



THE EVOLUTION OF THE JUDICIAL RECOVERY INSTITUTE: AN ANALYSIS OF IMPACTS AFTER THE COVID-19 PANDEMIC

ORIGINAL ARTICLE

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ABSTRACT

The main objective of this article is to present the relationship between the judicial recovery institute and the consequences generated by the COVID-19 pandemic. The development of this study was carried out from the perspective of the principles of Law No. 14,112 of December 24, 2020. The methodology employed is a bibliographic study (based on classical literature of bankruptcy, insolvency, and corporate law) and documentary (relevant legislation). The method used also involves a descriptive and exploratory research approach, with a qualitative data analysis. It was observed that the restrictions and economic impacts generated by the pandemic affected the restructuring of debts contracted by companies, thus having the potential to worsen the economic and financial crisis faced by debtors undergoing restructuring. Furthermore, the consequences of the pandemic directly impacted the possibility of non-compliance with obligations that were assumed by the debtors. Finally, upon analyzing the impacts of the legal changes that occurred in light of the recent pandemic context, it is possible to perceive that these changes have shown modest results, with no substantial increase in the number of requests for judicial recovery, even during a crisis. This leads to the conclusion that many companies ended up ceasing their activities irregularly.

Keywords: Judicial Recovery. Law No. 14,112/2020. Pandemic. Covid-19. Business Activity.



1. INTRODUCTION

The exercise of business activity is endowed with inherent risks stemming from market volatility, such that even under good management, a company can be affected by crises of various natures, compromising its operations, and consequently harming all those dependent on it.

Having said that, insolvency law is the branch of business law responsible for addressing safeguarding measures for companies in crisis, utilizing concepts like bankruptcy and judicial recovery to confront the various crises that may befall a company, with the latter being the subject of this study.

This institute was established by Law No. 11,101 on February 9, 2005, with the aim of providing a less burdensome means for the entrepreneur, who is the debtor, to satisfy the company's debts. It places emphasis on maintaining economic activities and facilitating a higher likelihood of full debt settlement, as well as the preservation of the legal entity.

That being said, in the wake of the recent pandemic context that has swept across the world, causing numerous human losses as well as severe damage to the national economy, Law No. 14,112 of December 24, 2020 was enacted to support the existing insolvency law frameworks, bringing new possibilities for entrepreneurs to tackle crises.

In light of these considerations, the main objective of this article is to present the relationship between the judicial recovery institute and the consequences generated by the COVID-19 pandemic. The specific objectives were: to present the origin of judicial recovery in Brazil, identify how Law No. 14,112/2020 affects judicial recovery, and highlight how these changes impact the reality within the post-pandemic context.

The employed methodology is based on bibliographical study (grounded in classical literature on bankruptcy, insolvency, and business law) and documentary analysis (relevant legislation). The method also involves descriptive and exploratory research, with a qualitative approach to data analysis.



2. JUDICIAL RECOVERY

Business crisis is one of the main topics in Business Law, as its occurrence represents a reality faced by companies due to the inherent risks in the development of this activity. For this reason, the law has devised solutions within its framework, one of which is judicial recovery.

Judicial recovery is a legal institution based on Law No. 11,101 of February 9, 2005. Its primary objective is to enable the continuation of companies that, despite facing a crisis, still maintain economic viability.

2.1 NATURE OF THE INSTITUTION

Judicial Recovery is a form of insolvency law whose objective is the maintenance and recovery of a company facing a crisis. It's a means of state intervention to ensure the company's survival and the continuation of its activities.

The legal nature of this institution is complex, requiring the will of both creditors and debtors, with both aiming to recover the company. It also involves a court-approved act when the court grants the recovery request.

In this context, there are controversies regarding the procedural aspects of judicial recovery. Some conceive it as having a contentious nature, where the state provides judicial intervention to both the creditor and debtor to resolve credit-related disputes. On the other hand, there's the notion that judicial recovery is a positive constitutive act aimed at resolving the debtor's crisis.

It's important to note the dichotomous nature of judicial recovery, as it can occur with creditor consent as outlined in Article 45 of Law No. 11,101 of February 9, 2005, or without creditor consent, with the rejection of the recovery plan by the assembly, as stipulated in Article 58, § 1º of the mentioned law.

The contractual nature of judicial recovery can be understood from the perspective of recovery as a private multilateral contract, consolidating the will of the creditor body



under the court's supervision. Thus, the complex legal nature of judicial recovery, along with its various aspects, becomes evident. There isn't a unanimous understanding among scholars, but it's generally perceived that this institution is predominantly of a voluntary nature, where the will of the creditors should prevail.

2.2 PURPOSE OF JUDICIAL RECOVERY IN BUSINESS ACTIVITY

Business activity holds significant importance in the proper functioning of society, directly contributing to job creation, income generation, as well as the provision of services and goods.

