

PREVIOUS EXAMINATION – AN ANALYSIS OF ITS APPLICABILITY

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The objective of this article is to demonstrate, besides the phatic crisis of the Brazilian economy, the function, the applicability and limits to the power conceived by Law to the Judge when designating the Previous Examination on the proceedings of Judicial Reorganization and also to demonstrate the influences that this may cause in its factual and legal aspects.

Before entering the practical aspects of the Previous Examination, it is necessary a brief contextualisation about the economic crisis in Brazil and also an analysis of the Judicial Reorganization as a mechanism to overcome the economic and financial crises which are affecting Brazilian Companies.

Using a historical and legal background, this article analyzes practical aspects of the Previous Examination and its effectiveness in improving the proceedings by verifying the empirical data when deciding whether to rule in favor of the Judicial Reorganization.

§ 1 – CONTEXTUALIZATION OF THE BRAZILIAN ECONOMIC SCENARIO SINCE 2014

The Brazilian economy, due to numerous political factors and wrong applicability of public policies, plunged into hyperinflation occurred in the late 1980s and early 1990s, affecting especially basic commodities. After a long period of time, the hyperinflation was controlled by the so called “Real Plan” in 1994, which, in addition to establish “Real” as the currency in Brazil, also imposed other measures on the economic level.

Since then, no other crisis has been as severe as the one faced by Brazil since 2014.

The Brazilian economy started to demonstrate a timid recovery only in the second semester of 2018, after several periods of retraction of the Gross Domestic Product (GDP), especially with the existence of approximately 13 million unemployed, in a country with a total of 208 million inhabitants¹.

Like any other crisis, this one is an “(...) *crise économique [que] se produit lentement, se développe pendant des années, et ne cesse que peu à*

¹ Data from IBGE.

<http://www.brasil.gov.br/noticias/cidadania-e-inclusao/2018/08/populacao-brasileira-ultrapassa-208-milhoes-de-pessoas-revela-ibge>.

peu”, or, “an economic crisis that occurs slowly, grows through the years, and do not cease but only little by little”. (PARETO, 1909 p. 536)².

In this interregnum, many other social and legal phenomena emerged because of the crisis. Therefore, its effects must be observed and analysed from the perspective of the results obtained with its application in the legal system in order to improve this very legal system and obtain experiences that, if well analysed, could lead to the premature overcoming of the crisis that has been affecting the Brazilian nation.

The genesis of the most recent crisis was triggered by successive political and economic factors over the last years, as public knowledge, which resulted in economic instability and business insecurity, culminating into a decline of the Brazilian GDP, causing many companies either to terminate their activities or to opt for using legal mechanisms related to Insolvency Law, like the Judicial Reorganization.

There are three types of economic crises that can affect a company: (i) the economic crisis, when the sale of products or services does not occur in the volume necessary to keep the company running; (ii) the financial crisis, when there is insufficient cash flow or when there is no viable resources to meet the obligations of the company; and (iii) the patrimonial crisis, which occurs when the sum of the assets of the company is less than the sum of liabilities, resulting in illiquidity of future obligations³.

Any of these crisis models can affect a company, preventing it from generating jobs or producing more goods and services, activities that generate tax collection, and, therefore, threatening the fulfilment of its social purpose⁴.

After the experience of the crisis in the beginning of the 90s and inspired by the comparative law, it was created in Brazil the Law on Judicial Reorganization and Bankruptcy (Law nº 11.105/2005), which is based on the principle of the preservation of the company, aiming to protect the wealth-producing sources, jobs creation by entrepreneurial activity and creditor’s interest in receiving their credits and collective interest, with the collection of taxes and other social benefits that create the business activity.

A) Crisis Panorama Presentation in Real Numbers

In the order to understand the economic, political and social context of the recent period of the economic crisis (2014-2018), it is necessary to introduce the study of numbers and data that, in a clear manner, present the panorama of the Brazilian entrepreneur,

² PARETO, Vilfredo. *Manuel D’Économie Politique*. Libraires-Éditeurs. Paris. 5^{ed}. 1909.

³ COELHO, Fábio Ulhoa. *Curso de direito comercial: direito de empresa*. 8. Ed. São Paulo: Saraiva, 2008, v. 3, p. 132/232.

⁴ CARNIO, Daniel Costa. *A perícia prévia em recuperação judicial de empresas – Fundamentos e aplicação prática*. Migalhas. 2018. Available in:

<https://www.migalhas.com.br/InsolvenciaemFoco/121,MI277594,41046->

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Last view on November, 11th, 2018.

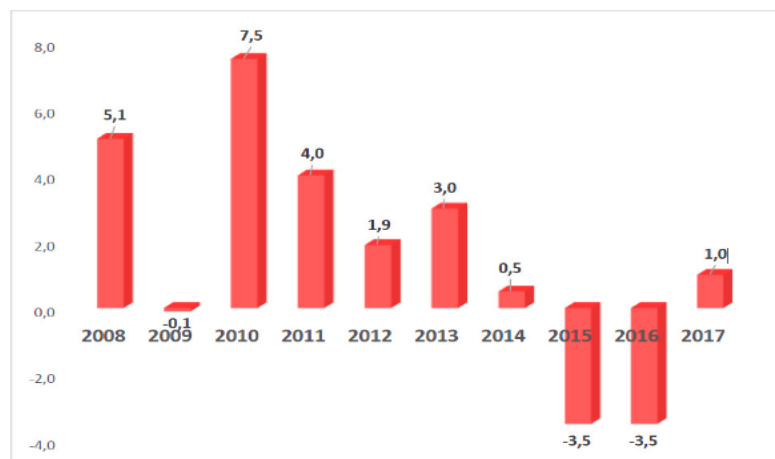
the Multinational entrepreneur and also the Macroeconomic aspect which generates a direct influence on the use of insolvency mechanisms.

According to the data provided by the Brazilian Institute of Geography and Statistics (IBGE)⁵, there was an abrupt deceleration of the Brazilian economic growth in 2014, whose results were perceptible in the measurement of the negative GDP since 2015.

This macroeconomic factor has been creating many negative effects on the market, triggering a lot of economic-financial-patrimonial crises in Brazilian companies of the most diverse sectors of the economy and branches of the market.

Note the variation of the GDP from the year 2008 to the year 2017:

VARIAÇÃO ANUAL DO PRODUTO INTERNO BRUTO: 2013 – 2017 (%)



Fonte: Elaboração IEGV/ACSP, a partir de dados do IBGE.

