



TMA International NEWS

Third Quarter 2010

- Brazilian Bankruptcy Act raises questions 2
 - TMA-Australia awards.... 6
 - Where is UK plc in its turnaround plan? 8
 - TMA contacts help cross-border case 9
-

A message from TMA's VP of International Relations



TMA plans inaugural Asia Pacific Regional Conference

by Alan Tilley

Recognizing the growing importance of the Asia Pacific region and China, TMA is in the process of planning a regional conference in Spring 2011.

A provisional steering committee of representatives from Taiwan, Japan, Australia and the embryonic Hong Kong-based regional chapter, together with TMA International staff and representatives, has convened to commence the planning process.

Based on the long-established TMA Taiwan conference, the first venue is proposed to be the Grand Hotel in Taipei, and provisional dates of April 13-15 have been set.

Program topics and speakers are being considered by the committee. It is anticipated that dates and the budget will be finalized and marketing commenced by the end of October of this year.

The focus will be on saving business and preserving stakeholder value in

the Asia Pacific region. Of particular interest will be the development of restructuring process and practice in China and cross-border issues affecting not only other Asia and Australasian economies, but North American and European international businesses.

TMA is confident it can attract a high profile list of speakers with real local expertise. Based on the experience gained from TMA Europe conferences where delegates have benefited from regional networking opportunities, as well as the educational content, I am certain that the TMA Asia Pacific conference will become an important event in restructuring professionals' calendars in the years ahead. 

Alan Tilley is a principal of Bryan Mansell and Tilley LLP specializing in international and European cross-border turnaround and restructuring. He was TMA-UK President 2005/6 and has served on the TMA International Committee since 2004.

Brazilian Bankruptcy Act raises questions on arbitration, insolvency proceedings

by Raphael Nehin Corrêa, Mattos Filho, Veiga Filho, Marrey Jr. and Quiroga

The enactment of Law nr. 9,307, dated September 23, 1996, (“Brazilian Arbitration Act”) is evidence that the legislative innovation contributed to the advancement of the arbitration institute in Brazil. The entrepreneurial community has recognized arbitration as an efficient mechanism for resolution of conflicts.

In light of this scenario that is continuously more favorable to the use of arbitration, new discussions have arisen in relation to the arbitrability of controversial issues. One of these issues is the relationship between arbitration and the insolvency of companies, and not even the enactment of Law nr. 11,101, dated February 9, 2005 (“Brazilian Bankruptcy Act”) has shed any light into clarifying the question.

Therefore, it seems appropriate to analyze the practical issues relating to these two laws—Brazilian Arbitration Act and Brazilian Bankruptcy Act—so as to assess the feasibility of companies submitting to arbitration in the midst of insolvency proceedings.

Considering that this is a vast field for reflection and debate, it is necessary to limit the object of our analysis here to the use of arbitration by companies undergoing bankruptcy/liquidation proceedings, thus leaving discussions concerning judicial reorganizations and extrajudicial recoveries for another opportunity.

This article intends to relate the arbitration institute with the liquidation proceeding, and,

thus, analyze the possibility of commencing or continuing the arbitral proceeding provided for in an agreement executed by the company prior to its bankruptcy decree.

Such a question generates discussions among scholars, calls the attention (and generates many doubts) of attorneys who face the new mechanisms provided for in the Brazilian Bankruptcy Act, and requires continuous clarifications from the Judiciary Branch concerning the subject matter.

Commencement or continuation of arbitration in the supervening bankruptcy decree of one of the parties

The legal effects of the bankruptcy of an entity with respect to commencement of arbitration may yet be discussed through another point of view: the contracting party bound to an agreement containing an arbitration clause (having the arbitration proceeding commenced or not) whose bankruptcy is subsequently declared.

It is our understanding that the bankruptcy of one of the contracting parties does not hinder the fulfillment of the previously executed arbitration clause, whether for continuation of the ongoing arbitration proceeding or for filing of arbitration following bankruptcy.

An analysis of the practical matters related to this issue is, however, necessary.

The use of arbitration for settling controversies related to insolvency issues is still subject to discussion in Brazil.

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Arbitrability

Initially, the possibility of submitting the matter at hand to an arbitration proceeding must be verified. The answer runs through the provision contained in section 1 of Law nr. 9,307/96, which prescribes that the object of the dispute submitted to arbitration must concern disposable and patrimonial rights.

Thus, based on the premise that at the time of execution of the agreement containing an arbitration clause, the contracting parties did not face any situation of insolvency. They were free in regard to the disposal of their assets, with no restrictions as to their ability to contract.

