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CO-OBLIGATORS IN JUDICIAL RECOVERY CO-OBLIGORS IN JUDICIAL REORGANIZATION

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SUMMARY

This article addresses positions on the obligations of co-obligors, guarantors and sureties within the scope of the judicial recovery process, highlighting their divergences, as well as the need to reach an understanding in order to guarantee legal certainty to the parties involved. It also highlights the implications that may occur in the recovery process due to the subjection or not of the co-obligors to the effects of the judicial recovery, given that it may impact the recovery procedure of the debtor itself. The article uses mainly bibliographic sources, such as books and legislation, but it is also supported by judgments of the Courts of Justice of the Brazilian national territory, so the bibliographic research method was used.
Keywords: judicial recovery; co-obligors; guarantors; endorsers; novation.

ABSTRACT

This article addresses positions on the obligations of co-obligors, guarantors and guarantors within the scope of the judicial reorganization process, highlighting the differences in such positions, as well as the need to pacify an understanding in order to guarantee legal certainty to the parties involved . Also noteworthy are the implications that may occur in the reorganization process due to the subjection or not of the co-obligors to the effects of the judicial reorganization, given that it may impact the debtor's own uplift procedure. The article mainly uses bibliographic sources, such as books and legislation, but it is also supported by judgments from the Courts of Justice in the Brazilian national territory, so the bibliographic research method was used. **Keywords**: judicial reorganization; co-obligors; guarantors; warrantors; novation.

1. INTRODUCTION

The work presented in the form of an article initially presents general notions of the judicial recovery process in order to clarify certain concepts, such as the suspension of certain actions and novation occurring within the scope of the recovery procedure.

In view of such clarifications, the text mainly deals with the maintenance or not of the obligations of co-obligors, guarantors and endorsers due to the distribution of the request for judicial recovery of the main debtor, highlighting doctrinal and jurisprudential positions.

In this scenario, the article sets out which credits are subject to the effects of judicial recovery in order to demonstrate how third-party co-obligors will be included within the scope of judicial recovery.

It then presents the definition of co-obligors, guarantors and endorsers, considering §1 of article 49 of the LRF.

Finally, it highlights the 3 (three) current positions on whether or not to maintain the obligations of co-obligors, guarantors and endorsers in light of the distribution of the request for judicial recovery of the main debtor, highlighting their differences.

2. GENERAL NOTIONS OF THE RECOVERY INSTITUTE

Initially, it is important to explain that the various difficulties that the entrepreneur (person who runs the company) may face are inherent to economic activity, such as the search for new markets, maintaining clientele, etc. Such difficulties, therefore, may cause crises arising from factors outside the entrepreneur's actions, culminating in the deterioration of the economic conditions of the activity, and in financial difficulties (TOMAZETTE, 2024, p.14).

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Due to these scenarios of economic and financial crisis – which encompasses the difficulties that make it impossible for the entrepreneur to continue pursuing the purpose of his company, as well as the insufficiency of resources to pay his obligations (NEGRÃO, 2024, p. 132) – that a company may face, Brazilian legislation provides some institutes capable of helping in the restructuring of the company and allowing its recovery, such as the institute of judicial recovery (TOMAZETTE, 2024, p. 15).

As SACRAMONE (2024, p. 34) teaches, judicial recovery is a legal benefit that allows the entrepreneur or debtor business corporation – in accordance with art. 1 of the LRF[2]– renegotiate debts with your creditors to enable your recovery. This benefit is granted only to entrepreneurs or business corporations due to the activity they perform, since business activity enables national economic development, the creation of new technologies, fosters competition in the commercial world, increases jobs and reduces the price passed on to consumers.

In fact, the concept of entrepreneur, provided for in art. 966 of the Civil Code – namely: "an entrepreneur is considered to be anyone who professionally carries out an organized economic activity for the production or circulation of goods or services" – directly interferes with the classification of the person entitled to request judicial recovery.

In this sense, AYOUB (2021, p. 4) states that it is necessary to observe the essential aspects to apply for judicial recovery:

The rule of legitimacy for the recovery provided for in the LRF is formed by articles 1 and 48 of the LRF. In order to be entitled to file for judicial recovery, it is not enough for the debtor to be qualified as a businessman: it is necessary that this qualification be added to the other requirements indicated by art. 48 of the same Law. In other words, the debtor who is a businessman is entitled to file for judicial recovery if he meets certain legal requirements. Hence the importance of clarifying the criteria for configuring a businessman in Brazilian law, as well as the other requirements for legitimacy to file for judicial recovery.

Furthermore, it is important to highlight that, as established in art. 49 of the LRF[3], only the credits existing on the date of distribution of the request for judicial recovery, even if not due, are subject to the effects of judicial recovery.

Such credits must, therefore, be paid under the terms of the judicial recovery plan approved at the general meeting of creditors and ratified by the recovery court, since they will be subject to novation caused by said plan, in accordance with art. 59 of the LRF.[4].

In turn, the first paragraph of article 49 of the LRF[5]provides that creditors retain their rights and privileges "*against co-obligors, guarantors and obligors in return*". That is, creditors with personal guarantees have the right to normally execute co-obligors, guarantors and sureties of the contract signed between the parties.

This is because, as will be seen below, the suspension period, called*stay period*, provided for in art. 6 of the LRF[6], and novation, do not affect co-obligors, guarantors and sureties.

