



Neutral Citation Number: [2020] EWHC 3560 (Ch)

Case No: CR-2016-004824  
& CR-2020-0003146

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**INSOLVENCY AND COMPANIES LIST (ChD)**

**IN THE MATTERS OF:**

- (1) **INDUSTRIA DE ALIMENTOS NILZA SA**
- (2) **BUGLIN PARTICIPACOES LTDA; AND**
- (3) **ENDIPA COMÉRCIO E ADMINISTRAÇÃO LTDA**

**IN THE MATTER OF THE CROSS-BORDER INSOLVENCY  
REGULATIONS 2006**

**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 21/12/2020

**Before :**

**INSOLVENCY AND COMPANIES COURT JUDGE BURTON**

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**Between :**

**ALEXANDRE BORGES LEITE**

**Applicant**

**- and -**

**AMICORP (UK) LIMITED**

**Respondent**

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**Tony Beswetherick** (instructed by **Gowling WLG** ) for the **Applicant**  
The **Respondent** did not attend and was not represented

Hearing date: 28 July 2020

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## **Approved Judgment**

COVID-19: This judgment was handed down remotely by circulation to the Applicant's representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 4.30pm on 21 December 2020

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INSOLVENCY AND COMPANIES COURT JUDGE BURTON

## **Insolvency and Companies Court Judge Burton :**

### **Summary**

- A. The Judicial Administrator of Nilza, Dr Leite, has been appointed on an interim basis, pursuant to the Brazilian Bankruptcy Law, Civil Code and Stock Corporations Law, as Provisional Judicial Administrator of Buglin and Endipa, pending final determination of the Extension Applications;
- B. the Extension Applications are collective proceedings pursuant to a law relating to insolvency for the purposes of the CBIR;
- C. the Court recognises the Extension Applications as foreign main proceedings and Dr Leite as foreign representative; and
- D. the Court grants relief pursuant to Article 21(1)(g) by making an order requiring the Respondent to disclose documents and information to Dr Leite.

### **The Applications**

1. The Applicant, Dr Leite holds appointments pursuant to orders of the Brazilian Court in respect of three Brazilian entities:
  - i) Industria De Alimentos Nilza SA (“Nilza”) in respect of which Dr Leite has been appointed as Judicial Administrator;
  - ii) Buglin Participacoes Ltda (“Buglin”), in respect of which Dr Leite has been appointed as Provisional Judicial Administrator; and
  - iii) Endipa Comércio e Administração Ltda (“Endipa”), in respect of which Dr Leite has also been appointed as Provisional Judicial Administrator.
2. On 12 September 2016, Dr Leite obtained an order under the Cross Border Insolvency Regulations 2006 (“CBIR”) recognising his appointment as a foreign representative of Nilza. On 12 April 2018, he applied in those proceedings for an order pursuant to Articles 21(1)(e) and 21(1)(g) of the Model Law and/or section 236 of the Insolvency Act 1986 (“IA86”) for the Respondent, Amicorp (UK) Limited (“Amicorp”) to deliver up any documents in its possession or control relating to Nilza, Buglin, Endipa and four other entities including “Tipuana Investments Limited” (the “April 2018 Application”).
3. On 7 April 2020, Dr Leite applied by Application Notice in proceedings under case number CR-2020-003146, in his capacity not only as Judicial Administrator of Nilza but also as Provisional Judicial Administrator of Buglin and Endipa for (i) determination of the April 2018 Application; (ii) recognition of his appointment as Provisional Judicial Administrator of Buglin and Endipa; and (iii) an order requiring Amicorp to disclose documents in its possession relating to Nilza, Buglin and Endipa (the “Companies”) “including for the avoidance of doubt any documents relating to Tipuana Investments LLC which relate to the affairs of the Companies” (the “April 2020 Application”). No reference was made in the April 2020 Application to the CBIR. Recognition and assistance were sought only pursuant to the common law.

4. On 24 July 2020, in his capacity as Provisional Judicial Administrator of Buglin and Endipa, Dr Leite issued a further recognition application, this time seeking recognition under the CBIR and, so far as necessary, to amend the April 2020 Application to seek relief under Article 21(1) of the Model Law and/or section 236 IA86 against Amicorp.
5. In summary, the court is asked to recognise Dr Leite as Provisional Judicial Administrator of Buglin and Endipa, whether under the common law or pursuant to the CBIR and to grant him relief in his capacity as Judicial Administrator of Nilza (recognised by the Court in September 2016) and as Provisional Administrator of Buglin and Endipa (if recognised as part of the applications now before me) against the Respondent, Amicorp under Article 21(1) of the Model Law, the common law and section 236 IA86.
6. The applications are supported by three affidavits of Dr Leite:
  - i) First Affidavit dated 23 July 2020, sworn in support of the April 2020 Application;
  - ii) Second Affidavit dated 22 March 2018; and
  - iii) Third Affidavit dated 25 July 2018,both of which latter affidavits were sworn in support of the April 2018 Application.
7. The applications are further supported by a witness statement of Rodrigo Kaysserlian dated 17 March 2020. Mr Kaysserlian is a Brazilian lawyer instructed to act for Dr Leite in relation to the Companies. Mr Kaysserlian's witness statement supplements the background information provided by Dr Leite and seeks also to explain a number of Brazilian legal concepts which are not directly replicated in English law.
8. The Respondent did not appear at the hearing to oppose the application.