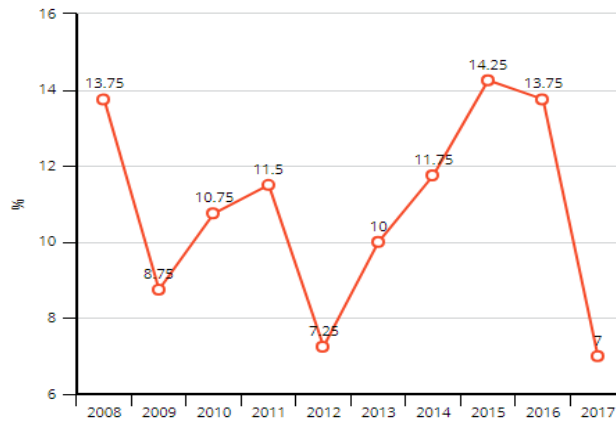
Image 1⁶

At the same time, due to the economy recession, the inflation and the basic interest rate, according to the following indexes, showed not only that the stimulation of the economic activity has slowed down, discouraging investors from making loans but also that it created difficulties for the purchase of new goods by people and companies:

⁵Brazilian Institute of Geography and Statistics. Available in: <<https://www.ibge.gov.br/>>.

⁶Variation of the GDP of Brazil between the years 1967 and 2016, according to the data of the International Bank and IBGE. Available on: <https://commons.wikimedia.org/wiki/File:Varia%C3%A7%C3%A3o_do_PIB_do_Brasil_entre_1967_e_2016.png>. Last access on september 4th, 2018.

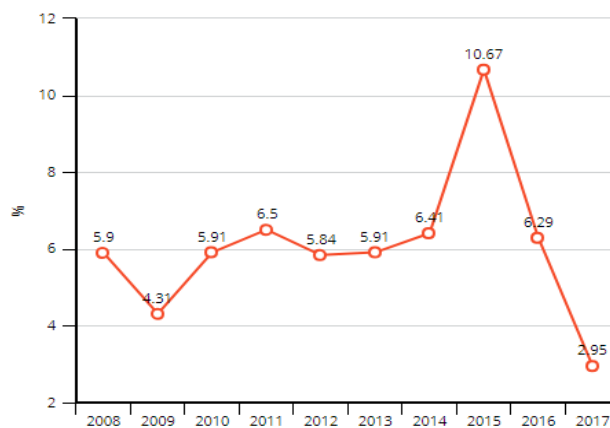
BASIC INTEREST RATE



Source: ADVFN

Image 2⁷

INFLATION



Source: Inflation.eu

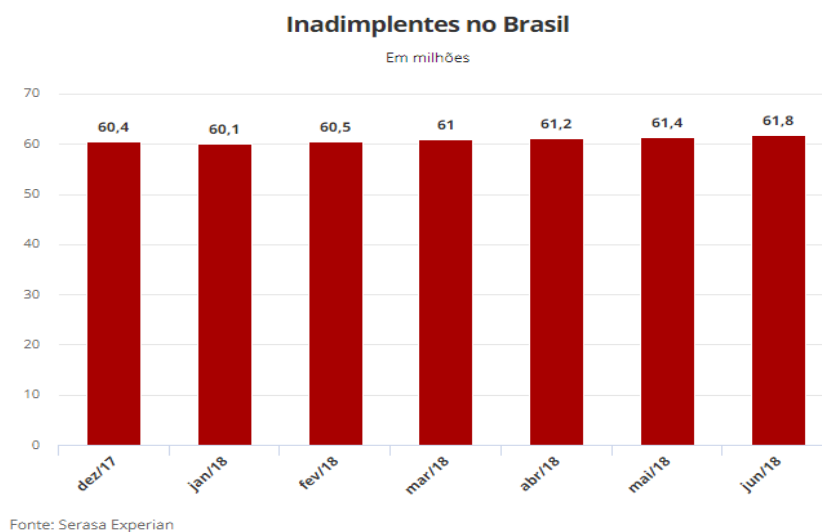
Image 3⁸

In addition, the next data show the number of defaulters in the partial period of 2018, that totalizes around 40.3% of the economically active population, totaling a debt of R\$ 273.4 billion (two hundred seventy-three billion and four hundred million reais).

This figure continues to grow, due to the country's slow economic recovery and the absence of new jobs and companies, justifying such record levels of delayed debts by the private sector.

⁷ Historical Value of the Selic Tax. Available on: <<https://br.advfn.com/indicadores/taxa-selic/valores-historicos>>. Last access on september 4th, 2018.

⁸Inflação histórica Brasil – IPC. Available in: <<https://pt.inflation.eu/taxas-de-inflacao/brasil/inflacao-historica/ipc-inflacao-brasil.aspx>> Último acesso em 04 de setembro de 2018.



Image⁹

It does not need a complex economic reasoning to conclude that this systemic default, added to the high interest rates, has put too much pressure on the companies in the productive aspect, due to the decrease in sales and the need to inject strategic funds, some of them urgent to its operating dynamics, aiming to maintain its cash flow.

It is not surprising that the number of defaulting companies reached its record in January 2018, presenting a total number of approximately 5.4 million (five million and four hundred thousand) CNPJs (Company Taxpayer Number that identifies the company before the Internal Revenue Service of Brazil, whose records agglomerate all the companies, associations, foundations and organizations in national territory) with negative cash flow reported in the most diverse services of credit protection.

The amount reached by the debts of companies has also no historical paradigm in the national territory, reaching an unprecedented amount of R\$ 122.9 bi (hundred and twenty-two billion and nine hundred million)¹⁰ in January 2018.

But it's not just that. As one can notice in the balance sheet disclosed by the Credit Protection Service (SPC), there is a constant increase in the rate since that date:

“Corporate defaults have gained momentum in recent months. In the comparison between June 2018 and the same month of the previous year, the advance was 9.41%, the highest growth observed in the last 21 months.”¹¹

⁹Número de inadimplentes chega a 61,8 milhões e bate recorde, diz Serasa.2018. G1. Ava: <<https://g1.globo.com/economia/noticia/2018/07/19/numero-de-inadimplentes-chega-a-618-milhoes-e-bate-recorde-diz-serasa.ghtml>

¹⁰ Instrução Normativa RFB nº 1634, de 06 de Maio de 2016. Art. 1º “Art. 1º O Cadastro Nacional da Pessoa Jurídica (CNPJ) passa a ser regido por esta Instrução Normativa”.