3.*STAY PERIOD*

As mentioned above, the*stay period*is the period in which executions are suspended due to the approval of the processing of the judicial recovery, under the terms of art. 6 of the LRF.

The shielding period, therefore, causes the suspension (of the prescription and executions, in accordance with items I and II of art. 6 of the LRF) and the prohibition of any form of seizure of the debtor's assets for a period of 180 (one hundred and eighty) days (item III of art. 6 of the LRF), and, under the terms of the amendments made by Law No. 14,112/2020 in Law No. 11,101/2005, such suspension may be extended for the same period once

2 Art. 1 This Law regulates the judicial recovery, extrajudicial recovery and bankruptcy of entrepreneurs and companies. businesswoman, hereinafter referred to simply as debtor.

3 Art. 49. All credits existing on the date of the request, even if not due, are subject to judicial recovery. Art. 59. The

4 judicial recovery plan implies novation of credits prior to the request, and obliges the debtor and all creditors subject to it, without prejudice to guarantees, in accordance with the provisions of § 1 of art. 50 of this Law.

5 § 1º The creditors of the debtor under judicial recovery retain their rights and privileges against co-obligors, guarantors and recourse obligors.

6 Art. 6 The declaration of bankruptcy or the approval of the processing of judicial recovery implies:

I - suspension of the statute of limitations on the debtor's obligations subject to the regime of this Law;

II - suspension of executions filed against the debtor, including those of the private creditors of the joint partner, relating to credits or obligations subject to judicial recovery or bankruptcy;

III - prohibition of any form of retention, seizure, attachment, sequestration, search and seizure and judicial or extrajudicial constraint on the debtor's assets, arising from judicial or extrajudicial lawsuits whose credits or obligations are subject to judicial recovery or bankruptcy.

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only time[7].

THE *stay period* It aims to create an institutional environment for negotiation between creditors and debtors, making it impossible for individual creditors to withdraw assets that are fundamental to restructuring the debtor's business activity, guaranteeing the debtor the possibility of finding ways to resolve his economic-financial crisis with a judicial recovery plan (SACRAMONE, 2024, p. 53).

In this sense, it is worth highlighting the teachings of FAVER (2014, p.125):

The law provides for this possibility in judicial recovery with the aim of giving the debtor a period of tranquility so that he can think of the most effective and viable way to restructure his business. If this were not the case, it could be said that the institution of recovery would be doomed to failure, because if the debtor needs treatment to get back on his feet and preserve the continuity of his business, he cannot suffer the great and drastic losses arising from collection and/or execution processes, such as seizure, freezing of accounts, forced sale of part of his assets, etc.

Therefore, in order for creditors to be able to assess the economic viability of the company under judicial recovery, they may not attempt to satisfy their own interests through acts of contrition. It is important to note that only holders of credits subject to the effects of judicial recovery are prohibited from carrying out any coercive measures due to the *stay period* (SACRAMONE, 2021, p. 43).

In fact, even if the prohibition of carrying out restrictive measures is an effect of the decision to process the judicial recovery, if the acts of restriction were carried out before the date of distribution of the request, they must also be cancelled, and the restricted assets must be delivered to the debtor, since, as a rule, the credits subject to judicial recovery will be novated with the approval of the judicial recovery plan (SACRAMONE, 2024, p. 56).

For TOMAZETTE (2019, p.111), considering that the main objective of *stay period* is to protect only the debtor who requested judicial recovery, any joint and several co-debtors or even partners affected by the disregard of the legal personality do not benefit from such suspension. In fact, as briefly explained above, art. 49, § 1, of Law No. 11,101/2005, expressly provides that "*the creditors of the debtor under judicial recovery retain their rights and privileges against co-obligors, guarantors and recourse obligors*".

In this way, the suspension only covers executions filed against the debtor in judicial recovery for credits subject to the effects of recovery, and credits that do not meet the requirements set out above do not run the risk of having their conditions changed and co-debtors may be executed.

4. NOVATION

The novation of credits that occurred due to the terms established in the judicial recovery plan does not resemble the ordinary novation provided for in art. 360 of the Civil Code.[8], since it is considered *sui generis* and does not interfere with guarantees or alter obligations towards joint and several debtors and co-obligors.

It is explained: for GONÇALVES (2019, p.350) the novation provided for in the Civil Code is the creation of a new obligation to extinguish a previous obligation, that is, it is the replacement of one debt by another, causing the extinction of the first, and its intention is to create in order to extinguish. Art. 364 of the Civil Code[9], including, establishes that, if there is no stipulation to the contrary, the novation also extinguishes the accessories and guarantees of the debt.

As for the novation caused by the judicial recovery plan, as explained by TOMAZETTE (2019, p. 255), the co-debtors and guarantors maintain the obligations they had before the novation, since they were not part of the transaction, as can be seen from articles 49 and 59 of the LRF.

In this sense, MAMEDE (2020, p. 133) states:

There is no communication of the benefits of the decision granting the company's judicial recovery,

7 Art. 6, § 4 In judicial recovery, the suspensions and prohibitions referred to in items I, II and III of the caput of this article will last for a period of 180 (one hundred and eighty) days, counted from the approval of the recovery processing, extendable for the same period, once only, on an exceptional basis, provided that the debtor has not contributed to overcoming the time lapse.

