DEBTOR- FINANCING IN JUDICIAL RECOVERY AND COVID-19 PANDEMIA IMPACTS ON THE BRAZILIAN ENTREPRENEURS

FINANCIAMENTO DO DEVEDOR EM RECUPERAÇÃO JUDICIAL E OS IMPACTOS DA PANDEMIA DO COVID-19 PARA O EMPRESÁRIO BRASILEIRO

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ABSTRACT

Objectives: The instant work investigates the effects of the COVID-19 pandemia on Brazilians entrepreneur, through analysis of two premises: (i) in 2020, the number of judicial reorganization requests would increase exponentially; (ii) the legislative measures promulgated by law #14,112/2020 upon law #11,101/2005, especially, the financing to debtors under judicial reorganization, would be useful and effective to the utilization of judicial recovery as a means of maintaining and preserving the company.

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Methodology: The deductive method was adopted, as from document research, as well as from analysis of data collected by other official statistical surveys and economic measurements.

Results: It is appropriate to state that the sanitary measures for pandemia containment have deeply affected Brazilian entrepreneurs. However, the number of judicial reorganization requests has not increased, as expected, and the changes implemented upon bankruptcy legislation, as to debtor financing, have not yet proven efficient to foster the use of judicial reorganization.

Contributions: Despite legal incentives created on behalf of debtor financing under judicial reorganization, there still is a high reputational cost to the entrepreneur which avails itself of this tool, turning the credit granted to this grantee more financially burdensome, on account of regulatory motivations. Finally, it can be mentioned that a judicial recovery request implies, to the debtor, the taking up of several obligations representing a significant tranche of expenses to the entrepreneur in distress, thereby discouraging such requests.

Keywords: Pandemia; Coronavirus (COVID-19); Law #11,101/2005; Company crises; Judicial recovery; Financing.

RESUMO

Objetivo: *O presente trabalho investiga os efeitos da pandemia do COVID-19 para o empresário brasileiro, por meio da análise de duas premissas: (i) no ano de 2020, o número de pedidos de recuperação judicial aumentaria de forma exponencial; (ii) as medidas legislativas promulgadas pela Lei nº 14,112/2020 na Lei nº 11,101/2005, em especial, o financiamento à empresa do devedor em recuperação judicial, seriam úteis e efetivas à utilização da recuperação judicial como meio de manutenção e preservação da empresa.*

Metodologia: *Adotou-se o método dedutivo, a partir de pesquisa documental, bem como da análise dos dados coletados por outras pesquisas estatísticas e medidores econômicos oficiais.*

Resultados: *É correto afirmar que as medidas sanitárias de contenção da pandemia afetaram profundamente o empresário brasileiro. Porém, o número de pedidos de recuperação judicial não aumentou, conforme esperado, e as modificações implementadas na legislação falimentar, no que se refere ao financiamento do devedor, ainda não se mostraram eficientes para fomentar a utilização da recuperação judicial.*

Contribuições: *Apesar dos incentivos legais criados em prol do financiamento do devedor em recuperação judicial, ainda existe um alto custo reputacional para o*

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empresário que se socorre dessa ferramenta, tornando o crédito a este concedido mais oneroso, por motivações regulatórias. Finalmente, pode-se mencionar que o pedido de recuperação judicial importa para o devedor a assunção de diversas obrigações que representam uma parcela significativa de despesas para o empresário em crise, desestimulando o pedido.

Palavras-chave: *Pandemia; Coronavírus (COVID-19); Lei nº 11,101/2005, Crise da Empresa; Recuperação Judicial; Financiamento.*

1 INTRODUCTION

The present work investigates the effects of the covid-19 pandemic upon Brazilian entrepreneurs within a legislative context, as well as in a judicial recovery context in which company performance preservation is sought. In this scenario, in which several spectra may be analyzed, the impacts sustained by entrepreneurs within the pandemic, context the worsening of the liquidity crises already faced by some – even before the sanitary crises – as well as the liquidity crises brought forth by pandemic, which have affected several areas of the economy directly and deeply, thus interfering in business operations and timely compliance with tax, labor, contract liabilities, among so many others, shall be subject of analyses.

Two assumptions shall be tackled in order that the proposed target be reached: (i) the first one occurs in the sense that the assumption that the number of judicial recovery requests would exponentially rise, along the year 2020, on account of the losses faced by entrepreneurs, especially through the lockdown and blockage/circulation restrictions decreed by the state and municipal governments, which have hindered effective operation of commercial establishments and activities geared to the public in general; the second, that the legislative measures promulgated during the pandemic, especially the chapter dealing with financing to the judicial recovery debtor's company recently included by law #14,112/2020 in law #11,101/2005 shall be useful and effective to the recovery of an economic agency hit

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by COVID-19 or to activity upkeep of those which were already under a judicial recovery process, when the pandemic took global, unprecedent proportions[1].

Thus, this paper shall be divided into three parties: in the first, the rules passed by the Federal Government, by the State of Rio de Janeiro Government and by the Rio de Janeiro Municipal City Hall shall be analyzed, so that a picture may be made of the measures adopted in facing sanitary crises, at different levels of encompassment. The second part of the paper shall tackled proposed assumptions, that is, regarding actual increase in the number of judicial recovery request distributions and as to the impact faced by entrepreneurs with the enactment of several legal devices pertinent to the Dip Financing when compared to the U.S. legislation, wherefrom such devices were imported. The third and last part of the paper shall analyze each one of the devices of section IV-A from bankruptcy legislation (arts. 69-A to 69-F).

In order to gauge whether the assumption are proven or disproved, the research shall foresee: (i) analyses of connections between the legal measures implemented during the pandemic and the possible impact endured by entrepreneurs; (ii) the number of judicial recovery requests shall be measured by official indices as *Serasa Experian* and the determination of the increase in the number of the judicial reorganization requests shall be measured as from the comparison to be made between the numbers collected in the year 2009, when the coronavirus pandemic potential was still ignored in Brazil, and the numbers collect in the year 2020, when Brazil was already suffering the pandemic effects; (iii) finally, the devices dealing with debtor financing under judicial reorganization, and those newly- instated in bankruptcy legislation.

[1] The state of Rio de Janeiro and its capital – Rio de Janeiro- were elected for the instant presentation as they comprise a tourist hub - known worldwide – and a major center concentrating the headquarters of several corporations. Moreover, the city of Rio de Janeiro is the venue of the state Court of Justice, where specialized Corporate Courts were created, which facilitate specific data acquisition for scientific research, currently proposed. For analyzes purposes of expected growth in the number of distributions of judicial reorganization requests.

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This review has adopted the deductive method, as form document[2] search, as well as from analyzes of data collected for other surveys to referenced and analyzed for the targets proposed herein.

2 (SOME) LEGAL MEASURES ADOPTED FOR FACING COVID-19 PANDEMIA

The emergence of public health issues resulting from COVID-19 produced effects of global proportions in health, economic and social terms. All, without exception, were hit at some level: the population as a whole – without distinction of any social class – entrepreneurs, scientists and politicians. It is possible to say that, since the influenza pandemia[3] the world and its latter generations did not know that – and perhaps faced – the effects steamming from a pandemia.

