WHITE & CASE LLP
1221 Avenue of the Americas
New York, New York 10020-1095
(212) 819-8200
John K. Cunningham
Thomas E. MacWright
Samuel P. Hershey

111 South Wacker Drive
Chicago, IL 60606
(312) 881-5400
Jason N. Zakia (*admitted pro hac vice*)

Southeast Financial Center
200 South Biscayne Blvd., Suite 4900
Miami, Florida 33131
(305) 371-2700
Richard S. Kebrdle (*admitted pro hac vice*)

Attorneys for Andrew Childe,
as Petitioner and Foreign Representative

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	)	
Serviços de Petróleo Constellation S.A., *et al.*,[1]	)	Case No. 18-13952 (Jointly Administered)
Debtors in a Foreign Proceeding.	)	Chapter 15

SEVENTH DECLARATION OF SAMUEL P. HERSHEY

I, SAMUEL P. HERSHEY, declare under penalty of perjury, as follows:

1. I am a member of the firm of White & Case LLP ("White & Case"), counsel to Andrew Childe (the "Petitioner" or the "Foreign Representative"), in his capacity as the duly-authorized foreign representative of the jointly-administered judicial reorganization

[1] The debtors (the "Chapter 15 Debtors") in these chapter 15 cases are as follows: Serviços de Petróleo Constellation S.A.; Lone Star Offshore Ltd.; Gold Star Equities Ltd.; Olinda Star Ltd. (in Provisional Liquidation) ("Olinda"); Star International Drilling Limited; Alpha Star Equities Ltd.; Snover International Inc.; Arazi S.à.r.l. ("Arazi"); Constellation Oil Services Holding S.A.; and Constellation Overseas Ltd.

(*recuperação judicial* or "Brazilian RJ Proceeding") of Serviços de Petróleo Constellation S.A. and its affiliated debtors (the "Debtors") pending in the 1st Business Court of Rio de Janeiro (the "Brazilian RJ Court") pursuant to Federal Law No. 11.101 of February 9, 2005 (the "Brazilian Bankruptcy Law") of the laws of the Federative Republic of Brazil ("Brazil"). I am an attorney at law, qualified to practice in New York.

2. I submit this declaration in support of the *Omnibus Motion of the Foreign Representative for Entry of an Order (I) Approving the Withdrawal by the Foreign Representative of the Verified Petition for Recognition of the Brazilian RJ Proceeding as to Olinda Star Ltd. (In Provisional Liquidation) [ECF No. 7] and Dismissal of its Chapter 15 Case, and (II) Granting the Foreign Representative's Renewed Request for Recognition of the Brazilian RJ Proceeding as to Arazi S.à.r.l. Pursuant to 11 U.S.C. §§ 1515, 1517 and 1520 and Giving Full Force and Effect to the Brazilian Reorganization Plan as to Arazi S.à.r.l. Pursuant to 11 U.S.C. §§ 105(a), 1507(a), 1521(a) and 1525(a)* (the "Motion") [ECF No. 197].[2]

3. Attached hereto as Exhibit A is a true and correct copy of the Brazilian Court of Appeals Majority Opinion dated March 26, 2019 and English Translation.

4. Attached hereto as Exhibit B is a true and correct copy of the Clarification Decision and Certified English Translation.

5. Attached hereto as Exhibit C is a true and correct copy of the Olinda Term Sheet.

6. Attached hereto as Exhibit D is a true and correct copy of Olinda's resolution to propose the Olinda BVI Scheme.

7. Attached hereto as Exhibit E is a true and correct copy of the report of the Scheme Administrator of the Olinda BVI Scheme.

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[2] Capitalized terms used but not defined herein have the meanings ascribed to them in the Motion.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 6, 2020

New York, New York

Samuel P. Hershey

EXHIBIT A

Brazilian Court of Appeals Majority Opinion

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Agravo de Instrumento nº 0070417-46.2018.8.19.0000
Agravante: Ministério Público do Estado do Rio de Janeiro
Agravados: Serviços de Petróleo Constellation S.A. em recuperação judicial e outros
Desembargador Eduardo Gusmão Alves de Brito Neto

ACÓRDÃO

Agravo de Instrumento. Direito Empresarial e Processual. Recuperação judicial de empresas estrangeiras. Consolidação Substancial. Sigilo dos dados bancários e da remuneração dos administradores das sociedades recuperandas.

1- A jurisdição brasileira, em se tratando de recuperação judicial e falência, obedece ao Princípio da Territorialidade, ou Grab Rule, pela qual se limita a atuação do juiz nacional às sociedades, brasileiras ou estrangeiras, que possuem bens e atividade econômica em território brasileiro, o que ademais se extrai do artigo 3º, 2ª parte, da Lei 11.101, que ao aludir à sede da filial de empresa estrangeira, sinaliza seu tratamento como verdadeiro patrimônio separado.

2- A jurisdição para a recuperação das subsidiárias, em se tratando de grupos econômicos, e mercê da autonomia das diversas personalidades jurídicas, não é determinada pelo Centro de Principal Interesse do grupo, entendido como síntese resultante da atividade econômica das diversas sociedades, que serão recuperadas, no plano internacional, em tantos lugares quantos forem os países em que possuírem seu patrimônio, sem prejuízo de que

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outras jurisdições, segundo seu respectivo ordenamento, atribuam a um dos processos status de principal.

3- O Centro de Principal Interesse, de todo modo, não pode ser determinado pela simples mensuração do local em que situada a mais destacada zona de atuação da empresa, sob o ponto de vista econômico, ao menos para a finalidade de determinar a jurisdição a ser utilizada.

4- Reconhecimento de jurisdição brasileira que se limita, em obediência ao Princípio da Territorialidade, às sociedades estrangeiras com patrimônio em território nacional.

5- Restringem-se as hipóteses da consolidação substancial por ordem do juiz àqueles casos de confusão patrimonial e abuso de personalidade jurídica como instituto de defesa da totalidade dos credores. Fora dessa hipótese, deve a consolidação ser aprovada pelos próprios credores, em listas separadas, sem que possa, como regra, substituir o julgamento dos credores pela opinião judicial acerca da melhor forma de tutelar seus interesses.

6- Consolidação substancial que, do que se extrai das razões e pareceres, reproduziria no Brasil o instituto americano da substantive consolidation, sem previsão expressa naquele ordenamento e deferido em juízo de equidade. Evidências, todavia, de que a substantive consolidation tem aplicação restrita às hipóteses da falência. Recuperação judicial a que corresponde figura diversa, de Joint Administration, prevista na Rule of Bankruptcy Procedure em que a possibilidade da votação pelo grupo, como conjunto, do plano (per plan), a oposição à aprovação por devedor (per debtor), não foi reconhecida claramente até o julgamento, em 25 de

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janeiro de 2018, pela Corte de Apelação do 9º Circuito da Justiça Federal Americana, In Re Transwest Resort Properties.

7- Os documentos exigidos com o requerimento da recuperação passam a integrar o contraditório e não podem ser sonegados às próprias partes, donde a nulidade de decisão que limita seu acesso ao juiz e ao Membro do Ministério Público.

8- Recurso parcialmente provido para excluir três das quatorze empresas estrangeiras do processo, indeferir a consolidação substancial obrigatória e assegurar o acesso das partes a todos os documentos obrigatórios listados no artigo 51 da Lei 11.101.

Vistos, relatados e discutidos estes autos do **Agravo de Instrumento nº 0070417-46.2018.8.19.0000**, em que é agravante Ministério Público do Estado do Rio de Janeiro e agravados Serviços de Petróleo Constellation S.A. em recuperação judicial e outros.

ACORDAM os Desembargadores da Décima Sexta Câmara Cível do Tribunal de Justiça do Estado do Rio de Janeiro, por unanimidade, em **dar parcial provimento ao recurso,** na forma do voto do Relator.

RELATÓRIO

O Ministério Público do Estado do Rio de Janeiro interpôs o presente agravo de instrumento contra decisão do juízo da 1ª Vara Empresarial da Capital que deferiu o processamento da recuperação judicial do chamado grupo Constellation, em um total de 18 empresas dedicadas à prospecção de petróleo em

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terra e na costa brasileira. Desta decisão diverge o Ministério Público porque teria reconhecido a competência da justiça brasileira para a chamada recuperação transnacional, a incluir empresas do grupo sediadas no exterior, porque ignorou a não apresentação e documentos obrigatórios para o deferimento do processamento e por último porque adotou a chamada consolidação substancial.

Sobre a consolidação substancial pondera sobre a diferença conceitual, reconhecida em doutrina, entre esta e a chamada consolidação processual. Por consolidação processual tem-se o litisconsórcio entre diversas empresas de um mesmo grupo econômico que requerem conjuntamente ao juízo a reestruturação das suas atividades, embora o façam com a apresentação de lista de credores diferentes, planos separados ainda que convergentes e assembleias autônomas, prática que a jurisprudência vem tolerando com relativa tranquilidade. Já a consolidação substancial, deferida pelo juízo, consistiria na reunião de todos os credores e todos os ativos em um só bloco, com listas únicas e plano também único, de tal modo que as empresas integrantes do conglomerado seriam consideradas, para todos os efeitos, uma coisa só. O credor de uma empresa seria também credor do grupo. Seu voto na assembleia não teria em consideração a proporção que lhe cabe do passivo da pessoa com quem se relacionou, mas a fração do todo, nele incluídas pessoas jurídicas com as quais não travou qualquer contato.

E esta segunda prática, a da consolidação patrimonial, não estaria sendo acolhida pela jurisprudência brasileira, salvo quando assim deliberado pelos próprios credores, em votações que contenham listas separadas.

No tocante à chamada recuperação transnacional, e à competência do juízo brasileiro para o processamento da reestruturação de empresas estrangeiras, sustenta o Ministério Público que 14 sociedades estrangeiras situam-se no polo ativo, sem que possuam filiais, credores ou empregados no Brasil. As obrigações contraídas e objeto do plano deveriam ser

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cumpridas no exterior, inclusive com a aplicação da legislação estrangeira e a eleição do foro de Nova Iorque como o único competente para qualquer litígio.

Continua o parquet ponderando que a escolha pelas empresas das Ilhas Virgens Britânicas para sua sede, provavelmente por razões tributárias, tem como contrapartida os ônus inerentes a essa escolha, a inviabilizar a utilização do Poder Judiciário brasileiro e das leis brasileiras. Destaca-se a propósito das razões o seguinte trecho: "O grupo Queiroz Galvão criou 14 sociedades empresariais no exterior; emitiu títulos por estas sociedades no exterior; se comprometeu a honrar esses títulos no exterior; recolheu eventuais tributos referentes a essas obrigações no exterior, mas suplica a aplicação da jurisdição brasileira para reestruturar tais operações."

No direito brasileiro, sobre a competência, prossegue o Ministério Público, dispõe a lei de falências que a competência para processar a recuperação judicial ou decretar a falência estende-se somente à filial de empresa que tenha sede fora do Brasil, e mesmo nesses casos sem a aptidão de estender os braços da jurisdição aos bens situados no exterior, tudo de acordo com o Princípio da Territorialidade, acolhido pelo ordenamento jurídico brasileiro.

Por fim, sobre o terceiro argumento, sustenta o Ministério Público que não foram apresentados aos autos Demonstração dos Resultados Acumulados (art. 51, inc. II, letra "b", da Lei 11101), Relatório Gerencial de Fluxo de Caixa (art. 51, inc. II, letra "d") e Relação de Credores individualizada por recuperanda (art. 51, inc. III), além de ter sido ilegalmente decretado o sigilo das relações de empregados e de bens do sócio controlador e dos administradores, vedando o seu acesso aos credores e aos advogados, ainda que constituídos nos autos, o que a seu turno atenta contra o Princípio da Publicidade que permeia o art. 51 da Lei de Falências e Recuperação Judicial.

As contrarrazões oferecidas pelo grupo em recuperação destacam preliminarmente que apenas 3 recursos foram interpostos contra a decisão que

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deferiu o processamento da reestruturação do grupo: este do Ministério Público, outro interposto por Alperton Capital Ltd., ex-acionista minoritária de duas entidades do grupo, e um terceiro interposto por credor detentor de Bonds, a evidenciar que de todos os credores do grupo apenas um deles se mostrou inconformado com a decisão recorrida. Destaca ainda que na fase administrativa foram apresentadas 11 habilitações e divergências versando erros materiais ou valores de crédito, sem qualquer ataque, mais uma vez, à recuperação em si. Metade dos créditos trabalhistas já foi paga e algumas das recuperandas valeram-se da proteção auxiliar concedida pelo famoso Chapter 15 (Capítulo 15) da legislação americana e pelo seu equivalente na legislação das Ilhas Virgens Britânicas, sendo que em ambos os processos se teria reconhecido a competência da justiça brasileira para processar o pedido de recuperação judicial de todas as entidades do grupo Constellation.

Prossegue salientando, a baixa litigiosidade é explicada pela natureza negocial e consensual do processo, que contou destarte com o que chamam de Plan Support Agreement ao Plano de Recuperação, pelo qual 47,1% dos credores com garantia real e 60,2% dos credores sem garantia já se comprometem a dar suporte à reestruturação.

No que toca ao direito propriamente dito, sustenta que não existe empecilho algum na legislação brasileira à jurisdição nacional sendo antes desejável que esta se proceda, em se tratando de grupo econômico, no local onde está o principal empreendimento, a partir do qual se irradiariam os efeitos pelas demais jurisdições em processo de colaboração e coordenação entre todas elas, como se deu em alguns processos já submetidos aos tribunais brasileiros.

O grupo Constellation desenvolveu-se de forma plurissocietária, com a criação de entidades estrangeiras ligadas, todavia, pela prestação conjunta e concomitante de serviços no Brasil, onde se situa, portanto, o seu centro operacional e onde deve tramitar o processo de recuperação. Afinal o grupo teve origem no Rio de Janeiro, onde se situa a operadora de todas as sondas, no Brasil

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concentra as suas atividades, em direta relação com a Petrobras, bem como as próprias sondas, exploradas em serviço de afretamento materializado por trabalhadores brasileiros em atuação no território nacional.

Do mesmo modo, tampouco haveria impedimento à chamada consolidação substancial, que no caso em tela parte de prévio consentimento da maioria dos credores. Isto porque as empresas integram o mesmo grupo econômico, atuam conjuntamente e de forma conexa, possuem direção comum e coincidentes composições societárias além de terem prestadas garantias cruzadas em que indicadas as próprias sondas com esta finalidade, tudo isso justificando o plano de suporte subscrito pelos próprios credores, que assim reconhecem a existência de um fenômeno econômico único.

Sobre os documentos faltantes sustenta que estes acham-se nos autos e que o inconformismo do Ministério Público volta-se em verdade contra a sua apresentação de forma consolidada, que entretanto não vem tratada pela Lei de Recuperação de Empresas. E por fim, quanto ao sigilo decretado, afirma que este se mostrou necessário pelo risco de cooptação de seus funcionários pelas concorrentes das agravadas, caso se difundisse o salário de todo e cada funcionário, sem contar os riscos para própria segurança de todos eles em uma cidade como o Rio de Janeiro, e neste sentido arrola precedentes do Tribunal de Justiça de São Paulo.

O parecer ministerial opina pelo provimento parcial do recurso para que sejam apresentadas relações individualizadas dos credores por sociedade e para que os documentos mencionados no artigo 51 da Lei de Falência sejam apresentados e postos à disposição do Ministério Público, dos advogados e das partes interessadas, mantida no mais a decisão recorrida.

É o relatório.

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VOTO

A competência ou jurisdição para a recuperação judicial e falência de grupos societários tem chegado aos tribunais brasileiros nos últimos anos a partir das dificuldades enfrentadas pela economia do país e a presença de conglomerados nacionais que conseguiram competir globalmente, com filiais, agências e subsidiárias espalhadas pelo mundo. Um dos mais, senão o mais representativo desses casos, foi aquele envolvendo a OGX Petróleo e Gás Participações e suas subsidiárias austríacas, que existiam com o fim de emitirem bonds no exterior visando ao financiamento das atividades no Brasil. Tratando da jurisdição nacional para processar a recuperação das empresas austríacas, concluiu a Egrégia Décima Quarta Câmara do Tribunal de Justiça do Rio de Janeiro que aquelas poderiam ser admitidas no processo sob a seguinte fundamentação:

> "***As duas empresas estrangeiras subsidiárias, excluídas, em primeiro em grau, do processo de recuperação judicial, operam apenas e tão somente em estrita função da controladora, servindo como veículos das sociedades brasileiras para emissão de títulos de dívidas e recebimento de receitas no exterior, colimando o financiamento das atividades de exploração e produção de petróleo e gás natural no Brasil.***
>
> ***Tem-se, portanto, sociedades empresárias estrangeiras que se erigem em estrutura de financiamento de sua controladora nacional, formando um grupo econômico único, em prol de uma única atividade empresarial, o que não é nada incomum na era contemporânea, de globalização de mercados, mais ainda quando se pondera a própria atividade explorada, que intensifica as relações jurídicas transfronteiriças.***

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> ***Obviamente não possuem elas filiais, sucursais, nem agências em território nacional, porquanto, como já dito, são subsidiárias da sociedade empresária brasileira que é, na realidade, a responsável pelo pagamento dos títulos de dívida (bonds) emitidos no exterior" (Agravo de Instrumento 0064658-77.2013.8.19.0000)***

O quadro das requerentes no caso concreto é significativamente diverso, a começar pelo fato de ser estrangeira a própria holding do grupo, além de constituir cada sociedade um empreendimento diverso e em certa medida isolado.

A pergunta a ser feita aqui, portanto, diante da estrutura do grupo, é se as quatorze empresas, sediadas no exterior, mas com atuação quase exclusiva em território nacional, preenchem os requisitos do Código de Processo Civil e da Lei 11.101 para o acesso ao Judiciário brasileiro.

Convém antes explicar, de forma sintética, o organograma do grupo e a origem das dívidas que desaguaram no requerimento de recuperação. Sobre o organograma, tem-se que a holding do grupo, Constellation Oil Services, com sede em Luxemburgo, controla indiretamente Constellation Overseas, com sede nas Ilhas Virgens Birtânicas, que a seu turno controla no Brasil a sociedade Serviços de Petróleo Constellation. E justamente esta última, porque sediada no Brasil, participa de licitações para perfuração de poços onshore (em terra) e offshore (em mar), basicamente promovidas pela Petrobras.

A cada nova perfuração, a cada novo projeto, uma offshore era criada. E no exterior obtinham-se os financiamentos necessários à construção das sondas e demais embarcações necessárias ao serviço. Tais recursos provinham basicamente de mútuos clássicos oriundos das mais diversas instituições financeiras e títulos emitidos (ou bonds), com vencimento em 2019 e 2024. Uns e outros, mútuos e títulos, foram formalizados por contratos celebrados no exterior,

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regidos em regra pelas leis de Nova Iorque, que elegeram o judiciário daquele Estado para a solução de eventuais litígios.

Como regra, até onde pude entender, os agentes financeiros exigiram em garantia dos empréstimos a própria sonda a ser construída, bem como fianças ou instrumentos equivalentes dados pelas demais empresas do grupo. E é exatamente disso que se trata a presente recuperação. Cinco sociedades captaram recursos no exterior: Constellation Oil Services Holding e Constellation Overseas, de um lado, e as empresas-sonda de outro, a saber, Brava Star, Laguna Star e Amaralina Star. As demais pessoas jurídicas incluídas na recuperação são todas elas meras garantidoras do pagamento das dívidas, exceto Constellation Services, que embora não tenha dívida alguma ou haja prestado qualquer garantia, foi incluída, segundo se alega, por concentrar no exterior o caixa do grupo e precisar, assim, ganhar proteção contra o ataque de possíveis credores.

Descrita sumariamente a operação do grupo, e passando à competência, para o processamento de falência ou recuperação de grupos internacionais, temos no plano teórico a concepção de três possíveis sistemas para sua disciplina, segundo nos ensina Alexandre Ferreira de Assunção Alves, professor de Direito Empresarial da Uerj, em artigo publicado na Revista da Escola da Magistratura com o título “Insolvência Transnacional e Direito Falimentar Brasileiro”. O primeiro sistema seria o assim denominado universalista, que atribui a um juízo – falimentar ou recuperacional – universal, a competência para a totalidade das relações jurídicas do devedor, onde quer que tenham nascido e onde quer que se localizem os bens da pessoa jurídica. A lei de regência da recuperação ou da falência seria única, mesmo em se tratando de corporações internacionais, conferindo previsibilidade, eficiência e razoabilidade ao procedimento e que não podem ser obtidos com a divisão, país por país, do processo de liquidação ou de recuperação da empresa. Credores japoneses com garantias reais seriam tratados da mesma forma que os credores com as mesmas

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garantias e domiciliados na Bolívia ou na Tanzânia. Esta era a teoria acolhida por Savigny, segundo lição de Haroldo Valladão.

Na doutrina universalista, e como a administração dos bens fica reservada a um único juízo universal, o risco de decisões conflitantes diminui drasticamente, assim como são reduzidos os custos e o tempo do procedimento. Dentre outros, este parece ser o sonho sonhado pela Professora Irit Mevorach, em obra publicada pela Oxford University Press com o título Insolvency Within Multinational Entreprise Groups. Segundo a Professora, o tratamento dado pela legislação mundial ao tema da falência e da recuperação judicial parte sempre do direito societário, que foi concebido para regular as atividades das empresas separadamente consideradas, realidade normativa incapaz de apreender o atual estado da economia e a maneira como operam os grupos econômicos em um mundo globalizado. A própria ideia da separação da personalidade da pessoa jurídica é posta em jogo embora se reconheça que a segregação dos ativos entre as pessoas jurídicas de um grupo econômico constitui uma das principais razões da sua existência.

A verdade, porém, nas palavras de Alexandre Ferreira de Assunção Alves, é que "***A proposta universalista, mesmo por seus proponentes, é reconhecida como algo ideal pois dificilmente funcionaria nas circunstâncias factuais do mundo, principalmente em razão dos óbices da noção de soberania."*** Não é coisa distinta, mutatis mutandis, o que assinala Irit Mevorach, quando parece reconhecer que nenhum Estado até o momento adotou livremente e de modo unilateral a política de reconhecer a validade de sentenças estrangeiras com respeito a bens imóveis localizados no interior de seu território (Ob.cit. pag 86). Com efeito, as legislações de cada país costumam disciplinar de forma diferente o processo de recuperação, como de resto também o de falência, dando a cada crédito a preferência que lhe parece mais adequada, sem prejuízo de simplesmente excluir da recuperação esta ou aquela relação jurídica. Além do mais, costumam os países guardar para si a decisão sobre a propriedade dos bens situados em seu próprio território, como faz o Brasil no Código de Processo Civil,

reservando para si, com exclusão de qualquer outra, a competência para conhecer de ações relativas a bens situados no Brasil (artigo 23, inc. I).

A segunda linha teórica para o problema da competência adota o chamado sistema territorialista. Segundo esta, ainda nas palavras de Alexandre Assunção Alves, "***a decisão de cada tribunal está restringida tão somente às fronteiras de seu território nacional, de modo que só poderá versar sobre aqueles bens que estiverem situados dentro desses limites."*** Citando o professor Alexsander Kipnis, a regra básica da territorialidade dispõe que as cortes de cada país em que o devedor possua ativos será responsável por sua distribuição, não lhe sendo dado tratar ou distribuir bens e ativos localizados em outros países nos quais tenha atuação a pessoa jurídica.

Portanto, pela teoria territorialista a recuperação judicial e a falência, em se tratando de empresas multinacionais, dar-se-ão por tantos processos quantos forem as jurisdições em que atuar o falido. É como se na prática houvesse uma pluralidade de falências ou de recuperações relativas ao mesmo devedor. E é justamente esta pluralidade, prossegue Alexandre de Assunção Alves, que de um modo geral se consagra no direito internacional, sobretudo em nome da soberania dos países e ainda por ser o único sistema que permite aos estados preservar as suas próprias políticas públicas e preferências jurídicas.

Como este sistema também possui desvantagens, dentre as quais o encarecimento do crédito e o risco de favorecimento pelos países dos credores nacionais em detrimento dos credores estrangeiros, concebeu-se um sistema intermediário ou procedimento síntese dos dois anteriores, que é o assim denominado sistema ou sistemas mistos. Nestes passa-se de alguma forma pela colaboração entre os estados que possuam interesses em determinada insolvência. Embora vários processos sigam concomitantemente pelo Globo, regido cada um pela lei do próprio país, algumas variações da teoria mista defendem a prevalência de um processo principal em detrimento dos processos

acessórios, nos quais os juízes se limitariam a aferir a razoabilidade e a justiça das decisões por aquele tomadas, entendida uma e outra como antídotos à possível violação de imperativos da lei local. Já outras variações da teoria mista negam qualquer sujeição em favor do processo principal, embora reconhecendo o dever de recíproco auxílio que grava cada uma das jurisdições.

Diversos artigos disponíveis na internet e livros estrangeiros tratam da aplicação concreta, em cada país, das noções acima sintetizadas. Procurei examiná-los, ainda que a perfeita compreensão do estado atual de cada país seja muitíssimo dificultada pela veloz evolução do tema em Direito Internacional. Nos Estados Unidos, por exemplo, o Código de Falência trata em sua Seção 109 da competência para requerer falência ou recuperação nos Estados Unidos, dispondo que: "***somente uma pessoa que resida ou tenha domicílio, um lugar de negócio, ou propriedade nos Estados Unidos pode ser um devedor sob este título."*** [1]

Como explica Adrian Walters[2], a barra para a entrada na justiça americana é bem baixa. Não se exige que a empresa ou o grupo de empresas possua seu centro principal de interesses econômicos nos Estados Unidos, e não raro os credores fabricam a competência americana transferindo para o país pequenas somas de recursos que legitimem o critério de propriedade em território nacional. Um caso extremamente representativo desta liberalidade foi a reestruturação da Avianca no judiciário americano. O grupo de empresas, que tinha certamente seu principal centro de interesses na Colômbia, não se valeu da legislação daquele país, mas dos tribunais norte-americanos, ao simples argumento de que seus aviões não raro estavam em solo americano, onde se podia dizer, destarte, que aquela possuía propriedade.

[1] …only a person that resides or has a domicile, a place of business, or property in the United States… may be a debtor under this title.
[2] United States' Bankruptcy Jurisdiction over Foreign Entities: Exorbitant or Congruent?

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Segundo Adrian Walters, isso se explica porque a grande preocupação dos devedores era na verdade impedir a ação dos grandes grupos financeiros americanos, o que talvez não fosse conseguido, por questões de soberania, se a ação houvesse sido proposta no centro de principal interesse da Avianca. Havia o risco, em outras palavras, de que o deferimento da recuperação judicial pelo tribunal colombiano não inibisse os pedidos de arresto pelas credoras americanas, elas justamente as detentoras da parte mais significativa dos créditos contra a empresa aérea.

Este e outros precedentes traduzem o pragmatismo norte-americano em se tratando de recuperação e falência, porquanto mostram a preferência por uma competência de efeitos, digamos assim, no sentido de que a jurisdição da justiça americana se faz presente onde ela puder ser efetivamente prestada.

No Reino Unido, pelo menos sob a vigência do Insolvency Act de 1986, com as suas alterações de 2005, somente empresas situadas no Reino Unido e na Comunidade Econômica Europeia podem se valer das cortes britânicas, exceto se ficar provado que possuam como principal centro de interesses a Inglaterra, o País de Gales ou a Escócia. E a presunção de que a empresa tem seu principal centro de interesses no lugar da sede estatutária somente pode ser superada mediante argumentos objetivos e aferíveis de que o contrário acontece.

Portanto, no Reino Unido, diferentemente dos Estados Unidos, o sarrafo foi colocado em nível mais alto, não bastando que a empresa possua propriedades em território britânico, se lá não possui sua sede ou o seu principal centro de interesses, um conceito que é antes econômico do que jurídico.

O Regulamento 2015/848 do Parlamento Europeu, de 20 de maio de 2015, relativo aos processos de insolvência na Comunidade Europeia, a seu turno, dispõe em seu artigo 3º que a competência (rectius, jurisdição) para o

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processamento da falência é do Estado-membro onde situado o chamado centro de interesses principais do devedor, presumindo-se até prova em contrário que o centro de interesses é o local da respectiva sede estatutária. Embora o artigo 3º não trate expressamente de grupo de sociedades, os consideranda do regulamento anunciam em seu item 53, literalmente que:

> "***A introdução de regras sobre o processo de insolvência de grupos de sociedades não deverá limitar a possibilidade de um órgão jurisdicional abrir o processo de insolvência relativamente a várias sociedades pertencentes ao mesmo grupo numa única jurisdição, se considerar que o centro dos interesses principais destas sociedades se situa num único Estado-Membro. Nesses casos, o órgão jurisdicional deverá também poder nomear, se necessário, o mesmo administrador de insolvência em todos os processos em questão, desde que tal não seja incompatível com as regras que lhes são aplicáveis."***

Segundo extraio deste passo, não existe uma predominância da holding ou a tentativa de encontrar um centro de atividades do bloco de empresas. Elas são, ao contrário, cada uma das possíveis subsidiárias, vistas como entidades autônomas e possuidoras do seu próprio centro de interesses, até porque, a existência de interesses comuns será remediada através de um sistema de coordenação, do qual tratarei mais adiante, que deverá de todo modo, como diz o item 54 dos consideranda, respeitar "***ao mesmo tempo a personalidade jurídica própria de cada membro do grupo."***

Por fim, temos o famoso modelo de legislação proposto pelas Nações Unidas, ou simplesmente modelo UNCITRAL, que trabalha com um juízo preponderante, onde se situa o principal centro de interesses do devedor, auxiliado por processos acessórios, nos países em que o devedor possua patrimônio, assim adotando, pelo que pude entender, uma linha universalista intermediária.

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Descendo à legislação brasileira, sabe-se que esta não disciplinou a insolvência, tampouco a recuperação, transnacional. Limitou-se a Lei 11.101, em seu artigo 3º, a tratar da competência interna para conhecer e julgar a falência ou o pedido de recuperação, o que fez com as seguintes palavras: ***"É competente para homologar o plano de recuperação extrajudicial, deferir a recuperação judicial ou decretar a falência o juízo do local do principal estabelecimento do devedor ou da filial de empresa que tenha sede fora do Brasil."***

A tese da inicial é a de que a primeira parte do artigo, quando alude ao principal centro de interesse do devedor, legitimaria o recurso ao Judiciário brasileiro de todas as sociedades recuperandas, mesmo estrangeiras, porquanto em se tratando de grupos de sociedades a jurisdição deveria ser determinada pela síntese resultante da soma das atividades de todas elas, como se de uma instituição só se estivesse a cuidar.

Principiando de trás para frente, do particular para o geral, saliento que nada no ordenamento jurídico dá suporte à pretensão de tratar o grupo econômico, para fins de jurisdição internacional, como se fosse uma coisa única, salvo quando verificada a confusão de personalidades ou talvez quando as sociedades do grupo integrem todas elas parte de uma engrenagem que se complementa pela conjugação dos esforços para a consecução de uma única empresa, no sentido de atividade econômica. Ao contrário, a Lei 6.404, Lei das Sociedades Anônimas, como de resto a legislação de outros países, dispõe em seu artigo 266 que nos grupos de sociedades cada integrante deve conservar separados personalidade e patrimônios, o que foi enfatizado por muitos, dos quais destaco Jorge Lobo (Grupo de Sociedades, Revista dos Tribunais, Vol. 636/1988): "***Assim, formam um grupo de fato a controladora, suas controladas e coligadas, que embora atuando interligadas, não celebraram um pacto disciplinador de suas atividades, devendo, neste caso, o estudioso encará-las como sociedades isoladas, independentes umas das outras, não podendo, em hipótese alguma, uma sociedade beneficiar outra, ou sacrificar***

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seus próprios direitos e interesses em benefício do grupo ou de qualquer outra sociedade". Destaca ainda Jorge Lobo que esta independência é explicitada pelo ordenamento jurídico quando dispõe no artigo 245 da Lei 6.404 que os administradores não podem, em prejuízo da companhia, favorecer sociedade coligada, controladora ou controlada, cumprindo-lhe zelar para que as obrigações entre as sociedades, se houver, observem condições estritamente comutativas.