8 Art. 360. Novation occurs:
I - when the debtor contracts a new debt with the creditor to extinguish and replace the previous one; II - when the new debtor succeeds the old one, the latter being paid off with the creditor;

9 Art. 364. Novation extinguishes the accessories and guarantees of the debt, whenever there is no stipulation to the contrary. However, it will not benefit the creditor to reserve the pledge, mortgage or anticresis, if the assets given as guarantee belong to a third party who was not a party to the novation.

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same – I reiterate – in view of the provision for novation of legal relations (article 59 of Law 11.101/05). The benefits of the decision granting the judicial recovery of the company must be understood as subjective (they concern the subject: the person of the entrepreneur or business corporation) and not as objective, since they do not concern the obligation itself, which remains with the original outline with regard to co-obligors, guarantors or recourse obligors.

Therefore, it is important to clarify the difference between novations according to the teachings of SACRAMONE (2024, p. 201):

> "*The novation of credits subject to judicial recovery differs from the ordinary novation, established in art. 360 of the Civil Code. According to this legal provision, the novation causes the extinction of the previous obligation, replaced by a new legal relationship in all effects, which implies the extinction of the previous guarantees, whether real or surety, as well as the extinction of the obligations of the joint and several debtors. (...) In the LREF, despite the granting of judicial recovery implying novation of credits, it is sui generis. It occurs without prejudice to the guarantees, nor alteration of the obligations vis-à-vis the joint and several debtors and co-obligors. According to art. 49, § 1, even if the novation of the credit occurs, the creditors maintain their rights and privileges against the co-obligors, guarantors and obligors in return.*".

That is, as a rule, the novation of credits arising from Judicial Recovery does not affect co-obligors and guarantors, considering the reservations made in articles 49 and 59 of the LRF.[10]. Creditors, therefore, retain their rights and privileges against co-obligors, guarantors and recourse obligors.

Thus, it is worth mentioning Summary 581 issued by the Superior Court of Justice, which originated based on the judgment of Repetitive Theme 885:

> "*Matter submitted for judgment: Controversy alluding to the possibility of continuing collection actions or executions filed against joint debtors or jointly obligated parties in general, after the judicial recovery has been granted or even after the recovery plan of the main debtor has been approved. Thesis established: The judicial recovery of the main debtor does not prevent the continuation of the executions nor does it induce the suspension or termination of actions filed against third-party joint debtors or jointly obligated parties in general, by exchange, real or surety guarantee, since the suspension provided for in arts. 6, caput, and 52, item III, or the novation referred to in art. 59, caput, do not apply to them, by virtue of the provisions art. 49, § 1, all of Law No. 11,101/2005*".

However, there is an exception related to joint and several partners who will have the executions of private creditors suspended, as long as they refer to credits or obligations subject to the effects of judicial recovery (TOMAZETTE, 2019, p. 155).

Therefore, it is clear that the novation relating to judicial recovery does not have the same legal nature as the novation provided for in the Civil Code.

5. CO-OBLIGATORS, GUARANTORS, GUARANTEES AND THEIR ASPECTS IN JUDICIAL RECOVERY

Considering the provisions of §1 of article 49 of the LRF, it is necessary to quickly explain the concept of co-obligors, guarantors and endorsers:

5.1. Co-obligors

The co-obligor is the one who assumed an obligation and/or debt jointly with another person, that is, as endorsers and/or guarantors of those who assumed a debt as the main debtor (DINIZ, 2019, p. 469).

In judicial recovery, as mentioned above, there is no obstacle to the continuation of actions and executions against the joint debtors of the recovering company or co-obligors in general, whether they are real or surety guarantors (SACRAMONE, 2024, p. 64).

10 Art. 59. The judicial recovery plan implies novation of credits prior to the request, and obliges the debtor and all creditors subject to it, without prejudice to guarantees, in accordance with the provisions of § 1 of art. 50 of this Law.

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5.2. Guarantors

The surety is considered as an act of guarantee with non-exchange effects, and is distinguished from the endorsement in terms of the nature of the relationship with the guaranteed obligation. In fact, the obligation of the guarantor is ancillary to that of the guarantor, while the obligation of the guarantor is autonomous, independent of the obligation of the guarantor..

Guarantors, therefore, are those who guarantee another person, that is, they take on the responsibility of fulfilling the obligation of the guarantor if the latter fails to fulfill it.

For DINIZ (2019, p. 467) the guarantee arises from a contract and bilateral obligations, being linked to a main obligation and, therefore, is accessory to the main obligation, which means it does not have autonomy, that is, the guarantee will not prevail if the main obligation is declared null or extinguished.

As can be seen from Article 837 of the Civil Code, the suretyship allows the guarantor to oppose personal exceptions to the creditor, as well as those that extinguish the obligation that are the responsibility of the principal debtor, if they do not simply arise from personal incapacity, with the exception of the loan made to a minor.

5.3. Guarantors

Unlike a surety, a guarantee is a type of bill of exchange by which the guarantor guarantees that another person's debt will be paid in favor of the principal debtor or a co-obligor.

For DINIZ (2019, p. 468) the guarantee is a personal guarantee – or surety – added to the promise of payment of the title given by a third party or by the signatory of the title (art. 30 of the LUG[11]), is considered a unilateral manifestation of the guarantor, who undertakes to pay the title assumed by the guarantor (art. 32 of the LUG[12]and art. 897 of the Civil Code[13]).

