

Probability of the Debtor Obtaining Financing During Judicial Recovery

Prof. Dr. Rickardo Léo Ramos Gomes¹; Spec. Sebastião Madeiro Filho².

¹ Department of the Euvaldo Lodi Institute (IEL), and Postgraduate Department of the Farias Brito University Center (FBUNI), Fortaleza, Ceará, Brazil.

² Specialist in Controllershship and Finance from Centro Universitário UniAteneu, Fortaleza, Ceará, Brazil.
Corresponding Author: Prof. Dr. Rickardo Léo Ramos Gomes. <https://orcid.org/0000-0001-6101-9571>.

Abstract: *There are several reasons that lead a company and/or entrepreneur to undergo a judicial recovery process. What they all have in common, however, is the lack of liquidity, or rather, the lack of financial means to fulfill the necessary obligations for the daily operation of the company, such as worker salaries, operational costs, suppliers of inputs/raw materials and services, and investments, etc. In this regard, credit is an essential variable to promote the growth and survival of the company in times of crisis, to protect the core of economic activity, the source of services, in line with the fundamental principle of the Institute of Judicial Recovery, namely, the preservation of the company. In this context, and within the hypothetical realm, the present article has the general objective of analyzing the situation of a company undergoing judicial recovery, identifying the mechanism and the possibility for the debtor company to obtain a loan, and citing the legal framework for enabling and materializing the obtaining of financing. As for the methodological approach adopted for the development of this research, it is characterized as qualitative, employing two types of methodological procedures, namely, bibliographic review and documentary research. The study reaffirms that the choice to secure financing for companies undergoing judicial recovery is entirely justifiable as it concerns a higher good; in other words, it favors the preservation of the employment relationships of workers who operate within companies under the mentioned situation, thus establishing a conducive environment for the preservation of the corporate organization, also upholding its social function and continuing to stimulate the activity carried out by companies undergoing judicial recovery.*

Keywords: *Judicial Recovery; Financing; Lack of Liquidity; Loans.*

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I. INTRODUCTION

In the current phase of the Brazilian economy, a scenario of serious difficulties is being observed, with evident negative repercussions for companies striving to maintain stability in the market. In this situation, companies are required to maintain constant vigilance over economic indicators and other factors that could impact the market vectors in which they operate, particularly the levels of demand for their products or services, direct and indirect costs, and other predominant variables.

As a recent example, it is pertinent to mention the case of Lojas Americanas, which, due to financial challenges, had to resort to the legal process of filing for judicial recovery. In this context, within a hypothetical realm, the overarching goal of this article is to analyze the situation of a company undergoing judicial recovery, identify the mechanism and feasibility for the debtor company to obtain a loan, and cite the legal framework supporting the facilitation and realization of financing acquisition.

This financing aims to enable the company to honor its commitments promptly to suppliers, employees, tax authorities, and to operate in the market with an efficient level of performance. Regarding the methodological approach employed for the development of this research, it is characterized as qualitative, employing two methodological procedures, namely, bibliographic review and documentary research.

This article is structured into four sections. The first section serves as an introduction, explaining the research objectives. The second section is dedicated to presenting the experimental procedure undertaken for the advancement of this research. In the third section, a scientific discussion of the researched data is conducted in light of the contributions from authors and documents examined. Finally, in the fourth section, the study's conclusion is formulated.

II. EXPERIMENTAL PROCEDURE

In this section, the methods employed in the execution of this scientific research are expounded upon, elucidating the adopted methodological approach and the procedures employed for data collection and analysis. A comprehensive understanding of the investigated phenomena and processes was established through a qualitative approach, in conjunction with bibliographic and documentary research, with the purpose of enhancing and substantiating the proposed discussion.

2.1 Qualitative Methodological Approach

The methodological approach adopted in this study is qualitative, known for its emphasis on in-depth understanding and interpretation of the underlying meanings within the studied phenomena (Denzin and Lincoln, 2018). According to Yin (2016, p. 39), "qualitative research is an inquiry method that seeks to understand the meanings of human experiences, actions, social practices, and cultures." This approach allows for a contextual and holistic analysis of the researched issues, providing valuable insights into the understanding of the investigated processes.

