

MANUAL OF GOOD PRACTICES FOR JUDICIAL REORGANIZATION

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This article has the aspiration to analyze the best possible practices in Judicial Reorganization of all agents involved, being them the Judge, the Judicial Administrator or Lawyers.

In addition, it will also make a thorough investigation on the reflexes of conjoined activities of these professionals under the scope of Judicial Reorganization.

In that manner, it is necessary to conceptualize the obligations, powers and duties of all those agents that integrate insolvency litigations, including third parties who might have interests in the dispute.

It is also an objective of this study to demonstrate the numerous procedures difficulties found in the unravel of litigations, as well as to propose ways to facilitate the conjoined activity of the Judicial Administrator, Judges, creditors and companies in Reorganization, that allows the resolution of such issues in an agile and effective manner, steering the Judicial Reorganization to a success or to a swift award of bankruptcy at the appropriate time, avoiding social costs.

§ 1 – PRACTICE OF THE JUDGE

Being a special procedure, regulated in a specific law, there is the demand for a special judge, whose attention to detail is vital in complex Judicial Reorganization cases, especially in districts where there are no specialized Courts.

This occurs because litigation involves, normally, interests from a large number of creditors, claiming for a refined accounting/financial verification and counting on social and economic relevance and prestige. Concomitantly, these are sporadic cases in the daily basis of a judge, making it difficult for the non-specialized judge, to deepen and study constantly the novelties of theme, which possesses individualized procedures and numerous specificities.

Additionally, these procedures tend to involve the positive acting of a diverse group of Court auxiliaries, such as the Judicial Administrator, experts, accounting specialists, auctioneers and evaluators.

Therefore, it will be shown in this article the set of basic tools available to the Judge in the steering of the Judicial Reorganization.

A) The practices of Judges in Judicial Reorganization

Although article 47 of Act no. 11.101/2005 has defined objectives of the Reorganization procedure (preservation of viable companies; maintenance of companies' social function; stimulation of economic activity; maintenance of jobs and guardianship of creditors and collectivity rights), the norm did not clarify in a textual manner the limits of the agent's activities and their role in Judicial Reorganizations.

With the purpose to delimitate the judge's actions in these procedures, it is imperative to comprehend the systemic interpretation of the norms, principles and provisions embraced in the Law between themselves and with other legislations correlated that interact during the procedure.

The first point of complexity to be faced by judges in Judicial Reorganization proceedings resides in the decision that analyzes the granting of the Reorganization request.

Despite looking trivial the analysis of the possibility to rule on a Reorganization request, this is one of the most debated aspects in the contemporary business law in Brazil, either by the doctrine or by Court's precedents. The discussion of which should be the pattern of analysis of documents that instructed the request is key to approve the beginning of the Reorganization procedure. Some defend that the purely formal analysis of documents demanded by law would suffice while others argue that a material and detailed analysis is the best method. In this context is where the so profoundly polemic of previous analysis arises.

B) Previous Examination

Previous Examination consists in an informal verification determined by Court before granting the request of Judicial Reorganization, with the aim to ascertain the regularity of the technical documentation that accompany the complaint, as well as the real conditions and adversities of the Company that requested the Judicial Reorganization, so the judge can adequately appreciate the conditions underlying the conflict before deciding positively or negatively about the processing request.

The company capacity to generate job posts and income, circulate goods and services, wealth and taxes are a logical presupposition of the Judicial Reorganization.

The identification of the real conditions of the company in crisis is essential to the suitable application of the legal remedy. The wrongful employment of insolvency tools produces severe social costs: loss of viable economic activities with the consequent loss of potential job openings and, therefore, a reduction of income tax and wealth. Conversely, the good application of insolvency

tools could end the artificial maintenance of businesses that have shown impracticable, not generating the economic and social benefits in overall disservice to the interests of society and the proper market functioning.

In this circumstances that the previous examination shows its relevance.

What is the point in initiating a judicial reorganization, imposing to creditors and general society the heavy burden of reorganizing the financial health of a business (credit renegotiation, amendments in original conditions of signed contracts with the company in reorganization and suspension of all litigations and executions already filed against the debtor) if, from the beginning, it is possible to verify that the corporation will not be able to fulfill the commandments that the law expresses as vital, even if the reorganization is granted. What justifies the imposition of these conditions to the creditors if there is no counter effort that satisfies the social/public interest that will balance the hardship endured by creditors?

Even though there is no expressed legal provision on the application of the previous examination, the adequate interpretation of article 52, *caput*, Act no. 11.101/2005, made by the newest doctrine intends to surpass the hermeneutic theory of pendular dualism, unequivocally authorizing its application.

Article 52 of Act no. 11.101/2005, presents the idea that once documentation requested in the article is complete, the judge will approve the processing of the reorganization request. But how should the law practitioner interpret the expression "being in terms the documentation"? Should the Judge simply make a formal analysis of the documents or disregard the evaluation of the consistency reflected substantially in those documents? The best interpretation of the law, in a way to overcome the pendular dualism, is never the one who protects the material rights in dispute (creditor and debtor) but the one that allows the law practitioner to guarantee the effectiveness of the system in which the material relations take place. Hence, it does not aspire to protect neither party, but to guarantee that the insolvency system attains efficiently its purpose. In these terms, it strongly appears that the expression "being in terms the documentation" demands that the judge thoroughly study said documentation and its correspondence with the present reality of the corporation. Definitively, that is the best interpretation when it comes to assuring the concrete effects and efficiency of the objectives presented in the insolvency legislation.

It is shown in article 156 of the Civil Procedural *Codex* that the judge will be assisted by an expert when the exhibit depends on technical or scientific knowledge. Furthermore, article 481 of the same *codex* provides that the judge can, at any given time, inspect people or things in order to elucidate facts that may be of interest to the case. It is of extreme relevance to point out that article 189 of Act no. 11.101/2005 translucently expresses that the Civil

Procedure Code will be used in a subsidiary manner in reorganization proceedings.

Thus, having the necessity to verify the content, the consistency and completeness of the technical documentation brought forth with the complaint and its correspondent effects with the phatic reality of the company, the judge may appoint an expert to work on the substantial analysis of these documents, as well as to inspect and confirm the real conditions of the company while running. Clearly, this well refined study is imperative to the judicial decision that will conclude the operation and admit the reorganization or award of bankruptcy.

It is worth to observe, however, that the previous examination is not properly an official investigation. Being a hybrid figure that has the nature of a preliminary and informal observation done by a qualified professional with necessary technical knowledge, aiming to supplement the Court with enough information to guarantee that the objectives of the Law are going to be met.

Once the expert is appointed¹, the previous examination should be concluded within 5 (five) days. This short period is necessary due to the publicity given by the filing of the complaint. Consequently, creditors have the information that the defaulter has filed a reorganization request. However, the protection of the *stay period* only begins, in the Brazilian system, when the request is granted by the Court. Thereby, the judge does not have an extended period of time to understand the case and make a correspondent decision, under penalty of putting the defaulter's patrimony at the mercy of opportunistic attacks from creditors.

It is not the goal of the previous examination to analyze the economic viability of the claimant. First, because it is impossible to attest the viability of the business in such an embryonic phase of the procedure. The company's feasibility depends on a plural set of external factors that are not possible to the judge to apprehend. Moreover, the economic viability of a business or company is a decision that the market must make. Thus, the creditors are the ones who should believe in that entrepreneurial activity and in the importance of its maintenance. A judge cannot substitute the key role of creditors in the decision on the economic viability.

In that sense, the previous examination intends to analyze only the capacity of the company in generating jobs, taxes, goods, services and wealth. Being sufficient the verification that the business exists, has employees, clients and contracts.

The practical experience of the 1st Court of Bankruptcy and Judicial Reorganization of São Paulo shows that by using the previous examination as a tool it can reveal four different situations: a) the inexistence of any entrepreneurial activity; b) irregularity or incomplete documentation; c) fraud; and d) functional incompetence of the Court.

¹ “A perícia prévia em recuperação judicial de empresas – fundamentos e aplicação prática (<https://www.migalhas.com.br/InsolvenciaemFoco/121,MI277594,41046>).

Demonstrating with the previous examination that the economic activity does not exist, the complaint must be dismissed and the proceedings must be extinct without analysis on the merits because of the lack of procedural interest. This is because a Judicial Reorganization is not the adequate legal remedy for a company in structural crisis that cannot overcome this situation.

In case of irregularity or partial lack of documentation, the judge has to grant a time lapse suitable for an amendment of the previous complaint. When the regularization happens, the judge has to rule in favor of the request, therefore initiating the Reorganization procedure. On the contrary, the judge will dismiss the complaint and order the case to be dismissed without resolution of merits with grounds on the article 321 and sole paragraph of the *codex* of civil procedure.

In cases of fraud, there is a similar situation as if there was the inexistence of the entrepreneurial activity. The judge must not allow that the proceedings are used with other means that are not those foreseen in the insolvency legislation. There will be, consequently, lack of procedural interest that imposes the extinction of the action without resolution of merits.

But, in this particular hypothesis, the judge is obliged to send a copy to the State Prosecutor's office with the finality of discovering possible criminal responsibilities. It is important to understand that if the fraudster tries to file the action again, the new complaint will be sent to the same prior judge, attending to article 286, section II, *codex* of civil procedure, that provides that the new filing of the action should be sent to the same judge.

The previous exam may, still, give the clear notion that the reorganization request was filed to the Court where it does not have its main business venue. In this sense, the case must be filed again before the correct and competent Court.

Jurisprudence has evolved and is broadly sheltering the usage of the previous exam by judges. There are, for example, precedents in the State Court of São Paulo (Interlocutory Appeals no. 2008754-72.2015.8.26.0000; no. 0194436-42.2012.8.26.000045 and no. 2058626- 90.2014.8.26.00004), in the State Court of Santa Catarina (Interlocutory Appeal no. 4005558-80.2016) and in the State Court of Paraná (Interlocutory Appeal no. 0000745-65.2017).

Lastly, the data acquired and presented in a study made in the Pontifical Catholic University of São Paulo, PUC/SP, denominated "Insolvency Observatory", brought up evidence that the previous examination represents, candidly, a measure that grants access to the juridical order.

Such confirmation appeared because the access to Justice, constitutionally guaranteed, does not simply translate into the right to take a case to the Court but rather in the right to have the useful result of litigation. Corporations in crisis, but viable, must have assurance of their right to a useful judicial procedure, with the preservation of the activity and the consequent economic and social benefits that comes with it.

C) The Legality Exam of the Judicial Reorganization Plan

It is valid, in the scope of the Brazilian judicial reorganization system, to deduct that the economic analysis of the Reorganization Plan is exclusively part of the competence of the General Creditors Assembly, possessing sovereignty in the decisions to be made along the reorganization process.

However, this would be a frivolous and a nonanalytic interpretation of the law put at *lumen*, for there are cases of approval by the General Assembly of Creditors of a flagrantly illegal Reorganization Plan, as well as the dismissal of a perfectly legal plan, whose decision of rejection was motivated by the interest of one or more creditors with expressive voting power.

This type of occurrence must be, certainly, subject to the judge's attention as the principles that govern the Reorganization Procedure must be respected, even by the General Creditors Assembly, which cannot dodge the enforcement of the mandatory public norms, commonly denominated in the Brazilian system as simply norms of public order.