This activity is characterized by professional engagement with the aim of generating profit and meeting market-driven needs, producing goods, services, and utilities through organization, whether it pertains to labor or other essential factors for its execution. However, all these factors can be threatened in the face of business crises that may arise due to inherent risks associated with the activity, putting the enterprise in a vulnerable position.

Crises are traditionally classified by doctrine into three types: economic crises, stemming from a sudden drop in profits leading to costs surpassing the company's capacity; financial crises, characterized by repeated defaults by the company; and asset-related crises, arising when the company's liabilities outweigh its assets upon summation of values. In light of this, Article 47 of Law No. 11,101, dated February 9, 2005 stipulates:

Art. 47. A recuperação judicial tem por objetivo viabilizar a superação da situação de crise econômico-financeira do devedor, a fim de permitir a manutenção da fonte produtora, do emprego dos trabalhadores e dos interesses dos credores, promovendo, assim, a preservação da empresa, sua função social e o estímulo à atividade econômica. (BRASIL, 2005).

The legislative need to establish means for addressing business crises is evident, aiming to ensure a minimum level of protection for the entrepreneur, creditors, and economic activity. These are the subjects of study in insolvency law.



This branch of law delves into the crises that companies undergo, as well as their potential solutions. Among the most common solutions are bankruptcy and judicial recovery, with the latter being the focus of this study.

Regarding this topic, it is essential to mention the teachings of Magalhães (2020, p. 490): "The recovery of companies is the legal mechanism for overcoming economic and financial crises. That is to say, it is necessary for the entrepreneur to be in crisis, but their activity is still economically viable."

As precisely pointed out above, a business crisis alone is insufficient for the granting of judicial recovery; it is also essential to demonstrate the economic viability of the company. Along these lines, the company undergoing judicial recovery must have its viability evaluated, as taught by Tomazette (2021, p. 30):

Apenas as empresas viáveis são capazes de justificar os sacrifícios que terão que ser realizados pelos credores na recuperação judicial. Os credores só realizarão tais sacrifícios para proteger interesses mais relevantes. Em outras palavras, os credores irão analisar os valores em jogo, ponderando os ônus da manutenção da atividade e os ônus do encerramento da atividade.

The viability of companies can be defined by their impact on reality, whether through the provision of products, services, technological advancements, or job creation. All of these factors serve as justification for the company's continuation, as well as the possibility for creditors to recover their credits and for the company to carry on its operations. On the other hand, in the absence of viability in business activity, there is no basis for discussing the granting of judicial recovery, as asserted by Coelho (2016, p.226):

Nesse contexto, pode-se afirmar que, em princípio, se não há solução de mercado para a crise de determinada empresa, é porque ela não comporta recuperação. Se nenhum empreendedor ou investidor viu nela uma alternativa atraente de investimento, e a recapitalização e a reorganização do negócio não estimulam nem mesmo os seus atuais donos, então o encerramento da atividade, com a realocação dos recursos nela existente, é o que mais atende à economia.



In summary, the requirements for judicial recovery encompass business crisis, creditor consensus on the viability of the business activity and the capacity for restructuring, as well as judicial approval, which will verify the compliance with the legal requisites imposed on the debtor.

However, companies in crisis that are unable to meet the requirements for judicial recovery, or for any reason, fail to adhere to the respective procedures after its approval, are destined for the institution of bankruptcy.

From a formal perspective, it's worth noting that judicial recovery is a right held solely by duly registered entrepreneurs who engage in regular and habitual business activity for at least 2 years. They must also satisfy the other requisites outlined in Article 48 of Law No. 11,101, dated February 9, 2005, which stipulates:

Art. 48. Poderá requerer recuperação judicial o devedor que, no momento do pedido, exerça regularmente suas atividades há mais de 2 (dois) anos e que atenda aos seguintes requisitos, cumulativamente:

I – não ser falido e, se o foi, estejam declaradas extintas, por sentença transitada em julgado, as responsabilidades daí decorrentes;

II - não ter, há menos de 5 (cinco) anos, obtido concessão de recuperação judicial;

(...)

IV – não ter sido condenado ou não ter, como administrador ou sócio controlador, pessoa condenada por qualquer dos crimes previstos nesta Lei." (BRASIL, 2005).

