

THE UNIVERSAL SUBJECT MATTER JURISDICTION IN BANKRUPTCY PROCEEDINGS TO RULE ON MATTERS INTERFERING IN THE ASSETS OF BANKRUPTCY ESTATE OR THE COMPANY IN JUDICIAL REORGANIZATION

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This article aims to demonstrate the concept of Universal Subject Matter Jurisdiction in Bankruptcy Proceedings in the Brazilian legal system, showing the prevalence of bankruptcy jurisdiction at the expense of civil, labor, fiscal and criminal jurisdictions, as a form of protection of the collective interests of creditors, in the hierarchical order established in law. Cases of exception will also be a matter of this study, in which actions directed against the bankrupt economic group, or the insolvent company, are subject to the ordinary rules of jurisdiction, as well as the special judicial protection granted to assets that are essential to the continuity of the operations of the company in Judicial Reorganization.

§ 1 – JURISDICTION IN THE BRAZILIAN JUSTICE

A) Principle of Natural Court

It is easy to conceptualize jurisdiction in the Brazilian legal scenario, because the country adopts criteria similar to those adopted by other Democratic States of law, in particular those that are signatories of the Pact of San José of Costa Rica.

José da Silva Pacheco defines it accurately:

“[...] jurisdiction, as an expression of the sovereignty of the State and specific activity of the Judiciary, is, in its organization, the limitations imposed by the precepts of internal division of powers, so that each judicial organ, including the judge of the Lower Courts, has his jurisdictional powers restricted to those given by Law.”¹

According to Celso Antônio Bandeira de Melo:

“[...] The jurisdictional function is the function that the state, and only it, exercise through decisions that resolve

¹ J. PACHECO, *Processo de recuperação judicial, extrajudicial e falência: em conformidade com a lei No. 11.101/2005 e a alteração da lei No. 11.127/2005*. 8th ed., Forense, Rio de Janeiro, 2006. p. 29.

controversies with the power of matter adjudicated (‘res judicata’), an attribute that corresponds to decision issued in the last instance by the judiciary branch and which is appreciate by any sentence or court judgment. That haven’t had any appeal submitted in time.”²

Thus, the concept of jurisdiction in the Brazilian legal system is related to the concept of limiting the power of the magistrate, which can only be exercised by prior granting and delimitation by Law.³

It means that there is a Court previously specified and designated by the legal system to processes and judge each one of the types of complaint that might exist, through objective definition of his limits of power to process and judge all the causes that involve that particular matter, within the range of his territorial jurisdiction (judicial district).

It is a principle aligned with the constitutional spirit (art. 5, items and XXXVII and LIII of the Federal Constitution of 1988), to prohibit the existence of any kind of Court of exception, also in line with the Pact of San José of Costa Rica, of which Brazil is a signatory.

Moreover, in the case of a bankruptcy process, it creates extremely salutary legal predictability, because any one of the creditors or interested parties are able, without any effort, to know which Court is competent to process and judge the case against the bankrupt party, which is the subject of the next topic of this article.

B) Definition of venue– Main business criterion

In the Brazilian legal system, one adopts, since 1890, the main domicile of the debtor criterion for definition of the venue in cases of bankruptcy.⁴

Calamandrei defines competence as being:

“By a phenomenon of metonymy: a subjective measure of the powers of the judicial body, is practically understood as an objective measure of the matter on which it is called in concrete to provide the judicial body, it’s clear this way by the jurisdiction of a judge the set of causes on which he exercises, according to law, his fraction of jurisdiction [...]”⁵

Competence comes from the Latin term “*competentia*”, which derives from the term “*competitor*”, whose meaning is linked to possessing the capacity to be in use of something, such as the capacity to possess as your own.

² C. DE MELO, *Course of Administrative Law*, 16th ed., Malheiros, São Paulo, 2003. p. 34

³ A. ARRUDA, *Civil procedural law manual – Vol. I*. 8^a ed., Revista dos Tribunais, São Paulo, 2003.

⁴ Decree No. 917, of 1890, art. 4^o: “Bankruptcy will be declared by the Commercial Court in whose jurisdiction debtor has its main place of business or branch outside Brazil”.

⁵ P. CALAMANDREI, *Civil procedural law*. Vol. 2., Bookseller, Campinas, 1999, pp. 104-105.

The competence is the property of the court in our system, and all cases that deal with a particular matter, in a given jurisdiction, will compete, that is, it will be the competence of that magistrate who uses and detains as his own⁶.

Ada Pelegrini Grinover, Cândido Rangel Dinamarco and Antônio Carlos de Araújo Cintra define with precision the jurisdiction in the Brazilian system:

“[...] It is one of the functions of the State; to replace the holders of the conflicting interests, in order to, impartially, seek a pacification of the conflict that involves them, with justice. This pacification is made through the action of will of the object law that reigns in the concrete presented case to be solved; and the State always perform this function through the process, either by imperatively expressing the precept (through a judgment of merit) or by making in the world of things what the precept establishes (through enforced execution).”⁷

The same position was adopted in Decree No. 7661/1945 and in the New Bankruptcy and Judicial Reorganization Act No. 11.101/2005.

However, there were countless doctrinal discussions in this interregnum, which culminated in the adoption of several different theories by the Brazilian Judiciary about the effective scope of the concept of "principal domicile of the debtor".

Although intense debates have occurred during the drafting of the text of the Bankruptcy and Judicial Reorganization Act (Act No. 11101/2005), most of the problems in this respect have not been resolved by the new Act, and Bezerra Filho came to assert that “[...] It is regrettable that we have discussed for eleven years to achieve very little positive result”⁸.

Therefore, the loopholes of the Act, caused by the gap in the legislative process in Brazil, had to be bridged through the concentration of doctrine and jurisprudence on the formation and direction of bankruptcy jurisdiction.

This is derived from the fact that many debtors are not willing to contribute to the bankruptcy process, creating obstacles to the progress and performance of the Court and Judicial Administrators alike. Such obstacles are mainly posed by a business estate planning to hide illicitly diverted assets of the company and the economic group, including the opening of fictitious companies in other countries and other unscrupulous ploys.⁹

⁶ DE PLÁCIDO E SILVA, *Legal Vocabulary*. 3rd ed., Forense, Rio de Janeiro, 1973, p. 370. Vol. 1.

⁷ A. GRINOVER, A. Cintra, C. Dinamarco, *General theory of the process*, 9th ed., Malheiros, São Paulo, 1993, p. 113.

⁸ M. BEZERRA FILHO, *Lei de recuperação de empresas e falências comentada*, 4th ed. rev., ampl. e atual., RT, São Paulo, 2007, p. 50.

⁹ M. BEZERRA FILHO, *Lei de recuperação de empresas e falências comentada*, 4th ed. rev., ampl. e atual., RT, São Paulo, 2007.

However, Act No. 11.101/2005 kept in the hands of Lower Courts the opportunity to decide about venue under the bankruptcy process, which, in the understanding of Frederico Augusto Monte Simionato, is not appropriate, because, in his words:

“This systematization could have been changed, passing the venue definition to the Upper Court, which would decide the issue, avoiding the presentation of appeals, with purposes to delay the proceedings. Thus, in the Italian bankruptcy law, bankruptcy is declared by the Court where the entrepreneur has the headquarters of the company”.¹⁰

Such understanding, although aimed to speed up bankruptcy proceedings, in our view is not appropriate.

Act No. 11.101/2005 establishes, in article 3, the criterion to define territorial jurisdiction, in the following manner:

“Art. 3. It Is competent to approve the out-of-court reorganization plan, grant the judicial reorganization or enact bankruptcy the Court of the main business of the debtor or of the subsidiary with headquarters outside of Brazil.”

According to Tomazette, what at last determines the competence as absolute or relative is the simple interest of the people involved.¹¹

The assessment of Sebastião José Roque is that there is a risk in applying the understanding that the main business is considered to be in the Judicial District of its headquarters. It promptly creates problems of implementation and effectiveness of the bankruptcy process in cases where the company is based in a city, but the preponderant business activity takes place in another often thousands of kilometers away.¹²

The competence is fixed in only one court, as defined by Bertoldi:

“The principle of unity has as purpose the efficiency of the process avoiding the repetition of acts and contradictions, it would be impracticable more than one bankruptcy, and for that reason the requirement of the law is one process for the same debtor”.¹³

In cases where the company or the economic group has several subsidiaries in a number of Judicial Districts, it creates an additional problem because the jurisdiction of the bankruptcy Court is determined to be in a sole Court.

Manoel Justino Bezerra Filho (2007, p. 56) states that the problem arises when the economic group owns several businesses

¹⁰ F. SIMIONATO, *Tratado de direito falimentar*, 1st ed., Forense, Rio de Janeiro, 2008, p. 44.

¹¹ M. TOMAZETTE, *Business law course*, Atlas, São Paulo, 2008.

¹² S. ROQUE, *Direito de Recuperação de Empresa*, Ícone, São Paulo, 2005.

¹³ M. BERTOLDI, M. RIBEIRO, *Advanced Business Law Course*. 4th ed., ver. e atual., Revista dos Tribunais, São Paulo, 2008. p. 556.

and “in each one of them, develop a great number of activities or appoint managers, in each of them, with ample authority”.¹⁴

Considering that many times business managers predict future bankruptcy and, fraudulently, perform a business estate planning aimed to hide illicitly diverted assets by opening businesses and companies in other localities, there is an additional difficulty to be harnessed not only by the Court but also by the Judicial Administrator.

