REPORT ON THE OBSERVANCE OF STANDARDS AND CODES
INSOLVENCY AND CREDITOR/DEBTOR REGIMES

ROMANIA

FINAL - APRIL 2014

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APRIL 2014

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EXECUTIVE SUMMARY

Romanian authorities have made remarkable progress over the last two decades in creating a comprehensive legal and regulatory framework for enterprise credit, including through giving effect to European Union law. Considerable room remains for further improvement, however.

While the law permits for the creation of a broad range of credit instruments and provides an adequate system of priorities among them, there is uncertainty about the treatment of title retention arrangement and weaknesses in the laws related to the creation of mortgages. The new Civil Code is regarded as having inappropriately applied several doctrines originally intended for the protection of consumer to commercial entities bargaining from comparable positions of strength. Finance leasing rests on a generally supportive framework but suffers from unfavourable tax treatment. The EU regulations on late payments have had a beneficial effect on small businesses though local authorities lag behind in fully complying with their timely payment obligations. While the register for security interests in movables assets works well, the land registry is in need of important improvements. The auction process for claim enforcement can be unnecessarily lengthy and destructive of value. The credit bureau and Credit Registry play a critical role in the economy and their operation could be further strengthened. The country suffers from critical weaknesses in the informal workout culture and in the treatment of non-performing loans. The insolvency legislation is modern but does not function optimally, and is implemented by often overburdened and under-skilled courts and inadequately supervised insolvency practitioners. A new Insolvency Code attempted to address many of the problems that were apparent in the insolvency framework; however there was still need for further improvement. That law has been repealed and a new Code has been recently drafted.

The recommendations in this Report are presented with the hope that they will assist the authorities in their continuing efforts to enhance the country's legal and regulatory framework for enterprise credit. Addressing the deficiencies in the system, identified in this Report, is critical in a time of financial distress and the Romanian economy can expect to gain important benefits from the adoption of the suggested reform. In particular, the financial sector would be strengthened by the implementation of reform to the insolvency (it is understood that already many of the recommendations in the final draft report delivered to the Romania authorities were indeed taken on board), pre-insolvency and risk management frameworks which could help resolve the high level of nonperforming loans. Growth of the private sector can be accelerated were a well-developed insolvency system would ensure that businesses in distress are administered efficiently, wealth is maximised, resources are appropriately channelled and jobs can be preserved. An efficient insolvency system, improved procedures for the taking, registering and enforcing of security interests and a trusted judicial and regulatory system would increase creditor confidence thus reducing borrowing costs and attracting investment into the economy.

I. INTRODUCTION

1 The World Bank assessed the insolvency and creditor/debtor regimes ('**ICR**') of Romania pursuant to the joint IMF/World Bank initiative on the observance of standards and codes ('**ROSC**'). The assessment has been undertaken on the basis of the World Bank's *Principles for Effective Insolvency and Creditor/Debtor Regimes* ('***the Principles***') prepared by the World Bank.[2]

2 The conclusions in this assessment are based on a review of the Constitution, legislation,[3] and other regulations and procedures relevant to bankruptcy, insolvency, the creation and enforcement of pledges and security interests over immovable and movable property, and debt enforcement. The assessment team also had access to various memoranda and reports prepared by and for the World Bank, the IMF, the IFC, and others. In addition to the review of legislation, regulations and related information, the conclusions in this assessment are based on meetings held by the ROSC team in March/April 2012 with a broad cross-section of local stakeholders, including office-holders of: (a) the Ministry of Justice; (b) the National Bank of Romania; (c) the National Agency for Fiscal Administration; (d) the National Agency for Cadastre and Real Estate Publicity; (e) the Electronic Archive of Security Interests; (f) courts of first instance and of appeal; (g) the National Institute of Magistracy; (h) the National School of Clerks; (i) the Insolvency Law Reform advisory group coordinated by PWC; (j) the National Union of Insolvency Practitioners; (k) the Banking Association; (l) the Business Association; (m) the Financial Companies Association; (n) commercial banks; (o) law firms; and (p) accountancy firms. The objective of these meetings was to review the effectiveness of the legal infrastructure supporting debtor/creditor relationships, credit risk management and resolution practices. The ROSC team expresses its gratitude for the excellent spirit of cooperation with which all its interlocutors received it, and in particular, for the support and assistance of the Ministry of Justice.

II. DESCRIPTION OF COUNTRY PRACTICE

A. CREDITOR RIGHTS: CONTEXT AND LEGAL FRAMEWORK

3 **Romania has a relatively small but sophisticated financial sector that strives to meet the credit needs of the economy.** Some 41 banks are established within the country. The

[2] World Bank, *Principles for Effective Insolvency and Creditor/Debtor Regimes* (Revised version 2011), http://www.worldbank.org/ifa/rosc_icr.html.

[3] Including, among others, the Civil, Civil Procedure, and Fiscal Codes; and the Laws on Accounting; Collateral; Commercial Enterprises; Companies; Credit Organisations; Delayed Payments; Enforcement of Judgments; Financial Collateral; Financial Crisis and Insolvency of Territorial-Administrative Units; Financial Markets; Insolvency; Insolvency Practitioners; Insurance Undertakings; Leasing; Local Public Finance; Mortgage Loans; Non-banking Financial Institutions; Payment Injunction; and Uncontested Claims. A new draft insolvency code was also reviewed by the team and comments on the new draft law are provided separately in an addendum (Annex II). The new insolvency code was introduced through an emergency government decree which was later declared unconstitutional. Subsequently, a revised draft was presented to Parliament, and was enacted on 15 April 2014. The key issues and recommendations concerning the draft law are also discussed in this document. While some key features of the newly enacted law are noted in this Summary, no thorough commentary on the new law as ultimately enacted is offered or intended.

financial sector also includes over 40 insurance companies, over 5,000 non-bank financial institutions focusing on leasing activity, and investment and pension funds and brokers. Some 92% of banking assets are privately owned, and 91% are owned by the wholly owned subsidiaries of foreign (primarily Greek, Austrian, and Dutch) banks. Over 220 foreign banks exercise the freedom to provide services within the territory without the establishment of branches. Bank assets are 74% of GDP, loans are 40.3% of GDP, and deposits represent 34.4% of GDP. By way of comparison, the comparable average EU figures are 351%, 120.2%, and 114.4%. Some 37.3% of firms used banks to finance investment as of 2009. Risk premium on lending (interest charged by banks on loan to prime private sector customers, minus treasury bill interest rate) was 5.1% in 2012, up from 4.8% in 2011 but down from 6.9% the previous year. Interest rate spread (the rate charged by banks to prime customers minus the rate paid on deposits), reported at 5.8% in 2012, unchanged from the previous year. The headline non-performing loan ('**NPL**') ratio was a high 21% as of July 2013 up from 17.3% a year earlier. NPLs amongst micro-enterprise borrowers are twice as high as the corporate NPL rate.

4 **In the two decades since starting on the road to a market economy, Romanian authorities have made remarkable progress in creating a comprehensive legal and regulatory framework for enterprise credit.** This includes giving effect to relevant elements of European Union law. The law supports the use of a very broad range of credit instruments, including personal guarantees and possessory and non-possessory proprietary security, both 'fixed' and 'floating', over a comprehensive set of movable and immovable assets and including the entire undertaking of an enterprise. Security interests may be created by agreement or arise by operation of law, to secure present, future, accrued, and contingent liabilities.

5 **The recently promulgated New Civil Code has not received an enthusiastic reception from lender groups and their advisors.** The Code is regarded as having tilted things too far in favour of the debtor, for example, through invalidation of the material adverse change provision and increased powers to renegotiate the agreement even on the basis of simple economic grounds. Rules originally designed for the protection of consumers (parties who were not classified as "merchants" under the previous dispensation) are now also applicable to large business enterprises, which would have had a far greater influence on the terms of their agreement. The likely result is increased uncertainty in the system and higher contractual costs.

6 **There are shortcomings in the rules concerning mortgage loans.** A mortgage over immovable property may be created pursuant to the New Civil Code or the Mortgage Loan Act. Yet, whereas under the New Civil Code, mortgages may be created in favour of any person, mortgages created under the Mortgage Loan Act are narrower in scope as they may only be granted to authorized lending institutions (though these may include both banking an non-banking financial institutions).[4] The Mortgage Loan Act provides greater protection to authorized lenders, though, particularly in circumstances where the collateral is acquired by a third party contrary to the terms of the mortgage agreement. Under the New Civil Code, such a transfer is valid notwithstanding any provision in the mortgage agreement, though the transferee's title to the asset remains subject to the mortgage. In relation to the breach of the non-transfer term in the mortgage agreement, the mortgagee is entitled to

[4] *See* Law No. 190/1999, art. 2(f); Law No. 93/2009, art. 14(1), art. 18(1).

claim damages from the mortgagor, which may not be useful in the fairly common situation where the mortgagor is judgment-proof or not locatable. The problem is heightened when the asset is transferred from a natural to a legal person, thus potentially enmeshing the mortgagor in the corporate insolvency process, which may have been contrary to the calculations on which the lending decision was made. This weakness in the protection accorded to the mortgagee is likely to increase uncertainty in mortgage transactions and to be reflected in somewhat higher credit costs and lower availability.

7 **The position regarding title retention arrangements is unclear.** While the law contemplates that the parties by agreement may cause one of them to retain title to certain assets while transferring possession to the other, in practice, it appears that onward sale to a good-faith third-party buyer could succeed in conveying title. This in turn could create doubt about the efficacy of retention of title in the hands of the seller in the event of insolvency on the part of the party in possession. Effective retention of title can perform a useful role in conferring commercial certainty on transactions where it might be impractical or disproportionately costly to create security interests properly so called. The law should uphold the efficacy of title retention, subject to appropriate public notice of the existence of the retention of title arrangement.[5]

8 **There is a generally appropriate framework for both financial and operational leases, including as to their tax treatment, but problems remain**. Experienced market participants point to the following issues: (i) Confusion has arisen in the past regarding the implications of the requirement that customs duty calculated by reference to the residual value of the leased assets (the value at which they might be bought by the lessee at the end of the lease period) must be paid so long as it is not less than 20% of the initial value. Some market participants took the view that this rule required that lease agreement specify a residual value of no less than 20% of the initial value. This issue may have been resolved as a result of changes to VAT-related regulations, effective January 1, 2013, relieving lessors and leasing companies who do not actually re-take possession of the leased property, from performing this calculation, so long as they *sought* to do so but were unsuccessful.[6] (ii) The regulation of the consequences of termination of the lease agreement is said to be inadequate. For example, where there is a breach of the leasing agreement by the lessee, courts do not allow compensation regarding future instalments. Also, the New Civil Code reportedly extinguishes the right to bring legal actions in relation to a leasing agreement after six months of termination, which is said to be inadequate. As a final example, there are complaints that where the lessee defaults and the agreement is terminated but the lessee is unable to recover the assets within one month, the lessor has to pay value added tax on instalments which were never paid. (iii) There

[5] It has been suggested that the underlying inalienability clause in the title document itself is automatically registered in the land book once the real estate publicity formalities are performed. Thus, an argument can be made that a third party's claim of good faith to defeat a retention of title provision may no longer have effect, such that any unauthorized alienation of the real property to such third party should not be possible. If the retention of title provision is clearly a matter of public record, and if the provision is sufficiently clear in barring alienation, then this problem noted in the text is less likely to occur. It is reported that the newly enacted Insolvency Law of 15 April 2014 ("the 2014 Insolvency Code") addresses the problem by treating the property as part of the insolvency estate, and treating the selling party as a secured creditor. The ICR team has not reviewed this new law for this Report.

[6] *See* Gov't Dec. No. 84/2013, amending Law 571/2003 (Tax Code).

have also been problems regarding damage to leased goods, where the police have not acknowledged that the lessor has the right to complain.

9 **The incorporation of the EU regulations on late payments are said to have had a beneficial effect on the case-flows of small businesses in particular**. However, the local authority sector lags behind in this respect, with some businesses still expecting payments for supplies made in 2009.

10 **The land registry, which plays a critical role in the credit framework, is in need of improvement**. All interests in real property must be created and perfected through registration, though the effects of this law have been suspended, pending the completion of the cadaster works for administrative and territorial units.[7] The cadastre has 135 bureaus (local offices) and 42 cadastral (county) offices. An automation process is underway, and about 40% of records have so far been converted into electronic form. The rest are still maintained in paper form in local offices. Delineation of land boundaries is not always accurate, particularly in relation to rural agricultural areas.[8] Strictly speaking, access to the register was not publicly available until July 2010, and to date, key information may still only be accessed with the registered owner's cooperation. Much of the register still exists on paper, which means that searches are not possible against the name of natural or legal persons, but only against the reference number of particular plots of land or other immovable assets. This considerably weakens the register's efficacy. Problems are exacerbated when court decisions and deeds of public executors fail to state the reference number of the immovable asset in question.[9] It appears, further, that the state of the register is not determinative of title. Instead of relying simply on the register, at least some lenders investigate the chain of title going back 30 years. There is an administrative error correction procedure presided over by the Chief Registrar, whose decision is subject to judicial review. Where an error has been made, legal liability may be imposed on the cadaster office or the operator who committed the error, pursuant to the Civil Code. If the consequences of the damaging act are removed through judicial action, the claim for damages will not lie.

11 **The registry for interests in movable assets operates well.** Registration of security in movable assets is required in order to obtain priority and effectiveness against third parties. The new Civil Code permits registration of a list of contractual clauses in relation to collateral. The register started operations on 15 December 2000. It is unitary and in electronic form, with entries made by authorised legal persons around the country. Either creditor or borrower may make the initial filing, though only the registered secured creditor may make subsequent amendments. Tax authorities are an authorised operator and register seizures of assets. Entries expire after five years unless renewed. Searches are public and free, and may be made by reference to debtor, creditor, or asset identification number, though some stakeholders are of the view that the search functions could usefully be

[7] *See* Law No. 71/2011, art. 56(1).

[8] In some cases, this is the result of a lack of plot plans, which should have been prepared by local land commissions prior to the release of title, but were not.

[9] In some regions of Romania, registration was based solely on the names of owners, and not on a description of the real property.

enhanced. The registry itself provides no redress against erroneous entries, though the registrant is personally liable for any such errors. Further, the Ministry of Justice, the supervising authority for the register, may order corrections of the register in certain limited circumstances.

12 **The cost and operation of the notarisation system attracts some concern**. Mandatory notarisation of registrable mortgage documents can cost in excess of 0.65% of the value of the secured debt, which market participants consider to be steep. They also note the difficulties that can arise when notaries apply to the register for a "notarisation excerpt", which is determinative of the state of the register for 10 days from being issued, but which correspondingly also precludes the registrars from making, or even considering, any other entries over this period. This can have unnecessary adverse effects for judgment creditors and those holding statutory or tax liens.

13 **The claim enforcement process is regulated in detail, but in practice is lengthy and cumbersome, and can be uncertain and destructive of value.** The New Code of Civil Procedure, which came into force on 15 February 2013, is insufficiently tested in practice. Experienced observers of court practice opine that the New Code of Civil Procedure will complicate proceedings and generate confusion in the courts over the coming years, mostly by its inconsistent application by the courts. Its implementation has reportedly been rushed but much of it is incapable of being properly applied in practice, mainly because of the inadequate infrastructure of the courts system (insufficient number of judges and supporting staff, improper space for the court rooms and the archives) and inconsistent training of the judges on the issues related to the implementation in practice of the New Code of Civil Procedure.

14 **The auction process can be unnecessarily lengthy and destructive of value.** It has several weaknesses. First, the notice of sale is generally given through being physically posted at certain locations, though it may also be published in a national newspaper at the request of the lender. What is lacking is a common online platform for the advertisement of properties put up for auction. This hampers due exposure of the asset to the relevant markets and tends to depress realised values. Second, the first auction, in order to be valid, must by law realise at least as much as the highest offer price, or if no offer was received, the full assessed value of the collateral. If the first auction is unsuccessful, a second auction must be held within 30 days with a reserve price set at 75% of the value originally placed on the property, and if even this price is not realised, the enforcement official may sell to the highest, or sole, bidder. This process invites strategic behaviour, with most first auctions reportedly failing to elicit appropriate, or any, bids, as potential buyers await the effective elimination of the reserve price in the second auction. The process is prolonged and collateral value is further impaired. Third, where the collateral is immovable property, it appears that the existing occupant may stay in situ during the auction, thereby preventing potential buyers from being able to see or acquire the collateral with vacant possession. This reportedly reduces the realised value by about 25%.

15 **Lenders complain unanimously about the effect on the enforcement process of the corporate debtor's commencement of insolvency proceedings**. Even if the enforcement process is well advanced, a corporate debtor may petition for the commencement of its own insolvency proceedings. The petition must be heard within five days, and if granted, suspends the on-going enforcement process. Costs incurred by lenders in organising

auctions are laid to waste. Lenders report that debtor filings in such circumstances almost always amount to strategic manipulations of the insolvency moratorium.

B. RISK MANAGEMENT AND CORPORATE WORKOUTS

16 **The private sector Credit Bureau is one of two critical sources of credit information in the country**. The Credit Bureau began in August 2004, is owned by 25 banks, has records for 6 million individuals (not legal persons) with coverage of 45% of the adult population as of 2012 and operates on the basis of reciprocity amongst financial institutions.. Both positive and negative information is received and reported. Information subjects have the right to access their records once each year without charge, and otherwise for a fee of RON 6. There are four main limitations of the Bureau. First and reportedly under pressure from the country's data protection authority, it only reports information for 4-year periods. The utility of credit history depends on the ability to spot patterns of payment or default, which requires the history to cover a sufficiently lengthy period; international best practice is for coverage to extend to between 5 and 7 years. For the history to cover a shorter period may preclude it from providing an adequate picture of the debtor, whereas a longer period would risk contaminating present-day judgements about the debtor credit-worthiness by out-dated data. Second, the Bureau does not allow non-financial creditors such as utilities to participate in the system. It therefore does not enable persons with a good credit history with such creditors to use it to obtain better terms of lending with financial institutions. Third, the Bureau has no in-house redress mechanism regarding complaints, about a hundred of which it receives each year. This not only weakens borrower protection against errors in their credit history but also deprives the Bureau of a potentially powerful additional mechanism to enhance the accuracy of its data. Fourth and finally, there is no obligation on lenders making adverse credit decisions on the basis of a bad credit report to disclose this fact to the potential borrower.

17 **The National Bank-operated Credit Registry, the other primary source of credit information would also benefit from several improvements.** All regulated financial institutions participate in the system, which has 1 million records and coverage equivalent to 14% of the adult population as of 2012, 90% of which are for individuals and the rest for legal entities. Only those with an exposure in excess of RON 20,000 are covered. The Register extends over a 7-year period, reports both positive and negative information, and is obligated upon receiving a written request to disclose the requesting party's records to it. There is again no duty for lenders making adverse decisions on the basis of Register reports to notify the refused borrower of this fact. And again, there is no in-house redress mechanism at the Register. The banking supervision department of the National Bank has real-time access to the Register, but it appears that the Register does not itself provide regular periodic reports of supervisory value, such as on largest exposures by lender, borrower, sector, and so on.

18 **While the Insolvency Act provided useful mechanisms for incentivising the debtor's management to commence insolvency proceedings in a timely manner the design of these mechanisms may require improvement**. The debtor's equity-holders have power to prevent senior management from commencing a bankruptcy proceedings (although they

do not have the power to prevent management from initiating an insolvency proceeding).[10] Any such power would be inappropriate. Equity-holders are not entitled to receive value from the company's estate if the company is unable to meet its debt liabilities as they fall due. In such circumstances, the law should require companies to be run so as to minimise any/further loss to creditors, and if the optimum way of attaining this objective is to commence insolvency proceedings, equity-holders should not be entitled to interfere. Second, the law does not explicitly address the liability of *de facto* directors (i.e. those not formally appointed as director but representing themselves and acting as such) and shadow directors (i.e. those not formally appointed as director but on whose instructions the debtor or its senior management habitually act).[11] Third, the law does not explicitly create mechanisms for the funding of proceedings to hold directors liable. In many cases there may be insufficient funds available in the insolvency estate to pursue a director, even if there is a strong likelihood that the litigation will be successful. Devising creative approaches to funding in such circumstances may offer an effective means of restoring to the estate value lost. Fourth, some stakeholders express concern that professional advisors such as accountants or turnaround specialists acting at arm's length to advise the management of distressed debtors might themselves be held liable under the provisions on the triggering of liability in insolvency.

19 **Informal workouts are hampered because of the structure of the banking sector and a reported weakness of a 'negotiating culture'**. In order to be successful, informal workouts require unanimity amongst relevant lenders, their willingness to engage in good faith negotiations, and their ability to abide by the resulting agreements. However, market participants report that in some cases, particularly though not exclusively in relation to certain foreign banks, negotiators have not possessed the authority to reach agreements, instead having to seek approval from the foreign parent. There are also some indications that the prudential requirements applicable to parent institutions incentivise capital repatriation, and thus, exit from rather than engagement with problem loans in the jurisdiction. Further, the current regime does not provide sufficient motivation for lenders with better quality collateral to agree to workouts or, in the alternative, require lenders with any type of collateral to participate in a restructuring.

20 **The regulatory environment, especially as it applies to fiscal authorities, is insufficiently supportive of corporate workouts and other preventive measures**. There are frequent mentions of the fiscal authorities' reported inability to participate in workouts and schemes (concordats), on the basis of lack of legal capacity but also because of European state aid rules. The justification for the latter position is not clear, since European Union law has consistently emphasised that state actions undertaken on an objective and commercial basis are not inconsistent with state aid rules.[12] Article 24(5) now provides for

[10] We are advised that, in the newly enacted 2014 Insolvency Code, the basic structure of the IA with regard to an initial observation period, followed by the decision whether to pursue reorganization, or to instead proceed with bankruptcy, is retained. See 2014 Insolvency Code, at article 66(5).

[11] We are advised that there is implicit authority to pursue shadow directors in the 2014 Insolvency Code. *Cf.* 2013 Draft Insolvency Law (the Emergency Decree), at article 169, which states that "any person which contributed to insolvency…"

[12] We are advised that this problem may now be rectified by the introduction of Article 30(3) in the new 2014 Insolvency Code with respect to the legal and technical capacity of tax authorities (clarifying the right

(continued)

the application of a private creditor test to any proposed reduction in budgetary claims, so that such a reduction will not be deemed state aid. *See also* proposed Article 5(71) (defining the meaning and purpose of the private creditor test). So long as a proposed reduction meets this test, a concordat may be imposed over the objection of budgetary claims, under the proposed draft Insolvency Code.[13] Thus, the state aid question has been resolved.[14] Another problem is that tax law treats a written down element of a loan as income for the debtor, and may not permit a lender engaged in a write down to claim that element as a loss for tax purposes. This disincentivises parties from engaging in workouts. Until recently, the law also accorded an adverse tax treatment to distressed assets/liabilities sales. As of 1 October 2012, however, Government Ordinance No. 15/2012 amends the Fiscal Code to enable those buying or retaining distressed assets/liabilities as part of a merger or division to recover fiscal losses in proportion to the assets/liabilities transferred, or as the case may be, retained. It is also reported that tax authorities are required by law to charge high penalties (35%) for non-payment (though they possess discretion to forego up to half of these), and to demand collateral;[15] such aggressiveness can sink what might otherwise be viable restructuring outcomes.

The above mentioned new private creditor test applied to tax and other budgetary claims in the preventive concordat mechanism has also created a new problem. The private creditor test has the effect of reducing the budgetary claim. The homologation procedure in the preventive concordat (discussed below) then has the effect of making the reduced amount binding on the budgetary claim holders, though they may not have agreed to it. This creates the possibility of abuse, as debtors with large budgetary obligations might be tempted to use the preventive concordat solely to write down tax debt. However, we are told that the 2014 Insolvency Code now sets the percentage approval at 75%, which is generally high enough to curb abuse, but not so high that it is not achievable.

21 **There are some concerns regarding the efficacy and availability of restructuring tools.** While debt-for-equity-swaps may occur under general legal principles, they are not provided for under the Company Law and they are not frequently employed in the jurisdiction, not least because banks fear having the remainder of their outstanding debt claims against the company treated as shareholder loans. Article 145 of Government Emergency Ordinance 99/2006 empowers banks to take temporary equity positions in non-financial businesses as a restructuring tool. New Regulation No. 26/2011 has set forth the conditions under which such an action can take place. The banking community have greeted this Regulation with moderate optimism. Knowledgeable observers of the banking

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of tax authorities to voluntarily agree to adjustments of their claims, so long as the adjustments are consistent with European Union state aid rules).

[13] It may be appropriate to revise the rules relating to cramdown on taxing authorities, permitting only involuntary *extensions* of budgetary claims, as opposed to involuntary *reductions* of such claims.

[14] It is also noted that the National Tax Administration Agency currently has the authority to appoint official receivers or liquidators for insolvent taxpayer debtors. *See* Tax Procedure Code, art. 177(4).

[15] It has been also noted, however, that the Tax Procedure Code (Art. 119-124) authorizes the assessment of such charges, and that under Art. 41, Law 85/2006, no interest or penalties can be added to claims upon opening of insolvency proceedings. It has been therefore suggested that tax authorities do not charge high penalties.

market report that, in order to make good use of these new powers, banks will have to develop turnaround and management capacity.

22 **Market participants also express a number of other challenges to the creation of a thriving workout culture**. (i) The inability to toll the running of limitation periods within which creditor claims must be pressed against a defaulting borrower hampers workout negotiations, with creditors refusing to initiate negotiations, or to see them through to their logical conclusion, for fear that the limitation period would have expired by the time that negotiations were concluded in a way which was not acceptable to them; (ii) existing lenders are deterred from making further loans to a troubled debtor by the risk that any security or other preferential repayment terms offered to them might be reversed in subsequent insolvency proceedings; (iii) the debtor's management might fear incurring personal liability by causing the debtor to enter into legitimate restructuring activities; and (iv) lenders are sometimes concerned about lender liability;' (v) there is no sufficient discussion regarding the development of a body of workout professionals. There is a need to promote confidence of finance providers that companies in distress can effectively address the situation and develop a sustainable business strategy.

23 **The new Insolvency Law of 15 April 2014 ("the 2014 Insolvency Code") incorporates the former law on schemes of arrangement, entitled "preventive concordats."** We are advised that the 2014 Insolvency Code retained the basic idea of the scheme of arrangement from former law, renaming the procedure "preventive concordats." Under the 2014 Insolvency Code, we are told, 75% of total accepted and undisputed claims by value are need to gain approval. In addition, the value of disputed claims must not exceed 25% of the total value of claims in order to bind dissenters. The suspension of interest accrual provision, we are told, has also now been removed. We are further advised that the new law also provides a mechanism to assure that a concordat that reduces the amount of the budgetary claim, either voluntarily or otherwise, is enforceable only if it does not constitute state aid (and a mandatory private creditor is designed to assure that no state aid is accomplished). Thus, the only argument that was offered to justify their lack of participation in the process appears to have been removed.

24 **Market participants express concern about the 'evergreening' of problem loans**. Several banks in Romania appear to resort to routine rescheduling where default has occurred, without due effort to ascertain the underlying causes other than to obtain a perfunctory 'independent business review', which is regarded as a mere formality. At least one bank reports the remarkable fact that every single loan in its distress portfolio has seen at least one rescheduling. A very senior official of another bank indicated that, on the basis of their experience, "evergreening" is indeed occurring in the system. A senior official at another bank explicitly admitted that the bank would consider rescheduling not because it was particularly confident of the debtor's fundamental viability but precisely to avoid having to reclassify the loan. Such practices, if widespread, indicate that problems in the financial sector may go even deeper than is indicated by the high and rising headline NPL figures. The National Bank's regulations do not appear to limit the number of times a loan may be rescheduled prior to *mandatory* (as opposed to discretionary) downgrading. Nor do they provide minimum criteria by which lenders must assess distress scenarios prior to agreeing to a rescheduling.

25 **A code of good practice exists in relation to informal workouts but is not used by parties.** In September 2010, Voluntary Guidelines on Out-of-Court Corporate Debt

Restructuring were endorsed by the Ministries of Justice and Public Finance and the National Bank. The Guidelines are consistent with international best practice, providing principles governing good faith, confidentiality, disclosure, new funding, and the obligations of debtors and lenders. Unfortunately, there does not appear to have been a high uptake of these provisions. Financial institutions who would be their natural users report that the National Bank, while nominally having endorsed the Guidelines, appears entirely passive in respect of them, providing little or no encouragement for lenders to have resort to them in appropriate circumstances. The National Bank's position appears to be that it has no legal authority formally to issue, as opposed to "endorse", recommendations of the sort contained in the Guidelines, and no legal power to encourage lenders to have resort to them. However, other central banks, starting with the Bank of England's 'London Approach', have indeed issued such guidance and put regulatory weight behind their use. There is room for further dialogue here with the Romanian National Bank, whose active intervention could confer very significant value to the Guidelines, and thus, for the market.

C. LEGAL FRAMEWORK FOR INSOLVENCY

26 **The Romanian Insolvency Act provided for a legal framework which was relatively comprehensive and modern, though it still needed strengthening in many respects. A new Insolvency Code (reviewed in draft) attempted to address many of these concerns.** The Emergency Decree, enacted last fall, while declared unconstitutional as a result of a specific provision (since removed), contained the essential structure which we are advised was ultimately enacted on 15 April 2014. The insolvency framework, we are advised, includes rules intended to prevent the improper use of the insolvency system by both debtors and creditors and to avoid the premature dismemberment of a debtor's assets by a comprehensive stay of actions. The law also includes rules aimed at achieving transparency and to collect, process and disperse information to the relevant stakeholders. The 2013 Draft Insolvency Law also incorporated the Model Law on Cross-Border Insolvency, and the EU Regulation on Insolvency Proceedings is directly applicable in the country. There are forty-one county courts which have exclusive jurisdiction over insolvency cases commenced on debtors whose centre of main interests is located in Romania. The regulatory framework is relatively new. Some 23,665 insolvency cases were commenced in 2012 under the IA, 10% higher than the previous year.

27 A serious effort was being made in the 2013 Draft Insolvency Law (the Emergency Decree) to address the concerns raised in preliminary drafts of the ROSC.[16] The new draft proposed a provision for post-opening credit for the debtor, a minimum percentage of participation required for various actions by the creditors' meeting (including a minimum percentage in order to approve a plan), provisions designed to reduce abuse of process, some extension of time for notices and for responding to proposed actions (to enhance due process), provisions to break logjams when creditors' committees are deadlocked, a

[16] The Ministry of Justice was furnished a preliminary draft of the detailed principle-by-principle Report for their consideration. When a draft of the new Insolvency Code was furnished to the ICR team in mid-September, it was accompanied by an Executive Summary, prepared by the Ministry of Justice, which detailed how the amendments in the revision were aimed at responding to the concerns raised in the draft ROSC.

provision to permit the sale of a business as a whole, provisions for interim measures to protect the debtor's assets, a provision to set aside unregistered security interests, deadlines for convening the creditors' meeting, for deciding on the opening of the proceeding, a provision to prevent utilities from discontinuing service, adjustment of look-back periods for avoidable transfers, procedures for expediting the claims resolution process, and new provisions for managing enterprise groups. These are all welcome changes, and assuming they were ultimately incorporated into the 2014 Insolvency Code, they will substantially improve the efficacy of the law. There were still issues that in the draft that needed to be addressed, , though[17]:

27.1 **Eligibility and Access.** It appeared that some professionals (debtors) would only be eligible for a simplified proceeding, and are not eligible for restructuring. Small and medium sized businesses, including family-owned businesses, can often restructure if given the opportunity. The draft law did not appear to permit that option for professionals in the trade registry, or for family businesses. There was also a question regarding the thresholds set for both creditors and debtors to initiate a proceeding. Small creditors were excluded from filing, as were small debtors. *Regii autonome* were to be considered debtors, but the question of municipalities had not been addressed in the insolvency law.[18]

27.2 **Due Process Issues.** A principle of due process is that notice needs to get to whoever is affected, and needs to get there in time for that party to be able to react appropriately. The draft law relied heavily on an official bulletin for notice, and it is presumed that business people in Romania are accustomed to reviewing such bulletins daily to see if there is some matter that might affect them. If that is the case, then using the Bulletin solves the first aspect of due process. The draft law suffered still from insufficient time frames with respect to the second aspect of due process. Romania is a relatively large country, with a mailing system that suffers all the failings of mail systems in many countries. Short deadlines overlook this reality. Of course, if responses could reliably be submitted electronically, the matter would be easier. The new Civil Procedure Code now provides that all requests addressed to courts, as well as all procedural acts of the parties addressed to the courts, may be filed by electronic means. Given the new general rules of notification and communication of procedural acts, the capabilities of courts in electronic communication are likely to improve substantially.It is recognized that the law as drafted sought to speed up the process, which has been perceived in the past as unnecessarily slow. However, the primary drivers of delay tend to be slowness in the decision-making process, excessive appeals, and a failure to make decisions promptly, not merely response times.

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[17] For the complete assessment of the Emergency Decree (referred to in this report as the "2013 Draft Insolvency Law" as the Emergency Decree was later stricken by the Constitutional Court), please see Annex II. A copy of this analysis was provided to the Ministry of Justice shortly after the enactment of the Emergency Decree and some aspects of that analysis have apparently been addressed in the 2014 Insolvency Code.

[18] It has been indicated, though, that municipality insolvency has been separately addressed in another law.

In addition to the logistics of sending in a response, there is also the reality that a response should be prepared in a considered fashion, clarifying the reasons for the response and the reasons why relief should be given. The time frames afforded in the draft did not appear to give parties enough time to fashion considered responses.

There was also a concern regarding whether counting via calendar days (as the Code of Civil Procedure requires) might not be less than effective notice, due to the intervention of weekends.

