankruptcy courts to more adequately meet the demands of cross-border restructurings involving Brazilian entities.

Recognizing the desirability of supplementing the BBL with provisions that specifically address international insolvency issues, various Brazilian political representatives have introduced Bills to bring the BBL more in line with the Model Law. In June 2011, Congressman Vicente Candido (PT/SP) introduced Bill 1.572/2011 to replace the current Brazilian Commercial Code and, *inter alia*, incorporate provisions of the Model Law into the BBL. If passed, Bill 1.572/2011 would result in the addition of 21 articles to the BBL that would specifically address cross-border insolvency issues in a manner that is intended to be consistent with the Model Law. Bill 1.572/2011 is currently before the House of Representatives, pending review and voting. In addition, in November 2013, Senator Renan Calheiros introduced Bill No. 487/2013 ("Bill 487/2013"), the first bill in the Sparse Legislation, before the Senate. Like Bill 1.572/2011, Bill 487/2013 seeks to reform the current Brazilian Commercial Code and supplement the BBL with articles that address cross-border insolvency issues in a manner consistent with the Model Law. More recently, in November 2015, Congressman Laercio Oliveira (SD/SE) introduced Bill No. 3741/2015 ("Bill 3741/2015"), the second bill in the Sparse Legislation, before the House of Representatives. As with the other two Bills, Bill 3741/2015 would supplement the BBL with provisions that would address cross-border insolvency issues in a manner that is substantially similar to the Model Law. Of the three Bills, Bill 1.572/2011 is the closest to being enacted by the Brazilian Congress, but it has yet to receive approval by the Brazilian Congress and the President.

The current versions of the Bills contain almost identical provisions to address cross-border insolvency issues, and each purportedly aims to bring Brazilian insolvency law in line with the Model Law and other modern cross-border insolvency regimes. Consistent with the Model Law, the Bills incorporate provisions relating to foreign main proceedings and foreign non-main proceedings,[52] and would establish a process for obtaining recognition of a foreign proceeding by a Brazilian court.[53] Furthermore, the Bills would specify means of cooperation across jurisdictions[54] and allow direct communication between different courts without resort to the current letter rogatory mechanisms (which tend to be time-consuming and incompatible with

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[52] The Bills classify bankruptcy proceeding with cross-border implications as (a) main when the debtor's most important interests, whether economic or patrimonial, are centralized in the country of filing and (b) non-main in all the other cases.

[53] The Bills provide that that a foreign representative may apply for recognition of a foreign proceeding in Brazil and specify that the application for recognition shall be accompanied by (a) the documents listed in Article 15 of the Model Law, and (b) an indication of the country in which the debtor has its COMI from an economic and patrimonial perspective. The Bills also include rules to determine the competent court for recognition of foreign proceedings and indicate the information that the court responsible for the non-main proceeding should provide to the authority overseeing the main proceeding abroad (i.e., debt amount, assets scheduled, and waterfall).

[54] The Bills substantially adopt Article 27 of the Model Law. For example, the Bills provide (a) that cooperation may be implemented by appointment of an official or judicial auxiliary to whom the foreign bankruptcy court should report; (b) for communication with the foreign bankruptcy court, even if confidential; and (c) for coordination with the foreign bankruptcy court with respect to decisions rendered and management of the seized debtor assets.

the speed with which insolvency proceedings are often conducted). The Bills also provide that requests for cooperation made by foreign courts should be accommodated by Brazilian courts as long as they are not contrary to Brazilian public policies and do not harm national creditors, which is also consistent with the approach adopted by Model Law.

Notwithstanding the foregoing, there remain significant concerns that passage of the current versions of any of the Bills would result in the adoption of a limited and significantly modified version of the Model Law. For example, in their current forms, each of the Bills would subordinate foreign creditors based solely on their nationality.[55] That is, foreign creditors would receive recoveries from insolvency proceedings involving a Brazilian company only after all domestic Brazilian unsecured creditors are paid in full. Commentators have harshly criticized the Bills' inclusion of such subordination provisions.[56] Indeed, such subordinated treatment is arguably contrary to the very purposes of the Model Law, which include international cooperation, efficiency, and fairness in insolvency proceedings. Although these provisions are expected to be modified or rejected, commentators have warned that the inclusion of such provisions in the current versions of the Bills may already be hindering new foreign investments in Brazil, regardless of whether such provisions are ultimately enacted.[57] The current versions of the Bills would also arguably modify other well-established provisions of the Model Law and create rules that are not included in the Model Law.[58] For example, the Bills contemplate that the foreign main proceeding must take place in the state in which the debtor has its COMI, whether economic or patrimonial, but, unlike the Model Law, do not include a presumption that the COMI is the state in which the debtor's registered office is located.[59] The current versions of the Bills also provide that the Public Prosecutor's Office would be entitled to request the liquidation of a Brazilian company that is part of an economic group or conglomerate for which an insolvency proceeding has been commenced abroad, regardless of whether the Brazilian company would otherwise be subject to liquidation under the BBL's liquidation provisions. Commentators have criticized this aspect of the Bills, arguing that economically viable Brazilian companies should not be subject to the harms of a liquidation simply because a foreign affiliate

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55 *See* Bill No. PL 1.572/2011, art. 188-L; Bill No. 487/1, art. 1070; Bill No. 3741/2015, art. 167-L.

56 Francisco Satiro, Paulo Fernando Campana Filho & Sabrina Becue, *Insolvência Transnacional e o Projeto do Código Comercial*, JOTA (July 5, 2016), http://jota.info/artigos/insolvencia-transnacional-e-o-projeto-de-codigo-comercial-05072016.

57 *Id.* ("At the UNCITRAL Central Commission session held at the end of June, delegates from countries with traditional investors questioned the correct interpretation of the message that the country would like to send with the inclusion of a discriminatory foreign investment mechanism in the design of the most important regulatory framework for Business activity in the country. This reveals not only the interest of investors in institutional evolution in Brazil, but the mere inclusion of such a provision in an official legislative document, even if it is not enacted, has the enormous potential to signal negatively and to hinder new Foreign investments. . . . In the judicial reorganization recently filed by Oi, for example, the approximately 11 billion dollars represented by notes issued abroad (bonds), according to the wording of art. 188-L of the Bill, should be subordinated to the unsecured. It is not difficult to identify the interests and project the negative repercussions of a situation like this.") (English translation of original text).

58 *Id.*

59 *See UNCITRAL Model Law on Cross-Border Insolvency* art. 16, *in UNCITRAL Model Law*, *supra* note 18, at 8.

is subject to insolvency proceedings.[60] Each of these criticized provisions is expected to be removed from any final version of the Bills that is ultimately passed. Moreover, it is widely acknowledged that, in spite of these provisions, the Bills represent a step forward in bringing Brazil in line with modern cross-border insolvency principles and the Model Law.

V. Case Studies

To further understand the treatment of multi-jurisdictional restructuring issues under the current Brazilian bankruptcy regime and the potential benefits of adopting the Model Law, this section considers recent cross-border restructurings conducted under the BBL. In particular, this section examines (a) how cross-border issues were addressed by the Brazilian courts and (b) how such issues might have been addressed had the Model Law been in effect in Brazil.

A. Parmalat

The restructuring of the Parmalat Group (defined below) was one of the earliest major cross-border insolvency cases that proceeded under the BBL. The Parmalat Group restructuring exposed tensions between the BBL's territorial approach and the needs of modern, multi-jurisdictional business restructurings.

1. Background

Parmalat S.p.A. ("Parmalat"), an Italian dairy conglomerate, and several of its subsidiaries (collectively, the "Parmalat Group") filed insolvency proceedings in multiple jurisdictions in 2003 and thereafter, following the discovery of a €14 billion deficit in their accounts. Prior to the Parmalat Group's collapse, it had over 30,000 employees in 30 countries, including Brazil, where the Parmalat Group had its largest dairy plant.[61] In 2003, Brazil accounted for 10 percent of the Parmalat Group's global revenue and employed one-sixth of its workers worldwide.[62]

Beginning in 1997, the Parmalat Group engaged in a number of international acquisitions (particularly in North and South America) that were financed through debt issuances.[63] Such acquisitions quickly proved unprofitable and the company began experiencing liquidity issues. In order to raise additional funds, the company used various accounting measures to hide losses in offshore companies.[64] Parmalat's accounting system produced the appearance of liquidity, thereby allowing the company to provide security for bonds, which were sold across the globe.

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60 Satiro, Campana Filho & Becue, *supra* note 56.

61 Tony Smith, *Big Parmalat Unit Files for Bankruptcy in Brazilian Court*, N.Y. Times (Jan. 29, 2004), http://www.nytimes.com/2004/01/29/business/big-parmalat-unit-files-for-bankruptcy-in-brazilian-court.html?_r=0.

62 *Id.*

63 Claudio Celani, *The Story Behind Parmalat's Bankruptcy*, Executive Intelligence Rev., Jan. 16, 2004, at 10.

64 *Id.* at 10-11.

