# CONFLICT OF NORMS IN THE BRAZILIAN BANKRUPTCY LAW

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In 2005, Brazil implemented a new Bankruptcy Law (Law No. 11.101, dated February 9, 2005)[1], modeled largely after the Title 11 of the United States Code, also known as the United States Bankruptcy Code.

The current Brazilian system provides three alternatives for insolvent legal entities: (i) judicial reorganization, a court-supervised reorganization proceeding[2]; (ii) bankruptcy, a court-supervised liquidation proceeding[3]; and (iii) extrajudicial reorganization, an out-of-court reorganization proceeding[4].

The possibility of recovery of an activity momentarily in crisis, with the possibility of implementing a corporate restructuring plan, renegotiation of liabilities with creditors and business continuity was undoubtedly the innovative point of the Law.

Unfortunately, the Brazilian Bankruptcy Law embodies within itself serious contradictions – legal antinomies – which prevent the fulfillment of the objective of the Law. One of the most serious antinomies is the conflict between Article 47 and Article 49, Paragraph 3. This antinomy has the potential to impair the judicial recovery of the economically viable company. For this reason, this antinomy must be widely discussed, as well as the cause and the nature of this conflict of norms.

## § 1 – THE SPIRIT AND THE LITTERA LEGIS OF THE BRAZILIAN LAW ON JUDICIAL REORGANIZATION (ARTICLE 47)

### A) The Spirit of the Brazilian Bankruptcy Law

Law No. 11.101/2005 brought with it the purpose of a paradigm shift, a changing perception towards a failed business entity. The new rule widened the debate regarding the term *bankruptcy*, which correlates the state of mercantile insolvency to fraud and decoy. The Latin word *fallere* means *to falsify*, *to deceive*, and it is believed the term *bankruptcy* stems from the Italian word *banca* (or *banco*)

[1] Regulates judicial and extrajudicial reorganization and bankruptcy of the entrepreneur and the company.
[2] Chapter III of the current Brazilian Bankruptcy Law.
[3] Chapter IV and V of the current Brazilian Bankruptcy Law.
[4] Chapter VI of the current Brazilian Bankruptcy Law.

and *rotta* (or *rotto*)[5]. The literal translation of these words being *broken bench*. In fact, the word *bankrupt* brings with it the negative charge of failure and the inability of business management. From the etymology, it can be inferred that the general notion of *bankruptcy* is the situation of the merchant who fails to honor his payments or who deceives his creditors. According to Carvalho de Mendonça[6] '*quebra*' was the real Portuguese word to state this situation; word found in legal texts since the ordinations.

It must be noted that, in the twenty-first century, more than in any other time, the success of the company is as dependent on macroeconomic and sectorial factors as on the entrepreneur's personal effort. It is necessary, therefore, to recognize the determining influence of impersonal variables in insolvency, with an important distinction between insolvency caused by adverse economic conditions and fraudulent or criminal bankruptcy.

For this reason, the current order establishes collective right as the rule, mainly in order not to have to liquidate a company that is an organized business activity and a source of wealth. The company is no longer considered as a contractual relationship, but an institution that involves the most varied interests. There is a consolidated understanding that early bankruptcy of legally and economically viable companies brings with it unemployment, non-payment of taxes, non-customer service and the non-realization of other businesses. Consequently, the negative impact that can be minimized or avoided is a socioeconomic advance for the debtor, for society and for the State.

Moreover, the *spirit of the law*, which we define as a social and moral consensus of the interpretation of the letter of the law, is expressed in basic principles of Law No. 11,101/2005.

Among the principles of interpretation that guide the modern Brazilian Bankruptcy Law are[7]: (i) the preservation of the viable company; (ii) the distinction between the company and the entrepreneur; (iii) recovery of viable companies and removal of non-recoverable companies or entrepreneurs from the market ("saving what is salvageable"); (iv) protection of workers; (v) reduction of the cost of credit in Brazil; (vi) speed and efficiency of judicial processes; (vii) legal certainty; (viii) active participation of creditors; (ix) maximization of the value of the bankrupt's assets; (x) reduction of bureaucracy in the recovery of microenterprises and small enterprises; and, finally, (xi) rigorous punishment for crimes related to bankruptcy and judicial recovery.

[5] CARVALHO DE MENDONÇA. *Tratado de Direito Comercial Brasileiro*. 2ª Edição. Livro V. Parte I. v. 7. p. 12.

[6] CARVALHO DE MENDONÇA. *op. cit*. p. 11.

[7] Chapter III, Section I, of the current Brazilian Bankruptcy Law.

### B) The Purpose, *Littera Legis*, of the Brazilian Bankruptcy Law on Judicial Reorganization

The judicial reorganization corresponds to a legal benefit available to the legal entity in financial crisis. The purpose of the judicial reorganization is provided, *littera legis*, in Article 47 of Law No. 11.101/2005, as follows:

> "Article 47. The judicial reorganization aims to facilitate the overcoming of the situation of economic and financial crisis of the debtor in order to allow the maintenance of the production source, employment of workers and the interests of the creditors, thereby promoting the preservation of company, its social function and stimulating economic activity."