Also, regarding impacts, several aspects of social life become temporally or permanently altered, markedly, on account of the closing of establishments, schools, shopping malls, show houses, movie theaters and limited opening hours (because working hours or there seating capacity) of supermarkets, drug stores, ferries, and leisure areas (squares, beaches and parks). Evidently, such measures arouse out of command issued by the Executive and Legislative Powers and, as concerns specifically Brazil, a continental country, each federation entity bars competences to handle certain subject matters. In this sense, The Federal Union, the States and the Municipalities act along different fronts by issuing rules to be complied with by the different bodies of Executive Power.

[2] Several pieces of news were published in major newspapers reporting and speculating on the increase of judicial recovery numbers, after the implementation of restrictive isolation measures in Brazil. As an example, one can mention the news disclosed by Revista Valor Economico about the number of judicial recovery requests in the month of May, 2020. (MOREIRA, 2020)

[3] During the World War I, in mid-august and beginning of September, 1918, some small pieces of news regarding a estrange disease started to circulate in the Federal Capital Newspapers, without, however, arousing great attention from public authorities and the population in general. Since May, Europe and Africa were afflicted by an epidemic epidemic disease, whose diagnoses was uncertain. Initially this malady ended up being mistaken for various other diseases, such as cholera, dengue fever and typhus. Only at the end of June, coming from London, news arrive that the ailment consisted of the flu or influenza, and which had spread to several points in Europe. It covered the world for eight months, killing between fifth and hundred millions persons and becoming the greatest enigma in history.

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Damaging conditions do not, simply, arise out of the COVID-19 disease spreading, but rather from governmental acts which have restricted the circulation of people and trade operations, while aiming to contain coronavirus spread. Thus, it is natural that these ruling acts (ordinances, provisional measures, resolutions, laws, decrees, and so on) to differently impact the most diverse branches of the economy as well as the economic agencies. If the retail trade, on the one hand, is deeply hit by the fall of its clientele, it is possible that other segments be, on the contrary, benefiting from these acts. It is interesting to mention, for example, the supermarkets, corporations, Corporate entities whose main activity is delivery services, as well as hospital supply material companies, surgical masks, gloves, ventilators, etc., whose demand remains overheated during the pandemia.

On the other hand, it is possible to state the same economic agents which take advantage of positive externalities, arising out of the pandemia, be target of the measures adopted by the public authorities and which place them in a fragile position. As an example, one can mention Law # 13,979 from February 6th, 2020, which addressed measures considered necessary for facing this public health emergency. This is stated according to item VII[4], art. 3º of the pertinent federal law, it would be allowed for the public authority to request assets and services from legal entities and natural entities, with late payment promises to be made by means of fair indemnification.

Such measures have become reality for several Brazilian economic agents during the pandemic, especially manufacturers of surgical gloves, masks and necessary inputs hospital equipment[5]. The same entrepreneurs which, at this fist moment could face an increase of income and consequent growth of business may suffer impacts caused by acts of the State or excessive burden in fulfilling their contract on account of the price increases of the prime material necessary in their productive

[4] Art. 3. The authorities may adopt, within the scope of their competences, so as to face the public health emergency of international importance arising out of the coronavirus pandemic, the following measures among others: […]; VII – requisition of assets and services from natural and legal persons, in which situation there shall be guarantee later payment of fair indemnification; […].

[5] The measure which shall be ultimately characterized, by something close to confiscation, with the distinction of promise of future payment, to be certainly operationalized by means of precatory note.

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process chain and of an act performed by the executive power, authorized by an exceptional and legal measures issued during the pandemic.

This and the other observations serve to demonstrate that the pandemia may act as an incentive to a certain branch of business; however, it may also be a catalyzer of a crisis in which not even funding or more informally, not even "new money" is capable of saving it or keeping its activities. In an ongoing judicial recovery process scenario, the sanitary crisis and its effects become extremely concerning for the debtors on account of the commitments taken up regarding the plan and the need to honor the credits not subject to recovery.

Legislative measures forwarded by the National Congress at their legislative level for COVID-19 pandemic containment shall be indicated hereunder.

Nonetheless, Provisional Measure #948, by means of which regulation was setforth on cancelation of services, reservations an event in the tourism and cultural sectors was established, supported by the State of Public Calamity, recognized by Legislative Decree #6, of March 20th, 2020, and by the public health emergency of international proportions on account of coronavirus (COVID-19). Some of the legislative measures sanctioned by the Government of State of Rio de Janeiro shall be commented.

State Decree #47.250 instituted as per its article # 2: (i) the use of respiratory protections masks at any public site, as well as, at private establishments with authorized collective[6] access operation; (ii) remote work as long as the nature of the activity is complied with, for public civil service employees who work in regions in which COVID-19 risk is considered moderate[7]; (iii) as per its 5th article and with the purpose

[6] As per § 1 of said provision the sites at which the use of masks is mandatory have been specified as thus: "[…] streets, squares, parks, beaches, passage collective and individual means of transportation, public offices hospitals, supermarkets, bakeries, bank branches, in addition to other commercial establishments […]"

[7] Regulating a remote mode for work Decree #46,970 of March 13th, 2020 was promulgated, by means of which it was established remote mode for work of public and contract service, and them set forth temporally the suspension of activities which could give rise to any type people crowding. This decree directly impacts the surrounds and interior the public offices where entrepreneurs have meticulously and intentionally chosen to install there restaurants, canteens, cafeterias, drugstores, clothing and shoe stores, beauty salons, and also public and private transportation sector, besides parking lots – all this related to people's circulation restrictions measures.

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of protecting collective interest, as well as acting and preventing contamination and in the fighting against COVID-19 propagation, suspension of the following activities was set forth throughout the Rio de Janeiro State: (a) events with public attendance and resulting crowding such as sports events with public attendance, shows, rallies, demonstrations; (b) visits to patients diagnosed with COVID-19 hospitalized at the public or private health system; (c) permanence of persons at beaches, lakes and public pools[8]; (iv) as per article 6, presential classes were suspended at public and private teaching network including upper education units, thereby following the regulation issued by State Education Secretary.

At this point – and rashly manner – one could challenge to what measure would the Brazilian entrepreneurs be impacted by the temporary closing of public spaces such as lake, beaches, parks and schools, as, when entrepreneurs are mentioned, one can imagine – brashly – that the legislators would be referring to a major automobile industry whose operation revolves on account of the control and automation technology, there being little or no human contact.

Contrary to reasoning which follows this logic, it is important to mention that 90% of the entrepreneur group is made up of microentrepreneurs such as microcompanies and small-sized companies[9]. Thus, when a school is closed the restaurants in its environs immediately suffer with the disappearance of its patrons, popcorn sellers, beaches, parks and lakes are closed, the concession stands and peddlers lose their sole consumer public, exactly those people who look for these environments. Economic and social effects are catastrophic and work as if in cascade effect.

The impacts suffered by entrepreneurs are widespread to the level that, upon this intricate webwork which is the market, a reduction of people circulation renders

[8] At this point it was contemplated that the measures indicated under said provision should be taken to effect through formalization by municipal administration, which should later report adoption of said measures to the Rio de Janeiro State Government, by the civil cabinet by State Secretariat.