A segment of the doctrine defends that the sovereignty of the General Creditors Assembly has limitations, related to the necessities of sheltering public interest, notably through the social function of the entrepreneurial activity.

It current understands the Reorganization Procedure as a provision of Public Law, therefore, as an amplification of the Court's original jurisdiction, so it will be possible to apply a diversity of judicial institutes *ex officio*, or without initiative of neither of the parties.

The Brazilian judicial system has its attention specially directed to norms that shelter public interest as opposed to private interest. This has a duality of consequences. On the one hand it contributes to the augmentation of difficulties to the materialization of the private interest, decreasing the risk of private opportunistic behavior, hence assuring the consecution of collective interests.

In that manner, Eduardo Secchi MUNHOZ teaches:

'From this we can affirm that bankruptcy law - or the company in crisis - corresponds to one of the branches of business law in which the social function of the company is most clearly evidenced, or the need to contemplate all the affected interests, which are not summarized interests of the entrepreneur. External interests, at the moment of the crisis of the company, come to the fore, alongside the inmates. The first directive to be followed, therefore, is that, in addition to the interests of the debtor and the creditors, the right of the company in crisis should seek an efficient organization of all other interests, focusing on the pursuit of the public interest Roman meaning, that is, of the people's interest), expressed in the principles and objectives of the economic order established in article 170 of the Federal Constitution of 1988. In a word, it is assumed that the right of the company in crisis constitutes an important instrument of

implementation of public policies, constituting one of the chapters of economic policy.”²

In reference about this, Jorge LOBO asserts:

“(…) because the Law of Judicial Reorganization and Bankruptcy guarantees the debtor, fulfilling the formal requirements of article 51 and its material requirements of article 48, to propose judicial reorganization action; affirm, with emphasis, that if judicial reorganization is effective and implemented through a procedural action of a constitutive nature, it is an institute of Public Law, in line with the Italian doctrine on ‘controlled administration’, ‘extraordinary administration’, and the ‘co-act administrative settlement’”³

On the other hand, other part of the doctrine understands that the Judicial Reorganization possesses the character of Economic Law, because, in the saying of LOBO:

“Although ‘complex act’ and ‘constitutive action’, judicial recovery has the nature and characteristics of an institute of Economic Law, as I will demonstrate. I join the doctrine, led by Orlando Gomes, which supports (a) that the Economic Law is located in an intermediate area between Public and Private Law, (b) has a threefold unity: ‘spirit, object (c) the rule of law is not guided by the idea of justice (principle of equality), but by the idea of technical efficacy due to the special nature of the legal protection that emerges, in which general and collective, public and social, which it Colima preserve and serve as a priority, hence the public nature of its norms, which are materialized through ‘prince fact’, ‘legal prohibitions’ and ‘exceptional rules’. In fact, judicial reorganization of an enterprise is an institute of economic law, because its rules do not aim to achieve the idea of justice, but above all to create conditions and impose measures that allow companies in a state of economic crisis to restructure, even if with partial sacrifice of its creditors ...”⁴

Concurring with the above mentioned, understands Sérgio CAMPINHO:

“Therefore, in our view, the institute of judicial recovery should be seen as the nature of a judicial contract with a new feature, realizable through a recovery plan, obeyed by the debtor, determination of objective and subjective order conditions for its implementation.”⁵

The lesson of CAMPINHO evidences the fact that the reorganization procedure possesses, *a priori*, the character of a legal act *interpartes*, which is done inside of a judicial litigation, with the consequent inspection by the Judiciary and the *parquet*.

Such understanding comes from the fact that the Reorganization Plan is presented by the debtor to the creditors that, may or may not, in assembly, be approved, constituting, the way shown by CAMPINHO, a legal act with evident “innovative features”,

² MUNHOZ, Eduardo Secchi, Anotações sobre os limites do poder jurisdicional da apreciação do plano de recuperação judicial, in Revista de Direito Bancário e do Mercado de Capitais, ano 10, vol. 36, abril/junho de 2007, p. 187.

³ LOBO, Jorge, Comentários aos art. 35 a 69, in TOLEDO, Paulo F.C. Salles de; ABRÃO, Carlos h. (coords.), Comentários à Lei de Recuperação de Empresas e Falência, 5ª edição, São Paulo, Saraiva, 2012, comentário ao art. 47, p. 170.

⁴ *Ibidem* p. 171-172.

⁵ CAMPINHO, Sérgio, Falência e Recuperação de Empresa: O Novo Regime da Insolvência Empresarial, 7ª Edição, Rio de Janeiro, Renovar, 2015, p. 12-13.

meaning that it is capable of creating an alteration or modification of legal acts preterit to the Reorganization.

The position of Minister Nancy Andrighi, member of the Superior Justice Court, when judging an Appeal, highlights the necessity of compliance with formal validity requirements:

“The board of creditors is sovereign in its decisions regarding judicial recovery plans. However, the deliberations of this plan are subject to the validity requirements of legal acts in general, which are subject to judicial control.”⁶

In general sense, the Reorganization procedure can be seen as an institute of public law, as well as an institute of private or economic law, but in the end it is solid that all the parties of the proceedings must act guided and motivated by the purest legalist spirit, without distancing from the implacable fulfilling of the existing and valid law of Brazilian jurisdiction. Thus, all the parties involved in the business Reorganization have to, necessarily, apply the principle of legality as the conductor of their actions.

It is for this exact reason that to the Judge is assigned the role of the legality analysis and control of the plan of judicial reorganization. In order to facilitate the mentioned control of legality, the inspection must be done in four different phases, called the tetra phasic criteria, aimed to assist the Judge in the exercise of control in a systematic and complete manner.

D) Tetra Phase Control Criterion of Legality of the Reorganization Plan

Act no. 11.110/2005, that regulates insolvency in the Brazilian territory, bestowed great powers to the participation of creditors, such as the possibility of habilitating credits, pleading a Defense, presenting objections to the Reorganization Plan, beyond de classic powers granted to creditors, which is the power of voting in the General Creditors Assembly.

Nonetheless, even though the Brazilian jurisprudence is quiet in what concerns the power of creditors, it is the Judiciary's roll to implement and control the legality of (i) creditors decision and (ii) the reorganization plan itself.

Yet again, the insolvency law is silent, this time about the limitations of control that must be necessarily performed by court.

In order to delimitate a practical concept, that allows judges to exert a proper legality control in the Reorganization plan, without confusion between the merits of the discussion around creditors and the effective control of legality of the plan, the 1st Court of Bankruptcy and Judicial Reorganization of São Paulo has been applying the tetra phasic criteria, which, in summary, establishes four different stages of diligence to be taken by the Court in the

⁶ STJ, Recurso Especial nº 1.314.209/SP, Terceira Turma, Relatora Ministra Nancy Andrighi, julgado em 22/05/2012, publicado em 01/06/2012.

case, that conduct the complete analysis of the legality of the Reorganization Plan.

On four different phases, with distinct characteristics, thus having the potential of making Court's dwell on all the relevant aspects that may be object of control, in an orderly fashion and respecting the limits of the judge's action in the actual case.

The first phase compels the Court to exercise control on the clauses of the Reorganization Plan, where, *a priori*, a verification is done regarding the possibility of some of them confronting legal provisions.

The first phase is necessary and compulsory, because, even if the creditor's decision possesses sovereignty, it can never confront the current juridical order, creating obligations, taxes, fines and other legal figures that are forbidden by the Brazilian legal system. A common example in practical cases is the existence of clauses in the Reorganization Plan providing that bankruptcy should be granted in case of noncompliance to a determined obligation, when the due date of such obligation only takes place two years after the inspection. This cannot occur, due to the fact that the eventual infringement of obligations by the corporation is solely regulated by the legislation, Act no. 11.101/2005, whose principles of public order are not subject to by the parties, even if by majority of votes in the Creditor's Assembly.⁷

Likewise, the Judicial Reorganization Plan approved by the General Creditors Assembly may not establish directives that entail a transgression of the law or criminal activity, such as, for example, tax evasion or exposure of workers to conditions similar to slavery.

With the first phase done, and surviving the first control that aims strictly in legality, the Court must enter the second phase of the tetra phasic control. The reason for the existence of this second phase is due to the juridical nature to make decisions that has been taken by the creditors in the General Creditors Assembly, which, under the Brazilian legislation, has a uncontroversial aspect of a juridical act. As a juridical act, it must contain all the intrinsic and extrinsic criteria, formal and material, that must be present in a juridical act for it to be reputed as valid, wholly or in sections.

The material causes, or those related to motivation, that lead to invalidity of juridical acts are listed in the civil *codex*, that possesses a roster of *numerus clausus* of situations (consensual vices) that causes invalidity of the deal: (i) error; (ii) malice; (iii) duress; (iv) state of danger; (v) simulation; (vi) fraud against creditors and; (vii) mischief.

For that reason, the second phase is where there is an analysis of the business conditions during the Judicial Reorganization Plan,

⁷ COSTA, Daniel Carnio. O critério tetrafásico de controle judicial do plano de recuperação judicial
<https://www.migalhas.com.br/InsolvenciaemFoco/121,MI267199,41046O+criterio+tetrafasico+de+controle+judicial+do+plano+de+recuperacao>. Last view on January, 2019.

where the Court exerts the control of the reasons that formed the majority that approves, or not, the Judicial Reorganization Plan.

For this purpose, the Court must analyze if the creditors were duly informed of the content of the plan, or if they fell victims of any sort of coercion, induced in error, misled, or if they exercised their right to vote without any vice caused by a state of danger, fraud or simulation.

It is also in this phase that the judge must verify the occurrence of a simulation between creditors, or a group of those, with the debtor, with the end of approving the plan, as well as of some conducts that may be reputed as fraudulent and aim to guarantee the approval of the Judicial Reorganization Plan, in detriment of other creditors⁸.

In the Brazilian legal system, the juridical act is analyzed not only by written word and documentation, by the formal pact, but also must be taken into consideration numerous aspects beyond the strict formality, like the motivation behind the negotiation and even the *praxis* of the parties in previous negotiations. The clauses of the pacts firmed between the parties must, still, be analyzed with *lumen* of the good faith (objective and subjective), likewise taking into consideration the social function that must be observed in nonpublic transactions.

This limitations and parameters used in the exegesis of particular accordance have the purpose of avoiding that juridical acts of some parties may cause a negative result to the collectivity, once more demonstrating the peculiar attention the legislative power has bestowed upon the collective interest *vis-a-vis* the private one.

Having overcome the preconditions for the existence and validity of the legal business, the judge must enter into the third phase of the tetra phasic control, which consists in verifying the legality of the extension of the decision taken by the majority of the creditors in the General Creditors Assembly in regard to beating creditors or dissident ones.

The third step is to verify, in detail, whether, although there is no illegality in the General Creditors Assembly's sovereign decision, nor vice in the legal business, whether of consent or motivation, formal or material, the application of the decision will inflict, reflexively, an offense to the public policy. In other words, it is not enough to verify the legality and the hygiene of the decision taken at the General Creditors Assembly, but it must be verified, above all, whether the application of this decision will constitute a possible violation of the public policy norm and, therefore, is acceptable *ex officio* by the judge.

