



Costs of insolvency in Brazil from the perspective of economic efficiency

Costs of Insolvency in Brazil from the Perspective of Economic Efficiency

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Summary

This article analyzes the costs of insolvency in Brazil from the perspective of economic efficiency, a central element of the Brazilian Bankruptcy and Judicial Reorganization Law (LREF), to determine whether the legal framework for insolvency achieves the purpose of preserving the company and its social function. To this end, it uses empirical research based on data from the second phase of the São Paulo State Insolvency Observatory and doctrinal analysis on the topic. The article assesses the extent to which direct costs (legal costs, judicial administrator fees, and administrative expenses) and indirect costs (duration of proceedings, credit restrictions, and opportunity costs) impact the credit recovery rate for creditors and the success of the plan for debtor companies, serving as benchmarks for measuring the system's economic effectiveness. The results reveal that direct costs consume, on average, more than 25% of a company's initial assets during recovery and 35% in bankruptcy, while indirect costs are prolonged over time, with credit restrictions and a significant reduction in investments. The credit recovery rate is around 25% in judicial recovery and 12% in bankruptcy, while only 54.4% of companies manage to comply with the approved plan. The conclusion is that, from the perspective of the economic efficiency of the legal framework for corporate recovery and bankruptcy, the results are modest and may even have adverse effects on the credit market and on trust in business relationships.

Keywords: Insolvency. Judicial Recovery. Economic Costs. Economic Efficiency.

Abstract

The article analyzes the costs of insolvency in Brazil from the perspective of economic efficiency, a central element of the Brazilian Judicial Reorganization and Bankruptcy Law (LREF), in order to verify whether the insolvency legal framework fulfills its purpose of preserving the company and its social function. To this end, the study adopts an empirical approach based on data from the 2nd phase of the Insolvency Observatory in the State of São Paulo, combined with doctrinal analysis on the subject. It assesses the extent to which direct costs (court fees, judicial administrator's fees, and administrative expenses) and indirect costs (length of proceedings, credit restrictions, and opportunity costs) affect the rate of credit recovery by creditors and the success of reorganization plans by debtor companies, serving as benchmarks to measure the system's economic effectiveness. The findings show that direct costs consume, on average, more than 25% of the company's initial assets in reorganization and 35% in bankruptcy, while indirect costs extend over time, with credit restrictions and significant reduction of investments. The rate of credit recovery averages around 25% in judicial reorganization and 12% in bankruptcy, while only 54.4% of companies manage to comply with the approved plan. It is concluded that, from the perspective of the economic efficiency of the Brazilian insolvency regime, the results are modest and may even produce adverse effects on the credit market and on confidence in business relations.

Keywords: Insolvency. Judicial Reorganization. Economic Costs. Economic Efficiency.

Introduction

The company's crisis constitutes a legal and economic phenomenon of great relevance, capable of producing repercussions that go beyond the sphere of the parties directly involved, being felt in the credit market, in the confidence of commercial relations and in the dynamics of economic development. In this context, Law No. 11,101/2005 (Law of Judicial Recovery and Bankruptcy – LREF) enshrined as guiding principles the preservation of the viable company and its social function, which, ultimately, should be translated into efficiency economic.

To assess the economic efficiency of the LREF, cost analysis is essential. direct, such as court costs, expert fees and remuneration of the judicial administrator, and indirect costs, related to the duration of the process, credit restrictions and losses of opportunity, which decisively affect both the companies' ability to recover as the rate of return of creditors.

In this context, we seek to analyze the costs of insolvency in Brazil from the perspective of economic efficiency, using empirical data from the 2nd phase of the Insolvency Observatory in the State of São Paulo, in addition to the contribution of specialized doctrine. The purpose is understand whether the results actually obtained — in terms of success rate of companies and credit recovery rate — correspond to the political-legislative objectives declared in the LREF, or if, on the contrary, the search for the preservation of the company has produced limited and sometimes adverse market effects.

1 Insolvency costs:

A company crisis, whether temporary or permanent, has legal and economic repercussions. beyond those individuals or legal entities that have a direct relationship with it, reflecting a social cost, considered by the legislator when prescribing in the recovery law enterprise and bankruptcy (LREF) the principle of preserving the economically viable enterprise. In addition, the insolvency process involves direct and indirect costs.