27.3 **Moratoriums on Creditor Collection.** We are told that the 2014 Insolvency Act has removed provisions in the draft that gave exceptions to certain creditors regarding the moratorium, depending on the status of their collection activity. In general, exceptions to moratoria tend to hurt the chances for reorganization, they may violate the rights of other creditors, and they violate the most fundamental principle of insolvency, i.e. the idea that insolvency is a collective and equitable process. Another problem is that, there is no notice given to other creditors in the event that a creditor wishes to have relief from the stay. Other creditors have an interest in whether property that might be necessary for reorganization, or which has excess value, might be removed from the estate.

27.4 **Post-Petition Borrowing**. A key to saving an enterprise in financial difficulty is the ability to fund operations during the insolvency proceeding. Attracting lenders in such a situation is not easy, however. The debtor is already in financial difficulty, with many outstanding unpaid liabilities. Lending to such a debtor can be risky. To ameliorate the risk, and to attract lenders, the law needs to explicitly assure them that they will be re-paid, even if other creditors are not repaid, both in liquidations and in reorganizations. The draft law was still ambiguous on important questions regarding priority of repayment for such lenders. It also failed to involve all the creditors in the decision whether to borrow, and if so, on what terms. Interestingly, the draft law permitted post-opening creditors to pursue their own collection if they remained unpaid for more than 90 days. This would have had the perverse effect of undermining reorganization, the very goal of post-petition borrowing.[19]

27.5 **Creditor Participation**. The rule regarding initiation of a creditors' meeting and the percentage which applied in this respect (30%) under the draft law did not distinguish between secured and unsecured creditors. This meant that privileged creditors may often be able to call creditors' meeting easily, but unsecured creditors, who have to act cooperatively, would have a more difficult time calling a meeting.

27.6 **Plan term**. We are advised that the newly enacted 2014 Insolvency Code sets the initial plan term at three years, with the possibility of an additional one year extension. This would be a positive change. However, some creditors may hold

[19] We have been advised that the 2014 Insolvency Code has addressed this problem, removing this exception from the moratorium.

claims that cannot be resolved in that time frame. Long term debt with a privilege is an example, as is a bond issue that might agree to a rescheduling rather than a default. It would seem that, if creditors voted in favor of an arrangement designed to go beyond three years with respect to certain long term debts, the law should not prohibit it.

27.7 **Compensation for Insolvency Practitioners**. While it is always important to make sure that such persons are sufficiently well compensated to induce good people to take up such tasks and perform them with integrity, it is equally important that the means and methods of compensation be regulated. Otherwise, there is a great risk that the cost of administering a case could consume a significant percentage of asset value that might otherwise go to pay creditors. There were concerns surrounding the compensation systems in the draft law. The concordat administrator negotiated its fee (including a possible bonus) with only the debtor, for example.[20] The draft law also provided that the judicial administrator negotiated its fee with the creditors who initiated the petition. There was no clear rule in the law regarding how or when the judicial liquidator was compensated.[21] In almost no cases was external supervision involved. Nor was there any independent standard set out to apply to compensation proposals. This created at least a potential for overcompensation of the professionals, at the expense of the creditors.

27.8 **Claims Resolution.** It has been noted that the observation period (which follows the opening of proceedings) tended to be extremely lengthy, due primarily to the time it took to process the claims in advance of the creditors' meeting. We are advised that the 2014 Insolvency Code now permits provisional allowance for claims that are the subject of an objection for which evidence must be taken.[22] In addition, we are told that the law accords a presumption of validity to claims filed unless they are objected to, reducing the amount of time the administrator has to spend reviewing claims.[23] It would be helpful if contingent claims could be provisionally allowed via a summary estimation procedure.

27.9 **Priorities**. Most insolvency laws rank the rights of unsecured creditors (including the deficiency amounts owed to creditors who are underprivileged), paying all the creditors in the top rank first, then paying lower ranks in the same manner, in a "waterfall" arrangement. Because of this scheme, lower ranked creditors face the real possibility that there will be nothing left for them at all. As a general rule, there should not be any more priorities than are either necessary to the process, or

[20] It is true that the fee negotiated was ultimately to be approved by the creditor body as part of any concordat plan, giving the creditors some say over the fee. However, as a practical matter, it is often difficult for creditors to renegotiate the fee with a professional when those creditors are also negotiating a resolution with each other and with the debtor.

[21] Articles 159(1) and 161(1) authorize compensation as a priority claim, but do not set the percentage or amount.

[22] The new law, we are told, also places a time limit on the observation period at one year.

[23] See article 102(9) of the 2014 Insolvency Code.

appropriate (in accordance with public policy and the societal economic and social priorities of the state). What is more, the ranking of those priorities should be consistent with these stated policies.

The priority scheme in the draft law suffered some significant problems. Most significantly, there was insufficient clarity regarding the essential priority that ought to be accorded to post-opening financing lenders.[24] The draft law also accorded priorities to a subset of unsecured creditors over another subset of unsecured creditors – bondholders – that could have had a significant adverse effect on the bond market in Romania, however we have been advised that the 2014 Insolvency Code resolved the matter. There were unlimited priorities given to labor claims. There was a priority given to counterparties of contracts terminated during the proceeding, even if no benefit came to the estate.[25] These issues could have adverse impacts both on the efficacy of the law itself and on larger economic issues that are important to Romania, and so bear attention.

27.10 The draft law did not appear to sufficiently address the recommendation in the draft ROSC regarding director and officer accountability (see para. 18 above).[26]

27.11 The draft law incorporated a provision that deprived broadcasters of a license to broadcast during the observation period. It also required Ministry approval of the sort of broadcasting the debtor may do upon emerging with a confirmed plan. There was no stated reason for this provision, and it appeared all but certain that it would have rendered reorganization of such debtors impossible. The Government Decree was struck down as unconstitutional. We note this matter here because such highly targeted or special interest provision is inimical to an effective insolvency system.

- A roadmap of both the pre insolvency and the insolvency procedures available under the insolvency framework as set out in the draft law is attached to this document It is a process oriented flow chart that helps to identify the source of potential procedural delays in the law.[27]

D. INSTITUTIONAL & REGULATORY FRAMEWORKS

28 **There is a separate jurisdiction for insolvency matters, with specially assigned judges operating pursuant to a specialised procedure**. The existence of insolvency judges (syndic judges) is a positive element of the Romanian judicial system. Notwithstanding this, the expected benefits of insolvency specialization have not fully materialized yet due to several remaining weaknesses. First, there are no specialized insolvency tribunals or

[24] We are advised that the 2014 Insolvency Code may have clarified this issue.

[25] This issue may have been resolved in the 2014 Insolvency Code. We are advised that it was addressed.

[26] We are advised that this issue may have been to some extent addressed in the 2014 Insolvency Code.

[27] The flow of cases as shown in the chart may have been altered in the 2014 Insolvency Code.

sections covering most of the country but, rather, some judges with exclusive competence on insolvency within a few civil and commercial tribunals; and only in a reduced number of jurisdictions (14 such judges in Bucharest, and a lower number in four additional jurisdictions). Second, previous experience on insolvency and related matters is not required for being appointed as a syndic judge. Third, there are no specialized insolvency sections at the courts of appeals, and at appeal level many times insolvency cases are not assigned to judges with previous experience as syndic judges.

29 **The Romanian system of selection and appointment of judges seems to be transparent and reasonably adequate, yet judges would benefit from training.** The Superior Council of Magistrates (‘**SCM**’) is the representative body of the judiciary with competencies in selection, appointment and promotion of judges. The National Institute of Magistracy, an institution under the supervision of the SCM, oversees the training of judges before and after their appointment. The National School of Clerks performs similar roles with respect to judicial officials. In theory, there are two ways to become a judge: (1) undertaking the two-year National Institute of Magistracy course and passing the final examination; or, (2) applying directly for a judicial position open to lawyers with five years of experience, and passing the required exam. In practice, the latter way seems to be somewhat exceptional, and in the recent past most appointments would have been made using the first selection mechanism. As a consequence, the majority of newly appointed judges do not have practical experience with business transactions, commercial disputes, enterprise insolvency and financial distress, etcetera. Besides, the judicial school does not provide any courses on basic elements of accounting, finance and economics to future judges. Users of the judicial system express concern about the lack of sufficient understanding of many judges with respect to complex commercial transactions and insolvency procedures. Particularly in commercial and insolvency cases, judges seem to require more financial and business training.

30 **The efficiency of courts and judges that deal with commercial and insolvency cases is not fully satisfactory.** In particular, cases take too long to be resolved and the time limits set out in the law are rarely met. As regards insolvency cases, the workload of most syndic judges has thus far been significant. Approximately 2,000 new insolvency cases have been filed per year after the global financial crisis, representing almost 11 per cent of the total civil and commercial caseload of the Romanian judiciary. As of mid-2012, some 3.400 insolvency cases were pending in the courts. In Bucharest, each syndic judge opened approximately 400 new insolvency procedures in 2011. Furthermore, these numbers do not reflect all the additional contentious cases (incidents) that arise in the course of insolvency procedures and should be dealt with before the syndic judge of the main proceeding. Inefficiency exacerbated since judges could not devote all their time and efforts to jurisdictional activities because the law requires them to perform many administrative tasks. The new law devolves many of the duties formerly imposed on the syndic judge onto the judicial administrators, including especially the duty to call and preside over creditors’ meetings. There are further improvements that could be made in this regard, including specifically re-assigning the preparation of reviews regarding the status of the proceeding to the judicial administrator, who is more likely to know what is going on in the case anyway. Such reviews may be filed with the court, but need not be ruled on by the court.

31 **Predictability of the judicial system is currently affected by frequently inconsistent interpretation of the law by different courts and judges**. The formal mechanism for unifying judicial interpretation of the law (“recourse in the interest of the law” before the

High Court of Justice of Romania) does not seem to be an effective method for resolving this problem: only a limited number of decisions have been issued in the mentioned recourse. Creating a complete body of jurisprudence, easily accessible, could contribute to eliminate many incoherent judicial decisions. The current means of publication of judicial precedents, however, would not allow access to all judicial decisions; in many cases the full text of the motivation of judicial decisions is not published, and search criteria by subject matter is not feasible.

32 **Notwithstanding what has been on paper a generally adequate legal and regulatory framework for the insolvency profession, there was widespread dissatisfaction with its operation in practice**. There are frequent allegations, including in the public domain, of collusion between debtors and insolvency practitioners, which are said to enable commencement of insolvency proceedings in districts less accessible to some or most creditors, and under which the debtor’s management may ‘tunnel’ or strip assets out of the debtor’s estate without risking real accountability.

III. CONCLUDING REMARKS

33 In conclusion, the Romanian insolvency and creditor rights’ system has undergone important reform, to the extent that it is now relatively modern and comprehensive. However, it requires certain significant improvements in order to make it fully compliant with international standards and fit to deal effectively with the challenges it faces in a difficult economic climate. Indeed, addressing the remaining concerns raised in the Report would bring specific benefits to the Romanian economy, and would make a significant positive impact on both the financial and the private sectors:

33.1 *Financial Sector*: it is clear that the current state of the framework for risk management, workouts and insolvency hampers the decisive resolution (write-offs and loan restructuring) of the high levels of nonperforming loans (NPLs). NPL resolution has taken place at too slow a pace so far, despite the efforts of banks’ workout units. The sale of problem loan portfolios and outsourcing of collection remain rare. The implementation of reforms to the insolvency and pre-insolvency frameworks (done right) as well as the strengthening of the rules pertaining to risk management will help facilitate and encourage out-of-court restructuring. The improvement in portfolio quality will, in part, also bring some degree of relief to banks’ profitability, as loan-loss provisioning moderates. This in turn will help with the much needed recovery of sustainable private sector credit.

33.2 *Private Sector*: the resumption of growth in private sector activities is essential for Romania's economic recovery. A well-developed creditor rights and insolvency system is a critical component of every well-functioning market economy, and its role is particularly critical in a time of financial distress. A well-established insolvency system provides firms suffering from financial difficulty with valuable breathing space to redeploy resources in an orderly way, thereby maximizing the value of a going concern and preserving jobs. It also facilitates a smooth reallocation of resources into more productive uses for firms that cannot be returned to profitability through a restructuring. The predictability brought about by an efficient insolvency system as well as the improved procedures for the taking, registering and enforcement of securities would also build confidence among credit providers, resulting in reduced borrowing costs, particularly essential for SMEs. Additionally, diversion of some Romanian wealth which is presently invested in businesses outside the country may be invested instead within the domestic economy, thus benefiting local businesses and increasing employment. Confidence in the Romanian judicial, legal and regulatory systems may increase by the strengthening of the institutional and regulatory frameworks.

34 The next section lists key recommendations which follow from the Report. Implementing these recommendations would best position Romania's economy to sustain the needs of its citizens in the future and to enhance commercial competitiveness regionally and globally.

IV. POLICY RECOMMENDATIONS

35 It should be noted that some of the recommendations listed in the chart below may be dealt with relatively quickly, as they require altering specific requirements in existing legislation (e.g. altering percentages or deadlines related to reorganization plans). Others may demand more nuanced solutions. Furthermore, not all of the recommendations require legislative reform. Certain recommendations are concerned with strengthening regulatory oversight or improving the administration of certain systems. Other recommendations refer to building capacity and strengthening institutions or ensuring that laws that are already in place are implemented effectively. The recommendations are therefore divided into distinct categories: Legislative, Administrative, Regulatory and Capacity building and implementation. The recommendations also note the impact that is likely to accrue from their implementation and the urgency of addressing any of the recommendations.

Legislative

Key recommendation	Impact	Urgency
Creditor rights		
Consideration should be given to identifying those protective rules in the New Civil Code which should only properly apply in consumer transactions or in other contexts where there was likely to be a significant disparity in bargaining power.	Increase creditor confidence resulting in reduced borrowing costs, particularly essential for SMEs.	Urgent
The law governing leases should be clarified in several respects, particularly as to the consequences of premature termination of the lease agreement.	Enhance the protection afforded to lessors; strengthen leasing as an effective credit instrument.	Medium term

The New Civil Code and New Code of Civil Procedure should clearly identify the party or parties to whom are owed the duties of a receiver appointed in an enforcement context.	Increase trust in the enforcement system and ensure its effectiveness.	Urgent
The above rules governing receivership should also be clarified to indicate that the receiver appointed in relation to all or almost all the assets of an enterprise has the power to manage the enterprise, and may even commence insolvency proceedings in relation to it.	Receivership process would become more efficient and fair.	Urgent
Consideration should be given to strengthening the protection afforded to mortgagees under the New Civil code.	Increase certainty in mortgage transactions; enhance confidence of credit providers and reduce borrowing costs.	Medium term
Consideration should be given to amending the rules regarding the auction process to make it more effective, less cumbersome and less destructive of value, and to avoid abuse of the system.	Strengthen the claim enforcement system; increase confidence among credit providers; reduce borrowing costs.	Medium term.
It is critically important for courts to be empowered, and in appropriate circumstances, obligated, to order existing occupants of immovable property to vacate the property as a prelude to its realisation, so proper market value can be realised on a vacant possession basis.	Strengthen the claim enforcement system; immovable mortgages become more effective.	Urgent

Risk management and corporate workouts		
The insolvency law should clarify the liability of de facto and shadow directors as well as those acting de jure for mismanagement of companies in the vicinity of insolvency and mechanisms should be provided for the funding of actions against directors.	Incentivise managers and corporate controllers to address financial distress effectively at an early stage without deterring them from taking commercial risks; encourage entrepreneurship and enhance the effective resolution of financial distress.	Medium term
Consideration should be given to explicitly authorize tax authorities to participate on a commercial basis in informal out-of-court workout negotiations, and to enabling the authorities to agree to write down debts or make concessions in the course of such negotiations.	Enhance the use of informal workouts; speed up the resolution of distressed debt.	Medium term
The law (e.g. company law) should be enhanced to explicitly facilitate debt to debt and debt to equity exchange offerings.	Incentivize lenders to engage in out of court restructurings; speed up the resolution of distressed debts.	Medium term
Insolvency framework		
Due Process		
Expand the notice period to creditors for participating in the creditors' meeting beyond 5 days.[28]	Increase participation in the insolvency process so that the process is both fairer and more transparent.	Urgent
Define "days" as business days, for purposes of	Eliminate unnecessary confusion about how to count days; assure	Urgent

[28] This issue may have been addressed in the 2014 Insolvency Code.

notices and response periods.[29]	adequate notice.	
Require that creditors and the debtor be given notice when a creditor with a privilege wants to retrieve its collateral or pursue suit outside of the insolvency. See Art. 78.[30]	Increase transparency of the process; limit the potential for abuse by privileged claim holders; encourage reorganization by making it harder to simply take property out of the estate.	Urgent
Require that all creditors have notice when the debtor wants to borrow money post-opening. See Art. 87(4).[31]	Increase transparency; limit the potential for abuse; encourage participation by creditors.	Urgent
Eligibility		
Clarify which professionals can be debtors in a general proceeding.	Encourage use of restructuring by professionals and their creditors.	Medium term
Access		
Re-examine the threshold amount for creditors to qualify to file a petition. Art. 5(20)	The threshold (as reflected in the draft law) excludes smaller creditors from being able to use the law to put pressure on a debtor.	Urgent
Re-examine the threshold amount for debtors to qualify for insolvency. Art. 5(20)	The threshold (as reflected in the draft law) could include very small debtors for whom the cost is too great.	Urgent
Address whether creditors should be "disqualified" from filing a petition when the debtor sues them (challenging their claim). Art. 5(70).[32]	Reduce potential for abuse by debtors using the law to shield themselves from insolvency.	Urgent
Professionals		

[29] We are advised that this issue has been addressed in the 2014 Insolvency Code.

[30] We are advised that the 2014 Insolvency Code now requires notice to the debtor and to the creditors' committee of any such request.

[31] We are advised that the 2014 Insolvency Code has attempted to address this issue.

[32] There is some confusion surrounding whether the law actually creates this opportunity. The 2014 Insolvency Code will need to be consulted to determine whether this issue requires further consideration.

Re-examine the procedures for hiring and paying judicial administrators, concordat administrators and liquidators. There should be an independent standard of compensation to limit the potential for abuse.	Enhance the integrity of the process so that creditors and debtors will be willing to use it; enhance the integrity and reputation of the judicial administrators and syndic judges so that their decisions will be respected.	Urgent
Require that emergency sales can only take place with the advance approval of the creditor's committee.	Enhance the integrity of the process so that creditors and debtors will be willing to use it; enhance the integrity and reputation of the judicial administrators and syndic judges so that their decisions will be respected.	Urgent
Consider deleting the role of "special administrator" as a professional which may not be required where the management remains in control.[33]	Reduce unnecessary representation to make the insolvency process less cumbersome.	Medium Term
Creditor Participation		
Consider whether the percentage of total claims that is required of creditors to call a creditors' meeting on their own should be applied only to unsecured creditors and, if so, whether it should be reduced to a lower percentage (*e.g.,* 20%).	Overall, the monetary amount of privileged creditors is likely to be larger than for unsecured creditors. A flat global rule of 30%, applied without differentiation, is likely to be satisfied in every case solely by the privileged creditor, allowing that creditor to exercise greater power over the proceeding, to the potential detriment of other creditors without privilege.	Medium Term
Consider whether the 30% of total creditors that is the minimum required for a quorum of the creditors'	Overall, the monetary amount of privileged creditors is likely to be larger than for unsecured creditors. A flat global rule of 30%, applied	Medium Term

[33] The new Insolvency law of 15 April 2014 has clarified that the special administrator is not an estate expense, but rather a shareholder expense. In addition, the special administrator role is deemed needed because the existing governing body is divested by the filing.

meeting should be applied only to creditors not holding a privilege and, if so, whether it should be reduced to a lower percentage (*e.g.,* 20%).	without differentiation, is likely to be satisfied in every case solely by the privileged creditor, allowing that creditor to exercise greater power over the proceeding, to the potential detriment of other creditors without privilege.	
Sustaining Business Operations		
Special attention needs to be given to assure that creditors who lend money to the debtor post-opening are sufficiently protected, in order to induce them to lend. The law as written is not sufficiently specific about giving an express first priority claim to such lenders if they are still owed money after resort to their collateral. The priority claim for such lending must also be recognized and paid under any plan of reorganization, ahead of pre-opening claims.[34]	Cash flow is vital to a successful restructuring of a debtor in financial difficulty. Unless appropriate protections are put in place, it will be difficult to find lenders willing to lend to debtors in an insolvency proceeding.	Urgent
The exceptions to the stay should be reconsidered, especially with regard to post-petition creditors.[35]	Discourage creditors from racing to enforcement, instead of negotiating a workout. Assure availability of post-petition financing. Prevent erosion of the fundamental principle of insolvency, i.e. its collective nature.	Urgent
Contracts		
Clarify that a counterparty to a contract only has a priority claim for claims	Excessive priorities undercut the principle of equality of distribution, and discourage creditor	Medium Term

[34] We are advised that the 2014 Insolvency Code now provides that a plan must recognize and pay such claims in accordance with their priority.

[35] We are advised that the new Insolvency Law of 15 April 2014 has removed this exception to the moratorium, with regard to post-petition creditors.

attributable to post-opening services.	participation and confidence in the process. Parties who continue to extend credit to a debtor during insolvency, however, are entitled to priority treatment, to encourage that cooperation.	
Avoidable Transactions		
Confirm whether paulianic actions can only be brought in the insolvency case, and not be an individual creditor	Such remedies should, upon insolvency, benefit all unsecured creditors, not just one creditor, in order to support the principle of equality of distribution.	Medium Term
Priorities		
Post-petition loans need to be accorded a clear priority for any portion that is unsecured.	Post-petition lending is essential to support the cash flow of a troubled debtor seeking to reorganize. Every effort to assure this lending is paid before other creditors is needed, in order to induce the extension of such credit. The priority must be honored in reorganizations as well as liquidations, unless the lender itself agrees to different treatment.	Urgent
The separate class for "unsecured creditors, including bondholders" needs to be combined with the class immediately above it.[36]	Bondholders are a significant source of capital financing for companies. Normally bond debt is unsecured debt, paid *pari passu* with other unsecured debt. This provision must be amended because it now *subordinates* bond debt to most other unsecured debt in insolvency. Such a provision will tend to discourage bond debt issuance in Romania. It also violates the principle of equality of distribution.	Urgent
Claims Resolution		
Consider further streamlining the claims resolution process by relieving the judicial administrator of the obligation to affirmatively	It is the creditors who have the most to gain by reviewing other claims, and objecting only to those that are obviously flawed. Similarly, a claim that has appropriate documentation should be considered presumptively	Urgent

[36] We are advised that the new Insolvency Law of 15 April 2014 has resolved this problem.

ratify the legitimacy of every claim.[37]	valid until it is challenged by a creditor. This procedure would reduce costs.	
Expand the time frames for how long creditors have to file claims, to avoid having to ask the court to always expand them. The draft law set the minimum notice at only 10 days.	Often, a very short deadline has the effect of causing delay because the deadline is not realistic and so is continued routinely by the court. Extending the deadline to a more realistic time frame is likely to lead to fewer continuances, and so speed up the process.	Urgent
Reorganization Procedures		
Voting Procedures – Consider re-examining the classification and class percentage aspects in the reorganization phase, with a view to adapting them to the legal and economic needs of Romania.	Classes of creditors help to assure that the unique interest of different creditor constituencies are fairly represented. Setting the percentage for class approval correctly makes the process less prone to abuse.	Urgent
Plan Term – Further consideration ought to be given to whether the maximum term of a plan is sufficient to permit a real restructuring of debt.[38]	The current outside limit is still short, especially for long term loans with privileges. It may also not be appropriate for bondholders, who might agree to a rescheduling of their debt as opposed to a straight default. Longer terms should be permitted if creditor classes support them, and if they are considered fair by the judge who reviews the plan. If necessary, exception could be carved out for special creditors	Urgent

[37] We are advised that this issue has been addressed in part by the 2014 Insolvency Code, which affords a presumption of validity to claims as filed.

[38] We are advised that the 2014 Insolvency Code has extended the permissible term of plans to three years, with the possibility of an additional year extension. This is welcome, but does not address the question of giving greater flexibility to manage long term debt.

	(such as taxing authorities).	
Court Organization		
It is suggested that reviews regarding the status of the proceeding might be unnecessary, and could be better prepared by the judicial administrator in any event.[39]	As a rule, judges are better suited to decide matters than they are to supervising or administering. Because they tend to be removed from the day to day activity of the debtor and other players, they are not in a good position to supervise operations or to report on progress. Administrative tasks are better assigned to the judicial administrator.	Urgent

Administrative

Key recommendation	Impact	Urgency
Creditor rights		
The system for registration of real property is in need of critical improvements and in this respect regard may be given to the way the registry for interests in movable operates in the country. Particularly, moving the land registry records to a central, electronic database is crucial, and might benefit from being speeded up.	The land registry plays a significant role in the creditor right system. Making it more efficient would reduce costs associated with the creation and registration of interests in realty making such credit instruments more effective and attractive.	Urgent
The auction process should be strengthened, with the assets fully exposed to the relevant segments of the market, and with an obligation on those conducting the auction to make all reasonable efforts to realise fair market value. Inclusion of penalties for	Strengthen the claim enforcement system and build confidence among credit providers, resulting in reduced borrowing costs.	Urgent

[39] We are advised that the 2014 Insolvency Code now assigns the task of preparing this report to the judicial administrator. The report is submitted to the court for its review, but does not require a hearing.

failure to fulfil these obligations may be considered.		
An online unified auction platform should be created as a complement to current auction notification processes, to provide optimal market exposure to the assets for sale and to enable better realisation of such assets.	This would further strengthen the claim enforcement system.	Medium term.
Risk management		
The performance of the Credit Bureaus should be strengthened. In particular the private creditor bureau (which covers more individuals) should undergo urgent improvements including by extending the period covered by the reports to at least 5 (but no longer than 7) years and by enabling the participation of non-financial repeat creditors, such as utilities.	Allow creditors to better calculate their risks and debtors to obtain credit on better terms.	Urgent
The Credit Registry could be improved including by preparing for the benefit of the bank supervisory authorities regular periodic reports of supervisory value.	Allow creditors to better calculate their risks and debtors to obtain credit on better terms.	Medium term
Insolvency framework		
Consideration should be given to reducing unnecessary hearings and unnecessary reports by the judge. Attention should be given especially to the need for post-plan reports. Maximizing the use of technology to minimize paperwork is also worth examining.	In general, judges should not be administrators of cases. They have too little information to do the task well, and they are not trained for that task in the first place. Judicial administrators, on the other hand, are trained to perform these functions. This allows the judge to perform proper judicial functions in a timely manner.	Medium term

Regulatory

Key recommendation	Impact	Urgency
Risk management and corporate workouts		
Whether through amendment to NBR Regulation No. 11/2011 or otherwise, the National Bank should urgently consider providing further and specific binding guidance to address situations where a facility is impaired and/or subject to a replacement operation.	Stricter scrutiny and oversight of the treatment of NPLs would speed up their effective resolution. The improvement in portfolio quality will also bring some degree of relief to banks' profitability and in turn it will help with the recovery of sustainable private sector credit.	Urgent
The National Bank and the Bankers' Association should give consideration to the more active promotion of standard form lending documents.	Incentivise participation in workouts and speed up distressed debt resolution.	Medium term
The National Bank should take a leadership role and encourage financial institutions involved in multi-lender distress scenarios to make use of the Guidelines on Out-of-Court Corporate Debt Restructuring.	Encourage financial institution to use the workout Guidelines, which will in turn benefit all relevant stakeholders. It could speed up distressed debt resolution, avoiding entering into prolonged insolvency proceedings.	Medium term
Insolvency framework		
Assure that judicial administrators are appropriately trained and adequately supervised.	Judicial administrators play a central role in the insolvency law. Their integrity, competence, and honesty must be assured. They must be paid well, but they must not be overpaid. Ideally, an agency of the government would set and enforce standards, and would monitor compensation.	Medium term
Urgent consideration should be given to strengthening	Diminish malpractice; build debtor and creditor confidence in the	Urgent

the Code of Conduct applicable to insolvency practitioners to enforce their duties of independence and impartiality.	insolvency system; encourage proper use of insolvency procedures.	
The creditors' committee should be better enabled to approach the court with jurisdiction over the case if it has reason to believe that the insolvency practitioner is engaged in misfeasance or nonfeasance, and should also be provided better access to a low-cost professional complaints procedure facilitated by but independent from the Union.	Strengthen the mechanisms for detecting insolvency practitioners' mal practice; increase creditor and debtor confidence in the insolvency system which is currently lacking.	Urgent

Capacity Building and effective implementation of the laws

Key recommendation	Impact	Urgency
Creditor rights		
Steps should be taken to effectively implement the law on late payments to transactions involving local authorities.	Increase of cash-flows of businesses, SMEs in particular.	Urgent
Consideration should be given to reviewing the capacity of the court system to effectively implement the New Code of Civil Procedure.	Increase efficiency of the claim enforcement process.	Urgent
Insolvency Framework		
Concerted efforts are required to recruit to the specialist insolvency bench individuals with appropriate expertise in commercial legal matters, particularly insolvency.	Increase confidence of users of the insolvency system and ensure that insolvency disputes can be addressed appropriately and more speedily, avoiding destruction of value during the process. As a result	Urgent

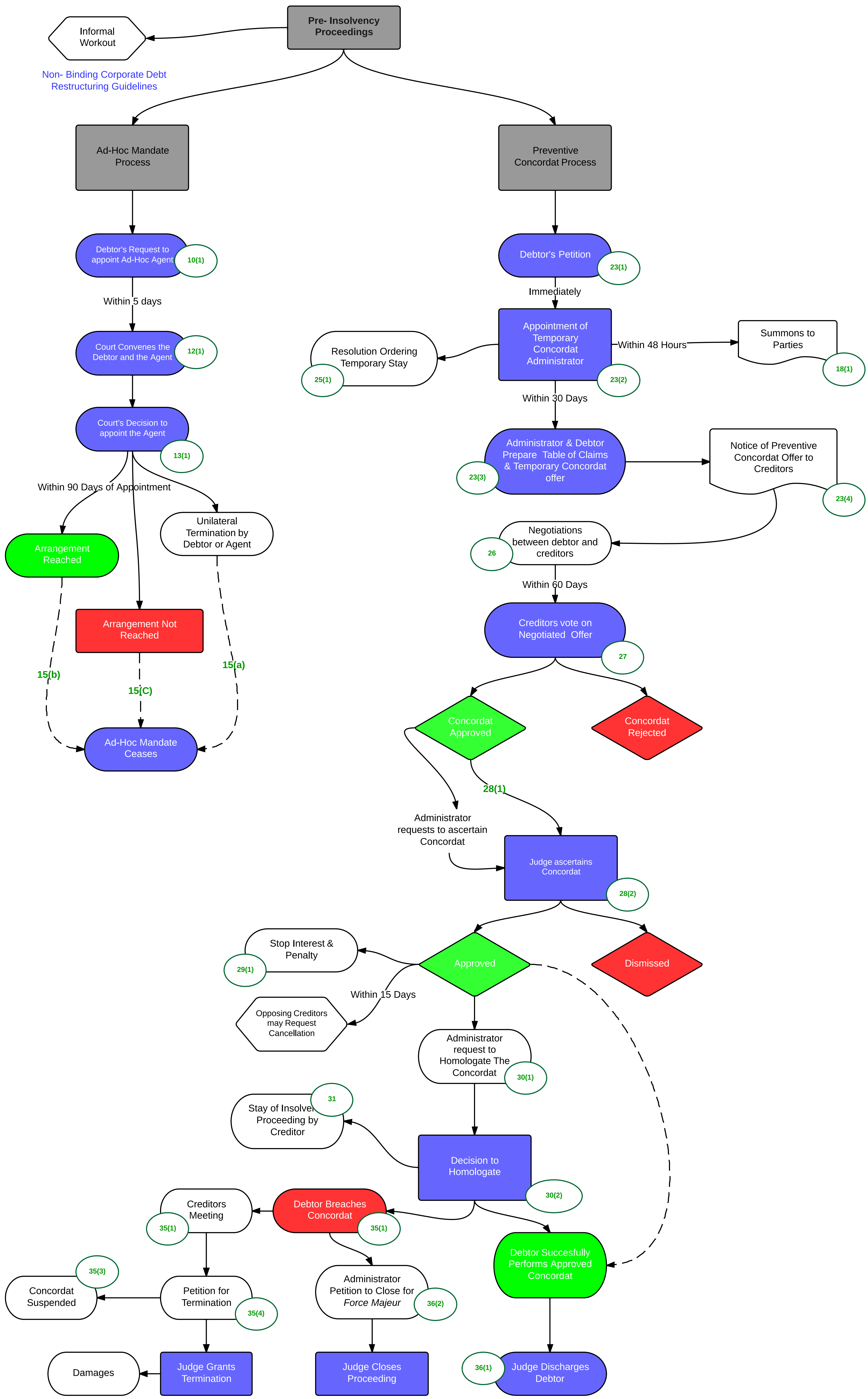
	wealth will be maximized and jobs may be preserved.	
Consideration should be given to increasing the number of judges in currently overburdened insolvency tribunals.	Speed up the insolvency process.	Medium term
Consideration should be given to enhancing the efficacy of the specialised insolvency judicature through extending it to regions currently lacking it but where need is demonstrated; and by ensuring that appellate tribunals hearing insolvency matters have at least one judge with directly relevant prior insolvency expertise.	Improve the insolvency process; increase confidence of users of the system across the country; enhance consistency of outcomes.	Medium term
General		
The National Institute of Magistracy should consider ways of strengthening its course offering to cover basic elements of accounting, finance and economics.	Allow judges to deal with complex commercial and insolvency cases effectively.	Urgent
To the extent practicable, administrative tasks currently performed by judges should be assigned to judicial officials.	Make better use of the courts' human resources.	Medium term
Consideration should also be given, by institutions responsible for advocacy and magistracy training, to encourage courts to request, and lawyer advocates to cite, judgments of courts in previous cases addressing matters material to those in dispute in the present case.	Enhance the degree of uniformity of judicial decision-making and thus the predictability of commercial litigation.	Medium term
Consideration should be given to ensuring that all	Increase transparency and consistency of decisions;	Urgent

(and not selected) reasoned judicial decisions are published.	make outcomes more predictable; increase creditor and debtor confidence in the system.	

