CUE288 - THE IMPORTANCE OF THE PRIOR ANALYSIS OF THE INITIAL DOCUMENTATION FOR THE PROCESS OF JUDICIAL RECOVERY

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Resumo

The judicial recovery aims to offer the opportunity to reorganize the companies in economic-financial crisis. When studying the rite of procedure, it should be noted that, in practice, judges are responsible for making the initial decision to allow the company to try to reorganize, or not, by means of the acceptance of the processing. It was identified that, for this deferral, it is generally not analyzed the documentation submitted by the company, because the same is not an activity provided for in the legislation. However, it is believed that the opportunity of reorganization should be given only to companies that have conditions to recover. Therefore, the objective of this study was to gather empirical evidence of the need for analysis of the documentation of the initial request for judicial recovery in the period that precedes the acceptance. For this reason, agents involved in the process were interviewed. The judicial administrators interviewed proved to be resistant to such activity. However, the other respondents, judges, and representatives of creditors positioned in favor of its existence. It was identified that the activity would be relevant mainly to generate informational subside for the judgment to grant or not the processing of judicial recovery, and therefore, there could there be then the decrease of type I error, what happens when a company that does not have conditions to recover has his request granted.

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ABSTRACT

The judicial recovery aims to offer the opportunity to reorganize the companies in economic-financial crisis. When studying the rite of procedure, it should be noted that, in practice, judges are responsible for making the initial decision to allow the company to try to reorganize, or not, by means of the acceptance of the processing. It was identified that, for this deferral, it is generally not analyzed the documentation submitted by the company, because the same is not an activity provided for in the legislation. However, it is believed that the opportunity of reorganization should be given only to companies that have conditions to recover. Therefore, the objective of this study was to gather empirical evidence of the need for analysis of the documentation of the initial request for judicial recovery in the period that precedes the acceptance. For this reason, agents involved in the process were interviewed. The judicial administrators interviewed proved to be resistant to such activity. However, the other respondents, judges, and representatives of creditors positioned in favor of its existence. It was identified that the activity would be relevant mainly to generate informational subside for the judgment to grant or not the processing of judicial recovery, and therefore, there could there be then the decrease of type I error, what happens when a company that does not have conditions to recover has his request granted.

Key-words: Judicial recovery; financial crisis; Accounting Information

1. INTRODUCTION

After almost 12 years of implementation of the new bankruptcy legislation in Brazil, by means of the Law 11.101/2005 (LRF), it is realized that there is still little involvement of Accounting and its professionals in procedural rites and discussions on the topic. The participation or acting of accounting professionals occurs in specific moments of the judicial process, being all of them after its beginning, i.e., after the decision of enactment of bankruptcy or the acceptance of the processing of recovery - both are part of the rite of LRF procedure.

In the acceptance of recovery, it is incumbent upon the debtor only the protocol for the delivery of the documentation provided for in law (Article 51), when there is no analysis of the same. This is the context of the inquiry that has promoted this study to address the role of accounting in a process of this nature.

The judge granting, or not, the request for recovery, is, at that moment, taking a decision. As with any decision maker, it's up to him to seek relevant information to reduce the uncertainty inherent to this action and, at the same time, minimize risk of the parties involved.

In a process of recovery, there are other stakeholders, besides their own debtors, who participate in the rite only a posteriori of the judge's decision. In this way, the judge has an essential role in the decision of acceptance of this process, since there is the possibility of the debtor, opportunistically, opt for a request for recovery and bankruptcy, not considering the asymmetry of information between it and the judge, in order to minimize their losses or even procrastinate the event of bankruptcy.

Thus, as the judge will be the decider, he could be in possession of various information in economic, financial and operational terms, including the venture that seeks to recovery, to reduce the informational existent asymmetry. However, as before said, in Brazil, it is incumbent upon the debtor Party requesting the judicial recovery only submit documents, and not prove by means of the capacity of the company (business)to have its continuity maintained for purposes of better safeguard the interests of creditors.

In this context, it is inserted the role of accounting information as a means of contributing to minimize the asymmetry of information among the parties and assist in decision-making for a better allocation of resources.

Considering that in processes of recovery and bankruptcy the debtor has effective control of the generation of information and even the data that will be presented in justice, the likelihood of asymmetry between debtors and creditors is high. Thus, even the manipulation of accounting information (window-dressing) can be used to hinder the assessment of the judge who does not have expertise in the area and holds the role of deciding, or not, by the acceptance. Another effect of asymmetry can happen in the proposition of recovery plans more convenient to the debtor, since this lack of information may negatively affect the bargaining power of creditors.

The essence declared in the Brazilian Agribusiness for establishing a recovery process via the judiciary, is to preserve the best way to allocate economic resources among those involved, thereby aiming at minimizing losses on the part of creditors in the event of a liquidation of company solvent, one with financial difficulties that affect their ability to pay, but which has a capacity of reorganization.

A source of basic information on how is the financial situation of the company would be its own accounts and their reports. However, only the provision of this information does not guarantee that the company will be able to obtain the justice support for their recovery - in these cases, it is likely to incur on the issue of granting the benefit of the debtor at the expense of the creditor, maximizing the usefulness of the first, with considerable losses to the creditors, even on account of the costs of processes of this nature.