That is, the guarantee serves as a guarantee for the drawer or issuer and final debtor of the credit instrument, so that it has exchange characteristics for a unilateral declaration of will, being granted autonomy and the inopposability of personal exceptions to a third party in good faith.

In this sense, SACRAMONE defines guarantee as:

> "*The exchange guarantee, given by a third party or even by one of the signatories of the instrument, the guarantor, that the obligation contained in the credit instrument will be paid by a specific debtor, the guarantor (art. 30 of the LU). This is a fiducial guarantee.*".

Thus, the guarantor will only have to satisfy a certain obligation if the original debtor does not fulfill it due to the benefit of orem, while the guarantor – considering the autonomous nature of the guarantee – may be called upon to pay a certain amount before the guarantor.

6. SUBROGATION

Considering that the credit towards the guarantor and other co-obligors is not subject to the effects of the novation of the obligation, it is possible that the debt towards the aforementioned creditor will be satisfied by the co-obligor. In other words, the co-obligor will be subrogated to the rights of the original creditor.

From this perspective, it is necessary to explain conventional subrogation and legal subrogation, let us see. In the first (conventional subrogation), the person who satisfies the obligation in his own name and on his own behalf is a non-interested third party, therefore, under the terms of art. 347 of the Civil Code[14], the creditor may receive payment from the non-interested third party and transfer all of his rights to it, but subrogation will not occur. In fact, the creditor will only be entitled to reimbursement of what he paid.

11 Art. 30. The bearer is obliged to give notice of the protest to the last endorser, within two days, counting from the date of the protest instrument and each endorsee, within two days, counting from the receipt of the notice, must transmit it to his endorser, under penalty of being liable for losses and interests.

12 Art. 32. The holder who does not take out, in a timely and regular manner, the instrument of protest of the bill, loses the right of recourse against the drawer, endorsers and guarantors.

13 Art. 897. Payment of a credit instrument, which contains an obligation to pay a specific sum, may be guaranteed by endorsement.

14 Art. 347. Subrogation is conventional:
I - when the creditor receives payment from a third party and expressly transfers all his rights to him;
II - when a third party lends the debtor the amount needed to settle the debt, under the express condition that the lender is subrogated to the rights of the satisfied creditor.

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In legal subrogation, it is necessary that the *solvents* be interested in the satisfaction of the debt. Or that is, the *solvents* it may be an interested third party who makes the payment in order to release himself from obligation or avoid being held liable to the creditor, and there is not necessarily a desire to be the holder of the credit in question, but only a desire to pay the credit to protect his own assets, with no need to speak of assignment of credit (SACRAMONE, 2023, p. 155).

Thus, payment in legal subrogation makes the *solvents* begins to occupy the position of the original creditor, with credit of the same nature and with the same privileges, rights and actions vis-à-vis the debtor, in accordance with art. 349 of the Civil Code[15]. Subrogation, therefore, transfers to the new creditor all the rights, actions, privileges and guarantees of the original creditor, in relation to the debt, against the principal debtor and the guarantors.[16].

For AYOUB (2021, p. 64), the Co-obligor who makes the payment, as a rule, is subrogated in the credit against the other co-obligors, including the debtor company, under the terms of art. 259, sole paragraph, of the Civil Code.[17].

Therefore, after receiving the payment made by the co-obligor, the creditor must report the receipt in the judicial recovery records, specifying the payment made, so that, if the obligation is pecuniary, it must report the amount paid. The co-obligor who paid must be eligible in the judicial recovery records to receive the amount to which the original creditor would be entitled, under the terms of the Judicial Recovery Plan, that is, the renewed credit.

AYOUB (2021, p. 64) also states that the Co-obligor who makes the payment of the debt must qualify his credit to receive the amount established in the Judicial Recovery Plan, and not the full amount paid to the original creditor. However, José da Silva Pacheco states that there is a possibility for the co-obligor who paid the debt to collect it in full from the debtor in judicial recovery.

7. ASPECTS IN JUDICIAL RECOVERY

7.1 First Understanding

In view of the concepts set out above, it is necessary to highlight that, according to SACRAMONE, the granting of judicial recovery does not impact the relationship between the creditor and the co-obligor (2024, p. 201):

> "*Regarding real collateral rights, art. 59 expressly refers to art. 50, § 1, which determines that the creditor, even if his principal credit has been novated, retains the right of mortgage, anticresis or pledge over the assets, unless there is an express waiver. The asset given as collateral to the creditor may only be sold in the judicial reorganization if the creditor holding the collateral expressly agrees. In this regard, case law should observe the changes resulting from the enactment of the Legal Framework for Collateral (Law No. 14,771/2023), given the possibility of the same collateral being extended to multiple creditors. It is worth mentioning that these changes do not appear to be widespread, including due to the new art. 1,487-A of the Civil Code, § 3, which states that, in cases of supervening multiplicity of creditors guaranteed by the same extended mortgage, only the creditor holding the highest priority credit, as established in § 2 of the same article533, may promote the judicial or extrajudicial execution of the guarantee, unless otherwise agreed by all creditors534. The new law did not change the bankruptcy nature of real guarantee credits, nor the extra-bankruptcy nature of those of a fiduciary nature.*".