Perfectly aligned with the spirit of the Law, the abovementioned Article 47 introduced the "Preservation of the Company Principle", establishing that the objective of a judicial restructuring is to enable the debtor company to overcome its crisis, allowing the maintenance of the revenue source, the employment and the interests of creditors, promoting the preservation of the company's social function and the stimulus to the economic activity. As highlighted by Simionato[8], it is evident the importance that private companies have for the economy of a society, so that the great part of jobs and the production of wealth is created by the business performance in the regional and world context. Therefore, Article 47 emphasizes the achievement of the social objectives of the enterprise, despite the particular interest of one creditor or debtor. It is relevant to note that the wording of the above-mentioned Article expresses the legislator's option of overcoming the normative oscillation in favor of the creditor or the debtor and, above this historical dualism, defend a legal institute, which is the recovery of the viable company.

Thus, the judicial reorganization proceeding may only be filed by a debtor who: (i) has been doing business regularly for over two years; (ii) is not bankrupt, and if he has been, the resulting liabilities have been declared extinguished by final and conclusive decision; (iii) was not engaged in judicial reorganization within the last five years; (iv) was not engaged in judicial recovery based on the special plan for microenterprises and small businesses, within the last five years; (v) does not have an administrator or controlling partner convicted of any of the crimes provided for in the Bankruptcy Law[9].

[8] F. A. Monte SIMIONATO, *Tratado de Direito Falimentar*. Rio de Janeiro: Forense, 2008, p. 9.

[9] Brazilian Bankruptcy Law, Article 48.

## § 2 – THE FIDUCIARY ASSIGNMENT OF RECEIVABLES ON JUDICIAL REORGANIZATION (ARTICLE 49, PARAGRAPH 3)

Law No. 11.101/2005 provides that credits existing on the date of the filing for judicial reorganization are subject to the court-supervised proceeding, even if such credits have not become due[10]. Hence, those credits may not be enforced during the stay effect (a 180-day automatic stay)[11] and will be paid within the proceeding and in accordance to the reorganization plan as approved by the majority of the creditors. In addition, the judicial recovery plan, in the lesson of Fábio Konder Comparato[12], should be "*fair, equitable and feasible*".

However, some specific types of credits are not subject to the reorganization proceeding, and must be paid according to the exact original terms and conditions, regardless of any different provision in the reorganization plan.

For a better understanding, a distinction should be drawn first between the fiduciary alienation and fiduciary assignment of receivables.

### A) Fiduciary alienation

There is no specific law that fully and sufficiently regulates the fiduciary alienation in guarantee in Brazil, even though the institute is nowadays, because of its peculiarities and facilities in the execution, one of the main instruments used for the granting of credit in the country. The regulation of fiduciary alienation is in a normative framework of several laws, elaborated, each of them, to regulate exclusively some form of fiduciary alienation or only in an ancillary way.

Among the different laws that regulate fiduciary alienation, the following should be highlighted: (i) Law No. 4,728/65 and Decree-Law No. 911/69 (which regulate the fiduciary sale of movables in the capital markets, tax and social security credits, the fiduciary alienation of fungible movable property and the fiduciary assignment of rights over movables and debt securities); (ii) Law No. 9,514/97, which established the fiduciary transfer in guarantee of immovable property; and (iii) the Brazilian Civil Code (Articles 1,361 to 1,368-A), which applies to fiduciary sales that are not within the scope of the above-mentioned markets. Although the Brazilian Civil Code makes no provision regarding the characteristics of the asset given as collateral in a fiduciary sale, there are precedents of the Superior Court of Justice

[10] Brazilian Bankruptcy Law, Article 49.

[11] If the request for processing the judicial reorganization is granted, there is an automatic stay of 180 days. The stay suspends the limitations period and the course of actions against the debtor, except for tax and labor claims, and claims that seek indemnification of unliquidated amounts. In the strictest letter of the law, the automatic stay cannot be extended.

[12] F. K. COMPARATO, *Aspectos jurídicos da macro-empresa*. São Paulo: RT, 1970, p. 112.

narrowing the fiduciary sale under the Civil Code to non-fungible assets.

According to Article 6, Paragraph 4, combined with Article 49, Paragraph 3, of Law No. 11.101/2005, the approval of the judicial recovery process ensues the suspension of legal actions and judicial executions against the recovering firm, being prohibited the removal of capital goods which are essential to business activity from the building of the recovering company within 180 days.

> "Art. 6. The decree of bankruptcy or the approval of the judicial recovery processing suspends the statute of limitations and all legal actions and judicial executions against the debtor, including those of the private creditors of the joint partner.
> [...] § 4. In the judicial recovery, the suspension stated in the main section of this article under no circumstances shall exceed the non-extendable term of 180 (one hundred and eighty) days counted from the approval of the judicial recovery processing, reestablishing, after the expiration of the term, the right of creditors to initiate or continue their legal actions and judicial executions, regardless of judicial pronouncement."

> "Art. 49. All credits existing on the date of the request, even if not due, are subject to judicial recovery.
> [...] § 3. In the case of a creditor holding the position of fiduciary owner of movable or immovable assets, commercial lessor, owner or committed seller of real estate whose respective contracts contain an irrevocability or irreversibility clause, including on what concerns real estate developments, or owner in a sales agreement with reserve of ownership, his credit shall not be subject to the effects of judicial recovery; the contractual conditions and the property rights over the thing shall prevail, in consonance with the respective legislation, not being allowed the sale or the removal of capital assets essential to the business activity, during the term of suspension to which Art. 6, Paragraph 4 of this Law refers."

