

COMPLEXITIES OF BANKRUPTCY PROCEEDINGS OR COURT-SUPERVISED REORGANIZATION OF MAJOR ECONOMIC GROUPS UNDER THE FOCUS OF SUBSTANTIVE AND PROCEDURAL CONSOLIDATION

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The purpose of this article is to analyze the complexity of Bankruptcy or Court-Supervised Reorganization Proceedings of major economic groups, as well as their consequences before the Court, the Trustee, the Companies being reorganized, the creditors and the collectivity.

It is also the object of this study to demonstrate several procedural difficulties encountered during the course of these judicial processes, with special focus on Consolidation and Substantive in the course of the process.

§ 1 – GENERAL ASPECTS OF THE COURT-SUPERVISED REORGANIZATION

For a variety of reasons a company, or a group of companies, may experience the economic-financial crisis: economic, financial or even economic-financial.

The current bankruptcy and judicial recovery law uses the term “economic-financial” assuming that the decline will be joint, but as Waldo Fazzio JR emphasizes¹: “The differences between economic situation and financial situation are very fragile and of technical interest of the company. Externally, both serve to justify the contest.”

According to Fábio de Ulhôa Coelho, there are three types of economic and financial crisis relevant to the Court-Supervised Reorganization doctrine: (i) The economic crisis, when the sale of products or services does not take place in sufficient quantity to maintain the business activity working; (ii) the financial crisis, when there is insufficient cash flow, money or resources available to meet the obligations and; (iii) the equity crisis, which occurs when assets are less than liabilities, that is, the debts exceed the

¹ <http://fazziojuridico.com.br/crisis-economic-financial/>.

credits of the company or the business group, causing illiquidity to settle future obligations².

Up to 2005, the solution regime for economic-financial crisis of companies in Brazil was regulated by Decree-Law No. 7.661/1945, which provided the *Concordata* (an arrangement with creditors), preventive or suspensive, as a form of release of debts for indebted companies, with fixed rules and minimum rates of payment proposals established by law. According to José da Silva Pacheco, the bankruptcy was preventive when required before the bankruptcy decree and suspensive when required after the breach, as long as it followed some legal conditions³.

As for bankruptcy, Decree-Law No. 7.661/1945 was essentially based on the idea of removing the unsuccessful business owner and their administrator from the market, collecting and liquidating his assets, with a view to paying as many creditors as possible, with no concern, however, for the maintenance of the business activity and the social benefits arising from it, such as the maintenance of jobs, the generation of taxes and wealth.

Such understanding was altered, in a true revolution of the Brazilian system of reorganization and bankruptcy, when Decree-Law No. 7.661/1945 was repealed by Law No. 11.101/2005, also known as the Bankruptcy and Company Reorganization Act, or simply *LRF*, which privileges the principle of company preservation, aiming to protect the wealth-producing source, the jobs generated by entrepreneurial activity and the interest of the creditors, as well as the collective interest, through the collection of taxes.

Eronides Aparecido Rodrigues dos Santos⁴ points out that the first point to be observed in the new legislation is the valuation of the company, giving it an important role in society and highlighting the need to be preserved.

A double aspect was adopted in this new system, aiming, at first, to recover the business activity or, if not possible, to extinguish it through bankruptcy.

According to Professor Manoel Justino, the judicial recovery is intended for the companies with real capacity to get back in business. In the cases where this do not apply there's need to declare bankruptcy of the companies that use this institute inappropriately⁵.

The legal scholar, Rachel Sztajn, stated that the new law addressed the social demand of preservation of the companies through the reorganization of the business activity, denominating such reorganization as Court-Supervised Reorganization, whose

² F. COELHO, *Curso de direito comercial: direito de empresa (Commercial Law Course: Entrepreneurial Law)*, 8. Ed. São Paulo: Saraiva, 2008, v. 3. pp. 132-232.

³ J. DA SILVA PACHECO, *Processo de Falência e Concordata*, RJ, 2001, 12ª edição, p. 584.

⁴ A. ANDRIGHI, F. BENETTI, S. AGOSTINHO, Coordinators of the 10 years' work of validity of the Law of Recovery and Bankruptcy (Lei nº 11.101/05) - Retrospectiva geral (Locais do Kindle 10408). Saraiva. Edição do Kindle.