## **Background**

9. The background to Dr Leite's appointment in respect of Nilza and his subsequent appointment in respect of Buglin and Endipa is set out in Dr Leite's Second and Third Affidavits, supplemented by Mr Kaysserlian's witness statement and helpfully summarised in Mr Beswetherick's skeleton argument:

"Nilza was incorporated in Brazil. It entered a process known as "judicial reorganisation" in 2009 (which is akin to an English CVA), which was subsequently converted into bankruptcy (which has similarities to liquidation and administration) on 24 January 2011. After various appeals (the first of which was successful), the decision to move Nilza into bankruptcy was upheld by the Court of Appeal in São Paulo on 30 October 2012.

On 12 September 2016, ICC Judge Barber granted recognition of Dr Leite's appointment in respect of Nilza.

At the time of Nilza's entry into judicial reorganisation/CVA in 2009, it owned and operated 3 milk processing plants. Its chief executive officer was Mr Adhemar de Barros Neto ("Mr Neto"). Mr Neto was the direct owner of a single share in Nilza.

He was also the owner of 99.9% of the shares in Extracred Participacoes Ltda, which in turn owned 63.76% of the shares in Nilza.

Following his appointment, Dr Leite has been investigating the affairs of Nilza. It has debts estimated at over Brazilian Real 690 m (c. £102.8 m), but to date there have been no distributions to creditors”.

### **Extending Nilza’s bankruptcy to Mr Neto and Buglin**

10. Dr Leite explains in his First Affidavit, that where the Brazilian Court finds evidence of abuse of a company’s corporate structure, co-mingling and misappropriation of assets between a bankrupt company and other individuals and entities closely connected to it (“Connected Third Parties”), it has the power to “extend” the bankruptcy proceedings to the Connected Third Parties in order to make them jointly liable for the bankrupt company’s debts.
11. On 1 October 2013, Dr Leite applied to the Brazilian Court to extend Nilza’s bankruptcy to Mr Neto. On 4 December 2013, he amended his application to include Buglin (the “Buglin Extension Application”) and several other entities. More than six and a half years later, as a result of difficulties serving the Buglin Extension Application on some of the other entities, it has still not been heard. It was, however, served on Buglin. On 9 December 2013, the Brazilian Court granted an injunction freezing the assets of Mr Neto, Buglin and various other parties pending the hearing of the application.

### **Extending Nilza’s bankruptcy to Endipa**

12. On 7 January 2014, Dr Leite applied to extend the bankruptcy also to include Endipa (the “Endipa Extension Application”). On 23 October 2015, the Brazilian Court made orders extending Nilza’s bankruptcy to Endipa following which, according to Dr Leite’s First Affidavit, Endipa’s assets were seized by the Court.
13. Mr Neto’s sister, Ms de Barros appealed but on 8 February 2017, the São Paulo Court of Appeal upheld the first instance decision, referring in its judgment to evidence of Mr Neto diverting assets away from Nilza to defraud its creditors. Dr Leite states:

“it is my position that the Endipa Extension Application is therefore now final given that all proper avenues to appeal it have been exhausted”.
14. However, on 6 November 2017, Ms de Barros filed a fresh application, which resulted in a first instance judgment that Nilza’s creditors are entitled only to one sixth of Endipa’s equity (as opposed to Endipa being jointly liable for Nilza’s debts). The one-sixth share appears to have been calculated by reference to Mr Neto’s entitlement to inherit one sixth of Endipa’s shares from his father.
15. Dr Leite has lodged an appeal against the one-sixth decision and states that in the meantime:

“the current legal status of the extension of Nilza's bankruptcy to Endipa is effective, contingent on the reversal of the [one sixth decision] by the Court of Appeal”.

## **Appointment as provisional judicial administrator of Buglin and Endipa**

16. In July 2017, Dr Leite applied in his capacity as Judicial Administrator of Nilza, to be appointed as provisional judicial administrator of various other companies including Buglin and Endipa. The orders were made, and Dr Leite has provided copies and translations.
17. His first affidavit (and Mr Kaysserlian's witness statement) explains that the orders were made pursuant to a number of Brazilian legal provisions:

“(a) Article 49 of the Civil Code which states that, if a legal entity does not have proper administration or management of its own, a judge will appoint a Provisional Administrator at the request of any interested party. The judge in this instance did not feel that the Companies had proper administration or management, and so saw fit to appoint me as its Provisional Administrator of them upon my application. I was an “interested party” in this regard as I am the Judicial Administrator of Nilza, and the Companies had probably transacted using monies that Nilza (and therefore its creditors) is entitled to;

(b) Articles 153 – 155 (inclusive) of the Stock Corporations Law, which concern an Administrator's duties in respect of the company they run. An “Administrator” in this context is responsible for the running of the company's business. Whilst Articles 153 – 155 set out the general rules concerning the duties that an administrator has to the company and its shareholders, the exact role of an administrator, including its obligations and powers, is governed by the Articles of Association or Bylaws of the relevant company. The Brazilian Court did not feel that these duties were being carried out properly in respect of Buglin and Endipa given their continued mismanagement, and for that reason it agreed that both needed proper representation in order to preserve their remaining assets; and

(c) Article 64 (III) of the Bankruptcy Law, which states that if, during the course of a judicial reorganisation/recovery procedure, the debtor company's administrators are considered unfit to continue in their role(s) due to mismanagement, their behaving in bad faith or acting fraudulently, the Brazilian Court can remove the administrator(s) concerned from those position(s). Article 65 of the same law dictates that the choice of the new manager is to be made by a Creditors' Assembly.”

18. Dr Leite continues:

“Although the order extending Nilza's bankruptcy to Endipa is not yet final, and my application concerning Buglin has not yet been heard, the Court nevertheless saw fit to dismiss the administrators of the Companies and appoint me as Provisional Judicial Administrator under Article 64(III) of the Bankruptcy Law owing to the circumstances of the case and the fact that there were procedures on foot (i.e. the Extension Applications) which could be considered as petitions for involuntary bankruptcy.