¹¹ COSTA, José César; PELLIZZARO JUNIOR, Roque. *Indicador de Inadimplência de Pessoas Jurídicas SPC Brasil e CNDL*. 2018. p. 3

Thus, due to logical and inevitable consequences, there is a decline in the number of active companies in the years studied, as there is a very small number of new firms.

Between the years of 2013 and 2016, Brazil lost about 341 thousand (three hundred and forty-one thousand) companies.

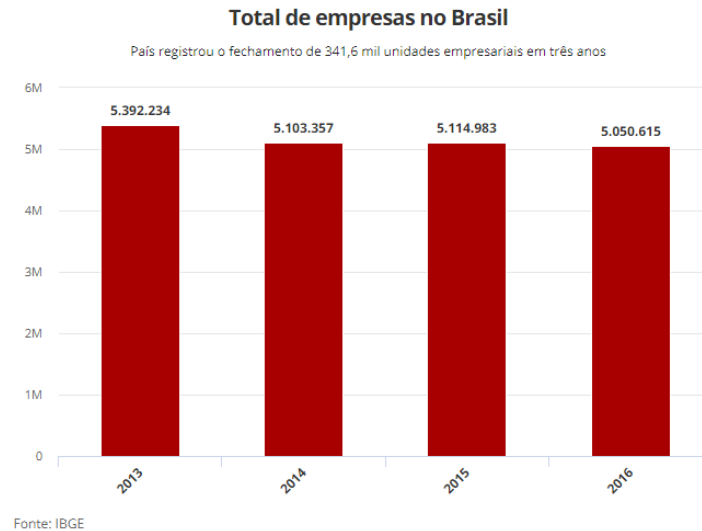


Image 4¹²

The notorious sentence by the economist PARETO, mentioned at the beginning of this paper, could not present a greater measure of the reality witnessed in the recent years by Brazilian firms. There is a limitation of economic capacity of several individuals and organizations due to the lack of capital, the fall in the generation of wealth, with the consequent decrease of the purchasing power. These two factors, when added to the increase of interest rates, make it unfeasible even to purchase using payment methods in installments, discouraging the market of primary products and services, which are the true maintainers of the country's industrial and agricultural activity.

Immediately after these effects, the process of indebtedness and the consequent delinquency of both individuals and legal entities begin. Thus, it is not long before such a default reaches the cashflows of companies, placing them in a situation of economic crisis because of the many different problems created by the national crisis.

Therefore, looking at the greater picture of the Brazilian economy and observing the reflexes of Judicial restructuring from the perspective of the New Institutional Economics, which was headed by NORTH (1992, p.1), there “*is an attempt to incorporate the theory of institutions into economics*”¹³, aiming to exemplify that the continuous growth of countries is the result of the stability of its

¹²<https://sidra.ibge.gov.br/pesquisa/demografia-das-empresas/tabelas>

¹³ NORTH, Douglass C. *The New Institutional Economics and Development*. Washington University in St. Louis, p.1. 1992.

institutions and law, which are the great delimiters of human action, acting as real systems of incentive and disincentive to the right or wrong attitudes of private agents in the commercial field.

1) Analysis According to the School of the New Institutional Economics

The New Institutional Economics (NIE) is a school that analyses the economical view, focusing on the social and legal norms and rules (which are institutions) to get a better perspective on the economic activity.

Starting from this connection between the legal and the economic system, it is necessary to understand the symbiosis between them.

John Maynard KEYNES says:

“The ideas of economists and political philosophers, both when they are right and when they are wrong, are far more powerful than one normally imagines. In fact, the world is governed almost exclusively by them. Practical men, who deem themselves immune to any intellectual influence, are often slaves to some deceased economist.” (KEYNES)¹⁴

Therefore, since economists have such an impact on life in society and, especially, on life in society which are based on an essentially capitalist culture where there is production and transaction of goods, it is of salutary importance to analyse the human aspect of the economic question. Thus, the order generated by institutions, has its influence exactly in the reduction of variables of the human conduct, generating an increase in the economic performance.

According to BARDHAN (1989, p. 1389)¹⁵, such circumstances are tied to “transaction costs” which are:

“These costs include those of information, negotiation, monitoring, coordination and enforcement of contracts. When transaction costs are absent, the initial assignment of property rights does not matter from the point of view of efficiency, because rights can be voluntarily adjusted and exchanged to promote increased production. But when transaction costs are substantial, as is usually the case, the allocation of property rights is critical.”

For this reason, it became necessary to create strong institutions to monitor, assist, process, rule and apply what was agreed between individuals.

In the case of the Judiciary, such stability is delivered through the predictability of legal decisions, which is obtained through the standard resolution of legal situations that have factual similarity.

Starting from this premise, BARDHAN affirms¹⁶:

“In Western societies over time, complex institutional structures have been devised (elaborately defined and

¹⁴John Maynard Keynes

¹⁵PRANAB BARDHAN, *The New Institutional Economics and Development Theory: A Brief Critical Assessment*, World Development, Vol. 17, No. 9, pp. 1389-1395.1989

¹⁶ Ibid.

effectively enforced property rights, formal contracts and guarantees, corporate hierarchy, vertical integration, limited liability, bankruptcy laws and so on) to constrain the participants, to reduce the uncertainty of social interaction, in general to prevent the transactions from being too costly and thus to allow the productivity gains of larger scale and improved technology to be realized.” (1989, p.1391)

In a similar vein, NORTH, Nobel economist (1993) and one of the pioneers of New Institutional Economics, defends that the institutions are the different between countries in their growth over the time:

“Institutions are the humanly devised constraints that structure political, economic, and social interactions. They consist of both informal constraints (sanctions, taboos, customs, traditions, and codes of conduct), and formal rules (constitutions, laws, property rights). Throughout history, institutions have been devised by human beings to create order and reduce uncertainty in exchange. Together with the standard constraints of economics they define the choice set and therefore determine transaction and production costs and hence the profitability and feasibility of engaging in economic activity. They evolve incrementally, connecting the past with the present and the future; history in consequence is largely a story of institutional evolution in which the historical performance of economies can only be understood as a part of a sequential story. Institutions provide the incentive structure of an economy; as that structure evolves, it shapes the direction of economic change towards growth, stagnation, or decline. In this essay, I intend to elaborate on the role of institutions in the performance of economies and illustrate my analysis from economic history.”(1991, p. 97-112).¹⁷

In his perspective the institutions can have incentive effects and also limitations for the private agents, in order to guide their conduct in a collectively accepted way. With strong institutions, therefore, NORTH¹⁸ argues that there is an increase in predictability in the private sector, generating a context of order in the actions within the possibilities of each one of them and a greater legal security for individuals.