É certo que inúmeras críticas são direcionadas à sacralidade da personalidade jurídica, em particular quando a separação contradiz a realidade de grupos unidos sob o ponto de vista econômico. De toda sorte, essa é uma escolha do empresário, e dela advêm consequências. Na medida em que preferiu segregar os patrimônios e extrair disso vantagens várias, inclusive tributárias, não pode em seguida pregar a unidade do grupo.

Por exemplo, tome-se a tributação das sondas. Não há dúvida de que não fosse a diversidade de pessoas jurídicas o ingresso daquelas em território nacional constituiria fato gerador de tributos que são contornados através de contratos de arrendamento entre as diferentes integrantes do conglomerado.

Concluo que a jurisdição, em se tratando de grupos econômicos, ao menos à míngua de absolutamente qualquer aceno legislativo, deve ser determinada sociedade a sociedade, ou pelo menos empresa a empresa, exatamente como preconizado no direito europeu, porque é isso o que resulta do artigo 266 da Lei 6.404. E nesse passo, reitero, a hipótese sob análise é completamente diversa do precedente da Décima Quarta Câmara Cível, em que duas sociedades existentes no exterior eram absolutamente vazias e se prestavam exclusivamente a instrumentalizar empréstimos, do que aqui não se cogita, ao menos para a totalidade das subsidiárias.

Mas isso, por si só, não resolve o dilema da jurisdição. Segundo as autoras todas as subsidiárias, de uma forma ou de outra, têm seu Centro de

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Principal Interesse no Brasil, na medida em que é nos contratos aqui celebrados, precipuamente com a Petrobras, que concentram sua atividade econômica. Portanto, a jurisdição brasileira seria determinada não pelo Centro de Interesses do grupo, como conjunto, mas das próprias subsidiárias.

Sobre essa segunda linha de argumentação das autoras, começo divergindo do conceito de Centro de Principal Interesse por elas eleito, pelo menos no que toca a sua utilidade para a fixação da jurisdição internacional, e por negar, em consequência, que as subsidiárias estrangeiras possuam no Brasil o núcleo de sua atividade. Com efeito, precedentes recentes do STJ parecem atribuir ao Centro de Principal Interesses uma conotação quantitativa, conforme se extrai do AgInt no CC 147.714/SP e no AgInt no CC 157.969, ambos do STJ, o primeiro deles contendo a seguinte afirmação: "***Nos termos do artigo 3º da Lei 11101/2005, o foro competente para processamento da recuperação judicial e da decretação de falência é aquele onde se situe o principal estabelecimento da sociedade, assim considerado o local onde haja o maior volume de negócios, ou seja, o local mais importante da atividade empresária sob o ponto de vista econômico."***

Partindo, portanto, do fato de estarem as sondas das empresas estrangeiras arrendadas no Brasil, conclui-se que é aqui que se situa o Centro de Principal Interesses e que aqui deve seguir a recuperação. Mas esta definição, em especial quando se está a definir a jurisdição internacional, traz consequências dramáticas.

Pensemos em alguns grupos econômicos e societários famosos: TAP ou Vale. É possível, pelo que sabemos dessas empresas, definir a competência para recuperá-las a partir do local de onde provém o maior volume de seus recursos? Se a resposta for meramente econômica, é possível que o principal centro de interesses da Vale seja na China, e da TAP o Brasil. Isto é, a TAP, sociedade com sede em Portugal e significativa participação acionária do governo português, seria recuperada no Brasil e aqui teria sua falência decretada, apenas

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por ter em território nacional 25% de sua receita, percentual superior aos 20% que extrai do próprio país de origem.

O Centro de Principal Interesse, com esta conformação, parece perfeito para a definição da competência territorial, mas não é suficiente quando em jogo a definição da jurisdição, se o principal mercado da sociedade pode estar longe de seu centro decisório, de sua contabilidade, do capital que controla a sociedade.

Portanto, se fôssemos adotar o conceito de Centro de Principal Interesse eleito, este não socorreria as recuperandas estrangeiras. A riqueza que as alimenta vem do Brasil, é certo. Só que aqui não têm sede, filial, conta-corrente ou livros contábeis. Sequer contratos são celebrados, em sua maioria, vez que as sondas entraram no país por contratos de arrendamento celebrados no exterior e envolvendo três pessoas: no exterior as recuperandas locam as sondas sem tripulação (Bareboat charter) a uma segunda sociedade (este o caso da Palase), que em seguida as “subarrendam”, por assim dizer, à Petrobras ou à Constellation Brasil.

De novo, o Centro de Principal Interesse, para ser reconhecido, deve ao menos refletir alguma estrutura perene da sociedade. E deve ser confrontada com outros fatores igualmente importantes, que aqui não estão presentes: local de celebração de contratos, país de concentração de mão de obra, dentre outros. Alpha Star, Amaralina, Arazi, Brava, Laguna e outras não têm um funcionário sequer trabalhando do Brasil. E diversamente do caso OGX, trata-se de sociedades que existem verdadeiramente, o que se extrai da própria inicial, que não nega a separação das personalidades.

A realidade é que o conceito de Centro de Principal Interesses não pode ser utilizado para tratar o grupo como uma coisa só, e mesmo quando aplicado a cada empresa, em sentido rigoroso de estrutura econômica, sua

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utilidade para determinar a jurisdição internacional deve ser temperada com a investigação de outros elementos além do mero fluxo econômico de recursos.

E mais importante. Quando utilizado na legislação estrangeira, com os olhos voltados à falência ou recuperação transnacionais de grupos econômicos, o Centro de Principal Interesse constitui invariavelmente parte de um conjunto de regras de coordenação, não raro afirmadas por tratados de cooperação internacional, que equacionam os limites da jurisdição nacional e da eficácia de suas decisões. Isso o que se observa do Projeto apresentado ao Congresso Nacional de alteração da Lei 11.101, do qual consta um capítulo inteiro denominado de Insolvência Transfronteiriça, repleto de regras definindo a concorrência dos processos estrangeiros e nacionais, a partir das dificuldades que surgem da pretensão de atribuir a um país a jurisdição para o chamado processo principal.

No caso dos autos, ao contrário, as requerentes aludem ao conceito de Centro de Principal Interesse como se ele fosse a única regra relevante e bastasse para a recuperação, sem esclarecer por exemplo o que ocorreria em caso de falências com as sociedades estrangeiras, ou o valor que seria atribuído pelas cortes dos vários países às decisões dos juízes brasileiros.

Concluo, portanto, que as empresas estrangeiras não possuem seu Centro Principal de Interesse no Brasil, porque aqui não têm estrutura alguma e porque os recursos que alimentam a sua contabilidade são na verdade obtidos de forma indireta, pela utilização feita pelas arrendatárias das sondas, o que bem pode acontecer no Brasil ou em qualquer lugar do mundo para o qual queiram transferi-las.

Todas as considerações dos vários artigos e livros a que o relator teve acesso tratam paralelamente de um modelo ideal e da legislação de cada ordenamento jurídico, que se pretende seja influenciado pelas considerações

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doutrinárias. Mas todos parecem indicar que a solução dada a cada processo não pode ignorar o que diz o próprio ordenamento jurídico.

Portanto, se a definição da jurisdição para os processos de falência e recuperação não pode se fazer, repita-se, à luz de meras considerações teóricas, e exige a compreensão do ordenamento jurídico de cada país, penso que se deva, incialmente, ter em mente os critérios que norteiam o ordenamento brasileiro, e estes, segundo Cândido Rangel Dinamarco (Comentários ao Código de Processo Civil, editora Saraiva, página 216), são os critérios da conveniência e o da viabilidade. Pelo primeiro declina o estado a competência sobre litígios que lhe são absolutamente indiferentes enquanto pelo segundo recusa o estado competência para julgamento das causas que já saiba de antemão terão sua eficácia recusada em território estrangeiro.

A conjugação desses dois interesses resultou nos artigos 21, 22 e 23 do Código de Processo Civil de 2015, dos quais, em conjugação com o artigo 3º, da Lei 11.101, deve-se extrair os limites da jurisdição brasileira, até o momento regida pelo Princípio da Territorialidade, e das limitações que o acompanham, enquanto aguardamos a modernização tardia da disciplina da jurisdição brasileira. E começando pelo último dispositivo, torno a transcrevê-lo: ***"É competente para homologar o plano de recuperação extrajudicial, deferir a recuperação judicial ou decretar a falência o juízo do local do principal estabelecimento do devedor ou da filial de empresa que tenha sede fora do Brasil."***

De todos, tenho que a segunda parte do artigo 3º, se bem interpretada em um ambiente territorialista, diz muito do caminho a ser seguido quanto aos limites da jurisdição brasileira. Com efeito, quando o artigo 3º admite a recuperação no Brasil de filial de empresa estrangeira, a primeira conclusão evidente é quase tautológica: é possível recuperar no país empresas estrangeiras, e mesmo que possuam lá fora seu Principal Centro de Interesses. Não há outra possível interpretação! As dúvidas que sobrevivem ao texto da lei são apenas

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duas: a) quais os pressupostos dessa intervenção sobre empresas estrangeiras e b) qual o limite de atuação do judiciário.

Quanto à primeira questão, indubitável que o ordenamento jurídico exige a presença em território nacional de algo da sociedade a ser recuperada. Talvez se possa ir além de uma verdadeira filial, mas nunca ao ponto de reconhecer uma jurisdição puramente cognitiva, sem os atos executórios que caracterizam, seja a recuperação como a falência, isso ao menos nas hipóteses de sociedades estrangeiras reais, como não parece haver dúvida ser a hipótese dos autos.

Como explica Cândido Dinamarco na obra acima citada, os países tendem a uma postura relativamente liberal quanto à fase de conhecimento dos processos. Exceto pelas hipóteses do artigo 23 do CPC, não importa no Brasil que outras jurisdições definam conflitos, o que está mesmo em sintonia com a nova dimensão da arbitragem. Se os países reconhecem sentenças arbitrais com grande latitude, não há motivos para negar efeitos às decisões dos juízes estrangeiros. Todavia, expõe o professor paulista, o mesmo não vale para os atos de execução, praticados sempre, ou quase, com a colaboração da jurisdição estrangeira.

E a recuperação muito mais se aproxima de atos materiais, ou executivos, do que de uma mera cognição. Porque a aprovação do plano não passa pelo juiz. A ele competem apenas, ou sobretudo, a fiscalização da atividade do devedor, exercida através do Administrador Judicial e do Comitê de Credores onde ele existir. A recuperação é a antessala da falência e por isso uma e outra exigem algo de concreto no Brasil: filial, administração, livros ou patrimônio.

Esse o sentido histórico do Territorialismo, também conhecido nos Estados Unidos por The Grab Rule, do verbo to grab (agarrar, apanhar). Cada país apreende os ativos locais e os administra, seja em caso de falência como na hipótese de recuperação. Daí o artigo 3º da Lei 11.1101, que expressamente

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sinaliza a disposição do ordenamento nacional para a recuperação do tanto existente no Brasil das sociedades estrangeiras.

Com essa fundamentação, reconheço a jurisdição em relação às estrangeiras Brava Star, Amaralina Star, Laguna Star, Alpha Star, Lone Star, Gold Star, Star International Drilling e Snover International, todas elas com sondas no Brasil.

Não vai aqui qualquer juízo sobre a viabilidade de reestruturar subsidiárias somente por serem garantidoras dos débitos das controladoras ou de suas irmãs. Apenas reconheço que o Princípio da Territorialidade abre a porta da recuperação para sociedades que tenham ativos no Brasil, porque tanto em caso de falência quanto de recuperação, pelo Princípio Territorialista, compete mesmo à justiça nacional de cada país a distribuição dos ativos que se encontram em seu território, chancelando ou não possível processo concorrente existente no exterior.

Pela mesma razão admito à jurisdição brasileira as sociedades Constellation Oil Services, a holding do grupo, e Constellation Overseas. Ainda que não possuam elas próprias bens em território nacional, é inegável que as ações de suas controladas, ainda que indiretas, constituem ativos passíveis de constrição judicial. Posto de outra forma, o conteúdo econômico dessas duas empresas estrangeiras é quase que exclusivamente corporificado pelas sondas das empresas controladas que se encontram em território nacional.

Agora em sentido contrário, adotando a mesma regra, voto pelo indeferimento da recuperação no Brasil das sociedades Olinda Star, Arazi e Lancaster Projects. A par de não funcionarem no país, não terem aqui um credor trabalhista sequer, nenhuma delas possui ativos em território nacional. A sonda pertencente a Olinda Star, que durante algum tempo prestou serviços no Brasil, acha-se na Índia. De maneira que englobá-las no processo de recuperação decorreria exclusivamente das garantias por elas prestadas aos financiamentos contraídos pelas empresas do grupo, o que me parece insuficiente.

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Entendo como Relator a preocupação das recuperandas de obter com a recuperação a proteção das empresas que garantiram os financiamentos e que poderão ser alcançadas por possíveis atos executórios caso não obtenham algum tipo de proteção. Todavia esta proteção deve ser conferida pela jurisdição do local onde têm sua sede ou onde mantêm os seus ativos, jurisdição que poderá atribuir ao seu próprio processo natureza ancilar da recuperação em curso no território brasileiro, a depender da respectiva legislação de regência. O que não se pode acolher é a recuperação de uma sociedade materialmente existente mas que, repita-se, não pode ser fiscalizada e alcançada pelo judiciário, ao menos com a velocidade necessária, à míngua de disciplina legislativa e tratados de cooperação entre os países envolvidos.

Por fim, franqueio a jurisdição brasileira à Sociedade Constellation Services, que tem autorização para funcionar em território nacional e que, segundo as recuperandas, celebra contratos a serem cumpridos no Brasil, e que são servis à estrutura do grupo como um todo.

De modo que em relação à jurisdição internacional as conclusões, certas ou erradas, são as seguintes: a) em se tratando de grupos econômicos, não nenhuma razão para supor que a jurisdição internacional será necessariamente fixada para o todo, se as sociedades podem integrar diferentes empresas, cada uma delas com seu próprio Centro de Interesses; b) o Centro de Interesses, para os fins da jurisdição internacional, não pode ser extraído exclusivamente do local de onde provém a riqueza que alimenta as recuperandas, mormente se neste hipotético lugar não possuem nenhuma estrutura administrativa, não celebram contratos ou mantêm livros; c) tampouco constitui Centro de Principal Interesses de uma sociedade ou de uma empresa a cidade ou país onde as arrendatárias de seus produtos exercem elas próprias sua atividade econômica; d) como indica o artigo 3, parte final, da Lei 11101, é possível recuperar no Brasil empresas estrangeiras desde que aqui tenham algum patrimônio, a ser tratado, praticamente,

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como uma empresa separada, o que está em perfeita linha com o Princípio da Territorialidade, até o momento adotado pelo direito brasileiro.

O segundo e igualmente complexo tema tratado neste agravo diz com a chamada consolidação dos grupos econômicos. Segundo a doutrina, e também a práxis forense, a consolidação divide-se em duas subespécies distintas, ambas ligadas à estrutura dos processos de recuperação ou de falência envolvendo grupos econômicos: consolidação processual e consolidação substancial. Por consolidação processual entende-se a formação de litisconsórcio entre as empresas de um mesmo grupo econômico, que se valem do mesmo processo para em conjunto solucionarem a crise que a todas afeta. Haverá um só administrador, as decisões estarão concentradas na figura do mesmo juiz, mas as listas de credores serão apresentadas separadamente e também separadamente serão votados os respectivos planos, que embora sejam integrados, em um processo harmônico, são essencialmente distintos, ainda que convergentes.

Ao lado da consolidação processual – rectius, litisconsórcio ativo – temos a chamada consolidação substancial, derivada da norte-americana consolidação substantiva. Por esta tem-se o tratamento das diversas sociedades integrantes de um grupo como se existente uma só. Os credores, em consequência, não buscarão seus créditos dos seus devedores originais, mas votarão nas assembleias e receberão sua participação no ativo a partir de um acervo comum, soma de todos os ativos das entidades consolidadas.

Logo se vê que a falência ou recuperação de várias empresas de um grupo econômico como se de uma coisa só se tratasse violam o Princípio da Autonomia das Personalidades Jurídicas, existente no Direito Empresarial estrangeiro e também nacional, como se extrai do artigo 266 da Lei das Sociedades por Ações, segundo o qual as relações entre as sociedades de um grupo econômico estabelecem-se com a preservação das personalidades individuais e dos respectivos patrimônios. A consolidação substancial, bem por isso, deve ser estabelecida como uma exceção ao sistema e ser deferida apenas

lá onde estejam presentes os requisitos objetivos traçados pelo legislador ou pela doutrina. Isto o que diz, dentre outros, Maria Isabel Vergueiro de Almeida Fontana, em trabalho de mestrado apresentado à PUC de São Paulo, sob o título de Recuperação Judicial de Grupos de Sociedades, para quem "***a consolidação substancial só pode ser utilizada se restar comprovado que os elementos caracterizadores da desconsideração da personalidade jurídica estejam presentes no grupo desde antes do pedido de recuperação judicial (hipóteses em que a consolidação é obrigatória e deve ser determinada pelo juízo) ou se os credores de todas as recuperandas aprovarem a consolidação substancial (o que se convencionou chamar de consolidação voluntária)".***

Para bem compreender a origem da teoria da consolidação substancial convém recorrer ao direito americano, onde se reconhece ter aquela sido gestada. Segundo Timothy E. Graulich, em artigo sob o título de Substantive Consolidation – a Post-modern Trend, constitui princípio legal básico do sistema que as sociedades integrantes de um grupo empresarial não são responsáveis pelos atos umas das outras. Esta separação, exatamente como no Brasil, somente é abandonada quando se detecta o mau uso das personalidades, dentre outras possibilidades para permitir a desconsideração de uma delas, reflexo no Brasil do chamado Veil-Piercing, ou levantamento do véu, há tanto tempo absorvido pela jurisprudência brasileira.

Foi somente depois desses primeiros institutos que se evoluiu para os primórdios da agora debatida consolidação substancial. O primeiro caso a tratar da doutrina, e recebida como sua certidão de nascimento para o mundo do Direito, foi o julgamento de Sampsell v. Imperial Paper & Color Co. Tratava-se de uma hipótese em que Downey, um comerciante individual, ficou insolvente depois de ter transferido quase todos os seus ativos para uma nova corporação de propriedade dele próprio, de sua mulher e de seu filho. Na falência, portanto, o administrador judicial reuniu numa massa só todos os ativos pessoais do devedor e da pessoa atrás da qual ele escondeu o seu patrimônio, o que foi ratificado pelos tribunais pelo caráter fraudulento da manobra.

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Em casos subsequentes, outras hipóteses foram sendo acrescidas. Assim, em Stone v. Eacho os tribunais aceitaram a consolidação ao argumento de que uma das subsidiárias não tinha existência real e estava insuficientemente capitalizada. Do mesmo modo se fez em Todd v. Heller, em que ativos foram transferidos de uma sociedade a outra para protegê-los da insolvência de uma das empresas do grupo econômico, o que evidencia também aqui a ideia de fraude.

Ainda segundo o autor do artigo, novo impulso foi dado à teoria da consolidação substancial em 1964, quando o Segundo Circuito Americano, equivalente ao nosso TRF 2, admitiu em Chemical Bank New York Trust v. Kheel que a consolidação dos ativos deveria ser admitida ao argumento de que a inter-relação entre as empresas do grupo estava obscurecida de tal forma que o tempo necessário para separá-las contabilmente seria tão grande que poria em risco a realização dos ativos para todos os credores.

Nesse caso, portanto, não se tratava mais, e pela primeira vez, da ideia de fraude, mas da dificuldade de separação dos ativos e responsabilidades. E a partir daí concebeu-se um teste bifásico, revelado em outro leading case chamado Union Saving Bank v. Augie/Restivo Banking, em que o mesmo Segundo Circuito sintetiza os requisitos para a consolidação a dois: a percepção dos credores de que não estavam tratando com pessoas jurídicas separadas, mas com uma unidade econômica, e a percepção de que os vínculos entre os credores aconselham uma consolidação que beneficiará a ***todos*** os credores (whether the affairs of the debtor are so entangled that consolidation will benefit all creditors).

Neste julgamento ficou assentado também algo da maior relevância. Afirmou-se ali que mesmo se os proponentes da consolidação pudessem demonstrar a crença pessoal de estarem lidando com uma pessoa jurídica única, o instrumento não poderia ser utilizado em detrimento dos credores que achassem o contrário, é dizer, aqueles que estavam convencidos da separação das diversas personalidades. Consta do acórdão, em tradução livre, o

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seguinte: "***Onde... credores... conscientemente fizeram empréstimos para entidades separadas e nenhuma irremediável confusão de ativos aconteceu, um credor não pode ser obrigado a sacrificar a prioridade das suas pretensões contra o seu devedor por decisão baseada na especulação da corte de falência de que ela sabe mais do interesse do credor do que este próprio. (Where... creditors... knowingly made loans to separate entities and no irremediable commingling of assets has occurred, a creditor cannot be made to sacrifice the priority of its claims against its debtor by fiat based on the priority court´s speculation that it knows the creditor´s interest better than does the creditor itself.)"***

O que se extrai daí constitui a meu sentir a óbvia conclusão de que embora alguns credores possam ter contratado com a pessoa do falido ou do recuperando na percepção de serem os diversos integrantes de um grupo econômico uma coisa única, outros credores ao contrário confiavam na separação das personalidades. Enfatizou o tribunal, portanto, que a consolidação substancial deveria ser usada apenas depois que houvesse sido determinado que todos os credores seriam beneficiados pela impossibilidade de separação dos patrimônios ou porque essa se mostraria excessivamente custosa a ponto de consumir o próprio patrimônio.

Foi apenas em torno de 1980, se não neste próprio ano, que surgiu aquilo que o articulista chama de Tendência Moderna, ou "Modern Trend", elaborada pela Corte de Falências do distrito leste da Virgínia ao julgar In re Vecco Construction Industries Inc, pela qual essencialmente foram afrouxadas as amarras e os requisitos necessários para a aprovação da consolidação substancial, a ponto de na prática subtrair qualquer previsibilidade das relações contratuais, segundo o autor. Esta Moderna Tendência passou a trabalhar com uma série de critérios tidos por vários como questionáveis e também subjetivos: a) a presença de declarações financeiras consolidadas; b) a unidade de interesses entre as diversas corporações; c) a existência de garantias cruzadas; d) o grau de dificuldade na segregação dos ativos e responsabilidades de cada pessoa jurídica; e) a

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transferência de ativos sem a observância dos requisitos formais; f) o proveito da consolidação; g) a proporção do controle acionário pela holding das subsidiárias; h) a presença de diretores comuns em todas as sociedades; i) o fato de estar a subsidiária subcapitalizada; j) o fato das sociedades não estarem preservando a separação de suas personalidades; l) a existência de um caixa único.

A última etapa dessa novela revela aquilo que o articulista chamou de Rejeição da Teoria Liberal, esta proveniente da decisão tomada pelo Terceiro Circuito, equivalente ao nosso TRF 3, ao julgar a reestruturação de Owens Corning, já na década de 90. E os detalhes deste caso são curiosos porque extremamente semelhantes com aqueles sob análise no presente agravo. Com efeito, em 1997 aquela sociedade celebrou um contrato com seus credores no valor de 2 bilhões de dólares. Para garantir o pagamento desta importância, os credores exigiram garantias prestadas pelas diversas subsidiárias, que eram saudáveis, não possuíam dívidas e tinham ativos extremamente valiosos, mutatis mutandis o que aconteceu aqui, em sentido inverso.

Anos depois, em 2003, iniciou-se o processo de recuperação de Owens Corning e 17 outras subsidiárias, que apresentaram o requerimento de consolidação substancial de todos os seus ativos, desta forma arrastando para o processo de recuperação as subsidiárias até então saudáveis. E o requerimento foi atendido pela corte de primeiro grau ao argumento de que havia entre as sociedades um controle único e de terem sido as subsidiárias, criadas principalmente por razões tributárias, o que ao lado de argumentos pragmáticos, como parece ser o caso em análise, aconselhava a consolidação substancial.

Como este e os testes anteriormente citados resultavam na quase constante aprovação dos planos de reestruturação, sem maiores critérios, sobreveio a reação do Terceiro Circuito e a firme rejeição da Tendência Moderna. Os nortes traçados pelo Tribunal na compreensão do tema parecem-me interessantes e também relevantes. Segundo aquela Corte, limitar a responsabilidade cruzada entre as empresas de um mesmo grupo, em respeito à

separação de seus patrimônios, constitui uma regra fundamental do Direito Comercial. Também destaca o Tribunal que a consolidação substancial serve quase sempre a remediar os problemas causados pelo devedor que desconsidera a separação dos patrimônios. Por outro lado, a simples facilitação do procedimento não justifica a consolidação, que deve ser preservada para episódios raros, não podendo ser utilizada como uma panaceia para todas as hipóteses de crise do grupo empresarial.

E curiosamente, ao tratar das garantias cruzadas obtidas antes do processo de recuperação, naturalmente, destacou-se que a exigência de que aquelas fossem prestadas revelava na verdade a perfeita consciência dos credores de que estavam a tratar com pessoas jurídicas distintas. Por isso terminou a Corte por limitar o cabimento da consolidação substancial a duas hipóteses: a) a confusão das personalidades jurídicas e b) a presença de um tal nível de confusão entre os ativos que a sua separação se mostraria extremamente custosa.

Esse histórico parece mostrar, no mínimo, não se estar tratando de tema relativamente banal e já pacificado em doutrina, como sugerem as manifestações das recuperandas e alguns dos pareceres acostados. Entre uma tendência liberal e outra restritiva, presa às origens do instituto, oscilam os tribunais americanos no vácuo de ordenamento que não disciplinou a consolidação substancial, ao mesmo tempo em que contém dispositivos que consagram a independência das pessoas jurídicas no âmbito econômico.

Semelhante perplexidade, visível no direito americano pelas divergências entre o Segundo e Terceiro Circuitos da justiça federal americana, foi objeto de destaque por outro trabalho acadêmico de autoria do Professor Douglas G. Baird, da Faculdade de Direito da Universidade de Chicago (Substantive Consolidation Today, Boston College Law Review, Vol. 47:5). Em suas palavras, à

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consolidação substancial falta o sólido fundamento que alguém esperaria encontrar em uma prática tão comum no dia a dia dos tribunais.[3]

Não bastasse a divergência sobre as hipóteses de cabimento de consolidação substancial nos Estados Unidos, a evidenciar o terreno movediço pelo qual está caminhando a jurisprudência brasileira, destaco também que na véspera do julgamento recebi honrado e estimulado um parecer do Excelentíssimo Juiz aposentado Richard J. Holwell, que funcionou como juiz federal de primeiro grau na Corte Distrital do Distrito de Nova Iorque de 2003 a 2012, com competência para o julgamento de casos de falência e de recuperação. E segundo o respeitável magistrado, pelo que pude entender, o que se está tentando no Brasil no caso da Constellation não seria aquilo que os americanos denominam de consolidação substancial.

Em suas palavras, a consolidação substancial importa no colapso da separação das personalidades para a criação de um único bolo a ser distribuído entre os credores. Isto o que parece também dizer Andrew Brasher, em artigo sob o título Substantive Consolidation: A Critical Examination, para quem mesmo quando aplicada às recuperações judiciais, vale dizer, o famoso Chapter 11, a consolidação gera ao final uma única pessoa (In a Chapter 11 case, class voting, classification of claims, and cramdown are all adjudicated on the basis of the combined entity and, when the corporate group emerges form Chapter 11, it does so as a single).

Segundo o mesmo juiz Holwell, o que se está tentando aqui não é verdadeiramente reunir todos os ativos e passivos em um bolo único, pelo simples fato de que as sociedades pretendem preservar a sua autonomia, mesmo depois do término da recuperação. O verdadeiro intento das recuperandas é aprovar um plano único que dê conta dos débitos e das garantias concedidas, sem o desaparecimento de qualquer das pessoas jurídicas originais. E isto, diz o juiz, não

[3] Substantive consolidation lacks the solid foundation one usually expects of doctrines so firmly embedded in day-to-day practice.

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consiste em uma consolidação substancial mas naquilo a que chamam de Joint Administration, que diferentemente da consolidação tem expressa previsão legal nas Federal Rules of Bankruptcy Procedure, Rule 1.015, e que traduz justamente a necessidade de uma administração conjunta dos ativos, segundo o plano a ser aprovado por critérios que até muito recentemente eram ainda controvertidos, se apenas em 25 de fevereiro de 2018, ao julgar In Re Transwest Resort Properties, concluiu o Tribunal de Apelação do 9º Circuito, não por razões de direito natural, mas com base em sua própria legislação, mais precisamente segundo o contido no 11 U.S.C. §1129(a)(10), que a aprovação do plano não deveria levar em consideração a multiplicidade de devedores, mas tê-los como uma coisa única, em se tratando de grupos econômicos.

Portanto, a multiplicidade de artigos e trabalhos aludindo à consolidação substancial, através da qual se tenta implementar algo não previsto no ordenamento, quando menos deixou os respectivos destinatários sem uma completa e perfeita compreensão de como opera o ordenamento americano em sua amplitude, o que compromete muitíssimo o desejo de ultrapassar o dogma da separação das personalidades apenas para aprovação do plano e sem qualquer dispositivo equivalente ao contido na legislação americana.

E para recorrer ainda uma vez ao direito estrangeiro, em se tratando de problema jurídico de natureza internacional, observo que a linha mais restritiva de aplicação da teoria da consolidação foi a adotada pelo direito francês, até onde pude apurar, ao menos segundo a letra fria do artigo 621-2 do Código de Comércio, em seguida às alterações da Lei 2014-326, que fala de reunião de patrimônio nos casos de confusão patrimonial ou de fraude em detrimento de um credor quirografário.

Do Brasil não se pode dizer que tenha alcançado a desejada harmonia na aplicação do instituto, o que seria mesmo difícil se nem mesmo nos Estados Unidos, onde concebida, alcançou-se critério uniforme. Ao julgar o agravo de instrumento 003950-90.2015.8.19.0000, houve por bem a Egrégia 22ª Câmara

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Cível do TJRJ admitir a consolidação, basicamente por pertencerem as diversas empresas ao mesmo grupo econômico e também porque silente o artigo 53 da Lei 1101 quanto à possibilidade de sua utilização. Por fim, destacou o eminente relator que os dois maiores credores eram favoráveis ao plano único: "***a unificação dos planos de recuperação, ao que tudo indica, não tem o condão de causar qualquer prejuízo financeiro aos credores, muito menos dificultar a análise da viabilidade econômica das agravantes."***

Também a favor da consolidação, desta feita com mais argumentos, temos o agravo 2169130-27.2018.8.26.0000 do Tribunal de Justiça de São Paulo, relator o Desembargador Alexandre Lazzarini, que a seu turno valeu-se das lições do Ministro Luiz Felipe Salomão e de outros precedentes. Do Ministro, em obra conjunta com o Professor Paulo Penalva Santos, extraiu o relator o seguinte trecho: "***o grau de dificuldade em segregar os ativos e passivos individuais, o compartilhamento de despesas e de infraestrutura, a existência de empréstimos intragrupo ou garantias a empréstimos a empresa do grupo, a mesma administração ou sede são indícios que, no caso concreto, autorizam a consolidação substancial."***

Em sentido contrário, por outro lado, encontramos outros precedentes do Tribunal de Justiça de São Paulo. Este o caso dos agravos 2178269-37.2017.8.26.0000 e 2072604-95.2018.8.26.0000, envolvendo o grupo UTC, do qual se extrai:

> ***"Embora possível e interessante às devedoras comungar ativos e passivos, como meio de viabilizar a própria recuperação, inegável, como assentou o Des. Fabio Tabosa no julgamento do Agravo de Instrumento nº 2123667-67.2015.8.26.0000, quando integrante desta C. 2ª Câmara Reservada de Direito Empresarial, que a elaboração de um único plano de recuperação judicial presta-se, em última***

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> ***análise, a abusos e tem o condão de gerar graves distorções no tocante à situação dos credores de alguma das sociedades recuperandas, por primeiro diluindo o peso de suas participações na composição dos quóruns de votação e prestando-se inclusive a comprometer a legitimidade das deliberações assembleares, conforme venham tomadas, e depois, no plano da renegociação objetiva das obrigações, interferindo nas condições originárias dos negócios jurídicos por eles celebrados com as devedoras independentemente da situação econômico-financeira efetivamente apresentada por cada uma delas.***
>
> ***Na sequência, arremata: a elaboração de plano de recuperação judicial único somente pode ser deferida se aprovada pelos credores próprios de casa uma das recuperandas.***
>
> ***E com razão, pois admitir a consolidação substancial – mesmo quando evidente a confusão societária ou patrimonial das devedoras – sem exigir a concordância da maioria dos credores de cada uma delas certamente encaminharia para a subversão do instituto, prejudicando aqueles que têm o seu crédito garantido pelo patrimônio de uma ou outra sociedade, até então com independência patrimonial reconhecida."***

Também contrária à consolidação por decisão judicial, se bem compreendi o precedente, foi a decisão tomada pela 14ª Câmara Cível do TJRJ ao julgar o agravo 057021-07.2015.8.19.0000. Segundo o voto condutor do acórdão, não cabe ao Tribunal aprovar ou rejeitar a consolidação, mas à assembleia dos credores, deixando implícita a conclusão de que as listas deveriam ser separadas assim como separadamente deviam ocorrer as votações.