Therefore, the judge in the context of Brazil may decide to defer the processing of applications for businesses that do not have conditions to reorganize itself, and which should be subject to a bankruptcy process and not a process of judicial recovery (situation classified as type I error[i]).

Before this context, the objective of this study was to gather empirical evidence of the need for analysis of the documentation of the initial request for judicial recovery in the period that precedes its acceptance.

2. BIBLIOGRAPHIC REVIEW

In this topic, it is made exposure of bankruptcy legislation as well as a review of the key jobs that helped its development.

2.1. THE LEGAL INSTITUTIONS OF REORGANIZATION IN BRAZIL

In 2005, the Law 11.101 came to replace the Decree 7.661, of June 21st 1945, being the main change the replacement of the Arrangement with creditors for recovery. The main objective of both institutes is to assist the company in financial crisis.

In the arrangement with creditors, regulated by the previous law, the requesting company should demonstrate that it has an asset exceeds 50% of the liabilities of unsecured creditors called unsecured creditors. This verification was carried out by the judge and was an attempt to limit the application to only viable companies. However, the analysis of financial statements and the company's ability to reorganize yet was not performed. Mario (2002) states that this was a mechanism for companies unable to obtain deadline for the payment of debts and/or reduction of fines, depending on the agreement between the creditor and the debtor company. Therefore, it was a process that presupposed the undertaking's solvency and its ability to recover its liquidity. In the new LRF, few limitations of negotiation are provided between creditors and debtors and there is no forecast analysis of active with respect to the liabilities of the company.

The judicial recovery may be requested by companies that are in regular exercise of their activities, which are not bankrupt, that have not gone through a process of recovery in the last 5 years and whose members have not committed a bankruptcy crime. When filing the request for recovery, the debtor shall submit the documentation contained in art.51 of the Law 11.101/05, among it are the financial statements of the last three years, the bank statement, the list of employees and creditors, as well as explaining the causes of economic-financial crisis.

Within this context, it is believed that, even if it is not provided for in the legislation in terms of procedural rite, there is a need to check if the company is not bankrupt, as well as if it has conditions to reorganize itself, what can be done through the analysis of the documentation of the initial request.

After fulfilling the legal requirements mentioned previously, the judge shall approve the processing of recovery and the company has 60 days to submit a recovery plan, which clarifies the means that it will use to rearrange. This plan can be accepted, or not, by creditors, and payments made in accordance with the established in this plan in the event of approval. Two years after the granting of the recovery, the proceeding should be terminated, even if all the obligations of the plan have not yet been fulfilled.

2.2.THE ACCOUNTING AND THE PROCESS OF JUDICIAL RECOVERY

Considering that the judicial recovery aims to facilitate the overcoming of the situation of economic-financial crisis of the debtor, allowing the maintenance of producing source (Article 47 of the LRF), it is possible to infer that it would be necessary to analyze then if the company actually has conditions to overcome the crisis. The inexistence of analysis of the conditions of the company in overcoming its financial crisis has already occurred due to the Decree Law No. 7.661 of 1945 in force, and has not changed in the existing law, the 11.101/05. By not being foreseen in the legislation, the prior examination of the economic-financial condition of the company did not compose the rite of procedure.

De Lucca (2005, p.210) emphasizes that:

> "It is essential that there is, therefore, a real and unequivocal economic viability of the firm in difficulty so that you have a reasonable axiological foundation to be able to legitimize the undervaluing of legal reaction of those whose rights have been soiled [...] Otherwise, it will be rewarding, once more, the thoughtful maneuvers of those bad entrepreneurs who elect, without any shame, the institution of the swindle as the most emblematic of their lives."

As soon as the company files the application of judicial recovery, it has the obligation to submit all documentation provided for in Article 51 of the LRF. The accounting documentation started to be required at this moment of the process, with the aim of enabling a deeper knowledge of the economic and financial situation of the company (Moro Junior, 2011). However, the analysis of the documentation presented in the initial request, most of the times, is not performed (Moro Junior, 2011; Santos, 2009; Aguilar, 2016). Article 52 provides that: "Being in accordance with the documentation required in Article 51 of this Law, the judge shall comply with the processing of judicial recovery…". Therefore, it is only required the conference, "check list", of the documentation required, so that the processing is granted.

In Brazil, there is not a consensus on the need for prior analysis of the documentation of the initial request. The judge Luiz Roberto Ayoub talks about the importance of this analysis as a source of information for the judgment at the time of acceptance of the processing of judicial recovery, since, under his point of view, it should be considered the viability and the harmfulness to society[ii]. It also relates to the need of the analysis of the initial documentation as being, in a certain way, due to the lack of culture of deepening insolvency[iii] in Brazil. In addition, in the same document, the judge is alert to the need for the implementation of this activity by an assistant in a short period of time, so that, there is no loss to the company or society. In this way, for him, the ideal is that the examination of the

initial documentation does not have the goal of exhausting the information presented, but it is done in an agile way and allowing the observation of the contracts of the company and the existence of entrepreneurial activity.