Direct costs are those involved in the judicial processing itself or extrajudicial aspects of the insolvency procedure, such as legal costs, expert fees and

judicial administrator, and indirect expenses, expenses with lawyer, accountant, in addition to the duration of the procedure and, what is called, opportunity costs, for the debtor and creditor. ¹

1.1. Direct costs

Direct costs are the administrative expenses of the insolvency procedure, such as procedural expenses and court fees, expert and judicial administrator fees, among others.

Court costs are established by State Law, therefore, they vary from according to each State of the Federation, in the case of the State of São Paulo, they are regulated, as regards procedural expenses, by regulations of the TJSP, and the court fee by Law 11,608/20032 .

In the State of São Paulo the court fee is 1% of the value of the case in the case of request for judicial recovery or bankruptcy, limited to a maximum of 3000 UFESPs, that is, considering the value of UFESPs of R\$ 34.26 in February 2023, the ceiling totals R\$ 102,780.00 (one hundred and two thousand seven hundred and eighty reais) in 2023, which means that every company with liabilities subject to insolvency proceedings above R\$ 10,278,000.00 (ten million two hundred and seventy-eight thousand reais), must initially pay the maximum amount of the court fee. According to data from the Insolvency Observatory in the State of São Paulo³ , only 24.4% of companies that filed for judicial recovery did not reach this ceiling.

¹ NOGUEIRA, Ricardo José N. The Efficiency of the Judicial Process in Company Recovery, 1st edition. Available at: Minha Biblioteca, Editora Saraiva, 2009. Pg. 194

² <https://www.al.sp.gov.br/repositorio/legislacao/lei/2003/lei-11608-29.12.2003.html>

³ Insolvency Observatory - Judicial Recovery in the State of São Paulo - Update of the 2nd Phase of the Insolvency Observatory - available at [obs_recuperacoes_abj.pdf \(abjur.github.io\)](#)



Tabela 4.1: Distribuição das companhias pela faixa de passivo circulante e não circulante (conforme dados extraídos do balanço contábil).

Faixa de passivo	Frequência	%
Até R\$ 1MM	88	7,4%
Entre R\$ 1MM e R\$ 5MM	124	10,4%
Entre R\$ 5MM e R\$ 10MM	79	6,6%
Entre R\$ 10MM e R\$ 50MM	190	15,9%
Entre R\$ 50MM e R\$ 100MM	48	4,0%
Acima de R\$ 100MM	113	9,5%
Sem informação	552	46,2%
Total	1194	100,0%

The remuneration of the judicial administrator must be set taking into account the capacity of the debtor and the complexity of the work, not being able to exceed 5% of the liabilities subject to the effects of judicial recovery.

In the State of São Paulo, according to data from the Insolvency Observatory – Judicial Recovery in the State of São Paulo⁴, regarding the remuneration of the judicial administrator, 48.9% was arbitrated in a fixed amount and 51.1% in percentages of the liabilities under recovery, being mostly set close to the maximum percentage provided for in article 24, §1, of the LFR5.

Tabela 7.3: Contagem dos tipos de remuneração dos Administradores Judiciais.

Tipo de remuneração do AJ	N	%
Fixo	276	48,9%
Percentual	288	51,1%
Total	564	100,0%

⁴ Ibid.

⁵ Art. 24. The judge shall set the amount and form of payment of the judicial administrator's remuneration, taking into account the debtor's ability to pay, the degree of complexity of the work and the values practiced in the market for the performance of similar activities.

§ 1 In any case, the total paid to the judicial administrator will not exceed 5% (five percent) of the amount owed to creditors subject to judicial recovery or the sale value of the assets in bankruptcy.