36 The World Bank's Bucharest Office and the Bank's Global Initiative on Insolvency and Creditor/Debtor Regimes stand ready to assist the Romanian authorities in implementation of the recommendations in this Report.

2013 Romania Draft Insolvency Law

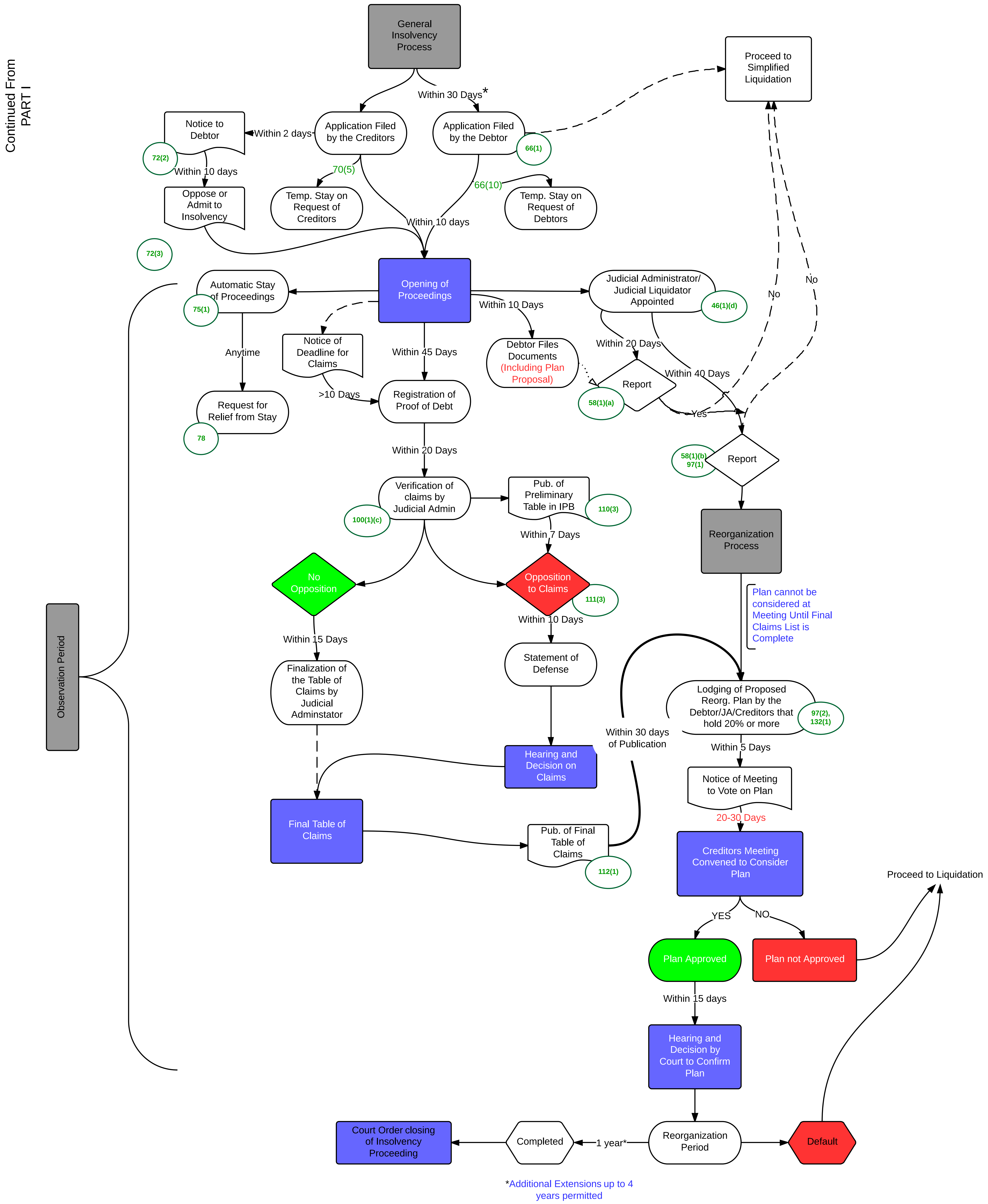
PART I



2013 Romania Draft Insolvency Law

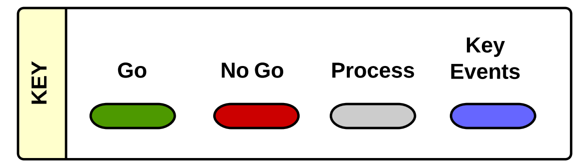
Part II

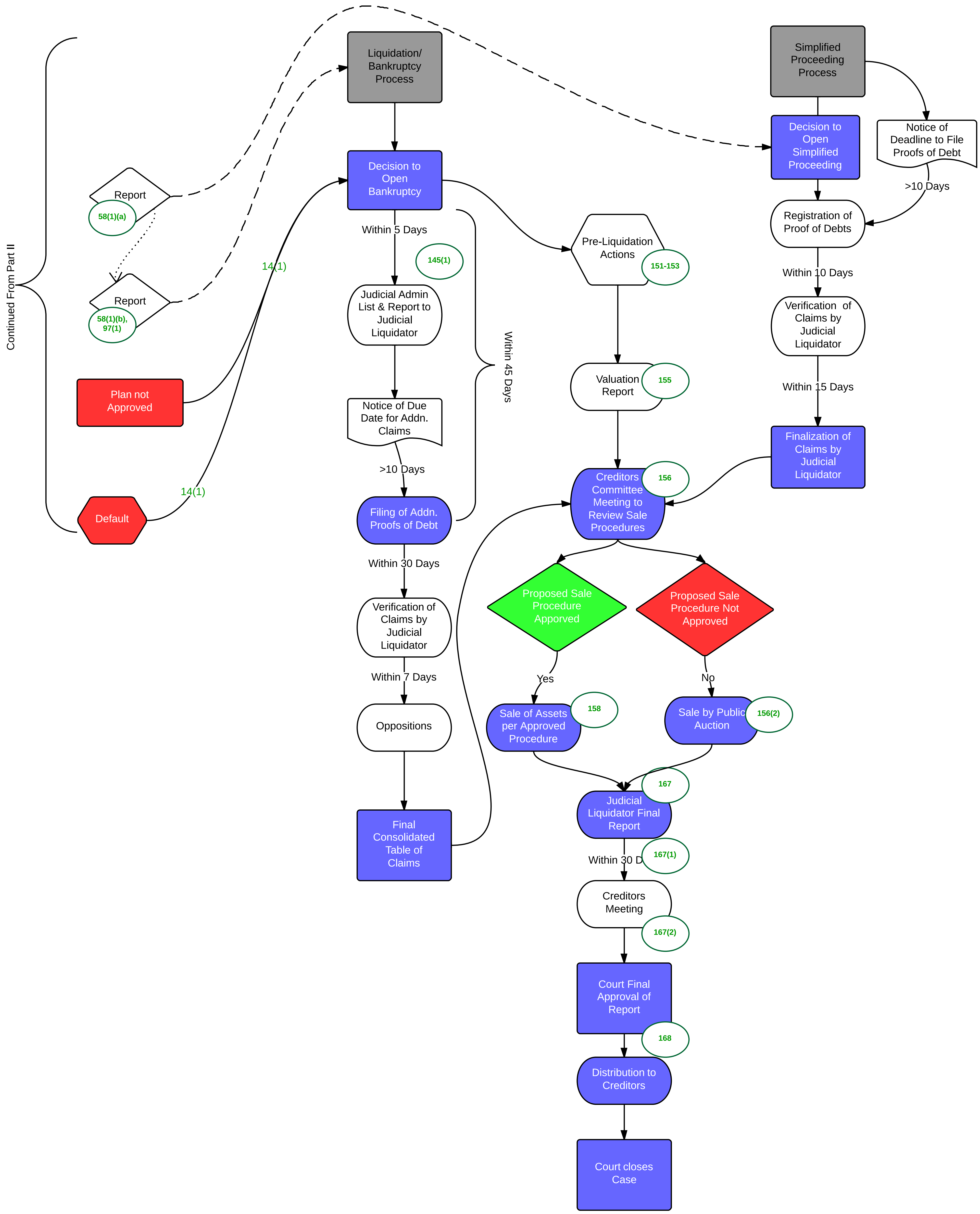
KEY: Go | No Go | Process | Events



2013 Romania Draft Insolvency Law

PART III





ANNEX I: PRINCIPLE BY PRINCIPLE ASSESSMENT

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	PART A. LEGAL FRAMEWORK FOR CREDITOR RIGHTS
Principle A1	**Key Elements** A modern credit-based economy should facilitate broad access to credit at affordable rates through the widest possible range of credit products (secured and unsecured) inspired by a complete, integrated and harmonized commercial law system designed to promote: • reliable and affordable means for protecting credit and minimizing the risks of non-performance and default; • reliable procedures that enable credit providers and investors to more effectively assess, manage and resolve default risks and to promptly respond to a state of financial distress of an enterprise borrower; • affordable, transparent and reasonably predictable mechanisms to enforce unsecured and secured credit claims by means of individual action (*e.g.*, enforcement and execution) or through collective action and proceedings (*e.g.*, insolvency); • a unified policy vision governing credit access, credit protection, credit risk management and recovery, and insolvency through laws and regulations that are compatible procedurally and substantively.
Description	**General Overview of the Legal System** In 2010, Romania marked the beginning of a third decade since the material political transformations of its government system in late 1989. The 1990s witnessed a period of constant change for the country's political and economic organization, marking its evolution from a state-controlled to a market economy. Political turmoil, economic downturn and social convulsions severely impacted all major sectors of the economy, resulting in significant business default and unemployment rates. Romania is a civil law jurisdiction, and for 150 years and until very recently, its legal system largely relied on an adjusted version of the French Napoleonic Code. In addition, a "dual" system was implement such that the interactions between and amongst organizations engaging in lucrative businesses (generally called "merchants") were governed by a full body of additional, more flexible, rules, codified in 1887 into a Commercial Code inspired by the Italian *Codice di Commercio* of 1882. After 1989, specific legal instruments required to support a free market were incorporated gradually into the Romanian legal framework, permitting the free organization and functioning of commercial enterprises (Law No. 31/1990), credit organizations (Law No. 33/1991, now repealed), insurance undertakings (Law No. 32/2000), and the financial markets (Law No. 52/1994, now repealed). In 1999, Romania abandoned its old and rigid possessory pledge system for personal property and moved to a modern, non-possessory security interest system, coupled with the implementation of a freely accessible electronic database for the registration of security notices. In parallel, specific laws and regulations were passed to unify and modernize the mortgage registration system, and to facilitate the development of the mortgage-based financial products and the primary and

secondary mortgage market. Particular laws and regulations were also adopted to address the specifics of the security interests created in financial assets and their special treatment in an insolvency context.

In 1995, a new corporate insolvency framework was enacted, inspired in part by the US Bankruptcy Code, which, in particular, introduced the concept of "reorganization". The Insolvency Acts were consecutively amended several times, and completely replaced in 2006 by a new law. Alternative mechanisms aimed at encouraging the restructuring process were adopted in 2009 and 2010, viz., the Scheme of Arrangements and Ad-Hoc Mandate Act, together with a set of non-binding guidelines called Corporate Debt Restructuring Guidelines, promoted by the National Bank of Romania, Romanian Ministry of Public Finance, and Romanian Ministry of Justice.

An insolvency law was passed on 2 October 2013 through an emergency government decree (Emergency Govt. Ordinance No. 91/2013), and became effective on 25 October 2013. It embodied in one piece of legislation pre-insolvency alternative mechanisms, the general rules applicable to the insolvency process, the special rules applicable to credit institutions, insurance and re-insurance companies and the regulation of cross border insolvency. Comments relating to this insolvency law are provided in Annex II. The emergency ordinance was declared unconstitutional and it ceased to be applicable from the date the decision of the Constitutional Court was published in the Official Gazette (1 November 2013). Thereafter, the government returned to drafting a new insolvency law, addressing the constitutional concerns and making further refinements. A new Insolvency Code was enacted by the Parliament on 15 April 2014.

This report does not review the newly enacted Code, though it provides some references and indication of issues (identified in the Report) which seem to have been taken on board in the new law. For ease of reference, throughout this report, the law that was enacted by Emergency Ordinance, and which was later declared unconstitutional, will be referred to as "the 2013 Draft Insolvency Law," as the comments in Annex II were prepared in response to a draft form of that legislation prior to its enactment by emergency decree. The insolvency law enacted on 14 April 2014 will be referred to throughout this report as "the 2014 Insolvency Code."

The New Civil Code (Law no. 287/2009) came into force on 1 October 2011, marking the culmination of an extensive effort to rejuvenate this part of the legal system. The new legislation, which only applies to transactions concluded after 1 October 2011, abandons the old separation between "merchants" and "non-merchants" and consolidates the "merchant" rules and court practice into the new body of law. It also introduces certain changes with respect to the legal framework governing the creation, perfection, and enforcement of security interests in both real and personal property.[1]

The enforcement of secured and unsecured claims through individual action is currently governed mainly by the New Code of Civil Procedure and several additional pieces of legislation (the most notable featuring the Romanian Code of Fiscal Procedure). The vast majority of provisions of the New Code of Civil Procedure came into force on 15 February 2013[2] (see Law No. 76/2012, as subsequently amended by the Emergency Government Ordinance No.44/2012 and

[1] Throughout this Report all descriptions and references to legal institutions are made to the New Civil Code, in effect since October 2011. Most of the security interests presently in existence were created and perfected under the prior rules of Romanian law, and continue to generate effects after the entry into force of the New Civil Code, mainly pursuant to the old rules.

[2] Proceedings which were on-going before the entry into force of the New Code of Civil Procedure are governed by the old rules.

the Emergency Government Ordinance No.4/2013 and Law No. 2/2013).

The Financial System

Overview

The financial system, dominated in the 1990s by state-owned banks, encountered major challenges due to a mix of factors including high inflation, constant and rapid devaluation of the national currency, and an unprecedented increase of non-performing loans on the banks' balance sheets. The first problems arose in 1995 with some of the largest private banks, Dacia Felix and Credit Bank, and in 1996 with Columna Bank. They were slowly isolated and finally went bankrupt. The crisis peaked in 1999 firstly with the insolvency of two small banks, Banca Albina and Bankcoop, then with problems at two large state-owned banks, Bancorex and Banca Agricola, which accounted for 25% and 20% of aggregate banking assets, respectively. Rescue efforts consisted in clearing the banks' balance sheets from non-performing loans via their transfer to a newly established Government Agency, the Office for the Recovery of Bank Assets, later transformed into the Bank Asset Recovery Agency. As a result of such measures, the major performing assets of Bancorex were acquired in 1999 by another state-owned bank, Banca Comerciala Romana, while Banca Agricola was acquired in 2001 by an Austrian banking group, Raiffeisen Zentralbank Oesterreich.

Currently, the banking system is synchronized with its counterparts in the other Member States of the European Union ('**EU**'). It consists of both locally incorporated credit institutions and branches of credit institutions incorporate in foreign jurisdictions, within and beyond the EU. In addition to the credit institutions, which are authorized to provide a full scope of credit services, there also exists a whole host of "non-banking financial institutions", which can provide similar services but which are not allowed to accept deposits.

Range of Credit Instruments

Regulatory considerations

Pursuant to Romanian law, the business of general lending can be pursued in Romania on a professional basis solely by those entities duly authorized as either "credit institutions", "financial institutions" or "non-banking financial institutions".[3] Such apparently restrictive language creates doubt with respect to the ability of private equity funds, distressed investment firms, and similar entities that do not technically meet the "financial institution" criteria, of extending finance in Romania through debt or hybrid instruments. It also raises some legal questions with respect to the ability of corporate groups to provide intra-group debt finance to their group members.

Corporate lending

Credit instruments devised for corporate borrowers include syndicated loans, credit lines, trade finance, factoring, leasing and bank letters of credit. A sizeable proportion of the long-term financings granted in Romania is documented in the Loan Market Association ('**LMA**') standard fashion, and are frequently governed by either New York or English law. However, an increasing proportion of such documents are governed by German, French, or Austrian law, or indeed, by Romanian law. Romanian banks and law firms have tried to craft LMA-styled

[3] Defined by Article 2 of Law No. 93/2009.

forms and precedents adapted to Romanian law. Because litigation involving issues related to bank corporate lending has been limited until 2008, a wide range of legal issues remain unsettled and court practice is fragmented or lacking. In particular, it is not clear whether LMA documents have ever been tested in Romanian courts.

Consumer lending

Consumer debt witnessed a rapid expansion in the 2000s with the development of credit cards, store cards, automobile finance, personal loans, retail loans, and mortgages. Specific legislation was adopted in order to address the growing needs and sophistication of home mortgage financing.[4] However, the credit market in Romania was severely affected by the financial crisis of 2008, in parallel with the housing construction industry, which adversely impacted on both corporate and retail lending numbers.

As a potential counterbalance to the steep decline in credit, the Romanian Executive sought to help strengthen the Romanian housing market, to keep money flowing to mortgage lenders and to support affordable homeownership through the development of a national home mortgage loan program, called "First Home" (*Prima Casă*). Prima Casa Home Mortgage Loan Program is a format designed especially for first-time home buyers of moderate or low income, which enjoys a guarantee from the Romanian Government, through a State Owned Fund, *i.e.*, *Fondul Naţional de Garantare a Creditelor pentru Întreprinderi Mici şi Mijlocii* (the '**Fund**').[5] The structure of the program, its particular features, and the specific relationships between the Fund and the select lending organizations accepted in the program are governed by a specially-designed legal framework encompassing a series of statutes, rules and regulations.[6] The legal framework deviates, in pertinent respects, from the general legal framework governing home mortgage loans in Romania, particularly with respect to the assignability and tradability of such home mortgage loans. Certain restrictions apply to the assignment and trading of the relevant types of loans granted under the program, which narrow the scope of the potential original investors in such loans and the potential of a secondary trading market for portfolios of such loans.[7]

Non-recourse loans have never been a traditional item on the Romanian banks' menu. As consumer lending mainly developed over a limited period from early 2000s until 2008 and because of rather tight lending regulations issued by the National Bank of Romania, banks in practice offer only recourse loans. The New

[4] *See* Mortgage Loan Act No. 190/1999 on mortgage loans for real estate investments, published in the Romanian Official Gazette No. 611 of 14 December1999, as subsequently amended; *see*, *also*, Act. No. 31/1996 on securitization; Act No. 32/2006 on mortgage bonds, Act. No. 33/2006 on mortgage banks.

[5] Prima Casa has been structured on a season-like basis, and it has already gathered four seasons. The first three seasons featured a 100% State guarantee for the relevant mortgage loans, while the fourth (last) season presented only a 50% State guarantee.

[6] The list of statutes and regulations that are applicable in Prima Casa program includes: (i) Government Emergency Ordinance No. 60/2009 on several steps for implementing the "Prima Casa" Program, published in the Romanian Official Gazette No. 381 of 4 June 2009, as further amended ("Prima Casa Law"); (ii) Government Resolution No. 717/2009 approving the Rules implementing the "Prima Casa" Program and the Eligibility Criteria for lenders and borrowers under the Prima Casa Program, published in the Romanian Official Gazette No. 418 of 18 June 2009, as further amended; (iii) Minister of Finance Order No. 2225/2009 sanctioning the Arrangement implementing the "Prima Casa" Program and the related Guarantee Arrangement, and approving other necessary measures for the application of Article 10 in Annex 1 to Government Resolution No. 717/2009, published in the Romanian Official Gazette No. 469 of 7 July 2009, as further amended.

[7] Under Article1 (32) of Prima Casa Law, which was only introduced in April 2011, the eligible lenders participating in the program may assign the loan receivables derived from mortgage loans under the program exclusively to other eligible lenders. This rule seems to represent a public policy provision, which does not contractual modification. Accordingly, a non-eligible lender does not qualify for a direct transfer of such receivables. However, in the absence of any similar restrictions vis-à-vis the creation of security interests in such receivables, a non-eligible investor would still qualify for taking a security interest in the relevant receivables; provided, however, that to the extent such investor were to foreclose on the collateral, it may not acquire title to the receivables via strict foreclosure or other mechanism.

Civil Code does, however, open the door to non-recourse loans as a special type of consumer loan.[8]

Secured Transactions

Overview

Under Romanian law, creditors may take personal or real security, by way of contract, by operation of law, as a judicially granted remedy, or as tax lien.[9] A creditor can also benefit from quasi-security mechanisms that are aimed at fulfilling a similar function.

Contractual Security

General Considerations

As a general principle of Romanian law, a debtor's personal obligations are secured by all its property, both present and future, and both movable and immovable, save only that property which the law declares inalienable.[10] At any given time, the benefit of such floating 'security' is jointly shared *pari passu* by all unsecured creditors of the debtor and is called *the joint security of all unsecured creditors* (*gajul general al creditorilor chirografari*).

In addition to such nominal 'security', creditors may severally benefit from personal or real security granted by their debtor or third parties. Personal and real securities are mainly governed by Book V of the New Civil Code, Title X (Personal Security) and Title XI (Preferences and Real Security).

As a matter of principle, personal or real security and the legal instruments that create it are legally dependent upon the underlying obligation to be secured, except for independent guarantees.[11] Thus, in principle, termination of an obligation secured by a security interest extinguishes the attendant security, unless the parties provide otherwise.[12]

Under Romanian law, it is not clear yet whether personal security may be granted unilaterally by its grantor through an instrument to which the grantor is the single party. It is not clear either whether security can be granted through a will.

Conversely, a real security may only be granted by agreement or as a matter of right, by operation of law.[13]

As a general rule, parties enjoy wide discretion to agree on what particular substantive national law is to govern a security agreement, and they are also free to decide, post-agreement, the changing of that law.[14] Accordingly, parties may choose the substantive law of a jurisdiction other than Romania as the governing law of their security agreement.[15] Furthermore, such parties may elect as governing law

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8 *See* New Civil Code, Article 2.325.

9 For ease of reference, unless distinctively indicated otherwise, this document refers to both personal guarantees and real security as "security" and to all instruments creating such "security" as security agreements.

10 *See* New Civil Code, Article 2.324.

11 *See* New Civil Code, Article 2.321 and Article 2.344.

12 *See* New Civil Code, Article 2.288.

13 *See* New Civil Code, Article 2.349 para. (2).

14 *See* Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (aka *Rome I Regulation*), Official Journal L 177, 04/07/2008 P. 0006 – 0016, Article3 para.1 (setting forth the freedom of choice principle). As a Member of European Union, Romania's legal framework includes the provisions of Rome I Regulation.

15 Ibid.

either the law of any EU Member State, or the law of a jurisdiction outside the EU (such as the federal law of the US or of the State of NY).[16]

The governing law may become important in the context of security agreements creating security interests in immovable property situated in Romania, the costs of which can be significant in practice if governed by Romanian law, due to mortgage recordation taxes and notary fees. If, for cost purposes, the parties consider electing the law of a foreign jurisdiction to govern their security agreement, the validity of such choice of law should in theory not raise special concerns. In practice, however, parties appear to invariably choose Romanian law as the governing law of their security agreements.

Personal security

The main categories of personal security recognized under Romanian law are (i) the suretyship; and (ii) the independent guarantee. The law also acknowledges a form of quasi-guarantee, referred to as a 'comfort letter'.

Suretyship (*fideiusiune*) binds the surety for another already bound, either in whole or in part, as for the other's debt, default or miscarriage. A surety does not put up one or more particular assets as security, but rather assumes responsibility for the debt obligation of a main obligor if that obligor defaults.

Independent guarantees, also known as demand guarantees or autonomous guarantees (*garanţie la cerere*), are instruments developed by bank practice and recently incorporated into the New Civil Code, constituting independent and unconditional promises to pay, which are payable upon the beneficiary's written first demand notwithstanding any defence related to any other underlying transactions. Proof of default is not needed and issuers are not concerned with the underlying contract nor can they raise any defence available to the underlying contracting party, other than manifest fraud or abuse.

Real security[17]

Romanian law acknowledges several forms of real security:

- a security interest in real or personal property, called mortgage, which may represent either
    - a mortgage over immovables or immovable mortgage (*ipoteca imobiliara*),[18]
    - a (mainly) non-possessory security interest in personal property called mortgage over movables or movable mortgage (*ipoteca mobiliara*, formerly acceptable mainly as a (possessory) pledge (*gaj cu deposedare*

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[16] *Ibid*, Article 2 (Universal Application), the text of which reads as follows: "Any law specified by this Regulation shall be applied whether or not it is the law of a Member State."

[17] Since a significant proportion of the rules are equally applicable to both security interests in immovable and movable property, a general overview of such rules are provided in this section. The rules that are specific or distinctive to either security interests in immovable or movable shall be addressed separately under their respective sections below.

[18] *See* New Civil Code, Article 2.377 *et seq*; *see*, *also*, Mortgage Loan Act No. 190/1999 on mortgage loans for real estate investments, published in the Romanian Official Gazette No. 611 of 14 December1999, as subsequently amended.

or amanet)), introduced by Law on Accelerating the Economic Reform No. 99/1999, Title VI (the '**Collateral Law**'),[19] and maintained under the New Civil Code, and

- a possessory security over movable tangible property or negotiable title documents, called pledge (*gaj*),[20] and

- financial collateral (*garanţie financiară*),[21] which is governed by distinct rules enacted to implement Directive 2002/47/EC on financial collateral arrangements (the "Financial Collateral Directive").[22]

Scope of security

As a general rule, Romanian law permits the creation of security interests in any type of property save for property that is regarded by law as inalienable. Such cases of inalienability are usually grounded in public policy considerations. Traditional inalienable property is public property, *i.e.* property that belongs to the public domain (either national or local), and may therefore not be transferred, encumbered, charged, or subject to the rules of adverse possession.[23] The usual consequence of a transfer breaching such restrictions is that such transfer is regarded as void and subject to rescission, and so would be a creation of a security interest in that category of property.[24]

Other situations where property may be regarded as inalienable involve a personal want of legal capacity of a particular individual or entity, or group of individuals or entities, of either disposing of or acquiring legal title to a specific type of property. For instance, some foreign nationals are restricted (entirely or in part) from acquiring full ownership title to certain categories of land located in Romania.[25] Some categories of individuals or entities are prevented from acquiring legal title to certain property from some categories of transferors (irrespective of the nationality of such parties, and sometimes irrespective of whether the acquisition would be for or without consideration).

The usual consequence of a transfer breaching such restrictions is that such transfer is regarded as either void or voidable (depending on the nature of the interest that is protected by law, *i.e.* public policy, or private interest) and subject to rescission. Nevertheless, the creation of a security interest in a piece of property in a situation involving such circumstances is, as a general rule, permitted, and only the subsequent acquisition of title to that specific property via strict foreclosure or credit bidding is either prohibited or subject to particular scrutiny.

A second category of situations that entail inalienability is represented by contractual inalienability clauses.[26] Assuming such clauses meet the validity test under Romanian law, property with respect to which an inalienability covenant exists is amenable to the creation of security interests therein. However, in a

[19] *See* Law No. 99 dated 26 May 1999, published in Official Gazette of Romania No. 236, dated 27 May 1999, Title VI, as subsequently amended. Collateral Law was repealed by Act No. 71/2011 on Implementing the New Civil Code; *see, also*, New Civil Code, Article 2.387 *et seq*.
[20] *See* New Civil Code, Article 2.480 *et seq*.
[21] *See* Government Ordinance No. 9 dated 22 January 2004, published in Official Gazette of Romania No. 78, dated 30 January 2004, as subsequently amended.
[22] *See* Directive of the European Parliament and of the Council No. 2002/47/EC, 2002 O.J. (L168), p. 43, as subsequently amended.
[23] *See* Romanian Constitution, Article 136, para. 4, Public Property Act No. 213/1998 (now repealed) and Article 861 of the New Civil Code.
[24] *See* New Civil Code, Article 2.351 para. (1).
[25] Act No. 312/2005 on foreign or stateless nationals' acquiring ownership title to land in Romania.
[26] The length in time for a inalienability clause is limited by law to 49 years; *see* New Civil Code, Article627 para.(1)

situation like that, the security interest is regarded as a future interest, *i.e.* it will vest in its holder at the moment when the inalienability clause is rendered ineffective (by the passage of time or otherwise).[27]

A security interest may be created in a broad range of property, either tangible or intangible, present or future, and it may envisage individual property or pools of property (so called *universitas bonorum*), *i.e.* an accumulation of assets that are endowed with a certain purpose (either by law or by their legal owner).[28]

A real security agreement must contain several mandatory elements, *i.e.*:[29]

- the parties to the agreement, *i.e.*, the mortgagor and the mortgagee;
- the source of the secured obligation;
- a sufficient description of the mortgaged property;[30] and
- the amount that is secured by mortgage should be determined or reasonably determinable under the agreement.

Fixed and floating security

The concept of *floating security* emerged into Romanian law in 1999 in the Collateral Law, which combined the philosophy behind Article 9 of the US Uniform Commercial Code with some of the concepts developed under the 2001 UNIDROIT Convention on International Interests in Mobile Equipment.[31]

Prior to the enactment of the Collateral Law, taking a security interest in the "entire business concern" (*fondul de comert*) was the only possibility permitted under the Romanian Commercial Code that came close to resembling the concept of the floating charge. Case law provided little guidance, and the utility of such legal device had been frequently questioned.

In contrast with the security attached to individual pieces of property, far more popular in Romanian practice, the Collateral Law permitted a creditor to secure its claim by taking a security interest in the universality of personal property, present and future, of a chargor.

The novelty of the concept and the unfamiliarity of the Romanian courts with the relevant English or US case law have led, however, to significant debates with respect to the exact limits of the secured rights under a floating charge under Romanian law. These debates have included such issues as:

- the acceptance of crystallization as an event that would freeze the contents of the pool of assets and the exact consequences of such event;
- the ranking of a floating charge against a subsequent competing creditor holding a fixed security interest created in an individual item of property, particularly in a scenario where the chargor is subject to insolvency

[27] *See* New Civil Code, Article 2.351 para. (2).
[28] *See* New Civil Code, Article 541, Article2.357 and Article 2.368.
[29] *See* New Civil Code, Article2.372.
[30] *See* New Civil Code, Article 2.372 para.2 and Article 2.391. A mortgage over a bank account must identify with precision the bank account. A statement indicating that the security interest is created in all mortgagor's assets, or in all its current and future assets does not represent a sufficient description for such purpose. This is in contrast with Collateral Law, which permitted general descriptions of this nature.
[31] *See* Collateral Law, Article 10(3).

proceedings;

- the extent of control of the holder of a floating charge over the chargor's assets and business during the life of the floating charge;
- the statutory limitations or restrictions that may ensue where floating charges are created by individuals over the universality of their property;
- the corporate formalities for creating a floating charge over the universality of the assets of a company; and
- the banking and competition regulatory issues that may ensue subsequent to taking a floating charge over a company's assets.

The New Civil Code (which repealed the Collateral Law) seems to provide several statutory responses to some of these issues. A security interest in a pool of assets may only be granted with respect to the property of a business, no matter the form under which the business is carried out.[32] A security interest in a pool of assets continues to exist over the pool even if individual assets exit such pool or cease to exist. However, the law conditions the continued existence of the security interest over such pool on the replacement within a reasonable period of the exiting assets.[33] By exiting the pool, an asset is no longer subject to the security interest; however, an aggrieved creditor may nevertheless challenge the transfer of the individual asset via an avoidance action (*acţiune revocatorie or pauliană*) based on fraud (either actual or constructive).[34] The law establishes rules of priority between security interests created in individual assets, on the one hand, and over a pool containing such assets on the other.[35]

Also, if a "commercial concern" includes realty, taking a security interest in the "commercial concern" must also involve taking an immovable mortgage over the realty therein.

Scope of secured obligations

Any type of lawful obligations, present or future, can be secured under Romanian law. Imperfect obligations (*obligaţii naturale*), such as those that are not enforceable due to the expiry of the relevant statute of limitations, or due to incapacity of the obligor, can also be secured.[36]

Statutory security

Liens (charges or interests created by virtue of law to secure certain claims)

Security may also be granted to certain categories of creditors as a matter of law (*i.e.*, automatically as a matter of right). Such security is called lien or statutory mortgage (*ipotecă legală*) and arises by virtue of the nature of a particular obligation.

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[32] *See* New Civil Code, Article 2.368. Accordingly, a security agreement purporting to create a security interest in such pool of present and future assets owned by an individual would seemingly be regarded as illegal and void.
[33] *See* New Civil Code, Article 541 and Article 2.357 para. (2). It is unclear why the law imposes such condition, but most likely the parties to the security agreement may contractually alter this default rule.
[34] *See* Act No. 71/2011 on Implementing the New Civil Code, as subsequently amended and modified, Article 160, and New Civil Code, Article 1562-1565. The transfer can also be challenged under Insolvency Act by an insolvency trustee or, absent trustee's action, by the creditor committee in insolvency.
[35] *See* New Civil Code, Article 2.424.
[36] *See* New Civil Code, Article2.288.

Currently, statutory liens involve mostly immovable property (such as items (i) – (iv) below) or both movable and immovable property (item (v) below):

the unpaid vendor's lien over the land for the purchase price;

the lien of a holder of an option to purchase an interest in immovable property over that interest, for the part of the purchase price advanced to the seller;

the lender's lien over an interest in immovable property the purchase of which has been financed by such lender;

the vendor's lien over the land, where the consideration for sale consists of the vendee's duty to provide maintenance support to the vendor;[37] and

tax (also called fiscal or budgetary) liens.

