

## CONSIDERATIONS ON THE PLEADING FOR JUDICIAL REORGANIZATION OF FIRMS IN BRAZIL

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In situations of crisis, the decision-making process behind pleading a judicial reorganization often involves balancing a complex array of elements, where issues may range from legal and normative to accounting and financial matters. Especially in such a context, in which companies and individuals are amidst adversities, various other underlying factors may weigh into the choices made by agents responsible for taking action.

In order to comprehend the subject of this study, it is opportune to establish the following essential premise: the prospect of pursuing a judicial reorganization is exclusively intended for viable businesses, whose preservation would ultimately benefit society. This concept substantiates itself upon the notion that collective insolvency proceedings predominantly seek to harmonize the rights of creditors and of the debtor, instead of encouraging egotistic and disordered confrontation. Thus, the subjacent rationale consists in the substitution of individualistic negotiation in favor of solutions that promote, with the greatest possible means, the collective interest.

On this matter, the regulation provided in Law No. 11,101 of February 2005 (Reorganization and Bankruptcy Act or “LRF”) brings about considerable social impact, setting the standards and scope of norms applicable towards both liquidation and the reorganization of firms. Suitably, the recognition of the social functions fulfilled by firms and the collective advantages of their preservation are deeply embodied in the LRF (Section 47, of the LRF)<sup>1</sup>, revealing the conciliatory nature of the legislation before all interests prejudiced by a company’s breakdown.

The ideal realization of such principles would be permitting failing firms to resume their activities regularly in the market,

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<sup>1</sup> “Art. 47. A recuperação judicial tem por objetivo viabilizar a superação da situação de crise econômico-financeira do devedor, a fim de permitir a manutenção da fonte produtora, do emprego dos trabalhadores e dos interesses dos credores, promovendo, assim, a preservação da empresa, sua função social e o estímulo à atividade econômica.”

provided they have demonstrated the potential to do so. Otherwise, the systems' preferred alternative for irrecoverable businesses is bankruptcy, liquidating assets to attend to the interests of creditors. Contrary to a nearsighted understanding, a consistent application of the LRF<sup>2</sup> may perfectly well ensue the extinction of certain debtors, in case such alternative satisfies social interest more adequately<sup>2</sup>.

Once granted by the judiciary, the commencement of a judicial reorganization admits only limited possibilities of posterior abandonment<sup>3</sup>. Consequently, if a debtor effectively determines to initiate the proceeding, it will remain obliged to persevere until conclusion, risking facing a coercive conversion into bankruptcy in the case of failure to approve a recovery plan (Section 73 of the LRF<sup>4</sup>).

In view of the briefly commented circumstances, it is perceivable that there is a strategic relevance to the interval immediately preceding judicial reorganizations, as well as their pleading phases, being potentially decisive to the future survival of businesses. Hence, given their social and legal implications, the following considerations will specifically address the application procedures for judicial reorganizations.

To approach the subject, we propose to review the procedural requirements, conditions and information necessary for petitioning judicial reorganizations in Brazil, as well as the main criteria and consequences of decisions that grant or deny their commencement. Posteriorly, assessments will be made on the system currently in place, according to national and international standards and legal conditions.

## § 1 – PROCEDURAL CONDITIONS AND REQUIREMENTS

Albeit the presence of academic controversy on the topic, judicial reorganizations consist in legal remedies that operate via judiciary, and therefore must be petitioned before a judge. In so doing, as

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<sup>2</sup> N. LUCCA, "Abuso do Direito de Voto de Credor na Assembleia Geral de Credores Prevista nos Arts. 35 a 46 da Lei 11.101/2005", *Temas de Direito Societário e Empresarial Contemporâneos*, M. VIEIRA (dir.), ADAMEK, Malheiros, São Paulo, 2011, p. 658: "Mais que nunca tom a-se imperiosa a noção de equilíbrio entre, de um lado, favorecer a manutenção da unidade produtiva, aceitando-se como naturais os revezes empresariais, e, de outro, proporcionar aos mutuantes a provável satisfação de seus créditos, de maneira tal que os conduza a sempre recolocá-los em circulação em benefício de toda a coletividade."

<sup>3</sup> Once the judicial reorganization has been granted, the debtor cannot withdraw his plea for judicial reorganization, unless the approval of the General Assembly of Creditors is obtained, as determined by Section 52, Paragraph 4, of the LRF: "O devedor não poderá desistir do pedido de recuperação judicial após o deferimento de seu processamento, salvo se obtiver aprovação da desistência na assembleia-geral de credores."

