

# LEGAL UNCERTAINTY ON FINANCIAL DISTRESS COMPANIES REFINANCING IN BRAZIL

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This paper has as its goal to understand and analyze the difficulties faced by corporations to acquire refinancing and investments, during legal reorganization. With focus on bank operations, the conflicts established in the superior courts in surveying the operations commonly formalized by financial institutions, which adds as warranties the so-called “receivables”, to approach the due cares needed in these kinds of contracts.

From this premise, it will be acknowledged the discussion regarding credits whether they must or not be subjected to legal reorganization; therefore, it was observed the approach given by the Courts to the so-called bank locks (*travas bancárias*).

The new Bankruptcy and Legal Reorganization Act now completes 12 years in times of crises and instability, thus asking for new reflections aiming the social equilibria and legal certainty. The legal certainty always was regarded as indispensable in the view of the investors and financial institutions that seek tirelessly for the certainty of deals and facts around the risks of the business. By trying to ensure the certainty in its relations, the Law *Lei* 11.101/05 has brought a very fragile protection and many doubts about the potential investors and financial institutions who believe that the corporation facing financial distress can be restructured. Adding to that, the Resolutions/ *Resoluções* n°1.559/88 and n° 2.682/99 of the National Monetary Council/ *Conselho Monetário Nacional* deter in practice the development of the DIP Financing in Brazil.

## § 1 – FUNDAMENT OF THE LEGAL REORGANIZATION UNDER LEI 11.101/20051

According to the Act/ *Lei* 11.101/2005, the legal reorganization has as its goal to make possible the corporation to overcome of the financial-economic distress it faces, in order to avoid bankruptcy. Through this procedure, the corporation could sustain its reputation, the workers employment and the interests of the creditors. “Promoting, therefore the preservation of the corporation, its social function and the incentive to the economic

activity” as the predictions of the base-principles of the Legal Reorganization Act, in article 47<sup>1</sup>.

In practice, the fundament of the legal reorganization lies in the constitutional principles of the social function of corporations and the incentives to the economic activity given by articles 170, III<sup>2</sup> and 174<sup>3</sup> of the Brazilian Federal Constitution.

In the words of Fábio Ulhoa<sup>4</sup>, each country, by creating solutions to bankruptcy cases, take in consideration the local aspects:

“Each country, seeks to give to the problem its own solution, which attends its interests and cultural and economic peculiarities. [...]

In Brazil, the law englobes two legal measures with the aim to avoid the crises in the Corporation that may lead to the bankruptcy of those who explores it. From one hand, the legal reorganization; from the other, the legal homologation of out-of-court legal reorganization. Their goals are the same: the cessation of the economic-financial and patrimonial crisis, the preservation of the economic activity and its labor force, as well as the observation of the interests of the creditor. It may be said that, once recovered, the corporation may fulfill its social function.”

Calixto Salomão Filho<sup>5</sup>, quoting the Lei n° 11.101/2005, argues about its principles:

“Presupposes and includes principles that cannot be denied or avoided, regardless of the group of interests which has more influence in its elaboration. [...] It is also necessary to acknowledge that the legal reorganization of corporations also presupposes principles and goals that cannot be avoided. The main one it the preservation of the firm, declared formally in art. 47 of Lei 11.101/2005,

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<sup>1</sup> BRAZIL, Lei n° 11.101 of 9 February of 2005, Diário Oficial da União (DOU) de 09.02.2005, Art. 47. “The legal reorganization has as a goal to make viable the overcoming of the economic-financial distress of the debtor, in order to allow the maintenance of the productive source, the employment of the workers and the creditors interests, promoting, therefore, the preservation of the corporation, its social function and incentives to the economic activity”.

<sup>2</sup> BRAZIL, Constituição Federal, Art. 170. “The economic order, funded in the human work valuation and the free incentive, has as its foals to secure to all the dignified existence, according to the rules of social justice, observed the following principles : [...] III -social function of property [...]”.

<sup>3</sup> BRAZIL, Constituição Federal, Art. 174. “As normative and regulator of the economic activity’s agent, the State will exercise, in the form of the law, the functions of oversight, incentive and planning, bring this determining for the public sector and indicative to the private sector”.

<sup>4</sup> BRAZIL, Lei n° 11.101 of 9 February of 2005, Diário Oficial da União (DOU) de 09.02.2005. Art. 1° “This Act disciplines the legal reorganization, the out-of-court reorganization and bankruptcy of the entrepreneur and the entrepreneurs society, forwardly known are debtor.”

<sup>4</sup> F. COELHO, *Comentários à Lei de Falências e de recuperação de empresas*, São Paulo: Saraiva, 2014, p.158.

<sup>5</sup> C. SALOMÃO FILHO, in F. SOUZA JUNIOR, A. S. PITOMBO (ed.). *Comentários à lei de recuperação de empresas e falência – Lei 11.101/2005 – artigo por artigo*, São Paulo: RT. 2007, p. 42.

of 9 February of 2005 (New Bankruptcy Law), as a principle of legal reorganization.”

As well as, reveal the referred goal of the legislator in a very fashionable way, Paulo Campos Salles de Toledo and Adriana Pugliese<sup>6</sup>:

“The legal reorganization, thus, is one of the instruments established in Lei 11.101/2005 which has as a main goal to create conditions to make the overcome of the corporative crises possible, with the finality of keeping a source of production, the workers employment and to protect the creditor’s interests. The fundamental directive, which gives north to the procedure of legal reorganization it the preservation of the firm. For sure, it does not aims to any firm, but to one, which can demonstrate its viability, as will be further approached. In any case, the preservation of the firm, constitutes the north principle of the legal reorganization, and has as background the recognition that this, as, agent of production and wealth circulation has a social function. The maintenance of the viable firm which is in economic-financial distress, through its restructuration and reallocation in the market in conditions of keeping acting normally is crucial to the development of the economic activity.”

In this sense, Rachel Sztajn<sup>7</sup> shed light on that matter:

“The social function of the firm, presented in the redaction of article (47 of Lei 11.101/2005), indicates, still, the current vision of the corporative organization, which existence is attached in the due actuation in the economic realm, not to fulfill the typical state’s obligations or to replace it, but in the sense that, it, socially, in its existence must be balanced by the creation of job opportunities, respect to the environment and the collectivity and, in this sense it is the reason to seek its preservation.”

In a more deep reflection, Daniel Costa<sup>8</sup> signs that there must exist an equilibria within the process of legal reorganization:

“The legal reorganization must be good to the debtor, which will keep producing to pay its creditors, even than in renegotiable terms, compatible to its economic situation. However, it must also be good to the creditors, who will receive their credits, even though, through new terms and with the possibility of elimination of this damage in the medium or long run, considering that the

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<sup>6</sup> M. CARVALHOSA (ed.), M. J. BEZZERA, P. F. DE TOLEDO, M. DE QUEIROS PEREIRA CALÇAS, A. PUGLIESE, *Recuperação empresarial e falência*, São Paulo: Revista dos Tribunais, 2016, Coleção tratado de direito empresarial, vol. 5, p. 171.

<sup>7</sup> R. SZTAJN, “Da recuperação judicial”, in F. SOUZA JUNIOR, S. PITOMBO, (ed.), *Comentários à Lei de Recuperação de Empresas e Falência*, São Paulo: Ed. RT, 2007, p. 221.