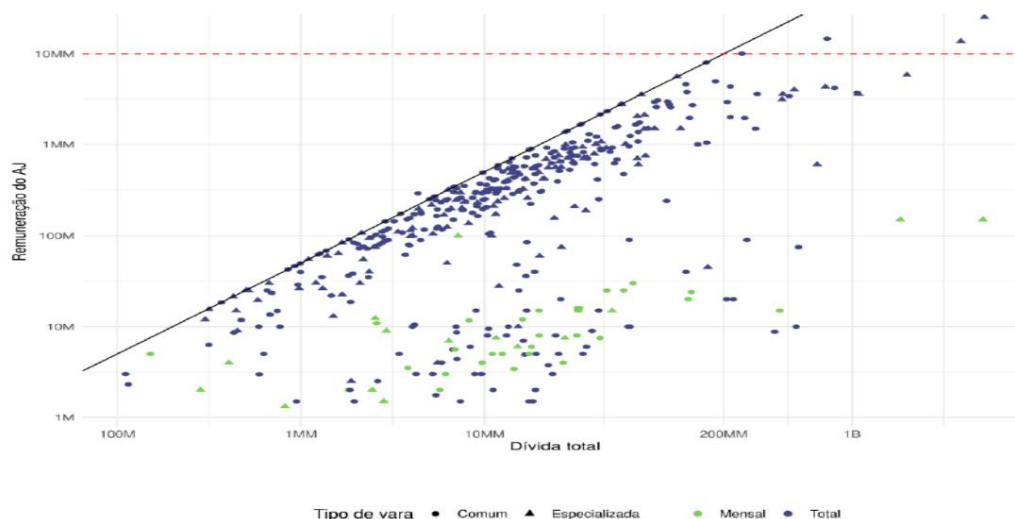


Figura 7.1: Remuneração do administrador judicial contra a dívida total apresentada na lista do Administrador Judicial. A linha contínua preta marca o limite de 5% do passivo. A linha tracejada vermelha marca 10 milhões de reais no eixo da remuneração dos Administradores Judiciais.

Added to these costs are the expenses for prior expertise and mediation, costs that directly impact the duration of the process – one of the indirect costs of insolvency.

According to data collected by JUPETIPE6, in the year 2013, analyzing insolvency proceedings in São Paulo/SP, Belo Horizonte/MG and Contagem/MG, the costs direct amounts meant, on average, 25.46% of the assets existing when the recovery was requested legal action by the company. In the case of bankruptcy, the direct costs were even higher and meant 35% of the bankrupt's final assets.

From the above study, it was found that the direct costs of insolvency are high, consuming, in the judicial recovery, more than $\frac{1}{4}$ (one quarter) of the company's initial assets, given important that must be observed and considered, because such costs can be an obstacle for the request for judicial recovery of some companies, such as small businesses large and medium-sized companies, and postpone the request for judicial recovery of others, in addition to, in with the payment of these expenses being a priority, consuming a significant part of your assets, which directly reflects on the credit recovery rate.

⁶ JUPETIPE, Fernanda Karoliny Nascimento. Bankruptcy costs of Brazilian bankruptcy legislation / Fernanda Karoliny Nascimento Jupetipe. – São Paulo, 2013. 77 p. Dissertation (Master's) – University of São Paulo, 2014. Advisor: Eliseu Martins.



1.2. Indirect costs

As indirect costs, we have the cost of lawyer, accountant, and the costs of opportunity, for both debtor and creditor. In the understanding of NOGUEIRA⁷, *"They are called costs indirect losses "losses that occur in the course of operations while the company is in operation crisis" (SMITH and STROMBERG, 2004, p. 14)"*, with the time element being a determining factor for the losses.

According to data from the Insolvency Observatory, in the State of São Paulo, in the recovery judicial, the average time for the final decision of the general meeting of creditors occurs on average in 506 days, that is, approximately in 1 and 5 months, counting from its approval⁸.

Tabela 7.8: Tempo mediano até a primeira AGC separado pela localidade de tramitação.

Tipo de vara	Frequência	Tempo mediano até 1ª AGC
Comum	412	456
Especializada	164	327

Added the period indicated above to the inspection period until the end of the judicial recovery, which, also according to data from the Insolvency Observatory, in States of São Paulo, considering the average time of the common and specialized court is 3 years and 5 months⁹, it is clear that the duration of judicial recovery is almost 5 years.

⁷ NOGUEIRA, Ricardo José N. The Efficiency of the Judicial Process in Company Recovery, 1st edition. Available at: Minha Biblioteca, Editora Saraiva, 2009. Pg. 194.

⁸ Insolvency Observatory - Judicial Recovery in the State of São Paulo - Update of the 2nd Phase of the Insolvency Observatory - available at [obs_recuperacoes_abj.pdf \(abjur.github.io\)](https://github.com/abjur/obs_recuperacoes_abj.pdf).

⁹ Ibid.



Tabela 9.3: Tempos medianos até os desfechos da fase de acompanhamento (encerramento da recuperação judicial ou convalidação em falência durante a fase de acompanhamento).