Taking into account the specific circumstances of Buglin and Endipa and their links to Nilza's bankruptcy in respect of which I was already appointed, the Court decided that in this instance there was no need for the decision to be submitted to

a Creditors' Assembly under Article 65 of the Bankruptcy Law. Moreover, they were both subject to careless management and, more importantly, probably transacted using funds that Nilza was entitled to, meaning that they fall within the remit of these Articles.

For these purposes, I confirm that the only operative difference between the phrases "Provisional Administrator" and "Provisional Judicial Administrator" is the fact that the Court is involved in the appointment of a Provisional Judicial Administrator. A Provisional Administrator can be appointed outside of court by the company itself, and the mechanism for such appointment can also be provided for in a company's by-laws if the "official" administrator is removed from office or passes away. A "Provisional Judicial Administrator" is a Provisional Administrator who has been appointed by the Court.

The basis for my appointments in respect of the Companies is therefore that they, and their assets, are in need of preservation pending the outcome of the Extension Applications in circumstances where they do not have adequate or appropriate management of their own. This is made clear on pages 311 and 322 wherein the Provisional Orders both state that:

'when there is a risk to preserve the company and consequently, its equity, with impact on third parties' right (creditors), it is prudent and necessary that the State Judge appoints a judicial administrator to manage the company and inspect its administration'.

This makes it clear that, in circumstances where the Brazilian Court felt there was a risk to the Companies and their assets with the possible impact on creditor rights, it concluded that it was prudent to appoint me to manage the Companies and preserve their assets.

Furthermore, Brazilian law does not permit the misuse of one company to another company's detriment. In this case, the Brazilian Court concluded that, given that the Companies have apparently received assets to which Nilza (and therefore Nilza's creditors) is entitled, it was important to appoint Nilza's Judicial Administrator (i.e. me) as Provisional Judicial Administrator in respect of those entities in order that he has powers to gather information on Buglin and Endipa and to recover their assets (in the same way as I have the power to do in respect of Nilza). The reason that the appointments are provisional is because the Extension Application to Buglin has not yet been determined by the Brazilian Court and the Extension Application to Endipa is pending the outcome of my appeal challenging the [one-sixth] Decision.

As the court-appointed Provisional Judicial Administrator of the Companies, I have the power to collect, manage and preserve their assets, as well as gather information on them, as their properly appointed manager/administrator. I am essentially a formal "controller" of the Companies in circumstances where they do not have adequate management of their own.

I have two main duties in respect of the Companies. The first of those is to preserve the Companies, and the second is to gather in their assets. In respect of the latter, funds I recover will, for the moment, be placed into a "judicial account", where

they will be under the Brazilian Court's direct control, and any other assets I recover will be kept under my custody, until there is a final ruling on the Extension Applications. All of the above applies whether, in the end, the Companies' assets are eventually subsumed into Nilza's bankruptcy. I have been appointed to preserve the Companies' assets in the interim for the ultimate benefit of their and Nilza's creditors".

19. Mr Kaysserlian states, in addition:

"Although Dr Leite's appointments in respect of Buglin and Endipa are 'provisional' in nature, given that neither of them is (or ever has been) a trading entity, it is reasonably likely that they will both eventually be subject to liquidation".

### **Legal principles – the Cross Border Insolvency Regulations 2006**

20. The CBIR were introduced pursuant to section 14 of the Insolvency Act 2000 to give effect, in Great Britain, to UNCITRAL's Model Law on Cross-Border Insolvency. The UNCITRAL Model Law, with certain modifications, is set out in Schedule 1 to the CBIR.

21. Regulation 2(2) provides:

"(2) Without prejudice to any practice of the court as to the matters which may be considered apart from this paragraph, the following documents may be considered in ascertaining the meaning or effect of any provision of the UNCITRAL Model Law as set out in Schedule 1 to these Regulations—

- a) the UNCITRAL Model Law;
- b) any documents of the United Nations Commission on International Trade Law and its working group relating to the preparation of the UNCITRAL Model Law; and
- c) the Guide to Enactment of the UNCITRAL Model Law (UNCITRAL document A/CN.9/442) prepared at the request of the United Nations Commission on International Trade Law made in May 1997.

22. Article 15(1) provides:

"1. A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.

2. An application for recognition shall be accompanied by—

- (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
- (b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or



(c) in the absence of evidence referred to in sub-paragraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

3. An application for recognition shall also be accompanied by a statement identifying all foreign proceedings, proceedings under British insolvency law and section 426 requests in respect of the debtor that are known to the foreign representative.

4. The foreign representative shall provide the court with a translation into English of documents supplied in support of the application for recognition”.

23. Article 16(1) provides that if the decision or certificate referred to in paragraph 2 of Article 15 indicates that the foreign proceeding is a “foreign proceeding” within the meaning of Article 2(i) and that the foreign office holder is a “foreign representative” within the meaning of Article 2(j), the court is entitled so to presume.

24. Article 17 provides:

“1. Subject to article 6, a foreign proceeding shall be recognised if—

(a) it is a foreign proceeding within the meaning of sub-paragraph (i) of article 2;

(b) the foreign representative applying for recognition is a person or body within the meaning of sub-paragraph (j) of article 2;

(c) the application meets the requirements of paragraphs 2 and 3 of article 15; and

(d) the application has been submitted to the court referred to in article 4.

2. The foreign proceeding shall be recognised—

(a) as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or

(b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of sub-paragraph (e) of article 2 in the foreign State”.

