

THE NEW THEORIES ON BUSINESS JUDICIAL REORGANIZATION IN THE BRAZILIAN SYSTEM

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The Brazilian Legislation on bankruptcy is inspired on the US Bankruptcy Code when it comes to business reorganization¹. It is important to note, however, that the legislations are not the same, but the Brazilian legislators have looked to the same principles of the Chapter 11 of the US Bankruptcy Code to build the Brazilian Business Reorganization in 2005, in order to create in a similar way some important institutes like the stay period, the plan of reorganization and the creditors meeting, among others.

A general overview of the insolvency systems around the world shows us that before the US Bankruptcy Code of 1978 with the amendments of 1984 and 2005 there were only two insolvency models: creditor oriented legislations and debtor oriented legislations².

The US Business Reorganization has inaugurated a legislation that was not in favor of the creditor, nor in favor of the debtor. The system was built focusing on social benefits generated by the fact of keeping the business running. According to Collier on Bankruptcy,

“Chapter 11 embodies a policy that it is generally preferable to enable a debtor to continue to operate and to reorganize or sell its business as a going concern rather than simply to liquidate a troubled business. Continued operation may enable the debtor to preserve any positive difference between the going concern value of the business and the liquidation value. Moreover, continued operation can save the jobs of employees, the tax base of communities, and generally reduce the upheaval that can result from termination of a business”³.

In this sense, the creditors and the debtor must comply with the reorganization proceeding, acting in a collaborative way in order to ensure the best result of the case, preserving the business in function and therefore the jobs, revenues and all the good social effects that come from the company’s activities.

¹ D. COSTA, “Novas Teorias Sobre Processos De Insolvência E Gestão Democrática De Processos”, *Comentários À Nova Lei De Recuperação De Empresas E De Falências*, Juruá, 2015.

² *Ibidem*, note 184, pp. 134-135.

³ A. RESNICK; H. SOMMER, *Collier on Bankruptcy*, Matthew Bender Elite Products, 7-1100 Collier on Bankruptcy P 1100.01 (15th 2015).

This principle has inspired the Brazilian legislator to enact the article 47 of the Law 11.101/05 which says:

“The judicial reorganization aims to facilitate the overcoming of the situation of economic and financial crisis of the debtor in order to allow the maintenance of the production source, employment of workers and the interests of the creditors, thereby promoting the preservation of company, its social function and stimulating economic activity.”

Based on this comparative analysis, we can affirm that the business reorganization in Brazil must comply with two new principles: the overcoming of the pendular dualism and the balanced sharing of the burdens⁴.

§ 1 – THEORY OF THE OVERCOMING OF THE PENDULAR DUALISM

Observing the development of the insolvency legislation throughout history, in the world and in Brazil, we can affirm that bankruptcy has evolved from individual and personal execution to collective process. The concepts of property of estate on bankruptcy and *par conditio creditorum*, created by *Lex Iulia* during the Roman Empire, are the result of this evolution⁵.

The granting of the recovery possibility arose initially as a possibility of payments to creditors, with the protection of the debtor against corporal punishment. The institute evolved from the creditor's option to be considered as a benefit to be granted by the State⁶.

1) The Evolution of the Bankruptcy Legislation in Brazil

During the colonial period in Brazil, the first legislation that addressed the issue of insolvency were the Manoelinas Ordinances (1521) and the Philipines Ordinances (1603) – issued in Portugal - which established the arrest of the debtor to pay the debt. However, the debtor could assign its assets to creditors in order to avoid the imprisonment. It is observed in this period a strong medieval influence, providing rigorous and criminal treatment of bad faith debtors⁷.

After that, the Decree of 11.13.1756 (Marques de Pombal) established the new bankruptcy system, which was suitable exclusively for entrepreneurs⁸.

In the period following the independence of Brazil, there was the Commercial Code of 1850 as the leading insolvency law. Bankruptcy has become characterized by the cessation of

⁴ D. COSTA, *op. cit.* note 302, pp. 17-62.

⁵ E. PERIN JR, *op. cit.* note 233, pp. 30-32.

⁶ D. COSTA, *op. cit.* note 302, pp. 32.

⁷ E. PERIN JR, *op. cit.* note 233, pp. 36-37.

