CRAM DOWN AND THE ABUSIVE EXERCISE OF THE RIGHT TO VOTE BY THE CREDITOR: AN ANALYSIS OF THE LEGISLATOR'S DEMOCRATIC INTENTS AND RECENT JURISPRUDENCE IN BRAZILIAN COURTS

by **Aguinaldo RIBEIRO JR**, Lawyer (Brazil), **Jéssica Malucelli BARBOSA**, Lawyer (Brazil).

This article aims at analyzing the democratic exercise of voting by creditors and its implication both in the result of the assembly and in the approval of the debtor's judicial reorganization, according to the ordinary and extraordinary procedures of the Brazilian Bankruptcy and Judicial Reorganization Law (Law 11.101/2005). To that end, the main principles of the Brazilian reorganization system will be presented, as well as the cases that allow for judicial reorganization as expressly provided for in the law and their practical aspects. The article will also indicate the inclination and application of the possibilities of approval of a judicial reorganization by the Judiciary in face of the non-acceptance of the plan through ordinary voting, by instruments such as cram down and abusive exercise of the right to vote. Finally, it will address modern doctrines that have been accepted before Brazilian Courts, with comments based on the author's practical experiences.

§ 1 – BRAZILIAN JUDICIAL REORGANIZATION SYSTEM AND ITS GUIDING PRINCIPLES

Reorganization law is widely recognized as a necessary measure to reduce negative impacts of the failure of business activities[1], so common in Brazil, mostly due to the high level of insecurity and economic volatility. The Judicial Reorganization Law currently has as main objective the preservation of a company's source of wealth, avoiding the negative impact of bankruptcy to the company, its creditors and the society. This is due to the realization that stimulating the effort of those affected by the crisis of a company may be less damaging than bankruptcy. Bankruptcy, as will be demonstrated, is the path to the company whose economic activity is no longer feasible.

[1] M. B. LISBOA et ALII, "A Racionalidade Econômica da Nova Lei de Falência e de Recuperação de Empresas", in Luiz Fernando Valente de Paiva (Coord), *Direito Falimentar e a Nova Lei de Falências e Recuperação de Empresas* Quartier Latin, São Paulo, 2005, p. 31.

In practice, the active participation of creditors in reorganization processes has proven to be more effective than the simple imposition of conditions of reorganization, as occurred under the former legislation, namely Decree 7,661 of 1945, which provided for the concordat[2]. This perception was adopted by several legal systems prior to coming into force in Brazil. In the words of Renaldo Limiro da Silva:

> "It is desirable for creditors to actively participate in bankruptcy and reorganization proceedings, so that, by acting in defense of their interests, especially the recovery of their rights, they optimize the results obtained with the process, reducing the possibility of fraud or wrongdoing of the company or estate assets."[3]

In this way, in 1867, *the first reorganization procedure* was instituted in the United States[4]. Initially, it concerned only railway companies and has gradually underwent changes that expanded its scope, culminating in the *Chapter Eleven* of the *U.S. Bankruptcy Code*, legislation that has been in force since then.

The French legislation, on the other hand, relies on the *redressement et liquidation judiciaires*, which simplifies the mechanisms of reorganization and is concerned with the right of creditors[5]. This evolution seems to be a worldwide trend and became the rule in Brazil, with Law 11.101/2005, which sought to establish the same goals of the legislative systems aforementioned.

In general, the reorganization system aims at the optimization of the resolution of problems arising from a state of insolvency. As Buschinelli explains, in this new moment of pre-bankruptcy law, the attention was drawn at the *communion of interests*[6], in order to minimize the losses of all the parties involved.

The decision-making power given to creditors under Law 11.101/2005, in contrast to the importance of the judge in the previous system, Decree-Law 7.661/1945, is an indication of the paradigm change that represented the evolution of the insolvency legislation. Free initiative and private autonomy are respected by giving decision-making power to creditors, limiting the judge's discretion to control the legality of decisions taken jointly by the creditors.

The importance given to private autonomy and free enterprise must, however, be balanced so that they allow the effective reorganization of viable businesses, namely those that, using the appropriate means for their reorganization, are still capable of generating jobs and move the economy.

In order for this balance of interests to be effective, Law 11.101/2005 expresses some principles that have served as a

---

[2] M. B. LISBOA et ALII, *Idem*, p. 46.

[3] R. L. SILVA, *A Recuperação Judicial Comentada Artigo por Artigo (Lei 11.101/2005),* Del Rey, Belo Horizonte, 2015, p. 332-333.