2.2 Bibliographic Research

Bibliographic research constituted a fundamental procedure for constructing the theoretical foundation of this study. Various bibliographic sources were consulted and analyzed, including books, scientific articles, and other relevant academic publications.

According to Gil (2017, p. 21), bibliographic research "enables the researcher to cover a much broader range of phenomena than they could directly investigate." The literature review contributed to contextualizing the topic, identifying gaps in knowledge, and providing the theoretical underpinning for the research.

2.3 Documentary Research

In addition to bibliographic research, documentary research also played a crucial role in this investigation. Through the analysis of documents, records, and various materials, it was possible to gather relevant information about the object of study, as well as contextualize and enrich the conducted analysis.

According to Marconi and Lakatos (2019, p. 215), documentary research "involves the search for data in documents, such as letters, diaries, films, photographs, newspapers, manuscripts, research reports." This approach allowed for the collection of historical and contemporary data, enhancing the understanding of the investigated aspects.

III. RESULTS AND DISCUSSIONS

3.1 Auxiliary Tool in Overcoming Financial Crisis

Once a company enters judicial recovery, sources for obtaining necessary resources to maintain ongoing operations invariably become scarce or more costly, complicating the development of activities for companies undergoing judicial recovery. In an effort to change this scenario, substantial changes were made to the Law on Judicial Recovery, Extrajudicial Recovery, and Bankruptcy, to introduce tools aimed at assisting the financial recovery of companies, providing greater security to the financing agent. (Brazil, 2020)

The addition of legislation is valuable, as Debtor-in-Possession (DIP) financing is a safer bet for those financing companies in recovery, given the undeniable risks involved in extending credit to companies undergoing recovery processes that urgently need "new" money, known as fresh money.

According to Drumond (2021, p. 05), "The changes in the law undoubtedly modernize the rules to encourage investment in recovering companies, but only time will tell the impact of the new law."

Authors Costa and Melo (2021, p. 193) affirm that: In this financing modality, the debtor retains possession and control of the assets or rights given as collateral, allowing the company to continue operating. As a result, it is possible to address the lack of cash flow to cover operational, restructuring, and asset value preservation expenses.

Fresh money, in its literal translation, means "new money," which is essential for crisis-ridden companies to overcome the difficulties they are facing. For the realization of fresh money, Law 14.112 of 20/12/2020, in Article 69-A and subsequent articles, formalized a practice that was already recognized but not contained in law, which certainly aids judicial recovery and is known as DIP Financing. (Brazil, 2020)

DIP Financing, as per Britto (2021), originated in the United States of America. It provides the financier with a secured source for the business, such as the fiduciary alienation of an asset. DIP Financing involves

providing financial resources to the company to reverse the financial crisis and implement judicial recovery, intended for working capital, covering various expenses including those with suppliers and operations. In essence, it should be directed towards maintaining the company's operations, under the supervision of the judicial administrator.

Article 69-A of the aforementioned law authorizes the debtor to enter into a contract secured by encumbrance or fiduciary alienation of assets and rights, whether owned by the debtor or third parties, to finance operational restructuring activities aimed at overcoming the financial crisis. (Brazil, 2020)

3.1.1 Problem Identification

The fictitious company 1A2DD (fictitious denomination) operates in the field of technological innovation and specialized technical consultancy, providing equipment and services to the hospital network. It currently employs 22 (twenty-two) individuals, comprising 10 (ten) technical staff, 12 (twelve) administrative staff, in addition to the 2 (two) directors who are partners.

In the last financial statement, the company reported total assets (property and rights) of R\$ 12,000,000.00 (twelve million Brazilian reais), total liabilities (obligations and duties) of R\$ 8,000,000.00 (eight million Brazilian reais), and shareholders' equity of R\$ 4,000,000.00 (four million Brazilian reais).

This company has initiated a judicial recovery process (JRP) and is currently faithfully adhering to the goals outlined in its JRP. The company has established, operationalized, and implemented a computerized system with the aim of maintaining rigorous control and monitoring of its finances, goals, innovation programs, commitments to suppliers, employees, public and private hospital service portfolios, and fiscal obligations.

Caças and Guinsani (2022, p. 07) emphasize that:

Considering that companies are economic agents that have a societal impact, as they affect the collective, they deserve state protection in order to preserve their activities to the maximum extent. In other words, the company's preservation aims to protect the entire community, ensuring the generation of jobs, income, development, and tax payments. It is in this context that judicial recovery comes into play.