The case law on the subject aligns with the legislation quoted above:

[...] 1 – O deferimento da recuperação judicial pressupõe a comprovação documental da qualidade de empresário, mediante a juntada com a petição inicial, ou em prazo concedido nos termos do CPC 284, de certidão de inscrição na Junta Comercial, realizada antes do ingresso do pedido em Juízo, comprovando o exercício das atividades por mais de dois anos, inadmissível a inscrição posterior ao ajuizamento. Não enfrentada, no julgamento, questão relativa às condições de admissibilidade ou não de pedido de recuperação judicial rural"



[...] (BRASIL; Superior Tribunal de Justiça (3ª Turma); Recurso Especial nº 1193115 / MT; Relatora Nancy Andrighi; Relator para acórdão Sidnei Beneti; Data do Julgamento 20 de agosto de 2013; Diário da Justiça Eletrônico out. 2013).

Such formal limits aim to safeguard creditors from possible abuses of rights by the debtor, as illustrated by clauses I, II, and IV of Article 48 of Law No. 11,101/2005, which prevent the improper use of this institution as a means to commit fraud against creditors or merely delay the debt.

Regarding the credits covered by judicial recovery, it's important to emphasize that it encompasses all those due and becoming due until the date of the request. However, the following are exceptions to this rule: credits based on a contract of fiduciary alienation as collateral; credits based on a leasing contract; those of the property owner or promissory seller of property based on a contract containing a clause of irrevocability; credits of the creditor of a contract of sale with retention of ownership; credits based on a foreign exchange contract; and tax credits.

On this matter, it's worth highlighting the following established understanding, as already solidified by domestic case law:

[...] 1. Encontra-se sedimentada no âmbito das Turmas que compõem a Segunda Seção do Superior Tribunal de Justiça a compreensão de que a alienação fiduciária de coisa fungível e a cessão fiduciária de direitos sobre coisas móveis, bem como de títulos de crédito (caso dos autos), justamente por possuírem a natureza jurídica de propriedade fiduciária, não se sujeitam aos efeitos da recuperação judicial, nos termos do § 3º do art. 49 da Lei n. 11.101/2005 [...] (BRASIL; Superior Tribunal de Justiça (3ª Turma); Recurso Especial nº 1559457/MT; Relator Marco Aurélio Bellizze; Data de Julgamento 17 de dezembro de 2015; Diário da Justiça Eletrônico set. 2016).

In the same vein, the jurisprudential understanding excerpted below is of a similar nature:

[...] 2. A jurisprudência do Superior Tribunal de Justiça é firme no sentido de que os créditos garantidos por cessão fiduciária não se submetem ao plano de recuperação, tampouco a medidas restritivas impostas pelo juízo da recuperação (art. 49, § 3º, da Lei 11.101/2005). 3. Na hipótese dos autos o juízo do soerguimento já decidiu sobre o caráter extraconcursal das



dívidas da empresa recuperanda garantidas por alienação fiduciária [...] (BRASIL; Superior Tribunal de Justiça (2ª Seção); Agravo Interno no Conflito de Competência nº 145.379; Relator Moura Ribeiro; Data do Julgamento 13 de dezembro de 2017; Diário da Justiça maio 2021).

It is important to highlight that, as a general rule, other contracts are also exempt from judicial recovery, unless the creditors' assembly chooses to include them in the judicial recovery plan, which could lead to contractual novation.

Therefore, it can be concluded that judicial recovery was established with the fundamental purpose of facilitating the overcoming of business crises, aiming to preserve the company and jobs, and consequently, satisfy the creditors.

2.3 MAJOR CHANGES BROUGHT BY LAW No. 14,112, DATED DECEMBER 24, 2020

Judicial recovery aims to safeguard the credibility of business activity by generating assurance mechanisms for the reestablishment of companies in crisis. Thus, once the economic viability of the company is demonstrated, the existence of regulations establishing the recovery procedure becomes essential. In line with this, Law No. 14,112 of 2020 introduced several changes to judicial recovery with the goals of facilitating access to it, simplifying and expediting various procedures, as well as combating irregular closure of business activities. Given these objectives, it is pertinent to highlight the main changes in insolvency legislation.

Conciliation and mediation sessions, as well as the voting in the creditors' assembly, respectively provided for in Articles 20-A and 39, § 4, II of the Bankruptcy Law, now explicitly allow the possibility of virtual implementation, ushering in the digitization of the recovery procedure.

Also noteworthy is that the general creditors' assembly, set out in Section IV of the same Law, underwent changes to allow the replacement of a creditor's vote with proof of their adherence. This can be seen in Articles 39 and 45-A, enabling a swifter deliberation by the assembly.



Certain legal formalities have also been relaxed, as illustrated by Article 20-B, IV and § 1, which allows companies facing difficulties in meeting the necessary requirements for filing a recovery request to seek judicial recovery as a precautionary measure, suspending executions for up to 60 days.

Furthermore, it is relevant to highlight the legal change regarding the possibility of financing for companies undergoing judicial recovery, providing a secure form of investment. With the approval of the creditors' committee, interested parties can enter into financing contracts with the debtor.