<sup>8</sup> D. COSTA (ed.), *Comentários Completos à Lei de Recuperação de Empresas e Falências*. vol. 1, Curitiba: Juruá Editora, 2015, p. 23.

recoveree will keep negotiating with its suppliers. Nevertheless, it cannot be avoided that all of this is made due the social benefits, which is why it is only rational it is good for the social interest.”

In addition to the idea of “*social function*”, Rachel Sztajn<sup>9</sup> reminds: “It is important not to lose sight that the social function can only be filled if the firm can come back to wealth generation, otherwise it could taint the legal system by giving it an welfare character [...]”.

The article first of<sup>10</sup> the Legal Reorganization Act, disciplines the legal reorganization, the out-of-court reorganization and the entrepreneurs bankruptcy as the corporative society, referred in the procedure as debtor. The conditions to claim the legal reorganization are predicted in the article 48 of *Lei* 11.101/05:

“Art. 48. It may require the legal reorganization the debtor that, in the moment of the claim, exercises regularly its activities more than 2 (two) years and fulfill cumulatively the following requisites (the corporation):

I – should not be bankrupt, and if it was, that may be declared extinct by sentence *res judicata*, the liabilities thereby casted-out;

II – should not have, less than 5 (five) years, since the concession of the legal reorganization;

III – should not have, less than 5 (five) years, since the concession of the legal reorganization based on the special plan that the Section V of this Chapter is about;

IV – should not be condemn or not have, as a manager or controller partner, person condemned by any crimes predicted under this Act.

§ 1º The legal reorganization can be required by the living spouse, the debtors heir, the legal successions manager or remaining partner.

§ 2º In being rural activity by a legal person, it is admitted as proof of compliance of the established deadline in the caput of this article by the Economic-Taxation Declaration of the Legal Person (DIPJ) delivered in due time.”

Monoel Justino<sup>11</sup> states that:

“In resemblance to what was demanded by the previous law (art.158.I), this art. 48 begins a list of obstructions to the reorganization claim, excluding from its ward the entrepreneur with less than two years of regular activity, by the rational that it would be not reasonable that in a

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<sup>9</sup> R. SZTAJN, “Da recuperação judicial”, in F. SOUZA JUNIOR, S. PITOMBO (ed.), *Comentários à Lei de Recuperação de Empresas e Falência*, São Paulo: RT, 2007, p. 223.

<sup>10</sup> BRAZIL, *Lei* 11.101 of 9 February 2005, *Diário Oficial da União (DOU)* (Edição extra) 9 February 2005.

<sup>11</sup> J. BEZERRA FILHO, M. JUSTINO, *Lei de recuperação de empresa e falências*, São Paulo: Revista dos Tribunais, 2104, p. 145.

dead line inferior to that the debtor could put himself in a situation of legal aid to recover”.

The Law also has discriminated and cared about their creditors, classifying them in specific classes in its article 41:

“Art. 41. The general-assembly will be composed by the following classes of creditors: I – title-owners of derivatives of labor legislation or labor accidents; II – title-owners of credits with real warranties; III – title-owners of non-covered credits, with special privilege, general privilege or subordinated; IV – title-owners of credits regarded as micro-corporation, or small sized corporations”.

According to the teachings of Sérgio Campinho<sup>12</sup>:

“The general assembly of creditors consists in the meeting of the creditors subjected to the effects of bankruptcy of legal reorganization, ordered in derivative categories due to their credit’s nature, with the goal of deliberate about matters that the law could demand their manifestation, or that may interest them. It reveals an alternative and impermanent decision forum for the creditors, installed and operating in strict compliance of the legal rules, to decide specific situations that eventually emerges within the procedure span.”

Professor Manoel Justino<sup>13</sup> criticizes the referred article in the following terms:

“The law, in its original redaction, divided the creditors to the end of composition of the general assembly, in three different kinds of “creditor’s classes”. One of these classes is composed, roughly, by the labor credits, including the credits from derivations of labor law credits or credits from labor accidents. The second class englobes the warranted credits and the third the rest, which are, secured creditors, with special privileges, or with general or subordinated privileges. The LC 147/2014 introduced a fourth class that assembles the micro-firms and small firms debts. (...). The legislator supposes that the creditors of the same nature may have convergent interests, and therefore, establishes classes of creditors to deliberate, especially for the approval, modification or rejection of the reorganization plan presented by the creditor in the legal reorganization (art.45, art.58 etc).”

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<sup>12</sup> S. CAMPINHO, *Falência e recuperação de empresa: O novo regime da insolvência empresarial*, Rio de Janeiro: Renovar, 2015, p. 79.

<sup>13</sup> J. BEZERRA FILHO, M. JUSTINO, *Lei de recuperação de empresa e falências*, São Paulo: Revista dos Tribunais, 2104, p.137.

As highlights, once more, Francisco Satiro<sup>14</sup>:

“[...]the dispositions of the organization regimes in general, by the principle of majority, interests typically individuals are “organized” thus, the sum of the manifestations can derive a sole result of common legal nature: the deliberation which by the plan is either approved or rejected. By its turn, it does not represent the “will of creditors” but a legal consequence of the manifestation of the will of creditors throughout the vote.”

It can be perceived that the referred article has contemplated only those credits that are subjected to the process of Legal Reorganization.

## § 2 – BANK CREDIT AND FIDUCIARY ALIENATION

In Brazil, historically, the economy was always leveraged by Financial Institutions, which were always the main investment and foment source to the industrial activity throughout their loans. Along with the evolution of the relations between the Financial Institutions and Corporations, the legislation has evolved as well, mainly to ensure that the institutions may offer credit with lower interest rates through warranties. Therefore, the fiduciary alienation has become the main instrument of warranty for Banks to foment the corporation’s activities with the lowest interest rates due the reduction of the risks through the values of the warranties given.

The fiduciary alienation of corporations real states in banking contracts, are predicted in the *Lei* 9.514 of 1997 in the caput of article 22. Which conceptualizes the fiduciary alienation as being: “the legal business by which the debtor or the fiduciary as the scope of the warranty contracts the transference to the creditor, or the fiduciary of the soluble property of a real estate”.

It also is featured by the transmission of the resoluble property and the indirect possession of a good either mobile or real estate, as warranty to the payment of a debit, in which the debtor is deterred to negotiate it before the debt resolution, but can enjoy it.

In this case, the debtor alienates himself of the property and gives it to the creditor. The property will only return to him when the debtor fulfill the payment that constitutes the object of the contract, according to GOMES<sup>15</sup> “It is a real right of warranty that confers the creditor the pretension to obtain the payment of the debt with the value applied exclusively to its satisfaction”.

The fiduciary alienation is predicted in *Lei* 4.728/1965 – art. 66 – (The Equity Capital Market Act - *Lei de Mercado de Capitais*), in

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<sup>14</sup> F. SOUZA JÚNIOR, *Autonomia dos credores na aprovação do plano de recuperação judicial. Direito empresarial e outros estudos em homenagem ao Professor José Alexandre Tavares Guerreiro*. São Paulo: Quartier Latin, 2013, p. 114.

<sup>15</sup> O. GOMES, H. THEODORO JUNIOR, *Direitos reais*, Rio de Janeiro: Revista Forense, 1999.

Decree-Law *Dec. Lei* 911/1969 (Fiduciary Alienation in Mobile Goods), in *Lei* 9.514/1997 in its article 22<sup>16</sup> (Fiduciary Alienation in Real Estate Goods) and in *Lei* 10.931/2004 which included the art. 66-B<sup>17</sup> which in its §3° predicts “the fiduciary alienation of unique things and fiduciary cession of rights about mobile things, as well as credit titles” – as well as the Civil Code in article 1368-A<sup>18</sup>, which states about the other species of fiduciary properties or about the fiduciary ownership.