<sup>4</sup> "Art. 73. O juiz decretará a falência durante o processo de recuperação judicial: I – por deliberação da assembleia-geral de credores, na forma do art. 42 desta Lei; II – pela não apresentação, pelo devedor, do plano de recuperação no prazo do art. 53 desta Lei; III – quando houver sido rejeitado o plano de recuperação, nos termos do § 4º do art. 56 desta Lei; IV – por descumprimento de qualquer obrigação assumida no plano de recuperação, na forma do § 1º do art. 61 desta Lei.

Parágrafo único. O disposto neste artigo não impede a decretação da falência por inadimplemento de obrigação não sujeita à recuperação judicial, nos termos dos incisos I ou II do **caput** do art. 94 desta Lei, ou por prática de ato previsto no inciso III do **caput** do art. 94 desta Lei."

any exercise of ones subjective right of action, it is required to adhere to general procedural conditions established in Law No. 13,105 of March 2015 (Code of Civil Procedure or “CPC”), as well as acknowledging the special requirements provided in the LRF.

As general conditions for the existence and validity of any legal procedural lien, interest in the claim and legal standing to plea are requisites for the reorganization proceeding (Section 17 of the CPC<sup>5</sup>); if not fulfilled, the petition will be immediately denied by court (Section 330, subsections II and III, of the CPC<sup>6</sup>).

As outlined above, the factual grounds that establish interest in the claim for a judicial reorganization is the economic and financial crisis of the debtor; absent such condition, there is no legitimate motive to act. According to Mauro RODRIGUES PENTEADO, this situation is characterized by either insolvency (insufficient liquid assets to honor all due and outstanding obligations) and/or insolvability (existence of more assets than liabilities, but without liquid means to honor isolated obligations)<sup>7</sup>.

This requirement of legal standing to plea cedes way to greater contention, given that the debtor (individual entrepreneur or firm) holds exclusive legitimacy to petition its reorganization (Sections 1 and 48 of the LRF<sup>8</sup>). The legal treatment conferred to bankruptcy proceedings, however, concedes legal standing to other relevant agents to take initiatives, namely creditors amongst them (Section 97 of the LRF<sup>9</sup>).

According to Law No. 10,406 of January 2002 (Civil Code or “CC”), the deliberation to plead judicial reorganization in LLCs is restrictive to quota holders (Section 1,071, subsection VII, of the CC, *by analogy*). Exceptionally, the proceeding may be petitioned without previous consent of all partners, if authorized by holders of the majority of the voting capital stock.

In Corporations, Section 122, subsection IX, of Law No. 6,404 of December 1976 (Corporations Act or “LSA”<sup>10</sup>) requires the authority of the General Assembly to authorize administrators to request the firm’s judicial reorganization. Similarly, as in LLCs, in case of urgency, the paragraph of Section 122 allows the petition to be filed without consultation of the assembly, so long as

<sup>5</sup> “Art. 17. Para postular em juízo é necessário ter interesse e legitimidade.”

<sup>6</sup> “Art. 330. A petição inicial será indeferida quando: ” “II - a parte for manifestamente ilegítima; III - o autor carecer de interesse processual; ”

<sup>7</sup> M. R. PENTEADO, “Capítulo I: Disposições preliminares”, *Comentários à Lei de Recuperação de Empresas e Falência: Lei 11.101/2005*, F. SATIRO DE SOUZA JUNIOR, A. S. A. DE MORAES PITOMBO (dir.), 2nd ed, RT, São Paulo, 2007, p. 77

<sup>8</sup> “Art. 1<sup>o</sup> Esta Lei disciplina a recuperação judicial, a recuperação extrajudicial e a falência do empresário e da sociedade empresária, doravante referidos simplesmente como devedor.” and “Art. 48. Poderá requerer recuperação judicial o devedor que, no momento do pedido, exerça regularmente suas atividades há mais de 2 (dois) anos e que atenda aos seguintes requisitos, cumulativamente:”

<sup>9</sup> “Art. 97. Podem requerer a falência do devedor: I – o próprio devedor, na forma do disposto nos arts. 105 a 107 desta Lei; II – o cônjuge sobrevivente, qualquer herdeiro do devedor ou o inventariante; III – o cotista ou o acionista do devedor na forma da lei ou do ato constitutivo da sociedade; IV – qualquer credor.”

<sup>10</sup> “Art. 122. Compete privativamente à assembleia geral: IX - autorizar os administradores a confessar falência e pedir concordata. ”

authorized by the controlling stakeholder<sup>11</sup>. In the cases of firms with administrative councils, their summoning is mandatory in order to sanction the reorganization application carried out without approval of the general assembly<sup>12</sup>.