The same issue was discussed at the 8th Meeting of 2015 the Center for Studies and discussions of TJPR (2015), in which the same judge clarifies that acts in such a way as to require the prior expertise upon receipt of the documentation of the initial request, because in the same way that there is no legal provision for the use of expertise, also there is no sealing this hypothesis. He also adds that "the measure means procedural economy, in support to the verification of the possibility of fraud or misuse of the institute of judicial recovery" (p.2).

Similarly, the judge Daniel Cárnio Costa determined the analysis of the documentation submitted by the debtor in a process of judicial recovery of the Court of Justice of the state of São Paulo (2012). The debtor tried to prevent the expert to perform the activity, but the decision of the judge responsible was favorable to the judge.

In an interview granted to Oliveira (2015, p. 36), the judge Daniel Cárnio Costa states:

> [...] I, for example, in my practice, at the moment of granting the process of judicial recovery I observe the documentation gathered by the company - balance sheet [and] projection - analyze it and, many times, I request a prior expertise before I accept the process to identify a clear infeasibility. It is clear that, at this moment, it is still too early for you to say that the firm is viable because it can depend on several factors, but it is possible to affirm that it is unfeasible. So, if I detect, since then, the unfeasibility, I deny the processing of recovery. Because only the acceptance of processing already generates the 'stay', which is a serious consequence. All creditors will be not able to exercise their right of credit for six months. If I grant this to an impracticable company , it will profit from this period to aggravate the injury of creditors. Hardly, you see the Judge performing this initial analysis. And the jurisprudence also comes in this direction, saying: 'No the, analysis of the content of the documentation is the General Meeting of creditors who should do." Yes, for approval of the plan, but I can do this feasibility analysis. I must do it.

However, the Associate Judge Renata Machado Cotta adopts a position contrary to the previously exposed, in her vote in a judgment of the 3rd Civil Chamber of Rio de Janeiro (2015)[iv]. In it, the company claims to have submitted the documentation required in Article 51 of the LRF, and that it is not up to the judge the analysis of the viability of the company from the documentation submitted. The Associate Judge says that, under her point of view, the judge can not analyze the economic feasibility of the debtor in the initial stage of the process, but that he should stick to the fulfilment of Article 52. She says that this analysis should be done at a later stage, in which it is verified the fulfilment of Article 58, to grant or not the judicial recovery, being that the granting of the recovery happens after the adoption of the recovery plan or absence of objections from creditors at the same.

Paulo Sérgio Restiffe still has a positioning that deserves to be exposed, (Oliveira, 2015,p.37).

> The judicial act that simply determines the processing of judicial recovery of companies has nature of order (Article 162, paragraph 3, of the CPC), and it is not a interlocutory order (Article 162, paragraph 2nd, of the CPC), because it does not resolve any incident issue. [...] The bias of the reform of Brazilian procedural system is consonant notoriously propagated, in the sense of limitation of resources. And, thus, the non-appealability of the order granting the processing of judicial recovery, as, moreover, had already occurred in the context of the agreement with creditors, is a step forward.

At this moment, it is necessary to point out that the benefits to the company under reorganization begins after the acceptance of the process, when the actions and executions against the company under reorganization are suspended, and not only after the granting of the recovery, which contradicts the latter positioning exposed. According to the judge Luiz Roberto Ayoub, the possibility exists that the entrepreneur even use this timeline 'lack' to squander the company. Therefore, when it comes to accounting information, it is argued that

the analysis should be carried out in a timely manner, and still, it should be used for decision making, and that this should be done in the initial stage of the process, prior to its acceptance.

It is perceived that there is a consolidated case law on the need for the analysis of the initial documentation. It was also noted the lack of manifestation of accounting professionals about this issue, which, as described above, has been discussed in the legal means. This study has as a focus this specific moment in the process of reorganization.

3. METHODOLOGY

This research can be classified as descriptive, because it is sought, through study and description of facts and empirical data. For this reason, it is carried out a qualitative research, using the field survey and documentary research.

In the field survey, semi structured interviews are carried out with two judicial administrators, two judges and three creditors representatives. The questions in the script of interviews had the purpose of capturing the perception of these agents and their empirical vision on need for the analysis of the documentation of the initial request in a process of judicial recovery.

For the analysis of the interviews, it was adopted a similar technique to content analysis of Baldin (2011). The interviews were recorded with the permission of the interviewees to maintain greater reliability of information when preparing the description made in this work. About the need for a review of the initial documentation in the processes of recovery, positive and negative points were identified mentioned by the interviewees, as well as positions in favor or against the activity, and suggestions on the best way of achieve it.

Finally, cases accessed in the judicial districts of Belo Horizonte, Contagem and São Paulo are exposed. There are 3 compositions and 4 cases of judicial recovery (Figures 1 and 2), selected by the presence of situations that could be modified if the proposed activity in this study was performed, or due to containing information able to illustrate some of the statements of the interviewees in this study.

4. INTERVIEWS

Judges, representatives of creditors and judicial administrators were interviewed with the purpose of collecting the empirical perceptions of agents who act in recovery procedures on the need of capacity analysis of restructuring of the company before the acceptance of the processing.

4.1. Interview 1 - Judicial Administrator 1

The judicial administrator 1 holds a bachelor's degree in law and holds a master in business law, acting in the area since 1998.

