A ordem pública como cláusula de barreira na insolvência transnacional: análise de um julgado da Corte de Hong Kong

The public policy as an exception in cross-board insolvency matters: an analysis of a Hong Kong Court's Decision

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Resumo: O Brasil internalizou a Lei Modelo da UNCITRAL, através da Lei 14.112/2020, lei que tem por objetivo, entre outros, a cooperação internacional entre jurisdições que tratem da insolvência de uma mesma empresa transnacional. Na lei, há a chamada cláusula de barreira da ordem pública, exceção que permite que o juiz negue eficácia ao processo de insolvência estrangeiro que represente *manifesta* ofensa à ordem pública do Brasil. O presente artigo analisa um julgado da Corte de Hong Kong que aplicou exatamente essa exceção de ordem pública e procura identificar no *decisum* uma base normativa para aplicação ou não no Brasil.

Palavras-chave: Insolvência transnacional – Lei Modelo – Brasil – Barreira ordem pública – Julgado Hong Kong – Aplicação no Brasil.

Abstract: Brazil internalized UNCITRAL's Model Law through Brazilian Act 14,112/2020. Such act has, among other objectives, the scope of cooperation between courts that deal with insolvency of cross-board companies. Under the rules established on the act, there is an exception of public policy, which enables a Brazilian judge to find a foreign insolvency lawsuit inadmissible in case it is manifestly contrary to public policy. In this sense, this paper analyses a Hong Kong Court's decision based on this exception, while the paper also tries to identify whether there is in Brazil an applicable rule or not for this situation.

Keywords: Cross-border Insolvency – Model Law UNCITRAL – Brazil – Public policy exception – Hong Kong Court's decision – Apply in Brazil.

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IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO 134 OF 2018

IN THE MATTER of Order 63, rules 4(1)(b)-(c) of the Rules of the High Court (Cap 4A); and the Court's inherent jurisdiction

and

IN THE MATTER of China Fishery Group Limited in Companies Winding-Up Proceedings No 367 of 2015 in Hong Kong

and

IN THE MATTER of China Fisheries International Limited in Companies Winding-Up Proceedings No 368 of 2015 in Hong Kong

Before: Hon Harris J in Chambers

Date of Hearing: 11 September 2018

Date of Decision: 17 September 2018

Date of Reasons for Decision: 14 January 2019

REASONS FOR DECISION

1. On 30 January 2018 William A Brandt Jr, the Chapter 11 Trustee of CFG Peru Investments Pte Limited (Singapore) ("Trustee"), issued an ex parte originating summons for leave to use the Decision of Deputy High Court Judge Kenneth Kwok, SC ("the DHCJ") made on 5 January 2016 in HCCW 367 and 368 of 2015 issued by The Hongkong and Shanghai Banking Corporation Limited ("HSBC") ("winding-up proceedings") discharging the joint and provisional liquidators appointed by me over China Fishery Group Limited ("CFG") and China Fisheries International Limited ("CFI") (collectively the "Companies") and the Reasons for Decision handed down on 17 March 2016, in Chapter 11 proceedings in the United States Bankruptcy Court of the Southern District of New York bearing the caption In re China Fishery Group Limited (Cayman), et al. [1]

2. Leave is required because, as is normal in the case of an application for the appointment of provisional liquidators, the hearing before the DHCJ was in chambers not open to the public and the Reasons for Decision are marked "Not Open to the Public" and "No search, inspection or publication without leave of the court". In addition in a similar application to that made by the Trustee in which the Companies sought leave to disclose the judgment amongst other documents generated as part of the winding-up proceedings, I ordered that the parties whether themselves or through their agents, must not without my leave provide to any persons any of the documents referred to in the Companies' summons.[2]

1. Case No. 16-11895 (JLG) (Bankr. S.D.N.Y. Oct 28, 2016), [ECF No. 203].

2. (Unrep, HCCW 367 and 368/2015 [heard together], 23 May 2017).

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3. Although the application is not framed as an application for judicial assistance by a foreign office holder charged with administering a corporate liquidation, before me Mr Dennis Kwok argued that the character of the Trustee's office justified this Court assessing the application with regard to the common law principles governing judicial assistance, which Mr Kwok argued bolstered the application, which was principally framed as one based on the open justice principle. It was not, however, necessary he argued for the court to be satisfied that the common law principles of judicial assistance are engaged in the present case in order for the Trustee to succeed.

4. HSBC opposes the application on two grounds. First, that the Trustee has failed to demonstrate sufficiently good reasons for the release of the Decision. Secondly, as the appeal against the Decision was explicitly withdrawn (as I explain in detail in [7]) because of undertakings given by the Companies to both HSBC and the court, which were then contumeliously breached by the Companies petitioning under Chapter 11 for the undisputed purpose of preventing HSBC from enforcing the undertakings, the court should not exercise its discretion to permit the application as it would allow the Companies to benefit from their egregious conduct[3], the undertakings having been given, it is also not disputed by the Trustee, although the management of the Companies had no intention of complying with them.[4]

5. Before identifying the issues that in my view this application requires the court to determine, it will be helpful if I set out the relevant factual background to what is an unusual case.

Background

6. CFG is incorporated in the Cayman Islands. CFI is incorporated in Samoa. They are part of the China Fisheries Group ("Group"), which is engaged in the business of fisheries and fishmeal processing in Peru for wholesale distribution. The Group experienced serious financial difficulties in 2014 and 2015. Restructuring discussions took place with their various bankers. HSBC was not satisfied with the progress of the discussions, and became aware of matters which it believed demonstrated financial misconduct by the management of the Group. On 25 November 2015, HSBC issued a petition seeking the winding up of CFG on the grounds of insolvency and applied *ex parte* to me for the appointment of provisional liquidators. I granted the application. I was not available to hear the continuation summonses. It was heard by the DHCJ on 30 and 31 December 2015 and 4 January 2016. On 5 January 2016 the DHCJ set aside the appointments.

7. HSBC issued a notice of appeal on 8 January 2016. HSBC considered seeking an expedited hearing, but did not do because it anticipated that the Companies would be wound up at the hearing of the petitions on 27 January 2016. However, following discussions with the Companies' management a deed of undertaking ("Deed") was signed on 20 January 2016 pursuant to which HSBC agreed to withdraw all proceedings in Hong Kong and similar proceedings in the Cayman Islands against CFG in which provisional liquidators had been appointed and remained in place. The Deed, which is governed by Hong Kong law and contains an exclusive Hong Kong jurisdiction clause, required the following the Companies to do:

> "(1) repay certain indebtedness from the proceeds of a sale of CFGL's [China Fishery Group Limited's] Peruvian subsidiaries which was to be carried out through a strict timetable of a six-month sales process ('Sale Process'), this being the length of time the Companies had

3. The finding of Garrity J at [39] of his judgment of 28 October 2016 in the Chapter 11 Proceedings.

4. The finding of Garrity J at [39] of his judgment of 28 October 2016 in the Chapter 11 Proceedings.

> themselves sought to implement such sale, and to provide HSBC and other creditors with updates of the Sales Process on a full and transparent basis. The date of repayment was set at 20.7.2016;
>
> (2) appoint Mr. Paul Brough ('Mr. Brough') as the CRO [Chief Restructuring Officer] of the CF Group [China Fisheries Group] (to which the Companies belonged) and as a director of CFGL;
>
> (3) provide Mr. Brough with full cooperation to allow him to carry out his role as CRO and to implement the Sale Process as soon as practicable;
>
> (4) appoint Grant Thornton as independent reporting accountants, with full access to the affairs of the CF Group and with CFGL responsible for payment of all fees reasonably incurred by Grant Thornton; and
>
> (5) consent to any subsequent application by HSBC [The Hongkong and Shanghai Banking Corporation Limited] (or BoA [Bank of America, N.A.]) for the immediate re-appointment of provisional liquidators in the Cayman Islands if the sale of the Peruvian OpCos' operations and the repayment of the debt owed to HSBC had not occurred by 20.7.2016."

