

POSITIVE ASPECTS OF THE CURRENT BRAZILIAN INSOLVENCY SYSTEM AND THE FIGURE OF THE TRUSTEE COMMITTED TO THE RESULTS OF THE PROCESS

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This study seeks to demonstrate the evolution of the Brazilian insolvency system after the effectiveness of Law 11.101/2005, inspired by the North American Law¹, which brought the figure of the trustee, auxiliary body of the court, as inspector, facilitator, driver, responsible for the good interface between debtor and creditor and, mainly, by the achievement of the social and economic benefits protected by the special legislation.

The World Bank's² "Doing Business" statistical reports show that after the advent of the new legislation (Law 11.101/2005), the rate of recovery of credits in Brazil made a significant leap from a negligible 0.02% for each dollar to 25.80% in 2015, the highest percentage reached by the country, with a reduction in 2016, 2017 and 2018 (22.40%, 15,80% and 12,70%), as the severe crisis in Brazil over the last three years has meant that numbers lost strength.

In the recently presented World Bank "Doing Business" report, Brazil is in 80th position among countries in terms of insolvency³ resolution, reaching a percentage of 47,46%, with an average term for creditors to recover their 4-year credits.

The same work points out some of the difficulties of the Brazilian system, among which is that of starting a business (bureaucracy), in which Brazil qualifies in position no. 176 and, in 184st⁴, when assessing the imputed taxes, in relation to the others countries (out of 190 countries analyzed).

¹ N. DE LUCCA, M. VASCONCELOS (ed.), *Falências, Insolvência e Recuperação de Empresas. Estudos Luso-Brasileiros*, Quartier Latin, São Paulo, 2015, p. 50.

² <http://portugues.doingbusiness.org/Methodology/Resolving-Insolvency>. Visited on 22 Jan. 2018.

³ <http://portugues.doingbusiness.org/rankings>. Visited on 22 Jan. 2018.

⁴ <http://portugues.doingbusiness.org/~media/WBG/DoingBusiness/Documents/Profiles/Country/BRA.pdf>. Visited on 22 Jan. 2018.

Such introduction is necessary only to demonstrate the distance of the Brazilian economy and its insolvency system in relation to developed countries, especially the United States of America, against which the current Brazilian insolvency law was inspired.

In the resolution ranking of “Doing Business” insolvency proceedings, the United States is in 3th position, only behind countries like Japan and Finland, followed by Germany and South Korea, with a credit recovery rate of 82,10% in relation to every dollar borrowed, an average time for lenders to recover their 1 year-loans.

Notwithstanding Brazil’s modest performance against the 190 other world economies analyzed, a reasonable improvement has been observed in the aforementioned ranking after the effectiveness of the current insolvency legislation, which sought to ensure greater effectiveness and transparency for both the corporate reorganization process (Judicial Reorganization), and for bankruptcy, the one in which the assets of the company are collected and settled to pay the remaining liabilities.

As an information and also corroborating with the foregoing, that is, the current Brazilian crisis, a study performed by NEPI (Nucleus of Study and Research on Insolvency of the Pontifical Catholic University of São Paulo - PUC/SP)⁵, which analyzed 194 cases of judicial reorganization filed between 1st September 2013 to 30 June 2016, in the two specialized lower courts of Bankruptcy and Judicial Reorganization of São Paulo/SP, and a significant increase in approvals of the respective deeds can be observed in the period between years 2014 and 2016, peaking in July-September 2015 (a period in which the economy plunged, with loss of confidence by the investors, rising inflation and unemployment, as well as other serious factors arising from the political crisis, for instance, the impeachment process of ex-President Dilma Rousseff⁶).

Therefore, it is possible to devise an improvement in the Brazilian business environment due to the current insolvency law, however it is necessary that we keep in mind the economic and political factors that have resulted in the biggest economic crisis ever faced by the country and reduce the reflections of the improvements of these figures in comparison with other global economies.

Therefore, in order to clarify and contextualize the improvement generated by the current insolvency law, we shall highlight the role of the trustee in conducting bankruptcy and judicial reorganization proceedings.