Under his point of view, the judge gives the documentation of the initial request and, if it is submitted, the processing must be granted, not being up to him to investigate the documentation or the company's viability. He clarifies that it would no be up to the judge to make analysis of technical feasibility, and that this would be verified by the creditors through the acceptance or not of the recovery plan.

For the judicial administrator 1, such analysis should not be done, because, at this point in the process, it is still not known the conditions under which the recovery plan will be approved, being possible the adoption of plans with 60%, 70% discount on the debts for example. He affirms that the analysis of the company without this information can take away the companies' opportunity to renegotiate their debts with the creditors, or even having the recovery to become more attractive to a potential buyer. He also claims that some companies enter into judicial recovery at the request of buyers.

If this activity had to be performed, he clarifies that he would require a professional or specialized company. He adds that include activities that demand other professionals may turn the process too expensive for the company under reorganization.

The interviewee says that with the passage of time, he changed his way of acting within the processes. He clarifies that, he began to make an analysis of the company, from the analysis of the accounting documentation submitted by the company under reorganization monthly, as required by law. He informs that he asks for additional information when necessary, and presents a report on the case advising creditors on the conditions of the company, but that does not explicitly inform the viability.

4.2. Interview 2 - Judicial Administrator 2 and 3

The Judicial Administrators 2 and 3 are bachelor in law and work at the same Law company in Belo Horizonte. The administrator 3 has already acted as Judge, Associate Judge and was a university professor, having wide experience in several branches of law.

The judicial administrator 2 clarifies that the Law 11.101/05 is categorical, but if it were possible the activity of analysis of the documentation of the initial request, he infers that it would be accompanied by an opinion for by the acceptance or rejection of the processing and he asks if this would not configure as an outsourcing of the competence of the judge, since it is only his the decision to accept or refuse the processing. He also adds that a report of economic viability is not always able to certify whether the company will be able to recover or not, because the economic scenario changes constantly, which can make it feasible or unfeasible a business. In his opinion, this report should be done by the company itself, at the moment in which it is preparing to order a recovery, but not all are capable of doing it.

The administrator 3 agrees with the administrator 2, adding that the interpretation of the law is the task of the magistrate, although where the law does not say, it is not up to the magistrate to say and that the analysis of the viability of the company is already established in the law at the time of submission of the recovery plan. Under his point of view, this activity would only be feasible if it were included in article 51. For him, the people responsible for assessing the conditions of the company to recover are the creditors at the time of submission of the recovery plan.

Both added that, if the analysis is done within the process by an expert, for example, it is likely the occurrence of an impact on the costs of the process that are already high. In addition, when assigning specifically the activity of analysis of initial documentation to a third party, there would be the risk of putting it on creditor condition in case the company needs to be liquidated.

In spite of the law establishing that a judicial administrator can be a professional from various areas, even if it is an accountant and have conditions to prepare the appraisal report, he could not perform the analysis due to conflict of interests among the activities. He mentions the example of a process in which he asked the bankruptcy of the company in recovery for noncompliance with the plan, and after enacting bankruptcy, he became responsible for more than 70 labor processes. As a result, the remuneration which he received in recovery was used to pay the labor lawyers.

4.3. Interview 3 – Judge 1

The judge 1 has a bachelor's degree in law and holds a master's degree in civil procedural law and, in addition to acting in business law, is an assistant professor at a Brazilian university.

The judge 1 clarifies that he was responsible for starting the demand by the activity of analysis of the conditions of continuity of the company, from the documentation presented in the initial request by the debtor. Although this should not be confused with an analysis of the

viability of the company or plan. According to him, there were discussions about the accomplishment of this task in the processes and those with positioning opposite to him pointed as a deterrent the fact that there is no legal provision for the accomplishment of this task in the legislation. However, he clarifies that, in this case, there is not contentious jurisdiction (a situation in which the judge is responsible for resolving a conflict between the parties), and in law, what is not vetoed is allowed. For him, the judge has the probative force conferred by article 130 of the Code of Civil Procedure[1] and the obligation to investigate the situation of the company in order to be able to grant the process whose armor can cause a huge loss to society. The necessity of this analysis is even higher in Brazil, because there are companies which request the judicial recovery, but they do not have conditions to recover, unlike the United States, where there is the figure of the deepening insolvency.

The interviewee says that he prefers to refer to the activity as prior evaluation and not prior expertise. In cases in which he operates, he establishes a very short deadline, 5 to 7 days, for the the prior evaluation, because the suffering company is sensitive to any delay of Judicial pronouncements. In his opinion, this assessment should be simplistic and not have the purpose of depleting the information provided, but allow the judge to be aware of the conditions of the company to continue operating in the future and its prospects.

The person responsible for evaluating goes to company's premises and examines the books with the purpose of verifying the existence of evidence that the company will continue to operate in the future and what its perspectives are. In this way, it is possible to identify companies that ask for recovery with intention to squander the heritage and not to recover. The judge 1 clarifies that the remuneration of the responsible for making the assessment is low, ranging from R$3,000.00 to R$7,000,00.

He adds that the professional responsible for the analysis cannot be the judicial administrator, once that he would be indirectly giving opinion about its future actions, or not, in the process. This professional must be impartial and neutral, therefore, he chooses to appoint an economist, financier or an expert with knowledge in related areas and able to perform the activity.