In terms of prerequisites, the debtor must exercise entrepreneurial activity regularly for at least two years (Section 48 of the LRF). Moreover, it should cumulatively respect the following legal requirements: not be bankrupt and, if he or she ever was bankrupt, have a declaration of *res judicata* of any outstanding responsibilities (Section 48, subsection I, of the LRF<sup>13</sup>). In addition, he or she must not have partaken in judicial reorganizations during the past five years, (Section 48, Subsections II and III, of the LRF<sup>14</sup>). Finally, the recovering firm must not have been condemned or have an administrator or partner that has been condemned for collective insolvency crimes (Section 48, Subsection IV, of the LRF<sup>15</sup>).

## § 2 – INFORMATION

As in all economically relevant positions, informational asymmetry is the source of dangerous disequilibria between the various parties that participate in judicial reorganization proceedings. Consequently, with the intent of levelling out conditions of negotiation, legislators carefully laid out the information that must instruct petitions, in Section 51 of the LRF<sup>16</sup>. Debtor transparency is crucial to ensure the trustworthiness and integrity of the procedure; and the evasion, omission or provision of false information all constitute in criminal offenses established in Section 171 of the LRF<sup>17</sup>.

The law requires the debtor to clarify the causes and reasons for its financial crisis (Section 51, Subsection I, of the LRF<sup>18</sup>), demanding precise and specific explanations<sup>19</sup>. The greater the

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<sup>11</sup> “Parágrafo único. Em caso de urgência, a confissão de falência ou o pedido de concordata poderá ser formulado pelos administradores, com a concordância do acionista controlador, se houver, convocando-se imediatamente a assembleia-geral, para manifestar-se sobre a matéria.”

<sup>12</sup> . S. C. N. CEREZETTI, *A Recuperação Judicial de Sociedade por Ações*, Malheiros, São Paulo, 2012, p. 246.

<sup>13</sup> “I – Não ser falido e, se o foi, estejam declaradas extintas, por sentença transitada em julgado, as responsabilidades daí decorrentes;”

<sup>14</sup> “II – Não ter, há menos de 5 (cinco) anos, obtido concessão de recuperação judicial;” and “III - não ter, há menos de 5 (cinco) anos, obtido concessão de recuperação judicial com base no plano especial de que trata a Seção V deste Capítulo;”

<sup>15</sup> “IV – Não ter sido condenado ou não ter, como administrador ou sócio controlador, pessoa condenada por qualquer dos crimes previstos nesta Lei.”

<sup>16</sup> R. SZTAJN, “Capítulo III: Da Recuperação Judicial” *Comentários à Lei de Recuperação de Empresas e Falência: Lei 11.101/2005*, F. SATIRO DE SOUZA JUNIOR, A. S. A. DE MORAES PITOMBO (dir.), 2nd ed, RT, São Paulo, 2007, p. 247.

<sup>17</sup> “Art. 171. Sonegar ou omitir informações ou prestar informações falsas no processo de falência, de recuperação judicial ou de recuperação extrajudicial, com o fim de induzir a erro o juiz, o Ministério Público, os credores, a assembleia-geral de credores, o Comitê ou o administrador judicial: Pena – reclusão, de 2 (dois) a 4 (quatro) anos, e multa.”

<sup>18</sup> “Art. 51. A petição inicial de recuperação judicial será instruída com: I – a exposição das causas concretas da situação patrimonial do devedor e das razões da crise econômico-financeira;”

<sup>19</sup> F. A. M. SIMIONATO, *Tratado de Direito Falimentar*, Forense, Rio de Janeiro, 2008, p. 156.

accuracy and celerity of the diagnostic, the better are the chances of weathering the storm, facilitating the determination of concrete and adequate measures to resolve existing difficulties.

Next, the debtor is required to present its current accounts (Section 51, Subsection II, of the LRF<sup>20</sup>), aiming to signal the true financial status of the firm to creditors and the judiciary, allowing an analysis of the risks to credit and the soundness of the recovery plan to be negotiated. In the same manner, up-to-date account and financial application balances disclose all cash currently available (Section 51, Subsection VII, of the LRF<sup>21</sup>).

It is necessary to nominally indicate all creditors of the recovering firm (Section 51, Subsection III, of the LRF<sup>22</sup>), along with the information needed for the elaboration of the definitive roster of creditors. It is also indispensable to provide an up-to-date list of all employees, allowing for an evaluation of labor-related liability (Section 51, Subsection IV, of the LRF<sup>23</sup>).

In order to attest the current and past notarial standing of the debtor, including for purposes of verifying the procedural prerequisites, certificates of regularity in the public ledger of firms, up-to-date social contracts, and records of nomination of current administrators must be submitted before the judge (Section 51, Subsection V, of the LRF<sup>24</sup>).