8. The petitions in Hong Kong and the Cayman Islands were also withdrawn.

9. The Deed was given additional force by orders of the courts both in Hong Kong and the Cayman Islands. The orders in Hong Kong which are dated 1 February 2016 contain the following undertakings to the court:

> "AND UPON undertakings of [China Fishery Group Limited / China Fisheries International Limited] (the 'Company') providing to the Court as set out in Clauses 2.3 and 2.4 of the Deed of Undertaking dated 20 January 2016 entered into between the Petitioner, the Company and [China Fisheries International Limited / China Fishery Group Limited], a copy of which is appended at Schedule 1 to this Order (the 'Deed of Undertaking')"

Clauses 2.3 and 2.4 contain the provisions for the payments to HSBC summarised in [6] above. It is not disputed by the Trustee that HSBC withdrew its appeal in reliance on the Deed and the orders containing the undertakings to this Court. Neither do I understand it to be seriously disputed that it is likely the Companies would have been wound up on 27 January 2016 in Hong Kong and that it is also likely that CFG would have been wound up in the Cayman Islands.

10. Following signing of the Deed, the Companies were supposed to be engaged in the sale of assets and HSBC and others were due to be repaid by 20 July 2016. On 30 June 2016 various members of the Group including the Companies filed under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. The Companies and the Group (and other companies falling within the definition of "Debtors" in the Trustee's evidence) had no operations in, or connection with, the United States. Jurisdiction was based on the payment of a retainer to the Debtors' counsel in December 2015, which I understand is a not uncommon basis for giving the Bankruptcy Court jurisdiction, and a New York governing law clause in certain notes issued by one of the Debtors. Upon making the filing, section 362 of the United States Bankruptcy Code provides for an automatic stay prohibiting the commencement or continuation of proceedings against the Debtors worldwide. It, therefore, prevented HSBC from taking action for breach of the Order and Deed in Hong Kong.

11. On 10 November 2016, upon the hearing of the motion of Cooperative Rabobank U A, Standard Chartered Bank (Hong Kong) Limited and DBS Bank (Hong Kong) Limited for the appointment of a Chapter 11 trustee for the Debtors in the Chapter 11 Cases, Garrity J appointed the Trustee over CFG Peru Investments Pte Limited (Singapore) only. The reason for not appointing the Trustee over other Debtors was explained by Garrity J at p 50 of his decision:

> "There are sixteen Debtors in these Chapter 11 cases. As noted, most of them are dormant, non-operating companies and a few are holding companies to other operating, non-debtor affiliates and businesses. It makes little practical or economic sense to appoint a trustee for each Debtor in these cases. That is particularly so where, as here, among other things, it is uncertain what impact such an appointment would have on (i) the Debtors' other businesses and affiliates (including non-debtor operating subsidiaries) and their creditors and constituents, and (ii) the corporate governance of the affected Debtor and non-debtor entities in foreign jurisdictions (including the publicly traded companies). Moreover, it is not clear whether an appointed Chapter 11 trustee will be recognized under applicable foreign law as the authorized representative of the Debtors."

12. The Trustee has sought and obtained from Garrity J an order for discovery against HSBC that covered the Decision. HSBC attempted unsuccessfully to appeal the Garrity J's decision.

13. In his first affidavit in support of his application the Trustee summarised his reasons for wanting to leave to obtain and use the Decision (which the Trustee subsequently found amongst the Group's papers that came into his possession and as a result he is now aware its contents) to determine whether the Debtors may have any claims against HSBC and investigate whether HSBC's conduct might give rise to defences by the Debtors' estates, for example, avoidance transfers and equitable subordination under section 510(c) of the Bankruptcy Code, or other theories of lender liability, and potentially other claims against HSBC.

14. The Trustee did not wait for determination of this application before deciding to commence proceedings against HSBC in New York. On 29 June 2018, the Trustee filed a complaint ("Complaint") in which in [9] it is asserted that "HSBC's claims against the estates totalling more than $100 million should be equitably subordinated or disallowed given the extent to which HSBC exceeded the confines of permissible conduct and the damage it caused." As I understand it, the Trustee suggests that the impermissible conduct extends to the application for the appointment of provisional liquidators and the reasons for the Decision support the suggestion. It is for that reason that the Trustee wishes to be able to use the Decision in the Complaint.

15. There are two other factual matters that are relevant to the application. The first concerns the solvency of the Companies and the Group. It is not clear from the Trustee's evidence whether or not he believes either the Companies or the Group to be solvent. I asked Mr. Kwok (the Trustee was in court during the hearing) what the Trustee believed the position to be. Although, the position does not appear to be clear, as I understand it the Trustee anticipates that the Group is solvent. The Group is owned by the Ng Family, who thus stand to benefit if the Group's debt and operations can be restructured and continue successfully under its present ownership. It is not suggested by the Trustee that the financial state of the Group and the Companies are so parlous that the shareholders have no economic interest in the Group and the outcome of the Chapter 11 proceedings.

16. The second concerns the circumstances in which the Trustee came to be appointed. The company, CFG Peru Investments Pte Limited (Singapore), over which the Trustee came to be appointed is a wholly owned subsidiary of CFG. On the basis of the evidence before me it seems highly probable, that but for the signing of the Deed CFG would have been wound up along with CFI on 27 January 2016 or possibly provisional liquidators reappointed for a period while the creditors considered alternatives to liquidation. What seems to be clear is that the Trustee's appointment was only possible as a consequence of what Garrity J has found to be a conscious decision by the owners of the Companies and the Group, the Ng Family, to sign the Deed and, importantly, give undertakings to this Court that they had no intention of honouring. Viewed from this Court's perspective the Chapter 11 filings by the Companies and the Group were, therefore, unconscionable and an abuse and it was only as a result of this objectionable conduct that the application to appoint the Trustee became possible.