The justification for the leased property to remain under the possession of the recovering firm is widely admissible by jurisprudence. This understanding is justified, insofar as removing capital goods interrupts the development of business activity and exacerbates the debtor's crisis situation. It is settled the legal understanding that, as the removal of assets essential to the productive chain increases the risk of paralyzing the continuity of the economic activity, this removal is in direct opposition to the purpose of the judicial recovery.

Pledges and mortgages are also commonly used as collateral in lending transactions, with pledges being applicable to movable assets and rights (for example, machinery, inventory, vehicles,

credits and shares) and mortgages to non-movable assets (real estate). Differently from the fiduciary sale, in pledges and mortgages the guarantor keeps the title of the collateral and, therefore, creditors may be affected by the bankruptcy of the guarantor.

### B) Fiduciary assignment of receivables

The bank loan is usually the first alternative to try to overcome the business economic crisis. Among the loan operations in the market, a specific alternative prevails as the recurrent form adopted by financial institutions, with the specific objective of not being subject to the effects of judicial recovery: the loan made via bank credit note with guarantee of fiduciary assignment of receivables.

A bank credit note is issued by an individual or legal entity, as a promise of cash payment to the financial institution in exchange for the release of funds. The bank credit note admits all forms of guarantee, however, the most used one is the fiduciary assignment of credit rights, in which the debtor assigns the ownership of credits determined to the financial institution, until the total settlement of the debt.

Therefore, the financial institution lends money to the debtor company, in exchange for the transfer of ownership of the existing credits as collateral of the business. Normally, the loan agreement rules that loans assigned as collateral, as well as other amounts operated by the debtor company, must be deposited into account under the administration of that financial institution.

In addition, since it is a credit title, it is subject to the general rules of Exchange Law. However, it is also benefited by legal specificities created to facilitate the right of credit by the creditor, as well as the respective debt collection lawsuit.

In the case of judicial reorganization, the payment of bank credit arising from operations guaranteed by fiduciary assignment of receivables is considered as priority, allowing banks, which are usually the holders of this type of guarantee, to claim their credits outside the judicial recovery process. This understanding is underpinned by Article 49, Paragraph 3:

> "Art. 49. All credits existing on the date of the request, even if not due, are subject to judicial recovery.
>
> [...] § 3. In the case of a creditor holding the position of fiduciary owner of movable or immovable assets, commercial lessor, owner or committed seller of real estate whose respective contracts contain an irrevocability or irreversibility clause, including on what concerns real estate developments, or owner in a sales agreement with reserve of ownership, his credit shall not be subject to the effects of judicial recovery; the contractual conditions and the property rights over the thing shall prevail, in consonance with the respective legislation, not being allowed the sale or removal of capital assets essential to

> the business activity, during the term of suspension to which Art. 6**,** Paragraph 4 of this Law refers."

Therefore, the fiduciary assignment of receivables, also known as "*banker padlock*", is a guarantee offered by companies to banks, in order to obtain bank loans to foster the company's activities. The future receivables, i.e., the revenue from the production financed by the Financial Institution, are "*padlocked/blocked*" and cannot be used by the recovering company for its cash flow, since those credits are passed directly to the Bank.

The justification for these credit operations not being subject to the rules of Judicial Recovery is the possibility of having lower risks and, therefore, lower interest rates, benefiting both financial institutions and credit borrowing companies. In theory, the low risk of a failed credit recovery would help financial institutions to lower their banking and administrative costs, benefiting consumers and the business sector. Moreover, bankers' advocates justify that the reduction of banking spread depends on a better and more effective guarantee of satisfaction of their credits. However, such benefits do not exist in the reality of the people and the business community.

Due to the potentially damaging effect of the Article 49 provision, recovering companies usually appeal to the bankruptcy courts to prevent bank creditors from declaring the early maturity of their credits and to make any amortization of credits, blocking of securities, blocking of current accounts or investment accounts, or any other act of constriction of property, values or property rights, under penalty of daily fine.

### C) The essentiality of financial resources in business recovery

Since the enactment of the new Bankruptcy Law in 2005, judicial reorganization became the most often used insolvency mechanism for businesses in Brazil. However, even so, the success rate of judicial recoveries remains low and unsatisfactory.

Among several factors that undermine the success of judicial recovery plans, the *banker padlock* (set up by Article 49, Paragraph 3) is pointed out as one of the most deleterious for the company. *Banker padlocks* have been legally questioned on the grounds that they prevent the recovery of companies by obstructing the day-to-day operations, preventing the recovering company from using its resources in favor of the business rescue and employment protection. For a better understanding of the scale of this problem, it is necessary to enter into the field of corporate finance.

Whether it is an owner-managed enterprise or a large multinational, a company facing financial distress or insolvency can be helped if action is taken early enough and if it has access to financial resources. These are basic requirements for a viable company to overcome the liquidity crisis and pay off its debts.

Nevertheless, the first obstacle arises from the right of the fiduciary creditor to file execution proceeding in parallel with the judicial recovery process, or even to proceed with the enforcement proceeding before the approval of the recovery plan. This possibility of parallel demands results in filing of diffuse lawsuits, causing repeated discussions about the credits to be satisfied, causing a legal obstacle in the solution of the disputes.