Provoking scholar dissent, Section 51, Subsection VI, of the LRF determines that a list of personal assets of the debtor's controlling stakeholders and administrators must accompany the petition.<sup>25</sup>

Although the sum of interests involved in reorganizations must be entertained, the personal prerogatives of the individuals affected by these invasive impositions cannot be ignored. Notwithstanding the rights of stakeholders and administrators not overtaking the collective good, such guarantees benefit from inalienable constitutional status. Therefore, the critique amounts precisely to the disproportionate harm caused to the right to privacy, established in Section 5, Subsection X, of the Federal Constitution of the Federative Republic of Brazil ("CRFB")<sup>26</sup>.

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<sup>20</sup> Micro-enterprises and small firms can present simplified accounting books, according to Section 51, Paragraph 2 of the LRF "*Com relação à exigência prevista no inciso II do caput deste artigo, as microempresas e empresas de pequeno porte poderão apresentar livros e escrituração contábil simplificados nos termos da legislação específica.*"

<sup>21</sup> "*VII – os extratos atualizados das contas bancárias do devedor e de suas eventuais aplicações financeiras de qualquer modalidade, inclusive em fundos de investimento ou em bolsas de valores, emitidos pelas respectivas instituições financeiras;*"

<sup>22</sup> "*III – a relação nominal completa dos credores, inclusive aqueles por obrigação de fazer ou de dar, com a indicação do endereço de cada um, a natureza, a classificação e o valor atualizado do crédito, discriminando sua origem, o regime dos respectivos vencimentos e a indicação dos registros contábeis de cada transação pendente;*"

<sup>23</sup> "*IV – a relação integral dos empregados, em que constem as respectivas funções, salários, indenizações e outras parcelas a que têm direito, com o correspondente mês de competência, e a discriminação dos valores pendentes de pagamento;*"

<sup>24</sup> "*V – Certidão de regularidade do devedor no Registro Público de Empresas, o ato constitutivo atualizado e as atas de nomeação dos atuais administradores;*"

<sup>25</sup> "*VI – a relação dos bens particulares dos sócios controladores e dos administradores do devedor;*"

<sup>26</sup> "*X - São invioláveis a intimidade, a vida privada, a honra e a imagem das pessoas, assegurado o direito a indenização pelo dano material ou moral decorrente de sua violação;*"

On the other hand, access to information on quota or shareholders and administrators can significantly contribute to the success of reorganization proceedings, quantifying the extent of personal assets for constituting new collaterals and facilitating the detection and liability for the commitment of abuses<sup>27</sup>.

Within view of the difficulties and doubtful morality in coercively disclosing private information, it would be incoherent to withhold the commencement of reorganizations pending upon the voluntary waiving of individual rights by the affected parties<sup>28</sup>. Thus, occasionally, such information is substituted by declarations of the exercise of right to privacy by the concerned rights holders<sup>29</sup>.

Legislation obliges the inclusion of attestations from the Protest Offices (Section 51, Subsection VIII, of the LRF<sup>30</sup>), to demonstrate the debtor's unpunctuality in satisfying his obligations, as well as a list of actions in which he is part (Section 51, Subsection IX, of the LRF<sup>31</sup>).

In this regard, Rachel SZTAJN indicates that the phrasing of subsection IX is unclear as to whether only litigation in which the firm is a defendant should be indicated<sup>32</sup>. It seems adequate to hold the interpretation that all actions in which the debtor is party should be reported, offering a broader vision on the firm's situation.

### § 3 – GRANTING THE PROCESSING OF THE JUDICIAL REORGANIZATION

In the prior legal regime in effect, a simple petition would suffice for the claimant to benefit from significant immunities, reality which nicknamed the national mechanism as a “legal favor”. Regarding current judicial reorganization, there is significant change in the functioning of the system, which postponed all substantial effects to after the proceeding has been granted by court, requiring the satisfaction of stricter conditions. Presently, the simple filing of a reorganization petition does not result in significant legal effects<sup>33</sup>.

Reflecting the importance of these decisions, while pondering to grant the processing of a reorganization proceeding, magistrates possess as main guidelines the previously mentioned conditions, requirements and information, oriented by the general finality of enabling the recovery of firms, as established in Section 47.

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<sup>27</sup> *Op. Cit.*, R. SZTAJN, *Capítulo III: Da Recuperação Judicial*, p. 254.

<sup>28</sup> The First Draft of the Work Group of the MF Decree No. 467/16 suggested revoking the requirement for the provision of the list of assets by the controlling share and quota holders and administrators.

<sup>29</sup> *Op. Cit.*, F. A. M. SIMIONATO, *Tratado de Direito Falimentar*, p. 161.

<sup>30</sup> “VIII – certidões dos cartórios de protestos situados na comarca do domicílio ou sede do devedor e naquelas onde possui filial;”.