17. It is common ground that it is not for me to assess whether or not the DHCJ was wrong to set aside the order appointing provisional liquidators and that I should deal with this application on the basis that the appeal was brought in good faith and arguable. I would, however, note that the Companies did not dispute before the DHCJ that the first of the two criteria, which a petitioner has to satisfy before the Companies Court will appoint provisional liquidators, namely, that the evidence demonstrated a prima facie case for granting of a winding-up order had been satisfied. However, the DHCJ did find in [60]–[62] of the Decision that the Group was balance sheet insolvent although he does not explain the relevance of this in his reasons or how, if at all, it factored into his decision. There was no suggestion before me that the Companies had any basis in December 2015 for disputing the debts owed to HSBC or the petitions, which as I have noted were to come on before me on 27 January 2016 and, therefore, applying normal principles HSBC would be entitled to winding-up orders *debito justitiae*. However, the DHCJ did in [65]–[67] of the Decision find that the Group (at least that is how I read [65]) were involved in a restructuring exercise and that it was in the interests of "stakeholders" that there was an orderly disposal of assets rather than a compulsory winding up and that this was a reason for discharging an order. The DHCJ did not explain how he reconciled this reasoning with the acceptance by the Companies that the first criteria had been satisfied and the application of the normal principles, which would suggest that the Companies would be wound up only a month after the hearing before him. It would appear from the evidence given before Garrity J and Garrity J's findings that the Companies were aware that unless they agreed some form of rescheduling of the debt owed to HSBC they were likely to be wound up on 27 January, which was why they agreed the Deed on 20 January 2016.

Open Justice Principle

18. The court has an inherent jurisdiction to control access to documents in its possession as a consequence of proceedings before it. Various authorities discuss the principle by reference to which the court determines whether access should be restricted. They establish that the judicial process should be conducted openly and that it should only be restricted if substantial and relevant reasons are demonstrated for so doing.[5] General considerations such as privacy and confidentiality are not relevant reasons. In TCWF v LKKS[6] Lam JA refers with approval in [45-6] to the principles to be found in the English Practice Guidance (Interim Non-disclosure Orders).[7] In the context of non-disclosure orders, the principle is clear: it can only be justified when strictly necessary to secure the proper administration of justice.

19. In the Companies Court context it is generally accepted that certain restrictions are necessary in order to ensure the proper and just administration of certain types of matters that regularly come before the Companies Court. Schedule 2 of Practice Direction 25.1 lists certain proceedings which are not usually open to the public. The justification is contained in [4(a)]:

> "The proceedings listed in Schedule 2 would usually not be open to the public. In relation to such proceedings, it is considered that having regard to their nature, one or more of the reasons for excluding the press and the public laid down in Article 10 of the Hong Kong Bill

5. SJ v FTCW [2014] 1 HKLRD 849, Lam JA [28, 114]; ATV v Communications Authority [2013] 3 HKC 66, Cheung CJHC [19-32].

6. 2013] HKFLR 456.

7. [2012] 1 WLR 1003.

> of Rights Ordinance, Cap. 383 ('Article 10') are usually satisfied. Accordingly, such proceedings would usually not be open to the public."

20. Part 3 of Schedule 2 contains a list of proceedings relating to companies winding-up and bankruptcy and the list includes applications for the appointment of provisional liquidators. The principal justification for this, as I understand it, is avoidance of the commercial damage that might result from an unjustified application becoming general knowledge. It is for this reason that the Decision is marked not open to the public and this application is necessary. If a hearing is not open to the public this would generally be a good reason for the decision also not to be available.[8]

21. What emerges in my view from the statements of general principle in the authorities and the practice of the High Court is an approach, which whilst recognising that the starting point is that the courts should conduct and decide proceedings openly, also recognises that in practice there are situations in which it is to be assumed that balancing the considerations giving rise to the general principle and those considerations commonly engaged for particular types of sensitive applications, there should be restrictions on who can attend certain hearings and have access to the decision and the court file. Applications under section 193 of the Companies (Winding-up and Miscellaneous Proceedings) Ordinance is one such case. In such a case it is necessary for the applicant to justify why the normal approach is not justified. In some cases it may be straightforward and the court readily accepts that there is no justification for qualifying or restricting the general right to have proceedings conducted openly and access granted to the public. Others may not be.

22. Although this is not quite how Mr. Kwok put his case, in my view the presumption that justified holding the application in private has ended. It, therefore, becomes necessary to consider the position afresh. This would normally involve focusing on the reasons why it is suggested that the restrictions should not be lifted. However, given the unusual circumstances in which this application comes to be made, in my view the appropriate starting point is to consider the status of the applicant and the reasons why he seeks to lift the restriction. I say this because the circumstances in which the Chapter 11 proceedings in which the Trustee came to be appointed are central to HSBC's grounds for opposing the application. I would note before considering these matters that in my view insufficient attention has been paid by the Parties to relevance of the Chapter 11 proceedings and the Trustee's status for reasons, which will become apparent in the following paragraphs.

The Trustee's Status

23. Put at its simplest, it is the Trustee's case that he has a substantial and bona fide reason for wanting to be able to use the Decision and this being the case the application of the open justice principle clearly entitles him to the order he seeks. As the Trustee's written submissions implicitly acknowledge, the Trustee's argument that he has a substantial reason for seeking the Decision is founded on his mandate under the US Bankruptcy Code. However, the Trustee's written submissions do not develop an argument explaining how the Trustee's position is relevant to an assessment of the application beyond making the general submission that the court has at common law a power to recognise and provide assistance to foreign insolvency proceedings and persons appointed to conduct them, which is uncontentious. The justification for this power was explained in the following way by Lord Sumption in Singularis Holdings Ltd v PricewaterhouseCoopers[9] at [23]:

8. Huang Hsin Yang v Bank of China (Hong Kong) Ltd (unrep, CACV 186/2007, 13 November 2007), Tang VP [8].
9. [2015] AC 1675; cited by me in Re BJB Career Education Co Ltd [2017] 1 HKRLD 113, [12].

> "... The principle of modified universalism is a recognised principle of the common law. It is founded on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a worldwide basis, notwithstanding the territorial limits of their jurisdiction. The basis of that public interest is not only comity, but a recognition that in a world of global businesses it is in the interest of every country that companies with transnational assets and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on a basis that will be recognised and effective internationally.... The courts have repeatedly recognised not just a right but a duty to assist in whatever way they properly can."

24. However, the courts of common law jurisdictions do not recognise and assist all foreign proceedings and holders of offices associated with insolvency or some form of corporate rehabilitation and the common law on the circumstances in which foreign insolvency proceedings will be recognised and assisted varies to some degree from jurisdiction to jurisdiction. For example, courts have differed on whether or not at common law recognition should be limited to liquidators or equivalent office holders appointed by the courts of the place of incorporation. Significant differences are to be found in the decisions of Lord Hoffman (preferred in Singapore[10]) in Re HIH Casualty and General Insurance Ltd[11] and those of Lord Collins writing for the majority in Rubin v Eurofinance SA[12] on this issue, with the current position in England and Wales appearing to be that the common law should not be extended beyond the established criteria that a liquidator appointed in the place of incorporation should be recognised.