Possessory Liens

A possessory lien (*drept de retentie*) constitutes another type of statutory lien that is conferred upon certain categories of creditors by virtue of the specific nature of their relationship with the counterparty, and represents a passive right to retain (but not sell) property until the debt or other obligation is discharged.[38] It refers to a purely possessory form of security interest; if possession of the property is lost other than by illegal use of force, the lien is released.[39]

Due to its possessory nature, a possessory lien is simply perfected by maintaining possession of the collateral. A lien holder may not object to an enforcement commenced by another competing creditor with respect to the relevant property, but the lien holder participates in the distribution of proceeds according to its ranking as at the moment when possession commenced.

Judicial Liens

It is possible under Romanian law that courts may impose upon a party a duty to provide personal or real security to guarantee certain obligations of that party.[40]

Tax Liens

Tax or related claims are usually unsecured. Nevertheless, such debt may become secured upon their holder's instituting a special injunctive relief procedure against particular realty or personal property of tax debtors, similar to the attachment of assets.[41]

Quasi-Security

General Considerations

Under Romanian law, parties may choose to structure a particular transaction in a

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[37] *See* New Civil Code, Article 2.386.
[38] *See* New Civil Code, Article 2.495 para (1).
[39] *See* New Civil Code, Article Article 2.499.
[40] *See*, *e.g.*, New Civil Code, Article 898 (establishing the possibility that courts may bound a trustee into providing suretyship or a real security), Article 2.281 (setting forth a general legal basis for courts to impose a suretyship on a party).
[41] *See* Government Ordinance No. 92/2003 (Code of Fiscal Procedure), as subsequently approved by statute, amended and modified, Article 154 para. 6 *et seq*. It should be noted that there is an entire set of rules governing the tax treatment under Romanian law, the description of which is, however, beyond the scope of this material.

	way that would afford an obligee with security, though without the creation of a traditional security interest. Such quasi-security mechanism would include: (a) retention of title clauses (*rezerva proprietății*); (b) repurchase agreements (*vânzarea cu pact de răscumpărare or acord repo*); and (c) assignment of receivables by way of security (*cesiunea de creanță cu titlu de garanție*). Under such security arrangements, the physical possession over the property, attended by the transfer of the legal title to such property, is conveyed to the transferee, yet the transferor (or the transferee, as the case may be) contractually retains an interest in such property. In order to perfect the transaction, particularly as against potential competing interests of third parties in the same property, the law requires that notice of the subject interests be recorded with the relevant public databases (such as the land registry or the Electronic Archive for Movable Mortgages).[42] *Retention of Title* As a rule, the transfer of property under Romanian law occurs upon conclusion of the agreement of the parties. However, the parties may agree that the transfer of property will only take place after all or part of the purchase price is paid. In practice, retention of title is more suitable for supply agreements and is not common for realty conveyance. From a practical standpoint, however, even retention of title to personal property may not preclude the seller from forfeiting title to the sold property. Since the purchaser may further dispose of the property to a good-faith third-party purchaser, the latter may benefit from a statutory allocation of risks that favours such purchasers over the sellers. In such a case, the seller may have no recourse against such third party purchaser for repossession of the property.[43] *Leasing* Leasing has been regulated since 1997 with the enactment of Government Ordinance No. 51/1997 ('**the Leasing Law**'), and lease finance was explicitly addressed by Government Ordinance No. 28/2006.[44] Leasing transactions are defined as transactions where the 'lessor' as owner transfers the right of use over an asset to the 'lessee' for a specified period of time not less than one year and in consideration of periodic instalment payments. Upon culmination of the lease period, the lessee has the options to purchase the asset, to extend the lease contract, or to end it. The lessee may also buy the leased assets over the course of the lease period so long as the parties agree and the lessee settles all its obligations. Leasing agreements and ancillary collateral arrangements have the force of writs of execution (see **Principle A5**, below). In order to ensure priority, leases must be registered with either the land or movable asset transaction registers (see **Principle A4**, below). The Leasing Law addresses both financial and operational leasing. *Financial*

[42] *See* New Civil Code, Article 2.347.
[43] It has been suggested that the underlying inalienability clause in the title document itself is automatically registered in the land book once the real estate publicity formalities are performed. Thus, an argument can be made that a third party's claim of good faith to defeat a retention of title provision may no longer have effect, such that any unauthorized alienation of the real property to such third party should not be possible. If the retention of title provision is clearly a matter of public record, and if the provision is sufficiently clear in barring alienation, then this problem noted in the text may no longer be the case. The answer depends in part on the rulings of the courts.
[44] Other relevant statutes and regulations include the Fiscal Code (Law No. 571/2003), read together with the Norms of the Fiscal Code (GD No. 44/2004) and Law No. 93/2009 regarding Non-banking Financial Institutions.

	leasing involves one of the following: (i) the risks and benefits of the ownership right vest in the lessee from the date of the leasing agreement; (ii) the leasing agreement expressly provides for the ownership right to be transferred to the lessee upon cessation of the leasing agreement; (iii) the lessee has the option to purchase upon expiry of the leasing agreement for a value that bears the same proportion to the asset's value at the start of the agreement as does the difference between the maximum normal period of use of the asset and the lease period to the maximum normal period of use of the asset; (iv) the lease duration exceeds 80% of the maximum standard life of the asset; and (v) the aggregate of the lease instalments less relevant expenses equals or exceeds the asset's value at the commencement of the agreement. *Operational leasing* is in effect defined as a lease transaction not meeting any of these conditions. Non-banking financial institutions are empowered to engage in financial and (under very limited circumstances) operational leasing activities (Law No. 93/2009). The law provides particular customs and tax rules regarding leases. Custom duties on imported/exported assets are calculated by reference to the residual value, which for these purposes may not be lower than 20% of the asset's initial value.[45] Instalment payments attract value added tax. The lessee under a financial lease and the lessor under an operational lease are deemed to be owner for tax purposes. Provisions set aside to cover leasing transactions are income tax deductible. *Set-Off* *Overview* Set-off (*compensaţie*) and netting represent legal tools that may provide a certain level of security to the participants to bilateral or multilateral transactions. The intricacies of the legal regime governing the right of set-off are beyond the scope of this document and only a brief description is provided here for the purpose of completeness. There are two situations where set-off or netting typically arise, including set-off in an insolvency related context. The first situation involves the setting-off of two or more parties' respective obligations under a 'plain vanilla' contractual or non-contractual scenario. The second situation concerns the setting-off and netting of the financial obligations of two or more parties to a financial arrangement, as such is defined under the Financial Collateral Directive and the relevant Romanian transposition rules (discussed further at **Principle C10**, below).[46] *Statutory, Contractual and Judicial Set-Off* Only the effects of the statutory set-off are expressly acknowledged under the Insolvency Act. As a general rule, Romanian law regards statutory set-off (*compensaţie legală*) as an automatic and default device operating solely with respect to pre-insolvency claims, and only to those which are (i) uncontested, (ii) due, and (iii) liquid.[47]

[45] As of January 1, 2013, VAT-related regulations were changed such that the VAT deduction adjustment is no longer performed with respect to assets that form the subject matter of terminated lease contracts where the leasing company is not in possession of the assets, so long as they can demonstrate that they sought to take possession, but were unsuccessful in their effort. *See* Gov't Dec. No. 84/2013, amending Law 571/2003 (Tax Code).
[46] See Government Ordinance No.9/2004 on Financial Collateral ("Financial Collateral Law"). The set-off and netting effects under the Financial Collateral Directive are detailed below under Article 20 (Contracts wholly or partially exempt from insolvency rules).
[47] *See* New Civil Code, Art. 1,617 and New Code of Civil Procedure, Art.662

	The other two types of set-off, *i.e.*, contractual set-off and judicial set-off, which result where the requirements of the statutory set-off test are not met, are arguably legally permissible under a scenario excluding competing secured cross claims of other creditors against the same debtor outside an insolvency context. **Enforcement** *Individual Enforcement of Claims* Individual enforcement of claims in Romania is governed by a complex legislative network.[48] The general rules shaping the enforcement process currently lie in the New Code of Civil Procedure which came into force on 15 February 2013 (the Code was adopted via the Law. No. 134/2010). The New Code of Civil Procedure establishes relevant procedures for enforcing both secured and unsecured claims through appropriate process, generally known as execution, and provides relevant guidance for mechanisms often employed in conjunction with the enforcement process, including provisional remedies of an injunctive relief nature (attachment of assets, garnishment of accounts and wages, preliminary injunctions). *Collective Enforcement of Claims* Enforcement of claims through collective actions used to constitute the exclusive domain of insolvency proceedings. Such proceedings can be of a general nature[49] or may pertain to specific categories of businesses (such as credit institutions or capital market participants).[50] For the enforcement of claims in an international insolvency context, the legal framework is supplemented by additional relevant provisions.[51] Currently, the New Code of Civil Procedure also provides under Art. 59 *et seq* for the possibility of collective actions under the civil procedure rules in view of enforcing collective claims. *Late payments* The EU rules on late payments have been incorporated into Romanian law.[52]
Assessment	Romania has a relatively small but sophisticated financial sector that strives to meet the credit needs of the economy. Some 41 banks are established within the country, The financial sector also includes over 40 insurance companies, over 5,000 non-bank financial institutions focusing on leasing activity, and investment and pension funds and brokers.

[48] For purposes of this document, we only refer to legislation and practice related to the enforcement of claims derived from business transactions, and do not address the enforcement of other type of claims, such as the enforcement of judgments in matrimonial matters and matters of parental responsibility, governed by Council Regulation (EC) No. 2201/2003 of 27 November 2003, or the enforcement of judgments concerning civil matters relating to maintenance obligations, which is covered by Regulation (EC) No. 4/2009 of 18 December 2008.

[49] *See* Law No. 85/2006 on Insolvency Procedures ("Insolvency Act").

[50] *See* Credit Institutions Insolvency Act (Government Emergency Ordinance No. 10/2004 on Insolvency of Credit Institutions, as subsequently approved by statute, amended and modified), and Law No. 297/2004 on Capital Markets, Article 170 *et seq*.

[51] *See* Law No. 637/2002 on International Insolvency, Title II in Credit Institutions Insolvency Act, and Council Regulation (EC) No. 1346/2000 on insolvency case, as subsequently amended, directly applicable in Romania.

[52] Government Emergency Ordinance No. 119/2007 on preventing the delayed performance of payment obligations derived from agreements between professionals, as subsequently approved, amended and modified, which aims at transposing Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions.

	Some 92% of banking assets are privately owned, and 91% are owned by the wholly owned subsidiaries of foreign (primarily Greek, Austrian, and Dutch) banks. Over 220 foreign banks exercise the freedom to provide services within the territory without the establishment of branches. Bank assets are 74% of GDP, loans are 40.3% of GDP, and deposits represent 34.4% of GDP. By way of comparison, the comparable average EU figures are 351%, 120.2%, and 114.4%. Some 37.3% of firms used banks to finance investment as of 2009.[53] Risk premium on lending (interest charged by banks on loan to prime private sector customers, minus treasury bill interest rate) was 5.1% in 2012, up from 4.8% in 2011 but down from 6.9% the previous year. Interest rate spread (the rate charged by banks to prime customers minus the rate paid on deposits), reported at 5.8% in 2012, and unchanged from the previous year. The headline NPL ratio was a high 21% as of July 2013, up from 17.3% a year earlier. NPLs amongst micro-enterprise borrowers are twice as high the corporate NPL rate. Only "credit institutions", "financial institutions" and "non-banking financial institutions" are allowed to engage in lending activities in the country. Market participants are of the view that this creates doubt about the ability of other financial entities such as private equity and distressed investment funds, which do not meet the criteria to fall in either of these categories, to extend finance through debt or hybrid instruments. Similar doubts are expressed regarding the activities of corporate group members extending intra-group funds. In the two decades since starting on the road to a market economy, and notwithstanding significant political and economic challenges along the way, Romanian authorities have made remarkable progress in creating a comprehensive legal and regulatory framework for enterprise credit. This includes giving effect to relevant elements of European Union law. The law supports the use of a very broad range of credit instruments, including personal guarantees and possessory and non-possessory proprietary security, both 'fixed' and 'floating', over a comprehensive set of movable and immovable assets and including the entire undertaking of an enterprise. Security interests may be created by agreement or arise by operation of law, to secure present, future, accrued, and contingent liabilities. The land and immovable assets register often falls short of the legitimate expectations of market participants, who report being unable to rely on the state of the register as determinative of the state of the registered title (see at Principle B4, below). By contrast, there is a well-functioning system for the public recordation of interests in movable assets. The law permits statutory, contractual and judicial set-off, and has given effect to the EU regime governing financial collateral. The recently promulgated New Civil Code has not received an enthusiastic reception from lender groups and their advisors. The Code is regarded as having tilted things too far in favour of the debtor, for example, through invalidation of the material adverse change provision and increased powers to renegotiate the agreement even on the basis of simple economic grounds. Rules originally designed for the protection of consumers (parties who were not classified as "merchants" under the previous dispensation) are now also applicable to large business enterprises, which would have had a far greater influence on the terms of their agreement. The likely result is increased uncertainty in the system and higher contractual costs. The position regarding title retention arrangements is unclear. While the law

[53] World Development Index (The World Bank, 2011).

	contemplates that the parties by agreement may cause one of them to retain title to certain assets while transferring possession to the other, in practice, it appears that onward sale to a good-faith third-party buyer would succeed in conveying title. There could therefore be doubt about the efficacy of retention of title in the insolvency of the party in possession.. Effective retention of title performs a very useful role in conferring commercial certainty on transactions where it might be impractical or disproportionately costly to create security interests properly so called, subject to appropriate public notice of the existence of the retention of title arrangement.[54] There is a generally appropriate framework for both financial and operational leases, including as to their tax treatment, but experienced market participants point to the following issues: (i) In practice, confusion has arisen regarding the implications of the requirement that customs duty calculated by reference to the residual value of the leased assets (the value at which they might be bought by the lessee at the end of the lease period) must be paid so long as it is not less than 20% of the initial value. Some market participants take the view that this rule requires that lease agreement specify a residual value of no less than 20% of the initial value. (ii) The regulation of the consequences of termination of the lease agreement are said to be inadequate. For example, where there is a breach of the leasing agreement by the lessee, courts do not allow compensation regarding future instalments. Also, the New Civil Code reportedly extinguishes the right to bring legal actions in relation to a leasing agreement after six months of termination, which is said to be inadequate. As a final example, there are complaints that where the lessee defaults and the agreement is terminated but the lessee is unable to recover the assets within one month, the lessor has to pay value added tax on instalments which were never paid. (iii) There have also been problems regarding damage to leased goods, where the police have not acknowledged that the lessor has the right to complain. The claim enforcement process is regulated in detail, but in practice is lengthy and cumbersome, and can be uncertain and destructive of value. The New Code of Civil Procedure, which came into force on 15 February 2013, is insufficiently tested in practice. Experienced and reliable observers of court practice opine that the New Code will complicate proceedings and generate confusion in the courts over the coming years, mostly by its inconsistent application by the courts. Its implementation has reportedly been rushed but much of it is incapable of being properly applied in practice, mainly because of the inadequate infrastructure of the courts system (insufficient number of judges and supporting staff, improper space for the court rooms and the archives) and inconsistent training of the judges on the issues related to the implementation in practice of the New Code of Civil Procedure. The incorporation of the EU regulations on late payments are said to have had a beneficial effect on the cash-flows of small businesses in particular, though the local authority sector lags behind in this respect, with some businesses still expecting payments for supplies made in 2009.
Comment	Consideration should be given to amending relevant statutes to provide clarity regarding the capacity to engage in commercial lending activities of entities other than "credit institutions", "financial institutions", and "non-banking financial institutions", such as hedge and distressed funds as well as corporate group members making intra-group loans. Consideration should be given to identifying those protective rules in the New Civil

[54] We are advised that the 2014 Insolvency Code now contains a provision that, in essence, would treat the seller who retained title and who followed proper formalities as a secured creditor in the buyer's insolvency proceeding. It would also treat the property as belonging to the insolvency estate of the buyer. See also note 44 above.

	Code which should only properly apply in consumer transaction or in other contexts where there was likely to be a significant disparity in bargaining power. In transactions where there is no significant disparity, such rules arguably should not apply. The law governing leases should be clarified in several respects, particularly as to the consequences of premature termination of the lease agreement. It should explicitly address issues such as whether the lessor may recover damages in respect of future instalments where the agreement is terminated because of lessee default. The adequacy of the six-month limitation period within which legal proceedings must be commenced upon termination of a lease agreement should be reconsidered. Where the agreement terminates because of lessee default but the lessor is unable to recover the assets, the law should clarify, in a way that is consistent with relevant EU regulations, the lessor's liability for VAT in relation to unpaid instalments. Finally, the relevant authorities, including the police, should be better informed regarding the respective rights and obligations of lessors and lessees in case the leased assets are subject to criminal damage, or where the lessor seeks to recover possession. Consideration should be given to urgently reviewing the capacity of the court system to effectively implement the New Code of Civil Procedure. Steps should be taken to effectively implement the law on late payments to transactions involving local authorities.
Principle A2	**Security (Immovable Property)** One of the pillars of a modern credit economy is the ability to own and freely transfer ownership interests in land and land use rights, and to grant a security interest (such as a mortgage or charge) to credit providers with respect to such interests and rights as a means of gaining access to credit at more affordable prices. The typical hallmarks of a modern mortgage system include the following features: • Clearly defined rules and procedures for granting, by agreement or operation of law, security interests (mortgages, charges, etc) in all types of interests in immovable assets; • • Security interests related to any or all of a debtor's obligations to a creditor, present or future, and between all types of persons; • • Clear rules of ownership and priority governing competing claims or interests in the same assets, eliminating or reducing priorities over security interests as much as possible; • • Methods of notice, including a system of registry, which will sufficiently publicize the existence of security interests to creditors, purchasers, and the public generally at the lowest possible cost.
Description	A discussion of general principles applicable to security interests in immovable property is at **Principle A1**, above. **Scope Of Immovable Mortgages** Under Romanian law, an immovable mortgage is essentially a non-possessory security interest in realty granted to a mortgagee by a mortgagor (the owner of realty) in order to secure financial or other types of obligations, due or future, actual

or contingent.[55]

Realty includes those proprietary interests in immovable property that comprise estates in land (*drepturi reale principale*), of which the most complete form is the fee simple, representing the most absolute and exclusive type of estate that confers upon its holder the attributes of possession, use, and disposition of the property (*drept de proprietate*).

Under Romanian law, there is a limited variety of other estates, which must be acknowledged by statute, which are less complete than a fee simple, and which are called dismemberments of a fee simple (*dezmembrăminte ale dreptului de proprietate*). These include:

(1) temporary/life estates (*uzufruct/uzufruct viager*),

(2) right of use or right of habitation (*drept de uz or drept de abitaţie*);

(3) right of superficies (*drept de superficie*);

(4) right of administration of public property (*drept de administrare*);

(5) right of concession of public property (*drept de concesiune*);

(6) right of use of public property (*drept de folosinţă*); and

(7) the right of easement or servitude (*drept de servitute*).

All estates may be held jointly, as joint tenancies (*proprietate comună*) and/or time-sharing tenancies (*proprietate periodică*).

Traditionally, incomplete estates are paired with a future interest, such as a reversion or remainder, which under Romanian law is known as bare ownership (*nudă proprietate*).

An immovable mortgage can be created over the following estates and future interests pertaining to non-public immovable property:

(1) fee simple;

(2) temporary/life estates;

(3) right of superficies;

(4) joint tenancies and time-sharing tenancies;

(5) bare ownership; and

(6) actual and future earnings generated by realty, and benefits derived therefrom, such as insurance proceeds.

An immovable mortgage shall extend automatically, unless otherwise agreed, to any

[55] For purposes of this Section, realty, real property or real estate represents virtually any proprietary interest in immovable property, seen as either one or several tracts of land and/or water (along with the vertical column of air above and sub-soil below the surface, and any accretions, improvements (such as buildings or other categories of constructions erected on and/or below) or fixtures thereto, or a pool of all such pieces of realty, both existing and to be acquired in the future, seen as *universitas bonorum*) which can be freely alienated under the law.

subsequent constructions, improvements, and appurtenances.[56] It will extend to cover the earnings or other benefits generated by the mortgaged realty after the recordation of a foreclosure or insolvency order notice with the land registry.[57]

Creation, Perfection And Priority

Overview

The essential aspects of a security interest in general, and an immovable mortgage in particular, concern the creation, perfection and priority of such interest.

Under Romanian, law, *perfection* refers to any steps required to ensure that the security interest is enforceable against third parties.

Priority envisages an ordering and prioritization of competing interests (both secured and unsecured) in same asset, particularly in the context of enforcement in individual or collective proceedings.

Creation Of Immovable Mortgages

The main rules governing the creation of immovable mortgages are currently located in two pieces of legislation, *i.e.*, the New Civil Code and the Mortgage Loans for Realty Investments Act No. 190/1999 (the '**Mortgage Loan Act**').[58]

Conceptually, a *mortgagor* creates a security interest in realty, which it transfers to the *mortgagee*, whereas legal title to that immovable property remains with the *mortgagor*, usually along with possession thereof.

The major distinctions between immovable mortgages created under each of the two laws are reflected in the table below:

	Categories of mortgages	New Civil Code	Mortgage Loan Act
1	Who may hold the benefit of the security interest?	Any person	Authorized lending institutions
2	Are mortgages over future buildings permitted?	Permitted but only conditional recordation with land registry.	Permitted.
3	Are there restrictions on transferring the mortgaged property until the mortgage loan is fully reimbursed or otherwise discharged?	Restriction not valid as against third parties acquiring the property, whether in good or bad faith, and irrespective of whether with or without	Valid as a matter of law; any acquisition made in violation of this transfer restriction is automatically void.

[56] *See* New Civil Code, Article 2.382.
[57] *See* New Civil Code, Article 2.383 para. (1).
[58] *See* Law No. 190 dated 9 December 1999, published in Official Gazette of Romania No. 611, dated 14 December 1999, as subsequently amended. The main goal of Mortgage Loan Act was to foster the development of the residential housing market via immovable mortgage-based financing. The Act introduced several new features for immovable mortgage practice: (1) a mortgage over a future building or residential unit was expressly permitted, as contrasted with the provisions in the Old Civil Code, which were viewed in practice as restrictive in that respect; (2) a mortgage recordation notice is valid and does not require a renewal after 15 years, as prescribed under the Old Civil Code; and (3) inalienability clauses are expressly permitted and technically represent an absolute barrier to the transfer of title to, or creation of subsequent security interests or other estates in, that property without prior written consent of the first mortgage lender. A further legislative package was adopted in 2005 to supplement the legal framework in this area and to permit the use of more sophisticated financing structures, such as mortgage bonds and securitization.

		notice; mortgagor only liable for damages.	
4	Mortgage-based bonds	Not permitted.	Permitted under certain conditions.
5	Securitisation	Arguably permitted only for mortgage-based securities other than bonds.	Permitted.

An immovable mortgage may be only granted by agreement or as a matter of right, by operation of law.[59]

Immovable mortgages granted by agreement

Currently, a contractual immovable mortgage can be validly created by agreement if granted and documented in an instrument that is duly notarised, *and* duly recorded with the relevant land registry where the subject mortgaged tract of real estate is properly tabulated.[60]

Thus, an immovable mortgage would appear not to be fully created until and unless recorded with the land registry. This is a major departure from previous law, which only required that creation of an immovable mortgage be documented in a notarized instrument, while only perfection of that mortgage required its recordation in the land registry.[61] It is uncertain how the New Civil Code intersects with the law relating to the recordation of mortgages in the land registry.

An immovable mortgage granted over a pool of realty shall only be effective upon the recordation of the mortgage over each tract of land in that pool.[62]

Junior immovable mortgages

The granting of subsequent mortgages in property that is already subject to an immovable mortgage depends on the particular rules that govern the granting of the first mortgage.

Pursuant to the New Civil Code, the granting of subsequent mortgages is fully permitted, irrespective of whether the security agreement that creates an original mortgage prohibits the granting of another mortgage (without the prior written consent of the senior mortgagee), and irrespective of whether the junior mortgagee is on notice (actual or constructive) about the existence of such prohibition.[63]

In contrast, the Mortgage Loan Act is open to the interpretation that the granting of subsequent mortgages without the prior written consent of the senior mortgagee is prohibited.[64]

Immovable mortgages granted by operation of law

[59] *See* New Civil Code, Article 2.349 para. (2).
[60] *See* New Civil Code, Article 2.377 para. (1) and Article 2.378 para. (2).
[61] *See* Law 71/2011, suspending implementation of Law 287/2009 (registration of a mortgage right in the land book is not determinative of title).
[62] *See* New Civil Code, Article 2.377 para. (2).
[63] *See* New Civil Code, Article 2.376 and Article 2.384.
[64] *See* Mortgage Loan Act, Article 5 paras. (1) and (2).

Certain situations feature contractual or legal obligations that benefit from a secured status through the automatic granting of a statutory lien (*ipotecă legală*), unless the purported beneficiary waives its entitlement to such liens. Such statutory liens include:

- the unpaid vendor's lien over the land for the purchase price;
- the lien of a holder of an option to purchase an interest in immovable property over that interest, for the part of the purchase price advanced to the seller;
- the lender's lien over an interest in immovable property the purchase of which has been financed by such lender;
- the vendor's lien over the land, where the consideration for sale consists of the vendee's duty to provide maintenance support to the vendor;[65]
- tax liens.

Although they are created as a matter of right (unless the beneficiary waives its right to such liens), the creation and perfection of such liens is not complete until their due recordation with the relevant book.[66]

Perfection Of Immovable Mortgages

Perfection of immovable mortgages occurs under Romanian law by duly recording an immovable mortgage notice in the relevant land registry where the subject mortgaged tract of real estate is properly tabulated.[67] The time of creation and perfection of immovable mortgages seems thus to coincide under Romanian law.

Rules Of Priority

General Rules of Priority

As a general rule, a claim secured by an immovable mortgage that is perfected is preferred over an unsecured claim.[68] Perfection of immovable mortgages occurs through recordation with the relevant land registry of mortgages that have been validly granted. The perfection date is considered as the date where a perfection application has been duly filed with the relevant land registry.

Rules of priority between and amongst mortgagees

A claim secured by an immovable mortgage that is perfected is preferred over a claim secured by an immovable mortgage that is not perfected, irrespective of whether the perfected mortgage has been granted at a later date.[69]

Once perfected, priority is determined by the norm of *first in time, first in right*; provided, however, that immovable mortgages perfected on the same day are granted the same priority.[70]

If certain realty (and, in particular, fixtures) is subject to both movable and

65 *See* New Civil Code, Article 2.386.
66 *See* New Civil Code, Article 2.377 para. (1).
67 *See* New Civil Code, Article 2.377 para. (1) and Article 2.378 para. (2).
68 *See* New Civil Code, Article 2.345 para. (2).
69 *Ibid. See, also*, New Civil Code, Article 2.420 para. (2).
70 *See* New Civil Code, Article 2.421.

	immovable mortgages, the *first in time, first in right* rule above shall likewise apply; provided, however, that if such mortgages are perfected on the same day, the immovable mortgage is preferred over the movable mortgage.[71] *Rules of priority between and amongst mortgagees, on one hand, and, on the other hand, holders of liens or other interests in the mortgaged property* If certain realty is subject to both immovable mortgages and other liens or property interests, the *first in time, first in right* rule above shall likewise apply. **Methods Of Notice** Under Romanian law, due notice of both an immovable mortgage, and of other quasi-security devices, liens, other interests in the subject realty or *lis pendens* in relation thereto is solely provided by record notice (*i.e.*, recordation of a notice of that particular interest or dispute with the land registry where the underlying realty is recorded).[72]
Assessment	While the provisions of the New Civil Code are only beginning to be tested in practice, and like any new piece legislation, give rise to some uncertainty, the law appears nevertheless to provide reasonable clarity as to the scope, creation, perfection, and recordation of security interests in immovable property. Mortgages may be created over a broad range of interests in immovable assets, including fee simple, temporary estates, rights of superficies, and actual and future earnings and benefits therefrom. Creation is completed only once the mortgage is recorded on the land registry, and a mortgage over a pool of immovable assets is effective upon due recordation in relation to each asset. (It is worth noting that, because of the incompleteness of the land cadastre, this aspect of the mortgage creation process under the New Civil Code is not operational in all parts of the country.) There are also clear rules of priority, which is generally determined as from the date of filing in the land registry of the recordation application, though applications filed on the same day rank on par. In addition to the New Civil Code, a mortgage over immovable property may also be created pursuant to the Mortgage Loan Act. Yet, whereas under the New Civil Code, mortgages may be created in favour of any person, mortgages created under the Mortgage Loan Act are narrower in scope as they may only be granted to authorized lending institutions. The Mortgage Loan Act provides greater protection to lenders, though, particularly in circumstances where the collateral is acquired by a third party contrary to the terms of the mortgage agreement. Under the New Civil Code, such a transfer is valid notwithstanding any provision in the mortgage agreement though the transferee's title to the asset remains subject to the mortgage. In relation to the breach of the non-transfer term in the mortgage agreement, the mortgagee is entitled to claim damages from the mortgagor, which may not be useful in the fairly common situation where the mortgagor is judgment-proof or not locatable. The problem is heightened when the asset is transferred from a natural to a legal person, thus potentially enmeshing the mortgagor in the corporate insolvency process, which may have been contrary to the calculations on which the lending decision was made. This weakness in the protection accorded to the mortgagee is likely to increase uncertainty in mortgage transactions. By contrast, attempts to transfer collateral in violation of a Mortgage Loan Act

[71] *See* New Civil Code, Article 2.422.
[72] In addition, where a dispute exists in connection with the realty recorded in the land registry, the dispute may be indicated in the land book, at the request of the party asserting the dispute.

	agreement are void, which may be a disproportionate way of protecting the mortgagee's legitimate interests. Registration issues, including notarisation costs, are discussed at **Principle A4**, and enforcement at **Principle A5**.
Comment	Consideration should be given to strengthening the protection afforded to mortgagees under the New Civil code.
Principle A3	**Security (Movable Property)** A modern credit economy should broadly support all manner of modern forms of lending and credit transactions and structures, with respect to utilizing movable assets as a means of providing credit protection to reduce the costs of credit. A mature secured transactions system enables parties to grant a security interest in movable property, with the primary features that include: • Clearly defined rules and procedures to create, recognize, and enforce security interests over movable assets, arising by agreement or operation of law; • Allowance of security interests in all types of movable assets, whether tangible or intangible (*e.g.*, equipment, inventory, bank accounts, securities, accounts receivables, goods in transit; intellectual property, and their proceeds, offspring and mutations); including present, after-acquired or future assets (including goods to be manufactured or acquired); wherever located and on a global basis; and based on both possessory and non-possessory interests; • Security interests related to any or all of a debtor's obligations to a creditor, present or future, and between all types of persons; • Methods of notice (including a system of registration) that will sufficiently publicize the existence of security interests to creditors, purchasers, and the public generally at the lowest possible cost; and • Clear rules of priority governing competing claims or interests in the same assets, eliminating or reducing priorities over security interests as much as possible.
Description	A discussion of general principles applicable to security interests in movable property is at **Principle A1**, above. **Categories of security interests in movable property** Based on the nature of secured property and the possessory implications of the security interests (*i.e.*, possessory or non-possessory), there are currently three main categories of security interests in movable property under Romanian law, *i.e.*: o Movable mortgage (*ipotecă mobiliară*), which is the primary non-possessory security interest in almost any kind of movable property, except for cash and financial instruments; o Pledge (*gaj*), which represents a possessory interest in tangible property or unrecorded negotiable instruments; o Financial collateral (*garanţie financiară*), representing a possessory interest in accounts, financial instruments, and similar intangible property.

Each of the above categories of security interests enjoys its own rules of creation, perfection, notice and priority, and enforcement.

Movable Mortgages

Scope Of Movable Mortgages

Under Romanian law, a movable mortgage represents a non-possessory security interest in personal property (either individual or *universitas bonorum*) granted to secure a wide array of financial or other types of obligations, due or future, actual or contingent.

Technically, almost any kind of personal property, tangible or intangible, present or future, which is not declared by law as inalienable, may fall within the scope of movable mortgages, including:

- Accounts receivable, contractual rights, insurance policies, and other credit rights;
- Negotiable instruments (bearer, nominal, or to order);
- Documents of title such as warehouse receipts, bills of lading, and similar documents;
- Credit balances in deposit accounts, savings accounts, or time deposits in banking or other financial institutions;
- Shares or social parts in corporations, equity, debt or hybrid securities tradable on exchange markets, and other financial instruments;
- Rights arising from patents, trademarks, copyrights, all other rights arising from intellectual and industrial property, and other general intangibles;
- Minerals and hydrocarbons to be extracted;
- Live stock;
- Standing timber, the harvest of agricultural products, machinery affixed to the ground, and or after extraction; and
- Equipment, devices, inventory, raw materials.[73]

A movable mortgage shall extend automatically, unless otherwise agreed, to the *proceeds* of the mortgaged property. The term proceeds includes any property, received by the mortgagor upon the sale, exchange, collection, indemnification or other form of management or disposition of the mortgaged property, any ordinary or extraordinary uses (the latter includes the consumption of the very substance of property) and profits from such property, and proceeds of proceeds.[74]

Creation of movable mortgages

[73] *See* New Civil Code, Article 2.389. Please note that pursuant to the New Civil Code, the law divides property into two categories: (1) realty; and (2) personal or movable property, which includes all property that the law does not mark as realty. *See* New Civil Code, Arts. 536-542.

[74] *See* New Civil Code, Article 2.392. Such proceeds include the proprietary interest in insurance claims or benefits relating to the mortgaged property, or in compensation to be received in case of any applicable instance of eminent domain.