⁵ M. BEZERRA FILHO, *Business Recovery and Bankruptcy Law: Lei 11.101/05: comentada artigo por artigo*. 7 ed., São Paulo. Revista dos Tribunais, 2011.

purpose is to recover, restore and reestablish the business activity⁶.

To create an alternative that would make the continuity of companies going through an economic-financial crisis possible, the Law No. 11.101/2005 established the Court-Supervised regime in the Brazilian legal system, which was inspired by successful experiences in other countries, such as the United States and France.

For Manoel Justino Bezerra Filho the Company's Court-Supervised Reorganization is an attempt to: "solve the economic situation, preserving the company as a living organism, which would preserve production, keep jobs and, with the business turnover returning to normality, provide the payment of all creditors."^{7,8}

Fábio Ulhôa Coelho defines Court-Supervised Reorganization simply as an attempt to avoid the company collapse and its adjudication of bankruptcy⁹.

However, the Court-Supervised Reorganization proceedings does not stand as a universal alternative, to be applied in all cases of economic-financial crisis, instead, it must take place only in the cases where there is a possibility of maintaining the business activity, its social purpose (generation of jobs, production of goods and services, payment of creditors and collection of taxes), with the effective overcoming of the economic and financial crisis.

§ 2 – GENERAL ASPECTS OF BANKRUPTCY PROCEEDINGS – BRAZILIAN SYSTEM VIEW

A company's bankruptcy can be decreed in a variety of ways. However, no matter how it occurs, the bankruptcy decreed implies in the withdrawal of the business owner, the bankrupt partner, the company's management team, and their replacement by a Trustee appointed by the Court.

Bankruptcy proceedings, *prima facie*, aim at collecting the largest number of assets possible in favor of the bankruptcy estate, in order to pay all the creditors or, at least, pay off the largest amount of credits possible, according to the order provided by Law.

According to Marco Antonio de Oliveira¹⁰: in addition to withdrawing from the market those companies that did not

⁶ R. SZTAJN, *Court-Supervised Reorganization*, in F. SOUZA JUNIOR, A. PITOMBO, (ed.). *Comentários à lei de recuperação de empresas e falência: Lei n. 11.101/2005 (Comments on the Bankruptcy and Company Reorganization Act: Law No. 11.101/2005)*, São Paulo: Revista dos Tribunais (*Magazine of the Courts*), 2005. p. 220.

⁷ Free translation.

⁸ F. BEZERRA, RT 2017, 12ª ed p. 65. Lei de Recuperações Judiciais de empresas e Falências (Court-Supervised Reorganization and Bankruptcy Act).

⁹ F. COELHO, *Curso de direito comercial: direito de empresa (Commercial Law Course: Entrepreneurial Law)*, v. 3. p. 381.

¹⁰ D. CARNIO COSTA, *Complete Remarks to the Law of Judicial Recovery and Bankruptcy*, Vol III, Curitiba, Juruá Editora, 2015, p. 48, by M. DE OLIVEIRA.

succeed, it open up the possibility for those creditors who had frustrated their hope of receiving the credit granted to the entrepreneur or the company society that had its bankruptcy declared minimize this loss, with the gathering of assets of the bankrupt debtor and their realization, observing the payments in the terms set forth in the Law itself.

Fábio Ulhoa Coelho¹¹ also adds that not all bankruptcy is harmful to the society. As an example, he talks about companies that are “technologically backward, undercapitalized” or even those with “poor administrative organization” should be closed.

As stated by Faccio and Ribeiro Neto:

“In bankruptcy proceedings, the aim is to satisfy creditors, by means of asset realization, which starts with the collection of the debtor’s properties by the Trustee. Besides, the collection of properties (and of documents) is one of the Trustee’s competencies in case of bankruptcy, as determined by Article No. 22, Item III, Subitem “f”, of Law No. 11.101 of 2005. Although in theory debtors’ properties and documents are collected right after the appointment of the Trustee, the collection can take place during all the course of the bankruptcy proceedings, as soon as such properties and documents are located.”^{12,13}

We can denominate as a bankruptcy estate everything that is collected during the bankruptcy proceeding and that can be credited to the bankruptcy estate.

As soon as a commitment letter is signed, the Trustee must provide the immediate collection of assets, according to Article 108 of Law No. 11.101/2005.

The collection as a first act is established in the legal text with the aim to prevent the general partners of the bankrupt business to misappropriate the assets, in detriment of the bankruptcy estate and its creditors.