25. There is one case in Hong Kong, BCCI (Overseas) Ltd v BCCI (Overseas) Ltd (Macau Branch),[13] a decision of the Court of Appeal, which touches on this issue. BCCI (Overseas) Ltd was incorporated in the Cayman Islands and had opened a branch in Macau. Officers of the Macau branch has placed monies with a bank in Hong Kong. The company was put into liquidation both in the Cayman Islands, its place of incorporation, and in Macau. The liquidators in both jurisdictions claimed the funds in Hong Kong. The court allowed the Macau liquidators to be represented and take part in an application by the Cayman liquidators seeking an order for a transfer of the funds in the Hong Kong

10. Re Opti-Medix [2016] SGHC 108; see also the judgement of Seagal J in the Court of the Grand Cayman, China Agrotech Holdings Ltd, FSD 157/2017 in which he held that recognition could be extended to the Hong Kong insolvency proceedings in respect of the Cayman incorporated company. Seagal J's decision contains a useful and comprehensive consideration of the pertinent authorities in various jurisdictions. I would observe in passing that in [32-33] Seagal J found that submission to the foreign jurisdiction could be sufficient to justify recognition for certain purposes. Although, it is not necessary for me to decide this I have reservations about the proposition that submission by a company to a foreign jurisdiction resulting from the company itself commencing insolvency proceedings, for example to avail itself of the Chapter 11 process, is by itself sufficient to justify recognition. The immediate reason is that as this case demonstrates it can be open to abuse. I would also note that Seagal J's analysis [34] seems to suggest that the test for submission to the jurisdiction of the Hong Kong court for the purposes of assessing whether or not Hong Kong proceedings should be recognised are less stringent than the tests applied by the Hong Kong court in assessing whether or not it should exercise its insolvency jurisdiction over a foreign incorporated company, which is surprising. Registration by a foreign company in Hong Kong is not of itself sufficient to engage the jurisdiction.
11. [2008] 1 WLR 852, [31].
12. [2013] 1 AC 236.
13. [1997] 1 HKLRD 304.

bank account to them. The application was successful. However, it would appear from the report that very limited consideration was given to the Macau liquidators' status and none to whether the Macau insolvency process should be recognised. The position in Hong Kong, therefore, remains undecided and this is not an appropriate case to determine it or express a view on the view the Companies Court might take.

26. Similar differences exist in relation to the recognition of liquidators appointed in voluntary liquidations. In Singularis the majority suggest obiter that the common law power to recognise and assist foreign insolvency proceedings would not extend to voluntary liquidations.[14] Singularis has not been followed in Singapore.[15] I declined to follow it in Supreme Tycoon Ltd.[16]

27. It is not, therefore, helpful to think of the significance of the Trustee's office in the broad, unfocused way advanced by Mr. Kwok. A more disciplined approach is required.

28. It is generally accepted in common law jurisdictions that determining whether or not a foreign office holder should be recognized and assisted requires a consideration of the following matters:

> (1) Whether the office holder had been appointed in collective insolvency proceedings.[17]
>
> (2) Whether the foreign jurisdiction in which the office holder has been appointed and the company have a relevant connection.[18]
>
> (3) If the answer to these first two questions is in the affirmative one would normally expect the foreign proceedings to be recognized.
>
> (4) If the foreign proceedings are recognized one would normally expect the office holder to be recognized unless the local court considers that there has been some irregularity in the office holder's appointment.
>
> (5) If a foreign office holder is recognized one would normally expect assistance, which may extend to granting orders that give the foreign office holder substantially similar powers to, for example, investigate the affairs of the company as would be available to a local liquidator if the foreign jurisdiction has similar provisions in its insolvency regime.[19]

29. As I have already noted the issues that I have just considered were not fully canvassed before me and it is neither appropriate nor necessary for me to explore fully how the Hong Kong Companies Court would approach an application for recognition of Chapter 11 proceedings; an issue on which as I explained in [25] there is no local authority and so far as I am aware limited authority in other common law jurisdictions. The reason why I say it is unnecessary is because it seems to me clear that the Trustee could never have satisfied the relevant criteria; and perhaps this is why no such application has been made. I say this for the following reasons.

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14. Ibid [25].
15. Singularis has not been followed in Singapore. 15 I declined to follow it in Supreme Tycoon Ltd. 16 27. It is not, therefore, helpful to think of the significance of the Trustee's office in the broad, unfocused way advanced by Mr Kwok. A more disciplined approach is required. 28. It is generally accepted in common law jurisdictions that determining whether or not a foreign office holder should be recognised and assisted requires a consideration of the following matters:
16. [2018] 2 HKC 485, [2018] HKCFI 277.
17. Ibid [15].
18. This follows from reasoning in cases such as Singularis, Gulf Pacific and Supreme Tycoon and is uncontroversial.
19. Ibid [12].

30. I accept for present purposes that the Chapter 11 proceedings are collective insolvency proceedings. However, there is no relevant connection between CFG Peru Investments Pte Limited (Singapore) and the jurisdiction of the United States Bankruptcy Court for the Southern District of New York or any other court in the United States. The company is incorporated in Singapore. Even if one takes the view that the recognition is not limited to the jurisdiction of incorporation and that some more flexible test is to be applied such as the location of the company's centre of main interest, to use the term found in the UNCITRAL Model Law and EU Insolvency Regulation ("COMI"), the COMI was not in the United States at the time of filing the Chapter 11 proceedings and it is not suggested that the COMI has shifted to the United States subsequently. The same is true of the other members of the China Fisheries Group. Jurisdictions in which the location of the COMI is a relevant consideration differ on the time at which it is to be assessed, but as I have demonstrated it matters not for present purposes what time is considered to be relevant, the Trustee cannot satisfy it.

31. It follows that there is no basis for recognising the Trustee's office or providing assistance to him. The relevance of the applicant being a Trustee appointed in the Chapter 11 proceedings is limited to it explaining why he is interested in the Decision and has made the application. However, it does seem to me that the Chapter 11 proceedings have a further relevance. As I have explained it seems clear that they were commenced in order to prevent enforcement by HSBC of the Deed. The Deed contained undertakings to this Court. It is self-evidently objectionable and an affront to this Court for the Companies having submitted to this jurisdiction by signing the Deed which contains a Hong Kong governing law clause and given undertakings to this Court, to commence proceedings in another jurisdiction with a view to hindering enforcement of the Deed. Even if the Trustee had applied for recognition and been able to satisfy the criteria summarised in [28] I would have declined to provide assistance in the form of the order sought in this application and it is quite likely refused to recognise the Chapter 11 proceedings on the grounds that to do so would be contrary to public policy.

Public Policy Considerations

32. The relevance of public policy issues to an application for recognition is usefully illustrated by Re Zetta Jet Pte Ltd, 20 another decision of Aedit Abdullah J. The court was faced with an application for recognition of a Chapter 11 bankruptcy under section 354B and the Tenth Schedule of the Companies Act (Cap 50, 2006 Rev Ed). At the material time, by 2017 amendments to the Companies Act, the UNCITRAL Model Law on Cross-Border Insolvency applied in Singapore. The Judge proceeded on the basis that the requirements of the version of the Model Law enacted in Singapore required recognition unless he concluded that to do so would manifestly be against public policy. Shortly after the Chapter 11 proceedings had been commenced a shareholder of Zetta Jet obtained an injunction enjoining Zetta Jet and its shareholders from carrying out any further steps in the Chapter 11 proceedings until further order of the Singapore court. The Company did not comply. The Chapter 11 proceedings were subsequently converted into Chapter 7 proceedings. The application for recognition was made by the Chapter 7 trustee. In rejecting recognition on the grounds of public policy Abdullah J said this:

> "Recognising the Chapter 7 Trustee despite the breach by the pursuit of the US proceedings in the face of the Singapore injunction undermines the administration of justice in Singapore. That injunction remains in force and prohibited the pursuit of the very proceedings that were the basis of the Trustee's appointment. It is furthermore an order made by a court of coordinate jurisdiction. There is nothing before me to show any error leading to the ordering of the Singapore injunction, but even if there were, the proper course would be to apply to set it

> aside or appeal. I cannot ignore or overlook the Singapore injunction. But that would be the effect of granting general recognition of the Chapter 7 Trustee."