It is worth reviewing an important precedent from the Specialized Bankruptcy and Judicial Recovery Chamber of the São Paulo Appeals Court (*Câmara Especializada de Falências e Recuperações Judiciais do Tribunal de Justiça de São Paulo*):

“... even considering that in the bankruptcy proceeding there are interests from the group of creditors of the debtor, we do not see any impediment for fulfillment of the arbitration clause established prior to the bankruptcy declaration, through a clause provided for in the agreement executed by legal entities, duly established and represented in accordance with their charter documents, with full business authority and having as its object disposable and patrimonial rights, as set forth in section 1, of Law nr. 9,307, of 1996.”¹

Confirming the possibility of commencement of arbitration proceedings by an insolvent company, based on a contractual convention, the Superior Court of Justice (*Superior Tribunal de Justiça*—the highest non-constitutional court in Brazil)² deemed applicable an arbitration clause executed before the declaration of bankruptcy of one of the contracting parties. Although the decision relates to a company in the extrajudicial bankruptcy governed by the Bank Insolvency Law (Law n.º 6,024/76), there would be no reason to prohibit the application of this understanding in the event of companies in judicial reorganization or bankruptcy proceedings.³

Procedural capacity and availability of assets

Upon the declaration of bankruptcy of one of the contracting parties, the shareholders and managers of the bankrupt entity lose the power of disposal and management over all assets of the company, which shall then integrate the assets of the bankrupt estate to be managed and represented in judicial and/or arbitral proceedings by its judicial administrator (“trustee”).

Thus, the declaration of bankruptcy of a company that executed an arbitration clause does not hinder the commencement or continuation of arbitration. The judicial administrator shall represent the bankrupt estate in the arbitration proceeding, replacing its former controlling shareholders and management.⁴

The non-availability of assets, therefore, takes place *vis-à-vis* the former shareholders and managers of the bankrupt company, but not with respect to the judicial administrator, who is entitled to manage the assets of the estate and represent it in judicial lawsuits or in arbitration proceedings.

Therefore, there is no reason to thwart the continuation of the ongoing arbitration or prohibit the commencement of a proceeding based on an arbitration clause executed prior to the bankruptcy, provided that its object concerns disposable and patrimonial rights.⁵

Nonetheless, a recent ruling of the 6th Chamber of the São Paulo Appeals Court (*6ª Câmara do Tribunal de Justiça de São Paulo*), upheld the impossibility of initiating an arbitration having a bankrupt entity company as a party thereto, despite the fact that the arbitration clause was executed prior to the bankruptcy. This ruling was founded on the lack of standing by the bankrupt estate since, according to the Justices of the 6th Chamber, capacity of a party “must be verified at the time when arbitration becomes necessary and not at the time of negotiation.”⁶

We do not agree with the position followed by the 6th Chamber, since (i) at the time the arbitration clause was negotiated and executed, there was no

obstacle or restriction to the ability to contract of the signatory parties; and (ii) as sustained above, the non-availability ensuing from bankruptcy applies to the shareholders and managers of the bankrupt entity; the bankruptcy estate shall be represented by the judicial administrator, thereby having full standing to take part of an arbitration proceeding.

Bankruptcy jurisdiction and interruption of the arbitration

Another practical issue to be discussed relates to the potential applicability of section 76 of the Brazilian Bankruptcy Act, which provides that the bankruptcy court shall have exclusive jurisdiction to “hear all actions concerning assets, interests and business of the bankrupt party.” The referred section of the law, however, provides for exceptions which exclude the original jurisdiction of the bankruptcy court, namely labor and tax matters as well as those not governed by the Brazilian Bankruptcy Act.

The disputed issue, therefore, relates to the possibility of continuation or commencement of arbitration having as its object a contractual matter (disposable and patrimonial rights) and which conforms to the exception provided for by law (namely, a matter governed by the Brazilian Arbitration Act and not by the Brazilian Bankruptcy Act).

Donaldo Armelin sustains that the Brazilian Bankruptcy Act itself repealed from the bankruptcy court lawsuits concerning labor and tax matters, “with more reason the diversity between state and arbitral jurisdiction shall suffice to that end.”⁷

In connection, in the precedent referred to in item II (a), the São Paulo Appeals Court (*Tribunal de Justiça de São Paulo*) decided that an arbitration proceeding would not be affected by the jurisdiction of the Bankruptcy Court, because the “principle referred to does not encompass arbitration, which is not included in the judicial lawsuits.”