	Movable mortgages can be created contractually or by operation of law. *General Rules* A movable mortgage agreement must be memorialized in writing, either in an agreement executed by the mortgagor and the mortgagee, or their duly authorized respective agents, or in an agreement notarized before a notary public.[75] If a movable mortgage pertains to future property, the movable mortgage comes into existence (*i.e.*, attaches) when the debtor acquires a property interest in property that falls within the description of the movable property set out in the relevant movable mortgage agreement.[76] To the extent that a movable mortgage secures a future obligations, such mortgage comes into existence when the mortgagee or another party transfers the funds, or performs the action, giving rise to the secured debt or obligation, fulfilling the condition on the existence of the principal secured obligation.[77] In contrast with the possessory pledge, a movable mortgage is created contractually without necessarily dispossessing the mortgagor. A movable mortgage vests the security holder with the power of selling the property upon default and generally does not require the possession of the property by the security holder in order to "perfect" the security interest. *Special rules regarding the creation of movable mortgages over shares or social interests in corporations and other business associations* Under Romanian law, valid creation of mortgages over such category of property requires the execution of a mortgage agreement.[78] For bearer and nominative shares of stock, the law institutes an additional requirement of inscribing a notice of the movable mortgage agreement on the relevant supporting certificates of such shares.[79] For mortgages on registered shares or social parts, the law requires a recordation of a notice of the mortgage in the registry of shares or social parts maintained by the subject business association (to the extent the law imposes the maintenance of such records).[80] *Special rules regarding the creation of movable mortgages over financial instruments* Creation of movable mortgages over financial instruments requires, in addition to execution of a written security agreement, the filing of a notice concerning such security agreement in the relevant account sections of the electronic database maintained by the Romanian Central Depository, in its capacity as authorized custodian of information related to the issuers of financial instruments that are admitted to trading on the Romanian Stock Exchange.[81] *Junior movable mortgages*

[75] *See* New Civil Code, Article 2.388.
[76] *See* New Civil Code, Article 2.387.
[77] *Ibid*.
[78] *See* Company Act No. 31/1990, as subsequently amended, modified, and restated, Article 991 para. (1).
[79] *Ibid*.
[80] *See* Company Act No. 31/1990, as subsequently amended, modified, and restated, Article 991 para. (2) and Article 198 para. (1).
[81] *See* Capital Markets Act No. 297/2004, Article 151, Romanian Securities and Exchange Commission Regulation No. 13/2005, Article96.

	Under Romanian law, it is expressly permitted to create movable mortgages or other security interests in personal property that has already been made subject of a movable mortgage, irrespective of whether the security agreement that creates an original mortgage prohibits the granting of another mortgage (without the prior written consent of the senior mortgagee), and irrespective of whether the junior mortgagee is on notice (actual or constructive) about the existence of such prohibition.[82] *Movable mortgages granted by operation of law* In cases featuring mortgage over personal property, the law indicates fewer situations where contractual or legal obligations would benefit from a secured status through the automatic granting of a statutory lien on that personal property. Currently, statutory liens grantable over personal property by operation of law include tax liens, which are created pursuant to particular rules of the Code of Fiscal Procedure. *Perfection of movable mortgages* As a general rule, perfection of movable mortgages occurs by duly filing a movable mortgage notice (*aviz de ipotecă mobiliară*) with the Electronic Database of Security Interest in Personal Property, which represents a centralized electronic storage of data.[83] *Special rules regarding perfection of movable mortgages over aircraft and vessels* Security interests created in certain categories of personal property (such as civil aircraft and vessel registered under a Romanian flag) are perfected through registration of a security notice with special property index registers that are maintained by government or other regulatory authorities (such as the Romanian Civil Aviation Authority in case of aircrafts and parts thereof,[84] and the Romanian Naval Authority, in case of vessel).[85] However, current best practice is to file an additional movable mortgage notice with the Electronic Database of Security Interests in Personal Property. *Special rules regarding perfection of movable mortgages over bank accounts* In case of bank accounts, Romanian law provides two alternatives for perfection: (1) by filing a requisite notice with the Electronic Database of Security Interests in Personal Property; or (2) through the mortgagee's control of the relevant bank account.[86] The law identifies three alternative ways for a mortgagee to take control of a bank account, irrespective whether the mortgagor maintains the power to operate in that bank account, *i.e.*: o automatically, if the mortgagee is the same credit institution where the relevant bank account is open; o all three involved parties (the mortgagor, the mortgagee, and the credit institution where the bank account is open) agree in writing that the mortgagee is solely authorized to give discretionary instructions to the credit institution with respect to the money in that bank account, without any interference from

[82] *See* New Civil Code, Article 2.396 para. (3).
[83] *See* New Civil Code, Article 2.409 para. (2) and Article 2.413 para. (1).
[84] *See* Air Code, Article 22.
[85] *See* Government Resolution No. 245/2003 approving the regulations issued for implementing Government Emergency Ordinance No. 42/1997 on nautical transportation, Arts. 29 and 31.
[86] *See* New Civil Code, Article 2.410.

the mortgagor; or

- the relevant bank account and the money therein is re-registered in the mortgagee's name.[87]

Special rules regarding perfection of movable mortgages over financial instruments

In case of financial instruments, perfection of a movable mortgage over such category of property occurs through the filing of a notice concerning such security agreement in the relevant account sections of the electronic database maintained by the Romanian Central Depository.[88] The creation and perfection, respectively, of such a movable mortgage coincide.

Special rules regarding perfection of movable mortgages over account receivables

Although Romanian law is not entirely clear on whether movable mortgages over account receivables require that a special notice is provided to, or creation of the mortgage is acknowledged in writing by, the account debtor, it conditions, nevertheless, the power of a secured creditor to request payment on account of the secured receivables from the account debtor upon satisfaction of either of such formalities.[89] This suggests that a movable mortgage over receivables is fully perfected with respect to the account debtors only just upon such account debtors take actual notice of the mortgage in either of the manners indicated above.

Special rules regarding perfection of movable mortgages over intellectual property rights

There are also special rules that apply to the perfection requirements pertaining to movable mortgages over intellectual or industrial property rights (patents, trademarks, copyright, and any derivative interests thereof).

As regards mortgages over industrial property rights, perfection occurs upon the (1) registration of a special notice with the separate databases maintained by the Romanian Office for Inventions and Trademarks for each category of industrial property, and (2) publication of such notice in the Official Bulletin of Industrial Property's relevant section.[90] Current best practice is for an additional movable mortgage notice to also be filed with the Electronic Database of Security Interests in Personal Property.

Mortgages over copyright are perfected through filing a movable mortgage notice with the Electronic Database of Security Interests in Personal property, following the general rule of perfection under the New Civil Code.

Furthermore, in cases where movable mortgages are created over intangible property such as royalty or other earnings claims related to the use of both industrial and intellectual property rights, it is necessary to provide a mortgage notice to the account debtor, or that such debtor acknowledges in writing the existence of such mortgages, like in any other cases involving mortgages over account receivables.

Priority Rules

[87] *See* New Civil Code, Arts. 2.410.
[88] *See* Capital Markets Act No. 297/2004, Article 151 paras. (4) and (6), Romanian Securities and Exchange Commission Regulation No. 13/2005, Article 96 paras. (1)-(2).
[89] *See* New Civil Code, Arts. 2.400.
[90] *See* Act No. 84/1998 on trademarks and geographical indications, Arts. 40-42; *see, also*, Regulations of 21 May 2005 for implementing Act No. 64/1991 on patents, Article 86.

General Rules of Priority

As a general rule, a claim secured by a movable mortgage that is perfected is preferred over an unsecured claim.[91] The perfection date is considered as the date where a perfection notice has been duly filed with any of the databases where such notices are recorded or, in case perfection occurs through a secured creditor's taking control over the mortgaged property, upon the data when control is transferred to the creditor.

Rules of priority between and amongst mortgagees

A claim secured by a movable mortgage that is perfected is preferred over a claim secured by a movable mortgage that is not perfected, irrespective of whether the perfected mortgage has been granted at a later date.[92]

Once perfected, priority is determined by the norm of *first in time, first in right*.[93] The same rules apply when comparing two movable mortgages, of which one has been granted over an individual asset, whereas the other has been created over universality.[94]

The law establishes certain exceptions to the above default rules. Hence, a purchase-money movable mortgage has priority over an earlier perfected movable mortgage or encumbrance if, before the purchaser-debtor acquires possession of the mortgaged property, a movable mortgage notice is filed in the Electronic Database of Security Interests in Personal Property, and the seller-mortgagee or lender-mortgagee notifies the earlier secured creditor of the sale and the filing of the movable mortgage notice.[95]

In the same way, if and upon filing in the Electronic Database of Security Interests in Personal Property, a movable mortgage over crops or their proceeds given for value to enable a debtor to produce the crops, or given while the crops are growing or during a period of six months immediately before the time the crops become growing crops, has priority over any other movable mortgage or encumbrance in the same property given by the same debtor.[96]

A similar exception applies with respect to movable mortgages over fowl, cattle, horses, sheep, swine or fish or their proceeds given for value to enable the debtor to acquire food, drugs or hormones to feed or place in the animals or fish. In such a scenario, if and when filed in the Electronic Database of Security Interests in Personal Property, that mortgage has priority over any other movable mortgage or encumbrance in the same property or its proceeds, except for the movable mortgage of the seller of the food, drugs, or hormones.[97]

It should be noted that a movable mortgage over a bank account, perfected through the creditor's taking control over the bank account, is preferred to a movable mortgage over the same bank account that is perfected by means of filing of a notice in the Electronic Database of Security Interests in Personal Property, irrespective of the perfection date.[98] Such choice of priority by statute seems to tip the balance decisively in favour of the account-controlling creditor and it can be reasonably

[91] *See* New Civil Code, Article 2.345 para. (2).
[92] *Ibid*. *See, also*, New Civil Code, Article 2.420 para. (2).
[93] *See* New Civil Code, Article 2.420.
[94] *See* New Civil Code, Article 2.424.
[95] *See* New Civil Code, Article 2.425 para. (1).
[96] *See* New Civil Code, Article 2.425 para. (2).
[97] *See* New Civil Code, Article 2.425 para. (3).
[98] *See* New Civil Code, Article 2.426.

anticipated that the use of perfection by filing with respect to such particular intangible property shall increasingly fade in the future, for practical purposes.

If certain realty (and, in particular, fixtures) is subject to both movable and immovable mortgages, the *first in time, first in right* rule above shall likewise apply; provided, however, that if such mortgages are perfected on the same day, the immovable mortgage is preferred over the movable mortgage.[99]

Rules of priority between and amongst mortgagees, on one hand, and, on the other hand, holders of liens or other interests in the mortgaged property

If personal property is subject to both movable mortgages and other special liens, the law would confer priority to the holders of such special liens over a holder of a perfected movable mortgage if and only if a notice of the relevant liens has been filed with the Electronic Database of Security Interests in Personal Property prior to the moment where the movable mortgage perfects.[100]

Methods Of Notice

Under Romanian law, due notice of both a movable mortgage, and of other quasi-security devices, liens, other interests in the subject personal property or *lis pendens* in relation thereto is provided to third parties, in principle, in the same manner as required for perfection of such interest. Therefore, where perfection requires a notice filing, the filing of that notice provides record notice (*i.e.*, recordation of a notice of that particular interest or dispute with the relevant database).

However, when control is required for perfection, notice is based on taking control over the relevant property, and such control provides actual or constructive notice of the existence of a movable mortgage over the property.

Pledges

Overview

Another form of movable security is the traditional pledge, which can only be granted over tangible assets (including cash) and unrecorded negotiable instruments.[101]

Creation Of Pledges

A pledge is validly created through either transferring possession or otherwise gaining control over the pledged property.[102] As regards bearer or nominal instruments, the transfer of possession for security purposes suffices, while the negotiable instruments to order also require the endorsement of such instruments for security purposes.[103]

While the law does not expressly require that pledge agreements must be documented in writing, it is most likely that best practices will continue this prior tradition, especially for perfection purposes.

Perfection Of Pledges

[99] *See* New Civil Code, Article 2.422.
[100] *See* New Civil Code, Article 2.342 para. (2).
[101] *See* New Civil Code, Arts. 2.480. There are three categories of negotiable instruments: (i) bearer instruments; (ii) nominal instruments; and (iii) instruments to order.
[102] *See* New Civil Code, Article 2.481.
[103] *See* New Civil Code, Article 2.481 para. 2.

Due to the possessory nature of pledges, perfection of pledges over tangible assets occurs, in principle, by transferring possession of the pledged movable asset to the secured creditor or other person indicated by the latter.[104] For pledges over cash, the transfer of possession is the only acceptable method of perfection under Romanian law.[105] Alternatively, a pledge over such assets (other than cash) can be perfected by recordation of a pledge notice in the Electronic Database of Security Interests in Personal Property.[106]

If perfection entails the taking of possession, the law requires that, in order to maintain perfection, possession must be open, notorious, and continuous.[107]

Perfection of negotiable instruments (other than instruments to order) occurs through the transfer of possession, while perfection of instruments to order is attained through endorsement thereof for security purposes.[108]

Priority Rules

Rules of priority between and amongst pledges

Under the current law, pledgees may become competitors only in two situations:

- if two pledgees have consecutively perfected their respective security interest in the same tangible assets via registration of a notice with the Electronic Database of Security Interests in Personal Property; in that situation, the default *first in time, first in right* rule would apply; and
- if two consecutive pledgees have perfected their respective security interest in the same tangible assets differently, *i.e.*, by taking possession of the subject assets and by recording a movable mortgage notice with the Electronic Database of Security Interests in Personal Property, respectively; in that scenario, the pledgee that perfects by recording the notice is preferred over the one that takes possession of the assets, irrespective of which one between the two of them perfects first.[109]

Financial Collateral

Overview

The legal regime applicable to financial collateral is constituted by the Financial Collateral Law,[110] which incorporates into Romanian law the rules of the Financial Collateral Directive.[111] Financial collateral is provided by one party (the collateral provider) to the other (the collateral taker) to minimise the risk of financial loss to the collateral taker in the event that the collateral provider defaults on its financial obligations to the collateral taker. The rules under the Financial Collateral Law are intended *inter alia*: (i) to do away with virtually all formal requirements traditionally imposed on the creation, perfection and enforcement of financial

[104] *See* New Civil Code, Article 2.482 para. 1.
[105] *See* New Civil Code, Article 2.482 para. 2.
[106] *See* New Civil Code, Article 2.482 para. 1.
[107] *See* New Civil Code, Article 2.483.
[108] *See* New Civil Code, Article 2.482 para. 2.
[109] *See* New Civil Code, Article 2.494 and Article 2.423.
[110] Government Ordinance No. 9/2004, published in Official Gazette of Romania No. 78, dated 30 January 2004, as subsequently approved by statute, amended and modified.
[111] Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, as subsequently amended and modified.

collateral arrangements; (ii) to provide protection for financial collateral arrangements from avoidance (or the risk of avoidance) under insolvency rules that exist in one form or another (such as "zero-hour" or *ipso-facto* rules, and rules prohibiting preferential transfers and transactions at undervalue); and (iii) to clarify the conflict of laws rule applicable to the holding and transfer of financial collateral in the form of intermediated securities.

Scope Of Financial Collateral And Nature Of Secured Obligations

Financial collateral (*garanţie financiară*) is a peculiar type of security that pertains to a limited class of movable assets: (i) cash (*i.e.*, bank accounts and certain other assimilated assets, including similar claims for the repayment of money, such as money market deposits); (ii) financial instruments; and (iii) credit claims (defined as pecuniary claims arising out of an agreement in which a credit institution grants credit in the form of a loan (*creanţe private*)), which are used to secure a specific type of obligations (called financial obligations) (*obligaţii financiare garantate*). Financial obligations constitute contractual obligations entailing payment of money or delivery of financial instruments.

The distinctiveness of financial collateral lies in three essential elements: (1) the nature of secured obligations; (2) the nature of the security; and (3) the eligibility of parties to the security agreement.

Financial collateral may only be created by a special type of agreement, viz., a financial collateral arrangement. Under Romanian law, a financial collateral arrangement (*contract de garanţie financiară*) represents a security agreement concluded between two parties (acting as "collateral provider" and "collateral taker", respectively) with a view to providing a particular category of collateral (*i.e.*, financial collateral) as security for their respective financial obligations.[112] Only a select category of entities, including financial institutions, central banks, central counterparties, and public authorities are eligible to becoming parties to a financial collateral arrangement under Romanian law.[113]

Creation And Perfection Of Financial Collateral

The law indicates that the creation, validity, perfection, enforceability or admissibility in evidence of a financial collateral arrangement or the provision of financial collateral under a financial collateral arrangement is not dependent on the performance of any formal act, such as the execution of any document in a specific form or in a particular manner, the making of any filing with an official or public body or registration in a public register, advertisement in a newspaper or journal, in an official register or publication or in any other matter, notification to a public officer or the provision of evidence in a particular form as to the date of execution of a document or instrument, the amount of the relevant financial obligations or any other matter.[114]

However, in order to avoid fraud and protect the interests of third parties, the law becomes applicable to a financial collateral agreement if and only if:(i) such financial collateral arrangement is evidenced in writing or in a legally equivalent manner; and (ii) the collateral provider "provides" the collateral taker with the subject financial collateral (*i.e.*, the collateral is required to be delivered, transferred, held, registered or otherwise designated so as to be in the possession or

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[112] Government Ordinance No. 9/2004 on Certain Financial Collateral Agreements, as subsequently amended ("Financial Collateral Law"), Article 2 para. (1) k), n), para. 2, and Article 3.
[113] *See* Financial Collateral Law, Arts. 1 and 3.
[114] *See* Financial Collateral Law, Article5 para.(1)

under the control of the collateral taker or of a person acting on the collateral taker's behalf).[115]

Under Financial Collateral law, control is indicated (i) in case of financial instruments, by recordation of the relevant financial collateral in the register maintained by the issuer of such financial instruments; (ii) in case of cash in bank accounts or similar assets, by blocking the relevant bank account in which the money are deposited,[116] and (iii) in case of credit claims, by providing the collateral taker with a list of such claims.[117]

Financial collateral can be created via either a *title transfer* financial collateral arrangement (including a repo agreement) or a *security* financial collateral arrangement, which can also include a netting clause (the effects of which are essentially those provided under the Credit Institutions Insolvency Act).[118]

A *title transfer* financial collateral arrangement is an arrangement under which the collateral provider transfers full ownership of financial collateral to the collateral taker for the purpose of securing or otherwise covering the performance of relevant financial obligations (*e.g.*, repos, reverse repos, credit support arrangements, etc.).[119]

By contrast, a *security* financial collateral arrangement is an arrangement under which a collateral provider provides financial collateral by way of security in favour of, or to, a collateral taker, and where the full ownership of the financial collateral remains with the collateral provider when the security right is established.[120]

A special feature that likely distinguishes financial collateral from other type of security interests is the collateral taker's contractual *right of use* regarding that collateral.[121] A right of use represents a contractually agreed right of the collateral taker (which is implied, unless the parties agree on waiving it) to use financial collateral provided under a *security* financial collateral arrangement as if the collateral taker were the full owner of subject collateral.[122] The prerogatives under a right of use may include the power to sell, lend, or create security interests in such collateral.

Several consequences stem from exercising a *right of use*:

- o the collateral taker incurs an obligation to transfer back equivalent collateral to the collateral provider;
- o equivalent collateral transferred back will be treated as if it were original financial collateral (also in case of insolvency); and
- o the obligation may be subject to a close-out netting provision.[123]

Priority Rules

The rules of movable mortgages in the New Civil Code do not apply to financial collateral granted under the Financial Collateral Law, according to the latter.[124] As

[115] *See* Financial Collateral Law, Article4 para.(1).
[116] *See* Financial Collateral Law, Article4 para.(3).
[117] *See* Financial Collateral Law, Article4 para.(2^1).
[118] *See* Financial Collateral Law, Art. 2 para. (1) c) and d).
[119] *See* Financial Collateral Law, Art. 2 para. (1) e).
[120] *See* Financial Collateral Law, Art. 2 para. (1) f).
[121] *See* Financial Collateral Law, Art. 7 para.(1).
[122] Ibid.
[123] *See* Financial Collateral Law, Art. 7

	long as the Financial Collateral Law remains a rather narrow option, the only situation in which the two Laws could intersect is where a movable mortgage and financial collateral might be granted in a bank account or credit claims. In the case of bank accounts, the New Civil Code itself indicates that the creditor who holds control over an account in which a security interest is granted is preferred over that who does not have such control (such as where a movable mortgage over such an account is perfected through registration with the Electronic Database of Security Interests in Personal Property).[125] As regards credit claims, the situation is unclear, because an entity that is eligible to grant financial collateral could technically also create a movable mortgage in the same assets, and perfect both security interests (by providing a list of the relevant claims to the collateral taker under the financial collateral agreement, and by recording a notice of the movable mortgage in the Electronic Database of Security Interests in Personal Property and notifying the claim debtor of the existence of such movable mortgage under a movable mortgage agreement, respectively).[126] Both categories of security interests are perfected from their governing rules relevant perspective. Although a collateral taker under a financial collateral arrangement may contend that the New Civil Code rules do not apply, it is more likely that in such a scenario the courts will be more open to the examination of priority based upon the general default *first in time, first in right* rule. It is obvious that in a competition like that, a mortgagee under a movable mortgage agreement would incur a higher risk than its potential competitor, the collateral taker under a financial collateral arrangement, since record notice is likely more effective than other form of constructive notice.
Assessment	There is a comprehensive framework for the creation and regulation of a wide range of lending and credit transactions, including non-possessory mortgages, possessory pledges, and a special regime giving effect to the European Financial Collateral Directive. Mortgages may be created over virtually any type of alienable asset, present, future, and contingent, including negotiable instruments, accounts receivable, and intellectual property. A mortgage of an asset extends to its proceeds, unless otherwise agreed. A mortgage agreement must be memorialised in writing, and may be notarised. Mortgages of future property attach when a relevant asset comes into the mortgagor's ownership. They may be created over the entire estate of an enterprise. Perfection occurs upon filing a notice on the Electronic Database of Security Interests in Personal Property. As between perfected mortgages, first in time is first in right. Special rules apply to shares, financial instruments, bank accounts, industrial property, aircraft and marine vessels. A pledge is created and perfected through the transfer of possession or control. Registration is discussed at **Principle A4**, below, and enforcement at **Principle A5**.
Comment	
Principle A4	**Registry Systems** There should be an efficient, transparent, and cost-effective registration system with regard to property rights and security interests in the borrower's immovable assets.

[124] *See* Financial Collateral Law, Article 5 para. (2).
[125] *See* New Civil Code, Article 2.426.
[126] *See* New Civil Code, Article 2.400.

	There should be an efficient, transparent and cost-effective means of providing notice of the possible existence of security interests in regard to the borrower's movable assets, with registration in most cases being the principal and strongly preferred method, with some exceptions. The registration system should be reasonably integrated, easily accessible and inexpensive with respect to recording requirements and searches of the registry, and should be secure. **A4.1** ***Land and mortgage registries.*** Registries pertaining to land (or land use rights) and mortgages are typically established solely for recording of interests of this nature, although permanent fixtures and attachments to the land may be treated as being subject to recordation in the place of the underlying immovable property. Land and mortgage registries are typically established by jurisdiction, region or locale where the property is situated, and ideally should provide for integrated, computerized search features. **A4.2** ***Charge registries.*** Registries pertaining to movable assets of enterprises should be integrated and established nationally with filings made on the basis of the enterprise or business name, ideally in a centralized, computerized registry situated in the jurisdiction or location where the enterprise or business entity has been incorporated or has its main place of registration. **A4.3** ***Specialized registries.*** Special registries are beneficial in the case of certain kinds of assets, such as aircraft, vessels, vehicles, and certain types of intellectual property (*e.g.*, trademarks, copyrights, *etc.*).
Description	**Land Registry - Mortgages, Liens and other interests in Realty** *Registration and Costs* Almost all interests in realty must be perfected through a public registration process – namely, by registering the subject interests with the land registry (*carte funciară*) of the relevant county.[127] Under current Romanian law, registration is required in order to assure creation, perfection, and priority of a certain interest in realty against third parties, *i.e.* unsecured creditors, subsequent acquirers or holders of security interests or other liens over the same property. The land registry is currently undergoing an automation process, as a significant proportion of the records were exclusively in printed form and the registration process was relatively cumbersome and time consuming. Since January 2012, however, the National Association of Cadastre and Real Estate Publicity (NACREP) has completed an integration of an electronic system for all of its offices, permitting more efficient registration with the land book. The NACREP organizes and administers the cadastre and land book databases. In terms of registration costs, the fees chargeable for the registration of an immovable mortgage notice are equal to RON 100 plus 0.1% of the secured debt. There are certain fee exemptions for registration of notices regarding statutory liens (*ipotecă legală*). Due to the method of assessing stamp duties for mortgages, the mandatory

[127] The process is governed by several laws and regulations, the most important of which is Act No. 7/1996 on Cadastre and Land Registration ("**Land Registry Act**").

notarisation requirement concerning mortgage agreements can have serious cost implications.[128] Notarization costs for creation of mortgages have a fixed and a variable part. The variable part ranges from 0.07% to 0.65% of the value of the secured debt, except for mortgages created under the Prima Casa programme, the of which consist solely of the fixed part.

Access

The information in the land registries is technically open to the public.[129] Prior to July 2010, the law only granted access to parties in interest, and not to the public. In practice, the concept of parties in interest was often interpreted to mean that the registry "was open only to the titleholders of the property or their authorized representatives." Thus, third parties did not have a right of access to the subject land registry; although in some instances they were allowed to search, pursuant to arbitrary practices based on the discretion of the registrar. In practice, creditors contractually obligate their debtors to provide them with an excerpt of the subject Land Registry (which contains a minimum level of information), together with a certified photostatic copy of the relevant pages of the subject land registry.

In terms of access costs, the current fee for obtaining a land registry excerpt is RON 20 (approx. EUR 4.5).

Effectiveness

A recent set of amendments to the Land Registry Act introduced several provisions that may create potential barriers to normal operation of the land registries and the fair protection of the parties with interests in realty.

Thus, due to the mandatory notarization requirements for any agreement that creates or transfers interests in realty, in practice the notaries apply for a "notarization excerpt" from the relevant land registry, which is supposed to provide a stationary view of all the interests that have been recorded with respect to the subject realty in the land registry. The information in the excerpt is valid for ten consecutive days and the notarization process should be completed within that period. However, the law has created the practice that during such a period, the registrars may not perform any other registrations in the land registry, other than for the transaction for which the excerpt has been released.[130] Moreover, if during such period other unrelated applications for notice registration are filed, they are only considered after the expiry of the ten-day period.[131] This practice certainly protects the secured creditor in the transaction for which the notarization excerpt is released, but it also potentially creates problems for other parties in interest, including judgment creditors that consider levying against the relevant realty; or holders of statutory, possessory, or tax liens, that intent to perfect their interest in order to protect their position.

Registries for Mortgages, Liens and other Interests in Personal Property

Electronic Database of Security Interests in Personal Property

Registration and Costs

[128] *See* Order No. 39/2009 of the Ministry of Administration and Home Affairs on fees charged by the National Agency for Cadastre and Land Registration and Order No. 46/2011 of the Minister of Justice on the Norms regarding the notary public fees.
[129] *See* Land Registry Act, as subsequently amended and modified, Article 68 para. (1).
[130] *See* Land Registry Act, Article 54 para.1^1.
[131] *See* Land Registry Act, Article 54 para.1^2

	The perfection of movable mortgages, liens and other interests in personal property is attained generally by filing a security notice with an electronic database, which is accessible to the general public online, free of charge, the Electronic Database of Security Interests in Personal Property ("*EDSIPP*") (*Arhiva Electronică de Garanţii Reale Mobiliare*). EDSIPP is structured as an electronic database system and is updated through interconnected servers. The Ministry of Justice and the authorized special operators are the two bodies responsible for operating the database. In general, the Ministry of Justice is responsible for overall administration, for maintaining a back-up of the database, and for authorizing and supervising the operators, whereas the main functions of the authorized operators include registration of the security interests (by entering data into the system) and ensuring public access. Registration is based on standard forms for the main category of notices (original, modification, termination, etc.). The operators may establish their own procedures for receiving registration applications and the contents of the form. If the information is presented in the proper form, the operator is not entitled to verify its accuracy or its legality, and must simply record it in the database by reproducing its contents. The applicant is liable for any damages caused by the registration as a result of inaccurate information on the particular form. The registration is valid for five years and renewal is mandatory if required by the principal obligation secured, which must be made before the lapse of the five-year period. Otherwise, the initial registration expires at the end of such five-year term. There is an open and competitive system of operator certification and operators and their agents are free to set their own fees, though there are maximum or minimum thresholds. In practice, the fee is minimal and typically amounts to less than RON 100 (approx. EUR 20). In addition to the registration fee, there is also a duty that differs depending on the type of notice (between RON 100 and 300 - approx. EUR 20-70); such duties are provided to the Ministry of Justice as extra-budgetary revenue. *Access* EDSIPP is accessible to the public on the Internet and is unlimited, unconditional and free of charge. The existing software enables searches of the Movable Security Archive on the basis of the name and ID of the debtor, the name and ID of the creditor, the type of asset, or the registration IDEM The property search criteria are classified in three different categories: (a) automobiles; (b) fixtures, including crops growing or to be grown, timber to be cut or minerals, where the debtor is the owner of the estate and the fixture; and (c) other. The debtors and creditors are classified as individuals and corporates. *Effectiveness* Although EDSIPP is much more effective than the Land Registry, and access is provided in a centralized fashion, irrespective of where the notice has been filed around the country, the online searching features could be improved so as to reduce the time required for obtaining information, and to improve average search reliability. **Specialised Registries** As indicated at **Principle A3**, above, perfection of security and other interests in certain categories of asset requires the recordation of proper notices in separate

	asset registries. These include the Central Depository (financial instruments), the Civil Aviation and Naval Authorities (aircraft and marine vessels, respectively), and the Romanian Office for Inventions and Trademarks (industrial property). In relation to virtually all these specialised registers, local practitioners regard it as best practice also to file with the EDSIPP.
Assessment	The land registry, which plays a critical role in the credit framework, is in need of improvement. All interests in real property must be created and perfected through registration. The cadastre has 135 bureaus (local offices) and 42 cadastral (county) offices. An automation process was undertaken starting in 2012, and about 40% of records have so far been converted into electronic form. The rest are still maintained in paper form in local offices. Delineation of land boundaries is not always accurate, particularly in relation to rural agricultural areas, and there are frequent cases of overlapping properties. Registration of an immovable asset requires an average of 8 procedures, takes 26 days, and costs 1.2% of the value of the property.[132] A search costs RON 20. Fees for the registration of a mortgage notice are RON 100 plus 0.1% of the secured debt. Mandatory notarisation, however, can cost in excess of 0.65% of the value of the secured debt, which market participants consider to be steep. They also note the difficulties that can arise when notaries apply to the register for a "notarisation excerpt", which is determinative of the state of the register for 10 days from being issued, but which correspondingly also precludes the registrars from making, or even considering, any other entries over this period. This can have unnecessary adverse effects for judgment creditors and those holding statutory or tax liens. Strictly speaking, access to the register was not publicly available until July 2010, and to date, key information may still only be accessed with the registered owner's cooperation. Much of the register still exists on paper, which means that searches are not possible against the name of natural or legal persons, but only against the reference number of particular plots of land or other immovable assets. This considerably weakens the register's efficacy. Problems are exacerbated when court decisions and deeds of public executors fail to state the reference number of the immovable asset in question. It appears, further, that the state of the register is not determinative of title. Instead of relying simply on the register, at least some lenders investigate the chain of title going back 30 years. There is an administrative error correction procedure presided over by the Chief Registrar, whose decision is subject to judicial review. Where an error has been made, legal liability may be imposed on the cadaster office or the operator who committed the error, pursuant to the Civil Code. If the consequences of the damaging act are removed through judicial action, the claim for damages will not lie. The registry for interests in movable assets operates well. Registration of security in movable assets is required in order to obtain priority and effectiveness against third parties. The new Civil Code permits registration of a list of contractual clauses in

[132] *Doing Business 2013* (The World Bank). For comparison, a similar transaction would require 4 steps in Hungary and 3 steps in the Czech Republic, would take 17 days in Hungary and 24 days in the Czech Republic, and would costs 5% and 3% respectively in this countries.

	relation to collateral. The register started operations on 15 December 2000. It is unitary and in electronic form, with entries made by authorised legal persons around the country. Either creditor or borrower may make the initial filing, though only the registered secured creditor may make subsequent amendments. Tax authorities are an authorised operator and register seizures of assets. Entries expire after five years unless renewed. Searches are public and free, and may be made by reference to debtor, creditor, or asset identification number, though some stakeholders are of the view that the search functions could usefully be enhanced. The registry itself provides no redress against erroneous entries, though the registrant is personally liable for any such errors. Further, the Ministry of Justice, the supervising authority for the register, may order corrections of the register in certain limited circumstances.
Comment	The land register should be improved in several ways: (i) the process of moving the records to a central, electronic database is crucial, and might benefit from being speeded up; (ii) consideration should be given to further enhancing competition in the notary sector, which could be expected to have a salutary effect on notarisation costs; (iii) when a 'notarisation excerpt' is issued in relation to an asset and new entries in relation to it are suspended for 10 days, the registry should continue to receive and date-stamp new applications;[133] when the transaction for which the excerpt was issued is registered, the registration should be dated as from the date on which the notarisation excerpt was issued, and this should be followed by registration of other transactions in the order in which they were received over the 10-day period; (iv) magistrates' courts and public executors should be better trained to ensure that orders and deeds in relation to immovable assets identify those assets by reference number; (v) steps should be taken to increase the reliability of the register, with a view to full compliance with the 'mirror principle', viz., that the state of the register is determinative of the state of the title; and (vi) consideration should be given to creating a fund from which to compensate those having suffered loss because of good-faith reliance on an erroneous entry in the register; in other jurisdictions, such a fund is financed in whole or part by a proportion of the registration fee. Consideration should be given to enhancing the search functions by which the register for interests in movable assets could be interrogated.
Principle A5	**Commercial Enforcement Systems** **A5.1** ***Enforcement of unsecured debt.*** A functional credit system should be supported by mechanisms and procedures that provide for efficient, transparent, and reliable methods for satisfying creditors' rights by means of court proceedings or non-judicial dispute resolution procedures. To the extent possible, a country's legal system should provide for executive or abbreviated procedures for debt collection.[134] **A5.2** ***Enforcement of secured debt.*** Enforcement systems should provide efficient, cost-effective, transparent and reliable methods (including both non-judicial and judicial) for enforcing a security interest over assets. Enforcement proceedings should provide for prompt realization of the rights obtained in secured assets, designed to enable maximum recovery according to market-based asset values.