⁸ W. FERREIRA, *Instituições de Direito Comercial*, 4th edition, Max Limonad, 1955

payments by the debtor. The bankruptcy was only granted if there was agreement from the majority of the creditors⁹.

The Decree 917/1890 has created means to avoid liquidation: moratorium, assignment of assets, and extra-judicial and preventive bankruptcy agreement¹⁰.

However, the new legal tools to avoid liquidation have started to be used fraudulently by the debtors. In this sense, in response to the proliferation of fraud in insolvency proceedings, it was enacted the Law 859/1902, which provided for a crackdown on abuse resulting from the moratorium¹¹.

The Law 2024/1908 improved the Brazilian system creating some important features: the definition of lateness as a cause of failure; characterization of acts of bankruptcy; suppression of friendly bankruptcy, having remained only a judicial composition; definition of bankruptcy crimes; liquidators number of the establishment in bankruptcy proceedings (01-03), chosen among the largest creditors, depending on the value of the bankruptcy estate.

Further, as a result of the economic crisis and the need for the preservation of the companies, Law 5746/1929 has again extended the possibility of recovery of the company, creating percentages of credit to grant bankruptcy and reducing the number of liquidators for just one, thereby facilitating the access of entrepreneurs to overcome the crisis¹².

The Decree-Law 7661/45 has strengthened the powers of the judge, reducing the influence of the meetings of creditors and established bankruptcy (preventive and suspensive) as a benefit to be granted by the State.

This law remained in force until 2005, when it was replaced by the current Bankruptcy Law 11,101/05.

The Law 11.101/05 has an eminently social nature, with the recognition of the social function of the company. Accordingly, it grants the possibility of the business reorganization, to preserve the social and economic benefits arising from the viable business activity (jobs, income, tax collection, movement of goods and services etc.).

2) The Existence of the Pendular Dualism

During the evolution of the bankruptcy system, it is clear that the pendulum of the legal protection swings from the debtor protection to the creditor protection. In terms of insolvency law, the greater possibility of recovery by the moratorium is evidence that the legislation is debtor oriented. On the contrary, the smaller the moratorium possibilities, the more prestigious the equity interests of creditors¹³.

⁹ E. PERIN JR, *op. cit.* note 233, p. 38.

¹⁰ E. PERIN JR, *op. cit.* pp. 39-40.

¹¹ *Ibidem*, p. 40.

¹² *Ibid.* p. 41.

¹³ D. COSTA, *op. cit.* note 302, p. 33.

It is clear that, during periods of economic crisis, the legislation has stimulated the moratorium. However, as a reaction to the abuse the debtors, the law used to bring limitations to the use of moratorium instruments, including giving criminal treatment to such fraudulent conduct. So, the legal protection pendulum goes from the creditor's side to the debtor's side according to the need of business's stimulation or due the fraudulent conduct of the debtors. This is what Fabio Konder Comparato¹⁴ called pendular dualism in protecting the interests of creditors or debtors with regard to insolvency law.

The great evolutionary leap represented by Law 11,101/05 was the recognition of the social function of business activity and the need to preserve this activity as maintenance assumption of all social and economic benefits arising from it.

Moreover, there was also recognition of the need to create an enabling environment for negotiation between creditors and debtors in order to find the best solution for the company's crisis. The social interest represented by the preservation of social and economic benefits arising from the running business must prevail over the private interest of the debtor or creditors.

3) Overcoming the Pendular Dualism

The observation of what happens in legislative reforms over time highlights the existence of a constant pendulum that swings in protecting creditor or debtor (the poles of the relationship of substantive law)¹⁵.

This phenomenon is also observed in relation to the Court's interpretation of the law. So, not only the law takes sides in protecting creditor or debtor, but also the Courts seek to apply the law always in favor of the plaintiff or the defendant in a particular case¹⁶.

However, the adequate interpretation of the Brazilian Bankruptcy Law, having in mind the article 47¹⁷ and the principles that come from the US Bankruptcy Code – which is a source of inspiration for the Brazilian law – leads us to the need of overcoming this dualism pendulum. It is necessary to move the focus of interpretation for the search of the useful purpose of the legal institution. The purpose of the institute and the proper

¹⁴ T. AZEREDO, "Parecer apresentado por Theophilo de Azeredo Santos ao IASP sobre o Projeto de Lei 4.376/93",

<http://www.egov.ufsc.br/portal/sites/default/files/anexos/9567-9566-1-PB.pdf>, last visited in 18/08/2015

¹⁵ See Evolution of the bankruptcy legislation in Brazil and the existence of the pendular dualism, D. COSTA, *Op.cit.* Part IV, A, I..