[9] According to information released by SEBRAE there are in Brazil 6.4 million establishments, and, out of this total, 99% are micro and small enterprises ("MPE"). The MPE's account for 53.4% of the GDP (Gross National Product) of the commercial sector. In a national scale, small business represent 27% of the Brazilian GDP, 52% of contract jobs, 40% of salaries paid. Available in https://www.sebrae.com.br/. Access in March 18th, 2021.

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economic agency unable to comply with the obligations they have compacted. Thus, a liquidity crisis broght about by the closing a (single) restaurant may represent breach of payment of a product acquired by a wholesale supermarket which supplied the establishment with foodstuffs, employee layoff, tax defaults due quarterly, tax defaults and so on.

Among the hundreds of legislative measures adopted, 110 decrees promulgated by the Mayor of the City of Rio de Janeiro between the dates of March 12th, 2020 and March 11th, 2021 were analyzed and were selected those, in which it was possible to visualize in a certain manner, an impact upon the Rio de Janeiro entrepreneurs. Among the several adopted measures, Decree nº 47,282 from March 21st, 2020, enlarge the adoption of measures promulgated in other decrees determining the closing of schools as per article 1ª, III, a[10]. As commented previously, school closing impacts the economic agents operating in their environs.

On the other hand, Decree #47,375, April 18th, 2020[11], made compulsory the use of facial protection masks, as a complementary measure for reducing COVID-19 contagion. This measure is relevant, as it means incentive to facial mask

[10] Art. 1º the municipal executive power shall adopt the following measures for containment of the new coronavirus, COVID-19: […] III – Municipal Secretariat of Education – SME: a) closing of municipal schools until March, 27th; […] VI – Municipal Public Order Secretariat – SEOP: a) guidance to merchants acting at seashore kiosks, as to circumstances requiring closing of their activities, with live music presentations being prohibited; b) temporary suspension of operation of nightclubs, massage parlors and the like, craft fairs of the (The Solidary Carioca Economy Circuit), art fairs and peddlers; c) reduction of street market operating days, so that they work fortnightly. […] XIII – Municipal Treasury Secretariat – SMF: […] b) suspension of gyn center activities. […] XIV – Municipal Healthy Aging, Life Quality and Events - SEMESQVE: a) suspension of license granting for the holding off events which cause clustering of people, this being understood as those in which it not possible to preserve the minimum distance of one meter and a half between the participants, as well as those already granted, which generate the same effect; […] c) suspension of services at the third age gym centers. XV – Municipal Culture Secretariat – SMC: a) suspension of activities at movie houses, museums, theaters circuses, arenas, and cultural center of the municipality;

[11] Art. 1º Decree #47,282, from March 21st, 2020, determining adoption of additional measures, by the municipality for fighting the new coronavirus - COVID-19 - pandemia is enacted added to the following provisions: " The use of facial, known-professional masks is considered mandatory during personnel transit through public municipal assets and to service at authorized operation establishments, especially for: I – use of public or private passenger means of transport, II- performance of work activities at shared environments, in the public and private sectors; […] public assets are considered as: I – those of common use by people, such as lagoons, rivers, seas, roads, streets and squares; II- those of special use, such as building or landlots dedicated to services or establishments […]]

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manufacturers, which lends itself to demonstrating that a state of calamity is also able to foster encouragement to business activity and overheating certain activities.

Contrary to eventual expectations that only positive incentives and externalities have been created on behalf of economic agents manufacturing hospital material, - and along the same line and set forth by Federal Law # 13.979, July 1st,2020 –, Decree # 47.561/2020 was passed by means of which public utility for purposes of expropriation[12] was declared and acknowledged, of the following moveable assets comprising the furnishing of emergency medical centers: (i) Fowler beds (a bed commonly used on hospitals, with foldable structure), (ii) operating table, (iii) chest coupled with meal table, (iv) two-step ladder, (v) mattresses, (vi) gurney, (vii) defibrillator, (viii) anesthesia set, (ix) electrical scalpel, and (x) ventilator.

Despite acknowledging that a state of exception requires unpleasant and extreme decisions, criticism must be made to said decree which had not even established a term for payment of the moveable assets possibly expropriated, it has subjectively forecast that the calculation for the amount payable for expropriation for said assets would be appraised by the Special Appraisal Committee[13].

This must be recognized: in a pandemic scenario, the difficulties faced by entrepreneurs are intricate and complex. We shall analyze hereunder the data related to the expected increase and judicial recovery request distribution.

3 THE COVID-19 PANDEMIC IMPACT UPON THE ENTERPRENEURS

The official indices indicating the number of the judicial recovery request distribution reveal themselves to be dissociated from the expectation disclosed by economists. It is determined that, at least until the month of March of 2021, there was

[12] Art. 1 Public utility is declared, for expropriation purposes, the moveable assets described below, expropriate for fighting the new coronavirus: […]
[13] Art. 2 Special Apraisal Comittee shall be constituted for aprasing the *quantum debeatur* regarding the expropriate assets.

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no occurrence of massive numbers of judicial recovery requests. This data may initially be ascertained through the index made available by *Serasa Experian*[14].

According to said economic indicator, it may be affirmed that there has been no increase in the number of the judicial recovery requests when data from 2019 and the year of 2020 are compared. Contrary to all expectations published by newspapers and specialized professionals, the spreadsheets made available by *Serasa Experian*, demonstrate that 1,387 judicial recovery requests were distributed in the year of 2019, whereas 1,179 judicial recovery requests were distributed in the year of 2020, that is, a slightly lower number than that observed in the year of 2019. This data is ratified by other means, as shown ahead.

In the event promoted by the Instituto Brasileiro da Empresa – IBDE, lawyer, professor and researcher Taissa Salles Romeiro has presented statistical and detailed outlook on the issue. The survey was delimited to collecting intended data between March 20th, and June 10th, 2020, geographically delimited in the Rio de Janeiro State Capital Judicial District.

With this delimitation, the research sought to analyze the number of judicial recovery requests by third parties and of self-proclaimed Bankruptcy, Distributed before the seven specialized Corporate Courts of the State of Rio de Janeiro Judicial District. The numbers of processes were forwarded to the researcher by the notary offices of the seven business Courts upon the professor's request and authorized by each of the head judges of the pertinent specialized courts. Firstly, professor Taissa reports that the number forwarded by the Court Offices caused a certain amount of awe because they show themselves to be relatively high in comparison with the numbers of the year of 2019, a fact which brought forth a preliminary impression that, in three months the pandemic impact had already brought forth consequences upon Rio de Janeiro Judicial Power, thereby exponentially increasing the number of judicial recovery requests.

[14] Indicadores Econômicos Serasa Experian. Falências, Recuperações judiciais e Concordatas: Apuração mensal do total de recuperações judiciais requeridas, deferidas e concedidas. (SERASA EXPERIAN).

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Said research was named **Subnotification Judicial Recovery Requests of the Rio de Janeiro Judiciary Power**[15], drawing up a parallel with CoVID-19, as, at the beginning of the pandemic (between the months of march and June of 2020) a serious failure in the number of infected persons reported to inspection bodies, on account of health units disorganization around forwarding of notification of detected COVID-19 cases[16]. This remark about the distortion of number is relevant because disclosing such data causes an important impact upon measures adopted by the legislative, judiciary and executive powers on account of the assets to be protected: life as well as the right to exercising economic activity, which are constitutionally protected.