4.4. Interview 4 – Judge 2

Judge 2 is a bachelor and postgraduate in law, active in cases of bankruptcy and judicial recovery. He affirms that, in legislation, the analysis of the documentation is not required and to grant a request for judicial recovery, he restricts himself to the conference of the documentation required. An analysis is not made, because he does not have the technical training to do it or to distinguish which companies are able to recover or not. He explained that there is a great social responsibility involved in that decision, and there is no technical support to a rejection of the processing, the evaluation of the company and the decision whether to follow the recovery remains essentially to the creditors. According to him, before a rejection, even if there is no immediate commutation in immediate bankruptcy, the company is doomed to failure.

In his opinion, the ideal would be the analysis of the company's ability to recover in time prior to the approval of the processing, the judge may then use it as backup to a rejection of the processing. However, there are currently no conditions for this task to be performed, since there are no employees in corporate court trained for it. He considers that it would be less costly if there were employees in the corporate courts to perform this activity, since the hiring of an expert, in general, is more expensive. Under your point of view, nor all the

[1] In accordance with the Law No 5.869 (1973), "it is up to the judge, ex officio or at the request of the party, determine the evidence necessary to the investigation of the case, dismissing the useless or merely delaying efforts " (Article 130).

information demanded in the case of task of analysis of the conditions of continuity of the company are presented in the initial request.

He says that it would be difficult to assign this task to the judicial administrator or expert, because both run the risk of working "for free" in this assessment, if the company is not able to cope with this cost.

Judge 2 also mentions the possibility of aggravation of the judicial decision as a limitation of an own initiative of the judge to ask for this analysis in the recovery process, a fact which would prevent the achievement of the proposed activity. So, for him, the ideal would be that the legislation was modified to provide this activity to judge, so that he could use the report for support of acceptance or not of processing. However, he stresses that only the modification of legislation (Article 51, Law 11.101/05) would not be sufficient; it is essential that there is an adequate structure in the corporate courts to allow its implementation in a satisfactory way.

4.5. Interview 5 - Representatives of creditors 1 and 2

The interview 5 was carried out with two professionals, representatives 1 and 2 of creditors. Both are graduated in law and act as representatives of creditors in cases of judicial, extrajudicial recovery and bankruptcies.

The interviewees showed to know the practice adopted to require the analysis of the conditions of the company to recover from the information of the original request for recovery. They manifest themselves in favor of the practice of this activity, if it is carried out as a result of an initiative of judge. Thus, the judge would demand the accomplishment of this activity when he understands that it is necessary.

The representative 2 clarifies that, in his opinion, the judge should feel comfortable to, from the understanding about the conditions of the company to recover, defer the processing or not. If, for this reason, the judge needs an analysis, that it should be done, but, otherwise, that he may grant or refuse the processing without this investigation.

Both interviewees clarify that, in principle, are against the addition of any other rule in legislation and that this task should be provided to the judgment and should not be attributed to the judicial administrator.

4.6.Analysis of the interviews

The interviewees have different positions in relation to the activity studied of the analysis of the conditions of recoverability of the company, from the documentation of the original request for recovery. The positions in favor and against the implementation of the activity were identified, as well as the positive and negative points mentioned.

The judicial administrators interviewed are positioned against the realization of the activity, being that the judicial administrators 2 and 3 believe that it would only be feasible if provided for by law. They all also share the view that it is not possible to confirm the viability of the company at the time that precedes the granting of processing, and that this is a task assigned to creditors at the time of voting by the approval or rejection of the recovery plan. The judicial administrator 1 still shows his concern about the possibility of this analysis to withdraw from the company the opportunity to renegotiate its debts. Such positioning is confronted in the affirmation of the judge Daniel Cárnio Costa in an interview granted to Oliveira (2015, p. 36), in which the judge says that it may be too early to assert the viability of a company, since it depends on many factors, but that is possible to verify the unfeasibility, which would bring benefits.

It should be emphasized that, in this study, it is understood that the legislation aims to facilitate the overcoming of the situation of economic-financial crisis of the debtor, and does not offer the opportunity for renegotiation of debts with exorbitant discounts. If the feasibility

is conditional upon this fact, as mentioned by the administrator 1, the company could use opportunistically the recovery for the simple purpose of decreasing the cost of capital of third parties and not to reorganize operationally and financially.

The judicial administrators had more resistance to the task studied than other respondents. In addition, they alert to the possibility of the process to become very expensive in function of this activity. In contrast, the judge 1 says that when required a simplistic analysis about the conditions of continuity of the company, this was the cost of the process in amounts between R$3 and R$7 thousand reais.

None of the interviewees believed that the activity should be done by the judicial administrator. By the clarifications of administrators 2 and 3 and the judge 1, it is noted that analysis of the initial application must be performed by a professional with accounting expertise, but which will not participate in the process if the process of recovery is granted or the plan is approved, because this could be more free of any interest in developing other future activities in the process, and then maintain neutrality in the analysis. Such a solution would still need to be studied more carefully, since, as alerted by administrators 2 and 3 and by the judge 2, the professional to perform the analysis may run the risk of becoming a creditor of the company in economic and financial difficulties. An alternative to this fact was proposed by Judge 2, that is to have employees in their own business sticks, responsible for accomplishing it.