[133] According to the NACREP, this is now being done. Any application filed during the suspension period is recorded in a general entry ledger, thereby maintaining a record of priority.
[134] Enforcement in this Principle aims primarily at the treatment with respect to proceedings to recover against corporate debtors. Where enforcement proceedings involve individuals or persons, reasonable exemptions may need to be adopted to allow individuals or persons to retain those assets indispensable to the subsistence of the debtor and his/her family. Any such exemptions should be clearly defined and narrowly tailored.

Description	**Legal Framework** The New Code of Civil Procedure (in force since 15 February 2013) represents the main legislative source of rules and practices relating to the enforcement process. The framework is completed by several bilateral and multilateral treaties on judicial assistance in civil and commercial matters to which Romania is a party,[135] as well as other pieces of legislation, each of them serving different objectives, *i.e.*: o Code of Fiscal Procedure, addressing the enforcement of fiscal claims; o European Enforcement Order for uncontested claims Law;[136] o European order for payment Law;[137] o Enforcement of judgments in civil and commercial matters Law;[138] *Enforcement System* Enforcement is currently carried out by two separate bodies of enforcement officers, *i.e.*: (i) fiscal enforcement officers, who are civil servants employed in-house as tax collectors by the Romanian Agency of Fiscal Administration (*Agenţia Naţională de Administrare Fiscală* or *ANAF*),[139] and (ii) judicial enforcement officers, who represent a professional body of private individuals legally authorized to pursue the enforcement of judgments, orders, and other similar instruments upon which the law confers enforceability (generally referred to under Romanian law as writs of execution or enforceable titles, *titluri executorii*).[140] A general enforcement process carried out by judicial enforcement officers, yields to an enforcement action pursued by fiscal enforcement officers. Thus, once a fiscal enforcement action commences, a parallel general enforcement must stop and the relevant fiscal enforcement officer must join in, as creditor representative, the fiscal enforcement course. This scheme is said to be justified on public policy grounds, and it is stated that fiscal enforcement actions can be opposed. **Enforcement of Unsecured Claims** *Overview* With certain exceptions (in principle, regarding the "specialty" legislation in the Code of Fiscal Procedure), the New Code of Civil Procedure and, to a much lesser extent, the New Civil Code are the main pieces of legislation for establishing the procedure for enforcing unsecured claims outside of the insolvency system. The

[135] *See* 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (signed between EU on the one hand and Norway, Iceland and Switzerland on the other); *see*, *also*, the bilateral conventions executed between Romania on the one hand and, on the other hand, by the following non-EU Member States: Albania, Algeria, PR China, Bosnia and Herzegovina, Croatia, North Korea, Cuba, Egypt, Russian Federation, Morocco, Mongolia, FYR Macedonia, Moldova, Serbia, Syria, Tunisia, Turkey, and Ukraine.
[136] *See* Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004, directly applicable in Romania, as Member of the European Union.
[137] *See* Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, directly applicable in Romania, as Member of the European Union.
[138] *See* Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, directly applicable in Romania, as Member of the European Union.
[139] *See* Code of Fiscal Procedure, Article 138.
[140] *See* Act No. 188/2000 on Judicial Enforcement Officers, as subsequently amended, modified, and restated in Romanian Official Gazette No. 738 of 20 October 2011, Article 1.

	basic procedure generally involves two steps: (i) first, the creditor must obtain a writ of execution (*titlu executoriu*), which is a 'final' court judgment or arbitral award with a 'sacramental formula' inscribed on it (basically a stamp containing a written order from the President of Romania and signed by the court, empowering and ordering a judicial enforcement officer (e.g., *executor judecatoresc*), along with police and other law enforcement officers, to enforce the court judgment or arbitral award and take all action to support its implementation); and (ii) second, the creditor must deliver the writ of execution to an enforcement officer, who is empowered and required to open a new judicial proceeding in which the writ of execution can be enforced against the debtor's assets, through seizure and/or forced sale.[141] These steps are discussed in greater detail below. *Obtaining writs of execution* As noted, a writ of execution is a final judicial decision or arbitral award that has been vested with a sacramental formula. The creditor may use one of two judicial procedures to obtain the required judicial decision, depending on whether the debt is contested or not: o where the debt is *uncontested*, based on Art. 1013 *et seq* in the New Code of Civil Procedure, the creditor may apply to the court for an accelerated and simplified procedure, called payment ordinance (*ordonanta de plata*), provided: (i) the monetary obligation is certain (undisputed), liquid, due and payable, and (ii) the monetary obligation results from a written agreement, statute, regulation or other document accepted by the parties; and o where the debt is *contested* (*e.g.*, there is a dispute as to its existence or amount) or is otherwise not recoverable under the payment ordinance procedure, the creditor must file a common action with a court of law of competent jurisdiction. Whatever procedure is used, the court of first instance will issue the sacramental formula once its decision has become final. The final decision and the sacramental formula together constitute the writ of execution. It is noteworthy that, under Romanian law, certain legal instruments are deemed as a matter of law to be the equivalent of *writs of execution* or are per se *writs of execution* – which means the creditor can proceed directly to an execution officer for enforcement. These include: (a) contracts or other documents that are executed (before a public notary or otherwise, as appropriate), as long as they involve monetary obligations that are certain, expressed in cash and due; (b) credit facilities granted to private entities by Romanian credit institutions or guaranteed by the Ministry of Public Finances on behalf of the Romanian State; and (c) fiscal claims, such as tax, public pension and health insurance claims, and environmental and criminal fines. Moreover, bank loans, bills of exchange, promissory notes (*bilete la ordin*), and

[141] The second step should make clear that, in the context of enforcing unsecured rights, the remedy of "self help" is generally not available to unsecured creditors, as they must rely on an enforcement officer to enforce their writs of execution.

	cheques are deemed, as a matter of law, to be the equivalent of a final judicial decision, and, thus, creditors need only vest such instruments with the sacramental formula (enforcement powers formula) with the competent court for them to be enforceable as writs of execution. *Enforcement of writs of execution* Once an unsecured creditor obtains a writ of execution, it must file an application for enforcement with a judicial enforcement officer.[142] Upon receipt, the enforcement officer must immediately take the writ of execution to the competent court to open an enforcement procedure – which generally takes three separate forms (i.e., an action for bank accounts, which includes a "freezing order" from the court, an action against movable property, and an action against immovable property). Thereafter, the enforcement officer will look to seize and sell the property of the debtor.[143] The sale of the debtor's property is generally accomplished through public auction, direct sale or other legally authorized method (e.g., foreclosure by the creditor if the public auction is unsuccessful). Special procedures apply for public auctions depending on whether the subject of the auction is immovable property (land and buildings) or moveable property. Where another creditor has a mortgage on a parcel of property or a security interest in property subject to being sold in the enforcement procedure, such creditor will be given notice of the sale and will be the first to be paid from the proceeds of the sale (after the administrative costs and expenses are paid, which rank senior under Romanian law). The enforcement officer is also required to notify all secured and lien creditors, who can this join in the enforcement to share the sale proceeds. *Effectiveness* The enforcement process for unsecured debt is fairly lengthy and cumbersome, and asset tracing is challenging. Enforcement practices vary across the country. Pursuant to information obtained individually from debt enforcement officers, attachment of unencumbered bank accounts and realization of debtor's personal property may take six to nine months, while enforcing real estate could run on for over one year. Challenges to and appeals from various enforcement stages may result in further delays of one to two years, leading to deterioration in collateral value. The enforcement process can be further delayed due to concurrent tax enforcement proceedings, which run pursuant to a different set of rules and which are overseen by tax enforcement officers in the Government employ. Once tax enforcement proceedings are initiated, any ordinary debt enforcement process is stayed or prevented to commence, and the non-tax creditors are required to join in the tax enforcement proceedings. **Enforcement of Security Interests In Personal Property** *Overview*

[142] As noted above, certain legal instruments are the legal equivalent of writs of execution or are *per se* writs of execution. Thus, creditors who hold such instruments proceed directly to enforcement by giving the instrument to an enforcement officer. In practice, these creditors typically go to different types of enforcement officers – for example, one who holds the office on behalf of the fiscal authority (fiscal enforcement officer).
[143] The enforcement officer must notify the debtor in writing before starting the enforcement proceedings and failure to notify triggers the annulment of the enforcement action.

The New Civil Code, the New Code of Civil Procedure, and other pieces of legislation (*e.g.*, Financial Collateral Law, Company Act and Capital Markets Act) govern the enforcement of secured rights in most forms of movable assets.

In general, creditors have a wide array of options (both judicial and non-judicial) to enforce their security over movable property and may choose between the enforcement methods of the New Code of Civil Procedure and the enforcement methods provided by the New Civil Code, which allows non-judicial execution.[144]

Enforcement methods afforded by law depend on the nature of the property enforced against, *i.e.*: (i) tangible property, (ii) documents of title such as warehouse receipts, bills of lading, and alike, and negotiable instruments; and (iii) account receivables and bank accounts.

New Civil Code Enforcement Methods

Preliminary considerations

The New Civil Code allows the parties to a movable mortgage agreement to select any commercially reasonable method by which collateral may be sold.[145] The law indicates several alternative factors indicating that the sale was conducted in a "commercially reasonable" manner, *i.e.*:

- where conducted on regulated markets, a sale that is conducted pursuant to the rules of those markets, and in exchange for prices determined by those markets and which are applicable at the time of the sale;
- where similar property is routinely marketed by other traders pursuant to commercially reasonable practices, a sale conducted pursuant to such practices;
- where there are no regulated markets or standard commercial practices for selling particular property, a sale conducted pursuant to the instructions provided under the very mortgage itself.[146]

As a general rule, an enforcement process must observe several mandatory limitations that seemingly the parties may not be able to waive.

Thus, under the New Civil Code, the parties to a mortgage agreement may not agree that a mortgagee is able to appropriate (by strict foreclosure) the mortgaged property or to dispose of it other than by duly following those requirements prescribed by law and which may not be departed from or waived by way of agreement.[147] Also, secured creditors may only acquire, through credit bidding or otherwise, property that is subject to their security in the course of a sale initiated by them (i) at a public sale (auction); or (ii) via a private sale, provided, however, that property is a commodity usually traded on regulated markets.[148]

[144] *See, e.g.*, New Civil Code, Article 2.432).
[145] *See, e.g.*, New Civil Code, Art. 2.445 para. (4) ("The parties may, in case of default, agree in the security agreement *the method for selling the goods subject to security*.") (emphasis added).
[146] *See* New Civil Code, Art. 2.446 para.(1). A sale conducted with the observance of such rules shall not be regarded as conducted in manner that is not commercially reasonable only because a method or timing other than the one that a creditor chooses may have yielded a higher price; *see* New Civil Code, Art. 2.446 para.(2).
[147] *See* New Civil Code, Art. 2.433.
[148] *See* New Civil Code, Art. 2.448.

	Furthermore, enforcement may proceed as long as it pertains to a document constituting a writ of execution and if it relates to an amount that is certain, liquidated, due, and payable.[149] The law is lenient with respect to a junior secured creditor, permitting such creditor to challenge the enforcement process to the extent that a senior secured creditor that commences the enforcement process against the same mortgaged property enjoys additional mortgaged movable property that is adequate (*i.e.*, provides enough value through enforcement to discharge the entire secured debt of the senior creditor).[150] *Preliminary steps – repossession* The New Civil Code identifies three separate methods which the parties to a movable mortgage agreement may envision both at the moment of their contract, and thereafter, in case default is anticipated and collateral about to be sold, *i.e.*: (1) sale; (2) strict foreclosure; and (3) receivership. In any situation, a creditor may first consider repossessing the mortgaged property in order to prevent concealment, destruction or other event that may impede a successful sale process. Repossession may be carried out through a creditor's own means or, if required, with the assistance of public force (judicial enforcement officers and police).[151] *Sale* The first step in an enforcement process under the New Civil Code where a secured creditor envisions a sale of the mortgaged property is for that creditor to seek permission from court to sell the property.[152] The test for the granting of such permission envisions an examination by the court of the mortgage agreement and the secured claims in order to determine, after notice and hearing, the existence of such claims, as well as the existence of a perfected movable mortgage.[153] Further, subject to several exceptions related to property that is perishable, volatile, or commonly traded on a regulated exchange, the creditor is under a duty to both: * notify its intent to sell the mortgaged property to an entire spectrum of third parties, including: (a) the debtor; (b) the owner of the mortgaged property or its successors and assignees; (c) any personal guarantor or any third party that is jointly and severally liable for the secured obligation; (d) any other secured creditors that maintain, at the date of notification, security interest in the mortgaged property that has perfected via registration with the Electronic Database of Security Interests in Personal Property; and (e) any other known secured creditor maintaining a security interest in the subject property that has perfected in other permitted manner; and * file a foreclosure notice with the Electronic Database of Security Interests in Personal Property at least 15 days prior to the proposed date of sale, the violation of which shall result in a defect in the foreclosure sale.[154] Any notified party in interest that is harmed by the sale may object before court within 15 days, and pending the final resolution of the case, foreclosure is stayed.[155]

[149] *See* New Civil Code, Art. 2.430.
[150] *See* New Civil Code, Art. 2.434.
[151] *See* New Civil Code, Arts. 2.435 – 2.444.
[152] *See* New Civil Code, Art. 2.445 para.(1)
[153] Idem.
[154] *See* New Civil Code, Arts. 2.449 and 2.450.
[155] *See* New Civil Code, Art. 2.452.

A secured creditor may elect to sell the mortgaged property via a public sale (*e.g.*, auction) or private sale (after a direct negotiation); provided that the sale is conducted under commercially reasonable terms.[156]

Upon completion of the sale, all existing security interests and liens in the sold property are, as a general rule, extinguished (including that of the foreclosing creditor), and the debtor remains personally liable for any deficiency.[157]

Strict foreclosure (appropriation)

Strict foreclosure is allowed under limited circumstances and it requires both the prior written consent of the mortgagor, which, however, must necessarily be given *after* default, and the non-objection of those parties which have to be notified under the law.[158] Similar to a regular sale scenario, the creditor must notify its strict foreclosure proposal to such parties and also duly file a strict foreclosure notice with the Electronic Database of Security Interests in Personal Property, in order to provide such parties with an adequate opportunity to challenge the sale.[159]

Upon the completion of the strict foreclosure, all existing junior security interests and liens in the sold property are, as a general rule, extinguished (including that of the foreclosing creditor).[160] However, in stark contrast with a sale scenario, the law dictates two important consequences of a creditor's acquiring the property in foreclosure, *i.e.*:

* the creditor's entire secured claim is automatically exhausted; and

* the debtor is released from further personal liability for any deficiency, leaving the creditor with no remedy of pursuing the debtor, irrespective of whether the value of its secured debt exceeds the value of the property (*i.e.*, the creditor is under secured).[161]

These consequences of strict foreclosure will likely make it a less desirable method of enforcement from the lender's point of view.

Specific rules for foreclosing on documents of title and negotiable instruments

The rules of private foreclosure on documents of title seem to only permit sale as a foreclosure method.[162]

A secured creditor holding a mortgage over negotiable instruments may foreclose on its collateral by pursuing the principal obligors, as well as the endorsers and avalists.[163]

Specific rules for foreclosing on receivables and bank accounts

Foreclosure on receivables can be realized via either sale or strict foreclosure.[164] With respect to bank account foreclosures, if perfection of a security interests in a

[156] *See* New Civil Code, Art. 2.445 para.(3)
[157] *See* New Civil Code, Arts. 2.455 para.(1) b) and c) and 2.456. *See, however,* New Civil Code, Art. 2.325 (allowing parties to contractually limit the scope of recourse of a secured creditor to other property of a debtor).
[158] *See* New Civil Code, Art. 2.460.
[159] *See* New Civil Code, Arts. 2.461 and 2.
[160] *See* New Civil Code, Art. 2.463.
[161] *See* Act No.71/2011, Chapter VII, Section 1, Art.184.
[162] *See* New Civil Code, Art.2.464 para.(1).
[163] *See* New Civil Code, Art.2.464 para.(2).

	bank account has been done via its control by the very credit institution where the bank account is open, such credit institution may proceed to foreclosure by setting off the positive balance in the bank account against the value of the bank's secured debt against the bank account holder.[165] *Receivership* Receivership (*preluarea bunului în vederea administrării*) is a novel institution under the New Civil Code. As indicated above, although the Collateral Law was regarded as permissive on floating charges, there are few, if any, instances in the past where floating charges crystallized and receivership was instituted. Receivership applies solely where there is a movable mortgage over assets of an enterprise.[166] If the context requires, a receivership can be instituted with respect to such assets and the creditor must fulfil notification and publication requirements similar to those provided by the sale rules.[167] Either the creditor, or a third party appointed by the creditor or the court may stand as receiver, in which capacity it is bound to follow the rules governing full administration of another person's property (*administrare deplină*).[168] Although bound by the rules governing fiduciary relationships, the law is not clear, however, as to whom a receiver appointed in an enforcement context owns its fiduciary duties: (a) the creditor; (b) the debtor (enterprise owner); or (c) to both of them.[169] A receiver with full powers enjoys substantial discretion with respect to managing and disposing of the assets and the way money is invested.[170] However, the law is not clear with respect to whether, in an enforcement context, a receiver's powers include the management of the affairs of the enterprise, and whether the receiver may resolve to liquidate the enterprise and sell its assets in order to discharge the enterprise's debts. The law indicates that receivership does not terminate if the debtor the property of which is in receivership runs into insolvent liquidation, but it does not provide further details about the conflicting duties of a receiver and an insolvency trustee and how they are supposed to exercise such competing duties.[171] It remains to be seen how this institution will develop in Romania, particularly in an insolvency context that relates to the legal owners of the assets in receivership. *Financial Collateral Law Methods* The Financial Collateral Law permits a streamlined method of enforcing collateral under a financial collateral arrangement. This is in line with the declared objectives of the Financial Collateral Directive and its implementation in other EU jurisdictions, *i.e.* (a) integration and cost efficiency of the financial markets; (b) stability of the financial system; and (c) reduction of risks (legal risks and credit risks) and losses.

[164] *See* New Civil Code, Art.2.465 (stipulating that a receivable sale should observe the relevant rules governing the assignment of receivables).
[165] *See* New Civil Code, Art.2.466 para.(1).
[166] *See* New Civil Code, Art.2.468.
[167] Idem.
[168] *See* New Civil Code, Arts.2469 and 2.470.
[169] *See* New Civil Code, Art.803 *et seq.*
[170] *See* New Civil Code, Arts.800 and 801.
[171] *See* New Civil Code, Art.2.472.

	If an enforcement event occurs, the realisation of financial collateral will be by either (i) sale or, if so agreed, (ii) appropriation of the financial instruments and by setting off the amount or applying it in discharge of the relevant financial obligation. As indicated, close-out netting and set-off rights are expressly identified under the law as permitted techniques for simplifying the account settlement between the collateral taker and collateral provider, as well as for offering protective remedies to participants in the financial markets.[172] The appropriation of collateral is available in cases of *security* financial collateral arrangements; provided, however, that the parties agree in the arrangement that appropriation is an accepted method of enforcement, and they also agree on the valuation of the collateral.[173] As a matter of principle, valuation and enforcement of financial collateral must always be carried out in a commercially reasonable manner, which should be agreed by the parties.[174] However, unless otherwise agreed in a financial collateral arrangement, enforcement does not depend on fulfilling certain prerequisites, such as: o advanced notification of the intention of enforcing collateral; o prior approval of enforcement by a court or administrative authority, o prior mandatory notice; o mandatory public sale.[175] *New Code of Civil Procedure Methods* If the remedy of 'self-help' is not pursued or if it is impossible to invoke, the secured creditor can generally bypass litigation before the commercial court and proceed directly to an enforcement officer (because a movable mortgage agreement is the equivalent of a writ of execution), who is empowered and required by law to open and pursue a judicial enforcement proceeding, which includes the power to seize and sell the subject movable assets. Although the enforcement proceeding is technically a judicial enforcement proceeding, the process itself involves minimal judicial intervention, which in turn is relatively streamlined. The debtor, the creditors that registered security on the same asset, and the owner of the good subject to the security interest (if different from the debtor) must all be notified of the enforcement proceedings. The enforcement officer is also required to notify all budgetary and budgetary-equivalent creditors (who may assert a privilege over the sale proceeds). *Sale / Distribution* The sale of the debtor's asset is generally accomplished through public auction, direct sale or other legally authorized method (*e.g.*, foreclosure by the creditor if the public auction is unsuccessful). Interested parties may oppose the sale within 15 days of receipt of notification, and the court must resolve the opposition within five days (subject to appeal, which does not automatically stay the execution

[172] *See* Financial Collateral Law, Art. 6.
[173] *See* Financial Collateral Law, Art. 6 para. (2).
[174] *See* Financial Collateral Law, Art. 6 para. (4).
[175] *See* Financial Collateral Law, Art. 6 para. (3).

	proceeding). In the event of a sale, the new buyer will acquire the asset free of any charges. The order of distribution of the proceeds is as follows: (1) expenses for maintaining, preserving, and taking over the asset; and (2) payment of the secured claims (including interests and costs), beginning with the first priority and continuing thereafter until all secured claims have been paid in full.[176] If the sum of the sale proceeds is not sufficient to pay the entire secured claim of a creditor, the debtor is not discharged. Rather, the deficiency is treated as an unsecured claim and the creditor may pursue the balance against other property of the debtor or any guarantors;[177] provided, however, that such remedy depends on whether the creditor has a recourse or nonrecourse claim.[178] *Time and Costs* In terms of time and costs related to the enforcement of the writs in respect of movable property, the average period is about six months and the maximum fees that can be charged is established by the Ministry of Justice (Order No. 2550/2006), based upon the type of service. The fees for enforcement of the writ involve a variable part (ranging *from* 10% of the value of the claim which is recovered in fact for amounts up to RON 50,000 (approx. EUR 10,000) or 1% for amounts larger than RON 100,000 (approx. EUR 20,000). **Enforcement of Security Interests in Realty** *Overview* Mortgages are created and recognized in accordance with the New Civil Code and Registry Land Act, and the New Code of Civil Procedure governs their execution. A mortgagee may also seize and force execution upon other realty of the debtor that is not mortgaged, but only to the extent that the value of mortgaged property is not sufficient to discharge the claim.[179] *Enforcement Methods* *Judicial foreclosure of immovable mortgages* The New Code of Civil Procedure governs judicial foreclosure on immovable property, including mortgaged property. Generally, only judicial enforcement officers conduct the foreclosure procedure under the Code of Civil Procedure. *Commencement of the foreclosure procedure* Generally, immovable mortgage agreements are regarded as self-executing instruments.[180] That means that the creditor does not need to obtain a writ of execution from the court in order to proceed to execution. *Court approval for forced execution* To commence a foreclosure procedure on the mortgage property a secured creditor

[176] *See* New Civil Code, Article 2.459.
[177] *See* New Civil Code, Article 2.456.
[178] *See* New Civil Code, Article 2.325.
[179] *See* New Civil Code, Article 2.478.
[180] *See See* New Civil Code, Article 2.431.

	must file an application for forced execution, accompanied by the self-executing instrument, with a judicial enforcement officer of competent jurisdiction.[181] Upon receipt of the application, the judicial enforcement officer must file an *ex parte* motion to obtain court's approval for forced execution.[182] *Minutes regarding the status of the mortgaged property* Immediately after obtaining court approval for forced execution, the judicial enforcement officer must visit the site of the mortgaged property and prepare minutes regarding the condition of the immovable property, identifying and describing in detail the mortgaged property.[183] *Summons to pay* After the execution of the minutes regarding the condition of the mortgaged property, the judicial enforcement officer must deliver a summons to pay to the debtor, together with the court order approving the forced execution.[184] *Registration of summons with the land registry* The summons must be registered with the land registry. Any rents or assignment of receivables made by a debtor after the registration of the summons to pay will have no effect (*nu va fi opozabil*) against the creditor or person who acquired the mortgaged property. If the debtor does not pay the outstanding loan within 15 days of the receipt of the summons, the judicial enforcement officer may proceed by selling the mortgaged property.[185] *Sale of the mortgaged property* According to the New Code of Civil Procedure, in case of foreclosure on mortgaged property, the judicial enforcement officer must sell the property through a public auction.[186] *Auction* *Determining the price* Upon expiry of 15 days from the receipt of summons to pay, the judicial enforcement officer will determine the value of the immovable property.[187] At the request of the interested parties, or if the judicial enforcement officer is unable itself to determine the value, the judicial enforcement officer may request an expert valuation report. Generally, the immovable property must be evaluated at its market value.[188] Apart from the price of the mortgaged property, the judicial enforcement officer must determine (through the evaluation of an expert) the value of any real rights registered after the registration of the mortgage.[189]

[181] *See* New Code of Civil Procedure, Article 818
[182] New Code of Civil Procedure, Article 665
[183] *See* New Code of Civil Procedure, Article 828.
[184] *See* New Code of Civil Procedure, Article 666.
[185] *See* New Code of Civil Procedure, Article 834.
[186] *See* New Code of Civil Procedure, Article 841.
[187] *See* New Code of Civil Procedure, Article 835.
[188] *Ibid* and Article 836 in the New Code of Civil procedure
[189] *See* New Code of Civil Procedure, Article835.

	Notice of sale Within five days of determining the price of the mortgaged property, the judicial enforcement officer will post a notice of sale containing information, including the identification of the property, the price, the details of the self-executing instrument and the date, hour and place of sale of property.[190] The notice of sale must be posted at the headquarters of the judicial enforcement officer, the court and the municipality, as well as at the sale address and the location of the property. In addition, at the request of an interested party, the sale notice may be published in a widely read newspaper.[191] The judicial enforcement officer must notify the debtor of the date, hour and place of sale of mortgage property. The creditor must advance the costs incurred in connection with the publication of notice of sale in the newspaper, with the right to claim them against the debtor.[192] *Time frame for the sale* The sale date of the mortgaged property must be set up between 20 and 40 days of the date of posting the sale notice at the address were the auction will take place.[193] *Conditions for participating at the auction sale* Any person (except for secured creditors with valid ranking) wishing to participate in the auction sale must post a bond of 10% of the auction property sale price.[194] *Auction sale process* The auction must take place in public.[195] It begins with the reading of the received offers. The judicial enforcement officer will then offer the mortgaged property for sale by citing the highest offer price, or if no offers were received, at the price initially determined by such officer or the applicable expert. If no offer is received after three calls, the judicial enforcement officer must organise another auction by no later than 30 days.[196] Notice of the new auction must be published in a newspaper. The starting price for the new auction will be set at 75% of the initially valued price. If no offer is received for this price, the judicial enforcement officer will sell the property to the highest bidder, but not if the offer is for less than 30% of the initial starting price. If the second auction is unsuccessful, a third auction may be organized, at a price representing 30% of the initial starting price. If this price is not tendered and there are at least two bidders, the property will be sold to the highest bidder. The sale could be affected even if there is only one bidder, provided that their bid is equal to the starting price.[197] The person (except for the secured creditor) who was declared the winner of the auction sale must transfer the offered price to an account indicated by the judicial enforcement officer, no later 30 days of the auction sale.[198] At the request of the bid

[190] *See* New Code of Civil Procedure, Article 837.
[191] *See* New Code of Civil Procedure, Article 838
[192] *See* New Code of Civil Procedure, Article 838 para.(5).
[193] . *See* New Code of Civil Procedure, Article 837 para (2)
[194] *See* New Code of Civil Procedure, Article 838 . para (1) letter (l) and Article 843
[195] *See* New Code of Civil Procedure, Article 845.
[196] *See* New Code of Civil Procedure, Article 845.
[197] Ibid.
[198] *See* New Code of Civil Procedure, Article 848.

	winner, the judicial enforcement officer may allow the price to be paid in instalments. *Transfer of title* Upon the payment of the price (or an advance if this was agreed with the judicial enforcement officer), the judicial enforcement officer must execute the deed of transfer (*act de adjudecare*) and deliver an original counterpart of such title to the bid winner, who can then register it with the land registry.[199] If the mortgaged property was sold subject to the payment of the price in instalments, the liens over the property shall remain in place until full payment of the price and the winner of the tender will be prevented from selling or encumbering the property without the prior consent of the secured creditors.[200] The registration of the property title with the land registry enables the winner of the tender to enjoy the right of disposal over the property, as per the land book rules.[201] *Credit bidding* Secured creditors or other parties with an interest in the proceedings cannot acquire the property at a price lower than 75% of the starting price in the first auction.[202] A secured creditor intending to participate at an auction sale does not need to post any bond.[203] The secured creditor acquiring the mortgaged property may apply its claim to offset the offered price, in which case it must pay only the balance, if any.[204] *Appointment of a receiver* After the delivery of the summons to pay, the judicial enforcement officer (at the request of the secured creditor or at his own initiative) may appoint a receiver to manage the mortgaged property. In principle, the judicial enforcement officer may appoint the secured creditor itself as a receiver of the mortgaged property. The receiver must collect any income deriving from the mortgaged property, deposit it in a bank account and deliver to the judicial enforcement officer all the deposit slips.[205] *Right of redemption* The New Civil Code indicates that a mortgagor enjoys the right to redeem the mortgaged property until the finalization of the execution proceedings.[206] However, this rules seems to be at odds with the pertinent part of New Code of Civil Procedure, pursuant to which a debtor may request a court, solely within 10 days of the receipt of the summons to pay, to approve the full payment of the outstanding debt (including interest and expenses) if it can prove that its income and revenue from the mortgaged property for the next six months may cover such outstanding debt.[207] Furthermore, the Code of Civil Procedure indicates that the debtor subject

[199] *See* New Code of Civil Procedure, Article 852.
[200] *See* New Code of Civil Procedure, Article856.
[201] *See* New Code of Civil Procedure, Article 856 para.(2).
[202] .New Code of Civil Procedure, Article 842 para (5).
[203] *See* New Code of Civil Procedure, Article 843 para.(2).
[204] *See* New Code of Civil Procedure, Article 848 para.(2).
[205] *See* New Code of Civil Procedure, Articles 830 and 831.
[206] *See* New Civil Code, Article 2.473.
[207] *See* New Code of Civil Procedure, Article 823.

	to the forced execution proceedings is prohibited from participating in the auction and acquiring the property that is sold at auction.[208] In principle, a debtor does not enjoy a statutory right of redemption of the mortgaged property after such is sold during the foreclosure procedure. *Contesting the foreclosure* According to the New Code of Civil Procedure, any interested party (including the debtor, or a third party in interest) may contest the commencement of the foreclosure procedure or any act made during such procedure.[209] If the self-executing instrument was not issued by a court (*e.g.*, mortgage agreement), the debtor or the third party may raise certain defences that require the court to address the merits of the case.[210] For example, a debtor may claim that it is not in default on the outstanding loan, and therefore, that the creditor does not have the right to commence foreclosure on the mortgaged property. Generally, the motion contesting the commencement of the foreclosure procedure or any enforcement acts thereof must be filed within (i) 15 days of the date the debtor or other interested party became aware of the act of forced execution[211] or (ii) ten days of the date of the notice to the debtor regarding the registration of the summons to pay with the land registry.[212] At the request of the debtor or other interested party and subject to posting a bond in the amount established by law, the foreclosure procedure may be suspended until the court's decision on the motion.[213] *Priority* In case of concurrent immovable property seizure, the highest ranking mortgagee has priority over all other creditors, including the mortgagees and preferential creditors of lower ranking, upon the distribution of the sale proceeds, excepting certain privileged creditors. *Time and Costs* The main advantages of immovable mortgages are that they allow more easily seizure of the mortgaged property and they confer priority over other creditors. However, collection of claims last relatively long, and the mortgagees of lower priority are exposed to the risk of insolvency of the debtor or guarantor.
Assessment	*Unsecured claim enforcement* Enforcement of unsecured claims is a lengthy and cumbersome process that characteristically brings little or no returns to the creditor. There is no self-help remedy in relation to the enforcement of unsecured credit claims. The process generally involves two steps: obtaining a writ of execution and obtaining execution of the writ through an enforcement officer. A writ of execution in relation to an uncontested, liquid and due payment

[208] *See* New Code of Civil Procedure, Article 841 para.(2).
[209] *See* New Code of Civil Procedure, Article 711 *et seq.*.
[210] *See* New Code of Civil Procedure, Article . 711 *et seq*
[211] *See* New Code of Civil Procedure, Article 711 *et seq*.
[212] *See* New Code of Civil Procedure, Article 816 para.(3).
[213] *See* New Code of Civil Procedure, Article 718.

obligations resulting from a written agreement or statute may be obtained through the abbreviated 'payment ordinance' process. If the claim fails to meet one or more of these conditions, the creditor must begin an ordinary court procedure. Certain documents, including notarised contracts with certain, liquid, and due obligations are regarded as on par with writs of execution, as are fiscal claims, and these may be directly enforced.

