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COMPANY JUDICIAL RECOVERY: A BRIEF LEGAL TEST OF THE CURRENT SCENARIO

RECUPERAÇÃO JUDICIAL DA EMPRESA: UM BREVE ENSAIO JURÍDICO DO CENÁRIO ATUAL

Antônio Carlos Diniz Murta[1]
Nany Papaspyrou Marques Mendes[2]

ABSTRACT

The economic, financial and health crisis caused by the coronavirus pandemic invites the legal community to a new cycle of studies on the impacts of the new world on Brazilian law, notably corporate law. After examining the construction of the bankruptcy and recovery system, with a specific rule approach, the study proposes the application of civil law institutes, branch of obligations and contracts, in the course of the recovery action, especially in order to check the right to review the contracted plan, under the influence of the new state of affairs, imposed by an unpredictable and extraordinary fact.

Keywords: Judicial recovery; Legal Nature; COVID-19; Business Law; Bankruptcy.

RESUMO

Resumo: A crise econômica, financeira e sanitária provocada pela pandemia do coronavírus convida a comunidade jurídica para um novo ciclo de estudos sobre os impactos do novo mundo no direito brasileiro, notadamente o empresarial. Depois de um exame sobre a construção do sistema jurídico falencial e recuperacional, com abordagem até de regra específica, o estudo propõe a aplicação de institutos do direito civil, ramo das obrigações e contratos, no curso da ação de recuperação, muito em especial para conferir o direito de revisão do plano contratado, sob as influências do novo estado de coisas, imposto por fato imprevisível e extraordinário, conforme Teoria da Imprevisão.

Palavras-chave: *Recuperação Judicial; Natureza Jurídica; COVID-19; Direito Empresarial; Falência.*

1 Graduated in Law from the Faculty of Law of the Federal University of Minas Gerais (1987). Specialization in Commercial Law from the Law Faculty of the Federal University of Minas Gerais (1994). PhD in Commercial Law from the Faculty of Law of the Federal University of Minas Gerais (2000). State Attorney at the Attorney of Taxes and Finance of MG (PTF), a member of the Attorney General of the State of Minas Gerais (AGE / MG). Coordinator of the Attorney of Taxes and Finance (PTF), of the General Attorney of the State of Minas Gerais (AGE / MG) with the Minas Gerais Taxpayers Council (CC / MG). Elected Member / Counselor of the Superior Council of the Advocacy General of the State of Minas Gerais (AGE / MG). Member of the Permanent Commission for the Review and Simplification of the Tax Legislation of the State of Minas Gerais, within the scope of the Secretariat of the Civil House and Institutional Relations and the Secretariat of State for Finance. Full Professor at the Faculty of Humanities, Social and Health Sciences (FCH), a member of the Minas Gerais Education and Culture Foundation / FUMEC University. Lattes: http://lattes.cnpq.br/5206258464220367. ORCID iD: https://orcid.org/0000-0002-9568-7997. E-mail: acmurta@fumec.br

2 Master's in Law from PPGD of FUMEC. Bachelor of Laws from the State University of Minas Gerais - UEMG (2013). Specialist in Public Law from FUMEC University (2017). ORCID iD: https://orcid.org/0000-0001-9531-6996. Email: nanypmarques@gmail.com

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1. INTRODUCTION

From what cannot be doubted, it is certain that the pandemic of the corona-virus marked the life of the world population in the year 2020. New situations, a future that is unknown and distant. The economy, of course, was transformed by the reflection of the situations generated by the spread of the virus in the world, and, of course, in Brazil. Businesses activity, the essence of the capitalist economy, has experienced varying consequences in this new pandemic period.

Some segments faced a world of opportunities and gains. Others, disabled-limited/obstacles to exercise, due to the recommendation of not grouping people, such as in entertainment, in public transportation, business institutions already affected by financial difficulties came under treatment of the recovery process regulated by law 11.101/2005, and also certainly impacted by the corollaries of the pandemic. These companies are likely to need a revision of the recovery plan so that they can effectively recover.

The normative alternative for non-compliance with the obligation agreed in the recovery plan is the convolution for the bankruptcy action. With the support of the principles that guide the construction of bankruptcy law, the text that is presented, in turn, proposes the possibility of a revision of the recovery plan in progress, if the obligations inserted therein become unbalanced, burdensome. To this end, the exploration of the legal doctrine that gives the recovery plan the nature of a contract, leads and justifies the scientific construction of this article.