That judgment further adds that when the arbitration concerns a non-determined amount, then this proceeding shall not be stayed by the bankruptcy of one of the parties. The reason: “section 6, paragraph 1, of Law nr. 11,101/2005, which repeals the interruption of the lawsuits commenced against

debtor, provided for in the heading of the referred legal provision, is applicable to the case at hand, when it determines that the lawsuit which claims a non-determined amount shall continue in the court in which it is being heard.”⁸

In the same sense, the opinion of Donaldo Armelin: “With more reason, therefore, it would not be justified to stay an ongoing or to be commenced arbitration based on an arbitration clause executed prior to bankruptcy and the period indicated by it. Thus, with respect to ongoing arbitrations, there is no reason to suspend them, contingent on the development of the bankruptcy. In arbitrations, there is a discussion concerning the existence of a certain obligation relating to disposable and patrimonial rights.”⁹

And it could not be otherwise, to the extent that the legal provision for the stay of the lawsuits does not encompass the claims for non-determined amounts. The arbitration proceeding, therefore, shall serve precisely to determine or quantify the claim of the party. Subsequently such credit will be presented in the bankruptcy proceeding by means of a proof of claim based on the arbitration award.

No need for intervention by the District Attorney’s Office

An argument which could make impracticable to continue or commence arbitration upon the supervening bankruptcy of one of the contracting parties relates to the contingent need for intervention by the District Attorney’s Office in lawsuits in which the bankruptcy estate is a party, in observance of the public interest involved in such proceedings.

However, section 4 of the Brazilian Bankruptcy Act, which should govern the role of the District Attorney’s Office in the context of lawsuits in which the bankruptcy estate is a party, was the object of presidential veto. Considering that the arbitration proceeding “may only involve disposable interests of capable persons,”¹⁰ it can be concluded that the participation of the District Attorney’s Office is waived. Hence, there is no obstacle for the existence of an arbitration proceeding involving a bankrupt entity.

The District Attorney’s Office is charged with supervisory authority in the bankruptcy proceeding,

having, indeed, the prerogative of intervening in such proceeding and filing lawsuits in the defense of interests pertaining to the bankruptcy estate.

Considering that arbitration is an autonomous proceeding, comparable to a lawsuit to which the bankruptcy estate is a party, there is no need for intervention of the District Attorney's Office, by express absence of legal standing to that end.

Conclusions

From the outline of the practical issues related to the topic addressed here, we may verify the existence of diverging opinions in case law concerning the manners of reconciliation of the bankruptcy proceedings and arbitration.

Nonetheless, it is our understanding that the use of arbitration is perfectly compatible with the analyzed insolvency situation. This is so

because, in our view and in spite of the collective interests involved in bankruptcy proceedings, the examined situation relates to contractual matters, which govern disposable rights and, hence, may be submitted, at the discretion of the parties, to arbitration.

It is certain, however, that the use of arbitration for settling controversies related to insolvency issues is still subject to discussion in Brazil. Many intriguing questions are yet to be raised, and local scholars and practitioners are still exploring the best alternatives available and approaches for dealing with harmonizing both concepts. 



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¹ TJSP. Interlocutory Appeal nr. 531.020-4/3-00. Reporter Pereira Calças. Decided on 06/25/2008.

² STJ. Provisional Measure nr. 14.295-SP. Reporting Justice Nancy Andrighi. Monocratic decision rendered on 06/09/2008.

³ TOLEDO, Paulo Fernando Campos Salles de. *A Arbitragem na Recuperação Judicial de Empresas*, in *Revista de Arbitragem e Mediação* nr. 20, p. 47.

⁴ Per Donaldo Armelin: "... with the execution, as per the manner provided by the applicable law, of an arbitration clause, the right to elect the arbitral jurisdiction has been consummated, thereby emerging the acquired right to its commencement, continuation and conclusion with the rendering of the arbitral award. Considering the emergence of the right to jurisdiction, in light of the supervening legal facts, arbitration cannot be extinguished by reason of the loss of availability of the right discussed in the arbitration, and which was free from any restriction at the time of the execution of the arbitration clause, if the signatory party to such document had full capacity at such time." (ARMELIN, Donaldo. *A arbitragem, a falência e a liquidação extrajudicial*, in *Revista de Arbitragem e Mediação* nr. 13, p. 19/20).