Realisation of assets is made through public auction, with secured creditors having priority ranking on the proceeds. The process is resource-intensive and time consuming. It may take up to a year for enforcement against real property and six to nine months for other types of assets, not counting the various contestations available and related appeals, as well as likely suspensions of the proceedings granted by the court, which could significantly delay the overall process. Further, tax enforcement proceedings take precedence, and once they are underway, other processes are suspended.

While no direct systematic evidence is available in relation to the enforcement of unsecured claims, survey evidence indicates that the enforcement of a contractual claim takes 512 days, costs 29% of the value of the claim, and requires 32 procedures.[214]

Enforcement of claims secured against movable property

Unless the collateral is difficult to locate, enforcement of claims secured against movable property is said to frequently proceed smoothly. The New Civil Code provides for sale, strict foreclosure, or receivership, and enables any commercially reasonable enforcement method to be specified in the security agreement. Where the mortgage agreement is on par with a writ of execution, the creditor may, pursuant to the New Code of Civil Procedure, bypass litigation and proceed directly through an enforcement officer (see above). Steps in the enforcement process may be challenged in court, but in general, such challenges do not cause suspension of the process. Enforcement fees range from 10% of the value of a claim smaller than RON 50,000 to 1% of a claim larger than RON 100,000.

Enforcement of claims secured against immovable property

The enforcement, through individual or collective processes, of claims secured on immovable assets takes an average of 3.3 years, costs 11% of the value of the debtor's estate, and yet yields the secured claimant only 29% of what it is owed.[215]

Agreements creating mortgages over immovable property are characteristically on par with writs of execution, and may thus be directly enforced through enforcement officers with minimal judicial involvement. After obtaining *ex parte* court approval, the enforcement official visits the property to inspect it and create 'minutes' detailing its attributes and condition. He then issues a 'summons to pay', which is registered with the land registry. If no payment is made within 15 days, the property may be realised. Realisation is through public auction. The enforcement officer has power to appoint a receiver, including the secured creditor itself, to manage the collateral and receive and account for income from it.

[214] *Doing Business 2013* (The World Bank). For comparison, a similar contractual claim could be enforced in Hungary and the Czech Republic in 395 and 611 days respectively, would costs 15% and 33% of the claim's value, and would require 35 and 27 procedures.

[215] *Doing Business 2013* (The World Bank). For comparison, similar enforcement processes would 2 years in Hungary and 3.2 years in the Czech Republic, would cost 15% and 17% in these two countries respectively, and would produce a recovery rate of 38% and 56%.

	The auction process can be unnecessarily lengthy and destructive of value. It has several weaknesses. First, the notice of sale is generally publicized by being physically posted at certain locations, and it must also be published in a national newspaper in case the value of the property exceeds 250,000 lei, or in a local newspaper for values below this ceiling. What is lacking is a common online platform for the advertisement of properties put up for auction. This hampers due exposure of the asset to the relevant markets and tends to depress realised values. Second, the first auction, in order to be valid, must by law realise at least as much as the highest offer price, or if no offer was received, the full assessed value of the collateral. If the first auction is unsuccessful, a second auction must be held within 30 days with a reserve price set at 75% of the value originally placed on the property, and if even this price is not realised, the enforcement official may sell to the highest, or sole, bidder. This process invites strategic behaviour, with most first auctions reportedly failing to elicit appropriate, or any, bids, as potential buyers await the effective elimination of the reserve price in the second auction. The process is prolonged and collateral value is further impaired. Third, it appears that the existing occupant may stay in situ during the auction, thereby preventing potential buyers from being able to see or acquire the collateral with vacant possession. This reportedly reduces the realised value by about 25%. *Other issues* There are significant doubts about the identity of the beneficiaries of the receiver's duties, and about the receiver's powers particularly in relation to all-enterprise security interests. Lenders complain unanimously about the effect on the enforcement process of the corporate debtor's commencement of insolvency proceedings. Even if the enforcement process is well advanced, a corporate debtor may petition for the commencement of its own insolvency proceedings. The petition must be heard within five days, and if granted, suspends the on-going enforcement process. Costs incurred by lenders in organising auctions are laid to waste. Lenders report that debtor filings in such circumstances almost always amount to strategic manipulations of the insolvency moratorium.
Comment	The enforcement process is in urgent need of strengthening through a number of reforms of law and practice, including the following: (i) The law should clearly identify the party or parties to whom are owed the duties of a receiver appointed in an enforcement context; it may be appropriate to impose a hierarchy of duties, arranged according to the priority of claims against the assets under receivership; there should be an overriding duty to act in good faith and with reasonable competence, and to act as to both the manner and timing of realisation so as to realise a fair market price; (ii) The law as to receivership should also be clarified to indicate that the receiver appointed in relation to all or almost all the assets of an enterprise has the power to manage the enterprise, and may even commence insolvency proceedings in relation to it, so long as he does so in compliance with the overriding duty identified above; if insolvency proceedings do commence, they should take precedence over receivership, which should terminate forthwith; insolvency proceedings are intended to protect the collective interest of all creditors of the debtor, which should take precedence over the individual interest of one or only some creditors served by receivership;

	(iii) An online unified auction platform should be created as a complement to current auction notification processes, to provide optimal market exposure to the assets for sale and to enable better realisation of such assets; (iv) The auction process should be strengthened, with the assets fully exposed to the relevant segments of the market through multiple advertisements in appropriate media as well as online on the afore-mentioned platform, and with an obligation on those conducting the auction to make all reasonable efforts to realise fair market value. Consideration should be given to amending the rules regarding the auction process to make it more effective, less cumbersome and less destructive of value and to avoid abuse of the system; (v) It is critically important for courts to be empowered, and in appropriate circumstances, obligated, to order existing occupants of immovable property to vacate the property as a prelude to its realisation, so proper market value can be realised on a vacant possession basis; where existing occupants have rights (such as a lease) binding on the secured claimant or other party at whose behest the property is to be realised, there should in appropriate circumstances be a power for a receiver to be appointed *prior to auction/sale* to receive rent etc. while awaiting expiry of the occupants' rights as a prelude to the auction/sale; the revenues received by the receiver should be applied towards *pro rata* discharge of the secured obligations; (vi) The deadlines for challenging the forced execution process, as well as the timeline for the court to settle such challenges should be shortened; (vii) The overall forced execution process should be simplified, to become more flexible and less formalistic, and ultimately less time consuming; (viii) in the insolvency process, the insolvency representative, or else the court, should have power at the earliest practicable opportunity to release encumbered assets from the insolvency moratorium where there is evidence on the balance of probabilities that those assets are not required either for a rehabilitation effort for, or a 'going concern' sale of, all or part of the debtor's business (see further below at **Principle C5**).
	PART B. RISK MANAGEMENT AND CORPORATE WORKOUT
Principle B1	**Credit Information Systems** A modern credit-based economy requires access to complete, accurate and reliable information concerning borrowers' payment histories. Key features of a credit information system should address the following: **B1.1 Legal framework**. The legal environment should not impede and, ideally should provide the framework for, the creation and operation of effective credit information systems. Libel and similar laws have the potential of constraining good faith reporting by credit information systems. While the accuracy of information reported is an important value, credit information systems should be afforded legal protection sufficient to encourage their activities without eliminating incentives to maintain high levels of accuracy. **B1.2 Operations.** Permissible uses of information from credit information systems should be clearly circumscribed, especially regarding information about individuals. Measures should be employed to safeguard information contained in the credit information system. Incentives should exist to maintain the integrity of the database. The legal system should create incentives for credit information services to collect and maintain a broad range of information on a significant part of

	the population. **B1.3 Public policy.** Legal controls on the type of information collected and distributed by credit information systems can be used to advance public policies. Legal controls on the type of information collected and distributed by credit information systems may be used to combat certain types of societal discrimination, such as discrimination based on race, gender, national origin, marital status, political affiliation, or union membership. There may be public policy reasons to restrict the ability of credit information services to report negative information beyond a certain period of time, *e.g.*, five or seven years. **B1.4 Privacy.** Subjects of information in credit information systems should be made aware of the existence of such systems and, in particular, should be notified when information from such systems is used to make adverse decisions about them. Subjects of information in credit information systems should be able to access information maintained in the credit information service about them. Subjects of information in credit information systems should be able to dispute inaccurate or incomplete information and mechanisms should exist to have such disputes investigated and have errors corrected. **B1.5 Enforcement/Supervision.** One benefit of the establishment of a credit information system is to permit regulators to assess an institution's risk exposure, thus giving the institution the tools and incentives to do it itself. Enforcement systems should provide efficient, inexpensive, transparent and predictable methods for resolving disputes concerning the operation of credit information systems. Both non-judicial and judicial enforcement methods should be considered. Sanctions for violations of laws regulating credit information systems should be sufficiently stringent to encourage compliance but not so stringent as to discourage operations of such systems.
Description	**Credit Information Systems** Presently there are several main credit information databases in Romania. **The Credit Bureau** *Type of information* The Credit Bureau (*Biroul de Credit*) is a private corporation in which 25 financial institutions hold equity participation. The activity of the Credit Bureau includes the collection and processing of data on individual client portfolios. Most banks report to the Credit Bureau information of both negative and positive nature concerning individuals who have borrowed and payment delays exceeding 30 days. *Access to information* Information stored with the Credit Bureau may be obtained upon payment of a fee by member financial institutions, and by the individuals whose data is stored in the database. **The Credit Registry**[216] *Type of information* The Credit Registry ('**CR**') is a system that collects, stores and compiles

[216]Source: National Bank of Romania, http://www.bnro.ro/Central-Credit-Register-2786.aspx

	information on the exposure of each reporting institution in Romania (credit institutions, non-bank financial institutions listed in the National Bank of Romania's Special Register, payment and electronic money institutions with significant lending activity) to the borrowers benefiting from loans and/or commitments whose cumulated value is equal to or higher than the reporting threshold (RON 20,000), as well as information on card frauds perpetrated by cardholders. The CR database comprises four files: 1) Central Credit File (CCF), which is updated monthly with credit risk information reported by the reporting institutions; 2) Overdue Debt File (ODF), which is updated monthly with credit risk information from the CCF on violations of the repayment schedules over the past seven years at most; 3) Groups File (GF), which is updated monthly with information from the CCF on the groups of related individuals and/or legal entities representing a single group of connected clients/single borrower; 4) Card Fraud File (CFF), which is updated on a real-time basis and contains information on card frauds committed by cardholders, as reported by the reporting institutions. The reporting institutions' reports shall include: o the identification data of the borrowers to whom the reporting institution incurs an exposure equal to or higher than the reporting threshold (lei 20,000); o information on all loans and commitments to the borrower: type of loan, maturity, type and value of collateral, debt service, granting date and maturity date, loan currency, amount granted, drawn and undrawn amounts, overdue loans, joint credits/commitments with other borrowers belonging to the same group, loan status, rating grade, probability of default; o information on groups of individuals and/or legal entities representing a group of connected clients/single borrower: group name, group code, group structure and disclosure of borrowers that have joint credits/commitments with other borrowers belonging to the same group; o information on card frauds committed by cardholders: cardholder identification data, card type, currency, date of finding the fraud, fraud amount. The CR disseminates the information to the reporting institutions via: o monthly reports comprising information on all borrowers the reporting institution reported in a particular month, including all the information available in the CR database on loans and commitments to the borrower from all reporting institutions, without disclosing the identity of the credit institution (overall risk statement); o responses to online queries whereby reporting institutions may request two types of information: overall risk statement and overdue loan statement (for up to seven years). Information on borrowers reported by reporting institutions is provided unconditionally, while information on clients that are potential borrowers is conditional on their prior consent.

	Access to information Information stored with the Credit Registry may be obtained directly from the NBR on a free of charge basis. The users of the information in the CR database are the reporting institutions and the National Bank of Romania. The exchange of credit risk information is performed electronically, via the Interbank Communication Network. *Comparison between CR and the Credit Bureau* o the Credit Registry reports information about individuals and companies, while the Credit Bureau stores only information about individuals; o Reports to the Credit Registry are provided on a monthly basis, whereas the Credit Bureau gets reports on a daily basis; o the Credit Registry is provided positive information relating only to debtors whose aggregate exposure exceeds RON 20,000, while the Credit Bureau receives information irrespective of the value of the exposure; o the Credit Registry receives reports about loans that are overdue for over 30 days regardless of the arrears, and unauthorized debit balances on current account over 30 days that are worth RON 10 or more; the Credit Bureau receives reports on amounts worth RON 11 or more that are outstanding for over 30 days. **Payment Incidents Register**[217] *Type of information* The Payment Incidents Register (PIR) collects, stores, and compiles information on payment incidents involving cheques, bills of exchange and promissory notes caused by account holders. Information to PIR is conveyed electronically through the Interbank Communication Network. The PIR database comprises two files: 1) *Payment Incidents National File* (PINF) with three components: o Cheques National File (CNF), o Bills of Exchange National File (BNF), o Promissory Notes National File (PNNF) 2) *Risky Persons National File* (RPNF) The Risky Persons National File (RPNF) collects information on major payment incidents (payments instruments drawn on accounts with insufficient funds, cheques issued without the approval of the drawee, cheques bearing a false date, cheques issued by a drawer with suspended cheque-writing privileges) registered as being

[217] Source: National Bank of Romania, http://www.bnro.ro/Payment-Incidents-Register-2805.aspx

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caused by a resident or non-resident natural or legal entity.

Payment incidents can be erased from the database only if cancelled by the same reporting institution which has previously submitted the mentioned information to the PIR on its own initiative or based on an enforceable court decision.

The suspension of cheque-writing privileges is imposed by a bank on an account holder. The latter is no longer allowed to draw cheques for one year starting with the date a major payment incident was recorded with the PIR. Thus, further payment incidents are avoided and account holders who violate relevant rules are penalised.

The reporting institutions may lift or resume the suspension of cheque-writing privileges based only on an enforceable court decision.

Based on the information received from the reporting institutions, the PIR shall send to all reporting institutions the "PIR Notification form for the suspension of cheque-writing privileges" in case of registration/cancellation of a major payment incident involving a cheque and the "PIR Notification form for the lift/resumption of the suspension of cheque-writing privileges" in case the suspension of cheque-writing privileges was lifted or resumed. The reporting institutions shall disseminate the information in their own intra-bank system.

The bank's head office or the branch where the resident or non-resident natural or legal entity has an account opened shall take all the necessary measures to retrieve the blank or incorrectly filled-in cheques previously issued to the respective account holder.

Access to information

The users of the information in the PIR database are:

o the National Bank of Romania;

o the banks, which are bound to use PIR database information when issuing cheques to account holders;

o the Prosecutor's Office attached to the High Court of Cassation and Justice and the Ministry of Administration and the Interior with their territorial units, law courts, other public institutions with control and supervisory tasks;

o the resident or non-resident natural or legal entities, through banks, according to the legal provisions.

The RPNF information on resident or non-resident natural or legal entities, together with the specific surveys conducted by banks, may contribute to making the decision on opening a current account for a new client or granting a loan.
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<tr><td>Assessment</td><td>
The private sector Credit Bureau is one of two critical sources of credit information in the country. The Credit Bureau began in August 2004, is owned by 25 banks, has records for 6 million individuals (not legal persons) with coverage of 45% of the adult population as of 2012 and operates on the basis of reciprocity amongst financial institutions. Both positive and negative information is received and reported. Information subjects have the right to access their records once each year without charge, and otherwise for a fee of RON 6. There are four main limitations of the Bureau. First and reportedly under pressure from the country’s data
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	protection authority, it only reports information for 4-year periods. The utility of credit history depends on the ability to spot patterns of payment or default, which requires the history to cover a sufficiently lengthy period; international best practice is for coverage to extend to between 5 and 7 years. For the history to cover a shorter period may preclude it from providing an adequate picture of the debtor, whereas a longer period would risk contaminating present-day judgements about the debtor credit-worthiness by out-dated data. Second, the Bureau does not allow non-financial creditors such as utilities to participate in the system. It therefore does not enable persons with a good credit history with such creditors to use it to obtain better terms of lending with financial institutions. Third, the Bureau has no in-house redress mechanism regarding complaints, about a hundred of which it receives each year. This not only weakens borrower protection against errors in their credit history but also deprives the Bureau of a potentially powerful additional mechanism to enhance the accuracy of its data. Fourth and finally, there is no obligation on lenders making adverse credit decisions on the basis of a bad credit report to disclose this fact to the potential borrower. The National Bank-operated Credit Registry, the other primary source of credit information, plays an even more critical role and would benefit from similar improvements. All regulated financial institutions participate in the system, which has 1 million records and coverage equivalent to 14% of the adult population as of 2012, 90% of which are for individuals and the rest for legal entities. Only those with an exposure in excess of RON 20,000 are covered. The Register extends over a 7-year period, reports both positive and negative information, and is obligated upon receiving a written request to disclose the requesting party's records to it. There is again no duty for lenders making adverse decisions on the basis of Register reports to notify the refused borrower of this fact. And again, there is no in-house redress mechanism at the Register. The banking supervision department of the National Bank has real-time access to the Register, but it appears that the Register does not itself provide regular periodic reports of supervisory value, such as on largest exposures by lender, borrower, sector, and so on.
Comment	The performance of the Credit Bureau can be improved by (i) extending the period covered by the reports to at least 5 (but no longer than 7) years; (ii) enabling the participation of non-financial repeat creditors, such as utilities; (iii) requiring a lender minded to make an adverse credit decision in material reliance on an adverse credit report to disclose this fact to the credit applicant; and (iv) introducing a duly independent in-house mechanism for the receipt and redress of complaints. Similarly, the Credit Registry would be improved by (i) requiring a lender minded to make an adverse credit decision in material reliance on an adverse credit report to disclose this fact to the credit applicant; (ii) introducing a duly independent in-house mechanism for the receipt and redress of complaints; and (iii) preparing for the benefit of the bank supervisory authorities regular periodic reports of supervisory value, such as on largest exposure by lender, borrower, sector, etc.
Principle B2	**Director and Officer Accountability** Laws governing director and officer liability for decisions detrimental to creditors made when an enterprise is in financial distress or insolvent should promote responsible corporate behavior while fostering reasonable risk taking. At a minimum, standards should hold management accountable for harm to creditors resulting from willful, reckless or grossly negligent conduct.[218]

[218] This principle addresses only accountabilities of directors and officers in the period when a company is facing an imminent risk of insolvency. General principles for corporate governance and officer and director liability to its shareholders are dealt with under the OECD Principles for Corporate Governance.

Description	**Overview** The Insolvency Act contains several provisions designed to sanction corporate decision makers for decisions and actions considered to be detrimental to creditors.[219] In general, these provisions can be divided into two categories: (i) those designed to encourage responsible decision-making concerning the decision to register an insolvency petition (which, by law, serves as the basis for "commencing" insolvency case); and (ii) those designed to sanction specific decisions or acts that are considered to be harmful to the debtor or its creditors. These two categories of provisions addressing the liability of officers and directors for irresponsible and/or improper corporate behaviour are discussed in greater detail below. **Civil Liability** **Decision to File Insolvency Proceeding** *General rules* The Insolvency Act (i) requires insolvent debtors to file an insolvency petition within 30 days of the occurrence of the state of insolvency, and failure to do so for more than 6 months is qualified as a criminal offence and is sanctionable by a minimum of 3 months and up to 1 year imprisonment or by a criminal fine; and (ii) permits non-insolvent debtors to file an insolvency petition if they are "threatened" by insolvency.[220] The law is unclear as to whether the equity holders have any role in driving the insolvency filing process, or whether the corporate management is under an overriding duty to file for insolvency despite a resolution to the contrary adopted by the equity holders. The provisions regarding the duty to file when insolvent and the limited "safe harbour" for pre-insolvency filings (discussed below) are bolstered by other provisions in the Insolvency Act, which impose personal liability on the statutory representatives of corporate debtors for any prejudice caused if they file a petition for the commencement of the insolvency case (i) prematurely and in bad faith, or (ii) too late.[221] Apart from Article 27 para. (4), but related to the decision to file an insolvency petition, the Insolvency Act also imposes personal liability on the "members of the senior management" of corporate debtors (*i.e.*, directors, managers, and internal auditors) who contribute to the state of "insolvency" by paying or ordering the

[219] *See* Insolvency Act, Chapter IV (The responsibility of managing bodies), Arts. 138-42; *see, also,* Insolvency Act, Article 27.
[220] *See* Insolvency Act, Article 27 paras. (1) and (2).
[221] *See* Insolvency Act, Article 27 para. (4).

	payment of, in the month preceding the "default," a debt that is considered to be a "preferential transfer."[222] *Safe harbour: workout negotiations* The Insolvency Act institutes a certain exception regarding the liability of a corporate debtor's management. To the extent that a debtor, prior to the commencement of an insolvency case, engaged in good-faith negotiations with some or all its creditors, negotiations that had led to the conclusion of an out-of-court restructuring agreement which was reasonably conducive to the financial recovery of the debtor, then any payments made in good faith under that agreement are not subject to avoidance as preferential transfers, and the debtor's management may not be held liable for the making of such payments.[223] It is unclear whether, in practice, Article 138 para. (1)(g) of the Insolvency Act encourages or discourages responsible corporate decision making when it comes to the decision to commence an insolvency proceeding. **Harmful Decisions / Acts** As for sanctioning improper corporate acts and/or detrimental corporate decisions (other than those that expressly and specifically concern the registration of an insolvency petition), the Insolvency Act contains a list of decisions and actions that are subject to being sanctioned – many of which are also subject to criminal sanctions. In short, the members of the board of directors, the managers and the internal auditors of a corporate debtor can be held personally liable (to the extent of the damages) where any of the following tortious conduct contributes to the insolvency of the subject debtor-company: (i) making use of the assets or loans granted to the debtor for the personal benefit of such directors or managers or that of a third party; (ii) carrying out business for the personal interest of the managers or directors, but in the name of the corporate debtor; iii) continuing to run the business, motivated by the personal interest of the managers and directors, after a moment where it is clear that doing so would lead the corporate debtor into insolvency; (iv) participating in fraudulent accounting, or concealing book records, or failing to observe the legal requirements for accounting reporting; (v) embezzling the debtor's assets, or forging the book records with a view to indicate larger liabilities than the existing ones; (vi) employing ruinous methods in order to procure funds to postpone the occurring of the debtor's state of insolvency; or (vii) making, or ordering the making of, preference payments to certain creditors to and with a detrimental effect on others, during the month preceding the insolvency).[224] The insolvency court may decide to hold the relevant legal representatives of the debtor responsible either *sua sponte* (based on the data in the court file) or upon a motion of the insolvency trustee, or (if the insolvency trustee fails to act), the chairman of the creditor committee or any creditor that holds more than 50% of the claims in value. Any amounts recovered from the legal representatives will be added to the debtor's estate.[225]

[222] *See* Insolvency Act, Article 138 para. (1)(g).
[223] *See* Insolvency Act, Article 138 para. (1^1).
[224] *See* Insolvency Act, Article 138 para. (1)(a)-(g).
[225] *See* Insolvency Act, Article 138 para. (3) and Article 140.

	Criminal Liability Failure to timely file for insolvency shall render the directors criminally liable if the delay in filing is longer than 6 months from the statutory deadline for the company to file a voluntary insolvency petition. Such criminal offence is called *bancrută simplă* and is punishable by up to one year of imprisonment, or a criminal fine.[226] Any person (including the directors, managers, or shareholders of a corporate debtor) is criminally sanctionable for up to 5 (five) years of imprisonment if such person is found guilty of committing fraudulent trading (*bancrută frauduloasă*) in any of the following forms: (i) forging, concealing or destroying books or records, or embezzling corporate assets; (ii) falsely representing, in the corporate records, or otherwise (including to the corporate creditors), non-existent liabilities, or larger liabilities than the existing ones, with a view to defrauding creditors; or (iii) fraudulently disposing of the corporate assets on the brink of insolvency to the detriment of the creditors.[227] Failure of the management of a debtor in insolvency to timely assist and cooperate with the insolvency trustee, by wrongfully obstructing the disclosure or turning over to the insolvency trustee, or preventing the insolvency trustee from taking lawful possession of, the relevant corporate records constitutes a crime that is sanctionable by up to three years imprisonment , or a criminal fine.[228] The officer / director liability provisions in the Insolvency Act are bolstered by other pieces of legislation, which imposed criminal sanctions for certain acts and decisions.[229] **Shadow Directors** Although Romanian law does not use the concept of "shadow director" or "*de facto* director," the Insolvency Act provides that an insolvency court may decide that part of the debt in the insolvency estate be paid by any person who provoked the debtor's insolvency through any of the types of action listed above. Thus, one may argue that the insolvency court enjoys discretion to hold certain persons, that apparently are outsiders, liable for the debt and that this provision, in fact, gives power to hold a shadow director liable.[230] **Miscellaneous. Lender liability in insolvency context** Romanian law and court practice do not address the issue of potential lender liability for insolvency related events, particular in a scenario where lenders might be in a position to influence the management of a corporate borrower.
Assessment	Useful mechanisms exist to incentivise the debtor's managers to file for insolvency proceedings at the correct time, but they can be further improved. Article 27 of the

[226] *See* Insolvency Act, Article 143 para. (1).
[227] *See* Insolvency Act, Article 143 para. (2).
[228] *See* Insolvency Act, Article 143 para. (7).
[229] *See* Criminal Code, Article 214 (criminal offense of fraudulent management).
[230] *See* Insolvency Act, Article138 para. (1).

	Insolvency Act requires insolvent debtor to file an insolvency petition within 30 days of the occurrence of the state of insolvency, and also permits non-insolvent debtors to file if they are "threatened" with insolvency. The statutory representatives of a corporate debtor may be personally civilly liable for any harm resulting from a premature bad faith filing or a late one. "Members of the senior management" are also personally liable if they contribute to the state of insolvency by ordering a "preferential transfer" in the month preceding the "default" (Article 138). There is also a 'safe harbour' provision exempting managers from liability for good faith payments made under an out-of-court restructuring agreement reasonably conducive towards the debtor's financial recovery (ibid.). Liability is also imposed for breach of managers' fiduciary obligations (ibid.). In addition, there are criminal sanctions for serious non-compliance with the duty timeously to commence insolvency proceedings as well as for fraudulent activity (Articles 143 and 214). The civil liability mechanisms can play an important role in incentivising managers of distressed businesses to take due account of creditor interests. The design of these mechanisms is deficient in several respects, however. First, it is not clear whether the debtor's equity-holders have power to prevent senior management from commencing insolvency proceedings. Any such power would be inappropriate. Equity-holders are not entitled to receive value from the company's estate if the company is unable to meet its debt liabilities as they fall due. In such circumstances, the law should require companies to be run so as to minimise any/further loss to creditors, and if the optimum way of attaining this objective is to commence insolvency proceedings, equity-holders should not be entitled to interfere. Second, the law does not explicitly address the liability of *de facto* directors (i.e. those not formally appointed as director but representing themselves and acting as such) and shadow directors (i.e. those not formally appointed as director but on whose instructions the debtor or its senior management habitually act). Third, the law does not explicitly create mechanisms for the funding of proceedings to hold directors liable. In many cases there may be insufficient funds available in the insolvency estate to pursue a director, even if there is a strong likelihood that the litigation will be successful. Devising creative approaches to funding in such circumstances may offer an effective means of restoring to the estate value lost. Fourth and following from the foregoing, some stakeholders express concern that professional advisors such as accountants or turnaround specialists acting at arm's length to advise the management of distressed debtors might themselves be held liable under Article 27.
Comment	The current mechanisms may be improved by providing with clarity that managers' compliance with their duties under the aforementioned provisions are neither subject to nor susceptible to being overridden by equity-holder action; by clarifying the liability of *de facto* and 'shadow' managers as well as those acting *de jure*; by providing appropriate mechanisms for the funding of actions under these provisions; and by clarifying that lenders and professional advisors acting in good faith and at arm's length from the debtor are not intended to become subject to liability.
Principle B3	**Enabling Legislative Framework** Corporate workouts and restructurings should be supported by an enabling environment that encourages participants to engage in consensual arrangements designed to restore an enterprise to financial viability. An environment that enables

	debt and enterprise restructuring includes laws and procedures that: **B3.1** Require disclosure of or ensure access to timely, reliable and accurate financial information on the distressed enterprise; **B3.2** Encourage lending to, investment in or recapitalization of viable financially distressed enterprises; **B3.3** Flexibly accommodate a broad range of restructuring activities, involving asset sales, discounted debt sales, debt write-offs, debt reschedulings, debt and enterprise restructurings, and exchange offerings (debt-to-debt and debt-to-equity exchanges); **B3.4** Provide favorable or neutral tax treatment with respect to losses or write-offs that are necessary to achieve a debt restructuring based on the real market value of the assets subject to the transaction; **B3.5** Address regulatory impediments that may affect enterprise reorganizations. **B3.6** Give creditors reliable recourse to enforcement as outlined in Section A and to liquidation and/or reorganization proceedings as outlined in Section C of these Principles.
Description	**Financial information** The statutory framework for auditing and financial reporting is broadly consistent with relevant elements of the European Union *acquis communautaire*, particularly as laid down in the Fourth and Seventh Company Law Directives. Non-financial enterprises are governed by Law 82/1991, as republished in 2008 ('the Accounting Law'), together with the Order nos. 1040/2004 (individual entrepreneurs) and 3055/2009 (joint stock and limited liability companies, general and limited partnerships, and cooperatives) of the Ministry of Public Finance. Joint stock companies (requiring a minimum registered capital of the equivalent of € 25,000) are required to apply double-entry accounting; to maintain records in the Romanian currency and language as well as any other relevant currency; and to preserve supporting documents for a 10-year period. They are required to maintain a standard range of accounts (equity, non-current assets, inventories and work in progress, third-party, treasury, expense, revenue, special, and management) as well as journal, inventory and general ledgers, and to prepare a monthly trial balance. Annual financial statements must give a true and fair view of the company's assets, liabilities, financial position and profit or loss, and should meet the requirements of understandability, relevance, reliability, and comparability. The governing general principles include the going concern, consistency, prudence, independence, separation, intangibility, non-compensation of assets and liabilities, substance over form, and materiality. Departures from these principles should be exceptional, and require disclosure and explanation. Companies which meet two of the following three criteria must prepare regular financial statements together with a directors' report: total assets of at least € 3.65m; net annual turnover of at least € 7.3m; and at least 50 employees. The statements must be audited by auditors authorised by the Romanian Chamber of Financial Auditors, who must also assess the directors' report. The statements and reports must be filed with the Trade Register within 15 days of being approved by the general shareholders or members' assembly. The Accounting Law imposes a fine of between RON 2,000 and RON 3,000 for default on this obligation, and the Company Law authorises a court to dissolve an entity which has persisted in such

	default for six months. Limited liability companies (guaranteed by fully paid-up registered capital of at least RON 200), partnerships limited by shares (with a minimum registered capital of € 25,000), general partnerships, and cooperatives (with minimum registered capital of RON 500) are subject to similar accounting, auditing, and filing requirements. Individual entrepreneurs (i.e. sole proprietors) are governed by the Accounting Law together with Order no. 1040/2004 of the Ministry of Public Finance. They are required to apply single-entry accounting, to maintain accounting records in Romanian language and currency as well as any relevant foreign currency, and to preserve supporting documents for 10 years. They are only required to prepare a ledger of receipts and payments and an inventory ledger. They are not obligated to prepare annual financial statements. The Accounting Law defines as "public-interest entities" credit institutions, non-bank financial institutions, insurance companies, certain other financial services providers, and listed companies, among others. All such entities must prepare and file regular consolidated financial statements. The accounting standards applicable to the various regulated entities are prepared by their own regulators, including the National Bank, the Insurance Supervisory Commission, the Private Pension Funds Supervisory Commission, and the National Securities Commission, and are endorsed by the Ministry of Public Finance. **Lending to and recapitalisation of distressed enterprises** Law 31/1990 ('the Company Law') as republished in 2006, envisages recapitalisation of a company through a new issue of shares at the behest of an extraordinary general meeting (Article 75). There are no specific provisions regarding lending to a distressed entity. **Provisions governing restructuring activities** The Company Law does not explicitly provide for debt-for-equity swaps. In December 2011, after a long and impassioned debate, the National Bank of Romania adopted Regulation No. 26/2011 on acquisition by banks of temporary holdings in businesses outside the financial sector, as a means of financial restructuring or assistance (setting forth the conditions under which banks can hold such equity as permitted under article 145 of GEO 99/2006). The regulation empowers banks to acquire capital participation, mainly through debt-to-equity swaps, in businesses that operate outside the financial sector and that present good turnaround prospects in a relatively short amount of time. **Tax treatment** In general, where a lender writes off uncertain or disputed debts not covered by reserves, the written-off amount is not deductible for tax purposes. Deductions are permitted where the written-off amount was covered by reserves at a minimum of 30%, was incurred on or after 1 January 2004, has been due for more than 270 days, is not covered by a third-party guarantee, was owed by an entity affiliated to the lender, and was included in the lender's taxable income. Unpaid debts are also deductible where the borrower's entire estate is affected by major financial difficulties, or where it is a legal entity and was subject to a

	completed bankruptcy procedure or was dissolved or liquidated, or if a legal person, has died and the debt is not recoverable from their heirs. Under the Fiscal Code, reserves constituted by legal persons in relation to utility supplies to companies undergoing restructuring, reorganization or privatisation, benefit from certain tax reliefs (Article 22). Consistently with discussions with the IMF and the World Bank, Romanian authorities amended the Fiscal Code through Ordinance 15/2012 to provide, as from 1 October 2012, a neutral tax treatment of sales of receivables by banks.
Assessment	Informal workouts are hampered because of the structure of the banking sector, a reported weaknesses of a 'negotiating culture', and by an insufficiently supportive regulatory environment. In order to be successful, informal workouts in Romania require unanimity amongst relevant lenders, their willingness to engage in good faith negotiations, and their ability to abide by the resulting agreements. (i) Market participants report that in some cases, particularly though not exclusively in relation to certain foreign banks, negotiators have not possessed the authority to reach agreements, instead having to seek approval from the foreign parent. (ii) There are also some indications that the prudential requirements applicable to parent institutions incentivise capital repatriation, and thus, exit from rather than engagement with problem loans in this jurisdiction. (iii) The current regime does not provide sufficient motivation for lenders with better quality collateral to agree to workouts or, in the alternative, require lenders with any type of collateral to participate in a restructuring. (iv) There are frequent mentions of the fiscal authorities' reported inability to participate in workouts, on the basis of lack of legal capacity but also because of European state aid rules. The justification for the latter position is not clear, since Union law has consistently emphasised that state actions undertaken on an objective and commercial basis are not inconsistent with state aid rules.[231] It is not clear whether the tax authorities require a specific authorization of some sort in order to voluntarily participate in workouts.[232] (v) Tax law treats a written down element of a loan as income for the debtor, and may not permit a lender engaged in a write down to claim that element as a loss for tax purposes. This disincentivises parties from engaging in workouts. Until recently, the law also accorded an adverse tax treatment to distressed assets/liabilities sales. As of 1 October 2012, however, Government Ordinance No. 15/2012 amends the Fiscal Code to enable those buying or retaining distressed assets/liabilities as part of a merger or division to recover fiscal losses in proportion to the assets/liabilities transferred, or as the case may be, retained.