Tipo de vara	Desfecho da recuperação	Tempo mediano
Comum	Encerramento sem falência	3 anos e 3 meses
Comum	Falência	2 anos e 1 mês
Especializada	Encerramento sem falência	2 anos e 10 meses
Especializada	Falência	1 ano e 7 meses

This is an important element, which impacts the opportunity cost, mainly, of the debtor. This is because, during the period of judicial recovery, the company has difficulty in obtaining financing to promote their activities.

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It is undeniable that, during this period, the company suffers from credit restrictions, which has an impact in project investments necessary for its competitiveness in the market, in addition to having to reduce costs, reduce the number of employees, among others.

The indirect cost for the creditor is related to the discount, credit installment and grace period. With the exception of labor credits, paid on average within a period of 1 year, other creditors receive their credit with a significant discount and in installments.

Regarding the payment of bankruptcy credits, the report from the Observatory of Insolvency – Judicial Recovery in the State of São Paulo¹¹, presents the following results: (i) labor debts were paid on average in 1 year and most without a discount (graph 1); (ii) debts with real guarantees, with a payment term of an average of 9 years, being 47.2% the average discount rate and with a grace period (graph 2); and (iii) unsecured debts, the payment term was 9 years on average, with an average discount rate of 70.8% and with grace period (chart 3):

¹⁰ NOGUEIRA, Ricardo José N. The Efficiency of the Judicial Process in Company Recovery, 1st edition. Available at: Minha Biblioteca, Editora Saraiva, 2009. Pg. 194. *apud* SMITH and STROMBERG, 2004, p. 14: Smith and Stromberg (2004, p.14), citing other studies, show that to maintain the value of the asset there is a need for new investments that cannot be easily obtained by the company in crisis (MYERS, 1977), deprived of necessary investments and new projects and assets (MYERS, 1977), which finds it difficult to maintain contracts with employees, suppliers and customers (TITMAN, 1984) and in facing actions from competitors (BOLTON and SCHARFSTEIN, 1996).

¹¹ Insolvency Observatory - Judicial Recovery in the State of São Paulo - Update of the 2nd Phase of the Insolvency Observatory - available at [obs_recuperacoes_abj.pdf \(abjur.github.io\)](https://obs_recuperacoes.abj.pdf(abjur.github.io))

Added to the credit installment and the discount, we have the grace period for the beginning of payment, so that, in the State of São Paulo, for unsecured credits, by For example, the average payment time is 10 to 15 years, in the case of a company with liabilities of 10 to 50 million.

Chart 112:

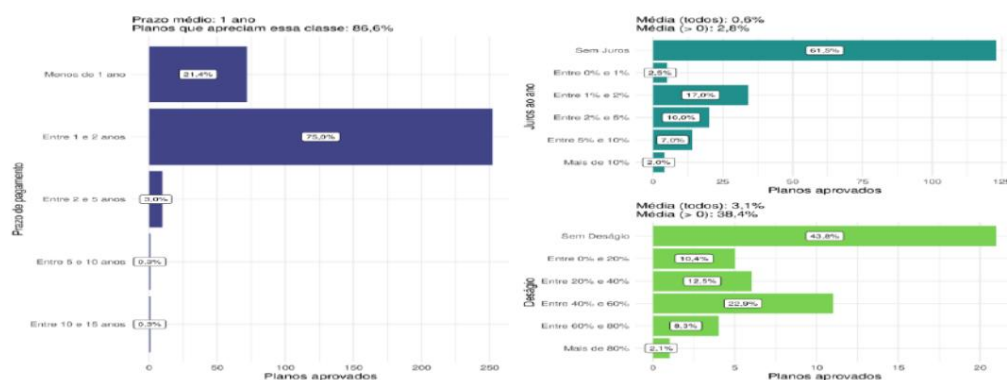


Figura 8.3: Prazo de pagamento, taxa de juros e de deságio das dívidas dos credores da classe 1, credores trabalhistas e com créditos decorrentes de acidente de trabalho.