With the order established through clear and precise objectives, it is possible to efficiently grow the economic order and reduce the friction generated by the individualistic visions upon societies.

AGUILAR FILHO says ¹⁹:

“Institutions are human inventions created to structure political, economic, and social interactions over time. A fundamental condition highlighted by North, though not sufficient to promote economic growth, is the existence of

¹⁷ NORTH, Douglass C. Institution., *Journal of Economic Perspectives*, 5(1): 97-112; 1991.

¹⁸ Ibid.

¹⁹ AGUILAR FILHO, Hélio. FONSECA, Pedro Cezar. *Instituições e Cooperação Social em Douglass North e nos Intérpretes Weberianos do Atraso Brasileiro*. Revista Estudos Econômicos. Vol 41, Nº 3 - Jul-Set 2011.

order. So, in the explanation about the causes of the economic and social development of countries over the time, in addition to material factors, it should also count cultural factors.” (2011, p.551-571).

In this way, it is assumed that the increase in the predictability is one of the real factors that justify the sustainable growth of nations over the time. Along with economic growth of any country, there is necessarily an increase of companies in the market, which will generate more jobs, payment of taxes, among other consequences that bring social benefits.

In this sense, the Previous Examination is a skillful instrument to give stability to the Judicial Reorganization proceedings, preventing creditors and interested parties, including the Treasury, from being surprised by a fraudulent and simulated Judicial Reorganization.

Some Judicial Reorganizations are filed by companies that are relevant in their areas of activity and in regions of the country.

These situations have repercussions in several other companies and groups of companies that have a relationship in the production chain. In this sense, a single case of Judicial Reorganization of a large economic group is capable of generating perceptible reflexes even in the measurement of the GDP of a nation.

On the other hand, to the extent that a country is affected by the crisis, there are more applications for Bankruptcy and Judicial Reorganization. At this moment, the principle of the company preservation must be observed from the perspective of the LRJF²⁰. According to COELHO²¹ (2017, p.161):

“The objectives (...) are the same: recovery of the economic-financial and patrimonial crisis, preservation of the economic activity and its jobs, as well as the attention to the interests of creditors. It says that, recovered, the company can fulfill its social function.”

That is why the principle of the preservation of the company is the most important one. One major consequence of the approval of Act no. 11.101/505 is that the pendular dualism, which is going to be explained in more details in the next topic, is not a practice in Brazil.

2) The Pendular Dualism

Before Act no. 11.101/2005, the Pendular Dualism was a practice in Brazil, and still is in a lot of countries, to bend during the liquidation of the assets of company in crisis, once prestiging more the creditors, once pending protection to the interests of the debtor, but almost always disregarding the main principle that

²⁰ Law 11.101/2005. Art. 47. *The Judicial Reorganization aims to make it possible to overcome the economic and financial crisis of the debtor in order to allow the maintenance of the source of production, the employment of workers and the interests of creditors, thus promoting the preservation of the company, its social function and stimulating economic activity.*

²¹ COELHO, Fábio Ulhoa. *Curso de Direito Civil*. 2ª ed. ver. São Paulo: Saraiva. 2007, v.3.

should be safeguarded, i.e., the superation of the crisis by the company in questioning, in a way to preserve jobs, tax collection and all the benefits of a functional company on the market.

In CARNIO's understanding:

“The observation of what happens in legislative reforms throughout the ages reveals the existence of a **constant pendular movement that oscillates in the protection of the poles of the relation of material right**. This is what Fábio Konder Comparato called the pendular dualism in protecting the interest of creditors or debtors in relation to the insolvency legislation”²²

And he continues to defend that:

“In this sense, it is observed that the law now protects the creditor more, sometimes the debtor; the consumer and the supplier, the tenant and the lessor; and so on. This phenomenon is also observed in relation to the interpreter. Thus, not only does the law take part in the protection of one of the poles of the relation of the material law, but also the interpreter seeks to apply the law always in favor of one of the poles of the law relationship discussed in the process of solving a concrete case.”²³

That means that the intention of Act no. 11.101/2005 is precisely the overcoming of this dualism, with the search for effectiveness of the guiding principles of the reorganization procedure.

The Supreme Federal Court (STF), in the Appeal nº 309867 ES 2013 / 0064947-3, confirms this understanding:

“The primary scope of Act no. 11.101/2005, pursuant to art. 47, is to make it possible to overcome the economic and financial crisis of the debtor in order to allow the maintenance of the source of production, the employment of workers and the interests of creditors, thus promoting the preservation of the company, its social function and the stimulus to economic activity.”²⁴

With the same understanding and wisdom, the Superior Court of Justice has decided recently, in an Appeal ruled by the Eminent Minister Luís FELIPE SOLOMÃO:

“Because of art. 6 of Act no. 11.101/2005, the Superior Court has stated that, although the approval of the Judicial Reorganization plan itself does not imply the stay of executive proceedings, the acts of constriction will only be adequate if they do not jeopardize the Company's activity, since the purpose of reorganization is to make it possible to overcome

²² CARNIO. Daniel Costa. *Recuperação Judicial De Empresas – As Novas Teorias Da Divisão Equilibrada De Ônus E Da Superação Do Dualismo Pendular*. Instituto e Cidadão. Ed. 207. 2017 <<https://www.editorajc.com.br/recuperacao-judicial-de-empresas-as-novas-teorias-da-divisao-equilibrada-de-onus-e-da-superacao-do-dualismo-pendular/>>

²³ COELHO, Fábio Ulhoa. *Curso de Direito Civil*. 2ª ed. ver. São Paulo: Saraiva. 2007, v.3.