<sup>31</sup> “IX – a relação, subscrita pelo devedor, de todas as ações judiciais em que este figure como parte, inclusive as de natureza trabalhista, com a estimativa dos respectivos valores demandados.”.

<sup>32</sup> *Op. Cit.*, R. SZTAJN, *Capítulo III: Da Recuperação Judicial*, p. 255.

<sup>33</sup> *Op. Cit.*, F. A. M. SIMIONATO, *Tratado de Direito Falimentar*, p. 167.

The most notable amongst the effects of admitting such a request is the suspension of legal actions held against the recovering firm (Section 52, Subsection III, of the LRF<sup>34</sup>) for the “non-extendable” stay period of 180 days.

Moreover, this decision follows the nomination of a trustee (Section 52, Subsection I, of the LRF<sup>35</sup>); the discharge of the obligation for the debtor who continues with its activities to provide debt clearance certificate, except when signing contracts with the State or to receive credit or tax benefits or incentives (Section 52, Subsection II, of the LRF<sup>36</sup>); and the publication of a notice indicating the name of all its creditors, indicating all up-to-date debts and the classification of each credit, along with the notice for delays for the proof of claims, and delay for creditors to present a objections to the plan of judicial recovery presented by the debtor (Section 52, Paragraph 1, of the LRF<sup>37</sup>).

At first glance, the caption of Section 52, interpreted through a grammatical approach, seems to bind the magistrate’s admission of the initiation of the proceeding to the sole presence of the required information: “*If all documentations required in Section 51 of the Law are provided, the judge shall grant the procedure of judicial recovery*”. In other words, if all documents are made available, the judge is obliged to allow the proceeding to initiate, resulting in the aforementioned legal consequences.

This interpretation, though supported by respectable doctrine and jurisprudence<sup>38</sup>, is losing support in national courts<sup>39</sup>. The claimant, when requesting judicial reorganization, does not act

<sup>34</sup> “III – ordenará a suspensão de todas as ações ou execuções contra o devedor, na forma do art. 6º desta Lei, permanecendo os respectivos autos no juízo onde se processam, ressalvadas as ações previstas nos §§ 1º, 2º e 7º do art. 6º desta Lei e as relativas a créditos excetuados na forma dos §§ 3º e 4º do art. 49 desta Lei;”.

<sup>35</sup> “I – Nomeará o administrador judicial, observado o disposto no art. 21 desta Lei;”.

<sup>36</sup> “II – Determinará a dispensa da apresentação de certidões negativas para que o devedor exerça suas atividades, exceto para contratação com o Poder Público ou para recebimento de benefícios ou incentivos fiscais ou creditícios, observando o disposto no art. 69 desta Lei;”.

<sup>37</sup> “§ 1º O juiz ordenará a expedição de edital, para publicação no órgão oficial, que conterá: I – o resumo do pedido do devedor e da decisão que defere o processamento da recuperação judicial; II – a relação nominal de credores, em que se discrimine o valor atualizado e a classificação de cada crédito; III – a advertência acerca dos prazos para habilitação dos créditos, na forma do art. 7º, § 1º, desta Lei, e para que os credores apresentem objeção ao plano de recuperação judicial apresentado pelo devedor nos termos do art. 55 desta Lei.”.

<sup>38</sup> Brazil, TJSP APELAÇÃO CÍVEL 604.813.4/2009, Câmara Especial de Falências e Recuperações Judiciais, Relator Des. Elliot Akel, j. 17/12/2008: “A questão apreciada diz respeito aos limites da cognição permitida ao juiz, na sistemática da Lei nº 11.101/05, no exame inicial do pedido de recuperação judicial: “o juiz deferirá o processamento da recuperação judicial (...) O processamento da recuperação judicial é determinado tão-só pelo cumprimento dos requisitos formais para tanto previstos em lei, sem apreciação do eventual direito da devedora ao benefício pleiteado.”

<sup>39</sup> Brazil, TJSP AI 0194436-42.2012.8.26.0000, 1ª Câmara Reservada de Direito Empresarial, Relator Des. Teixeira Leite, j. 02/09/2012: “Ausentes elementos mínimos a confiar na capacidade de recuperação da empresa agravante, motivo que resultou na determinação de uma perícia prévia, a ser elaborada por profissional qualificado, cuja finalidade é apenas e tão somente averiguar uma situação fática essencial ao processamento, mostra-se razoável e proporcional aos efeitos que irradiarão do deferimento”; and Brazil, TJSP, AI 0103311-56.2013.8.26.0000, 1ª Câmara Reservada de Direito Empresarial, Relator Des. Pereira Calças, j. 25/11/2014: “A Lei nº 11.101/05 não estipulou percentual mínimo como critério objetivo para aprovação de plano de recuperação, permitindo aos credores, a seu critério, aprovarem ou rejeitarem, como participantes do mercado e de acordo com seus interesses, as propostas apresentadas pelos devedores. (...) parece-me descabida a possibilidade de o Poder Judiciário anuir com proposta que economicamente pode gerar a ruína de outros participantes do mercado”.

exclusively in its private domain; contrarily, it is immersed into the realm of the State's judicial provisions.