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Por fim, destaca-se pela importância hierárquica o acórdão proferido pelo STJ ao julgar o AgRg na Medida Cautelar 20.733, relator o eminente Ministro Marco Buzzi, aludido pelo Ministério Público em suas razões recursais, ainda que não tenham o voto e a ementa feito expressa referência à consolidação substancial. Dele, com efeito, extrai-se o seguinte trecho:

> "***A formação de grupos econômicos, prevista na Lei de Sociedades anônimas, dá-se mediante a combinação de recursos ou esforços das sociedades envolvidas, tendo por desiderato viabilizar a realização dos respectivos objetos, ou a participação em atividades ou empreendimentos comuns. Entretanto, cada empresa conservará autonomamente sua personalidade e seu patrimônio, nos termos do artigo 266, do referido diploma legal. Tal autonomia, como assinalado, ganha relevância no bojo de uma recuperação judicial. Nessa ordem de ideias, a responsabilização do grupo econômico por débito assumido por um de seus integrantes demanda previsão legal específica, tal como se dá na legislação trabalhista e tributária, ou, mesmo, na civil, no caso de fraude, hipótese, inequivocamente, diversa da tratada nos autos.***"

Concluída esta exposição, e antes de seguir aos detalhes do caso concreto, recorro uma vez mais ao Professor de Chicago para estabelecer o ponto de partida de qualquer decisão judicial versando o requerimento de consolidação substancial. Para Douglas Baird, a consolidação substancial faz-se com a potencialização dos direitos de alguns credores em detrimento de outros, e isso

exige uma adequada fundamentação.[4] É preciso, diria eu ainda, que os fundamentos sejam objetivos, adequadamente provados e formalmente deduzidos nas respectivas manifestações das partes. Não bastam alegações genéricas de que os credores institucionais têm interesse na consolidação, porque esta em síntese trata de conflito entre credores. Se existe confusão patrimonial ou negócios entre as sociedades, recai sobre as sociedades requerentes o fardo de alegá-los e prová-los.

E como fundamento para a pretendida consolidação substancial começa a inicial por destacar que as sociedades requerentes possuem personalidades jurídicas diversas, patrimônios autônomos e estruturas próprias adequadas. As razões pelas quais se pretende reuni-las em um só bolo, mesmo diante desta autonomia, são de um lado a existência de garantias cruzadas e de outro o fato de serem economicamente interligadas. Estes fundamentos, porém, foram acrescidos de outros nas próprias contrarrazões recursais. Primeiro foram trazidas considerações de natureza pragmática, a saber, o compartilhamento da distribuição dos pagamentos pelos credores de forma equitativa e o afastamento do risco de que credores de uma das sociedades, críticos do plano, possam rejeitá-lo e assim colocar em risco a recuperação do grupo como um todo. Depois foram listadas outras razões que aparentemente se amoldariam àqueles requisitos traçados pela corrente liberal americana: a interconexão das sociedades empresárias e sua atuação conjunta; a direção comum entre elas; a coincidência de composição societária; a existência de garantias cruzadas; operações econômicas conjuntas; a aprovação da consolidação pelos credores e a visão dos credores de que presente um todo único.

Pois bem, assim como fez o Terceiro Circuito Americano ao julgar o famoso caso de Owens Corning, não vejo na existência de garantias cruzadas o sinal inequívoco de que os credores institucionais viam o grupo como um todo unitário. Muito ao contrário, o que se extrai das razões apresentadas até aqui é que a holding Constellation Oil Services utilizava-se de pessoas jurídicas criadas

[4] Enhancing the rights of some creditors at the expense of others in this fashion requires justification.

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no exterior para arrendar sondas que seriam utilizadas na prospecção de petróleo em território brasileiro, como já se destacou na parte do voto que trata da competência. As vantagens de índole tributária para a localização no exterior das empresas são evidentes, a começar pelo não pagamento do ICMS sobre as plataformas, trazidas ao Brasil por arrendamento, modalidade em que aquele tributo não incide. E cada sonda, pelo que pude compreender, constituía um empreendimento à parte, nada sugerindo que os credores houvessem sido enganados pela ideia de conjunto único ou tratassem das diversas sociedades como integrantes de uma coisa única.

É certo que ao exigirem as garantias cruzadas os credores arrastaram para o olho do furacão todo o grupo econômico, que seria igualmente comprometido em caso de insolvência das empresas subsidiárias. Mas isto não nega a perfeita compreensão de que se tratavam de sociedades diversas, até porque mesmo diante do plano de recuperação não se alega o desejo de unificá-las em uma pessoa jurídica única daqui para frente.

Ao mesmo tempo, tenho que as garantias cruzadas representam no final instrumentos postos à disposição dos grandes credores institucionais. São eles, em especial os credores financeiros, os que estão em condições de exigi-las. Os credores pequenos, ou aqueles integrantes do cotidiano da empresa, negociam em regra sem garantias. E disto se extrai que permitir a consolidação por conta das garantias cruzadas terminaria por conferir ao credor financeiro o poder de ao seu talante mudar as regras de distribuição do patrimônio e de votação nas respectivas assembleias onde serão aprovados os planos. Bastaria, na iminência ou mesmo diante do risco de uma insolvência, aportar capital mediante a contrapartida de garantias da holding ou da controladora direta.

Tampouco me impressiona a convergência de atividade econômica ou mesmo a existência de um centro único de comando. Em todos os grupos econômicos está presente algum tipo de controle central, normalmente exercido pela holding de forma direta ou indireta. E, do mesmo modo, grupos econômicos

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mantêm entre si algum tipo de sinergia econômica que potencializa o sucesso das empreitadas. Mas estando isso presente em quase todos os grupos econômicos, acolher o pleito de consolidação a partir daí significaria estendê-lo de forma linear e sem critério em virtualmente todas as circunstâncias, mesmo à míngua de qualquer dispositivo na Lei de Falências.

Os demais argumentos trazidos nas contrarrazões recursais não foram explicitados, e muito menos provados. Se a consolidação substancial representa uma exceção à separação das personalidades jurídicas e carece de cuidadosa fundamentação, não basta alegar a existência de operações econômicas conjuntas. Elas precisariam ser explicitadas e dimensionadas, de modo que o relator pudesse saber em que medida foram realmente significativas. Se o fluxo de capital era concentrado em uma única conta, por exemplo, e de lá saíam os pagamentos para os fornecedores, isso precisaria ser cuidadosamente demonstrado, ainda que esta concentração não fosse suficiente, à luz da jurisprudência restritiva americana, para o deferimento da reunião dos ativos.

Em síntese, é preciso que a jurisprudência brasileira, como de resto a estrangeira, estabeleça algum critério objetivo para o deferimento da consolidação substancial. É preciso também que a doutrina e os tribunais estudem com mais profundidade a matéria para confrontar o instituto com aquele outro da Joint Administration, enfatizando-se entretanto que o simples fato de consolidar-se o patrimônio não tem nenhuma relação aparente com a forma de votação do plano de recuperação na assembleia, porque a opção per plan / per debtor não se faz por juízo de equidade mas como reflexo da expressa opção legislativa do legislador americano. A prática dos juízes de primeiro grau, no Brasil e alhures, de tratarem o instituto como relativamente inevitável, em se tratando de grupos econômicos, não deve, portanto, ser acolhida pelos tribunais, e muito menos aqui, em que, repita-se, não se alega ter havido qualquer confusão de personalidade e não pretendem as recuperandas reunir passivo algum, ou ativo algum, mas preservar a multiplicidade de pessoas jurídicas ao final do procedimento.

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É certo que expressiva fração dos credores concordou com a consolidação, mas isso não significa que ela seja do interesse de todos os credores de todas as pessoas jurídicas envolvidas, algumas delas sem qualquer dívida e absolutamente saudáveis, e ainda assim arrastadas para o processo de recuperação em possível detrimento dos seus respectivos credores.

Tendo as empresas personalidades totalmente separadas, como destacou a própria inicial, não cabe a consolidação por determinação judicial. Sua aprovação fica a critério dos próprios credores, que devem aprová-la, se assim o quiserem, com a apresentação de listas autônomas e separadas, sem que possa o Judiciário, paternalisticamente, julgar a conveniência de cada um dos credores.

Os dois últimos pontos do agravo interposto pelo Ministério Público dizem com a ausência de documentos obrigatórios previstos no artigo 51 da Lei 11101 e o decreto de sigilo, pela qual o juízo vedou aos credores e aos seus advogados, ainda que constituídos, o acesso às relações dos empregados e de bens do sócio controlador e dos administradores. E sobre esses temas dizem as contrarrazões recursais que foram todos os requisitos do artigo 51 da Lei 11101 devidamente atendidos e que o problema está no seu oferecimento consolidado. Por fim, alegam que não existe razão para se garantir o acesso ilimitado a documentos com as informações financeiras das pessoas físicas.

Com relação à primeira parte, e em coerência com o que se decidiu acima, tenho que os documentos obrigatórios devem ser apresentados de forma individual, respeitada a autonomia das respectivas personalidades jurídicas.

Já com relação ao sigilo das informações indicadas no artigo 51, inciso VI, da Lei 11101, é preciso compreender a razão de ser da regra, e a ratio das informações, a meu sentir, é permitir aos credores, os senhores únicos da aprovação do plano, decidir sobre o acolhimento ou não da proposta feita pelo devedor. É bem possível, por exemplo, que à luz dos bens particulares concluam os credores pela rejeição do plano e decretação da falência. Não faz sentido,

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portanto, que documentos que devem ser apresentados sejam cobertos por sigilo em detrimento das próprias partes do processo, de modo que também nessa parte merece o recurso do Ministério Público provimento para franquear ao Ministério Público, ao administrador judicial, aos advogados dos credores habilitados livre e franco acesso a todos os documentos do artigo 51 da Lei 11101, sem exceções.

Meu voto, destarte, é no sentido de dar parcial provimento ao recurso para: 1) excluir da recuperação as três sociedades estrangeiras acima referidas, 2) determinar a apresentação separada de listas de credores, a serem votadas separadamente nas respectivas assembleias, às quais caberá a aprovação ou rejeição da consolidação substancial proposta, 3) determinar a apresentação de relatórios separados e 4) deferir o acesso irrestrito de todos os advogados dos credores habilitados aos documentos a que se refere o artigo 51 da Lei 11101.

Rio de Janeiro, 26 de março de 2019.

EDUARDO GUSMÃO ALVES DE BRITO NETO
Desembargador Relator

Lucas Livingstone Felizola Soares de Andrade
SWORN PUBLIC TRANSLATOR
JUCESP 1879

LUCAS LIVINGSTONE FELIZOLA SOARES DE ANDRADE
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Judicial Branch of the State of Rio de Janeiro

Sixteenth Civil Chamber

Interlocutory Appeal No 0070417-46.2018.8.19.0000 Appellant: Prosecution Office of Rio de Janeiro

Appellee: Serviços de Petróleo Constellation S.A. in reorganization and others

Appellate Judge Eduardo Gusmão Alves de Brito Neto

APPELLATE DECISION

Interlocutory Appeal. Business and Procedural Law. Reorganization of foreign companies. Substantive Consolidation Confidentiality of bank data and remuneration of directors of the debtors.

1- The Brazilian jurisdiction, with respect to reorganization and bankruptcy liquidation, obeys the Territoriality Principle, or Grab Rule, by which the national court is restricted to Brazilian or foreign entities that possess assets and economic activity in the Brazilian territory, which is also extracted from article 3, part 2, of Law 11.101, which alludes to the headquarters of the branch of a foreign company, signaling its treatment as a true separate estate.

2- The jurisdiction for the reorganization of subsidiaries, with respect to economic groups, and due to the autonomy of the various corporate entities, is not determined by the Group's Center of Main Interest, understood as a synthesis of the economic activity developed by the various companies, which will be reorganized, at the international level, in as many places as the countries

Lucas Livingstone Felizola Soares de Andrade
SWORN PUBLIC TRANSLATOR
JUCESP 1879

LUCAS LIVINGSTONE FELIZOLA SOARES DE ANDRADE
Sworn Public Translator

AT-34059_001_
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in which they possess their assets, without prejudice to the fact that other jurisdictions, according to their respective legal system, may consider one of the proceedings as a main proceeding.

3- The Center of Main Interest, in any case, cannot be determined by the simple measurement of the place where the company's most important area of activity is situated, from an economic point of view, at least for the purpose of determining the jurisdiction to be used.

4- Recognition of Brazilian jurisdiction that is limited, in compliance with the Territoriality Principle, to foreign companies with assets in national territory.

5- The hypotheses of substantive consolidation by court order are restricted to those cases of co-mingling of assets and improper use of corporate personality, as an institute for the defense of all creditors. Otherwise, the consolidation shall be approved by the creditors themselves on separate lists, and, as a rule, the judgment of the creditors cannot be replaced by the judicial opinion on how best to protect their interests.

6- Substantive consolidation that, from what is understood from the reasons and legal opinions would reproduce in Brazil the American institute of “substantive consolidation”, which exists without express provision in that system and granted by the court‘s equity powers. Evidences, however, that substantive consolidation has application restricted to cases of bankruptcy liquidation. Judicial reorganization corresponds to a different figure of the Joint Administration, provided for in the Rule of Bankruptcy Procedure where the possibility of voting with respect to the group, as a whole, per plan, as opposed to a per debtor approval, was not clearly recognized until the trial, on January 25, 2018, by the Court of Appeal of the 9th Circuit of the American Federal Court of Justice, In Re Transwest Resort Properties.

7- The documents required to be filed with the reorganization petition become part of the evidence in record and cannot be withheld from the parties to the proceeding themselves, hence the nullity of an order limiting their access to the judge and the Member of the Public Prosecutor's Office.

8- Appeal partially granted to exclude three of the fourteen foreign companies from the proceeding, refuse the mandatory substantive consolidation and ensure the parties' access to all mandatory documents listed in article 51 of Law 11,101.

Lucas Livingstone Felizola Soares de Andrade
SWORN PUBLIC TRANSLATOR
JUCESP 1879

LUCAS LIVINGSTONE FELIZOLA SOARES DE ANDRADE
Sworn Public Translator

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These records of interlocutory appeal No 0070417-46.2018.8.19.0000 were seen, reported and discussed, in which the appellant is the Public Prosecution Office of Rio de Janeiro and the appellee is Serviços de Petróleo Constellation S.A. in reorganization and others.

The Appellate Judges of the Sixteenth Civil Chamber of the Court of Appeals of the State of Rio de Janeiro AGREE unanimously to partially grant the appeal, in the form of the Reporting Judge's vote.

REPORT

The Public Prosecutor's Office of the State of Rio de Janeiro filed this interlocutory appeal against the decision of the 1st business court of the capital that accepted the processing of the reorganization of the so-called Constellation group, in a total of 18 companies engaged in prospecting of oil onshore and on the Brazilian coast. From this decision disagrees the Public Prosecutor's Office because it allegedly recognized the jurisdiction of the Brazilian courts for the so-called transnational reorganization, to include group companies incorporated abroad, and because it ignored the non-submission of obligatory documents for the acceptance of the processing and finally because it granted the so-called substantive consolidation.

About the substantive consolidation, it argues on the conceptual difference, recognized in doctrine, between this and the so-called procedural consolidation. For procedural consolidation, there is joinder of parties among several companies of the same economic group that jointly require the court to restructure their activities, although they do so by submitting different lists of creditors, separate but convergent plans and autonomous meetings of creditors, a practice that the case law has tolerated with relative tranquility. The substantive consolidation, as granted by the court, would consist of pooling all creditors and all assets in a single block, with unified lists and a single plan, so that the companies that are part of the conglomerate would be considered, for all purposes, one thing only. The creditor of a company would also be the creditor of the group. Their vote in the meeting of creditors would not take into consideration the proportion of his share of the liabilities of the entity with whom he is related to, but merely the fraction, including legal entities with which they did not have contacts.

And this second practice, the consolidation of assets, would not be accepted by the Brazilian precedents, except when so decided by the creditors themselves, in votes that contain separate lists.

Lucas Livingstone Felizola Soares de Andrade
SWORN PUBLIC TRANSLATOR
JUCESP 1879

LUCAS LIVINGSTONE FELIZOLA SOARES DE ANDRADE
Sworn Public Translator

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With regard to the so-called transnational reorganization, and to the jurisdiction of the Brazilian court to process the restructuring of foreign companies, the Public Prosecution Office maintains that 14 foreign companies are listed as debtor entities, without having branches, creditors or employees in Brazil. The claims due and object of the plan should be repaid abroad, including with the application of foreign law and the election of the New York court as the sole jurisdiction for any litigation.

The Public Prosecution Office proceeds to ponder that the choice by the companies of the British Virgin Islands for their place of incorporation, probably for tax reasons, has as counterpart the burdens inherent to that choice, making unfeasible the use of the Brazilian Judicial Power and the Brazilian laws. With respect to the reasons for this, the following excerpt is highlighted: "The Queiroz Galvão group created 14 companies abroad; issued bonds by these companies abroad; has pledged to honor these bonds abroad; collected any taxes related to these obligations abroad, but pleads the application of the Brazilian jurisdiction to restructure such operations. "

In Brazilian law, on jurisdiction, the Public Prosecution Office proceeds, the bankruptcy law provides that the jurisdiction to process judicial reorganization or adjudicate bankruptcy liquidation extends only to the branch of a company that is incorporated outside Brazil, and even in those cases without the ability to extend the arms of the jurisdiction to the assets located abroad, all in accordance with the Territoriality Principle, accepted by the Brazilian legal system.

Lastly, about the third argument, the Public Prosecution Office maintains that were not submitted to the record any Accumulated Income Statement (art. 51, inc. II, letter "b", of Law 11101), Management Report of Cash Flow (art. 51, inc. II, letter "d") and Lists of Creditors individualized by debtor (art. 51, inc. III). In addition, the secrecy of the lists of employees and assets of the controlling shareholder and of the administrators has been unlawfully decreed, barring their access to creditors and lawyers, even though they are admitted in the records, which in turn violates the Principle of Transparency that is present in art. 51 of the Bankruptcy and Reorganization Law.

The counter-arguments offered by the group in reorganization point out that only 3 appeals have been filed against the decision that accepted the restructuring of the group: that of the Public Prosecutor's Office, another filed by Alperton Capital Ltd., a former minority shareholder of two group entities, and a third party placed by a creditor holder of Bonds, showing that of all the

Lucas Livingstone Felizola Soares de Andrade
SWORN PUBLIC TRANSLATOR
JUCESP 1879

LUCAS LIVINGSTONE FELIZOLA SOARES DE ANDRADE
Sworn Public Translator

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creditors of the group only one of them was dissatisfied with the contested order. It is also worth noting that in the administrative phase, 11 proofs of claims were presented, regarding material errors or divergent amounts of claims, without any challenge, once again, to the reorganization itself. Half of the labor claims have already been paid and some of the debtors have benefited from the ancillary protection granted by the famous Chapter 15 of the American legislation and its equivalent in the legislation of the British Virgin Islands, and in both cases the jurisdiction of the Brazilian court to process the request for reorganization of all entities of the Constellation group would have been recognized.

They continue to point out that the proportionally low litigation is explained by the negotiable and consensual nature of the process, which includes to what they call the Plan Support Agreement to the Reorganization Plan, whereby 47.1% of the secured creditors and 60.2% of the unsecured creditors are already committed to support the restructuring.

Regarding the law itself, they maintain that there is no impediment in Brazilian law to the national jurisdiction, and it is desirable that this should be affirmed, in the case of an economic group, in the place where the main part of the business is located, from which the effects by the other jurisdictions in a process of collaboration and coordination would irradiate among all of them, as per some prior cases already submitted to the Brazilian courts.

The Constellation group has been developed into a corporate conglomerate, with the creation of foreign entities linked, however, by the joint and concomitant provision of services in Brazil, where, therefore, its operational center is located and where it the reorganization process shall be based. After all, the group was originated in Rio de Janeiro, where the operator of all the drillship is located. In Brazil, it concentrates its activities, in direct relation with Petrobras, as well as the drillship themselves, operated in charter service performed by Brazilian workers in national territory.

Likewise, there would be no impediment to the so-called substantial consolidation, which in this case is based on prior consent of the majority of the creditors. This is because the companies are part of the same economic group, act jointly and in a connected way, have common direction and coincident ownership, besides having provided cross-collateralization in which the proper drillship are encumbered for this purpose, all of which justifies the support plan subscribed by the creditors themselves, who thus recognize the existence of a single economic phenomenon.

Lucas Livingstone Felizola Soares de Andrade
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JUCESP 1879

LUCAS LIVINGSTONE FELIZOLA SOARES DE ANDRADE
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Regarding the missing documents, it maintains that these are or record and that the objection of the Public Prosecutor's Office in fact is turned against its presentation in a consolidated manner, which has not been dealt with by the Companies Reorganization Law. And finally, as to the secrecy decreed, it states that it was necessary for the risk of cooptation of its employees by the competitors of the appellees, if the salary of each and every employee were to be publically disclosed, not counting the risks for their own safety in a city such as Rio de Janeiro, and in this sense, lists precedents of the Court of Justice of São Paulo.

The brief by the Public Prosecutor is of the opinion that the appeal should be partially granted so that individual lists of creditors are submitted per company and that the documents mentioned in article 51 of the Bankruptcy Law are presented and made available to the Public Prosecutor's Office, lawyers and interested parties, the remainder of the contested decision being maintained.

This is the report.

VOTE

The jurisdiction for the judicial reorganization and bankruptcy of corporate groups has reached the Brazilian courts in recent years from the difficulties faced by the country's economy and the presence of national conglomerates that have managed to compete globally, with branches, agents and subsidiaries spread around the world. One of the most, if not the most representative, of these cases was the one involving OGX Petróleo e Gás Participações and its Austrian subsidiaries, which existed for the purpose of issuing bonds abroad in order to finance activities in Brazil. In dealing with the national jurisdiction to process the reorganization of Austrian companies, concluded the Fourteenth Chamber of the Court of Justice of Rio de Janeiro that those could be admitted in the case under the following reasoning:

"The two foreign subsidiaries, which were excluded, first and foremost, from the judicial reorganization process, operate only in strict control of the parent company, serving as vehicles of Brazilian companies for the issuance of bonds and receipt of revenues abroad, collating the financing of oil and natural gas exploration and production activities in Brazil.

Thus, foreign business companies that are set up as the financing structure of their national parent company, forming a single economic group, in favor of a single business activity, which is

Lucas Livingstone Felizola Soares de Andrade
SWORN PUBLIC TRANSLATOR
JUCESP 1879

LUCAS LIVINGSTONE FELIZOLA SOARES DE ANDRADE
Sworn Public Translator

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something not uncommon in the contemporary era of globalization of markets, especially when one considers the activity that has been exploited, which intensifies cross-border legal relations.

Obviously, they do not have branches or agencies in the national territory, since, as already mentioned, they are subsidiaries of the Brazilian business entity which is, in reality, responsible for the payment of bonds issued abroad "(Interlocutory Appeal 0064658-77.2013.8.19.0000)

The framework of the applicants in the specific case is significantly different, starting with the fact that the group's own holding entity is foreign, and each company is a diverse and, to some extent, isolated enterprise.

The question to be asked here, therefore, given the structure of the group, is whether the fourteen companies, incorporated abroad, but which operate almost exclusively in the national territory, fulfill the requirements of the Code of Civil Procedure and Law 11.101 for access to Brazilian Judiciary.

It is appropriate first to explain, in summary form, the organization chart of the group and the origin of the debts that resulted in the request for reorganization. About the organization chart, the holding company of the group, Constellation Oil Services, with its registered office in Luxembourg, indirectly controls Constellation Overseas, incorporated in the British Virgin Islands, which in its turn controls the company Serviços de Petróleo Constellation. And precisely this last one, because the company is based in Brazil, it participates in bids for drilling offshore and offshore wells, basically promoted by Petrobras.

With each new drilling, with each new project, an offshore entity was created. And abroad, the necessary financing for the construction of the drillships and other vessels necessary for the service was obtained. These funds basically came from classic loans from a variety of financial institutions and bonds, maturing in 2019 and 2024. One and others, loans and bonds, were formalized by contracts entered into abroad, governed by the laws of New York, which elected the judiciary of that State to settle any disputes.

As a rule, as far as I could understand, the financial agents demanded, in guarantee of the loans, the very drillship to be built, as well as guarantees or equivalent instruments given by the other companies in the group. And that is exactly what this reorganization is all about. Five companies have raised funds abroad: Constellation Oil Services Holding and Constellation Overseas on the

Lucas Livingstone Felizola Soares de Andrade
SWORN PUBLIC TRANSLATOR
JUCESP 1879

LUCAS LIVINGSTONE FELIZOLA SOARES DE ANDRADE
Sworn Public Translator

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one hand, and other drillship companies, namely Brava Star, Laguna Star and Amaralina Star. The other legal entities included in the reorganization are all mere guarantors of the payment of debts, except Constellation Services, which although it has no debt or any guarantee, was included, as it is alleged, because it concentrates the group's cash abroad and requires thus protection against the attack of potential creditors.

Briefly describing the operation of the group, and passing to the jurisdiction, for the processing of bankruptcy liquidation or reorganization of international groups, we have in the theoretical plan the conception of three possible systems for its discipline, as taught by Alexandre Ferreira de Assunção Alves, Professor of Business Law of Uerj, in an article published in the Revista da Escola de Magistratura with the title "Transnational Insolvency and Brazilian Bankruptcy Law." The first system would be the so - called universalist system, which assigns to a single court – the universal jurisdiction for the totality of the legal relations of the debtor, wherever they have been born and wherever the assets of the legal entity are located - –whether in bankruptcy liquidation or reorganization. The governing law on the reorganization or liquidation would be singular, even in the case of international corporations, providing predictability, efficiency and reasonableness to the procedure and that cannot be obtained by dividing the settlement or reorganization process by country to country. Japanese secured creditors would be treated in the same way as creditors with the same collateral and domiciled in Bolivia or Tanzania. This was the theory accepted by Savigny, according to Haroldo Valladão's lesson.

In the universalist doctrine, and because the administration of assets is reserved to a single universal court, the risk of conflicting decisions decreases dramatically, as well as the costs and time of the procedure are reduced. Among others, this seems to be the ideal dreamed by Professor Irit Mevorach, in a work published by Oxford University Press under the title Insolvency Within Multinational Enterprise Groups. According to the Professor, the treatment given by world legislation to bankruptcy liquidation and judicial reorganization is always based on corporate law, which was designed to regulate the activities of companies separately considered, a normative reality incapable of picturing the current state of the economy and the way in which economic groups operate in a globalized world. The very idea of the separation of personality from the legal entity is put at stake although it is recognized that the segregation of assets among the legal entities of an economic group is one of the main reasons for its existence.

The truth, however, in the words of Alexandre Ferreira de Assunção Alves, is that "The universalist proposal, even by its proponents, is recognized as an ideal because it would hardly

LUCAS LIVINGSTONE FELIZOLA SOARES DE ANDRADE
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work in the factual circumstances of the world, mainly because of the obstacles of the notion of sovereignty. " It is not a distinct matter, mutatis mutandis, as Irit Mevorach points out, when she seems to recognize that no state has so far freely and unilaterally adopted the policy of recognizing the validity of foreign judgments with respect to immovable property located within its territory (Ob.cit. page 86). In fact, the laws of each country tend to discipline the reorganization process differently, as does bankruptcy liquidation, giving each claim the preference that seems most appropriate, without prejudice to simply excluding from the reorganization this or that legal relationship. Moreover, countries usually keep the decision on the ownership of assets situated in their own territory, as Brazil does in the Code of Civil Procedure, reserving for itself, to the exclusion of any other, the jurisdiction to hear relative actions to assets located in Brazil (article 23, inc. I).

The second theoretical line for the problem of jurisdiction adopts the so-called territorial system. According to this one, still in the words of Alexandre Assunção Alves, "the decision of each court is restricted only to the borders of its national territory, so that it can only deal with those assets that are situated within those limits." Quoting Professor Alexsander Kipnis, the basic rule of territoriality provides that the courts of each country in which the debtor has assets shall be responsible for their distribution, not being able to treat or distribute goods and assets located in other countries in which the legal entity operates.

Therefore, by the territorialist theory, the judicial reorganization and bankruptcy, in the case of multinational companies, shall be carried out by as many processes as there are jurisdictions in which the debtor operates. It is just like as in practice there were a plurality of bankruptcies or reorganizations relating to the same debtor. And it is precisely this plurality, says Alexandre de Assunção Alves, who is generally enshrined in international law, especially in the name of the sovereignty of the countries and also because it is the only system that allows states to preserve their own public policies and legal preferences.

As this system also has disadvantages, among which the increase in the cost of credit and the risk of favoring the national creditors of the countries to the detriment of foreign creditors, an intermediate system or synthesis procedure of the two previous ones was conceived, which is the so-called mixed system or systems. These are in some way due to the collaboration between the states that have interests in certain insolvency. Although several processes continue concurrently with the Globe, each governed by the law of the own country, some variations of the mixed theory defend the prevalence of a main proceeding to the detriment of the ancillary proceedings, in which

Lucas Livingstone Felizola Soares de Andrade
SWORN PUBLIC TRANSLATOR
JUCESP 1879

LUCAS LIVINGSTONE FELIZOLA SOARES DE ANDRADE
Sworn Public Translator

AT-34059_001_
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the judges would be limited to assess the reasonableness and justice of the decisions taken by the main proceeding, understood both as antidotes to the possible violation of imperatives of the local law. Other variations of the mixed theory, however, deny any submission in favor of the main proceedings, although recognizing the duty of reciprocal aid which is recorded in each of the jurisdictions.

Various articles available on the Internet and foreign books deal with the concrete application, in each country, of the above synthesized notions. I tried to examine them, although the perfect understanding of the current state of each country is greatly hampered by the fast evolution of the subject in International Law. In the United States, for example, the Bankruptcy Code addresses in Section 109 the jurisdiction to file for bankruptcy or reorganization in the United States, providing that: "only a person residing or has a domicile, a place of business, or property in the United States may be a debtor under this title. " [There appears footnote: …only a person that resides or has a domicile, a place of business, or property in the United States… may be a debtor under this title.]

As Adrian Walters [There appears footnote: United States' Bankruptcy Jurisdiction over Foreign Entities: Exorbitant or Congruent?] explains, the standard to access American courts is very low. The company or group of companies is not required to have its principal center of economic interests in the United States, and not infrequently the creditors manufacture the American jurisdiction by transferring to the country small sums of resources that legitimize the criterion of ownership in national territory. One extremely representative case of this liberality was the restructuring of Avianca in the American judiciary. The group of companies, which certainly had its center of main interest in Colombia, did not invoke the jurisdiction of that country, but of the US courts, on the simple argument that their planes were often on American soil, where it was possible to say that that one possessed property.