From a brief historical effort, and with visits to the rules and other norms of the recovery law, the idea that it proposes to build, is based on the application of precepts of the mandatory and contractual private law, in the solution of the issues arising from this and other inevitable, unpredictable and extraordinary context.

2. THE INSOLVENCY SYSTEM IN BRAZILIAN LEGAL ORDINATION

In 2005, Brazil inaugurated its new legal insolvency regime, which occurred with the entry into force, on June 10 of that year, of Law 11.101/2005, which was sanctioned and published on February 9 also of the year 2005.

The new law proposed to regulate the judicial, extrajudicial and bankruptcy of the entrepreneur and the company, thus replacing the institutes of preventive and suspensive bankruptcy provided for in Dec. Law 7661/45 by the new institutes then brought to call for the new law, which are the Judicial and Extrajudicial Recovery of companies in crisis.

If the debtor is an entrepreneur or business company, if the circumstance is framed in one of the permissives provided for in article 94 of Law 11.101/2005[3], the bankrupt state is set up capable of giving rise to the specific liquidation procedures of the tender process.

3 The debtor's bankruptcy will be decreed which: I - without relevant legal reason, does not pay, without maturity, a net obligation materialized in protested securities or executive securities whose sum exceeds the equivalent of 40 (forty) prices-updated on the date of the bankruptcy request ; II - obtaining for any net amount, not paid, not depositing and not assigning sufficient

On the other hand, the new law, drafted under the reality of Brazilian trade and industry at the beginning of the 21st century, dared to integrate the new institute for the recovery of companies into the national insolvency system, both judicially and extrajudicially.

Such an institute, especially when compared to the past bankruptcy, has an extended scope of its effects in relation to creditors and the very purpose of the measure, the judicial recovery of companies aims to make it possible to overcome the financial economic crisis, allowing the maintenance of the source producer, the employment of workers, the interests of creditors, all with a view to promoting the preservation of the company, its social function and stimulating economic activity, according to article 47 of the aforementioned law 11.101/2005[4].

The current insolvency system adopted by the national legislature, thus, inaugurated in Brazil the outstanding importance to business activity, so that the company's judicial reorganization institute has as its principled normative foundation and aims to promote the company's own preservation and social function and, yet, stimulate economic activity.

In this sense, it is believed that the insolvency legal regime meets the interests of the agents involved in the business activity, giving them solutions that can serve them satisfactorily in the circumstances in which the economic and financial crisis affects the business tranquility then existing, that is, in the liquidation measures carried out in the bankruptcy bankruptcy process, or in relation to the uplift measures carried out in the recovery procedure of the viable company.

By the way, commercial and industrial activity, most of the time, takes place with the offer of credit by the capital investing agents, thus, the industry finances its production under the premise that the result obtained with the sale of the products or services is deemed sufficient to honor the obligations to investors and, still, satisfactorily remunerate the labor and capital employed. When this market perspective is frustrated, as is the case today, the insolvency legal system will have to come on the scene, to ensure the reorganization of the business and business scenario.

assets to the attachment within the legal term; III - perform any of the acts, except if it is part of a judicial reorganization plan: a) proceeds to the hasty liquidation of its assets or use ruinous or fraudulent means to make payments; b) carries out or, by unequivocal acts, attempts to carry out, with the objective of delaying payments or defrauding creditors, simulated business or sale of part or all of its third-party asset, whether or not it is a creditor; c) transfers an establishment to a third party, creditor or not, without the consent of all creditors and without having sufficient assets to resolve its liabilities; d) simulates the transfer of its main establishment with the objective of circumventing legislation or supervision or to damage credit; e) gives or reinforces a guarantee to a creditor for a previous contracted debt without having enough free and clear assets to settle its liabilities; f) leaves without leaving a qualified representative and with sufficient resources to pay creditors, leaves the establishment or tries to hide from his domicile, the place of his headquarters or his main establishment; g) fails to comply, within the established period, with the obligation assumed in the judicial reorganization plan. Paragraph 1 Creditors may meet in litisconsortium in order to make the minimum limit for filing for bankruptcy based on item I of the caput of this article. Paragraph 2. Even if they are liquid, the claims that cannot be claimed are not legitimate for bankruptcy. § 3 In the event of item I of the caput of this article, the bankruptcy petition will be filed with the executive titles in the form of the sole paragraph of art. 9 of this Law, accompanied, in any case, by the respective protest instruments for bankruptcy purposes under the terms of specific legislation. § 4 In the event of item II of the caput of this article, the bankruptcy request will be instructed with a certificate issued by the court in which the execution takes place. § 5 In the event of item III of the caput of this article, the bankruptcy petition will describe the facts that characterize it, adding the evidence that exists and specifying the ones that will be produced. (BRAZIL, Law 11.101, of February 9, 2005. Available at: http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2005/lei/l11101.htm. Access on September 20, 2020).