The Parmalat Group's liquidity crisis became apparent on December 8, 2003, when Parmalat defaulted on a €150 million bond.[65] On December 9, 2003, Standard & Poor's downgraded Parmalat bonds to junk status, and Parmalat's stock fell 40% in the days that followed. On December 19, 2003, Bank of America announced that one of the Parmalat Group's accounts, which allegedly had held €3.9 billion in liquidity, did not exist, and Parmalat's stock fell an additional 66%.[66]

2. Restructuring

On December 24, 2003, Parmalat filed for extraordinary administration (*amministrazione straordinaria*)[67] before a court in Parma, Italy.[68] Over the following months, several other members of the Parmalat Group joined the insolvency proceedings in Italy, or filed insolvency proceedings in other jurisdictions, including Ireland, the United States, and Brazil. In addition, creditors brought several multi-billion dollar lawsuits in multiple jurisdictions, alleging fraud against both Parmalat and the banks that issued its bonds.[69]

On July 23, 2004, the Ministry for Productive Activities authorized the Parmalat Group's Italian restructuring plan, which contained provisions to restructure 16 of the Parmalat Group's companies; these 16 companies, in turn, controlled an additional 97 Parmalat Group companies.[70] On October 1, 2005, the Italian court approved the restructuring plan, and the assets and liabilities of the 16 companies involved were transferred to the "new" Parmalat S.p.A. Subsequently, the "new" Parmalat S.p.A. was relisted on the Italian stock market.[71]

On January 28, 2004, the Parmalat Group's Brazilian dairy unit, Parmalat Brasil Indústria de Alimentos S.A. ("Parmalat Brasil"), and Parmalat Brasil's holding company, Parmalat Participações do Brasil Ltda ("Parmalat Participações"), filed for *concordata* protection in São Paulo, Brazil. These insolvency filings were made under Brazil's prior insolvency regime and

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65 Verified Petition in Support of the Commencement of Cases Ancillary to Foreign Proceedings Pursuant to Section 304 of the Bankruptcy Code and Motion for a Temporary Restraining Order and Preliminary and Permanent Injunctions and Related Relief Under Section 304(b) of the Bankruptcy Code, ¶ 8, *In re Parmalat Finanziaria S.p.A.*, No. 04-14268 (RDD) (Bankr. S.D.N.Y. filed June 22, 2004), ECF No. 2.

66 *Id.* at ¶ 9.

67 *Amministrazione straordinaria* is a special Italian reorganization proceeding for large companies. *See* Italy Insolvency (Bankruptcy) Laws and Regulations Handbook 211 (Int'l Bus. Publications, USA 2014).

68 Affidavit of James A. Mesterharm Pursuant to Local Bankruptcy Rule 1007-2, ¶ 30, *In re Parmalat USA Corp., et al.*, No. 04-11139 (RDD) (Bankr. S.D.N.Y. filed Feb. 2, 2004), ECF No. 3.

69 *See* Memorandum Opinion at 3-4, *In re: Parmalat Securities Litigation*, No 04-md-01653 (LAK-HBP) (S.D.N.Y. filed Jan. 26, 2005), ECF No. 64 (describing several actions alleging securities fraud against Parmalat's directors, accountants, banks, and lawyers).

70 *See* Statement/English Translation of the Foreign Debtors' Restructuring Plan as Approved by the Minister of Productive Activities, *In re Parmalat Finanziaria S.p.A.*, No. 04-14268 (RDD) (Bankr. S.D.N.Y. filed Sept. 3, 2004), ECF. No. 40.

71 Transcript of Hearing Held on 12/8/2005 re: Status Conference at 3:1-18, *In re Parmalat Finanziaria S.p.A.*, No. 04-14268 (RDD) (Bankr. S.D.N.Y. filed Dec. 29, 2005), ECF No. 129.

following various legal actions against Parmalat in Brazilian courts.[72] At the time, Parmalat Brasil owed US$160 million to certain local Brazilian banks, and the total debt of the Parmalat Group's other Brazilian holding companies was estimated to be as high as US$1.8 billion.[73] Parmalat Brasil faced imminent collapse, as its cash flow dwindled, banks refused to extend any further credit, and a growing number of lawsuits effectively paralyzed operations. In June 2005, Parmalat Brasil and Parmalat Participações filed for RJ under the then-recently enacted BBL, thereby extinguishing the previous *concordata* proceedings.[74]

Although they were controlled by companies that were restructured under the Italian restructuring plan, Parmalat Brasil and Parmalat Participações were not, themselves, subject to the Italian plan. Instead, the Parmalat Brasil and Parmalat Participações cases proceeded independently before the Brazilian court under the BBL. On August 31, 2005 and September 9, 2005, respectively, Parmalat Brasil and Parmalat Participações filed separate restructuring plans with the Brazilian court.[75] Parmalat Brasil's plan provided for: (a) a 70% recovery for suppliers and a 40% recovery for financial creditors; (b) existing debt to be refinanced through a 12-year bond issue; (c) a €20 million rights offering (equal to 95% of share capital), offered first to Parmalat Participações' creditors under pre-emption rights and then to Parmalat S.p.A.; and (d) the disposal of non-core assets.[76] Parmalat Participações' plan gave the company's creditors (x) the right to subscribe to the rights offering outlined in the Parmalat Brasil plan, (y) all proceeds from certain pending legal proceedings, and (z) the right to subscribe to any further rights offering in an amount of up to 20% of the equity of Parmalat Brasil for the next 12 years.[77] On May 31, 2006, Parmalat announced that the Parmalat Group's control over Parmalat Brasil would cease upon completion of an amended restructuring plan.[78] The amendments included: authorization of Laep Capital LLC's ("Laep") subscription of Parmalat Brasil's capital increase, resulting in Laep holding 98.5% of Parmalat Brasil's share capital; the sale of Parmalat Brasil's controlling equity interest in manufacturing subsidiary Batavia SA; and authorization of a trademark license agreement between Parmalat and Batavia SA.

3. Cross-Border Issues

The consummation of Parmalat Brasil's amended plan was among the first successful restructurings under the BBL. However, the restructuring of Parmalat Brasil was not without its

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72 Smith, *supra* note 61.

73 *Id.*

74 Salve Pelo Gongo, *Justiça aceita pedido de recuperação judicial da Parmalat*, Consultor Jurídico (June 30, 2005), http://www.conjur.com.br/2005-jun-30/justica_aceita_recuperacao_judicial_parmalat (text only available in Portuguese).

75 Parmalat S.p.A., Parmalat Presentation 11 (Oct. 6, 2005), http://www.parmalat.com/attach/content/55/Presentazione%20Parmalat%2006-10-05.pdf.

76 *Id.*

77 *Id.*

78 Press Release, Parmalat S.p.A, Brazilian Operations (May 31, 2006), http://www.parmalat.com/attach/content/432/2006_05_31%20ENG.pdf.

complications. The proceedings tested the BBL's ability to address cross-border restructurings and the issues that they raise. The Parmalat Group restructuring was extremely complex, with separate proceedings in Italy, Ireland, the United States, and Brazil. As the case progressed in Brazil, the proceedings taking place across the globe were largely disregarded by the Brazilian courts because the BBL does not, itself, permit the recognition of ancillary proceedings. For example, the restructuring plan in Italy, which directly addressed Parmalat Brasil's parent companies, had no effect in Brazil, and the parties were required to develop entirely separate plans for the Brazilian subsidiaries. The restructuring in Ireland, which addressed one of Parmalat Brasil's subsidiaries, was also not recognized by the Brazilian courts, despite the fact that the European Court of Justice found that the COMI for Eurofood IFSC Ltd. was in Ireland, giving jurisdiction of the main proceeding to Irish courts.[79]

The BBL's lack of provisions to address recognition of foreign proceedings or coordination with foreign courts threatened confusion and uncertainty for the Parmalat Group's companies, creditors, employees, and potential investors. As one commentator has noted:

> Issues related to the impossibility of recognition of foreign proceedings as well as the lack of rules providing coordination, assistance, and cooperation among courts were clearly felt by all the parties involved.
>
> The occurrence of simultaneous proceedings in many jurisdictions such as Italy, Ireland, Brazil, and the United States brought about the issues of possible conflicting decisions and concerns about the applicability of different rules and also how different courts would manage that situation. . . . Hence, a high level of uncertainty was felt on a national and international level by creditors, governments, and employees in relation to the future of the company.
>
> The lack of unity in the proceedings occurring in Europe and Brazil and the litigation of U.S. creditors in New York courts remained a serious concern, principally related to whether the local courts in each country could protect the public and private interests affected and how the restructuring plans would be administered in different jurisdictions, applying diverse laws and procedures.[80]

Although the restructuring in Brazil was ultimately successful, the BBL did not, itself, provide the Brazilian court with critical tools to address the complex international issues that arose.

4. Model Law Analysis

Under the Model Law, much of the uncertainty associated with Parmalat Brasil's restructuring could have been avoided. First, the Model Law would have allowed for the recognition of the foreign proceedings. Since Parmalat Brasil was largely independent from its Italian parent, under the Model Law, COMI for Parmalat Brasil would have been in Brazil, and the proceedings in Italy, the United States, and Ireland could have been recognized as foreign

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[79] *See* Case C-341/04, Eurofood IFSC Ltd., 2006 E.C.R. I-3813 (Eurofood-ECJ).

[80] Locatelli, *supra* note 29, at 340-41.

non-main proceedings by the Brazilian court. Second, insofar as it expressly contemplates insolvency proceedings and coordination across multiple jurisdictions, the Model Law could have provided the Brazilian court with a framework for cross-border cooperation. With the ability to communicate with foreign courts and to recognize their judgments, the Brazilian court would have been equipped to ensure Brazilian creditors and employees were adequately represented and protected, not only in Brazil, but across the various jurisdictions in which restructuring proceedings were pending. This communication would have helped to restrain "the widespread creditors' fear of the collapse of the company in different countries, principally in Brazil and Italy where the company had strong economic activity and social relevance."[81] Moreover, this cooperation and coordination, along with the recognition of the foreign proceedings, would have worked to increase efficiency and creditor recoveries for parties involved.