Although the company's revenue is not considered a capital asset to be removed from the establishment, it is an essential asset for the company to survive until it renegotiates its debts with the creditors. It is important to clarify that financial resources are as important as capital resources to keep the business running. For this reason, there is a lack of technical justification for the distinction of treatment that courts make between creditors holding collateral by fiduciary alienation and creditors holding collateral by fiduciary assignment of credit.

The 1st Court of Bankruptcies and Judicial Recoveries of São Paulo, conducted by judge Daniel Carnio Costa, has set a precedent for this understanding, as follows:

> "In fact, the literal interpretation applied by the STJ (Superior Court of Justice) to the legal provision would certainly lead to the creation of situations that violate the principle of isonomy among creditors holding the same legal position. That is because the creditor holding a fiduciary alienation of an industrial machine could not sell the machine to realize his credit, whereas the creditor holding the trust assignment of receivables could do so without any restriction.
>
> However, in the light of Art. 49, Paragraph 3 of Law 11,101 / 05, creditors holding the position of fiduciary owner of movable or immovable property are subject to the same legal regime, and it is not reasonable for the interpreter to place them in diametrically opposed situations in relation to the exercise of the right of property over the object of the guarantee."[13]

Furthermore, among all the problems faced by companies under judicial reorganization, perhaps the most difficult to overcome is the lack of credit. The situation is aggravated by the fact that companies undergoing judicial recovery no longer have access to credit from financial institutions because of the low credit rating established by the National Monetary Council.

Companies in judicial recovery without access to credit lose the productive capacity and the possibility of overcoming the financial crisis. If credit is essential for companies that are not in a situation of overcoming financial and economic crisis, it is even more so for companies undergoing judicial reorganization that

[13] Brazil, 1st Court of Bankruptcies and Judicial Recoveries of São Paulo. Judicial Recovery – Collective Insolvency Proceedings n. 1049020-41.2017.8.26.0100. Judge: Daniel Carnio Costa. D.O.E.S.P. 10/08/2017.

have to restructure the business and comply with the approved recovery plan to overcome such a challenging scenario.
Another relevant topic is that the release of receivables (interruption of the *banker padlock*) enables the company to increase its working capital to operate and conduct the business. The lack of working capital hampers optimal utilization of installed capacity and, worse, prevents the company from meeting its short-term financial obligations.
As a conclusion, the economic and financial consequences of the privileged treatment of fiduciary creditors (Article 6 and Article 49, as above) are usually a cataclysm for the company that is experiencing a financial crisis due to lack of liquidity.
Financial resources are important assets as they help the company to run the operations, generate revenue and increase business value. Consequently, financial resources are vital to business continuity, to comply with the recovery plan approved by the creditors, and to fulfill the purpose of the Bankruptcy Law.

## § 3 – THE CONFLICT OF NORMS IN THE BRAZILIAN BANKRUPTCY LAW

There is a clear conflict between the wording of Article 47, which establishes the preservation of the company as the fundamental objective of the Law, and the norm of Article 49, Paragraph 3, which makes it impossible in most cases to fulfill the objective of the Law.
The Oxford English Dictionary defines *antinomy* as "a contradiction in a law, or between two equally binding laws."[14]
The conflict of norms is characterized by the existence of a rule that prescribes something while a second, also valid rule, prescribes the opposite. Therefore, antinomy is the existence of an incompatibility between two or more rules concerning the same object and that should be solved by means of interpretation.
Right at the beginning of almost every judicial recovery, lawyers and judges struggle to overcome the conflict between Article 47 and 49, which can be decisive for the effective recovery of the company.
With regard to fiduciary alienation of tangible assets essential to the business activity, the jurisprudence of the Superior Court of Justice, based on Article 49, Paragraph 3, generally forbids the removal of those goods from the recovering company. However, in the case of fiduciary ownership of credits, which are intangible assets, there has been much debate in Brazil about the fiduciary assignment of receivable credits, especially about their non-subjection to the effects of judicial reorganization.
The Superior Court of Justice has examined this issue, having stated the prevailing view, according to which the credits guaranteed by fiduciary assignment are not subject to the recovery plan, nor to the restrictive measures imposed by the bankruptcy

[14] Oxford English Dictionary.

court (in accordance with the letter of Article 49, Paragraph 3, of the Law).
Nonetheless, the non-subjection of the credits guaranteed by the fiduciary assignment to the effects of the judicial recovery, leaving such credits out of the competition of creditors, undermines the judicial reorganization by harming the preservation of the company, which is the main principle of the Law (in accordance with the letter of Article 47).
The immediate effect of the wording of Paragraph 3 of Article 49 was that Law No. 11.101/2005 ceased to be known as a '*business recovery law*' and became known as '*bank credit recovery law*'; since inaccessibility to the financial resources on which the company depends for its operation makes any judicial recovery difficult or impossible.
For this reason, both in legal doctrine and jurisprudence, there has been a growing acknowledgement that Paragraph 3 of Article 49 makes it impossible for the purpose of the Law to be fulfilled, since the company and its social function will not be preserved. This understanding admits the fact that it is extremely difficult to recover from a financial crisis without the possibility of having financial resources. In the moment of financial difficulty, the company needs capital to move in its normal activities or even to reinvent itself in order to overcome the crisis.
In practice, the 'privilege' guaranteed to financial institutions, holders of fiduciary guarantees, to pursuit those credits on an extra-bankruptcy basis, directly affects the compliance with the judicial recovery plan, the payment of other creditors without fiduciary guarantee (harming the principle of isonomy between creditors) and, finally, the business as a whole (which needs the financial resources to keep the business running).