4 Article 47: The purpose of judicial reorganization is to make it possible to overcome the debtor's economic and financial crisis, in order to allow the maintenance of the production source, the employment of workers and the interests of creditors, thereby promoting the preservation of the company social function and stimulating economic activity. (BRAZIL, Law 11.101, of February 9, 2005. Available at http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2005/lei/l11101.htm. Access on September 20, 2020

Failure to comply with the credit obligation, which often results from the crisis being affected in the business environment, a well-known and very present fact in this historic year of 2020, must be resolved based on the legal insolvency system adopted by the governing legal system, either by bankruptcy or by the recovery modalities established in the commercial legal regime.

Frederico A. Monte Simionato, in a precise lesson on the imperative of guarantees that the insolvency legal regime must offer in favor of those involved in the negotiation activity, explains that:

> "(...) in times when there is so much talk about the company's interest, preservation of the producing entity, the need to satisfy the interests of creditors cannot be overlooked, under the risk of incredible risks. Credit is the most essential thing that exists in the capitalist system (...)". (SIMIONATO, 2008, p.23)

In view of this, it is clear that the insolvency system in force by Law 11.101/2005 regulates the classic liquidation process, adopting the legal insolvency as the configuring element of the bankruptcy stage, that is, due to the intelligence of article 94 of the law. The same norm, as we know, still instituted the judicial and extrajudicial recovery procedures for companies in economic crisis, as long as they are still financially viable, a fact that greatly highlights the concern of the modern legislator to the interests and social function of the company and its usefulness in the market. that integrates.

MERITUM LAW JOURNAL • v.15 • n.4 • p. 14-26 • 2020

3. THE JUDICIAL RECOVERY OF COMPANIES

Law 11.101 / 2005, in addition to the typical liquidation precepts for non-viable companies that are in bankruptcy stage, also regulates and mainly the judicial reorganization procedure of the company in crisis, which is able to guarantee and preserve the social participation of the agents involved in the activity business, especially creditors (SIMIONATO, 2008).

This new normative characteristic, which gives prestige to the protection of social interests that interconnect the relationships that exist in the exercise of the company, proposes the preservation of viable business activity and the respective obedience to its social function and the stimulus of economic activity, this, knowingly, so that allow the maintenance of the productive nucleus, the employment of workers and, of course, the interests of creditors.

In this sense, the isolated interest and desire of the entrepreneur, consistent in the exercise of the company in crisis and in a reckless manner, gives way to the aspect and social relevance that can be inferred from the business activity, that is, in order to determine it as a precondition for the granting of the recooperative measure, careful research and examination of its essential financial viability[5].

5 "In the pursuit of the company's social purposes, the company's management cannot determine management policies that are contrary to the company's interest, and in this step there is a general interest in all the factors that make up the company, such as employees, consumers, the State, etc. even more so in cases of reckless or fraudulent management, damaging the interest of creditors. Indeed, the social interest must be the interest of the company, and of the community itself, according to art. 170 of the Federal Constitution and arts. 115, 116, 117, 153-159 of the Brazilian Corporation Law Certainly, the foundation of the new bankruptcy law lies in the preservation of the financially viable company, which means the reformulation of the

The judicial reorganization of companies, therefore, is based on the rule in Article 47 of Law 11.101 / 2005, insofar as this rule reaches and protects the main interests exposed to the situation of the business crisis.

The wording of the aforementioned standard, as stated, regulates and protects the interests of all agents involved in the business relationship, that is, to the extent that the standard foresees the recovery institute as being capable of overcoming the business crisis, so that it is allowed the maintenance of the source of production, the jobs of workers, the interests of creditors, all with a view to promoting the preservation of the viable company and its social function, as well as stimulating economic activity, is the legislator directing the spirit of the law to the idea of the institutional company that works for the benefit of all the public that is linked in its relations[6].

Indeed, the judicial recovery of companies is the institute provided for in the insolvency legal regime and, based on strong principles and fundamentals, proposes and regulates the pay against the crisis and the reconstruction, reorganization, recovery of the company, so that they are satisfactorily the social interests that interconnect the legal relationships within the business have been met.