[4] W. FAZZIO JÚNIOR, *Lei de Falência e Recuperação de Empresas*, 7 ed., Atlas, São Paulo, 2015, p. 11.

[5] W. FAZZIO JÚNIOR, *Idem,* p. 12

[6] G. S. K. BUSCHINELLI, *Abuso do Direito de Voto na Assembleia Geral de Credores,* Quartier Latin, São Paulo, 2014, p.35.

foundation for the elaboration of its provisions and which should be given priority when applied to a case.

It is important to emphasize that these principles aim at establishing guidelines for the preservation of healthy companies, i.e. those that, after having undergone a reorganization of their debts and benefited from external support for a while, will indeed be able to continue the productive activity. With respect to the application of the legislation:

> "the benefits of judicial reorganization must be guaranteed to companies that are effectively recoverable and not to any claimant simply for having required the legal aid."[7]

In this sense, the intention is not to allow, without criteria, the continuity of any company, which, in the end, would be even more costly to those the law is supposed to protect. Fábio Coelho Ulhoa[8] and Pinheiro and Saddi[9] agree in that some companies need to go bankrupt; for due development of the market and reduction of losses their bankruptcy is the best way out.

The fundamental principles of the Judicial Reorganization Law are in line with the principles of the Constitution of the Federative Republic of Brazil, specifically those aiming at stimulating economic activity, social justice and employment (article 170, II and VII of the Federal Constitution). In fact, they are present in the infraconstitutional principles laid down in the Judicial Reorganization Law in its article 47, which states that:

> "Article 47. The objective of judicial reorganization is to make it possible to overcome the economic and financial crisis of the debtor in order to allow the maintenance of the source of production, the employment of workers and the interests of creditors, thus promoting the preservation of the company, its social function and the stimulus to the economic activity."

Renaldo Limiro da Silva argues that there are twelve principles that govern the Law 11.101/2005; in this article, however, only three of them will be highlighted, namely *the principle of preservation of the company, the principle of reorganization of recoverable companies* and *the principle of active participation of creditors*[10].

The principle of preservation of the company is present throughout the Brazilian Reorganization Law and it is structured to try to maintain the productive activity. The current economic order, based on business activity, found that the premature liquidation of companies in financial distress was less effective than the imposition of sacrifices on the parties involved, but with a subsequent return.

---

[7] J. N. RIBEIRO NETO, "Concessão da Recuperação Judicial" in D. CARNIO COSTA (Coord.). *Comentários completos à Lei de Recuperação de Empresas e Falências: recuperação judicial e extrajudicial*, vol. II, Juruá, Curitiba, 2015, p. 181.

[8] F. U. COELHO. *Comentário à Lei de Falências e de Recuperação de Empresas,* 8 ed., Saraiva, São Paulo, 2011, p. 115.

[9] A. C. PINHEIRO e J. SADDI, *Direito Economia e Mercados*, 4ª reimpressão, Elsevier, Rio de Janeiro, 2005, p. 208.

[10] R. L. SILVA, *ibid.*, p. 332

That is true because companies with conditions to recover, if duly guided through this difficult moment, have the chance to be productive again, so as to raise enough assets to negotiate their debts and move on, generating benefits to society. For this purpose, Law 11.101/2005 was designed to leverage corporate reorganization in order to avoid bankruptcy of healthy companies, which leads to the second principle, the principle of reorganization of recoverable companies.

As previously mentioned, not every company should be the target of an attempt to recover, because, as Fábio Ulhoa Coelho puts it, *not all bankruptcy is an evil*[11]. Judicial reorganization is costly for society, since it may have a cascade effect, whereby other companies find themselves in difficulties due to the delay in receiving their credits. In this way, the social benefit of maintaining the business activity, due to the success of the reorganization process, must be greater than the negative impact it generates to creditors.

For that to take place, it is necessary that the company be viable, and that after the acceptance of the judicial reorganization it will be able to continue its activities without generating new debts. Law 11.101/2005 delegated to the creditors themselves the conduction of the company's feasibility analysis[12]. This relevance approved to them, which is an innovation brought by the law, leads to the third relevant principle, the principle of active participation of creditors.

Creditors are also given the power to decide, in most cases, the fate of the company undergoing judicial reorganization, which is plausible when considering that, in negotiating, creditors and debtor have signed commitments among themselves, based on free initiative. It does not seem coherent that, in dealing with insolvency, one of the traders should be left out, having to defer, without any voice, to any choice made by the State through the Judiciary.