Therefore, it is essential to have a fine-tuning between the Bankruptcy Judge and the Trustee, for once the bankruptcy is decreed, the Trustee must have a team prepared to perform the immediate collection of the properties, frequently at several registered offices and states simultaneously, what implies logistical and organizational difficulties.

The spirit of the bankruptcy process is to safeguard the credit of creditors by collecting the largest amount of assets. According to Alfredo Luiz Kugelmas and Fabrício Godoy de Souza, in the book; 10 years of the Law of Recovery and Bankruptcy (Law No.

¹¹ F. COELHO, “Comments on Bankruptcy and Business Recovery Law”, *Rev. dos Tribunais*, 2015, p. 165.

¹² Free translation.

¹³ V. RIBEIRO, J. NAZARENO, Realização do ativo – venda ordinária e extraordinária – leilões (“Assetrealization – ordinary and extraordinary sale – auctions – modalities”), in D. COSTA, (ed.). *Comentários completos à lei de Recuperação de Empresas e Falências* (“Full comments to the Bankruptcy and Company Reorganization Act”), Vol. 3. Curitiba: Juruá, 2015. p. 141.

11.101/2005)¹⁴, the judicial administrator has the duty to represent the bankrupt estate, judicially or extrajudicially, to represent the interest of all, assigning the credits authorized, disposing of the asset and investigating the conduct of the bankrupt.

Luis Felipe Salomão also points out that art. 113 of Law 11.101/2005 allows even the early sale when the assets of the group have the risk of perishing, all to maximize the collection¹⁵.

The legislator consecrated the rule that determines that the judicial administrator must act in all lawsuits and demands involving the bankrupt estate, making him a true Supervisor of the legality in favor of the creditors of the estate. It should be noted that the judicial administrator must be summoned to answer all the company's demands under penalty of invalidating the process¹⁶.

Besides court proceedings, which may cause to generate assets for the bankruptcy estate, it is up to the Trustee the role of analyzing and exercising bankruptcy estate rights, aiming at constituting the highest amount of current or noncurrent receivables.

At this point, it is essential that the Trustee have in his or her team qualified and committed professionals to analyze the company as a whole and to check possible actions and procedures that can result in assets for the bankruptcy estate. The Trustee and the team must also analyze the liabilities, by checking if they are correct or if they can be an object of reduction or extinction.

Due to his responsibilities, it is important to emphasize the duty of the administrator to account for his actions at the end of the process, or even when he is replaced, dismissed or resigned¹⁷.

The Trustee, as soon as possible, must perform the inventory of the bankruptcy estate, to move on to the next level, which is liquidating the assets and paying off the liabilities, respecting, as much as possible, the principle of business continuity.

§ 3 – THE ECONOMIC GROUPS

In the Brazilian Legislation, the bad performance of Legislative did not exempt itself from accurately resolving, issues related to the formation, constitution, and implications of the existence of economic groups among companies¹⁸.

¹⁴ C. ABRAO, F. ANDRIGHI, S. BENETI (eds), *10 anos de vigência da Lei de Recuperação e Falência (Lei nº 11.101/05) - Retrospectiva geral* (Locais do Kindle 4281). Saraiva. Edição do Kindle.

¹⁵ L.-F. SALOMÃO, *Recuperação Judicial, Extrajudicial e Falência - Teoria e Prática*, p. 33. Forense. Edição do Kindle.

¹⁶ Brasil, Tribunal Regional do Trabalho 4 RO: 11107620115040304 RS 0001110-76.2011.5.04.0304, Relator: A. ROSI, A. CHAPPER, Data de Julgamento: 21 August 2012, 4ª Vara do Trabalho de Novo Hamburgo.

¹⁷ Brasil, TJDF, AGI: 20150020243682, Relator: L. ARLANCH, Data de Julgamento: 27 January 2016, 2ª Turma Cível, Data de Publicação: Publicado no DJE: 12 February 2016, p. 160.

¹⁸ V. DE MELLO FRANCO, "Particularidades da affectio societatis no grupo econômico (The Particulars of affectio societatis in economic groups)", *Revista de Direito Mercantil* (Magazine of Mercantile Law), No. 89, p. 47.

In fact, in Brazil, some major companies, generally linked to a trade mark or an assumed commercial name, are constituted by a group of companies merged in an informal way. Thus, because of a legislative gap, the doctrine and the case law have established relatively solid parameters to cover this issue.