An example is when the approval of the plan occurs by most of the creditors, establishing in one of its clauses that the novation of the obligation applies to both the principal creditor and the joint obligor or guarantor. Since the credit is a disposable right, there is no legal impediment for the creditor to agree to pardon

⁸ *Ibidem*.

the debt of the principal creditor and the joint obligor and guarantors.

However, it should be noted that this applies exclusively to creditors who have effectively approved the plan, with dissenting creditors being protected by Law (article 49, paragraph 1, of Act no. 11.101/2005), to preserve their rights and privileges against joint obligors, guarantors and obligors on return.

The fourth and final phase of the four-phase control occurs with the control of possible abuse by one or more creditors in the exercise of his voting rights, which must be used only and exclusively in a strictly manner that is compatible with its own right.

Once more, the motivation, i.e., the literal will of the party is tied to the validity of its vote.

In the Brazilian Reorganization system, voting power is linked to the value of the credit in the reorganization process, resulting in situations in which a single or a group of creditors have a higher voting power, causing loss of the other creditors, of the Company in reorganization or of collectivity.

In spite of the sovereignty of the decision taken by the creditors in the General Creditors Assembly, this decision must be in agreement with the Social Function of the institute of the Judicial Reorganization. Although the creditor can exercise his voting rights in accordance with his particular interests, his decision cannot create an obstacle that is insurmountable or that prevents the attainment of the guiding principles of the institute, related to the Social and Public Function of Judicial Reorganization.

A creditor, at first, can refuse to negotiate with the debtor, demanding full compliance with the obligation. However, if your vote is decisive for the approval or not of the Reorganization Plan, the vote, in fact, may lead to the termination of a viable business activity, with the disappearance of all benefits from it.

In this case, the creditor does not have the right to oppose his will to the detriment of the creditors, the company and the collectivity.

In Judicial Reorganization the risk of occurrence of this category of addiction is accentuated, since one or some creditors may possess a high degree of dominance in their respective classes.

Finally, it is important to note that the four-phase control maintains the creditors' sovereignty over the merits of the Reorganization plan. This verification does not comply with the decision of the creditors on the market strategy to be used to achieve the Reorganization of the company. However, it maintains a strict control of the legality of the provisions reached in the General Creditors Assembly, as well as guiding the reorganization procedure to reach the social and public interests, its basic objectives, before the particular interests of creditors.

E) The Democratic Management of Processes

The Business insolvency proceedings are peculiar and complex insofar as they bring together diverse interests of hundreds or thousands of people, imposing on the Judge the need to rule numerous issues simultaneously and that must necessarily be resolved in economically useful time, failing to prove ineffective at end.

The great challenge imposed on the Judge is to manage the process in order to decide all these issues in good time, without prejudice to offer all the interested parties the right to plead in the records as adversary and the ample defense.

It is in this context that the democratic process management emerges as an alternative technique for conducting insolvency proceedings, with a focus on optimizing its results.

It is possible to improve procedural management irrespective of whether there are additional investments or changes in the applicable legislation. It is enough that there is a change of attitude and mentality of the applicators of the law, especially of the judges, as responsible for conducting and managing the process.

The definition of *case management* from the US health service is highlighted. According to the definition presented by the Case Management Society of America (CMSA), case management is a collaborative process of assessment, planning, facilitation, care coordination, evaluation, and advocacy for options and services to meet individual and family's comprehensive health needs through communication and available resources to promote quality, cost-effective outcomes.⁹ In free translation, it can be affirmed that case management is a collaborative process of analysis, planning, facilitation, coordination of care, evaluation and advocacy of options and services to achieve individual and family health needs through communication and available sources quality promotion and cost-effective results.

The goal of the application of *case management* in the US health services is to optimize health resources, favoring the maintenance of health and the satisfaction of the individual, and at the same time rationalizing the resources that will be spent by health care providers. The premise is to optimize the cost and benefit of this type of service, with advantages for all involved in this type of process. The individual will have better health guidance while health care providers will spend fewer resources to care for that individual's health.

This idea of *case management* from the health sector, which seeks to analyze individually the specific needs of the case in order to achieve better results with the fewest possible resources can and should be transported to the management of legal proceedings.

⁹ Case Management Society of America.

<http://www.cmsa.org/Home/CMSA/WhatisaCaseManager/tabid/224/Default.aspx>.
Last view on January, 2019.

This experience, moreover, has also been used in the US judicial system, where the concept of judicial case management has long been known. It is a schedule of procedures involving a certain matter to be judged. Each stage of the judicial process is analyzed according to the specific case, and the magistrate must establish the whole route of action so that all relevant points are taken to judgment, always with a view to giving a faster and more effective judgment, and to lower the cost of the process and enhancing the satisfaction of the jurisdiction with the service of Justice. The magistrate can designate hearings, called CMC (Case Management Conference), whose main objective is to determine the steps for the judgment of the matters presented to the Court, observing the specific needs of the concrete case.¹⁰

In comparative law, especially in cases of bankruptcy and judicial reorganization of companies, there is also Section 105 of the US Bankruptcy Code, which grants the judge powers to supplement legal provisions by making decisions and measures that are not expressly provided for in the text of the law. In this sense, the bankruptcy judge is authorized to determine any action that is necessary to achieve the objectives of the law, as the case may be.¹¹

¹⁰ According to the definition brought by the website “USLEGAL”, case management in legal terms refers to the schedule of proceedings involved in a matter. There are various stages in litigation, such as the filing of a complaint, answers, the discovery process (interrogatories, subpoenas, depositions, etc.), and motions that occur before a trial is held or a decision is rendered. Each stage of the process has a scheduled timeframe in which it must be filed with the court or completed. When a complaint is filed and a case is assigned to a judge, the judge will often set forth a schedule for the submission or completion of the relevant pleadings, court appearances, and other matters. For example, in a divorce matter, the judge will attempt to narrow the issues involved in the case, provide deadlines for filing schedules of assets, conducting discovery, filing of proposed visitation and custody plans, and other related matters. Depending on the jurisdiction, a case management *questionnaire* may need to be filled out. The judge may also decide to send the parties to arbitration or mediation to settle disputed matters. The conduct of the case management conference varies by jurisdiction, so local court rules should be consulted. A Case management Conference (CMC) is part of the court procedure. It is a meeting between the judge and the parties (the Plaintiff and the Defendant). The lawyers representing the parties may also appear at the conference. A case management conference usually happens after a plaintiff begins a law suit, but before the trial. The meeting is not a trial and as such witnesses don't need to be present. The main purpose of the meeting is to try settling some or all of the issues in dispute before going to trial. If no settlement is achieved at the CMC, the matter will proceed to trial. (<http://definitions.uslegal.com/c/case-management-conference/>)

¹¹ According to the paragraph 11 U.S. Code § 105 – Power of the Court.

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

(d) The court, on its own motion or on the request of a party in interest—

The bankruptcy judge may also *ex officio* or at the request of the parties' designate hearings, called status conferences at any time and as often as necessary to monitor the development of cases and determine the most rapid, effective and economic conduct of the proceedings to its final and useful result (subsection d.1).

Under the terms of the US Bankruptcy Act, a judge must hold state conferences where necessary to achieve the most cost-effective and expeditious settlement of the suit, and is authorized to determine at such hearings any measures, provided they are not conflicting with other legal norms, which have as objective to guarantee the adequate solution for the concrete case, including the definition of terms specifically considered for the case in question.

Therefore, it is the duty of the Judge to lead the insolvency process in the view of its own peculiarities, adjusting the procedure to the desired objectives and always taking into account the complexity of each situation put to the judge, in order to guarantee efficiency, speed and economy in the solution of the process.

Based on all these comparative law ideas and the experiences observed in other systems, the Judgment of the 1st Court of Bankruptcy and Judicial Reorganization of São Paulo initiated the transposition and adaptation of these premises for the management of bankruptcy and Judicial Reorganization cases. And this experience has shown excellent results even for the most complex cases, in a way to reduce costs, giving greater transparency, allowing greater access of the parties and interested parties, seeking consensual solutions and achieving a greater index of correct decisions (in the sense of that decisions are made on the basis of a larger and more faithful set of evidence brought by all interested parties to judicial knowledge).

The method that has been applied in the 1st Court of Bankruptcy and Judicial Reorganization is called democratic process management.

(1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, may issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that—

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title—

(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

It is a methodology suitable for conducting insolvency proceedings (Bankruptcy and Judicial Reorganization), which is clearly collective, but also for other collective processes, such as public civil actions of various kinds.

Processes of great complexity, such as bankruptcies and Judicial Reorganization of companies, require a different management from traditional cases; otherwise they will not be able to provide adequate responses to the lawsuits brought to the Judiciary.

Processes that deal with business issues cannot ignore the reality of the economical view, as if the legal world existed in isolation and disconnected from other aspects of modern society. The time of the process cannot be dissociated from the time of the negotiating reality, especially when looking for bankruptcy and Reorganization processes, in which the negotiation/economic timing is fundamental for the success of the jurisdictional activity.¹²

The objective of the judicial reorganization process is to collect the assets of the company that went bankrupt (all its assets), evaluate it and sell it, paying as many creditors as possible, in compliance with the legal priority order. The efficiency of this type of process is measured by the optimization of the assets of the bankrupt company in favor of the creditors benefit regarding the due payments, but also by the adequate allocation of the resources collected, with the intention to maintain the source of production, even if held by other agents, thus preserving jobs, taxes collection, the circulation of goods, products and services.

The achievement of the best result in Judicial Reorganizations depends, therefore, on the agility and the decision-making rights regarding the collection and destination of the assets of the bankrupt company. It is not just a matter of formally collecting and selling the assets of the company that went bankrupt. It is a question of defining, in a short period of time, the best allocation of these assets, in favor of the interest of creditors and also of the public and social interest. Exactly for that reason, the Bankruptcy Law itself determines that the disposal of assets must observe an order of priority, preferring the alienation of the company as a whole block or the isolated productive units (which preserves the source of wealth - business activity - in the hands of new owners and, at the same time, being able to generate better resources for the payment of the creditors) other than the disposal of the assets one by one.¹³

¹² O Valor Econômico: Magistrado Inova em Recuperação Judicial. Dez. 2014.

¹³ Law on Judicial Reorganization and Bankruptcy RF, article 140: The sale of assets will be carried out in one of the following ways, in the following order of preference: I - sale of the company, with the sale of its block establishments; II - disposal of the company, with the sale of its subsidiaries or production units alone; III - blocking of assets belonging to each of the debtor's establishments; IV - Disposal of the individual assets. § 1 If it is converted to the realization of the asset, or due to opportunity, more than one form of alienation may be adopted. Paragraph 2. The realization of the asset shall begin independently of the formation of the general creditors. Paragraph 3. The disposal of the company shall be all goods required for the profitable operation of the production unit, which may include the transfer of specific contracts. § 4 In the

Judicial decisions, therefore, must be launched in a short period of time, since delays in cases of this nature may aggravate the social and economic causing harm to the whole process. In addition, such decisions, in order to be effective, must take into account the peculiarities of the case in question and the difficulties inherent in the individual assets considered.

The Judicial Reorganization of companies also requires extreme legal agility skills, so that the procedural fundamental acts to the development of the process occur in a reasonable timeframe, making it possible a real opportunity to the company in crisis to have an effective economic recovery.