According to Adrian Walters, this explains why the great concern of the debtors was actually to prevent the action of the great American financial groups, which perhaps could not be achieved, for reasons of sovereignty if the action had been proposed in Avianca's center of main interest. There was a risk, in other words, that the grant of the judicial reorganization by the Colombian court did not inhibit the petitions for attachment by the American creditors, who are precisely the owners of the most significant part of the claims against the airline.

Lucas Livingstone Felizola Soares de Andrade
SWORN PUBLIC TRANSLATOR
JUCESP 1879

LUCAS LIVINGSTONE FELIZOLA SOARES DE ANDRADE
Sworn Public Translator

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This and other precedents reflect American pragmatism with respect to reorganization and bankruptcy, as they show the preference for a jurisdiction of effects, so to speak, in the sense that the jurisdiction of American justice is present where it can be effectively rendered.

In the United Kingdom, at least under the Insolvency Act of 1986, as amended in 2005, only companies located in the United Kingdom and the European Economic Community can evoke the British courts, unless it is proved that they have as center of main interest England, Wales or Scotland. And the presumption that the company has its center of main interests in place of the registered office can only be overcome by objective and verifiable arguments that the opposite happens.

Therefore, in the United Kingdom, unlike the United States, the bar was set at a higher level, and it is not enough that the company owns properties in British territory, if it does not have its headquarters or its center of main interests, a concept that is more economic than legal.

The European Parliament's Regulation 2015/848 of 20 May 2015 on insolvency proceedings in the European Community states in its article 3 that the competence (rectius, jurisdiction) for bankruptcy is the responsibility of the State where the so-called center of main interests of the debtor is situated, it being presumed that the center of interests is the place of its registered office. Although the Article 3 does not deal expressly with a group of companies, the recitals of the regulation announce in item 53, literally that:

"The introduction of rules on the insolvency proceedings against groups of companies should not restrict the possibility for a court to initiate insolvency proceedings in respect of several companies belonging to the same group in a single jurisdiction if it considers that the center of the main interests of those companies is situated in a single Member State. In such cases, the court shall also be entitled, where necessary, to appoint the same insolvency administrator in all the cases we are talking about, provided that this is not incompatible with the rules applicable to them."

As understood from this, there is not a predominance of the holding company or the attempt to find a center of activities of the block of companies. They are, on the contrary, each of the possible subsidiaries, seen as autonomous entities and possessing their own center of interests, even because the existence of common interests will be remedied through a system of coordination,

Lucas Livingstone Felizola Soares de Andrade
SWORN PUBLIC TRANSLATOR
JUCESP 1879

LUCAS LIVINGSTONE FELIZOLA SOARES DE ANDRADE
Sworn Public Translator

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which I will deal with later; in any case, as item 54 of the recital provides, shall respect "at the same time the legal personality of each member of the group."

Lastly, we have the famous model of legislation proposed by the United Nations, or simply UNCITRAL model, which works with a prevailing judgment, where the center of main interests of the debtor, aided by ancillary processes, is situated in countries where the debtor has property, thus adopting, as far as I could understand, an intermediate universalist line.

Descending to the Brazilian legislation, it is known that it did not regulate transnational insolvency, nor reorganization. Law 11.101, in its article 3, was limited to dealing with the internal jurisdiction to hear and judge bankruptcy liquidation or the request for reorganization, which it does with the following words: "The jurisdiction to approve the extrajudicial reorganization plan, judicial reorganization or adjudicate the bankruptcy liquidation, belongs to the court of the place of the principal place of business of the debtor or of the branch of company incorporated outside Brazil. "

The thesis of the initial petition is that the first part of the article, when alludes to the center of main interest of the debtor, would legitimize the access to the Brazilian judiciary of all debtor entities, even foreign ones, since in the case of groups of companies the jurisdiction should be determined by the synthesis resulting from the sum of the activities of all of them, as if only one institution were concerned.

Starting backwards, from the particular to the general, I emphasize that nothing in the legal system supports the claim to treat the economic group, for purposes of international jurisdiction, as if it were a single thing, except when verified the co-mingling of personalities or perhaps when the companies of the group integrate all of them a part of a structured that is complemented by the combination of efforts to achieve a single business in the sense of economic activity. On the other hand, the Law 6,404, Corporations Act, as well as the legislation of other countries, provides in article 266 that in groups of companies each member must keep separate personality and assets, which has been emphasized by many, of which I emphasize Jorge Lobo (Group of Companies, Revista dos Tribunais, Vol. 636/1988): "Thus, a de facto group is actually formed by the parent company, its subsidiaries and affiliates, who, although acting interconnected, did not enter into a disciplinary pact of their activities, in which case the expert should consider them as isolated, independent companies and in no event can one company benefit another, or sacrifice its own rights and interests for the benefit of the group or any other company". Jorge Lobo also points out

Lucas Livingstone Felizola Soares de Andrade
SWORN PUBLIC TRANSLATOR
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LUCAS LIVINGSTONE FELIZOLA SOARES DE ANDRADE
Sworn Public Translator

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that this independence is made explicit by the legal system when it establishes in Article 245 of Law 6,404 that the directors cannot, to the detriment of the company, favor affiliated, controlling or controlled company, in order to ensure that obligations between companies, if any, observe strictly commutative conditions.

It is true that innumerable criticisms are directed at the sacredness of legal personality, particularly when the separation contradicts the reality of groups united from the economic point of view. In any case, this is a choice of the entrepreneur, and consequences come from it. To the extent that he preferred segregate the assets and derive from it various advantages, including taxes, he cannot then claim the unity of the group.

For example, taxation of the offshore rigs. There is no doubt that if it were not for the diversity of legal entities, the entry of the rigs into national territory would be a taxable event that is circumvented through lease agreements between the different members of the conglomerate.

I conclude that the jurisdiction, in the case of economic groups, at least in the void of any legislative proposal, must be determined per company, or at least per business, exactly as advocated in European law, because that is what results from article 266 of Law 6.404. And in this step, the hypothesis under analysis is completely different from the precedent of the Fourteenth Civil Chamber, in which two companies existing abroad were absolutely empty and dedicated themselves exclusively to instrumentalizing loans, which is not considered here, at least for the subsidiaries.

But that, by itself, does not solve the jurisdiction dilemma. According to the debtors, all subsidiaries, in one form or another, have their Center of Main Interest in Brazil, inasmuch that it is in the contracts executed and performed here, with Petrobras, that they concentrate their economic activity. Therefore, the Brazilian jurisdiction would be determined not by the Group's Interests Center, as a whole, but by the subsidiaries themselves.

On this second line of argumentation, I begin by diverging from the concept of Center of Main Interest elected by them, at least as far as its usefulness is concerned for the establishment of international jurisdiction, and for denying, as a consequence, that foreign subsidiaries possess in the Brazil the core of its activity. Recent STJ precedents seem to give the Center of Major Interests a quantitative connotation, as extracted from AgInt in CC 147.714/SP and AgInt in CC 157,969, both of STJ, the first of which contained the following statement: "In terms of article 3 of Law

Lucas Livingstone Felizola Soares de Andrade
SWORN PUBLIC TRANSLATOR
JUCESP 1879

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11101/2005, the court with jurisdiction to process the judicial reorganization and the adjudication of bankruptcy is the one where the main establishment of the company is located, thus considered the place where there is the largest economic turnover, that is, the most important place of business activity from the economic point of view. "

Based, therefore, on the fact that the offshore rigs of the foreign companies are leased in Brazil, it is concluded that this is where the Center of Main Interests is located and that here the reorganization must proceed. But this definition, especially when international jurisdiction is being defined, has dramatic consequences.

Let's consider some famous economic and corporate groups: TAP or Vale. Is it possible, from what we know of these companies, to affirm the jurisdiction to reorganize them from the place where the greatest volume of their resources comes from? If the answer is purely economic, it is possible that Vale's center of main interest is in China, and TAP Brazil. That is, TAP, a company incorporated in Portugal and a significant shareholding by the Portuguese government, would be reorganized in Brazil and would have its bankruptcy adjudicated, only for having 25% of its revenue in the national territory, a percentage higher than the 20% that it extracts from its own country of origin.

The Center of Main Interest, with this conformation, seems perfect for the definition of the territorial jurisdiction, but it is not enough when the definition of jurisdiction is at stake, if the main market of the company may be far from its decision-making center, its accounting, capital that controls the company.

Therefore, if we adopt the concept of Center of Main Interest elected, it would not help the foreign the foreign debtors. The wealth that feeds them comes from Brazil, that is certain. But here there is no headquarters, branch office, checking account or accounting books. Not even contracts are executed, in their majority, since the offshore rigs entered the country through lease agreements executed abroad and involving three persons: abroad, the debtors lease the rigs without a crew (bareboat charter) to a second company (this is the case of Palase), which then subleases them, so to speak, to Petrobras or Constellation Brasil.

Again, the Center of Main Interest, to be recognized, must at least reflect some perennial structure of the company. And it must be confronted with other equally important factors, which are not present here: place of execution of contracts, country of concentration of labor, among others.

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JUCESP 1879

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Alpha Star, Amaralina, Arazi, Brava, Laguna and others do not have an employee working from Brazil. And unlike the OGX case, these are companies that truly exist, which is extracted from the initial petition, which does not deny the separation of personalities.

The reality is that the concept of Center of Main Interest cannot be used to treat the group as a single thing, and even when applied to each company in the strict sense of economic structure, its usefulness to determine the international jurisdiction should be tempered with the investigation of other elements beyond the mere economic flow of resources.

And more importantly: When used in foreign legislation with a focus on bankruptcy or transnational reorganization of economic groups, the Center of Main Interest invariably constitutes part of a set of rules of coordination, often affirmed by international cooperation treaties, which equate the limits of jurisdiction the effectiveness of their decisions. This is what is seen in the bill submitted to the National Congress for amendment of Law 11,101, which includes an entire chapter called Cross-Border Insolvency, full of rules defining the coordination of foreign and national processes, from the difficulties arising from the intent to attribute to a country the jurisdiction for the so-called main proceedings.

In the case from these records, on the other hand, the Debtors allude to the concept of Center of Main Interest as if it were the only relevant rule and was sufficient for reorganization, without clarifying for example what would happen in case of bankruptcies with foreign companies, or value that would be attributed by the courts of the various countries to the decisions of the Brazilian judges.

I conclude, therefore, that foreign Debtors do not have their Center of Main Interest in Brazil, because they have no structure here and because the resources that feed their accounting are actually indirectly obtained by the use made by the lessees of the offshore rigs, which may well happen in Brazil or anywhere in the world to which they want to transfer them.

All the considerations of the various articles and books to which the Reporting Judge had access deal in parallel with an ideal model and the legislation of each legal system, which is intended to be influenced by doctrinal considerations. But all seem to indicate that the solution given to each process cannot ignore what the legal system itself states.

Lucas Livingstone Felizola Soares de Andrade
SWORN PUBLIC TRANSLATOR
JUCESP 1879

LUCAS LIVINGSTONE FELIZOLA SOARES DE ANDRADE
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Therefore, if the definition of jurisdiction for bankruptcy and reorganization proceedings cannot be reached, I repeat, in the light of mere theoretical considerations, and requires an understanding of the legal order of each country, I think that it should, initially, hold in mind the criteria that guide the Brazilian legal system, and these, according to Candido Rangel Dinamarco (Comments on the Code of Civil Procedure, Saraiva, page 216), are the criteria of convenience and feasibility. By the first the state will affirm jurisdiction over litigation that are absolutely indifferent to it while the by second the state will refuse jurisdiction to judge the causes that already know beforehand will have their effectiveness refused in foreign territory.

The combination of these two interests resulted in articles 21, 22 and 23 of the Code of Civil Procedure of 2015, which, in conjunction with article 3, of Law 11.101, draws the limits of Brazilian jurisdiction, up to the moment governed by Principle of Territoriality, and the limitations that accompany it, while awaiting the late modernization of the discipline of Brazilian jurisdiction. And starting with the last provision, I am transcribing it again: "The jurisdiction to approve the extrajudicial reorganization plan, to grant judicial reorganization or to order the bankruptcy liquidation, belongs to the court of the place of the principal place of business of the debtor or the branch of the company incorporated outside Brazil."

Of all, I have that the second part of Article 3rd, if well interpreted in a territorialist environment, says much of the way to be followed regarding the limits of the Brazilian jurisdiction. Indeed, when Article 3rd admits the reorganization of the branch of a foreign company in Brazil, the first obvious conclusion is almost tautological: it is possible to reorganize foreign companies in the country, even if they have their Center of Main Interest out there. There is no other possible interpretation! The doubts that survive the text of the law are only two: a) what the assumptions of this intervention on foreign companies are and b) what the limit of action of the judiciary is.

Concerning the first question, it is undoubted that the legal system requires the presence on the national territory of something of the company to be reorganized. It may be possible to go beyond a real branch, but never to the point of recognizing a purely cognitive jurisdiction, without the executory acts that characterize it, be it reorganization or bankruptcy, at least in the hypotheses of real foreign companies, as there seems to be no doubt that is the case in the records concerned.

As Cândido Dinamarco explains in the above-mentioned work, countries tend to be relatively liberal in their acceptance of processes. Except for the hypothesis of article 23 of the CPC, it does not matter in Brazil that other jurisdictions define conflicts, which is in line with the new

Lucas Livingstone Felizola Soares de Andrade
SWORN PUBLIC TRANSLATOR
JUCESP 1879

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dimension of arbitration. If countries recognize arbitration awards with great latitude, there is no reason to deny effects to the decisions of foreign judges. However, the professor of São Paulo explains, the same does not apply to acts of execution, practiced always, or almost, with the collaboration of foreign jurisdiction.

And reorganization is much closer to material, or executive acts, than to mere cognition. Because the approval of the plan does not pass through the judge. Only the supervision of the debtor's activity, exercised through the Judicial Administrator and the Creditors' Committee, where it exists, is solely or mainly responsible. Reorganization is the antechamber of bankruptcy and therefore both require something concrete in Brazil: branch, administration, books or equity.

This is the historical sense of Territorialism, also known in the United States by The Grab Rule, from the verb to grab. Each country seizes local assets and administers them, whether in the event of bankruptcy liquidation or in case of reorganization. Hence Article 3rd of Law 11.1101, which expressly signals the provision of the national legal system for the reorganization of the portion of foreign companies existing in Brazil.

With this reasoning, I recognize the jurisdiction over foreign debtors Brava Star, Amaralina Star, Laguna Star, Alpha Star, Lone Star, Gold Star, Star International Drilling and Snover International, all of them with rigs in Brazil.

There is no ruling here about the feasibility of restructuring subsidiaries solely because they are guarantors of the debts of the parent companies or their subsidiaries. I only acknowledge that the Territoriality Principle opens the door to reorganization for companies that have assets in Brazil, because both in the event of bankruptcy and reorganization, by the Territorialist Principle, it is even the responsibility of the national courts of each country to distribute the assets that are in its territory, enabling or not possible competing process existing abroad.

For the same reason, I admit to the Brazilian jurisdiction Constellation Oil Services, the holding company of the group, and Constellation Overseas. Although they do not own assets themselves in the national territory, it is undeniable that the actions of their subsidiaries, even indirect ones, are assets subject to judicial restriction. Put differently, the economic content of these two foreign companies is almost exclusively embodied by the rigs of the controlled companies that are in national territory.

Lucas Livingstone Felizola Soares de Andrade
SWORN PUBLIC TRANSLATOR
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Now in the opposite direction, adopting the same rule, vote for the rejection of the reorganization in Brazil of the companies Olinda Star, Arazi and Lancaster Projects. As well as not operating in the country, they do not have a labor creditor here, none of them has assets in national territory. The offshore rig belonging to Olinda Star, which for some time served in Brazil, is in India. So that including them in the reorganization process would come exclusively from the guarantees they provided to the financing contracted by the group companies, which seems to me insufficient.

I understand as Reporting Judge the concern of debtors to obtain with the reorganization the protection of the companies that guaranteed the financing and that can be reached for possible executory acts if they do not obtain some type of protection. However, this protection must be conferred by the jurisdiction of the place where they have their headquarters or where they maintain their assets, a jurisdiction that may attribute to its own process the ancillary nature of the reorganization in progress in Brazil, depending on the respective regulative legislation. What cannot be accepted is the reorganization of a materially existing company, but which, again, cannot be scrutinized and attained by the judiciary, at least with the necessary speed, to the lack of legislative discipline and treaties of cooperation between the countries involved.

Finally, I affirm the Brazilian jurisdiction over debtor entity Constellation Services, which is authorized to operate in the national territory and, according to the debtors, executes contracts to be fulfilled in Brazil, and which serve the structure of the group as a whole.

So with respect to international jurisdiction the conclusions, right or wrong, are as follows: a) in the case of economic groups, there is no reason to suppose that international jurisdiction will necessarily be fixed for the whole, whether companies can integrate different businesses, each with its own Interests Center; b) the Center of Main Interests, for the purposes of international jurisdiction, cannot be extracted exclusively from the place where the wealth that feeds the debtors comes from, especially if in this hypothetical place they do not have any administrative structure, they do not celebrate contracts or keep books; c) it does not constitute a Center of Main Interests of a company or of a business the city or country where the lessors of their products carry out their own economic activity themselves; d) as indicated in article 3, final part, of Law 11101, it is possible to reorganize foreign companies in Brazil as long as they have some assets here, to be practically treated as a separate company, which is in line with the Principle of Territoriality, until the moment adopted by the Brazilian law.

LUCAS LIVINGSTONE FELIZOLA SOARES DE ANDRADE
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The second and equally complex issue addressed in this interlocutory appeal states with the so-called consolidation of economic groups. According to the doctrine, and also court practice, consolidation is divided into two distinct subspecies, both linked to the structure of reorganization or bankruptcy processes involving economic groups: procedural consolidation and substantive consolidation. Procedural consolidation is understood as the formation of a joinder between companies of the same economic group, which use the same process to jointly solve the crisis that affects them all. There will be a single Judicial Administrator, the decisions will be concentrated in the figure of the same judge, but the lists of creditors will be presented separately and also separately will be voted the respective plans, that although they are integrated, in a harmonic process, are essentially different, although convergent.

Alongside procedural consolidation - rectius, joinder - we have the so-called substantive consolidation, derived from the American substantive consolidation. This is the treatment of the various member companies of a group as if there is only one. The creditors, therefore, will not seek their credits from their original debtors, but will vote in the meeting of creditors and receive their participation in the asset from a common stock, sum of all the assets of the consolidated entities.

It is soon seen that the bankruptcy or reorganization of several companies from an economic group as if it were only a violation violates the Principle of Autonomy of Legal Personalities, existing in the Foreign Business Law and also national, as it is extracted from article 266 of the Corporations Act according to which the relations between the companies of an economic group are established with the preservation of individual personalities and their respective assets. Substantive consolidation, therefore, should be established as an exception to the system and be granted only where the objective requirements set out by the legislator or doctrine are present. This is what Maria Isabel Vergueiro de Almeida Fontana says, in a master's work presented to PUC of São Paulo, under the title of Judicial Reorganization of Groups of Companies, for whom "substantive consolidation can only be used if there is evidence that the elements that characterized the disregard of corporate entity were present in the group prior to the request for judicial reorganization (hypotheses where consolidation is mandatory and must be determined by the court) or if the creditors of all reorganizations approve the substantive consolidation (which was called voluntary consolidation)".

In order to understand the origin of the theory of substantive consolidation, it is necessary to resort to American law, where it is acknowledged to have been conceived. According to Timothy E.

Lucas Livingstone Felizola Soares de Andrade
SWORN PUBLIC TRANSLATOR
JUCESP 1879

LUCAS LIVINGSTONE FELIZOLA SOARES DE ANDRADE
Sworn Public Translator

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Graulich, in an article entitled Substantive Consolidation - Post-modern Trend, it is the basic legal principle of the system that member companies of a business group are not responsible for each other's actions. This separation, just as in Brazil, is only abandoned when one detects the misuse of personalities, among other possibilities to allow the disregard of one of them, a reflection in Brazil of the so-called Veil-Piercing, or lifting of the veil, Brazilian jurisprudence.

It was only after these first institutes that it evolved into the beginnings of the now debated substantive consolidation. The first case to deal with doctrine, and received as his birth certificate to the world of law, was the judgment of Sampsell v. Imperial Paper & Color Co. It was a case in which Downey, an individual trader, became insolvent after having transferred almost all his assets to a new corporation owned by himself, his wife, and his son. In bankruptcy, therefore, the trustee gathered in a mass only all personal assets of the debtor and the person behind which he hid his assets, which was ratified by the courts for the fraudulent nature of the maneuver.

In subsequent cases, other hypotheses were added. Thus, in Stone v. Eacho courts accepted the consolidation to the argument that one of the subsidiaries had no real existence and was insufficiently capitalized. In the same way was done in Todd v. Heller, in which assets were transferred from one company to another to protect them from the insolvency of one of the companies in the economic group, which also highlights the idea of fraud here.

Also according to the author of the article, new impetus was given to the theory of substantive consolidation in 1964, when the Second American Circuit, equivalent to our TRF 2, admitted in Chemical Bank New York Trust v. Kheel that asset consolidation should be admitted to the argument that the inter-relationship between the group companies was obscured in such a way that the time required to separate them from the accounts would be so large that it would jeopardize the distribution of the assets for all creditors.

In this case, therefore, it was no longer the case, for the first time, of the idea of fraud, but of the difficulty of separating assets and responsibilities. And from there a biphasic test was developed, revealed in another leading case called Union Saving Bank v. Augie/Restivo Banking, where the same Second Circuit synthesizes the requirements for consolidation in two: creditors' perception that they were not dealing with separate legal entities but with an economic unit and the perception that the links between creditors advise a consolidation that will benefit all creditors (whether the affairs of the debtor are so entangled that consolidation will benefit all creditors).

Lucas Livingstone Felizola Soares de Andrade
SWORN PUBLIC TRANSLATOR
JUCESP 1879

LUCAS LIVINGSTONE FELIZOLA SOARES DE ANDRADE
Sworn Public Translator

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In this judgment was also settled something of the greatest relevance. It was stated there that even if the proponents of consolidation could demonstrate the personal belief that they were dealing with a single legal entity, the instrument could not be used to the detriment of creditors who found otherwise, that is to say, those who were convinced of the separation of various personalities. The following is a free translation of the judgment: "Where... creditors... have consciously made loans to separate entities and no irreparable confusion of assets has occurred, a creditor may not be obliged to sacrifice the priority of his claims against his debtor by decision based on the speculation of the bankruptcy court that she knows more of the interest of the creditor than this own. (Where... creditors... knowingly made loans to separate entities and not irremediable commingling of assets has occurred, a creditor cannot be made to sacrifice the priority of its claims against its debtor by fiat based on the priority court's speculation that it knows the creditor's interest better than the creditor itself.)"

What is drawn from it is in my sense the obvious conclusion that although some creditors may have contracted with the bankrupt debtors or restructuring debtors in the perception that the various members of an economic group are unified, other creditors on the contrary relied on the separation of personalities. The court therefore emphasized that substantive consolidation should be used only after it had been determined that all creditors would be benefited by the impossibility of separating the assets or because it would prove excessively costly to the point of consuming the equity.

It was only around 1980, if not this very year, that what the columnist called Modern Tendency, or "Modern Trend," was developed by the Bankruptcy Court of the Eastern District of Virginia when it judged In re Vecco Construction Industries Inc, by which the moorings and the requisites necessary for the approval of substantive consolidation have been essentially loosened, to the point of depriving any predictability of contractual relations in practice, according to the author. This Modern Trend started to work with a series of criteria considered by several as questionable and also subjective: a) the presence of consolidated financial statements; b) the unity of interests between the various corporations; c) the existence of cross-collateralization; d) the degree of difficulty in the segregation of the assets and liabilities of each legal entity; e) the transfer of assets without observance of the formal requirements; f) the benefit of consolidation; g) the proportion of the controlling interest held by the holding company of the subsidiaries; h) the presence of common directors in all companies; i) the fact that the subsidiary is undercapitalized; j) the fact that companies are not preserving the separation of their personalities; l) the existence of a single cash.

Lucas Livingstone Felizola Soares de Andrade
SWORN PUBLIC TRANSLATOR
JUCESP 1879

LUCAS LIVINGSTONE FELIZOLA SOARES DE ANDRADE
Sworn Public Translator

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The last stage of this novel reveals what the writer called the Rejection of Liberal Theory, this coming from the decision taken by the Third Circuit, equivalent to our TRF 3, when judging the restructuring of Owens Corning, in the 90's. And the details of this case are curious because they are extremely similar to those under analysis in this interlocutory appeal. Indeed, in 1997 that company entered into a $ 2 billion contract with its creditors. In order to guarantee the payment of this amount, the creditors demanded posting of bonds from the various subsidiaries, which were in good standing, had no debts and had extremely valuable assets, mutatis mutandis what happened here in reverse.

Years later, in 2003, the reorganization process of Owens Corning and 17 other subsidiaries began, requiring substantive consolidation of all its assets, thus dragging into the reorganization process the subsidiaries previously in good standing. And the application was granted by the first-degree court to the argument that there was a single control among the companies and that the subsidiaries were created mainly for tax reasons, which, along with pragmatic arguments, as seems to be the case, advised substantive consolidation.

As this and the tests cited above resulted in the almost constant approval of the restructuring plans, without further criteria, the reaction of the Third Circuit and the firm rejection of the Modern Tendency came. The norms drawn up by the Court in understanding the subject seem interesting and relevant to me. According to the Court, limiting cross-liability between companies of the same group, with respect to the separation of their assets, is a fundamental rule of Commercial Law. The Court also points out that substantive consolidation almost always serves to remedy the problems caused by the debtor who disregards the separation of assets. On the other hand, the simple facilitation of the procedure does not justify the consolidation, which must be preserved for rare episodes, and cannot be used as a panacea for all the hypotheses of crisis of the business group.

Interestingly, in dealing with cross-collateralization obtained before the reorganization process, of course, it was emphasized that the requirement that they be provided revealed in fact the full awareness of creditors that they were dealing with different legal entities. That is why the Court ended by limiting the scope of substantive consolidation to two hypotheses: a) co-mingling of legal personalities and b) the presence of such a level of co-mingling among assets that their separation would prove extremely costly.

Lucas Livingstone Felizola Soares de Andrade
SWORN PUBLIC TRANSLATOR
JUCESP 1879

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This history seems to show, at least, that the theme is not a relatively banal subject and already pacified in doctrine, as suggested by the manifestations of the debtors and some of the legal opinions attached thereto. Between a liberal tendency and a restrictive one, tied to the origins of the institute, the American courts oscillate in a system vacuum that did not regulate substantive consolidation, while at the same time it contains provisions that devote the independence of juridical persons in the economic sphere.

Similar perplexity, visible in American law due to divergences between the Second and Third Circuits of the US federal court, was highlighted by another academic work authored by Professor Douglas G. Baird of the University of Chicago School of Law (Substantive Consolidation Today, Boston College Law Review, Vol. 47:5). In his words, substantive consolidation lacks the solid foundation one would expect to find in a practice so common in the day-to-day courts. [There appears footnote: Substantive consolidation lacks the solid foundation one usually expects of doctrines are firmly embedded in day-to-day practice.]

It was not enough to disagree on the hypotheses of substantive consolidation in the United States, to highlight the unstable ground on which Brazilian jurisprudence is moving, I also point out that on the eve of the trial I received an honest and encouraged opinion from the retired Judge Richard J. Holwell, who served as a first-degree federal judge in the District Court of the New York District from 2003 to 2012, with jurisdiction over bankruptcy and reorganization cases. And according to the respected magistrate, from what I could understand, what is being tried in Brazil in the case of the Constellation would not be what the Americans call substantive consolidation.

In his words, substantive consolidation matters in the collapse of the separation of personalities for the creation of a single cake to be distributed among the creditors. This also seems to say Andrew Brasher, in an article entitled Substantive Consolidation: A Critical Examination, for whom even when applied to judicial reorganizations, that is, the famous Chapter 11, consolidation generates at the end a single person (In a Chapter 11 case, class voting, classification of claims, and cramdown are all adjudicated on the basis of the combined entity and, when the corporate group emerges from Chapter 11, it does so as a single).

According to Judge Holwell, what is being tried here is not really bringing all the assets and liabilities together in a single pie, for the simple fact that companies want to preserve their autonomy, even after the end of the reorganization. The true intent of the reorganization is to approve a single plan that accounts for the debts and guarantees granted, without the

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SWORN PUBLIC TRANSLATOR
JUCESP 1879

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disappearance of any of the original legal entities. And this, says the judge, is not a substantive consolidation but rather what they call the Joint Administration, which unlike consolidation has expressly provided for in the Federal Rules of Bankruptcy Procedure, Rule 1.015, and which rightly reflects the need for joint administration of the assets, according to the plan to be approved by criteria that until very recently were still controversial, if only on February 25, 2018, when judging In Re Transwest Resort Properties, concluded the Court of Appeal of the 9th Circuit, not for reasons of law natural, but based on its own legislation, more precisely as contained in 11 USC §1129 (a) (10), that approval of the plan should not take into account the multiplicity of debtors but have them as a unique thing, in the case of economic groups.

Therefore, the multiplicity of articles and papers alluding to the substantive consolidation, through which one tries to implement something not provided for in the legal system, at least left the respective recipients without a complete and perfect understanding of how the American order operates in its amplitude, which compromises the desire to overcome the dogma of separating personalities only for the approval of the plan and without any device equivalent to that contained in the American legislation.

And to resort once again to foreign law, in the case of a legal problem of an international nature, I note that the most restrictive line of application of the theory of consolidation was adopted by French law, as far as I could ascertain, at least according to the cold letter of article 621-2 of the Commercial Code, following the amendments to Law 2014-326, which refers to shareholders' meetings in cases of asset confusion or fraud to the detriment of an unsecured creditor.

Brazil cannot be said to have achieved the desired harmony in the application of the institute, which would be difficult if even in the United States, where conceived, uniform criteria were achieved. In judging the interlocutory appeal 003950-90.2015.8.19.0000, the 22nd Civil Court of the TJRJ admitted the consolidation, basically because the different companies belong to the same economic group and also because Article 53 of Law 1101 is silent regarding possibility of its use. Finally, the eminent Reporting Judge pointed out that the two largest creditors were in favor of the single plan: "the unification of reorganization plans is unlikely to cause any financial loss to creditors, much less make it difficult to analyze the economic viability of the appellees."

Also in favor of consolidation, this time with more arguments, we have the interlocutory appeal 2169130-27.2018.8.26.0000 of the Court of Justice of São Paulo, Reporting Judge Alexandre Lazzarini, who in turn used the lessons of Justice Luiz Felipe Salomão and other precedents. From

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the Justice, in a joint project with Professor Paulo Penalva Santos, the Reporting Judge extracted the following excerpt: "the degree of difficulty in segregating individual assets and liabilities, sharing of expenses and infrastructure, the existence of intra-group loans or loan guarantees the group company, the same management or head office, are indications which, in the present case, authorize substantive consolidation."

On the other hand, we find other precedents of the Court of Justice of São Paulo. This is the case of interlocutory appeals 2178269-37.2017.8.26.0000 and 2072604-95.2018.8.26.0000, involving the group

UTC, from which it is extracted:

"Although it is possible and favors the debtors to commune assets and liabilities, as means of making reorganization possible, undeniable, as was established by the Judge Fabio Tabosa at the judgment of the Court of Appeal no. 2123667-67.2015.8.26.0000, as a member of the C. 2nd Restricted Chamber of Business Law, that the preparation of a single judicial reorganization plan is ultimately abusive and has the potential to cause serious distortions with regard to the situation of the creditors of some of the debtor entities by first diluting the weight of their holdings in the composition of the voting quorums and even compromising the legitimacy of the meeting of creditors, and then, in the objective renegotiation of the obligations, interfering in the conditions originating from the legal transactions they concluded with the debtors regardless of the economic and financial situation effectively presented by each of them.

In the following, concludes: the elaboration of a single judicial reorganization plan can only be granted if approved by the own creditors of each one of the debtors.

And rightly so, since admitting substantive consolidation - even when it is evident the corporate or patrimonial confusion of the debtors - without requiring the agreement of the majority of the creditors of each one of them would certainly lead to the subversion of the institute, harming those who have their credit guaranteed by equity of one or another company, hitherto with recognized equity independence."