B. Varig

The restructuring of the Varig Group (defined below) was another early major cross-border insolvency case that proceeded under the BBL. The case included a Brazilian main proceeding and a significant ancillary proceeding in the United States. As more fully discussed below, the Brazilian court overseeing the Varig case was required to look beyond the provisions of the BBL to creatively address the significant cross-border issues that arose. This, in turn, set the stage for years of *ad hoc* collaboration between judges, parties in interest, and Brazilian authorities across multiple jurisdictions.

1. Background[82]

Viação Aérea Rio-Grandense S.A. ("Varig"), a privately-owned Brazilian airline, was the first airline founded in Brazil, and was one of Brazil's leading national and international airlines until its collapse in 2005. The Varig group of airlines (the "Varig Group") included Varig and its affiliates Rio-Sul Linhas Aereas S.A. and Nordeste Linhas Aereas S.A. Prior to its restructuring, the Varig Group served 36 cities in Brazil and 25 international destinations in 20 countries. The three airlines operated 2,068 domestic departures per week, and enjoyed a 30.7% share of the domestic Brazilian market. As of May 31, 2005, the Varig Group had a fleet of 87 leased aircraft, including 11 freighters, served approximately 13 million passengers a year, and employed approximately 11,456 full-time employees.

The Varig Group historically dominated Brazil's domestic and international aviation markets, occupying more than 30% of the domestic market and approximately 85% of the international market serviced by Brazilian carriers. However, several low-cost carriers successfully entered the Brazilian market following the country's deregulation of the airline industry in 1991. As these competitors increased their low-cost offerings, the Varig Group began to lose substantial market share. By 2004, the Varig Group required increased capital to

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[81] *Id.*

[82] The information in this section is taken from the Petition Pursuant to 11 U.S.C. § 304 to Commence a Case Ancillary to a Foreign Proceeding, *In re Cervo ex rel. Varig, S.A.*, No. 05-14400 (RDD) (Bankr. S.D.N.Y. filed June 17, 2005), ECF No. 2.

meet its debt obligations due, in part, to high fuel costs, loss of market share to low-cost carriers, and the decline in value of the Brazilian *real* against the dollar. In 2005, the Varig Group filed insolvency proceedings after determining that it could no longer support its growing debt or aircraft leases, and facing the prospect that its aircraft could be seized by creditors in the United States. At the time, the Varig Group had an approximate negative net worth of US$2.5 billion, balance sheet debt of US$2.8 billion, off-balance-sheet debt of US$2 billion, and no significant fixed assets.

2. Restructuring

On June 17, 2005, only 8 days after the BBL took effect, the Varig Group commenced RJ proceedings, and the Brazilian court issued an interim order prohibiting aircraft creditors from seizing or interfering with the Varig Group's use of aircraft and equipment.[83] That same day, the Varig Group commenced an ancillary case in the United States Bankruptcy Court for the Southern District of New York pursuant to section 304 of the U.S. Bankruptcy Code.[84] As part of these ancillary proceedings, the Varig Group obtained from the U.S. court a temporary restraining order enforcing the Brazilian court's interim order in the United States.[85] On June 22, 2005, the Brazilian court issued an order formally accepting each of the debtors into the RJ.[86] On June 28, 2005, after notice and a hearing at which many of the aircraft creditors appeared in opposition, the U.S. court issued a preliminary injunction to continue the relief obtained in the temporary restraining order and to extend the application of such relief to include other types of creditors.[87]

Shortly after commencing RJ proceedings, Varig began selling off certain of its subsidiaries to raise capital. In November 2005, Varig sold a controlling interest in Varig Engineering and Maintenance to TAP Portugal for US$62 million.[88] Varig also sold its cargo division, Varig Logística S.A., operating as VarigLog, to the consortium Volo do Brasil for US$48.2 million.[89]

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83 *Id*. ¶¶ 36-37.

84 *Id.* at 1. With the adoption of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, tit. VII, 119 Stat. 23, 134-46, the former 11 U.S.C. § 304 was repealed and replaced by Chapter 15 (Ancillary and Other Cross-Border Cases) of Title 11 of the United States Code.

85 Temporary Restraining Order at 3, *In re Cervo ex rel. Varig, S.A.*, No. 05-14400 (RDD) (Bankr. S.D.N.Y. June 17, 2005), ECF No. 9.

86 Notice of Entry of Further Order of Brazilian Court, *In re Cervo ex rel. Varig, S.A.*, No. 05-14400 (RDD) (Bankr. S.D.N.Y. June 24, 2005), ECF No. 38.

87 Preliminary Injunction Order, *In re Cervo ex rel. Varig, S.A.*, No. 05-14400 (RDD) (Bankr. S.D.N.Y. June 28, 2005), ECF No. 46.

88 Foreign Representatives' Reply to Objections to Continuation of Preliminary Injunction ¶ 17, *In re Zerwes ex rel. Varig, S.A.*, No. 05-14400 (RDD) (Bankr. S.D.N.Y. Dec. 19, 2005), ECF No. 221.

89 *Brazil's Varig Sold in Auction to Former Cargo Unit*, MercoPress (July 21, 2006), http://archive.is/OtPeW.

In July 2006, creditors in Brazil voted to approve Varig's recovery plan, which contemplated a sale of the airline's name, operating assets and business after a competitive bidding process.[90] Following two unsuccessful auctions, the Brazilian court determined to split Varig into two entities, informally known as "New Varig" and "Old Varig." Old Varig consisted of the "Nordeste" brand, one aircraft, and various debts and liabilities. New Varig was comprised of the brands "Varig" and "Rio-Sul," all of Varig's route rights, and all but one aircraft. The prevailing bidder for New Varig was Varig Logistica S.A., the former Varig subsidiary owned by Volo do Brasil.[91] Following the satisfaction of certain conditions to the sale, the Brazilian court declared the sale complete on December 15, 2006.[92] On March 19, 2007, the U.S. court issued a permanent injunction pursuant to sections 304 and 105(a) of the U.S. Bankruptcy Code, permanently enjoining actions in violation of the Brazilian recovery plan.[93]

3. Cross-Border Issues

Since nearly all of the Varig Group's creditors were located in the United States, the Varig case gave rise to numerous cross-border issues. There were significant concerns that creditors could seize the Varig Group's equipment at airports in the United States, thereby negatively impacting the Varig Group's business. The principal reason that the Varig Group filed an ancillary proceeding in the United States under section 304 of the U.S. Bankruptcy Code, then, was to seek to prevent aircraft creditors in the United States from repossessing its equipment.[94] To receive this protection, the Varig Group needed an order directing an immediate stay by the U.S. court and continued collaboration between the two jurisdictions as the proceedings in Brazil and the United States progressed. The aircraft creditors opposed the section 304 filing, arguing that Brazilian law would not sufficiently protect their interests, as the BBL contained no provisions similar to section 1110 of the U.S. Bankruptcy Code, which allows aircraft creditors to repossess aircraft unless certain payments are made.[95]

In September 2005, a judge from the Court of Justice of the State of Rio de Janeiro flew to New York to meet with the U.S. judge, explain the mechanics of Brazilian law, and discuss

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[90] Notice of Restated Reorganization Plan Approved in the Foreign Proceeding, *In re Zerwes ex rel. Varig, S.A.*, No. 05-14400 (RDD) (Bankr. S.D.N.Y. July 27, 2006), ECF No. 357.

[91] *See* In-Court Reorganization Plan ¶¶ 4-13, *In re Cervo ex rel. Varig, S.A.*, No. 05-14400 (RDD) (Bankr. S.D.N.Y. July 27, 2006), ECF No. 357-1 (English translation).

[92] *See* Permanent Injunction Order at 3, *In re Zerwes ex rel. S.A. (Viacao Aerea Rio-Grandense) (f/k/a/ Varig, S.A.)*, No. 05-14400 (RDD) (Bankr. S.D.N.Y. Mar. 19, 2007), ECF No. 404.

[93] *Id.* at 2.

[94] Petition Pursuant to 11 U.S.C. § 304 to Commence a Case Ancillary to a Foreign Proceeding, *supra* note 82, at 9-10, 13-14.