The need for judicial decisions to be tailor-made for the needs of the company in crisis, with due regard for the peculiarities of the market and the specific case, is also applicable to Judicial Reorganization, otherwise it will not be able to preserve all social and economic benefits arising from the maintenance of a healthy business activity, namely, the preservation of jobs, the generation of wealth, the collection of taxes and the circulation of goods, products and services of public and social interest.

It is perceived, therefore, that the time and the construction of decisions tailored to a concrete case are essential elements for the success of these types of demands.

And the traditional process management, normally employed by the Judiciary, does not provide adequate and in a short timeframe needed responses so that the process of the bankruptcy and Judicial Reorganization may be successful.

In the traditional method of process management, the manifestations of all interested parties, the Public Ministry, the administrator and the expert, as a prerequisite for the issuance of the judicial decision, are made through decisions and petitions in the records. This implies a delay incompatible with the necessity of the economic reality, mainly because the judicial service, besides bureaucratic by nature, is absolutely overwhelmed with work beyond reasonable. Hence, the progress of the process becomes very slow and its outcome will often be ineffective. Finally, the period in which the process is unduly paralyzed because of the judicial bureaucracy significantly interfere with the effectiveness of the judicial service.

In this sense, it is not uncommon for a judicial decision to be rendered at an inadequate time, when the interest and utility have disappeared and also when the most adequate opportunity, from the economic and negotiating point of view, for the effective practice of the act determined by the court is no longer available. And even more: it is also common for a Court decision to fail to consider the specificities of the case, since many of those who would be in a position to bring to the Court extremely important elements on the best allocation of assets (employees and

transmission of assets alienated in the form of this article that depend on public registration, this will serve as sufficient acquisition title the respective court order.

economic partners, for example) do not have the opportunity to participate in the construction of the decision-making process.

For example, the decision to collect a good must be made in a reasonable period of time, under penalty of disappearance or perishing of the property that has to be collected. If pronounced in distemper, this decision will not generate positive effects in the reorganization process, either by the disappearance of the asset or even by its significant devaluation, to the detriment of creditors. As an example, the decision on the sale or lease of an asset of the company in bankrupt estate, which must be made in the same line with the preservation of the value of this asset and with the market's interest. Delay regarding decision-making may represent the loss of an opportunity and, therefore, the imposition of prejudice on the interests of creditors.

In Judicial Reorganization, which discusses the best strategies to overcome the crisis of the company, any communication noise or delay in the central decision making, can be decisive for the failure of the process, losing the possibility of maintaining the activity to the detriment of creditors and society in general.

Thus, a new management model of this kind of process is proposed which allows the Judge to be more agile in decision-making: the democratic process management.

Insolvency proceedings (bankruptcy and judicial reorganization), even in the light of their obvious complexity, must comply with the constitutional principles of the reasonable duration of proceedings (Article 5, section LXXVIII, Federal Constitution of 88)¹⁴ and efficiency (Article 37 caput of Federal Constitution of 88)¹⁵.

Citizens must be guaranteed access to a fair legal order, meaning qualified access to the process; not only access to the Judiciary, but access to the appropriate judicial solution. That is to say, the citizen has the right to the process as a useful instrument for the resolution of conflicts and effective realization of rights.

As already stated, the question of the duration of the proceedings (time of judicial decision-making) is fundamental in any type of procedure, but it is of crucial importance in the case of judicial bankruptcies and recoveries, so that the time of the proceedings is not dissociated from the time reality or the economy. Judicial decisions must be delivered in a timely manner, in order to meet the needs of the process, which in turn are dictated by the interest of economic agents.

And not only that.

Economic and social interests, in general, are also affected by the reorganization process, since it is not possible to survive with the

¹⁴ CF/88, art. 5o, inc. LXXVIII: *a todos, no âmbito judicial e administrativo, são assegurados a razoável duração do processo e os meios que garantam a celeridade de sua tramitação.* (Incluído pela Emenda Constitucional nº 45, de 2004).

¹⁵ CF/88, art. 37, *caput*: *A administração pública direta e indireta de qualquer dos Poderes da União, dos Estados, do Distrito Federal e dos Municípios obedecerá aos princípios de legalidade, impessoalidade, moralidade, publicidade e eficiência (...)* (Redação dada pela Emenda Constitucional nº 19, de 1998).

non-use of goods and services of economic and social relevance. The social function of property must be preserved even in relation to the bankrupt estate, preserving the interests of creditors, but also of society in general.

Therefore, within the model of democratic management, judicial decisions, especially on the issues that require greater urgency and compatibility with the time of economic agents, the decision-making should be taken in public hearings with the presence of all procedural parties involved and with interests on the process itself, such as, e.g., the administrator, the expert, the Public Prosecution Service and other interested parties specifically on the issues to be decided (notably the employees and business partners).

In this sense, in view of the need to decide several aspects of the insolvency process (collection of assets, sale of assets, valuation, leases, among other frequently occurring issues), the Judge should designate a hearing with a defined list of all issues to be addressed, discussed and decided. All those whose opinions are necessary for the formation of the decision-making process must be summoned to attend the act. At that hearing, all issues will be discussed and, if possible, decided. Thus, the decision on these issues, which would take months or years in the traditional model, could be pronounced in a single day, respecting the opportunity of manifestation of all interested parties.

The democratic management of the process also has other advantages: it guarantees the participation of the parties and shareholders in the decision-making process, induces a greater commitment on the part of all those who act in the process, ensures greater transparency in the process, provides greater oversight process, and also provides the interested parties with the supply of relevant and useful information about various aspects of the process (for example, what would be the best allocation of specific assets, among others), contributing to the judicial decision, which will be tailor-made for the specific case.

The parties (creditors and debtors) and all other interested parties involved in the course of the insolvency proceedings have a guaranteed participation in the process of forming the judicial decision. That is because everyone will be invited to participate in the democratic management hearing in which the issues previously defined by the Court will be deliberated and decided and demand a prompt and effective measure. At the hearing, everyone can bring important elements to the formation of the judicial decision. In addition, any possible disagreements can be analyzed immediately, making possible the formation of a consensual decision, with attendance of all interested parties. This is because all the interested parties will be present, interacting with the Judge, at the moment of forming their decision. It is clear, therefore, that the decision will have more elements of reality and will be closer to what would be correct from the point of view of the use of the resources/assets involved in the process.

The Judge will also act as mediator of the interests of all those involved in the process during the discussions and deliberations to be taken at the democratic management hearing. Thus acting, it will be possible the partial and/or total attendance of diverse interests, with the consensus of all those present. This mediation will lead to decisions that are accepted by all and, so, not subject to resources. Hence the conclusion of the procedure is accelerated, it will not be subject to the delay arising from the filing of appeals during the course of the claim.

Democratic management induces much greater transparency in the conduct of the process. All interested parties will be able to witness the actions of all the agents of the procedure. Creditors and debtors, as well as other interested parties, may verify the exact performance of all other parties involved in the proceedings, including the Judge, the Public Prosecution Service, the parties' attorneys, the Judicial Administrator and Experts.

The Judge, at the management hearing, will distribute tasks to the process agents in order to achieve the most appropriate, faster and economical result for solving the questions put to judgment. All those presents at the hearing will have the exact knowledge of what the responsibilities undertaken by each agent of the process will be. Accordingly, the eventual non-fulfillment of the judicially determined task will have individualized the responsibility of each action. In this way, it will be unfeasible for the agents of the process to hide behind the work firm, removing their responsibilities, in the conviction that their individual failures will never be denuded. In this sense, this form of process management induces much more commitment from the agents of the process, who will not wish to see their own incompetence revealed to all. It is important to emphasize that all the tasks distributed by the Judge in a democratic management hearing will be collected and conferred at the following hearing, which is always designated to follow up the stage of development of the process and to deliberate on the next steps of the process, towards a faster and more economically final solution.

The democratic management hearing, allowing the effective participation of all agents of the process, has the power to decisively interfere in the change of the position of these agents in relation to the development of the case. As everyone knows the development of the process on its course, it is possible to see how all the agents in the process are acting, it is only natural that parties abandon the traditional resistant stance and become more collaborative with the end result of the process. The parties involved, notably former employees and economic partners, cease to feel only part of the problem and become a key player in building the solution.

The supervision of the conduct of all agents during the process is also favored by democratic management. This is because, as already seen, all those involved in the process will know exactly how all agents should act during the process. Thus, it will not only be the Judge and the Public Prosecutor to supervise the

conduct of creditors, debtors, the Judicial Administrator and his assistants. All will act in this inspection, having a fast and easy access to the Judge and the Public Prosecutor in the audiences of the democratic management.

During the democratic management hearing, the Judge, after discussing the issues that need to be decided, will define the course of the process and the distribution of tasks to be performed by each of the parties involved in the case. Thus, for example, if there is a need to sell an asset of the bankrupt estate, after discussing the best technique for doing so, the Judge will order the Judicial Administrator to perform the evaluation and sale procedures within a certain period. And all those present at the democratic management hearing will know what these tasks are and the deadlines for their fulfillment (steps and deadlines accepted by all). Thus, it is intuitive to suppose that the said tasks will be effectively fulfilled, to the extent that they are widely scrutinized, in addition to previously accepted by all.

Again, it is important to note that democratic management hearings are held to follow up on all the issues decided and tasks handed out at the previous hearing. As the case may be, a monthly monitoring of the fulfillment of the defined goals and decided in the previous hearings is done.

The process develops itself from audience to audience, moving towards the final solution, quickly, economically and irreversibly. Greater involvement of all in the conduct of insolvency proceedings is encouraged, in favor of greater speed, agility, transparency and efficiency of the judicial service.

As it has already been stated, let it be repeated, the parties cease to feel only part of the problem and are seen as part of the solution of the case, which causes a sensible change of attitude in the conduct of the feat.

Decisions are built in the Court as a result of the wide-ranging discussion between all those who have an interest in resolving the case. The specific elements of each concrete case will naturally arise from the effective participation of the agents of the process, including the workers. The decision made in a democratic way will be fairly suited to the needs of the specific case, distributing the necessary tasks to reach the best practices from the point of view of creditors and society in general.

And the best: the application of the model of democratic process management is immediate and independent of legislative change.

According to the applicable legislation, the Judge is allowed to designate a hearing for the collection of information of the parties and other interested parties, whenever he deems necessary for the prompt and adequate solution of the questions put in Court. And more, this form of process management best meets the constitutional principles of efficiency and the reasonable duration of the process.

It improves the provision of the judicial service without the need for legislative changes or additional investments in the structure of the Judiciary.

§ 2 – PRACTICE OF THE JUDICIAL ADMINISTRATOR

The Judicial Administrator, in his position as the assistant of the Court, should maintain a strict compliance with objectives crystallized on Act no. 11.101/2005. Nonetheless, numbers of other duties are attributed to him due to the application of other Law sources, and also because of several peculiarities that originated from practical cases.

Thus, it has to be recognized that the practice of the Judicial Administrator at the Judicial Reorganization is flexible and, beyond to comply with the minimum obligations under Act no. 11,101/2005, there are several obligations attributed to him and that have to be entirely fulfilled, under the penalty of noncompliance of his primary function, that it is to act on behalf of the Court during the proceeding of Judicial Reorganization.