¹⁶ D. COSTA, *op. cit.*, note 302, at 34.

¹⁷ Brazil, Lei nº 11.101, de 9 de fevereiro de 2005, Diário Oficial da União (D.O.U.) de 09.02.2005. (Braz.), Art. 47 "The judicial reorganization aims to facilitate the overcoming of the situation of economic and financial crisis of the debtor in order to allow the maintenance of the production source, employment of workers and the interests of the creditors, thereby promoting the preservation of company, its social function and stimulating economic activity".

functioning of the legal system should take precedence over the protection of the interest of creditor or debtor.

The legal pendulum has swung between creditor and debtor during the evolution of the institute, however it is the time to recognize that the pendulum should be shifted from the parties (creditor and debtor) for the best result of the reorganization proceeding and the effective implementation of the institute's own purpose.

Thus, the adequate interpretation when it comes to business reorganization is that which leads to always honor the recovery of business activity in the light of relevant social benefits that result, despite the particular interest of one creditor or the debtor. One should always seek the fulfillment of employment, payment of taxes, heating of economic activity, income, earnings, movement of goods and wealth, even if it is given to the detriment of immediate interest of the debtor itself or creditors¹⁸.

It is important to note that the business reorganization is not an absolute goal. It should only be made on the basis of relevant social benefits that will be produced due to the preservation and recovery of productive activity. If the company is not able to generate the social benefits, which the law intends to preserve, the bankruptcy liquidation will be the best option in order to meet the social interest¹⁹.

The Brazilian Courts have already recognized the application of the theory of the overcoming of the pendular dualism. In *In Re Intervia Tecnologia Ltda – ME*, the trial judge has given an adequate interpretation to the article 51 of the Law 11,101/05, according to the theory of the overcoming of the pendular dualism. It was decided the following:

“The complaint for business reorganization must be accompanied by financial statements, the balance sheet, the statement of retained earnings and from the last fiscal year, as well as management of cash flow and its projection report. It requires also a full report of the company's economic and commercial situation. [...] This is because the purpose of the law is to ensure the continuity of business activity due to the social benefits deriving from it, such as generation and circulation of wealth, payment of taxes and, especially, employment and incomes. The simple decision authorizing the beginning of the business reorganization generates, by itself, the automatic stay, preventing the creditors from taking or continuing actions against the property of the company (debtor) for a period of 180 days (stay period), among other important legal consequences set out in art. 52 of the Brazilian Bankruptcy Law. [...] (The) preliminary

¹⁸ See the judicial decision, *infra* note 324.

¹⁹ D. COSTA, “Reflexões sobre Processos de Insolvência: divisão equilibrada de ônus, superação do dualismo pendular e gestão democrática de processos”, *10 Anos Da Lei De Recuperação Judicial E Falências – Reflexões Sobre A Reestruturação Empresarial No Brasil*, Luis Vasco Elias, Quartier Latin, 2015, pp. 87-111

analysis of such documents requires technical knowledge in order to understand the real meaning of the data reported by the debtor as well as the correspondence of such information with the reality of facts. The preliminary analysis is fundamental to ensure that the business reorganization proceeding could be used properly, fulfilling its social function, without imposing unreasonable burdens and losses to the community of creditors. [...] In this sense, despite the Law 11,101/05 does not require a previous expert analysis of the documentation submitted by the applicant company for business reorganization, the fact is that such expertise analysis should be inferred as a logical consequence of the legal requirements established as a condition for approval of its processing, namely, the regularity of the documentation presented by the debtor. [...] The experience in the First Bankruptcy Court of São Paulo has shown that inadvertent approval of the beginning of the business reorganization, based solely on a formal checklist of the documents submitted by the debtor, has served only to worsening the situation of creditors without any benefit to the business activity [...] So, based on that interpretation of the law, before deciding on the beginning of the business reorganization, I determine a previous expert examination on the real operating situation of the company and also on the documents presented by the company, in order to check its correspondence with fiscal and trade books”²⁰.