33. He did, however, grant recognition to the extent of allowing the Trustee to apply to set-aside the injunction or appeal it. Abdullah J took the view that this was consonant with the philosophy and objective of the Singapore Model Law including giving due weight to the international basis of the Model Law.

34. Although there is no recognition application before me, in my view a similar position exists in the present case. The Trustee was appointed in Chapter 11 proceedings, which were commenced to thwart HSBC taking action on the Deed in this jurisdiction. If the Companies had not done so HSBC would have taken action here which would, presumably, have prevented, or at least inhibited, the commencement of Chapter 11 proceedings in New York. It would have been the Hong Kong courts which had to determine how to deal with the Companies failure to honour the Deed and new winding-up proceedings. Although the Trustee is not appointed over the Companies, it is difficult to see how if HSBC had been free to take action for breach of the Deed and the undertakings to this Court, the Trustee would have been in a position to justify his need for the Decision on grounds relied on in the present application. This application invites me to overlook the Companies conduct and proceed on the basis that it has nothing to do with the Trustee. It seems to me that this approach ignores the fact that the Chapter 11 proceedings, and consequently the Trustee's appointment, is the consequence of what appears to be a conscious fraud on the part of the Ng family on HSBC and this Court. Public policy considerations weigh heavily in favour of declining to provide any form of assistance to a process that arises in this way. These public policy considerations in my view more than outweigh the more general public policy reasons that underpin the open justice principle and which might normally, I accept, justify making the order that is sought by the Trustee.

35. Mr. Kwok has suggested that the appropriate course if HSBC is aggrieved by the impact of the Chapter 11 proceedings is for it to make an application in New York, which permits it to take action on the Deed. I disagree. There is no suggestion that the Trustee would agree to such an application. His aggressive action against HSBC clearly suggests that he would not. Further, I see no reason why, as HSBC's complaint is that it has been hampered in enforcing its right in Hong Kong on a Deed governed by Hong Kong law and containing undertakings given to this Court, that it should have to do so.

Conclusion

36. It is for these reasons that I declined the application, which is dismissed. I make a costs order nisi that the Trustee pays HSBC's costs of these proceedings.

(Jonathan Harris)
Judge of the Court of First Instance
High Court

Comentário

Introdução

Com a entrada em vigor da Lei 14.112, em 24 de dezembro de 2020, entre tantas alterações trazidas no regime de recuperação judicial e de falências brasileiro (Lei 11.101/2005), houve a introdução do Capítulo VI-A, pelo qual o Brasil acabou por internalizar em seu ordenamento a Lei Modelo da UNCITRAL sobre insolvência transnacional, a exemplo do conhecido CHAPTER 15 do *Bankruptcy Code* dos Estados Unidos da América, lá introduzido no ano de 2005.

A ideia subjacente à Lei Modelo é fomentar uma aplicação uniforme, no âmbito internacional, do regime recuperacional e de falência, evitando processos autônomos nacionais, com tratamentos legislativos diversos, incidindo sobre empresas transnacionais. Nem sempre o sucesso econômico acompanha a vida da empresa. Há momentos de crise que precisam ser tratados de forma adequada, de maneira a preservar a atividade empresarial. E a experiência demonstrou que o tratamento individual das empresas transnacionais em crise, por cada país, tende a tornar mais difícil a superação daquela[20]. Daí a ideia da uniformização.

A segurança jurídica alcançada com um tratamento harmônico, que permita a integração entre cortes de países diferentes, todas com jurisdição sobre a empresa em crise, produz o efeito geral concreto de estimular a atividade econômica.[21] Há várias consequências fático-econômicas nessa

20. Sobre o princípio do *territorialismo*, dominante ao tempo da elaboração da Lei Modelo da UNICITRAL, e o princípio do *universalismo*, que busco se contrapor àquela tendência, escreveu CROCCO, Fabio Weinber no artigo "When a deference makes a difference: The Role of U.S. Courts in Cross-Border Bankruptcies", artigo premiado no III Prize Internacional Insolvency Studies: "In short, under the territorialist approach, each jurisdiction where the debtor's assets are located is entitled to administer a full insolvency proceeding governed by its own laws. Thus, there can be as many bankruptcy proceedings as there are countries where assets are located, each of which is governed by a different set of rules. On the other hand, under the universalist approach, cross-border bankruptcies are treated as unified global proceedings and administered by one principal court under a single governing law". Em tradução livre: "Em suma, sob a ótica territorialista, cada jurisdição onde os ativos do devedor se localizam é legitimada a administrar a insolvência por suas próprias leis. Assim, haverá tantos procedimentos de insolvência quantos países onde os ativos estiverem localizados, cada um executado por diferente conjunto de regras. Por outro lado, sob a ótica universalista, insolvências transnacionais são tratadas em procedimentos unificados de forma global e executados por uma só corte jurisdicional, com base em uma só legislação". Disponível em: [www.iiiglobal.org/sites/default/files/media/Weinberg%20Crocco%2C%20Fabio%20-%20When%20Deference%20Makes%20a%20Difference%20-%20The%20Role%20of....pdf]. Acesso em: 15.06.2021.

21. Em artigo publicado na obra coletiva coordenada por Daniel Carnio Costa, tivemos a oportunidade de pontuar na nota de rodapé n. 11 que "segurança é um conceito jurídico cujo correlato na ciência econômica é a confiança. A confiança é elemento fundamental para que a atividade econômica do agente prospere. Se ele não sente confiança no mercado que pretende ingressar, por certo não alocará seus recursos naquele ramo. Se ele não sente confiança no país onde intencionava instalar sua unidade produtora, por certo abandonará o projeto antes de implementá-lo. Essa confiança tem vários espectros, destacando-se dentre os mais importantes a confiança na estabilidade política do país, confiança na infraestrutura do país político, confiança nas bases econômicas do país e, fator não menos decisivo, a confiança na formatação jurídica do país" (COSTA, Daniel Carnio; COELHO, Cristiano de Castro Jarreta. A aplicação no Brasil da cláusula de barreira da ordem pública em insolvência transnacional – Artigo 167-A, § 4º da Lei 11.101/2005, introduzido pela Lei 14.112/2020. In: COSTA, Daniel Carnio (Coord.). *Sistema brasileiro de insolvência transnacional*. Curitiba: Juruá, 2022. p. 152-153).

adesão, mas uma das mais importantes é a sinalização ao mercado internacional de que naquele país, aderente à Lei Modelo, dá-se tratamento internacional à empresa em crise, gerando, de antemão, conhecimento prévio das regras a serem adotadas nessa situação. É a segurança jurídica necessária para o fomento da atividade econômica[22] em todos suas camadas operacionais, inclusive, e não menos importante a ser considerada, na questão da concessão de crédito. O fornecedor de crédito que não identifica de antemão, além do risco natural da operação, formalismos e dificuldades incomuns para recuperação o ativo em caso de inadimplência, dificuldades estas decorrentes da legislação do país onde o tomador irá desenvolver sua principal atividade, acaba não elevando a taxa do negócio. Isso tende a aumentar a procura daquele país como ambiente para execução de atividades econômicas, gerando um ciclo positivo de atividades.