Professor Taisssa Romeiro's research was divided in two parts: the first, taking into account the numbers forwarded by Court offices on March 10th, when Court work was halted Court operation suspension started the data and June 20th, the end of the first Court activity suspension.

In the course of her research, Professor Taissa Romeiro established that there was a distortion in the numbers reported as judicial recovery requests distribution between the Corporate courts. This bias is brought about the attorneys themselves. Usually, mistakes happen when lawyers distribute credit qualification or credit blocking or even bankruptcy and extrajudicial recovery plan ratification requests, but this indicates in the system that it comprises a judicial recovery request, which causes the process to be posted in the Court system as if it were a judicial recovery. Even the court office may reclassify these requests internally. The reported data remain biased on account of a mistaken initial registration. The same error is found upon distribution

[15] As can be seeing further ahead, the denomination provided by Professor Taissa Romeiro has included irony on the theme, because her research reveals a serious information processing error regarding the number of judicial, extrajudicial and bankruptcy requests in the Rio de Janeiro Judiciary Power.

[16] Subnotification of deaths by COVID-19 was object of a cientific study which concluded: "(…) formal start of the epidemic in Brazil, only São Paulo presented an excess of deaths, although of low magnitude and among man, whcihc may be related to subnotification of debts by COVID-19. Other studies, in different regions of the planet, have also suggested a possible subnotification of deaths by COVID-19 especially among the elders. (ORELLANA, CUNHA, MARRERO, MOREIRA, LEITE, HORTA, 2020, p. 11)

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of extrajudicial recovery plan ratification and on bankruptcy requests (required by creditors, or self-bankruptcy requested by the Debtors themselves).

By analyzing the numbers received, Professor Taissa determined that only in the year of 2019, the seven Corporate Courts in Rio de Janeiro had received 1,851 judicial recovery requests, 60 bankruptcy filings and 38 extrajudicial recovery plan ratification requests, distributed as thus: (i) 72 judicial recovery requests, then 10 bankruptcy requests and 1 extrajudicial recovery plan ratification request before the 1nd Corporate Court; (ii) 15 judicial recovery request and 10 bankruptcy filings and 1 extrajudicial recovery plan ratification request before the 2nd Corporate Court; (iii) 18 judicial recovery request, 5 bankruptcy filings and 1 extrajudicial recovery plan ratification request before the 3rd Corporate Court; (iv) 10 judicial recovery request and 9 bankruptcy, before the 4th Corporate Court; (v) 33 judicial recovery request, 14 bankruptcy filings and 1 extrajudicial recovery plan ratification request, before the 5th Corporate Court; (vi) 6 judicial recovery requests and 6 bankruptcy filings before the 6th Corporate Court; and (vii) 1,697 judicial recovery requests, 66 bankruptcy filings and 35 extrajudicial recovery plan ratification requests, before the 7th Corporate Court.

Conversely, in the year of 2020, until June, 10th, the seven Rio de Janeiro Corporate Courts had already received 1,236 judicial recovery request, 28 bankruptcy filings and 31 extrajudicial recovery plan ratification requests, thus distributed: (i) 46 judicial recovery requests and 3 bankruptcy filings, before the 1st Corporate Court; (ii) 9 judicial recovery requests, 1 bankruptcy filing and 1 extrajudicial recovery plan ratification, before the 2nd Corporate Court; (iii) 10 judicial recovery requests and 3 bankruptcy filings, before the 3nd Corporate Court; (iv) 13 judicial recovery requests and 4 bankruptcy filings, before the 4th Corporate Court; (v) 32 judicial recovery requests, 7 bankruptcy filings and 1 extrajudicial recovery plan ratification request, before the 5th Corporate Court; (vi) 9 judicial recovery requests and 6 bankruptcy filings, before the 6th Corporate Court; and (vii) 1,117 judicial recovery requests, 4 bankruptcy filings and 29 extrajudicial recovery plan ratification, before the 7th Corporate Court.

Professor Taissa Romeiro pointed out that prior to carrying out any qualitative analysis of these numbers, she had already perceived a certain bias regarding the

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reports printed by the Rio de Janeiro Court of Justice system, as a free distribution process would not allow for such a huge discrepancy between the number of recovery requests distributed on behalf of the 1st and 7th Corporate Courts to the detriment of the others (2nd to 6th Corporate Courts). As previously commented, the justification found for such distortion is explained by the behavior of lawyers who, upon performing registration of such petitions, equivocally registered them in the system the nature of the procedure which is being posted[17].

This imbalance found in the numbers of processes distributed among the Corporate Courts is justified by the fact that Varig's bankruptcy suit[18] is ongoing before the 1st Corporate Court of Rio de Janeiro, and which still receives dozens of credit qualifications; the judicial recovery of Grupo Enseada[19] which bears thousands of creditors; and the Grupo Eisa[20], proceedings which usually receive a great number of credit qualifications. On the other hand, before the 7th Corporate Court, this expressive process distribution number is justified by the fact that Grupo Oi Telemar Judicial Recovery[21] is ongoing before this Court, and which receives dozens of credit qualifications daily.

Upon analyzing in detail, the data which it was able to consult, with the help of the 1st Corporate Court Judge, Professor Taissa Romeiro concluded that even undergoing internal check by the Court of Justice clerks, some processes mistakenly follow classified in the system, but at an infinitely lower order of grandeur, which allows the researcher to determine each one of the cases to report the result of her research.

[17] At this point it relevant to comment that, prior to the existence of an electronic process distribution of any processes was done in person before the PROGER of the State of Rio de Janeiro Judicial District. In this system the Court of Justice clerk himself received the petition inserted relevant information in the system and pointed out the nature of the procedure which was being filed. Currently the work, which was previously performed by a clerk is remotely provided by attorney himself, at his office, or, from home, using his computer, to promote electronic distribution of a process. As can be observed by the numbers brought by Professor Taissa Romeiro, lawyers themselves contribute to a distortion in the numbers reported by system.

[18] Is it important to clarify that, when it had bankruptcy decree Varig operat with the Flex flag of and of two other group companies: Rio Sul Linhas Aéreas and Nordeste Linhas: Bankruptcy n. 0260447-16.2010.8.19.0001, M.F. de Rio Sul Linhas Aéreas S.A. and others ("Varig").

[19] Judicial reorganization n.0248791-47.2019.8.19.0001, Enseada Indústria Naval S.A. and other.

[20] Judicial reorganization n. 0494824-53.2015.8.19.0001, EISA - Estaleiro Ilha S.A.

[21] Judicial reorganization n. 0203711-65.2016.8.19.0001, OI S.A. and others.