In fact, the Court of Justice of the State of São Paulo issued Summary 61 precisely to emphasize this limitation: "In judicial recovery, the suppression of the guarantee or its replacement will only be permitted with the express approval of the holder".

In this sense, it is important to highlight the teachings of TOMAZETTE (2019, p. 47):

> *Since the objective is to protect the debtor who filed for judicial recovery, any joint and several co-debtors or even partners affected by the disregard of the legal personality do not benefit from such suspension. Art. 49, § 1, of Law No. 11,101/2005, which provides that "the creditors of the debtor in judicial recovery retain their rights and*

15 Art. 349. Subrogation transfers to the new creditor all the rights, actions, privileges and guarantees of the original creditor, in relation to to the debt, against the principal debtor and the guarantors. 16

Examples of legal subrogation: art. 831 of the Civil Code and art. 786 of the Civil Code.

17 Art. 259: If, where there are two or more debtors, the payment is not divisible, each one will be obliged for the entire debt. Sole paragraph: The debtor, who pays the debt, is subrogated to the creditor's rights in relation to the other co-obligors.

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> *privileges against co-obligors, guarantors and recourse obligors" who, therefore, cannot benefit from this suspension, except for partners". (...) Third-party guarantors, partners or any other co-debtors are not affected by the suspension, which is limited, in principle, to the debtor himself, according to Summary 581 of the STJ. The exception is for joint partners who will also keep their executions of private creditors suspended, as long as they relate to credits or obligations subject to judicial recovery or bankruptcy. The expression "joint partner" may include limited companies, simple limited partnerships (in relation to general partners) and partnerships, not referring to debts arising from the condition of partner, but only to debts covered by judicial recovery and arising from the condition of partner*."

It is also worth mentioning the examples given by BEZERRA FILHO (2008, p. 120):

> "A creditor with a third party guarantee (e.g. surety, bond, etc.), even if subject to the effects of recovery, may execute the guarantor. An example will facilitate understanding: suppose a limited company issued a promissory note in favor of any creditor, with the partner of that limited company (or any third party) having guaranteed the instrument. Even if the credit is subject to the effects of recovery, the creditor may execute the guarantor. He must take care to, if he receives any amount in any of the actions, communicate such receipt in the records of the other. In this case (full guarantee), there is obviously no limit to the amount under execution, given the autonomy of exchange relations."

Furthermore, it is worth highlighting that the waiver of the execution of guarantees – provided by co-obligors – by creditors may be included as a clause in the judicial recovery plan. However, such a clause may not be imposed on the dissenter or the absentee of the General Meeting of Creditors, since it is not compatible with the communion of interests of all creditors (SACRAMONE, 2023, p. 155).

Thus, if the plan contains a clause for the suppression of collateral, and the creditor holding the collateral votes to approve the plan, the collateral may be suppressed, since approval presupposes the tacit waiver of the collateral. Another situation occurs if the creditor holding the collateral rejects the plan, since there will be no waiver and, therefore, the collateral will be maintained.

Now, if the creditor presented his objection to the plan, because it contained a clause for the suppression of guarantees, and then voted in favor of the plan, there is also no need to speak of waiver, given that the objection already contained a reservation in the event of eventual approval of the plan. It also applies if the creditor holding the guarantee does not present an objection and votes for approval, but records his reservation in the minutes. Lastly, even if the creditor does not participate in the meeting, he will not be subject to the clause for the suppression of guarantee, since the suppression of guarantee will only be effective against the creditor who expresses, even tacitly, his will to waive the guarantee, since this is an available right (AYOUB, 2021, p.63).

Furthermore, Minister Moura Ribeiro of the Superior Court of Justice has already recognized that the suppression of real and surety guarantees provided by the debtor's partners and/or third-party guarantors established by mutual agreement with its creditors gathered in an assembly called to deliberate on the judicial recovery plan is lawful, regular and valid, consequently eliminating the incidence of Summary 581 of the STJ:

> "*COMMERCIAL. INTERNAL APPEAL IN SPECIAL APPEAL. RESIGNATION HANDED UNDER THE AEGIS OF THE NCPC. JUDICIAL RECOVERY ACTION. COURT OF RETRACTION. RECONSIDERATION OF THE DECISION THAT DENIED THE SPECIAL APPEAL. GRANT OF THE SPECIAL PROCEDURE. ACTIONS FILED AGAINST THIRD-PARTY GUARANTORS OF DEBTS CONTRACTED BY THE COMPANIES UNDER RECOVERY. SUMMARY Nº 581 OF THE STJ. PROVISION EXPRESSLY INSERTED IN THE JUDICIAL RECOVERY PLAN DISPENSING THE REAL AND FIRM GUARANTEES OFFERED BY THE CO-OBLIGATORS. DEPARTURE FROM THE STATEMENT. PRECEDENTS OF THE THIRD PANEL OF THE STJ. SPECIAL APPEAL GRANTED. (...) This distinguished Superior Court guides that, notwithstanding the possibility of the Judiciary carrying out the abstract legality control of the judicial recovery plan, it is the competence of the General Meeting of Creditors to examine the economic viability of the business corporation and, with the objective of raising the commercial activity and preserving jobs, tax collection and the satisfaction of the obligations assumed with the creditors, to deliberate on the terms of the presented proposal, including restricting the interests of the holders of each class of credits in favor of a greater objective, under penalty of making the restructuring of the legal entity in crisis unfeasible, resulting in its probable bankruptcy and even greater losses. (...) This is a skillful provision*