The phenomenon of the formation of economic groups arose right after the end of World War II, also being called as the third industrial revolution¹⁹, and has been developing in a crucial fashion in recent decades, also because of globalization.

In the words of Antunes, globalization enables:

“[...] internalization and interdependency of national markets; universalization of the free market model; the technology and communications revolution; an exponential increase in barriers to the international trade.”²⁰

Therefore, globalization has expanded the market for Brazilian companies from regional to worldwide; on the other hand, it has made possible for companies from all over the world to compete with Brazilian businesses in their internal market.

In this way, competition grew in the same proportion as the market of such companies, making an extremely specialized operation necessary in their respective fields of activity, in some cases resulting in the splitting of the main activity into several companies of support activities.

Economic groups are responsible for forming affiliates, aiming at creating better conditions to compete at the national and international levels, in addition to the privileged business conditions achieved through the grouping of companies.

Operations carried on by this type of group are usually responsible for an expressive portion of the countries' Gross Domestic Product (GDP) – including in Brazil – besides being the providers of a huge amount of jobs and, consequently, of beneficial impacts to society generated by them.

Considering the wealth created by them, it is important to analyze the impact of the existence of economic groups on the Reorganization proceeding, being such aimed at the social interest, consubstantiated in the business continuity and in a bankruptcy proceeding focused on the prompt payment of creditors.

In its origins, the doctrine tended to the classification of economic or company groups as “the concentration of companies, in the form of integration (shareholding, resulting in the control of one or some over the others), all of them being under a single economic direction”²¹.

¹⁹ M. CORDEIRO DE LIMA, M. MIRANDA, *Revista Virtual Direito Brasil* (Brazil Law Virtual Magazine), vol. 3, No. 1, 2009.

²⁰ J. ANTUNES, *Estrutura e Responsabilidade da Empresa* (Structure and Responsibility of a Company), p. 35.

²¹ W. BULGARELLI, *Manual das sociedades anônimas* (Hand book of Corporations), 13 ed. São Paulo: Atlas, 2001, p. 299.

As this understanding developed, doctrine and case law (precedents) now consider that there are diverse ways of consolidating economic groups, what makes the existence of a formal affiliation (shareholding agreement) among companies of the same group unnecessary²², for the economic groups of today are not subject to the classical business concentration, defined as horizontal or vertical, aimed at a single main business – but they can be formed by the diversification of products and activities, and even of business purposes, by means of the figure of the unitary control, carried out by a controlling entity²³.

Therefore, in subordination groups, it is not always possible to presume the joining of activities of each of the group companies aimed at a single main purpose. The group can then be formed with the aim of business diversification and broadening of its portfolio of products and services offered to the market.

In the Brazilian system, for instance, Law No. 6.046 of 1976, despite containing evident legislative gaps, rules two types of groups, being one of them the group in law, when there is a formal incorporation among partnerships, and the *de facto* group, incorporated by affiliated, controlled and controlling companies.

Such concepts are essential for the course of Reorganization and, consequently, for bankruptcies, since the characterization of the type of economic group constituted by the companies that filed for Reorganization or that went bankrupt will determine which repercussions will occur in the judicial world, related, mainly, to the collectivity of employees and creditors of the companies in crisis.

The lesson of COMPARATO teaches that there is an evident distinction between direction and control, for there are economic groups formed by coordination, in which there is a unity of direction, as well as – encompassed by a recent trend –, there are economic groups formed by subordination, in which the unity of control occurs, despite a common direction²⁴.

As will be seen below, it is of great importance to dwell on the doctrine of procedural consolidation and of substantive consolidation, to determine the reach the grouping of companies has in the judicial world.

Initially, it should be noted that the law did not discipline the procedural and substantive consolidation. These, however, have been applied in the proceedings due to the need in the conduct of proceedings. That is because the law considered bankruptcy and judicial recovery of only one company, but in the real world, several companies exercise control over each other and are so intrinsically related that one cannot deal with judicial recovery

²² F. COMPARATO, C. FILHO, *O poder de controle na sociedade anônima* (Controlling power in corporations), Rio de Janeiro: Forense, 2008, p. 45.

²³ W. BULGARELLI, *Manual das sociedades anônimas* (Hand book of Corporations), 13 ed. São Paulo: Atlas, 2001, p. 299.

²⁴ F. COMPARATO, C. FILHO, *O poder de controle na sociedade anônima* (Controlling power in corporations), Rio de Janeiro: Forense, 2008, p. 43.

without affecting the other and the creditors with whom they relate.