The success of the recovery measure promotes the preservation of the company, its social function and the encouragement of economic activity, as provided in article 47 of the Law 11.101/2005:

> Art. 47. The purpose of judicial reorganization is to make it possible to overcome the debtor's economic and financial crisis, in order to allow the maintenance of the production source, the employment of workers and the interests of creditors, thus promoting the preservation of the company, its function and stimulating economic activity. (gn) (BRASIL. 2005)

The effective participation of creditors in the luck or setback of the proposed recovery of the company offered by the debtor also records the social framework of the business activity and its respective usefulness in the environment in which it is integrated, especially with regard to reducing the cost of credit for the financing of the production and circulation of goods and services due to the organized business economic activity[7].

The judicial recovery of Brazilian companies, then, is the bankruptcy law institute that seeks to offer and guarantee to the entrepreneur or business society in an economic crisis, capable means of uplifting and overcoming the crisis.

company's treatment of economic difficulties, placing all interests in it represented in business activity, in a complex situation of supplying, each according to its strengths and conditions, legal and financial instruments to the process of reconstruction of the productive factor". (SIOMIONATO, Frederico Augusto Monte, 1972 - Bankruptcy Law Treaty / Frederico A. Monte Simionato. - Rio de Janeiro, Forensics, 2008, p. 17-18).

6 "The legal definition is really correct. The magistrates must be aware that it resides here, in art. 47 of the new Law, the source of interpretation and application of the new bankruptcy law, as a norm defining duties, functions and paradigms of legal hermeneutics, asserting the public interest over the individual interest of creditors, and, therefore, reflecting on the analysis of economic viability of the judicial reorganization plan. (SIMIONATO, Frederico Augusto Monte, 1972 - Bankruptcy Law Treaty / Frederico A. Monte Simionato. - Rio de Janeiro, Forensics, 2008, p. 122).

7 "Law 11.101 / 05 must be interpreted from the point of view of its economic utility, like any Bankruptcy Law. In the recovery chapter, this interpretation must be even stronger. The judging body must know that the prerogative of the presentation of the plan is, of course, that of the debtor, and that the sieve of this plan is conditioned, solely and exclusively, to the creditors, insofar as the legal nature of the approval of the plan is concordat, by legal majorities". (SIMIONATO, Frederico Augusto Monte, 1972 - Bankruptcy Law Treaty / Frederico A. Monte Simionato. - Rio de Janeiro, Forense, 2008, p. 21).

However, not all debtors are able to handle the action, since it clearly consists of the socialization of business risks with existing creditors at the time of the measure, and such risk distribution cannot be done in favor of non-viable companies. unrecoverable.

In this way, only the activities that are still financially viable and that, once recovered, can return to society the losses and sacrifices expended for their rescue, should be used by the company's recovery institute.

In this line, the business debtor who identifies and assumes the situation of an economic and financial crisis can seek the processing of the judicial recovery measure, and the Judiciary Branch must, in this case, safely assess the viability demonstrated by the debtor. Viable, therefore, is the company that holds the set of certain elements, such as financial viability, importance and social relevance, labor and technology employed, economic size, consolidated exercise of the activity and maturity for the market, among others that require the presence. For the doctrine of Fábio Ulhoa COELHO, they are able to look for the company recovery institute, the business institutions that in fact and by law meet the conditions of viability to do so. See below:

> Only viable companies should be subject to judicial or extrajudicial recovery. In order to justify the sacrifice of the Brazilian society present, to a greater or lesser extent, in any recovery of a company not derived from a market solution, the business society that the postulates must show itself worthy of the benefit. It must show, in other words, that it is able to return to Brazilian society, if and when recovered, at least in part the sacrifice made to save it. These conditions are grouped in the company's viability concept, to be assessed during the judicial reorganization process or in the approval of the extrajudicial reorganization.
>
> (COELHO, 2011, p.404)

In the same vein follows the reasoning provided by Frederico A. Monte SIMIONATO, who defends the necessary examination of the company's viability as an assumption, the basis for the granting of recovery by the Judiciary. For this jurist, companies that demonstrate irrecoverability, unfeasibility, should follow the setback of the bankruptcy liquidation procedure, leaving to the auspices of the company's recovery institute only those debtors who demonstrate and convince their creditors especially that the activity undertaken is, surely, economically viable.