### A) A Historical Perspective of the approval of Brazil's current Bankruptcy Law

It is fundamental to analyze the historical conditions and normative precedents that prevailed in the past and that preceded the new discipline to understand, by comparison, the conditioning factors of the genesis of the new law. Thus, the understanding of the development of a new bankruptcy prediction model depends on a historical interpretation of the social purpose of its emergence.
Bankruptcy legislation in Brazil began with the Manueline Ordinances[15], at about 1521, which determined that in the event of insolvency the debtor would be arrested until he paid what was due to the creditors, and under the influence of Italian law the debtor could transfer his assets to the creditors to avoid imprisonment[16].

[15] The legal system in force during colonial times (the period which goes from 1500 to 1822) is made up by the Royal Ordinances which compiled laws and customs in use in Portugal.
[16] SIMIONATO. *op. cit.* p. 250.

By 1603, bankruptcy law was ruled by the Ordinations of King Philip[17]. However, the Charter of 1756 was a decisive document for the history of Brazilian law. This Charter was subsequently amended and served as a model for the formulation of the Commercial Code of 1850, a legislative historical milestone in Latin America. The Commercial Code of the Empire of Brazil, which also regulates bankruptcy, placed Brazil at the center of the most technically advanced trade regulation in the West. The publication of the Commercial Code in 1850 was a genuine progress for the nation. Until then, there was only the French Code of 1808; Spanish Code of 1829; Portuguese Code of 1833; and the Dutch Code of 1838[18].

Brazilian Bankruptcy Law has a rich history and has gone through four important phases. The first was with the publication of the Commercial Code of 1850[19] and ended with the Republic in 1889. During this period the spirit of French doctrine and legislation prevailed. On the course until the proclamation of the Republic, the Imperial Code went through several amendments, almost all of them due to urgent situations to be solved.

Then came Decree No. 917/1890, against the background of the Proclamation of the Republic, when the interim government repealed the provisions on bankruptcies set forth in the Commercial Code[20]. Shortly thereafter, Law No. 859/1902 was published, which had the purpose of ending the cases of fraud that arose during Decree 917. The law sought to resolve the abuses that occurred in the moratorium and in the preventive agreement between debtor and creditors. This Act remained in force for only six years.

Law No. 2,024/1908 was a successful synthesis of the principles underlying Decree No. 917/1890, as well as the influence of comparative law. It stipulated, for instance, that the classification of credits should be the expression of truth. Later, due to the economic crisis of 1929, Law No. 5,746/1929 was elaborated. This law remained in force until the publication of Decree-Law No. 7.661/1945[21].

The Decree-Law No. 7.661/1945 preceded the current Brazilian Bankruptcy Law. The Decree-Law has the merit of having regulated the bankruptcy process for almost sixty years, even under the uncontrollable pressure of the Brazilian economy. Some of the important legal provisions of this law were: strengthening of the magistrate's decision-making; decrease of creditors' influence; and the *concordata* (both preventive and

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17 Philippine Ordinances (*Ordenações Filipinas*), period from 1603 to 1640.

18 CARVALHO DE MENDONÇA. *Das falências e dos meios preventivos de sua declaração*: Decreto n. 917, de 24 de outubro de 1890, São Paulo, Typographia Brazil de Carlos Gerke & Cia. 1899.

19 Since 2003, the Brazilian Commercial Code of 1850 is only in force with regard to Commercial Maritime Law, and the other issues were revoked by the Brazilian Civil Code of 2002.

20 SAMPAIO DE LACERDA. *Manual de Direito Falimentar*. Rio de Janeira: Freitas Bastos, 1971, p. 37.

21 SIMIONATO. *op. cit.* p. 253.

suspensive)[22] was no longer a contract and became a legal benefit granted to the honest but unfortunate debtor.

However, as can be observed, the text of Decree-Law No. 7,661/1945 dates back to the post-war period, thereby it no longer met the needs of business reality at a certain point. The former legal order was designed for simple business environments, at a time when Brazil lacked industrialization and there was a considerable state intervention from the macroeconomic perspective. The main criticism of the former bankruptcy model (regulated by Decree-Law No. 7.661/1945) was that bankruptcy and *concordata* did not offer the entrepreneur the possibility of recovering. In addition, according to Simionato[23], the Decree-Law proved completely unworkable to discipline the process of economic reorganization.

The current imperative in business strategy is that all companies must grow. Thereby, there is an intensification of the corporate complexity of organizations. Large organizations are by nature complex, but over the years circumstances have conspired to add layer upon layer of complexity to how businesses are structured and managed. Mergers and acquisitions (M&A transactions) play an important role in this process. The growth in importance of intangible assets is also of great relevance. There are changes in contractual relations. Traditional forms of guarantee, such as mortgage and pledge, are gradually being replaced by new forms, such as the securitization of receivables, fiduciary title of real estate, the assignment of credit rights and derivatives. Moreover, modern capitalism presents cyclical crises that affect national economies and even the stability of economic blocs. Therefore, it is blatant that such crises affect the organizations that operate in such markets.

