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THE VOTE OF DEBENTURE HOLDERS IN BRAZILIAN JUDICIAL REORGANIZATION

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Abstract

This article analyzes the evolving legal framework governing the participation of debenture holders in judicial reorganizations in Brazil. It critically examines tensions arising from out-of-court voting mechanisms, highlighting how these systems risk undermining the principle of equal treatment among creditors and imposing restrictive regulations on collective deliberation regarding debenture issuance terms, including modifications proposed within reorganization plans. The research identifies that such mechanisms, whether allowing resolutions by majority vote without safeguards for minority dissent or prohibiting majority resolutions outright, may inadvertently obstruct necessary corporate restructuring, thereby exacerbating the financial distress faced by debenture holders. The study advocates for the individualization of debenture holders' votes during judicial reorganizations as a robust and equitable solution, aligned with both Brazilian and international comparative legal traditions. It concludes that an effective and fair collective decision-making model requires formal and substantive safeguards guaranteed by judicial oversight and complemented by voting procedures specifically designed to stimulate active creditor engagement. Ultimately, this structured approach enhances debenture holders' participation, fostering more equitable and efficient outcomes in resolving corporate financial distress.

1. Introduction

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This article addresses the legal framework governing the procedure for debenture holders to express their will regarding a proposed modification of the debenture conditions embodied in a judicial reorganization plan, i.e.,

(i) Whether debenture holders can cast their individual votes in a debenture holders' meeting that will decide, by majority, the orientation of the single vote to be cast by the debenture holders' communion, *represented by the trustee*, regarding the approval or rejection of the judicial reorganization plan or abstention from voting in the judicial reorganization, and, in this case, whether the reorganization court can scrutinize not only the vote of the *debenture holders' communion in the general meeting of creditors*, but also the regularity of the individual exercise of votes by debenture holders in a debenture holders' meeting;

(ii) Whether debenture holders can be admitted to cast their individual votes directly in the *general meeting of creditors*, without the intermediation of the debenture holders' communion and its representative, the trustee, thus dispensing with prior resolution in a debenture holders' meeting; and

(iii) Whether the reorganization resolution procedure can, by determination of the reorganization court, adopt other resolution mechanisms for collecting individual votes of debenture holders regarding the judicial reorganization plan, which allow ascertaining the will of the majority of creditors, according to the deliberative quorums of the judicial reorganization.

To this end, this article is divided into 7 Sections, this first Section being introductory.

Section 2, titled "*The Legal Organization of the Debenture Holders' Collectivity*", analyzes the legal framework of the *governance of the debenture holders' communion*, notably regarding the *formation of the debenture holders' communion's will* on a proposal *to change the payment conditions of the debentures*, in a resolution taken in a debenture holders' meeting *by majority vote*.

In this regard, it will be described how the *equal treatment among debenture holders* translates into *material, procedural,* and *judicial safeguards* that delimit and inform the resolutions taken by majority vote in a debenture holders' meeting; and, subsequently, it will be demonstrated how the observance of equal treatment effectively promotes *fairer* and *more efficient* resolutions by preventing debenture holders from

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adopting selfish individual behaviors of the obstructive-opportunistic (*holdout*) and parasitic (*free rider*) types.

In Section 3, titled "*Judicial Intervention for the Safeguard of Equal Treatment of Debenture Holders*", the *judicial safeguards* found in the legal tradition of Brazilian law will be investigated, following a *long tradition* of European and American countries, through which *judicial control* of the debenture holders' meeting's resolution on the change of debenture payment conditions is carried out.

Also in Section 3, different systems of *judicial control* of majority resolution regarding the change of debenture payment conditions are presented, systematized as follows:

(i) *Out-of-court resolution systems controlled in a judicial homologation procedure*, i.e., which admit the change of payment conditions by majority resolution of debenture holders taken extrajudicially, but which require judicial homologation for the resolution to bind all debenture holders, as was, for example, the system adopted in Brazilian law from the end of the 19th century until the promulgation of Law 6,404/1976 (Brazilian Corporate Law - "LSA"); and

(ii) systems that *prohibit extrajudicial resolution and impose resolution and respective control in a judicial procedure*, in which (a) the change of payment conditions by majority resolution taken extrajudicially by the debenture holders' meeting is prevented, because (b) they grant each debenture holder the right to decide, individually, whether or not to agree with the proposal to change their credit, and (c) only admit resolution by majority on the change of debenture payment conditions in judicial procedures, in which there is judicial control of the regularity of the exercise of the vote and the legality of the renegotiation agreement before its judicial homologation, which is a prerequisite for binding all debenture holders, including the dissenting minority, as, for example, that adopted in US law from 1939 to the present day.

In Section 4, "*The Evolution of the Judicial Control System During the Validity of Law 6,404/1976*" will be analyzed, showing how the LSA system, which originally allowed majority resolution of the debenture holders' meeting on the modification of debentures, without surrounding it with judicial safeguards, led the Brazilian Securities and Exchange Commission (CVM), doctrine, and the STJ (Superior Court of Justice) to

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modify the positive norm in the law, to prohibit the debenture holders' meeting from changing the conditions of debenture credit by majority, based on the argument that the credit right constitutes an individual right of the debenture holder, who is responsible for deciding whether or not to consent to its modification.

Subsequently, it will be demonstrated how, given the recognition of the debenture holder's individual right to consent or veto the modification of debentures, to enable the renegotiation of debentures, the practice of allowing debenture holders to directly participate in the majority resolution of judicial reorganization developed in Brazilian law.

In Section 5, titled "*Obstacles to the Participation of the Debenture Holders' Communion in Judicial Reorganization that Recommend the Individualization of Debenture Holders' Votes*", the current characteristics of the debenture legal regime are explored, to demonstrate that these characteristics constitute obstacles to a fair and efficient renegotiation of the issuance conditions, which benefits debenture holders and the issuing company. This analysis allows demonstrating in detail how the reorganization procedure, due to its characteristics, provides adequate solutions to each of the obstacles to renegotiation arising from the debenture legal regime.

In Section 6, titled "*Mechanisms for Expressing and Collecting Votes in Judicial Reorganization*," the text interprets the meaning and scope of Article 39, § 4º, III, of Law 11,101/2005. This article addresses the possibility of utilizing alternative methods for expressing and collecting votes on judicial reorganization plans, provided they are deemed sufficiently secure by the reorganization court.

To illustrate practical applications of this legal provision, the section presents examples drawn from comparative law and Brazilian law, highlighting various approaches to organizing voting processes within judicial reorganizations and capital market contexts.

Section 7 provides concluding remarks.

2. *The Legal Organization of the Debenture Holders' Collectivity*

The entire legal framework governing the *collective organization* of debenture holders develops from the canon of *equal treatment* among debenture holders.[1]

[1] See CAVALLI, Cássio. Comentários aos arts. 52 a 74 da LSA - Capítulo V - Debêntures. In: GONÇALVES NETO, Alfredo de Assis (Ed.). *Lei das sociedades anônimas comentada*. São Paulo: Revista dos Tribunais, 2024, p. 215-373, p. 239 ("It is from the equal treatment of debenture holders that the entire collective governance of the interests of debenture holders gathered in a communion of debenture holders develops."); See, also, ASCARELLI, Tullio. Assembleia dos debenturistas e encurtamento do prazo de prescrição. In: Tullio Ascarelli (Ed.). *Problemas das sociedades anônimas e direito comparado*. São Paulo: Saraiva e Cia, 1945, p. 570-575, p. 573-574 ("Debentures are credit securities issued in series; identical, therefore, must be the rights arising from any of the securities of the same issue; the issuance of all securities

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Equal treatment among debenture holders constitutes the central pillar of the governance of the debenture holders' communion. The equal treatment of debenture holders provides "the very foundation of debenture lending."[2] Due to its centrality for debenture law, equal treatment among debenture holders has a principled character[3] that informs the content of all other constitutive norms of the *collective organization* of debenture holders.

Equal treatment of debenture holders should be for debenture holders of the same issue. However, in a questionable norm, art. 53, sole paragraph, of the LSA, provides that equal treatment is restricted to debenture holders of the same series is provided in art. 53, sole paragraph, of the LSA, which states that "[t]he debentures of the same series shall have equal nominal value and confer upon their holders the same rights." Its only advantage seems to be in dispersing the costs of issuance administration, notably the trustee's fees, over a larger base of debenture holders. However, this economy is made at the expense of the efficiency and speed of resolutions on the modification of debenture conditions and fostering a greater volume of litigation among debenture holders. *De lege ferenda*, this norm should be rethought.

Due to equal treatment, debenture holders of the same series are endowed with equal credit rights and, because they have equal rights, debenture holders, as debenture holders, share *homogeneous interests* and form a communion of interests, which the law calls the *communion of debenture holders* (cf. arts. 68 and 71 of the LSA).

It is in this sense that, like the equal treatment of debenture holders, the homogeneity of debenture holders' interests "is at the root of the governance norms for the collective action of the debenture holders' communion, both for purposes of majority resolution and for the collective exercise of rights before the company."[4]

Equal treatment also presupposes the imposition of collective action on debenture holders. To ensure the *effectiveness* of equal treatment of debenture holders, it is not enough to invest them with equal credit rights: it is necessary to determine that debenture holders exercise their rights jointly, as a communion of debenture holders, in a *collective action*.

To this end, a norm is established that, on the one hand, *prohibits individual action* and, on the other hand, *imposes* the exercise of *collective action*. Due to equal treatment, no debenture holder can *exercise individual* action to "place himself in a better situation

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corresponds to a single operation. And therefore, natural, the interest in collectively organizing debenture holders and indeed this happened, due to voluntary associations of debenture holders, even before the legal discipline of their collective organization.").

[2] CARVALHOSA, Modesto. *Comentários à Lei de Sociedades Anônimas*. v. I, 6. ed., São Paulo: Saraiva, 2011, p. 913.

[3] CARVALHOSA, *Comentários à Lei de Sociedades Anônimas*, v. I, 2011, p. 700 (referring to the "principle that none of the debenture holders has more rights than others.").

[4] See CAVALLI, Comentários aos arts. 52 a 74 da LSA - Capítulo V - Debêntures, 2024, p. 239.

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than others"[5] seeking to "pay himself preferentially over the assets that serve as collateral for *the loan*, leaving the bones to the other bondholders."[6] And also due to the principle of equal treatment that debenture holders must *act collectively*, as they are "invested with equal rights and equal obligations, exercisable jointly, in the same weight and measure."[7]

Due to equal treatment, the organization of the collective action of debenture holders is constituted by norms of *public order* and, therefore, *mandatory*, over which debenture holders and the issuer cannot dispose.[8] These norms impose the uniqueness of direction of collective action, according to which the rights of debenture holders must be exercised jointly in the same action and in a single direction. Therefore, the collective exercise of rights presupposes that debenture holders choose the measure they prefer to take collectively for the protection of their interests.

In a word, the communion of debenture holders *acts collectively* (art. 68 of the LSA) and, to this end, needs to *deliberate collectively* (art. 71 of the LSA), except in situations where individual action is expressly permitted.[9]

Thus, for example, in case of default by the issuing company, debenture holders may have to choose between different alternatives of collective action, i.e., whether they prefer (i) to file an execution lawsuit to collect the debt; (ii) *to waive* the right to accelerate the maturity of the debt and await the payment promised by the issuer; or (iii) to renegotiate the terms of the issuance, believing that execution would be less advantageous to them.

The will of the *debenture holders' communion* is formed by resolution taken in a *debenture holders' meeting* (art. 71 of the LSA), in which decisions are made by *majority vote*, based on the aggregation of votes cast individually by debenture holders, on the basis of one vote per debenture (art. 71, § 6º, of the LSA). For debenture holders to be able to choose the course of action to be pursued jointly, the governance of the collective

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[5] CARVALHO DE MENDONÇA, José Xavier. *Tratado de direito comercial brasileiro*. v. IV, 7. ed., Rio de Janeiro: Livraria Freitas Bastos, 1964, p. 164.

[6] CARVALHO DE MENDONÇA, *Tratado de direito comercial brasileiro*, v. IV, 1964, p. 164.

[7] FERREIRA, Waldemar Martins. *Tratado de sociedades mercantis*. v. 5, 5. ed., Rio de Janeiro: Editora Nacional de Direito Ltda, 1958, p. 1497.

[8] CAVALLI, Comentários aos arts. 52 a 74 da LSA - Capítulo V - Debêntures, 2024, p. 237 ("The equality of rights conferred on debenture holders of the same series provided for in art. 53, sole paragraph, of Law 6,404/1976, is a norm of public order, mandatory, over which one cannot dispose").

[9] CAVALLI, Comentários aos arts. 52 a 74 da LSA - Capítulo V - Debêntures, 2024, p. 535 ("Debenture holders are part of the debenture holders' communion that deliberates collectively (art. 71) and acts collectively (art. 68), except in the limited hypotheses where individual action is expressly permitted. These hypotheses are sometimes provided for in law (as was the case of art. 18 of Decree-Law 781/1938) or result from interpretation endorsed by legal practice (for example, Statement 76 of the CJF Commercial Law Conferences on the unbundling of the debenture holder's voting right in judicial reorganization).").

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action of debenture holders adopts the *majority principle*, according to which the proposition that obtains the *majority of votes* cast in a debenture holders' meeting will be victorious and will constitute the *collective resolution* binding on all debenture holders of the series, including the dissenting minority.[10]

The adoption of the majority principle brings with it the risk of the majority abusively exercising its power to obtain advantages to the detriment of the dissenting minority. To ensure that equal treatment effectively prevents the force of the majority from being exercised abusively, majority resolution is surrounded by *counter-majority safeguards for the protection of the minority*, which constitute counter-majority protections for the dissenting minority against abuses by the majority.

The *safeguards* are based on the mandatory nature of equal treatment. That is to say, the *majority principle* is always combined with the *principle of equality*. To bind all debenture holders, the content of the resolution taken by the majority must be one and the same, equally applicable to both the debenture holders who are part of the majority and the minority debenture holders who dissent from the resolution.