The credit operations with alienations of real estate of companies are usually made through a Credit Bank Note. This instrument of credit was instituted by the Decree *Medida Provisória* n° 1.925-15/2000, which has defined in its article first that:

“Art. 1. The Bank Credit Note is credit title emitted by a natural or legal person, in favor of a financial institution or an entity equal to that, representing a promise of payment in money, due the credit operation of any kind”.

*Lei* 9.514 of 1997, in its article 22<sup>nd19</sup> and followings institutes this out-of-court procedure for retaking an alienated real estate. In practice the fiduciary alienation or bank lock creates a warranty to the credit supplier, giving to it legal certainty that if the contract may not be fulfilled the supplier will have its losses compensated. The fiduciary alienation has a specific prediction in the Legal Reorganization Act in its third paragraph of article 49:

“Are subjected to legal reorganization all credits existent in the claims date, even if not in their term yet.  
[...]§ 3° In being a creditor entitled to the position of fiduciary owner of mobile or real estate goods, financial lessor, owner or committed seller of real estate which respective contracts have irrevocability or non-disclaiming, even in real estate incorporations, or owner in

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<sup>16</sup> BRAZIL, *Lei* n° 9.514, of 20 November 1997, Diário Oficial da União (DOU) 21 November 1997. Art. 22. “The fiduciary alienation regulated by this Act if the legal business by which the debtor, or fiduciary, which the scope of warranty, hires the transfer to the creditor, of the fiduciary, the resolvable property of the real estate”

<sup>17</sup> BRAZIL, *Lei* 10.931 of 2 August 2004, Diário Oficial da União (DOU) 02.08.2004, Art. 66-B. “The contract of fiduciary alienation celebrated in the realm of the financial Market of capitals, as well as in warranty of tributary and retirement system credits, must contain, in addition to the requirements defined in *Lei* no 10.406, of 10th January 2002 – Código Civil, the interest rates, the punitive clause, the monetary update index, if there is one, and other fees and charges. (Included by *Lei* 10.931, of 2004). [...] § 3° It is admitted as fiduciary alienation of exchangeable thing and fiduciary cession of credits about mobile things, as well as credit titles, hypothesis in which, in the exception of disposition in contrary, the direct or indirect possession of the good object of fiduciary ownership or title representing the right or credit is attributed to the creditor, which in case of non-compliance or delay in the obligation warranted, can sell to the third parties the good object of the fiduciary ownership independently of bid, auction or any other legal or out-of-court measure, which must apply the selling price in the payment of its credit and the expenses generated to fulfill the warranty, returning to the debtor the balance, if there is any, as the receipt of the operation made”.

<sup>18</sup> BRAZIL, *Lei* 10.406 of 10 January 2002, Diário Oficial da União (DOU) 11 January 2002, Art. 1.368-A. “The other species of fiduciary property or fiduciary titularity, subject themselves to the discipline specific of the special legislation, applying only the dispositions of this Code in which is not compatible with the special legislation”. (Included by *Lei* n° 10.931, of 2004)

<sup>19</sup> See BRAZIL, Art. 22 of *Lei* n° 9.514, of 20 November 1997, Diário Oficial da União (DOU) 21 November 1997.

selling contract with ownership reserves, its credit will not be submitted to the effects of the legal reorganization and will prevail the rights of ownership of the property about the thing and contractual conditions observed the respective legislation and not being allowed, though, for the deadline of the suspension predicted on § 4º of art. 6º of this Act, the selling or release of the establishment of the debtor of capital goods essential to its corporative activity”.

Sérgio Campinho<sup>20</sup> synthesizes the concept of the fiduciary alienation and its mechanisms didactically:

“Thus, generally, we can state that when the fiduciary alienation in warranty has by its object the right of credit, it passes to be, by law, denominated fiduciary assignment agreement, under which is applied the institute of restitution, if shown the unjust possession of the assets by the property titles of the claiming creditor, having as its central and general rule the caput of article 85 of Lei nº 11.101/2005, specified and referenced by lei especial(Lei 9.514/97, article 20).”

By the time of the promulgation of the Act, many authors criticize this protection, such as Manoel Justino<sup>21</sup>:

“This disposition was the point that contributed in a more direct fashion to the Act let to be known as the “reorganization of corporations Act” and being known as the “recuperation of Bank credits Act”, of “financial credit”, by establishing which goods are not affected by the effects of legal reorganization. Which are, none of the goods of a Corporation that are object of fiduciary alienation, mercantile lease or reserve of ownership will be under the reorganization.”

Also, are very well considered the quoted goals by Toledo and Pugliese<sup>22</sup>:

“This way, all the existent credits (not necessarily expired) in the date of the claim of the action could be object of the proposition in the plan; therefore, by the other hand, the obligations not presented by the plan retain the same conditions priority adjusted and are excluded from the legal reorganization. Thus, presumably, as exerts the caput of art. 49 of Lei 11.101/2005, every creditor are subjected to the effects of legal reorganization. Although, this rule can withstand exceptions about the credits commented below. Therefore, by adopting the legislative politics – though

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<sup>20</sup> S. CAMPINHO, *Falência e recuperação de empresa: O novo regime da insolvência empresarial*, Rio de Janeiro: Renovar, 2015, p. 407.

<sup>21</sup> J. BEZERRA FILHO, M. JUSTINO, *Lei de recuperação de empresa e falências*, São Paulo: Revista dos Tribunais, 2104, p. 148.

<sup>22</sup> M. CARVALHOSA (ed.), M. J. BEZZERA, P. F. DE TOLEDO, M. DE QUEIROS PEREIRA CALÇAS, A. PUGLIESE, *Recuperação empresarial e falência*, São Paulo: Revista dos Tribunais, 2016, Coleção tratado de direito empresarial, vol. 5, p. 187.



subject of critics, thus the ideal would be that, effectively, all creditors were subjected to the procedure, giving a wide debate about the means of overcoming the crisis – there are creditors that are excluded from negotiations. It is evident that the progress regarding the Dec.-lei 7.661/1945, which only targeted the unsecured creditors by composition, is questionable. However, it cannot be set aside that the best would be the enlargement of the creditors subjected to the effects of the legal reorganization's list, without exception, so the ends predicted by the Law, could be better reached; even if the Law established some balances respecting the peculiarity of some contracts. As is the case of exceptions referred by the § 3.º of the mentioned art. 49 of Lei 11.101/2005 which corresponds to the so called creditors of domain [...]"

Under the same rational of Manoel Justino, Sérgio Campinho<sup>23</sup> underlines the specified situation of the fiduciary agreements of credit rights:

However, there are authors that understand that the deterrence is absolute and beneficial, such as Fábio Ulhoa<sup>24</sup>:

“The owners of some real warranties or financial positions (fiduciary, leasing, etc.) and the banks that have anticipated resourced to the exporter due Exchange contracts are excluded from the effects of legal reorganization so they can practice lower interest rated (with spreads casted aside of the risk associated with the legal reorganization), helping the law, therefore, with an environment more feasible to the economic development reboot.

[...]In the fiduciary agreement on credit rights, the position of the creditor is of the owner of a personal right and not a real one. Therefore, as the rule of § 3º is an exception, it must be interpreted in a restrictive way.”

Although, the reality is seen in a distinctive way, harming the greater good, which is the social function of the firm. As Manoel de Queiroz Pereira Calças<sup>25</sup> states, “we do not believe that the *spreads* will be reduced to the benefit of the economic and social development of our country.”