Given the context of the twenty-first century, and the role that companies have in the contemporary economy, as generators of jobs and wealth production, the Brazilian legislator recognized the great importance of the judicial recovery of companies[24]. According to Rubens Requião[25], the company should not be analyzed as an absolute property of the entrepreneur, but as a community of workers, capital and collectivity. The change in the business environment, both nationally and globally, led to consensus on the need for legal mechanisms to ensure the survival of the viable company, recognizing its social function. In this sense, the legislative branch recognized the importance of the company and the consequent difficulty in imposing barriers to its existence, risks and impacts and, in this way, perceived the need

[22] Decree-Law No. 7.661/1945, Title X, First Section, Article. 139.

[23] SIMIONATO. *op. cit.* p. 15.

[24] In fact, the interest of the company is not restricted to the social interest of the members, but legally the social interest should be the interest of the company, and of the collectivity, according to article 170 of the Brazilian Federal Constitution and articles 115, 116, 117, 153- 159 of the Brazilian Corporation Law (Law No. 6,404, dated December 15, 1976).

[25] R. REQUIÃO, "A função social da empresa no estado de direito", *Revista da Faculdade de Direito da UFPR*, vol. 19, p. 270, 1980.

to protect the social interests directly and indirectly linked to the business organization, mainly through insolvency law.

The Brazilian Bankruptcy Law in force, Law No. 11,101, dated as of February 9th, 2005, originates from the Bill of Law No. 4,376/93, submitted by the Executive Branch, which had been discussed in the National Congress for approximately 12 years until its promulgation. Lastly, the new order abrogated and replaced the Decree-Law No. 7,661/45 (the former Bankruptcy Law).

Thus, under the influence of the principles of judicial reorganization of companies in economic crisis, a model established in several countries, the current Brazilian Bankruptcy Law adopted a functional concept of the company's social interest, thereby adopting instruments that favor the business continuity, aiming to protect employment, productive activity and tax collection.

The recognition of the social function of the company is one of the guiding principles established by the legislator, which was based on the need for preservation and/or recovery of the company. In this sense, according to Paulo Fernando Campos Salles de Toledo[26], Brazil has adopted a market economy based on free initiative and, consequently, should act in its defense.

However, as pointed out by Manoel Justino Bezerra Filho[27], the Bill has suffered a series of deviations of course until the current diploma. Among the difficulties faced is the "Pendular Dualism" of the Brazilian legal system, cited by the legal scholar Fábio Konder Comparato[28].

Traditionally, bankruptcy proceedings were designed to protect the interests of creditors or the interests of debtors, with a markedly proceduralist approach prevailing in the Brazilian system. This difficulty in defending the true interests to be preserved in the judicial recovery and bankruptcy proceedings of the company appeared prominently in the drafting of the new law.

From 1993 until about 2000, the bill introduced a series of propositions that demonstrated an effective concern with the situation of the business community, with institutes that might, perhaps, provide conditions for the recovery of the business. From 2000/2001, the pressures that became gradually present in the elaboration of the law caused a change of direction that led to a significant modification from the philosophical point of view, in such a way that the text was increasingly distanced from its original goal. In the legal community, it was concluded that the law would no longer be the "*Business Recovery Law*" but the "Bank Credit Recovery Law", or the "*FEBRABAN Law*"[29].

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[26] P. F. TOLEDO, in N. DE LUCCA, A. DOMINGUES, (Coord.). *Direito recuperacional*: aspectos teóricos e práticos. São Paulo: Quartier Latin, 2009. pp. 528-529.
[27] M. J. FILHO, *Lei de Recuperação de Empresas Comentada*. 2007, p. 34.
[28] F. K. COMPARATO, *Aspectos jurídicos da macro-empresa*. São Paulo: RT, 1970, p. 98.
[29] Acronym for *Federação Brasileira de Bancos* (the Brazilian Banking Federation).

This pendular dualism of Brazilian law (indecision about whether to support the debtor or prestige the creditor) was effectively present in legal thinking. Further, lobbying pressures extend the continuity of the 'dualism'. Although the Law is the result of the average feeling of the population at a given moment, there were evidently certain sectors that made their voices heard in a more audible and determinant way. This was the case in the drafting of the current Bankruptcy Law, which was seriously concerned with the recovery of companies, and from a certain point (around 2000/2001) began to suffer pressure from one of the national and international bankers.

As a result, the bill that until then had been aimed at providing conditions for recovery to companies in difficulty was modified in order to create the conditions for the invested financial capital to return to the origins in the shortest length of time. In other words, before any concern about the company's recovery, the Law began to prioritize saving the money invested by financial capital, making it impossible – or at least making very problematic – the possibility of recovering the business.

On that occasion, the World Bank commissioned a number of officials to distribute the booklet titled '*Principles and Guidelines for Effective Insolvency and Creditor Rights Systems*'[30], which contained 35 (thirty-five) '*Principles and Guidelines for the Effectiveness of Bankruptcy Procedures and Debt Collection*.'

As a result, the judicial reorganization procedure replaced the old legal institute of 'preventive concordata', regulated by Decree-Law No. 7,661/1945. With notable differences from its predecessor, the judicial reorganization caused considerable changes in the legal outlook, especially because it provided for creditors and debtors a court procedure for the negotiation of a *sui generis* agreement to be approved at the general meeting of creditors: the judicial reorganization plan. On the other hand, the effective granting of the judicial reorganization cannot do without a court order and the jurisdictional power is given to the judge to ensure the legality of the procedure and to analysis the reorganization plan.