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Following this second triage, it was concluded that, of the 46 supposed requests for judicial recovery, none corresponded to an actual request, and of the 3 bankruptcy requests only 1 corresponded to a bankruptcy request before the 1st Court[22]; (ii) before the 2nd Court, where, in theory, 9 judicial recovery requests had been distributed, no request effectively existed within the period assigned for the survey, with the filing of a single bankruptcy request being confirmed; (iii) before the 3rd Court, of the 10 supposed judicial recovery requests, no request was actually filed within the period and, of the 3 supposed bankruptcy requests, only 1 corresponded to a bankruptcy request[23]; (iv) before the 4th Court, of the 13 lawsuits filed, only 1 comprised an actual judicial reorganization request[24] and, of the 4 supposed bankruptcy requests, only 1 was confirmed; (v) before the 5th Court, of the 32 process distributed, only 1 comprised a judicial recovery request[25] and no bankruptcy request, from those 7 initially appointed was confirmed; (vi) before the 6th Court, to where, apparently, 9 judicial recovery requests were forwarded, no request actually existed within the period and, of the 6 supposed bankruptcy filings, only 1 corresponded to a bankruptcy filing; (vii) before the 7th Court, of the supposed 1,117 judicial reorganization requests, no request actually existed within the period and of the 4 supposed bankruptcy filings only 1 corresponded to a bankruptcy requests.

Thus, although the initial numbers seem to be alarming, only 2 judicial recovery requests were distributed in the period set forth for the survey (March 10th to June 20th, 2020), before the Corporate Courts, as well as 6 bankruptcy requests, all brought by labor creditors. Survey results may cast doubt upon the accuracy of the reports by means of which it was reported that the numbers of judicial reorganizations and bankruptcy requests had increased by around 60% when compared with 2020. This data bias, as warns, Professor Taissa Romeiro, may cause political decisions to be taken in, brashly, or even mistakenly, such as, for example, approval of legislative

[22] It is important to mention that SILIMED Judicial recovery request was found, distributed on 06 March, 2020, therefore prior to the period selected for research.
[23] It should be mentioned that LEADER MAGAZINE judicial recovery request was found, distributed 04 March, 2020, /03/2020, therefore prior to the period selected for the research.
[24] Judicial reorganization request of João Fortes distributed on 27 April, 2020.
[25] Judicial reorganization request of Universidade Cândido Mendes.

measures created to remedy the supposed increase in the numbers of the judicial reorganizations' requests, which may be inflated (as it actually happens in the Rio de Janeiro Judicial District) on account of data processing error.

3.1 POSSIBLE MOTIVATIONS RELATED TO THE LOW NUMBER OF JUDICIAL RECOVERY REQUESTS DISTRIBUTED AND IRREGULAR ESTABLISHMENT CLOSING

It may be considered that the effects faced by the Brazilian entrepreneurs, on account of the sanitary measures of social isolation before temporary closing of establishments, more business breakages and judicial recovery requests would appear during the pandemic. However, this assumption is difficult to confirm as, in Brazil, several entrepreneurs practice what is known as the irregular closing of these establishments and, therefore, they do not always provide the regular winding up of their activities or carry forth company dissolution. This irregularity occurs implicitly because regular winding up measures are bureaucratic and depend on compliance with measures implying in costs which possibly, an entrepreneur would find himself in conditions to pay.

This is stated because the legislators have clearly addressed the question of winding up of the company, the act subsequent to any of the causes of company dissolution should lead to its liquidation[26], so that, following, its extinguishment may be possible, in case no creditors have subsisted. And, despite article 105 of LRF[27] contemplating a debtor's obligations in an economic-financial crisis confessing

[26] Thus, once the company is dissolved on account of one of the assumptions envisaged under art. 1,033 of the Civil Code ("CC") liquidator should be appointed to promote the liquidation, as contemplated under art. 1,102 of the CC who in turn should: (i) raise balances, (ii) realize liabilities, (iii) render accounts. Once liquidation is completed, the company is extinguished, and the extinguishment minute must be filed with the State Registration Body as per art. 1,109 of the CC. It is important to mention that it is the liquidators obligation to state bankruptcy if this is understood as necessary, according to item VII of art. 1,103 of CC.

[27] Art. 105. A debtor under economic-financial crisis which deems it is not able to meet the requirements to request its judicial reorganization, should request its bankruptcy to the Court, by presenting the reasons for impossibility to proceed with its corporate activity, together with the following documents: […]

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bankruptcy, there is not, in the Brazilian legislation, a corresponding section for failure to comply with this legal command, it being necessary to use the trustee's accountability tools[28].

Even in light of provisions of art. 9 of Complementary Law #123/2006, by means of which it is envisaged that the constitution or extinguishment of the entrepreneurs sited in said legislation there may also occur that, pending regularity of tax, social security, or labor liabilities, either main or ancillary, did not set apart the obligation that, once dissolved, promote there liquidation, in compliance with obligations listed under the civil code, aiming to "finalize company businesses, realize assets, pay liabilities (…)"[29]. In short the correct reading of sad provision is performed in the following manner: microenterprises and smallsized companies are compelled to promote liquidation when seeking to regularly terminate their activities, but are not compelled to present a debt clearance certificates to secure said termination.

As the majority of the Brazilian entrepreneurial class is comprised by microenterprises and small sized enterprises, exactly the structures most impacted by the pandemic, the formalities for promoting regular winding up are rarely met. This indicates that even after suffering direct impacts, on account of social isolation measures, the entrepreneurs are not using the judicial recovery tool to prevent bankruptcy. Two main reasons are presented as follows:

1º) A high reputational cost exists for the entrepreneur who files a judicial recovery cost in Brazil, as the financial institutions – with very rare exceptions - do not provide new credit to these entrepreneurs. This is due, quite possibly to the need of

[28] Several paths may be adopted, as foreseen by legislation under art. 158, II of law # 6,404/1976; articles 1,015 and 1,016I of the civil code, and article 82 of LRF in case administrators responsibility is sought for failing to perform the legal duty of requesting bankruptcy.

[29] In the word of Paulo José Carvalho Nunes the: "The "extinguishment" according to the terms proposed by legislation under discussion that is, Complementary Law #123/2006, with language given by Complementary law # 147/2014, comprises only an assumption for dissolution. (…) **Alas, with the company dissolved, "it is the administrators duty to immediately provide the liquidators appointment, and restrict on management of businesses which cannot be postponed" (…). Therefore, the liquidation phase is immediately ushered in. Liquidation which is mandatory, should bare as parameters, in addition to ultimating businesses which cannot be postponed, and liability payments, then these, that is, debt payments be performed in respect to the rights of preferred creditors.** (intelligence from articles 1,036, 1,103, 1,105 and 1,106, all from the Civil Code.)" (NUNES, 2015).

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classification at the "H" level, the credit granted to corporations submitted to a judicial recovery process, as envisaged under resolution number 2,682/1999 by the National Monetary Council[30]. Also, this conclusion stems from the fact that, once the judicial recovery request processing is granted, the credits which are submitted to the procedure are suspended at least for 180 days, while the effects of the stay period last, as they arise out of the granting itself[31].

According to item VIII, of art. 6 of said Resolution[32] this recommendation would render mandatory the provisioning of 100% of the amount loaned as a guarantee of the financing operation. Obviously, the regulatory disposition fails to arouse interest on the part of financial institutions, as the compulsory provisioning reserve represents a return lower than that accrued in case funds were available in the market[33]. Moreover, judicial recovery failure implies in changing the procedure into bankruptcy which would render the possibility of credit recovery even more improbable and difficult.