Also against the consolidation by judicial decision, if I understood the precedent, it was the decision taken by the 14th Civil Chamber of the TJRJ when it adjudicated the interlocutory appeal 057021-07.2015.8.19.0000. According to the ruling vote, it is not for the Court to approve or

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reject the consolidation, but to the meeting of creditors, leaving implicit the conclusion that the lists should be separated as well as separately should the votes take place.

Lastly, the hierarchical importance of the judgment given by the STJ in judging AgRg in Injunction 20.733, reported by the eminent Justice Marco Buzzi, alluded to by the Public Prosecutor's Office in his appeal, even though they do not have the vote and the express statement made reference to substantive consolidation. From it, the following excerpt is drawn:

"The formation of economic groups, provided for in the Corporations Law, takes place through the combination of resources or efforts of the companies involved, with the purpose of making feasible the realization of the respective objects, or participation in common activities or undertakings. However, each company will independently maintain its personality and its assets, in accordance with article 266, of said legal diploma. Such autonomy, as pointed out, gains relevance in the context of a judicial reorganization. In this sense, the responsibility of the economic group for debt assumed by one of its members demands specific legal prediction, as it occurs in labor and tax legislation, or even in civil law, in case of fraud, hypothesis, unequivocally, diverse dealt with in the file."

After completing this presentation, and before following the details of the case, I turn to the Chicago Professor once again to establish the starting point of any judicial decision on the substantive consolidation application. For Douglas Baird, substantive consolidation is done by leveraging the rights of some creditors to the detriment of others, and this requires adequate grounds. [There appears footnote: Enhancing the rights of some creditors at the expense of others in this fashion requires justification.] It is necessary, I would say, that the grounds are objective, adequately proven and formally deduced in the respective manifestations of the parties. Generic allegations that institutional creditors have an interest in consolidation are not enough, because this is in summary a conflict between creditors. If there is a confusion of assets or business between companies, it is incumbent upon the claimant companies to confront and prove them.

And as a basis for the intended substantive consolidation begins the initial petition by noting that the debtor entities have diverse legal personalities, autonomous assets and proper structures. The reasons why it is intended to bring them together in one single pie, even in the face of this autonomy, are on the one hand the existence of cross-collateralization and on the other, the fact that they are economically interconnected. These grounds, however, were added to others in the debtors' counter-arguments. First, considerations of a pragmatic nature were shared, namely the

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sharing of the distribution of payments by creditors in an equitable way and the removal of the risk that creditors of one of the critical companies of the plan might reject it and thus jeopardize the reorganization of the group as a whole. Other reasons were then listed that would apparently conform to those requirements drawn by the American liberal current: the interconnection of business companies and their joint action; the common direction between them; the coincidence of corporate composition; the existence of cross-collateralization; joint economic operations; the approval of consolidation by creditors and the view of creditors to present a single whole.

Well, just as the Third American Circuit did in judging the famous case of Owens Corning, I do not see in the existence of cross-collateralization the unmistakable sign that institutional creditors saw the group as a unitary whole. Quite to the contrary, what is taken from the reasons presented so far is that the holding company Constellation Oil Services used legal entities created abroad to lease offshore rigs that would be used in the prospecting of oil in Brazilian territory, as already highlighted in the part of the vote that deals with jurisdiction. The tax advantages for the foreign location of the companies are evident, starting with the non-payment of ICMS on the platforms, brought to Brazil by lease, modality in which that tax does not affect. And each offshore rig, as far as I could understand, was a separate undertaking, suggesting nothing that creditors had been deceived by the idea of a single set or treated the various companies as members of a single thing.

It is true that in requiring cross-collateralization, creditors dragged the whole economic group into the eye of the hurricane, which would also be compromised in the event of insolvency of the subsidiary companies. But this does not deny the perfect understanding that they were diverse companies, even because even in the face of the reorganization plan there is no claim to unify them into a single legal entity going forward.

At the same time, I have that cross-collateralization represents in the end instruments made available to large institutional creditors. It is they, especially the financial creditors, who are in a position to demand them. The small creditors, or those members of the daily life of the company, negotiate as a rule without guarantees. From this it can be seen that allowing consolidation due to cross-collateralization would end up conferring on the financial creditor the power to change the rules of equity distribution and voting in the respective meetings of creditors where the plans will be approved. It would suffice, on the verge of, or even in the face of, the risk of insolvency, to provide capital through counterpart guarantees from the holding company or the direct parent company.

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Nor am I impressed by the convergence of economic activity or even the existence of a single command center. In all economic groups there is some type of central control, usually exercised by the holding company directly or indirectly. And, in the same way, economic groups maintain among themselves some type of economic synergy that potentiates the success of the works. But being present in almost all economic groups, accepting the consolidation suit from there would mean extending it in a linear and non-judgmental manner in virtually all circumstances, even to the detriment of any provisions in the Bankruptcy Law.

The other arguments brought in the appeal counterarguments were not made explicit, let alone proved. If substantive consolidation represents an exception to the separation of legal personalities and lacks careful reasoning, it is not enough to claim the existence of joint economic operations. They would need to be made explicit and scaled so that the Reporting Judge could know to what extent they were really meaningful. If the capital flow was concentrated in a single account, for example, and payment to suppliers came from it, this would need to be carefully demonstrated, even if this concentration were not sufficient, in the light of US restrictive jurisprudence, for the meeting of assets.

In summary, it is necessary that Brazilian jurisprudence, as well as foreign jurisprudence, establish some objective criterion for the grant of substantive consolidation. It is also necessary that doctrine and the courts study in more depth the matter to confront the institute with that one of the Joint Administration, emphasizing however that the simple fact of consolidating the patrimony has no apparent relation with the form of voting of the plan for reorganization at the meeting, because the per plan / per debtor option is not done by equity judgment but as a reflection of the explicit legislative option of the American legislator. The practice of the first-degree judges in Brazil and elsewhere to treat the institute as relatively unavoidable in the case of economic groups should therefore not be upheld by the courts, much less here, where, again, it is not claimed that there has been any confusion of personality and the reorganizations are not intended to bring any liabilities, or assets, but to preserve the multiplicity of legal entities at the end of the procedure.

It is true that a significant fraction of the creditors agreed with the consolidation, but that does not mean that it is in the interest of all the creditors of all the legal entities involved, some of them without any debt and in absolute good standing, and yet dragged into the reorganization process to the detriment of their respective creditors.

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Having the companies personalities totally separated, as it emphasized the own initial, it does not fit the consolidation by court order. Its approval is at the discretion of the creditors themselves, who must approve it, if they so wish, with the presentation of autonomous and separate lists, without which the Judiciary can, paternalistically, judge the convenience of each of the creditors.

The last two points of the complaint filed by the Public Prosecution Service say that there are no compulsory documents provided for in article 51 of Law 11101 and the decree of secrecy, by which the court denied creditors and their counsels, even if on record, access to lists of employees and assets of the controlling shareholder and of the administrators. And on these subjects the appeal counterarguments stated all the requirements of article 51 of Law 11101 were properly observed and that the problem lies in its consolidated offer. Finally, they claim that there is no reason to guarantee unrestricted access to documents containing the financial information of individuals.

With regard to the first part, and in consistency with what was decided above, I have that the mandatory documents must be presented individually, respecting the autonomy of their respective legal personalities.

Regarding the secrecy of the information indicated in article 51, item VI, of Law 11101, it is necessary to understand the rationale of the rule, and the ratio of information, in my opinion, is to allow creditors, sole masters of the approval of the plan, to decide whether or not to accept the offer made by the debtor. It is quite possible, for example, that in the light of private property, the creditors opt to reject the plan and declare bankruptcy liquidation. It does not make sense, therefore, that documents that must be presented are covered by secrecy to the detriment of the parties to the proceedings, so that also in this part deserves the appeal of the Public Prosecutor's Office to be granted so that the Public Prosecutor, the bankruptcy trustee, creditors' counsels are provided with free and full access to all documents of article 51 of Law 11101, without exceptions.

My vote, therefore, is to give partial relief to the appeal to: 1) exclude from the reorganization of the three foreign companies mentioned above, 2) determine the separate presentation of lists of creditors, to be voted separately in the respective meetings of creditors, which shall approve or reject the proposed substantive consolidation, (3) determine the submission of separate reports, and (4) grant unrestricted access by all creditors' counsels to the documents referred to in Article 51 of Law 11101.

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0070417-46.2018.8.19.0000- AI - BUSINESS - reorganization (vote) EG

[There appears seal: Digitally Signed]

Rio de Janeiro, March 26, 2019.

EDUARDO GUSMÃO ALVES DE BRITO NETO

Reporting Judge
//
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EXHIBIT B

Clarification Decision

Poder Judiciário do Estado do Rio de Janeiro
Décima Sexta Câmara Cível

Embargos de Declaração no Agravo de Instrumento nº 0070417-46.2018.8.19.0000
Embargantes 1: Serviços de Petróleo Constellation S.A. em Recuperação Judicial e outras
Embargante 2: Alperton Capital Ltd.
Embargado: Ministério Público do Estado do Rio de Janeiro
Desembargador Eduardo Gusmão Alves de Brito Neto

ACÓRDÃO

Embargos de Declaração em Agravo de Instrumento. Recursos interpostos por ex-sócia de uma das recuperandas e por estas próprias pretendendo rever a decisão agravada no que excluiu três das sociedades estrangeiras do procedimento e franqueou o acesso dos credores aos documentos previstos no artigo 51 da Lei 11.101. 1- Inexiste omissão do acórdão no que toca ao enfrentamento do artigo 22, III, do CPC, se não integrou ele as razões e contrarrazões deduzidas pelas partes no agravo. 2- De todo modo, não se aplica à recuperação judicial e à falência a regra do novo artigo 22, III, do CPC, que espelha na jurisdição tradicional a regra da livre escolha do juiz prevista para a arbitragem, desde que observada a concordância da totalidade das partes, entendidas como sujeitos do contraditório, aqueles legitimados a praticar atos processuais. 3- Sócios e credores, de todas as dimensões, que têm o direito de participar de eventual processo de recuperação no local onde a sociedade tenha seu principal centro de interesses, e não em uma jurisdição qualquer para a qual a maioria queira transportar o julgamento. 4- Dramáticas consequências que adviriam da interpretação segundo a qual a letra da lei, quando alude "às partes", deveria ser interpretada como "maioria das partes". 5- Segundos

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embargos dos quais não se conhece se interpostos com base em qualidade de sócia não mais ostentada pela recorrente. 6- Primeiros embargos acolhidos para autorizar a participação no procedimento de duas das três sociedades antes excluídas, ante a prova de que a maior parte de seus ativos, ainda que indiretamente, consiste em embarcações em operação no território nacional e contratos em execução no país, e explicitar as condições de acesso aos documentos juntados pelas recuperandas.

Vistos, relatados e discutidos estes autos dos **Embargos de Declaração no Agravo de Instrumento nº 0070417-46.2018.8.19.0000**, em que são embargantes Serviços de Petróleo Constellation S.A. em recuperação judicial e Alperton Capital Ltd., e embargado o Ministério Público do Estado do Rio de Janeiro.

ACORDAM os Desembargadores da Décima Sexta Câmara Cível do Tribunal de Justiça do Estado do Rio de Janeiro, por maioria, em **dar parcial provimento aos primeiros embargos e não conhecer dos segundos aclaratórios,** na forma do voto do Relator.

RELATÓRIO

O Ministério Público do Estado do Rio de Janeiro interpôs o presente agravo de instrumento contra decisão do juízo da 1ª Vara Empresarial da Capital que deferiu o processamento da recuperação judicial do chamado grupo Constellation, em um total de 18 empresas dedicadas à prospecção de petróleo em terra e na costa brasileira. Desta decisão diverge o Ministério Público porque teria reconhecido a competência da justiça brasileira para a chamada recuperação transnacional, a incluir empresas do grupo sediadas no exterior, porque ignorou a

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não apresentação e documentos obrigatórios para o deferimento do processamento e por último porque adotou a chamada consolidação substancial.

Sobre a consolidação substancial pondera sobre a diferença conceitual, reconhecida em doutrina, entre esta e a chamada consolidação processual. Por consolidação processual tem-se o litisconsórcio entre diversas empresas de um mesmo grupo econômico que requerem conjuntamente ao juízo a reestruturação das suas atividades, embora o façam com a apresentação de lista de credores diferentes, planos separados ainda que convergentes e assembleias autônomas, prática que a jurisprudência vem tolerando com relativa tranquilidade. Já a consolidação substancial, deferida pelo juízo, consistiria na reunião de todos os credores e todos os ativos em um só bloco, com listas únicas e plano também único, de tal modo que as empresas integrantes do conglomerado seriam consideradas, para todos os efeitos, uma coisa só. O credor de uma empresa seria também credor do grupo. Seu voto na assembleia não teria em consideração a proporção que lhe cabe do passivo da pessoa com quem se relacionou, mas a fração do todo, nele incluídas pessoas jurídicas com as quais não travou qualquer contato.

E esta segunda prática, a da consolidação patrimonial, não estaria sendo acolhida pela jurisprudência brasileira, salvo quando assim deliberado pelos próprios credores, em votações que contenham listas separadas.

No tocante à chamada recuperação transnacional, e à competência do juízo brasileiro para o processamento da reestruturação de empresas estrangeiras, sustenta o Ministério Público que 14 sociedades estrangeiras situam-se no polo ativo, sem que possuam filiais, credores ou empregados no Brasil. As obrigações contraídas e objeto do plano deveriam ser cumpridas no exterior, inclusive com a aplicação da legislação estrangeira e a eleição do foro de Nova Iorque como o único competente para qualquer litígio.

Continua o parquet ponderando que a escolha pelas empresas das Ilhas Virgens Britânicas para sua sede, provavelmente por razões tributárias, tem

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como contrapartida os ônus inerentes a essa escolha, a inviabilizar a utilização do Poder Judiciário brasileiro e das leis brasileiras. Destaca-se a propósito das razões o seguinte trecho: “O grupo Queiroz Galvão criou 14 sociedades empresariais no exterior; emitiu títulos por estas sociedades no exterior; se comprometeu a honrar esses títulos no exterior; recolheu eventuais tributos referentes a essas obrigações no exterior, mas suplica a aplicação da jurisdição brasileira para reestruturar tais operações.”

No direito brasileiro, sobre a competência, prossegue o Ministério Público, dispõe a lei de falências que a competência para processar a recuperação judicial ou decretar a falência estende-se somente à filial de empresa que tenha sede fora do Brasil, e mesmo nesses casos sem a aptidão de estender os braços da jurisdição aos bens situados no exterior, tudo de acordo com o Princípio da Territorialidade, acolhido pelo ordenamento jurídico brasileiro.

Por fim, sobre o terceiro argumento, sustenta o Ministério Público que não foram apresentados aos autos Demonstração dos Resultados Acumulados (art. 51, inc. II, letra “b”, da Lei 11101), Relatório Gerencial de Fluxo de Caixa (art. 51, inc. II, letra “d”) e Relação de Credores individualizada por recuperanda (art. 51, inc. III), além de ter sido ilegalmente decretado o sigilo das relações de empregados e de bens do sócio controlador e dos administradores, vedando o seu acesso aos credores e aos advogados, ainda que constituídos nos autos, o que a seu turno atenta contra o Princípio da Publicidade que permeia o art. 51 da Lei de Falências e Recuperação Judicial.

As contrarrazões oferecidas pelo grupo em recuperação destacam preliminarmente que apenas 3 recursos foram interpostos contra a decisão que deferiu o processamento da reestruturação do grupo: este do Ministério Público, outro interposto por Alperton Capital Ltd., ex-acionista minoritária de duas entidades do grupo, e um terceiro interposto por credor detentor de Bonds, a evidenciar que de todos os credores do grupo apenas um deles se mostrou inconformado com a decisão recorrida. Destaca ainda que na fase administrativa foram apresentadas 11

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habilitações e divergências versando erros materiais ou valores de crédito, sem qualquer ataque, mais uma vez, à recuperação em si. Metade dos créditos trabalhistas já foi paga e algumas das recuperandas valeram-se da proteção auxiliar concedida pelo famoso Chapter 15 (Capítulo 15) da legislação americana e pelo seu equivalente na legislação das Ilhas Virgens Britânicas, sendo que em ambos os processos se teria reconhecido a competência da justiça brasileira para processar o pedido de recuperação judicial de todas as entidades do grupo Constellation.

Prossegue salientando, a baixa litigiosidade é explicada pela natureza negocial e consensual do processo, que contou destarte com o que chamam de Plan Support Agreement ao Plano de Recuperação, pelo qual 47,1% dos credores com garantia real e 60,2% dos credores sem garantia já se comprometem a dar suporte à reestruturação.

No que toca ao direito propriamente dito, sustenta que não existe empecilho algum na legislação brasileira à jurisdição nacional sendo antes desejável que esta se proceda, em se tratando de grupo econômico, no local onde está o principal empreendimento, a partir do qual se irradiariam os efeitos pelas demais jurisdições em processo de colaboração e coordenação entre todas elas, como se deu em alguns processos já submetidos aos tribunais brasileiros.

O grupo Constellation desenvolveu-se de forma plurissocietária, com a criação de entidades estrangeiras ligadas, todavia, pela prestação conjunta e concomitante de serviços no Brasil, onde se situa, portanto, o seu centro operacional e onde deve tramitar o processo de recuperação. Afinal o grupo teve origem no Rio de Janeiro, onde se situa a operadora de todas as sondas, no Brasil concentra as suas atividades, em direta relação com a Petrobras, bem como as próprias sondas, exploradas em serviço de afretamento materializado por trabalhadores brasileiros em atuação no território nacional.

Do mesmo modo, tampouco haveria impedimento à chamada consolidação substancial, que no caso em tela parte de prévio consentimento da

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maioria dos credores. Isto porque as empresas integram o mesmo grupo econômico, atuam conjuntamente e de forma conexa, possuem direção comum e coincidentes composições societárias além de terem prestadas garantias cruzadas em que indicadas as próprias sondas com esta finalidade, tudo isso justificando o plano de suporte subscrito pelos próprios credores, que assim reconhecem a existência de um fenômeno econômico único.

Sobre os documentos faltantes sustenta que estes acham-se nos autos e que o inconformismo do Ministério Público volta-se em verdade contra a sua apresentação de forma consolidada, que entretanto não vem tratada pela Lei de Recuperação de Empresas. E por fim, quanto ao sigilo decretado, afirma que este se mostrou necessário pelo risco de cooptação de seus funcionários pelas concorrentes das agravadas, caso se difundisse o salário de todo e cada funcionário, sem contar os riscos para própria segurança de todos eles em uma cidade como o Rio de Janeiro, e neste sentido arrola precedentes do Tribunal de Justiça de São Paulo.

O parecer ministerial opina pelo provimento parcial do recurso para que sejam apresentadas relações individualizadas dos credores por sociedade e para que os documentos mencionados no artigo 51 da Lei de Falência sejam apresentados e postos à disposição do Ministério Público, dos advogados e das partes interessadas, mantida no mais a decisão recorrida.

Pelo acórdão de fls. 2103/2142 foi dado parcial provimento ao recurso para: 1) excluir da recuperação três das sociedades estrangeiras (Olinda, Arazi e Lancaster), 2) determinar a apresentação separada de listas de credores, a serem votadas separadamente nas respectivas assembleias, às quais caberá a aprovação ou rejeição da consolidação substancial proposta, 3) determinar a apresentação de relatórios separados e 4) deferir o acesso irrestrito de todos os advogados dos credores habilitados aos documentos a que se refere o artigo 51 da Lei 11101.

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Inconformadas com o julgado, as recuperandas interpuseram os embargos de declaração de fls. 2170/2192, pretendendo a concessão de efeitos infringentes ao presente recurso para que seja reconhecida a jurisdição brasileira também em relação às sociedades Olinda Star Ltd., Arazi S.À.R.L. e Lancaster Projects Corp. para processamento da recuperação judicial.

Em relação à Olinda, aduzem que apesar de a sonda estar atualmente em operação na Índia, tendo sido contratada pela Oil and Natural Gas Corporation ("ONGC"), os recursos financeiros advindos desta operação fazem parte do Plano de Recuperação Judicial, especialmente por ser a referida sociedade garantidora de *bonds* emitidos pela Constellation Oil Services Holding S.A. Além disso, dos 43 empregados destacados para a operação da Olinda Star, 36 são brasileiros e aqui residem, retornando para suas famílias no Brasil, no contexto de suas escalas, sendo certo, ainda, que a sonda é tecnicamente controlada a partir da base de operações da Serviços de Petróleo Constellation S.A. no Brasil.

No que diz respeito à Arazi, requereu a recuperação judicial também em razão de ser a sociedade garantidora de *bonds* emitidos pela Constellation Oil Services Holding S.A. Já Lancaster requereu recuperação judicial em razão da sua dependência em relação à Arazi, sendo ambas operadoras de cinco embarcações de FPSO utilizadas pela indústria petrolífera brasileira.

Por fim, aduz que constou da certidão de julgamento que o acórdão foi proferido por unanimidade, quando, como se sabe, houve discordância do i. Des. Carlos Martins no que se refere ao reconhecimento da jurisdição brasileira sobre as entidades estrangeiras, cabendo, portanto, retificação do pequeno erro material.

Também contra o referido acórdão, foram interpostos por Alperton Capital Ltd., ex-sócia de duas das recuperandas, os embargos de declaração de fls. 2264/2273, pelos quais pretende a embargante que este órgão julgador se manifeste expressamente sobre os artigos 21, 22 e 23 do Código de Processo Civil, 3º e 47 da Lei nº 11.101/2005; 8º, § 1º da LINDB; 457, 458, 478 e 482 do Código

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Comercial; 2º e 8º da Lei nº 7.652/88; 94 do Decreto nº 1.530/95; e 277 do Decreto nº 18.871/29, a fim de que, atribuindo-se efeitos infringentes ao presente recurso, se reconheça a ausência de jurisdição para processar a insolvência de Amaralina Star Ltd. e Laguna Star Ltd.

É o relatório.

VOTO

Começando pelos embargos de Alperton, já antecipei na decisão de seu primeiro agravo a opinião, ainda não ratificada pela Câmara, de que alguma legitimidade lhe deve ser conferida. Lembremos que Alperton era detentora de 45% das ações de Amaralina e Laguna, duas das empresas estrangeiras em recuperação. Com fundamento em cláusula contratual cujo conteúdo não importa analisar, estas ações foram unilateralmente transferidas para e pela sócia que detinha 55% do capital social. Ao que parece, a implementação dessas cláusulas nas Ilhas Virgens Britânicas dispensa a intervenção do Poder Judiciário.

Fato é que operada a transferência, a parte adjudicante, por assim dizer, e segundo cláusula compromissória existente no acordo de acionistas, pôs em marcha arbitragem em Nova Iorque, cujo objetivo seria, se bem entendi das narrativas feitas, ver declarada a inexistência de saldo a pagar pelas ações apropriadas, como resultado de verdadeira conta-corrente existente entre as sociedades. E foi nessa arbitragem que Alperton postulou medida protetiva que grosso modo se assemelha a uma reconvenção, com o objetivo de ver repristinada a condição societária anterior e assim reconhecido seu status de acionista.

Esta liminar não foi concedida nos termos em que postulada mas o Tribunal Arbitral deferiu, sim, medida liminar proibindo a oneração na recuperação judicial dos 45% das ações objeto do litígio, que não podem ser dadas em garantia para o novo capital injetado pelos credores do grupo econômico.

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Sem a liminar de devolução do status de sócio, tem-se que Alperton não é realmente, nesse momento, sócia ou credora das sociedades em recuperação. E daí extraiu o juízo *a quo* a conclusão de que ausente qualquer legitimidade sua para peticionar ou postular o que quer que fosse nos autos. Mas essa solução parece-me imprópria. Imprópria porque se os árbitros eleitos pelos litigantes deferiram medida antecipatória com influência sobre a recuperação e capaz em tese de invalidar a própria aprovação do plano, é indubitável de que lhe há de ser reconhecida a possibilidade de trazer a decisão a debate no curso da recuperação.

Não se vá confundir a legitimidade com o mérito de sua pretensão. Se a liminar produz efeitos no Brasil e se está submetida a algum ato de controle estatal, como sugere o novel artigo 960, §1º, do CPC, são todas questões estranhas à legitimidade. O que é certo, apenas, e se enfatiza uma vez mais, é que a matéria deve poder ser submetida aos tribunais brasileiros, sob pena de se estabelecer o paradoxo de uma liminar concedida, com exequatur deferido, mas insuscetível de ser efetivada.

Reconhecer a legitimidade resolve apenas metade do problema, porque é preciso delimitá-la. Como regra o processo de recuperação tem como sujeitos do contraditório os credores e o recuperando. A legitimidade dos sócios, fora a hipótese de responsabilidade solidária, é limitada, dispondo a Lei 11101 de algumas pontuais hipóteses em que àqueles se defere a intervenção no processo. Só que Alperton não é sócia, o que é indubitável. Não há como o Tribunal ignorar a situação registral das Ilhas Virgens Britânicas e investigar a possível invalidade do ato de transferência das ações, ademais submetida à arbitragem.

Disso se extrai que enquanto e na medida em que tiver sua qualidade de sócia rejeitada, a atuação de Alperton no processo fica restrita ao potencial cumprimento da medida antecipatória, o que afasta, inclusive, a legitimidade para debater sobre a jurisdição nacional no que toca às empresas das

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quais foi sócia, motivo pelo qual, aqui aderindo ao judicioso parecer da Dra. Maria Lúcia Lima e Silva Ceglia, deixo de conhecer dos embargos interpostos por Alperton.

Passando ao recurso interposto pelas recuperandas, começo por analisar o introito dos embargos de declaração na parte em que aborda o artigo 22, inciso III, do CPC, sua pertinência ao caso e a postura do Ministério Público na Sessão de Julgamento do presente agravo, ainda que não haja registro em vídeo da sustentação do Parquet naquela oportunidade e ainda também que não haja qualquer contradição quanto ao mencionado dispositivo, se a ele não se aludiu, seja nas razões de recurso, seja nas opostas contrarrazões.

Para registro histórico, ante a gravidade dos interesses em jogo, é importante notar que rigorosamente 10 minutos antes do início da sessão foi o relator informado da presença na recepção dos advogados das partes interessadas e do Ministério Público, que foram prontamente recebidos. E uma vez no gabinete, pediu a palavra o ilustre representante do Ministério Público, na qualidade de agravante, para pedir que o acórdão consignasse algo por ele jamais sugerido até então, vale dizer, que embora a jurisdição não fosse originalmente brasileira, poderiam os credores elegê-la, na linha do novel artigo 22, inciso III, do CPC.

Diante desta surpreendente e intempestiva inovação, o relator facultou ao representante do Ministério Público a desistência do recurso, total ou parcial, de modo a abranger apenas um dos possíveis capítulos. A resposta do agravante foi clara e inequívoca: não desistiria do recurso, porque a seu ver haveria duas situações diversas, uma sendo a jurisdição nacional tal como prevista pelo Código de Processo e pela Lei de Falência, e outra a possibilidade de que as partes alterem essas regras por vontade própria, segundo o artigo do qual o ilustre promotor não havia até então cogitado.

Diante da negativa do relator em fazer consignar o direito de eleição, pelos credores, da jurisdição que melhor lhes aprouvesse, sustentou o

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Ministério Público no sentido de que se consignasse aquilo pretendido, sem, todavia, postular o desprovimento do recurso, o que seria mesmo contraditório se a desistência constitui direito potestativo do próprio recorrente.

Portanto, não tendo o preceito sido aludido em nenhum momento, não estava mesmo o acórdão obrigado a enfrentá-lo. O que não impediu que se debatesse o artigo oralmente durante a sessão. Dentre as razões para que ele não fosse empregado, de molde a permitir a escolha da jurisdição nacional, ponderou-se que o artigo 22, inciso III, constitui o espelho da Lei de Arbitragem, tendo por objetivo conferir às partes algum domínio sobre a autoridade a decidir o conflito. Mas tal como acontece na arbitragem, a regra do inciso III pressupõe no mínimo um acordo entre as partes, e não se sabe ao certo como transpor essa lógica para o processo de recuperação.

Quais são as partes de um processo de recuperação? Se entendermos o conceito de parte como aquele dado por Liebman – partes são os sujeitos do contraditório – então concluiríamos que as partes do processo de recuperação são todos aqueles aos quais a lei reconhece legitimidade para a prática de atos processuais: o recuperando, os credores e os sócios, estes com uma reduzida e típica atuação. E se fôssemos interpretar de forma mais restrita o conceito de parte, de modo a aproximá-lo da clássica definição de Chiovenda, então partes seriam apenas a recuperanda e os credores. De todo modo, ao menos segundo uma interpretação literal do artigo, a eleição de uma jurisdição diferente da natural demandaria o consenso de todas as partes, a menos que se tentasse adaptar o artigo para compreendê-lo como significando não a totalidade das partes, mas a maioria das partes.

E se for a maioria das partes, ter-se-ia que indagar se essa maioria seria apurada na mesma forma em que apreciado o plano, rompendo-se neste caso o paralelo com a arbitragem, porque nela, como se disse, exige-se o consenso de todos os litigantes e não apenas da maioria dos litisconsortes. Estou convencido de que o artigo deve ser interpretado na sua literalidade, inclusive pelas consequências

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que traz. Um credor de sociedade brasileira não pode ser compelido a se habilitar em país completamente estranho e diverso daquele em que situado o centro de comando da empresa apenas porque credores mais poderosos resolveram manipular a jurisdição a seu bel prazer. O artigo 23, inciso III, é o espelho jurisdicional, repita-se, das regras de arbitragem e por partes deve-se entender todas as partes e não a maioria dos litisconsortes.

Há ainda uma dificuldade que chamaria de cronológica. Partindo da ideia de que todas as partes (devedores, credores e sócios) precisariam anuir à eleição da jurisdição diversa da natural, tenha-se em mente que o momento para a manifestação sobre a matéria seria a própria Assembleia. Só que para se chegar a ela há de ser deferido o processamento, antecedente lógico da assembleia. E não pode o juiz de deferi-lo em caráter condicional, sem saber se presente a própria jurisdição, na esperança de que ela seja eleita por todas as partes, ou mesmo pela maioria delas.

Oralmente também se afirmou que o artigo 22, inciso III, não pode ser interpretado de forma literal. Primeiro porque há limitações explícitas decorrentes do próprio Código, como aquelas elencadas no artigo 23, que reserva à autoridade brasileira, dentre outras, as ações relativas a imóveis situados no Brasil, regra que encontra paralelo em diversos ordenamentos. Mas além dessas exceções explícitas, outras de natureza implícita podem ser extraídas da conjugação dos dois valores declinados por Candido Dinamarco como norteadores da jurisdição nacional: os critérios da conveniência e da viabilidade. E isso afastaria a recuperação no Brasil de empresas completamente estranhas à economia nacional simplesmente porque eleitas pelos credores interessados. Com efeito, a recuperação traduz algo de executivo, palavra que foi empregada no seu sentido jurídico, de conjunto de atos voltados à transformação da realidade.

Tanto o Ministério Público quanto as recuperandas parecem incomodadas com o uso da palavra execução, como se com ela se quisesse aludir a execução por quantia certa, quando definitivamente não foi neste sentido. Isso se

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percebe do item 19 dos embargos, que lecionam a diferença entre falência e recuperação judicial para esclarecer que na segunda não há atos de execução. Todavia, não foi nesse sentido, e isso ficou bem claro na sessão, que o termo foi empregado. Porque o conceito de execução se contrapõe na verdade àquele de cognição e traduz exatamente a mesma atividade realizada em sentido amplo pelo Poder Executivo, que é o de transformar a realidade material para adequá-la ao que foi decidido na fase de conhecimento. E é justamente isso que se extrai da função exercida pelo administrador judicial e pelo Comitê de Credores, função que não é puramente intelectual, importando na prática de atos materiais que exigem uma proximidade do juiz condutor da recuperação, e que por isso mesmo foi escolhido pelas legislações do mundo como aquele mais próximo do centro nevrálgico da instituição por recuperar.