In Brazil, the former receiver, provided for in Decree-law 7.661/1945, was replaced by the Trustee, a professional with higher requirements related to his qualification, and should have multidisciplinary knowledge in the legal, economic, management and accounting areas, in addition to assigning a greater number of

⁵ http://rpubs.com/abj/pucrj_pre. Accessed on 22 Jan. 2018.

⁶ <http://economia.estadao.com.br/blogs/economia-a-vista/dados-economicos-daera-dilma-de-chorar/>. Visited on 22 Jan. 2018.

tasks to insolvency proceedings. However, it is necessary to clarify a certain impropriety in the terminology⁷ “*administrator*”, since the professional does not exercise such a “*management*” assignment in judicial reorganization proceedings, maybe, only when the bankruptcy procedure is initiated (article 22, III, of Law 11.101/2005).

Under US law, there are three agents that we can compare, or rather, indicate as the inspiration for the creation of the current auxiliary body of the insolvency court in Brazil, the “*trustee*”, a suitable professional with multidisciplinary knowledge, adequate organizational structure in order to exercise the assignments provided by law, which are not pertaining to a representative of the debtor or creditors, but rather to an auxiliary body of the Court, which acts as an agent in the search for the effectiveness of the process.

In the US Court of Justice, there is the US Trustee⁸, who is responsible for monitoring the progress of Judicial Reorganization and the conduct of debtors in matters affecting their business. The US Trustee have the duty of inspecting, specially, the type of regularization of liabilities by DIB (debtor in possession), that is, the execution of the judicial reorganization plan by the debtor, against reports and other relevant documents (“*section 704*”). Still, one can examine the convenience of business continuity. The costs of the US Trustee must be absorbed by the debtor. It also assists the bankruptcy process of individuals, a figure that does not exist in Brazilian’s legal system. The US Trustee has extensive administrative, regulatory and litigation authorities(executing them), aiming at the effectiveness of insolvency systems for the benefit of all parties involved, debtors, creditors and the public entity.

In Brazilian law, as well as in the United States, during the judicial reorganization procedure, the debtor and his/her respective administrators remain in the conduction of the business⁹, being removed and with a judicial manager being appointed, only if any of the hypotheses of article 64 of Law 11.101/2005 (crime commitment, occurrence of simulations, willful misconduct, fraud against creditors, among other attitudes manifestly harmful to the business). Such assignment, under US law and, pursuant to “*section 1104*”, is exercised by the so-called “*case trustee*” or private trustee, who shall manage the business and present the company’s feasibility plan¹⁰.

In US law, there is still an “*examiner*”¹¹, an assignment which is very similar in terms of assigning the role of the Brazilian trustee acting in judicial reorganization proceedings, since he shall be

⁷ F. COELHO, *Comentários à lei de falências e recuperações de empresas*, 12th ed. rev. atual. e ampl., São Paulo: Editora Revista dos Tribunais, 2017, p. 106.

⁸ <https://www.justice.gov/ust/about-program>. Visited on 22 jan. 2018.

⁹ S. CAMPINHO, *Curso de Direito Comercial: falência e recuperação judicial*, 8. ed. rev. e atual, São Paulo: Saraiva, 2017, p. 162.

¹⁰ <https://www.justice.gov/ust/private-trustee-information>. Visited on 22 Jan. 2018.

¹¹ https://www.justice.gov/sites/default/files/ust/legacy/2015/03/13/abi_201101.pdf Visited on 22 Jan. 2018.

appointed by the judge, in cases in which there is no “case trustee”, in order to supervise the procedure and conduct business without interfering in the effective management of the business and in the preparation of the reorganization plan.

After these brief clarifications regarding the origin and inspiration of the role of the Brazilian trustee based on US law, we shall discuss the role of this professional and his relevance to the optimal outcome of insolvency proceedings.