Chart 213

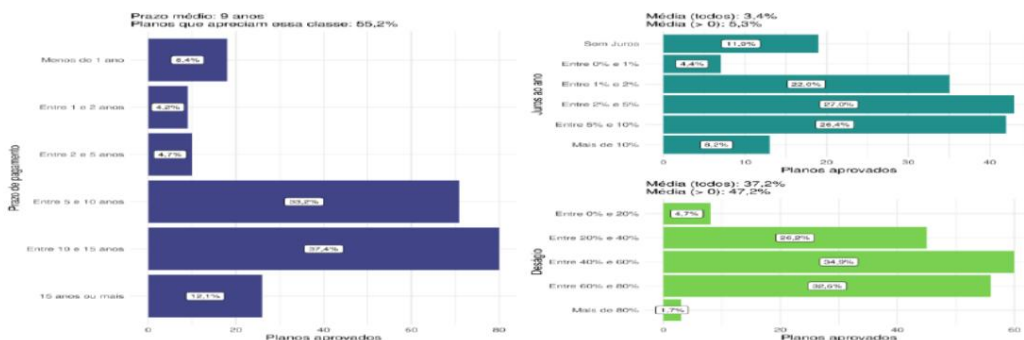


Figura 8.5: Índices básicos do plano separados para os credores da classe 2, credores titulares de créditos com garantia real.

¹² Insolvency Observatory - Judicial Recovery in the State of São Paulo - Update of the 2nd Phase of the Insolvency Observatory - available at obs_recuperacoes_abj.pdf (abjur.github.io)

¹³ Insolvency Observatory - Judicial Recovery in the State of São Paulo - Update of the 2nd Phase of the Insolvency Observatory - available at obs_recuperacoes_abj.pdf (abjur.github.io)

Chart 314:

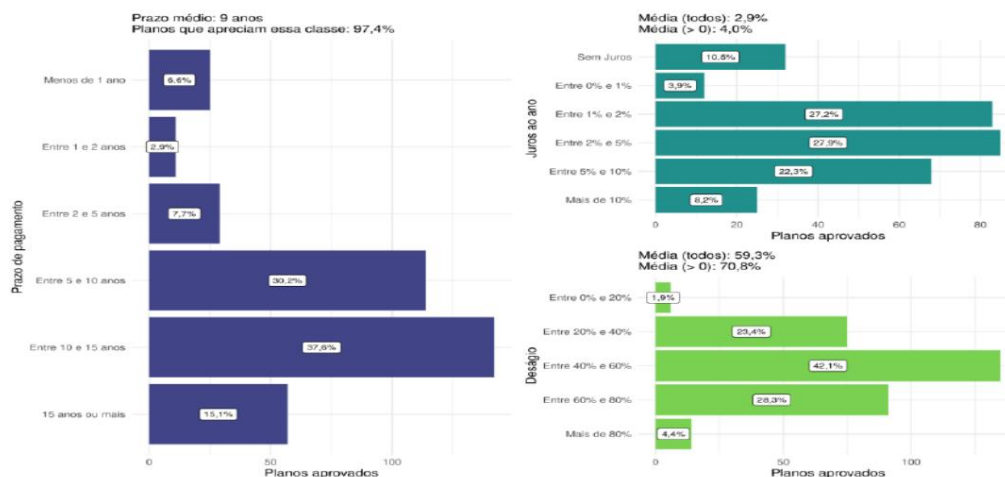


Figura 8.7: Índices básicos do plano separados para os credores da classe 3, credores quirografários, privilegiados, subquirografários e subordinados.

Note that indirect costs extend over time and their effects are more extensive than direct costs, and often involve data that is difficult to measure, such as how much impact does the opportunity cost measured by the company undergoing judicial recovery have on the company undergoing judicial recovery? time and how much the creditor's opportunity cost in receiving their payment impacts the market credit with a 70% discount over a period of 10 years.

In any case, it would not be bold to state that the indirect costs, as regards the debtor, may postpone investments necessary for their activity, delaying or even harming death, its competitive recovery in the market. With regard to the creditor, the discount and the term of payment of the invested credit are the deciding factor, for example, for new concessions of credit.

It can be seen, therefore, that the element – cost – involved in insolvency cannot be despised, on the contrary, it is necessary to look at it, including to gain insight into intended economic efficiency.

¹⁴ Insolvency Observatory - Judicial Recovery in the State of São Paulo - Update of the 2nd Phase of the Insolvency Observatory - available at obs_recuperacoes_abj.pdf (abjur.github.io)



As public policy elected and contained in the LREF, economic efficiency is valued, which aims to be achieved with the express legal provision of *"preservation of the company, its function social and the stimulus to economic activity"*, in the conception of SACRAMONE. ¹⁵

For CAMPINHO, the objective of the LREF is to preserve the company's social assets, which is only achieved if, during the recovery period, the company is able to achieve a *"self-sustaining profitability"*, with the sharing of the burden of restructuring, naming it as a *"sacrifice process"*.¹⁶

The company must be able to reach the end of the judicial recovery procedure, with the overcoming of the economic and financial crisis. In turn, creditors, forced into submission to the competitive procedure, the renegotiated obligations must be fulfilled.