The judicial administrators 2 and 3 also speak about the risk of outsourcing the activity of judgment. However, the judge 1 says that the judge has the evidence power conferred by article130 of the Code of Civil Procedure and that has the obligation to search for the situation of the company to have conditions of granting the processing. Such research could then, involve the analysis of the documentation of the initial request. In this point, judge 2 affirms that the ideal would be to analysis of the company's ability to recover in time prior to the approval of the processing, the judge may then use it as backup to a rejection of the processing.

Unlike the judicial administrators, other interviewees, judges and representatives of creditors, are in favor of the proposed activity.

Also, there is not a homogeneous positioning regarding the inclusion of the activity studied in legislation. The judicial administrator 1 and representatives of creditors are against, and the judicial administrators 2 and 3 and judge 2 understand that the task would only be possible if it were provided for in law. It is perceived that with the exception of judicial administrator 1, all other interviewees are not resistant to this task to be made available to the judgment, the application of this option of the judge, in order to subsidize it when necessary in decision by granting or not of processing. Judge 2, however, limits the application of the activity in relation to the resources available in the bankruptcy courts and exposes a solution that was not considered initially in the study, to have professionals in their own bankruptcy courts with expertise and responsibility to perform such analysis.

About the impacts that may be caused by the activity, it is the possibility of increase in procedural costs and time, both cited in the interviews. The increase in costs or in the duration of proceedings may be acceptable before the benefit of the activity, as shown by the judge 1. However, the ease found by him to deal with these variables, may not be found by others. The judge 2, for example, does not demonstrate to believe that the analysis can be done by a third party in order not to significantly impact the procedural costs.

It is identified that the proposed activity would generate informational subside, mainly for the judgment, which today, in most cases, is limited to a simple conference on the presentation of the documentation required by law. Consequently, there could be then the decrease of the error type I.

In a complementary fashion to interviews and with the aim to illustrate the consequences of not having the analysis of such documentation, some cases were reported in which the course of the process could be different if there were such an analysis.

5. CASES OF JUDICIAL RECOVERY AND COMPOSITION WITH CREDITORS

In Figures 1 and 2 some cases are reported and analyzed briefly that presented situations that could be modified if the proposed activity in this study was performed, or that contains information to illustrate the statements of the interviewees in this study.

In Figure 1 the processes of composition and in Figure 2 the judicial recovery processes are exposed.

Figure 1 - Description of cases of Composition with Creditors

Process Code	Facts description	Facts analysis
C1	The process C1 began as a composition with creditors in Decree Law no.7.661, but in sequence, began to fall in the Law 11.101/05. The applicant filed its request for recovery on 10/31/2005 and claims that his difficulties are a result of the recession in the world economy in 2001, the year in which he was obliged to implore a request of composition with creditors. However, the judge responsible for the analysis of the composition, opted to declare bankruptcy, because the insolvency proceedings did not make any payment and confined himself to submit only the application of judicial recovery. Then the Judge of Judicial Recovery and Bankruptcy, followed the decision of the Judge Holder of the Composition. However, the Court of Justice dismissed the appeal of the applicant arguing that, even though the deposits of the instalments promised of composition of creditors have not been made, the creditors showed themselves willing to examine a judicial recovery plan to be submitted by the debtor, therefore, allowed the processing of the application of judicial recovery. This fact would make one more and last chance to avoid bankruptcy, with the holding of the meeting of creditors and eventual approval of that plan. It was then that the applicant had its processing Accepted on 03/23/2007 to meet only the requirements of article. 51 of the Law of bankruptcy and recovery.	It is realized the relative ease in obtaining the acceptance of the Composition/judicial recovery, even after the company has gone through a frustrated composition in a short interval of time. The responsibility of analysis of the conditions of the company to pay their debts was fully transferred to the creditors.
C2	There is presentation of embargoes on 11/03/2004 by a creditor who claims that the Insolvent has not acted in good faith, and that the Composition would be a maneuver for that, not being fulfilled the legal deadline, were converted into bankruptcy and company and their legitimate partners and hidden then were completely emptied, in terms of prevention. This same creditor claims that the second partner of the firm is a "straw man" and that it would be managed only by an influential politician in the state of MG. After that, the Judge decrees open to bankruptcy, because the asset have very large participation of third party checks and customers to receive, and also for the remainder of the asset is equivalent to only 35% of its liabilities. This fact was exposed earlier in the presentation of embargoes, which shows that the analysis of financial statements was not made in time skillful because it had already been granted the Composition on 09/15/2004. The judge stated that the company has spent 2 years without recomposing the corporate framework after the exit of a partner, on 08/25/2003, and the entry of a new partner,	This case portrays the attempt to use the possibility of companies to make use of the mechanism of the Composition /recovery, with the purpose of emptying the company. Although there are limitations to the action of companies in the processes, even so, it is understood as necessary the knowledge of this fact. It is perceived that there is, after the acceptance of the request, the analysis of financial statements of the company for part of the judgment, which is used for enactment of the bankruptcy