[95] *See* Objection of U.S. Bank National Association, U.S. Bank Trust National Association and Wells Fargo Bank, N.A., as Trustees, to the Temporary Restraining Order or Preliminary Injunction at 4, 7-8, *In re Cervo ex rel. Varig, S.A.*, No. 05-14400 (RDD) (Bankr. S.D.N.Y. filed June 26, 2005), ECF No. 42; *see also* 11 U.S.C. § 1110 (2006).

how the aircraft creditors would be protected in Brazil.[96] This meeting marked the first time a Brazilian court overseeing an RJ under the BBL engaged in *ad hoc* collaboration with a U.S. court.[97] Following the meeting, in order to ensure the aircraft creditors were given similar protections to those provided under U.S. law, the U.S. court directed the development of a contingency return plan (the "CRP").[98] The CRP gave the aircraft creditors a priority claim for damages incurred as a result of missing parts or documentation, but did not relieve the creditors from the stay that had been put into place in the United States and Brazil.[99] The U.S. court also instructed the Varig Group to seek to have the CRP approved by the Brazilian court, ensuring that the aircraft creditors would receive similar protections in Brazil.[100] When Varig presented the CRP to the court in Rio de Janeiro, the Brazilian court approved the CRP, thereby providing the aircraft lessors with the protections contemplated by the CRP notwithstanding that that such protections were "atypical" and not provided for under Brazilian law.[101] The Brazilian court's collaboration with the U.S. court and confirmation of the CRP, which granted creditors some of the protections of section 1110 of the U.S. Bankruptcy Code, were significant factors in the U.S. court's decision to extend the preliminary injunction.[102] Without this *ad hoc* collaboration, the U.S. court may have determined to grant the creditors relief from the automatic stay in the United States, which could have compromised the Varig Group's ability to continue operations.[103]

4. Model Law Analysis

The Varig case represents a successful collaboration between the Brazilian and U.S. courts to resolve issues in a manner allowing the debtor to continue operations and successfully restructure, while preserving creditors' rights and remedies subject to certain conditions. Nonetheless, this success depended upon the Brazilian court adopting an *ad hoc* cooperative

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96 *See* Letter to The Honorable Robert D. Drain, dated September 2, 2005, re: Introducing Judge Marcia Cunha Silva Araujo de Caravalho, *In re Cervo ex rel. Varig, S.A.*, No. 05-14400 (RDD) (Bankr. S.D.N.Y. filed Sept. 2, 2005), ECF No. 94 (stating that "[i]n appointing Judge Cunha, the Court is fully aware of the importance of close cooperation between the judiciary of Brazil and the United States as a means of enhancing the commercial relations between our countries").

97 Letter, dated 9/21/2005, to Judge Drain from The Honorable S.C. Filho, Pres. Of the Courts of Justice of the State of Rio de Janeiro, *In re Cervo ex rel. Varig, S.A.*, No. 05-14400 (RDD) (Bankr. S.D.N.Y. filed Oct. 11, 2005), ECF No. 177 (describing Judge Cunha's successful visit to New York as the "first time such a correlation occurred" between the courts of Brazil and the United States).

98 Preliminary Injunction Order at 6, *In re Cervo ex rel. Varig, S.A.*, No. 05-14400 (RDD) (Bankr. S.D.N.Y. filed Jan. 5, 2006), ECF No. 232.

99 *Id.*

100 *Id.*

101 Notice of Decision of Brazilian Court at 12, *In re Cervo ex rel. Varig, S.A.*, No. 05-14400 (RDD) (Bankr. S.D.N.Y. filed Jan. 9, 2006), ECF No. 239.

102 *Id.*

103 *Id.*; *see also* Otto Eduardo Fonseca Lobo et al., *Varig Airlines: Flying the Friendly Skies of Brazil's New Bankruptcy Law with Help from Old §340,* Am. Bankr. Inst. J., July/Aug. 2007, at 42-43.

approach because the BBL does not contemplate separate proceedings in a foreign jurisdiction, let alone provide for cross-border collaboration. If Brazil had adopted the Model Law, the Brazilian court would have had a domestic statute contemplating multiple proceedings with cooperation and coordination across foreign jurisdictions and, thus, a statutory basis for cross-border collaboration. There would, therefore, have been less confusion and uncertainty as to how the Brazilian court would collaborate with, and recognize the ruling of, the U.S. court (and *vice versa*). As one commentator has noted, adoption of the Model Law could have ensured a more unified proceeding between the jurisdictions, thereby "help[ing] to avoid the losses suffered by the company in the stock exchange (fall of the share price) . . . during the first moments of the company's crisis," by increasing creditors' and investors' confidence in the efficiency of the proceedings.[104] Accordingly, the Model Law could have avoided any uncertainty, and possibly increased the value obtained by creditors in the restructuring.

C. OGX

The OGX Group (defined below) restructuring is one of the first in a series of cross-border restructurings resulting from the current economic recession in Brazil. The restructuring of the OGX Group continued the *ad hoc* collaborative approach developed in Varig. Moreover, it illustrates that the BBL's limited international scope may constitute an unnecessary impediment in large multi-jurisdictional restructurings.

1. Background[105]

OGX Petróleo e Gás S.A. ("OGX"), a publicly-held Brazilian company that was Brazil's second largest oil company and Brazil's largest private investor in oil and gas exploration, was founded in 2007 as one of five companies under Eike Batista's EBX Group. Prior to its bankruptcy in 2013, OGX owned 22 offshore exploratory blocks and 12 onshore exploratory blocks in Brazil and Colombia. At its peak, OGX boasted 10.8 billion potential recoverable barrels of oil equivalent and was valued at over US$35 billion.

The OGX group of companies (the "OGX Group") consisted primarily of the holding company, Óleo e Gás Participações S.A. ("OGPar"), and its subsidiaries OGX, OGX Austria GmbH ("OGX Austria"), and OGX International GmbH ("OGX International"). All or nearly all of the OGX Group's accounting, finance, marketing, research and development, legal services, human resource management, cash management and other operational and administrative activities, and/or decision-making were conducted in Rio de Janeiro, Brazil. Further, aside from OGX's bondholders, substantially all of the OGX Group's creditors were located in Brazil.

In June 2008, OGPar raised more than R$6.7 billion in what was then the largest IPO on the Brazilian stock exchange, Novo Mercado of BM&F BOVESPA S.A. ("BM&F BOVESPA").

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[104] Locatelli, *supra* note 29, at 342-43.

[105] Information in this section is taken from the OGX Group's *Petição Recuperação Judicial* [Judicial Recovery Petition]. *See* Sergio Bermudes Law Firm, *OGX Petition, English Version* (Oct. 30, 2013), http://reorg-research.com/pdf/OGX%20Petition,%20English%20Version.pdf?date=1483566688926.

In order to raise additional capital for exploration, the OGX Group issued debt primarily through OGPar's financing vehicles, OGX Austria and OGX International, which were incorporated in the Republic of Austria. OGPar also entered the international bond markets in 2011, when it sold US$2.563 billion in 8.5% senior unsecured bonds due in 2018. OGPar returned to the bond markets a year later by issuing US$1.063 billion in 8.375% senior unsecured bonds due in 2022. The OGX Group's financial indebtedness in 2013 totaled approximately R$11.2 billion.

OGPar's successful IPO was based on estimates of the volume of oil discovered at several of its exploratory blocks. The OGX Group missed its production targets, however, and the company announced in early 2013 that its only producing wells were not economically viable and would be closed. Moreover, the OGX Group's ambitious US$1.3 billion capital expenditure program resulted in a depletion of the company's cash. By the end of 2013, the OGX Group was in need of capital to continue operations and was unable to make interest payments on its bonds.

2. Restructuring

On October 30, 2013, OGPar, OGX, OGX Austria, and OGX International commenced RJ proceedings in Rio de Janeiro seeking relief under the BBL.[106] After commencing the RJ proceedings, the OGX Group searched for investors to support a DIP financing transaction. In December 2013, the OGX Group was able to negotiate a plan support agreement with a group of bondholders, providing the basis for a pre-arranged restructuring.[107] In February 2014, OGX negotiated US$215 million in DIP financing to be provided by creditors in the form of convertible debentures representing approximately 65% of the equity position in the reorganized OGX.[108] The DIP financing was the first major DIP loan implemented under the BBL.[109]

Also in February 2014, OGX filed its restructuring plan with the Brazilian court.[110] The plan called for the full conversion of OGX's entire prepetition debt – consisting of approximately US$5.8 billion – into equity of reorganized OGX.[111] The plan further provided for the merger of OGPar into OGX and for the listing of the stock of reorganized OGX on BM&F BOVESPA. The plan specifically provided that prepetition creditors would receive approximately 25% of the common stock of the reorganized OGX, with DIP Lenders receiving 65%, and existing equity holders receiving 10%.[112]

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106 *Id.*

107 Giuliano Colombo & Thiago Braga Junqueira, *The OGX Restructuring: Many Firsts and a Good Testament to Brazilian Bankruptcy Practice*, at 2, INSOL Electronic Newsletter (Jan. 2015), http://www.insol.org/emailer/Jan_2015_downloads/Jan%20Highlight%20Article.pdf.

108 *Id.*

109 *Id.*

110 Press Release, Óleo e Gás Participações S.A., Filing of the Reorganization Plan at 1 (Feb. 14, 2014), http://www.ogx.com.br/conteudo_en.asp?tipo=53352&id=0&idioma=1&conta=44&submenu=0&img=0&ano=2014 (follow 2/14/2014 Filing of the Reorganization Plan hyperlink).

111 *Id.*

112 *Id.* at 1-2.

In June 2014, the plan was approved by a majority of OGX's unsecured creditors and the Brazilian court confirmed the plan.[113] On October 20, 2014, OGX closed the capitalization of its prepetition debt in full satisfaction and discharge of the debt in accordance with OGX's plan of reorganization,[114] representing the first full debt to equity conversion under a Brazilian plan of reorganization.[115]

3. Cross-Border Issues

There were two main cross-border issues that arose during the OGX Group restructuring. First, it was not clear whether the Brazilian court would allow the OGX Group's foreign subsidiaries to participate in the RJ proceedings. On November 11, 2013, Rio de Janeiro's Public Prosecutor indicated its approval of the OGX and OGPar filings, but stated that the offshore companies, OGX Austria and OGX International, should be excluded from the RJ.[116] Based upon the principle of territoriality, the Public Prosecutor argued that the bankruptcy should be pursued in the country in which the debtor was based, and that, under the BBL, only the court of the jurisdiction in which the debtor's principal place of business was located would be competent to ratify reorganization plans.[117] OGX argued that, although the BBL did not explicitly extend to offshore entities, OGX's offshore affiliates should be included in the RJ because they did not do business in Austria, they did not produce any revenue, and they were created for tax purposes only.[118] OGX further argued that a single filing in Brazil would avoid conflicting decisions from other jurisdictions. On November 21, 2013, the Brazilian court issued an order formally accepting OGPar and OGX into the RJ, but declining to accept the offshore companies.[119] However, on December 5, 2013, following an appeal of the Brazilian court's decision, a panel of Justices from the Court of Appeals of the State of Rio de Janeiro reversed the

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[113] Press Release, Óleo e Gás Participações S.A. – Em Recuperação Judicial, *Confirmation of the Company's and its Subsidiaries Judicial Recovery* (June 13, 2014), http://www.ogx.com.br/conteudo_en.asp?tipo=53352&id=0&idioma=1&conta=44&submenu=0&img=0&ano=2014 (follow 6/13/2014 Confirmation of the Company's and its Subsidiaries Judicial Recovery hyperlink).