A verdade, portanto, é que as recuperandas jamais imaginaram seriamente que a jurisdição para processar uma recuperação de 10 bilhões de reais fosse definida pela maioria dos credores, se a maioria dos litisconsortes não é suficiente sequer para instaurar uma arbitragem sobre acidente de trânsito de pequena envergadura. O artigo foi citado astutamente, como procedem os bons advogados, mas não tem qualquer aplicação ao tipo da matéria de que se está a tratar.

Passando agora ao segundo capítulo dos embargos, tratam estes da suposta desobediência pela Câmara dos precedentes do STJ no que toca ao conceito de principal estabelecimento do devedor, a propósito do que são referidos os acórdãos proferidos no AgInt no Conflito de Competência 157.969, o AgInt no Conflito de Competência 147.714 e o Conflito de Competência 37736, todos a indicar que o principal estabelecimento do devedor, local onde deveria tramitar a recuperação, é aquele “onde se situa o centro das atividades e influência econômica do grupo econômico.” Sobre esses acórdãos, destaca-se incialmente que todos tratam da definição da competência territorial, e não da jurisdição nacional. E mais importante, analisando detidamente o acórdão proferido no Conflito de Competência 37736 percebe-se que nada nele sugere que em grupos econômicos exista um só

centro de interesses, apenas e somente pelo fato da existência do próprio grupo. Tratava-se ali, com efeito, de pedido de concordata e falência envolvendo sociedades do grupo Sharp. E ao votar não indicou a eminente Ministra Nancy Andrighi a unidade necessária de centro de interesses, muito ao contrário. Destaca-se, com efeito, de seu voto o seguinte trecho: "***Urge relevar o fato de que determinada sociedade empresária, para conseguir benefícios fiscais compreendidos no âmbito da denominada Zona Franca, deve ter sua atividade centralizada no estado do Amazonas. Assim, a atividade produtiva das empresas em exame e a maior parte do correlato patrimônio encontravam-se em Manaus."***

O que o acórdão embargado fez foi ressaltar as diferentes consequências emanadas da adoção do conceito de Principal Centro de Interesses conforme em jogo esteja a competência de foro e a jurisdição internacional. Se for usado para a jurisdição o conceito de origem dos recursos econômicos que alimentam o caixa da sociedade, de modo que o Principal Centro de Interesses seja o país de onde a empresa obtém sua receita mais expressiva, teríamos que admitir verdadeiros absurdos, como situar no Brasil o Principal Centro de Interesses da TAP por ser aqui a praça em que a sociedade portuguesa aufere os lucros mais expressivos.

Afastado, para a jurisdição, este conceito, passou-se à literatura estrangeira, muito rica em se tratando de processos de insolvência transnacionais. E segundo a doutrina internacional que comenta o tema da jurisdição internacional para os processos envolvendo a insolvência de grupos econômicos, o ideal seria que se conseguisse determinar uma única jurisdição capaz de centralizar todos os atos de liquidação do patrimônio ou reestruturação da sociedade. Esse centro de interesses não é, contudo, de fácil determinação, e o conceito se mostra na verdade muito fluido. Fala-se em conjugação do lugar da sede estatutária com o lugar em que situados os principais ativos do devedor e finalmente com o local em que situada a administração verdadeira da empresa. Dentre eles, segundo Irit Mevorach (Insolvency Within Multinational Enterprise Groups, pág. 164), têm os países que

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aderiram ao modelo UNCITRAL adotado a presunção de que o centro está localizado na jurisdição em que situada a administração do grupo.

A decisão sobre a jurisdição internacional nestes casos não é irrelevante, diga-se, para os credores, e a imprecisão sobre o Principal Centro de Interesses acaba propiciando aquilo que a doutrina americana chama de Forum Shopping, podendo optar pela jurisdição dos Estados Unidos, porque lá está declaradamente o centro de comando da holding, ou pelas Ilhas Virgens Britânicas, onde quase todas as sociedades donas das sondas estão registradas, ou mesmo pelo Brasil. Em cada país os procedimentos e os quóruns de aprovação são diversos, com dramáticas consequências para os pequenos credores, sobretudo.

Por isso, então, passou-se a refletir sobre estes três vetores declinados por Irit Mevorach. Concluiu-se em relação às empresas estrangeiras que elas eram afinal parte de uma organização controlada por holding que tinha sua sede estatutária no exterior e que concomitantemente declarava ter em Nova Iorque o seu centro de comando. Também se afirmou que quase nenhuma das empresas estrangeiras tinha autorização para funcionar no Brasil, ou celebravam no país contratos, ou ainda possuíam funcionários em território nacional. Ao contrário, os contratos celebrados pelas empresas foram firmados no exterior, em língua estrangeira, com eleição da legislação americana e do foro de Nova Iorque. O ingresso das sondas no Brasil, por fim, dava-se em sequência a contrato de arrendamento que as empresas estrangeiras celebravam no exterior. Não há, portanto, nos estabelecimentos no Brasil, uma estrutura que autorizasse receber no país o centro de interesse destas recuperandas.

Sobre esta mesma questão um dos livros gentilmente emprestados pelo ilustre advogado das recuperandas (Richard Sheldon QC, Cross-Border Insolvency) dizia respeito, por exemplo, ao direito inglês. Lá, segundo o artigo 2 (h) da Insolvency Regulation, para que um pedido de falência ou recuperação seja inaugurado no Reino Unido, é preciso que o devedor tenha lá um estabelecimento, assim definido como qualquer lugar de operações onde o devedor realize uma

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atividade econômica não transitória com mão de obra e material[1]. Segundo o guia de interpretação dado pelo §71 do Virgos-Schmit Report, a ênfase em uma atividade econômica indica a exigência de um mínimo de organização. Alguma estabilidade é necessária. E mais importante é que essa atividade tem que ser visível externamente, e não ficar apenas no plano da intenção do devedor (Op.cit, §2.47).

Afastada a ideia de que as empresas possuíssem seu centro de interesses no Brasil, se sequer obtiveram autorização para aqui funcionar, passou-se à análise do artigo 3º da Lei 11.101 e ao final se reconheceu que mesmo empresas estrangeiras e com centro de interesses no exterior podem ter a recuperação deferida no Brasil. Não há, ao ver do relator, outra possível interpretação para o artigo 3º, em sua parte final, quando admite a recuperação de uma mera filial de empresa que tenha sede fora do Brasil. Concluiu-se também que essa regra permite a recuperação de partes das empresas e sociedades, mas que para tanto seria necessária a presença de algo de concreto em território nacional. Em seguida, para concluir, e com os olhos voltados ao Princípio da Territorialidade, passou-se a buscar a existência no Brasil de ativos que pudessem ser atacados caso as sociedades não obtivessem a proteção da justiça brasileira.

Curiosamente, esta interpretação parece se alinhar com as opiniões manifestadas por alguns dos livros gentilmente emprestados pelas recuperandas. Entre eles, está Germán Esteban Gerbaudo, que escreve a propósito da insolvência transfronteiriça à luz do ordenamento argentino. Este ordenamento, disciplinado pela Lei de Concursos e Quebras de 1995, trata em seu artigo 2º dos sujeitos que podem valer-se da jurisdição argentina: "***Se consideran comprendidos: 2) Los deudores domiciliados en el estranjero respecto de bienes existentes en el país.***" Exatamente como concluiu a Câmara ao julgar o agravo, diante da letra do artigo 3º, salienta Germán Gerbaudo que não é necessário que o devedor domiciliado no estrangeiro tenha no país agência, sucursal ou representação, bastando que possua bens em território argentino.

[1] "...any place of operations where the debtor carries out a non-transitory economic activity with human means and goods."

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Com essas premissas em mente, devem ser analisados os embargos interpostos pelas recuperandas em relação às três empresas excluídas, a saber, Arazi, Lancaster e Olinda Star. Afirma-se que com o critério eleito pelo Tribunal as três sociedades fariam jus à jurisdição brasileira.

Principiando por Arazi e Lancaster, sabe-se que estão sediadas, uma em Luxemburgo e outra nas Ilhas Virgens Britânicas. As duas sociedades não têm permissão para funcionar no Brasil, não celebraram contratos em território nacional e tampouco possuem funcionários no país. A estrutura de sua operação dá-se mais ou menos da seguinte forma: a cada nova sonda a entrar em operação no Brasil, o grupo econômico utilizava Arazi para com ela formar uma joint venture, em que esta sociedade se associava a grupos econômicos estrangeiros para a construção ou compra de barcos de apoio para as sondas, a que denominam de FPSO. Nessas joint ventures, e foram cinco delas criadas (uma para cada embarcação), Arazi entrava com participação no capital que variava de 5 a 20% das ações da empresa criada.

Paralelamente a esta joint venture constituída para a compra ou construção dos barcos, uma segunda joint venture vinha à luz para a operação das embarcações, que não era destarte feita pela sua proprietária. Desta segunda joint venture participa Lancaster, com proporções de capital semelhantes, e que era ligada a Arazi nos contratos de tal forma que a exclusão de uma da sociedade representava concomitantemente a exclusão da outra.

Uma dessas joint ventures chama-se, por exemplo, Guará Norte SARL, que é a dona, portanto, da embarcação. Só que Guará Norte não é responsável por trazer a embarcação ao Brasil. Ela na verdade celebra contrato de afretamento com outra empresa do grupo, Guará B.V, sociedade holandesa de cuja estrutura de capital pouco se sabe. Esta última, por sua vez, faz constar dos contratos de afretamento que a operação da embarcação se fará por uma terceira empresa chamada Guará-Norte Operações Marítimas Limitada, que é aquela que

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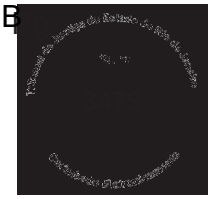
ao final celebra o contrato de prestação de serviços com a Petrobras que é paralelo ao outro contrato de fornecimento de mão de obras celebrado com a Serviços de Petróleo Constellation.

Pelos critérios declinados no voto, não se pode afirmar que Arazi tenha seu Principal Centro de Interesses no Brasil. Afinal, não tem aqui a sua sede estatutária e, uma vez mais, consta da inicial que o próprio centro de comando da holding está fora do país. Além do que, não celebra contratos no Brasil ou tem aqui pessoal próprio. Sua ligação com o país dá-se apenas porque daqui provêm os recursos que alimentam seu caixa, nada que não possa ser dito da Boeing, da Apple ou de qualquer outra empresa estrangeira.

Mas devo reconhecer que a admissão pelo voto como suficiente à jurisdição brasileira da presença em território nacional de parte substancial dos ativos das empresas aproveita as duas recuperandas. Não chegaria a ponto de uma generosidade americana e afirmar a suficiência de bens de valor diminuto como chave para o ingresso na justiça brasileira. Mas em sendo verdadeiro que a substância do patrimônio de Arazi está atualmente em águas brasileiras e que poderia ser teoricamente atingida por possível execução voltada contra a sociedade no exterior, dados novos que não estavam claros quando do julgamento do acórdão, tem-se que o recurso merece provimento nesta parte para a inclusão das duas sociedades entre as recuperandas.

O mesmo não se pode dizer de Olinda Star. Não importa quanto a esta sonda/sociedade que sua construção tenha ocorrido em território brasileiro. O que sabemos é que a sociedade foi constituída fora do Brasil e lá celebrou um contrato de arrendamento da embarcação. Um contrato cuja praça de pagamento é aparentemente o exterior. E foi com base neste contrato de arrendamento que a arrendatária transportou a sonda para a Índia a fim de utilizá-la em serviços contratados por outra sociedade, a serviço de quem ainda continua. A sonda, portanto, não está no Brasil, os contratos de arrendamento e de prestação de



serviços não foram firmados no Brasil e a sociedade em si não tem sede ou autorização para funcionar em território nacional.

As embargantes, tentando passar Olinda pelo filtro construído no agravo, argumentaram que Olinda tem patrimônio em território nacional, visto que parcelas do contrato de arrendamento estariam impagas. Mas algumas razões levam à conclusão de que insuficiente o argumento.

A primeira razão diz com a significação dos créditos *vis-à-vis* do patrimônio. As demais estrangeiras admitidas à jurisdição nacional o foram porque a substância, senão a integralidade dos seus ativos, estava em território nacional. Assim ocorre com as sondas, que essencialmente representavam tudo o que as sociedades de mesmo nome possuíam. E aqui, segundo se alega, teríamos créditos de pequena monta, se confrontados com o valor da sociedade.

A segunda razão, naturalmente, é que os créditos de Olinda diante de suas arrendatárias estão submetidos à recuperação judicial, se a devedora Serviços de Petróleo Constellation S.A. é uma das recuperandas. Isso não importa a impenhorabilidade dos créditos, é certo, mas é incompreensível que credores desejosos de escapar à recuperação ataquem créditos sujeitos à recuperação.

Conclui-se que se, sob uma perspectiva universalista Olinda pudesse ser recuperada no Brasil, em tese, se fôssemos descartar todos os outros critérios de fixação do Principal Centro de Interesses do grupo, isso não é possível diante do Princípio da Territorialidade e da constatação inequívoca de que por si e isoladamente Olinda nada tem a ver com o Brasil.

Passando agora ao segundo ponto das razões recursais, que dizem respeito à forma de disponibilização dos documentos apresentados pelas recuperandas, deixo claro que os documentos podem ficar acautelados em cartório, no sentido de não serem disponibilizados pela internet e que o acesso a eles se restringe ao Ministério Público, ao Administrador Judicial e a todos os advogados

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dos credores, que não poderão deles tirar cópia. Por outro lado, deixo claro e friso que nenhuma autorização judicial ou justificativa de qualquer natureza, ou requerimento qualquer precisa ser formulado ao juízo para que se dê o acesso, providências que ademais não existem para a consulta dos autos pelos advogados.

Isto posto, o meu voto é no sentido de não conhecer dos embargos interpostos por Alperton e dar parcial provimento aos embargos interpostos pelas recuperandas, primeiro, para reconhecer o erro material apontado, a fim de que passe a constar da certidão de julgamento que o acórdão foi proferido por maior, e, segundo, para admitir na recuperação Arazi e Lancaster, mantendo o afastamento de Olinda Star, além de explicitar a forma como se dará o acesso aos documentos das recuperandas.

Rio de Janeiro, 4 de junho de 2019.

EDUARDO GUSMÃO ALVES DE BRITO NETO
Desembargador Relator

Judiciary of the State of Rio de Janeiro
Sixteenth Civil Chamber

Motion for Clarification in the Interlocutory Appeal No. 0070417- 46.2018.8.19.0000

Movants 1: Serviços de Petróleo Constellation S.A. under Financial Restructuring and others

Movant 2: Alperton Capital Ltd.

Respondent: Public Prosecutor's Office of the State of Rio de Janeiro

Court of Appeals Judge Eduardo Gusmão Alves de Brito Neto

COURT DECISION

Motion for Clarification in Interlocutory Appeal. Appeals filed by a former member of one of the companies under financial restructuring and by the latter intending to review the appealed decision in which it excluded three of the foreign companies from the procedure and granted creditors access to the documents provided for in article 51 of Law 11.101. 1- There is no omission of the court decision regarding the confrontation of article 22, III, of the CPC (Civil Procedure Code), if it did not integrate the reasons and contrary reasons deduced by the parties in the interlocutory appeal. 2- In any case, the rule of the new Article 22, III, of the CPC, which reflects in the traditional jurisdiction the rule of free choice of the judge provided for the arbitration, does not apply to financial restructuring and bankruptcy, provided that all parties, understood as subjects of the adversary system, those entitled to practice procedural acts. 3- Members and creditors of all sizes which have the right to participate in any financial restructuring process in the place where the company has its main interest center, and not in any jurisdiction to which most want to move the judgment. 4- Dramatic consequences that would follow from the interpretation according to which the letter of the law, when alludes "to the parties", shall be interpreted like "the majority of the parties". 5- Second

motions that are not known to have been filed on the basis of the member status no longer borne by the appellant. 6- First motions accepted to authorize participation in the procedure of two of the three previously excluded companies, proving that the majority of their assets, albeit indirectly, consists of vessels in operation in the national territory and contracts being executed in the country, and explain the conditions of access to the documents collected by the companies under financial restructuring.

These proceedings of the **Motion for Clarification in the Interlocutory Appeal No. 0070417-46.2018.8.19.0000**, in which the movants are Serviços de Petróleo Constellation S.A. under financial restructuring and Alperton Capital Ltd., and respondent the Public Prosecutor's Office of the State of Rio de Janeiro, were examined, reported and discussed.

The Court of Appeals Judges of the Sixteenth Civil Chamber of the Court of Appeals of the State of Rio de Janeiro unanimously **AGREE** to partially grant to the fist motions and not to hear the second requests for clarification, **in the form of the Rapporteur's vote.**

REPORT

The Public Prosecutor's Office of the State of Rio de Janeiro filed this interlocutory appeal against the decision of the 1st Business Court of the Capital that granted the processing of the financial restructuring of Constellation group, in a total of 18 companies engaged in prospecting of oil onshore and on the Brazilian coast. This decision diverges the Public Prosecutor's Office because it would have recognized the jurisdiction of the Brazilian courts for the so-called transnational financial restructuring, to include group companies headquartered abroad, because it ignored the

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non-submission and obligatory documents for the grant of the processing and finally because it adopted the so-called substantive consolidation.

Regarding the substantive consolidation, it reflects on the conceptual difference, recognized in doctrine, between this and the so-called procedural consolidation. For procedural consolidation, there is a joinder of several companies of the same economic group that jointly require the court to restructure their activities, although they do so by submitting a list of different creditors, separate but convergent plans and autonomous meetings, a practice that the case law has tolerated with relative tranquility. The substantive consolidation, as granted by the court, would consist of gathering all creditors and all assets in a single block, with unique lists and a single plan, so that the companies that are part of the conglomerate would be considered, for all purposes, one thing only. The creditor of a company would also be the creditor of the group. Their vote in the assembly would not take into consideration the proportion of his share of the liabilities of the person with whom he is related to, but the fraction, including legal entities with which they did not make contact.

In addition, this second practice, the consolidation of assets, would not be accepted by the Brazilian case law, except when so resolved by the creditors themselves, in votes that contain separate lists.

With regard to the so-called transnational financial restructuring, and to the jurisdiction of the Brazilian court to process the restructuring of foreign companies, the Public Prosecutor's Office maintains that 14 foreign companies are located in the active pole, without having subsidiaries, creditors or employees in Brazil. The obligations assumed and purpose of the plan should be fulfilled abroad, including with the application of foreign law and the election of the New York court as the sole jurisdiction for any litigation.

The Federal Prosecution Service proceeds considering that the choice by the companies of the British Virgin Islands for their headquarters, probably for tax reasons, has

as a counterpart the burden inherent to that choice, in order to make the use of the Brazilian Judiciary and the Brazilian laws unfeasible. The reasons for this are the following: "The Queiroz Galvão group created 14 companies abroad; issued bonds by these companies abroad; has pledged to honor these bonds abroad; collected any taxes related to these obligations abroad, but pleads with the application of the Brazilian jurisdiction to restructure such operations."

In Brazilian law, on jurisdiction, the Public Prosecutor's Office provides that the jurisdiction to process judicial restructuring or adjudicate bankruptcy extends only to a company subsidiary that has its headquarters outside Brazil, and even in those cases without the ability to extend the arms of the jurisdiction to the assets located abroad, all in accordance with the Territoriality Principle, accepted by the Brazilian legal system.

Lastly, on the third argument, the Public Prosecutor's Office maintains that the following were not submitted to the records: Accumulated Income Statement (article 51, subparagraph II, letter "b", of Law 11101), Management Report of Cash Flow (article 51, subparagraph II, letter "d") and Creditors' Report individualized by debtor (art. 51, subparagraph III). In addition, the secrecy of the relations of employees and assets of the controlling member and of the directors has been unlawfully decreed, barring their access to creditors and lawyers, even though they are recorded in the records, which in turn violates the Publicness Principle that is present in article 51 of the Bankruptcy and Financial Restructuring Law.

The counter-arguments offered by the group under restructuring point out that only 3 appeals have been filed against the decision that resulted in the restructuring of the group: That of the Public Prosecutor's Office, another filed by Alperton Capital Ltd., a former minority shareholder of two group entities, and a third party filed by a Bonds holder, showing that of all the creditors of the group only one of them was dissatisfied with the contested order. It is also worth noting that, during the administrative phase, 11

qualifications and divergences regarding material errors or amounts of credit, without any attack, where presented, once again, on the restructuring itself. Half of the labor claims have already been paid and some of the debtors have benefited from the auxiliary protection granted by the famous Chapter 15 of the American legislation and its equivalent in the legislation of the British Virgin Islands, and in both cases the jurisdiction of the Brazilian court to process the request for financial restructuring of all entities of the Constellation group would have been recovered.

It continues to point out that the low litigation is explained by the negotiating and consensual nature of the process, which related to what they call the Plan Support Agreement to the Financial Restructuring Plan, whereby 47.1% of the secured creditors and 60.2% of the unsecured creditors are already committed to support the restructuring.

Regarding the law itself, it maintains that there is no impediment in Brazilian law to the national jurisdiction, and it is first desirable that this should be done, in the case of an economic group, in the place where the main venture is located, from which the effects by the other jurisdictions in a process of collaboration and coordination would irradiate among all of them, as in some cases already submitted to the Brazilian courts.

Constellation group has developed on a multi-company basis, with the creation of foreign entities linked, however, by the joint and concomitant provision of services in Brazil, where, therefore, its operational center is located and where it shall process the reorganization process. After all, the group originated in Rio de Janeiro, where the operator of all the rigs is located. In Brazil, it concentrates its activities, in direct relation with Petrobras, as well as the rigs themselves, operated in charter service materialized by Brazilian workers in national territory.

Likewise, there would be no impediment to the so-called substantive consolidation, which in this case is based on prior consent of the

majority of creditors. This is because the companies are part of the same economic group, act jointly and in a connected way, have common direction and coincident shareholding structures, besides having provided cross-collateralization in which the rigs themselves are indicated for this purpose, all of this justifies the support plan subscribed by the creditors themselves, who thus recognize the existence of a unique economic phenomenon.

Regarding the missing documents, it maintains that these are in the file and that the objection of the Public Prosecutor's Office turns in fact against its presentation in a consolidated manner, which is not dealt with by the Company Financial Restructuring Law. And finally, as to the secrecy decreed, it states that it was necessary for the risk of cooptation of its employees by the competitors of the appellees, if the salary of each and every employee was disseminated, not counting the risks for their own safety in a city such as Rio de Janeiro, and in this sense, lists precedents of the Court of Appeals of São Paulo.

The ministerial opinion is of the opinion that the appeal should be partially granted so that individual reports of creditors are submitted per company and that the documents mentioned in article 51 of the Bankruptcy Law are presented and made available to the Public Prosecutor's Office, lawyers and interested parties, the contested decision being maintained.

By the court decision of pages 2103/2142 is to give partial relief to the appeal to: 1) exclude from the reorganization of the three foreign companies mentioned above (Olinda, Arazi, and Lancaster), 2) determine the separate presentation of lists of creditors, to be voted separately in the respective assemblies, which will be approval or rejection of the proposed substantive consolidation, 3) determine the submission of separate reports, and 4) grant unrestricted access by all creditors' lawyers to the documents referred to in Article 51 of Law 11101.

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Dissatisfied with the judgment, the companies under financial restructuring filed the motion for clarification of pages 2170/2192, seeking to grant infringing effects to the present appeal so that the Brazilian jurisdiction is also recognized in relation to the companies Olinda Star Ltd., Arazi S.À.R.L. and Lancaster Projects Corp. for processing of financial restructuring.

Regarding Olinda, it is added that, although the rig is currently in operation in India, having been hired by the Oil and Natural Gas Corporation ("ONGC"), the financial resources resulting from this operation are part of the Financial Restructuring Plan, especially since the above-mentioned guarantee company for *bonds* issued by Constellation Oil Services Holding S.A. In addition, of the 43 employees assigned to the Olinda Star operation, 36 are Brazilian and reside here, returning to their families in Brazil in the context of their shifts, and the rig is technically controlled from the base of operations of Serviços de Petróleo Constellation S.A. in Brazil.

Regarding Arazi, it also sought financial restructuring on the grounds that it was the guarantee company for *bonds* issued by Constellation Oil Services Holding S.A. Moreover, Lancaster had requested financial restructuring because of its dependence on Arazi, both operators of five FPSO ships used by the Brazilian oil industry.

Lastly, it is added that it was recorded in the certificate of judgment that the court decision was given unanimously, when, as it is known, there was disagreement on the Court of Appeals Judge Carlos Martins regarding the recognition of the Brazilian jurisdiction over foreign entities, and therefore, rectification of the small material error.

Also against that court decision, Alperton Capital Ltd., former member of two of the companies under financial restructuring, filed the motions for clarification of pages 2264/2273, and through which the movant intends that the judging body expressly states on articles 21, 22 and 23 of the Civil Procedure Code, 3 and 47 of Law 11.101/2005; 8, paragraph 1 of LINDB; 457, 458, 478 and 482 of the Business

Code; 2 and 8 of Law No. 7.652/88; 94 of Decree No. 1.530/95; and 277 of Decree No 18.871/29, in order in order to find that there is a lack of jurisdiction to prosecute the insolvency of Amaralina Star Ltd. and Laguna Star Ltd.

This is the report.

VOTE

Beginning with Alperton's motion, I already anticipated in the decision of its first appeal the opinion, not yet ratified by the Chamber, that some legitimacy should be conferred on it. It should be recalled that Alperton held 45% of the shares of Amaralina and Laguna, two of the foreign companies under financial restructuring. Based on a contractual clause of which content does not matter to analyze, these shares were unilaterally transferred to and by the member that held 55% of the share capital. It seems that the implementation of these clauses in the British Virgin Islands does not require the intervention of the Judiciary.

Fact is that the transfer, the contracting party, so to speak, and according to the arbitration clause in the shareholders' agreement, initiated arbitration in New York, of which purpose would be, if I understood the narratives, to declare the non-existence of a balance payable for the appropriate shares, as a result of a true current account between the companies. In addition, it was in this arbitration that Alperton postulated a protective measure that roughly resembles a counterclaim, in order to see the previous corporate condition reconsidered and thus recognized its shareholder status.

This motion was not granted in the terms in which it was postulated but the Court of Arbitration granted an injunction prohibiting the financial restructuring of the 45% of the shares in dispute, which cannot be pledged for the new capital injected by the creditors of the economic group.

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Without the injunction to return member status, it is believed that Alperton is not really, at that time, member or creditor of the companies under financial restructuring. And from that, the court a *quo* concluded that there is no legitimacy of its own to petition or apply for anything in the records. However, this solution seems inappropriate to me. Inappropriate because if the arbitrators elected by the litigants deferred an provisional summary judgment with influence on the restructuring and capable in theory of invalidating the approval of the plan itself, there is no doubt of the possibility of bringing the decision to debate during the course of the restructuring will be recovered.

Do not confuse legitimacy with the merit of the claim. If the injunction takes effect in Brazil and if it is subject to any act of state control, as suggested in article 960, paragraph 1, of the CPC, all questions are alien to legitimacy. What is certain, only, and emphasized once again, is that the matter must be able to be submitted to the Brazilian courts, under penalty of establishing the paradox of an injunction granted, with deferred authorization to proceed, but insusceptible to be effected.

Recognizing legitimacy solves only half the problem, because it has to be delimited. As a rule, the financial restructuring has as subjects of the adversary system the creditors and the restructuring party. The legitimacy of the members, apart from the hypothesis of joint and several liability, is limited, and Law 11101 provides for some specific hypotheses in which the intervention in the process is deferred. Only Alperton is not a member, which is claimless. There is no way in which the Court can ignore the registration situation of the British Virgin Islands and investigate the possible invalidity of the act of transferring the shares, in addition to being submitted to arbitration.

From this, it can be deduced that while and to the extent that it is rejected as a member, Alperton's performance in the process is restricted to the potential fulfillment of the provisional summary judgment, which removes even the legitimacy to discuss national jurisdiction with regard to companies of

which was a member, reason why, here adhering to the judicious opinion of Judge Maria Lúcia Lima e Silva Ceglia, I hereby cease to hear of the motions brought by Alperton.

Turning to the appeal filed by the companies under financial restructuring, I begin by analyzing the introduction of the declaration in the part that addresses article 22, subparagraph III, of the CPC, its relevance to the case and the position of the Public Prosecutor's Office in the Judgment Session of this interlocutory appeal, still that there is no video record of the Federal Prosecution Service argument at that time and also that there is no contradiction as to the aforementioned device if it was not alluded to, either in the grounds of appeal or in the opposing counter-arguments.

For historical record, given the seriousness of the interests at stake, it is important to note that strictly 10 minutes before the beginning of the session the rapporteur was informed of the presence at the reception of the interested parties' lawyers and of the Public Prosecutor's Office, who were promptly received. And once in the office, the distinguished representative of the Public Prosecutor's Office, as an appellant, addressed the Court to request that the court decision should contain something that had never been suggested until then, that is to say, although the jurisdiction was not originally Brazilian, to elect it, in line with article 22, subparagraph III, of the CPC.

Faced with this surprising and untimely innovation, the rapporteur has given the representative of the Public Prosecutor's Office the desistance of the appeal, in whole or in part, to cover only one of the possible chapters. The appellant response was clear and unequivocal: It would not desist of the appeal, because in its view there would be two different situations, one being national jurisdiction as provided for by the Procedural Code and the Bankruptcy Law, and the other the possibility for the parties to change these rules at their own discretion, according to the article which the illustrious prosecutor had not previously considered.

In the light of the rapporteur's refusal to make the right of election by creditors of the jurisdiction that best suited them,

the Public Prosecutor's Office sustained, in the sense that it was intended to do so, without, however, postulating the dismissal of the appeal, which would be contradictory even if desistance constitutes an optional right of the appellant itself.

Therefore, not having the precept alluded to at any time, the court decision was not obliged to face it. This did not prevent the debate of the article during the session orally. Among the reasons for not being used, in order to allow the choice of national jurisdiction, it was considered that Article 22, subparagraph III, is the reflection of the Arbitration Law, with the purpose of conferring to the parties some control over the authority to decide the conflict. Nevertheless, as in arbitration, the rule in subparagraph III presupposes at least an agreement between the parties, and it is not clear how to transpose this logic to the restructuring process.

What are the parties of a financial restructuring process? If we understand the concept of a party as that given by Liebman - parties are the subjects of the contradictory system - then we would conclude that the parties of the financial restructuring process are all those to which the law recognizes legitimacy for the practice of procedural acts: Under financial restructuring party, creditors and members, these with a reduced and typical performance. In addition, if we were to interpret more narrowly the concept of party, so as to bring it closer to the classical definition of Chiovenda, then parties would be only the companies under financial restructuring and the creditors. In any case, at least according to a literal interpretation of the article, the election of a jurisdiction other than the natural one would require the agreement of all parties, unless one tried to adapt the article to understand it as meaning not all the parties, but the majority of the parties.

And if it is the majority of the parties, one would have to ask whether this majority would be ascertained in the same way as the plan was appreciated, in this case breaking the parallel with the arbitration, because in it, as said, the agreement of all litigants and not just the majority of joint parties. I am convinced that the article must be interpreted in its literal sense, including the consequences

brought upon it. A creditor of a Brazilian company cannot be compelled to qualify in a foreign country and different from that in which the company's control center is located only because more powerful creditors have decided to manipulate the jurisdiction at their whim. Article 23, subparagraph III, is the jurisdictional reflection of the arbitration rules and by parties one must understand all parties and not the majority of the parties.

There is still a difficulty that I would call chronological. Starting from the idea that all parties (debtors, creditors and members) would have to consent to the election of the jurisdiction other than the natural one, it should be borne in mind that the moment for the manifestation on the matter would be the General Meeting itself. However, in order to get there, the processing, the logical antecedent of the general meeting must be granted. And the judge cannot defer it on a conditional basis, without knowing whether the jurisdiction itself is present, in the hope that it will be elected by all parties, or even by the majority of them.