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In the words of Professor Bezerra Filho:

“[...]already preparing a future fraudulent bankruptcy, the entrepreneur opens several establishments and in all of them exerts decisive and relevant activities, in such a way that no matter in which Court your bankruptcy is required, he will always argue that his primary establishment is not that but the other one. Therefore, one can promptly perceive the importance of determining the main place of business. However, if the Court perceives that it is a maneuver to delay the proceedings, the best option is, of course, recognize that fact and declare bankruptcy in the process at hand, as a correct judicial policy measure, notwithstanding the competence of the Court of the main establishment, although territorial, is absolute.”¹⁶

In the words of Rubens Requião:

“[...] in a bankruptcy matter, therefore, the competent Court is not determined by the civil or by-laws domicile, but by the location of the real domicile, where the main establishment is located, as a flagship in a fleet.

[...] the location where the leadership of the company is set, where the entrepreneur effectively acts in charge or in command of his business, from which emanates the orders and instructions which shall carry out commercial and financial operations of largest figure and bulk, where the general ledger is.”¹⁷

The Superior Court of Justice, has already adopted this opinion in a number of cases, notably, in the solution of the conflict of jurisdiction between Courts, 1799/PR, reported by Your Hon.

¹⁴ M. BEZERRA FILHO, *Lei de recuperação de empresas e falências comentada*, 4th ed. rev., ampl. e atual, RT, São Paulo, 2007, p. 56.

¹⁵ M. BERTOLDI, M. RIBEIRO, *Advanced Business Law Course*. 4th ed., ver. e atual., Revista dos Tribunais, São Paulo, 2008, p. 556.

¹⁶ M. BEZERRA FILHO, *Lei de recuperação de empresas e falências comentada*, 4th ed. rev., ampl. e atual, RT, São Paulo, 2007, p. 56.

¹⁷ R. REQUIÃO, *Curso de direito comercial*. 11th ed., Saraiva, São Paulo, Vol. 1, 1989, p. 81.

Judge Nilson Naves. His decision was published in the Official Gazette of 09.09.1991 and has been serving as a paradigm shift to the present day, although there has been substantial change in bankruptcy law, with the advent of Act No. 11101/2005.

Nery Júnior and Rosa Maria Andrade Nery points out that the competence due to the main establishment is absolute, since it's from functional order.¹⁸

Luiz Tzirulnik draws attention to the relevant fact that, in many cases, there is no overlap between the main place of business and the headquarters. In his words:

“[...] It is also noteworthy that not always the ‘main establishment’ of the merchant, in the case of companies, matches the headquarters, that is, the location determined in the articles of incorporation to serve as headquarters to the company”.¹⁹

Arruda Alvim draws attention, in this matter, to the prevention institute:

“[...] means the determination of jurisdiction, in a given judgment, through a concrete act. The law contains criteria for determining the moment of the occurrence of prevention, in Arts. 219 and 106. It is understood that if the courts, which are considered, in the event of discussion, do not have the same territorial jurisdiction, prevention is given by the act of summons (present in Art. 219, in the light of Art. 106); if, however, they have the same territorial jurisdiction – which depends on the examination of the concrete hypothesis – the prevention will take place in the court where the order was verified in the initial petition, first”.²⁰

As changes may occur that could, incidentally, change the location of the main place of business of the company in bankruptcy, and in order to honor the legal certainty through the stabilization of a Court, it is applicable to the case the provision contained in art. 87 of the Brazilian Civil Procedure Code (BCPC) of 1973, currently implemented with similar wording in art. 43 of the BCPC of 2015:

“Art. 43. Jurisdiction is determined at the moment of filing or assigning the complaint, with changes of state, factor law occurring subsequently being deemed irrelevant, unless the Court is extinguished or its exclusive jurisdiction is altered.”

It means that occasional changes of facts or of law occurred after the jurisdiction definition are not relevant, which occurs when there is a positive order, where an admissibility examination is

¹⁸ N. NERY JÚNIOR, R. NERY, *Code of Civil Procedure*, 4th ed., Revista dos Tribunais, São Paulo, 1999, p. 573.

¹⁹ L. TZIRULNIK, *Direito Falimentar*. 3th ed., ver. e atual., Revista dos Tribunais, SP, 1994, pp. 61-62.

²⁰ A. ARRUDA, *Civil procedural law manual*, 5th ed., RT, São Paulo, 1996. pp. 213-214, nota rod.1. Vol. 1.

carried out and the citation is determined, except when they change the jurisdiction by reason of the matter or the hierarchy.²¹ Nelson Nery Júnior and Rosa Maria Andrade Nery (1999, p. 2096), understand that, once determined the jurisdiction of a venue, an occasional “change in the domicile of the company during the critical period of its insolvency does not necessarily imply a modification of the jurisdiction of the Bankruptcy Court”²².

Lacerda also shares the same understanding:

“One should not confuse the notions of head office of a society with of a commercial establishment. A society may have a head office determined in its social contract; but have several establishments where, in fact, it conducts its business, reserving, only, the head office for its convenience. The law, which establishes the competent court based on the principal establishment, naturally aimed at facilitating the collection of the debtor’s assets but not always the head office have a considerable volume of assets, capable of representing greater assets to the mass.

This way, the head office may not correspond to the principal establishment therefore the need to, once this situation is proven, the bankruptcy process be sent to the true competent court, according to the law.”²³

This topic, concerning the modification of the jurisdiction, will be analyzed in detail in specific topics, with regard to tax, labor, and civil proceedings.

C) The Brazilian jurisdiction to process and judge bankruptcies of foreign companies belonging to an economic group based in Brazil

In October 2013, OGX Group filed a request for a judicial reorganization²⁴ with the formation of a joinder of parties (several plaintiffs), situation that is already known to law operators in Brazil.

However, with this request of Judicial Reorganization, a situation that had not yet been dealt with by the operators of law in Brazil has arisen: two of the four companies that formed the economic group in the active joinder, are foreign, based in Austria.

In the Brazilian civil procedural system, the formation of co-parties in the active pole does not imply in the automatic meeting of procedural manifestations and, even the confession of one of

²¹ AI n.º 87/89, j. 9.8.89, 4ª CC do TJ-PR, Rel. Des. Wilson Reback, in *ADV JUR* 1989, p. 750, v. 46825.

²² N. NERY JÚNIOR, R. NERY, *Code of Civil Procedure*, 4th ed., Revista dos Tribunais, São Paulo, 1999, p. 2096.

²³ J. C. SAMPAIO DE LACERDA, *Bankruptcy Law Manual*. Rev. Jorge de Miranda Magalhães. 13th ed., Freitas Bastos, Rio de Janeiro, 1996.

²⁴ Records No. 0377620-56.2013.8.19.0001, in course before the 4th District of the Capital’s Corporate Court of the State of Rio de Janeiro.

the members in the active pole does not imply in the confession of the others.²⁵

In this system, the co-parties may be simple, when there's no meeting between the members of the active pole and, the co-parties, can be necessary, when necessarily there is meeting between the members of the active pole.²⁶

The inclusion of these companies in the formation of the joinder of parties was based on the argument that these companies were simple means for facilitating the obtaining of loans abroad, being subject to the control of the parent company headquartered in Brazil.²⁷

According to the initial request, these companies did not have assets, operational activity and neither decision-making autonomy, so that the four companies, for the purpose of determining the jurisdiction (art. 3 of Act No. 11101/2005), had their main business in Rio de Janeiro-RJ.

The Public Ministry, supervisor of law enforcement in Brazil, challenged the request, stating that it would apply to the case the provision contained in art. 12 of Decree-Law No. 4657, which determines that the obligation, having being formed abroad, should there be fulfilled, taking into account the criterion established in the system of territoriality of the bankruptcy effects and that, hence, the decisions of the Court could only operate effects within the limits of the territorial borders of Brazil.

The Court of the 4th Corporate Court of Rio de Janeiro dismissed the request for active joinder, adopting the Public Ministry's reasoning and stating that there would be an offense to Austria's sovereignty. Additionally, the Court affirmed that it would not have been found sufficient evidence to characterize the possibility of disregarding the legal entity of these companies, which would prevent, from the Lower Court standpoint, the dismissal of the request for active joinder.

OGX group appealed against this decision. An interlocutory appeal was filed before the Upper Court of Rio de Janeiro, stating that the jurisdiction predicted in Act No. 11101/2005 provides that Brazil has jurisdiction to process and judge judicial reorganizations in which the main place of business is within the national territory. The companies based in Austria held the center of their interests in Brazilian companies, headquartered in Rio de Janeiro, where, in fact, was the predominant activity of the economic group.

With respect to an occasional violation to the sovereignty of Austria, OXG alleged that since this country is signatory of a judicial cooperation agreement on judicial reorganizations, it could even accept the Brazilian jurisdiction, with grounds on the

²⁵ V. GRECO FILHO, *Brazilian procedural law*, vol. 1, 15th ed., Saraiva, São Paulo, 2000. pp. 117-125.

²⁶ N. NERY JÚNIOR, R. NERY, *Code of Civil Procedure*, 2nd ed., Revista dos Tribunais, São Paulo, 1996.

²⁷ P. CAMPANA FILHO, "O caso OGX e a questão do ajuizamento de RJ de sociedades estrangeiras no Brasil", *Revista Comercialista*, vol. 5, No. 13, 2015, pp. 28-31.

need of adopting a system of universality of the effects of the insolvency proceedings.

In the Brazilian system, having the same exact case proposed in another country, there will be no *lis pendens*, leaving to the Superior Court of Justice to exercise the right to deliberation.²⁸

The Court of the State of Rio de Janeiro, when judging the appeal, in February 2014, overturned the decision of the Lower Court, to allow the Austrian companies to be included in active joinder with Brazilian companies, being the first documented case of such nature occurred in Brazil.