Moreover, the active participation of creditors is a way of avoiding misuse of interests that in cases of reorganization and bankruptcy of companies must always be the interest of the majority. In this sense, an important doctrinal understanding stands out:

> "It is desirable for creditors to actively participate in bankruptcy and reorganization proceedings, so that, by seeking to defend their interests, especially the receipt of their credit, they optimize the results obtained with the process, reducing the possibility of fraud or misappropriation of company funds or bankrupt estate."[13]

In order to strengthen the decision-making power of creditors, the judge is, in principle, limited to the role of ratifying the choice made by them, assuring they are legal. The approval provided for

[11] F. U. COELHO, *ibid.,* p. 173.
[12] Law 11.101, of February 9th, 2005, Official Gazette of February 9th, 2005. (Braz.), Article 53, II and 56, paragraph 2nd.
[13] R. L. SILVA, *ibid.,* pp. 332 - 333.

in article 58 of Law 11.101/2005 is a consequence from assembly the conditions of its article 45, which represents an ordinary system of approval of the judicial reorganization plan.

§ 2 – THE APPROVAL OF THE JUDICIAL REORGANIZATION PLAN IN THE BRAZILIAN LAW.

Law 11.101/2005 provides expressly that the judicial reorganization plan may be approved by the court in three different ways, all of which are contemplated by article 58 of the Law.

> "Art. 58. Once the requirements of this Law have been met, the judge shall approve the judicial reorganization of the debtor whose plan has not been objected by a creditor pursuant to article 55 of this Law or that has been approved by the general committee of creditors according to article 45 of this Law.
>
> Paragraph 1st. The judge may approve the judicial reorganization based on a plan that did not obtain approval in the form of article 45 of this Law, provided that, in that assembly, it has obtained, cumulatively:"

It is therefore understood that (i) in case there are no objections to the plan, the judge must approve the judicial reorganization; (ii) the same holds true for the cases of approval by the quorum established in article 45 of the Law, as will be seen below; and, finally, (iii) the judge may approve the judicial reorganization based on the alternative quorum determined by the clauses of article 58, paragraph 1st, of the Law.

The first hypothesis of approving is rarer, because it is uncommon for a judicial reorganization plan to pass without any insurgency by the creditors, who manifest themselves through the so-called *objection*, provided for in article 55 of the Judicial Reorganization Law. As in other areas of law, the parties that, duly summoned, chose to remain inert, tacitly agree with the situation that is proposed to them. In the judicial reorganization proceeding it is no different. Therefore, if there are no objections to the plan, which is the instrument with the description of the payments, it is assumed that all parties have agreed to it.

Secondly, there is an ordinary rule for verifying the approval of the judicial reorganization plan, which should respect the rule of Article 45:

> "Article 45. In the deliberations on the judicial reorganization plan, all classes of creditors referred to in article 41 of this Law must approve the proposal.
>
> Paragraph 1st. In each of the classes referred to in items II and III of article 41 of this Law, the proposal must be approved by creditors who represent more than half of the total amount of the credits present at the assembly and, cumulatively, by the simple majority of the creditors present.
>
> Paragraph 2nd. In the classes provided for in items I and IV of article 41 of this Law, the proposal must be approved by a

> simple majority of the creditors present, regardless of the amount of their credit.
>
> Paragraph 3rd. The creditor shall not be entitled to vote and shall not be considered for the purposes of determining a quorum of resolution if the judicial reorganization plan does not change the original amount or conditions of payment of its credit."[14]

Since the ordinary form is much more common, it requires, cumulatively, approval by the four classes of creditors subject to the judicial reorganization. For the classes I and IV (labor and micro-enterprise and small business) approval must reach the simple majority of those present at the assembly, regardless of the amount of their credit. In addition, in order to be considered approved by the classes II and III (property guarantee and unsecured guarantee), a minimum of more than half of the total amount of credits installed in the assembly must be reached, in addition to the simple majority of those present.