The Judicial Administrator must be a taintless and a diligent person, worth the trust of the Court that designated him to this particular function. Notably, the Judicial Administrator must perform his duty without willful misconduct nor malice, doing everything it is possible to help the Court in the conduction and administration of the proceedings of reorganization, always leading throughout the pressure of the creditors, neither of the companies on judicial reorganization nor third parties interested on the process.

The practice of the Judicial Administrator on the Judicial Reorganization must object the achievement of the fundamental principles of the proceedings, as TZIRULNIK points out:

*“The fundamental principles that oriented the elaboration of Act no. 11.101/2005 include the preservation of the Company; the separation of the concepts of Business person and Companies that can be Recovered; the withdrawal from the market of unrecoverable Companies or Businessperson; the workers protection; the reduction of costs of credits in Brazil; the efficiency of the judicial lawsuits; the legal security; active participation of the creditors; maximization of the assets of the Company on Judicial Organization; the Deburocratization of the Judicial Organization in the cases of small business companies; and a severe punishment related to Bankruptcy and Judicial Reorganization Crimes”.*¹⁶

Companies that opt for the Judicial Reorganization or have the Bankruptcy declared, will be subjected to the Court’s jurisdictional control, when the Judicial Administrator will assist the Court, which, in the case of Judicial Reorganization, must act truly as a *longa manus* of the Judge, personifying a diligent inspector on the fulfilling of the reorganization plan and an auditor who analyses the data presented by the creditors and the companies which are in the process of Judicial Reorganization.

That means, the Judicial Administrator has control over what it is offered by the parties involved on the procedural relationship,

¹⁶ TZIRULNIK, Luiz. Recuperação de empresas e falências: perguntas e respostas. 5ª ed. rev., atual. e ampl. Da obra Falências e concordatas: perguntas e respostas. São Paulo: Revista dos Tribunais, 2007. P.31.

checking its validity, veracity, constitution and reflexes, before taking into the knowledge of the Court and of the interested parties of the proceedings.

Act no. 11.101/2005, in its article 22, subsections I and II, describes in a sui generis way the practice of the Judicial Administrator, in verbis:

“Art. 22. To the Judicial Administrator compete, under the inspection of the Judge and the Committee, besides other duties imposed by this Law:

I – in the Judicial Reorganization and in the Bankruptcy:

send correspondence to the creditors included on the list referred which deals the subsection III of the caput of the article 51, subsection III of the caput of the article 99 or in the subsection II of the caput of the article 105 of this Law, communicating the date of the request Judicial Reorganization or Decree of Bankruptcy, its nature, its amount and its classification given to the credit;

give, with promptness, all information requested by the interested creditors;

give statements of the debtor’s book, that will be given authentic of office, in order to serve as fundament to the credit’s habilitation or its impugnation;

demand of the creditors, of the debtor or its administrators any information;

elaborate the list of the creditors, which deals the §2 of the article 7 of this Law;

consolidate the List of General Creditors under the terms of the article 18 of this Law;

request to the Judge the convocation of the General Creditors Assembly on the cases foreseen by this Law or when understand is necessary its hearing for a decision making;

hire, upon judicial authorization, professionals or specialized firms for, when necessary, assist him performing his functions;

manifest in the cases foreseen in this Law;

II) in the Judicial Reorganization:

inspect the activities of the debtor and the compliance with the PLAN of Judicial Reorganization;

request to be declared Bankruptcy in the case of noncompliance of the obligation taken on the Judicial Reorganization Plan;

present to the Judge, to be placed on the case-file, a monthly report of the debtor’s activities;

present the report regarding the execution of the reorganization plan, in accordance with subsection III of the caput of the article 63 of the Law;”

Even though it may appear negligible at a first glance, there is an enormity of activities, attitudes and diligences that have to be effectively carried out by the Judicial Administrator and its staff to achieve full compliance with the provisions under subsection I and II of the article 22 of Act no. 11.101/2005.

Additionally, in the cases that the Judge or the Court decide for the removal of the CEO from the Company that is going through the process of Judicial Reorganization, it will be the Judicial Administrator that has to fulfil the place of the CEO while there is no appointment for a judicial manager and also until the General Creditors Assembly's meeting.

From the beginning, due to the application of article 33 of the Judicial Reorganization and Bankruptcy Law, the Judicial Administrator will be summoned for, in 48 hours (forty-eight hours), sign the Term of Commitment, binding himself to a well and faithful performance in such position and shoulder the resultant responsibilities inherent to the post.

Once the Term of Commitment has been signed, it is incumbent upon the Judicial Administrator, in order to comply with the principle of transparency, to act with due diligence¹⁷, which, pursuant to article 153 of Act no. 6.404/1976, means:

“Art. 153. The manager of the company must employ, in the exercise of his functions, the care and the diligence that every active and trustworthy person usually employs in the administration of his own affairs.”

Such application is analogous, once Act no. 11.101/2005 does not mention anything in this regard. By doing so the forensic practice itself led to this interpretation of the article 153 of the Law N. 6.404/1976 as a guidance to the practice of the Judicial Administrator.

Therefore, it is reasonable to require from the Judicial Administrator to act with the same level of ordinary diligence as from a “active and trustworthy person” usually would employ in “*his own affairs*”.

That does not mean, a *priori*, that the Judicial Administrator should act in such an incisive manner to a point that exceeds the limit of the functional competencies of other members of the proceedings. However, its performance must be to fulfill the functional attributions, keeping the Court and the creditors constantly informed of the actual conditions and circumstances observed in the course of the procedure.

From the Judicial Administrator it is not demanded the same level of diligence of as an ordinary person, but it is expected an active, willing, capable, and prepared person to take a proactive stance, performing the most various and necessary diligences without having to be provoked to act so.

Likewise, it is required from the Judicial Administrator to be trustworthy, not only on the conduction of the Judicial Administration, but in all the aspects of his social life, being recognized by the society as an honest person and above any suspicion.

¹⁷ ORLEANS E BRAGANÇA, Gabriel de. Administrador Judicial: Transparência no processo de recuperação judicial. São Paulo, Quartier Latin; 2017, p. 120-121.

CEREZETTI defends that the Judicial Administrator exercises a fiduciary¹⁸ duty in favor of all the parties involved in the procedure, in an similar interpretation of article 68, § 1º, “a”, of Act no. 6.404/1976, what would imply, once more, the assumption of the diction of the article 153, also from Act no. 6.404/197 defined as the “duty of diligence” from the Judicial Administrator.

The jurisprudence that is being built on the limitation of the practice of the Judicial Administrator, seeks to make it more flexible its attributions when the fulfillment of its *mister* depends on it.

A good example is the relativism of the clause of confidentiality of the contracts signed by the Companies¹⁹ on ongoing proceedings of reorganization, notwithstanding it exists a divergent understanding, spearheaded by MANDEL, that defends that the Judicial Administrator does not have powers to supervise the negotiations between the Company subject to the Reorganization and the shareholders, suppliers, nor with any other agent²⁰.

At this point, *a priori*, it is understandable that the Judicial Administrator should possess powers to inspect the negotiations between the Company subject to the Reorganization when these negotiations are related to the conduction of the Judicial Reorganization procedure, because it is the duty of the Judicial Administrator to verify the occurrence of eventual illegalities or frauds and to keep the Court informed regarding all aspects, formal and material, that may influence directly on the process of the judicial reorganization, on the viability of the Reorganization Plan or General Creditors Assembly.

The already mentioned article 153 of Act no. 6.404/1976 establishes a similar *bonus pater familias*, borrowed from the Roman Law²¹, although legal scholars, such as Luiz Antonio de SAMPAIO CAMPOS, understand that the diction of the referred article finds more resemblance with the “business man” as enshrined in the North-American Law, which held very little similarity with the Brazilian system.²²

Gabriel José de ORLEANS E BRAGANÇA, argues that:

“(…) the function of a Judicial Administrator is on the same line as an Audit Committee of a firm, with the difference that, instead of passing the information and results of this audition to the partners of this firm or to the market, its attribution will

¹⁸ CEREZETTI, Sheila. A recuperação judicial de sociedade por ações: o princípio da preservação da empresa na lei de recuperação e falência. São Paulo: Malheiros, 2012. P. 424.

¹⁹ TJ-SP – AI: 21791120720148160000 SP 2179112-07.2014.8.26.000, Relator: Helio Faria, Data de Julgamento: 25.05.2015, 18ª Câmara de Direito Privado, Data de Publicação: 03.06.2015.

²⁰ MANDEL, Júlio Kahan. Nova lei de falências e recuperação de empresas anotada: lei 11.101, de 09.02.2005. São Paulo: Saraiva, 2005. P.51-52.

²¹ Idem.

²² CAMPOS, Luiz Antonio de Sampaio. Deveres e responsabilidade. In: PEDREIRA, José Luiz Bulhões; LAMY FILHO, Alfredo (coord.). Direito das companhias. Rio de Janeiro: Forense, 2009. v.1. p.1.100.

be related to the creditors, the interested parties and the Judge from the judicial procedure. For that reason, it is understandable the of the analogy mentioned since a member of the Audit Committee has the same duties as the partners of the firm. (...)”²³

CEREZETTI, along the same line, defends that the Judicial Administrator possess the fiduciary duties “for the good of all participants (zum wohl aller beteiligten), serving of the preservation of the company and the interests of creditors.”²⁴

Another of the primary duties of the Judicial Administrator is interconnected to the duty of supervision, which, under the historical scope, consecrates the tradition of Brazilian legislation in this regard.

Hence, it is incumbent upon the Judicial Administrator to exercise diligently the duty of information, a *sine qua non* premise for the regular and transparent development of the process for all of those involved.²⁵

In the words of ORLEANS E BRAGANÇA:

“Since the former commissioner in the preventive concordata to the Judicial Administrator in the judicial reorganization, the function of this auxiliary of the Court has always been identified by the supervision practice”.²⁶

It is not incumbent upon the Judicial Administrator supervise only the formal aspects of a Judicial Reorganization process. He must supervise, especially, activities of the Company in the process of Judicial Reorganization.

The scholium of the legal scholar MENDES deserves to be reiterated by its preciousity:

“Not only as an auditor of the jurisdictional procedure, the Judicial Administrator began to assume the function of accompanying 'pari passu' the execution of the judicial reorganization plan in crisis, once approved by the Judiciary and creditors, as well as carry out the acts of management invested of an economic and financial nature and administration in favor of the alleged speed of the bankruptcy process.”²⁷

It is also incumbent upon the Judicial Administrator the verification of the possibility of the misuse of purpose or fraud in

²³ ORLEANS E BRAGANÇA, Gabriel de. Administrador Judicial: Transparência no processo de recuperação judicial. São Paulo, Quartier Latin; 2017, p. 122.

²⁴ CEREZETTI, Sheila. A recuperação judicial de sociedade por ações: o princípio da preservação da empresa na lei de recuperação e falência. São Paulo: Malheiros, 2012. P. 424.

²⁵ COSTA, Daniel Carnio. Administrador Judicial moderno. Artigo publicado no jornal Valor Econômico do dia 06/06/2017, caderno Legislação & Tributos.

²⁶ ORLEANS E BRAGANÇA, Gabriel de. Administrador Judicial: Transparência no processo de recuperação judicial. São Paulo, Quartier Latin; 2017, p. 122-123.