Thus, the Brazilian Bankruptcy Law not only regulated the corporate bankruptcy proceedings, but also innovated by establishing judicial and extrajudicial mechanisms to save a company which is still economically and financially viable, provided that legal requirements are met.

Taking into consideration the normative precedents and preparatory legislative works, which preceded the approval of Law No. 11.101/2005, we find the meaning of words in the context of the creation of the norm (*occasio legis*)[31]. The adoption of the Judicial Recovery Institute was an evolution in Brazilian

[30] WORLD BANK, *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems*, 2011.

[31] "Historical circumstance from which came the external impulse to the creation of the law." F. FERRARA, *Interpretação e aplicação das leis*. 2.ed. Coimbra: Arménio Amado, 1963, p. 142.

bankruptcy law, since it is a legal mechanism that allows economically viable companies to reorganize and generate once again wealth for the country. However, this same institute was distorted by the influence of representatives of the banking segment in the final drafting of some legal articles (as in the case of Paragraph 3 of Article 49), resulting in a law fraught with a legal antinomy and detached from the will of the legislator.

### B) A Teleological Perspective of the conflicts of norms in Brazil's Bankruptcy Law

The interpretation is the jurist's oldest activity. It is called teleological the process that guides the interpretation according to the end collimated by the legal provision, or by Law in general[32]. The word *teleology* derives from the Greek *telos*, meaning end, completion, fulfillment, perfection[33].

Although Law No. 11,101/2005 provides that fiduciary property is not subject to the effects of Judicial Recovery, the jurisprudence is not unanimous in this matter. There are divergent understandings in different courts of Brazil, some sustaining the exclusion of credit from the effects of judicial recovery, with a special mention in Article 49, Paragraph 3 of Law No. 11,101/2005 and others stating that such securities would not be included in the list of credits mentioned in Paragraph 3[34].

According to Carlos Maximiliano[35], on the use of the teleological element in the interpretation, "the end inspired the legal provision, it must, therefore, also serve to limit the content; rectifies and completes the characters in the legal hypothesis and helps to specify which species fit the same. It sets the scope, the practical possibility; since there is a presumption that the legislature has intended to edit reasonable means, and, among the possible means, chosen the simplest, most effective. The end does not reveal, by itself, the means that the authors of the expressions of the Law put in action to accomplish it; serves, however, to make it better to understand them and to develop them in their minutiae. It is not therefore sufficient to determine the practical purpose of the standard in order to reconstitute its actual content; it is necessary to ascertain whether the legislature has already shown a preference for one means, rather than another, to achieve the collimated objective; if this has not

[32] "The teleological perspective, commonly named logical interpretation, improper expression, since it is an interpretive method based on the ratio legis, that is, the reason or the purpose for which the norm was established. Starting from the double assumption that the legislator, as a reasonable being, sets goals and establishes suitable means to be achieved, once the aim of the legislator is individualized, the purpose can clarify in this case the means to achieve it, that is, the content of the law." N. BOBBIO, *O positivismo jurídico: lições de filosofia do direito*, São Paulo: Ícone, 1995, p. 214.

[33] L. F. COELHO, *Aulas de introdução ao direito*. Barueri, SP: Manole, 2004, p. 335.

[34] BRAZIL, Third Panel of the Superior Court of Justice, Special Appeal *1.202.918/SP*, Reporting judge: Ricardo Villas Bôas Cueva. Court decision in 07/03/2013.

[35] C. MAXIMILIANO, *Hermenêutica e Aplicação do Direito*. 19. Ed. Rio de Janeiro: Forense, 2007. p. 125.

happened, primacy should be given to the most suitable means to achieve that end in a full, complete, integral way."

Focused on the teleology of the norm, not its structure, Bobbio[36] asserts that the concern of the operator of the Law should be for what the norm serves. Symmetrically, Eros Grau[37] posits, supported by the conceptions of Rudolph von Jhering, that the purpose is the creator of all law and there is no norm or legal institute that does not originate from the purpose. In this sense, when interpreting a legal provision, it is necessary to take into account the economic and social requirements that the law was constructed to meet and conform the norm with the principles of justice and the common good.

Although there are several important interpretive methods, the teleological interpretation overcomes the formal logic and directs its attention to the legal good protected by the norm, that is, to the end that the norm seeks to achieve. The interpretive conclusion must be attached to the preservation of this legal value, which goes beyond the scope of formal logic.

In this regard, corroborating with the hermeneutical tendency of a restrictive analysis of the banker padlocks' permissibility, it is valuable to bring back the recent decision of the 1st Court of Bankruptcies and Judicial Recoveries of São Paulo[38], which highlighted the social function of the legal institute of judicial recovery:

> "The interpretation in accordance with the theories of overcoming the pendular dualism and of the balanced division of burden should be applied to the recovery system.
>
> According to the theory of overcoming the pendular dualism, the best interpretation that must be given to the institutes of judicial recovery is the one that allows the one who applies the law to achieve more effectively the results of social interest protected by the recovery system and not the partial interests of creditors or debtors.
>
> The viability of overcoming the crisis is consonant with the protection of public and social interests that comprise the preservation of the economic and social benefits of the healthy business activity, such as the generation of employment, tax collections, the circulation of goods, products, services and the generation of wealth.
>
> The greater interests, guaranteed by the success of the company's recovery, should overlap the private and partial interests of creditors and debtors within the process of judicial recovery.
>
> The partial interest of a creditor or a debtor can never become an insurmountable barrier to the achievement of the greater interest, of a public/social nature, resulting

[36] N. BOBBIO, *Dalla struttura alla funzione*. Milano, Edizioni di Comunità, 1977, p. 63.
[37] E. R. GRAU, *Essay and Discourse on Interpretation* /Application of Law. São Paulo: Malheiros, 2002, p. 35.
[38] Brazil, 1st Court of Bankruptcies and Judicial Recoveries of São Paulo, *op. cit.*, p. 591.