As a result, the legislator sought to balance the weight of the votes of creditors who, in general, have less bargaining power over the conditions of the plan, so that workers and micro-enterprises, regardless of the amount of their credit, have votes of equal weight. However, regarding the classes of creditors with real and unsecured guarantees, several problems arise from the need to cumulate the approval of the majority of those present with more than half of the amount of their credits. This is due to rather frequent situations in which a creditor is the only one of a certain class or when that credit alone represents more than half of the amount of an entire class, or even that a single creditor holds the majority of all the debt of a company:

> "*Majoritarian creditors* are those whose credits reach amounts that give them a considerable predominance in the deliberations, according to the principle that considers the votes according to the proportionality of the credit in relation to the total amount of debts. [...]
>
> On the other hand, the creditor who holds the credits that ensure, non-eventually, the majority of votes in the deliberations of the general assembly is in *control*."[15]

Aware of this possibility, the legislator provided for an alternative quorum of approval of the judicial reorganization plan, in article 58, paragraph 1st, of Law 11.101/2005. This rule originated in an institute known as Cram Down, provided for in the *Chapter Eleven* of the *Bankruptcy Code*, the law that regulates the bankruptcy and reorganization law in the United States of America.

Thus, the third hypothesis expressly provided for in the Brazilian Bankruptcy and Judicial Reorganization Law, for approving judicial reorganization through the approval of its plan, is that of

---

[14] Law 11.101, of February 9th, 2005, Official Gazette of February 9th, 2005. (Braz.), Article 45.

[15] G. MAMEDE, ***Direito Empresarial Brasileiro: Falência e Recuperação de Empresas,* 7ª ed., vol. 4, Atlas, São Paulo, 2015. p. 90.**

article 58, paragraph 1st, which is considered to be the reception of cram down in Brazilian law.

This article establishes parameters for the judge to analyze, *in casu*, the possibility of electing an extraordinary way of ratifying the plan in favor of democracy. That is, disregarding the will of one creditor in respect of the will of several creditors.

In this reasoning, the new bankruptcy and judicial reorganization system sought to increase the participation of creditors, valuing their choices, by representing the will of the majority in an assembly of creditors.

Law 11.101/2005 was nevertheless cautious in establishing limits and guidelines for this imposition, so that it does not happen without due criteria. Thus, formal requirements are imposed, as listed in items I, II and III of article 58, paragraph 1st of the Law.

Fabio Ulhoa Coelho labels as *intermediary*[16] the possibility of legal approval of the plan that did not meet the ordinary voting quorum, requirement of article 45 of Law 11.101/2005. That is because it would be an option between the homologation of the plan and the decree of bankruptcy, both without opening for discretion of the judge. The approval by cram down, contrary to the two other possibilities, requires the analysis and manifestation of the judge about the plan voted. After all, the law gives the judge the last word in approving or not the judicial reorganization whose outcome of the assembly meets the objective conditions for cram down, in that it makes it clear that "the judge can approve judicial reorganization of the debtor" following those conditions.

§ 3 – THE CRAM DOWN INSTITUTE AS INCORPORATED IN BRAZIL

By implementing a third option for approving judicial reorganization and allowing a departure from the plan that was initially rejected by the general assembly of creditors, once again one notices the legislator's option for the continuity of the company and the relevance of democracy. Nevertheless, the requirements for its concession are well delineated in the items of article 58, paragraph 1st of Law 11.101/2005.

As can be extracted from article 58, some requirements are imposed with respect to the *par conditio creditorum*, among them, that the plan to be approved by the court shall not imply differential treatment among creditors of the class that rejected it (article 58, paragraph 2nd, Law 11.101/2005).

This is a way of respecting the principle of equality among creditors, even when imposing to them a choice that has not been made through ordinary voting in that particular class. In addition, other formal requirements are imposed, as listed in items I, II and III of that article: (I) favorable vote of creditors who together represent more than half of the amount of all credits present in

[16] F. U COELHO, *ibid.*, p. 246.

the assembly; (II) approval in two other classes or in another class in case there are only two voting classes[17]; (III) Favorable vote of 1/3 of creditors of the class that has rejected the plan.

The logic behind the institute in question is fully in line with the aforementioned principles of the bankruptcy law, given that it is a mechanism that attempts to reduce the influence of a creditor or a minority with greater voting power, as a way of valuing democracy. In other words, given the influential role of a minority to the detriment of the interest of the majority with weaker voting power, the judge may actively rule out the decision made by this strong minority, always within the parameters established by the law.

Cram down is therefore another mechanism that uses the Bankruptcy and Judicial Reorganization Law as a way of enabling the continuity of recoverable companies in order to provide maximum protection to the interest of creditors. Mamede recognizes the need for mechanisms that allow the court to intervene when demonstrated the abusive performance of majoritarian or controlling creditors:

> "It would be ideal if the creditors, in assembly, showed a willingness to work together for the good development of universal judgment, for the good of all. But that not always or almost never occurs"[18]

As previously mentioned, it is difficult for a judicial reorganization plan to please all creditors subject to it, therefore the need to allow an alternative quorum to that of Article 45 of Law 11.101/2005.