The decision is based on the argument that the companies based in Austria would have been created only for the purpose of financing OGX group. Therefore, they shared the same business activity and the Brazilian companies were the ones responsible for the payment of credits generated abroad. This would be evidenced by the fact that the main business activity was developed in Rio de Janeiro.

Finally, the collegiate decision was based on the fact that Austria has a collaboration treaty with other States in this regard and that, an occasional violation to the sovereignty of Austria could only be observed in the case of a denial of such country to accept the Brazilian jurisdiction within the framework of international cooperation.²⁹

Ever since several debates have been unfolding in the Doctrine and Jurisprudence in this regard. However, there is not yet unity of opinions able to pacify the matter.

§ 2 – THE CONCEPT OF UNIVERSAL BANKRUPTCY COURT OR JUDICIAL REORGANIZATION

Bankruptcy, per se, could not obtain fruitful results if it was subject to the ordinary rules of jurisdiction definition because the countless actions in which companies, or economic groups, are parties would be processed and judged in a sparse way.

The spirit of the bankruptcy process is to safeguard the credit of creditors by collecting the largest amount of assets. According to Alfredo Luiz Kugelmas and Fabrício Godoy de Souza, in the book, the judicial administrator has the duty to represent the bankrupt estate, judicially or extrajudicially, in any legal proceeding of the company, to represent the interest of all, assigning the credits authorized, disposing of the asset and investigating the conduct of the bankrupt³⁰.

In order to make bankruptcy effective, it was necessary to create the concept of Universal Bankruptcy or Judicial Reorganization Court, which favors the gathering of all proceedings (or almost all

²⁸ M. CARVALHO, *General Theory of Civil Procedure*, 1st ed., 2010, p. 142.

²⁹ How Brasil and Austria doesn't have colateral agrément in this area, the requesto f cooperation are given, when made by brazilians, acoording to Interministerial Regulation No. 501 MRE/MJ, since 21 March 2012.

³⁰ C. ABRAO, F. ANDRIGHI, S. BENETI (eds), *10 anos de vigência da Lei de Recuperação e Falência (Lei No. 11.101/05) – Retrospectiva geral (Locais do Kindle 4281)*, Saraiva, Kindle.

of them) involving the company in reorganization or the bankrupt company in a single, universal, unique, indivisible Court. Such Court overlaps any other Court, with the performance of a Judicial Administrator in all of them³¹.

Fábio Ulhôa Coelho brings a fundamental lesson on the theme:

“The bankruptcy Court is universal. It means that all actions concerning assets, interests and business of the insolvent estate will be processed and decreed by the Court where the bankruptcy proceedings are. It is called attractive force of the bankruptcy Court, to which the law gave the power to process and judge all legal measures of asset content relating to the bankrupt company or insolvent estate.”³²

Rubens Requião concurs with Coelho:

“It is avoided, actually, with the unity and consequent indivisibility of the bankruptcy Court, the dispersal of actions, claims as, together, they form the bankruptcy procedure, subject to the uniform criterion of the magistrate’s judgment who supervises the bankruptcy and who presides the solution of the interests in conflict with it or related to it. As Piero Pajardi describes, the reason of the system is evident, as it concentrates all the litigation and all procedural activity of bankruptcy in the bankruptcy Court, to keep under its unity a complex judicial structure, and ensure, in its various stages of development, uniformity of view, synthesis and economy of proceedings.”³³

And he adds up:

“by the collective nature of the bankruptcy proceedings and by the principle of *par condition creditorum* all creditors in bankruptcy proceedings should be treated with equality in relation to other creditors of the same category. Only the unity and universality of judgment could ensure the implementation of these rules.”³⁴

The only way to ensure the distribution between all possible creditors, according to their classes and preferred provisions, is through a single centralized execution Court.

The universality of the bankruptcy Court is provided for in articles 3 and 76, both of Act No. 11101/2005.

Article 76 of Act No. 11101/2005 provides that:

“The bankruptcy Court is indivisible and competent to hear all actions on assets, interests and business of the bankrupt, except labor claims, tax claims and those not

³¹ M. BEZERRA FILHO, *Lei de recuperação de empresas e falências comentada*, 4th ed. rev., ampl. e atual, RT, São Paulo, 2007.

³² F. COELHO, *Comentários à nova Lei de Falências e de Recuperação de Empresas*, 6th ed., Saraiva, São Paulo, 2009, fl. 199.

³³ R. REQUIÃO, RT, 906, p. 71, 12/2002.

³⁴ R. REQUIÃO, *Curso de direito comercial*. 11th ed., Saraiva, São Paulo, Vol. 1, 1989, p. 87.

regulated in this Act in which the bankrupt company figures as author or in active joinder.”

In the Brazilian system, the courts with competence to prosecute and adjudicate bankruptcies and judicial recoveries are within the scope of the state judicial organization³⁵.

Thus, after determined the jurisdiction of a Court to process and judge the bankruptcy, it becomes indivisible and, its jurisdiction, is absorbent and attractive.

Walter T. Alvarez, in precise lesson, brings very brief succinct and elucidative note, that affirms: “it remains to examine the basic implication of this fact and substantiated in the following: the bankruptcy Court is indivisible and its jurisdiction is absorbent and attractive”³⁶.

In the words of Mangerona:

“Precisely the wording of article 76 of Act 11101/2005 starts predicting that “the bankruptcy Court is indivisible”, which leads us to believe that the legislature signaled the need to ensure to all creditors a form of equal treatment. Once pointed out the debtor’s insolvency, originally it would not be possible the full satisfaction of all creditors, being necessary, therefore, to pay obedience to the principle of *par conditio creditorum*.”³⁷

In the opinion of Adriana Valéria Pugliesi, the indivisibility of the bankruptcy Court arose as a result of the need to publicize the bankruptcy to third parties, to prevent new deals from being made with the debtor, so as to preserve the safety of commercial relations. She cites the procedure adopted in old Venice and Genoa, in which the debtor’s table was broken in a public place (*bancorotto*), to demonstrate to everyone that the merchant no longer had conditions to perform his pacts.³⁸

Actions that are not processed and judged in the universal bankruptcy Court are those that are not related to the performance of due and payable obligations, generally at an early stage of proceedings before a regular civil Court, by virtue of the provisions contained in articles 6, §§ 1, 2 and 7 of the Act No. 11101/2005. However, once the obligation becomes due and payable, it must be habilitated in the universal bankruptcy Court with the mandatory intervention of the Public Ministry and the Judicial Administrator at all stages of the process.

In the words of Fabio Ulhoa Coelho:

“actions against the debtor in bankruptcy or in reorganization are not suspended by the overcoming bankruptcy or by the process aiming the benefit. They are

³⁵ ASSOCIAÇÃO DOS MAG. BRASILEIROS, *The judiciary for everyone: Legal basics*, 1st ed., Brasília: AMB, 2005.

³⁶ W. ALVARES, *Direito Falimentar*, 6th ed., Sugestões Literárias, 1977, No. 169, p. 162.

³⁷ F. MANGERONA, “Competência dos processos falimentares e recuperacionais”, in D. CARNIO COSTA (ed.). *Comentários completos à lei de Recuperação de Empresas e Falências*, Juruá, Curitiba, 2015.

³⁸ A. PUGLIESI, *Direito Falimentar e Preservação da Empresa*, Quartier Latin, São Paulo, 2013, p. 256.

not enforcement proceedings and, moreover, the legislator has reserved to them a specific device determining the continuation (§1).”³⁹

For Gladston Mamede, the universal bankruptcy Court should be understood as a universal collective enforcement Court, reason that justifies its *vis attractiva* and indivisibility. In other words, its jurisdiction to process and judge all actions involving assets, interests and business of the bankrupt company, without disrespecting, however, the constitutional powers of labor or federal Courts, as well as the jurisdiction of other Courts to rule on actions without a definite sum⁴⁰.

Carvalho de Mendonça, in a poetic quotation, defined the bankruptcy judgment as a “sea in which all rivers precipitate”⁴¹.

§ 3 – CONCEPT OF ASSETS IN THE BANKRUPTCY ESTATE AND JUDICIAL RECOVERY

A) Assets of the insolvent estate: scope, form of gathering, transfer and destination

One of the scopes of the bankruptcy proceedings is, in the words of Faccio and Ribeiro Neto:

“In the process of bankruptcy, it is sought the creditors’ satisfaction, through the sale of assets, which begins with collection, by the judicial administrator, of the debtor’s assets. In fact, the collection of assets (and documents) is one of the powers of the judicial administrator in the bankruptcy case, determined by art. 22, Inc. (III), (f), of Act No. 11101/2005.

Although in theory, the assets and documents of the debtor are raised soon after the appointment of the judicial administrator, the collection may occur throughout the course of the bankruptcy process, as they are being located.”⁴²

In this manner, one can nominate as assets of the bankrupt estate everything that is collected in the bankruptcy process that can be included as a credit of the bankruptcy estate to be destined for the payment of creditors.

When it comes to bankruptcy, once the term of appointment is signed, the Judicial Administrator shall carry out immediate collection of the assets, pursuant to art. 108 of Act No. 11101/2005:

³⁹ F. COELHO, *Comentários à nova Lei de Falências e de Recuperação de Empresas*, 2nd ed., Saraiva, São Paulo, 2005, p. 39.

⁴⁰ G. MAMEDE, *Direito empresarial brasileiro: falência e recuperação de empresas*, Atlas, São Paulo, 2006. Vol. 4, p. 312.