²⁷ MENDES, Bernardo Bicalho de Alvarenga. A importância do administrador judicial como órgão auxiliar ao juízo falimentar na busca da eficácia dos processos falimentares e de recuperação judicial de empresas. Revista de Direito Mercantil, Industrial, Econômico e Financeiro. V. 49, nº 155-156, p. 263-268, ago.dez., 2010. P. 263.

the activities of the Companies on the process of Reorganization, being liable for reporting the fact to the competent Court.²⁸

Although the Judicial Administrator holds a continuing duty to supervise the activities of the Companies on ongoing process of reorganization, he has no managerial power whatsoever in its activities. Being so, it is necessary to have a proactive attitude of the Judicial Administrator and his team, using the information provided, formally requesting the Companies on ongoing processes of reorganization to provide data and documents, or reporting the refusal to provide these to the Court, requesting the measures that are reasonable in the understanding of the Judge of the cause.

In this sense, FAZZIO JÚNIOR has a unique scholium:

“As a general rule, the Judicial Administrator has no managerial powers. This does not mean, however, that their participation is merely passive. In fact, if there is any event that can be prejudicial to the fulfillment of the reorganization, it should be communicate it to the judicial body for the appropriate measures. It is an audit assistant of the Court, with the same responsibility to that of the Bankrupt Administrator, but with different activity. He may be civilly and criminally liable to the perpetuation of the commitment of unlawful acts, whether to the detriment of creditors or against the debtor going through reorganization.”²⁹

At first, although the Judicial Administrator does not have managerial powers, negotiating or managing, the Law on Judicial Reorganization and Bankruptcies did not impose any limit on the duty of supervision that must be exercised by it, once again leaving the path of conceptualization and delimitation of its powers under the responsibility of the Jurisprudence and the Doctrine.

In the lessons of PURIFICATION³⁰ "(...) all the activities performed by the debtor that are related to the operations of the company and the judicial reorganization plan" are part of the audit scope of the Judicial Administrator.

In practice, this positioning shows to be adequate, since there is no reason to the appointment of a Judicial Administrator who acts as an Assistant to the Judge, if he does not have extensive powers to supervise the activities of the debtor.

The Judicial Administrator does not need to request judicial authorization to perform his audit duty, being able to attend on the facilities of the Company in Reorganization at any time he deems necessary, having free access to his headquarters, branches, books, documents and all data relevant to the Judicial Reorganization.³¹

²⁸ ORLEANS E BRAGANÇA, Gabriel de. Administrador Judicial: Transparência no processo de recuperação judicial. São Paulo, Quartier Latin; 2017, p. 124.

²⁹ FAZZIO JÚNIOR, Waldo. Lei de falência e recuperação de empresas. 4ª ed. São Paulo: Atlas, 2008. P. 173.

³⁰ PURIFICAÇÃO, Carlos Alberto da. Recuperação de empresas e falência comentada. São Paulo: Atlas, 2011. P. 73.

³¹ GIASANTE, Gilberto. Um ensaio prático sobre a recuperação judicial especial > a visão do advogado e do administrador judicial. In: LUCCA, Newton de;

In practice, the Judicial Administration finds, in some cases, resistance on the part of the Companies in Reorganization and its managers, on the transfer of information and documents, either for mere ignorance of the powers of the Judicial Administrator or for the illegal intention of hiding fraudulent and illegal acts.

In those cases, there must be a necessary bond of trust between the Judicial Administrator and the Court, because it must bring such circumstances immediately to the attention of the Judge, who may determine the measures he deems necessary for the fulfillment of the audit duty, including the possibility of dismissing partners and managers of the company in reorganization.

Such communications must be made either verbally to the Court, or through manifestations of the Judicial Administrator in the course of the proceedings, in which the latter requests, formally and through a specific request to the Court, access to the documents and data of the Companies in Reorganization.

The proactive attitude of the Judicial Administrator and his staff is of primordial value, since in the administration of the reorganization procedure, the latter should not wait for the judicial branch to provoke the diligence established in Act no. 11.101/2005, within the legal term.

Once more, ORLEANS E BRAGRANÇA brings a precious scholium:

“In Brazil, in spite of the fact that there is no administration of the Company in reorganization, several acts inherent to the Judicial Administrator concern the administration of the judicial reorganization process, which depends on its good diligence for greater success among all those involved. As an example, it is the Judicial Administrator who is responsible for chairing the General Creditors Assembly, and it is up to him to investigate whether the creditor votes comply with legal formalities and impediments in the exercise of the vote (article 43, Law on Judicial Reorganization and Bankruptcies)”³².

Therefore, the Judicial Administrator acts as an auditor not only of the Company in reorganization, but also of the actual conduct of all aspects and procedural acts, taken by the debtor, the creditors and interested parties, and any eventual abuse of rights, as soon as it is detected, must be taken to the knowledge of the Court accompanied by a request for action.

Naturally, if the Judicial Administrator is faced with an evident nullity in one of the proceedings during the course of the Judicial Reorganization, or if he finds that he has committed an improper procedural act, afterwards, or is enraged by motivation or consent, he shall immediately report such act to the Court, taking all measures necessary to normalize the established illegality.

DOMINGUES, Alessandra de Azeredo (Coords.). *Direito recuperacional: aspectos teóricos e práticos*. São Paulo: Quartier Latin, 2009. P.312.

³² ORLEANS E BRAGRANÇA, Gabriel de. *Administrador Judicial: Transparência no processo de recuperação judicial*. São Paulo, Quartier Latin; 2017, p. 142.

It is also incumbent upon the Judicial Administrator to perform the organization of the creditors, listing them within the categories established by the Law on Judicial Reorganization and Bankruptcies as well as analyzing the hygiene, amount and content of their credits, which results, from the analysis of the Judicial Administrator (article 7, paragraph 2, of Act no. 11.101/2005), the definition of the amount of the credits to prepare the notice and for the purposes of voting to be held at the General Creditors Assembly.

Even in the credit challenge, when the creditor disagrees with the amount and classification of his credit, the Judicial Administrator must give his opinion in the case, serving as an auxiliary to the Court in the decision on the challenge.

Also, at this stage, when analyzing the credits, their habilitations and claims, the Judicial Administrator must act diligently and, *in dubio*, request information and documents from the Company in reorganization, creditors and interested parties, within the power of action granted to him by article. 22, "d", of the Law on Judicial Reorganization and Bankruptcies.

It is worth mentioning that every bankruptcy is provoked, either at the request of a creditor, through a request for self-bankruptcy or through the request of the Judicial Administrator in the course of Judicial Reorganization. This assignment consists of another duty of the Judicial Administrator, as a result of article 22, II, b, of Act no. 11.101/2005, and does not depend on the call of the General Creditors Assembly³³. The request must be motivated by noncompliance with the obligation assumed in the Reorganization Plan. Therefore, in this case, the Judicial Administrator acts as true prosecutor of compliance with the Reorganization Plan.

A) Attributions established to the Judicial Administrator by Act no. 11.101/2005

In order to accurately define the minimum functions of the Judicial Administrator in Judicial Reorganization, it is necessary an exhaustive analysis of the contents of article 22 of Act no. 11.101/2005.

The provisions contained in subsection I., of referred article, are common to both the Judicial Reorganization and to the Bankruptcy.

Subsection (a), of section I, has the following wording:

“a - send correspondence to the creditors included on the list referred which deals the subsection III of the caput of the article 51, subsection III of the caput of the article 99 or in the subsection II of the caput of the article 105 of this Law, communicating the date of the request *Judicial Reorganization* or

³³ ORLEANS E BRAGANÇA, Gabriel de. *Administrador Judicial: Transparência no processo de recuperação judicial*. São Paulo, Quartier Latin; 2017, p. 134.

Decree of Bankruptcy, *its nature, its amount and its classification given to the credit;*"

Such provision is an interpretation of the most simple and meaningful, the Judicial Administrator, must send to all related creditors, after have been analyzed their credit, communicating the date of the request for judicial reorganization or the date of the bankruptcy, the nature of the credits, the amount considered correct by the analysis of the Judicial Administrator, as also the classification of the credit ("extraconcursal", unsecured, Collateralized Debt Obligations, privileged labor and privileged fiscal).

The provision contained in paragraph b, of the same subsection, is redacted as follows:

"b) give, with promptness, all information requested by the interested creditors;"

Such provision constitutes a true obligation of the Judicial Administrator beyond those arising from the mere exegesis of the letter of the law.

That is because, by reason of this provision, the Judicial Administrator must keep publicity of all the acts done during the judicial reorganization, preferably through a *webpage* duly published in the Judicial Reorganization case-file, as well as the letter sent to the creditors due to the application of paragraph a, preferably including address for physical assistance, telephones contact and the time the Administrator or his staff will be available to meet the interested creditors.

Paragraph c of the same subsection is worded as follows:

"c) give statements of the debtor's book, that will be given authentic of office, in order to serve as fundament to the credit's habilitation or its impugnation;"

Such provision is an obligation on the Judicial Administrator to collect, analyze and provide copies to the creditors of the reorganization books (supporting documents), even though the creditors themselves do not have such documents.

In these cases, the Judicial Administrator is also responsible for certifying the non-existence of a possible book of the debtor, requesting the necessary measures, either to recover such documents or to hold the guilty parties responsible for their disappearance or non-existence.

The provision of paragraph d, still of the same subsection, grants a further power to the Judicial Administrator better than it confers an obligation:

"d) demand of the creditors, of the debtor or its administrators any information;"

The Judicial Administrator, as reported in this paper, has innumerable duties of information, transparency, publicity during the process management, in addition to obligations of other natures, which can only be fulfilled because to the Judicial Administrator is granted the power to require from creditors, debtors and their administrators all information that may be necessary in the course of the Judicial Reorganization.

In cases of recalcitrance of those in the non-supply of the information, it is incumbent upon the Judicial Administrator to request the Judicial Recovery Court to take whatever steps are necessary to resolve the *quaestio*.

The provision of paragraph *e*. establishes an objective duty to the Judicial Administrator:

“e) elaborate the list of the creditors, which deals the §2 of the article 7 of “this Law;”

Combining, the section 2 of article 7, has the following redaction:

“Art. 7. The verification of the credits will be carried out by the judicial administrator, based on the accounting books and commercial and tax documents of the debtor and in the documents presented to him by the creditors, and may rely on the assistance of professionals or specialized companies.

Paragraph 2. The judicial administrator, based on the information and documents collected in the form of the caput and paragraph 1 of this article, shall publish a notice containing the list of creditors within 45 (forty-five) days, counting from the end of the term of Paragraph 1 of this article, and shall indicate the place, time and the common term in which the persons indicated in article 8 of this Law shall have access to the documents that substantiated the elaboration of this list of general creditors.”

Accordingly, beyond performing the list of general creditors referred to in article 7, paragraph 2, the Judicial Administrator shall give publicity to documents that based his decision, for a full verification by the creditors, i.e., the decision of the Judicial Administrator to include or exclude, to reduce or to increase, as well as to classify a credit in the Judicial Reorganization, must take place in an absolutely justified manner and in accordance with documents and technical reports, which justify his decision.