The Intervia Tecnologia Ltda – ME has filed an interlocutory appeal seeking for the reversal of the judge’s decision saying that the Law does not leave any room for the determination of an expert examination. According to the company, the article 51 should be interpreted literally. The Supreme Court of São Paulo upheld the decision saying that the interpretation of the law must comply with the best result of the reorganization proceeding and the effective implementation of the institute's own purpose. Thus, the judge, when interpreting article 51, can determine a expert examination on the documents and also on the operating conditions of the company, since the business reorganization should only be made on the basis of relevant social benefits that will be produced due to the preservation and recovery of productive activity. If it is possible to determine, even before the beginning of the case, that the company is not able to generate the social benefits, which the law intends to preserve, the beginning of the business reorganization proceeding must be denied in order to meet the social interest.

²⁰ Brazil, TJSP, Agravo de Instrumento No. 0194436-42.2012.8.26.0000, Relator: Des. Teixeira Leite, 02.10/2012, Diário Oficial do Estado de São Paulo (D.O.E.S.P.), 06.10.2012.

§ 2 – THEORY OF THE BALANCED SHARING OF THE BURDEN OF THE BUSINESS REORGANIZATION

It was already said that the Brazilian legislation on bankruptcy is inspired by the US Bankruptcy Code when it comes to business reorganization²¹. In this sense, it is possible to affirm that the principles that govern the business reorganization in the US Bankruptcy Code (Chapter 11) may be used as a source of interpretation of the Brazilian legislation.

In the US system of business reorganization (Bankruptcy Code - 11 USC Chapter 11), confirmation or approval of the plan depends on the judicial finding of some requirements or standards to ensure that the burden of business recovery are divided evenly between creditor and debtor.

Even in the case of plans accepted by every class, section 1129 (a) of the Bankruptcy Code sets out 16 requirements that must be met as a condition for the approval of the plan submitted by the debtor. It ensures that the recovery plan is fair and has economic sense²².

²¹See The New Theories in the Brazilian System Inspired on the US System, *op. cit.* Part IV

²² 11 U.S.C. § 1129(a) (2005). “The court shall confirm a plan only if all of the following requirements are met: (1) The plan complies with the applicable provisions of this title. (2) The proponent of the plan complies with the applicable provisions of this title. (3) The plan has been proposed in good faith and not by any means forbidden by law. (4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable. (5) (A) (i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and (ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and (B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider. (6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval. (7) With respect to each impaired class of claims or interests— (A) each holder of a claim or interest of such class— (i) has accepted the plan; or (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or (B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder’s interest in the estate’s interest in the property that secures such claims. (8) With respect to each class of claims or interests— (A) such class has accepted the plan; or (B) such class is not impaired under the plan. (9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that— (A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim; (B) with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive— (i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or (ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim; (C) with respect to

The US Business Reorganization system has been built focusing on social benefits generated by the fact of keeping the business running²³. Therefore, creditors and the debtor must act in a collaborative way in order to keep the business running in function of the jobs, revenues and wealth that arises from the company's activities.

So, it shows that the US Business Reorganization system is also governed by the principle of the balanced sharing of the burden of the reorganization proceeding.

It should be noted, therefore, that in the American system, the judicial balancing in the sharing of the burden of the reorganization proceeding between debtor and creditors may be done, for instance, by checking standards as fairness, feasibility, best interests of creditors, special treatment for priority claims, among others.

Although Brazilian law is silent regarding the judicial control of the balancing of the sharing of the burden of the business reorganization, its realization is essential to ensure the practical

a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim regular installment payments in cash— (i)of a total value, as of the effective date of the plan, equal to the allowed amount of such claim; (ii)over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and (iii)in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b); and (D)with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C). (10)If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider. (11)Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.(12)All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan. (13)The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits. (14)If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition. (15)In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan— (A)the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or (B)the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer. (16)All transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

²³ See the new theories, *op. cit.* note 324.

result of the recovery of companies and it is, obviously, a necessary consequence of the system²⁴.

In the Brazilian system, the business reorganization must comply with article 47 of the Law 11.101/05²⁵. So, it is possible to affirm that the use of this legal tool in Brazil only makes sense on the basis of the achievement of the social and economic benefits resulting from the continuation of the business activities. It is also true that the business reorganization should rest on the assumption of the sharing of its burden between debtor and creditors, because the Law does not seek the protection of the rights of creditors, nor the protection of the interests of the debtor. Every player involved in the proceeding must collaborate in order to ensure the reaching of the social interest.