First, the process consolidation occurs when several companies act together in the active pole of the demand, without this implying a uniqueness of treatment. The second, which contains more implications, is the substantive consolidation, in which several companies, by some factors related ahead, start to develop only one plan and only one list of creditors, being the credits and debits examined as if they were only one.

§ 4 – THE PROCEDURAL CONSOLIDATION

Notably, the Courts of Brazil have been accepting the Reorganization formulated by joinder of plaintiffs of several companies belonging to the same economic group, applying, in view of the lacuna existing in the 11.101/2005 law, subsidiarity the Code of Civil Procedure, as authorized by art. 189 of LRF²⁵.

The formal consolidation occurs through the Reorganization filing, together with companies of the same group. However, in this case of formal consolidation, the existence of the consolidation of the proceedings does not imply an immediate pooling of the assets and liabilities of the group companies.

In this case, we verify the fact that the reorganization filing is made before the same court, with the same Trustee, which leads both to the economy and speed up of the proceedings, and to the economy of the treasury itself, in addition to avoiding conflicting decisions.

According to Paulo Penalva Santos, “in the event that the debtors belong to the same economic group, the processing of judicial recoveries in different courts could even prevent the success of overcoming the economic-financial crises.”²⁶

Cerezetti’s teaching is that the consolidation of the proceedings requires:

“the voting of the plan, even if scheduled to take place in meetings called on the same date, is made separately with respect to the legal separation existing between the companies of the group. The creditors of each debtor shall meet and, in accordance with the classes and quorums provided for in the Reorganization Act, shall resolve on the plan. The result of the conclave will therefore be determined in relation to each debtor.”²⁷

²⁵ Brazil, TJ-PE - AI: 3184481 PE, Relator: Cândido José da Fonte Saraiva de Moraes, Date of Judgment:: 18 December 2013, 2ª Câmara Cível, Date of Publication: 6 January 2014.

²⁶ L.-F. SALOMÃO, e P. PENALVA SANTOS, *Judicial Recovery, Extrajudicial and Bankruptcy - Theory and Practice*, 3ª ed., Rio de Janeiro, Editora Forense, 2017, Kindle.

²⁷ S.-C. NEDER CEREZETTI, “Grupos de sociedades e recuperação judicial: o indispensável encontro entre Direitos Societário, Processual e Concursal” *Groups of companies and court-supervised organization: the indispensable encounter among Corporate, Procedural and Bankruptcy and Reorganization Law*, in F. Yarshell e G. Pereira (ed.), *Processo Societário II*, Quartier latin, São Paulo, 2015, p. 763.

Initially, the formation of the joinder of plaintiffs in the reorganization filing constitutes *ab initio* the procedural consolidation of the economic group, which does not imply in the immediate pooling of its assets and liabilities that can occur in diverse situations, through the substantive consolidation doctrine.

§ 5 – SUBSTANTIVE CONSOLIDATION

With the emergence of the financial crisis in Brazil in mid-2013, coupled with the fact that large business groups are the object of criminal investigations in the framework of the *Lava Jato* Operation, with several reflections in the sphere of their assets, several reorganization requests have been filed²⁸. They did not intend to respect the economic separation of the companies of the economic group, pooling assets and liabilities of all the companies involved in a single monetary unit *monte mor*.

In general terms, substantive consolidation is the legal phenomenon that occurs when there is a pooling of assets and liabilities of several companies belonging to the same economic group, within the scope of reorganization.

Although the legislator has once again caused to frame a gap in Law, since this concept is not covered by the Bankruptcy and Company Reorganization Act, neither in the North American Bankruptcy Code, its occurrence has been accepted by case law and doctrine, (i) the Code of Civil Procedure provides for the possibility of forming a joinder of parties, that is, a union in one party, whether as plaintiffs or defendants; (ii) the Civil Code provides the possibility of disregarding the legal personality in several cases, as in cases where there is evident asset commingling or misuse of purpose between companies of the same group.

In Brazil, the Courts have authorized substantive consolidation²⁹ when verified the direct interpellation between the companies of the same group, with management of one over the others and provision of cross-guarantees³⁰.