For the entrepreneur, the remaining alternative is seeking credit before the Investment Funds in Credit Rights which usually remunerate the credit granted on behalf of the Debtor under Judicial Recovery at a rate equivalent to that practiced by financial institutions, or even more aggressive, in considering risk exposure by financing a Debtor under judicial recovery.

[30] Art. 4º Operation classification as per risk level dealt with by art. 1 should be reviewed, at least: I – monthly on occasion of balance sheet and balance issuances, on account of the delay determined upon payment of main trench or charges with the following being complied with: g) delay greater than 180 days: H risk level.

[31] Art. 6º bankruptcy decreeing or granting of judicial recovery processing implies: [...]
II – suspension of foreclosures filed against the debtor, including those of the joint partner private creditors, relating to credits or liabilities subject to judicial reorganization or bankruptcy;
III – Voidance of any manner of retention, seizure, lien, attachment, search and seizure and judicial or extrajudicial constriction on debtor's assets, stemming from judicial or extrajudicial demands whose credits or obligations are subject to judicial reorganization or bankruptcy.
§ 4º On judicial reorganization the suspension and prohibition dealt with by item I, II and III of the heading of this article shall last for a period of 180 days, counted as from reorganization processing granting, extendable for an equal period, once under exceptional character, as long as debtor has not been caused termination of time period.

[32] Art. 6º The provision to face doubtful liquidation credits should be constituted monthly, and cannot be shorter than the sum of application of percentages mentioned hereunder, at no loss to the liability of the administrators of the institutions by constitution of provisions at amount sufficient to face probable losses in credit realization: VIII – one hundred percent (100%) on the value of operations classified as risk level H.

[33] Ivo Waisberg's and João Roberto F. Franco's analyses on bnaking provision and judicial reorganization published by Jornal Valor Econômico is extremely interesting.

The higher the risk finance agent's exposure, the higher will be its remuneration by it, as required from the Debtor which takes out a loan. This reality depicts the bad treatment that bankruptcy legislation has addressed to the creditor which has made available capital funds on behalf of the entrepreneur under judicial reorganization as per art. 67 (privileged credit upon bankruptcy, but subject to order of preference by art. 83). Until January, 2021, the financing agent which granted credit on behalf of an entrepreneur under judicial reorganization would find itself in the fifth place of the priority line among the privileged credit as per art. 84, item V of Law # 11,101/2005 in its original language. [34]

2º) The second reason which may be established for low judicial recovery request demand finds its answer in the cost entailed in the procedure. This so happens because, by filing its judicial recovery request, a Debtor must: (i) provide extensive account information, whose cost may be important in case accounting books are not duly complied with; (ii) attach to the complaint dozens of certificates proving fulfillment of requirements envisaged under art. 51 of LRF; (iii) pay lawyers' fees of the office which shall render advice to the entrepreneur, usually are relevant expense to be taken into consideration prior to filing of request; (iv) pay fees due to the judicial administrator, which become a fixed expense, as payment is made in installments on behalf of the Court-appointed inspector; (v) pay rates due on judicial reorganization request distribution date, which naturally reach the highest judicial fees, as the judicial recovery request should be assigned the sum of credits submitted to judicial reorganization effects. Lastly, but not least, it is possible to credit to the lowest judicial reorganization tool, and excessive optimism of debtor company administrators, added to the fear faced before the procedure which represents – except for – waiver approval by the

[34] The current language of art. 84, as provided by law #14,112/2020, the amounts actually delivered to a debtor under judicial reorganization by the financing agent, on account of the performing of financing contracts authorized by the judge, following opinion by the creditor Committee, shall also be considered privileged credits but at a second position in the current order, in second place only regarding amounts relating to expenses which early payment shall be mandatory to bankruptcy administration including the possibility of provisional continuation of debtor's activities, and by labor credits of a strictly salary nature due three months prior to bankruptcy declaration, up to the limit of five minimum salaries per worker. (Art. 150 and 151 of LRF).

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creditor Committee itself – a no-return road which may imply conversion of the restructuring attempt into bankruptcy.

Some may argue that costs involved in a judicial reorganization request are not relevant for a major company which needs to avail itself of a judicial reorganization request in order to restructure its liabilities and its activity. Such kind of argument may be challenge two lines of reasoning: (i) the first refers to the fact that major companies do not comprise the majority f the Brazilian entrepreneur class as commented by subitem 1.2 of the instant article through presentation of SEBRAE numbers; the second argument is posited in the sense that, the bigger the company, the more probable the number of creditors involved is, and the creditor and the credit submitted to judicial recovery. Through this equation, it is possible to state that the judicial administrator's fees, and, certainly, the fees of the lawyers advising the debtor under judicial reorganization, increase proportionally with the work involved in the project, being, however, a relevant expense to be taken into account by small, medium or major entrepreneurs.

In view of above-mentioned scenario, legislators have attempted to implement significant changes through bankruptcy legislation by means of law #14,112/2020. It may be considered that the most relevant change in the sense of encouraging use of judicial reorganization occurs with the inclusion of section IV-A in bankruptcy legislation. Said section contains six new provisions entirely dedicated to debtor financing under judicial reorganization (viz): art. 69-A, inserting DIP financing into bankruptcy legislation to regulate the loan granted to debtor under judicial recovery; (ii) art. 69-B bestows legal security to the financier, especially because it limits the appealability of the decision authorization DIP taking, thereby keeping priority of the credit granted on behalf of the debtor as well as the sound guarantees presented for safeguarding amounts actually handed to the loan taker; (iii) art. 69-C deals with the possibility of the institution subordinated guarantee over preexisting guaranteed real right; (iv) art. 69-D envisages priority treatment regarding the financier in case judicial recovery is converted into bankruptcy with the preservation of the constituted guarantees regarding amount effectively rendered to debtor; (v) art. 69-E bestows legal security to financing agent by referring to a list of parties related to debtor which shall

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be authorized to grant loans, with the benefits dealt with by section IV-A being extended to them; finally, (vi) art. 69-F contemplates the possibility of the debtor itself instituting guarantees for loan-taking, thereby exceeding the voidance contained under art. 66 of LRF.

Even though insertion in a better position in the order of payment of privileged credits and the positivation of rules for DIP financing contracts are welcomed by distressed entrepreneurs, with a certain degree of optimism by specialists (judges, judicial administrators, attorneys, and consultancies) which operate in the insolvency area there is still a long way to go. Effectiveness of these provisions linked to financing may only be measured after effective adherence of financial institutions and Investment Funds in Creditor Rights and investment Funds to legal tools which start providing them a priority treatment in payment of the counterpart by finance granting. Towards this, we find the comment by Leonardo Adriano Ribeiro Dias:

> Credit concession by financial institutions, although regulated by specific provisions to each operation, bears three essential elements, as follows: (a) a credit limit which same bank may grant to a loan taker; (b) banks liability to follow good banking practices, lending to those able to pay and; (c) bank guarantees, through competition that credit will be available to those which needs. (DIAS, p. 80).