Here is the precise lesson of the doctrine in question:

> "The company should only be bailed out if it is still viable. Business societies that may demonstrate financial and economic fragility, without even being able to glimpse a serious possibility of recovery, should be declared bankrupt, for the sake of credit, which, in reality, cannot be dissipated in non-viable bodies either by their management incompetent or the volume of liabilities". (SIMIONATO, 2008, p. 129)

In addition, the magistrate, the judicial administrator and even the creditors are responsible for verifying the balance sheets, the recovery plan, in short, the company's effective viability, a fact that denotes due obedience to the Principle of Preservation of the Viable Company[8].

8 "This principle is the starting point for the application of Law 11.101 / 2005. The magistrate, together with the judicial administrator must verify, analyzing the balance sheets, the viability of that business activity. It is true that the application of the new legislation deserves caution, so that the spirit of the Law can be enforced, that is, the maintenance of the viable company, and the feasibility check must be evaluated, even preliminarily, in granting or not the processing of recuperation plan." (SIMIONATO, 2008, p. 130).

For the granting of the measure, the debtor entrepreneur must observe the assumptions dictated by Law 11.101 / 05, which are those proclaimed by article 48 of the respective norm.

The debtor must also explain in the initial petition the concrete causes of the crisis and the equity situation, instructing it with the accounting documents required by the rule of article 51[9] of the affirmed governing law.

Regarding the means of judicial reorganization, the legislator also listed, no less than 16 (sixteen) options offered to the debtor in crisis, these, launched in the text of article 50 of the normative rules of law 11.101 / 2005.

Professionals with proven aptitude should serve the debtor in choosing the bailout strategy, such as economists, accountants, administrators, market analysts and, for lawyers.

The recovery, as can be seen, has the scope of protecting not only the exclusive and individual interests of the entrepreneur, but rather, macro and collective and social interests, a reason that justifies an investigation and interpretation that meets the true intention and effectiveness of the recovery action, its related principles and the insolvency legal system itself.

The company cannot be considered as an activity organized solely in the interests of the entrepreneur's strictly individual interests, as being an asset of his exclusive property that does what he wants and desires, since the company today serves society as a pillar of its economic balance, social development.

Law 11.101 / 2005, sensitive to the social importance of the company and the harmful effect of bankruptcy on society, proposes a new interpretation and finalistic view in favor of the maintenance and preservation of the company. the serious and safe application of the company's recovery and, therefore, the preservation and maintenance of the productive nucleus. The proposed measure, once the case is processed, submitted to the creditors' analysis, the approval of the plan gives judicial recovery the legal nature of a novative judicial contract.

For jurist Maria Celeste Morais Guimarães, the procedural aspect of the recovery measure is highlighted in the definition, because, for such doctrine:

9 Art. 51. The initial petition for judicial reorganization will be accompanied by: I - an explanation of the concrete causes of the debtor's assets and the reasons for the economic and financial crisis; II - the financial statements related to the last 3 (three) fiscal years and those drawn up especially to instruct the request, made in strict compliance with the applicable corporate law and mandatorily composed of: a) balance sheet; b) statement of accumulated results; c) income statement since the last fiscal year; d) cash flow management report and its projection; III - the full nominal list of creditors, including those under obligation to make or give, with an indication of the address of each one, the nature, classification and updated value of the credit, detailing its origin, the regime of the respective maturities and the indication of the accounting records of each pending transaction; IV - the full list of employees, which include the respective functions, salaries, indemnities and other portions to which they are entitled, with the corresponding month of competence, and the breakdown of the amounts pending payment; ; V - certificate of regularity of the debtor in the Public Registry of Companies, the updated constitutive act and the minutes of appointment of the current administrators; VI - the list of the private assets of the controlling shareholders and the debtor's administrators; VII - updated statements of the debtor's bank accounts and their possible financial investments of any type, including in investment funds or in stock exchanges, issued by the respective financial institutions; VIII - certificates from the protest offices located in the district of the debtor's domicile or headquarters and in those where it has a branch; IX - the list, signed by the debtor, of all the legal actions in which he appears as a party, including those of a labor nature, with an estimate of the respective amounts demanded. § 1 The accounting bookkeeping documents and other auxiliary reports, in the form and support provided for by law, will remain at the disposal of the court, the judicial administrator and, upon judicial authorization, of any interested party. § 2 With respect to the requirement provided for in item II of the caput of this article, micro and small businesses may present simplified books and bookkeeping under the terms of specific legislation.
§ 3 The judge may determine the deposit in court of the documents referred to in § 1 and 2 of this article or a copy thereof. (BRAZIL, Law 11.101, of February 9, 2005. Available at: http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2005/lei/l11101.htm. Accessed on Aug. 20, 2020).