This modification assists in the recovery of companies by maintaining their operations and covering their expenses during the recovery period. It can be arranged by someone within the creditors' committee or an external party.

In light of this, the mentioned financing is endowed with notable security for the investor. In the event that judicial recovery is converted into bankruptcy, the financing contract is automatically terminated, placing the investor in a position of holding priority extraconcursal credits over others.

In conclusion, the changes introduced by Law No. 14,112 of December 24, 2020 aim to flexibilize and expedite the judicial recovery process, playing a significant role in the contemporary economic landscape, especially due to Brazil's public health emergency situation.

3. THE HISTORICAL EVOLUTION OF JUDICIAL RECOVERY IN BRAZIL

In order to comprehend the purpose and functioning of judicial recovery, it is of utmost importance to examine its origins as well as its evolution over time in Brazilian law. In this regard, it is also relevant to provide, albeit briefly, an overview of the analogous institute in American law to understand how it influenced domestic legislation. Consequently, it is also necessary to examine the guiding principles used in the



construction of this institution, which should be employed during its interpretation and application.

3.1 GUIDING PRINCIPLES OF JUDICIAL RECOVERY

For a better understanding of judicial recovery and its evolution in Brazilian law, the following provides information regarding adherence to its guiding principles outlined in Article 47 of Law No. 11,101 of 2005, which stipulates:

Art. 47. A recuperação judicial tem por objetivo viabilizar a superação da situação de crise econômico-financeira do devedor, a fim de permitir a manutenção da fonte produtora, do emprego dos trabalhadores e dos interesses dos credores, promovendo, assim, a preservação da empresa, sua função social e o estímulo à atividade econômica. (BRASIL, 2005)

Given the transcribed legal provision, it is evident that the preservation of the company is the main pillar underpinning judicial recovery, as the fulfillment of other objectives of the institution is closely tied to the company's survival.

This principle guides the application of the norm towards always preferring the least burdensome means for the company to satisfy its debts, as in the event of the conversion of judicial recovery into bankruptcy, the company's dissolution can significantly harm both creditors and the debtor's employees.

However, the protection assured to the entrepreneur cannot entirely override the creditors' interest, as they are entitled to the receipt of the credits due to them, and judicial recovery cannot serve as a tool for the debtor to evade their obligations.

Lastly, the social function of the company cannot be overlooked, as business activity is indispensable for the proper functioning of society, generating jobs as well as products and services to meet societal demands. It is pertinent to consider Article 170 of the Federal Constitution, which states:



Art. 170. A ordem econômica, fundada na valorização do trabalho humano e na livre iniciativa, tem por fim assegurar a todos existência digna, conforme os ditames da justiça social, observados os seguintes princípios:

(...)

II - propriedade privada;

III - função social da propriedade; (BRASIL, 1988)

Regarding the social function of the company, it is significant to quote the studies of Kuyven and Ronco (2020, p.181):

Por outro lado, a função social da empresa é cogente e decorre da Lei e da própria Constituição Federal brasileira, aplicando-se diretamente às atividades que constituem o objeto social de cada empresa. Essa função social representa o cumprimento, pela sociedade, de funções que originalmente competiriam ao próprio Estado, quais sejam as de prover à coletividade bens e serviços que permitam satisfazer as necessidades básicas da comunidade em que a empresa se insere, garantido a ela o acesso a garantias fundamentais.

In light of the above, the significance attributed by domestic legislation to the preservation of the company due to its notable social relevance is evident, and this perception should be taken into consideration when conducting the analysis of judicial recovery.

3.2 ORIGIN OF THE INSTITUTION AND ITS EVOLUTION IN BRAZILIAN LAW

The first legal provisions of bankruptcy nature emerged in the national legislation in 1850 with the Commercial Code, which established means to safeguard the entrepreneur, with particular emphasis on moratorium and concordat due to their relevance to the theme of this study.

The moratorium aimed to suspend the collection of debts incurred by the debtor for a determined period, through an agreement with creditors, preventing collection and consequently bankruptcy declaration. Concordat, on the other hand, was an initially used institute for suspensive purposes, with the main goal of suspending already



declared bankruptcy proceedings, allowing the debtor to seek a better way to satisfy their debts. It is timely to bring forth the teachings of the late Requião (1995, p. 3):

Convém esclarecer, desde já, que a concordata difere visceralmente da falência porque não submete o devedor às restrições em sua liberdade, nem lhe tira a administração de seus bens. Como veremos mais adiante no desenvolvimento de nossos estudos, o empresário comercial, obtendo a concordata, continua à testa de seus negócios, dirigindo a empresa apenas sob a fiscalização de um comissário nomeado pelo juiz para tal fim.