> from the preservation of the benefits derived from the healthy business activity.
> Therefore, the interpretation of the legal safeguard brought by Article 49, Paragraph 3 of the above-mentioned law must abide by these theories, in order to ensure that it is possible for the system the effective court protection of the social and economic benefits that arise from the preservation of the business activity (the ultimate objective of the judicial recovery system)."

It is important to note that this specific court decision overcame the pendular dualism between creditor and debtor to emphasize the protection of the legal institute of judicial recovery, as inspired and expressed in the Brazilian Bankruptcy Law.
Further, facing another serious problem of judicial recovery, the same decision also determined that financial institutions with assignment of fiduciary guarantee credits would only receive the respective credit after the approval of the recovery plan by the general meeting of creditors:

> "According to the theory of the balanced division of burden, all creditors and debtors must assume burdens in the process of judicial recovery, so that their conducts enable the achievement of the greater result of the judicial recovery process, which is the protection of the economic and social benefits that result from the preservation of the business activity. [...] Thus, the judicial recovery system imposes this burden on the creditor holding the fiduciary guarantee, ensuring that the asset subject to the guarantee is not realized, to the detriment of the essential activities of the debtor, at least during the stay period, in which the creditors and the debtor should negotiate a plan to overcome the crisis."[39]

In light of the foregoing, essentially, while solving the cases, the judge must find a method to make the rule of law applicable to the event, thereby ideally rendering a verdict containing justice (philosophical), certainty (juridical), and usefulness (sociological) aspects. The principles of justice, law certainty and usefulness should be conducted in compromise by means of applying them equally or proportionally, for the sake of the legal institute of judicial recovery.

## CONCLUSIONS

Bankruptcy Law is certainly a legal branch of intense doctrinal debates that requires a detailed study and reflection on the fundamental instruments aiming the economic reorganization of the company. From a practical perspective, it would be incongruous to expect that the Brazilian judiciary would be able to solve *per se* the problems caused by the company's economic

[39] *Ibid.*, p. 591.

crisis. Nonetheless, the Law sought, at least in theory, to provide a solution of continuity for the economically viable company.

On the other hand, the codification of law, even though it seems to be complete, is never perfect. Although Law No. 11.101/2005 has implemented a judicial reorganization model, seeking to ensure instruments that enable overcoming the situation of financial crisis, judicial reorganizations have been impaired, in many cases, because fiduciary assignment of receivable credits is not subject to the effects of judicial reorganization, according to the wording of Article 49, Paragraph 3.

The main challenge, therefore, is to find means to impose a restriction, without, on the one hand, sacrificing fiduciary property (*as it would occur in the case of simple liberation of values in favor of debtors*), and without, on the other hand, frustrating the objective of the preservation of the company (as in the case of banker padlock, which prevents values from being used in the economic activity of the company).

However, while society awaits an urgent correction, the judiciary has already expressed the relativization of the rule of Article 49, Paragraph 3, whose literal interpretation, when applied to the process of judicial recovery, may jeopardize the execution of the recovery plan and the success of the main purpose as provided for in the article 47 of Law No. 11,101/2005.

Hence, the antinomy between Articles 47 and 49 of Law No. 11,101/2005 has imposed a change in exegesis, impacting judicial decisions and the fate of Brazilian companies in judicial reorganization.

Law enforcement requires indisputably an attentive and diligent Judiciary, grounding its decisions on the spirit of the law, and not so much in the literal interpretation of the legal text. Otherwise, the reform aimed by Law No. 11.101/05 would be in vain, without reasonable solutions to deal with the economic crisis of the company. In other words, Law No. 11.101/05 should be interpreted from the perspective of its social and economic utility. The prevalence of literal interpretation of the Law leads to irrationality and injustice, as Legal Hermeneutics has demonstrated over the centuries.

Lastly, beyond this interpretation of conflict of norms, which reduces the contradictions between legal rules to mere legal defects, it is possible to look for more substantial causes hiding behind these antinomies and consider them as symptoms of existing tensions at the deeper level of legal foundations.

The normative conflict between Article 47 and Article 49, Paragraph 3, exposes a failure in the norm producing process, as well the existence of a conflict between the values and interests which inspired the norms.

Based on the Preservation of the Company Principle, the Brazilian legislator clearly opted to recover the business activity, inasmuch as the firm, which besides generating employment, is also a source of tax payment. The difficulty in defending the interests that shall be preserved in the process of judicial

reorganization and bankruptcy effectively rests upon the interference of vested interests that remarkably distorted the spirit of the current law. Moreover, this deviation of course will require a considerable length of time for correction, if there will be political will to make the necessary corrections. In conclusion, this adjustment of the hermeneutic processes may not prevent the need to change the law; as there are still serious obstacles to its implementation.