Orally it was also stated that article 22, subparagraph III, cannot be interpreted in a literal way. Firstly, there are explicit limitations deriving from the Code itself, such as those listed in article 23, which reserve the Brazilian authorities, among others, actions relating to real estate located in Brazil, a rule that is parallel in several jurisdictions. Nevertheless, apart from these explicit exceptions, others of an implicit nature can be drawn from the combination of the two values denoted by Candido Dinamarco as guiding principles of national jurisdiction: The criteria of convenience and viability. In addition, this would remove the restructuring in Brazil of companies foreign to the national economy simply because elected by interested creditors. In fact, the restructuring represents something executive, a word that was used in its legal sense, a set of acts aimed at the transformation of reality.

Both the Prosecutor's Office and the companies under financial restructuring appear to have been bothered by the use of the word execution, as if it were intended to refer to execution for a certain amount, when it was definitely not in this sense. This is

understood from item 19 of the motions, which teach the difference between bankruptcy and financial restructuring to clarify that in the second there are no acts of execution. However, it was not in this sense, and it was made clear in the session, that the term was used. Because the concept of execution actually contrasts with that of cognition and translates exactly the same activity carried out in a broad sense by the Government, which is to transform the material reality to suit it to what was decided in the phase of knowledge. And this is precisely what is drawn from the role of the receiver and the Creditors' Committee, a function that is not purely intellectual, but which implies the practice of material acts that require a close proximity to the judge who led the financial restructuring, and who was therefore chosen by the world as the closest to the neuralgic center of the institution to be restructured.

The truth, then, is that the companies under financial restructuring never seriously imagined that the jurisdiction to sue for a restructuring of 10 billion reais would be defined by the majority of creditors if the majority of joint parties are not even sufficient to institute arbitration on a small traffic accident. The article has been quoted astutely, as good lawyers do, but it has no application whatsoever to the kind of matter being dealt with.

Turning now to the second chapter of the motions, they deal with the alleged disobedience by the Chamber of the precedent of the STJ regarding the concept of the principal establishment of the debtor, with regard to the court decisions rendered in the Interlocutory Appeal in Conflict of Jurisdiction 157,969, the Interlocutory Appeal in Conflict of Jurisdiction 147.714 and the Conflict of Jurisdiction 37736, all of which indicate that the principal place of business of the debtor, where it should process the restructuring, is "where the center of activities and economic influence of the economic group is located." In those court decisions, it is first of all pointed out that all deal with the definition of territorial jurisdiction, and not national jurisdiction. More importantly, by carefully analyzing the court decision handed down in Conflict of Jurisdiction 37736, it can be seen that nothing in it suggests that in economic groups there is only one

interest center, only because of the existence of the group itself. It was, in effect, an application for composition and bankruptcy involving companies of the Sharp group. And when voting Minister Nancy Andrighi did not indicate the necessary unit of interest center, quite the contrary. The following excerpts of her vote stand out: "***It is important to highlight the fact that a certain company, in order to obtain tax benefits within the scope of the so-called Free Trade Zone, should have its activity centralized in the state of Amazonas. Thus, the productive activity of the companies under examination and most of the related property were in Manaus."***

What the court decision did was to highlight the different consequences of the adoption of the concept of Main Interest Center depending on whether the forum jurisdiction and international jurisdiction. If the concept of the origin of the economic resources that feed society's cash is used for jurisdiction, so that the Main Interest Center is the country from which the company earns its most expressive revenue, we would have to admit true absurdities, such as Brazil the Main Interest Center of TAP as it is the place where Portuguese company earns the most expressive profits.

For the jurisdiction, when this concept is removed, foreign literature is mentioned, very rich in dealing with transnational insolvency proceedings. Moreover, according to the international doctrine that discusses the subject of international jurisdiction for the processes involving the insolvency of economic groups, the ideal would be to be able to determine a single jurisdiction capable of centralizing all acts of liquidation of the patrimony or restructuring of the company. This interest center, however, is not easy to determine, and the concept is indeed very fluid. It is said in conjunction with the place of the registered office with the place where the main assets of the debtor are located and finally with the place where the true management of the company is located. Among them, according to Irit Mevorach (Insolvency within Multinational Enterprise Groups, page 164), the countries that

joined the UNCITRAL model have adopted the presumption that the center is located in the jurisdiction where the group management is located.

The decision on international jurisdiction in these cases is not irrelevant, say, for creditors, and the inaccuracy about the Main Interest Center ends up giving what American doctrine calls Forum Shopping, being able to opt for the jurisdiction of the United States, because it is reportedly the headquarters of the holding company, or the British Virgin Islands, where almost all companies that own the rigs are registered, or even Brazil. In each country, the approval procedures and quorums are diverse, with dramatic consequences for small creditors, above all.

So, then, we began to reflect on these three vectors disclaimed by Irit Mevorach. It was concluded in relation to foreign companies that they were at last part of a company controlled by a holding company that had its registered office abroad and concurrently stated that it had its control center in New York. It was also stated that almost none of the foreign companies had authorization to operate in Brazil, or entered into contracts in the country, or even had employees in national territory. On the contrary, the contracts entered into by the companies were signed abroad, in a foreign language, with the election of US legislation and New York courts. The entrance of the rigs in Brazil, in the end, resulted in a lease agreement that the foreign companies celebrated abroad. Therefore, there is no structure in Brazil that allows the country to receive the interest center of these companies under restructuring.

On the same matter, one of the books gently lent by the honorable lawyer of the companies under financial restructuring (Richard Sheldon QC, Cross-Border Insolvency) concerned, for example, the English law. There, according to Article 2 (h) of Insolvency Regulation, for an application for bankruptcy or restructuring to be filed in the United Kingdom, the debtor must have an establishment there, defined as any place of business where the debtor undertakes a

non-transitory economic activity with labor and material[1]. According to the interpretation guide given by paragraph 71 of the Virgos-Schmit Report, the emphasis on an economic activity indicates the requirement of a minimum of organization. Some stability is needed. And more importantly, this activity has to be externally visible, not just on the debtor's intention (Op.cit, paragraph 2.47).

With the idea that the companies had their interest center in Brazil, even if they did not obtain authorization to operate here, article 3 of Law 11.101 was analyzed, and in the end, it was recognized that even foreign companies with an interest center abroad might have the financial restructuring deferred in Brazil. There is no other possible interpretation for article 3, in the final section, when it admits the restructuring of a mere branch of a company that has its headquarters outside Brazil. It was also concluded that this rule allows the restructuring of parts of businesses and companies, but that would require the presence of something concrete in the national territory. Then, to conclude, and focused on the Territoriality Principle, we began to search for the existence in Brazil of assets that could be attacked if the companies did not obtain the protection of Brazilian justice.

Curiously, this interpretation seems to be in line with the opinions expressed by some of the books gently lent by the companies under financial restructuring. Among them is Germán Esteban Gerbaudo, who writes about cross-border insolvency in the light of Argentinian law. This ordinance, regulated by the Lei de Concursos e Quebras de 1995, deals in its article 2 with the subjects that can be used in the Argentinian jurisdiction: "***Se consideran comprendidos: 2) Los deudores domiciliados en el estranjero respecto de bienes existentes en el país.***" As stated by the Chamber when judging the appeal, provided the article 3, Germán Gerbaudo points out that it is not necessary for the debtor domiciled abroad to have an branch, subsidiary or representation in the country, just as it owns assets in Argentina.

[1] "...any place of operations where the debtor carries out a non-transitory economic activity with human means and goods."

With these premises in mind, the motions brought by the companies under financial restructuring should be analyzed in relation to the three excluded companies, namely Arazi, Lancaster and Olinda Star. It is stated that with the criterion chosen by the Court, the three companies would be entitled to the Brazilian jurisdiction.

Beginning with Arazi and Lancaster, it is known that they are headquartered one in Luxembourg and one in the British Virgin Islands. The two companies are not allowed to operate in Brazil, have not entered into contracts in Brazil and do not have employees in Brazil. The structure of its operation is more or less as follows: With each new rig to be put into operation in Brazil, the economic group used Arazi to form a joint venture, in which this company was associated with foreign economic groups to the construction or purchase of support boats for the rigs, which they call FPSO. In these joint ventures, and five of them were created (one for each vessel), Arazi entered with a participation in the capital that varied from 5 to 20% of the shares of the company created.

Parallel to this joint venture established for the purchase or construction of boats, a second joint venture came to light for the operation of the vessels, which was not really made by its owner. Lancaster participates of this second joint venture, with similar proportions of capital, and that was linked to Arazi in the contracts of such form that the exclusion of one of the company represented concomitantly the exclusion of the other.

One such joint venture is, for example, Guará Norte SARL, which is the owner, therefore, of the vessel. Only Guará Norte is not responsible for bringing the vessel to Brazil. It actually enters into a charter with another company in the group, Guará B.V., a Dutch company whose capital structure is little known. The latter, in turn, records in the charter agreements that the operation of the vessel will be done by a third company called Guará-Norte Operações Marítimas Limitada, which is the one that

at the end executes the service agreement with Petrobras, which is in parallel with the other contract for the supply of labor made with Serviços de Petróleo Constellation.

By the criteria disclaimed in the vote, it cannot be said that Arazi has its Main Interest Center in Brazil. After all, it does not have its registered office here and, once again, it is clear that the holding company's own control center is outside Brazil. Besides, it does not celebrate contracts in Brazil or has its own personnel here. Its connection to the country is made only because it provides the resources that feed the cash flow, nothing that cannot be said of Boeing, Apple or any other foreign company.

However, I must recognize that the admission by vote as sufficient to the Brazilian jurisdiction of the presence in the national territory of a substantial part of the companies' assets takes advantage of both companies under financial restructuring. It would not reach the point of American generosity and affirm the sufficiency of small-value goods as the key to entry in Brazilian justice. But since it is true that the substance of Arazi's property is currently in Brazilian waters and could theoretically be affected by possible execution against the company abroad, new data that were not clear at the adjudication of the court decision, it must be noted that the appeal is well founded in this part for the inclusion of the two companies between the under financial restructuring ones.

The same cannot be said of Olinda Star. It does not matter as to this rig/company that its construction took place in Brazilian territory. What we do know is that the company was incorporated outside Brazil and there it signed a lease agreement for the vessel. A contract whose place of payment is apparently abroad. Moreover, it was on the basis of this lease that the lessee transported the rig to India in order to use it in services contracted by another company, at the service of those who continue in progress. The rig, therefore, is not in Brazil, the lease and service

provision agreements were not signed in Brazil and the company itself does not have headquarters or authorization to operate in national territory.

The movants, trying to pass Olinda through the filter built in the interlocutory appeal, argued that Olinda has assets in national territory, since portions of the lease would be unpaid. But some reasons lead to the conclusion of insufficient argument.

The first reason has to do with the significance of credits *vis-à-vis* of property. The other foreign ones admitted to the national jurisdiction were because the substance, if not the entirety of its assets, was in national territory. This is the case with the rigs, which essentially represented everything that companies with the same name possessed. And here, it is alleged, we would have small claims if confronted with the value of the company.

The second reason, of course, is that Olinda's credits to its lessees are subject to financial restructuring, if the debtor Serviços de Petróleo Constellation S.A. is one of the companies under financial restructuring. This does not matter how unreliable the credits are, but it is incomprehensible that creditors wanting to escape financial restructuring attack recoverable credits.

It is concluded that if, under a Universalist perspective, Olinda could be restructured in Brazil, in theory, if we were to discard all other criteria for establishing the Main Interest Center of the group, this is not possible in the face of the Territoriality Principle and the unequivocal confirmation that Olinda itself has nothing to do with Brazil.

Turning now to the second point of the grounds of appeal, which relate to the way in which the documents submitted by the companies under financial restructuring are made available, I make it clear that the documents can be protected in a notary's office, in the sense that they are not available on the Internet and that access to them is restricted to Public Prosecutor's Office, the Receiver and all lawyers

Judiciary of the State of Rio de Janeiro
Sixteenth Civil Chamber

of the creditors, who cannot copy them. On the other hand, I leave it clear and highlight that no judicial authorization or justification of any nature, or any request whatsoever, must be made to the court to give access, measures that do not exist for consultation of the case by lawyers.

That being so, my vote is that I will not hear the motions filed by Alperton and give partial relief to the motions filed by the companies under financial restructuring, first, to acknowledge the material error indicated, so that it appears in the certificate of judgment that the court decision was pronounced by a majority, and, secondly, to admit Arazi and Lancaster to the financial restructuring, keeping the removal of Olinda Star, in addition to explaining how access will be given to the documents of the companies under financial restructuring.

Rio de Janeiro, June 4, 2019.

EDUARDO GUSMÃO ALVES DE BRITO NETO
Court of Appeals Judge-Rapporteur

EXHIBIT C

Olinda Term Sheet

Exhibit A[1]

Olinda Plan Term Sheet[2]

BVI[3] **PROCESS**	
General Principles	On June 4, 2019, the Rio de Janeiro Court of Appeals entered an order clarifying its prior decision that Olinda Star Ltd. ("Olinda") should be removed as one of the Filing Entities in, and dismissed from, the Brazilian RJ Proceeding (the "June 4 Order"). This term sheet (the "Term Sheet") sets forth the material terms for the restructuring of Olinda's debts (the "Olinda Restructuring") pursuant to a plan of arrangement to be filed in the British Virgin Islands ("BVI") with the Eastern Caribbean Supreme Court (Virgin Islands) Commercial Court presiding over the Olinda BVI Proceeding (the "Olinda BVI Court"). Such plan (the "Olinda Plan") shall be consistent with this Term Sheet and the Plan Support Agreement and shall be in form and substance reasonably satisfactory to the Required Consenting 2024 Noteholders, Bradesco, the Required Consenting Lenders and the joint provisional liquidators (the "JPLs"). The Olinda Restructuring shall be administered under a proceeding commenced in the BVI under Section 177 of the BVI Business Companies Act (as amended) (the "Olinda BVI Proceeding"), separate and apart from the restructuring of the Filing Entities, all of which shall remain debtors in the Brazilian RJ Proceeding. For the avoidance of doubt, the RJ Closing Date is permitted to occur prior to the consummation of the Olinda Plan. The Constellation Group shall take all commercially reasonable steps to implement the Olinda Restructuring consistent with this Term Sheet and the Plan Support Agreement (as applicable). Immediately upon the occurrence of the Olinda Plan Outside Date (as defined below), the obligations of each of the Required Consenting 2024 Noteholders, Bradesco and the Required Consenting Lenders to support the Olinda Plan, the Olinda Restructuring and/or the Olinda BVI Proceeding shall terminate and such Term Sheet Parties shall have no continuing obligation to support the Olinda Plan, the Olinda Restructuring and/or the Olinda BVI Proceeding. In such case, the Term Sheet Parties' rights shall be automatically (and without any need for further action or requirement to seek approval from any court, the JPLs or other body or authority) returned to the *status quo ante* as of the date immediately

[1] This Term Sheet will be attached as an exhibit to a letter agreement by and among Olinda, Constellation Overseas Ltd., each other member of the Constellation Group that is a party to the Plan Support Agreement (as defined below), the Required Consenting Lenders, the Required Consenting 2024 Noteholders, Bradesco and the JPLs (collectively, in their capacities as parties to this Term Sheet, the "Term Sheet Parties").

[2] Each of the Term Sheet Parties acknowledges and agrees that this Term Sheet is the "Olinda Term Sheet" referenced throughout the Plan Support Agreement (defined below) and RJ Plan Term Sheet, and that the letter agreement to be executed in furtherance of this Term Sheet shall explicitly state that this is the case.

[3] Capitalized terms used but not otherwise defined herein have the meanings ascribed to such terms in the Second Amended and Restated Plan Support and Lock-Up Agreement, dated as of June 28, 2019 (as may be further amended, restated, or otherwise modified from time to time, the "Plan Support Agreement").

	preceding the Olinda BVI Filing Date, as if the Olinda Plan had not been filed, voted on or approved by the Olinda BVI Court in the first instance. The Required Consenting 2024 Noteholders, Bradesco and the Required Consenting Lenders shall agree to support the Olinda Restructuring in accordance with the terms set forth herein. The Required Consenting 2024 Noteholders shall agree to vote in favor of the Olinda Plan and/ or provide written confirmation of their willingness to approve or vote in favour of the Olinda Plan and all Term Sheet Parties shall agree to refrain from taking any actions that would interfere with or delay the Olinda Restructuring. Notwithstanding the foregoing, except as explicitly set forth in this Term Sheet, the Required Consenting 2024 Noteholders, Bradesco and the Required Consenting Lenders shall not be required to take any position or support any statement or filing of any kind made by any party, including the JPLs, Olinda or any of its Affiliates, during or in connection with the Olinda Plan or the Olinda BVI Proceeding, and any positions or actions taken or supported by the Term Sheet Parties in connection with this Term Sheet, the Olinda Plan or the Olinda BVI Proceeding (including, without limitation, any vote in favor of the Olinda Plan) shall not be binding on, or be introduced as evidence of any kind by or against, any Term Sheet Party in connection with any subsequent proceeding, including any bankruptcy or insolvency proceeding, litigation, regulatory hearing, arbitral tribunal or similar proceeding (for the avoidance of doubt, this does not include the Olinda BVI Proceeding or the Olinda Chapter 15 Filing to the extent the Olinda Plan and final sealed order are in form and substance reasonably satisfactory to the Required Consenting 2024 Noteholders, the Required Consenting Lenders and Bradesco). For the avoidance of doubt, none of the Required Consenting 2024 Noteholders, the Required Consenting Lenders, Bradesco or the JPLs shall be required to incur any costs, fees or expenses in connection with this Term Sheet, the Olinda Plan, the Olinda BVI Proceeding or the Chapter 15 Proceeding in respect of Olinda, and such Term Sheet Parties shall not be obligated to provide any indemnity or otherwise incur any liability in connection with this Term Sheet, the Olinda Plan, the Olinda BVI Proceeding, the Chapter 15 Proceeding in respect of Olinda or any other Olinda-related process or proceeding. For further avoidance of doubt, to the extent that the Plan Support Agreement is terminated in accordance with its terms (i) in respect of the Filing Entities at any time prior to the RJ Closing Date or (ii) in respect of Olinda at any time prior to the Olinda Confirmation Date, in either event all Term Sheet Parties' respective rights, duties and obligations under this Term Sheet and related Restructuring Documents, taken as a whole, vis-à-vis Olinda, shall terminate in their entirety subject to any terms and conditions of the Term Sheet and the Plan Support Agreement which expressly survive termination. The Olinda Plan, the Olinda Chapter 15 Filing, the Olinda Confirmation Order, the U.S. Enforcement Order, the Olinda FR Application, each as defined below, and any other motions, pleadings or documents to be filed in connection with the Olinda BVI Proceeding will be in form and

	substance reasonably satisfactory to the Required Consenting 2024 Noteholders, Bradesco, the Required Consenting Lenders and the JPLs. Olinda shall be authorized to continue to pursue an appeal of the June 4 Order; *provided*, *however*, that in the event the prosecution or continuation of an appeal of the June 4 Order or non-withdrawal of Olinda from the Brazilian RJ Proceeding would interfere with or delay the Olinda Restructuring or cause, exacerbate or frustrate the progress or consummation of the Olinda Restructuring pursuant to the Olinda Plan or the Olinda BVI Proceeding, or cause any other similar issues with the Olinda BVI Court (*e.g.*, issues that hinder, delay or prevent the Olinda BVI Court from agreeing to accept jurisdiction over the Olinda Restructuring or the Olinda BVI Proceeding, or hearing the Olinda Plan), Olinda agrees that it shall take all steps reasonably necessary to stay or withdraw the appeal.
Old Olinda Guarantee	On the RJ Closing Date, each holder of the Existing 2024 Notes will receive (i) an escrow position in their DTC account corresponding to the principal amount of Existing 2024 Notes held by such holder immediately prior to the RJ Closing Date or (ii) such other proof memorializing its claim to Olinda's accelerated guarantee of the Existing 2024 as may be mutually agreed by the Company and the Required Consenting 2024 Noteholders. In either case, any such escrow position or claim shall be permitted to be transferred via DTC on and after the RJ Closing Date and such escrow position or claim shall, to the extent possible after taking commercially reasonable efforts, have a separate CUSIP.
Economic Terms	The Olinda Plan will provide that: (i) Olinda's accelerated guarantee of the Existing 2024 Notes (the "Existing 2024 Notes Guarantee") is exchanged for Olinda's guarantee of the New 2024 Notes issued under the RJ Plan (the "New 2024 Notes Guarantee"); (ii) The New 2024 Notes Guarantee will be a secured guarantee with the same collateral as the Existing 2024 Notes Guarantee; and (iii) all new or amended collateral entitlements and security interests provided for under the Participating Notes Indentures and Non-Participating Notes Indenture (and any other Restructuring Documents) to secure the obligations of Olinda in respect of the New 2024 Notes Guarantee will be granted by Olinda, and Olinda and its Affiliates will grant or cause to be granted all such collateral entitlements and security interests, ensure they are duly created and perfected by the indenture trustee(s) for the New 2024 Notes, and represent valid and enforceable obligations of Olinda and any other members of the Constellation Group in accordance with the Participating Notes Indenture. For the avoidance of doubt, as set forth in the Participating Notes Indenture, until the Olinda Plan is effective, Olinda will not be a guarantor

	of the New 2024 Notes issued under the RJ Plan and Olinda will continue to be subject to the Existing 2024 Notes Indenture. The Existing 2024 Notes Guarantee will remain an obligation of Olinda and remain in full force and effect for the duration of the Olinda BVI Proceeding, and it will only terminate upon the granting of the New 2024 Notes Guarantee (in accordance with the terms and timings set out in the Participating Notes Indenture), and the full consummation of the Olinda Plan. If the RJ Closing Date occurs prior to the consummation of the Olinda BVI Proceeding, the New 2024 Notes will be issued under the Participating Notes Indentures and the Non-Participating Notes Indenture. Olinda shall accede to the necessary documents under the RJ Plan (including, for the avoidance of doubt, the Participating Notes Indenture and the credit agreements relating to the Bradesco Loans) in accordance with the terms and timings set out in the Participating Notes Indenture once the Olinda Plan is effective or the appeal in the Brazilian RJ Proceeding with respect to Olinda is successful and a judicial restructuring plan (*plano de recuperação judicial*) is confirmed by the Brazilian RJ Court, such that Olinda's debts are restructured under the RJ Plan (whichever is sooner). The Olinda Plan will also provide, upon consummation of the Olinda Plan, the discharge of the JPLs and in accordance with the terms of the Participating Notes Indenture, for Olinda's guarantee of the Bradesco Loans (including the New Bradesco Facility) and the Bradesco LC Reimbursement Obligations restructured under the RJ Plan (the "Bradesco Guarantee") and for the Bradesco Guarantee to be secured by the same collateral as the New 2024 Notes Guarantee, in each case consistent with the terms of the RJ Plan Term Sheet and Plan Support Agreement.
Filing Process	(i) Olinda filed an updated insolvency protocol with the Olinda BVI Court allowing Olinda the capacity to pursue a plan of arrangement. The Olinda BVI Court approved the updated insolvency protocol on 25 July 2019. (ii) Olinda shall provide all known stakeholders and interested parties with notice of Olinda's intention to pursue and file the Olinda Plan. Such notice will be provided no fewer than fourteen (14) days prior to the first hearing of the Olinda BVI Court. (iii) Olinda will place advertisements in the BVI, Brazil, India and New York giving notice of the plan of arrangement hearing prior to the hearing date. (iv) Olinda will commence the Olinda BVI Proceeding by filing an application supported by such evidence as is necessary with the Olinda BVI Court seeking approval of the Olinda Plan, which will be attached to such application in substantially final form. (v) At the initial hearing, Olinda will request the Olinda BVI Court to set all necessary requirements for approval of the Olinda Plan and the issuance of the Olinda Final Confirmation Certificate by the BVI Registry of Corporate Affairs.

	(vi) The JPLs will file an affidavit setting out their views on the proposed restructuring to assist the Olinda BVI Court in reaching its decision. (vii) Olinda shall comply with the directions of the Olinda BVI Court. If a second hearing is required all reasonable efforts to be made to obtain such hearing as soon as possible. (viii) Immediately upon receipt of the final sealed order from the Olinda BVI Court approving the Olinda Plan, the final sealed order will be shared with the Consenting 2024 Noteholders, Bradesco and the Required Consenting Lenders. If the Olinda BVI Court order approves the Olinda Plan without change, the director of Olinda will pass the necessary corporate approvals to confirm and approve the Olinda Plan. If the Olinda BVI Court order approves the Olinda Plan but requires or includes any changes to such plan, the Olinda director shall not approve the Olinda Plan without the prior express written consent of the Required Consenting 2024 Noteholders, Bradesco and the Required Consenting Lenders; (ix) The JPLs have obtained the sanction of the Olinda BVI Court to act as the Olinda FRs (as defined below) and shall apply for chapter 15 relief in the U.S. Bankruptcy Court with respect to the Olinda BVI Proceeding; (x) The JPLs, in their capacity as the Olinda FRs, will file the U.S. Enforcement Filing with respect to Olinda; and (xi) Olinda will make any necessary filings with the BVI Registry of Corporate Affairs to obtain the Olinda Final Confirmation Certificate.
Timeline for Approval of the Plan, Confirmation and Consummation	The Constellation Group will implement the Olinda BVI Restructuring in accordance with the following Milestones: (i) within seven (7) Business Days (for the avoidance of doubt, Business Days shall not include weekends or public holidays in the BVI) of the approval of this Term Sheet by the Required Consenting 2024 Noteholders, Bradesco, Required Consenting Lenders and the JPLs (the "Olinda Term Sheet Approval"), draft documents for the Olinda BVI Proceeding and Olinda Plan will be provided to counsel for each of the Consenting 2024 Noteholders, Bradesco and the Required Consenting Lenders; (ii) on the earlier to occur of (x) five (5) Business Days after entry of the enforcement order in the pending Chapter 15 Cases (as defined in the Plan Support Agreement) and (y) the date that the New 2024 Notes are issued, all relevant corporate approvals required in connection with the Olinda Plan (pursuant to the terms thereof), including, without limitation, approval of the Olinda Plan and commencement of the Olinda

	BVI Proceeding in accordance with the terms hereunder by the Olinda board of directors, will be obtained; (iii) on the earlier to occur of (x) five (5) Business Days after entry of the enforcement order in the pending Chapter 15 Cases (as defined in the Plan Support Agreement) and (y) the date that the New 2024 Notes are issued (a) all documents necessary for the Olinda BVI Proceeding and Olinda Plan shall be in final form in accordance with this Term Sheet and (b) Olinda shall commence the Olinda BVI Proceeding and file the Olinda Plan in such form with the Olinda BVI Court (the "Olinda BVI Filing Date"); (iv) within ten (10) Business Days following the Olinda BVI Filing Date (the "Olinda Chapter 15 Filing Date"), the Olinda FRs will file the Olinda Chapter 15 Filing (each, as defined below) with the U.S. Bankruptcy Court; (v) following the Olinda BVI Filing Date, the first hearing on the application for approval of the Olinda Plan shall be held on the date set by the Olinda BVI Court; (vi) within three (3) Business Days of the Olinda director resolution approving the Olinda Plan and the Olinda Plan having been executed by all necessary parties, Olinda shall file the Articles of Arrangement with the BVI Registry of Corporate Affairs. The BVI Registry of Corporate Affairs shall thereafter issue the certificate confirming that the Olinda Plan has been registered and the Plan shall become effective (the "Olinda Confirmation Date"); (vii) within seven (7) Business Days following the Olinda Confirmation Date (the "U.S. Enforcement Order Filing Date"), the Olinda FRs will file all necessary filings needed to obtain the U.S. Enforcement Order (as defined below); (viii) on or before 31 December 2019, the consummation of the Olinda Plan, including the satisfaction of all conditions precedent thereto, will have taken place (the "Olinda Plan Outside Date"); (ix) immediately following the Olinda Confirmation Date and the discharge of the JPLs and in accordance with, and subject to, the terms and timings set out in the Participating Notes Indenture, Olinda shall accede to the Participating Notes Indenture, and shall pledge the agreed security by the earlier of (i) the date set forth in the Participating Notes Indenture and (ii) the date set by the Olinda BVI Court; and (x) if, by the Olinda Plan Outside Date, (x) the Olinda Plan is not approved by the Olinda BVI Court or (y) the final sealed order approving the Olinda Plan is not in form and substance reasonably satisfactory to the Required Consenting 2024 Noteholders, Bradesco and the Required Consenting Lenders (including, without limitation, if such Olinda Plan includes

	dissent rights) such that the director of Olinda has not been expressly authorized by the Required Consenting 2024 Noteholders, Bradesco and the Required Consenting Lenders to confirm and approve the Olinda Plan, in each case other than as a result of the action or inaction of any party other than the Term Sheet Parties, the Term Sheet Parties' rights shall be returned to the *status quo ante* as of the date immediately preceding the Olinda BVI Filing Date, as if the Olinda Plan had not been filed, voted on or approved by the Olinda BVI Court in the first instance. Any termination of the Plan Support Agreement that occurs prior to the occurrence of the RJ Closing Date (as defined in the Plan Support Agreement) shall, without any further required action or notice, result in the automatic termination of the Term Sheet and all Term Sheet Parties' respective obligations with respect to Olinda, the Olinda Restructuring, the Olinda BVI Proceeding, the Olinda Plan and any Chapter 15 Proceeding in respect of Olinda. For the avoidance of doubt, except as explicitly set forth in this Term Sheet, the terms of the Participating Notes Indentures and the Non-Participating Notes Indenture, including the obligations of members of the Constellation Group to provide the New 2024 Notes Guarantee and grant and ensure the perfection and validity of all collateral entitlements and security interests, shall not be altered or deemed altered in any respect by this Term Sheet.
Other Conditions Precedent and Other Terms	The terms of the Olinda Plan will include, as conditions precedent to effectiveness and consummation of the Restructuring Transaction(s) to be implemented thereunder: (i) the occurrence of the RJ Closing Date in the Brazilian RJ Proceeding; (ii) the entry by the U.S. Bankruptcy Court of the U.S. Enforcement Order (as defined below) on or before the Olinda Plan Outside Date; and (iii) the Olinda Plan and the final sealed order approving the Olinda Plan each shall be in form and substance reasonably satisfactory to the Required Consenting 2024 Noteholders, Bradesco, the Required Consenting Lenders and the JPLs, and the director of Olinda shall not be authorized to confirm and approve the Olinda Plan pursuant to the final sealed order without the consent of the Required Consenting 2024 Noteholders, Bradesco and the Required Consenting Lenders. If the Olinda Plan is not consummated on or before the Olinda Plan Outside Date, the Olinda Plan, and any votes submitted with respect to the Olinda Plan, shall be immediately and automatically, without any further action or notice, deemed null and void *ab initio*, and the Consenting Stakeholders will be able to exercise any and all rights and remedies they may have against Olinda, unless the Required Consenting 2024 Noteholders, Bradesco and the Required Consenting Lenders agree otherwise.