Equal treatment must be *formal* and *material*.

Formal equality requires that the rights conferred on debenture holders of the same series must be *formally equal*, whether originally, at the time of issuance, or subsequently, at the time of renegotiation of the debenture payment conditions.

However, it is not enough that they are *formally equal*, only on paper; it is necessary that they are also *materially equal*, in the sense that all debenture holders *effectively* receive the same treatment, with individual favors being prohibited. More concretely, *side deals* that grant one or some debenture holders advantages not extended to others are prohibited.

In this sense, equal treatment informs the material, procedural, and judicial safeguards of debenture holders' rights.

Material safeguards ensure the equality of the content of the rights conferred on debenture holders.

Procedural safeguards serve to prevent debenture holders' rights from being *exercised* in a way that leads to practical results that, while maintaining the formal equality of rights, result in the distribution of substantially unequal treatments to the debenture holders of the communion.

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[10] CARVALHOSA, *Comentários à Lei de Sociedades Anônimas*, v. I, 2011, p. 926 ("The resolution taken in assembly will be the will of the communion. Thus, the general assembly, duly convened, represents the universality of debenture holders. It is through the majority resolution of the general assembly of debenture holders that the will of the communion is expressed, opposable *erga omnes*. The interest of the communion prevails over the individual interests of debenture holders, in view of the uniqueness of the debenture debt and the principle of *par conditio creditorum*.").

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Finally, *judicial safeguards* serve to supervise and ensure the effective observance of material and procedural safeguards.

The norm of equal treatment plays a very important instrumental role in promoting two very important objectives: on the one hand, it ensures the *fairness* of majority resolution and, therefore, contributes to its greater *social acceptability* by debenture holders and the issuing company; on the other hand, it promotes more *efficient* resolutions for the interests of the debenture holders' collectivity and for the issuing company.

The promotion of *fairness* and *efficiency* of resolution results from the fact that equal treatment makes the *individual interest* of each debenture holder coincide with the *collective interest* of the debenture holders' communion: if debenture holders cannot receive individual advantages to the detriment of the collectivity, each debenture holder will have an incentive *to vote sincerely* for the option they deem most beneficial to the collectivity, as they will benefit from it in equal proportion.[11, 12]

By making each debenture holder vote sincerely for the alternative they deem most favorable to all, equal treatment promotes the *fairness* of resolution, as the dissenting minority will receive the same treatment that the majority chose for itself.

Equal treatment also promotes the efficiency of resolution, because (i) it encourages each debenture holder to vote *sincerely* for the alternative that maximizes the satisfaction of the debenture holders' collectivity's credits and, therefore, (ii) discourages debenture holders from *adopting strategic behaviors* aimed at obtaining individual advantages not shared with the debenture holders' collectivity.

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[11] See CAVALLI, Comentários aos arts. 52 a 74 da LSA - Capítulo V - Debêntures, 2024, p. 361; and ASCARELLI, Assembleia dos debenturistas e encurtamento do prazo de prescrição, 1945, p. 573-574 ("Debentures are credit securities issued in series; identical, therefore, must be the rights arising from any of the securities of the same issue; the issuance of all securities corresponds to a single operation. And therefore, natural, the interest in collectively organizing debenture holders and indeed this happened, due to voluntary associations of debenture holders, even before the legal discipline of their collective organization. On the one hand, bondholders thus achieve more effective protection of their rights before the company; on the other hand, the original clauses of the debentures can then be modified through a collective resolution of the bondholders, whose effectiveness is general.").

[12] The same reasoning applies to the role of equality regarding any other collective resolution, including that taken in judicial reorganization. Thus, see CAVALLI, Cássio. *O direito de voto na recuperação judicial*. 2.ed., São Paulo: Agenda Recuperacional, 2023, p. 24 ("This is the fundamental presupposition on which the entire discipline of reorganization law also rests and informs the discipline of voting rights: the creditor's interest is not limited to increasing the individual satisfaction of their credit, but to increasing the collective satisfaction of the credit in the reorganization procedure through the maximization of the debtor company's asset value. More concretely, the individual interest of the creditor and the collective interest of the creditors coincide in judicial reorganization. To make the individual interest of the creditor coincide with the interest of the collectivity of creditors, judicial reorganization brings together all creditors in a single collective procedure, in which all creditors will benefit in equal proportion from the maximization of the company's value.").

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The adoption of strategic behaviors to obtain individual advantages harms the efficiency of resolution, as it leads to impasses that delay[13] or even *prevent* an agreement from being reached,[14] and, therefore, harms debenture holders, the issuing company, and all others who relate to it.

Indeed, equal treatment structures a faster collective renegotiation, as each debenture holder will only have to evaluate the terms of the proposal made to the debenture holders' collectivity and "sincerely express their individual preference, which is what is best for the group."[15]

To promote the imperatives of fairness and efficiency associated with equal treatment among debenture holders of the same series, *procedural safeguards* are adopted, consisting of the discipline of the *assembly procedure*, which formally organizes the resolution procedure, in order to ensure broad participation of debenture holders.

Equal treatment among debenture holders informs the exercise of rights by the debenture holders' communion (art. 68) and the procedure and content of majority resolutions taken in a debenture holders' meeting (art. 71). Indeed, the equality of rights conferred by debentures of the same series constitutes a limit to the will of the debenture holders' meeting that approves the modification of the conditions of debentures of the same series.[16]

Procedural safeguards serve to prevent or deter debenture holders from voting strategically to (i) seek some individual benefit not shared with the collectivity or to (ii) promote some other particular interest different from their interest as debenture holders.

In the latter case, procedural safeguards serve to control the vote cast in a *conflict of interest* and to admit to resolution only those debenture holders who, by their vote, exclusively promote their interests as debenture holders and, therefore, do not promote another interest they hold in conflict with the debenture holder's interest, - such as, for example, the interest of a shareholder of the issuer or the interest of a competitor, - which might lead them to prefer to vote in sacrifice of their interests as debenture holders to promote a different interest.

Debenture restructurings decided by conflicted majorities left deep scars in the practice of the Brazilian capital market, which were vividly recorded in our legal

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[13] The delay in renegotiations was portrayed by J. X. Carvalho de Mendonça, when criticizing Decree 177-A/1893 in the following terms: "[t]he law, not having organized collective action nor the legal representation of the mass of bondholders, to escape the isolation to which they were condemned, sacrificed respectable interests. Often, a timely measure, an extension of interest payment or amortization, certain modifications in the contract would save the company and ensure the rights of bondholders." CARVALHO DE MENDONÇA, *Tratado de direito comercial brasileiro*, v. IV, 1964, p. 155.

[14] For a detailed explanation of how these strategic behaviors operate, see CAVALLI, Comentários aos arts. 52 a 74 da LSA - Capítulo V - Debêntures, 2024, p. 360-362.

[15] CAVALLI, Comentários aos arts. 52 a 74 da LSA - Capítulo V - Debêntures, 2024, p. 360.

[16] CAVALLI, Comentários aos arts. 52 a 74 da LSA - Capítulo V - Debêntures, 2024, p. 237.

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experience. Thus, referring to art. 5 of Law 177-A/1893, which provided for the possibility of renegotiating debentures by a 2/3 majority of the total value of the issue, but without providing other safeguards, J. X. Carvalho de Mendonça recorded that this provision for renegotiation by majority constituted:

> "the nest of scandalous fraud and the plague of bearer bond [i.e., debenture] loans. Dishonest administrators sought to discredit the debentures issued, and when they achieved a sharp drop in quotation, they acquired two-thirds of the securities, imposing on the holders of the other third a miserable dividend for the full redemption of the loan. For this purpose, they used straw men, who appeared as bondholders. The agreement also constituted a strong attack on the rights of unsecured creditors, who were neither heard nor could supervise their interests, nor had the right to consult the company's books and documents. How many agreements were not made, transferring all the company's assets to the debenture holders, leaving the unsecured creditors without a penny in the forced liquidation that followed! To admit this agreement with the bondholders, with the majority winning, it would be necessary to extend the prescription to holders of mortgage bonds, which would be equally dangerous."[17]

The concern of the illustrious professor with collusive agreements with the majority of debenture holders was to protect dispersed minority debenture holders and the issuer's other creditors against unfair renegotiations that imposed a worse unequal treatment on them, for the benefit of debenture holders in a conflict of interest, who benefited from a more advantageous treatment.

This same problem also manifests itself in cases where majority resolution must formally provide equal treatment to the dissenting minority, but without *procedural safeguards* that allow verifying the effective observance of equal treatment. This is what Vincent Buccola teaches, referring to the practice of the US capital market:

> "As is well known, majority – and supermajority – rule arrangements invite insiders to expropriate wealth from dispersed, minority creditors. To illustrate the intuition, recall Acme Bounce House Corporation and its $1000 of bonds held *pro rata* by 100 bondholders. Suppose the bond indenture were to permit a two-thirds vote to modify repayment terms. It would now be in the interest of Acme's shareholders for the company to acquire $670 of the bonds-assuming for simplicity it could buy them at par – and vote to cancel repayment obligations outright. Acme would in this way expropriate $330 from the bondholders. It would take a total

[17] CARVALHO DE MENDONÇA, *Tratado de direito comercial brasileiro*, v. IV, 1964, p. 173.

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> loss on the bonds it bought but realize a gain from cancellation of debt that would more than offset the loss. To be sure, a scheme so indelicate would be impossible to pull off even absent the unanimity requirement for amending core payment terms. Among other things, bondholder vote tallies disregard the views of the issuer's insiders. But more creative ways of accomplishing a similar end are wellknown. Exchange offers conditioned on the exchanging bondholder's consent to amend terms 'on the way out,' for example, can replicate the economics of the simple hypothetical. If the bondholders are sufficiently concentrated or can coordinate effectively, they can resist expropriation; but if they are dispersed and unable to coordinate, then, depending on their strategic calculations, a coercive exchange offer can succeed."[18]

The "more creative ways of accomplishing a similar end" to which Vincent Buccola referred in the transcribed excerpt above consist of strategic behaviors of the obstructive-opportunistic (*holdout*) and parasitic (*free rider*) types,[19] which can be adopted by debenture holders to seek individual advantages to the detriment of the debenture holders' collectivity, if the norms governing the collective resolution of debenture holders are not adequately configured.

The adoption of parasitic (*free rider*) and obstructive-opportunistic (*holdout*) behavior can both make it impossible to collectively renegotiate the issue and lead to renegotiations in which some debenture holders receive more advantageous treatment

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[18] BUCCOLA, Vincent S. J. *Bankruptcy's cathedral: property rules, liability rules, and distress*. Nw. UL Rev., v. 114, p. 705, 2019, p. 729.

[19] CAVALLI, Comentários aos arts. 52 a 74 da LSA - Capítulo V - Debêntures, 2024, p. 361 (Parasitic behavior, or free rider, as I noted in comments on art. 71 of Law 6,404/1976, "is characterized by the debenture holder's non-acceptance of a proposal addressed to all debenture holders and which will only bind those who accept it. The free rider debenture holder understands that the proposal made by the company is better for the group of debenture holders than a scenario of judicial reorganization or bankruptcy. However, the free rider does not accept this better proposal in the expectation of obtaining a greater individual benefit than that obtained by the set of debenture holders who accepted the proposal. This occurs, for example, if the issuing company proposes to debenture holders the modification of debenture payment conditions, extending the payment term and reducing the interest rate. If, by the adopted voting system, the proposal only binds those who accept it, but not those who do not accept it, each debenture holder will have an incentive not to accept it, as they will wait for others to accept it, leading to an improvement in the issuer's capital structure and, therefore, a greater probability of payment of debentures that maintain the original conditions. This improvement will be reflected in the quotation value of the original debentures held by the free rider. The problem with voting systems that are based on individual adherences without binding non-adherents is that all debenture holders will tend not to accept the proposal, hoping to benefit from acceptance by others. With this, the issuing company cannot reorganize its capital structure and may be led to request judicial reorganization or bankruptcy, which are second-best options. In other words, free rider behavior can make a renegotiation that would be more advantageous for the group of debenture holders unfeasible.").

CAVALLI, Cássio. The vote of debenture holders in brazilian judicial reorganization. *Agenda Recuperacional*. São Paulo. v. 3, n. 43, p. 1-46, setembro/2025. Disponível em: www.agendarecuperacional.com.br. Acesso em:

than that given to others.[20] That is, both strategic behaviors can compromise the efficiency and fairness of debenture renegotiations.

3. *Judicial Intervention for the Safeguard of Equal Treatment of Debenture Holders*

To avoid these undesirable results, it is necessary to equip the *resolution procedure* with more energetic safeguards, capable of ensuring formal and material equality among debenture holders, in order to minimize the possibility of debenture holders adopting *parasitic* and *obstructive-opportunistic* strategic behaviors.[21]

That is to say, it is not enough for debentures to confer the same patrimonial and political rights. It is necessary that these formally equal rights be exercised in order to ensure material equality among debenture holders, through the adoption of safeguards that prevent the issuing company from granting, laterally, through side deals, advantages to some debenture holders, nor debenture holders, individually or in groups, from seeking to obtain individual advantages, to the detriment of the collectivity.[22]

To achieve this purpose, the majority resolution for debenture renegotiation must be endowed with *judicial safeguards*, which allow judicial intervention to protect the rights of minority debenture holders against abuses by the majority,[23] through the scrutiny of the fairness of the procedure and the control of the legality of the renegotiation agreement, according to a "long tradition"[24] adopted in European countries, in US law, and in Brazilian law in force until 1976.

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[20] CAVALLI, Comentários aos arts. 52 a 74 da LSA - Capítulo V - Debêntures, 2024, p. 362 (However, "[t]he problem with holdout behavior is that it can lead to the loss of the renegotiation opportunity, which could be more advantageous to debenture holders, including the holdout debenture holder, than the scenario without renegotiation; in addition to undermining the social acceptability of the result of collective resolutions. This last consequence manifests itself in cases where other debenture holders suspect that the issuing company covertly granted an individual advantage to the holdout debenture holder in a side deal, or that other debenture holders were pressured to consent to a renegotiation that granted a more advantageous treatment to the holdout.").