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<sup>23</sup> S. CAMPINHO, *Falência e recuperação de empresa: O novo regime da insolvência empresarial*, Rio de Janeiro: Renovar, 2015, p. 154.

<sup>24</sup> F. COELHO, *Ulhoa, Comentários à Lei de Falências e de recuperação de empresas*, São Paulo: Saraiva, 2014, p.49.

<sup>25</sup> M. DE QUEIROS PEREIRA CALÇAS, *A Nova Lei de Recuperação de Empresas e Falências: Repercussão no Direito do Trabalho* (Lei n. 11.101, of 9 February 2005). Rev. TST, Brasília, vol. 73, nº3, jul/set 2007, p.. 44.

According to João Pedro Scalzilli<sup>26</sup> the creditor in the position of fiduciary owner of mobile goods does not subject to the legal reorganization:

“In the current system, may be subjected to fiduciary agreements mobile or real estate goods, such as machines, equipment, vehicles, real estates and buildings, as well as incorporeal goods, such as credit titles (v.g promissory notes, check, duplicates, CBD, FGBL) and credit rights (v.g. receivable of credit cards). The last ones are subjected of the so called ‘*fiduciary agreement*’ (known by the Market as ‘*bank lock*’).”

Even with the legal prediction of non-subjection of the credit by the fiduciary agreement, the financial institutions must follow with care all legal demands so the warranty may be fulfilled.

As stated by Luiz Ayoub and Cássio Cavalli<sup>27</sup>, in order to the credit not be subjected to legal reorganization, it is due to the creditor the burden of proof the effective existence of the alienation of the credit “Is it is uncharacterized, the fiduciary agreement of receivable, may eventually be characterized as pledge under the credit rights which is disciplined by art.49,§ 5º, of LRE”.

In the rationale of Walter Fázio<sup>28</sup>, the prohibition is relative, due, the reorganization plan can alter the conditions of the fulfillment of such contracts predicted by the § 3º of the referred article, “In all these cases, will prevail the emergent rights of such conditions, which are the rights of ownership upon the thing. Of course that the legal reorganization plan can predict other conditions to the fulfillment of the respective contracts”.

### § 3 – COURTS STANCE

Another polemic point about the fiduciary alienation in receivables as credit cards and contracts through an early call of credits through the payment of fees. The jurisprudence has comprehended that the lack of registry, undo the condition of non-binding effects of the legal reorganization.

“Legal reorganization. Fiduciary cession of receivables with future existence. Admissibility. Legal reorganization. Loan with fiduciary warranty of receivables. Contract, though, without registry. Fiduciary property not constituted. Credit subjected to the effects of the reorganization. Appeal denied, revoked the suspensive effect.

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<sup>26</sup> J. P. SCALZILLI, L. F. SPINNELLI, R. TELLECHEA, *Recuperação de empresas e falência: teoria e prática na Lei 11.101/2005*, 2ª edição atualizada e ampliada. São Paulo: Almedina, 2017, p. 308.

<sup>27</sup> L. R. AYOUN, C. CAVALLI, *A construção jurisprudencial da recuperação judicial de empresas*, Rio de Janeiro: Forense, 2013, p. 71.

<sup>28</sup> W. FÁZIO JÚNIOR, *Lei de Falência e recuperação de empresas*, São Paulo:Atlas, 2015, p. 136.

Legal reorganization. Fiduciary cession of credits. Necessity of registry. Súmula (Binding Precedent) 60 of this Court. Registry in this case absent. Appeler that limited to contest the value of its credit, as presented by the legal manager, without, though, appoint the alleged error in calculations. Documents attached that are not enough to fundament the value that it has argued to be correct. Decision maintained. Appeal denied”<sup>29</sup>.

Another important factor is that the registry must be done before the legal reorganization, thus, the jurisprudential comprehension does not admit its efficacy if made after the reorganization claim.

“Appeal – Legal Reorganization – Bank Credit Note with fiduciary cession of rights – Fiduciary ownership that constitutes itself through registry of the title in the Titles and Documents Registry – Knowledge of art. 1.361, § 1º, of the Civil Code – Register made in date after the legal reorganization claim – The anticipated liquidation of contracts affects the legal reorganization and the creditor must subject itself to the unwarranted classification of its credit due the inertia in proceeding the registry of its warranties – decision maintained – appeal denied.

Appeal – Legal Reorganization – Bank Credit Note – Instrument of fiduciary cession of credit notes in warranty – Fiduciary Property, which constitutes itself through the register in the Titles and Documents Registry – Knowledge of art. 1.361, § 1º, of the Civil Code - Súmula nº 60 of E. TJSP – Inexistency of registry prior to the legal reorganization claim – Appeal denied.”<sup>30</sup>

The courts also do not admit only the registry of the loan agreement; being necessary the registry of the warranty itself:

“Appeal – Legal Reorganization – Credit impugnation. The credit granted by the fiduciary alienation as warranty. Registry, restricted to the contract of loan. Fiduciary property that constitutes itself only by the registry in the Documents and Titles Registry. Article 1.361, § 1º, of the Civil Code. Registry made after the legal reorganizations claim. Credit that must be included in the class of unwarranted. Súmula nº 60 of E. TJSP. Partially sustained to this end”<sup>31</sup>.

Another altering point is that the registry of the contract must be done effectively in the Titles and Documents Registry, the competent branch for such:

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<sup>29</sup> BRAZIL, TJSP, *Agravo de Instrumento* nº 2124583-38.2014.8.26.0000. 2ª Câmara Reservada de Direito Empresarial. Des. Rel. Araldo Telles, Diário Oficial do Estado de São Paulo (DOESP), 30 June 2015.

<sup>30</sup> BRAZIL, TJSP, *Agravo de Instrumento* nº 2038759-77.2015.8.26.0000. 2ª Câmara Reservada de Direito Empresarial. Des. Rel. Ricardo Negrão, Diário Oficial do Estado de São Paulo (DOESP), 18 June 2015.

<sup>31</sup> BRAZIL, TJSP, *Agravo de Instrumento* nº 2219418-18.2014.8.26.0000. 1ª Câmara Reservada de Direito Empresarial. Des. Rel. Enio Zuliani, Diário Oficial do Estado de São Paulo (DOESP), 29 April 2015.

“Appeal. Legal reorganization. Decision that includes in the general frame the credit originated by bank credit note warranted by fiduciary cession of credit titles. Knowledge of art. 49, § 3º, of Lei nº 11.101/2005. The fiduciary cession of credit has the same nature of fiduciary alienation of mobile goods and configures itself as fiduciary property. Indispensability of the registry in the Titles and Documents Registry. Interpretation of art. 1.361, § 1º, of the Civil Code. Constitutive nature of the registry. Registry on CETIP that does not fulfill the legal requirement. Lack of registry implies in the inexistence of the fiduciary property. Credit subjected to the effects of the legal reorganization as unwarranted. Inexistence of documents that proof the value of the credit must be raised. Appeal provided with determination.”<sup>32</sup>

Another polemic yet is the necessity of detailed discrimination of the Warranty demanded by the Brazilian Civil Code:

“Art. 1.362. The contract, which serves as fiduciary property will contain:

[...]

IV – the description of the thing, objects of the transference, with the elements indispensable to its identification.”