[114] The conversion of prepetition debt to equity was completed on December 28, 2015. *See* Press Release, Óleo e Gás Participações S.A. – Em Recuperação Judicial, Delivery of ADS to creditors of Senior Notes due 2018 and 2022, (Dec. 28, 2015), http://www.ogx.com.br/conteudo_en.asp?tipo=53352&id=0&idioma=1&conta=44&submenu=0&img=0&ano=2015 (follow 06/13/2014 Confirmation of the Company's and its Subsidiaries Judicial Recovery hyperlink).

[115] Colombo & Junqueira, *supra* note 107, at 3.

[116] *Rio's Public Ministry Asks OGX for Exclusion of Offshore Assets in Bankruptcy*, Reorg Research (Nov. 11, 2013), http://platform.reorg-research.com/app#company/1952/intel/view/10960.

[117] *Id.*

[118] *See id.*

[119] Press Release, Óleo e Gás Participações S.A. – Em Recuperação Judicial, OGX Announces Decision Granting for Judicial Recovery (Nov. 21, 2013), http://www.ogx.com.br/conteudo_en.asp?tipo=53352&id=0&idioma=1&conta=44&submenu=0&img=0&ano=2013 (follow 11/21/2013 OGX announces granting for judicial recovery processing hyperlink).

initial decision barring the foreign subsidiaries from the RJ.[120] The Court of Appeals based its decision, *inter alia*, on the fact that foreign financing vehicles are common in the era of globalization. The Court of Appeals reasoned that the two foreign subsidiaries should be included in the Brazilian parent's RJ insofar as the subsidiaries only operated at the behest of the parent and served as vehicles of the Brazilian debtors.[121]

A separate cross-border issue that arose in the OGX Group restructuring related to the legality of the DIP financing. On May 30, 2014, a group of minority bondholders filed a complaint in New York State Supreme Court alleging that Deutsche Bank had acted improperly as indenture trustee for the bonds, thereby allegedly causing the minority bondholders to recover significantly less than other identically-situated bondholders.[122] The complaint alleged that upon OGX's bankruptcy, certain bondholders were permitted to invest US$215 million in DIP financing and were guaranteed a US$150 million back-stop fee paid by Deutsche Bank for the right to purchase equity at "deeply discounted prices."[123] This right, the complaint alleged, was denied to the plaintiffs, resulting in distributions to participating bondholders under the plan that would be "grossly disproportionate."[124]

Similar objections were pursued concurrently in the RJ proceedings in Brazil, where the minority bondholders were challenging the alleged discriminatory treatment of similarly situated creditors and their respective recoveries under the OGX plan of reorganization. Ultimately, on October 1, 2014, the plaintiff group and Deutsche Bank agreed to a limited stay of the New York state court action "in light of ongoing proceedings before the Brazilian courts, and without prejudice to the parties' respective positions regarding such Brazilian proceedings."[125] On December 3, 2014, the Court of Appeals of the State of Rio de Janeiro dismissed the appeals filed by the minority bondholders finding that the DIP arrangements were legal and valid and that there was no discriminatory treatment among creditors.[126] Subsequently, on April 24, 2015,

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120 *Tussle Over OGX Foreign Subsidiary Continues as a Senior Judge Reverts Previous Decision*, Reorg Research (Dec. 5, 2013), http://platform.reorg-research.com/app#company/1952/intel/view/10800.

121 *Id.*

122 Complaint ¶ 1, *Capital Ventures Int'l v. Deutsche Bank Trust Co. Ams.*, No. 651673/2014 (N.Y. Sup. Ct. filed May 30, 2014), NYSECF No. 1.

123 *Id.* ¶¶ 1-2.

124 *Id.* ¶ 3.

125 Stipulation to Stay Proceedings at 2, *Capital Ventures Int'l v. Deutsche Bank Trust Co. Ams.*, No. 651673/2014 (N.Y. Sup. Ct. filed Sept. 30, 2014), NYSCEF No. 47, *so ordered*, *Capital Ventures Int'l v. Deutsche Bank Trust Co. Ams.*, No. 651673/2014 (N.Y. Sup. Ct. Oct. 1, 2014), NYSCEF No. 49.

126 Óleo e Gás Participações S.A. – Em Recuperação Judicial, Judgment of the Appeal of Public Prosecutor Office of Rio de Janeiro State (Dec. 4, 2014), http://www.ogx.com.br/conteudo_en.asp?tipo=53352&id=0&idioma=1&conta=44&submenu=0&img=0&ano=2014 (follow 12/04/2014 Judgment of the Appeal of Public Prosecutor Office of Rio de Janeiro State).

the plaintiffs filed a stipulation of discontinuance in the New York court, discontinuing the lawsuit with prejudice.[127]

4. Model Law Analysis

Under the Model Law, the issues that arose during the OGX proceeding could have been addressed with greater certainty and efficiency. First, the court in Brazil would likely have had little difficulty recognizing that Brazil was the jurisdiction in which OGX and its foreign subsidiaries had their COMI. Under the Model Law's COMI principle, the court could have included the foreign subsidiaries in the proceedings from the outset and recognized the importance of constructing a global settlement for the entire OGX Group. Second, if Brazil had enacted the Model Law, it would have facilitated the Brazilian court's cooperation with the U.S. court pursuant to the provisions thereof.

D. OSX

OSX Brasil S.A. ("OSX"), a sister company of OGX and one of OGX's largest creditors, filed its own bankruptcy proceeding shortly after the OGX Group's filing in 2013. Although closely related to OGX, OSX's restructuring was not nearly as unified as the OGX proceeding, as OSX's foreign subsidiaries and their assets were not deemed to fall under the reach of the Brazilian court.

1. Background[128]

OSX, a publicly-held Brazilian multinational conglomerate, provided equipment and services to offshore oil and gas industries. Along with OGX, OSX was one of five companies under Eike Batista's EBX Group. OSX operated in three sectors: Naval Construction, Chartering of Exploration and Production ("E&P") Units, and Services of Operation and Maintenance ("O&M"). In the Naval Construction sector, OSX was involved in the construction, assembly and integration of E&P units, such as fixed and floating production platforms and drilling rigs. The company's chartering sector focused on the charter of E&P units to companies in the oil and gas sector. OSX leased three E&P units: OSX-1, OSX-2 and OSX-3. In the O&M sector, OSX offered services and solutions for its customers.

The OSX group of companies (the "OSX Group") consisted primarily of the holding company OSX, its Brazil-based subsidiaries, OSX Construção Naval S.A. ("OSX Construction"), OSX Serviços Operacionais Ltda ("OSX O&M"), and its Netherlands-based leasing units. The OSX Group derived its main source of revenue from leasing its E&P units. Two of OSX's E&P units were originally leased to its sister company, OGX. The assets of each

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[127] Stipulation of Discontinuance at 1, *Capital Ventures Int'l v. Deutsche Bank Trust Co. Ams.*, No. 651673/2014 (N.Y. Sup. Ct. filed Apr. 24, 2015), NYSCEF No. 91, *so ordered*, *Capital Ventures Int'l v. Deutsche Bank Trust Co. Ams.*, No. 651673/2014 (N.Y. Sup. Ct. May 13, 2014), NYSCEF No. 92.

[128] Information in this section is taken from the OSX Group's *Petição Recuperação Judicial* [Judicial Recovery Petition], (Nov. 11, 2013) (text only available in Portuguese), http://www.osx.com.br/conteudo_en.asp?tipo=57566&id=0&idioma=1&conta=44&submenu=0&img=0&ano=2013 (follow 11/11/2013 Judicial Recovery Request (only in Portuguese) hyperlink).

E&P unit were used as collateral for various debt issuances: OSX-1 and OSX-2 were collateral for a syndicated loan, and OSX-3 was collateral for a US$500 million 9.25% bond issuance due in 2015 (the "2015 Notes"). If OSX were to sell all of its E&P units at expected market value, it was anticipated that sufficient proceeds would be generated to pay all related debt and leave approximately R$2 billion (US$860 million) in equity.

OSX was among the largest creditors of OGX, with over US$1.5 billion in claims for lease related and other payments. After OGX filed its RJ proceeding in October 2013, OSX faced significant losses in revenue and realized it would be unable to make its December 20, 2013 coupon payment on the 2015 Notes. Accordingly, OSX determined to file for bankruptcy and to renegotiate its contracts with OGX for the charter of its platforms.