> Judicial recovery is a lawsuit aimed at remedying the debtor's economic and financial crisis, safeguarding the maintenance of the source of production, the employment of its workers and the interests of creditors, thus enabling the realization of the company's social function.
>
> (GUIMARÃES, 2007. p. 126)

In the definition of Alberto Caminã Moreira, r also envisions the idea of a contract to be signed between the debtor and his creditors, who are the addressees of the proposal contained in the plan. For that doctrine, judicial reorganization consists of the debtor's right to present his proposal to his creditors, a plan, which may or may not be accepted by them. It is not, therefore, a litigious measure, but a procedure whose cause for request is the proposal to overcome the crisis through the implementation of a strategic plan that will be analyzed and approved or rejected by creditors[10].

Joaquim Jorge Lobo affirms that judicial recovery has a nature and characteristics specific to Economic Law, since the rules that regulate it do not aim to resolve a conflict in the light of the ideal of justice, but rather to offer solutions, means and conditions for companies state of crisis can rebuild and restructure, so that it can return to fulfilling its economic and social function in the production chain[11].

The doctrine in question sees judicial recovery as an institute linked to Economic Law, notably because the recovery measure has the purpose of offering the company in crisis the means to facilitate the restructuring of the activity and not directly the solution of the case under the main idea of justice.

Marlon Tomazette, for his part, says the judicial recovery as a:

10 For Alberto Camiña: "In the judicial reorganization, there is no claim made against creditors, understood as the claim of a right against the defendant, so that the defendant can be submitted to him. The debtor's right, in judicial reorganization, is to present a proposal, to present a plan. The fate of the plan, however, is in the hands of creditors, who will be able to accept it, modify it or reject it. [...] Negotiation is the key word; and this negotiation, while taking place before the Judiciary, takes place without the intervention of the judge. The law does not provide for jurisdictional action for this purpose; even though the Brazilian judge has general powers of conciliation, and it is really emphasized by the doctrine. " (Ibid., P. 249-250).
For Joaquim Jorge Lobo, "although' complex act 'and' constitutive action ', judicial recovery has the nature and characteristics of an economic law institute, as a step to demonstrate. I join the doctrine, led, in the country, by Orlando Gomes, who maintains (a) that Economic Law is located in an intermediate zone between Public Law and Private Law, (b) to have a threefold unity: 'of spirit, of object, and method 'and (c) the rule of law is not guided by the idea of justice (principle of equality), but by the idea of technical effectiveness due to the special nature of the legal protection that emerges from it, in which general interests prevail and collective, public and social, which it collimates to preserve and serve as a priority, hence the publicity character of its norms, which materialize through 'prince costume', 'legal prohibitions' and 'exceptional rules'. In effect, the judicial recovery of the company is an institute of Economic Law, because its norms are not primarily aimed at realizing the idea of justice, but above all to create conditions and impose measures that allow companies in a state of economic crisis to restructure, even if with partial sacrifice of your creditors ". (LOBO, Jorge Joaquim. Company law in crisis: the new company recovery law. Revista Forense, v. 379, p. 119-131, May-Jun. 2005, p. 127-128).

11 For Joaquim Jorge Lobo, "although' complex act 'and' constitutive action ', judicial recovery has the nature and characteristics of an economic law institute, as a step to demonstrate. I join the doctrine, led, in the country, by Orlando Gomes, who maintains (a) that Economic Law is located in an intermediate zone between Public Law and Private Law, (b) to have a threefold unity: 'of spirit, of object, and method 'and (c) the rule of law is not guided by the idea of justice (principle of equality), but by the idea of technical effectiveness due to the special nature of the legal protection that emerges from it, in which general interests prevail and collective, public and social, which it collimates to preserve and serve as a priority, hence the publicity character of its norms, which materialize through 'prince costume', 'legal prohibitions' and 'exceptional rules'. In effect, the judicial recovery of the company is an institute of Economic Law, because its norms are not primarily aimed at realizing the idea of justice, but above all to create conditions and impose measures that allow companies in a state of economic crisis to restructure, even if with partial sacrifice of your creditors". (LOBO, Jorge Joaquim. Company law in crisis: the new company recovery law. Revista Forense, v. 379, p. 119-131, May-Jun. 2005, p. 127-128).