When not the exigence of detailed description is not satisfied, the jurisprudence excludes as well the credits as unwarranted:

“Legal reorganization. Credit classification. Fiduciary cession of credit rights. Deposits in bonded account. Lack of any identification of origin of the values to be deposited. Credits that are subject of warranty never were specified in details. Lack, as well, of balance in the accounts. Fiduciary entitlement not perfected. Inclusion as unwarranted credit. Decision sustained. Appeal denied.”

Despite that fact, even if all legal requirements are fulfilled, *Lei* 11.101/05 protects the essential goods:

“Art. 49. Are subjected to legal reorganization all the credits existent at the date of the claim, even if nota expired.

[...]

§ 3º Being the creditor entitled to the position of fiduciary owner of mobile and real estate goods, the mercantile loaner, of owner or committed seller of real estate which respective contracts have clauses of irrevocability or irreversibility, including real estate incorporations, or owner in contracts of selling with minimum ownership reserve, its credit will not be subjected to the effects of legal reorganization and will prevail the ownership rights

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<sup>32</sup> BRAZIL, TJSP, *Agravo de Instrumento* nº 0294738-16.2011.8.26.0000. Câmara Reservada à Falência e Recuperação. Des. Rel. Pereira Calças, Diário Oficial do Estado de São Paulo (DOESP) 3 July 2012.

about the thing and the contractual conditions, observed the respective legislation, not being allowed, however, during the suspension deadline referred by § 4° of art. 6° of this Lei, the selling or withdraw of the establishment of the debtor of the capital goods, essential to its corporative activity.”

The doctrine, through Ayoub<sup>33</sup>, also understands that “Even the credits that are not subjected to the legal reorganization may have their shares and execution suspended during the ‘stay period’, as long as they are linked to capital goods essential to the activity of the in debt company [...]”. Toledo and Pugliese<sup>34</sup> justify the necessity and the meaning of the “stay period”, as “The solution justifies itself, thus one of the main functionalities of the stay period, is precisely to proportionate to the debtor a “breathing” period so it can focus its efforts in the reorganization of the passive, instead of defending itself [...]”

When proved that the fiduciary warranty is essential to the activities of the reorganizing firm, the jurisprudence also protects this active:

“Appeal – Legal Reorganization – Arresting of vehicles. Deadline of 180 days of art. 6°, paragraph 4° of LRF postponed by the courts decision and not yet due. Essentially the vehicles used in the productive unity, which compromises or deter the activity of the debtor. Case of suspension of the arrest and authorization for circulation, avoiding harms to the productivity chain of the appellant. Appellant that cannot sell any good without previous authorization of the M. Reorganizational Judge since it was the inventory of all vehicles deposited in the office, minimizing the risks of patrimonial dissipation. The General Assembly of Creditors already was already made, lacking only the judicial homologation. Appeal granted”<sup>35</sup>.

The legal prediction of not subjection of determined credits in the realm of legal reorganization has been known as “bank-lock” (“*travas bancárias*”), due the fact of they deter the recuperation of the corporative society “locking” the procedure and due fulfillment of the corporation’s recuperation plan.

Usually, the financial institutions are, in their vast majority, the main creditors of values listed as warranties in paragraphs 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> of article 49 of Lei 11.101/05. Fact that allowed the doctrine authors and observers to enlarge the concept “locking” pure and simples to the idea of “bank locks” aiming to grant the

<sup>33</sup> L. R. AYOUB, C. CAVALLI, *A construção jurisprudencial da recuperação judicial de empresas*, Rio de Janeiro: Forense, 2013, p. 134.

<sup>34</sup> M. CARVALHOSA (ed.), M. J. BEZZERA, P. F. DE TOLEDO, M. DE QUEIROS PEREIRA CALÇAS, A. PUGLIESE, *Recuperação empresarial e falência*, São Paulo: Revista dos Tribunais, 2016, Coleção tratado de direito empresarial, vol. 5, p.187.

<sup>35</sup> BRAZIL, TJSP, *Agravo de Instrumento* n° 2186310-95.2014.8.26.0000. 1ª Câmara Reservada de Direito Empresarial. Des. Rel. Francisco Loureiro, Diário Oficial do Estado de São Paulo (DOESP), 11 March 2015.

satisfaction of these credits to which, in theory, usually are the main creditors of corporations in distress, bring that, the financial institutions.

One who defends the “bank locks” justifies the necessity of granting a more tangible and safe warranty to societies and institutions which are responsible for the refinancing of credits in the corporative Market, due the risks of non-compliance. Also states that the “bank locks” are a measure are the legal instrument of locking credits of financial-economic nature most effective in the concession of warranties to the compliance of the contracted obligations of a society in financial distress in the view of fomenters and financing institutions of the country’s corporative activity.

Another strong argument utilized by ones who defend the bank locks is the principle of the compulsory compliance of contracts, or the binding force of conventions, represented by the rule *pacta sunt servanda*. The evoked principle capsules the idea by which the contract, obeyed the legal requirements, becomes mandatory between the parties, not being able to disconnect from it by other mean that no other bargain, in this sense, the contract constitutes a species of private law between the parties, acquiring binding force equal do the legislative statutes.

The defenders of the position of “*bank locks*” states that only with a better and more effective protection of their credits, therefore, it could be possible to diminish the bank spread, which would result, thus, in diminishing of the inherent risks to the activities of refinancing and credit granting by the financial institutions in Brazil

Currently, the stance in defense of the “bank locks” is targeted by countless debates among the Brazilian lawyers and courts. One of the main reasons of these discussions lies in the practice adopted by the financial institutions of the repass of high interest rates to the consumers, either natural or legal persons. It is public and well known that even with the warranty that the financial firms obtain against non-compliance in the moment of the concession of credit, the Brazilian bank spread is still considered to be one of the highest of the world market.

Until the year of 2015 the jurisprudence was pacific in the sense that the credits in bank locks were subjected to the effects of Legal Reorganization, though, the decision made in 14/07/15 - File RJ n°0823725-50.2015.8.12.0001 – Campo Grande’s Bankruptcy Court (*Vara de Falências de Campo Grande*), in favor to the reorganize Grupo Pinesso, where, for the first time it was questioned the constitutionality of paragraphs third and fourth of article 49 of *lei* 11.101/2005:

“[...] Due the unconstitutionality of the paragraph third and fourth of article 49 of *lei* 11.101/2005, I will not apply them in the present demand, given that it is not in accord with the rules and constitutional principles (article 170 and 1<sup>st</sup>, I of CF), mainly those that give north to the economic order: the private property, the social function

of property and the Corporation, the free Market, the granting of plain employment, the balance of regional and social inequalities, and the distinctive treatment to small and micro-corporations, declaring that the bank credits originated from legal institutions described in the referred paragraphs, ‘creditor entitled to the position of fiduciary owner of mobile or real estate goods, mercantile loaner, owner or committed seller of real estate, which respective contracts have clauses of irrevocability or irreversibility, including real estate incorporation, or the property in contract of selling with domain reserve; as well as the Advance Payment of Exchange Contract”, are subjected to the legal reorganization.”

[...] Therefore, bring, the adoption of the principle of the Corporation preservation by the legislator of 2005 considered this new paradigm, given that by the referred principle we must, in the solution of the financial distress of a Corporation, consider firstly the collectivity’s interests, which usually corresponds to the preservation of the Corporation. Given this position, it may come the following question: But what is the importance to the collectivity of the preservation of Corporations? Well, the answer is quite simples. The corporation represents today one of the main pillars of the modern economy, therefore, it is a great source of work posts; tributary incomes; supply of products and services in general; as well as bring of the engine of a free market system; along with many other functions. [...]