The author believes that credit granting draws all stakeholders, related to the entrepreneur in a judicial reorganization, for providing an optimistic message regarding actual recovery of the economic agent. (Dias, 2014, p. 85)

Some questions should be asked under these perspectives: even if all factors (social isolation measures, suspension of establishment operations, and changes to bankruptcy legislation) were supporting that the number of judicial recovery requests increase, why did this not happen? Would these demands be backlogged? The changes promoted by Law # 14,112/2020 have not been enough to create the expected incentive? Such questions will be dealt in the following section.

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4 DIP FINANCING UNDER LAW #11,101/2005

If, until 2020, the treatment meted out to financing creditors was, in practice, of great indifference, we can currently say that the alterations implemented by law #114,112/2020 are laden with fine intentions and tools which seek to encourage Debtor Financing upon Judicial Recovery.

The path trodden so far not only dates from the last bankruptcy legislation entirely reformed in 2005; it consists of decades of bankruptcy legislation evolution, including import of foreign legislation provisions. As an example, one can mention the protection provided by the legislators to the credit derived from Exchange Contract Advancement) protected as per § 3º, art. 75, law 4,728/1965[35].

Such provision was even ratified by the Higher Court of Justice, in 2004, through publication of Precedent 307[36], aiming at addressing privileged treatment to ACC credit, as per art. 75, which regulates the capital market. Such precedent bore as effect making the ACC credit have priority in the order of payments upon bankruptcy contemplated by decree law 7,661/1945 (revoked decree law). With the publication of Precedent 307, it became clear that ACC creditor was paid prior to the creditors with real guarantee rights, as per art. 102 of the revoked decree law[37].

In current legislation, ACC credit remains privileged because it is note submit to judicial reorganization effects as per term of art. 49, § 4º[38] of LRF and upon bankruptcy, said creditor may request reimbursement as per art. 86, II of LRF, which

[35] Art. 75 the foreign Exchange contract, as long as protested by a competent officer title protesting comprises document sufficient to request executive action. § 3º In case of bankruptcy or receivership a creditor may request reimbursement of amounts advanced, refer to under the previous paragraph.
[36] Precedent 307: foreign exchange contract reimbursement, upon bankruptcy, should be met prior to any credit.
[37] Regarding this point, it is pertinent to record that as STJ Precedent 307 bears its reason of existence grounded on the capitals market law. It is evident that such was impaired when Law 11,101/2005 was enacted which provided for payment of strictly wage related credits due in the three months prior to bankruptcy decreeing as per art. 151 of said legislation. And so that there shall be no doubt on this reasoning, it is a good idea to keep in mind that the legal norm prevails over the Precedent, markedly when the rule at issue (Law #11,101 of February 9, 2005) was enacted following publication of Precedent 307 (dating from December 6th, 2004) which a parameter the capitals market law which, in turn, dates form the 1960.
[38] Art. 49. All credits existing on request date, albeit not due, are subject to judicial reorganization. § 4 the amount referred to under item II of art. 86 of this law shall not be subject to judicial reorganization effects.

implies to say that, in order of preference for payment in bankruptcy, the ACC creditor would be the third entity in the line, as foreseen by art. 84, I-C of LRF[39], immediately below Section IV-A financier.

Still dealing with biased expectations on distribution of judicial reorganization requests it may be considered that, despite the legislators' having included an entire section dedicated to debtor financing under judicial reorganization, there occurs great legal insecurity as to changes implemented by law # 14,112/2020. One of these changes deals with the possibility that a creditor presents an alternative to the judicial recovery plan as per art. 6, § 4-A in case the *stay period* term envisaged has expired runout.

On the other hand, one can understand that the legislators' approach to credit granting market does not change the economic prospect that these agents bear regarding debtors under judicial reorganization. This so happens because, in the *Doing Business Index* is that Brazil's credit recovery reputation is low, as well as credit granting on behalf of debtor under judicial recovery is remunerated at a very high cost to the entrepreneur.

The World Bank Report Doing Business of 2020 reports that an average of 31.2% in Latin America and the Caribbean credit is recovered, and, on the other hand, an average of 18% is recovered in judicial reorganizations. Regarding high-income countries OECD members, a credit recovery rate of 71.2% is achieved. These numbers show that financing acquisition in Brazil is a Herculean task for a debtor which comes into an economic and financial crisis. [40]

Besides the difficulties mentioned by the author, which indicate a justification for the hesitation by the entrepreneurs to use a judicial reorganization request, there exist legal disincentives for the financing agent to grant credit to the debtor. This

[39] Art. 84. The following shall be considered unsubmitted credits and shall be paid in advance over those mentioned under art. 83 of this law in the order as follows, those relating to: I-C credits in cash object of reimbursement as envisaged under art. 86 of this law.

[40] Former Minister of the Treasury, Mailson de Nóbrega, confirm this information by commenting that the Brazils credit recovery rate would be only 13% and that banks take around four years to recover their credits, whereas in the United Kingdom, the average recovery rate is 89%, in a one year and a half term. The minister confirms the impress – already reported by economists– in the sense that the Brazilian judiciary Power tends to favorable bias to the debtor, which causes legal insecurity on financiers as well as making credit costlier. (CORREIO BRAZILIENSE, 2020)

disincentive shall be better analyzed below, together with the verification of legal provisions which, in theory, have joined bankruptcy legislation to encourage financiers to grant credit on behalf of the debtor in judicial recovery.

4.1 THE (DES)INCENTIVE BESTOWED BY PROVISIONS LINKED TO DIP FINANCING

As presented in subsection 2.1, Law # 14,112/2020 has inserted, under bankruptcy legislation a section entirely dedicated to debtor financing under judicial recovery with seven new articles on the theme. Such kind of financing is usually mentioned as DIP Financing (*debtor-in-possession-financing*), in which a debtor in judicial reorganization which obtains a loan from a financing agent. In terms contemplated by art. 69-E of LRF, this financing agent may be a creditor, subject or not to judicial recovery, family member of the entrepreneurs or from corporate partners, partners and members of the debtor's group.

Upon analyzing the provision pertinent to DIP financing, it is established that the greatest advantages provided to the financier shall be useful only in the case of converting judicial reorganizations into bankruptcies. In practical terms one cannot affirm that special benefit exists for the financier in granting credit on behalf of a debtor under judicial recovery as facilitation in guarantee set up institution for this type of contract (refer to provision set forth under arts. 69-A, 69-E e 69-F) bestow legal security to the financier, thereby facilitating comprisal of guarantees in the financing contract. Insertion of these provisions provides an incentive, albeit shy, to credit concession on behalf of a distressed entrepreneur.