25. The term “foreign proceeding” is defined in article 2(i) as “a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation”.

26. Article 2(j) provides: “‘foreign representative’ means a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding”.

27. Article 21 sets out the relief that may be granted on recognition of a foreign proceeding and includes, at sub-paragraph (1)(d):

“(d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities”;

and at sub-paragraph (1)(g):

“(g) granting any additional relief that may be available to a British insolvency officeholder under the law of Great Britain”.

### **Recognition of the Buglin and Endipa Extension Applications under the CBIR**

28. The Buglin and Endipa Extension Applications do not have a direct parallel under English law. In my judgment, the Orders of His Honour Judge Dr Héber Mendes Batista (i) extending Nilza's bankruptcy to Endipa's assets, dated 23 October 2015; and (ii) appointing Dr Leite as Provisional Judicial Administrator in respect of Buglin and Endipa, do not indicate with sufficient clarity that the proceedings are “foreign proceedings” for the presumption in Article 16(1) to apply.

#### ***Are the Extension Application proceedings “collective”?***

29. A matter of concern, when this unopposed application came before me, was whether, to be capable of recognition under the CBIR, the proceedings must be collective in the sense that the applicant company's assets are administered for the benefit of its own creditors, and not for the benefit of another entity's creditors.
30. For assistance, and as contemplated by Regulation 2(2) of the CBIR, I have considered the documents produced by UNCITRAL's Working Group V on Insolvency and in particular, the Guide to Enactment of the Model Law (the “Legislative Guide”).
31. Until 2010, the provisions of the Legislative Guide were restricted to insolvency law as it relates to individual debtors. However, in 2010, the Commission adopted the text of a new Part 3 to the Legislative Guide: “Treatment of Enterprise Groups in Insolvency” (“Part 3”). Part 3 recognises that increasingly, the business of corporations is conducted both domestically and internationally, through “enterprise groups”. Part 3 notes:
- “Despite the absence of legislation, judges and insolvency representatives in many countries, faced with issues that may better be addressed by reference to a single enterprise rather than a single corporate entity, have developed solutions to achieve results that more accurately reflect the economic reality of modern business”.
32. Part 3 draws a distinction between “procedural coordination” defined as:
- “the coordination of the administration of two or more insolvency proceedings in respect of enterprise group members. Each of those members, including its assets and liabilities, remains separate and distinct”;

and substantive consolidation, defined as

“the treatment of the assets and liabilities of two or more enterprise group members as if they were part of a single insolvency estate”.

33. The introduction to Part 3’s chapter on substantive consolidation explains:

“Substantive consolidation ... permits the court, in insolvency proceedings involving two or more enterprise group members, to disregard the separate identity of each group member in appropriate circumstances and consolidate their assets and liabilities, treating them as though held and incurred by a single entity”.

34. The commentary to Part II, Chapter B of Part 3, “Application and Commencement”, contemplates scenarios where substantive consolidation is effected by just one application being made to open proceedings in respect of the entire group – so-called “group proceedings”:

“As a general rule, insolvency laws respect the separate legal status of each enterprise group member, and a separate application for commencement of insolvency proceedings is required to be made with respect to each of those members. Moreover, each of those members must be covered by the insolvency law (see recommendation 10) and satisfy the standard for commencement of insolvency proceedings (see recommendations 15 and 16). *Some laws make provision for limited exceptions that allow a single application to be extended to other group members where, for example, all interested parties consent to the inclusion of more than one group member; the insolvency of one group member has the potential to affect other group members; the parties to the application are closely economically integrated, such as by intermingling of assets or a specified degree of control or ownership; or consideration of the group as a single entity has special legal relevance, especially in the context of reorganization plans*”. (Emphasis added.)

35. A form of such group proceedings came before the court in *Agrokor DD* [2017] EWHC 2791 (Ch). Agrokor was the holding company of Croatia’s largest privately owned group of companies specialising in agriculture and food production. Its financial difficulties prompted the enactment of new legislation in Croatia to facilitate the restructuring of the holding company as well as, and in the same proceedings, its subsidiaries and affiliates, thereby enabling them to continue as going concerns. The day after the legislation was passed, the holding company and its subsidiaries applied to enter extraordinary administration. Some of the company’s debt obligations were in England. The holding company, and not its subsidiaries, applied to the English court for the extraordinary administration - apparently a form of group proceedings - to be recognised as “foreign proceedings” under the CBIR.

36. His Honour Paul Matthews, sitting as a Judge of the High Court, identified the question before him:

“do the CBIR make it possible to recognise in England a foreign proceeding which is expressly brought in a foreign court in respect of a *group* of companies, even though recognition here is sought only in relation to *one specific company* which is identified in the application?”.

37. The application was challenged by a substantial creditor, *inter alia* on the basis that the group proceedings in respect of the holding company and its subsidiaries fell outside the scope of Article 2(i) and was not a "foreign proceeding". Of potential relevance to the question now before me, the Respondent argued that to be collective, for the purposes of the Model Law, the proceeding must be between a debtor and its creditors, not between a debtor and another entity's creditors.
38. HHJ Matthews considered two decisions from the United States (*Re Rede Energia SA* and *Re OAS SA*) as well as the Legislative Guide and "The UNCITRAL Model Law on Cross Border Insolvency: the Judicial Perspective" (the "Judicial Perspective Paper"). He held that the CBIR did not prevent a foreign proceeding being recognised where it involves a group of companies with recognition requested only in relation to a single company. At paragraph 52 of his judgment, he said:

"The effect of recognition, as shown by article 20 and 21 of schedule 1, is on the particular debtor and the particular debtor's position, so there would be no problem in itself in recognising a foreign proceeding in relation to a particular debtor. As I have said above, the Guide, the working group reports and the Judicial Perspective Paper all show that the focus is on the individual debtor and not on groups. It is clear that a group proceeding cannot be recognised as such. But the materials do not say that it is impossible to recognise a group proceeding as a proceeding *in respect of a particular debtor*, if it otherwise meets all the relevant criteria. On the contrary, the Judicial Perspective Paper at [64] assumes that this is possible. So do the American cases of *Rede* and *OAS*.