The decision made by the first instance was maintained by the Court of Justice of Mato Grosso (*Tribunal de Justiça do Mato Grosso*), by other arguments, creating a great unsettlement and apprehension in the financial institutions. If it was not enough, the Superior Court of Justice, (*Superior Tribunal de Justiça*) that already had a position firmed in favor to bank locks in September of 2016, through the trial of the Special Appeal (*Recurso Especial*) nº 1.532.943 – MT (2015/0116344-4) where the imminent Reporting Judge, Minister Marco Aurélio Bellizze, followed by the majority of the 3<sup>rd</sup> Group of judges of the Superior Court of Justice; let clear that, in the legal reorganization, the approved plan in the general assembly of creditors is valid for everyone, being inferred that it had deterred the bank lock, almost causing a panic among the financial institutions<sup>36</sup>.

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<sup>36</sup> “Special appeal. in court control of legality in the plan of legal reorganization approved by the general assembly of creditors. Possibility, in theory. Prediction of suspension of fiduciary warranties and real in the realm of legal reorganization rightfully approved by the general assembly of creditors. Binding, therefore the debtor and all creditors indistinctively. Special appeal provided. 1. It is absolutely possible to the Judiciary Power, without enter in the economic viability of the economically distressed company, to promote the legality control of the plan of legal reorganization, which itself, in nothing compromises the general assembly of creditors sovereignty. The attribution of each one does not mix themselves. The general assembly of creditors is due to analyze, in one time, the economic viability of the corporation, as the

Therefore, the Superior Court of Justice has generated a limited period of interpretation that altered their stance about the subject, positioning itself in favor of the principle of the preservation of the Corporation and the economic activity against the legal certainty of the creditors. The interpretations of well-known lawyers about the subject were the most diverse and contradictory. Later, in 18<sup>th</sup> April 2017 the 3<sup>rd</sup> Group of SCJ has trialed the Declaration Appeal, published with the respective decision in 2 June 2017, clarifying through the Reporting Minister Marco Aurélio Bellizze the majority understanding which is revealed in its transcription:

“Therefore, considering that: i) the general rule of LREF is that the novation affects only the society’s obligations in the reorganization, with express distinction to the warranties granted to the creditors; ii) that the bankruptcy law allows wide possibilities to the creditor and debtor to negotiate the terms of the plans of legal reorganization, to allow the best arrange of both parties interests; iii) that the clause predicted in the legal reorganization plan which excluded the warranties granted is about the disposable

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consecution of the presented proposal. To the Judiciary Power by its turn, it is given the duty to care about the validity of the manifestations made, and, naturally, to preserve the legal effects of the rules that are revealed as binding. 2. The extinction of obligations, due the homologation of the plan of legal reorganization is conditioned to the effective fulfillment of its terms. If not implemented the resolute condition, by express legal disposition, “the creditors will be reconstituted of their rights and warranties in the conditions originally contracted” (art. 61, § 2º, of Lei n. 11.101/2005). 2.1 Usually, despite the novation operated by the legal reorganization, are preserved the warranties, in which it states the possibility of its owner exercise its rights against the third party’s warrantors and impose the maintenance of the claims and enforcements promoted against warrantors, guarantor, or co-obliged in general, except for the partner with unlimited and solidary liability (§ 1º, of art. 49 of Lei n. 11.101/2005). And, specifically about the real warranties, these only can be fulfilled or substituted, by the occasion of its alienation, through express permission of the creditor entitled to this warranty, in the terms of the § 1º of art. 50 of the mentioned act. 2.2 Preserved in principle, the conditions originally contracted in which are present the adjusted warranties, the regency law, predicts expressly the possibility that the plan of legal reorganization, under them may state otherwise (§ 2º, of art. 49 of Lei n. 11.101/2009). 3. Inadequate, thus, restrict the suppression of real and fiduciary warranties, as seen in the plan of legal reorganization approved by the general assembly, only to the creditors that have voted favorably in this sense, coffering distinctive treatment regarding the other creditors of the same class, in manifest contrariety to the majoritarian deliberation. 3.1 By the occasion of the deliberation of the presented recuperation plan, the creditors, represented by their respective class, and debtor proceed with negotiable bargains and adequate the different sided interests, evaluating well in which extension of efforts and renounces they were willing to support, in the intent to reduce the harms that were coming (by the perspective of the creditors) as well as let the restructuring of the distressed corporation (on the view of the debtor) And in order to let the creditors to have the adequate representation, being for the instauration of the general assembly, or to the legal reorganization plan’s approval, the regency act established in arts. 37 and 45, the respective minimum quorum. 4. In the hypothesis of the proceeding, the suspension of real and fiduciary warranties are mentioned expressively in the legal reorganization plan, which has counted with the approval of the creditors with due representation by their classes (providence, therefore, which converges in the ponderation of values, with interests of these in majority), which causes reflexively in the observance of § 1º of art. 50 of Lei n. 11.101/2005, and, mainly, in the binding of all creditors indistinctively. 5. Special appeal granted.”

BRAZIL, Superior Tribunal de Justiça, *Recurso Especial* nº 1.532.943, 3ª Turma, Ministro Relator Marco Aurélio Bellizze, Diário Oficial da União (DOU), 13 September 2016.



patrimonial rights (renounce of the right to charge the debt from the warrantors), the conclusion that best fits the dichotomy “preservation of the viable corporation x preservation of warranties” is that the clause would be only legitimated and opposable to the creditors which approved the reorganization plan without any distinction claim, therefore, not bring applicable to those not present in the occasion of the general assembly of creditors, have abstained themselves of voting or have manifestly against the disposition in contrary, which is to submit to the plan of reorganization of the creditors that voted against the clause that predicts the exclusion of clauses that excludes, the warranties imposes in a true disrespect to the legal certainty and its consequences, in the measure that a creditor that gives a credit and receives in exchange a warranty, must certainly of a minimum granting that this warranty will be respected, even in the occasion of legal reorganization or bankruptcy in the form predicted by Lei nº 11.101/2005.

By the other hand, for the creditors that approved the reorganization plan without any distinction, the clause that excludes the warranty is plainly effective thus is about a disposable right, which is embedded in the realm of the autonomy of will of the creditor himself. And, in the hypothesis of failure of the legal recuperation and bankruptcy, the creditors will have restituted their rights and warranties in the conditions originally contracted (art. 61, § 2º, of Lei nº 11.101/2005).<sup>37</sup>

The stance, therefore, has returned to the prior one, which is the warranties maintenance, in the words of Ricardo Limiro:

“In conclusion, therefore, that this decision has nothing of new or innovative, and even less historical modification of the SCJ which, altering its prior jurisprudence, has comprehended that the general assembly of creditors can free the co-obliged in the legal reorganization, but only in the strict observation of lei (art. 45 and § 2 of art. 49 of lei 11.101/05), respecting the will of the majority in all classes of existent creditors in the case and those who opted for the modification of the pact originally, as well as respecting the precedent in Súmula 581 of SCJ (STJ), given that the agreement only bonded the respective parties – debtor in legal reorganization and creditors –, and not third debtors solidary or co-obliged in general by exchange, real or fiducial warranties.”<sup>38</sup>

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<sup>37</sup> BRAZIL, Superior Tribunal de Justiça, Embargos de Declaração em Recurso Especial nº 1.532.943, 3ª Turma, Diário Oficial da União (DOU) 2 June 2017.