In order for there to be approved by the judge under the terms of article 58, the first analysis that must be conducted concerns the total amount of approval of the plan. That is, the creditors who approved the plan will be considered based on the total amount of the sum of their credits, which should surpass half of the total amount of credit present in the assembly.

Once the first requirement has been met, the proportion of approval to the number of voting classes will be assessed. In the event of two voting classes, one of them must have approved the plan; in the case of three, two must have approved; in the case of four classes voting in assembly, the plan must be approved by three. Finally, the composition of the class that rejected the judicial reorganization plan is verified. In it, 1/3 of the creditors under the terms of article 45, paragraphs 1st and 2nd of Law 11.101/2005, must have approved the plan, that is, 1/3 of the amount of credits and 1/3 of the creditors present.

---

[17] This rule was not updated after the inclusion, through Supplementary Law 147/2014, of class IV of creditors, micro-enterprise and small business. The application that has been given to article 58, as a form of analogical interpretation of its section II, requires the proportionality of class approval. Thus, in case there are only two voting classes, one of them must approve the plan; in case there are three, two must approve it and, proportionally, with the creation and existence of four classes, three must approve it so that it is possible to approve the plan by cram down.

[18] G. MAMEDE, *ibid.*, **p. 89.**

After cumulatively meeting the conditions of the three subsections of article 58 of Law 11.101/2005, the judicial reorganization plan may be judicially approved. However, often the request for approval brought before the judiciary does not have this ideal alternative quorum, which has opened the door for the application of the thesis of abuse of voting rights by a controlling creditor.

§ 4 – ALTERNATIVE FOR CASES IN WHICH THE LEGAL REQUIREMENTS FOR APPLICATION OF CRAM DOWN ARE NOT MET, CUMULATED WITH THE IDENTIFICATION OF ABUSIVE BEHAVIOR BY THE CREDITOR

Since the entry into force of the law, the empirical analysis has indicated that it is not uncommon for a creditor alone to hold half or more of the total amount of claims in a judicial reorganization, or that it is the sole creditor voter in one of the four classes of creditors.

With the need to cumulate the conditions imposed in article 58 for approval of the plan through cram down, if that single creditor does not vote in favor of the plan, none of the quorums of approval exist, neither that of Article 45 nor of Article 58, culminating in the denial of the plan and consequent conversion to bankruptcy. As a result, some creditors have identified this power the law gave them and began to adopt abusive behavior in negotiating the conditions that extended to the class of creditors in which there were the sole member.

In situations such as this, the provision in article 58 is not enough to safeguard the choice of other voters, and the majority principle falls to the ground, since, although greater in numbers, the minimum voting required will never be reached.

In failing to meet the legal requirements for applying the rule of cram down, the judge's analysis becomes more relevant. That is because, in cases where only one creditor alone holds the voting power to dismiss a plan, regardless of the vote of the others, one must question what would be the real influence of the will of the majority.

Aware of this issue, the Brazilian jurisprudence has increased the Judiciary's discretion in the case-by-case analysis of the possibility of homologation of judicial reorganization plans that were not approved in the assembly and did not meet the conditions for approval by cram down, whenever the creditor holding the privileged position adopts an abusive behavior.

In the way it was incorporated by Brazilian law, the institute of cram down still leaves room for the abusive behavior of some creditors who see themselves as having the power to decide the destiny of a company. This approach confronts the principle of sovereignty of the will of the creditors, which is protected by the assembly, in that it leaves the debtor and most creditors subject to the influence of only one creditor holding a privileged position.

A) Abuse of right

The intervention of the judge in the result of the assembly of creditors is allowed in case there is any illegality[19], which may occur through its complete annulment, when there is some defect in form, or even by simply vetoing and dismissal from some part of the plan that may be considered illegal[20].

Thus, the judge has the duty to exercise an active position on the outcome of an assembly of creditors, interfering whenever any form of illegality is identified. The court could approve the plan if it found that the dismissal was due to individual conduct and to the detriment of the rights of other creditors, in the same way that the court could not approve a plan that has been approved under ordinary conditions, if the debtor has exercised some illegality to achieve such approval.

Brazilian jurisprudence favors this understanding, inasmuch as in an increasing number of cases judicial reorganization was approved despite the rejection in the assembly and without meeting the requirements for cram down. In these cases, the abuse of the right to vote by a specific creditor or by a minority in number is analyzed.