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to rule out the incidence of the aforementioned statement, since it privileges the sovereignty of the deliberation of the General Meeting of Creditors itself, which deemed it convenient and adequate to limit the rights of its own members with the aim of restructuring the legal entity in crisis, binding all debtors, regardless of the vote, in favor or not of the waiver of real or surety guarantees, that they have cast during the session, or even if there has been abstention or absence from the meeting." (STJ. Monocratic decision handed down in the Appeal Intern in Special Appeal No. 1,848,005/SP; Rapporteur Min. Moura Ribeiro; J: 5/29/2020)"[18] [19]

Therefore, the position set out above understands that, once a consensus has been established, it is possible to release the guarantees provided by third-party guarantors.

7.2 Second Understanding

In another sense, there are those who argue that guarantees, when they are accessory to the credit subject to the effects of judicial recovery, should have the same treatment as the main credit.

In this sense, AYOUB (2021, p. 56) presents Rachel Sztajn's understanding, who states that there is an imprecision in the wording of art. 49, § 1°, of the LRF when arguing that it should be "*interpret the paragraph as meaning that the guarantees, as an accessory, follow the principal, the credit*", so that "*they are subject to the same conditions that apply to guaranteed credits, that is, they cannot be executed immediately*".

Here, it is necessary to observe the teachings of VENOSA (2021. p. 35) on guarantees, which states that the guarantee is directly linked to an obligation (main right), therefore the guarantee is accessory.

Thus, when considering such doctrinal positioning, in accordance with the general rule provided for in

18 Position that had already been adopted within the scope of Special Appeals No. 1,532,943/MT and No. 1,700,487/MT, reported by Ministers Marco Aurélio Bellizze and Ricardo Villas Bôas Cueva, respectively.

19 "SPECIAL APPEAL. RECOVERY PLAN. 1. DELIMITATION OF THE DISPUTE. 2. TREATMENT DIFFERENTIATED. CREDITORS OF THE SAME CLASS. POSSIBILITY. PARAMETERS. 3. CONVERSION OF REORGANIZATION INTO BANKRUPTCY. CALLING OF CREDITORS' MEETING. UNNECESSARY. 4. PROVISION FOR SUPPRESSION OF REAL AND FIGURED GUARANTEES DULY APPROVED BY THE GENERAL MEETING OF CREDITORS. BINDING OF THE DEBTOR AND ALL CREDITORS, WITHOUT DISTINTINATELY. 5. SPECIAL APPEAL PARTIALLY GRANTED. 1. The controversy is limited to defining: a) whether it is possible to impose differentiated treatment on creditors of the same class in judicial reorganization; b) whether it is necessary to call a creditors' meeting before converting the judicial reorganization into bankruptcy in the event of non-compliance with an obligation contained in the judicial reorganization plan; c) whether the suppression of the real and personal guarantees expressly set out in the judicial reorganization plan, approved at a general meeting of creditors, binds all creditors of the respective class or only those who voted in favor of the suppression. By unanimous vote. 2. The creation of subclasses among the creditors of the judicial reorganization is possible provided that an objective criterion is established, justified in the judicial reorganization plan, covering creditors with homogeneous interests, and the stipulation of discounts that imply in the true cancellation of the rights of any isolated or minority creditors is prohibited. 3. The debtor may propose, when foreseeing difficulties in complying with the reorganization plan, changes to its clauses, which will be submitted to the scrutiny of the creditors. Once the obligations stipulated in the plan have been breached and the conversion of the reorganization into bankruptcy has been requested, the reorganization party may not submit to the creditors a decision that completes exclusively the reorganization court. By majority vote. 4. In the present case, the suppression of real and personal guarantees was expressly stated in the judicial reorganization plan, which was approved by creditors duly represented by their respective classes, which means that all creditors are bound without distinction. 4.1 As a rule (and despite the silence of the judicial reorganization plan), despite the novation brought about by the judicial reorganization, the guarantees are preserved, as regards the possibility of their holder exercising their rights against third-party guarantors and requiring the maintenance of actions and executions brought against guarantors, sureties or co-obligors in general, with the exception of the partner with unlimited and joint liability (§ 1, art. 49 of Law No. 11.101/2005). And, specifically with regard to real guarantees, these may only be supplied or replaced, upon their sale, with the express consent of the creditor holding such guarantee, under the terms of § 1 of art. 50 of the aforementioned law. 4.2 In principle, the conditions originally contracted are maintained, including the agreed guarantees, and the governing law expressly provides for the possibility of the Document plan:94863913 - HEADNOTE / JUDGMENT - Certified website - DJe: 04/26/2019 Page 1 of 2 Superior Court of Justice of judicial recovery, on them, to provide differently (§ 2, of art. 49 of Law No. 11.101/2009). 4.3. On the occasion of the deliberation of the presented recovery plan, creditors, represented by their respective class, and debtor, proceed with negotiation negotiations aimed at adapting the opposing interests, as well as evaluating in what extent of efforts and sacrifices would they be willing to make in order to reduce the losses that lie ahead (under the creditors' perspective), as well as to allow the restructuring of the company in crisis (from the debtor's perspective). And, in order to allow creditors to have adequate representation, whether for the establishment of the general meeting or for the approval of the judicial recovery plan, the governing law establishes, in articles 37 and 45, the respective minimum quorum. 4.4 It is therefore inappropriate to restrict the suppression of real and surety guarantees, as provided for in the judicial recovery plan approved by the general meeting, only to creditors who have voted favorably in this sense, granting differentiated treatment to other creditors of the same class, in clear contradiction to the majority decision. 4.5 In particular, the suppression of real and surety guarantees was expressly stated in the judicial reorganization plan, which was approved by creditors duly represented by their respective classes (a measure, therefore, that converges, in a weighing of values, with the interests of the majority of these), which means, reflexively, compliance with § 1 of art. 50 of Law No. 11.101/2005, and, mainly, the binding of all creditors, without distinction. 5. Special appeal partially granted. (STJ. Special Appeal No. 1,700,487/MT; Rapporteur Min. Ricardo Villas Bôas Cueva; J: 2/4/2019)