[21] CAVALLI, Comentários aos arts. 52 a 74 da LSA - Capítulo V - Debêntures, 2024, p. 361.

[22] CAVALLI, Comentários aos arts. 52 a 74 da LSA - Capítulo V - Debêntures, 2024, p. 239.

[23] CARVALHOSA, *Comentários à Lei de Sociedades Anônimas*, v. I, 2011, p. 699 (transcribing Trajano de Miranda Valverde's opinion on Decree-Law 781/1938, for whom "The law, by requiring judicial intervention, sought to safeguard the rights of minority bondholders, preventing as much as possible that they be sacrificed by majority voters, often in collusion with the debtor itself, when they are not, in fact, mere straw men acting in its exclusive interest.").

[24] CARVALHOSA, *Comentários à Lei de Sociedades Anônimas*, v. I, 2011, p. 700 (commenting on the system of judicial homologation of debenture renegotiation agreements in Decree-Law 871/1938, stated that "[i]t thus followed the old legal system, with regard to the individual and common rights of debenture holders, the long tradition of old French, Italian, and Spanish laws, all requiring judicial homologation, as indeed some legal systems still do.").

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In these cases, extrajudicial majority resolution is restricted, imposing the *need for judicial homologation* of the renegotiation agreement or even that the agreement itself be negotiated, deliberated, and homologated in court. From an abstract point of view, nothing would prevent the scrutiny of the resolution from taking place in an arbitration proceeding, but for this, it would be necessary to adapt the regulations and arbitration practices for collective homologation procedures.

3.1. Judicial safeguards in Brazilian law

In Brazilian law, to prevent unscrupulous majorities of debenture holders from manipulating the course of renegotiation for their own benefit, tyrannically exercising majority power to impose a *miserable* treatment on the minority, as occurred during the validity of Decree 177-A/1893, renegotiation by majority resolution was subjected to the homologation of the bankruptcy court so that its terms would bind all debenture holders, including dissenters.[25]

Thus, Decree 2,159/1897 regulated the homologation of the renegotiation agreement by majority provided for in art. 5 of Decree 177-A/1893 and allowed companies in *insolvency* or *liquidation* to enter into a debenture renegotiation agreement, which would bind all debenture holders if it had the consent of 2/3 of them and was homologated in court by the *extrajudicial concordata* process governed by Decree 917/1890.[26]

The *extrajudicial concordata* process followed a very similar procedure to the current *extrajudicial reorganization* and, to a large extent, to the *judicial reorganization* in which the assembly is replaced by a term of adherence signed by the creditors, under the terms of art. 39, § 4º, I, combined with art. 45-A, both of Law 11,101/2005: the debtor could enter into a written agreement with its creditors and then file a request for homologation, accompanied by the written agreement signed by the creditors, and their nominal list. The judge would order the publication of a public notice opening a period for interested parties to express themselves, alleging bad faith, fraud, or deceit by the debtor. After a brief instruction, the judge would issue a sentence, by which he would

[25] CAVALLI, Comentários aos arts. 52 a 74 da LSA - Capítulo V - Debêntures, 2024, p. 240.

[26] FERREIRA, *Tratado de sociedades mercantis*, v. 5, 1958, p. 1500 ("Homologation would proceed in accordance with arts. 121 and 122 of Decree No. 917, of October 24, 1890, which dealt with the homologation of the agreement or extrajudicial concordata.").

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homologate or not the agreement.[27] However, if homologation was denied, bankruptcy should be declared.[28]

This legally provided procedural rite "could, perfectly, apply to the homologation of the agreement between the debenture holders and the issuing company."[29]

From an institutional design point of view, it should be noted that renegotiation agreements whose debenture holders' will has been previously expressed and collected can be submitted for judicial homologation in a procedure that is adequate for this purpose, as are currently judicial and extrajudicial reorganization.

Indeed, to prevent majority resolution systems from sliding into a tyranny of the majority, "with the concern to defend individual interest against collective interest,"[30] Brazilian law regulated the *debenture holders' communion* in more detail, through the promulgation of Decree 22,431/1933, subsequently replaced by Decree-Law 781/1938. The new legislation, observed Trajano de Miranda Valverde, "did not create the communion of interests, but organized it with the aim of safeguarding the interests of both parties."[31]

Art. 11[32] of Decree 22,431/1933 authorized the renegotiation of debentures by resolution taken by a 2/3 majority, even if the issuer was not insolvent, which would bind all debenture holders, including dissenters, if it was judicially homologated.

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[27] FERREIRA, *Tratado de sociedades mercantis*, v. 5, 1958, p. 1500-1501 ("The debtor, with a registered firm, could, before the protest, for lack of payment, of a liquid and certain commercial obligation, make an agreement, in writing, with his creditors, who represented, at least, three quarters of his total liabilities. Having obtained their acceptance, the debtor would request the judge for homologation, attaching the written agreement, signed by the creditors, signatures recognized by a notary, and their nominal list, indicating their domiciles, plus the nature of the securities and the amount of each credit. And the judge would order the publication of a public notice, setting a period of ten days for interested parties to claim what they deemed appropriate for their rights. The claim could consist only of alleging bad faith, fraud, or deceit by the debtor. Once received, the three-day evidentiary period for the alleged would follow. And the judge would issue a judgment, homologating, or not, the agreement. An appeal was allowed against the sentence.").

[28] Cf. art. 125 of Decree 917/1890.

[29] FERREIRA, *Tratado de sociedades mercantis*, v. 5, 1958, p. 1501.

[30] VALVERDE, Trajano de Miranda. *Sociedades por ações*. v. II, 3.ed., Rio de Janeiro: Forense, 1959, p. 194.

[31] VALVERDE, *Sociedades por ações*, v. II, 1959, n. 523, p. 195, emphasis mine.

[32] The said provision read: "Art. 11. The resolutions provided for in the preceding article no. 2, letters d, e, f, q, h, always require a quorum of at least two thirds of the outstanding obligations, excluding those belonging to the debtor company and a two-thirds majority of the obligations represented [in assembly by proxies], and also depend, to become mandatory, on judicial homologation, which shall not be denied if all formalities and conditions imposed by this law have been strictly observed, after hearing the public prosecutor."

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Decree of 1933 was replaced by the promulgation of Decree-Law 781/1938, in whose art. 12 read:

> Art. 12. Deliberations that alter loan agreement clauses must always be supported by at least 2/3 of the outstanding obligations and depend, to become mandatory, on judicial homologation, which shall not be denied if all formalities and conditions imposed by law have been observed, after hearing the public prosecutor and, if requested or deemed necessary by the judge, a representative of the dissenting debenture holders.
>
> Sole paragraph. The homologation shall proceed in accordance with the provisions regarding concordata (Decree No. 5,746, of December 9, 1929).

The protection of debenture holders was ensured by the *concordata homologation procedure*, in which dissenters could express reasons against homologation, and the Public Prosecutor's Office was heard before homologating the resolution.[33]

According to the sole paragraph of art. 12 of Decree-Law 781/1938, homologation should be processed by the concordata governed by Decree 5,746/1929. Commenting on this provision, Waldemar Ferreira observed an incongruity, consisting of the fact that both preventive and definitive concordata of bankruptcy "are processed in creditors' meetings, presided over by the judge. Once the concordata proposal is discussed, it is submitted to votes. Accepted by the double majority of creditors and credits, the judge can and should, if there are no dissenting creditors, immediately homologate the concordata in the assembly."[34]

In other words, what the celebrated professor was observing was that, unlike the *extrajudicial concordata* procedure governed by Decree 917/1890, in which votes were collected by the debtor company and recorded in a term of adherence signed by the creditors, in the *concordata* governed by Decree 5,746/1929, vote collection was done

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[33] FERREIRA, *Tratado de sociedades mercantis*, v. 5, 1958, p. 1449 (For the alteration of loan conditions "to become mandatory for all debenture holders, absent or dissenting, it is essential that it be judicially homologated. [...] The homologation process is that of concordata."); VALVERDE, Sociedades por ações, v. II, 1959, n. 532, p. 206-207 ("Decree-Law provided, in art. 12, that resolutions that alter the clauses of the loan agreement depend, to become mandatory, on judicial homologation, after prior hearing of the Public Prosecutor's Office and the representative of the dissenting debenture holders, if requested or deemed necessary by the judge. [...] [T]he judge, upon becoming aware of the request, must order the representative of the dissenting debenture holders to be heard, within the period he sets, if applicable, and the Public Prosecutor's Office. If the former files objections to the request for homologation of the agreement or resolution, they will be processed as provided in arts. 144, sole paragraph, 146 and 147 of Decree-Law No. 7,661, of 1945.").

[34] FERREIRA, *Tratado de sociedades mercantis*, v. 5, 1958, p. 1499.

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exclusively in assembly, which led to the conclusion that "[t]he judicial homologation of the resolution of the general assembly of debenture holders is entirely impossible, if it has to obey the concordata process between bankrupt and creditors, in accordance with Decree No. 5,746, of December 9, 1929. Even less so in the system of Decree-Law No. 7,661, of June 21, 1945, which is in force."[35]

To protect the dissenting minority and prevent "abuse of rights by deliberating majorities in the debenture holders' assembly, Decree-Law No. 781, of 1938, required a *qualified quorum* and judicial homologation, preceded by a statement from the Public Prosecutor's Office and, furthermore, the presence in the conclave of a representative of the dissenting debenture holders, for resolutions that modified loan clauses."[36] In other words, minorities had procedural safeguards aimed at curbing the excesses of the majority.

Furthermore, a debenture renegotiation agreement that provided for a payment lower than what debenture holders would receive in case of bankruptcy could not be homologated;[37] that is, the judge of the homologation action could scrutinize the content of the resolution according to the criterion of the *best interest of the creditors*, according to which "the creditor cannot vote to sacrifice his interest as a creditor if, by doing so, he sacrifices the interest of the collectivity of dissenting creditors. In this sense, the best interest criterion constitutes a relevant mechanism for protecting dissenting creditors. [...] The best interest of the creditor criterion serves to scrutinize the regularity or abusiveness of the vote based on the comparison between the payment creditors will receive in the reorganization plan and the payment they will receive in bankruptcy."[38]

3.2 Judicial safeguards in US law for the resolution by majority of bondholders

It was not only in Brazilian law that abuses of the majority rule in debenture renegotiations in the first half of the 20th century prompted legislative reforms in the debenture resolution voting system to impose material and procedural safeguards for the protection of minorities.

In the US experience, in "a New Deal reaction to the excesses of an out-of-court restructuring market in the Depression era, in which insider equity holders and their favored creditors siphoned value away from bondholders,"[39] the Trust Indenture Act of

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[35] FERREIRA, *Tratado de sociedades mercantis*, v. 5, 1958, p. 1501.

[36] CARVALHOSA, *Comentários à Lei de Sociedades Anônimas*, v. I, 2011, p. 699.

[37] As provided in art. 13, sole paragraph, of Decree-Law 781/1938: "Any agreement for the liquidation of a loan by obligations (debentures) must correspond to a payment not less than what would be produced, for the bondholders, by the liquidation of the company, deducting the foreseen expenses of the operation and the value of the privileged debts by law."

[38] CAVALLI, *O direito de voto na recuperação judicial*, 2023, p. 43-44.

[39] BRATTON, William W. and LEVITIN, Adam J. *The new bond workouts*. University of Pennsylvania Law Review, v. v. 166, n. n. 7, p. 1597-1674, 2018, p. 1600.

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1939 ("TIA") was enacted, whose Section 316(b)[40] prohibited private renegotiation by majority resolution of debenture holders by providing that the individual right of the debenture holder to receive payment of principal and interest on such security, and the right to institute suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such holder.

As there is no supervision or scrutiny by a court in private renegotiations, there are no protections against distortions and abuses in renegotiation.[41] In this context, Section 316(b) is the *central provision* of the TIA,[42] which "protects the rights of each individual bondholder under an indenture as against other bondholders under that indenture. It is a 'countermajoritarian' protection designed to preserve the rights of the one against the desires of the many,"[43] especially the rights of small retail investors against large institutional investors. It is a protection for the debenture holder against other debenture holders.[44]

Thus, analogously to what happened in Brazilian law in the 1930s, Section 316(b) of the TIA, on the one hand, restricted renegotiation deliberated by majority and, on the other hand, referred the collective resolution of debenture holders to the judicial reorganization process (at the time governed by Chapter X of the Bankruptcy Act), under the supervision of the reorganization court, which is responsible for scrutinizing the regularity of the procedure and the fairness of the resolution, preventing abuses[45] and

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[40] Section 316(b) reads: "Notwithstanding any other provision of the indenture to be qualified, the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such holder".

[41] BRATTON and LEVITIN, *The new bond workouts*, 2018, p. 1600 ("There is no judicial oversight of the restructuring process, as would be the case in bankruptcy. Nor does contract law provide in the way of protection against distorted bargaining in a financial context like this one.").

[42] SHUSTER Jr., George W. *Trust Indenture Act and international debt restructurings*. American Bankruptcy Institute Law Review, v. 14, p. 431-467, 2006, p. 431.

[43] SHUSTER Jr., *Trust Indenture Act and international debt restructurings*, 2006, p. 433 (free translation of: "section 316(b) protects the rights of each individual bondholder under an indenture as against other bondholders under that indenture. It is a 'countermajoritarian' protection designed to preserve the rights of the one against the desires of the many".).

[44] SHUSTER Jr., *Trust Indenture Act and international debt restructurings*, 2006, p. 433 (Section 316(b) is a protection for the debenture holder against other debenture holders, which "functions only indirectly to protect a bondholder against a debt issuer (creditor against debtor), but functions directly to protect a bondholder against fellow bondholders (creditor against other creditors). More specifically, the legislative history for the TIA suggests that section 316(b) was passed to protect an individual, 'retail' holder from the attempts of institutional investors, usually in coordination with the debt issuer, to restructure all of the issuer's debt.").