In this manner, whilst admitting the initiation of a judicial reorganization (as well as in other crucial moments of the procedure, such as the decision on the referendum of the recovery plan adopted by the General Assembly of Creditors<sup>40</sup>), the judge exercises power over formal and material legality of proceedings as well as the merit of the reorganization<sup>41</sup>. It would be contradictory to suppose that the examination of the recovering firms claim could occur strictly on a formality basis, within a mechanism of a predominantly judicial nature.

Given that only viable companies may seek out judicial reorganizations, minimal demonstrations of the feasibility of their recovery is imperative in order to grant the initiation of the procedure, otherwise condoning the potentially useless or abusive utilization of reorganization pleas, with detrimental effects to creditors<sup>42</sup>.

If exorbitant, however, such governance may result in non-requested State intervention in the domain of parties' waivable property rights, unilaterally foreordaining the reorganizations' outcome, and possibly contradicting interests of creditors and debtor alike. By replacing parties' will in predetermining the convenience and opportunity of authorizing the proceedings, the judiciary threatens to give rise to non-legally oriented decision on such matters.

In this regard, American and French regulations abide significant power to magistrates throughout proceedings<sup>43</sup>. Section 52 of the LRF seems to recommend moderation towards the invasive conduct of the judiciary, indicating that, when judging the pleas for the installment of reorganizations, the State should minimize interventions.

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<sup>40</sup> Brazil, TJ-SP AI 2016148-33.2015.8.26.0000, 2ª Câmara Reservada de Direito Empresarial, Rel. Des. Carlos Alberto Garbi, j. 29/06/2015: "*cabendo ao Magistrado examinar não só a legalidade do plano e de seus aditivos, como também a viabilidade do quanto decidido pela Assembleia Geral dos Credores, em respeito principalmente aos princípios contratuais e empresariais de ordem pública.*"

<sup>41</sup> J. LOBO and, P.F.C.S DE TOLEDO and C. H. ABRÃO (dir.), *Comentários à Lei de Recuperação de Empresas e Falência*, Saraiva, São Paulo, 2005, p. 154: "O juízo da ação de recuperação judicial deve exercer, sempre, necessária e obrigatoriamente: (1 a) o controle da legalidade formal, quando examinará questões, por exemplo, como: (a) legitimidade ativa (arts. 1a e 47); (b) preenchimento dos requisitos do art. 48; (c) atendimento das exigências sobre convocação, instalação e deliberação da assembleia geral de credores (art. 36 a 45); (d) observância das formalidades legais referentes à publicação de editais; e, outrossim, (2a) o controle de legalidade material ou substancial, em que verificará se houve, por exemplo: (a) fraude à lei ou abuso de direito, quer por parte do devedor, quer dos credores, (b) acordos contrários à lei, à moral, aos bons costumes, à boa-fé objetiva, ao interesse público etc. Incumbe-lhe, ademais, dependendo do caso concreto exercer controle de mérito, tanto do plano de recuperação quanto da decisão da assembleia geral de credores, com o, por exemplo, quando: (a) a deliberação for por maioria e os dissidentes hajam deduzido objeções e votos divergentes; (b) a deliberação for contrária à aprovação do plano e o devedor haja apresentado defesa e postulado a anulação do conclave por fraude à lei, abuso de direito, preterição de formalidade essencial etc."

<sup>42</sup> Brazil, TJSP AI 2058626-90.2014.8.26.0000, 1ª Câmara Reservada de Direito Empresarial, Relator Des. Teixeira Leite, j. 03/07/2014: "*Empresa com inviabilidade econômica não pode ter o pedido de processamento deferido, sob pena de ao invés de se proteger uma empresa da quebra, passa a inverter a ordem dos fatores, deferindo-se a benesse em casos de total inviabilidade, com prejuízo na recuperação dos créditos. Restou mantida, pois, a r. decisão.*"

<sup>43</sup> Op. Cit., F. A. M. SIMIONATO, *Tratado de Direito Falimentar*, p. 164.