⁴¹ Quoted by AMADOR PAES DE ALMEIDA, *Curso de Falência e Concordata*, 11th ed., Saraiva, 1992, No. 66, p. 137.

⁴² V. FACCIO, J. RIBEIRO NETO, “Realização do ativo – venda ordinária e extraordinária – leilões – modalidades”, in D. CARNIO COSTA (ed.), *Comentários completos à lei de Recuperação de Empresas e Falências*. vol. 3, Juruá, Curitiba, 2015, p. 141.

“Art. 108. Following the term of appointment’s signature, the judicial administrator will proceed with the collection of assets and documents as well as with the evaluation of assets, separately or in bulk, in the place where they are located, requiring to the Court, for such purposes, the necessary measures.”

The collection must be carried out with priority, even before the judicial administrator peruses the records and the general list of creditors or have contact with the claims of the Bankrupt Estate. The logics of this provision effective immediately in the bankruptcy process, as soon as declared the bankruptcy and appointed the judicial administrator is linked to the idea of preventing administrators of the bankrupt business to have time and conditions to deviate assets, by hiding them intentionally to the detriment of creditors.

For this reason it is so important to have a fine tuning between the Bankruptcy Court and the Judicial Administrator. Once declared bankruptcy, the Judicial Administrator must have a team ready to make the immediate collection of assets, often in several offices and different States, concomitantly, demanding that logistics must be prepared days in advance.

This constitutes another form of credit protection of the creditors in the general list of creditors, the real recipients of bankruptcy proceedings, which initiates a universal enforcement Court.

The assets can be collected in a group, in a sole collection certificate. However, assets encumbered with collateral must be collected separately, each one in an exclusive collection certificate. Not all possible assets are immediately subject to sale and, at this point, the performance of the Judicial Administrator is paramount.

For this reason, the legislature edited the norm that stipulates that the Judicial Administrator must perform in all processes and actions involving the bankrupt estate, making him bastion of legality in favor of the creditors.

In addition to judicial proceedings, which may, conditionally, add some assets to the bankruptcy estate, the Judicial Administrator also has the function to analyze and exercise rights of the bankruptcy estate, in order to gather the greatest amount of assets subject to sale, or subject to sale in the future.

At this point, it is essential for the judicial administrator to possess in his team qualified professionals to analyze the overall company and check possible actions and procedures that can lead to assets to the bankrupt estate. This team must also analyze judicial liabilities to verify if they are correct or if they can be subject to reduction. It is worth noting that it is often verified the occurrence of habilitated credits that are already barred by statute of limitation, being the responsibility of the Judicial Administrator to obtain such judicial award.

As soon as possible, the Judicial Administrator must conduct the inventory of bankrupt estate, to carry out the liquidation phase of

the assets for the payment of liabilities, respecting, as much as possible, and in cases where it is feasible, the principle of continuity of the company.

It is mandatory for the Judicial Administrator to carry out the sale of the assets, which broadly speaking, can be performed in three distinct ways:

- “(a) The ordinary sale, ruled, *prima facie*, by order of preference listed in article 142 of Act No. 11101/2005, constituting the general form of liquidation of assets of the bankrupt estate;
- (b) The summary sale, which occurs through authorization of the Court and agreement of the General Assembly of Creditors, situation in which it may occur the adjudication of assets composing the bankrupt estate by its creditors or sale to third parties, as long as the General Assembly of Creditors approve such a measure and;
- (c) The extraordinary sale, which takes place in subsidiary character, in a peremptory manner, at the request of the Judicial Administrator to the Court, without requiring the approval of the General Assembly of Creditors or the observance of some kind of order of liquidation. Alternatively, with the approval of two-thirds of the General Assembly, situation in which the President of General Assembly of Creditors may require the sale directly to the Court through a petition with duly motivated request.”⁴³

The ordinary sale, typically adopted in the course of bankruptcy proceedings, is ruled by the provisions of art. 142 of Act No. 11101/2005, which provides:

“Art. 142. The Court, hearing the judicial administrator, and taking into account the guidance of the Committee, if any, will order the sale of the asset in one of the following ways:

- I – Auction, for oral bids;
- II – Closed proposals;
- III – Trading.

§ 1^o The completion of the sale in any of the terms of this article shall be preceded by publication of a notice in a newspaper of wide circulation, with 15 (fifteen) days in advance, in case of movable property, and 30 (thirty) days in case of sale of the company or real estate, being optional the disclosure by other means that may contribute to the extensive knowledge of the sale.

§ 2^o The sale shall occur by the highest offered value, even if it is less than the assessed value.

§ 3^o In the auction for oral bids, it applies, if appropriate, the rule of Act No. 5869 of January 11th 1973- Civil Procedure Code.

⁴³Art. 144, da Lei No. 11.101/2005.

§ 4° The sale by closed proposals will occur upon delivery, in registry and under receipt, of sealed envelopes to be opened by the judge, on the day, time and place designated in the notice, drafting the Registrar the respective document, signed by those present, and gathering the proposals to the bankruptcy records.

§ 5° The sale by trading constitutes a hybrid mode of the previous ones, with 2 (two) stages:

I – Receipt of proposals, in the form of § 3 of this article;

II – Auction for oral bids with participation of bidders with proposals not less than 90% (ninety percent) of the larger proposal offered in the form of § 2 of this article.

§ 6° The sale by trading shall respect the following rules:

I – once received and opened the proposals in the form of § 5 of this article, the Court will order the notification of bidders, whose proposals satisfy the prerequisite of your item II, to attend the auction;

II – The value of the auction opening will be that of the proposal received from the highest bidder attending the session, considering this value as a bid, to which he is obliged;

III – In case the highest bidder does not attend the auction and it is not given a bid equal to or greater than the value offered by him, he is obliged to pay the verified difference, constituting the respective certificate of the Court an enforceable title for the collection of the values by the judicial administrator.

§ 7° In any form of sale, the Public Ministry will be summoned in person, under penalty of nullity.”

It is pointed out that with the entry into force of the Civil Procedure Code of 2015, the provision that stipulated the application of the Civil Procedure Code of 1973 is no longer valid with the application of the subsequent Code.

With respect to the extraordinary sale, article 144 of Act No. 11101/2005 regulates the possibility of its occurrence. However, part of the doctrine criticizes the possibility of extraordinary sale at the request of the Judicial Administrator because, in their opinion, the analysis on the feasibility of the sale to be held by the Court is eminently of economic character, so that it would apply the sovereign will of the General Assembly of Creditors rather than the Court's decision.

Article 144 of Act No. 11101/2005 states that:

“Art. 144. In case of justified motives, the Court may authorize, through reasonable pleading by the judicial administrator or the Committee, modalities of judicial sale different from those provided for in article 142 of this Act.”

The cited article 144 does not grant the possibility of the Court to authorize the sale based on an economic criterion because the

norm high lights that the extraordinary sales should occur "based on justified motives", without any mention to the economic issue. Within such range, several situations may demand the peremptory action of the bankruptcy Court, precisely to preserve the assets of the bankrupt estate and the interest of the creditors.

The exegesis of this norm, even if elastic, does not grant to the Court the possibility to decide on issues that are eminently economic, whose jurisdiction falls on the General Assembly of Creditors, but merely authorizes the sale of property and rights in an extraordinary way when there is a motive for such.

For example, assets related to perishable goods and those who would become scrap in short time, preventing the other modalities of liquidation, or those causing harm to third parties, who would have to file compensatory actions against the bankrupt estate, or those whose deposit costs are higher than the cost of liquidation.

In this respect, the bankruptcy Court and the Judicial Administrator should act together, seeking to act in such a way as to avoid the emergence of new actions and situations that might bring delay to the process or damage to the bankrupt estate.

B) Assets in reorganization – Possible liquidations through Court supervision, for the benefit of the recovery plan

In reorganization proceedings it occurs quite a diverse situation if compared to bankruptcy ones. First, there is no removal of the directors out of the company or the economic group of their activities. Second, there is no collection of assets against the company in reorganization, which should only cease to encumber fixed assets when they are included in the plan of recovery. In order to encumber assets not included in the recovery plan, the company in reorganization must present a plausible reason for sale to the Court, which holds jurisdiction to authorize the sale or not.

Assets liquidated based on the business activity of the company in reorganization do not require judicial authorization to be sold, under the penalty of preventing the very continuity of the business activity, according to the construction of article 66 of Act No. 11101/2005.

However, these assets must be described in the recovery plan to be approved by the General Assembly of Creditors.

This caution stems from the need to prevent the companies in reorganization: i) from intentionally liquidating their assets in the recovery phase, aiming to harm the mass of creditors against a possible future bankruptcy and; ii) from hiding their assets through a business estate planning or deviations on behalf of shareholders and managers of the company in reorganization.

Humberto Lucena da Pereira Fonseca believes that the solution to an occasional abuse of right regarding the possibility of sales without judicial authorization is provided for in article 166, VII,

of the Brazilian Civil Code, which deals with the nullity of forbidden acts. This is the case of those acts conducted without judicial authorization, when depending on such authorization to occur⁴⁴.

Similarly, Act No. 11101/2005 has devices that rule the nullity of trades carried out in violation of the reorganization, which are not the focus of this article.

Article 50 of Act No. 11101/2005 brings different forms of reorganization, among them, the establishment sale and the sale of part of the assets of the company in reorganization, in order to ensure cash flow to maintain the continuity of the business activity, with attention to the principle of continuity of the company.