Later, the preventive concordat was established, aiming to prevent bankruptcy before its deferment by court judgment, providing even more security to the debtor. During that time, it is noteworthy that all concordats required creditors' consent, and the debtor couldn't unilaterally seek its benefits. However, Decree-Law No. 7,661 of June 21, 1945 altered the institute, making it possible to grant benefits to the debtor in crisis through judicial authorization, even without creditors' consent.

Subsequently, Law No. 11,101 of February 9, 2005, repealed the concordat and introduced judicial recovery, which aimed to provide even more security to debtors and creditors, allowing for greater efficiency in overcoming crises and maintaining companies. However, despite the dissolution of the concordat, one must not forget the common objectives between it and judicial recovery, as highlighted by Almeida (2007, p. 304): "Judicial recovery essentially has the same objective as the concordat, namely, economically recovering the debtor while ensuring the necessary means for company maintenance, considering its social function."

With that said, it's opportune to quote Magalhães' teachings (2020, p. 489) regarding the main objective of Law No. 11,101 of February 9, 2005:

O principal objetivo da nova legislação é viabilizar a superação da crise econômico-financeira do devedor, a fim de permitir a manutenção da fonte produtora, do emprego dos trabalhadores e dos interesses dos credores, promovendo, assim, a preservação da empresa, sua função social e o estímulo à atividade econômica.



It is pertinent to highlight that such a legal provision stipulates the impossibility of using judicial recovery to suspend bankruptcy, and it must necessarily be proposed beforehand, provided that the viability of the company is demonstrated.

However, even with the advancements brought by Law No. 11,101 of February 9, 2005, the realization of the objectives of judicial recovery remained limited by some impediments imposed by the corresponding Law, often excluding debtors who needed the benefit.

Law No. 14,112 of December 24, 2020, modified the existing institute with the aim of promoting expeditiousness, expanding its scope, and aiding the recovery of crisis-stricken companies, addressing the key difficulties they faced.

In this context, in addition to the aforementioned improvements, it is important to note that the changes placed an emphasis on the willingness of both creditors and debtors, prioritizing consensus between the parties. From this perspective, as Campinho (2020, p. 5) teaches:

O sistema concebido para a formação e aprovação do plano de recuperação judicial passou a ser bifásico, composto, assim, de uma primeira fase estritamente negocial e de uma segunda impositiva ou imperativa. A primeira fase desenvolve-se em ambiente puramente negocial, visando a integrar as vontades do devedor e de seus credores, que vêm, assim, conjuntamente, aprovar um plano de recuperação judicial. Malgrado a iniciativa negociada, passa-se à segunda fase, na qual a vontade coletiva dos credores se sobrepõe à do devedor, com a possibilidade de imposição de um plano de recuperação judicial.

The negotiation phase of judicial recovery is the moment when the creditors' assembly decides how the procedure will be carried out, deliberating on factors such as credits, resembling the characteristics of a plurilateral contract. This form of deliberation aligns the law with the concrete reality, and the judiciary's role should be limited to overseeing compliance with the regulation and the creditors' resolutions.

Thus, it is evident that the evolution of Brazilian bankruptcy law, since its inception, is aimed at providing more opportunities and ensuring greater security for entrepreneurs.



3.3 DIP FINANCING AND THE INSTITUTE OF JUDICIAL RECOVERY

Law No. 14,112 of December 24, 2020 brought necessary changes to judicial recovery, many of which were influenced by American legislation. Among the key changes, one of the most promising was the possibility of utilizing financing during judicial recovery, an action that was explicitly prohibited under national law.

This possibility is known as DIP financing in American law, which occurs when an investor or financial entity provides funding to cover the cash flow shortfall of a distressed company, positioning themselves as a priority creditor to recover the invested amount.

Inserted in Section IV-A of Law No. 11,101 of February 9, 2005, the financing of companies undergoing judicial recovery enables, with the judge's approval following the creditors' committee's position, the injection of new capital into the company, facilitating the continuation of activities and, consequently, the satisfaction of owed credits. In this regard, the excerpt from the analyzed legal provision is highlighted below:

Art. 69-A. Durante a recuperação judicial, nos termos dos arts. 66 e 67 desta Lei, o juiz poderá, depois de ouvido o Comitê de Credores, autorizar a celebração de contratos de financiamento com o devedor, garantidos pela oneração ou pela alienação fiduciária de bens e direitos, seus ou de terceiros, pertencentes ao ativo não circulante, para financiar as suas atividades e as despesas de reestruturação ou de preservação do valor de ativos.

(...)

Art. 69-D. Caso a recuperação judicial seja convolada em falência antes da liberação integral dos valores de que trata esta Seção, o contrato de financiamento será considerado automaticamente rescindido.