[53] Given the problems that are or might be caused by attempting to recognise group proceedings as such, it may well have been a good idea not to provide for this in the Model Law. But at the same time, it would be sensible to allow for the recognition of the position of individual debtors caught up in a group insolvency procedure. Since such groups are today very common, not to do so would leave a significant hole in the range of possible options for international recognition. Whenever there were insolvency proceedings involving a group of companies as such, it would not be possible to recognise those proceedings in relation to any debtor. That would be going much further than refusing to recognise the group proceedings as a group. And in my judgment, it is not the law".

[54] Of course there may then arise a further question, which is how to decide what is an insolvency involving a group of companies. There was some debate before me as to whether an appropriate test would be whether there was simply procedural consolidation of the proceedings involving different companies, so that the distinct proceedings were heard simultaneously by the same judge and using the same materials, or whether it was necessary to have substantive consolidation of those proceedings, so that the estates were merged. But it is not necessary for me now to resolve any of these questions. The important point is simply this. There is nothing in the CBIR to prevent a foreign proceeding being recognised, which in the foreign court involves a group of companies, but the recognition is sought in this country in relation only to a particular individual debtor. In my judgment, the respondent's objection here is without foundation".

39. The framework I have identified above includes:
- i) procedural coordination of separate proceedings affecting individual entities;
  - ii) proceedings commenced separately against each entity but in which, at some stage, an order is made for the substantive consolidation of their assets; and
  - iii) the more radical concept of “group proceedings” where there is only one application and one set of proceedings in respect of two or more separate entities whose assets are consolidated from the start.
40. The Extension Application proceedings appear to me to fall somewhere between (ii) and (iii). They do not appear to be group proceedings, as seen in *Agrokor*, where there was one application to the Croatian court and one set of proceedings in respect of all entities in the group. Rather, separate applications have been made, and have reached different stages in respect of each entity: an order was made in the Endipa Extension Application on 23 October 2015, but the Buglin Extension Application is yet to be heard.
41. As summarised at paragraph 10 above, Dr Leite explains that the Brazilian Court can either grant the application and extend the bankruptcy, so that the Connected Third Party also enters bankruptcy, or make the Connected Third Party liable for the bankrupt company’s debts, but without making it bankrupt in its own right. In his First Affidavit he says:
- “Once the Extension Orders are final ... the Companies will be placed into bankruptcy. This means that their assets will be gathered internationally, to be distributed to their creditors (and those of Nilza, as to which see paragraph 7.2(a) below) in a prescribed order.
- As set out above, precedent set by the Brazilian courts indicated that the Extension Orders would also have the effect of consolidating Endipa and Buglin’s assets with those of Nilza into a single bankruptcy estate (see by way of example of a case in which this was considered, Appeal 1030355-36.2001.8.26.0100 which is discussed at paragraph 5.15 above) with creditors of all three companies to be treated as one body of creditors. There is a small possibility that the estates would remain separate, although I am advised by my Brazilian lawyers that this is very unlikely to happen.
- Subject to [the preceding paragraph] Nilza’s creditors would therefore be entitled to all of the assets in the Companies’ estates if the Extension Orders are made final”.
42. From this, I discern that the likely outcome of the Extension Applications will be the substantive consolidation of the assets and liabilities of all three companies, although there appears to remain a possibility that, with the benefit of further information, Dr Leite may be able to unravel co-mingled assets, and trace those originally belonging to Nilza in a manner which permits the insolvent estates to remain separate.
43. Whilst the concept of extension proceedings does not arise in English law, consequences, such as described by Dr Leite, are not entirely unfamiliar to the English

courts. In *Re BCCI (No.3)* 1 BCLC 1490 the liquidators of BCCI sought the sanction of the court for a pooling agreement, where the assets of BCCI and another company would be combined. The creditors' committee opposed the proposals, but they were nevertheless approved by Sir Donald Nicholls V-C. In the Court of Appeal, Dillon LJ approved the following conclusion of the then Vice Chancellor:

“The creditors' committee and others contended that I have no jurisdiction (that is, legal power) to approve these proposals on this application by the liquidators. The argument was that in several respects the proposals involve a variation in the rights of creditors and that such a variation can only be sanctioned so as to bind the creditors as part of a formal scheme of arrangement under s 425 of the Companies Act 1985. I do not agree. The liquidators' powers under paras 2 and 3 of Sch 4 to the Insolvency Act 1986, exercisable with the approval of the court, are wide and they are wide enough to cover this case. In so far as the package does involve departures from the simple and fundamental principle that an insolvent company's assets should be distributed equally among all its creditors, I would in normal circumstances expect the scheme of arrangement procedure to be followed. That procedure contains additional safeguards for creditors. But if that procedure is followed in this case the proposals will flounder and sink in a morass of elaborate legal procedures and niceties. That cannot be the right way to approach this exceptional case.

It seems to me that, in the very similar circumstances of this case, *Re Taylor* [1993] BCLC 1343 is authority to warrant the conclusion at which the Vice Chancellor arrived. Of course, in this case it is not possible to tell what the assets of SA and Overseas are, but it is possible, to some extent at any rate, to say who the creditors are. But it is not practicable to hold meetings, let alone class meetings, to ascertain the wishes of the creditors. I therefore do not see any real difference between the present case and *Taylor*”.