[45] BRATTON and LEVITIN, *The new bond workouts*, 2018, p. 1600 ("The statute's drafters wanted restructurings to proceed in bankruptcy under judicial and administrative oversight so as to prevent process abuses.").

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ensuring the fairness of the resolution based on imperatives of equality arising from *protection against unfair discrimination*,[46] which is the discrimination not consented to by the discriminated party.

The referral to the reorganization process to collectively renegotiate debentures constitutes an *implicit exception* to the norm of Section 316(b) of the TIA.[47] Indeed, it is in the reorganization process that debenture holders deliberate collectively, through the individual exercise of their political voting rights, in accordance with the rules governing the resolution procedure of the reorganization process. Thus, as George Shuster Jr. noted,

> "[s]ection 316(b) was adopted with a specific purpose in mind: to prevent out-of-court debt restructurings from being forced upon minority bondholders. The perceived problem was that, absent section 316(b), a debt issuer would be able to agree with a majority of its bondholders that all bond debt will be reduced. Such an out-of-court agreement would allow the issuer to circumvent or 'contract-around' the provisions of the U.S. Bankruptcy Code, which would apply different, statutory requirements for debt reduction. For example, if an indenture allowed bond debt to be reduced on a vote of bondholders representing 50% of the principal amount of bonds, such a vote would be inconsistent with the bankruptcy voting requirements in section 1126 of the Bankruptcy Code, which provide that a chapter 11 plan of reorganization may be approved by a class of debt if affirmative notes are cast by two-thirds in amount of the claims constituting the class, and more than one-half in number of the creditors in the class, with the fractions measured against those claims and creditors actually voting on the plan. The United States Securities and Exchange Commission ('SEC'), in promoting the TIA, was consciously forcing debt restructurings involving TIA - qualified indebtedness to occur in bankruptcy court under the applicable laws and rules, rather than in an out-of-court setting under rules contracted by the parties."[48]

And, further on, the author continues,

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[46] CAVALLI, Comentários aos arts. 52 a 74 da LSA - Capítulo V - Debêntures, 2024, p. 240.

[47] SHUSTER Jr., *Trust Indenture Act and international debt restructurings*, 2006, p. 438-439 ("Although the legislative history of section 316(b) makes clear that the SEC and Congress preferred bankruptcy to out-of-court debt restructurings, as far as protecting individual bondholders was concerned, Congress made no explicit reference to bankruptcy in section 316(b). Notwithstanding this textual omission, the TIA's legislative history and its citation by courts and commentators have caused the bankruptcy 'exception' to become a standard inference in section 316(b) analysis.").

[48] SHUSTER Jr., *Trust Indenture Act and international debt restructurings*, 2006, p. 437-438

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> "From the perspective of an individual bondholder, chapter 11 provides a process for a portion of a debt issuer's creditors to agree to a reduction in bond debt, principal and/or interest, and for the court to make that reduction binding upon the individual bondholder without regard to whether it has agreed to it, opposed it, or abstained from voting on it. But isn't this precisely what section 316(b) prohibits? How can chapter 11 and the TIA be reconciled if the one statute infringes upon individual rights that the other protects? The answer is as noted above - that chapter 11 offers and requires more than just a reduced creditor voting percentage. It is a statute that carefully balances the rights of the individual against the rights of the group, the rights of the debtor against the rights of its creditors. Within this scheme, there is an advanced degree of comfort that the individual bondholder's rights will not be unduly prejudiced. And, unlike an out-of-court restructuring, there is a judge waiting to hear the equitable concerns that an individual bondholder might raise."[49]

Thus, as Vincent Buccola concludes,

> "The filing of a bankruptcy petition displaces section 316(b). In its place, Chapter 11 establishes a complex governance scheme designed to deliver bondholders a sum approximating fair value for their investments. The rudiments are familiar and quite simple insofar as prepackaged bankruptcies go. A supermajority of bondholders of each class-two-thirds by dollar – value and one-half by number – can, in general, impose the terms of a plan of reorganization on dissenters. The power of the many to impose equal terms on all dissolves the payoff to brinksmanship and so increases the likelihood that value-enhancing restructurings will come off. But while supermajority rule solves the holdout problem, it also reintroduces the prospect of expropriation by corporate insiders or others with multiple (conflicting) investments in the debtor. To limit this problem's magnitude, Chapter 11 thus interposes the bankruptcy judge as arbiter of procedural as well as substantive checks on the power of the vote. As a matter of procedure, the bankruptcy judge is authorized to designate the votes of bondholders proceeding in bad faith."[50]

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[49] SHUSTER Jr., *Trust Indenture Act and international debt restructurings*, 2006, p. 440.

[50] BUCCOLA, *Bankruptcy's cathedral: property rules, liability rules, and distress*, 2019, p. 731.

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4. *The Evolution of the Judicial Control System During the Validity of Law 6,404/1976*

4.1. The original regime: majority resolution without judicial safeguards

Unlike Decree-Law 781/1938, the LSA did not adopt the judicial safeguard of submitting to judicial homologation the majority resolution taken in a debenture holders' meeting regarding the renegotiation of debentures.

However, although the drafter of Law 6,404/1976 expressly stated in its Explanatory Memorandum the influence of Anglo-Saxon law, especially the figure of the indenture trustee for the conception of the debenture holders' trustee, and conceived the indenture similar to the US indenture, both figures regulated by the Trust Indenture Act, the LSA did not import the model found in Section 316(b) of the TIA, which prevents private renegotiations by majority resolution, ensures the debenture holder the right to individually decide the fate of their credit, and has an exception that admits renegotiation by majority resolution only in judicial reorganization, under the supervision of the reorganization court.

This option may have been due to the inadequacy of the *concordata* process governed by Decree-Law 7,661/1945 to collectively negotiate and homologate a collective renegotiation agreement.

Thus, by art. 71, § 5º, the LSA adopted a norm that allows the modification of debenture conditions by resolution of the debenture holders' meeting taken by majority, by a quorum not less than half of the outstanding debentures.

That is, it chose to admit private renegotiations by majority resolution, but, disregarding the tradition of Brazilian law since the end of the 19th century, it did not surround the hypothesis with the necessary *judicial safeguards* that control the excesses of the majority. Thus, art. 71, § 5º, of the LSA opened the doors for majorities of debenture holders to exercise their power to the detriment of dissenting minorities.

4.2. Modification of the regime: prohibition of modification of debenture conditions by majority resolution of the debenture holders' meeting, if there is no individual consent of the debenture holder

Soon after the promulgation of Law 6,404/1976, the norm contained in art. 71, § 5º, was altered, and a norm was adopted that prevents the modification of debenture payment conditions by majority resolution taken in a debenture holders' meeting.

The alteration of the norm occurred through creative interpretation. Thus, contradicting the literal text of § 5º of art. 71 of the LSA, CVM Instruction 28/1983 was promulgated, which provided in its art. 13, sole paragraph,[51] the need for unanimous

[51] Art. 13 of CVM Instruction 28/1983 read: "Art. 13. In case of default by the company, the trustee must use any and all action to protect rights or defend debenture holders' interests, and for that purpose: I – declare, observing the conditions of the issuance indenture, the debentures

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resolution of debenture holders to exempt the trustee from the duty to file an execution lawsuit against the issuing company.

This norm was justified by CVM Explanatory Note 27/1983 as follows:

> "The requirement of unanimous consent of the holders of outstanding debentures is explained, *setting aside the majority principle adopted by Law No. 6,404/76 for assembly decisions*, in view of the very nature of the object of the resolution to be taken. In fact, the *credit of each debenture holder has a personal and autonomous character*; consequently, *the decision not to execute it, when due, can only be taken by the creditor himself*. Thus, *in order for each debenture holder to be able to decide on the convenience of taking measures that directly concern the realization of their personal credits*, the Instruction imposed that such decisions can only be taken by the unanimity of the holders of outstanding debentures." (emphasis added)

That is, the creative interpretation of the Brazilian Securities and Exchange Commission was based on the solid argument that the *majority principle*, when devoid of proper *safeguards*, jeopardized the *individual credit rights of debenture holders* and, therefore, should be *set aside*, preventing the debenture holders' meeting from deciding by majority not to execute the credit; and should be replaced by a norm analogous to Section 316(b) of the TIA, which ensures the debenture holder *to individually decide on the convenience of taking measures that directly concern the realization of their personal credits*.

This norm, which set aside the majority principle and granted the debenture holder the power to individually decide on their debenture credit, was reinforced by CVM Deliberation 120/1991, in which the Collegiate of the Securities and Exchange Commission established that the majority resolution of acceptance of the proposal to modify the payment method does not bind the dissenting debenture holder, because "the conditions established in the debenture issuance indenture [...] must be maintained in relation to debenture holders who do not agree with the resolutions of the Debenture Holders' Meeting [...] concerning the repurchase obligation by the issuing company."[52]

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prematurely due and collect their principal and accessories; II – execute real guarantees, applying the proceeds to the full or proportional payment of debenture holders; III – request the bankruptcy of the issuing company if there are no real guarantees; IV – take any necessary measure for debenture holders to realize their credits; and V – represent debenture holders in bankruptcy, concordata, intervention, or extrajudicial liquidation proceedings of the issuing company. Sole paragraph. The trustee shall only be exempt from responsibility for not adopting the measures contemplated in items I to IV if, after convening the debenture holders' assembly, it so authorizes by unanimous resolution of the outstanding debentures. In the hypothesis of item V, the resolution of the majority of the outstanding debentures shall be sufficient."

[52] CVM Deliberation 120/1991.

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Specialized commentators have endorsed the new norm interpretatively constructed by the CVM, stating that the alteration of the *substantial conditions* of the debenture credit would depend on the unanimous consent of the debenture holders.[53] Thus, the modification of the debenture holder's right depended on their individual consent, and any debenture holder had a veto power over the renegotiation approved by all others.

Finally, the limitation of the debenture holders' assembly's competence to decide by majority on the alteration of the substantial conditions of debentures was endorsed by the STJ in the leading case *Sansuy S/A vs. Sprind DTVM*,[54] reported by Minister Ruy Rosado de Aguiar, whose summary reads:

> "DEBENTURES. General Assembly. Reduction of value. The general assembly of debenture holders is not authorized by art. 71, § 5º, of Law 6,404/76 to reduce the value of debentures."

In the report, it is stated that Sansuy, the issuer of the debentures, filed a declaratory action against Sprind "for the erga omnes effectiveness of the general assembly that altered the debenture conditions, with a reduction in value and modification of the monthly maturity dates. The defendant, a debenture holder, opposed the general assembly which, by majority, had established new conditions for the debentures, alleging that CVM Deliberation No. 120 applied to the case, and had notified the plaintiff of its intention to redeem its securities. The plaintiff's claim is to give effect to the assembly decision and prevent the announced redemption."[55]

The special appeal was filed against a judgment rendered by the TJSP (São Paulo State Court of Justice) in an appeal judgment, which decided in line with the vote drafted by then Judge César Peluso, who summarized: "It is that, in light of art. 71, § 5º, of federal Law No. 6404, of December 15, 1976, the assembly is not authorized to modify the unit value of debentures."

In the vote of the Reporting Minister Ruy Rosado de Aguiar, it reads that:

> "[t]he value of debentures is not a condition that can be altered by decision of the general assembly, under the terms of art. 71, § 5º, of Law 6404/76, as it concerns the very essence of the securities."
>
> [...]
>
> "To the argument so well wielded by the plaintiff, in the sense that the uniqueness that must exist between debentures will be broken with the

[53] See BORBA, José Edwaldo Tavares. *Das debêntures*. Rio de Janeiro: Renovar, 2005, p. 147; and EIZIRIK, Nelson. *A Lei das S/A comentada*. v. 1, 2. ed. São Paulo: Quartier Latin, 2015, p. 480.

[54] STJ, REsp 303.825, Fourth Panel, j. 19.06.2001, u.v., rel. Min. Ruy Rosado de Aguiar.

[55] STJ, REsp 303.825, Fourth Panel, j. 19.06.2001, u.v., rel. Min. Ruy Rosado de Aguiar.

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> institution of securities of unequal values, it can be retorted that this situation was created by the general assembly itself, by adopting a non-unanimous decision that unduly altered the value of debentures, and thereby allowed the insurgency of the minority."[56]

Thus, a norm analogous to Section 316(b) of the TIA came into force in Brazilian law in practice (*law in action*), according to which the individual right of the debenture holder to receive payment of principal and interest and the right to file an execution lawsuit cannot be restricted by majority resolution of the debenture holders' assembly without the individual consent of the debenture holder.

By adopting the norm that the individual right of the debenture holder to receive credit payment and the right to file an execution cannot be restricted without their individual consent, the debenture holders' assembly is prevented from altering the conditions of debenture credit by majority.

In practical terms, this norm ends up making numerous private renegotiations that seek to alter the payment conditions of issues unfeasible. However, in many cases, the renegotiation of debenture payment conditions is the most appropriate alternative to protect the credit right of debenture holders.

Therefore, in legal systems that limit the private renegotiation of debentures by majority resolution of the debenture holders' assembly, the renegotiation of the terms of the issue is referred to a judicial negotiation process, resolution, and homologation of the terms agreed upon by majority.

This is the case, for example, in US law, where the norm prohibiting the alteration of payment conditions by majority resolution of Section 316(b) of the TIA is complemented by an *implicit exception*,[57] by which the renegotiation of debenture payment conditions by majority resolution in the reorganization process governed by Chapter 11, conducted and homologated by the reorganization court, is admitted.

In Brazilian law, the norm that emerged from creative interpretation followed the same path and, after the positive law of judicial reorganization by the promulgation of the Law 11,101/2005, also by the creative action of the courts, the normative discipline that refers the collective renegotiation of debentures to the judicial reorganization process was developed.

Interestingly, this subsequent step in the development of Brazilian law was taken in the context of judicial reorganizations of Brazilian companies that had issued bonds in New York, whose indentures adopted the model of indentures prepared based on the provisions of the TIA, which did not allow the alteration of debenture payment conditions by majority resolution of the debenture holders' assembly.