²⁴ STJ - AREsp: 309867 ES 2013/0064947-3, Relator: Ministro GURGEL DE FARIA, Data de Julgamento: 26/06/2018, T1 - PRIMEIRA TURMA, Data de Publicação: DJe 08/08/2018

the economic and financial crisis of the debtor in order to allow the maintenance of the source of production, the employment of workers and the interests of creditors "(article 47 of Law 11.101 / 2005)"²⁵

Strengthening such understanding, once more the Brazilian Supreme Court itself decided in an Appeal that:

"(...)Although art. 57 of Act no. 11.101/2005 establishes the requirement of the negative certificate of tax credits (CND) for homologation of Judicial Reorganization, case law has been manifested in the sense that the CND can be waived. That is because the rejection of Judicial Reorganization, due to the lack of presentation of negative tax certificates, could make the preservation of the company and its employees unfeasible; 3. In addition, the Superior Court of Justice has pacified the understanding in the sense that it is not the burden of the taxpayer to present certificates of fiscal regularity so that Judicial Reorganization can be granted."²⁶

In addition to having pacified the understanding in the sense that it is not a burden of the applicant to present certificates of fiscal regularity to be granted the Judicial Reorganization, according to *res judicata* formed in Appeal n° 1337989 SP 2011 / 0269578-5, it was evident that in the Supreme Court prevails the understanding of the primacy of such principle, since it affirms that:

"In order to avoid possible abuse of the right to vote [at the stage of approval of the Judicial Reorganization plan], precisely at the moment of overcoming the crisis, is when the Judge must act with sensitivity when checking the requirements of the cramdown, preferring an examination based on the principle of the preservation of the company, often opting for its flexibility, especially when only one creditor dominates the deliberation absolutely, overlapping what seems to be the interest of the creditor's community."²⁷

In order to maintain these values, the legal architecture of the Brazilian Judicial Reorganization System was constructed aiming to seek a simplified way of containment of damages, not only to creditors, but also to the community that is directly or indirectly affected by the weakening of that economic agent.

In other words, the clear intent of the legislator with the creation of the Law on Judicial Reorganization and Bankruptcy is to keep jobs, to collect taxes and to contribute to economic production, since the company in difficulty would not be able to preserve these benefits without the filing of Judicial Reorganization.

²⁵STJ - AgInt no REsp: 1548587 MG 2015/0196138-5, Relator: Ministro GURGEL DE FARIA, Data de Julgamento: 05/12/2017, T1 - PRIMEIRA TURMA, Data de Publicação: DJe 09/03/2018.

²⁶(STF - ARE: 1140553 BA - BAHIA 0003519-80.2014.8.05.0000, Relator: Min. RICARDO LEWANDOWSKI, Data de Julgamento: 19/06/2018, Data de Publicação: DJe-125 25/06/2018.

²⁷STJ - REsp: 1337989 SP 2011/0269578-5, Relator: Ministro LUIS FELIPE SALOMÃO, Data de Julgamento: 08/05/2018, T4 - QUARTA TURMA, Data de Publicação: DJe04/06/2018.

This is a clear reflection of the need to preserve companies for the maintenance of the economy in times of crisis. GALBRAITH, in his masterpiece of economics, already said that laws are the reflection of what men believe about the power of the market, *in verbis*:

“Ideas are important not only for themselves, but also to explain or interpret social behavior. The prevailing ideas of the time are those that both, people and governments, follow. In this way, they help shape the story itself. What men believe about the power of the market or the dangers of the state has much influence on the laws they enact or fail to enact-about what they ask the government for or attach to market forces.” (1980, p.105)²⁸

As mentioned in the beginning, this research aims to demonstrate the panorama of the Brazilian reorganization system in the recent economic crisis that has been spread all over the country. For this, the data collected by Serasa Experian²⁹, the largest credit protection agency in Brazil, is used, in which the following historical figures are presented in the time frame from 2011 to 2017, referring to bankruptcy petitions and Judicial Reorganization plans granted by the Courts:

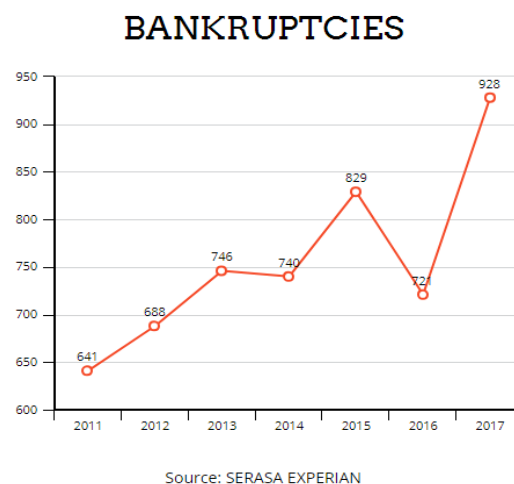


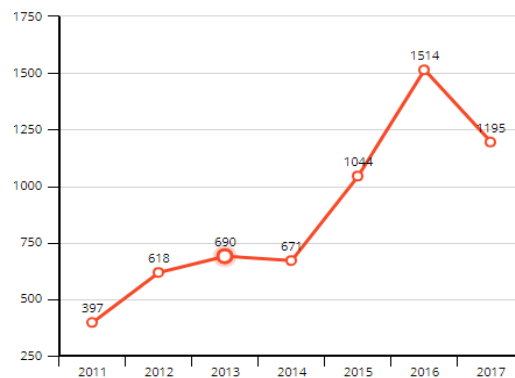
Image 5³⁰

²⁸GALBRAITH, John Kenneth. *A Era da Incerteza*, 1980, 3ª Ed. Editora Pioneira, São Paulo, pág. 105.

²⁹ SERASA EXPERIAN. Indicadores Econômicos, available on: <<https://www.serasaexperian.com.br/amplie-seus-conhecimentos/indicadores-economicos>> Last viwe on agust, 21rst of 2018.

³⁰ GALBRAITH, John Kenneth. *A Era da Incerteza*, 1980, 3ª Ed. Editora Pioneira, São Paulo, pág. 105.

CHAPTER 11



Source: SERASA EXPERIAN

Image 6³¹

What happens is the migration of shares of companies that would go bankrupt after the request of Judicial Reorganization, as if they were complementary and sequential institutes.

Judicial Reorganization proceedings should only be filed by companies that still have economic viability and are not in a situation of phatic insolvency. In other words, it should only be pleaded in cases in which there is a true possibility of maintaining the business activity running.

From the start, it should be noted that Judicial Reorganization is not the proper process for situations of real insolvency, i.e., situations in which there is no possibility of overcoming the financial economic crisis and the liability of the business company outweighs its ability to pay, even through the liquidation of its assets. In the words of REQUIÃO, "*Insolvency is a fact that is usually inferred from the insufficiency of the debtor's patrimony for the payment of his debts.*" (REQUIÃO, 1998, 64)³².

SIMIATO defines insolvency as:

"Insolvency means the state of equity in which the imbalance between the asset and the liability, unfavorable to it, is manifested. The insolvency in the commercial order is not confused in its concepts and effects with the own bankruptcy. Bankruptcy can, of course, come from it, but it also arises from numerous other causes." (SIMIATO, 2008, p. 265/266).³³

The Judicial Reorganization is not adequate for those cases.

Besides, there are also requests for Judicial Reorganization with the sole purpose of self benefit from the *Stay Period* for the practice of assets dilapidation, assets misappropriation and other types of fraud against creditors.