Daniel Carnio Costa, in an interview with Valor³¹, specified the requirements that he considers necessary for the configuration of substantive consolidation, which are: a) interconnection of the companies of the economic group; b) existence of cross-guarantees between the companies of the economic group; c) confusion of patrimony and responsibility among the companies of the economic group; d) joint action of the companies that

²⁸ <https://www.jota.info/justica/lava-jato-causa-efeito-domino-em-recuperacao-judicial-03112016>.

²⁹ Brasil, Tribunal de Justiça de São Paulo, Agravo de Instrumento 2009147-60.2016.8.26.0000; Relator (a): Caio. Marcelo. Mendes. DE OLIVEIRA; Órgão Julgador: 2ª Câmara Reservada de Direito Empresarial; Foro Central Cível - 2ª Vara de Falências e Recuperações Judiciais; Date of Judgment: 27 March 2017.

³⁰ Brasil, Tribunal de Justiça de São Paulo, Agravo de Instrumento 2247163-02.2016.8.26.0000; Relator (a): Francisco Loureiro; Órgão Julgador: 1ª Câmara Reservada de Direito Empresarial; Foro Central Cível - 1ª Vara de Falências e Recuperações Judiciais; Date of Judgment 31 July 2017).

³¹ <http://www.valor.com.br/legislacao/4901160/recuperacao-de-grupos-de-empresas>

make up the economic group in the market; e) existence of coincidence of directors; f) existence of coincidence of corporate composition; g) control relationship and / or dependency among the companies that are part of the economic group; h) existence of diversion of assets through companies belonging to the economic group.

In addition, as previously pointed out, article 189 of the Reorganization Act determined the subsidiary application of the Code of Civil Procedure to the procedures it regulates and the comparative law demonstrates successful experiences to this end, which are used as inspiration for the formulation of the system adopted in Brazil.

This phenomenon generates innumerable reflexes to the creditors, because often the subjects are creditors of only one of the group companies, that has little liabilities compared to its assets and that, separately and apparently has liquidity of its obligations and that is not going through economic crisis, but which, after the constitution of the substantive consolidation, with the pooling of assets and liabilities of the other companies in the group, does not have the same liquidity as the original debtor.

It is important to highlight that the Superior Court of Justice, in spite of not having appreciated the procedural and substantive consolidation, decided in cases of bankruptcy of the extension of the effects of the breach to companies of the same group that have their activities “*under equity, labor and management unit*” (STJ, RMS 14.168/SP, Rapporteur of the Minister Nancy Andrighi)³². In these cases, there is a real need of joinder of the parties, considering the confusion among the legal personalities of the members, making the reorganization of one to depend on the others, given the commingling of assets among the group companies.

In the book *Judicial Recovery, Extrajudicial and Bankruptcy - Theory and Practice*³³, the authors uses as reference UNICITRAL, which, based on international experience, is used as requirements of substantive consolidation: the existence of consolidated financial statements of the company, the affinity of interests and / or ownership between the group companies, the difficulty of separating the assets and liabilities of each; the sharing of expenses and management, the existence of loan intra-groups and cross-guaranteed loans, the confusion of assets and business, the appointment of directors or management positions in common, the existence of common place, and “it is considered if substantive consolidation will be the only means of effective recovery of the group, taking into account, at the same time, the risks arising from the segregated treatment of companies in insolvency proceedings”. Therefore, in these situations, a unitary plan should be presented, with equal treatment dispensed among

³² Brazil, Superior Court of Justice, RMS 14.168 / SP, Rel. Minister Andrighi NANCY, 3rd Court, judged on 30 April 2002, DJ 8 May 2002, p. 323.

³³ L. SALOMÃO, e P. PENALVA SANTO, *Recovery, Extrajudicial and Bankruptcy – Theory and Practice*, 3rd ed, Rio de Janeiro, Editora Forense, 2017.

the creditors part of each class, despite of which of the group companies is its debtor, while the reorganization plan voting is carried out in a single conclave of creditors.

It is clear that the pooling of assets and liabilities of the group companies, as well as of their creditors in a single General Meeting of Creditors, also implies a change in the weight of the creditors in the formation of the voting quorum. The creditors of one of the companies will be subject to the regulation of all liabilities and assets.

Some authors, such as Fábio Konder Comparato, argue that there is solidarity between companies in the group³⁴ and others, such as Jorge Lobo³⁵, argue that there is subsidiarity between them.

Both, the doctrine and the case law agree that the application of the substantive consolidation is an exceptional measure.