44. *Re BCCI (No.3)* demonstrates that whilst the *pari passu* principle forms a fundamental principle of English insolvency law and requires the distribution of an insolvent entity's assets equally among creditors of the same class, in appropriate, rare and extreme circumstances, the English courts have been prepared to make so-called “pooling orders”.
45. There is no suggestion in this case, as there was in *Re Stanford International Bank* [2011] Ch 33 that the Extension Applications are for the benefit of only one class of creditor (the court having decided that the receivership in *Stanford* was not “collective” as it was intended to benefit only investors). There is no suggestion of an intention to exclude any class of creditor from the Companies' combined assets.
46. By:
  - i) adopting the rationale applied by HHJ Matthews in *Agrokor*, that it would create a significant hole in the range of possible options for international recognition if the English courts were not prepared to recognise proceedings affecting a distinct company within a form of “group proceedings” that is unfamiliar to this jurisdiction; and

- ii) taking into account the court's willingness, in extreme and unusual circumstances, to permit a liquidator to pool the assets of two or more insolvent entities,

I am satisfied that the likely pooling of Buglin and Endipa's assets to meet the claims of Nilza's creditors does not preclude the Extension Proceedings from being "collective proceedings" for the purposes of the CBIR.

***Are the Extension Application proceedings judicial or administrative proceedings in a foreign State, in which the companies' assets and affairs are subject to control or supervision by a foreign court?***

47. The Judicial Perspective provides:

"The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. The Guide to Enactment and Interpretation of the Model Law indicates that although it is intended that the control or supervision required under subparagraph (a) should be formal in nature, it may be potential rather than actual. A proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession, would satisfy this requirement. Control or supervision may be exercised not only directly by the court, but also by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Mere supervision of an insolvency representative by a licensing authority would not be sufficient.

...Subparagraph (a) of article 2 makes it clear that both assets and affairs of the debtor should be subject to control or supervision; it would not be sufficient if only one or the other were covered by the foreign proceeding".

48. It also notes that, at the date of its publication, the concept of "control or supervision" has received limited judicial attention.
49. For the following reasons, I accept Dr Leite's evidence that the Extension Applications are "judicial" and that Buglin and Endipa's affairs and assets are subject to the control of the Brazilian Court. If granted, the Extension Orders will be made by the court. Dr Leite's provisional appointments have been made by the court. Any monies collected by him must be paid into the Brazilian court funds office where they are subject to the Brazilian court's control. Dr Leite is a lawyer enrolled by the São Paulo Bar Association and describes himself as an "officer of the court". Article 22 of the Brazilian Bankruptcy Law expressly provides that:

"The court-appointed administrator shall be responsible for, *under the supervision of the judge* and the Committee, in addition to other duties imposed upon by this Law ... (III...)(f) collecting the debtor's asset and documents and preparing a notice of collection ... (o) applying for all actions and procedures as are required to enforce this Law, to enforce the estate, or to ensure efficient administration" (emphasis added).

The Brazilian court's supervision is demonstrated by Dr Leite's application before Judge Héber Mendes Batista dated 23 April 2019, seeking judicial authorisation to apply for

recognition in England and to obtain information and documentation from abroad, “especially in the United Kingdom” regarding Buglin and Endipa’s affairs.

***Are the Extension Proceedings “pursuant to a law relating to insolvency”?***

50. Dr Leite states:

“Although there is no statute governing the extension of bankruptcy to companies such as Buglin and Endipa, a line of case law has developed in Brazil to the effect that the effects of bankruptcy can be extended to companies such as these which are closely connected with the original bankrupt entity (in this case, Nilza)”.

“The proceedings are for the purpose of liquidation i.e. to ensure that proven creditors’ claims are satisfied to the fullest extent possible from the assets of the Companies’ estates. If Nilza’s bankruptcy is extended to Buglin and Endipa, then, as explained above, Buglin and Endipa will themselves be placed into liquidation”.

51. The jurisdiction relied upon for Dr Leite’s appointment included both company law provisions, to fill a lacuna in a company’s management, and Article 64(III) of Brazil’s Bankruptcy Law.

52. Article 2(i) of the Model Law expressly states that the term “foreign proceeding” includes interim proceedings. Dr Leite’s appointment as Provisional Judicial Administrator of Buglin and Endipa bears similarities to the appointment, in this jurisdiction, of a provisional liquidator, where a company’s assets are preserved for the benefit of a company’s creditors.

53. Taking into account Dr Leite’s explanation of the basis on which he was appointed, the source of the Court’s jurisdiction when appointing him and the similarities between his appointment and the appointment of a provisional liquidator, I am satisfied that for the purposes of Article 2(i), the Extension Applications are “*interim proceedings pursuant to a law relating to insolvency*”, “*for the purpose of liquidation*”.

***Is Dr Leite a “foreign representative”?***

54. As noted, Dr Leite has been appointed on an interim basis by the Brazilian Court, pending final determination of the Extension Applications, pursuant to the Brazilian Bankruptcy Law and Civil Code, with the power to preserve, manage and collect in the companies’ assets. Subject to the court determining that the Extension Applications are “foreign proceedings”, these factors persuade me that Dr Leite is a “*foreign representative*” of each company, entitled to apply to this court for recognition.

**Procedural requirements**

55. Each of the procedural requirements set out in Article 15 and Schedule 2 to the CBIR has been satisfied, other than service of the application and accompanying evidence on the debtor. As Buglin and Endipa have been under Dr Leite’s sole control for some time, no purpose would be served by requiring him to serve a copy of the April 2020 Application on himself. I waive the requirement for him to do so.