³¹ Idem.

³²Requião. Rubens. *Curso de Direito Falimentar*. v. I. 17ª edição. São Paulo: Saraiva, 1998.

³³SIMIATO. Frederico Augusto Monte. *Tratado de Direito Falimentar*. 1ª edição. Rio de Janeiro: Forense, 2008.

As pointed out by Dr. Daniel Carnio Costa³⁴, Judge of the 1st Court of Bankruptcy and Judicial Reorganization of São Paulo, companies that pretend to fulfill the requirements of the law cannot be protected by the Judicial Reorganization:

“These were companies that only existed formally, on paper, but did not generate jobs, nor did they circulate products or services, nor did they generate taxes or wealth. In other cases, the processing of the Judicial Reorganization was based on the purely formal analysis made by the Judge on the documentation presented by the debtor.”

As it will be seen below, such situations were identified when applying the Preliminary Conference to the requests for Judicial Reorganization, thus avoiding frauds and the birth of Judicial Reorganization procedures that has no chance to succeed, failing to burden the Judiciary with ineffective processes.

§ 2 – THE IMPORTANCE OF THE PREVIOUS EXAMINATION BY THE JUDGE TO THE IMPROVEMENT OF THE JUDICIAL REORGANIZATION

In order to delimitate the scope of the Judge's action in deciding whether or not to rule in favor of the Judicial Reorganization, it is necessary to make a systemic interpretation of norms, principles and provisions of Act no. 11.101/2005, as well as under the overcoming theory of pendular dualism, as already asserted in this paper.

There is no discussion about the sovereignty of the General Creditors Assembly. However, it is up to the Judge to verify if it is the case to apply and grant the Reorganization request, in addition to deciding on the occurrence of fraud, only to verify its legality after the approval of the Reorganization Plan.

Doctrine and jurisprudence have evolved to establish that the sovereignty of the General Creditors Assembly has limits and the line is drawn when it comes to the protection of the public interest, in an institute commonly known as “preservation of the social function of business activities”.

This current understands that Judicial Reorganization is a device of Public Law, as Eduardo Secchi MUNHOZ (2007, p.187) lectures³⁵:

“From this we can affirm that the 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

³⁴ COSTA, Daniel Carnio. *A pericia prévia em recuperação judicial de empresas – Fundamentos e aplicação prática*. Migalhas. 2018. Available on: <<https://www.migalhas.com.br/InsolvenciaemFoco/121,MI277594,41046-A+pericia+previa+em+recuperacao+judicial+de+empresas+Fundamentos+e>> Last access on september, 04th of 2018.

³⁵ 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.

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 with internal interests. 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 (meaning of the people's interest), expressed in the principles and objectives of the economic order established in the art. 170 of the CF/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.”

Another current construes the Judicial Reorganization as being an institute of Economic Law.

Jorge LOBO (2012, pp. 171-172) ³⁶ defends that:

“Even though as a 'complex act' and a 'constitutive action', Judicial Reorganization 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 Economic Law is located in an intermediate area between Public and Private Law, (b) has a threefold unity: 'spirit, object and method' and (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 collimates in a way to 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 (...).”

LOBO is accompanied by Sérgio CAMPINHO³⁷:

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

In fact, the most important decisions during the course of Judicial Reorganization are responsibility of the creditors (possibility to qualify their credits, to challenge credits, to challenge the Reorganization Plan).

³⁶ 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. 171-172.

³⁷ CAMPINHO, Sérgio, *Falência e Recuperação de Empresa: O Novo Regime da Insolvência Empresarial*, 7ª Edição, Rio de Janeiro, Renovar, 2015, p. 12-13.

However, it is common to file a request of Reorganization that, for reasons of fact or law, are not applicable or would be vitiated by motivation vices, and therefore, it becomes necessary to elucidate the legal instrument that ensures the correct analysis for the decision of processing the request for Judicial Reorganization. The aforementioned Law on Judicial Reorganization and Bankruptcy, in its article 51, states that the ruling of the process must be positive in the formal analysis of a list of documents: (i) the reasons for the economic and financial crisis, (ii) the last three-year balance sheets, (iii) the list of creditors, (iv) the list of employees, (v) the formal regularity of the company, (vi) the assets of the partners and administrators of the company, (vii) financial investments and (viii) other documents.

Therefore, the formal analysis of the documentation regarding the size of the benesse that will be granted at the time of the initial order is not enough. This verification must be carried out by a specialized professional, who will provide to the Judge with information that will help him or her better decide whether to grant or not grant the request. This institute is named Previous Examination.

Its goal is to provide factual information on the request for Judicial Reorganization and it finds protection in reality. It is a tool that is able to solve the asymmetry of information in the proceedings, being a true instrument of recovery governance, able to place the Judicial Reorganization on the rails as soon as it is born.

Hence, it is correct the view that before the granting of the reorganization, the Judge draws the incumbency on itself to have a model of governance over the process, availing itself of both its *longa manus*, the judicial expert, who, in case of granting, may be brought to the position of Judicial Administrator of the case.

§ 3 – PREVIOUS EXAMINATION

Due to the acceleration of the Brazilian economic crisis and the increasing use of legal methods of insolvency, it became necessary to formulate alternatives that would grant the Judge a macroscopic view of the lawsuit and the real knowledge of the company's situation in the market in a short period of time. Based on this, Preliminary Examination emerged as a tool.

The preliminary examination is applicable only to the processes of Judicial Reorganization and is not used in other cases because its *raison d'être* is the analysis of the legal feasibility of the request for Judicial Reorganization, with the verification of compliance with the requirements established by Act no. 11.101/2005.

The Judge of the 1st Court of Bankruptcy and Judicial Reorganization of the District of São Paulo, Dr. Daniel Carnio

Costa³⁸ defines the preliminary examination in a succinct and precise way:

“The preliminary examination consists of an informal finding determined by the Judge prior to the decision to grant Judicial Reorganization, in order to ascertain the regularity of the technical documentation accompanying the initial petition, as well as the actual operating conditions of the requesting company, in order to give the Judge more adequate conditions for deciding whether or not to approve the Judicial Reorganization process. It is a provision that aims to ensure the regular and effective application of Judicial Reorganization in defense of the preservation of the public, the social and creditors interests. The judicial order does not derive from an express article of law, but from the proper interpretation of article 52 of Act no. 11.101/2005.”

Whatever the reason for the economic and financial crisis is and that leads to the request for Judicial Reorganization, we can parallel the lesson of PARETO (1902, p. 536)³⁹, which defined:

“The financial crisis occurs suddenly, at the beginning of the downward period. She is deep; but it passes quickly.