For Cerezetti, such doctrine can only be applied by reason of the Judge's decision, when it is called mandatory substantive consolidation, or at the option of the creditors, when it is called voluntary consolidation, but cannot take place by mere request of the companies being reorganized³⁶.

Substantive consolidation has been widely applied in the Brazilian Courts³⁷, through the analysis of each specific case³⁸.

Minister Rapporteur Marco Buzzi, in the judgment of Internal Interlocutory Appeal (called *agravo de instrumento* in Brazil) in Provisional Measure No. 20.733, voted that it is not correct to require a creditor to be subject to the payment terms proposed by a company with which he has never established any legal business, and that the application of the doctrine should be subject to cases in which there is a complete demonstration of abuse of the legal personality and the commingling of assets.

In this sense, it is not reasonable to grant the creditor who has assumed the risk inherent in conducting business with a company in bankruptcy situation, the benefit of receiving his credit with the assets or financial condition of another company with which he has never established any business relationship.

However, *concessa venia*, it seems to us that in the real economy some creditors analyze not only one company, but the group as a whole, this being the market practice, especially in the financial segment, which has the information and qualified technicians for

³⁴ F. COMPARATO, "Os grupos societários na nova lei de sociedade por ações" ("company groups in the new law of corporations"), *Revista de Direito Mercantil*, No. 23, 1976, pp. 105-106; F. COMPARATO, C. FILHO, *O poder de controle na sociedade anônima (The controlling power in corporations)*. 6ª ed. Rio de Janeiro: Forense, 2014, p. 432.

³⁵ J. LOBO, "Direito dos grupos de sociedades" ("The law of company groups"), *Revista de Direito Mercantil*, No. 107, 1997, p. 174.

³⁶ S. CEREZETTI, *Grupos de sociedades e recuperação judicial: o indispensável encontro entre Direitos Societário, Processual e Concursal (Groups of companies and court-supervised reorganization: the indispensable encounter among Corporate, Procedural and Bankruptcy and Reorganization Law)*, *op. cit.*, pp. 772-781.

³⁷ Brasil, TJ/MS, AI 14084250022.015.8.12.0000, Relator P. DE OLIVEIRA, j. 21 June 2016.

³⁸ (TJSP; Agravo de Instrumento 2247163-02.2016.8.26.0000; Relator (a): F. LOUREIRO; Ó. JULGADOR: 1ª Câmara Reservada de Direito Empresarial; Foro Central Cível - 1ª Vara de Falências e Recuperações Judiciais; Data do Julgamento: 31 July 2017; Data de Registro: 31 July 2017).

such analyzes, often requiring guarantees and endorsements between companies of the same group.

To Fábio Ulhoa Coelho, the consolidation of the general framework of creditors and the consolidation of the plans are separate institutes. The consolidation of the plans should take place if it is useful to overcome the crisis and the consolidation of the creditors take place when there is a confounding of assets and the requirements of disregard are present of legal personality³⁹.

There is also the Substantive Voluntary Consolidation doctrine. It occurs when the abuse of the legal personality of the companies belonging to the economic group is not determined. A good example of such doctrine is the Reorganization of the OSX Group, which the Court of Justice of Rio de Janeiro decided that the resolution on substantive consolidation would be made by the creditors, in the category of substantive voluntary consolidation⁴⁰. Substantive consolidation, therefore, should be analyzed in each case, and applied when there is evidence that the relationship between companies goes beyond limits and the individuality of the group.

§ 6 – BANKRUPTCY OF A GROUP OF COMPANIES

In the event of a court-supervised reorganization in which there is a procedural consolidation, that is, in the union of the reorganization of some companies, as long as their autonomy is kept, upon the presentation of distinct court-supervised reorganization plans, and without debt pooling, the eventual conversion to bankruptcy of one of the companies will not automatically lead to the bankruptcy of the other companies. In some cases, the failure of one of the companies in one economic group may indirectly affect the other and also lead to bankruptcy. There is no adjudication, however, of bankruptcy as a whole.

In the event the procedural consolidation is substantive, the grouping of companies, plans and analysis of the conditions of the reorganization are all done together. In this case, the eventual adjudication of bankruptcy will be extended to all the companies that compose the plaintiffs.

In the procedural consolidation, it is necessary that the lists of creditors be made, prepared and related separately, which will also imply in the separate analysis of the assets and the creditors affected in the event of an eventual adjudication of the company bankruptcy.