2. Restructuring

On November 11, 2013, OSX, OSX Construction and OSX O&M commenced RJ proceedings seeking relief under the BBL for the OSX Group's onshore companies.[129] On November 25, 2013, the Brazilian court issued an order formally accepting OSX into the RJ. Notably, OSX determined not to include its platforms in the Brazilian RJ proceeding, as they were leased by Dutch subsidiaries and governed under Dutch law.[130]

In January 2014, one of OSX's creditors sought an injunction in a Dutch court requiring a lien on the shares and assets of OSX's Dutch leasing unit.[131] The Dutch court approved the injunction over OSX's argument that the injunction was subject to judicial review in Brazil. OSX argued that the petitioning creditor was listed as a creditor in the RJ proceeding and that the injunction should be resolved as part of the RJ proceeding.[132] On July 10, 2014, OSX received a Dutch court's approval to suspend payments for 18 months on unsecured debt related to the OSX-1 and OSX-2 leasing units. OSX had sought this relief to prevent certain lenders from seeking "improper advantages" as the company continued to restructure in Rio de Janeiro.[133] The suspension of payments was intended to ensure the company's continuity while it pursued its restructuring plan in the RJ proceeding.

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[129] Press Release, OSX Brasil S.A., OSX Requests Judicial Recovery (Nov. 11, 2013), http://www.osx.com.br/conteudo_en.asp?tipo=57566&id=0&idioma=1&conta=44&submenu=0&img=0&ano=2013 (follow 11/11/2013 OSX requests judicial recovery hyperlink).

[130] Press Release, OSX Brasil S.A., OSX Announces Granting for Judicial Recovery Processing (Nov. 26, 2013), http://www.osx.com.br/conteudo_en.asp?tipo=57566&id=0&idioma=1&conta=44&submenu=0&img=0&ano=2013 (follow 11/26/2013 OSX announces granting for judicial recovery processing hyperlink).

[131] Press Release, OSX Brasil S.A., OSX: Clarifications on Acciona Case (Jan. 23, 2014), http://www.osx.com.br/conteudo_en.asp?tipo=57566&id=0&idioma=1&conta=44&submenu=0&img=0&ano=2014 (follow 1/23/2014 OSX: Clarification on Acciona case hyperlink).

[132] *See id.*

[133] Press Release, OSX Brasil S.A., *OSX Announces the Approval of Suspension of Payments for Its Subsidiary OSX WHP 1&2 Leasing BV in the Netherlands* (July 10, 2014), http://www.osx.com.br/conteudo_en.asp?tipo=57566&id=0&idioma=1&conta=44&submenu=0&img=0&ano=2014 (follow 7/10/2014 OSX announces the approval of Suspension . . . hyperlink).

On March 17, 2015, after OGX and OSX announced a six-month suspension of the charter payments for the OSX-3 E&P unit, the trustee for OSX's bondholders filed bankruptcy petitions with respect to various OSX entities in the Amsterdam District Court (with respect to OSX Leasing Group BV) and the Hague District Court (with respect to OSX 3 Holdco BV and OSX 3 Holding BV). The trustee's asserted basis for filing the bankruptcy petitions was that an event of default had occurred with respect to the US$560 million of outstanding bonds and that there were amounts due and payable pursuant to guarantees made by the subject OSX entities.[134] In response, on March 27, 2015, OSX sought bankruptcy protection in the Netherlands for certain subsidiaries, including OSX 3 Holding BV, OSX 3 Holdco BV, and OSX Leasing Group BV.[135]

On April 29, 2015, the Dutch court recognized the bankruptcies of OSX 3 Holding BV and OSX 3 Holdco BV and suspended certain payments for OSX Leasing Group BV.[136] The suspension applied to all collection efforts with respect to unsecured debt of OSX Leasing Group BV, and it was intended to allow OSX Leasing Group BV to restructure its debt and present a plan to creditors under the supervision of the court and a court-appointed administrator. The suspension encompassed only the obligations of OSX Leasing Group BV, which included the 2015 Notes. On July 15, 2015, the Dutch court granted an order declaring that OSX Leasing Group BV had entered bankruptcy in the Netherlands with immediate effect, appointing a bankruptcy trustee of OSX Leasing Group BV, and commencing the liquidation of OSX Leasing Group BV.[137]

3. Cross-Border Issues

Throughout the restructuring of the OSX Group, the concurrent proceedings before the Dutch and Brazilian courts went forward largely without any cooperation or collaboration between the courts. Not only did the Brazilian court fail to recognize the Dutch proceeding, but it also issued an order that was arguably in direct conflict with the Dutch court's jurisdiction. Shortly after the commencement of the Dutch proceeding, OSX requested that the Brazilian court pierce the corporate veil of the Dutch companies in order to reach the OSX-3 E&P unit as an asset of the estate for the purposes of OSX's reorganization. The Brazilian court granted the

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134 *OSX Brasil Bond Trustee Sends Notice of Default on $560M in Bonds, Calls for Payment on the Debt*, Reorg Research (Mar. 19, 2015), http://platform.reorg-research.com/app#company/1871/intel/view/6176.

135 *Amsterdam Court Declares OSX Leasing Group Bankruptcy in the Netherlands, Appoints Trustee*, Reorg Research (July 15, 2015), http://platform.reorg-research.com/app#company/1871/intel/view/13983; *OSX Brasil Requests Netherlands Bankruptcy Protection for Various Subsidiaries*, Reorg Research (Mar. 27, 2015), http://platform.reorg-research.com/app#company/1871/intel/view/6054.

136 *OSX Gets Approval From Dutch Court to Suspend Payments for OSX Leasing Group, Certain OSX-3 Group Subsidiaries*, Reorg Research (Apr. 29, 2015), http://platform.reorg-research.com/app#company/1871/intel/view/12558.

137 *Amsterdam Court Declares OSX Leasing Group Bankruptcy in the Netherlands, Appoints Trustee*, Reorg Research (July 15, 2015), http://platform.reorg-research.com/app#company/1871/intel/view/13983.

relief and ordered the attachment of the OSX-3 E&P unit, the very same unit for which the Dutch court had ordered a liquidation as part of the Dutch proceeding.[138]

Although the Brazilian court's decision was appealed and later reversed by the Rio de Janeiro Court of Appeals,[139] the dynamic demonstrates the type of issues that arise when there are no procedures in place for acknowledging foreign proceedings. As one commentator has noted:

> If the decision of the lower court had been upheld, there would be an unsolvable conflict between Brazilian and Dutch jurisdictions, since the former pierced the veil of all Dutch subsidiaries and ordered the turnover of the asset to the parent company (OSX Brasil S.A.), whereas the latter determined the liquidation of the direct parent of the subsidiary (OSX3 Leasing BV, the owner of the vessel) and, thus, all of its assets were under its supervision (the shares of the subsidiary and it's [sic] respective assets).[140]

This "unsolvable conflict" could have easily resulted in an inefficient race to the asset and a recovery that favored creditors in one jurisdiction over another.

4. Model Law Analysis

Under the Model Law, the conflict between the two courts could have been avoided entirely. If the Model Law were in place in Brazil, the Dutch liquidator would have been able to file in the Brazilian court for recognition of the Dutch proceeding. This would have created an avenue for the Dutch liquidator to communicate directly with the Brazilian court and ensure that any decisions by the Dutch court could be recognized and enforced in Brazil, allowing the Brazilian court to effectively recognize issues that were more properly resolved in the Dutch proceeding and avoid issuing conflicting opinions.[141] Rather than an unsolvable conflict, there would have been a procedure for addressing the ancillary proceeding to the benefit of all parties involved.

E. OAS

The restructuring of the OAS Group (defined below) demonstrates a continued evolution toward a more universalist approach to the treatment of multinational restructurings under the BBL. From the outset of the proceedings, the Brazilian judge allowed the OAS Group's foreign subsidiaries to join the RJ proceeding (arguably by looking to the OGX Group restructuring as

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[138] *See* Guilherme Da Costa, *Why Brazil Should Adopt the UNCITRAL Model Law on Cross-Border Insolvency*, inBRAZIL.net (July 7, 2016), http://www.inbrazil.net/single-post/2016/07/07/WHY-BRAZIL-SHOULD-ADOPT-THE-UNCITRAL-MODEL-LAW-ON-CROSSBORDER-INSOLVENCY.

[139] *Id.*

[140] *Id.*

[141] *Id.*

precedent). While this appeared to be a step in the right direction, it created several cross-border issues that were not easily resolved under the BBL.

1. Background[142]

OAS S.A. ("OAS"), a privately-owned Brazilian multinational conglomerate, consisted primarily of construction, infrastructure, and investment companies. Prior to its bankruptcy, OAS was Brazil's fourth largest builder, generating approximately 110,000 jobs on 80 different infrastructure projects worldwide. The OAS group of companies (the "OAS Group") consisted primarily of OAS and its subsidiaries, including Construtora OAS S.A. ("OAS Construction"), OAS Investimentos S.A. ("OAS Investimentos"), OAS Investments GmbH ("OAS Investments"), and OAS Finance Limited ("OAS Finance").

The OAS Group's services included public concessions, construction, engineering, planning, execution, and works management for the transportation, power, sanitation, infrastructure, and real estate industries. The OAS Group provided services in 22 countries in Latin America, the Caribbean, and Africa. Its principal operating activities were organized into two major divisions: engineering, which engaged in heavy civil engineering and construction projects, and investments, which focused on private investments in infrastructure and public and private services concessions.