The establishment sale, in the norm preceding Act No. 11101/2005, implied in the immediate bankruptcy of the one who sold the establishment to another entrepreneur, or group of businessmen.

With the advent of Act No. 11101/2005, the sale of establishment became an alternative for business recovery. However, such alternative is of limited applicability, given the possibility of succession of tax and labor liabilities by whoever takes responsibility for the business⁴⁵.

Act No. 11101/2005 was generic to define the possibility of sale of part of the assets of the company in reorganization. In the opinion of Maria Celeste Moraes Guimarães, the generic wording of such Act does not contribute to its application in cases where it may occur the sale of assets of the company in reorganization because the norm only requires that the company maintain its capacity to honor obligations of the recovery plan⁴⁶.

As a solution to prevent the succession of the burden and liabilities of the establishment, a *Drop Down* operation is often performed, or transfer to a subsidiary. It happens when, even before the approval of a recovery plan, there is the transfer of assets of the company in reorganization to an established company as IPU - Isolated Production Unit (through capital increase).

When a judicial sale occurs, the quotas of IPU are transferred to the buyer, isolating the asset to be transferred, covering him with the protection that the burden and liabilities will not accompany the acquired part⁴⁷.

⁴⁴ H. FONSECA, “Comentário ao artigo 66 da Lei 11.101/2005”, in O. CORRÊA-LIMA, S. CORRÊA-LIMA (eds), *Comentários à nova Lei de Falências e Recuperação de Empresas*, Forense, Rio de Janeiro, 2009, p. 452.

⁴⁵ P. TOLEDO, B. Poppa, “UPI estabelecimento: uma visão crítica”, in P. TOLEDO, F. SATIRO (eds.), *Direito das Empresas em Crise: problemas e soluções*, Quartier Latin, São Paulo, 2012, pp. 273-275.

⁴⁶ M. GUIMARAES, “Comentário ao artigo 50 da Lei No. 11.101/05”, O. CORRÊA-LIMA, S. CORRÊA-LIMA (eds), *Comentários à nova Lei de Falências e Recuperação de Empresas*, Forense, Rio de Janeiro, 2009, p. 362.

⁴⁷ R. TEPEDINO, “O trespasse para subsidiária (Drop Down)”, in R. CASTRO, L. ARAGÃO (eds), *Direito Societário e a Nova Lei de Falências e Recuperação de Empresas*, Quartier Latin, São Paulo, 2006, p. 64.

There are those who, in the doctrine, take this procedure as fraudulent in its birthplace, because it serves to shield assets that should compose the estate of the company in reorganization.

However, the supervision exercised by the Court and the Judicial Administrator as the inspectors of the recovery plan implementation along with the required approval of the plan by the General Assembly of Creditors to make it valid, are sufficient to resolve this issue.

In the words of Paulo Fernando Campos Salles de Toledo and Bruno Poppa:

“The unit of establishment is expressed by the complex of assets that form it, united under a common destination, which is the productive activity, a company’s attribute. Once isolated, on the other hand, it seems to indicate that this is an establishment that is distinctive, or that can be segregated from the main one[...]⁴⁸”

The legislator assigned as primary the attempt to sell of assets of the company in reorganization (and of the bankrupt party) in block, pursuant to article 140 of Act No. 11101/2005:

“Art. 140. The liquidation of assets will be held in one of the following ways, observed the following order of preference:

I – sale of the company, with the sale of their establishments in block;

II – sale of the company, with liquidation of their subsidiaries or production units in an isolated manner;

III – sale in block of assets that integrate each of the debtor’s establishments;

IV – sale of assets individually considered.

§ 1º If convenient to sale the assets, or in virtue of an opportunity, it may be adopted more than one form of liquidation.

§ 2º The liquidation of the assets will start regardless of the formation of the general list of creditors.

§ 3º The sale of the company shall have as its object the set of particular assets necessary for the profitability of the operation of the production unit, that can comprehend the transfer of specific contracts.

§ 4º In the transmissions of assets sold in the form of this article that rely on public record, the respective judicial warrant will serve as a sufficient purchasing title.”

This option was taken with the intent to maximize the potential results with the liquidation of assets. Also, in order to maintain the business activity for another entrepreneur, preserving in this way the corporate interests inherent to the reorganization and bankruptcy procedure of companies. Although the legal provision is directed to bankruptcy proceedings, there is no obstacle to its

⁴⁸ P. TOLEDO, B. POPPA, “UPI estabelecimento: uma visão crítica”, in P. TOLEDO, F. SATIRO (eds.), *Direito das Empresas em Crise: problemas e soluções*, Quartier Latin, São Paulo, 2012, p. 277.

subsidiary application in the context of companies in reorganization.

In general, article 60 deals with the sale of IPUs, and article 66 of Act No. 11101/2005 deals with the sale of permanent assets of the company in reorganization.

One can apply, alternatively, the provision contained in article 142 of Act No. 11101/2005 to the reorganizations. With the sale of the assets of the company in reorganization within judicial proceedings, it also operates the phenomenon of non-succession of the burden and liabilities by the purchaser related to the acquired establishment or asset.

Although article 141, II of Act No. 11101/2005 deals specifically with bankruptcy proceedings, in what concerns the absence of succession of burden and liabilities, the teleological interpretation of Act No. 11101/2005 approaches the provision of article 60, which deals with reorganization, towards article 141, II.

In this respect, there is still intense doctrinal debate, without any concrete conclusion to the present moment, causing unnecessary legal uncertainty for companies opting for reorganization as an alternative against bankruptcy.

§ 4 – CONFLICTS OF JURISDICTION

In the Brazilian system, competence can be defined as: “the measure of jurisdiction in the activity of the jurisdictional bodies”⁴⁹.

Meanwhile, it is assumed that there should be only one court previously designated to judge a particular type of claim and that, likewise, it cannot occur cases where courts refuses to provide jurisdiction⁵⁰.

There’s two types of competence conflict that may occur in the judicial organization of Brazil, the negative, in which no court accepts a claim as its own, and the positive, where more than one court deems itself competent to prosecute and adjudicate that particular case⁵¹.

In the case of a positive conflict of jurisdiction, it’s not necessary for the court to state that they are competent to prosecute and adjudicate the matter, they only need to carry on the process.⁵²

In order to even be a conflict, it’s necessary that both courts have already rendered decisions denying or invoking the competence to judge⁵³.

Furthermore, there cannot be conflict of jurisdiction between courts that maintain a hierarchical relationship of jurisdictional

⁴⁹ M. CARVALHO, *General Theory of Civil Procedure*, 1st ed., 2010, p. 139.

⁵⁰ H. THEODORO JUNIOR, *Curso de Direito Processual Civil*. 52th ed. Vol. 1, Forense, Rio de Janeiro, p. 209.

⁵¹ N. NERY JÚNIOR, *Código de Processo Civil Comentado*. 11th ed. p. 392.

⁵² C. BARBI, *Comments on the Code of Civil Procedure*, 10th ed. rev. e ampl., 3. tiragem, Rio de Janeiro: Forense, 1999, p. 368.

⁵³ H. THEODORO JUNIOR, *Curso de Direito Processual Civil*, 41th ed., Vol. 1, Forense, Rio de Janeiro, p. 179.

performance, since that will prevail the one with the higher hierarchy⁵⁴.

Pizzol states that:

“In order to be a conflict, its necessary that: a) the judge understands himself as competent, when another had already understood himself as competent; b) the judge considers himself incompetent and understand that the competent court is one that has already declared itself as incompetent.”⁵⁵

In any case, the conflict of jurisdiction will have an incidental action character, since it has no legal nature of appeal, nor of declaratory action⁵⁶. The same is brought in the magisterium of Barbi⁵⁷ and Marques⁵⁸.

On the contrary, Greco Filho argues that the Conflict of Competence is a declaratory action⁵⁹.

In the Brazilian system, the court itself determines whether or not it is competent to judge a particular claim, since it becomes a forerunner when accepting the claim, conducting an admissibility examination and determining the adverse party's summons⁶⁰.

The conflict of competence may be raised by either party, by the Public Prosecution Service and by the court itself⁶¹.

And, as soon as the conflict of jurisdiction is established, it must be addressed and referred to the competent court, for its judgment.

And, as soon as the conflict of jurisdiction is established, it must be addressed and referred to the competent court, for its judgment⁶².

If the petition has a problem, that can be fixed, part of the doctrine holds that the party be summoned to amend it⁶³ and another part of the doctrine holds that the petition must be rejected⁶⁴.

It's in the rapporteur of the conflict of jurisdiction the choice to request information from the conflicting courts, if he found it necessary, although in in practice this will cause unreasonable delay until the resolution of the incident⁶⁵.

⁵⁴ J. AMARAL, *Civil Procedural Law*. Coimbra, Almedina: Imprensa, 2003, p. 105.

⁵⁵ P. PIZZOL, *Competence in Civil Proceedings*, Revista dos Tribunais, São Paulo, 2003, p. 348.

⁵⁶ A. CÂMARA, *Lessons in Civil Procedural Law*, 25th ed., Atlas, São Paulo, 2004, p. 110.

⁵⁷ C. BARBI, *Comments on the Code of Civil Procedure*, 10th ed. rev. e ampl., 3. tiragem, Rio de Janeiro: Forense, 1999, p. 370.

⁵⁸ J. MARQUES, *Civil procedural law institutions*. 4th ed., rev., Forense, Rio de Janeiro, 1971, p. 461.

⁵⁹ V. GRECO FILHO, *Brazilian civil procedural law*, 23th ed., Saraiva, São Paulo, 2010. p. 214.

