

EFFECTS OF THE BANKRUPTCY OF A FOREIGN SHAREHOLDER OR QUOTAHOLDER IN A BRAZILIAN CORPORATION

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We refer to the consultation on the effects of the bankruptcy of a foreign legal entity holder in a Brazilian Corporation.

Participation in the Capital Stock

A quota or share, as the minimum portion of the capital stock, grants many rights to their holders, as well as leads to some obligations.

As rights, we may quote the receiving of its part in the company's profits and supervision of the company's management, among others. Other rights as voting are also granted and considered important, in spite of not considered as necessary.

An important obligation is that the quota or shareholders must pay in the subscribed participation, or, in case of the limited liability company, if any quotaholder has not paid in the total amount of subscribed capital (his quotas), any quotaholder may be compelled to provide resources till the limit of total capital stock.

Nevertheless, fulfilled these qualifications, the quota or share is mainly an asset and considered as so.

Bankruptcy in the International Private Law

There are two thesis regarding this matter - the unity and the plurality of bankruptcy, as defined by Oscar Tenório:

"The first considers the court competent for the bankruptcy acts internationally. The verdict declaring the bankruptcy is understood as part of the international community, and enforceable as on where it was uttered.

The plurality thesis is characterized as per the territoriality. There would be as many courts as territories. The bankruptcy established in a country would include only the local establishments and creditors. The effects of the decision is territorial, and consequently, lacks of extraterritorial effects."

Competent Court

The International Law Institute in the Paris Session (1894) established the understanding that the court located where the dealer to bankrupt has its main headquarters is competent for the bankruptcy analysis.

The Code of Bustamante, subscribed by Brazil, establishes the bankruptcy court as of the civil or mercantile domicile of the bankrupt (art. 414). It admits, however, as many courts as the economically separated establishments (art. 415).

The previous Brazilian law (art. 7 Decreto-lei nº 7.661/45) and the Brazilian Bankruptcy Law for (Lei 11.101/2005 - LF), establish that the court of the main establishment in Brazil or of the branch of a foreign corporation is competent for the analysis regarding the branch or establishment.

Effects

The effects of the bankruptcy in other countries include the bankrupt and its assets.

Arminjon considered that the law of the country where the bankruptcy was declared would establish the effects.

The Bustamante Code establishes that the in rem suits and rights shall remain ruled by the law of their location.

The International Law Institute approved in the Cristania Session (1912) agreed to that the lex res sitae would be applicable only (i) when establishing if a person has the right in rem; or (ii) to decide if this right may be opposed to third parties.

G. Diena, criticizing this position, remembers that the lex res sitae principle is based on the public order and as so may not be annulled.

In spite of all discussion, these effects depend on the validation of the judicial decision in Brazil, in respect to the principle of the territoriality and of the lex res sitae. We shall analyze the Brazilian case law hereunder.

Historic Analysis of the Legal Treatment of International Bankruptcy in Brazil

The historic analysis is indispensable for the good understanding of the matter by jurists in Brazil.

The Executive Law 5.746/29, presently revoked, established limitations on the validation of a foreign judgement that declared the bankruptcy of a Brazilian or foreign dealer who did business having premises in Brazil.

The previous Bankruptcy Law (Decreto-Lei nº 7.661/45) and the present Law 11.101/2005, did not deal expressly with this question. They establish, however, effects of the bankruptcy in Brazil, analyzed hereunder. The previous Code of Civil Procedure, revoked by Law nº 5.869/73 (CPC), established the following:

- a. the foreign judgements declaring the bankruptcy of a Brazilian dealer were unenforceable;
- b. the foreign judgement declaring the bankruptcy of a dealer in Brazil, would not produce any effect on the premises located in Brazil;
- c. the foreign judgement declaring the bankruptcy of a foreign dealer would produce effects in Brazil after dully validated. However, the following restrictions were established:
 - i. the trustee of the bankrupt estate independently of the validation of the judgement,

dully nominated, could require actions, debts and bring suits in order to assure the estate's rights;

ii. executive acts, as collection and sale at auction of assets of the bankrupt, would only produce effect after the full validation of the foreign judgement and if in accordance with the Brazilian Laws;

iii. the creditors domiciled in Brazil were able to maintain the suits already brought, when of the validation of the foreign judgements, and execute the assets in Brazil.