From this perspective, regarding the success rate, the data from the 2nd phase of the Observatory of Insolvency cases reveal that, in the State of São Paulo, of the completed judicial recoveries, 54.4% of companies complied with the judicial recovery plan and 45.6% went bankrupt decreed. ¹⁷

By creditors, regarding the credit recovery rate, around 25% of the credit bankruptcy is recovered in judicial recovery, and, in bankruptcy, only 12%, according to the data collected by JUPETIPE. ¹⁸

It is worth noting that both the success rate for the recovering party and the recovery rate of credit by the creditor reveal unsatisfactory percentages in light of the LFR objective, to point out that time is an important element in this equation, mainly for the creditor, since

¹⁵ SACRAMONE, Marcelo B. Comments on the Corporate Reorganization and Bankruptcy Law. Available at: Minha Biblioteca, (4th edition). Editora Saraiva, 2023. Pg. 137: "Although judicial reorganization aims to overcome the entrepreneur's economic and financial crisis and ensure the preservation of the company, it will only fulfill its social function if it is economically efficient. Only a viable activity that guarantees the fulfillment of its social obligations, with the delivery of products to consumers, the collection of taxes, and the payment of employees and creditors, will fulfill its social function."

¹⁶ CAMPINHO, Sérgio. Judicial Recovery Plan – Formation, approval and review. Available at: Minha Biblioteca, Editora Saraiva, 2021. Pg. 05

¹⁷ Insolvency Observatory - Judicial Recovery in the State of São Paulo - Update of the 2nd Phase of the Insolvency Observatory - available at [obs_recuperacoes_abj.pdf \(abjur.github.io\)](#)

¹⁸ JUPETIPE, Fernanda Karoliny Nascimento. Bankruptcy costs of Brazilian bankruptcy legislation / Fernanda Karoliny Nascimento Jupetipe. – São Paulo, 2013. 77 p. Dissertation (Master's) – University of São Paulo, 2014. Advisor: Eliseu Martins.

that, during the period of judicial recovery, the company has difficulty in obtaining financing to promote its activities, which can be the deciding factor for your recovery. In bankruptcy, time depreciates the asset, as MAMEDE argues. 19

The legal regime of insolvency, which aims to preserve the company and its social function with the aim of economic efficiency, and, to this end, it imposes on individual creditors the submission to the bankruptcy regime established by him, is capable of recovering only 25% of the credit in judicial recovery.

Given these data, there is the intriguing question of whether the LREF is achieving its objective. Another: how many of those surviving companies – which fit the success rate – 54.4% of companies - can translate into economic efficiency.

The numbers speak for themselves. It doesn't seem reasonable that the microsystem, which has as its aiming at economic efficiency, and results in the recovery of 25% of credits submitted to it and reveals a success rate of less than 54.4% of the companies submitted to it your regime, be efficient.

It turns out that the problem is not limited to whether or not the LREF is achieving its objective she intended, in which case, it could be concluded that this is another case of Law in Brazilian legal system that would not have achieved its purpose. The problem lies in the consequences of this economic inefficiency for the market, to the extent that this naive disposition that the company and its social function must be preserved, impacts the market as a whole, for the granting of new credits, for the promotion of other viable activities, among others.

In fact, it must be considered, and perhaps this is the most sensitive point, that regulation of companies and activities subject to the insolvency regime have effects beyond the parties involved, in addition to the debtors and creditors directly involved, in addition to that