Parágrafo único. As garantias constituídas e as preferências serão conservadas até o limite dos valores efetivamente entregues ao devedor antes da data da sentença que convolar a recuperação judicial em falência. (BRASIL, 2005)



This form of financing brings secure opportunities for investors, given that they will have prioritization of their credits in the event of the conversion of the recovery into bankruptcy, as well as automatic termination of the contract if bankruptcy occurs before the release of funds. However, for the injection of new capital, it is essential that the distressed company demonstrates viability, that is, it attracts the interest of potential investors, as precisely stated by Coelho (2016, p.228):

A recuperação judicial não pode significar, como visto, a substituição da iniciativa privada pelo juiz na busca de soluções para a crise da empresa. Se a sobrevivência de determinada organização empresarial em estado crítico não desperta o interesse de nenhum agente econômico privado (empreendedores ou investidores), então, em princípio, as suas perspectivas de rentabilidade não são atraentes quando comparadas com as demais alternativas de investimento.

From this perspective, there is also a divergence between the model adopted by the domestic legislation and the North American model, as in Brazilian law, the assembly of creditors' approval and the judge's deferment are essential for the use of this financing method, which does not occur in the mentioned foreign legislation.

However, it is not possible to overlook some risks that the adaptation of the foreign model presents to the creditor of this type, as after the financing is granted, in the event that the recovery does not result in bankruptcy, the creditor loses priority over other credits, which could compromise the reimbursement of the amount owed to them.

Therefore, even with the hypothetical risk of losing priority in credit cases, DIP financing is a reliable instrument, constituting itself as another possibility to assist the debtor in facing business crises.

4. JUDICIAL RECOVERY IN THE PANDEMIC CONTEXT

Amidst the COVID-19 pandemic that recently swept across the world, many companies succumbed to the economic crisis. In light of this, Law No. 14,112 of December 24, 2020, was enacted with the aim of assisting distressed companies, introducing significant changes to facilitate bankruptcy and judicial recovery procedures.



Having said that, it is important to analyze the impacts of this Law on the reality of those engaged in business activities in order to ascertain its effectiveness in overcoming crises under the following aspects.

4.1 ADDRESSING IRREGULAR TERMINATION OF BUSINESS ACTIVITIES

The Coronavirus pandemic that swept the world was declared in Brazil on February 26, 2020, leading to the closure of numerous commercial establishments due to protective sanitary measures to combat the pandemic. As a result, many entrepreneurs, especially small and medium-sized ones, felt the severe impacts of the pandemic, resulting in a significant burden from maintaining their business establishments, including costs related to employees, rent, taxes, among others.

As a consequence of this chaotic situation, many entrepreneurs conducting their activities irregularly or legally without qualifying for the benefits of judicial recovery or bankruptcy, ended up closing their activities irregularly, without even entering the official statistics of dissolved legal entities.

In this context, it is essential to point out that, in the Brazilian business context, bankruptcy is still met with significant prejudice, a stigma that also falls upon the entrepreneur. It is worth highlighting the teachings of Almeida (2007, p. 229): "Even today, when bankruptcy is no longer regarded as a punitive measure, but rather as a process of collective execution with a clear patrimonial objective, moral consequences that inevitably affect the debtor's reputation are observed."

It is evident that the damage to an entrepreneur's reputation has a significant impact on their profession. However, another undeniable factor influencing the irregular termination of business activities is the inconvenient array of formalities required by the national legislation. On this subject, it is appropriate to cite the studies of Almeida, Alves, and Gonçalves (2021, p. 16):

Há que se considerar que os efeitos experimentados pelos empresários brasileiros, em razão das medidas sanitárias de



isolamento social e fechamento temporário de estabelecimentos, mais quebras e pedidos de recuperação judicial haveriam de surgir durante a pandemia. No entanto, essa premissa é de difícil confirmação, pois, no Brasil, muitos empresários praticam o que se conhece por "fechamento irregular" do seu estabelecimento e por isso nem sempre providenciam a baixa regular de suas atividades ou promovem a dissolução da empresa. Essas irregularidades ocorrem, precipuamente, porque as providências de baixa regular são burocráticas e dependem do atendimento de providências que importam em custos que, muito possivelmente, o empresário não possui condições de arcar.

It becomes evident that complying with the array of formalities defined by the Bankruptcy Law, especially the settlement before creditors, is a significant factor contributing to the irregular termination of business entities. This is a notably detrimental factor for the market as a whole, as in such a situation, creditors do not enjoy any priority for the collection of their credits. They must seek to execute the debtor through common legal channels in an attempt to recover their credits, often with little success in their endeavor.

Furthermore, within this line of reasoning, it is easy to perceive that the irregular termination of business activities, particularly among microenterprises and small-sized companies, has occurred with a much higher frequency than requests for judicial recovery during the pandemic and post-pandemic periods. This fact demonstrates a low effectiveness of Law No. 14,112 of December 24, 2020.