Creditors shall bear losses in the short and medium term, considering that they will be prevented from carrying out their claims for a certain period of time (stay period). In addition, the creditors shall support a plan of reorganization that may involve, as it usually occurs, an extra time for the payment of the obligations of the debtor. The plan may also bring haircuts or discounts for the due payments²⁶.

However, in the other hand, the business reorganization shall be good for the creditors in the medium and long term, since they will receive their credits, although in new terms. In addition, the creditors will have the possibility of compensating their losses in the medium or long term, whereas the company will continue in function and, therefore, it will continue to negotiate with its suppliers²⁷.

So it is important to note that the burden borne by the creditors makes sense only if the company meets the goals of the business reorganization. In other words, the creditors shall bear their burdens only if the debtor keeps on running, generates jobs and creates all the other benefits that arise from the effective exercise of its activities.

The debtor must also bear its burdens. The company must act transparently and in good faith, keep jobs, collect taxes, produce and circulate goods and services and ultimately preserve the economic and social benefits that are sought with the maintenance of business activity. The company in bankruptcy protection has the obligation to seek at all costs to preserve the social and economic benefits sought by the institute of the business reorganization²⁸.

The debtor must also present a recovery plan that can be considered feasible, reasonable and fair. The plan must make

²⁴ D. COSTA, “Reflexões sobre processos de insolvência: divisão equilibrada de ônus, superação do dualismo pendular e gestão democrática de processos”, *Cadernos Jurídicos* V 16, pp. 59-77.

²⁵ See the new theories, D. COSTA, s. note 324.

²⁶ D. COSTA, “A divisão equilibrada de ônus na recuperação judicial da empresa” *Falência, Insolvência E Recuperação De Empresas – Estudos Luso-Brasileiros*, Newton de Lucca and Miguel Pestana de Vasconcelos, Quartier Latin, 2015 pp. 47-63.

²⁷ D. COSTA, *op. cit.*, note 304, at 24.

²⁸ D. COSTA, *op. cit.*, note 304, at 24.

economic sense, within the balanced division of burdens between creditors and debtors²⁹.

In addition, the debtor shall promptly meet the requirements set out by the judge. The debtor must be collaborative with the trustee and must also fulfill faithfully the proceeding deadlines. The debtor must act aligned with the purpose of the procedure and therefore must always be guided by absolute transparency and good faith, as a logical consequence of the principle of a balanced sharing of burdens³⁰.

In the Brazilian system, the trustee and the judge have the duty of monetizing the adequate sharing of the burdens in the business reorganization proceeding.

The trustee must pay closely attention at the conduct of the debtor for the proper exercise of their function. The trustee will not take over the management of the company, but must be very careful in monitoring the business activities made by its officers in order to make sure that the resources earned by the debtor during the stay period are being applied to activities consistent with the Institute purposes. Likewise, should the trustee monitor very closely the respect of deadlines by debtor as well as its procedural conduct, which must also be compatible with the purpose of the reorganization.³¹

The judge will control the sharing of burden when analyzing the debtor's conduct during the case and the negotiation between creditors and debtor. The judge must prevent the abuse of the dominant position by some creditor during the negotiation of the plan. In the same sense, the judge must check the legal boundaries of the plan. It is not appropriate to confirm a plan with illegal, fraudulent or unfair clauses³².

The Brazilian law says nothing about the judicial control over the plan. The article 58 of the Law 11,101/05 determines the judicial confirmation of the plan if its clauses have been approved at the creditor's meeting.

According to article 58,

“Fulfilled the requirements of this Law, the judge will grant the business reorganization of the debtor whose plan has not suffered creditor's objection pursuant to art. 55 of this Law or has been approved by the general meeting of creditors pursuant to art. 45 of this Law”³³.

Again, it is important to point out that, despite the absence of explicit regulation on the judicial control of the plan, it is possible to use the US model as a complementary source of interpretation of the Brazilian law. Since the US Bankruptcy Law is governed by the balanced sharing of the burdens, it is possible to affirm that

²⁹ *Ibidem*. at 25

³⁰ D. COSTA, *Op. cit.* note 329.

³¹ D. COSTA, “Divisão equilibrada de ônus da Recuperação”, *O Valor Econômico*, march 20, 2014, at E1.