> Set of acts, the practice of which depends on a judicial concession, in order to overcome the crises of viable companies. Thus, we can establish the essential elements of judicial recovery: (a) series of acts; (b) creditors' consent; (c) judicial concession; (d) overcoming the crisis; and (e) maintaining viable companies.
>
> (TOMAZZETE, 2011, p.42)

The concept elaborated by the didactic author reveals judicial recovery as a procedure, judicial contract and, still, its teleological and principiological aspect.

3.1 STUDY ON THE LEGAL NATURE

In reading its legal nature, adherents of the privatist doctrine tend to affirm that the legal nature of judicial recovery is a judicial contract. Publicists, who see recovery as a public law institute, claim that judicial recovery is a procedural law institute (LOBO, 2005, p.126).

For Sérgio Campinho, judicial recovery is a novative judicial contract. It is a contract that is celebrated before the judiciary and, after granting the processing of the recovery action, as proclaimed in the norm of art. 59 of Law no. 11.101 / 2005, implies the renewal of credits prior to the request.

Tomazette, follows the same line that confers the legal nature of a contract to judicial reorganization, and further explains that the judicial performance present in the course of the reorganization action does not dismantle its contractual aspect, since the judge is merely a supervisor of the procedure.

The judiciary, therefore, does not impose recovery, it can only grant it if an agreement is reached between creditors. Therefore, judicial recovery is an agreement of wills between the debtor in crisis and his creditors, who manifest themselves together, through the assembly of creditors, since they have a common interest (TOMAZETTE, 2011).

In spite of the authority of the arguments about the legal nature of the company's recovery, the contractual aspect of the company's judicial recovery stands out, insofar as it, the institute, is examined alongside the legal elements that configure the private contract, and with the identification of points that coincide with them - recovery of the company and private contract.

The importance and value of other scientific legal constructions, which also define the legal nature of recovery, can obviously not be overlooked, but in a different way.

The procedural nature, by the way, is equally rich and well-founded, as long as it is built from the observation that judicial recovery is processed through the exercise of the right of action, subject to the state jurisdiction of the Judiciary Power, therefore, its nature is eminently procedural.

The contractual nature of the company's recovery institute, in turn, stands out from the existence of a viable company recovery plan, carried out in the presence of strategic preparation, presentation to creditors, deliberations, changes and approval (consensus) - volitional element.

The declaration of the will, general, free and consented, to contract a viable plan for judicial reorganization of the company, is a fundamental assumption of the legal institute. In this way, the contractual feature of the legal nature of the company's recovery is clear, as both

in this institute and in private contracts in general, the will agreement is a legal requirement enshrined both in terms of existence and validity.

In judicial reorganization, the debtor and creditors "sit down at the table" to effectively negotiate as to the mandatory ties that bind them, all of this, carried out before the state jurisdictional power, which provide security and validity to the effects that result from the recovery institute.

Therefore, there are coincident elements, of a contractual nature, in the scientific legal construction of the company's judicial recovery.

The law of obligations, governed by the civil code, completes and standardizes the content of private contracts in general, as these, the contracts, are essentially instruments for agreeing obligations, whether to do or not, to deliver or not, to satisfy or not. The obligations agreed upon in the context of corporate business operations are materialized in the contracts, which arise from voluntary, free and consensual declarations.

Furthermore, article 47 of law 11,101 / 2005, regulates the preservation of the company as a legal objective of the company's judicial recovery. Preservation, likewise, is a precept that also regulates contracts in general, insofar as the legal system enshrines the preservation of contracts as a normative postulate that guides the interpretation and execution of contractual obligations. In the recovery action plan, the approval of the plan, as it is known, produces a renewal of the obligations then entered into, an effect that is also characteristic of the private law of the obligations.

The law provides that:

> "Art. 59. The judicial reorganization plan implies a renewal of credits prior to the request, and obliges the debtor and all creditors subject to it, without prejudice to guarantees, subject to the provisions of § 1 of art. 50 of this Law".

In the same sense, the approval of the plan also binds the debtor to the obligations included in the plan, and if it fails to comply with any of them, the convolution of the bankruptcy recovery action is an effect already provided for by law.

The vigor of the law, and the well-established doctrine and jurisprudence, signed a consensus that the plan, once approved, must be strictly complied with by the debtor recovering, under the risk of his bankrupt recovery action being called upon. Also, if the procedural period of the action has passed, the non-fulfillment of the remaining obligation, in time and manner, justifies the reason for asking for filing for bankruptcy action. As can be seen, the plan is approved, or the recovering debtor complies with it, or its bankruptcy must be fatally decreed.