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art. 92 of the Civil Code[20], the accessory follows the main one, that is, the accessory is that good whose existence presupposes that of the main one.

That is, according to this understanding, within the scope of judicial recovery, the guarantees provided must follow the main credit, being subordinated to the same conditions that apply to the guaranteed credits, that is, they cannot be executed immediately.

1.3 **Third Understanding**

Furthermore, there is an understanding that the release of guarantees may result from an express provision included in the judicial recovery plan approved by the majority of creditors present at the meeting and judicially approved.

Therefore, the possibility of releasing guarantees provided by third parties must be discussed with creditors, so that, if it is the alternative that best suits the interests and needs of creditors and the financial capabilities and possibilities of the debtor, creditors can approve the plan with such provision.

In this scenario, the guarantee release clause must be drawn up based on economic and financial criteria and not merely based on article 59 of Law No. 11,101/2005, since, if such a provision does not exist, the debtor may not be able to fulfill the obligations assumed in its PRJ and, simultaneously, maintain and develop its regular activities.

In other words, if the clause in question has been discussed, debated, analyzed and approved by the majority of creditors, it must be respected due to the autonomy of the creditors' will, thus applying article 122 of the Civil Code, which establishes that, as a rule, all conditions that do not violate the law, public order or good customs are lawful. The exculpatory conditions include those that deprive the legal transaction of any effect, or subject it to the pure discretion of one of the parties.

Furthermore, the possibility of changing the conditions of obligations prior to the request for judicial recovery, provided that it is duly and legally approved by creditors, is permitted by § 2 of art. 49 of Law 11.101/2005.

The Superior Court of Justice has already recognized that the provision in the PRJ that establishes the release of guarantees is lawful, regular and valid, provided that such provision has the approval of the majority of creditors, respecting the quorums and formalities provided for in Law No. 11,101/2005:

> "*COMMERCIAL. INTERNAL APPEAL IN SPECIAL APPEAL. COMPLAINT MANAGED UNDER THE AEGIS OF THE NCPC. ACTION FOR JUDICIAL RECOVERY. JUDGMENT OF RETRACTION. RECONSIDERATION OF THE DECISION THAT DENIED THE SPECIAL APPEAL. GRANT OF THE SPECIAL PROCEDURE. ACTIONS FILED AGAINST THIRD-PARTY GUARANTORS OF DEBTS CONTRACTED BY THE COMPANIES UNDER RECOVERY. SUMMARY Nº 581 OF THE STJ. PROVISION EXPRESSLY INSERTED IN THE JUDICIAL RECOVERY PLAN DISPENSING THE REAL AND FIRM GUARANTEES OFFERED BY THE CO-OBLIGATORS. DELETION OF THE STATEMENT. PRECEDENTS OF THE THIRD PANEL OF THE STJ. SPECIAL APPEAL GRANTED. (...) This distinguished Superior Court instructs that, notwithstanding the possibility of the Judiciary carrying out the abstract legality control of the judicial recovery plan, it is the competence of the General Meeting of Creditors to examine the economic viability of the business corporation and, with the objective of raising the commercial activity and preserving jobs, tax collection and the satisfaction of the obligations assumed with the creditors, to deliberate on the terms of the presented proposal, including restricting the interests of the holders of each class of credits in favor of a greater objective, under penalty of making the restructuring of the legal entity in crisis unfeasible, resulting in its probable bankruptcy and even greater losses. (...) This is a provision capable of eliminating the incidence of the aforementioned statement, since it privileges the sovereignty of the deliberation of the General Meeting of Creditors itself, which deemed it convenient and adequate to limit the rights of its own members with the aim of restructuring the legal entity in crisis, binding all debtors, regardless of the vote, whether in favor or not of the waiver of real or surety guarantees, that they have cast during the session, or even if there has been abstention or absence from the meeting." (STJ). Monocratic decision handed down in the Internal Appeal*

20 Art. 92. The main asset is the asset that exists on itself, abstractly or concretely; accessory, the one whose existence presupposes the main.

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in Special Appeal No. 1,848,005/SP; Rel. Min. Moura Ribeiro; J: 5/29/2020)[21 22].