⁵ The two important and recent precedents from our Courts mentioned above acknowledge the jurisdiction of the arbitration tribunal to decide matters relating to the existence, validity and effectiveness of the arbitration clause (TJSP. Interlocutory Appeal nr. 531.020-4/3-00. Reporter Pereira Calças. Decided on 06/25/2008 and STJ. Provisional Measure nr. 14.295-SP. Reporting Justice Nancy Andrighi. Monocratic decision rendered on 06/09/2008).

⁶ TJSP. Interlocutory Appeal nr. 658.014-4/2-00. Reporter Roberto Solimene. Decided on 12/10/09.

⁷ Cited work, p. 21.

⁸ TJSP. Interlocutory Appeal nr. 531.020-4/3-00. Reporter Pereira Calças. Decided on 06/25/2008.

⁹ ARMELIN, Donaldo. Cited work, p. 20.

¹⁰ TJSP. Interlocutory Appeal nr. 531.020-4/3-00. Reporter Pereira Calças. Decided on 06/25/2008.

TMA-Australia's Annual Awards presented at National Conference

TMA-Australia's seventh annual conference was held in September this year in Sydney. More than 100 delegates attended the conference—a substantial increase over last year—while the 2010 awards dinner drew an audience of 330.

This year's TMA-Australia National Award recipients are:

- **Large Company Turnaround of the Year**
Clifford Hallam Healthcare (CH2) with the support of Allegro Private Equity
- **SME Company Turnaround of the Year**
Aircom Group with the support of 180 Corporate
- **TMA & University of Technology Sydney CTP Top Student of the Year**
Suelen McCallum
- **TMA Lifetime Service Award**
Ian Hyman

Prior to the conference, State Award recipients were announced.

- **TMA Queensland State SME Company Turnaround of the Year**
Vantage Performance for its role in turning around an iconic beverage manufacturer.
- **TMA Queensland State Turnaround Professional of the Year**
Keith Bailey from Vantage Performance
- **TMA New South Wales State Large Company Turnaround of the Year**
Clifford Hallam Healthcare Pty Ltd (CH2) with the support of Allegro Private Equity
- **TMA New South Wales State SME Company Turnaround of the Year**
Aircom Group with the support of 180 Corporate
- **TMA Victoria State SME Company Turnaround of the Year**
Lithocraft Printing with the support of Promentor 🌐



Top Student of the Year Suelen McCallum accepts her award from Brian Leis, University of Technology Sydney.



Greg Woszczalski, managing director of 180 Corporate accepts the award for SME Company Turnaround of the Year.



Large Company Turnaround of the Year winner David Collins, CEO, CH2 (at lectern) with (from left) John Nestel, TMA NSW state chairman; Michael Sloan, TMA Vic state chairman; Stuart King, judging panel representative.



TMA-Australia's annual awards dinner drew an audience of 330.

Master of ceremonies for the awards dinner was comedian Paul Martell.



Ian Hyman (left) accepts the Lifetime Service Award from TMA-Australia Chairman Ian Johnson.



An auction held during the awards dinner raised more than AU\$6,000 for Special Olympics. A charitable organization that helps transform the lives of children and adults with intellectual disabilities, it offers year-round sports participation, training and competition in local communities across Australia.

Where is UK plc in its turnaround plan?

by David Hole

TMA-UK has issued several press releases this year highlighting its concern about the UK's turnaround plan following the credit crisis of 2007 to 2009 and its consequences.

The classic phases of a turnaround are Recognition/Diagnostic/Emergency/Strategic and Growth. I would propose that if UK plc was an island, we would be in the Strategic phase of the turnaround. However, as UK plc is a principal player in the global economy, external influences on our economic fortunes have greater macro effects than our internal factors.

We have witnessed the proactive package of stimulus in the Emergency phase with all the fiscal tools being used to avert a total meltdown. This was coordinated throughout the western economies, but resulted in huge deficits being developed, heaped upon the already established deficits that were not attended to during the credit boom years.

Despite this well-supported initiative, few micro-economic actions took place in the UK, principally as a consequence of the banks nursing severe balance sheet ruptures, uncertainty as to the effects of the stimulus package and a UK government divided on taking the harsh medicine required, combined with poor leadership.

Despite the government bailing out the banks, much of the funding has been absorbed rather than lent back out to UK business. Businesses have had to fend for themselves, certainly at the SME level. Some of this was simply transferred indirectly by businesses not paying government taxes, so government became cash poor—a simple case of pass the parcel!