	The Olinda Plan will expressly authorize the Consenting 2024 Noteholders, Bradesco and Consenting Lenders (as applicable) to exercise any and all rights and remedies they may have under each of the Restructuring Documents with respect to Olinda, including, without limitation, the Plan Support Agreement, in accordance with the terms of each Restructuring Document, without requiring further approval of the Olinda BVI Court and subject only to the terms of the relevant Restructuring Document.
Fees	All outstanding amounts then due and owing to the Professional Advisors incurred prior to the RJ Closing will be paid at RJ Closing. The fees and expenses related to the Olinda BVI Proceeding of all legal and financial advisors to (i) the Required Consenting 2024 Noteholders, (ii) the Existing 2024 Notes Indenture Trustee, (iii) Bradesco and (iv) the Required Consenting Lenders (in accordance with the terms set forth in the Credit Agreements) will be paid on a current basis, within five (5) Business Days of the receipt by the Company of any invoice until the later of (i) the consummation of the Olinda Plan, (ii) completion of an agreed alternative transaction to address the Existing 2024 Notes Guarantee and any related obligations, and (iii) the perfection of all new or amended collateral entitlements.
JPL fees and release	The Constellation Group will pay the fees and expenses of the JPLs arising from the discharge of their duties. By authorizing the director to approve the finalized Olinda Plan, the Term Sheet Parties agree to, upon discharge of the JPLs by the Olinda BVI Court following the consummation of the Olinda Plan in a manner consistent with this Term Sheet, irrevocably release and hold harmless and not bring any action, claim, complaint or litigation against the JPLs, their employees and/or advisors in any jurisdiction with regard to any matter arising from or incidental to the provisional liquidation of Olinda, the Olinda Plan or any associated actions, documentation or agreements, subject to customary exceptions for fraud, gross negligence and wilful misconduct.
U.S. PROCESS	
Recognition of Olinda FRs and Olinda BVI Proceeding	The JPLs filed an application (the "Olinda FR Application") with the Olinda BVI Court seeking authorization for the JPLs to act as "foreign representatives" for the Olinda BVI Proceeding (in such capacity, the "Olinda FRs"), which was sanctioned by the Olinda BVI Court on 25 July 2019. In accordance with step (vii) of the *Timeline for Approval of the Plan, Confirmation and Consummation* section above, the Olinda FRs will seek recognition from the U.S. Bankruptcy Court of the Olinda BVI Proceeding as the "foreign main proceeding" or "foreign nonmain proceeding" (both as defined in section 1502 of the Bankruptcy Code) of Olinda (the "Olinda Chapter 15 Filing").
Full Force and Effect Relief	On or before the U.S. Enforcement Order Filing Date, the Olinda FRs shall file a motion seeking an order from the U.S. Bankruptcy Court recognizing, enforcing and giving full force and effect to the terms of the

	Olinda Plan within the territorial jurisdiction of the U.S. as a matter of U.S. law (the "U.S. Enforcement Order").
BRAZIL PROCESS	
Brazilian RJ Proceeding	Consistent with the Plan Support Agreement and the RJ Plan Term Sheet, the Constellation Group shall continue to seek implementation of the RJ Plan with respect to the Filing Entities. The RJ Closing Date will not be conditioned on or subject to the consummation of the Olinda BVI Proceeding or the effectiveness of the Olinda Plan. Olinda shall be authorized to continue to pursue an appeal of the June 4 Order; *provided*, *however*, that in the event the prosecution or continuation of an appeal of the June 4 Order or non-withdrawal of Olinda from the Brazilian RJ Proceeding would interfere with or delay the Olinda Restructuring or cause, exacerbate or frustrate the progress or consummation of the Olinda Restructuring pursuant to the Olinda Plan or the Olinda BVI Proceeding, or cause any other similar issues with the Olinda BVI Court (*e.g.*, issues that hinder, delay or prevent the Olinda BVI Court from agreeing to accept jurisdiction over the Olinda Restructuring or the Olinda BVI Proceeding, or hearing the Olinda Plan), Olinda agrees that it shall cease its pursuit of such appeal and timely take all steps reasonably necessary to withdraw itself from the Brazilian RJ Proceeding.
OTHER TERMS	
Ticking Fee	The Constellation Group will be required to pay compensatory interest (the "Ticking Fee") on the Participating 2024 Notes if (i) the New 2024 Notes Guarantee is not delivered by December 31, 2019; or (ii) Olinda fails to meet the milestones set forth in clauses (i), (iii), (iv), (vi), and (ix) of the section herein titled "*Timeline for Approval of the Plan, Confirmation and Consummation*" (the "Ticking Fee Milestones"). The Ticking Fee will be payable in kind at the rate of (as applicable): (i) to the extent the New 2024 Notes Guarantee is effective between January 1, 2020 and June 30, 2020, an amount equal to the greater of (x) $3.5 million and (y) twenty-five (25) basis points *per annum* calculated retroactively from RJ Closing until the New 2024 Notes Guarantee is effective; or (ii) to the extent the New 2024 Notes Guarantee is not effective by June 30, 2022, $12 million. In each case, the Ticking Fee will accrue on a daily basis and be payable on such dates and in such manner as set forth in the applicable Participating Notes Indenture with respect to other interest payments. No Ticking Fee will be payable if (i) the New 2024 Notes Guarantee is effective by December 31, 2019, (ii) the failure to deliver the New 2024 Notes Guarantee by December 31, 2019 is caused by any objection, challenge or enforcement action taken by the 2024 Noteholders (the "Noteholder Action"), if the Noteholder Action is initiated before December 31, 2019, or (iii) the Consenting Noteholders fail to vote in support of (or take such other actions reasonably necessary to indicate their consent for) the Olinda Plan or other Olinda Restructuring that is consistent with the "Economic Terms" section of this Term Sheet upon written

	request from the Company and 15 Business Days' notice (or, if such period is not possible, as early as practicably possible, and no fewer than 1 Business Day's notice). For the avoidance of doubt, a failure by Olinda to otherwise comply with this Term Sheet or failure to provide new Olinda guarantees and pledges of security by a date certain shall not result in an event of default under the Participating Notes Indentures or the Bradesco Loans.
Conflicts	Solely with respect to the Olinda Restructuring: (i) in the case of any inconsistency between this Term Sheet and the RJ Plan Term Sheet, including, without limitation, in interpreting the Plan Support Agreement, finalizing the terms of any Restructuring Document or implementing the Restructuring Transactions with respect to Olinda, this Term Sheet shall govern; and (ii) in the case of any inconsistency between this Term Sheet, the Olinda Plan, and the Plan Support Agreement, the Olinda Plan shall govern.
Governing Law	This Term Sheet will be governed by New York law.
Submission to Jurisdiction	The Term Sheet Parties may bring lawsuits or seek injunctive relief to enforce this Term Sheet either under Chapter 15 in the U.S. and/or with the Olinda BVI Court.

EXHIBIT D

Olinda's resolution to propose the Olinda BVI Scheme

Olinda Star Ltd. (In Provisional Liquidation)

BC Number: 1049761

(the Company)

Written resolutions of the sole director (the **Director**) of the Company adopted pursuant to Regulation 96 of the Company's Articles of Association (the **Articles**) and pursuant to Section 129 of the BVI Business Companies Act, 2004 (the **Act**).

Scheme of arrangement commencement

1 It is noted that the Company is part of a worldwide group of companies, whose ultimate holding company is Constellation Oil Services Holding S.A.[1] (the **Parent** and, together with its subsidiaries, the **Constellation Group**).

2 It is noted that the Parent and several of its subsidiaries (the **RJ Debtors**) are currently undergoing a judicial reorganization (*recuperação judicial*) under Brazilian Federal Law Nº 11.101 of February 9, 2005 (the **RJ**) before the 1st Business Court of Rio de Janeiro (the **Brazilian RJ Court**). The comprehensive plan of reorganisation of the RJ Debtors (the **RJ Plan**) has been agreed, was approved at a creditors meeting on 28 June 2019 and was confirmed by the Brazilian RJ Court on 1 July 2019.

3 It is further noted that certain of the RJ Debtors (the **Chapter 15 Debtors**) are currently parties to ancillary proceedings (the **Chapter 15 Proceedings**) under chapter 15 (**Chapter 15**) of title 11 of the United States Code (the **U.S. Bankruptcy Code**). It was further noted that certain of the RJ Debtors, including the Company (the **Provisional Liquidation Debtors**), are currently undergoing a joint provisional liquidation proceeding in the BVI (the **BVI Provisional Liquidation** and, together with the RJ and Chapter 15 Proceedings, the **Restructuring Undertakings**).

4 It is noted that pursuant to an Order of the Eastern Caribbean Supreme Court of the Territory of the British Virgin Islands (the **BVI Court**) dated December 19, 2018 (the **JPL Appointment Order**), Ms. Eleanor Fisher and Mr. Paul Pretlove have been appointed to the Company as Joint Provisional Liquidators (the **JPLs**). The JPL Appointment Order authorised the JPLs to enter into an Insolvency Protocol dated 21 December 2018, which, to the extent permitted by law, governs the relationship between the JPLs and the Company (the **2018 Insolvency Protocol**). On 25 July 2019 BVI Court granted an Order to replace the 2018 Insolvency Protocol with a new insolvency protocol granting the JPLs the capacity to pursue a BVI restructuring by way, *inter alia*, of a scheme of arrangement (the **2019 Insolvency Protocol**).

5 It is noted that the Rio de Janeiro Court of Appeals has ruled that the Company should be removed from the RJ.

6 It is noted that the Director has determined, having spoken to advisors and considering the Constellation Group as a whole, that it is advisable and in the best interests of the Company to commence a scheme of arrangement (the **Scheme of Arrangement**) pursuant to section

[1] Formerly known as QGOG Constellation S.A.

179A of the Act, which Scheme of Arrangement shall be on substantially the same terms as the RJ Plan, in order to effect a court-sanctioned restructuring of the Company's debt in the British Virgin Islands.

7 It is necessary for the successful implementation of the Scheme of Arrangement for the Company to obtain recognition of the BVI Provisional Liquidation and enforcement of the Scheme of Arrangement by the US Courts as a part of a new Chapter 15 proceeding (the **BVI Chapter 15 Proceeding**).

8 It was noted that legal advisors and financial advisors, including Houlihan Lokey, Alvarez & Marsal Holdings, LLC, White & Case LLP, and Ogier, have been appointed by the Constellation Group to assist the Constellation Group in coordinating the Scheme of Arrangement. It is further noted that White & Case LLP and Ogier have been appointed by the JPLs to assist and advise the JPLs on the Scheme of Arrangement and the BVI Chapter 15 Proceeding.

9 Section 179A(1) states "*Where a compromise or arrangement is proposed between a company and its creditors, or any class of them,…the Court may, on application of a person specified in subsection (2)* [which includes the company], *order a meeting of creditors or class of creditors…to be summoned in such manner as the Court directs*".

10 It is intended that the Scheme of Arrangement will restructure the debt obligations of the Company so that it mirrors the process of the RJ Debtors that had the same creditors as the Company in the RJ Plan. The Company will apply to the BVI Court to ask it to convene a creditors' meeting to approve the Scheme of Arrangement. If the court convened meeting is successful the BVI Court will be applied to provide a sanctioning order for the Scheme (such process being the **Olinda BVI Proceeding**).

11 Currently, the Company is a guarantor in relation to certain loan notes issued pursuant to an indenture dated 27 July 2017 (the **Old Notes**). Olinda's only creditors are the holders of the Old Notes, as well as a limited number of trade creditors. Olinda's only funded debt obligation is the guarantee under the Old Notes (the **Existing 2024 Notes Guarantee**). Following the completion of the transactions required for the RJ Plan, all other guarantors under the Old Notes will be released from their obligations in relation to the Old Notes such that the Company will become the sole guarantor in respect of the Old Notes. On or substantially contemporaneously with the date that the Scheme of Arrangement is effective, (i) Wilmington Trust, National Association, as trustee for the noteholders under the Old Notes will release the Company from the Existing 2024 Notes Guarantee and the Old Notes will be terminated, (ii) the Company will accede to the Participating Notes Indenture in accordance with the terms set out therein and become a guarantor under the New Notes (the **New 2024 Notes Guarantee**, which will be secured with the same collateral as the Old Notes guarantee), and (iii) all of the security granted in or over the shares in the Company in relation to the Old Notes will be released and new security will be granted over the assets and shares of the Company in accordance with the New Notes. For the avoidance of doubt, the Existing 2024 Notes Guarantee will remain an obligation of the Company and remain in full force and effect for the duration of the Olinda BVI Proceeding, and it will only terminate upon the granting of the New 2024 Notes Guarantee (in accordance with the terms and timings set out in the Participating Notes Indenture). In addition the Company will at substantially the same time guarantee the obligations under the Working Capital

Facility and Bradesco L/C Agreements (each as defined in Participating Notes Indenture), which shall be secured by the same collateral as the New 2024 Notes Guarantee. The Scheme of Arrangement will terminate upon the completion of the above.

12 The Company intends to take the following actions (the **Actions**):

(a) apply to the BVI Court to convene a creditors' meeting to approve the Scheme of Arrangement;

(b) if the BVI Court convenes a creditors' meeting, provide notice (**Notice**) of the Scheme of Arrangement to all known creditors on such notice as the BVI Court determines;

(c) place an advert in suitable publications in the BVI, New York, Brazil, and India providing notice of the court convened meeting for the Scheme of Arrangement;

(d) if the Scheme of Arrangement is approved by the required majorities as set out in Section 179A of the Act at the court convened meeting, to apply to the BVI Court for an order to sanction the Scheme of Arrangement (the **Sanctioning Order**);

(e) to file the Sanctioning Order with the BVI Registry of Corporate Affairs; and

(f) apply for a BVI Chapter 15 Proceeding, appointing Eleanor Fisher as Foreign Representative as required.

13 The Director notes that the Scheme of Arrangement is a mirror of the RJ Plan and has been approved by the JPLs as being in the best interests of the creditors of the company as a whole.

14 With the above transaction in mind, the following documents have been examined by the Director (the **Documents**):

(a) the draft Olinda scheme of arrangement circular to creditors;

(b) the draft Notice; and

(c) the draft application to the BVI Court comprising:

(i) the application notice;

(ii) the draft affidavit in support;

(iii) the draft order; and

(iv) the draft certificate of urgency.

15 The Director confirms by his signature hereto that he has no interest for the purposes of Section 124 of the Act in the Documents or the plan of arrangement by reason of a financial interest or relationship with any other parties to the Documents or otherwise that has not already been disclosed.

16 The Director confirms by his signature that he has carefully considered the Documents and the transactions contemplated thereby. The Director does not wish to suggest any amendments to any of the Documents.

17 The Director of the Company does hereby adopt the following written resolutions:

(a) the contents of the Documents be and are hereby approved and that it is in the best interests of the Company and its creditors as a whole to commence a scheme of arrangement in the BVI in the terms set out in the Documents;

(b) the Director be and is hereby authorised to file the application for the Scheme of Arrangement in the BVI, with such amendments as the Director in his sole discretion thinks fit;

(c) the Director be and is hereby authorised to complete the Actions and sign, execute or seal any such ancillary documents as necessary in order to complete the Actions;

(d) if the BVI Court does order a court convened meeting of the creditors to vote on the scheme of arrangement, the Director and his professional advisors be and are hereby authorised to set a Record Time (as defined in the scheme circular) ahead of the court convened meeting and to circulate that date in the scheme circular and notice;

(e) the Director be and is hereby authorised to sign, execute or seal all such documents and to perform all such acts on behalf of the Company in connection with the Documents, the commencement of the Scheme of Arrangement and the transactions contemplated thereby as the Director shall in his absolute discretion think fit; and

(f) to the extent any of the actions set out above have already occurred, they are hereby confirmed and ratified.

[*signature page follows*]

.....
Michael Pearson

13 December 2019
Date signed

Location where signed: GEORGE TOWN, CAYMAN ISLANDS

These resolutions are confirmed as authorised by the JPLs and the JPLs confirm that Michael Pearson, as director of the Company, will have all authority to act on behalf of the Company as set out above in the Resolutions.

.....
Name: Eleanor Fisher
Title: Joint provisional liquidator acting without personal liability

..... 2019
Date signed

.... 2019
Michael Pearson Date signed

Location where signed:.....

These resolutions are confirmed as authorised by the JPLs and the JPLs confirm that Michael Pearson, as director of the Company, will have all authority to act on behalf of the Company as set out above in the Resolutions.

..... 13 December 2019
Name: Eleanor Fisher Date signed
Title: Joint provisional liquidator acting without personal liability

SCHEDULE

Companies of which Michael Pearson is a director

Alaskan Star Ltd
Amaralina Star Ltd.
Amaralina Star Holdco 1 Ltd
Amaralina Star Holdco 2 Ltd
Laguna Star Ltd.
Laguna Star Holdco 1 Ltd
Laguna Star Holdco 2 Ltd
Alpha Star Equities Ltd.
Brava Star Ltd.
Brava Star Holdco 1 Ltd
BravaStar Holdco 2 Ltd
Constellation Overseas Ltd.
Constellation Services Ltd.
Gold Star Equities Ltd.
Snover International Inc.
Lone Star Offshore Ltd.
Olinda Star Ltd.
Lancaster Projects Corp.
Star International Drilling Limited
Bonvie Investments Inc.
Constellation Africa Inc.
QGOG Atlantic/ Alaskan Rigs Ltd
QGOG Constellation BVI Ltd.

EXHIBIT E

Report of the Scheme Administrator of the Olinda BVI Scheme

Made on behalf of the Applicant

Affidavit: E Fisher

EF-1

Sworn: 19 February 2020

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

VIRGIN ISLANDS

COMMERCIAL DIVISION

CLAIM NO. BVIHC (COM) 2018/0211

IN THE MATTER OF OLINDA STAR LTD (in Provisional Liquidation)

AND

IN THE MATTER OF THE INSOLVENCY ACT, 2003

AND

IN THE MATTER OF SECTION 179A OF THE BVI BUSINESS COMPANIES ACT, 2004

OLINDA STAR LTD

(in Provisional Liquidation)

Applicant

AFFIDAVIT OF ELEANOR FISHER

I, Eleanor Fisher, of EY Cayman Ltd. of 62 Forum Lane, Camana Bay, PO Box 510, Grand Cayman KY1-1106, Cayman Islands being duly sworn MAKE OATH and SAY as follows:

Executive Summary

1 I was appointed by the Court to act as chairperson of the meeting of the scheme creditors (the "**Scheme Creditors**") of Olinda Star Ltd ("**Olinda**" or the "**Company**") convened pursuant to the Convening Order (as defined below).

2 The meeting of Scheme Creditors with claims amounting in the aggregate to US$504,985,524[1] was attended by 34 proxyholders. No Scheme Creditors attended in person.

3 34 proxies representing claims amounting in the aggregate of US$504,985,524 constituting 100% of the number and 100% by value of all those voting, voted in favour of the Olinda Scheme (as defined below).

4 The Olinda Scheme was approved by 82.99% of all Scheme Creditors of Olinda and therefore it was approved and adopted at the meeting of the Scheme Creditors of Olinda.

Introduction

5 Together with Paul Pretlove of Kalo (BVI) Limited, I am one of the joint provisional liquidators ("**JPLs**") appointed in respect of Olinda.

6 I make this Affidavit in support of the Company's application filed on 13 December 2019 (the "**Application**") with relation to a scheme of arrangement (the "**Olinda Scheme**") in respect of Olinda pursuant to section 179A of the BVI Companies Act, 2004 (as amended) (the "**Act**") in order to effect a restructuring of Olinda's financial debt in the BVI.

7 Details of the Olinda Scheme and reasons behind it were outlined, in detail, in the Fifth Affidavit of Michael Pearson filed on 16 December 2019. As noted above I am, together with Paul Pretlove, one of the BVI Court appointed Joint Provisional Liquidators of Olinda. We were appointed in December 2018 in order to monitor, oversee and assist with the financial restructuring of six BVI companies (of which Olinda was one) (the "**BVI Companies**").

8 As stated in the Fifth Affidavit of Michael Pearson, the BVI Companies (other than Olinda) were restructured in Brazil, in the form of a Brazilian judicial reorganisation (*recuperação judicial*) under Brazilian Federal Law Nº 11.101 of 9 February 2005 (the "**RJ Proceedings**"), before the 1st Business Court of Rio de Janeiro. The RJ Proceedings have been recognised in the United States with respect to certain debtor entities

[1] The total principal amount of the Scheme Creditors of Olinda is US$608,455,375.

(including the BVI Companies but excluding Olinda) pursuant to Chapter 15 of the US Bankruptcy Code. The restructuring of Olinda in the BVI is materially identical, so far as Olinda is concerned, to the terms of the restructuring achieved in the RJ Proceedings.

9 I can confirm that the JPLs had input on the scheme documents on which creditors (as defined below) were invited to vote upon to ensure that they were fair and reasonable. It is for this reason that the JPLs supported the application to call a creditors' meeting so that creditors could vote on the proposed scheme of arrangement.

10 Save as otherwise indicated, the facts and matters deposed to in this Affidavit are derived from my own personal knowledge and from my review of relevant documents and information concerning the Company's operations and its industry as a whole, financial affairs and restructuring initiatives, information obtained from the Company's management team and other professionals and advisors, or my opinion based upon experience and knowledge. Such information is true to the best of my knowledge and belief. Where facts and matters are not within my own knowledge, the source of information is stated and the facts and matters are true to the best of my information and belief.

11 Exhibited to me at the time of swearing this Affidavit and marked "**EF-1**" is a bundle of true copy documents referred to in this Affidavit. Any reference to a page number in this Affidavit is a reference to the corresponding page number in the exhibit EF-1 (save where otherwise stated).

The Convening Order

12 On 20 December 2019, the Honourable Justice Gerard Wallbank [Ag] granted an order (the "**Convening Order**") to convene a meeting of the Scheme Creditors of Olinda for the purposes of considering and, if thought fit, approving with or without modification, the Olinda Scheme.

The Creditors' Meeting

13 Pursuant to the Convening Order, the meeting of the creditors was scheduled for 14 January 2020, at 13:00 (New York time) at the offices of Olinda's US counsel, White & Case of 1221 6th Avenue, New York, 10020, USA (the "**Scheme Meeting**")[2].

14 I was appointed as chairperson of the Scheme Meeting on behalf of the Company[3].

Advertisement of the Scheme Meeting

15 Pursuant to the Convening Order, the Scheme Documents (as defined in the Convening Order) were made available to the Scheme Creditors as follows:

15.1 on 31 December 2019, the Scheme Documents were uploaded by the Company to the Group's website at https://theconstellation.com/enu/s-2005-enu.html[4] and were made publicly available on 7 January 2020[5]; and

15.2 on 2 January 2020, the Scheme Documents were made available through DTC's Legal Notice System[6]. DTC, which stands for The Depository Trust Company is, through its nominee, Cede & Co., the record holder for the notes, meaning that they are named as holder on the physical note. For U.S. dollar denominated notes, DTC is the clearing system for such notes. Outside the United States, Euroclear and Clearstream are similar clearing systems for notes. DTC has an electronic platform where the ultimate beneficial holders of the notes hold a beneficial interest in the note through participant banks. Notices and payments under the indenture are sent to DTC, who then disseminates the notice and allocates the payment to the participants and ultimately to the beneficial holders.

16 I attach a copy of the upload confirmation which details the date that the Scheme of Arrangement documents were uploaded, and therefore made available on the Constellation Group's website. [**EF-1/1-3**]

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[2] Paragraph 1 of the Convening Order.
[3] Paragraph 9 of the Convening Order.
[4] **EF-1/2-3**
[5] **EF-1/47-48**
[6] To the three sets of CUSIPs for the three new secured notes issued on 18 December 2019.

17 Copies of the upload confirmations from DTC, which detail the date that the Scheme Documents were made available on DTC's Legal Notice System, on 2 January 2020, is at **EF-1/4-6**.

18 The notice of the Scheme Meeting and Scheme Documents were also forwarded separately to Milbank and Dechert on 27 December 2019 (who, together, represent approximately 75%[7] in value of the creditors of the Company)[8].

Voting procedure at the Scheme Meeting

19 The voting procedure in respect of the Olinda Scheme allowed for the Scheme Creditors to vote in person or by proxy at the Scheme Meeting. The submission deadline for the Voting and Proxy Forms was 13:00 (New York time) on 13 January 2020. However, in accordance with the Convening Order the Chairperson was provided with a discretion to accept voting and/or proxy forms after this deadline.

20 Any Scheme Creditor on whose behalf a duly completed Voting and Proxy Form was submitted before the deadline (as stated at paragraph 19 above) was still entitled to attend the Scheme Meeting in person.

21 Any Scheme Creditor who wished to be represented in person at the Scheme Meeting (or its proxy) was required to register its attendance at the Scheme Meeting prior to its commencement.

22 Registration commenced at 11am on 14 January 2020. A passport was required as proof of personal identity to attend the Scheme Meeting and, in the case of a corporation, evidence of corporate authority (for example, a valid power of attorney and/or board minutes). Each proxy was required to bring to the Scheme Meeting a copy of the Voting and Proxy Form of the Scheme Creditor having been duly completed authorising him or her to act as proxy on behalf of the Scheme Creditor and evidence of personal identity.

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[7] PIMCO: 23%, Capre: 18%, Moneda: 35%

[8] See emails to Milbank and Dechert [**EF-1/7-8**]

23 Before the Scheme Meeting commenced, I, in my capacity as the chairperson of the Scheme Meeting, received 30 of the Voting and Proxy Forms[9] and no Scheme Creditor attended in person.

Decision to Adjourn the Scheme Meeting

24 On or about 6 January 2020, I was made aware that, the Scheme Documents were not made available through DTC's Legal Notice System until after 5pm on 2 January 2020. This meant that the required 14 days' notice period, as specified at paragraph 2 of the Convening Order was not given to all Scheme Creditors. Given that the Scheme Meeting was convened for 14 January 2020, this did not give the Scheme Creditors the Court ordered notice of at least 14 days.

25 Also, on or about 6 January 2020, it was brought to my attention that Olinda wished to make some amendments to the Scheme Documents[10] to take into account the fact that, in the event that the Olinda Scheme is approved by the Scheme Creditors and later sanctioned by the BVI Court, the Company does not intend to file any order sanctioning the Olinda Scheme with the Registrar of Corporate Affairs in the BVI until such time as it receives a full force and effect order pursuant to Chapter 15 Proceeding in the US Bankruptcy Court. I understand that the reason that Chapter 15 recognition is desirable in the circumstances of this case is because the DTC will require a domestic order, i.e an order from US courts, before it will give effect to the terms of the restructuring approved by the creditors and ordered by the BVI Court.

26 Accordingly amendments were made to the Scheme Documents to reflect a timing clarification in the effective date for the Olinda Scheme and also to clarify the CUSIP numbers contained on the Voting and Proxy forms to provide certainty as to what positions were being voted. A CUSIP number is an identification number for a series of notes and enables the applicable trustee, DTC and holders to easily track such series of notes. To ensure broad distribution, the Scheme Documents were sent to all holders of the notes (i.e., the various series of new notes issued on 18 December 2019), meaning

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[9] Any Voting and Proxy Forms received after the Scheme Meeting finished could not be recorded for the purposes of the initial meeting but were accepted for the Adjourned Scheme Meeting (as defined below).
[10] Amended Scheme Documents were uploaded to the Company's website on 10 January 2020.

that the notices referenced, as addressees, the three sets of CUSIPs for the three new secured notes issued on 18 December 2019, each of which were the recipients of the new escrow position (and included a footnote referencing the CUSIPs of the escrow position for completeness). While holders of notes held both the escrow position and at least one other series of new notes, the Voting and Proxy forms were revised to include the CUSIP numbers only applicable to the escrow position to ensure all parties represented their holdings correctly. As also stated at paragraph 30 below, the revised Scheme Documents and a redline showing the changes were made available to Scheme Creditors on the designated web address and through the DTC on 10 January 2020 and also emailed to Milbank and Dechert on 9 January 2020. A copy of the upload confirmations from DTC, which detail the date on which such documents were made available on DTC's Legal Notice System on 10 January 2020 is at **EF-1/52-54**.

27 A comparison copy of the amended Scheme Documents is at **EF-1/9-46**. This comparison version of the Scheme Documents was also notified to the Scheme Creditors as explained below.

28 In order to comply with the Convening Order in respect of the notice period and also to ensure that the Scheme Creditors had sufficient time to consider the amendments to the Scheme Documents, I took a decision, in my capacity as the chairperson of the Scheme Meeting, to have the Scheme Meeting adjourned.

29 Consequently, on 14 January 2020, the Scheme Meeting was officially opened and adjourned to 6 February 2020 (the "**Adjourned Scheme Meeting**") to ensure that the Scheme Creditors received sufficient notice of the Scheme Meeting and could consider the amendments to the Scheme Documents.

The Notice of the Adjourned Scheme Meeting

30 A notice of the amended Scheme Documents and Adjourned Scheme Meeting was made available to the Scheme Creditors as follows:

30.1 the Scheme Documents (in an amended form) were uploaded by the Company to the Company's website at https://theconstellation.com/enu/s-2005-enu.html on 10 January 2020[11] so that they were available to all Scheme Creditors[12];

30.2 on 15 January 2020, a notice of the Adjourned Scheme Meeting was uploaded to the Company's website at https://theconstellation.com/enu/s-2005-enu.html[13]; and

30.3 on 16 January 2020, the Scheme Documents (in an amended form) were made available through DTC's Legal Notice System[14]. A copy of the upload confirmations from DTC, which detail the date on which such documents were made available on DTC's Legal Notice System is at **EF-1/55-57**.

Voting procedure at the Adjourned Scheme Meeting

31 The voting procedure at the Adjourned Scheme Meeting remained the same as that at the Scheme Meeting described at paragraphs 19 to 22 above. The difference, of course, was that the submission deadline for the Voting and Proxy Forms was 13:00 (New York time) on 5 February 2020 and the registration was due to commence at 11am on 6 February 2020.

32 Before the Adjourned Scheme Meeting commenced, I, in my capacity as the chairperson of the Adjourned Scheme Meeting, received 34 of the Voting and Proxy Forms.

33 Validly completed Voting and Proxy Forms already provided by the Scheme Creditors prior to the adjournment of the Scheme Meeting on 14 January 2020 were retained, and unless I was notified to the contrary, these forms were accepted at and considered valid for the purposes of the Adjourned Scheme Meeting.

34 No Scheme Creditors registered in person at the Adjourned Scheme Meeting.[15]

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[11] **EF-1/2**

[12] The amended Scheme Documents were also forwarded separately to Milbank and Dechert on 9 January 2020 [**EF-1/50-51**]

[13] **EF/1-2**

[14] **EF-1/52-54**

[15] A legal representative of 15 Scheme Creditors was in attendance to observe the Adjourned Scheme Meeting.

Voting at the Adjourned Scheme Meeting

35 The Adjourned Scheme Meeting commenced at 13:00 (New York time) on 6 February 2020.

36 The number[16] of Scheme Creditors present at the Adjourned Scheme Meeting and voting in person or by proxy at the Adjourned Scheme Meeting and the value of their claims were as stated in the first column of the following table, and the votes given by such creditors "for" or "against" the said resolution were as stated in the second and third columns of the following table (**Table A**).

Column 1			Column 2		Column 3	
Present and Voting			For		Against	
How present	Number	Value of Claims **[US$]**	Number	Value of Claims **[US$]**	Number	Value of Claims **[US$]**
In person	0	0	0	0	0	0
By proxy	34	504,985,524	34	504,985,524	0	0
Totals	34	504,985,524	34	504,985,524	0	0

37 As can be seen from Table A above, the Adjourned Scheme Meeting was attended either in person, or by proxy by 34 proxy holders, who represented claims amounting to an aggregate of US$504,985,524 (the "**Proxy Holders**"). The Proxy Holders constituted 100% of the of the number and 100% of all those voting at the Adjourned Scheme Meeting. Therefore, as the total aggregate escrow principal position was US$608,455,375, the level of participation and approval of the Olinda Scheme amounted to 82.99% of all Scheme Creditors.

[16] Authorised representatives of Scheme Creditors may have submitted aggregated Voting and Proxy forms.

38 To confirm, whilst there were 34 Voting and Proxy Forms filed, the authorised representative may have filed the proxies for multiple underlying beneficial owners.

39 The Adjourned Scheme Meeting was conducted in a fair manner allowing all Scheme Creditors to be properly consulted. Furthermore, nothing took place at the Adjourned Scheme Meeting to suggest to me that:

39.1 Scheme Creditors were not fairly represented at the Adjourned Scheme Meeting by those who were present in person or by proxy and voted at the Adjourned Scheme Meeting;

39.2 Scheme Creditors present in person or by proxy and voting at the Adjourned Scheme Meeting did not act in good faith; or

39.3 There was any form of coercion or irregularity in respect of the exercise by the Scheme Creditors (acting by their proxies) of their right to vote at the Adjourned Scheme Meeting.

SWORN on 19 February 2020)
at Road Town Tortola)
before me)

Eleanor Fisher

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
VIRGIN ISLANDS
COMMERCIAL DIVISION
CLAIM NO. BVIHC (COM) 2018/0211

IN THE MATTER OF OLINDA STAR LTD

AND

IN THE MATTER OF THE INSOLVENCY ACT, 2003

OLINDA STAR LTD
(in Provisional Liquidation)

Applicant

AFFIDAVIT OF ELEANOR FISHER

Ogier

Ritter House
Wickham's Cay II
Road Town, Tortola
British Virgin Islands
VG1110
Tel: +1 284 852 7300
Ref: BRL /CARGR 174287.00001
Legal Practitioners for the Applicant