⁶⁰ N. NERY JÚNIOR, *Code of Civil Procedure commented*, 11th ed., p. 392.

⁶¹ N. NERY JÚNIOR, *Code of Civil Procedure commented*, 11th ed., p. 395.

⁶² D. NEVES, *Competence in Civil Proceedings*, Método, São Paulo, 2005. p. 211-213.

⁶³ A. DALL'AGNOL, *Comments on the Civil Process Code*. Coord. Ovídio Baptista da Silva. vol. 2. 2nd ed., rev., atual. e ampl., Revista dos Tribunais, São Paulo, 2007. p. 82.

⁶⁴ N. NERY JÚNIOR, R. NERY, *Code of Civil Procedure*, 4th ed., Revista dos Tribunais, São Paulo, 1999, p. 520.

⁶⁵ S. TEIXEIRA, *Code of Civil Procedure noted*, 1st ed., Saraiva, São Paulo, 2003. p. 101.

This is the same understanding granted by Santos⁶⁶ and Montenegro Filho⁶⁷.

Bedaque argues that, in the event of a conflict of competence, all unnecessary procedural acts or those of which are not indispensable for the definition of the incident should not be used⁶⁸.

Dall’Agnol, on the other hand, argues that although the jurisdictional nature of the conflict of jurisdiction is incidental, therefore possessing deferred probation, one cannot avoid producing those acts that are necessary for the good judgment of the conflict, even if this prevents the rapid outcome of the deed⁶⁹. The conflict of competence is not naturally endowed with the suspending effect on the conflicting acts and, as the law requires, this choice falls to the rapporteur.

The conflict of competence isn’t naturally endowed with the suspending effect on the conflicting acts and, as the law requires, this choice falls to the rapporteur⁷⁰.

In the case of negative conflict of competence, there is no need to speak of interrupting the acts, since none of the courts will render a decision in the cases that it does not have jurisdiction⁷¹.

In the same direction goes the teaching of Didier Jr⁷².

After receiving the incident, the rapporteur shall indicate a competent court on a provisional basis, however the decisions of this court will not be provisional⁷³ and, if another court is declared competent at the end of the incident, the decisions of the preliminary court shall be maintained⁷⁴.

The rapporteur can also, monocratically, judge the conflict of competence when he is instructed with all the necessary documents and acts, according to Theodoro Júnior’s teaching⁷⁵.

At last, in the Brazilian system, the party that used the autonomous procedure of the exception of competence cannot use the conflict of competence⁷⁶.

Entering specifically in the field of conflict of jurisdiction among Courts it is necessary to examine the universal subject matter

⁶⁶ E. SANTOS, *Civil Procedural Law Manual*, Vol. 1. 10th ed., Saraiva, São Paulo, 2003. p. 110.

⁶⁷ MONTENEGRO FILHO, *Civil Procedural Law Course*, Vol. 1, Atlas, São Paulo, 2006, p. 121.

⁶⁸ J. BEDAQUE, *Effectiveness of the process and procedural technique*, Malheiros, São Paulo, 2006, pp. 431-432.

⁶⁹ A. DALL’AGNOL. *Comments on the civil process code*, O. DA SILVA (ed.), Vol. 2, 2nd ed., rev., atual. e ampl., Revista dos Tribunais, São Paulo, 2007. p. 84.

⁷⁰ P. MIRANDA, *Comments on the Code of Civil Procedure*, t. 2., Forense, Rio de Janeiro, 1973, p. 325.

⁷¹ V. GRECO FILHO, *Brazilian Civil Procedural Law*, 15th ed., Saraiva, São Paulo, 2000. p. 215.

⁷² F. DIDIER JUNIOR, *Civil Procedural Law Course*, Vol. 1, 6th ed., Salvador: Jus Podivm, 2006, p. 144.

⁷³ P. PIZZOL, *Competence in Civil Proceedings*, Revista dos Tribunais, São Paulo, 2003, p. 358.

⁷⁴ C. BARBI, *Comments on the Code of Civil Procedure*, 10th ed. rev. e ampl., 3. tiragem, Rio de Janeiro: Forense, 1999, p. 378.

⁷⁵ H. THEODORO JUNIOR, *Civil Procedural Law Course*, 41th ed., Vol. 1, Forense. Rio de Janeiro, p. 180.

⁷⁶ N. NERY JÚNIOR, *The Code of Civil Procedure commented*, 11th ed. p. 466.

jurisdiction of bankruptcy Courts when in conflict with civil, tax, labor and criminal Courts.

In all these cases, when the action predates the declaration of bankruptcy, the understanding of the Brazilian courts have been in the sense that there is not attraction of the action preceding the universal jurisdiction of the Court. They implicate, indeed, the Judicial Administrator to act in those actions and the examination by the bankruptcy Court of its nature to characterize the cases (or not) as one of the actions that are suspended.

For bankruptcy, Act No. 11101/2005 is very clear in establishing the jurisdiction:

“Art. 76. Bankruptcy Court is indivisible and competent to all actions on goods, interests and business of the bankrupt, except labor claims, and those not regulated in this Act in which the bankrupt party appears as plaintiff or joint plaintiff.

Sole paragraph. All actions, including those excepted in the caput of this article, will continue with the judicial administrator, who should be summoned to represent the bankruptcy estate, under penalty of nullity of the proceedings.”

The exegesis of article 76 leaves no doubt about the scope of the universality of the bankruptcy Court, as well as the *vis attractiva* exercised by it, reflecting the recognition by the Judiciary, repeatedly, that the bankruptcy Court prefers any other in net processes.

A) Jurisdiction Conflict between the Universal Bankruptcy Court and the Civil Court

The simplest jurisdiction conflict occurs between bankruptcy Courts and that civil Court which is competent to deal with actions having the bankrupt or company in reorganization as plaintiffs, or that have been filed against them.

Any of the cases not legally predicted law and those filed before the declaration of bankruptcy will continue to normally run in civil Courts of origin, as long as they do not directly interfere in the assets of the bankruptcy estate. In other words, typical acts of collection of execution proceedings are suspended, and must be habilitated in the bankruptcy universal Court.

There is a jurisdiction conflict when a civil Court decides to seize or dispose of assets composing the Bankruptcy Estate or that is essential to the continuity of the activities of the company in Reorganization. In such cases, the final decision on the case will belong to the Bankruptcy Universal Court, because the special jurisdiction defined by law determines that the bankruptcy Court attracts all net processes against the bankruptcy estate.

From the time the Court takes a final decision, liquidating the value of the debt, each creditor must enable its credit, as a

receivable according to the order established in the Bankruptcy Act and this is above any reasonable doubt.

A similar situation will occur in case of an essential asset to the continuity of the business activity in Reorganization, whose company possession cannot be withdrawn by an order of a Court other than the one competent to deal with its reorganization proceedings.

It is necessary to take special care not to allow that assets essential to the activity of the debtor are encumbered, sold or judicially lost in actions involving the companies in reorganization as parties, under penalty to derail the continuity of the business activities and, therefore, the implementation of the recovery plan.

In this sense, the Brazilian not binding precedents are wide to allow for retention by the debtors of assets deemed as essential to their activity, in compliance with the principle of continuity of the company, during the period referred to in art. 60, paragraph 4, of Act No. 11101/2005.

This protection is extensive and applicable to goods subject of a lien on movable property (chattel), as it was recognized in the records of Interlocutory Appeal No. 0032031-6.2013.8.08.0048, judged by the Court of Justice of the State of Espírito Santo, in which it was acknowledged the flexibility of the general rule to this type of contract⁷⁷.

In the interlocutory appeal No. 70065381063, the Court of the State of Rio Grande do Sul has decided that the credit secured by chattel does not suffer the effects of the reorganization. However, by applying § 3º, art. 49, of Act No. 11101/2005, the company in reorganization was kept in possession of the asset because it was essential to the continuity of its activity.⁷⁸

The Court of the State of São Paulo, in the records of interlocutory appeal No. 2211899552015816000, kept the company in reorganization in the possession of the asset deemed as essential to the continuity of its activity, which was burdened with a lien on a chattel, in the capacity of a depository.⁷⁹

It must be said that the protection given to chattel used to secure a loan to third parties is limited to the maintenance of the company in reorganization which is in possession of the asset, but it does not make null the valid existence of the own chattel mortgage and the resulting credit will not suffer the judicial reorganization effects.

In this respect, Act No. 11101/2005 is not silent, predicting in its art. 49:

⁷⁷ TJ-ES - AI: 00320317620138080048, Rapporteur Judge: Annibal de Rezende Lima, Date of Judgment: 1st March 2016, First Civil Chamber, Date of Publication: 8 March 2016.

⁷⁸ TJ-RS - AI: 70065381063 RS, Rapporteur Judge: Elisabete Correa Hoeverler, Date of Judgment: 24 July 2015, Thirteenth Civil Chamber, Date of Publication: Official Gazette of 28 July 2015.

⁷⁹ TJ-SP - AI: 22118995520158260000 SP 2211899-55.2015.8.26.0000, Rapporteur Judge: Edgard Rosa, Date of Judgment: 22 October 2015, 25th Private Law Chamber, Date of Publication: 24 October 2015.

“Art. 49. All existing credits on the date of the filing, yet not due, are subject to reorganization.

§ 1 The creditors of the debtor in reorganization retain their rights and privileges against the co-guarantors, guarantors and regressive guarantors.

§ 2 Obligations existing prior to the reorganization shall observe the conditions originally contracted or defined in law, including accrual, unless otherwise established in the recovery plan.