Through its investments division, OAS held stakes in a number of valuable enterprises, including a 24.4 % stake in Invepar (the "Invepar Shares"), which is one of the largest concession companies in Brazil, comprising 12 public-service concessionaires in the toll road, urban mobility and air transportation industries. As of December 31, 2014, the book value of OAS Group assets was approximately R$2.8 billion, the vast majority of which were located in Brazil.

The OAS Group issued debt primarily through OAS's subsidiaries, OAS Investments and OAS Finance. As of March 31, 2015, the OAS Group's financial indebtedness totaled approximately R$9.2 billion. Approximately R$400 million of the OAS Group's debt was secured. The OAS Group had only one secured creditor, FI-FGTS, which held a security interest in 5.95% of total shares in Invepar, which were pledged in connection with a R$400 million local debenture. Approximately R$6.1 billion of the OAS Group's debt was unsecured, with R$2.18 billion of the unsecured debt arising under various debt securities issued in both Brazil and the United States. The United States debt instruments consisted of approximately US$1.78 billion in notes governed by New York law. Specifically, OAS Finance issued (a) 8.875% perpetual notes (the "Perpetual Notes") in the aggregate principal amount of US$500 million and (b) 8.00% Senior Notes due in 2021 (the "2021 Notes," and together with the Perpetual Notes, the "OAS Finance Notes") in the aggregate principal amount of US$400 million. OAS Investments issued (y) 8.25% Senior Notes due in 2019 (the "2019-I Notes") in the aggregate principal amount of US$500 million and (z) 8.25% Senior Notes due in 2019 (the "2019-II Notes," and together with the 2019-I Notes, the "OAS Investments Notes," and together with the OAS Finance Notes, the

[142] The information in this section is taken from the Verified Petition for Recognition of Brazilian Bankruptcy Proceedings and Motion for Order Granting Related Relief Pursuant to 11 U.S.C. §§ 1515, 1517, 1520 and 1521, *In re OAS S.A.*, No. 15-10937 (SMB) (Bankr. S.D.N.Y. filed Apr. 15, 2015), ECF No. 3.

"Notes") in the aggregate principal amount of US$375 million. OAS and OAS Construction issued guarantees for all of the Notes.

In March 2014, the official investigation of Petrobras commenced as a consequence of an ongoing Brazilian federal government-led anti-corruption case, known as the Lava Jato Petrobras scandal (the "Car Wash Scandal"), involving most of Brazil's largest construction companies and at least 14 suppliers. On November 21, 2014, Petrobras released a list of 23 firms – including OAS – that were temporarily blocked from competing for new contracts with Petrobras, leading Standard & Poor's to downgrade OAS to 'B+' from 'BB-', even though only approximately 3% of the OAS Group's revenues were derived from contracts with Petrobras. The Car Wash Scandal and its collateral effects caused the OAS Group to lose several contracts and put a number of projects on hold. These factors, coupled with the recent economic conditions in Brazil, forced OAS to file restructuring proceedings.

2. Restructuring

On March 31, 2015, OAS, OAS Construction, OAS Investimentos, OAS Investments, and OAS Finance commenced RJ proceedings in Brazil. On April 1, 2015, the Brazilian court issued an order formally accepting each of the debtors into the RJ. The Brazilian court noted in the order that "[e]ven though Brazil has not yet adopted the UNCITRAL Legal Model for transnational bankruptcies, there is nothing to prevent companies incorporated abroad, but with Brazil as the principal center of their activities (COMI - Center of Main Interest), and unequivocally controlled and made up of members of a Brazilian economic business group, from petitioning the Brazilian Judiciary for the legal protection established in Law 11.101/05."[143]

On April 15, 2015, OAS, OAS Construction, OAS Investimentos, OAS Investments, and OAS Finance filed Chapter 15 cases in the U.S. Bankruptcy Court for the Southern District of New York (the "OAS Chapter 15 Cases").[144] The U.S. court issued an order recognizing the RJ proceedings as foreign main proceedings on August 3, 2015.[145]

On July 14, 2015, the Brazilian court approved a R$800 million DIP financing provided by Brookfield Infrastructure ("Brookfield") to OAS, determining that the financial support was necessary for OAS to continue as a going concern.[146] At the time, Brookfield was seen as the most likely potential buyer of OAS's Invepar Shares. Under the DIP agreement, OAS was

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143 Declaration of Renato Fermiano Tavares Pursuant to 28 U.S.C. § 1746 in Support of Verified Petition for Recognition of Brazilian Bankruptcy Proceedings and Motion for Order Granting Related Relief Pursuant to 11 U.S.C. §§ 1515, 1517, 1520 and 1521, Ex. B, at 4-5, *In re OAS S.A.*, No. 15-10937 (SMB) (Bankr. S.D.N.Y. filed Apr. 15, 2016), ECF No. 4-2 (Brazilian Bankruptcy Court Order at 3328-3329 (English translation)).

144 Verified Petition for Recognition of Brazilian Bankruptcy Proceedings, *supra* note 142.

145 Order Granting Recognition of Foreign Main Proceedings, *In re OAS S.A.*, No. 15-10937 (SMB) (Bankr. S.D.N.Y. Aug. 3, 2015), ECF No. 85.

146 *Judge Approves OAS 800M Reais DIP Financing Agreement With Brookfield*, Reorg Research (July 16, 2015), http://platform.reorg-research.com/app#company/1962/intel/view/14003.

required to inform Brookfield of any third-party proposal made to OAS to acquire the Invepar Shares, and Brookfield was given a match right.[147]

On December 17, 2015, OAS creditors, including an *ad hoc* group of bondholders, approved the company's restructuring plan (the "OAS Plan").[148] The OAS Plan provided for an auction with respect to the Invepar Shares, with a R$1.35 billion (US$347 million) stalking horse bid by Brookfield serving as the minimum bid (the "Minimum Sale Price") and with certain creditors having the right (by operation of the OAS Plan) to credit bid for the asset at the Minimum Sale Price through a special purpose vehicle ("SPV").[149]

On January 26, 2016, the Brazilian court approved the OAS Plan, setting an auction date of March 14, 2016.[150] Subsequently, on February 2, 2016, Brookfield withdrew its stalking horse bid for the Invepar Shares, and no bids were made at the March 14 auction.[151] Pursuant to the terms of the OAS Plan, a credit bid of a portion of claims in respect of the Notes and other debt equal to the Minimum Sale Price was deemed to have been submitted for the purchase of the Invepar Shares.[152] The credit bid triggered a right of first refusal (the "ROFR") held by the shareholders of Invepar other than the OAS Group. The shareholders of Invepar did not elect to exercise the ROFR.[153] As provided in the OAS Plan, because there was no winning bidder at the Invepar Auction and the other shareholders did not exercise the ROFR, the Invepar Shares were to be distributed to the creditors' SPV on or before the OAS Plan closing date. However, certain creditors of the OAS Group filed appeals contesting the provisions of the OAS Plan and the order confirming the OAS Plan, including those relating to the distribution of proceeds of the Invepar Shares and the transfer of such shares to the SPV. The appeals were rejected by majority opinion of a panel of five Justices of the Court of Appeals of the State of São Paulo, pending publication of the Official Gazette of the dissenting opinions. As of the writing of this paper, the OAS Plan is in the process of being implemented, including the transfer of the Invepar Shares to the SPV.

On June 6, 2016, OAS filed a motion in the OAS Chapter 15 Cases seeking entry of an order authorizing the issuance of new notes and warrants (the "New Notes and Warrants") to replace certain notes in accordance with the terms of the OAS Plan.[154] It is a termination event under the OAS Plan if the New Notes and Warrants are not distributed within 4 days of the

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147 *See id.*

148 Petitioner's Limited Motion for an Order Granting Relief Pursuant to 11 U.S.C. §§ 105(a), 1507(a), 1509(b)(2)-(3), 1519(a), 1521(a) and 1525(a) in Aid of Foreign Proceedings and Confirmed Brazilian Reorganization Plan at 3-5, *In re OAS S.A.*, No. 15-10937 (SMB) (Bankr. S.D.N.Y. filed June 6, 2016), ECF No. 92.

149 *See id.* at 9-10.

150 *Id.* at 8-9.

151 *Id.* at 8.

152 *Id.*

153 *Id.*

154 *Id.*

closing of the sale of the Invepar Shares. As of the writing of this paper, a hearing on the motion for the New Notes and Warrants was scheduled for March 21, 2017.[155]

3. Cross-Border Issues

Significant cross-border issues arose in the OAS restructuring. On April 16, 2015, following the commencement of the OAS Chapter 15 Cases, a group of creditors of OAS Finance, a British Virgin Islands ("BVI") company, including two bondholders, Aurelius Capital Management LP ("Aurelius") and Alden Global Capital LLC ("Alden"), filed an application with the BVI court requesting that OAS Finance be liquidated and that joint provisional liquidators (the "JPLs") be appointed for OAS Finance.[156] On the same day, the BVI court placed OAS Finance into provisional liquidation and appointed the petitioners as the JPLs of OAS Finance.[157]

On April 28, 2015, the JPLs filed an application with the Brazilian court to have OAS Finance excluded from the Brazilian proceeding and to instead allow OAS Finance to participate in the RJ purely as a creditor (the "Exclusion Motion").[158] In the Exclusion Motion, the JPLs argued that OAS Finance was not eligible to be restructured under the BBL as it was a funding entity without any active business, employees, or hard assets in Brazil. Subsequently, on May 18, 2015, the JPLs filed a Chapter 15 case in the U.S. (the "JPLs' Chapter 15 Case"), seeking to have the BVI proceeding recognized as the foreign main proceeding for OAS Finance.[159]

The commencement of the BVI proceeding, the Exclusion Motion, and the JPLs' Chapter 15 Case represented an attempt by certain bondholders to pursue remedies outside of the Brazilian proceeding. Ultimately, the courts in Brazil and the United States were not swayed by the JPLs' initiatives.[160] First, the Brazilian court refrained from ruling on the Exclusion Motion, allowing OAS time to formulate a plan that included all of its subsidiaries. Second, the U.S. court determined that it would not rule on the JPLs' Chapter 15 Case pending the outcome of the OAS Chapter 15 Cases.[161] These actions ultimately helped persuade the dissenting bondholders to engage in negotiations with OAS, and to eventually agree to the OAS Plan and enter a

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155 Notice of Adjournment of Hearing, *In re OAS S.A.*, No. 15-10937 (SMB) (Bankr. S.D.N.Y. Mar. 3, 2017), ECF No. 128.

