

Principles C- Legal Framework for

Insolvency - C1 to C9

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Insolvency - C1 to C9

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C1 Key Objectives and Policies

SHORTCOMINGS:

- The insolvency system was too lengthy, expensive and value destructive - excessive duration of the observation period ;
- The lack of the rules intended to prevent : on the one hand- the improper use of the insolvency mechanism and, on the other hand – the premature dismemberment of a debtor’s assets
Despite its relatively adequate legal framework, the Romanian insolvency system is not working well in practice – need to make insolvency attractive for market participants

REMEDIES:

- First goal: balancing the interest between debtor and its creditor;
- Limitation of the observation period – max. 1 year with the possibility to be prolonged, if necessary – art. 112 (3);
- The rights of unpaid current creditors to ask for bankruptcy – art. 75 (4);
- The intervention of creditors within the introductory claim of the debtor – art. 72 ;
- The measure of temporary suspension of individuals enforcements before the commencement – art. 70 (5);
- Additional conditions for approval of a reorganization plan- art. 139;

C2 Due Process: Notification and Information

SHORTCOMINGS:

Effectively protecting the rights of parties require, inter alia:

- to have a right to be heard on and receive proper notice – **in some cases, the intervals to challenge a decision or to carry out a procedural act were too short;**
- such parties be afforded access to information that affect their rights – **in case of the publication of the report of the insolvency representative was delayed, this left the parties with very little/ no time to challenge the report to the Court**, since the term to oppose ran from the submission of the report to the Court, instead of from the moment of publication in the Insolvency Bulletin;
- **the debtor to disclose relevant information pertaining to its business and financial affairs** to enable the Court, the creditors and affected parties to reasonably evaluate the prospects for reorganization
- **To avoid insufficient publicity, given the hard consequences envisaged for late filing, it might be convenient to provide for the additional publication of the opening of the insolvency** in a national newspaper or in several local newspapers, as long as the size of the case so justifies;

REMEDIES:

- **Extension of the term for challenging the representative's reports – art. 59 (6);**
- **The Judicial administrator's report challenged from the moment of publication in the Insolvency Proceedings Bulletin – art. 59 (6);**
- **Notifying all creditors and the debtor when a creditor with privilege wants to retrieve its collateral – art. 78;**
- **Notifying all creditors for obtaining the post-opening financing- art. 87 (4);**
- **obligation to make available to the creditors the documents necessary to draft the reorganization plan – art. 132 (c);**
- **The unannounced creditor – considered to be in time for submission of claim – art. 42 (3);**

C3 Commencement: Eligibility

SHORTCOMINGS:

- Clarifying which professionals can be debtors – **the insolvency proceeding should apply to all enterprise or corporate entities, including state-owned enterprises** – the law exempted from its scope certain entities that were wholly owned by the State or municipalities
- **Alining the insolvency legislation to the New Civil Code**, in order to achieve consistency - which has replaced the concept of „traders” with the broader one of ”professionals”;
- **Closing monitor the performance of the insolvency framework in relation to municipalities bankruptcies with a view to strengthening it further if necessary.**

REMEDIES:

- **Extending the applicability of the insolvency proceeding to the state owned enterprises – art. 3 (2);**
- **Separate, the OUG nr 46/2013 settle the insolvency of municipalities;**
- **The concept of “professionals” according to the New Civil Code – art. 3;**

C4 Commencement: Applicability and Accesibility

SHORTCOMINGS:

- Creditors access to insolvency was excessively (90 days from the due date and RON 45.000) and the procedure too slow;
- Unjustified asymmetry in the path to declare insolvency between debtors and creditors (while the debtor's petition was solved in few days, the creditors ones could last few month)
- The system of access to the proceedings suffers the abusive behavior of debtors, who are able to manipulate the insolvency mechanism of case allocation to select the judge that they consider more fit for their own interests and to appoint the desired insolvency representatives.
- In case of admission of the creditor petition and opened the insolvency proceedings, the debtor was not entitled to pursue the reorganization of the business if challanged the creditor's petition.