§ 3 In case of a creditor holding the position of owner or trustee of movable or immovable property, lessor, landlord or seller promisor of real estate whose respective contracts contain irrevocability or non-repudiation clauses, including real estate developments, or owner in contract of sale with lien, its credit does not suffer the effects of the reorganization and ownership rights shall prevail over the goods and the contractual conditions, observed the respective legislation. It is not allowed, however, during the period of suspension referred to in paragraph 4 of art. 6 of this Act, sale or withdrawal of the establishment of the debtor of capital assets essential to its business activity.

§ 4 It is not subject to the effects of reorganization the importance referred to in item II of art. 86 of this Act.

§ 5 In the case of credit secured by pledge over securities, receivables, investments or stocks, the guarantees paid or due may be replaced or renewed during the reorganization and, while not renewed or replaced, the value eventually received in payment of guarantees will remain in escrow account during the period of suspension referred to in paragraph 4 of art. 6 of this Act.”

The norm is clear and of easy application: during the period of suspension of the obligations of the company in reorganization, it is prohibited to remove from the possession of the company assets deemed to be essential to its activity, even those that are encumbered with chattel mortgage and as long as is duly proven the essentiality of such assets.

The bankruptcy law also determines, clearly and of easy application, that the bankruptcy universal Court exerts *vis attractiva* and is truly competent to decide matters associated with the companies in reorganization and the assets composing its business activity.

B) Jurisdiction Conflict between Bankruptcy Courts and Tax Courts

Another exception to the general rule of attraction and indivisibility of the bankruptcy Court occurs in the tax cases.

First, it must be pointed out that, in the context of judicial reorganizations, the tax credit does not suffer the effects of

reorganization, according to the provision of article 187 of the National Tax Code (CTN). This is the reason why the recovery plan cannot contain a provision on tax credits and tax collections, which are not suspended by the granting of reorganization proceedings (article 6, paragraph 7, of Act No. 11101/2005).⁸⁰

Ayoub and Cavalli affirm that:

“If on the one hand the tax credit is not affected by the reorganization, on the other it also does not interfere in the judicial reorganization process, in the sense that the tax creditor does not take part along with other creditors into the recovery plan assessment; that is, the tax creditor cannot present objections to the plan and does not participate in the general assembly of creditors (art. 41 of Act No. 11101/2005). Furthermore, the decision to grant the reorganization “will determine the dismissal of negative certificates for the debtor to carry on its activities, except for contracting with the Government or receiving benefits or tax or credit breaks, observed the provisions of art. 69 of this Act”, as can be read in the art. 52, II, of Act No. 11101/2005.”⁸¹

When it comes to bankruptcies, tax collections also maintain their regular march, before the specialized Court which is competent to judge tax related cases. However, like civil Courts, tax collections must define the amount of the tax liability so that it can be habilitated in the list of creditors.

In this manner, it does not take a long cognitive path to understand that the tax collections, net by their own naturally nature, are stayed for 180 days referred to in art. 6, paragraph 4, of Act 11101/2015, In such period, the Tax Court cannot enforce any expropriatory typical of tax collections and should be limited to decide questions about validity, value, and other credit characteristics, including its statute of limitation and a motion to stay execution and other legal remedies of merits to enable the credit habilitation in the list of creditors of the bankruptcy Court. The conflict of jurisdiction arises when the tax Court decides about the assets of the bankruptcy estate. In these cases, the final decision on the matter will belong to the Universal Bankruptcy Court, applying to tax cases, provisions quite similar to civil actions in general.

C) Jurisdiction Conflict between the Bankruptcy Court and the Labor Court

The most common conflict of jurisdiction is that between the bankruptcy Court and the labor Court.

In Brazil, the organization of labor legislation and courts to judge these issues culminate in a faster solution in cases of this nature,

⁸⁰ L. AYOUB, C. CAVALLI, *A construção jurisprudencial da recuperação judicial de empresas*, 3rd ed., rev., atual. Ampl., Forense, Rio de Janeiro, 2017. p. 51.

⁸¹ *Idem*.

making that Labor Complaints are decreed before the bankruptcy decision. It allows Labor Courts to attempt to seize assets of the bankruptcy estate or the bankrupt shareholders to a public auction. However, this issue is resolved by the simple analysis of the legal text.

For the purposes of defining the jurisdiction for processing and execution of labor credits, one has to observe the rule of art. 6, §§ of Act No. 11101/2005 along with art. 114 of the Federal Constitution of 1988, which determines, in general, that the calculation of labor credit must be carried out by the specialized justice, but the enforcement of due and payable sums must be dealt with by the bankruptcy Court.

As Mangerona points out:

“Thus, once the final decision is rendered in the specialized Court, it will suffice the simple communication to the bankruptcy Court on the calculated quantum, so that the labor credit is inserted in the list of creditors regardless of formal habilitation in the records of the judicial reorganization or bankruptcy.”⁸²

This measure is necessary to safeguard the right of the very labor creditors, preventing some from receiving their credits in a privileged manner in relation to other creditors of the same class, which is strictly forbidden in bankruptcy law.

In Brazil, it was built a solid judicial position in the sense that labor credits are subject to habilitation in the bankruptcy Court, but there are a few exceptions, which will be further addressed.

The very labor Court, notably in higher instances, recognizes the preference of the bankruptcy Court.

In the records of Interlocutory Appeal Petition No. 20160394990, the Regional Labor Court of Sao Paulo acknowledged that the assets of the bankruptcy estate, even if unduly held by shareholders of the company, belong to the jurisdiction of the universal bankruptcy Court. Labor credits are subject to habilitation and division in the form of the art. 83 of Act No. 11101/2005.⁸³

The same Court, in the judgment of the Interlocutory Appeal no. 2016026329, decided that the jurisdiction to decide about occasional liability of shareholders of the bankruptcy estate, through the disregard of the legal entity, belongs to the universal bankruptcy Court, as long as the bankruptcy proceedings last.⁸⁴

The Superior Labor Court, final collegiate Court, in charge of the judgment of labor complaints, has pacified understanding on the issue.

In the records of Interlocutory Appeal No. 101100-79.2008.5.01.0061, the Court ruled that the collective proceedings

⁸² F. MANGERONA, “Competência dos processos falimentares e recuperacionais”, in D. CARNIO COSTA (ed.), *Comentários completos à lei de Recuperação de Empresas e Falências*, Juruá, Curitiba, 2015, pp. 79- 81.

⁸³ TRT SP Ag Pet 20160394990 Rapporteur Judge Valdir Florindo; Pub 20 June 2016.

⁸⁴ TRT SP Ag Pet 20160206329 Rapporteur Judge: Maria de Lourdes Antonio; Date of Publication: 13 April 2016.

of enforcement, where there are several creditors, as in cases of bankruptcy, reorganization and civil insolvency, may be prosecuted and judged by labor Courts up to the assessment of the amount due phase, when they shift to the exclusive jurisdiction of the bankruptcy Courts⁸⁵.

In a judgment of a further Appeal, the same Court also decided in this regard, defining that the proceedings belong to labor Courts up to the moment that the amount of credit to be paid by the debtor is yet subject to calculation, but once calculated, they must be processed before bankruptcy Courts⁸⁶.

However, the conflict of jurisdiction is seldom resolved in ordinary instances, generating a conflict of jurisdiction, to be decided by the Superior Court of Justice.

Precedents of that Court are aligned in resolving this kind of controversy, acknowledging the bankruptcy Courts as competent for receiving and distributing the funds obtained by public auction in labor cases, real estate belonging to the bankruptcy estate or its shareholders after the disregard for the legal entity of the company.

In the judgment of the jurisdiction conflict No. 115.768-SP, which was dealing with an order to withdraw amounts deposited in a labor Court, in proceedings of enforcement filed by a single employee, the Superior Court of Justice ruled that once declared the company bankruptcy, pending enforcement proceedings before labor Courts should continue before the Universal Bankruptcy Court.⁸⁷

Likewise, the Court ruled in the records of the Jurisdiction Conflict no. 33397-MG, determining that seized assets and sums should be sent to the bankruptcy Court⁸⁸, in an identical decision rendered in the Jurisdiction Conflict no. 46.928-SP⁸⁹, as well as in the records of AgRg in CC n° 114.916-SP⁹⁰.

Although this is the position of the Upper Courts, and also of those judges dealing with this matter, Lower Courts routinely delves into the jurisdiction of bankruptcy Courts, generating unnecessary amount of appeals and jurisdiction conflicts to resolve such issue which is already pacified and that depends on the mere implementation of the teleological legal text.

⁸⁵ ARR – 101100-79.2008.5.01.0061, Rapporteur Judge: Ministro Alberto Luiz Bresciani de Fontan Pereira, 3rd Panel, Date of Publication: DEJT 19 February 2016.

⁸⁶ RR - 1257-06.2010.5.04.0024, Rapporteur Judge: Ministra Maria de Assis Calsing, 4th Panel, Date of Publication: DEJT 28 August 2015.

⁸⁷ STJ – CC: 115768, Rapporteur Judge: Ministro JOÃO OTÁVIO DE NORONHA, Date of Publication: DJ 14 March 2011.

⁸⁸ Ag Rg nos EDcl no CC n. 33.397-MG, Rapporteur Judge Ministro Ari Pargendler, DJ de 5 May 2003.

⁸⁹ EDcl no Ag Rg no CC n. 46.928-SP, Rapporteur Judge Ministro Castro Filho, DJ de 4 May 2006.

⁹⁰ AgRg no CC n. 114916 SP 2010/0208546-0, referendary Ministro João Otávio Noronha.