It is indispensable to refer once again to the contemporary studies of Almeida, Alves, and Gonçalves (2021, p. 18):

Como a parte majoritária da classe empresária brasileira é formada por microempresas e empresas de pequeno porte, justamente as estruturas mais impactadas pela pandemia, as formalidades de promoção de baixa regular são raramente atendidas. Isso indica que, mesmo depois de sofrer impactos diretos, em razão das medidas de isolamento social, os empresários impactados não estão promovendo fechamento e dissolução regular de seus estabelecimentos e tampouco estão se socorrendo da ferramenta de recuperação judicial para evitar a falência.



In conclusion, it is evident that even amidst the pandemic situation, which brought drastic measures of social isolation and suspension of economic activities, directly contributing to the closure of businesses, especially small-sized and microenterprises, such measures did not substantially affect the number of requests for judicial recovery and bankruptcy.

In this context, it is noteworthy to highlight the research conducted by SEBRAE regarding the contribution of Micro and Small Enterprises (MSEs) to the economy, revealing that: 97% of the country's businesses are MSEs; 66% of the employed individuals work in MSEs; 55% of formally employed (CLT) workers are employed by MSEs; 61% of exporting companies are MSEs; 2.2% of export value comes from MSEs; and 22% of the Brazilian GDP is generated by MSEs (SEBRAE, 2006).

Therefore, the contributory importance of micro and small enterprises to the national economy is crystal clear, despite not receiving legislative support in the same proportion. Although possessing their own legislation, it is still limited in many aspects, such as the simplification of business closure procedures.

As a result, it is evident that even though they constitute the majority, small business owners are left unsupported by Brazilian legislation, especially during the termination of their business activities. On such occasions, they often opt for irregular termination of their companies due to the excessive formalities and burdensome costs resulting from the requirements imposed by the Bankruptcy and Judicial Recovery Law. These requirements are usually manageable only by larger enterprises.

4.2 MAINTENANCE OF BUSINESS ACTIVITY

The maintenance of business activity is one of the main purposes of judicial reorganization, considering that it aims to prevent the filing for bankruptcy and the subsequent dissolution of the company. In this regard, it is relevant to bring forth the opinion of the then senator at the time, Ramez Tebet (BRAZIL, 2005, p. 29):

1) preservação da empresa: em razão de sua função social, a empresa deve ser preservada sempre que possível, pois gera



riqueza econômica e cria emprego e renda, contribuindo para o crescimento e o desenvolvimento social do País. Além disso, a extinção da empresa provoca a perda do agregado econômico representado pelos chamados intangíveis como nome, ponto comercial, reputação, marcas, clientela, rede de fornecedores, know-how, treinamento, perspectiva de lucro futuro, entre outros.

In the same vein, it is timely to bring forth the teachings of Coelho (2016, p. 224):

A crise da empresa pode ser fatal, gerando prejuízos não só para os empreendedores e investidores que empregaram capital no seu desenvolvimento, como para os credores e, em alguns casos, num encadear de sucessivas crises, também para os outros agentes econômicos. A crise fatal de uma grande empresa significa o fim de postos de trabalho, desabastecimento de produtos e serviços, diminuição na arrecadação de impostos e, dependendo das circunstâncias, paralisação de atividades satélites e problemas sérios para a economia local, regional ou, até mesmo, nacional.

That said, the importance of maintaining business activities is evident, a fact that received focus in the crafting of Law No. 11,101 of February 9, 2005. Subsequently, Law No. 14,112 of December 24, 2020 introduced possibilities for injecting new capital into companies as a means to ensure their continuity.

These possibilities significantly contribute to the maintenance of business activities, considering that both financing, asset encumbrance, and loans aid in maintaining cash flow, enabling the satisfaction of debts incurred from the business itself, thereby aiming at the entity's continuity.

It is opportune to quote Dias's teachings (2014, p. 80) regarding the granting of credit to companies undergoing judicial recovery, as this conveys a positive and reassuring message to the market that the company is viable to fulfill its obligations:

A concessão de crédito pelas instituições financeiras embora regulada por disposições próprias a cada operação, possui três elementos essenciais, a saber: (a) limite de crédito que um mesmo banco pode conceder a um tomador; (b) responsabilidade do banco de seguir a boa técnica bancária, emprestando a quem pode pagar, e (c) garantia do banco, via competição, que o crédito estará disponível a quem precisar.