### **Conclusion regarding recognition**

56. The requirements of Article 17 of the Model Law have been met. I am not aware of any grounds which would make it manifestly contrary to the public policy of England for the court to recognise the Extension Applications. Consequently, pursuant to Article 17, the court is obliged to recognise the Extension Applications as “foreign proceedings”. Buglin and Endipa are both incorporated and each has its registered office, in Brazil. Article 16(3) provides that in the absence of proof to the contrary, a debtor’s registered office is presumed to be its centre of main interests. There is no contrary evidence. The Extension Application proceedings are recognised as main proceedings of which Dr Leite is the foreign representative.
57. The question of recognition under the common law need not be considered.

### **Relief sought upon recognition**

58. In light of the interim nature of his role, Dr Leite chose not to pursue the part of his application which sought an order, should he be recognised, entrusting him with powers to realise and distribute Buglin and Endipa’s assets in this jurisdiction. He did, however, seek orders for disclosure of documents held by Amicorp in respect of the affairs of Buglin and Endipa on the same basis as pursued in relation to Nilza.

### **The Disclosure Applications**

#### **Amicorp (UK) Limited and Tipuana Investments LLP**

59. I have already recited the provisions of Article 22 of the Brazilian Bankruptcy Law (which together with Articles 396 to 404 of the Civil Procedure Code) empower Dr Leite as Provisional Judicial Administrator to collect, manage and preserve Buglin and Endipa’s assets, as well as to gather information about their affairs. Dr Leite’s evidence confirms that if Amicorp were subject to the jurisdiction of the Brazilian court, he would be entitled to disclosure of documents by Amicorp and, if necessary, to apply to court for an order compelling such disclosure.
60. On 23 April 2019, Judge Héber Mendes Batista made an order whereby Dr Leite “in his capacity as Judicial Administrator of [Buglin] and [Endipa]” was “authorised with the collection, levy and restriction of any and all documents or financial assets belonging to [Buglin] and [Endipa] especially in the United Kingdom”.
61. Dr Leite’s April 2018 and April 2020 Applications both seek orders requiring Amicorp to provide disclosure of any documents in its possession relating to the affairs of Tipuana – described in the April 2018 Application as “Tipuana Investments Ltd” and in the April 2020 Application as “Tipuana Investments LLC”. Dr Leite explains in his Third Affidavit that the Application contained an error and should have referred to Tipuana Investments LLP (“Tipuana”). This was brought to the Respondent’s attention by letter dated 21 June 2018. Dr Leite’s solicitors’ first letter to the Respondent dated 5 October 2016 referred correctly to the LLP.
62. Dr Leite’s Second Affidavit provides a detailed explanation of his investigations into the affairs of Nilza and why he considers Amicorp may hold important information. This is again, helpfully summarised in Mr Beswetherick’s skeleton argument:

“Mr Neto is a shareholder in Buglin. He is also connected to Endipa:

- (1) He was previously one of its direct shareholders and part of its management, but his shares were transferred to his father (Mr Filho) in 1997 at which time he left his position on its board. However, Dr Leite explains that, following Mr Filho’s death in January 2014, Mr Neto and his two sisters have become heirs to those shares.
- (2) The remaining shares in Endipa are registered in the name of an English limited liability partnership, Tipuana. Tipuana was incorporated on 14 July 2003 and dissolved on 28 April 2015. Mr Filho was the registered holder of 99.99% of Tipuana’s shares as at the date of his death.

... Dr Leite’s investigations lead him to suspect that:

- (1) Assets belonging to Endipa were transferred to Tipuana prior to Tipuana’s dissolution;
- (2) Buglin entered into various transactions with Endipa (including agreements in 1996 to make substantial loans to Endipa) which require investigation;
- (3) There may have been a pattern of common management and confusion of assets between various companies connected with Mr Neto and Mr Filho.

However, it is fair to say that the picture is opaque and Dr Leite has not been able to identify whether funds belonging to and misappropriated from Nilza were received or held by any of Tipuana, Endipa or Buglin. Nor are the connections between the various companies clearly defined. Through these applications, Dr Leite hopes to obtain a better understanding of the affairs of the companies over which he has been appointed.

Dr Leite believes that Amicorp may hold information relating to all three companies, their affairs and their dealings. Amicorp appears to be the provider of corporate services. Its registered office address was the same as Tipuana’s address and, in documents obtained by Dr Leite, Amicorp was identified in documents obtained in the British Virgin Islands as one of Tipuana’s “*domiciliation offices*”, suggesting that it provided services to Tipuana.

63. In October 2016, Dr Leite’s solicitors wrote to Amicorp, explaining his role, that he had identified a likely connection between Nilza and Tipuana and setting out 13 items of information and documentation which he sought from Amicorp concerning the services that it supplied to Tipuana and documents or correspondence relating to Nilza, Mr Filho and Mr Neto. Amicorp responded on 15 December 2016, informing him that Tipuana never executed transactions and did not have any business relationship with Nilza, but it did not address the other enquiries. This prompted Dr Leite to issue the April 2018 Application for disclosure.
64. Edwin Coe were instructed to represent Amicorp in the application and directions were made and extended by consent for Amicorp to serve evidence in answer. Correspondence between the parties’ solicitors continued and on 18 June 2018, Edwin Coe stated that Amicorp was prepared to cooperate but underlined that it was bound by

duties of confidentiality to its clients and could only disclose information when required to do so by law, including by court order. They informed Dr Leite's solicitors that Amicorp had "undertaken a reasonable and proportionate search of its database to identify whether any of the parties listed in the application notice is a client" and confirmed that Amicorp did not have a client relationship with any of the named entities and "does not hold and has not processed information concerning" those entities. The list included, however, the erroneous reference to Tipuana Investments Limited. Information available to Dr Leite led him to believe that Amicorp would have information about Tipuana – the LLP. Correspondence between the parties continued, and on 21 August 2018, Edwin Coe repeated statements made in earlier correspondence that Amicorp did not intend to oppose the application and explained that when searching for the seven entities listed in the April 2018 Application, it had performed a database search for each one, which "returned a negative result – no documents".