Currently, it is certain that the proactive performance of the trustee in the performance of the numerous assignments established by law has certainly helped to improve the outcome of insolvency proceedings in Brazil, mainly regarding its promptness and effectiveness, consequently implying progress in indexes of economic analysis reports, such as the World Bank’s “*Doing Business*”.

Prior to the effectiveness of Law 11.101/2005, it was not uncommon for reorganization proceedings and bankruptcy (insolvency proceedings provided for in Decree-law 7.661/1945) to be extremely time consuming and lasting decades without any solution or effective outcome¹². The current reality is different, especially because the trustee has a wide range of attributions, which the doctrine calls linear and transversal assignments, which in addition to bringing benefits to the process as a whole, also allow the creation of a favorable environment for negotiations can take place, seeking the preservation of the social and economic benefits protected by the legislation.

The linear assignments of the trustee are set forth in article 22, items I, II and III of the prevailing Law¹³ and are therefore named as the beginning of an insolvency proceeding, i.e. after the approval of judicial reorganization or decree of bankruptcy, the process is subdivided into two parallel lines and concomitant development, being sure that in both lines there are relevant obligations of the Receiver.

In the “first line”, which is the same for the process of judicial reorganization and bankruptcy, the assignments related to the verification and authorization of claims arise, that is, the creditor lists that shall support the procedure. The trustee shall be responsible for reviewing and verifying the list of creditors presented by the debtor, in addition to receiving, analyzing and issuing a conclusive opinion on credit ratings and discrepancies. Therefore, at this administrative stage of verification and proof of claim, the trustee acts as a *longa manus* of the Judge and presents, at the end, the so-called 2nd list of creditors (article 7º paragraph 2 of Law 11.101/2005). After the presentation of the 2nd list of creditors, objection of claims could be presented against it, which shall be judged by the magistrate, yet it remains the duty of the trustee to issue an accounting and legal opinion to assist the judge

¹² J. R. BERNIER, *Administrador Judicial. São Paulo*, Quartier Latin, 2016, p. 44.

¹³ ASIL, Brasília, DF, 9 Feb. 2005. Available at: http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2005/lei/111101.htm. Visited on 22 Jan. 2018.

in the judgment of such objections¹⁴. Finally, after judgment of the objections, it shall still be the responsibility of the trustee to consolidate the general framework of creditors, closing its performance in the “*first line*”.

In the “*second line*”, the procedure is different for judicial reorganization and for bankruptcy. In judicial reorganization, the assignment of analyzing the timeliness, legality and compliance with the obligations of the judicial reorganization plan is accumulated, as well as exercising the presidency and regular development of the General Meeting of Creditors, manifesting itself in the process and issuing opinions on incidental matters, whenever it is required by the Judge. In bankruptcy, the “*second line*” concerns the collection, valuation and disposal of the assets of the debtor (asset liquidation), for subsequent payment of liabilities, always striving to achieve promptness and process economy, as well as preservation and optimization of productive use of the company’s goods, assets and productive resources¹⁵.

In addition, we highlight the assignment of the trustee to maintain communication with creditors (either by correspondence, e-mail or telephone), providing information about the process, accounting documents and financial documents of the debtor, preparing reports and making them available in the process¹⁶. The administrator has the duty to prepare the list of creditors (2nd list), through an in-depth legal and accounting analysis of the list of creditors presented by the debtor, not only by using sampling. This analysis must take place within the legal term, in order to enable the meeting between debtor and creditors (General Meeting of Creditors) in the search for a common denominator within the period of discontinuance of executions (stay period - article 6, paragraph 4, Law 11.101/2005).

It is also incumbent upon the trustee to supervise the activities, that is, the business and the operations of the debtor, not only through the monthly activity reports but also conducting on-site inspections to verify the real situation of the company, having testimonies from employees and business partners, providing a high-quality follow-up and based on reliable information of all obligations and business of the debtor by the main stakeholders in the procedure, namely, the creditors.