On the other hand, it is also relevant to cite the discouraging results presented in the studies by Almeida, Alves, Gonçalves (2021, p. 24):

O Relatório do Banco Mundial Doing Business de 2020 informa que na América Latina e Caribe recupera-se uma média de 31,2% (trinta e um vírgula dois por cento) do crédito, e de outro lado, nas recuperações judiciais brasileiras recupera-se uma média de 18% (dezoito por cento) do crédito. Em relação aos países de alta renda, integrantes da OCDE, verifica-se uma taxa de recuperação do crédito de 71,2% (setenta e um vírgula dois por cento). Esses números mostram que a obtenção de financiamento no Brasil é missão hercúlea para o devedor que se encontra em crise econômico-financeira.

Therefore, it is evident that for companies undergoing judicial recovery, despite credit being a support to creditors, demonstrating the likelihood of fulfillment, in a diametrically opposite sense is the possibility of its acquisition from financial institutions, given the high level of default, as evidenced by the above-mentioned indices.

Thus, it can be concluded that the continuity of the company should always be prioritized, as it generates jobs and income, factors that directly contribute to the maintenance of cash flow, and consequently, the overcoming of crises, fulfilling the objective of the judicial recovery institute.

4.3 THE EFFECTS OF THE CHANGES INTRODUCED IN THE POST-PANDEMIC CONTEXT

Due to the COVID-19 pandemic, the economic crisis that was already affecting the country was exacerbated, leading to the overindebtedness of several companies and the closure of their operations. Despite the chaotic scenario not faced for decades, Brazilian entrepreneurs have managed to reinvent themselves in the face of adversity, using new technological resources and practices to contribute to business continuity.

Among the various resources, remote work stands out, popularized as a survival strategy due to the restrictions imposed by sanitary measures. This has reduced the



expenses of many companies related to employee transportation and the maintenance of offices and commercial spaces, thus contributing to cost reduction.

Another significant factor is the virtualization of activities, initially adopted as an alternative to pandemic-related sanitary measures. It has since been widely used by micro and small business owners due to the substantial cost reduction associated with maintaining physical points of service and the demands of the new virtualized service market arising from the COVID-19 pandemic.

In summary, in the face of all the adversities encountered, the fundamental lesson to be learned in the post-pandemic context, regardless of the mode of service provision (whether in-person or virtual), is the recognition of the importance of business continuity. This recognition is driven by the significant value that business activities contribute, as brilliantly emphasized by Toledo (2021, p.288):

É preciso levar em conta que a continuidade da atividade de uma empresa saudável satisfaz os interesses daqueles que gravitam em torno dela, como empregados, fornecedores, a comunidade em que atua e mesmo o mercado (que precisa de variados agentes para assegurar concorrência). Ou seja: o sobrevalor da empresa em atividade é representado não só pela sua capacidade de gerar novas riquezas para si e seus credores, mas também pelos benefícios indiretos que traz aos *stakeholders*, ao mercado e à comunidade.

In the meantime, it is worth noting that even before the context created by the COVID-19 pandemic, the judicial recovery process was already subject to significant criticism from legal experts and entrepreneurs. The criticisms regarding its low effectiveness were exacerbated following the public health crisis caused by the pandemic.

5. FINAL REMARKS

The main objective of this article has been achieved as it was found that the restrictions and economic impacts generated by the pandemic affected the debt restructurings of companies. In this sense, there is the potential for exacerbating the economic and financial crisis experienced by debtors undergoing restructuring. Furthermore, the



consequences of the pandemic directly impacted the ability to fulfill obligations that were assumed with creditors.

The judicial recovery process was established by Law No. 11,101 of February 9, 2005, with the purpose of providing entrepreneurs, who are debtors, with means to overcome potential crises they may face, always aiming to preserve economically viable businesses and maintain their activities.

With that said, maintaining the business enables the fulfillment of its social function, considering the numerous stakeholders benefiting from its continuation, including investors, employees, customers, creditors, and others.

In this regard, upon analyzing Law No. 14,112 of December 24, 2020, several changes aimed at modernizing and streamlining the judicial recovery procedure are evident, contributing to its speed and effectiveness.

Among the main changes, we can highlight the introduction of DIP financing, breaking the old prohibition on the injection of new capital into companies undergoing judicial recovery, the virtualization of proceedings, which facilitated the participation of members of the creditors' assembly, as well as the simplification of these procedures, allowing creditors to simply demonstrate their proven adherence to the plan, dispensing with the need for voting.

Finally, when assessing the impacts of legal changes in the face of the recent pandemic context, it can be observed that these changes have yielded modest results. There has not been a substantial increase in the number of requests for judicial recovery, even in times of crisis, leading to the conclusion that many companies ended up irregularly ceasing their activities.

However, even in light of less than satisfactory results in the face of the COVID-19 health crisis, the necessary modernization brought by the 2020 Law No. 14,112 cannot be overlooked. This law created more possibilities to safeguard entrepreneurs, demonstrating clear alignment with the principle of business preservation.



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