³² D. COSTA, “Teoria da Distribuição Equilibrada dos ônus na Recuperação Judicial da Empresa”, *Carta Forense*, november 7, 2013, B18 - B18.

³³ Lei nº 11.101, de 9 de fevereiro de 2005, Diário Oficial da União (D.O.U.) de 09.02.2005. (Braz.), Art 58.

the Brazilian judge can use the essence of the standards laid down by Section 1129(a), if they are compatible with the Brazilian law³⁴. Therefore, there is no doubt that the Brazilian judge must control the legal boundaries of the plan. But, in addition to it, the judge must also ensure the feasibility and the fairness of the plan by preventing abuse and fraud.

The Brazilian Courts have already recognized the judicial control power over the legal aspects of the plan and also the control over the feasibility, fairness, best interest of the creditors, good faith and prevention of fraud. In *In Re CONSTRULEV INDÚSTRIA E COMÉRCIO DE PLÁSTICOS LTDA*³⁵, the 1st Bankruptcy Court of São Paulo has approved the plan, after doing the judicial analysis over the plan. The Itaú Bank, as a creditor, has filed an interlocutory appeal seeking for the rejection of the plan on the basis that it should be considered unfair in comparison to the conditions offered to other creditors, and also abusive since it has imposed a disproportionate loss to some creditors. The Supreme Court of São Paulo upheld the decision, saying that there was no abusive clause, nor unfair treatment of the creditors. In addition, the Court has said:

“If the plan approved by the AGC depends on the Court approval, it is because “there is a public policy, which requires the court to observe more than just its legality and constitutionality, but also ethics, good faith, respect for creditors and the manifest intention to meet the recovery target, under the penalty of breaking the spirit of Law n. 11,101/2005”³⁶.

Note that the default by debtor of its burdens may cause the conversion of the bankruptcy reorganization into bankruptcy liquidation. Although there is no rule on that in the Brazilian law, it seems clear that the disappearance of the fundamentals of the institute of the business reorganization should cause the conversion of the case into a liquidation of the company based on the theory of the balanced sharing of the burdens³⁷.

CONCLUSION

It is important to bear in mind that the Brazilian Bankruptcy System has found inspiration in the US Bankruptcy Code. Therefore, the interpretation of the Brazilian law can take some features from the US Bankruptcy System as a manner of improving the application of the law and ensuring the best result for the case.

³⁴ D. COSTA , *op. cit.*, note 302, at 26.

³⁵ Brazil, TJSP, Agravo de Instrumento No. 2147847-50.2015.8.26.0000, Relator: Des. Maia da Cunha, 28.10.2015, Diário Oficial do Estado de São Paulo (D.O.E.S.P), 03.11.2015 .

³⁶ Brazil, TJSP, Agravo de Instrumento No. 2147847-50.2015.8.26.0000, Relator: Des. Maia da Cunha, 28.10.2015, Diário Oficial do Estado de São Paulo (D.O.E.S.P), 03.11.2015.

³⁷ D. COSTA , *op. cit.*, note 302, at 25.

In this sense, the theory of the overcoming the dualistic pendulum has been created in Brazil, based on the observation of the evolution of the insolvency systems worldwide, but mainly on the fact that the US Bankruptcy Code has inaugurated a new insolvency model where the social interest must prevail over the particular interest of debtors and creditors. So, in Brazil, as it is being done in the US, the insolvency law must be applied in accordance to social interest. The business reorganization must be interpreted in order to ensure the maintenance of the production source, employment of workers and the interests of the creditors, thereby promoting the preservation of the company, its social function and the stimulation of economic activity.

The theory of the balanced sharing of burden of the business reorganization also rests its basis on the US Bankruptcy system. This theory is based on the observation of the US system of the judicial control over the plan of reorganization. In the US Bankruptcy Code, the judge ought to check the plan approved by the creditors in order to find its compliance with some standards that ensure the adequate sharing of the burdens among creditors and debtors.

Based on this idea, and according to this new theory, the Brazilian Courts have decided that the Brazilian judge, despite the absence of an explicit legal rule, has the power of observe the legality and constitutionality of the plan of reorganization. Further, these judges can decide the ethics, good faith, respect for creditors, and the manifest intention to meet the recovery target under the penalty of breaking the spirit of Law n° 11,101/05.