Colocadas as premissas que orientaram o legislador para a internalização da Lei Modelo no Brasil[23], nasce para a doutrina, consequentemente, a necessidade de buscar interpretar o exato alcance da novel legislação. Um dos instrumentos de apoio da doutrina nessa busca hermenêutica, a análise de jurisprudência, nesse momento, encontra um obstáculo: a alteração é deveras nova e ainda não teve o tempo necessário para produzir relevantes e importantes debates nas cortes superiores.

Como se trata de um instrumento de aplicação internacional, e tendo o Brasil sido apenas o 49º país a promover a internalização da Lei Modelo da UNCITRAL, consegue-se encontrar na jurisprudência internacional importantes aplicações das mesmas regras que aqui foram implantadas.

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22. Esse binômio confiança-segurança permeia os estudos perpetrados pela ótica da chamada "Análise Econômica do Direito" ou, como prefere Guido Calabresi, "Direito e Economia". Sobre o assunto, vale a pena citar FORGIONI, Paula Andrea. Análise Econômica do Direito: Paranoia ou Mistificação? *Revista do Tribunal Regional Federal da 3ª Região*, v. 77, p. 35-71, 2006, p. 35, que bem explica a chamada Análise Econômica do Direito – AED: "Um dos pilares sobre os quais se funda a AED liga-se à verificação de que o incremento do grau de segurança e de previsibilidade proporcionado pelo sistema jurídico leva ao azeitamento do fluxo de relações econômicas. Em outras palavras, os mercados funcionam de forma mais eficiente se ligados a um ambiente institucional estável, no qual os agentes econômicos podem calcular, i. e., razoavelmente prever o resultado de seu comportamento e o daqueles com quem se relacionam". Guido Calabresi, por sua vez, afirma que "o que eu chamo de Análise Econômica do Direito utiliza a teoria econômica para analisar o mundo jurídico. Analisa o mundo sob o ponto de vista da teoria econômica e, como resultado desse exame, confirma, traz dúvida ou, mais comumente, sugere reformas sobre a realidade jurídica (...) O que eu chamo de Direito e Economia, por sua vez, começa com uma aceitação agnóstica do mundo como é, na descrição dos juristas. Verifica então se a teoria econômica pode explicar esse mundo, essa realidade. E se não puder, em vez de automaticamente considerar esse mundo como absurdo, faz duas perguntas. A primeira é: os juristas que descrevem a realidade estão olhando para o mundo como realmente é? (...) Se, contudo, mesmo uma visão mais ampla da realidade jurídica revela regras e práticas que a teoria econômica não pode explicar, o Direito e Economia faz uma segunda pergunta. Pode a teoria econômica ser ampliada, pode se tornar mais vasta e fluida (sem, no entanto, perder as características que lhe dão coerência e a fazem tão potente) de forma que se possa explicar por que a realidade jurídica se apresenta como tal?" (In: CALABRESI, Guido. *O futuro do direito e da economia*. São Paulo: Quartier Latin, 2021. p. 16-18).

23. "Este capítulo foi integralmente incluído pela recente reforma da Lei 11.101/2005, com o propósito de introduzir a insolvência transfronteiriça no ordenamento jurídico brasileiro, visto que este tema ainda não dispunha de regras próprias no País. A base para essa proposição e inovação legislativa foi a Lei Modelo da Uncitral, que busca dar maior segurança jurídica e previsibilidade para que investidores estrangeiros atuem no Brasil e fomentem o mercado de crédito, atraindo novas empresas para o mercado brasileiro, o que irá impulsionar o desenvolvimento da economia nacional." (COSTA, Daniel Carnio; NASSER, Alexandre Correa. *Comentários à Lei de Recuperação de Empresas e Falência*: Lei 11.101, de 09 de fevereiro de 2005. 2. ed. Curitiba: Juruá, 2021. p. 415).

Essa é a proposta do presente trabalho. Comentar uma decisão judicial estrangeira, onde foi aplicada a Lei Modelo da UNCITRAL, procurando extrair do julgado uma norma que sirva de orientação para a aplicação de nossa legislação.

O julgado escolhido foi uma decisão de primeiro grau da Corte de Hong Kong, na qual se negou reconhecimento a processo de insolvência dos EUA, negando-se, assim, eficácia à decisão da corte americana naquele território, por se compreender que houve, naquele caso, afronta à ordem pública de Hong Kong. É a chamada *cláusula de barreira da ordem pública*. Ainda que se tenha o escopo normativo de cooperação internacional nos casos de insolvência transnacional, a Lei Modelo buscou temperar o universalismo e o nacionalismo radicais com um instrumento de inaplicabilidade do modelo internacional em casos de lesão ao entendimento interno de ordem pública, resguardando, assim, ao país aderente um *núcleo protetivo mínimo* de sua soberania jurídica.

Essa cláusula de barreira da ordem pública prevista na lei modelo da UNCITRAL foi integralmente internalizada pela Lei 14.112, de 2020, na medida em que ela introduziu na Lei 11.101/2005 o artigo 167-A, cujo § 4º estatui: "§ 4º O juiz somente poderá deixar de aplicar as disposições deste Capítulo se, no caso concreto, a sua aplicação configurar *manifesta* ofensa à *ordem pública*". (grifei)

A necessidade de harmonizar essa cláusula de barreira com o escopo internacional da norma[24], baseado no equilíbrio entre os termos "manifesta" e "ordem pública", coloca o intérprete na contingência de investigar o exato alcance do termo *ordem pública* em matéria de insolvência transnacional. Essa a importância, portanto, do julgado em análise, que representa um dos poucos casos internacionais[25] de negação de eficácia de um processo de insolvência estrangeiro por afronta à ordem pública[26].

Segue-se à presente introdução a apresentação do caso e de sua decisão, sendo que, na sequência, comentamos a norma extraível do julgado e a crítica existente para, então, concluirmos.

Explicação do caso

CHINA FISHERIES GROUP (CFG) é um grupo econômico que atua no Peru, no ramo de pescados, processamento de refeições de pescados e posterior distribuição. A empresa operadora do grupo no Peru é a CFG PERU INVESTIMENTS PTE. LIMITED, sediada em Singapura. A CHINA FISHERY GROUP LIMITED é sediada em Samoa e a CHINA FISHERIES INTERNATIONAL LIMITED, por sua vez, é sediada nas Ilhas Cayman.