Through meticulous performance tracking, the dynamics of commitments to clients, creditors, employees, tax authorities, and especially the commitments and goals outlined in the JRP are assessed on a weekly basis.

3.1.2 Problem Analysis and Solution

After 10 (ten) months of the judicial recovery plan homologation period, the financial sector, upon analyzing the variables of the company's financial performance, detected a slight decline in projected revenues. The rigorous control system implemented for financial monitoring indicated a yellow warning signal, alerting that the cash flow was experiencing a decline in revenues.

As a result of this, the process was initiated to study the feasibility of negotiating and financing options for the company undergoing judicial recovery, aiming to maintain stability in the market and fully honor all commitments outlined in the judicial recovery process. Identifying the resource scarcity issue, the manager convened a meeting with the two company directors (Administration and Production). In this meeting, the problem was analyzed from a future perspective, and it was decided to explore an immediate solution with a minimum timeframe of 30 (thirty) days and a maximum of 45 (forty-five) days.

The study is focused on analyzing solutions within three (3) alternatives: a) Sale of assets; b) Bank financing; c) Capital increase. During the initial meeting, the first two alternatives were ruled out. The solution was centered around alternative C. To materialize this alternative, it was decided to pursue two paths: a) Bank financing with fiduciary collateral through one of the partner directors; b) Bank financing with fiduciary collateral through both partner directors.

Following the problem-solving analysis, guided by the principles of suitability, feasibility, and acceptability, the result favored alternative B. The parameters studied within the analysis for problem-solving were: Suitability – if adopted, the problem will be resolved. Feasibility – it can be executed, as the costs fall within financial limitations. Acceptability – it meets the requirements for both partners to obtain bank financing with fiduciary collateral, with legal support from Article 69-A of Law 14.112, dated 24/12/2020, excerpted below. (Bammann, 2021)

During judicial recovery, as per Articles 66 and 67 of this law, the judge may, after consulting the creditors' committee, authorize the execution of financing contracts with the debtor, secured by encumbrance or fiduciary alienation of property and rights, whether owned by the debtor or third parties, belonging to non-current assets, to finance their activities and expenses related to restructuring or preservation of asset value. (Brazil, 2020)

3.2 Discussions

3.2.1 Selection and Implementation of the Solution

With the positive decision made regarding alternative B – bank financing with fiduciary collateral through both partner directors, the board of directors contacted three financial institutions that offer financing for companies. From this pool, banks B and N were selected for offering more advantageous terms.

The partner directors-initiated contact with the managers of the two aforementioned banks and scheduled a meeting for the following day. During these meetings, the partner directors provided all requisite documentation and obtained approval for the desired financing from each bank. The approved financing amounts were R\$ 750,000.00 (seven hundred and fifty thousand reais) from each bank, with fiduciary collateral of a property for each bank, valued at R\$ 1,000,000.00 (one million reais) each. The interest rate was set at ten percent per year, with a three-month grace period.

Following meetings with the bank managers, the directors decided to meet with the company's manager. After this meeting, a decision was made to issue an invitation for a preliminary meeting with creditors (suppliers and employees) and the judicial administrator to plan the continuation of the process.

Three business days later, the meeting was held in the company's auditorium. During discussions, participants initially approved the financing. It was further decided to convene a General Creditors' Assembly (GCA) within ten calendar days. Invitations were extended to both bank managers to provide an explanation of the financing, as well as representatives from tax authorities and trade unions.

Following the publication of the notice and dispatch of correspondence to all interested parties, the Assembly was held, presided over by the Judicial Administrator. The Director of Administration presented the plan for obtaining and using the financing in the amount of R\$ 1,500,000.00 (one million and five hundred thousand reais), as well as the plan for resource allocation: R\$ 600,000.00 (six hundred thousand reais) – suppliers, R\$ 300,000.00 (three hundred thousand reais) – employees, R\$ 100,000.00 (one hundred thousand reais) - Tax Authority, and R\$ 500,000.00 (five hundred thousand reais) – working capital.