The use of the abuse of right theory in cases such as these is adequate because its emergence occurred as a reaction to the legalistic application of law, which often led to decisions that were manifestly unfair or prejudicial to the majority[21].

Cavalieri Filho, in his book A Responsabilidade Objetiva no Código Civil [*The Objective Responsibility in the Civil Code*], quotes Thiago Rodovalho to point out the distinction between *abuse of right* and *abuse in the exercise of a right*[22]. That is so because the right to vote is necessarily lawful, but its exercise may be unlawful[23], that is, the way in which the vote is exercised may exceed the legality and possibly justify its disregard.

For the analysis of the vote in the assembly of creditors, the distinction proposed by the authors seems to apply perfectly. This is because the right to vote comes from credit generated by a lawful relationship[24], and, therefore, the right to exercise the vote is lawful. However, the way this vote is exercised may distort the larger purpose for which it is envisaged, which is to find the best solution for a company in crisis, either through necessary

[19] Statement 44 approved in the 1st Brazilian Conference of Commercial Law: "The confirmation of a judicial reorganization plan approved by the creditors is subject to judicial legality control".

[20] L. F. SALOMÃO & P. P. SANTOS, *Recuperação Judicial, Extrajudicial e Falência: Teoria e Prática,* 2 ed., Forense, Rio de Janeiro, p. 320.

[21] S. CAVALIERI FILHO, *Programa de Responsabilidade Civil*, 11 ed., Atlas, São Paulo, 2014, p. 201.

[22] T. RODOVALHO *apud* S. CAVALIERI FILHO, *Programa de Responsabilidade Civil,* 11 ed., Atlas, São Paulo, 2014, p. 203.

[23] T. RODOVALHO *apud* S. CAVALIERI FILHO, *Idem,* p. 203.

[24] In the present case, the possibility of fraudulent claims for the purpose of effectively misrepresenting or gaining illicit advantages through the insolvency of creditors is excluded.

bankruptcy, or through joint effort of all creditors to maintain a viable business in the market.

In this sense Gabriel Saad Kik Buschinelli stresses the importance of verifying a specific issue in the case of a collectivity of creditors in which sometimes a creditor holds the power to influence and impose its choice:

> "By integrating a community of interests, a creditor can influence the legal spheres of the other creditors members of the communion. However, communion participation does not presuppose the conclusion of a contract. It is imposed by law. In this situation, one may question whether the creditor is free to pursue its interests in any way it chooses without being bound by other creditors, or whether it is a recipient of a duty of loyalty to the fellowship and to other creditors."[25]

In that sense, on the exercise of right in attention or inattention to the collectivity, Cavalieri Filho conceptualizes as an abuse of right its *antisocial exercise*, i.e. when exercised in a direction contrary to the *economic and social purpose of the law*[26].

It is clear that there is a link between the exercise of an economic and social right and the exercise of the right to vote in a scenario of several creditors, where majority voting should effectively express the majority, not the largest controlling stakeholder.

B) Abuse of vote in an assembly of creditors.

Brazilian jurisprudence has been opening for the application of the thesis of the *abuse of the right to vote* of a majoritarian creditor who has acted in disregard of the preference of the majority or in order to guarantee to itself exclusive benefit.

There has been an overlap of the decision of the judge to that of the creditor whose vote has been expressed in an environment of abuse of right. This freedom of the judge, to assess case-by-case the possibility of approving or not the judicial reorganization plan, regardless of the result voted in the assembly, raises many insurgencies in their disadvantage.

As presented at the beginning of this article, the active participation of creditors in the decision of the company's future is one of the foundational and most striking principles of the Brazilian Bankruptcy Law, compared to the previous system. Allowing the judiciary to pass over the decision handed down sovereignly in assembly can seriously harm this legislative claim.

In the Brazilian legal system, the possibility of disregarding voting, that is, the approval of a reorganization plan, even with expressive manifestation (in amount or because it is a single creditor of a class) contrary to it, is permitted and has become object of an official statement during the 1st Conference of Commercial Law of the Federal Justice, which reads: *45. The judge*

[25] G. S. K. BUSCHINELLI, *ibid.*, pp. 40 – 41.
[26] S. CAVALIERI FILHO. *Ibid.*, p. 203.

may disregard the vote of creditors or the manifestation of the will of the debtor, in cases of abuse of right[27].