The law provides:

> Art. 61. The decision provided for in art. 58 of this Law, the debtor will remain in judicial reorganization until all obligations foreseen in the plan are fulfilled that are due up to 2 (two) years after the grant of the judicial reorganization.
>
> § 1 During the period established in the caput of this article, non-compliance with any obligation provided for in the plan will entail the convolution of bankruptcy recovery, under the terms of art. 73 of this Law.

> § 2 Bankruptcy is declared, the creditors will have reconstituted their rights and guarantees in the conditions originally contracted, less the amounts eventually paid and except for the acts validly practiced within the scope of the judicial reorganization.. (BRASIL, 2005)

However, in current times, when the world is overwhelmed by the economic effects caused by the pandemic of the covid-19, certainly companies will seek the existing alternatives to provide them with survival during and after the installed crisis, in particular, the action of recovery.

In addition, so many other companies that were already in a situation of recovery are now forced to find the balance point capable of guaranteeing viability for their legal existence, although in a factual scenario that is certainly very different from the one that existed when the recovery plan was built.

These companies are under the severity of the normative vigor of the bankruptcy and bankruptcy legal system, obliged to comply with a mandatory plan elaborated, discussed and approved in a totally different context. The chosen strategies, designed and elaborated to guarantee the viability and success of the recovery, are now challenged by a new, uncertain, unknown and unexpected world.

What treatment should be given to these business institutions? Decree its fatal bankruptcy under the literal legal basis of the normative text? Or, on the other hand, alongside the rules governing the preservation of the company and the contracts, the social function, the interests of creditors, the revision of the plan already approved could be allowed, including as a reinterpretation of the recovering institute.

In this line, again the acceptance of judicial reorganization also in its contractual nature is necessary for the theory of unpredictability, typical of private obligatory relations, to be applied to guarantee the recovering debtor the opportunity to revise the plan already approved, obviously, by means of participation of creditors even in a new meeting.

Based on the theory of unpredictability, in the hypotheses of non-compliance with obligations due to unpredictable and extraordinary events, such as the still immeasurable crisis of the covid-19, the judicial reorganization plan must be subject to the right of review, so that it is provided to the recovering of rebalancing the situation, and achieving the sacred objective, namely, the recovery of the company.

To subject the law 11,101 / 2005 to a new and current interpretive exercise, under the baton of constitutional guarantees established in the order, means to frame the actual factual framework of the circumstances to a modern interpretation and application of the recovery law, to allow the judicial review of the approved plan, through a new conclave and obedience to the rites and procedural guarantees.

By means of a fundamental foundation, built on the contractual legal nature of the recovery plan, the revision of the company's recovery plan would be allowed, under the joint and harmonious regulation of private laws, notably those of a contractual and mandatory nature, and the rules inscribed in the bankruptcy and bankruptcy legal system.

4. FINAL CONSIDERATIONS

In Brazil, a bankruptcy and recovery system has been in force for fifteen years, with the object of legally regulating business crisis conflicts, mainly in private activity.

Said system takes care of the bankruptcy process in a wide way, and also recovery of companies in crisis.

The set of these norms was instituted by a modern principiological content, instituted in the 21st century environment. It is, at fifteen years old, and already with directed jurisprudence challenged by a factual state overwhelmed by an unprecedented sanitary, health, financial and economic pandemic in the world.

In the previous lines inserted throughout this study, the intention was to demonstrate the strong normative construction of the theme, its historical, general aspects, and specific rules, these, brought to the challenge of the world that presents itself at this time. This is the greatest and sacred function of law, that is, to regulate socio-human conflicts.

This is the moment when the doctrine of law is dedicated to thinking about solutions, with well-founded support, capable of allowing the maintenance of companies, under the current and necessary re-reading of the system of laws.

Until today, the simple and unmotivated failure to comply with the obligations of the plan approved by the transmuted assembly, as the law says, is a conviction, almost in an automatic pass, for a company recovery project in a fatal bankruptcy liquidation process and for the closure of the activity.

The revision of the contracted obligations proper to the law of private contracts, can be applied in the recovery action, allowing another opportunity to overcome the recovering company, in the face of a new, extraordinary, and unpredictable world of things.

The proposal is nothing more, nothing less focused on the consecration of the principles and objectives of the institute, protagonists of this system now called into question, the preservation and social function of the company, zeal for the interests of creditors and maintenance of the source that produces jobs. review of the obligations contracted in the recovery plan, is based on the dialogue between the sources of civil law - obligations and contracts, with company law.

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