The UK has now seen a change in its leadership (a classic turnaround action), and we now have an innovative style of government not seen in the UK for 90 years—a coalition.

Many countries, including Germany, are very familiar with such a style. What was important from this change was the start of well-known turnaround tactics and strategies to deal with the UK's huge deficit. George Osborne's

emergency budget commenced a root and branches approach to government income, expense and its debt and appraised how to reposition UK plc for growth.

TMA-UK hailed Chancellor George Osborne for producing a strategic budget with long-term recovery in mind, rather than opting for a tactical quick fix—some £85 billion in fact. Massive cuts to public spending have been budgeted combined with direct taxation.

It would seem that the UK government (you may agree or disagree) is tackling the painful process of change not just at the surface, but structurally. All turnaround professionals deal with this on a day-to-day basis. However, as we all know, the skill is in the surgery to ensure we prune back, but without killing the plant in order for recovery to take hold.

Commentators in the UK note two risks for Mr. Osborne:

- Can spending cuts of this order be delivered?
- Will fiscal tightening of this scale derail the recovery?

In any turnaround, delivering the cuts might just be possible, but it is difficult to control external factors beyond your influence.

Although recent UK economic data have been positive, and we have added flexibility by not being part of the Euro, it's finely balanced. I refer to the prospect of a double dip recession—the big W. In the UK, commentators are cautious to discuss it, but in the U.S., it is in common day usage—rather scary.

What's more scary is the traditional economic link between the UK and U.S. The UK exports predominantly to the U.S. and the Euro zone. The direction of the U.S. economy is causing some concerns in terms of GDP, deficits, and unemployment.

Why are we looking down the barrel of a big W? Interest rates are predicted to rise to starve off inflationary pressure (although data are not immediately apparent). Direct taxes are being implemented by governments to deal with the

deficits. Stimulus packages are being withdrawn by governments in the West. There is significant deleveraging of debt taking place by corporations, and the global economy is more unpredictable.

It will take a long time to unwind the effects of the financial crisis; UK plc will be buffered by the global financial winds. So batten down the hatches for the other side of the hurricane.

The challenge for the turnaround profession is to showcase its skills in the face of such adversity. 🌐



David Hole is Education Director for TMA-UK and CEO of Greenfield Restructuring Services Limited.

TMA European contacts help cross-border restructuring

In June 2009, when TMA-Spain President Carlos Gila was appointed executive vice chairman of La Seda de Barcelona, a €1.5 billion distressed Spanish public company, he found himself with a crisis on his hands.

The London-based agent bank for the €600 million, 54-member syndicated loan was threatening UK insolvency of a significant pan-European part of the La Seda group controlled from the United Kingdom.

UK-based management of this major and profitable group of subsidiaries, out of concern for their personal liabilities, were preparing for a filing of that group. At the same time, another UK subsidiary, controlled directly from Barcelona, was faced with a winding up order from a major group supplier. The whole La Seda group was at risk, and immediate action was necessary.

Gila needed help in gaining control of the UK situation and turned to contacts he had made through TMA where he had worked with Alan Tilley of Bryan Mansell and Tilley LLP (BM&T) in establishing TMA-Spain.

The personal and professional regard established between Gila and Tilley in this process was such that Tilley and his partner, David Bryan, were appointed as restructuring advisors.

Working closely together, Gila, Tilley and Bryan established control over UK and group cash flows. They earned the trust of the La Seda UK management team and helped avoid the filing of a core group activity.

While the filing of the other UK subsidiary of La Seda was inevitable, the restructuring team was able to isolate the filing's impact from the rest of the group, both operationally and financially, thus avoiding a parent company filing in Spain.

As a result of these actions, the team was able to buy time and progressively get support from the agent bank for a debt-to-equity restructuring of the syndicated loan.

Negotiations with the syndicate began in earnest in September 2009, and the process only concluded in August 2010. During this period, Gila & Co. and BM&T were closely involved in guiding the process, establishing and implementing the revised business plan, managing creditors and managing cash.

Not all of the 54 syndicate members were supportive, and cross-border expertise was again required. The Spanish company successfully resorted to a UK Scheme of Arrangement led by Richard Tett of Freshfields London to cram down holdouts to the plan.

La Seda has been a significant case in Spanish restructuring, and its successful conclusion was truly a team effort involving turnaround professionals, lawyers and accountants in Spain and UK.

But at the critical moment when speed was of the essence, it was the immediate trust and confidence established through TMA connections that enabled Carlos Gila to seize control and navigate the path towards eventual success for his company. 🌐