Within the event, the Manager also presented the evolution and projected revenues and expenses for the current quarter and the next fiscal year. The Production Director discussed the outstanding orders and the forecasted slight market uptick in the sector. The Manager of Bank B, speaking on behalf of both Bank B and Bank N, provided a detailed explanation of the fiduciary collateral financing operation, citing and commenting on Article 22 of Law 9514 of 20/11/1977, excerpted below. "Fiduciary alienation regulated by this Law is the legal transaction by which the debtor, or fiduciary, with the purpose of providing security, contracts and transfers to the Creditor or Fiduciary, the resolvable ownership of immovable property." (Brazil, 1977)

The Judicial Administrator elaborated extensively on the significance of obtaining the financing, explaining the intricacies of the tax debt within Article 187 of Law 5172 of October 25, 1966, which approved the National Tax Code (CTN), and Article 10-A and its Item V, of the LRJ, excerpted below.

Article 187 "Judicial collection of the tax credit is not subject to creditor competition or qualification in bankruptcy, judicial recovery, composition with creditors, probate, or inventory." (Brazil, 1966)

Article 10-A "The entrepreneur or business entity that requests or has been granted the processing of judicial recovery, as per Articles 51, 52, and 70 of Law 11,101 of February 9, 2005, may settle its debts with the National Treasury, even if not yet due on the date of filing the initial petition for judicial recovery, whether tax-related or not, constituted or not as an active debt, by choosing one of the following options." (Brazil, 1966; Brazil, 2005)

Item V "Installment of the consolidated debt in up to 120 (one hundred and twenty) monthly and successive installments, calculated to observe the following minimum percentages, applied on the value of the consolidated debt in the installment." (Brazil, 1966)

It was agreed that if the company that is in the process of judicial recovery pays the total debts of suppliers and employees within twelve days after receiving the financing, these creditors would grant a ten percent discount each. The bank managers committed to credit the amount within five days of the Judge's approval of the financing and the signing and registration of the two financing contracts.

The approval of the guarantee for obtaining the financing was unanimously voted upon. Subsequently, the minutes were prepared in accordance with legal formalities and requirements. Following the reading of the minutes, it was approved unanimously, and all present signed the document. The minutes were registered with the Notary's Office. All documentation was compiled and submitted to the corresponding court, where it underwent a thorough analysis.

All documents were meticulously screened for formality and authenticity. The Judicial Administrator was also consulted by the Judge regarding the current situation of the company and its future outlook. Upon the positive completion of this legal ritual, the Judge decided to approve and authorize the financing sought by the company that is in the process of judicial recovery.

It was further stipulated by the magistrate that a specific item regarding the monitoring of repayment of the approved financing from the banks, as well as the relevant debt to creditors and the Tax Authority, be included in the monthly activity report of the recuperated company.

IV. CONCLUSION

This research has evidenced that the potential for financing could be realized when a group of debtors, in this specific case, the creditor suppliers, creditor collaborators, or partner members of the debtor group, come together with the aim of pooling efforts to rectify the company's finances, eliminate or minimize losses, and avert bankruptcy.

It is noteworthy that the financing under consideration can be executed by either the group of creditor suppliers or creditor collaborators individually or by partner members of the debtor group. The procedural framework for this type of financing, as previously cited in Article 69-A of Law No. 11,101 of February 9, 2005, and in the articles of the same law below transcribed, must be scrupulously adhered to.

Article 69-E. "The financing referred to in this section may be undertaken by anyone, including creditors subject or not to judicial recovery, family members, partners, and members of the debtor group." (Brazil, 2005)

Article 69-F. "Any person or entity may secure the financing referred to in this section by encumbering or through the fiduciary transfer of assets and rights, including the debtor themselves and the other members of their group, whether or not undergoing judicial recovery." (Brazil, 2005)

The research underscores that concerning the feasibility of financing for the debtor or debtor group during judicial recovery, as expounded, it is viable provided the legal formalities of Section IV-A of Law 14,112/2020 are adhered to. (Brazil, 2020; Bammann, 2021)

In conclusion, this study reaffirms that the decision to ensure financing for companies undergoing judicial recovery is entirely justifiable as it concerns a greater good. In other words, it favors the preservation of the employment ties of the workers operating within companies in the mentioned situation, thereby establishing a conducive situation for the preservation of the business organization, while also upholding its social function and continuing to stimulate the activities undertaken by companies undergoing judicial recovery. (Licks, 2018)

Conflict of interest

There is no conflict to disclose.

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