In bankruptcy, the trustee shall examine, make available the books and documents of the bankrupt, take over the representation of legal proceedings, collect assets, evaluate and dispose them in a short time, seeking to optimize them, plus the practice of acts, measures and diligences that are necessary for

¹⁴ P. TOLEDO, C. ABRÃO (ed.), *Comentários à Lei de Recuperação de Empresas e Falências*. 5th ed. *Rev. atual. e ampl.*, São Paulo: Saraiva, 2012, p. 88

¹⁵ B. CASTRO, C. IMHOF, *Lei de Recuperação de Empresas e Falência: interpretada e anotada artigo por artigo*, 4th ed, Balneário Camboriú, SC: Booklaw, 2017, pp. 785-786.

¹⁶ BERNIER, 2016, pp. 88-90 and 100-105.

compliance with the Law, protection of the mass and efficiency in the administration of its productive and active resources¹⁷.

In addition to the linear assignments, expressly provided for by law and summarized above, there are the transversal assignments, which derive from the requirement of a proactive trustee and committed to the optimal result and the effectiveness of the process, that is, there is a collection of performance in its practice. As shall be seen below, in interpreting the transversal assignments of the trustee, it is concluded that these go beyond the mere fulfillment by the trustee of his linear assignments, there is a requirement for action that complies with the principles of the insolvency law and, the achievement of the intended results and the effectiveness of the legislation. That work will influence the good or bad result of bankruptcy or reorganization.¹⁸

It is observed that, by itself, the current legislation has already sought to give more promptness and efficiency to insolvency proceedings by means of a professional and multidisciplinary action of the trustees, which allows for a greater recovery of the credits submitted there, reasonable time limit for completing the procedure. Moreover, it is well known that magistrates have given preference to the appointment of legal entities as trustees, because it is simpler to gather all the multidisciplinary specialties required in the performance and there is a collection of results in the performance of this legal entity, with the orchestrated performance of all professionals that integrate the work team.

The fact that Brazilian insolvency proceedings are currently being processed electronically¹⁹ – through unrestricted access to the parties through the internet –, added to the transparency²⁰ and seriousness brought by a good professional who works in the Judicial Administration – exercising strictly its linear and transversal assignments, ends up generating legal security for creditors and greater effectiveness for the purposes of the law itself²¹. Namely, sanitize the economic crisis by reorganization or bankruptcy, attended the social role of the company. An assistant who is committed to the outcome and, mainly diligent, reduces the attempts (or even the occurrences) of frauds, simulations, willful misconducts and coercion during the process. The proximity and synergy with the magistrate who presides the case intimidates the bad professionals who try to take advantage of such situation.

One of the practical examples of the exercise of transversal assignments by the trustee, which ends up avoiding the continuation of Judicial Reorganizations of totally unfeasible companies or even that they use the process to sacrifice their

¹⁷ N. DE LUCCA, A. DOMINGUES (ed). *Direito Recuperacional – Aspectos Teóricos e Práticos*, Quartier Latin, São Paulo, 2009, p. 170.

¹⁸ BEZERRA FILHO, 2017, p. 115.

¹⁹ <http://www.cnj.jus.br/tecnologia-da-informacao/processo-judicial-eletronico-pje>. Visited on the 22 Jan. 2018.

²⁰ N. DE LUCCA, A. DOMINGUES (ed.), 2009, pp. 127-129.

²¹ M. GUIMARÃES, *Recuperação Judicial de Empresas e Falência. rev. atual. e ampl.*, Belo Horizonte/MG, Del Rey, 2007, p. 126.

creditors without prospects of business continuity, is the preliminary confirmation of document regularity, known as “*prior expert examination*”²², which happens after the distribution of the request for judicial reorganization.

Although such prior expert examination was not expressly provided for by law, it was devised by Dr. Daniel Carnio Costa, judge of one of the specialized lower courts of São Paulo, the largest city in Brazil. The performance of this prior procedure has improved the efficiency and transparency of judicial reorganization procedures, as it drives away companies that do not actually qualify for state favor, leaving behind debtors who seek to use the insolvency procedure as a fraudulent mechanism, as well as providing regularization of documents that shall enable a credible process capable of providing a healthy environment for negotiations.