Thus, in this context, Brazilian legal practice benefited from the experience of bondholders, already accustomed to individualizing the right to vote in Chapter 11

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[56] STJ, REsp 303.825, Fourth Panel, j. 19.06.2001, u.v., rel. Min. Ruy Rosado de Aguiar.

[57] See footnote 48, above.

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proceedings in the US. This is called the unbundling of the bondholder's right to voice and vote to vote individually in judicial reorganization.

In the bond issuance indenture, a trustee is appointed to represent the bondholders before the issuing company. In case of default by the issuing company, new fiduciary duties of care arise that limit the trustee's actions. Thus, with the filing of judicial reorganization, the following situation presented itself to the bondholders.

In judicial reorganization, the global credit of the issue is listed in the name of the trustee, as representative of the bondholders, who are the holders of the credit interest.

By appearing on the list of creditors, the trustee is legitimized to appear and vote in the general meeting of creditors. However, to do so, the bondholders need to inform him in which direction he should vote, whether for the approval or rejection of the plan.

In one alternative or another, if there is no unanimous resolution, with which everyone agrees, there will be bondholders dissatisfied with the voting orientation decided by the majority. Therefore, the indenture trustee fears voting on the debenture renegotiation proposal made in judicial reorganization without the consent of all bondholders, as he does not want to expose himself to a liability action for breach of fiduciary duties.

Bondholders know this and, as they are the creditors who will suffer the consequences of the reorganization plan, they appear in the process to enable their individual credit, in a procedure of unbundling or individualization of the vote, as it has become known in legal practice.

Thus, once their credit is duly listed, the bondholder is legitimized to appear at the general meeting of creditors and cast their vote on the judicial reorganization plan, which will be counted to form the deliberative quorums for the approval or rejection of the judicial reorganization plan.

Legal practice has consolidated in the Courts, reaching the STJ, from which the leading case *OSX vs. Acciona*[58] is taken, in which it was understood that "[t]he judicial

[58] STJ, REsp 1.670.096, Third Panel, j. 20.06.2017, u.v., rel. Min. Nancy Adrighi, unanimous vote in which Ministers Paulo de Tarso Sanseverino, Ricardo Villas Bôas Cueva, Marco Aurélio Bellizze, and Moura Ribeiro voted with the Reporting Minister (the judgment was thus summarized: "SPECIAL APPEAL. JUDICIAL REORGANIZATION. [...] GENERAL ASSEMBLY. RIGHT TO VOTE. CREDITORS AFFECTED BY THE REORGANIZATION PLAN. [...] BONDHOLDERS. JUDICIAL AUTHORIZATION TO VOTE. POSSIBILITY. [...] The appellate purpose is to define whether certain creditors of the reorganizing companies have the right to vote in the assemblies responsible for considering the presented judicial reorganization plans. [...] Law 11,101/05 establishes, in its art. 45, § 3º, that, in resolutions on the judicial reorganization plan, only creditors whose credits were not affected by it, either in terms of the amount due or in terms of the original payment conditions, will not have the right to vote. [...] [T]he recovery plan promoted a substantial alteration in the amounts owed to unsecured creditors without guarantee and to holders of fiduciary guarantees. [...] The judicial decision that ensures voting rights to holders of debt securities issued by the reorganizing companies represented by a

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decision that ensures voting rights to holders of debt securities issued by the reorganizing companies represented by a trustee (bondholders) is compatible with the norm of article 39 of Federal Law No. 11,101/2005, inasmuch as these creditors have an immediate interest in the resolutions on the recovery plan." According to the vote of the Reporting Minister Nancy Andrighi,

> "[t]he *bondholders* are investors who acquired debt securities (*bonds*) issued by Brazilian companies – in this case, the reorganizing companies – that sought to finance their activities abroad. The issuance of these *bonds* is instrumentalized by an indenture, which must indicate the name of the trustee responsible for acting on behalf of the final investors. As a rule, when the company undergoes a judicial reorganization process, in the absence of express provision in the LFRE [Law 11,101/2005], the list of creditors presented by it only lists the name of the trustee, appointed as creditor of the total amount of resources raised in the credit operation. However, in reality, the true holders of the economic-financial interest, who will directly suffer the effects of the business reorganization, are the final investors (*bondholders*), as they are the real creditors of the reorganizing companies. For this reason, in view of the authorizing norm of art. 39, *caput*, of Law 11,101/05, they must be granted, as occurred in this case, the possibility of voting in the creditors' meetings, so that they can deliberate on issues that are directly related to their interests."[59]

In this case, the clauses of the proposed reorganization plans substantially altered the original payment conditions of the so-called minority creditors.[60]

Furthermore, the Reporting Minister observed that the *creditor's interest* in the resolution constitutes the basis for their legitimacy to exercise the vote. In this sense, the norm of art. 39, *caput*, of Law 11,101/2005 shares its normative content with the provisions of art. 45, § 3º, of Law 11,101/2005, which establishes "that, in resolutions on the judicial reorganization plan, only creditors whose credits were not affected by it, either in terms of the amount due or in terms of the original payment conditions, will not have the right to vote."[61]

In summary: those creditors whose credit interests are affected by the judicial reorganization plan must be admitted to participate in the negotiation and to cast a vote in the general meeting of creditors.

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trustee (bondholders) is compatible with the norm of art. 39 of Law 11,101/05, inasmuch as these creditors have an immediate interest in the resolutions on the recovery plan.").

[59] STJ, REsp 1.670.096, Third Panel, j. 20.06.2017, u.v., rel. Min. Nancy Adrighi.

[60] STJ, REsp 1.670.096, Third Panel, j. 20.06.2017, u.v., rel. Min. Nancy Adrighi.

[61] STJ, REsp 1.670.096, Third Panel, j. 20.06.2017, u.v., rel. Min. Nancy Adrighi.

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The discipline of bondholder vote individualization, developed in legal practice and consolidated in the precedents of the Superior Courts, was soon also applied in cases where there were debenture holders holding debentures issued by Brazilian companies in judicial reorganization.

The practice was summarized in Statement 76 of the CJF Commercial Law Conferences, whose wording resulted from a proposition I had the privilege of presenting and which was improved by the collegiate, which reads:

> "In cases of issuance of debt securities by the reorganizing company, in which there is a trustee or similar figure representing a collectivity of creditors, the trustee shall exercise the vote in the general meeting of creditors, under the terms and with the authorizations provided in the issuance document, reserving the right of any final investor to request the reorganization court to unbundle the right to voice and vote in the assembly to exercise them individually, solely upon judicial authorization."

5. *Obstacles to the Participation of the Debenture Holders' Communion in Judicial Reorganization that Recommend the Individualization of Debenture Holders' Votes*

Certain characteristics of the debenture legal regime contributed to the consolidation of the understanding that debenture holders can individually exercise the right to vote in the judicial reorganization plan, which constitute obstacles to the effective participation of the debenture holders' communion, represented by the trustee, in the negotiations and in the general meeting of creditors that will deliberate on the judicial reorganization plan.

It is true that the representation powers of the debenture holders' communion attributed to the trustee include the power to represent it in the exercise of the political right to vote in the judicial reorganization plan. This representation power stems from the fact that the law attributes to the trustee the duty to *use any and all measures* to protect rights or defend the interests of debenture holders in case of default by the company,[62] which includes representing debenture holders in collection actions (art. 68, § 3º, a, of the LSA) and "representing debenture holders in bankruptcy, concordata" (art. 68, § 3º, d, of the LSA).

However, six obstacles hinder the effective participation of the debenture holders' communion in judicial reorganization.

[62] Cf. art. 68, *caput* and § 3º, of Law 6,404/1976 and art. 12 of CVM Resolution 17/2021.

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First obstacle to the participation of the debenture holders' communion in judicial reorganization: – the trustee can only vote on the plan according to the direction previously deliberated by the debenture holders assembly

As per the current legal regime, the trustee has very limited decision-making and initiative autonomy regarding the acts he must perform in representing the debenture holders' communion,[63] because, according to Ary Oswaldo Mattos Filho's apt expression, "the trustee is *driven* to act in accordance with legal provisions, the commands of the issuance indenture, and the resolutions of the debenture holders' assemblies."[64]

Thus, in case of debenture default, the trustee does not have autonomy to immediately take the measure he deems appropriate to protect the rights of debenture holders.

On the contrary, according to the uses and customs of the capital market, which guide the expectations of all its participants regarding the trustee's powers, it is customary to provide in the indenture that, in cases of default, the trustee must first communicate the fact to the debenture holders[65] and convene a debenture holders' meeting to deliberate on the measure to be taken by the trustee: whether he should file an execution or bankruptcy lawsuit to collect the debt or whether he should not file an execution or bankruptcy lawsuit and, instead, should renegotiate the terms of the issuance.

Thus, the trustee can only act according to the terms deliberated and authorized by the debenture holders' meeting.

Similarly, it is up to the debenture holders' meeting to deliberate on the orientation of the vote to be cast by the trustee in a judicial reorganization plan: whether for approval or rejection. And the trustee will only cast a vote if he receives a valid voting orientation and is authorized to exercise it by the debenture holders' meeting.

However, there are several circumstances in which the debenture holders' meeting cannot decide on the voting orientation to be followed by the trustee, which harms both the debenture holders' communion and the issuing company.

To ensure that debenture holders can act to protect their individual credit right and enable the taking of a fair and efficient majority resolution, it is recommended that debenture holders be admitted to individually exercise the political right to vote in the reorganization process, under judicial supervision and surrounded by the necessary safeguards to prevent tyrannical majorities from oppressing dissenting minorities.

This seems to be the best solution and also the one that best aligns with the tradition of Brazilian law and comparative law.

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[63] CAVALLI, Comentários aos arts. 52 a 74 da LSA - Capítulo V - Debêntures, 2024, p. 335.

[64] MATTOS FILHO, Ary Oswaldo. *Direito dos valores mobiliários*. v. 1, t. 2, São Paulo: FGV, 2015, p. 139 – emphasis not in original.

[65] Cf. art. 68, § 1º, 'c', of Law 6,404/1976 and art. 11, XXI, of CVM Resolution 17/2021.

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Second obstacle to the participation of the debenture holders' communion in judicial reorganization: – the difficulty in determining the will of the communion regarding the voting orientation to be exercised by the trustee

If there is a resolution of the debenture holders' meeting taken by unanimity of the debenture holders, there is no doubt as to the will of the debenture holders' communion regarding the voting orientation to be cast by the trustee in judicial reorganization. However, the same cannot be said for deliberations taken in a debenture holders' meeting by majority vote.

The resolution of the debenture holders' meeting for the approval of the reorganization plan presented by the debtor contains a double volitional content of the debenture holders' communion: on the one hand, the plan is approved, with all its clauses, but, on the other hand, the modification of the debenture conditions is also approved in the terms contained in the judicial reorganization plan proposed by the debtor and submitted to the resolution of the debenture holders' meeting.

Thus, if it is understood that the majority resolution of the debenture holders' meeting aims at *modifying the debenture conditions*, one encounters the discussion about the need for individual consent of the debenture holder to modify their credit, which is only clearly excepted by the admission of majority resolution resulting from votes cast directly in judicial reorganization.

The same can be argued about the resolution of the debenture holders' meeting that instructs the trustee to vote for the rejection of the judicial reorganization plan and, consequently, for bankruptcy.

Therefore, whatever the voting orientation to be followed by the trustee, whether for the approval or rejection of the plan, it is certain that there will be greater certainty regarding the definition of the will of the debenture holders' communion if the resolution is taken by *unanimity* of votes.

If there is no unanimity, it can be questioned whether the majority's resolution can bind dissenters, understood as debenture holders who voted in the opposite direction, abstained from voting, or did not even attend the meeting. The problem is solved if dissenters are not bound by the majority's resolution, and are admitted to individually exercise their vote in the judicial reorganization plan, because, in this way, the originally majority orientation becomes the unanimous orientation, which has the consent of all who expressed themselves in that direction.

It is precisely to avoid these impasses, which disturb and delay the negotiation, that it is recommended to shift the deliberative procedure to the scope of judicial reorganization, in which all debenture holders are admitted to cast individual votes, which will form the majority quorum of the judicial reorganization, which will bind everyone, including dissenters.

In addition, even if majority resolution taken in a debenture holders' meeting is admitted, there may be doubt as to the content of the debenture holders' communion's will. Thus, for example, if the voting proposition "who is in favor of the trustee voting

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for the approval of the plan" does not receive enough votes, there may be doubt as to the meaning of the resolution. That is, the will of the debenture holders' communion that the trustee not vote for the approval of the reorganization plan does not correspond to the affirmation of the will in the opposite direction, that the trustee vote for the *rejection* of the reorganization plan. In this case, it seems to me that the resolution of the debenture holders' communion is to instruct the trustee to abstain from voting on the plan.

In any case, it is certain that the result of the resolution changes significantly depending on how the proposition to be submitted to a vote is formulated, both in a debenture holders' meeting and in a general meeting of creditors. And the interaction between the formulation of the proposition made to the debenture holders' meeting and that made to the general meeting of creditors only accentuates the possibilities of not clearly identifying the will of the debenture holders' communion.

The difficulties in determining the will of the debenture holders' communion regarding the voting orientation to be cast by the trustee recommend that the reorganization court, in its function of presiding over and supervising the judicial reorganization, assisted by the judicial administrator, exercise control over the resolutions of the debenture holders' meetings to ascertain whether the vote cast by the trustee on the plan is faithful to the will of the debenture holders' resolution.

Furthermore, it is always preferable for the debenture holder to exercise their vote directly in the reorganization procedure, as this ensures that interested parties clearly express their preference in the vote on the judicial reorganization plan.

Third obstacle to the participation of the debenture holders' communion in judicial reorganization: – the individual adherence system of the debenture holder does not allow the formation of collective will and makes negotiation unfeasible

In currently effective law in action, there is no unequivocal normative source that determines the quorum for the debenture holders' meeting to deliberate on not filing an execution or on modifying the debenture payment conditions, which seems to include the hypothesis of modification in a judicial reorganization plan.