¹⁹ MAMEDE, Gladston. Brazilian Business Law: Bankruptcy and Business Recovery. Available at: Minha Biblioteca, (13th edition). GEN Group, 2022. Pg. 338: "A demonstration that the legislator recognized that the delay in realizing the bankrupt's assets is urgent is found in Article 144-A of Law 11.101/2005: if the attempt to sell the assets of the bankruptcy estate is unsuccessful and, moreover, if the creditors do not present any proposal to take them, the assets may be considered without market value and destined for donation. This insertion was made by Law 14.112/2020, which, here too, clearly demonstrates that extending the bankruptcy is an evil in itself and does not serve the public interest. If it is not possible to donate because there is no interested donee, the assets will be returned to the bankrupt, states the sole paragraph, and that's it. It is important to conclude the case so that the costs of the judicial system do not make the bankruptcy even more damaging to the State and society in general. The law, in fact, says more than its text: it makes it clear that extending the bankruptcy process is harmful in itself. yes, which many had already noticed and denounced long ago. It doesn't matter whether it's a micro-entrepreneur or a large corporation: Time is the enemy of the best solution: it devalues, rusts, wears out, corrodes, etc. Time does not improve the realization of the asset; it worsens it. It worsens it. The bankruptcy process must be swift and effective."

protected activity in itself, which, if the view is restricted to a specific company and the activity in itself, it could even be understood as a fair submission to the regime.

It turns out that, when expanding the field of vision, it is necessary to observe and consider that there is a economic system, the so-called market, which will have a new credit order established, by example, based on the value and time of the credit withdrawn from the market and the relationship commercial activity was weakened as a result of the submission of credit to the insolvency regime. 20

The granting of credit, undeniably necessary for the promotion of business activity, is umbilically linked to trust, to the certainty of recoverability, to security and credibility of relationships. The lower the certainty of credit recoverability, in other words, the The greater the risk of irrecoverability, the more expensive the credit becomes, which, it should be repeated, impacts the promotion of business activity as a whole.²¹

It is undeniable that the intention to seek the preservation of the company and its social function, especially in a developing country, like Brazil, where the state intervention is still very necessary in regulating various activities.

What is questioned is whether this intervention is despite the credit guarantee. And further, if when weighing the scales in favor of preserving the company and its social function, the objective intended by the LREF of economic efficiency. And the inquiry is legitimate when analyzes the numbers presented in the lines above, mainly in relation to the rate of credit recovery by the creditor and the success rate of companies subject to the regime judicial recovery.

According to the numbers revealed, the greatest protection for the preservation of the company and its function social, a political option of the Brazilian legislator, was not able to achieve the objective of efficiency economic. What's more, the quest to achieve this goal may be having harmful effects on the market.

3. Conclusion

²⁰ SADDI, Jairo. Credit and the Judiciary in Brazil: An Analysis of Law and Economics. São Paulo: Quartier Latin, 2007.

²¹ SADDI, Jairo. Credit and the Judiciary in Brazil: An Analysis of Law and Economics. São Paulo: Quartier Latin, 2007

Through the analysis of data from the Insolvency Observatory, regarding costs involved in judicial recovery and bankruptcy, if it was intended to verify whether the insolvency system in Brazil it achieves its objective, which consists of economic efficiency.

It was found that the direct costs of insolvency are high and consume, in judicial recovery, more than $\frac{1}{4}$ (one quarter) of the company's initial assets, which may be an obstacle to the request for judicial recovery of some types of companies, such as small businesses large and medium-sized companies, and postpone the request for judicial recovery of others, in addition to, in with the payment of these expenses being a priority, consuming a significant part of your assets, which directly reflects on the credit recovery rate, which averages 25%. In the case of bankruptcy, direct costs are even higher and consume 35% of the company's final assets, with a credit recovery rate of 12%, data from 2013²².

As indirect costs, we have time as the determining time element for the losses, considering that during the period of judicial recovery, the company has to reduce costs, reduce the number of employees, limit investments, in addition to the patent restriction on credit.

Added to these elements is the success rate of the insolvency regime, just 54.4%. of companies subject to the insolvency regime are able to comply with the recovery plan judicial.

From the figures above, which, it should be noted, in the case of judicial recovery, reveal the rate of recovery of 25% of credits subject to the insolvency regime and 12% of credit in bankruptcy, it is not difficult to conclude that the insolvency regime is inefficient.

Furthermore, the above figures reveal that greater protection for the preservation of the company and its social function, a political option of the Brazilian legislator, was not able to achieve the objective of economic efficiency. What's more, the quest to achieve this goal may be bringing about side effects harmful to the market.

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²² JUPETIPE, Fernanda Karoliny Nascimento. Bankruptcy costs of Brazilian bankruptcy legislation / Fernanda Karoliny Nascimento Jupetipe. – São Paulo, 2013. 77 p. Dissertation (Master's) – University of São Paulo, 2014. Advisor: Eliseu Martins.

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