The norm inserted in subsection *f*. establishes one of the most important obligations in the Judicial Administration of a Judicial Reorganization or Bankruptcy, which is the accomplishment of the consolidation of the List of General Creditors:

“f) consolidate the List of General Creditors under the terms of the article 18 of this Law;”

The list of general creditors must contain the table of all creditors from the Company in Reorganization, the amount of their credits and the category to which they belong, pursuant to article 18, of Act no. 11.101/2005, which is redacted as follows:

“Art. 18. The judicial administrator shall be responsible for the consolidation of the list of general creditors, to be approved by the judge, based on the table of creditors referred to in art. 7, paragraph 2, of this Law and in the decisions rendered in the appeals offered.

Solo paragraph. The general list, signed by the judge and the judicial administrator, shall mention the importance and the classification of each credit at the date of the request for judicial reorganization or decree of bankruptcy, shall be added to the file

and published in the official body within 5 (five) days, counted from the date of the ruling that judged the impugnation.”

The creditors must be separated according to the classes established by Law, namely: (Class I) Labor Creditors; (Class II) Creditors with Collateralized Debt Obligations; (Class III) Unsecured creditors; (Class IV) Micro or Small Business Creditors.

After presenting the table referred to in article 7, paragraph 2, of already mentioned Law, the credit’s impugnation will be presented by those creditors who disagree with the amount and classification of their credits, as well as those who disagree with the classification and credit amount related to another creditor.

Only after these challenges are ruled the Judicial Administrator can consolidate the table called the List of General Creditors, which shall be approved by the Court and duly published in official bodies and in public notices.

The provision referred to in the subsection g., section I, article 22, of Law N. 11.101/2005 is worded as follows:

“g) request to the Judge the call of the General Creditors Assembly on the cases provided for by this Law or when it deems necessary its hearing for a decision making;”

The Judicial Administrator must be the organizer, the one who gives impulse and makes happen the General Creditors Assembly, which has been already stated in this academic article, has sovereign power over the decision-making in matters pertaining to the approval or not of the Reorganization Plan.

However, when the situation in the case-file indicates the necessity for a decision regarding the approval or disapproval of the reorganization plan, or part of it, and, still, in cases where an ancillary obligation of the reorganization plan already approved is not being fulfilled, the Judicial Administrator must summon, as often as necessary, the General Creditors Assembly, so it can be decided such matters.

Such provision is more than necessary, since the decision-making, with such a sovereign nature, is the responsibility of the General Creditors Assembly and, in the event of non-compliance with this provision, numerous acts may be considered null and void, causing damages to Company in reorganization and Creditors.

The provision in subsection h., concerns the possibility of hiring professionals and specialized companies:

“h) hire, upon judicial authorization, professionals or specialized firms for, when necessary, assist him performing his functions;”

The subsection h. deals with the authorization given to the Judicial Administrator to assemble a team to assist him in the exercise of his function. However, what happens in practice is that Judges have determined the appointment of companies specialized in Judicial Administration, which already have a multidisciplinary team formed only with the purpose to supervise the Judicial Reorganization. This point will be more closely addressed in a separate topic.

The provision in subsection (i) is one of the simplest to comprehend:

“i) manifest in the cases provided for in this Law;”

Whenever the Judicial Administrator renders his legal opinion, whether by decision of the Court or by virtue of the application of the Law, he shall do so, with extreme attention, otherwise he may not be fulfilling the objective of good perform its function of assisting judgment as required.

The section II deals with issues solely related to Judicial Reorganization.

Subsection a. contains an extremely important obligation:

“a) inspect the activities of the debtor and the compliance with the plan of Judicial Reorganization;”

The duty to supervise the activity of the debtor and to comply with the judicial reorganization plan have their own topics in this paper, which is why they will not be reanalyzed.

The provisions of subsection b. establish the obligation of the Judicial Administrator, in compliance with the provisions of the previous subsection, when observing the noncompliance with the judicial reorganization plan, to request the Judicial Reorganization to be converted in Bankruptcy:

“b) request to be declared Bankruptcy in case of noncompliance of the obligations undertaken on the Judicial Reorganization Plan;”

However, such rule does not have a simple applicability as it may suggest the direct exegesis of the wording of the Law.

In numerous cases, as already is being accepted by the jurisprudence and doctrine, in case of noncompliance with minor obligations and with the assistance of the judicial reorganization plan, a new General Creditors Assembly may be convened to decide whether the judicial reorganization plan should be maintained, even though being aware of its partial noncompliance. Therefore, it is up to the Judicial Administrator to communicate immediately to the Judge of the case the noncompliance with the Plan, so that it decides on the conversion on bankruptcy or determines a new General Creditors Assembly.

The provisions of subsection c. is one topic of this paper, but it constitutes the monthly duty of the Judicial Administrator to submit a monthly report of the debtor's activities:

“c) present to the Judge, to be placed on the case-file, a monthly report of the debtor's activities;”

The provision contained in subsection d, of section II, of article 22, of Act no. 11.101/2005, refers to the last of the proceedings of the Judicial Administrator of Judicial Reorganization:

“d) present the report regarding the execution of the reorganization plan, in accordance with section III of the caput of the article 63 of the Law;”

This final report also has its own topic in this paper, which is why it will not be repeated also at this point.

B) Multidisciplinary Team – subsection h. of section I, article 22 of Act no. 11.101/2005

As already stated in this article, the crisis of a company, or a corporation or even a group of companies, may be caused by a multitude of factors.

It is important to emphasize that it is incumbent upon the Judicial Administrator and its team to supervise compliance with the laws (both formal and material), but it is also their duty to ensure the success of the Reorganization Plan within the legality.

That includes the ability to diagnose the reasons that led the activity to decline, whose first step is “(...) to understand the reasons for the decline, which may be in noncompetitive products, inappropriate distribution channels, wrong business strategies”³⁴.

Because of that, it is essential that the Judicial Administrator is advised by a full multidisciplinary team prepared and capable of analyzing all aspects of the business activity in reorganization, whether financial, operational or legal aspects. Consequently, his work inevitably focuses on his area of expertise, leaving the others without the due attention, simply because of lack of practical knowledge.

However, in view of the practical evolution of the Judicial Administration and the specialization of real team of professionals, it is clear that working in complex cases requires the effort of several professionals working together, providing the Judge and creditors with financial, operational and necessary legal assistance, but also providing the fundamental legal support to the Court, within the legal norms.

It should be noted that the Judicial Reorganization tend to be filed out of time in order to resolve the financial crisis that plagues the company, so “it is very difficult for a late turnaround process to be conducted off the rails of insolvency proceedings due to the strong elements of operational and financial deterioration that the firm presents at this critical stage.”³⁵

Strong in this regard, the Judicial Administration team is the instrument for conducting the relevant data of the Reorganization Company to the Judge and to the collectivity of creditors, as foreseen in article 22, section II, subsection c., of the Law on Judicial Reorganization and Bankruptcies, which establishes the duty of the Judicial Administrator to carry out the Monthly Report on the activities of the Company in Reorganization, which will be developed within the following topic.

Armed with the information provided by company in reorganization and the information collected during inspections, visits and diligences, the Judicial Administration shall analyze such data and prepare the monthly report that indicates, in an analytical

³⁴ Reestruturação de empresas: como recuperar e reerguer negócios / Salvatore Milanese [et al.]. 1. Ed. – São Paulo: Matrix, 2016. P. 13.

³⁵ Reestruturação de empresas: como recuperar e reerguer negócios / Salvatore Milanese [et al.]. 1. Ed. – São Paulo: Matrix, 2016. P. 14

and easy-to-understand manner, the financial information of the debtor company.

At this point, the Monthly Activity Report serves as a true measure of the success of the company's reorganization in the course of the process.

It is also incumbent upon the Judicial Administrator's staff to conduct a review of the data collected by the Companies in reorganization, mainly, to carry out the work of verifying if frauds, illegalities or manipulated information passed on by the company in reorganization have not occurred.

It is also the assignment of the Judicial Administration team to analyze the credits. For this, it is necessary to work with professionals from the most varied areas, according to the business performance of the Company in reorganization. Usually administrators, economists and accountants do the organization, tabulate and analysis of the contracts and invoices that relate to the credits, being able to verify with exactitude the correct amount of each credit. After this analysis by a qualified financial professional, it is necessary the verification by a lawyer to ensure that the contract that resulted in the credit did not occur in an illegal or fraudulent way.

Lawyers are also fundamental in the legal support to the Court, collaborating with reports of the most varied natures. Usually, the Judicial Administrator is required to express itself regarding claims from the creditors and the Company in reorganization in the course of the demand. In order to collaborate with the Court, the Judicial Administrator must give his opinion so that he indicates the majority position of the doctrine and the jurisprudence on each subject, indicating what is most appropriate for the case under analysis.

Therefore, the Judicial Administrator and his or her multidisciplinary team are responsible for analytically exposing the relevant data of the business in question to the Court and to the creditors.

It is the Judicial Administrator who brings to the knowledge of the Judge the data presented by the Company in Reorganization, making it the first filter in the detection of compliance or not, with the Reorganization Plan and also in the identification and analytical detail of the reasons for which the decline continues to last.

To this extent, this analysis must be carried out observing all the financial and economic information necessary to measure the performance of the reorganization plan and must be brought to the process in an analytical way, which will allow the Judge and the creditors to understand, even without being financial experts, the actual conditions of the companies in reorganization.

For this purpose, the Judicial Administrator may rely on numerous technical files and reports that assist in the reorganization and restructuring of procedural activities.

Mainly, the information collected by the Judicial Administrator must be organized within a management information system,

exactly in the way that these data must be presented in the best parameters of a Business Administration.

In the words of OLIVEIRA:

“An Information system is the process of transforming data into information. And, when this process is aimed at the generation of information that is necessary and used in the decision-making process of the company, it is known as the system of managerial information” (OLIVEIRA, 2007, p. 25)³⁶.

When the Judicial Administrator provides to the Judge and to the creditors complete and accurate information, it permits everyone to have a better representation of the company's reality, allowing better decision-making, either in the course of procedural proceedings, or in the voting by creditors in the General Creditors Assembly.

That is the only way that the Judicial Administrator can be able to dispose this information fully and comprehensively, in a way to translate it in an understandable way to the Court and to the creditors.

Nonetheless, a company in reorganization can have many branches of activity, sectors, units and even work groups.

In this sense, the Judicial Administrator must have access to the information of each of the activities (branches) of the company, in particular software, data and people³⁷.

For large companies or economic groups, there may be also a need for the intervention of *information system managers*, who will have to unify the information coming from several sectors, units or areas of operation of the reorganization Company. It will improve the overall efficiency of the *integrated information system*, which enables the right information to be provided at the right time to the right recipient.³⁸

What happens in many situations is that the economic and financial crisis mainly arises from the lack of structural, financial and administrative organization of Companies in reorganization (see the topic regarding Previous Examination).

The perfect picture is one in which the Company in reorganization grants the Judicial Administrator the information obtained through the two classic ways of obtaining business information: internal and external sources, passing on true and complete information about all their branches of activity.

For specific cases, the Judicial Administrator can rely on the help of professionals from different areas of knowledge, so that he can understand the data of Company in reorganization, or even to identify the technical cause of the activity that has been generating the economic-financial crisis.