According to the precedent *Sansuy S/A vs. Sprind DTVM*,[66] the general assembly of debenture holders is not authorized by art. 71, § 5º, of Law 6,404/76 to approve, by majority, a proposal to reduce the value and alter the payment term of debentures. The alteration of debentures, by concerning substantial conditions of the debenture credit, could not be decided by the majority formed in a debenture holders' meeting and imposed on dissenting debenture holders. On the contrary, the alteration of debenture conditions would only bind debenture holders who individually consented to it.

Furthermore, by establishing the norm that only those debenture holders who accept the renegotiation proposal will be bound, the adoption of parasitic strategic behavior (*free rider*) is encouraged, as each debenture holder will tend not to accept the

[66] STJ, REsp 303.825, Fourth Panel, j. 19.06.2001, u.v., rel. Min. Ruy Rosado de Aguiar.

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proposal, hoping that others will accept it, leading to an improvement in the issuer's payment capacity to pay the parasitic debenture holder under the original conditions, which are maintained.[67]

The problem with the resolution norm based on "individual adherences without binding non-adherents is that all debenture holders will tend not to accept the proposal, hoping to benefit from acceptance by others."[68] Consequently, renegotiation becomes unfeasible, even if it could be more beneficial to the debenture holders' collectivity.

Therefore, the solution to enable renegotiation by majority is to refer interested parties to negotiate in the reorganization procedure, which, in addition to having an optimal majority resolution quorum, is endowed with judicial safeguards that aim to prevent excesses by the majority.

Fourth obstacle to the participation of the debenture holders' communion in judicial reorganization: – the deliberative quorums make it unfeasible for the debenture holders' communion to deliberate on the voting orientation to be followed by the trustee

It can be argued that, instead of a norm of individual debenture holder consent as described above being in force in Brazilian law, there is a basis for a different interpretation, based on art. 12, § 2º, of CVM Resolution 17/2021, which revoked CVM Instruction 28/1983, and established that the modification of debenture conditions or the non-adoption of any measure provided for in law or in the issuance indenture must be approved in a debenture holders' meeting by more than half of the outstanding debentures, unless the issuance indenture establishes a higher quorum. In this sense, art. 12, § 2º, of CVM Resolution 17/2021 seeks to reestablish the norm corresponding to the literal text of art. 71, § 5º, of the LSA.

Leaving aside the question of whether a Brazilian Securities and Exchange Commission Resolution has the power to reshape the understanding already crystallized, including in a leading case of the STJ, the fact is that, if it did, it would have reestablished in Brazilian law the same norm that contradictorily allowed renegotiations by majority without providing them with judicial safeguards or adequate resolution quorums.

Regarding resolution quorums, in the practice of the Brazilian capital market, clauses that establish qualified majority resolution quorums of 3/4 or even super-qualified majorities of more than 90% of the total outstanding debentures are frequent, for resolution on the modification of debenture payment conditions.

Quorums of more than half of the outstanding debentures, qualified or super-qualified majorities not only make it difficult to deliberate on renegotiation; more than that, they deeply distort the collective resolution process, because, the higher the resolution quorum to accept the proposal, the greater the probability of debenture holders

[67] CAVALLI, Cássio. Comentários aos arts. 52 a 74 da LSA - Capítulo V – Debêntures, 2024, p. 361.

[68] CAVALLI, Comentários aos arts. 52 a 74 da LSA - Capítulo V - Debêntures, 2024, p. 361.

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adopting individual obstructive-opportunistic (*holdout*) behavior,[69] which consists of threatening to prevent resolution to try to extract an individual advantage from other debenture holders or the issuer in exchange for their consent.

The problem with obstructive-opportunistic (*holdout*) behavior is that it can lead to the loss of the renegotiation opportunity, which could be more advantageous to debenture holders, including the obstructive-opportunistic (*holdout*) debenture holder himself, than the scenario without renegotiation. In this case, obstructive-opportunistic (*holdout*) behavior can make it impossible to deliberate on the voting orientation to be pursued by the trustee in judicial reorganization.

Furthermore, the possibility of obstructive-opportunistic behavior erodes the social acceptability of the result of collective resolutions, especially in cases where other debenture holders are pressured to consent to a renegotiation that provides more advantageous treatment to the holdout debenture holder or in cases where other debenture holders suspect that the issuing company covertly granted an individual advantage to the obstructive-opportunistic debenture holder.[70]

In both cases, the formation of the debenture holders' communion's will in a debenture holders' meeting is greatly hindered, which, analogously to what occurs in US law and occurred in Brazilian law before 1976, recommends enabling collective negotiation by referring debenture holders to cast their votes directly in judicial reorganization to, under judicial supervision, deliberate by majority on the judicial reorganization plan.

Fifth obstacle to the participation of the debenture holders' communion in judicial reorganization: – the inflexibility of the norm of equal treatment among debenture holders of the same series

The resolution on the renegotiation of debentures is rigidly limited by the norm of parity of treatment of debenture holders provided for in art. 53, sole paragraph, of Law 6,404/1976. As is known, the hermeneutic canon of *equal treatment* of debenture holders of the same series is the central pillar on which the entire discipline of the organization of the debenture holders' communion rests. *Equal treatment* performs a series of instrumental functions aimed at ensuring adequate protection of debenture holders.

Thus, equal treatment provides support for the *majority principle* to enable *timely* and *efficient* collective decision-making, which is neither made unfeasible nor tainted by strategic behaviors of the obstructive-opportunistic (*holdout*) and parasitic (*free rider*) types,[71] and also to be fair, by preventing the tyrannical exercise of a majority to the detriment of a dissenting minority.

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[69] CAVALLI, Comentários aos arts. 52 a 74 da LSA - Capítulo V - Debêntures, 2024, p. 362.
[70] CAVALLI, Comentários aos arts. 52 a 74 da LSA - Capítulo V - Debêntures, 2024, p. 362.
[71] CAVALLI, Comentários aos arts. 52 a 74 da LSA - Capítulo V - Debêntures, 2024, p. 362.

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In summary, it is through equal treatment that fair and efficient renegotiations are made possible.

However, *paradoxically*, the inflexible observance of the equality norm can make debenture renegotiations unfeasible, to the detriment of the company and the debenture holders.

To illustrate the argument, let's take the example of a single series issue that brings together debenture holders with different profiles, with *heterogeneous interests*, which demand different treatments to be met. In this case, imposing equal treatment on all debenture holders can lead to the failure of negotiations and the rejection of the plan, even when a renegotiation could be more advantageous to debenture holders than bankruptcy.

Thus, imagine a renegotiation of a single series issue whose debentures are equally distributed among three groups of debenture holders with distinct interests: one of them, formed by debenture holders who are investment funds willing to finance the debtor company and who are interested in converting the debt into equity participation in the reorganizing company; the other group is formed by debenture holders who are Brazilian financial institutions that, due to sectoral regulation, cannot and do not wish to convert the debt into equity participation, and prefer to receive their credit with a discount so that they can release provisions and use the tax loss; finally, the third group is formed by small individual investors, who prefer to receive their small credits in a shorter period.

In a debenture renegotiation deliberated in a debenture holders' meeting, according to the norm of art. 53 of Law 6,404/1976, the issuing company would be restricted to offering the same payment option to these different groups of debenture holders. Thus, in the example above, if the issuer offered debenture holders the conversion of debentures into shares, the proposal would meet the interest of investment funds, who would approve it, but would not meet the interests of Brazilian financial institutions or small investors, which would probably lead to the rejection of the proposal by 2/3 of the debenture holders. The same would occur if the proposal offered to all was shaped in accordance with the interest of Brazilian financial institutions or the interest of small investors.

In this case, it is the inflexible observance of equal treatment that makes negotiation unfeasible. However, simply tolerating it would not constitute an adequate solution, as it would open space for the adoption of strategic behaviors based on unequal treatment among debenture holders that undermine the efficiency and fairness of renegotiation.

To solve the impasse, it must be allowed that renegotiation provides unequal treatments to debenture holders, which contemplate their various interests. In this case, it is by admitting inequality that a negotiation with which the different groups of debenture holders *consent* is made possible.

However, the possibility of providing unequal treatments to debenture holders of the same series opens the door to the adoption of selfish strategic behaviors and the formation of abusive majorities, to the detriment of dissenting minorities.

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Hence the need for debenture renegotiation by majority to be accompanied by the appropriate *judicial safeguards*, which ensure the scrutiny and judicial homologation of the majority's resolution, as a requirement for binding all debenture holders, including the dissenting minority.

Thus, for example, the judicial reorganization procedure is endowed with numerous safeguards,[72] which ensure the fairness of the procedure by preventing selfish manipulations and protect the dissenting minority against the imposition of discriminatory treatments to which it has not consented, as provided in the norm of art. 58, § 2º, of the Law 11,101/2005, which states: "Judicial reorganization may only be granted based on § 1º of this article if the plan does not imply differentiated treatment among the creditors of the class that rejected it."

In summary, through the safeguards ensured by the judicial reorganization procedure, dissenting minorities are protected against unequal treatments not consented to, and also, renegotiations involving debenture holders who consent to receive unequal treatments to meet their different interests are made possible. Thus, the consent of those who are treated unequally is the prerequisite for admitting unequal treatment.

Sixth obstacle to the participation of the debenture holders' communion in judicial reorganization: – the existence of issues with more than one series

Despite its centrality in the organization of the debenture holders' communion, the equal treatment of debenture holders is not adequately protected by the provisions of Law 6,404/1976, for the following reason.

Art. 53, sole paragraph, of the LSA restricts equal treatment to debenture holders of the same series. However, art. 53, *caput*, of the LSA admits that an issue may have more than one series. Thus, the division of the issue into series constitutes the technique that allows the creation of *unequal* debentures and, consequently, allows bringing together debenture holders with heterogeneous interests within the same issue.

Given that it is the *homogeneity of interests*, based on the equality of rights conferred on debenture holders, that allows the organization of the deliberative procedure of the debenture holders' assembly, in issues with more than one series, it is necessary to organize as many assemblies as there are series, so that each series deliberates on matters of interest to the series.

Therefore, in the standardized model of issuance indenture endorsed by the Securities and Exchange Commission, a clause wording is suggested that refers to the

[72] For a systematization of safeguards that serve to judicially control the regular exercise of the vote by creditors, I refer to the book CAVALLI, *O direito de voto na recuperação judicial*, 2023.

CAVALLI, Cássio. The vote of debenture holders in brazilian judicial reorganization. *Agenda Recuperacional*. São Paulo. v. 3, n. 43, p. 1-46, setembro/2025. Disponível em: www.agendarecuperacional.com.br. Acesso em:

convocation of a debenture holders' assembly *of the series* to deliberate on matters of interest to the *debenture holders' communion of the respective series*.[73]

The existence of autonomous assembly procedures for each series leads to serious distortions in majority resolutions regarding the alteration of debenture conditions, as they do not allow safely determining who has an *interest in the resolution*; when precisely it is the interest in the resolution that constitutes the criterion for identifying who is admitted to vote on a given proposition. As a rule, only debenture holders whose rights may be affected by the resolution have an interest in the outcome of the resolution, which is why only they are admitted to vote.

In issues with more than one series, however, the practical problem arises of determining which debenture holders will be admitted to vote in the debenture holders' assembly of one of the series. As I observed when commenting on art. 71 of the LSA,

> "[t]he problem, here, is that the relationship between a matter submitted for resolution and the interest of debenture holders of a series or of the entire issue depends on how the association between one and the other is stated. In other words, the same matter can be of interest to one series or to all series depending on how the relationship is described. Thus, for example, by the formal criterion, it would be possible to say that, in an issue divided into two series, one of unsecured debentures and another of debentures with real guarantee, only the debenture holders of the series with real guarantee would have an interest in voting on the resolution about eventual reinforcement of guarantee. However, this same matter can also be described as being of interest to the unsecured series, because, if the reinforcement of guarantee is not waived, there may be early maturity of the issue. However, admitting the vote of the unsecured debentures can lead to the approval of the waiver of the reinforcement of guarantee by a majority of votes cast by the unsecured debenture holders and with the dissent of the debenture holders with

[73] CAVALLI, Comentários aos arts. 52 a 74 da LSA - Capítulo V - Debêntures, 2024, p. 358 (the model clause is thus worded: "9.1. Debenture Holders may, at any time, meet in a general assembly, in accordance with the provisions of article 71 of the Corporations Law, in order to deliberate on matters of interest to the communion of Debenture Holders ("Debenture Holders' General Assembly"). [The Debenture Holders of each of the series may, at any time, meet in a General Assembly of Debenture Holders of the [•] Series ("General Assembly of Debenture Holders of the [•] Series") and General Assembly of Debenture Holders of the [•] Series ("General Assembly of Debenture Holders of the [•] Series" and, together with the General Assembly of Debenture Holders of the [•] Series, "General Assemblies of Debenture Holders"), in accordance with article 71 of the Corporations Law, in order to deliberate on matters of interest to the communion of Debenture Holders of the respective series, and a common General Assembly of Debenture Holders may be held for the [•] series if they have the same agenda.").

CAVALLI, Cássio. The vote of debenture holders in brazilian judicial reorganization. *Agenda Recuperacional*. São Paulo. v. 3, n. 43, p. 1-46, setembro/2025. Disponível em: www.agendarecuperacional.com.br. Acesso em:

> real guarantee. In this case, the matter is again posed as being of exclusive interest of the series with real guarantee. And so on."[74]

Impasses of this nature lead to litigation that delays renegotiations and can even make them unfeasible, to the detriment of the issuing company and the debenture holders.