Articles 69-A and 69-F institute burdening of assets and constitution of fiduciary sales as guarantees which may be instituted in financing contracts. Such provisions allow that assets from the debtor under judicial recovery itself may be fiduciarily granted, thereby creating exceptions to the rule contained in art. 66 of LRF, because this burdening may take place prior to deliberations of judicial reorganization plan. In this respect Marcelo Barbosa Sacramone's (2021, p.373-374) ponderations are relevant:

> **Judicial authorization shall only be necessary for security financing to activities and restructuring expenses or asset value preservation with the burdening or fiduciary sale of assets and rights in case the creditors, by the General Meeting or by the alternative deliberation modes do not have the judicial reorganization plan approved, with the forecast of the said means of company rebuilding.** For a judicial authorization to be instated following hearing by creditors' committee in case there is one the evident utility for entrepreneurial restructure shall be acknowledged. Not only should the importance of financing for the maintenance of productive activity be gauge but it should also be appreciated whether the guarantee granted or the burdening of an asset under guarantee are mandatory and reasonable to the designed financing, as well as not promoting expropriation of debtor's items into detriment of other creditors. (emphasis added)

As the authors warnings are essential to avoid equity depletion of the assets of such debtor, by preventing that debtors' assets expropriation, to loss of creditor existing upon the judicial reorganization request. Judicial authorization shall not be granted without addressing stated concerns, especially regarding preservation of assets which may be useful to payment of creditors either submitted or not to judicial reorganization effects.

Art. 99-E enables debtor to secure loans from any person including creditors, holders of credits subject or not to reorganization. Moreover, family member, partners, and members of the debtors' group may finance, as expressly authorized by the provision, It should be admitted that, in practice, this type of operation already occurs, but challenges may be raised around such contracts a possible configuration of asset confusion, or even a conflict of interests, especially when the loan is secured with people related to the debtor or to an economic agent member of the same group.

In this point it is important to assure, especially when dealing with the financier of an economic agent belonging to the same group as the debtor, compliance with commutative conditions in loan granting, as well as fair payment of remuneration and interest and advantages obtained with said agreement execution. Failure to meet commutative conditions in contracts executed among economic agents of the same group is cause of attributing liability of the administrator of the – potential – financing corporation.

Conversely articles 69-B and 69-D bestow upon the financier a certain degree of legal security. This so happens because art. 69-B imposes limitation to a possible

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decision passed under appeal, assuring the financier upkeep of the guarantee related to amounts effectively delivered to the debtor. According to professor Fábio Ulhoa Coelho (2021, p. 272):

> Voidance to appeal is condition to two requirements: the financier's good faith and the deposit or availability, in the debtors' companies' bank account, of the financing funds. For the judiciary power, at a second level of jurisdiction to know the appeal related to the first degree decision aspects (unsubmitted credit nature in case of bankruptcy and guarantee validity), the Appeals Judges initially need to decide whether financier was not acting in good faith, or that it had not delivered to the financed party the full financing funds.

As criticism to the above mentioned comment art. 69-B does not seem to condition the soundness of the guarantee only to the assumption that the full amount has been made available to the debtor. One could cogitate of a modulation of the decision effects to assure soundness of the guarantee up to the limit of amounts actually delivered to the debtor, as envisaged under art. 69-D, when dealing with bankruptcy effects upon financing contract.

Article 69-D deals with the effects of the conversion of judicial recovery into bankruptcy for the financing contract. As per said provision, the drafting time foreseen that the finance contract shall be deemed as automatically terminated, with the preservation of guarantees and preferences constituted up to the amounts effectively delivered to the debtor and prior to the winding up decision date. From this stems the conclusion that guarantee soundness shall be preserved, even in the assumption of financed debtor bankruptcy. Such provision bestows not only legal security to the financier, but also comprises an actual encouragement.

Ultimately, a comment must be made as to the issue posited under art. 69-C. Just as what is established in the heading the above-mentioned provision, the legislator authorized comprisal of a subordinated guarantee upon one or more debtor assets, dispensing with agreement the major guarantee holder. This waiver of agreement provides speed and legal security to the act, thereby by voiding a possible creditor veto originally guaranteed.

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Despite fostering a certain speed to a loan taking proceeding and setting up the subordinated[41] guarantee, thus preventing that originally guaranteed creditor to be notified or be required to produce his express agreement as to comprisal of said guarantee, the first paragraph of said provision imposes limitations to comprising a secondary guarantee, envisaging that such form of guarantee shall be limited to the a possible surplus arising out of asset sale, so as to protect the rights of preference comprised as guarantee. Thus, it shall be necessary to determine whether the creditor owns the liened assets, whose value exceeds the debt of guaranteed contracts, so that, only in these cases, the issue set forth under art. 69-C may be put into operation. What is usually found is that the guarantees established under the contract (of any nature) are inferior to the global value of the guaranteed contract. At any rate, ascertaining as to the existence of guarantees whose value exceeds the protected and preexisting contracts, may only be determined in a concrete case.

Lastly, the second paragraph of art. 69-C is technically correct by setting forth that provisions in the heading do not apply to any mode of a fiduciary sale or of a fiduciary grant whose constitution system would not admit such form of "segregation" of the proceeds of the sale, as the fiduciary creditor is assured asset domain and direct asset possession.

Two criticisms are likely to be made: (i) the effectiveness most of the provisions linked depends, on a concrete case, of the debtor being holder of assets available to guarantee comprisal, as counterpart due to finance granting on the success of the judicial reorganization on available assets for guarantee comprisal.

It is usually unlikely that the debtor has unburdened assets upon filling of a judicial recovery request, this being the reason why the mission of forecasting actual incentives to finance granting is almost impossible; and (ii) the second greatest advantage from the privileged treatment of the finance agent may only be harvested upon a bankruptcy scenario, a fact that none of the parties expects or actually aims to undergo.

[41] Despite the legislator having use the expression subordinate guarantee, said provision deals with a guarantee comprised over a thing of real nature, such as a mortgage and a lien. Therefore, the most appropriate term could be secondary guarantee.

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5 FINAL CONSIDERATIONS

The effects brought about by the pandemic on the Brazilian entrepreneurs are deep, as from the moment that the Brazilian authorities acknowledged the need for adopting measures containing the coronavirus in mid-March, 2020. However, and contradicting the expectations of several sectors, there was no massive acceptance by entrepreneurs to judicial recovery. The research allowed for concluding that two reasons may justify this hesitation in using such tool:

The high reputational cost for the entrepreneurs which file a judicial recovery request, considering that the credit granting on behalf on the debtor in judicial recovery is placed at an extremely low liability level, as set forth under resolution #2,682, by CMN, which renders debtor's access to credit even more difficult.

The second reason may be credited to the high costs involved around this procedure. This so happens because, upon filing its judicial recovery request, the debtor shall pay the lawyers' fees of the office which will advise it during the process; the fees owed to the judicial administrator; the rates due on the date of judicial recovery request distribution and, finally it can also be said that there is an extremely great fear by the entrepreneurs that the Creditors General Committee reject the plan and lastly, bankruptcy be decreed for following approval of a recovery procedure, a possible waiver need to be approve by the creditors .

Two conclusions are possible from the brief analyses of articles 69-A to 69-F: (i) the effectiveness of most provisions linked to financing, depends, in a concrete case, that debtor be holder of assets available to guarantee institution, as the counterpart due for financing granting shall depend on judicial recovery success or on the existence of assets which are already guaranteeing other contracts display appraisal exceeding preexisting guarantee. It is usual to ascertain that, hardly, a debtor owns unburdened assets upon filing of a judicial recovery request, which is why it is difficult to foresee effective incentives to financing granting; and (ii) the greatest advantage as to privileged treatment by financier as to credit recovery may only be harvested at the bankruptcy scenario (unsubmitted credit in second order of payment) affect which none of the parties expects or actually desires to face.

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