The work of “*prior expert examination*”, usually carried out by the future trustee to be appointed in case of approval of the process, has also been collaborating with the improvements of the current law, since already in the beginning of the procedure, before the approval, the multidisciplinary team analyzes, improves or even rejects documents and information to the terms and requirements of Law 11,101/2005.

The aforementioned study of the “*Insolvency Observatory*” of PUC/SP found that in the cases where the “*prior expert examination*” occurred, the proportion of approvals (of the processing) was 50% higher compared to the cases in which it have not occurred²³. Thus, there is no other conclusion than that the implementation of “*prior expert examination*” is in perfect harmony with the principle of preservation of the company, its social assignment, the generation of wealth, maintenance of jobs and collection of taxes. The simple judicial order of amendment of the complaint and documentation, without proper readjustment and clarification was not so effective because in these cases the proportion of processing approval was 30% higher. It can be seen that such expert examinations increases the efficiency of the process even more, given its specific application to the spirit of the law, with the hope of recovering the business, but based on reliable and credible analysis of documents.

Another point set forth by Law 11.101/2005 that deserves special mention was the possibility of selling goods, without succession (responsibility of the acquirer)²⁴, which is a tool that subsequently turns into a return of credit to creditors, since that the result of the disposals are fundamental contributions not obtained naturally from the financial system and inherent operators

²² D. CARNIO COSTA (ed.), *Comentários Completos à Lei de Recuperação de Empresas e Falências*, Curitiba: Juruá. 1 Vol, 2015, pp. 35-39.

²³ http://rpubs.com/abj/pucrj_pre. Visited on 22 Jan. 2018.

²⁴ L. LIAS, (ed.), *10 Anos da Lei de Recuperação de Empresas e Falências: Reflexões sobre a Reestruturação Empresarial no Brasil*, São Paulo: Quartier Latin, 2015, pp. 268-271.

because of the blocking of the credit resulted by the request for debt restructuring.²⁵

In this regard, the active participation of the Trustee in negotiations and mediations between debtor, creditors and interested parties brings good results to the process, since the fact that the court assistant is present provides more transparency, security and balance to those involved.

This type of intervention, like others that seek to optimize the result of the process, and which develop concomitantly with the linear assignments referred to above, are examples of transversal assignments, not provided by law but a product of good practices and concern for the proper development of the acts which occur during the period in which the request for judicial reorganization and its granting are processed.

We also highlight the prior analysis by the trustee of the judicial reorganization plan, in search of its adequacy to the legal and jurisprudential limits. Such prior analysis of the plan produces a highly positive effect, although it helps in the construction of a collective agreement without defects, limiting procedural discussions, avoiding resources with subsequent declarations of invalidity of the plan²⁶ and effectively accelerating the fulfillment of the new contracted obligations.

In addition, prior analysis of the judicial reorganization plan by the trustee is an essential element for judicial control based on the plan's four-phase criterion²⁷, so that the negotiation decision, covered by the sovereignty of the General Meeting of Creditors, can effectively meet the economic and social benefits sought by the regulation, avoiding legal distortions.

As an example, we emphasize that this type of four-phase control, performed by the 1st lower court specialized in judicial reorganizations and bankruptcies in the city of São Paulo / SP, also favors the superiority of numbers and indicators arising from the new law, since it brings order to the process, insofar as it excludes clauses that violate a rule of public order (legal certainty), verifies the existence and removes, if applicable, defects of the legal business generated by the approval of the plan (coercion, simulation, fraud against creditors, error, quorum manipulation, among other things that must be brought by the Administrator to the Magistrate), analyzes the extent of the decision of the majority of the creditors in relation to the dissidents (preservation of rights)²⁸ and the abusiveness of the creditor vote that unjustifiably and for the recovery of the business and the achievement of the social assignment). Therefore, it is verified that the diligent, committed and proactive action of the trustee is also essential to

²⁵ A. ARRUDA JUNIOR, C RABELO (ed), *Estudos do Capitalismo Humanista*, Vol 2 – Rio de Janeiro/RJ: Lumen Juris, 2017, pp. 134-135.