In order for the abuse of the right to vote to be applied favorably to the company and to the majority of the creditors altogether, it is generally necessary for it to represent the balance between the interest of creditors and the interest of the debtors, without favoring any of them differently. On the need to ponder principles and interests, Jorge Lobo states that:

> "In order to achieve these scopes in the process of judicial reorganization, it should be emphasized finally that the general assembly of creditors and the judge of the case must commit themselves to (a) weigh the principles of preservation and the social function of the company, and (b) weigh the immediate ends of the Law – maintaining the company, maintaining jobs and securing credits – by means of the principle of reasonableness or proportionality [...]"[28]

Abuse of voting rights aims at giving effect to the principles of business continuity, maintenance of jobs and the source of wealth, taking into account that the company to be recovered is viable and will bring more benefits to creditors and to the market with its maintenance. However, even if the company is worthy of reorganization, any reorganization plan that does not respect the rights of creditors or even a single creditor would not be a plan worthy of approval by the judiciary. In other words, the tendency of the judiciary to approve judicial reorganization through the abuse of the right to vote theory cannot become an easy path for companies which, without having worked hard to find a compromise between their effective reorganization and the will of the creditors, approve a plan to reduce their debts.

The case-by-case analysis for the approval of the judicial reorganization plan that was dismissed in the assembly by a majoritarian creditor should assess whether the debtor effectively sought to negotiate and adapt the conditions of the plan in a variety of ways in a manner that would be acceptable to the majority of those involved. It is also necessary to verify if the refusal to comply with the proposed plan would not be simply motivated by the fact that the dissident creditor has better payment conditions in eventual bankruptcy, disregarding that little or nothing could be left for the others.

From this perspective, abuse occurs whenever the advantage sought by the creditor holding the majoritarian vote is disproportionate to that same majority (of credit) that it holds against the other creditors. If the unfavorable vote generates this imbalance, protecting it becomes a judge's duty.

Ideally, the approval of the plan by the judiciary would be a measure against the individualistic mentality of a creditor

---

[27] 1st Journey of Commercial Law, [23rd-24th October of 2012, Brasília]. Brasília, Conselho da Justiça Federal, Centro de Estudos Judiciários, 2013. p. 56.

[28] J. LOBO, "Seção IV da Assembleia Geral de Credores" *in* C. H. ABRÃO, P. F. C. S. TOLEDO, *Comentários à Lei de Recuperação de Empresas e Falência,* 6 ed., Saraiva, São Paulo, 2016, p. 244.

exercising its right to vote, ignoring what would be best for the majority. This is because, in such cases, the right to vote would be exercised in an individualistic manner and in conflict with the universality of creditors, that is, with the inseparable social characteristic of voting at a general assembly of creditors.

Buschinelli teaches that *if the exercise of a right is disproportionate, incompatible with the duty of consideration in relation to the legal position of others imposed by good faith, then the act is considered abusive*[29]. Thus, in a case-by-case analysis of the right to be applied, one should thoroughly analyze the facts that involve the denial of a judicial reorganization plan by a specific creditor.

In order to understand how the thesis of abuse of the right to vote is being applied by the Brazilian courts, there follows a decision of the Superior Court of Justice that lists the main points to be observed in such cases:

> "APPEAL TO THE SUPREME COURT. COMMERCIAL LAW. JUDICIAL RECOVERY. PLAN. JUDICIAL APPROVAL. CRAM DOWN. REQUIREMENTS OF ARTICLE 58, PARAGRAPH 1st, LAW 11.101/2005. EXCEPTIONAL MITIGATION. POSSIBILITY. PRESERVATION OF THE COMPANY.
>
> 1. Law 11.101/2005, aiming at preventing "abuse of the minority" or of "individualistic positions" on the interest of society in overcoming the corporate crisis regime, provided in paragraph 1st of article 58 for a mechanism that allows the judge to approve the judicial reorganization, even if it goes against the assembly decision.
>
> (...)
>
> 4. In this case, the requirements of items I and II of article 58 were met and, with respect to item III, the plan obtained a qualitative approval in relation to the creditors with real guarantee, given that it was received by more than half of the amounts of the credits belonging to the present creditors, since "three creditors of this class were present, the plan was approved by one of them, whose credit amounted to R$ 3.324.312,50, representing 97.46376% of the total credit of the class, considering the creditors present" (page 130). However, it did not reach the quantitative majority, since it received the approval *per capita* of only one creditor, although it has almost reached the qualified quorum (it obtained a vote of 1/3 of those present, whereas the law requires "more than" 1/3). In addition, the judicial reorganization was approved on May 15th, 2009, and the lawsuit is still active.
>
> 5. Thus, in order to avoid possible abuse of the right to vote, precisely at the moment of overcoming crisis, the judge should act with sensitivity in checking the requirements of cram down, preferring an examination based on the principle of preservation of the company, often choosing, for its flexibility, especially when only one creditor absolutely dominates the

[29] G. S. K. BUSCHINELLI, *ibid.,* p. 64.

deliberation, overlapping what seems to be the interest of the communion of creditors.