To solve the problem and overcome the impasse, I stated in the same comments on the LSA, one should:

> "adopt norms that articulate the voting and veto powers of a series over the collective resolution in the same assembly. The starting point is the provision that the approval of a proposition by the debenture holders' assembly depends on its approval in each of the series. Thus, for example, the unsecured series cannot impose the waiver of the reinforcement of guarantee on the series with real guarantee if the latter does not approve it; or, in other words, the series with real guarantee can veto the assembly resolution in this regard. However, at the same time, the series with real guarantee cannot approve the reinforcement of the guarantee if the unsecured series does not approve it (because it understands, for example, that the reinforcement of the guarantee will harm the recovery of the unsecured credit); or, in other words, the unsecured series can veto the assembly resolution in this regard. In this way, each of the series is ensured the power to veto the assembly resolution. However, ensuring the veto power is not enough. It is necessary to provide for the possibility of overcoming the veto if the approval of the vetoed proposition does not harm the series that vetoed it, either directly or indirectly, by creating an exclusive advantage for another series that approved it."[75]

The solution I described above corresponds precisely to the criteria used for judicial control of the regularity of the exercise of the political power of vote and veto by classes of creditors with heterogeneous interests in judicial reorganization.[76] That is, to avoid the costly impasses in the private renegotiation of debentures, one can resort to judicial reorganization, which is the appropriate procedure to organize creditor classes and promote the collective resolution of debenture holders regarding the renegotiation of debentures.

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[74] CAVALLI, Comentários aos arts. 52 a 74 da LSA - Capítulo V - Debêntures, 2024, p. 359.

[75] CAVALLI, Comentários aos arts. 52 a 74 da LSA - Capítulo V - Debêntures, 2024, p. 359-360.

[76] For a systematization of these resolution control criteria, I refer again to the book CAVALLI, *O direito de voto na recuperação judicial*, 2023.

CAVALLI, Cássio. The vote of debenture holders in brazilian judicial reorganization. *Agenda Recuperacional*. São Paulo. v. 3, n. 43, p. 1-46, setembro/2025. Disponível em: www.agendarecuperacional.com.br. Acesso em:

5.1. The inadequacy of reducing the resolution quorum of the debenture holders' assembly to ensure the participation of debenture holders in judicial reorganization

The reduction of the resolution quorums of the debenture holders' assembly by authorization of the Securities and Exchange Commission, under the terms of the recent legislative amendment that inserted §§ 8º to 10[77] in art. 71 of the LSA, do not constitute an adequate solution for the problems of coordination among debenture holders regarding resolution on a judicial reorganization plan that modifies the debenture payment conditions, because, by reducing the resolution quorum to a reduced percentage of the total outstanding debentures, the power to deliberate on the rejection of the judicial reorganization plan is concentrated in a few debenture holders. This leads to at least two problems.

The first problem is that the issuer, or its administrators, may be tempted to acquire majority power by spending less to acquire debentures to, subsequently, make a resolution less favorable to the communion.

The second problem is that, the greater the power of one or a few debenture holders to reject the plan, the greater the probability that these debenture holders will adopt obstructive-opportunistic (*holdout*) behavior,[78] which consists of threatening to reject the plan to extract more favorable payment conditions from the issuer, even to the detriment of other debenture holders or the issuer.

However, obstructive-opportunistic behavior constitutes the main risk to plan negotiation,[79] because the "adoption of *obstructive behavior* by all parties can lead to a

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[77] These paragraphs, included in the LSA by Law 14,711/2023, read:

"§ 8º The Securities and Exchange Commission may authorize the reduction of the quorum provided for in § 5º of this article in the case of debentures of a publicly traded company, when the ownership of the debentures is dispersed in the market.

§ 9º In the hypothesis provided for in § 8º of this article, the authorization of the Securities and Exchange Commission shall be mentioned in the call notices, and the resolution with a reduced quorum may only be adopted in a third call.

§ 10. For the purposes of § 8º of this article, the ownership of debentures is considered dispersed when no debenture holder holds, directly or indirectly, more than half of the debentures."

[78] See CAVALLI, Cássio. *O direito de voto na recuperação judicial*. 2.ed. São Paulo: Agenda Recuperacional, 2023, p. 78 and SKEEL Jr., David A.; TRIANTIS, George. *Bankruptcy's uneasy shift to a contract paradigm*. University of Pennsylvania Law Review, 166, p. 1777-1817. 2018, p. 1811.

[79] CAVALLI, Cássio. *O direito de voto na recuperação judicial*. 2.ed. São Paulo: Agenda Recuperacional, 2023, p. 78. See, in the same vein, SKEEL Jr., David A.; TRIANTIS, George. *Bankruptcy's uneasy shift to a contract paradigm*. University of Pennsylvania Law Review, 166, p. 1777-1817. 2018, p. 1811; CASEY, Anthony J. Chapter 11's renegotiation framework and the purpose of corporate bankruptcy. Columbia Law Review, v. 120, n. 7, p. 1709-1770, 2020, p. 1737.

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greater delay in negotiation, which, per se, decreases the value of the company in crisis. In extreme cases, the adoption of obstructive behavior can make it impossible for the plan negotiation to reach a conclusion."[80] Consequently, the impasse generated by obstructive-opportunistic behavior "is serious and can lead to the effective rejection of the plan, even if bankruptcy imposes greater sacrifice on the creditor who rejected the plan and on the collectivity of dependent creditors."[80]

Therefore, as I observed on another occasion:

> "the majority principle does not provide an effective solution to the problem if there is an isolated creditor or minority group of creditors with the power to obstruct the formation of a majority for the approval of the plan. If the satisfaction of the interest of other creditors depends on the preservation of the company's operating value by the approval of the plan, the isolated creditor or minority group of creditors will be in a position to threaten to reject the plan to obtain, for themselves, a more advantageous treatment than the creditors dependent on the plan."[81]

In this sense, the concentration of the power to determine the rejection of the plan in a *minority creditor* or in a *group of minority creditors* amplifies the risk of adopting obstructive-opportunistic behavior, because it is the minority creditor's control over the rejection that allows him to exercise *abuse of economic position*,[82] characterized as *abuse of the minority*[83] (or *abuse of minorities*[84]), for the benefit of *individualistic positions*.[85]

To ward off the risks of obstructive-opportunistic behavior, the reorganization court can control the exercise of the vote based on art. 39, § 6º, of the Law 11,101/2005, which prohibits the creditor from exercising the vote "to obtain an illicit advantage for himself." For this purpose, a relevant indication "is provided by the concentration of voting power capable of preventing the approval of the judicial reorganization plan in a single creditor or in a minority group of creditors. Only the creditor who effectively has

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[80] CAVALLI, Cássio. *O direito de voto na recuperação judicial*. 2.ed. São Paulo: Agenda Recuperacional, 2023, p. 78.

[81] CAVALLI, Cássio. *O direito de voto na recuperação judicial*. 2.ed. São Paulo: Agenda Recuperacional, 2023, p. 77.

[82] TJSP, AI 2152902-74.2018.8.26.0000, 1st Reserved Chamber of Business Law, j. 21.08.2018, m.v., rel. Des. Alexandre Lazzarini.

[83] TJSP, AI 627.497-4/3-00, Special Chamber of Bankruptcies and Judicial Reorganizations, j. 30.06.2009, u.v., rel. Des. Romeu Ricupero; STJ, REsp 1.337.989, Fourth Panel, j. 08.05.2018, u.v., rel. Min. Luis Felipe Salomão.

[84] STJ, AgInt no Ag em REsp 1.551.410, Fourth Panel, j. 29.03.2022, m.v., rel. Min. Antonio Carlos Ferreira (in the dissenting vote drafted by Minister Maria Isabel Galotti, it reads that "[t]he STJ's understanding on the matter aims to avoid eventual abuse by the creditor, whose credits are minority, in view of the principle of business preservation.").

[85] STJ, REsp 1.337.989, Fourth Panel, j. 08.05.2018, u.v., rel. Min. Luis Felipe Salomão.

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the power to prevent the approval of the reorganization plan can eventually exercise it abusively; as well as the collectivity of creditors and the debtor company will only take seriously the threat of rejection of the plan if it comes from a creditor with voting power to interfere with the outcome of the resolution."[86]

In this sense, judicial reorganization constitutes the most appropriate solution to ensure the effective participation of debenture holders and enable an efficient and fair collective negotiation on the judicial reorganization plan, as it allows debenture holders to cast their votes directly in the reorganization procedure, where the reorganization court will scrutinize the regularity of the exercise of votes, including to ensure that equal treatment among creditors has not been prejudiced by obstructive-opportunistic behaviors.

5.2. The reorganization solution to ensure the effective participation of debenture holders in the collective renegotiation of their credits

The admission of the individual vote of the debenture holder in judicial reorganization enables the active participation of debenture holders and, therefore, constitutes the solution to the obstacles that the debenture legal regime opposes to the effective participation of the debenture holders' communion in judicial reorganization.

Judicial reorganization constitutes a *procedural platform* that *structures* a *collective negotiation*[87] between the debtor and its creditors with the purpose of promoting the formation of a *majority consensus*[88] regarding a *fair* and *efficient* solution to the company's crisis.[89]

To achieve this objective, judicial reorganization is aimed at ensuring the full participation and protagonism of creditors[90] in the negotiation of a judicial reorganization plan. Thus, judicial reorganization grants interested parties broad flexibility to elaborate

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[86] CAVALLI, Cássio. *O direito de voto na recuperação judicial*. 2.ed. São Paulo: Agenda Recuperacional, 2023, p. 79.

[87] TENE, Omer. *Revisiting the creditors' bargain: The entitlement to the going-concern surplus in corporate bankruptcy reorganizations*. Bankruptcy Developments Journal, v. 19, p. 287, 2002, p. 288 (stating that "Bankruptcy must provide parties with a set of fair and unbiased procedural rules that will allow them to conduct multiparty bargaining.").

[88] BUSSEL, Daniel J. and KLEE, Kenneth N. *Recalibrating consent in bankruptcy*. American Bankruptcy Law Journal, v. 83, n. 4, p. 663-748, 2009.

[89] CAVALLI, *O direito de voto na recuperação judicial*, 2023, p. 15.

[90] See TOLEDO, Paulo F. C. Salles de. *Recuperação judicial, a principal inovação da Lei de Recuperação de Empresas - LRE*. Revista do Advogado - AASP, 83, p. 98-106. 2005, p. 103 (noting that "[c]reditors, with the LRE, rose in the scale of procedural subjects of business reorganization (judicial or extrajudicial) and bankruptcies. From mere spectators, who in the old concordata did not even express their agreement, they become protagonists of the history of the company in crisis, deciding, in the final act, whether it can survive or will go bankrupt.").

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solutions that best meet their interests[91] and the judicial reorganization plan is prepared with a large margin of freedom.[92]

To adequately treat creditors with distinct interests, the reorganizing company may propose different payment options to satisfy the different interests of creditors, and creditors, organized into classes by the criterion of homogeneity of interests, can negotiate plans that contemplate the peculiarities of their interests.

Thus, judicial reorganization enables collective negotiation in order to meet the different interests present in the negotiation. It is in this sense that the understanding crystallized in Statement 81 of the CJF Commercial Law Conferences, which reads: "The principle of *par condicio creditorum* applies to judicial reorganization, mutatis mutandis."

However, while it is true that the possibility of proposing unequal treatments to debenture holders is a measure that enables negotiation, on the other hand, this same possibility opens up room for abusive behaviors on the part of debenture holders and the issuer, who may seek to obtain individual advantages at the expense of a defenseless minority, to whom a disadvantaged treatment is attributed. After all, the judicial reorganization plan, as a *judicial contract*,[93] binds even dissenting parties[94] to the majority's resolution (art. 59 of the Law 11,101/2005).

Therefore, the reorganization procedure is endowed with a set of material and procedural safeguards, whose observance is supervised by the reorganization court, which ensure the *efficiency* and *fairness* of majority resolution, through counter-majority norms that protect dissenting minorities against the *tyranny of the majority*.[95]

6. Mechanisms for Expressing and Collecting Votes in Judicial Reorganization

[91] TABB, Charles J. *The law of bankruptcy*. 4.ed., St. Paul: West Academic Publishing, 2013, p. 1089. (noting that "[t]he watchword in chapter 11 is flexibility. Nowhere is that more true than with regard to the contents of a plan. Congress intended for the parties to have considerable freedom to negotiate whatever plan best serves their interests.").

[92] CAVALLI, Cássio. Plano de recuperação In: Coelho, Fábio (Org.). *Tratado de Direito Comercial*. São Paulo: Saraiva, v. 7, 2015, p. 258-294, p. 259.

[93] CAMPINHO, Sérgio. *Falência e recuperação de empresa: o novo regime da insolvência empresarial*. Rio de Janeiro: Renovar. 2012, p. 12 (stating that "the institute of judicial reorganization must be seen as having the nature of a judicial contract").

[94] TABB, *The law of bankruptcy*, 2013, p. 1085 ("A reorganization plan is not a pure contract in the classic sense, however. One difference from a normal contract is that non-assenting parties are bound to the plan's terms. [...]").

[95] TABB, *The law of bankruptcy*, 2013, p. 1085 (stating that, "however, those dissenting parties are protected from the tyranny of the majority by the rule that they are entitled to receive at least the liquidation value of their claim or interest. [...] Also, the parties are not entirely autonomous; the court will only confirm a plan if a number of statutory requirements in addition to party assent are satisfied.").

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In judicial reorganization, the *collective will of creditors* is constituted by the set of *individual wills* expressed in accordance with the norms governing the resolution procedures regulated by Law 11,101/2005.

The reorganization court must control the observance of the norms of the resolution procedure, that is, of the "requirements of this Law" (art. 58, *caput*, of the Law 11,101/2005), before homologating the plan that will bind all creditors, including dissenters (art. 59 of the Law 11,101/2005).

Thus, in *negotiation through the reorganization procedure*, the debtor must present a renegotiation proposal to creditors by filing the proposed reorganization plan (art. 53 of the Law 11,101/2005) and creditors are responsible for deliberating on the proposed plan observing one of the legally provided procedures for voting.