(..)

The economic crisis occurs slowly, develops during years, and stops only little by little, when a new rising period begins”.

Any of these crisis models can affect a company's ability to generate jobs, products, services, and the collection of taxes, wealth creation and income, preventing it from achieving the ultimate goal of the Reorganization process and the Law on Judicial Reorganization and Bankruptcy itself, which is to safeguard such institutes⁴⁰.

The previous examination conference lends itself to locate the procedural or formal defects of the Reorganization procedure. Dr. Daniel Carnio COSTA⁴¹, in an interview to the journal ConJur, demonstrated that the prior expertise lends itself to the role of true filter of legality in the Judicial Reorganizations. He exemplified:

“For example, out of 20 requests for reorganization received this year here on this Court, three were dismissed summarily

³⁸ CÁRNIO, Daniel. *A perícia prévia em recuperação judicial de empresas – Fundamentos e aplicação prática*. Migalhas. Available in: <<https://www.migalhas.com.br/InsolvenciaemFoco/121,MI277594,41046-A+pericia+previa+em+recuperacao+judicial+de+empresas+Fundamentos+e>> Última visualização em: 21 de agosto de 2018.

³⁹ PARETO, Vilfredo. *Manuel D'Économie Politique*. Libraires-Éditeurs. Paris. 5ªed. 1909.

⁴⁰ CARNIO, Daniel Costa. *A perícia prévia em recuperação judicial de empresas – Fundamentos e aplicação prática*. Migalhas. 2018. Available in: <<https://www.migalhas.com.br/InsolvenciaemFoco/121,MI277594,41046-A+pericia+previa+em+recuperacao+judicial+de+empresas+Fundamentos+e>>. Last view on November 9th of 2018.

⁴¹ GRILLO, Brenno. EFETIVIDADE DO PROCESSO - "Judiciário precisa de varas regionais especializadas em recuperação judicial". ConJur. 2016 <https://www.conjur.com.br/2016-nov-20/entrevista-daniel-carnio-costa-juiz-falencia-recuperacao-judicial> Last view on November 9th of 2018.

because there was no documentation. One was dismissed after the preliminary examination because fraud was detected, or the company did not actually exist. In one case, prior to the preliminary conference, it was found that the company was not exactly as described in the petition and the company withdrew after I determined the preliminary conference. In three cases the preliminary conference found that this was not the competent court, because the reorganization must proceed at the place of the principal establishment of the company, which was not here.”

This procedure, based on *the informal primary examination* that already exists in the US Bankruptcy Law, consists of the use of a qualified professional, to assist the Judge in verifying the consistency/veracity of the information provided on documents when the request for Reorganization is filed. It does not intend to analyze the economic viability of the company, but to verify in the preliminary conference if the company fulfills with requirements of the Law and if it is not simulating a crisis through fraud or misconduct.

Even without express legal provision, the preliminary examination is based on the hermeneutics performed from the caput of article 52 of the Law on Judicial Reorganization and Bankruptcy, on the overcoming of the pendular dualism, thus allowing its application, since it is clear that the Court must adhere to the primary objectives of the legislation and not merely be tied to the unilateral interest of one or more of the parties.

In fact, in a lot of cases, Act no. 11.101/2005 gives the debtor benefits and, at other times, lends creditors with decision-making powers. Such a dualistic relationship can and should be analyzed by the Judge.

According to article 52 regarding the terms of documentation, the Judge must mandatorily approve the processing of the Judicial Reorganization. The conclusion that follows the spirit of the Law is that the Judge has to guarantee the effectiveness of the system and not the material law relationships that exist in between the parties involved. Therefore, one should not seek to defend creditors or debtors, but rather the validity of the insolvency system in order to achieve the preservation of the company.

And, according to the vision obtained through the conclusions achieved with the NWE, this objective is capable of establishing the necessary conditions for the continuous development of the nation as a concatenated chain of production of goods and services.

Before the Brazilian Law on Judicial Reorganization and Decree of Bankruptcy, according to COMPARATO (1970, p. 97)⁴², the legal regulations “*alternately protected the insolvent, or its creditors, from the economic situation and the political philosophy of the moment.*”⁴³

⁴²COMPARATO, Fábio Konder. *Aspectos jurídicos da macro-empresa*. São Paulo: Revista dos Tribunais, 1970.

⁴³The least that can be said in this respect is that the dualism in which our right to bankruptcy has ended - to protect the debtor's personal interest or the creditor's interest

According to the new understanding based on the principle of balanced distribution of the burden on the Judicial Reorganization of the Company, both the debtor and the creditors must cooperate in order to maintain the viable productive activity in order to obtain the social benefits arising from the continuation of the activity.

As is understandable from the paper written by Dr. Daniel Carnio COSTA⁴⁴:

“The purpose of the institute and the proper functioning of the legal system must prevail over the protection of the interest of one of the poles of the relation of material law. Thus, in a credit and debt relationship, the focus of the interpretation must be on achieving the efficiency in the collection system, much more than in the protection of creditor or debtor. This is because, for example, if the law creates protection to the debtor, in order to make it impossible to carry out the credit, the system loses its effectiveness and, in that condition, will no longer be used by the creditors, who will seek the realization of their credit through alternative systems, often illegitimate.”(COSTA, 2015, p.68)

It is worth noting that, of course, within the activities required for the Judge's knowledge, there is no deep knowledge of accounting, economics or business administration. Whenever this occurs, article 156 of the Brazilian Civil Procedure Code (CPC)⁴⁵ allows the Judge to be assisted by experts. Based on article 481 of the same *codex*, which provides for the possibility of the Court to hear testimony from third parties or to inspect documents and materials to clarify facts that are of interest to the decision, it may be assisted by an expert in the Judicial Reorganization.

Thus, from the impartial analysis of this auxiliary of the judgment, it will be possible to have a macroscopic view that allows a correct decision about whether or not to grant the Judicial Reorganization.

This procedure is even more necessary in view of the increasing complexity of business relations, regarding methods of monetization of services, suppliers, corporate structures, productive inputs and capital flows.

Although this concept seems insufficient, it is obtained in only 23%⁴⁶ of the judicial reorganizations granted, according to data analyzed by Serasa Experian. It shows, therefore, a mismatch

is not such as to provide harmonious solutions in the general scheme of the economy. The legislator seems to be totally unaware of the reality of the company as a center of multiple interests - the entrepreneur, the employees, the capitalist partners, the creditors, the tax authorities, the region, the market in general - disengaging from the entrepreneur. COMPARATO, Fábio Konder. *Aspectos jurídicos da macro-empresa*. São Paulo: Revista dos Tribunais, 1970, p. 102.