156 Petitioner's Limited Motion, *supra* note 148, at 7.

157 *Id.*

158 Verified Petition Under Chapter 15 of the Bankruptcy Code for Recognition of a Foreign Main Proceeding, and Requesting a Temporary Restraining Order, a Preliminary Injunction, and Related Relief at 23, *In re OAS Fin. Ltd.*, No. 15-11304 (SMB) (Bankr. S.D.N.Y. filed May 18, 2015), ECF No. 2.

159 *Id.*

160 In a hearing concerning the BVI Chapter 15 Case, Judge Stuart Bernstein stated that the "record could [] support a finding that [the JPLs] filed the BVI proceeding simply to derail the Brazilian proceeding." Transcript Regarding Hearing Held on 8/18/2015 3:04PM Re: Closing Argument at 24:3-6, *In re OAS Fin. Ltd.*, No. 15-11304 (SMB) (Bankr. S.D.N.Y. filed Aug. 18, 2015), ECF No. 68.

161 Petitioner's Limited Motion, *supra* note 148, at 7.

forbearance and settlement agreement.[162] The settlement required the settling bondholders to dismiss with prejudice all pending actions, including the JPLs' Chapter 15 Case, within five days of the OAS Plan's closing date.[163]

4. Model Law Analysis

Although the parties were eventually able to reach a consensual resolution on a restructuring for OAS, the path to settlement was complicated by the BBL's lack of provisions that address cross-border issues. As noted above, the BBL contains no provision that allows Brazilian courts to extend their reach to offshore subsidiaries. Had the Brazilian court granted the Exclusion Motion, it would have likely required OAS to seek to have its plan approved in the BVI as well as Brazil, creating uncertainties about the outcome and enforceability of the plan approved in Brazil in respect to the BVI subsidiaries. Further, it would have resulted in significant confusion and court costs, as the Brazilian court would have had no way to consider and recognize the BVI proceeding as an ancillary proceeding.[164]

Under the Model Law's modified universalist approach, the OAS Group's COMI would arguably have been in Brazil and the Brazilian court would have had authority over the foreign subsidiaries in the RJ proceedings under law. This would have provided greater certainty and reduced the risk posed by creditors filing litigations in other jurisdictions. Furthermore, the debtors and creditors would have had greater confidence in the Brazilian court's ability to confirm a plan that could reach all of the OAS Group's assets, reducing the need for costly proceedings in other jurisdictions.

F. Oi[165]

The restructuring of Oi S.A. ("Oi") and its subsidiaries (collectively, the "Oi Group") is the most recent multi-billion dollar cross-border restructuring proceeding under the BBL. In June 2016, the Oi Group, one of the world's largest integrated telecommunications service providers, commenced an RJ proceeding in Brazil and applied for recognition of the RJ proceeding as a foreign main proceeding in the United States and the United Kingdom.[166] In

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[162] *See id.* at 7-9.

[163] *See id.* at 8-9.

[164] *See* Mark D. Bloom & Vitor Araujo, *OAS Group: A Tale of Two Chapter 15 Cases in the United States*, INSOL World, Fourth Quarter 2015, at 8, 10 (discussing how the BVI and Brazilian proceedings went on "with little apparent coordination between them").

[165] The Oi Group's insolvency proceedings are ongoing as of the writing of this paper. Accordingly, the Authors reserve comment on the merits of the Oi Group's case.

[166] *See* Verified Petition for Recognition of the Brazilian RJ Proceeding and Motion for Order Granting Related Relief Pursuant to 11 U.S.C. §§ 1515, 1517, and 1520, *In re OI S.A.*, No. 16-11791 (SHL) (Bankr. S.D.N.Y. filed June 21, 2016), ECF No. 3; Declaration of Ojas N. Shah Notifying the Court of a Change of Status Pursuant to 11 U.S.C. § 1518 and 28 U.S.C. § 1746, ¶ 9, *In re OI S.A.*, No. 16-11791 (SHL) (Bankr. S.D.N.Y. filed July 13, 2016), ECF No. 32 (alterations in original).

August 2016, certain subsidiaries of Oi filed proceedings in a Dutch bankruptcy court to suspend payments, and a Dutch Administrator was appointed.[167]

As of the writing of this paper, the Oi Group's insolvency proceedings remain ongoing. There is currently considerable discussion relating to the procedures, including the Dutch suspension of payments proceedings, since neither Dutch nor Brazilian law expressly allows for recognition of foreign proceedings, and the Dutch and Brazilian proceedings are going forward simultaneously with limited cooperation between the courts.[168] It remains to be seen what cross-border issues will arise and how any such issues will be resolved. Nevertheless, and consistent with the discussion above, it may be argued that adoption of the Model Law by Brazil could result in a more efficient administration of the Oi Group restructuring, and greater predictability that could benefit creditors and other stakeholders.

VI. Conclusion and Proposal to UNCITRAL

Brazil has experienced a significant increase in insolvency proceedings in recent years as a result of its ongoing and severe recession. Several of these recent proceedings have involved major conglomerates with significant cross-border operations. As outlined above, these recent insolvencies demonstrate the limitations of the BBL and of a territorial approach to cross-border restructurings. The BBL does not formally provide Brazilian courts with the ability to recognize foreign (main or non-main) proceedings or to cooperate or coordinate with foreign courts. As a result, Brazilian courts have adopted *ad hoc* measures to address cross-border issues. While these *ad hoc* measures have facilitated several restructurings, the application of these measures varies from court to court and case to case, resulting in uncertainty for Brazilian companies involved in multi-jurisdictional restructurings and their creditors and stakeholders.

The Model Law addresses many of the cross-border insolvency issues that have arisen, and will continue to arise, as an increasing number of Brazilian companies and their affiliates are subject to multi-jurisdictional restructurings. In this regard, the Model Law would provide Brazilian courts with a statutory basis for recognizing foreign proceedings and for cooperation and coordinating with those proceedings. Adoption of the Model Law would thereby facilitate the development of protocols for dealing with foreign affiliates, assets, and jurisdictions. An evolution by Brazil from a territorial approach to the modern modified universalist regime incorporated into the Model Law would, therefore, reduce dependence upon *ad hoc* measures that have heretofore been adopted in certain cases and provide greater certainty to parties involved in international restructurings with Brazilian component. Adoption of the Model Law (or a modified version of it) would thereby result in more predictable outcomes for such parties,

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[167] *See* Declaration of Jasper R. Berkenbosch, Solely in His Capacity as Administrator of Oi Brasil Holdings Coöperatief U.A. ¶¶ 5-6, *In re OI S.A.*, No. 16-11791 (SHL) (Bankr. S.D.N.Y. filed Nov. 14, 2016), ECF No. 57.

[168] Oi has noted that "[a]dverse actions in the Netherlands pose a particular threat to [the Oi Group] because the Netherlands has no official process through which [the Oi Group] may petition the Dutch court to formally recognize and grant comity to the RJ Proceeding." Third Declaration of Ojas N. Shah Notifying the Court of a Change of Status Pursuant to 11 U.S.C. § 1518 and 28 U.S.C. § 1746, ¶ 5, *In re OI S.A.*, No. 16-11791 (SHL) (Bankr. S.D.N.Y. filed Aug. 23, 2016), ECF No. 48.

encourage increased investment in the Brazilian market, and further the rehabilitation of Brazilian companies and the wider Brazilian economy by extension.

Nonetheless, the authors' conclusion is based upon the analysis set forth above and is therefore limited by the data that is currently available. To supplement this data, the authors propose that UNCITRAL authorize Working Group V (Insolvency Law) to study the impact that the Model Law has had on restructurings in, and on the economies of, the jurisdictions in which the Model Law has been adopted. There is no other international legal authority or body that is better equipped to undertake such a study or to report its findings. The authors anticipate that the study would find that adoption of the Model Law has facilitated international restructurings and encouraged investment by providing more predictable outcomes in the jurisdictions in which it has been adopted. A report of these findings could prove helpful to Member States, like Brazil, that have not yet incorporated the Model Law into their respective domestic insolvency legal regimes. Indeed, it may encourage adoption of the Model Law in Brazil and elsewhere. A study of the kind that the authors propose could also provide guidance on how the Model Law might be improved to further goals for which it was adopted. Finally, UNCITRAL could also consider offering assistance to Brazil to address any inquiries that it may have as to how the Model Law has been implemented in other jurisdictions and the impact that the Model Law has had on the economy in the jurisdictions where it has been adopted. UNCITRAL may also consider providing such assistance to other countries in which adoption of the Model Law is being considered.