There is still another question to be considered. Frequently, companies that make up the same economic group file a court-supervised reorganization separately aiming to keep some of the companies in the group unharmed. If this company were to have

³⁹ F.-U. COELHO, *Comments on the Bankruptcy and Company Recovery Law*, Editora Revista dos Tribunais, 2015, p. 179.

⁴⁰ Brazil, Court of Justice of Rio de Janeiro, Agravo No. 0043183-31.2014.8.19.0000, 14th Civil Chamber. Rel. Gilberto. GUAIRINO, j. 8 August 2014.

its bankruptcy decreed, the other companies in the group would not be affected by such measure.

According to Fábio Ulhoa Coelho⁴¹ the disregard of legal personality does not infringe the institute itself, but, on the contrary, seeks to its preservation, since it restrains the companies that fraudulently misuse the legal entity.

Minister Nancy Andrichi, the rapporteur, for a case judged by the Superior Court of Justice in her vote, explains that:

“It is possible for the court to anticipate the decision to extend the effects of a bankrupt company to affiliated companies in the event of a clear conspiracy to prejudice creditors, there is transfer of assets for asset diversion. There is no nullity in the deferred exercise of the right of defense in such cases.”⁴²

In practice, however, it turns out that some entrepreneurs seek to safeguard their healthy assets in affiliates that would not be affected by the measure. Should this interference of joint ventures be detected or if the attempted asset misappropriation is proven, the Bankruptcy Court may extend the effect of the bankruptcy to other companies in the group, whether due to the commingling of assets or through disregard of the legal personality, which will also jeopardize the assets of the bankrupt partners.

Others sentences by the Superior Court of Justice⁴³ has also widened the convolation on Bankrupt, in the cases of abuse of legal personality.

The same will occur when a company has bankruptcy decreed directly, without having undergone a court-supervised reorganization proceeding. The Trustee and creditors should analyze the other companies of the economic group and verify the existence or not of commingling of assets among the legal personalities, as well as the occurrence of asset misappropriation, protection attempt or fraud. In such cases, they should request the extension of the effects of bankruptcy to the other companies in the group and the disregard of their legal personality. Marcelo Barbosa Sacramone⁴⁴ in commenting on the disregard of legal personality adds that the jurisprudence of Brazil has applied the theory of disregard of legal personality to extend bankruptcy to third parties.

There are also cases in which the bankruptcy of one company causes the bankruptcy of the others due to the existence of an economic relationship of financial interdependence. These cases are not about the extent of the bankruptcy, but about a new bankruptcy generated by the collapse of another company.

⁴¹ F. COELHO, *Commercial Law Course – Company Law*, 19^a ed., 2015, SP, p. 61.

⁴² Brazil, Superior Court of Justice, Resp 1125767 / SP, Rel. Minister N. ANDRIGHI, 3rd Court, judged on 8 September 2011, DJe 25 August 2011).

⁴³ Brazil, Superior Court of Justice, AgRg, No. Resp 1.229.579-MG, Rel. Min. Raul Araújo, judged on 18 December 2012.

⁴⁴ D. Costa, *Full comments on the Corporate Recovery and Bankruptcy Act*, Volume III, Curitiba: Jurua, 2015, p. 197.

It is worth noting that in the event of a company group being decreed bankrupt, it is necessary that the collection of property be carried out concomitantly in the various companies, in order to avoid asset dissipation.

In any case, when large corporations or economic groups are bankrupt, procedural speed is still required in the progress of the procedure, to liquidate assets and pay off creditors as soon as possible, to mitigate the negative effects of the depreciation of assets, avoiding greater losses to creditors and to society.

CONCLUSIONS

By the end of the present study, we reached the conclusion that reorganizations and bankruptcies of major economic groups create a number of procedural and social difficulties not provided for in the legislation on the subject, delegating to law professionals the creation and application of mechanisms to mitigate the difficulties arisen when this kind of proceeding is conducted.

We have also concluded that the Trustee shall maintain a close relationship with the Judges, the Companies being reorganized and their creditors, with a view to settle the greatest possible amount of disputes amicably, thus avoiding unnecessary and sometimes harmful procedural turmoil. In addition, the Trustee shall serve as mediator to reduce the litigious character of the case.

We, therefore, conclude that Court-Supervised Reorganizations or Bankruptcies of major economic groups must take place in a synergy among the Court, the Trustee, the Companies being reorganized or bankrupt and creditors, with an aim at reducing the social depreciation caused by the economic hardship of the company and of the business group involved.