Facing these facts, a Judicial Administration team should be formed by lawyers, accountants, auditors, economists, engineers,

³⁶ OLIVEIRA, D. P. R. da. *Organização e Métodos*. São Paulo, Atlas, 2007. P. 25.

³⁷ BEAL, Adriana. *Gestão estratégica da informação*. São Paulo, Atlas, 2004.

³⁸ CARVALHO, Fábio Câmara de Araújo. *Gestão do conhecimento*. São Paulo: Pearson, 2012.

mediators, evaluators and all other professionals who are needed to perform well in specific cases.

Beyond that, the Judicial Administrator must exercise extreme caution in the selection of his or her staff. First, he is able to offer to the Court and to the creditors information provided by those experts, which contain paradigmatic and precise content, and is not a cause of doubt in the Court or creditors, as well does not cause damage to the judicial reorganization process, in order to offer to the Court a work carried out by suitable professionals, who are not willing to submit to pressures, misleading and even corruption, which would undermine the development of the Reorganization Plan or favor one of the creditors to the detriment of the others.

C) Article 22, section II, subsection c., of the Law on Judicial Reorganization and Bankruptcies - Requirements for a Monthly Activity Report

The Monthly Activity Report referred to in the article 22, section II, subsection c., of the Law on Judicial Reorganization and Bankruptcies, must contain all the necessary data so that the Judge, creditors and interested parties can know, in an analytical way, the activities of the debtor, as already stated.

Although the duty to present the monthly activity complete report is provided for in Act no. 11.101/2005, this is one of the least observed duties in the course of Judicial Reorganization, impairing the achievement of the objectives of the law.

Because this is one of the duties of the Judicial Administrator, his noncompliance, "within the required periodicity in relation to the necessary content" must, necessarily, concern his dismissal.³⁹

CEZEREZETTI advocate that this action of the Judicial Administrator in the preparation of the Monthly Activity Report does not only benefit creditors, but undoubtedly contributes to the smooth progress of judicial reorganization:

*"As regards the other body that performs supervisory functions throughout judicial reorganization, it should be pointed out, as it has been done above, that the performance of the judicial administrator not only benefits the creditors, but the good progress of the process and all others interested in the success of the debtor. The information he has collected and propagated through the reports he must present to the court, allows a wide range of agents to be aware of the conditions of the debtor (...)"*⁴⁰

Once more, the legal provision is laconic and does not define precisely the extent of the legal command. However, the practice of the Judicial Administration in cases of Judicial Reorganization

³⁹ VERÇOSA, Haroldo Malheiros Duclerc. In: SOUZA JÚNIOR, Francisco Satiro de; PITOMBO, Antônio Sérgio A. de Moraes (Coord.). Comentários à lei de recuperação de empresas e falência/lei 11.101/2005: artigo por artigo. 2ª ed. rev., atual. e ampl. São Paulo: Revista dos Tribunais, 2007. p.171.

⁴⁰ CEREZETTI, Sheila. A recuperação judicial de sociedade por ações: o princípio da preservação da empresa na lei de recuperação e falência. São Paulo: Malheiros, 2012. P. 424.

has demonstrated the need for the Monthly Activity Reports to be a true thermometer of all market and administrative aspects of Companies in Reorganization that should be brought to the knowledge of the Judge and creditors.

Luis Augusto GUERRA, accompanied by a good part of the doctrine, with the purpose of suppressing this gap, presents the content that must appear in the Monthly Activity Report through a specific role⁴¹. By joining and complementing GUERRA's lesson, the Monthly Activity Report must contain: (i) all businesses conducted in the analyzed period, if necessary, separated and agglomerated into branches of activity of the Company in Reorganization; (ii) the complete description of the sale of the permanent and current assets; (iii) the gross revenues obtained in the analyzed period; (iv) the cash flow for the period analyzed; (v) the volume of working capital within the analyzed period; (vi) the report of the results obtained with the reduction of operational costs; and (vii) in an analytically way, the net sales, profits, dividends, and the similar, as well as any losses found during the period analyzed.

In addition to the essential and necessary content, as a result of the duty of supervision and vigilance held by the Judicial Administrator, he must fully express in the Monthly Activity Report the detection of any inconsistency, irregularity, evidence of fraud, simulation or collusion with creditors, since any of these situations may compromise the financial recovery to the detriment of creditors, or may be linked to the formal, legal and content validity of the Reorganization Plan and its procedural process, in the interests of the Reorganization Court, creditors or interested third parties.⁴²

The list of items that should be included in the preparation of the Monthly Activity Report confirms that the Judicial Administrator must use a multidisciplinary team in its preparation (see previous topic).

The first of the requirements for the preparation of a Monthly Activity Report is related to the need for a conference held in the documentation presented by Company in Reorganization, in order to verify its veracity and, also, if the documentation was presented in its entirety.

In this sense, the most recent Doctrine lectures that:

“(...) it does not make sense that the judicial administrator, in the exercise of his supervisory functions, should limit himself to collecting the data provided to him by the company and passing them on to the file-case to the knowledge of the judge and the creditors. The Judicial Administrator must elaborate his report, checking the data provided by the debtor company. The Judicial Administrator must perform a similar function as an

⁴¹ GUERRA, Luis Antonio. Falências e recuperação de empresas: crise econômico-financeira. Brasília: Guerra Editora, 2011. V.3. p. 501-502.

⁴² BONIOLO, Eduardo. Perícias em falência e recuperação judicial. São Paulo: Trevisan Editora, 2015, p. 73.

auditor, once he must confirm the basis of the data informed by the debtor, comparing the data with the reality of the company's performance.”⁴³

The Judicial Administrator shall then carry out an analysis regarding the aspects of the validity, formal and material, that must be present in the documentation presented.

This stage depends on the careful verification of the information and documents provided by the Company in reorganization, to verify its truthfulness.

After analyzing the validity of the documentation presented, as well as the inquiry on aspects that can demonstrate the existence of any type of fraud, collusion, deviation, or illegal act perpetrated by the administrators of the Company in reorganization and/or creditors, the Judicial Administrator must carry out analysis and request any documents or procedures that are missing, i.e., those that should have been submitted by Company in reorganization and were not presented during the month related to the Monthly Activity Report.

In addition, the Monthly Activity Report should contain specific information related to each type of activity of the company in reorganization. This means that the Monthly Activity Report should also examine the most relevant aspects for the type of commercial activity or services rendered.

D) Mediation between Creditors and Companies in Reorganization

Another provision that must be taken by the Judicial Administrator in the course of a Judicial Reorganization is interconnected with mediation between Creditors and the Companies in reorganization.

The first difficulty found in this function is related to the lack of knowledge, in many cases, of creditors, regarding the Judicial Reorganization process. Initially, it is incumbent upon the Judicial Administrator to attend all the interested creditors, explaining to them the judicial measures that will be taken, within the Law, with the purpose of recovering the company.

The Judicial Administrator will also provide information on the progress and management of the company, passing on these issues to creditors in a succinct and understandable way. When this job is carried out in a satisfactory manner, a multitude of unnecessary collection proceedings, executions (and the numerous incidents and impugnation brought about therefrom), are avoided, importing in benefit to creditors, Company in reorganization and even to the collectivity, because such a condition assists the Judiciary, giving greater effectiveness and speed to the adjudication of protection.

This occurs mainly when the Judicial Administrator is diligent in analyzing the differences presented to the credits of the Judicial

⁴³ COSTA, Daniel Carnio. Administrador Judicial moderno. Artigo publicado no jornal Valor Econômico do dia 06/06/2017, caderno Legislação & Tributos”.

Reorganization and performs the documentary and legal verification of each credit, relating them within the strictest legality.

The verification of credits and administrative judgment of divergences is a key point of the Reorganization process, once, if it is not done with due care and discretion, it may result in errors in the amount of the credits, nullity of the assembly or large amount of legal challenges. The Judicial Administrator, within his role of assistant of the Court, has the obligation to avoid judicial challenges, making a careful administrative analysis of the divergences.

In addition, fewer complaints, appeals and incidents will necessarily result in fewer expenses for the company in reorganization, cooperating with the proper progress of the process. It will also prevent the Judiciary from being overloaded with unnecessary proceedings.

A Judicial Reorganization, by itself, is a process with a great degree of litigation between the parties involved, where often feelings are running high, damaging the necessary negotiating environment for the resolution of the conflict. Due to it, it is the responsibility of the Judicial Administrator to maintain a conciliatory position between creditors and debtors.

Where possible, the Judicial Administration may seek a conciliatory understanding between the parties to arrive at the administrative judgment of the divergence of the claims. This simple, but laborious, procedure means that the reorganization procedure has far fewer incidents, resulting in a significant reduction of judicial challenges.

In this way, the Judicial Administration must have an exemption, not seeking to act in favor of either an eventual creditor or in favor of the Company in reorganization, fulfilling only the role of passing to the court the information in the best way possible that may represent the reality of the period or facts established, demanding what understand necessary according to the law, always aiming at the proper delineation of judicial reorganization in obedience to the guiding principles of this institute.

E) Termination of the Judicial Administrator's Action on Judicial Reorganization - The report of section III, of the caput of article 63, of Act no. 11.101/2005.

In addition to the monthly activity report, the Judicial Administrator shall submit another report in the judicial reorganization proceedings, within fifteen days after the closing of the judicial reorganization, as a result of the provision of section III, of the caput of article 63, of Act no. 11.101/2005.

ORLEANS AND BRAGANÇA defines it precisely:

“This report is the last act of the judicial administrator, in case of compliance with the judicial reorganization plan, and will justify the closing ruling of the judicial reorganization.”⁴⁴

For grammatical reasons, it could be considered that the report should be presented after the closure of the process of Judicial Reorganization. However, with a logical interpretation of the provisions of the law, the most correct exegesis and according to other principles of the reorganization procedure, is that this report must precede the ruling to close the Judicial Reorganization or Bankruptcy, according to the lesson of MAMEDE⁴⁵ corroborated by Gabriel de ORLEANS AND BRAGANÇA.

CONCLUSION

After everything presented in this paper, the conclusion is that the agents of Judicial Reorganization should be guided by the jurisprudence, complying with the provisions of Act no. 11.101/2005.

In this way, measures were presented to facilitate the performance of Judges in the Judicial Reorganization process, mainly when dealing with relevant points to unravel the case and to the good progress of the proceedings, such as: previous examination; control of the legality of the plan; democratic management of hearings; and the management of demands, claims and lawsuits; among other measures.

For the Judicial Administration and its multidisciplinary team, this paper showed that the strict positioning as assistant of the Court is fundamental. The Judicial Administrator must also follow closely the measures employed by the Company for its recovery, bringing this to the knowledge of the Court, the creditors and those interested in the process, in a simple way and easy to understand.

Therefore, with the care related above, the Judicial Reorganization processes will certainly have a much more effective course and will allow greater successes in the restart of the company and in the maintenance of its social function.

⁴⁴ ORLEANS E BRAGANÇA, Gabriel de. *Administrador Judicial: Transparência no processo de recuperação judicial*. São Paulo, Quartier Latin; 2017, p. 139.

⁴⁵ MAMEDE, Gladston. *Direito empresarial brasileiro: falência e recuperação de empresas*. 5ª ed. São Paulo: Atlas, 2012. V. 4, p.64.