O grupo passou por sérias dificuldades financeiras, entre 2014 e 2015, quando, então, iniciou negociações com seus credores. O HONGKONG AND SHANGAI BANKING CORPORATION (HSBC),

24. Artigo 167, § 1º: Na interpretação das disposições deste Capítulo, deverão ser considerados o seu objetivo de *cooperação internacional*, a necessidade de uniformidade de sua aplicação e a observância da boa-fé. (grifo nosso)

25. Sim, poucos casos, pois a tendência internacional é maior no sentido de reconhecimento dos processos estrangeiros, como inclusive demonstrou CROCCO, Fabio Weinberg. Op. cit., p. 62-63.

26. Em artigo denominado "Situações que levariam à incidência da cláusula de barreira da ordem pública na insolvência transnacional no Brasil – artigo 167-A, § 4º da Lei 11.101/2005, introduzido pela Lei 14.112/2020", apresentado no VIII Simposio Internacional de Derecho CONSINTER, organizado pela Universidade de Barcelona e pelo CONSINTER, em publicação pela Editora Juruá, discutimos três hipóteses abstratas que, em concreto, levariam à incidência da cláusula de barreira.

identificando má conduta financeira por parte do CFG (grupo), abandona as negociações e ingressa com pedido de falência na Justiça de Hong Kong, no final de 2015. Após audiência de justificação, em decisão da lavra de outro Juiz, a Corte indeferiu o pedido falência por entender que o CFG tinha saúde financeira para quitar seus credores.

O HSBC, inconformado, recorreu da decisão. Nesse interregno, a instituição financeira e o grupo CFG acabaram realizando um acordo. Pelo acordo, o banco *desistiu* dos procedimentos de liquidação iniciados em Hong Kong e nas Ilhas Cayman, ajustando as partes, ainda, *cláusula de submissão à jurisdição de Hong Kong*. No acordo, entre tantas obrigações, o CFG comprometeu-se a vender parte de seus ativos da subsidiária Peruana para pagamento do débito junto ao HSBC, em até 6 meses, fixando-se a data fatal para tanto em 20.07.2016. O acordo foi homologado pela Corte de Hong Kong.

Ocorre que, no dia 30 de junho de 2016, 20 dias antes do fim do prazo para a venda dos ativos e pagamento do HSBC, o Grupo entrou com pedido de recuperação (*Chapter 11*) nos Estados Unidos da América (*Southern District of New York*), onde se admitiu jurisdição com base num pagamento feito pelo Grupo a um advogado americano contratado pela empresa. Admitido o pedido, obteve-se, nos Estados Unidos, de forma automática, a suspensão de todas as ações (*stay*) em curso contra si no mundo e ordem para impedir os credores do Grupo de ingressarem com novas ações (*stay prohibiting*).

O *Trustee* nomeado no processo americano (representante estrangeiro) ingressou na Justiça de Hong Kong com pedido de reconhecimento do processo de insolvência americano, a fim de que fosse dada eficácia em Hong Kong às ordens de paralisação, decisão que impediria o HSBC diretamente de exigir o cumprimento do acordo judicial homologado anteriormente. Daí a evidente oposição do HSBC ao pedido, conforme noticiado no corpo da decisão.

Ouvidas as partes, o Juiz Jonathan Harris indeferiu o reconhecimento em Hong Kong do processo americano. O fundamento, como adiantado na introdução do presente, foi a *cláusula de barreira de ordem pública*.

Pontuou o juiz, inicialmente, que o primeiro pedido formulado pelo HSBC já seria caso de decretação da falência do CFG, sinalizando que teria julgado de forma diferente. Com tal argumento, reforçou a importância do acordo formulado pelas partes que levou à desistência do recurso do banco contra a decisão primeira de indeferimento, submetendo-se a empresa devedora, ainda, à Jurisdição de Hong Kong. *Nesse contexto*, concluiu o juiz que o CFG, ao formular pedido de recuperação judicial nos Estados Unidos, com base em um pequeno pagamento feito a advogado nos Estados Unidos, em típica conduta de *forum shopping*[27], poucos dias antes do prazo fatal para pagamento do quanto ajustado no acordo homologado perante a Corte de Hong Kong, buscou *deliberadamente* impedir que o HSBC denunciasse o ajuste e requeresse a sua falência na Justiça em Hong Kong, em típica manobra fraudulenta.

A partir desse ponto, frisou em sua fundamentação que essa conduta da empresa revelava má-fé não só contra a instituição financeira, mas principalmente também contra a Corte de Hong Kong, que homologou o acordo que previa cláusula de submissão de jurisprudência. A partir desse comportamento, o Juiz Jonathan Harris identificou ofensa à *ordem pública* (*public policy*, no inglês).

27. Ensinam Daniel Carnio Costa e Alexandre Correa Nasser que "a promoção da uniformidade de sua aplicação é de extrema relevância para evitar o *forum shopping*, que ocorre quando a empresa devedora busca a jurisdição que lhe seja mais favorável ou conveniente, dadas as circunstâncias de sua crise, mesmo que isso se dê em detrimento dos credores" (COSTA, Daniel Carnio; NASSER, Alexandre Correa. Op. cit., p. 416).

2. Comentários ao caso

A norma extraível desse julgamento de Hong Kong passa pela análise do seguinte conjunto fático, que gerou o afronta à ordem pública, apto a impedir o reconhecimento naquele território do processo americano de insolvência: (a) a busca deliberada da jurisdição americana para obstar qualquer iniciativa do banco credor no acordo homologado na Justiça de Hong Kong – *forum shopping*; (b) desprestígio à Corte de Hong Kong que homologou o acordo das partes, acordo este com cláusula de submissão à jurisdição.

A conduta do CFG, analisada do *ponto de vista dos negócios jurídicos*, não há dúvidas, careceu de *boa-fé objetiva* (artigo 422 do CC), já que a empresa teve comportamento tipicamente contraditório, conhecido como *venire contra factum proprium*[28], na medida em que, em vez de providenciar o cumprimento do acordo ou então anunciar a ausência de capacidade financeira para honrá-lo, numa tentativa de impedir a própria falência, inverteu o ânimo estampado no ajuste e buscou na Justiça Americana uma tutela de urgência (*stay*) para impedir justamente que o HSBC *denunciasse* em Hong Kong o acordo por incumprimento de obrigação principal.

Contudo, somente esse descumprimento do ajuste, a nosso ver, não seria suficiente para que sequer se cogitasse de afronta à ordem pública. Fosse todo e qualquer descumprimento de norma ou de contrato um fato jurídico suficiente para qualificar a manifesta violação da ordem pública, ter-se-ia, fatalmente, o esvaziamento completo do instituto da insolvência transnacional, com a frustração de seu importante escopo.

O desrespeito à homologação judicial do acordo, por si só, também não é suficiente para induzir à conclusão de afronta manifesto à ordem pública, já que, em sua essência, está-se diante de um descumprimento de acordo, ainda que homologado. O desrespeito primário não deixa de ser voltado para a avença. O fato de as partes terem acordo submissão à jurisdição de Hong Kong não impede que uma delas, mudando de ideia, tente jurisdição diversa.