	on 09/16/2004, being the deadline established in the law and in the contract up to 180 days, and this is the main reason why the judge decreed the bankruptcy of the debtor. He also highlights the existence of many protests before the application of the Composition processing.	of the company. The analysis, therefore, is not made in a timely manner.
C3	The applicant, filed a request for composition on 06/25/2003, having his application accepted on 06/30/2003. In sentencing the judge shall approve the processing of the Composition , because, among other reasons, the special balance sheet raised for the composition, demonstrates in principle that the applicant has real assets exceeding 50% of the liabilities, fulfilling the legal requirement. The commissioner (judicial administrator in Law 11.101/05) on 04/26/2004 reports, based on the expert's report, that the economic status of society was precarious with a financial deficit reality, having in view that the company was paralyzed with its activities, not earning income to justify its existence. There are various reasons that indicate the economic insecurity of society: There is no sign of any kind of activity on the local headquarters of the company; the unsecured liabilities is R$ 1,073,748.59 or $369,277.63[v], on the same date, which corresponds to twice that was carried in the accounting balance sheet of insolvency proceedings used in the application of processing of the composition, i.e., the accumulated losses was frauded ; in addition to numerous accounting irregularities. On 01/06/2005, bankruptcy is enacted, due to the fact that insolvency proceedings fail to prove the payment of the first installment due to creditors, which explains the infraction to the provision prescribed by article 175 of the decree-law nº 7.661/45.	The judge performs an analysis of the relationship between asset and liability as provided for in Decree-law nº7.661/45 However, it is still exposed, after a short period of time, that the company already was not in continuity. The analysis, therefore, is not made in a timely manner, to the point of being able to avoid the error type I.

Source: Elaborated by the authors

Figure 2 - Description of cases of Judicial Recovery

Process Code	Facts description	Facts analysis
R1	The judge dismissed the applications of injunctions and the request for recovery, alleging that the cash flow was quite mild in relation to the liability observed, and that paid-in capital and active were less expressive to ensure the liability already confessed. Nevertheless, the Court partially granted the request of anticipation of appeal tutelage, only to defer the processing of judicial recovery, determining the judgment of origin, compliance with the provisions contained in Article 52 of the Law 11.101/05. It fell to the Judge to keep the rejection of injunctions and proceed with the judicial recovery.	The Court based its decision on accounting numbers observed in the initial documentation submitted by the applicant. However, for higher order, the processing was accepted, which is an indication that the proposed activity in this study should be provided to the judgment in the legislation.

R2	The applicant filed its request for recovery on 11/01/2006. His request was granted by fulfilling the requirements of article 51 of Law 11.101/05. Because there was no objection to the recovery plan presented, the recovery was granted. In the expert report submitted in February 2007, the expert stated that the company had a liquidation value of negative equity of R$ 3,215,398.82 or US$1,524,969.79 on the same date.	In addition to acceptance of processing by the judgment, in this case, the creditors also approve the recovery plan from a company that does not have conditions to reorganize itself, which is exposed by the expert. This is an evidence of the importance of greater participation and activity of the expert in bankruptcy processes.
R3	The applicant filed its request for recovery on 2/5/2009. The application of the recovery was granted on 03/20/2009 by fulfilling the requirements required by article 70 of the bankruptcy law. Because this is a microenterprise, the applicant had a period of 180 days for payment of the first installment of the value due to its creditors after distributing the plan. Due to not meeting this deadline, the recovery was converted into bankruptcy.	The case exemplifies the lack of financial viability of the company that has not been able to even start the payment of its creditors. This fact highlights the importance of having the analysis of the conditions of the company to reorganize itself and its capacity for continuity.
R4	The initial request for judicial recovery was filed on April 2010 and the processing of judicial recovery was granted still in the same month, after the conference of documentation from the initial request by the judgment. The company did not provide all the documentation required by article 51 (Law 11.101/05), but still had its request granted by the judge. Despite the resistance of some of the creditors regarding the approval of the plan, and the company under reorganization needed to change the proposed plan, it manages to have its approved plan and recovery is granted on March 2011. Some creditors manifest exposing that identified differentiated treatment in the plan among creditors of the same class, because for the unsecured creditors were offered a fixed term banking and correction more advantageous and for others in the same class (unsecured) and with similar claims was made a proposal on the basis of net revenue, causing the payment, for some people, in a period of not fewer than 45 years. As well as this, other claims of creditors appear in the process. There is no implication of this or the other in the rite of the procedure. After complying with its obligations for two years, the recovery is closed. However, the company at this time the company had paid only 8% of the debt.	The lack of presentation of all the documentation required in the initial request, it is evidenced that this is not analyzed, this fact could affect the analysis of the company's ability to reorganize itself.

Source: Elaborated by the authors

In cases in which any analysis is made, it is carried out in an extremely limited not collaborating, therefore, for the reduction of the error type I. This fact can be due to be performed by professionals who do not have expertise in the area. It is understood, therefore, that an analysis of this kind requires the action of an accounting specialized professional and who has conditions to do it more effectively.

By the study of the cases of recovery (or of the extinct composition) it is noted that it is not enough the fulfillment of the rite of procedure, there is a need for a technical analysis of the viability of the business (the capacity of continuity), so that the law reaches its goal.