²⁶ COELHO, 2017, pp. 243-244.

²⁷ <http://www.migalhas.com.br/InsolvenciaemFoco/121,MI267199,41046O+criterio+tetrafasico+de+controle+judicial+do+plano+de+recuperacao>. Visited on 22 Jan. 2018.

²⁸ COELHO, 2017, pp. 235-236.

the fullness of the jurisdictional activity in controlling the legality of the reorganization plan²⁹.

In fact, the sum of the good performance of the legal and transversal assignments of the trustee is extremely relevant to the success and effectiveness of the country's insolvency process, directly affecting the improvement of indicators and ratings compared to other global economies.

The economic system is interconnected, that is, when an entrepreneur provides resources or invests in a country, he already measures the risks, which shall reflect in the cost of that money. Legal certainty and predictability help in this calculation and, of course, insolvency proceedings are observed and provided as an important indicator in the measurement of this risk. Now, we are seeing improvements in our system, and much of this progress can be attributed to the full performance of the trustee, because the good progress and even the success of the procedures depend on it.

Thus, the law has adapted to the reality, improved the procedures and effectively brought better solutions to insolvency systems, but these results necessarily depend on the agents of the system to be suitable, both in a moral and in economic and financial analysis.

Given the particularity of insolvency proceedings, it is of paramount importance to qualify the judges who work in the area, applying Law 11.101/2005, since a mistaken or even late decision can have the same negative effect. It is true that the voices that defend the specialization of magistrates and the redefinition of areas of territorial competence (regionalization of courts specialized in insolvency) are seeking improvements in the State's performance and consequently advances in the effectiveness of insolvency proceedings³⁰.

Currently in Brazil there is a working group of the Ministry of Finance, accompanied by professional and specialized professionals, studying and proposing changes in legislation³¹ in order to improve the search for an even better and less vulnerable system.

Among the changes, we can cite the extent of the scope of the law, which can be accessed by economic agents, an enlarged figure of the previous concepts of entrepreneur and business company, being expressed in law the jurisdiction of the judicial reorganization court when dealing with issues that affect debtor's assets³², in particular the inhibition or discussion of those that are denominated and considered essential (a rule that could give greater legal certainty to the parties, drawing from the judge the need to complement the gap of the law).

²⁹ BEZERRA FILHO, 2017, p. 202.

³⁰ L. ELIAS (ed.), 2015, pp. 256-257.

³¹ <https://g1.globo.com/economia/noticia/fazenda-prepara-projeto-que-muda-lei-de-recuperacao-judicial-diz-meirelles.ghtml>. Visited on 22 Jan. 2018.

³² B. CASTRO, C. IMHOF, 2017, p. 83, Item 10.

There is also a new definition of the trustee, that is, a suitable legal entity or individual, with proven experience and adequate organizational structure, can heal the existing criticism in the sense that there is no minimum criterion. On the other hand, it may ban excellent and qualified professionals who intend to engage in insolvency proceedings.

One of the tools already used by good administrators shall be obligatory in this bill, that is, the availability of information and documents in its own site and linked to the reorganization processes and or bankruptcy in custody of that professional.

The promotion of mediation of related conflicts shall also be positive, as today is done by few and constant of the denominated transversal assignments that seek the effectiveness of the process.

Another attempt to optimize the event, in the case of bankruptcy, is the claim of a stipulation of a 180-day term, counted from the collection of the sequestration order, for the Trustee to sell the assets of the bankrupt estate.

We conclude, after all the considerations set out in this article, that the role of the trustee in the Brazilian insolvency system, both in judicial reorganization and bankruptcy proceedings, is essential to the success and effectiveness of the law. In order to do so, it is necessary to have qualified professionals capable of exercising accurately all the linear and transversal assignments set forth in law, as a catalyst for the social and economic benefits that Law 11.101/2005 seeks to preserve through the maintenance of business activity.