However, there is one exception. When there is a final judgment in one of the conflicting judgments, there can be no conflict of jurisdiction⁹¹.

There is a possibility of the labor Court to disregard for the legal entity before this request has been granted in the bankruptcy Court.

In this situation, the enforcement should ordinarily proceed without the credit habilitation in the bankruptcy Court⁹².

It causes serious problems during bankruptcy proceedings because once goods are taken to public auction, the outcome does not enter as an asset of the bankruptcy estate for the payment of creditors - and the labor plaintiff is paid.

Exacerbating this situation, there is a possibility of other creditors of the same order habilitate their credits in the same labor records, receiving the amounts owed to each one of them to the detriment of creditors of the bankruptcy estate properly habilitated in the competent Court.

Furthermore, the legal norm is clear: the execution started before the bankruptcy normally continues and, if they succeed in the disregard of the legal entity in the labor sphere before that acceptance in the bankruptcy Court, it is possible the payment of that single creditor appearing as plaintiff of the labor complaint. However, there is no legal provision that allows habilitation of other creditors in those records. It could not be otherwise since this would implicate clear damages to other creditors of the bankruptcy estate.

What should happen in such proceedings is the necessary diligence of the Judicial Administrator to require the disregard and a preliminary injunction request to freeze the assets against the bankrupt shareholders, assuming there is legal grounds for that. Such order, when granted, suspends the possibility of labor Courts to make payments to other creditors requiring habilitation in the labor complaint.

In these cases, after the auction of the asset belonging to the bankrupt shareholder and the proceeds passed to the plaintiff, the remaining balance must necessarily be sent to the bankruptcy Court, in order to be included the bankruptcy estate and be subject to general distribution between the normal other classes of creditors.

This is because the bankruptcy Court is unique, universal, indivisible and has preference over any other Court, given its capacity to exercise *vis attractiva*, as well as the urgent need for compliance with the principle *par condition creditorum*.

⁹¹ AgRg no CC n. 131820 PR 2013/0409360-3, referendary Ministro João Otávio Noronha.

⁹² CC n. 125589 MG, 2012/0240037-4, of the Minister Luis Felipe Salomão.

D) Jurisdiction Conflict between the Bankruptcy Court and the Criminal Court

In many cases, the economic financial crisis causing the request of reorganization or the declaration of bankruptcy stem from criminal investigations in cases where is evidenced the participation of the group of companies and its shareholders in crimes such as corruption, money laundering, Ponzi schemes, tax evasion, among others.

Notably, since 2013, Brazil witnessed a series of police operations which have unveiled a series of acts of corruption, money laundering and other crimes, which resulted in effective and unequivocal harm to the Treasury, because they were committed with direct participation of members of the direct and indirect public administration, including members of the Executive and Legislative branches.

When it involves bankrupt companies or companies in reorganization, there is a risk that the criminal Court determines the confiscation of property and rights of the economic group and its managers, in order to recover the money. On the other hand, it causes clear harm to creditors because it would remove from the bankruptcy Court a substantial portion of property and rights composing the bankruptcy estate, which should be reserved to the collectivity of creditors.

The criminal Court aims to give effectiveness to criminal conviction whose sanction in "the loss in favor of the Government [...] of the product of the crime or of any good or value that constitutes the benefit received by the agent with the practice of the criminal fact"⁹³.

However, as it was verified in this study, the bankruptcy Court holds the power to decide about all the assets of the insolvent estate, to divide them among creditors as set forth in the hierarchy provided for in the bankruptcy legislation.

Our courts have established that the bankruptcy Court is competent to judge even the crimes with connection to the bankruptcy process, as the crime of fraud or conspiracy, when practiced by the bankrupt shareholders or managers of the company⁹⁴.

Therefore, when a conflict arises between the bankruptcy and criminal Courts regarding acts that affect the assets of the bankrupt company or the company in reorganization, it should be applied the *vis attractiva* of the bankruptcy Court, which shall decide on the division of the assets of the insolvent estate.

This is the understanding of the Superior Court of Justice when adjudicated the jurisdiction conflict between the criminal and the bankruptcy Courts:

“It is not, with such understanding, denying the criminal Court the jurisdiction for confiscation, in favor of the

⁹³ Art. 91, II, “b”, of Criminal Code.

⁹⁴ RHC 18643/MG, judged by STJ on 19 April 2007 and HC 85147/SP, judged by STJ on 18 July 2007.

Government, of goods resulting from crime. One only highlights that the Brazilian legal system elected the bankruptcy Court as responsible for raising and allocating assets pertaining the bankruptcy estate.

Consequently, after the *res judicata* of a criminal sentence convicting the defendant, moment in which the confiscation of property in favor of the Government is confirmed, the bankruptcy Court will have to indicate who are the third parties of good faith, which, in the light of art. 91, II, of the Criminal Code shall not be affected by the confiscation-effect of criminal conviction. Note: the confiscation of goods, as a criminal sentence civil effect, cannot harm those who conform as third parties of good faith, which, in the event of the bankruptcy of the companies holding such goods, should be made by the bankruptcy Court to the creditors of the insolvent estate.

Understand it differently would belittle the universality and indivisibility of the bankruptcy Court. It would also stimulate the creation of two collective creditors competitions: one before the bankruptcy court; another, in the orbit of the criminal court, to whom the various creditors will plead to be considered as third parties in good faith. It would mean to disregard that the criminal jurisdiction is not legally the instance dedicated to in-depth discussions on extra-criminal topics. By the way, it should be recalled that art. 120, paragraph 4, of the Code of Criminal Procedure confirms this specialization of criminal jurisdiction, with a provision that, in case of complex requests for return of seized goods, the criminal Court should avoid to meddle into these requests of civil nature, referring the parties to a civil court.

Furthermore, in line with the arguments above, with the bankruptcy of companies holding assets whose loss, in favor of the Government, was enacted by a criminal court, the decision about acts necessary for the preservation or disposal of these goods will belong to the jurisdiction of the universal bankruptcy Court. Such Court, as already noted, has the authority to allocate the assets of the insolvent estate.”⁹⁵

In another famous case in Brazil, records No. 5046512-94.2016.4.04.7000/PR before the 13th Federal Court of Curitiba, the Federal Judge Dr. Sergio Fernando Moro determined the seizure and confiscation of a penthouse received by the former President of Brazil, Mr. Luiz Inácio Lula da Silva, as a form of bribery. Mr. Moro sent a letter to the bankruptcy Court, requesting that such penthouse were no longer given as guarantee in civil cases.

⁹⁵ STJ – Conflict of Jurisdiction: 76861 SP 2006/0280806-2, Rapporteur Judge: Ministro MASSAMI UYEDA, Date of Judgment: 13 May 2009, S2 – SEGUNDA SEÇÃO, Date of Publication: 20090615. DJe 15 June 2009.

Judge Dr. Daniel Costa Carnio, ruling on records No. 1030812-77.2015.8.26.0100 (p. 56139), related to the judicial reorganization of OAS Group, in whose name the penthouse remained fraudulently registered, responding to the letter of the 13th Federal Court of Curitiba, decided that such asset would not be part of the list of goods available to the company in reorganization. It had no relationship with the recovery plan and, therefore, there was no obstacle to allow this seizure as well.

The property was no longer listed as an asset of the Judicial Reorganization. The general rule is that the bankruptcy Court, as cited, exerts *vis attractiva* since it is universal, indivisible and preferred over all others.

Evidently, an occasional return of the funds to the Treasury or of a penalty imposed as a result of such crimes should also be subject to a division according to the provisions of Act No. 11101/2005. It is not plausible to allow that the Government receives back such sums out of the bankruptcy Court, to the detriment of all other creditors forming the general list of creditors.

The actions of Misconduct of office, although decreed under civil jurisdiction, have substantial sanctions, which are equivalent to criminal ones. On this matter, in another case involving the bankruptcy of Banco Santos, a jurisdiction conflict has arisen between the universal bankruptcy Court and the treasury Court, which determined the freezing of assets pertaining to the insolvent estate and to the shareholders. The Superior Court of Justice, adjudicating the Jurisdiction Conflict No. 112516-SP, decided that the jurisdiction, with the declaration of the bankruptcy, is immediately shifted to the bankruptcy Court.⁹⁶

CONCLUSIONS

The conclusion of this study is that in the pursuit to safeguard the receivables of creditors, the law instituted the Universal Bankruptcy Court, with preference against any other Court and exerting inevitable *vis attractiva*, which substantially alters the ordinary rules to define subject matter jurisdiction in Brazil.

It was evident, by doctrine and precedents, that the magistrate of the bankruptcy Court will render the final decision about constriction on goods that affect the assets of the insolvent estate or goods essential to the continuity of Judicial Reorganization, even if necessary to meddle into the jurisdiction of civil judgments, tax, labor, or criminal Courts.

Other conclusion is that it is only possible to grant effectiveness to this universal Court when there is a competent and precise performance of the Judicial Administrator and his team. It ensures the collection of the greatest amount of assets, endeavoring for personal accountability of the bankrupt

⁹⁶ STJ - CC: 112516, Rapporteur Judge: Ministro HAMILTON CARVALHIDO, Date of Publication: DJe 2 August 2010.

shareholder or shareholder of the company in reorganization when it is proven fraud, misuse of assets or confusion. Hence, the Universal Court has the purpose to protect the assets of the insolvent estate and of the company in reorganization as much as possible, to avoid the frustration of creditors to receive their claims. Also, it aims to safeguard essential goods to the continuity of the business activity, without which there would be effective harm to the body of creditors and of the reorganization viability.