<sup>38</sup> R. LIMIRO, *Sobre a recuperação judicial e o Resp 1532943/MT*, Available at: <http://www.migalhas.com.br/dePeso/16,MI262383,91041sobre+a+recuperacao+judicial+e+o+Resp+1532943+MT+plano+aprovado+em>.

As it can be verified, the trial turned out to sustain the legal certainty and to secure the appliance of *Lei* 11.101/05. In this sense, adds Frederico Augusto Monte Simionato<sup>39</sup>:

“[...] There is no commerce without legal certainty and credit. The credit, by its turn, requires certainty of its receivables. Thus, the more tortious is the process of credit recovering, more it becomes expensive and hard to reach for the entrepreneur. Without the credit, there is no commerce. Without the credit, there is no legal reorganization. What comes out of all of this is that if the entrepreneur has presented the reorganization claim to become with no possibility of credit acquisition it would be more adequate that he claimed the proper bankruptcy and not the reorganization”.

The decision proffered by the Superior Court of Justice has put an end to the uncertainty scenario about the receiving of credit due the warranties weakening, fact that, if confirmed, would be bad News for the economy of the country. Thus, it would generate the raise and retraction in credit concession, the raise in the bank spread, the reduction of wealth circulation the distrust of the investors of both national and foreign capital and being expressively against the spirit of *Lei* n° 11.101/2005.

#### **§ 4 – DIP FINANCING AND THE RESOLUTIONS N° 1.559/88 AND 2.682/99 OF THE NATIONAL MONETARY COUNCIL (NMC)**

The DIP Financing has its origins in the United States of America, where the corporations that are in financial distress usually claim their legal reorganization according to Chapter 11 of Bankruptcy Code<sup>40</sup> to get access to new lines of credit.

Debtor in possession is a modality of refinancing which enables the injection of new Money in the recovering Corporation. Which finds itself in great financial distress and secure the priority investors in the payment regarding the creditors of any other nature.

The *DIP Financing* can give benefits such as the preferential payment regarding all other credits, either scheduled or unscheduled. This kind of financing can be contracted in the long run and allows the corporation in distress to fill the lack of resourced to tend to their most urgent obligations in this phase of transition between the recovery period and the approval of the Reorganization Plan (bridge-financing);

It is important to result that in this line of credit, debtor-in-possession financing (*DIP Financing*) the Corporation that claims

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<sup>39</sup> F. SIMIONATO, *Tratado de direito falimentar*. Rio de Janeiro: Forense, 2008, p. 201.

<sup>40</sup> USA. Bankruptcy Code. Available at: <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics>.

bankruptcy under *Chapter 11*<sup>41</sup> keeps the management and disposition of its goods during the process of reorganization. During the legal procedure of reorganization of corporations, instead to restrict the Corporation in distress credit, the claim opens new ways to acquire new money.

The DIP financing is disciplined by Section 364<sup>42</sup> of the Bankruptcy Code (obtaining credit), which secures to the investors priority in payment regarding the pre-existing creditors; §364. Obtaining credit (a) If the trustee is authorized to operate the business of the debtor under section 721, 1108, 1203, 1204, or 1304 of this title, unless the court orders otherwise, the trustee may obtain unsecured credit and incur unsecured debt in the ordinary course of business allowable under section 503(b)(1) of this title as an administrative expense. (b) The court, after notice and a hearing, may authorize the trustee to obtain unsecured credit or to incur unsecured debt other than under subsection (a) of this section, allowable under section 503(b)(1) of this title as an administrative expense. (c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt- (...) (1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title; (2) secured by a lien on property of the estate that is not otherwise subject to a lien; or (3) secured by a junior lien on property of the estate that is subject to a lien. (d)(1) The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if- (A) the trustee is unable to obtain such credit otherwise; and (B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

The procedures rules to the authorization of the DIP can be found in Rule 4001<sup>43</sup>(c) of the Federal Rules of Bankruptcy Procedure (“obtaining credit”).

In Brazil, the DIP Financing does not have an own specific regiment in *Lei* n° 11.101/05 which contemplates only two benefits to one who concedes credits to the debtor. The first it to acquire the classification of scheduled creditor in the event of bankruptcy (art. 67, caput<sup>44</sup>), being that the credit prior to the reorganization claim is under the non-scheduled condition.

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<sup>41</sup>USA. Bankruptcy Basics: Chapter 11. Available at: <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics>.

<sup>42</sup> USA, Bankruptcy Code. Available at: <http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title11-section364&num=0&edition=prelim>.

<sup>43</sup> USA, Bankruptcy Code. Available at: <http://uscode.house.gov/view.xhtml?Path=/prelim@title11/title11a/node2/node4/part4&edition=prelim>.

<sup>44</sup> Brazil, *Lei* 11.101 of 9 February 2005, *Diário Oficial da União* (DOU) (Edição extra) 9 February 2005.

“The credits from obligations contracted by the debtor during the legal reorganization, including those concerning expenditures with suppliers of goods or services and loans, will be considered unscheduled, in case of bankruptcy, respected, in which applies the order established by the article. 83 of this *Lei*”.

It can be observed in practice that both benefits predicted in the article 67 of the Legal Reorganization Act do not stimulate the Market to invest in corporations in situation of financial distress, thus, do not generate a warranty distinctive enough for ones who finance the corporation in this condition.

Luiz Ayoub and Cássio Cavalli<sup>45</sup> explain that the exact moment in which the credit is granted to the plaintiff becomes listed: “It is solidified in jurisprudence that are listed the credits that exist after the approval of the legal reorganization.”

By explaining the goal of article 67 of fomenting the finance aid to the company in financial distress, Luiz Ayoub and Cássio Cavalli<sup>46</sup> believe that the jurisprudence must add all the credits after the approval of the legal reorganization procedure “[...] We believe that is possible that the jurisprudence may enlarge its comprehension about the listed credits to include all credits after the date of the legal reorganization claim [...]”

The conceded credits within the legal reorganization are of great importance and therefore, deserve a supplementary protection, Fábio Ulhoa<sup>47</sup> justifies that “[...] we must recognize that these creditors, by opening credits to a entrepreneur declared in crisis, gave a decisive contribution to the process of overcoming that, by taking considerable risks to themselves.”

Manoel Justino<sup>48</sup> also adds value to the effort of the legislator in redacting the article: “This is a wise disposition of the Law, for it acts as an incentive for those who negotiate with the firm keep doing so during the period of legal reorganization.”

In the same sense of our understanding, Leonardo Dias<sup>49</sup> adds: “The country’s solution it criticized, thus the benefits are too limited and only operates in bankruptcy, while in legal reorganization no advantage is given by the law to the lender”.

In addition to the absence of legislation that incentive and give certainty to financial institutions foment the credit operations to corporations in legal reorganization, the legislation itself deter the concession of credit to corporations in this situation as the Resolutions/ *Resolução* 2.682/99<sup>50</sup> and 2.697/00 of the National

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<sup>45</sup> L. R. AYOUN, C. CAVALLI, *A construção jurisprudencial da recuperação judicial de empresas*, Rio de Janeiro: Forense, 2013, p. 81.

<sup>46</sup> L. R. AYOUN, C. CAVALLI, *A construção jurisprudencial da recuperação judicial de empresas*, Rio de Janeiro: Forense, 2013, p. 82.

<sup>47</sup> F. COELHO, *Ulhoa, Comentários à Lei de Falências e de recuperação de empresas*, São Paulo: Saraiva, 2014, p. 251.