## § 4 – CONSIDERATIONS

According to the National Institute of Enterprise Reorganization in Brazil (INRE), since the coming into effect of the LRF until June 9, 2015, 6,938 reorganizations were petitioned in the country. The average duration of collective insolvency proceedings ranges from six to ten years, with devaluations of approximately 50 to 60% of debts being claimed, varying according to plans approved by General Assemblies of Creditors. Although indicators demonstrate progress in comparison to prior systems, they also revealed that the number of firms that have successfully concluded reorganization proceedings and resumed normal operations are as few as 5%.<sup>44</sup>

Practitioners have observed that petitioning for reorganizations is often procrastinated, consequently reducing the possibility of success in restructuring the activities of failing firms.<sup>45</sup> The motives that bring entrepreneurs to postpone taking such measures are difficult to identify, and companies ultimately empty their cash reserves and aggravate their patrimonial situation in the meantime.

An influential cultural stigma suffocates the phenomena of reorganization and bankruptcy. Such institutions, oftentimes held as degrading, consist merely in legal instruments conceived to attenuate the effects brought upon by the materialization of risks inherent to any economic activity. The recognition of such contingencies as inexorable elements of market-based enterprises is fundamental to fortify entrepreneurial drive, leaving behind the inculcation executives for the eventual dysfunction of businesses. Corporate governance structures also suffer considerable pressure from such endogenous factors, affecting the capability of deliberative and administrative organisms to efficiently make decisions and execute important measures. If corporate institutions lose capacity and dynamism to act pragmatically and sensibly, the existence of diverse conflicting interests within firms (controlling stakeholders, minority stakeholders, boards of directors, executive officers, employees, creditors etc.) could impede the approval of structural actions, such as the plea for a reorganization.

The exorbitant costs and bureaucracies associated with the conduction of a reorganization also offer barriers to the accessibility of the mechanism to many firms. The lack of

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<sup>44</sup> CONSULTOR JURÍDICO, “Em 10 anos, quase 7 mil empresas entraram em recuperação judicial no Brasil”, *Conjur*, 2015, Available at <http://www.conjur.com.br/2015-jun-13/empresas-entram-recuperacao-judicial-reabilitam>, last accessed on June 20, 2017.

<sup>45</sup> “Principles and Guidelines for Effective Insolvency and Creditor Rights Systems”, *The World Bank*, 2001, p. 30: “Access to the law should be convenient, inexpensive and quick. Overly restrictive access can deter debtors, smothering the commercial need. Delay can result in insolvent corporations that should clearly be liquidated, otherwise being left uncontrolled with a likely dissipation or waste of assets. Delay can also cause insolvent but viable businesses to wither on the vine. Accordingly, careful consideration must be given to how the law frames the criteria required to satisfy the test for insolvency when an enterprise voluntarily submits to the process and where an involuntary petition is brought by creditors.”

structure and low degree of professionalism in the corporate milieu may delay the application for a reorganization. The irregularity or disorganization of corporate documents are factors that occasionally render a swift initiation of proceedings unpractical, in view of the plethora of lawfully required conditions.

Because of this, the LRF rightfully provides the possibility for micro and small businesses to present simplified bookkeeping. Conformably, the Work Group recently assembled by the Ministry of Finance to propose modifications to the LRF suggests the reduction of the legal requirements on firms to be liable for reorganization. As an example, the new proposed content of Section 48 of the LRF would be reduced to the following text: “*Any debtor that is not currently bankrupt, at the moment of application, is eligible for a reorganization, even if his activities have been temporarily ceased.*”<sup>46</sup>

Additionally, the exclusive legal standing of debtors to plea reorganizations is an essential matter. Considering the characteristics of the proceeding, many authors defend greater control to remaining parties interested in the uplift of firms, better reconciling such interests: “*The application stage of the judicial reorganization should already contain a reflex of the principle, and attempt to embrace all interested parties in the best manner possible. The restriction of the legal standing, as foreseen in the Bankruptcy Law, does not appear to uphold such postulate.*”<sup>47</sup>

In this sense, international organizations have suggested the amplification of the legal standing currently in effect in the Brazilian legal system (not on occasion, exalting arguments in favor of creditors’ rights). The World Bank, in its “Principles and Guidelines” on the matter, suggests that creditors accumulate the prerogative to plea for the involuntary reorganization of their debtors: “*Creditor rights are a fundamental concern of bankruptcy law, and an insolvency system should enable creditors to petition for commencement of proceedings.*”<sup>48</sup>

With a similar perception, while also contemplating the heterogeneous systems in place, the United Nations Commission on International Trade Law (UNCITRAL) asserts: “*Although insolvency laws generally provide for liquidation proceedings to be initiated by either a creditor or a debtor, there is no consensus as to whether reorganization proceedings can also be initiated by a creditor. As noted above, a number of laws include provision only for debtor applications. Given that one of the objectives of reorganization proceedings is to enhance the value of assets and thereby increase the return to creditors on their claims through the continued*