Ulhoa Coelho (2018, p. 253) also understands that it is possible for a guarantee suppression clause to exist in the debtor's PRJ:

> "*In principle, all creditors prior to the request for judicial reorganization are subject to the effects of the reorganization plan approved in court. Even those who had opposed the plan and voted for its rejection must bow to the court decision supported by the majority of creditors. They have no other alternative. If the plan approved in court provides for the replacement of a certain real guarantee by another of lesser value, the affected creditor simply has no means to oppose the merits of this measure, no matter how much he considers his interests to be unfairly sacrificed. As can be seen, the novation of credits affected by the judicial reorganization plan is a logical corollary, by force of law. The legislation leaves no room for the creditor to reject the new outline attributed to the credit of which he was the holder in a period prior to the request for judicial reorganization. In this regard, if there is an express provision in the judicial reorganization plan regarding the release of guarantees and the termination of executions filed against the company under reorganization and its co-obligors, and approved without reservations on this point, it is necessary to accept the non-compliance of the creditors.*
>
> *Aggravating circumstances and extinguishing the executive action*".

Here it is possible to conclude that, if the debtor's Judicial Recovery Plan is approved by the majority of creditors with an express clause releasing the guarantee granted by third parties, such clause will be valid for all creditors.

8. CONCLUSION

The work was carried out based on the divergence of positions on whether or not personal guarantees are subject to the effects of judicial recovery, as this may impact the debtor's recovery process.

Personal guarantees are essential for the promotion of the various business activities existing in the Brazilian business sector. Therefore, this article mainly addresses the three existing positions regarding personal guarantees in the context of judicial recovery, namely (i) the possibility of execution of the guarantors of the principal debt due to the express provision of § 1 of art. 49 of the LRF, however, if the creditor agrees with the suppression or release of the personal guarantee, the clause that provides for such provision will be enforceable in relation to him; (ii) in view of the general rule established in art. 92 of the Civil Code, the accessory must follow the principal, since the guarantee is considered an accessory whose existence requires the principal; and (iii) the possibility of suppression of the guarantee due to the approval of the judicial recovery plan at the general meeting by the majority of creditors.

Considering these positions, it is possible to observe that the first position, especially its peculiarity, is more reasonable, since it is possible for the creditor to waive the guarantee provided by a third party,

21 Position that had already been adopted within the scope of Special Appeals No. 1,532,943/MT and No. 1,700,487/MT, of reported by the Honourable Ministers Marco Aurélio Bellizze and Ricardo Villas Bôas Cueva, respectively.

22 "SPECIAL APPEAL. RECOVERY PLAN. 1. DELIMITATION OF THE CONTROVERSY. 2. DIFFERENTIATED TREATMENT. CREDITORS OF THE SAME CLASS. POSSIBILITY. PARAMETERS. 3. CONVERSION OF RE-CORRUPTION INTO BANKRUPTCY. CALLING OF CREDITORS' ASSEMBLY. UNNECESSARY. 4. PROVISION FOR SUPPRESSION OF REAL AND FIGURED GUARANTEES DULY APPROVED BY THE GENERAL ASSEMBLY OF CREDITORS. BINDING OF THE DEBTOR AND ALL CREDITORS, WITHOUT DISTRIBUTION. 5. SPECIAL APPEAL PARTIALLY GRANTED.

(...) 4.3. When deliberating on the presented recovery plan, creditors, represented by their respective class, and the debtor, proceed with negotiations aimed at adapting the opposing interests, as well as assessing to what extent efforts and sacrifices they would be willing to make, in an attempt to reduce the losses that lie ahead (from the perspective of creditors), as well as to allow the restructuring of the company in crisis (from the debtor's perspective). And, in order to allow creditors to have adequate representation, whether for the establishment of the general meeting or for the approval of the judicial recovery plan, the governing law establishes, in articles 37 and 45, the respective minimum quorum. 4.4 It is therefore inappropriate to restrict the suppression of real and surety guarantees, as provided for in the judicial recovery plan approved by the general meeting, only to creditors who have voted favorably in this sense, granting differentiated treatment to other creditors of the same class, in clear contradiction to the majority decision. 4.5 In particular, the suppression of real and surety guarantees was expressly stated in the judicial reorganization plan, which was approved by creditors duly represented by their respective classes (a measure, therefore, that converges, in a weighing of values, with the interests of the majority of these), which means, reflexively, compliance with § 1 of art. 50 of Law No. 11.101/2005, and, mainly, the binding of all creditors, without distinction. 5. Special appeal partially granted. (STJ. Special Appeal No. 1,700,487/MT; Rapporteur Min. Ricardo Villas Bôas Cueva; J: 2/4/2019)

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because it is an available right and, therefore, in accordance with the principle of autonomy of the will of the parties, their choice must be respected.

That is, if the creditor and the debtor understand that the best option for both parties is the release or replacement of the personal guarantee, it is possible that the debtor's judicial recovery plan may contain clauses to that effect. However, such clause will only be enforceable against creditors who participated in the general meeting of creditors and approved the plan without reservations regarding such provision.

The other two positions are also valid and necessary for the development of Brazilian jurisprudence to achieve legal certainty.

Furthermore, the article in question highlights the*stay period*and novation within the scope of judicial recovery, demonstrating its peculiarities in relation to the co-obligors and how they will occur.

Therefore, the discussion addressed here is necessary so that Recovery Law can be improved to increasingly enable the recovery of companies that are experiencing momentary economic and financial difficulties.

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