<sup>48</sup> J. BEZERRA FILHO, M. JUSTINO, *Lei de recuperação de empresa e falências*, São Paulo: Revista dos Tribunais, p. 190.

<sup>49</sup> L. A. DIAS, *Financiamento na Recuperação Judicial e na Falência*, São Paulo: Quartier Latin, 2014, p. 340.

<sup>50</sup> BRAZIL, *Banco Central do Brasil. Conselho Monetário Nacional. Resolução* n° 2682, of 21 December 1999.

Art. 1° “Determine which financial institutions and other institutions authorized to work for the Central Bank of Brazil, must classify their credit operations in crescent risk order, through the following levels: I - nível AA; II - nível A; III - nível B; IV - nível C; V - nível D; VI - nível E; VII - nível F; VIII - nível G; IX - nível H.”

[...]

Art. 6° : “The provision to make against credits the doubtful liquidation must be constituted monthly not being inferior to the sum of the appliance of percentages to me mentioned, without harming the liability of managers of the institutions for the

Monetary Council. Which determines that financial institutions must classify their credit operations through the risks with “rational and determinable” criteria regarding the debtor, considering: (a) the economic-financial situation, (b) indebtedness rate, (c) results generation capacity, (d) cash flow (e) management and control quality, (f) punctuality and delay in payments, (g) contingencies, (h) field of economic activity, (i) credit limit.

Considering the operation itself, must be observed; (a) the nature and finality of the operation, (b) warranties features (liquidity) and (c) amount at stake. The article 6<sup>th</sup> of *Resolução* 2.682/99 determines that the Financial Institutions must provide (through a compulsory deposit) the credits of uncertain liquidation of banks monthly in the perceptual of 100% (one hundred percent)<sup>51</sup> for those who have a non-compliance equal or superior to 180 days. It is certain that corporations in financial distress are, at least, in the mentioned rate of delay.

Adding to that, there is the prediction of “abusive concession of credit” in item IX of *Resolução* n°1.559/88<sup>52</sup> which prohibits expressly that financial institution to: “(a) do operations that do not comply with the principles of selectivity, warranty, liquidity and diversification of risks and (b) give credit or addition without the constitution of an adequate title, representing the debt”. The non-compliance of this criteria subject the financial institution to penalties, among them warning, monetary fine, disability to exercise administrative chairs and financial institutions.

If the express prohibitions by NMC were not enough, even if the Financial Institutions could refinance corporations in financial distress, they would have to deal with the interpretations generated by the Brazilian Civil Code<sup>53</sup>. By the simple fact that they have financed corporations in insolvency phase, article 159 determines that “they will be equally annulable the burden contracts of the insolvent debtor, when the insolvency is acknowledged or there if motive to be known by the other contractor”. This interpretation can deepen further while combined with the text of article 163 of the Code “Are assumed as fraudulent of rights of other creditors the warranties of debts that the insolvency debit has been given to another creditor”.

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constitution of provision in values enough to face the probable losses of the credits realization”.

<sup>51</sup> BRAZIL, *Banco Central do Brasil. Conselho Monetário Nacional. Resolução* n° 2682 of 21st December 1999. VIII – “100% (one hundred percent) about the value of the classified operations as risk level H” with the correspondent debit in provision, after past six months from its classification in this level of risk, not being admitted the registry in an inferior period.”

<sup>52</sup> BRAZIL, *Banco Central do Brasil. Conselho Monetário Nacional. Resolução* n° 1.559/88 of 22 December 1988 (DOU) 22.12.1988 IX – “It is forbidden to the financial institutions: a) to make operations that do not fulfill the principles of selectivity warranty, liquidity and diversification of risks. b) give credit in advance without the constitution of an adequate title representing the debt. (NR) (Content given by the incise IX of *Resolução* 3258, of 28/01/2005).

<sup>53</sup> BRAZIL, *Lei* 10.406 of 10 January de 2002, *Diário Oficial da União* (DOU), 11 January 2002.

As we have observed, the legal barriers that deter the Financial Institutions to foment corporations in financial distress are many and, only a special legislation and rules that alter the stance of the National Monetary Council, would bring calm and legal certainty needed to the creation of the DIP financing in Brazil.

## CONCLUSIONS

The lawyers that work in the field of legal reorganization know that in practice; even the goods marked as fiduciary alienation (most of them) have remained under the effects of legal reorganization. Firstly, due their capital goods nature, Essentials to the maintenance of the activity of the Corporation in debt, secondly due the successive and indeterminable prorogation of the “stay period” within the Legal Reorganization Act, which ends up to sustain its effects until the end of the reorganization and not only during the 180 days period.

In short, the financial institutions, while celebrating the exclusion of “fiduciary alienation” credits from the appliance of the Legal Reorganization Act, known as “bank locks”, through the transverse interpretation, oblige themselves to become part of legal reorganizations, without even be part of the creditors list or to have the right to vote.

With the trial of the Special Appeal/ Recurso Especial n° 1.532.943 great part of the lawyers believed that the Superior Court of Justice, with the intention to allow the continuity of economic and employment maintenance have revoked the bank locks. This fact was not confirmed and generated frustration to some, but have maintained the legal certainty needed for the creditors and financial institutions.

It can be concluded that it is important that the rules contained in the paragraph 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> of article 49 of Lei 11.101/05<sup>54</sup> must be interpreted according to the principle of the preservation of the entrepreneur society. However, it is reasonable that the applicability of the principle must find an economic-financial equilibrium to guarantee the right of the financial institutions,

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<sup>54</sup> Brazil, Lei n° 11.101 of 9 February 2005, Diário Oficial da União (DOU), 9 February 2005 :

“[...] )§ 3º: In bring the case of creditor entitled of the position of fiduciary owner of mobile or real estate goods, mercantile lender, owner or committed seller of real estate which respective contracts have irrevocability and non-waiver clauses including real estate incorporations, or owner in contract of selling with reserve of domain, its credit will not be submitted to the effects of the legal reorganization, and will prevail the property rights under the thing and contractual conditions, observed the respective legislation, not bring allowed, though, during the deadline of suspension which is referred by § 4º of art. 6º of this Lei, the selling or withdraw of establishment from the debtor of goods of capital essential to the corporative activity.

§ 4º It will not be subjected to the effects of legal reorganization the values referred by II of art. 86 of this Lei.

§ 5º Bring the credit granted by pledge under credit titles, credit rights, financial appliances or mobile values, can be substitutes or renewed as warranties liquid or expired during the reorganization and, while not renewed or substituted, the value eventually received in payment for the warranties will remain in bonded account during the period of suspension that refers § 4 of art. 6º of this Lei.”

given that, they are the ones, which foment the economic activity itself, and without warranties, the credit would be certainly scarcer due the lack of legal certainty.

There is no successful Legal Reorganization, without new cash and the source of refinancing is the lung of any Legal Reorganization, though the regulatory limits of Resolução 2.682 of the National Monetary Council deter the resources flow from banks. These rules must change.

Regarding the schedule feature of the new credit predicted in article 67 of the Legal Reorganization Act it is not absolute and does not give any real advantage in the Legal Reorganization to the creditor in practice.

Finally, it can be concluded that the legislation must evolve to institute the DIP financing in Brazil, with clear rules, legal certainty and mainly, giving to this credit a priority level of payment superior to the others, giving to the Financial Institutions that give the credit, the power to intervene in the management of the company to guarantee the success of the reorganization. Thus, the simple injection of capital without a proper planning and a qualified management would not improve the company's chances of success. If the refinancing is the lung of any Legal Reorganization, a good management is its heart.