⁴⁴COSTA, Daniel Carnio, *Reflexões sobre processos de insolvência: divisão equilibrada de ônus, superação do dualismo pendular e gestão democrática de processos*. Cadernos Jurídicos, São Paulo, ano 16, n° 39, p. 59-77, Janeiro-Março/2015.

⁴⁵ Código de Processo Civil, 16 Março 2015, Brasília, DF.

⁴⁶ SERASA EXPERIAN. Indicadores Econômicos, disponível em:

<<https://www.serasaexperian.com.br/amplie-seus-conhecimentos/indicadores-economicos>> Last view on: Agust, 21th of 2018.

between practices usually used and the present need of the market. Therefore, the objective of the Law, the judicial practices and the behavior of the agents must be considered.

According to ORLEANS e BRAGANÇA (2017, p. 102)⁴⁷:

“It is certain that the rules of the Law on Judicial Reorganization and Bankruptcy do not establish a formal conduct regarding the duty to inform. But it requires that the recovering company present its creditors with its real economic and financial situation to justify the object renegotiation of the Law on Judicial Reorganization and Bankruptcy.”

On the other hand, the successful exponent of this scenario is the 1st Court of Bankruptcy and Judicial Reorganization of São Paulo in about 81.7% of granted Judicial Reorganizations. This success was shown to be possible based on the realization not only of the preliminary examination, but also on the deep understanding of the necessary speed in judicial decisions to keep up with the speed employed in private sector relations.

It is worth mentioning that, as agreed by the Brazilian Reorganization institute, the success of the Judicial Reorganization is configured as: *“the continuity of the company’s performance and fulfillment of its obligations, after approval of the Reorganization plan by the creditors’ meeting, and its not bankrupt within 2 years.”*⁴⁸

The practical experience of the 1st Court of Bankruptcy and Judicial Reorganization of São Paulo shows that the preliminary examination may reveal four distinct situations: a) the absence of any business activity; b) document irregularity or incompleteness; c) fraud; d) and the functional incompetence of the judgment.⁴⁹

The contrary position understands that the preliminary examination would be a barrier to the access to justice, which may delay granting the benefit, causing the company to be attacked for its assets. However, the Court must determine that the preliminary conference be held quickly (five to ten days). With this shortened timeframe creditors do not have enough time to succeed in pursuing their credit rights.

From all this, what is seen is that the preliminary conference deserves to be positively received in the Brazilian legal system, based on what was instituted by the North Americans.

Studies presented by the PUC/SP Research Center, called the Insolvency Observatory, found that the initial petition rejection rate at the 1st Bankruptcy Court and São Paulo Judicial Reorganization, where the preliminary conference is held since 2011, is approximately 30%. On the other hand, in the 2nd Court of Bankruptcy and Judicial Reorganization of the same Region, where the practice of the conference is not implemented, the initial petition rejection rate is approximately 40%.⁵⁰

⁴⁷ ORLEANS e BRAGANÇA, Gabriel José de. *Administrador Judicial: Transparência no Processo de Recuperação Judicial*. São Paulo: QuartierLatin, 2017.

⁴⁸Ibid 53.

⁴⁹Ibid.53.

⁵⁰http://rpubs.com/abj/pucrj_pre

In view of the analytical support shown, one perceived the full suitability of the preliminary conference to prove possible fraud to the creditors without generating any additional hindrance to the applicant company using good faith. Thus, the Judge must rely on these instruments, even if not expressed in the wording of the law, to enforce the ultimate goal of the law.

From the formation of a factual context, ratified by forceful evidence, the analysis of the veracity of the conduct of the agents, with due removal of any shadow of simulation or fraud, the Judge should form the bridge between the request of the Reorganization and the materialization of the effects of such request.

CONCLUSION

Brazil has been the scene for several turbulences in the recent years and the economy is no exception. Social and political factors of wide dissemination generated distrust both among the citizens and in relation to external investors.

Starting from the premise that institutions and regulations are the mechanisms stipulated for the formation of order and containment of damages, the role of the judiciary is transparently observed.

Certainly, it is not an undertaking that proves to be easy to carry out, taking into account its various factors that cause instability, as well as the arduous materialization of actions that can carry out an adequate counterweight.

However, in a view of the irradiating values expressly set forth in the law dealing with companies in crisis, there is a duty of the Judiciary that can not be lightly removed. It is the Judiciary that holds legitimacy to solve disputes within the society and, of course, the disputes inherent in a Reorganization process must be protected by a competent Judge.

Thus, the function of the Judge in the area of corporate restructuring is to enforce the reasons stated by law that legitimize the Reorganization process and also to curb the spurious use of the institute with the clear intention of minimizing the damages caused in the social fabrics that is influenced by that company.

Therefore, insolvency instruments are extremely important in the continuous economic development of a country, since they are formal regulations that protect the market, contributing to companies that have the potential to continue in the market, generating jobs, paying taxes, as well as knowing with time, inevitably, will occur the collapse of a certain business company that no longer has existential conditions.

Hence, aiming to institute a sober and efficient order on the delicate legal situation, which pervades most Judicial Reorganizations and Bankruptcy proceedings, the Judge must lay all technicals arsenals at his disposal.

The efficiency of the preliminary conference method was proved by the generated data, since it minimized the perverse effects of

opportunism, which in return is essentially founded by the information asymmetry between agents. Crystalline, in order to make it possible, even if it is a narrow possibility of success, the Judge must take the responsibility of verifying the congruence of the factual support of the request for Judicial Reorganization and watch in full attention the actions performed by the partners both in the arrival of the request and during its course.

There is, of course, for the validity of the system, the need for a division of functions asserted in the law, with the Judicial Administrator, the assembly of creditors and the Judge, forming a plurilaterality of looks. However, the role of the Judge can not be relegated to mere assistant, as it is truly responsible for reinforcing the concrete motivations that make that company worthy of Reorganization, since it will be able to comply with the core values of the law, set forth in article 47.

In this sense, given the difficulty found in most Judicial Reorganizations and the growing need for the use of the institute, there must be a bold conduct of the Judge that is in tune with the inherent needs of the market, namely: speed, specialty and efficiency.

In the current scenario, since the Judge is one of the last barriers to the realization of rights, which can very well be relegated to mere paper and ink, this must adapt to the use of measures that have proven to be efficient and, in this area, be consistent with its premises.

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