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<sup>46</sup> First Draft of the Work Group of the MF Decree No. 467/16, Section 48: “*Poderá requerer recuperação judicial o devedor que não estiver falido, no momento do pedido, ainda que tenha cessado temporariamente suas atividades.*”

<sup>47</sup> *Op. Cit.*, S. C. N. CEREZETTI, *A Recuperação Judicial de Sociedade por Ações*, p. 250: “*A fase postulatória da recuperação judicial já deveria conter em si um reflexo do princípio e buscar abranger da melhor maneira possível os interessados. A restrição da legitimidade ativa, tal qual contida na Lei de Recuperação e Falência, não parece ir ao encontro desse postulado.*”

<sup>48</sup> “Principles and Guidelines for Effective Insolvency and Creditor Rights Systems”, *The World Bank*, 2001, p. 30.

*operation and reorganization of the debtor's business, it is highly desirable that the ability to apply not be given exclusively to the debtor. A further reason for allowing creditor applications is that there will be cases where the debtor will not or cannot apply for commencement because, for example, management has resigned.*<sup>49</sup>

From a comparative law standpoint, the legal system of the United States of America currently admits that judicial reorganization be initiated by one of two distinctive means: (i) *Voluntary Petition*, in which the debtor discretionarily pleads for the proceedings; and (ii) *Involuntary Petition*, in which creditors propose the installment of the proceeding. In the latter case, grounded suspicion regarding the debtor's integrity or lack of capability to conduct his business is required, and a legal provision is present to assure indemnification for damages potentially provoked by pleading the proceedings in bad faith.<sup>50</sup>

French, German and Portuguese legislation also legitimates creditors to file for reorganizations of debtors, under legally determined circumstances. In France and Portugal, reorganizations can also be commenced directly by the judiciary, or upon request by the competent District Attorney's office. Seemingly, such systems are more open to the participation of other agents, that, when aware of difficulties faced by businesses, possess legal grounds to intervene, despite the will of the debtor to do so.<sup>51</sup>

## CONCLUSION

After reviewing the procedural requirements, conditions and necessary information for pleading judicial reorganizations, many obstacles that currently present themselves for firms in distress that wish to initiate proceedings have surfaced. Achieving the objective of facilitating access to this important legal mechanism is essential to society, allowing businesses to resume their activities successfully in the market, resulting in greater welfare for their respective communities.

The judiciary's decision to grant the commencement of the proceeding, with all corresponding legal entailments, currently poses a dire tradeoff. On one hand, unrestrictedly allowing the initiation of reorganizations may provoke significant impairment towards the exercise of legitimate rights by creditors, and, on the other, submitting debtors to complex and meticulous filters and requirements could potentially condemn reorganization procedures before they are allowed a fighting chance.

Scholars persistently recommend forms of amplifying firms' access to collective insolvency proceedings, simplifying requisites and removing unnecessary bureaucracy. The possibility of

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<sup>49</sup> "Legislative Guide on Insolvency Law, Part Two: Core Provisions for an Effective and Efficient Insolvency Law", *United Nations Commission on International Trade Law (UNCITRAL)*, 2005, p. 68.

<sup>50</sup> *Op. Cit.*, S. C. N. CEREZETTI, *A Recuperação Judicial de Sociedade por Ações*, p. 257.

<sup>51</sup> *Op. Cit.*, S. C. N. CEREZETTI, *A Recuperação Judicial de Sociedade por Ações*, p. 266.

augmenting the participation of other interested parties, thereby granting legal standing to plead reorganizations on behalf of debtors (or even to propose reorganization plans), no doubt is among the discussed possibilities. This course of action, although compatible with orientations supported by qualified international organizations, already present in most developed countries, requires careful consideration to verify its pertinence to the Brazilian context.

National legislators must constantly monitor and strive to resolve practical difficulties faced by practitioners, procuring the concretization of the principles intended by insolvency law in general: to balance the interests impacted by crises, providing better outcomes for all of society.<sup>52</sup>

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<sup>52</sup> *Op. Cit.* Legislative Guide on Insolvency Law, Part Two: Core Provisions for an Effective and Efficient Insolvency Law”, United Nations Commission on International Trade Law (UNCITRAL), 2005, p. 12: “*Insolvency should be addressed and resolved in an orderly, quick and efficient manner, with a view to avoiding undue disruption to the business activities of the debtor and to minimizing the cost of the proceedings. Achieving timely and efficient administration will support the objective of maximizing asset value, while impartiality supports the goal of equitable treatment. The entire process needs to be carefully considered to ensure maximum efficiency without sacrificing flexibility. At the same time, it should be focused on the goal of liquidating non-viable and inefficient businesses and the survival of efficient, potentially viable businesses.*”.