REMEDIES:

- The threshold for insolvency filing by the creditor RON 40.000 – art. 5 (72);
- Lowering the default period of time 90 days to 60 days -art. 5 (29a);
- Measures to prevent the forum shopping – art. 41 (2);
- Creditors prevalence right to appoint the temporary representative of insolvency – art. 57 (2);
- Facilitating the submission of the reorganization plan in case of rejecting of the debtor's challenge against the creditor's claim;

C5 Provisional Measures and Effects of Commencement

SHORTCOMINGS:

- The automatic stay should be effective starting for the moment of commencement of the insolvency procedure and even before this date, in the period between the filing of a petition and the opening the insolvency proceeding.
- The non-registered security interest should not be effective to the representative and the creditors collective in insolvency in case they are perfected after the commencement of the insolvency proceeding.

REMEDIES:

- The emergency procedure for avoiding of dismemberment of the debtor's assets – art. 75 (4);
- Opening the bankruptcy proceeding during the observation period in case of failing to pay the current debts – art. 70 (5);
- Opposable formalities performed after the opening of the insolvency proceeding are non binding on the creditors – art. 88;

C6 Governance: Management

SHORTCOMINGS:

- The institution of the “*Special Administrator*” is rather a peculiar figure, which make much sense within the bankruptcy procedure rather than in insolvency procedure, when the debtor has the right to run its business;
- It is unclear how a Special Administrator can be an advantage when the debtor continues to run its own business;
- Co-existence is difficult and creates ambiguity as to the pluralism of duties between the business’ directors and the Special Administrator.

REMEDIES:

- The Special Administrator institution replace the General Meeting of Shareholders – art. 52;
- The general Meeting of Shareholders cease to operate after the commencement – art. 55;
- There is no overlapping between duties of the Special administrator General Meeting of Shareholders – art. 55;
- The duties of the Special Administrator under the control of the creditors/insolvency representatives– art. 87 (2);
- The liability of the Special Administrator for non-observance the law - art. 84 (2) ;

C7 Creditors and Creditors Committee

SHORTCOMINGS:

- The IA not seem to include a minimum numbers of days that have to elapse from the moment the creditors assembly of creditors is convened and the moment it is celebrated.
- The poor functioning of the committee of creditors as to the members of the committee only sought their own interest – and not the interest of general creditors;
- The possibility of the manipulation of the regulation concerning contingent claims by insolvent debtor.

REMEDIES:

- Creditors' Assembly - 5 days between convening and holding – art. 48 (1);
- The Creditors' Committee members in conflict or in passivity: possibility of replacement members - art. 51 (7);
- The consequences of the flawed vote in the creditors assembly – judge possibility to modify the Creditors' assembly decision – art. 49 (3);

C8 Administration: Collection, Preservation, Administration and Disposition of Assets

SHORTCOMINGS:

- The IA did not expressly provide for the possibility to sell assets during the general observation period in case they were at risk of depreciation;
- Possibility for creditors to comment on the sale of assets in terms of their evaluation;
- The transfer of the business as a going concern did not count on an adequate framework under the IA, especially in bankruptcy proceedings.

REMEDIES:

- The possibility to sell the assets at any time during the proceedings for lack of liquidity – art. 87 (2);
- The possibility for creditors to challenge to the Court the evaluation report - within 5 days from the report's notification – art. 62 (2);
- The possibility of transferring the assets and employ staff – as an operational unit – art. 154 (2);

C9 Administration: Stabilizing and Sustaining Business Operations

SHORTCOMINGS:

- The debtor or the judicial administrator could have access to funds accounts in which the lender might claim a privilege – by granting replacement collateral - the law made no such provision.
- Providing for the post-commencement funds and assure the reimbursement with super-priority in case of failure of the reorganization plan;
- The proceeding should provide for speed up the disposition of assets in liquidation.

REMEDIES:

- Use the funds accounts – by Syndic Judge order - for debtor's current activity – art. 87 (9);
- Protecting the post-commencement funding – art. 87 (4);
- The collective character of the insolvency proceeding – automatic stay is granted – art. 75;
- Sale of goods of the debtor by public auction according to Civil Code procedures – art. 156 (2);

THANK YOU!