6. Appeal to the Supreme Court denied."[30]

In line with what was decided by the Supreme Court of Justice, other Brazilian courts have been applying this understanding when, in different contexts, the abuse of the right to vote has been verified. Empirically, the principle of preservation of the company is always highlighted when approving a judicial reorganization whose plan was disapproved in an assembly of creditors and did not meet the requirements for approval by cram down[31]. Generally, one notices the abusive exercise of a creditor or a minority with greater voting power. In an appeal judged by the Court of Justice of the State of São Paulo, it was recognized the need *to respect the quantitative majority of the unsecured creditors in detriment of the qualitative majority*[32].

In another appeal of the same Court, it was pointed out that it was not possible to fulfill requirements for cram down ratification (Article 58, paragraph 1st of Law 11.101/2005), since there was a single creditor holding the total credits of a class[33].

In short, what is common in cases that apply the theory of abuse of the right to vote is the perception that one or some votes were exercised unjustifiably on an individualistic basis, leaving aside the necessary attention to the collectivity of creditors, inherent in a judicial reorganization process. In a scenario in which bankruptcy legislation leaves possibilities for an individualistic minority to act, to the detriment of the collectivity that should, in these cases, govern and direct all decisions, jurisprudential construction is necessary to maximize the principle of preservation of the company. Thus, what is observed is the increasing construction of validation so that the judge acts actively, not as a mere verifier of the conditions imposed by the Law for approval of the reorganization plan, but as an effective defender of the continuity of the company and the democracy within the collective deliberations.

CONCLUSION

This article sought to analyze, empirically, the legislative intention of indicating the conditions for judicial homologation of the creditors' decision on the reorganization plan presented by the

[30] Brasil, Superior Court of Justice, Special Appeal nº 1337989/SP. Rapporteur Justice Luis Felipe Salomão, May 8th, 2018. Forth Division. Official Gazette of June 4th, 2018.

[31] Brazil, TJRJ, Interlocutory Appeal nº 0037321-84.2011.8.19.0000, Rapporteur: Des. Milton Fernandes de Souza, 13/12/11. 5ª Câmara Cível do Tribunal de Justiça.
Brazil, TJSP, Interlocutory Appeal nº 0100844-07.2013.8.26.0000. Rapporteur: José Reynaldo, 03/02/2014. 2ª Câmara Reservada de Direito Empresarial do Tribunal de Justiça. Official Gazette of February 7th, 2014.

[32] Brazil, TJSP, Interlocutory Appeal nº 2156567-35.2017.8.26.0000. Rapporteur: Hamid Bdine, 07/02/2018. 1ª Câmara Reservada de Direito Empresarial. Official Gazette of 14/02/2018.

[33] Brazil, TJSP, Interlocutory Appeal nº 2017379-32.2014.8.26.0000. Rapporteur Des. Enio Zuliani, 11/09/2014. 1ª Câmara Reservada de Direito Empresarial. Official Gazette of September 18th, 2014.

debtor. Also, it has demonstrated that the legislator's intention is to favor the will of the majority of creditors, respecting the democracy, the business continuity, and the best interest of the creditors themselves. The instrument for this motivation is article 58, paragraph 1st, of Law 11.101/2005, which presents the conditions for cram down approval.

In line with the principles set forth in the Bankruptcy and Judicial Reorganization Law, there is the possibility of ratifying the judicial reorganization plan by removing an abusive vote.

It should be noted that the removal of the vote for abusive behavior must be carefully analyzed by the judge in each case, since this exceptional possibility should not become a system of forced homologation of reorganization plans favorable solely to the debtor. On the other hand, the development of this theory is absolutely necessary in defense of the basic principles of the reorganization system, since it allows the judge to act against the abusive exercise of the voting right of a dominant creditor to the detriment of the necessary attention to the right of the collectivity of creditors formed by the *par conditio creditorum*. To act in the way the Brazilian courts have acted is a way of fostering the reorganization of companies, curbing the abuse of right and, more than that, defending constitutional and legal regulations present in the entire legal system.