The Brazilian Law in force

The Brazilian Code of Civil Procedure (CPC) now in force does not treat the subject of analysis of this memorandum.

The CPC, when ruling the validation of foreign judgments, establishes that all procedure shall obey the established by the Internal Regulation of the Supreme Federal Court (RISTF), responsible for the validation procedure.

We shall treat of this matter hereunder.

The Brazilian Bankruptcy Law

The Brazilian Law does not establish any specific effect on international corporation groups. We shall, as so, deal with the LF and the effects established by this Executive Law, disregarding the fact that the bankrupt is a foreigner.

The Brazilian Law considers that all assets of the bankrupt, including rights and shares existing at the time the bankruptcy is declared or acquired during the proceeding (art. 76 LF), shall be considered by the bankruptcy.

It is also established that from the moment the bankruptcy is declared, the bankrupt loses the right to manage or dispose of its assets. As so, if the bankrupt was the manager of any company in Brazil, he would not be able to maintain this function (Arts. 102 and 103 of the LF).

For the Brazilian Law, the holder of the assets in Brazil shall be the bankrupt estate, during the bankruptcy; this shall include all referring assets, except the ones considered as restrained of mortgage as per art. 649 of the CPC.

The bilateral agreements signed by the bankrupt, according to the Brazilian Law (art. 117 of the LF), shall be maintained and may be performed by the trustee, or the responsible for the bankrupt estate management.

All current accounts are considered as closed at the moment the bankruptcy is declared (art. 121 of the LF).

Validation of a Foreign Judgment in Brazil

The art. 17 of the Introducing Law for the Brazilian Civil Code (LICC), establishes that foreign judgments shall only be effective if not offensive to the national sovereignty, public order and the good morals.

The procedure for validation of a foreign judgment is ruled, as mentioned above, by the RISTF. The main points established by this regiment are:

a) the Supreme Federal Court (STF) is competent for the analysis and decision on this matter;

b) the indispensable requirements for the validation of the foreign judgment are:

____ i. that it was uttered by a competent judge;

____ ii. that it has transited in rem judicatam or have the necessary formalities;

____ iii. that is has been certified by the Brazilian consulate and officially translated;

c) the interested party shall require the validation and the declaration must be as per the procedure law, is scheduled with the certificate of certified copy with the complete verdict and all other indispensable documents, dully translated and certified; and

d) the decision shall be executed by the competent court, as per the rules established for national verdicts of the same nature.

Effects of a Foreign Bankruptcy

In spite of the lack of legal basis, there are court decisions in the following understanding:

If a controller is declared bankrupt, assets of the controlled company, acquired by third parties only may be collected if determined by a judicial decision, considering the lifting of the veil of the controlled company possible.

The foreign judgment declaring a bankruptcy shall only be effective in Brazil when validated by the Supreme Federal Court, but even this homologation has no effect in connection with real estate locate in Brazil, as a specific suit must be filed exclusively here in connection with the same.

Lifting the veil

Responsibility throughout the economic group in case of bankruptcy is considered possible when verified acts viewing to fraud the creditors, bad will or irregular activities. The lifting of the veil is admitted in these cases, affecting not only holders in the bankrupt capital stock, but the economic group, especially in labor cases, as well the managers of the bankrupt.

Conclusion

As above established, the Brazilian Legal System now in force does not deal specifically with the effects of a Foreign Bankruptcy.

The judgment, which declares the bankruptcy of a foreign dealer shall only have effect in Brazil if dully validated, but this validations is impossible if dealing with real estate located in Brazil.

The validation of the foreign judgment shall obey the Brazilian procedure.

All rights and assets shall be considered in the bankruptcy, including shares or quotas. If the bankrupt was manager of a company in Brazil he will not be able to maintain this function.