Se a análise individual dos dois elementos fáticos acima identificados (itens "a" e "b") não é suficiente para se reconhecer afronta à ordem pública, consegue-se compreender a *ratio decidendi* do julgado em análise na identificação *conjunta* dos dois elementos. Sentiu-se desprestigiada a Corte de Hong Kong, cuja jurisdição já havia sido fixada pelo acordo firmado entre as partes, de forma que a prática do *forum shopping* perpetrada pelo grupo econômico acabou sendo a conduta reveladora da busca de supressão da jurisdição da Corte. Má-fé processual e contratual, lesando a ordem pública.

Contudo, a lesão à ordem pública que autoriza a incidência da cláusula de barreira foi qualificada pela lei: somente a ofensa à ordem pública que se revela *manifesta*. O uso do adjetivo pelo legislador, tal qual disposto na Lei Modelo, tem a função jurídica de resguardar a soberania jurídica do país, a fim de que seja possível rechaçar a entrada automática de processos estrangeiros, mesmo aqueles que contrariem suas bases civilizatórias. Essa tem sido nossa interpretação após a análise da aplicação do instituto em outros países. Defendemos em outras publicações que as lesões manifestas à ordem pública são aquelas que, de alguma forma, atacam as conquistas civilizatórias

28. Sobre o tema, TEPEDINO, Gustavo et al. *Código Civil interpretado conforme a Constituição da República*. Rio de Janeiro: Renovar, 2006, p. 20. v. 2 definem de forma didática o instituto em questão: "Em sua acepção contemporânea, este princípio veda que alguém pratique uma conduta em contradição com sua conduta anterior, lesando a legítima confiança de quem acreditara na preservação daquele comportamento inicial".

mais contundentes do ocidente, que no caso do Brasil estão estampadas na parte inaugural da Constituição Federal[29].

Nessa linha, não há como não concluir que o precedente em questão tem sua maior importância não por indicar caso clássico de incidência da cláusula de barreira da ordem pública. A nosso ver, a construção decisória do julgado em análise ultrapassa a permissão legal de denegação de eficácia ao processo estrangeiro. Do ponto de vista econômico, a empresa em tela apenas buscou uma melhor solução para superar sua crise. Faltou com ética e, por conseguinte, com boa-fé objetiva? É possível afirmar que sim. Cometeu alguma ilegalidade? Com a carga valorativa que a palavra ilegalidade traz ínsita, é possível afirmar que não. Isso porque, a despeito de se ter infringido normas abstratas que imputam todos responsabilidade por não cumprimento de obrigações em geral, o que por si só poderia ser qualificado, portanto, como um ato contra lei, ou seja, uma ilegalidade num exercício de simples silogismo, não se pode dizer que tenha havido afronta à ordem pública de um país. É *contra legem*, mas não fere a ordem pública do país. Fosse assim, qualquer descumprimento de lei feriria automaticamente a ordem pública, dificultando sobremaneira o reconhecimento de processo de insolvência estrangeiro no Brasil. Em outras palavras: há que se fazer uma avaliação axiológica gradativa de ilicitude, sob pena, repita-se, de banalização do instituto com perda direta de seu escopo.

Mesmo analisando a questão do ponto de vista da cláusula de submissão à jurisdição de Hong Kong, a despeito da má-fé processual, não se encontra força suficiente no argumento para se identificar uma afronta à ordem pública, por exemplo, do Brasil, no episódio. Essa é a razão pela qual se acredita que, no Brasil, os fatos apreciados no julgado em discussão não causariam manifesta ofensa à ordem pública. Os ajustes necessários para a solução adequada da crise dessa empresa passariam pelo reconhecimento do processo americano como não principal e da utilização dos instrumentos de cooperação entre as cortes, conforme previstos na legislação. Do ponto de vista do avanço civilizatório, não se tem no caso em análise algum elemento concreto suficiente para afastar a decisão americana até porque, se a solução da recuperação se revelasse instrumento suficiente para preservação da empresa em questão, não há dúvidas de que essa seria bem melhor opção que a decretação da quebra decorrente da inobservância do ajuste homologado.

Considerações finais

De todo o exposto no presente trabalho, concluímos que o precedente em análise constitui importante julgado porque demonstra como não interpretar a cláusula de barreira de forma extensiva.

A inserção do Brasil no cenário internacional através da adoção da Lei Modelo da UNCITRAL é importante instrumento de fomento econômico. Não é por outra razão que a própria lei estatuiu a obrigação de se interpretar seus dispositivos com os olhos voltados para a cooperação internacional e a necessidade de uniformidade[30]. Consequentemente, como dito linhas acima, qualquer interpretação extensiva, que retire a cláusula de barreira de sua verdadeira vocação, deve ser afastada pelo Poder Judiciário, sob pena de não se cumprir a missão dada à reforma da Lei de Recuperação.

Ainda que a ordem pública em questão deva ser objeto de melhor definição, não se pode permitir uma aplicação extensiva a ponto de incluir qualquer incumprimento de lei ou de contrato como fato jurídico impeditivo da cooperação internacional na crise da empresa transnacional. Esse balanço adequado entre a cooperação internacional e a soberania nacional é feita por intermédio do adjetivo *manifesta*.

29. COSTA, Daniel Carnio; COELHO, Cristiano de Castro Jarreta. Op. cit., p. 174.

30. Art. 167-A, § 1º, da Lei 11.101/2005, com redação dada pela Lei 14.112, de 24 de dezembro de 2020.

É justamente o estudo de decisões estrangeiras o instrumento que trará esse adequado balanço. Se o julgado em investigação serve de exemplo negativo, noutro giro, a Juíza Shelley C. Chapman da Corte de Falência do Distrito Sul de Nova York, no emblemático caso *In re Rede Energia S.A.*, apontou um caminho seguro e ainda reforça a compreensão posta acima: nos Estados Unidos o não reconhecimento de processo de insolvência estrangeiro deve ser reservado aos casos em que a decisão afronta o padrão americano de civilização[31]:

> "Foreign judgments 'are generally granted comity as long as the proceedings in the foreign court « are according to the course of a civilized jurisprudence »'" (...) "*the key determination required under section 1506 is whether the procedures used in the foreign jurisdiction 'meet our fundamental standards of fairness*.'"[32] (grifo nosso)

Daí porque, com os contornos acima apontados, o caso em análise se presta, como dito, mais a identificar que no Brasil a hipótese em questão não seria suficiente para impedir o reconhecimento do processo americano. E a conclusão aplicável é que não basta o mero descumprimento de obrigação legal ou contratual para caracterização jurídica da ordem pública apta a afastar a cooperação internacional. A lesão *manifesta* à ordem pública, nesse sentido, deve ser aquela que afronta as regras fundamentais do Estado de Direito brasileiro. Esse é ponto de partida de novas investigações.

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31. *In re Rede Energia S.A.*, 515 B.R. 69 (Bankr. S.D.N.Y. 2014). Disponível em: <https://casetext.com/case/in-re-rede-energia-sa>. Acesso em: 18.06.2021.

32. Em tradução livre "Decisões estrangeiras são geralmente reconhecidas na medida em que os ´procedimentos adotados na corte estão de acordo com uma jurisprudência civilizada... a chave exigida no Capítulo XV (capítulo de insolvência transnacional) se fundamenta no fato dos procedimentos da jurisdição estrangeira está de encontro com padrão fundamental de justiça (dos EUA)" – observações em parênteses de minha inclusão.