65. In making the 2020 Application, Dr Leite has narrowed the scope of the information and documents he seeks to obtain from Amicorp. The list of seven entities in the April 2018 Application is not being pursued and instead, he seeks disclosure of documents in its possession relating to Nilza, and, if recognised as a foreign representative by this Court also Buglin and Endipa, including documents relating to Tipuana which relate to the affairs of the Companies.
66. Article 21(1)(g) of the Model Law enables Dr Leite to apply for any relief that is available to an English insolvency officeholder. In England, such an insolvency officeholder may apply to court for an order under section 236 of the Insolvency Act 1986. Section 236(3) provides that the court may require any person known or suspected to have in his possession any property of the company or whom the court thinks capable of giving information concerning the promotion, formation, business dealings, affairs or property of the company ("Relevant Information") to submit an account of such dealings to the court or to produce any books, papers or other records in his possession or under his control relating to the company or which is Relevant Information.
67. When considering an application under section 236, the court's discretion is unfettered but, as set out in *Re British & Commonwealth Holdings plc* [1993] AC 426, the court will conduct a careful balancing exercise, asking whether the officeholder reasonably requires the information to carry out his task. The officeholder's view as to whether information is reasonably required carries a good deal of weight. In carrying out the balancing exercise, the court will be astute to avoid making an order which is wholly unreasonable, unnecessary or oppressive.
68. I am satisfied that if Amicorp holds any documents belonging to, or containing Relevant Information concerning Nilza, Buglin and Endipa, they are documents which fall within the scope of section 236 and should be disclosed to Dr Leite.
69. In relation to Tipuana, Dr Leite summarises his application:

"I have not, at this stage, been able to establish whether any funds received or held by Tipuana, Endipa or Buglin are derived from property misappropriated by Nilza. However ... I am the Provisional Judicial Administrator for Endipa and Buglin, and these companies' assets can be collected for the benefit of Nilza's creditors, and I believe, that Tipuana might, as majority shareholder of Endipa, having

information regarding Endipa's assets which would assist my investigations and asset recovery. This is particularly important now that I have been made Provisional Judicial Administrator of Endipa and Buglin, as information held by Tipuana will clearly be relevant to Endipa's affairs and it is now my duty to investigate those affairs, as well as the effective beneficiaries' of Buglin's unpaid loans".

70. I am satisfied from the information set out in Dr Leite's evidence that Amicorp may hold documents relating to Tipuana.
71. In my judgment, the fact that the Brazilian court has considered Endipa's affairs to be so closely connected to those of Nilza that the former's assets may ultimately be realised for the benefit of Nilza's creditors, and as Tipuana at one time held the majority of the shares in Endipa, it seems likely that information held by Amicorp on behalf of Tipuana may provide an insight into the relationship between Nilza and Endipa and the movement of assets between the two.
72. The court will not make an order under section 236 which it considers would be unreasonable, unnecessary or oppressive. Whilst Amicorp does not oppose Dr Leite's application and has not suggested any reasons why an order would be oppressive or should otherwise be refused, it has already undertaken a search for documents relating to the Companies. Edwin Coe informed Dr Leite's solicitors that the "reasonable and proportionate search of its database" Amicorp undertook was a word search against each of the company's names. They said that the results of those searches suggest that it has not processed information concerning the Companies and that the logical inference to draw from this, is that Amicorp has no information regarding the Companies which would be susceptible to production under section 236.
73. Mr Beswetherick submitted that it is unclear whether Amicorp searched only for the Companies' full names or whether the searches included variations or abbreviations of the names. It would, in my judgment, be appropriate for an order under section 236 to require Amicorp, when complying, to set out details of the searches which it has undertaken. This will assist the court in determining the necessity or reasonableness of a further order, if one were to be sought in the future.

## **Conclusion**

74. Pursuant to the CBIR, this court recognises (i) the Buglin and Endipa Extension Applications as foreign main proceedings and (ii) Dr Leite as the foreign representative acting in relation to those proceedings.
75. In my judgment it is appropriate to grant relief pursuant to Article 21(1)(g) by making an order requiring Amicorp to disclose to Dr Leite documents and Relevant Information it holds regarding the Companies, including documents which it holds on behalf of Tipuana which relate to the Companies' affairs. When complying with the order, Amicorp should provide details of the searches it has undertaken.
76. Dr Leite's application was first issued in 2018. His evidence did not suggest any urgent need for him to view the documents held by Amicorp. The current pandemic imposes unusual constraints and pressures on most entities' resources. As noted by the Court in *Re Harvest Finance Ltd (In Liquidation)* [2014] EWHC 4237 (Ch), the provision of

information to an office holder, albeit under compulsion, is “a public duty in aid of the administration of justice”. In my judgment, Amicorp should be given a reasonable time to undertake its public duty. I assess a reasonable time for compliance to be 56 days.

77. Counsel should please provide a draft order. As Amicorp will be required to provide details of the searches which it has undertaken, it is appropriate for Dr Leite to have liberty to apply.