The judge of the R1 could not refuse the processing of recovery, as the Court of Justice interfered in the sense of acceptance, which converges with the point of view of the

appeal of the Associate Judge Renata Machado Cotta, previously mentioned and that is opposite to that defends the judge 1 interviewed. Faced with this situation, it can be inferred that the greatest benefit of legal provision would allow/provide that the analysis of the documentation can be used as informational allowance for judges at the time of acceptance of the processing.

In case R2, the creditors had no objections to the plan, which highlights the lack of analysis of such a document for them, since the expert analyzes and reports that the company had a liquidation value of negative equity. This fact leads to thinking that there may not be an analysis of the viability of the plan on the part of creditors. Another possible explanation for such behavior, lies in the fact that the return of creditors in recovery is, on average, higher than in bankruptcy. Jupetipe (2014) finds that the rate of recovery of claims by creditors in bankruptcy is on average 12% and the recovery of 25%, which would encourage creditors to appreciate the recovery, as observed. Thus, the argument of judicial administrators interviewed that the feasibility analysis should be done only by creditors when the approval or not of the plan becomes questionable.

It is added that the plan approval and subsequent granting of recovery to insolvent companies (as was the case of the Composition) becomes an event of little economic and social effectiveness, considering that it does not meet the expected as legal act: prevent companies without conditions to continue operating and generating losses to creditors and the market as a whole. Thus, although the mechanism today, eventually gives creditors the responsibility to examine the feasibility of continuity of the company, it is realized that what happens in practice is the lack of this analysis by a majority of creditors.

6. FINAL CONSIDERATION

The focus of the study was to identify the empirical vision of agents who act in failing processes on the analysis of the viability of the company from the documentation/accounting information submitted by undertakings in accordance with Article 51 of the LRF, at the moment that precedes the acceptance of the processing of judicial recovery. The accounting documentation started to be required at this moment of the process, with the aim of enabling a deeper knowledge of the economic and financial situation of the company (Moro Junior, 2011). However, the simple presentation of documentation does not guarantee that it should be used in decisions in the process.

It is identified that the empirical need of this activity to provide informational subside of judgment and for the reduction of the error type I. The later is illustrated in the processes described, in which companies that were not able to reorganize, obtained his initial request of recovery granted by the judgment, postponing, many times, the process of liquidation. The expectation of decrease in type I error, with the analysis at the beginning of the process, is confirmed by the judge 1, who said to require this activity with the aim of avoiding that bankrupt companies already use the mechanism of recovery for another purpose than the reorganization.

Under the eyes of the law, the analysis at the beginning of the process can represent an outsourcing of the task of judge today, or you can take away the company the opportunity to renegotiate their debts and, therefore, become viable. The first aspect takes into consideration the assertion made by the interviewees that, the analysis of the initial documentation may happen when its forecast in the legislation, however, this is contrasted by the judge 1 who says that already does it even without legal change. However, it is perceived that without the legal provision, the judge can be prevented by higher order to make use of this analysis for the rejection of the processing, as is the case with R1 and is highlighted by the judge 2. In this

way, it is understood that there is a need to modify the legislation at least to provide such activity to the judgment.

About the possibility of veto, with the activity, the opportunity of the company to become feasible by means of renegotiation of debts, pointed out by judicial administrators interviewed, it is understood that such thinking is not consistent with the objective of the legislation and that the company should worry to restructure not only financially but also operationally.

Under the accounting point of view, it is believed that the ideal would be that the analysis of the initial application was made by an expert counter, which would be able to do it in a timely manner, so as to provide the information to subsidize the decision of the judges in granting or not the processing of recovery, without prejudice to the parties, safeguarding the process as a whole.

It is identified that there would be an increase of procedural costs with the inclusion of an analysis of the initial documentation, since this activity should be remunerated independently of other already existing in the legislation. A possible alternative to minimize this impact was cited in the interviews and consists of the creation and/or hiring an office for public officials to perform this activity in the Corporate/Bankruptcy judicial districts. Still on the consequences of the practice of the activity of analysis of initial documentation, there is the possibility to make the process more slowly, which could be detrimental to the applicant company. Therefore, if it is practiced, the activity should be carried out in a short space of time, as done by the judge 1, so that the crisis of the company cannot become worse as a result. It is suggested that these impacts are studied and their magnitude in future researches.

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[i] In this context, the Brazilian judge does not have conditions to commit the "Type I error", since, in the case of the undertaking to comply with the required by the IRF and submit all documentation, there is no legal requirement to refuse the request!

[ii] Full text available in: http://www.tjrj.jus.br/documents/10136/1186838/deferim-process-recupjud.pdf

[iii] According to Reis (2011), "the *deepening insolvency* is translated into a specific cause of imputation of liability to administrators by deterioration of the state of insolvency of society, having in view the artificial extension of business activity" (p. 10).

[iv] Full text available in:http://tj-rj.jusbrasil.com.br/jurisprudencia/373322756/apelacao-apl-10532398201481900 01-rio-de-janeiro-capital-7-vara-empresarial/inteiro-teor-373322760

[v] Conversion done by quote informed by the Central Bank of Brazil: http://www.bcb.gov.br/pt-br/#!/home