The recent reform of the Law 11,101/2005 added new procedures to art. 39 for the expression and registration of creditors' votes in a judicial reorganization plan. Thus, in addition to (i) voting held in a physical general meeting of creditors (art. 39, *caput*, of the Law 11,101/2005), the possibility of expressing and collecting votes in (ii) a *virtual* general meeting of creditors (art. 39, § 4º, II, of the Law 11,101/2005), in (iii) a term of adherence signed by creditors who meet the necessary majority for the approval of the plan (art. 39, § 4º, I, combined with art. 45, § 1º, and art. 56-A, all of the Law 11,101/2005) and, finally, (iv) by any "other mechanism deemed sufficiently safe by the judge" (art. 39, § 4º, III).

The new legal hypotheses for the expression and collection of votes are in clear harmony with the international trend of encouraging the greatest possible participation of creditors in reorganization resolution, reducing any impediments that might deter them from participating in reorganization resolution.

Among these hypotheses, the most relevant is the norm of art. 39, § 4º, III, which allows the adoption of *other mechanisms* for expressing and collecting creditors' votes in a judicial reorganization plan, without specifying and detailing precisely what this mechanism for expressing and collecting votes is. The provision contains an open norm, which allows legal practice the flexibility to conceive new forms for the individual exercise of the vote.

The practice of comparative law and Brazilian law provides numerous examples of configurations of other mechanisms for expressing and collecting creditors' votes in a reorganization plan.

6.1. Italian law: vote by email

Thus, for example, in Italian law, art. 107 of the *Codice della Crisi d'Impresa e dell'Insolvenza* regulates the creditor's vote in the preventive concordata plan as follows: art. 107, provides in its no. 1 that "[t]he creditors' vote is expressed by electronic means"; and in no. 2, second part, provides that "[t]he reorganization judge [giudice delegato] regulates the order and time of voting by his own decision"; no. 3 provides that the definitive proposals for reorganization plans must be sent to creditors together with a

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report prepared by the commissioner [judicial administrator]; after a brief instruction on the expressions of interested parties, no. 8 provides that "[t]he vote is expressed by certified email sent to the judicial commissioner. All data are owned by the Ministry of Justice and must be kept in accordance with the regulations in force for judicial acts."

The Italian example clearly aligns with the other resolution mechanisms referred to in art. 39, § 4º, III, of the Law 11,101/2005. Similarly, the following example can be said with respect to.

6.2. US law: sending ballot by mail

In US law, voting on a reorganization plan regulated based on Section 1125 of the US Bankruptcy Code involves a procedure for transmitting to creditors a report on the plan (*disclosure statement*) along with the plan and a ballot, so that creditors can record their vote on the ballot and return it by mail.

6.3. Dutch experience

To ensure the exercise of the vote by debenture holders in a judicial reorganization plan (*Akkoord*) involving cross-border restructurings, Dutch Courts employed "creative solutions developed in practice,"[96] through the application of "existing Dutch insolvency law flexibly and creatively."[97] These Dutch decisions "demonstrate the importance of developments in practice. They also demonstrate the constructive attitude of courts and practitioners in the Netherlands in assisting, as much as possible, cross-border restructurings in the Netherlands by applying existing Netherlands insolvency law in a flexible and creative manner."[98]

6.3.1. Voting mechanism adopted in the GTS Case: counting in judicial reorganization the votes of creditors collected in another resolution procedure on the same proposal

From Dutch law, other interesting examples of configurations that other mechanisms for expressing creditors' will can take are found, developed in legal practice and endorsed by jurisprudential construction.

The first example is taken from the case of the judicial reorganization (*suspension of payment proceeding*) of Global Telesystems Europe B.V. ("GTS"), a wholly-owned

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[96] DECLERCQ, Peter J. M. *Restructuring european distressed debt - Netherlands suspension of payment proceeding... The netherlands Chapter 11?* American Bankruptcy Law Journal, v. 77, p. 377-408, 2003, p. 400.

[97] DECLERCQ, Peter J. M. *Restructuring european distressed debt - Netherlands suspension of payment proceeding... The netherlands Chapter 11?* American Bankruptcy Law Journal, v. 77, p. 377-408, 2003, p. 405-406.

[98] DECLERCQ, *Restructuring european distressed debt - Netherlands suspension of payment proceeding... The netherlands Chapter 11?*, 2003, p. 405-406.

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subsidiary of the corporate group controlled by Global Telesystems Inc., a US company with other subsidiaries in the US.

On November 14, 2001, GTS, which had issued bonds in New York, requested judicial reorganization (suspension of payment proceeding to negotiate an Akkoord) in the Netherlands. On the same date, GTS and GTS Inc. also filed a Chapter 11 petition before the District Court of Delaware, in which they presented a reorganization plan that was approved by 99.36% of creditors and 98.35% of credits.

In the Dutch procedure, the same question faced by Brazilian Courts regarding the unbundling of votes by bondholders was encountered: The trustee had been listed as a creditor, but could not vote on the *Akkoord*. In this case, "[t]he result could be the rejection of the *Akkoord*."[99] To enable the negotiation, the Amsterdam Court allowed bondholders to unbundle their voting rights, analogously to what occurred in judicial reorganizations in Brazil.

As bondholders had already voted in the Chapter 11 proceeding, the Amsterdam Court authorized that the votes be considered and counted in the same way for the purpose of deliberating on the *Akkoord*. As Peter Declercq recorded,

> "As to the question of whether the votes cast in respect of the plan of reorganization in the *U.S. Chapter 11* proceedings could be considered and counted in the same way for purposes of approving the *Akkoord*, the court opined that the procedure determined by the U.S. bankruptcy judge had sufficient safeguards to assume that the beneficial owners were able to validly express their opinions about whether or not to accept the *Chapter 11* plan of reorganization. Consequently, the results of the votes cast and counted in the *U.S. Chapter 11* case were deemed to be valid votes cast by the beneficial owners at the meeting of creditors regarding the vote on the *Akkoord* in the Netherlands suspension of payment proceeding."[100]

6.3.2. Voting mechanism adopted in the UPC Case: admitting to vote in judicial reorganization debenture holders whose credits have been verified previously in another resolution procedure on the same proposal

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[99] DECLERCQ, Peter J. M. *Restructuring european distressed debt - Netherlands suspension of payment proceeding... The netherlands Chapter 11?* American Bankruptcy Law Journal, v. 77, p. 377-408, 2003, p. 401.

[100] DECLERCQ, Peter J. M. *Restructuring european distressed debt - Netherlands suspension of payment proceeding... The netherlands Chapter 11?* American Bankruptcy Law Journal, v. 77, p. 377-408, 2003, p. 402.

CAVALLI, Cássio. The vote of debenture holders in brazilian judicial reorganization. *Agenda Recuperacional*. São Paulo. v. 3, n. 43, p. 1-46, setembro/2025. Disponível em: www.agendarecuperacional.com.br. Acesso em:

The second example is found in the case of the restructuring of United Pan-Europe Communications N.V. ("UPC"), a Dutch company controlled by UnitedGlobalCom Inc., incorporated in the US.

UPC filed for judicial reorganization (*suspension of payment proceeding*) in the Netherlands and, on the same date, also filed a Chapter 11 petition in New York in a joint action with its controlling company. The *Akkoord* proposal presented in the Dutch process provided for a conversion of debt into equity participation according to the terms of a restructuring agreement negotiated with an informal committee of bondholders approximately one month before the judicial reorganization petition in the Netherlands.

The Amsterdam Court decided that creditors who were bondholders on the *date of vote registration*, as determined in Chapter 11, could enable their credits before the judicial administrator of the Dutch process to be admitted to vote in a creditors' meeting that would deliberate on the *Akkoord* proposal. The decision was confirmed by the Dutch Supreme Court, in the following terms:

> "The regulation in the Netherlands bankruptcy act regarding consultation and voting on an *Akkoord* does not constitute an obstacle to set a date for practical reasons, as has been done in the matter at hand, on which a person, who wants to participate in the consultation and voting, is recorded as creditor with the contemplated consequence that only the person so recorded on such date will be entitled to participate in the consultation and voting, provided that the course of time between the date of recordation and the date of the voting is not too big."[101]

6.4. Experience of Brazilian law in force until 1976

Also in Brazilian law, examples of other voting mechanisms are found, such as those found in the practice based on Decree-Law 781/1938 and other diplomas that authorized the prior collection of debenture holders' votes to bring the instrument with the votes signed by the creditors for judicial homologation by the *concordata* procedure.

6.5. Current experience of the Brazilian capital market

In the Brazilian capital market, there is also a current need to increase the participation of debenture holders in debenture holders' assembly resolutions. Thus, CVM Resolution 81/2022 regulated in detail remote participation and voting in assemblies of holders of debentures issued by publicly traded companies publicly offered or admitted to trading in securities markets, including their exclusively digital or hybrid realization (arts. 69 and 70).

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[101] DECLERCQ, Peter J. M. *Restructuring european distressed debt - Netherlands suspension of payment proceeding... The netherlands Chapter 11?* American Bankruptcy Law Journal, v. 77, p. 377-408, 2003, p. 405.

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The norms on digital or hybrid debenture holders' assembly of CVM Resolution 81/2022 are applicable to all issues, except those whose issuance indenture expressly prohibits remote participation and voting (art. 69, § 3º). Thus, as provided in art. 70 of CVM Resolution 81/2022:

> "Art. 70. It is considered that the assembly is held:
>
> I – exclusively digitally, if debenture holders can only participate and vote through electronic systems, without prejudice to the possibility of adopting remote voting instructions prior to the assembly; and
>
> II – partially digitally, if debenture holders can participate and vote both in person and, through electronic systems, remotely, without prejudice to the possibility of adopting remote voting instructions prior to the assembly."

In other words, to promote the participation of debenture holders, the holding of a hybrid debenture holders' assembly is allowed, in which some debenture holders attend *in person*, others *remotely*, *through electronic systems*, and others *send their voting instructions prior to the assembly*.

The sending of remote voting instructions prior to the assembly needs to observe art. 71, I, of CVM Resolution 81/2022, which provides:

> "Art. 71. In the case of an assembly that includes at least one of the following remote participation alternatives, the respective call notice must contain the following additional information:
>
> I – if the sending of voting instructions prior to the assembly is allowed: the applicable rules and procedures, including guidelines on filling out and sending and the necessary formalities for the sent vote to be considered valid."

The new CVM regulation finds a parallel in the experience of the US capital market, where bondholders can exercise their vote by accessing an electronic voting system such as, for example, that maintained by the Depository Trust Company (DTC).

6.6. Another mechanism: the collection of individual votes in a debenture holders' assembly and their transmission, by the trustee, to the reorganization process

To ensure the effective participation of debenture holders in judicial reorganization, in a reference work on the topic published before the positive law of art. 39, § 4º, III, of the Law 11,101/2005, based on the experience of comparative law, Eduardo Guimarães Wanderley conceived the possibility for legal practice to determine that the trustee collect individual votes of debenture holders in a debenture holders'

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assembly, to retransmit the record of individual votes to the judicial reorganization process, where they will be counted for the formation of the assembly resolution quorums.

The author sought another mechanism that "would allow not only the direct participation of the investor [in the general meeting of creditors], but also consider the agent [trustee], in judicial reorganization, as a mere representative and communicator of the votes of those represented," because such a vote collection mechanism "could: (i) avoid hold-out problems within the issue itself, if there are collective action clauses with high quorums; (ii) make the voting process more transparent, inasmuch as it is possible to identify who, in fact, casts the vote; and (iii) make the voting process fairer, as it would be proportional to the value of the risk involved, and not an all-or-nothing vote."[102]

6.7. Procedural safeguards of other voting mechanisms

In all the examples above, which involve numerous ways of conceiving other voting mechanisms that the judge deems sufficiently safe for vote collection, what matters is that the vote expression and collection procedure is executed in a fair, transparent, and orderly manner, allowing creditors to have a significant voice in the debtor's judicial reorganization.

Therefore, in the same way as in voting in a physical creditors' meeting, these other hypotheses of vote expression and collection must be surrounded by all the procedural norms that serve to ensure the fairness of the resolution. Thus, creditors must be effectively given the opportunity to exercise their vote (which in the creditors' meeting occurs through the necessary publication of the convocation, with the legal advance, so that creditors are informed in time, etc.), admitting to vote only those who are *proven creditors* (by verifying the existence, importance, and classification of the credit, and confirming the identity and powers of those who cast the vote) and who are not in a *conflict of interest* situation (to prevent or disregard votes of creditors who combine conflicting interests, such as those of a shareholder, related party, or competitor).

Furthermore, the regularity of the resolution must be supervised and controlled by the reorganization court, with the assistance of the judicial administrator, who is responsible for supervising the entire procedure and issuing an opinion on its regularity, prior to its judicial homologation, as provided in art. 39, § 5º, of the Law 11,101/2005.

7. Conclusion

In conclusion, this article has examined the evolving legal framework governing the participation of debenture holders in Brazilian judicial reorganizations, highlighting critical tensions arising from out-of-court voting mechanisms that risk undermining the principle of equal treatment among creditors. It has demonstrated that overly rigid

[102] WANDERLEY, Eduardo Guimarães. *A participação de bondholders na recuperação judicial*. São Paulo: Quartier Latin, 2019, p. 245.

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applications of equality and restrictive debenture regulations can inadvertently impede essential corporate restructuring negotiations.

The analysis identified that out-of-court systems allowing debenture holders' resolutions by majority vote without adequate safeguards for protecting dissenting minorities, as well as systems prohibiting any out-of-court majority resolutions to prevent unequal treatment, may lead to inefficient outcomes by hindering issuer reorganization, ultimately worsening the debenture holders' situation.

The individualization of debenture holders' votes within judicial reorganization proceedings emerges as a robust and equitable solution, resonating with both Brazilian and international comparative legal traditions. The adoption of individualized voting processes promises greater procedural fairness and substantive equity, particularly when supported by formal and material safeguards under judicial supervision.

A structured approach involving judicial oversight and specifically tailored voting mechanisms designed to encourage creditor engagement is imperative. Such an approach aligns with principles of equitable treatment and enhances the efficiency and fairness of the collective decision-making process. By proposing flexible yet secure alternative methods for collecting votes, courts can significantly boost debenture holders' participation, fostering more effective resolutions to corporate financial distress.