[231] We are advised that the 2014 Insolvency Code now requires that, if budgetary claims are reduced per the terms of the preventive concordat, then a valuation must be conducted to confirm that the write-down passes the private creditor test. This provision assures that the treatment of budgetary claims, whether done involuntarily or with the consent of the budgetary claims holders, does not violate EU rules regarding state aid. See 2014 Insolvency Code, at article 24(5), article 30(3).

[232] The National Tax Administration Agency does have the authority to appoint official receivers or liquidators for insolvent debtors. *See* Tax Procedure Code, art. 177(4). This authorization does not address the ability of taxing authorities to voluntarily compromise tax claims, however.

	There is a comprehensive system of accounting, auditing, and reporting of financial information for enterprises, which is broadly consistent with international and European Union standards. The law defines banks, insurers, other financial institutions and service providers, and listed companies as 'public-interest entities' and requires full audited periodic publication of consolidated financial statements prepared according to accounting standards devised by the relevant regulator and endorsed by the Ministry of Public Finance. Other commercial entities (but not sole proprietors) are required to file regular full or simplified statements, depending on whether they meet stipulated size criteria. The law creates sanctions for non-compliance, including fines and dissolution. However, such sanctions have rarely been applied in practice. Market participants also report the perception that financial statements are tax driven, and banks seldom place much weight on them in making lending decisions. The World Bank in 2008 prepared a Report on the Observance of Standards and Codes ('ROSC') on Accounting and Auditing ('A&A') in Romania, which noted the major improvements brought in the A&A framework in connection with Romania accession to the European Union, but identified several gaps and lacuna in the framework. The plugging of these gaps and lacunae remain a work in progress. Experienced observers informed us of widespread malpractice in the maintenance of enterprise accounts, falsification of accounting books, misuse of blank invoices, etc. While debt-for-equity- swaps may occur under general legal principles, they are not provided for under the Company Law and they are not frequently employed in the jurisdiction, not least because banks fear having the remainder of their outstanding debt claims against the company treated as shareholder loans. Article 145 of GEO 99/2006 empowers banks to take temporary equity positions in non-financial businesses as a restructuring tool. New Regulation No. 26/2011 has set forth the conditions under which such an action can take place. The banking community have greeted this Regulation with moderate optimism. Knowledgeable observers of the banking market report that, in order to make good use of these new powers, banks will have to develop turnaround and management capacity. Market participants also express a number of other challenges to the creation of a thriving workout culture: (i) the inability to toll the running of the limitation periods within which creditor claims must be pressed against a defaulting borrower hampers workout negotiations, with creditors refusing to initiate negotiations, or to see them through to their logical conclusion, for fear that the limitation period would have expired by the time that negotiations were concluded in a way which was not acceptable to them; (ii) existing lenders are deterred from making further loans to a troubled debtor by the risk that any security or other preferential repayment terms offered to them might be reversed in subsequent insolvency proceedings; (iii) the debtor's management might fear incurring personal liability by causing the debtor to enter into legitimate restructuring activities; and (iv) lenders are sometimes concerned about lender liability. (v) there is no sufficient discussion regarding the development of a body of workout professionals. There is a need to promote confidence of finance providers that companies in distress can effectively address the situation and develop a sustainable business strategy.
Comment	Urgent consideration should be given to implementing the remaining recommendations of the 2008 A&A ROSC. The obligation under the Accounting and Company Laws to file financial statements on a regular basis should be strictly enforced, including through the imposition of the sanctions stipulated in these Laws. The National Bank and the Bankers' Association should give consideration to the

	more active promotion of standard form lending documents, such as those promulgated by the Loan Market Association (already frequently employed), adapted as necessary to the particular circumstances and needs of Romania, that would contain contractual mechanisms for encouraging standstills, disclosure and confidentiality requirements, majority voting and other mechanisms for resolving inter-creditor disputes, etc. Urgent consideration should be given to enabling tax authorities to participate on a commercial basis in good-faith workout negotiations with a distressed taxpayer and/or that taxpayer's other creditors. The objective of their participation in such negotiations would be to maximise expected recovery from distressed tax-payers even if this would require accepting the partial write-down of accrued tax liabilities. In order to incentivise distress resolution, consideration should be given to further amending the Fiscal Code to ensure that where a debt is written down as part of an informal workout, it is not taxed as income from the debtor's perspective, and that it may nevertheless be written down as loss from the lender's perspective. Urgent steps should also be taken to promote a better understanding of European Union state aid rules as they impact upon this issue. Consideration should also be given to the example of other EU jurisdictions (such as France in relation to the *Procédure de sauvegarde*) that have enacted statutes to ensure that tax authorities' participation in informal workouts would not be mistaken for state aid.[233] The law should be enhanced to (i) explicitly facilitate debt to debt and debt to equity exchange offerings; (ii) ensure that lenders engaging in debt-for-equity swaps would not be at risk of having the remainder of their debt claims treated as shareholder loans; (iii) enable use of restructuring tools such as asset and discounted debt sales; (iv) permit the tolling of limitation periods where the parties are engaged in good-faith workout negotiations; (v) protect the legitimate interests of lenders making new funds available to a distressed debtor over the course of workout negotiations; (vi) protect the debtor's management in relation to legitimate restructuring activities; and (vii) protect from lender liability any lenders engaged in good faith and at arm's length to cooperate with the debtor to resolve distress. (viii) consider how to develop a body of workout professionals and thus promote confidence of finance providers that companies in distress can effectively address the situation and develop a sustainable business strategy.
Principle B4	**Informal Workout Procedures** **B4.1** An informal workout process may work better if it enables creditors and debtors to use informal techniques, such as voluntary negotiation or mediation or informal dispute resolution. While a reliable method for timely resolution of inter-creditor differences is important, the financial supervisor should play a facilitating role consistent with its regulatory duties as opposed to actively participating in the resolution of inter-creditor differences. **B4.2** Where the informal procedure relies on a formal reorganization, the formal proceeding should be able to quickly process the informal, pre-negotiated agreement. **B4.3** In the context of a systemic crisis, or where levels of corporate insolvency have reached systemic levels, informal rules and procedures may need to be supplemented by interim framework enhancement measures to address the special

[233] We have been advised that provisions in the 2014 Insolvency Code address this state aid issue by requiring the application of a private creditor test to any write-down of budgetary claims.

	needs and circumstances encountered with a view to encouraging restructuring. Such measures are typically of an interim nature designed to cover the crisis and resolution period, without undermining the conventional proceedings and systems.
Description	**Alternative dispute resolution** Before commencing formal litigation in a commercial dispute involving a monetary claim, the parties are obligated to seek mediation or mandatory conciliation. The general framework regarding mediation is governed by Act. No.192/2006 on mediation and the organization of the mediator profession. Mediation is defined under the law as a method of solving disputes on a conciliatory basis, with the support of a specialized third party as mediator, within a framework of neutrality, impartiality, and confidentiality and with the free consent of the parties. A mediator is a person trusted by the parties and able to facilitate the negotiations among them and support them in solving a dispute through the identification of a mutually convenient, efficient, and sustainable solution. The mediation process is based on the cooperation of the parties to the dispute. The mediator cannot impose a solution in relation to the dispute among parties. The Bucharest Stock Exchange Arbitration Court is a private body authorised to accept disputes where arbitration has been provided for in a contract. While the Court is able to accept disputes involving consumers as well as businesses, it appears that most of its work involves disputer amongst substantial commercial entities. In November 2009, the Union of Banking Mediators from Romania (UBMR) was created with the stated goal of promoting mediation and of mediating disputes in the banking, leasing and insurance sector. The mediation is paid for by the parties, and is not formally associated with or supported by the country's Bankers' Association. Attempts to create a bank ombudsperson have been underway since December 2006, and were approved by the National Bank in 2008, but the ombudsperson has not yet been created. **Schemes of arrangement** Act No.381/2009 on Schemes of Arrangement and Ad hoc Mandates ('**SAM**')[234] offers new mechanisms designed to facilitate the recovery of a debtor under financial distress by providing a greater span of options. Legal entities sustaining financial difficulties are given additional legal leeway to satisfy creditors by restructuring debts within the framework of a recovery plan through a scheme of arrangements. As for the 'Ad hoc Mandate', a debtor enters into confidential negotiations with one or more of its creditors for the restructuring of existing debts, with a view to overcoming its financial distress. Whereas the scheme of arrangement presumes involvement of a certain majority of creditors and the organisation of a recovery plan, the Ad hoc Mandate represents a quasi-judicial mechanism whereby the debtor may negotiate with individual creditors the settlement of their debt. The court within which the debtor's head office is located (*Tribunalul*) has

[234] Published in the Official Gazette of Romania No. 870 dated 14 December 2009.

	jurisdiction to resolve matters in connection with SAM (Article 5). *Scope of SAM. Categories of debtors* SAM seems to be applicable to all categories of legal person debtors, leaving aside only certain special entities from the financial sector (credit institutions, insurance companies and other companies regulated under specific financial markets rules),[235] or those companies that are wholly / partially owned by the Romanian State.[236] *Requirements for filing for a scheme of arrangement* Any debtor that is an entity with separate legal personality that undergoes financial difficulties may initiate an scheme of arrangement, unless any of the following conditions is alternatively met (Article 13 SAM): The debtor is insolvent, as such term is defined under the Insolvency Act; The debtor was criminally convicted for economic crimes by means of a final court decision; An insolvency case has been commenced against the debtor less than five years before the date of a scheme of arrangement proposal; The debtor availed itself of a scheme of arrangement less than three years before the date of the proposal; Less than five years before the commencement of a scheme of arrangement, the debtor and/or its limited liability shareholders/members, or its directors, have been convicted for fraudulent insolvency, fraudulent management, breach of trust, fraud, embezzlement, perjury, forgery, or crimes sanctioned under Competition Act No. 21/1996, by means of a final court decision; Less than five years before the commencement of a scheme of arrangement, the members of the management/supervisory bodies of the debtor incurred liability under the IA by contributing to the debtor's insolvency; The debtor is registered in the tax offence record.[237] *The assessment of the debtor's financial position* A debtor that suffers financial difficulties is defined as such "legal entity whose management and economic potential are undergoing a negative dynamic, but which meets or is capable of meeting its obligations as they fall due" (Article 3b of SAM). However, SAM does not go any further in providing additional guidance as to how such financial status may be assessed. Accordingly, it could become burdensome, from a legal and evidentiary standpoint, for a debtor to evaluate its financially distressed position, especially if threatened with a potential insolvency. This aspect would be of significance as, once insolvency happens, a debtor would become ineligible for resorting to a scheme of arrangement.

[235] *See*, *e.g.*, pertinent sections addressing restructuring mechanisms in Credit Institutions Act; (ii) Act No. 503/2004 concerning the financial recovery and insolvency of Insurance Companies.
[236] Although the above issues are not yet clarified, in 2007 the Romanian Government issued a report, as part of the legislative process, with respect to an initial form of the draft SAM ("**Government Report of 2007**"), whereby it took the view that the above mentioned categories of debtors are to be excluded from the application of the SAM.
[237] *See* Government Emergency Ordinance No. 75/2001 on organization and functioning of the tax offence record, recast, as amended.

	SAM appears to apply to good-faith debtors although no sanctions are provided for bad-faith debtors that file for a scheme of arrangement solely with a view to fending off the commencement of an ordinary insolvency procedure. SAM sets a number of rules which should be taken into consideration by a debtor when assessing the opportunity to pursue a scheme of arrangement: The debtor must be convinced that it is able to propose a plan according to which a restructuring of at least 50% of the aggregate value of the claims is achieved (Article 21.2); The proposal has a high potential to be accepted by creditors representing at least two thirds of the total value of allowed and non-disputed claims;[238] The scheme of arrangement has the chance of being confirmed by the court through a so called "homologation test" (*i.e.*, to become binding for all creditors, including those which opposed the scheme of arrangement, or unknown creditors). The homologation test entails the approval of a plan by creditors representing 80% of the aggregate value of claims, while the value of contested claims should not exceed 20% of the aggregate value of claims (Article 28). *Stages of a scheme of arrangement (SOA)* Under SAM, an insolvency court is less involved in the supervision and voting of a scheme than in an ordinary insolvency case under the IA. Accordingly, a scheme of arrangement is regarded, at least in principle, as a simplified reorganization process. However, an insolvency court maintains jurisdiction with respect to certain points concerning the scheme of arrangement process, although all court hearings related to requests arising from the latter procedure are handled *in camera*, with urgency and priority. The entire procedure is supervised and presumes a direct and constant involvement of a conciliator proposed by the debtor and confirmed by the creditors. The request for opening the procedure may be introduced only by a debtor under threat of insolvency but which is not insolvent, as provided by IA (Article 20.1). Creditors are not eligible for commencing a scheme of arrangement. During a scheme of arrangement, a debtor continues to carry out its activity in the ordinary course of business under the supervision of a conciliator. A scheme of arrangement involves the preparation of a list of creditors, which will include all known creditors including those with claims that are contested (Article 20). A conciliator and the debtor may submit a proposal, which, if accepted by the majority of creditors, will lead to the confirmation of a scheme of arrangement involving such creditors.[239] A debtor may request in court the homologation of the

[238] The SOA proposal is considered adopted upon the vote of creditors representing two thirds of the aggregate value of accepted and non-challenged receivables, as per Article 24 para. (5) from SAM.

[239] A SOA proposal must be accepted by creditors representing two thirds of the total value of accepted and non-contested claims. Nevertheless, the votes attached to the claims of the following categories of creditors will not be counted:

- legal entities with at least one shareholder with limited liability or director which are related up to the 4th degree with the debtor's shareholders with limited liability or directors;

	scheme of arrangement in order to make such agreement valid and binding upon all creditors, including dissenting and unknown creditors. Similarly to the procedure under the Insolvency Act (see **Principle C14**, below), the commencement of a scheme of arrangement may generate effects with respect to a debtor, its assets and liabilities, such as a stay of the payments, stay on accrual of penalties, interest or any other expenses in connection with claims, as well as suspension on enforcement procedures started by creditors. SAM does not set a time frame for the submission in court of the scheme of arrangement request. Accordingly, a good-faith debtor should carry out its own assessment of its financial position and the date for commencing a scheme. It should, however, be noted that the beginning of the procedure is not compatible with existence of insolvency. Moreover, it is advisable from the debtor's practice that insolvency does not occur before homologation of the scheme of arrangement (for up to such date the creditors are entitled to begin an ordinary insolvency case against the debtor). From an abstract perspective, a debtor may obtain the acknowledgement of a scheme of arrangement and its homologation within four to five months of the commencement of the reorganization procedure. Such streamlined course may be possible due to existence under SAM of relatively short procedural intervals. Also, court hearings related to requests arising from the SOA should, in principle, be handled with urgency and priority (Article 15). Nonetheless, in practice the above time estimate may obviously be different due to inevitable procedural delays. Under SAM, duration of a scheme of arrangement is limited to a maximum of eighteen months. However, the court may grant an extension of six more months (Articles 21 and 34). A proposal consists of a *recovery plan*, comprising the following detailed information: An analysis of the debtor's assets and liabilities, certified by an expert accountant, or audited by an auditor; The reasons for the existing financial difficulties as well as the measures taken by the debtor in order to overcome such difficulties until the date of submission of the offer; The financial accounting evolution prognosis for the next six (6) months. A recovery plan must identify *inter alia* the following measures (Article 21 SAM): The recovery of a debtor by means of management restructuring, change of functional structure, reduction of personnel or any other necessary measures; Solutions for solving the financial distress, *e.g.*, via increasing the share capital,

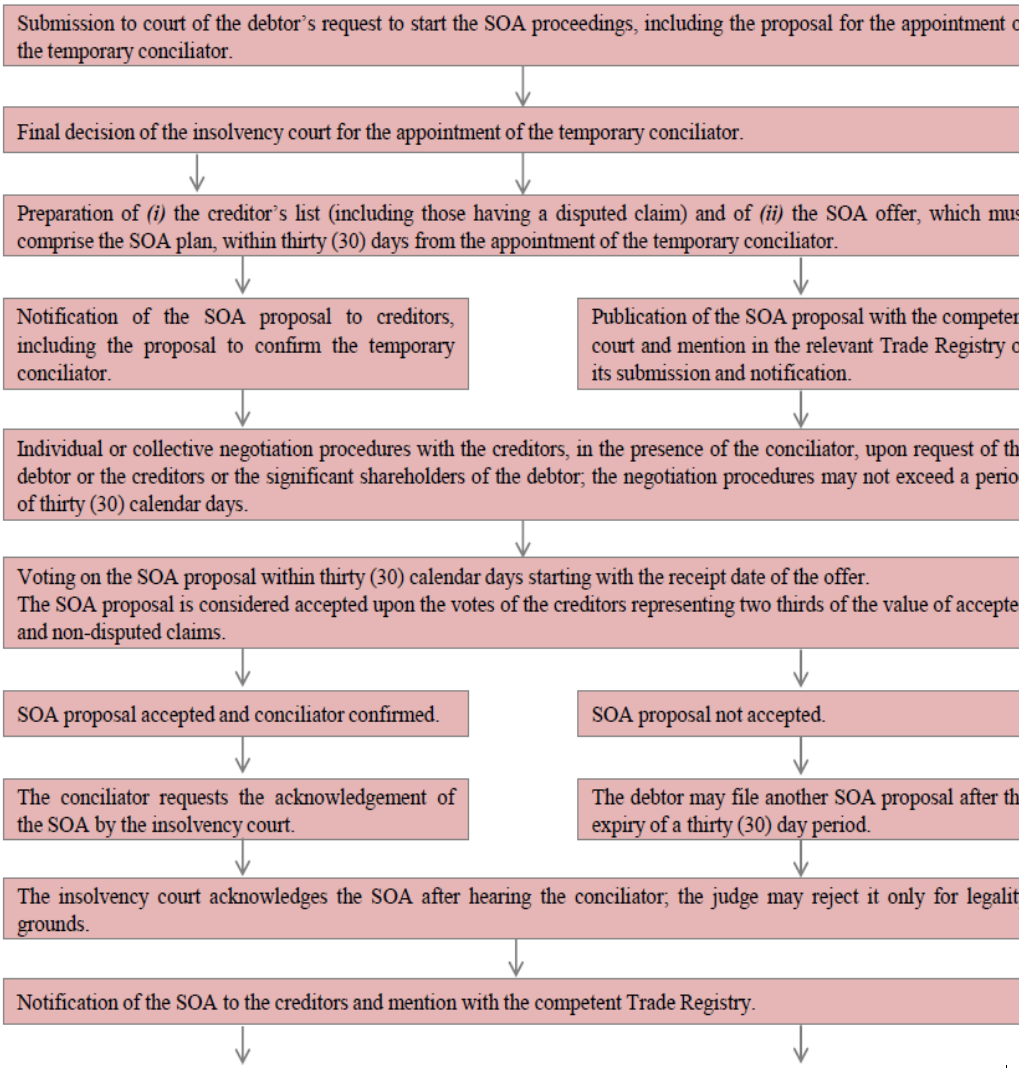
- legal entities where the debtor or its shareholders with limited liability or directors, or their relatives up to the 4th degree hold the position of limited liability shareholders or directors;
- legal entities whose limited liability shareholders or directors have been convicted for fraudulent insolvency, fraudulent management, breach of trust, fraud , embezzlement, perjury, offences regarding forgery or crimes sanctioned under Competition Act No. 21/1996, by means of a final court decision given within the last five (5) years before the beginning of the SOA;
- creditors which are registered with the tax offence record, according to Government Emergency Ordinance No. 75/2001 regarding the organization and functioning of the tax offence record.

bank loans, bond issuance, or any other type financing; establishing or closing down secondary offices, disposition of assets, and/or granting of security;

An estimate of the size of the claims that is expected to be satisfied as a result of the proposed measures, which may not go below 50%; in this respect, the debtor may suggest measures such as: deferred payments, partial/total cancellation of the principal of the claims or of their accrued interest, stay on penalties, set-offs, novations; as concerns measures with respect to tax liabilities, state aid rules must be observed;[240]

The maximum term for paying off the claims allowed in the SOA, which may not exceed eighteen (18) months starting with the conclusion date of this agreement. For convenience, the outline of the SOA provided above is replicated below.

Outline of a scheme of arrangement (SOA)



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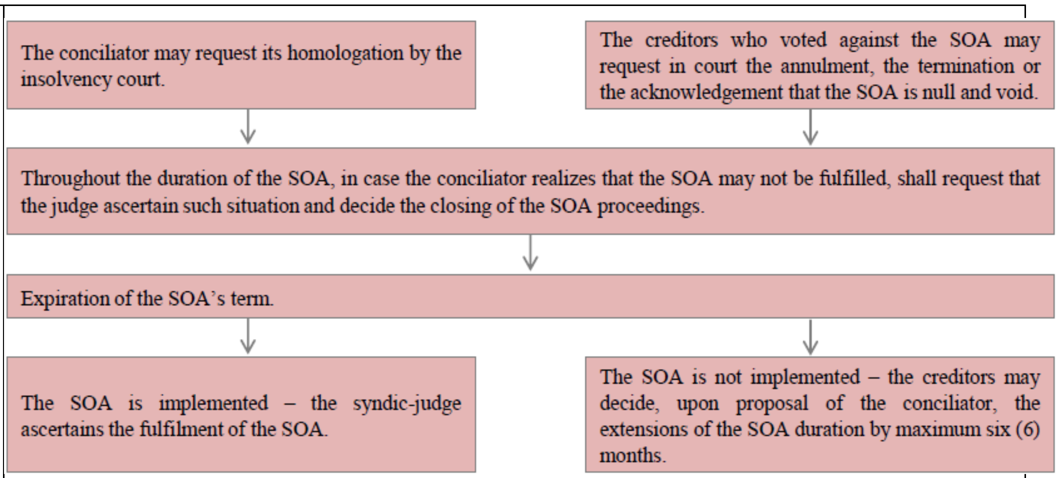
[240] The approval of National Agency for Fiscal Administration must be requested and obtained within thirty (30) days. Should this Agency not respond within this deadline, its approval shall be presumed.



Effects / Consequences of the scheme of arrangement

One important effect of a scheme of arrangement resides in the retention of a debtor's right to manage its business, though under the supervision of a conciliator and, indirectly, of the creditors.

Based on the proposal, the debtor may request court approval for a moratorium on creditor actions pending completion of the process (*i.e.*, until the proposal is either published or rejected) (Article 22).

All enforcement proceedings previously started by the consenting creditors are automatically suspended.

The communication of the decision on the acknowledgement of the scheme of arrangement automatically results in the stay of accrual of penalties, interest or on any other expenses in connection with claims of consenting creditors.

Upon homologation of the plan, there is a general stay of individual enforcement proceedings commenced by dissenting creditors. All enforcement proceedings started against the debtor (including those pertaining to unknown creditors) are automatically suspended, in case the conciliator requests, and the insolvency court homologates the scheme of arrangement (Article 28).

Upon the request of a conciliator and subject to the debtor's providing adequate security, the debtor may also obtain a stay of the accrual of interest, penalties as well as any related expense, for claims of dissenting creditors (and including claims of unknown creditors). Such stay is valid for a maximum period of eighteen months. As soon as the SOA is homologated, the creditors' right to begin the insolvency procedure against the debtor is stayed (Article 29 SAM). This appears to suggest that until the homologation of the scheme of arrangement is decided, it remains possible to commence an involuntary insolvency case against the debtor.

The scheme of arrangement will also be binding for creditors, including State authorities, but only if legal provisions with respect to state aid are observed and approval from the relevant Inter-Ministry Commission is obtained.

To the extent that a scheme is successfully implemented, the insolvency court will issue an order confirming the completion of the plan. The debt restructuring arranged under the agreement is consolidated as of the date of the court decision.

If, before the expiry of the term, the conciliator considers that the scheme of arrangement will not be successful, the insolvency court will issue an order attesting to such conclusion and commanding the ending of the procedure.

All claims restructured under the scheme of arrangement, including those pertaining to dissenting creditors, will remain final and binding. As discussed below (**Principle C11**), the IA provides that some legal acts executed by the debtor prior to the commencement of an ordinary insolvency procedure may be avoided. Since SAM is silent also in this matter, it is doubtful if acts adopted during the unsuccessful SOA may be also annulled on grounds of fraud, once the debtor enters the insolvency procedure.

Creditor rights within the scheme of arrangement

The conciliator delivers reports to creditors on the debtor's activity throughout the procedure, which they must approve (Articles 16 and 18).

Any creditor obtaining an enforceable title against the debtor during the currency of a scheme of arrangement may file a request with the insolvency court to join in the scheme or may realize its claims by any other permitted means (Article 30).

Creditors that voted against the proposal may request the annulment of the scheme within fifteen days from the publication date of the approved plan in the relevant Trade Registry. Along with its claims, a claimant may also request, and the insolvency court may grant, the stay of the scheme of arrangement.

Creditors may request the court to order termination of the scheme of arrangement and for award of damages, in case the debtor fails to fulfil its main contractual obligations, as set out in the scheme of arrangement. SAM regards the following actions as proof of breach of the main contractual obligations:

- the debtor preference of some creditors to the detriment of others;
- the concealment of debtor's assets pending completion of the scheme of arrangement;
- the making of payments without adequate justification.

Upon the filing of a termination request, the scheme of arrangement will be automatically stayed.

Upon the commencement of a scheme of arrangement, the insolvency court appoints the temporary conciliator proposed by the debtor. Further, the insolvency court is responsible for acknowledging the SOA (but it does not have the power to assess the feasibility of the SOA proposal) and the observance of legal requirements provided under SAM. Nevertheless, SAM is silent with respect to identifying such requirements. It appears that these requirements include the follows: (i) debtor's eligibility for SOA (*e.g.*, the debtor must not be in a situation, which precludes it from accessing the SOA; and (ii) the observance of the SOA procedure.

While SAM does not identify the financial position of a debtor as a factor to be examined in conjunction with the procedure of acknowledging the SOA, such financial position represents, however, a part of the test upon the request of homologation of the SOA.

Assessment	The Romanian legal system, prior to the 2014 Insolvency Code, provided potentially useful mechanisms in the form of schemes of arrangement and mandated *ad hoc* for restructuring the debtor's liabilities without commencing insolvency proceedings. The procedures were not used in practice, however. According to statistics compiled by the National Institute of the Magistracy, only 70 schemes of arrangement proceedings were opened altogether for the entire country in 2010 and 2011. There seems to be little awareness of the existence of the alternative procedures. Generally, stakeholders who were aware of the existence of the process did not seem to regard it as an effective way to rehabilitate the troubled business. There appeared to have been a number of structural reasons for the lack of use of these provisions, including the following: (i) no sanctions were provided for situations in which the scheme of arrangement process might be used strategically to fend off commencement of 'ordinary' insolvency proceedings; (ii) there was lack of clarity regarding the availability of the process when the debtor was "threatened" with insolvency as defined in the Insolvency Act; (iii) some markets participants complained that, in complex cases and especially where foreign-directed banks are involved, the period for plan formulation proved unrealistically tight; (iv) negotiations could become protracted and no deadlines were stipulated for steps in the process; (v) a scheme would have to affect at least 50% of the aggregate debt, even if only a smaller class of claims in fact needed to be restructured to enable the debtor's rehabilitation; (vi) the requirement for approval by a very high 80% of creditors by value in order to bind dissentients; (vii) the suspension of accrual of interests and penalties due to and expenses incurred by consent creditors; (viii) inadequate treatment of inter-group claims. Due to these deficiencies, lender representatives appeared to regard the invocation of these mechanisms as amounting primarily to debtors' efforts to escape their liabilities. In addition to these factors, market participants opined that the practice of successfully negotiating and implementing schemes of arrangement could only be viable if the tax authorities were enabled and encouraged to participate in such negotiations and agreements (on which see also **Principle B3**, above). It was also reported that tax authorities are required by law to charge high penalties (35%) for non-payment (though they possess discretion to forego up to half of these), and demand collateral;[241] such aggressiveness can sink what might otherwise be viable restructuring outcomes. The 2013 draft insolvency law sought to address a number of these deficiencies, and we are advised that the 2014 Insolvency Code has in fact addressed them. For example, it is reported that the percentage for approval of what are now called "preventive concordats" is now set at 75% of undisputed claims, with the further requirement that not more than 25% of disputed claims vote against approval. There is also, we are told, now a provision permitting interest to continue to accrue on debt during the negotiation process prior to approval. In addition, tax claims may be reduced under the proposal, so long as the reduction satisfies a "private creditor" test (to assure that the write-down does not result in state aid, in violation of European Union regulations). There are now deadlines stipulated in the law for both the negotiation of a concordat and its maximum term. Finally, there is a procedure to obtain court approval of the concordat making it binding on dissenting creditors.

[241] It has been also noted, however, that the Tax Procedure Code (Art. 119-124) authorizes the assessment of such charges, and that under Art. 41, Law 85/2006, no interest or penalties can be added to claims upon opening of insolvency proceedings. It has been therefore suggested that tax authorities do not charge high penalties.

Comment	The scheme of arrangement process had very significant but unrealised potential. In the event, it was considered that the process would be improved by (i) imposing sanctions for the debtor's decision-makers where a scheme of arrangement process is found to have been commenced or pursued in bad faith (see further **Principle B2**, above; (ii) providing a clearer and workable definition of the circumstances in which the scheme process may be commenced; international best practice is to allow this where a debtor is, or is imminently likely to become, unable to meet its liabilities as they fall due; (iii) enabling schemes to be proposed and agreed upon which affect less than 50% of outstanding claims, where such a smaller category of claims need to be restructured to enable the debtor's rehabilitation; (iv) providing deadlines for various steps in the negotiation and approval process; (v) enabling short extensions of the overall deadline for approval in complex cases; (vi) permitting creditors to vote by classes, depending upon the nature of their claims, and enabling approval of the concordat, and its being rendered binding upon all relevant creditors (including dissentients), where, in general, it is agreed to be creditors holding more than 65% to 75% of claims in each class;[242] (vii) permitting the continuing accrual of contractual interest and penalties even after the commencement of the scheme process, unless and until provided otherwise under a duly approved scheme itself;[243] (viii) providing a carefully thought-through treatment of inter-group claims; and (ix) removing any doubt as to the tax authorities legal and technical capacity to enter into negotiations to approve, and where appropriate, to vote in favour of, schemes; they should also have the explicit capacity to forego penalties and demands for collateral in such situations.[244] The new 2014 Insolvency Code may have substantially improved the viability of the process.
Principle B5	**Regulation of Workout and Risk Management Practices** **B5.1** A country's financial sector (possibly with the informal endorsement and assistance of the central bank, finance ministry or bankers' association) should promote the development of a code of conduct on a voluntary, consensual procedure for dealing with cases of corporate financial difficulty in which banks and other financial institutions have a significant exposure, especially in markets where corporate insolvency has reached systemic levels. **B5.2** In addition, good risk management practices should be encouraged by regulators of financial institutions and supported by norms that facilitate effective internal procedures and practices that support prompt and efficient recovery and resolution of non-performing loans and distressed assets.
Description	**Voluntary Corporate Debt Restructuring Guidelines** Upon the recommendation of the World Bank and IFC, three Romanian agencies, *viz*., the National Bank of Romania, the Ministry of Justice, and the Ministry of

[242] We are advised that the 2014 Insolvency Code sets the approval percentage at 75%.
[243] This change has apparently been made to the preventive concordat procedure in the 2014 Insolvency Code, at article 29(2).
[244] We are advised that the 2014 Insolvency Code has incorporated provisions that at least respond to the justification offered by the taxing authorities in the past for their non-participation (the concern that voluntary cooperation in any plan that reduced their claim might be viewed as state aid). New provisions now permit plans to be imposed over the objection of the taxing authorities (assuming the requisite percentage is reached), and further call for any treatment that results in a write-down to be subjected to a mandatory private-creditor test.

	Finance, agreed to endorse the adoption in September 2010 of Voluntary Guidelines on Out-of-Court Corporate Debt Restructuring (‘**CDRG**’).[245] The CDRG represent a body of voluntary, non-binding principles (as opposed to a set of mandatory rules) that represent an informal framework of cooperation between parties (borrowers, lenders and creditors) for dealing with temporary financial distress. The main objectives of the Guidelines are to: (i) avoid liquidating viable corporations; (ii) to minimize losses to banks and others; and (iii) to provide financial support for surviving businesses. The principles base their application on a few recommended conditions, which all parties involved in a negotiation would need to follow in order to reach a successful workout: *Good faith* Good faith is said to require, amongst other things, that a borrower carries on negotiations in honesty and is sincerely animated by an objective of reaching an agreement with the lender. Instances of bad faith include procrastination and deliberately postponing the reaching of an agreement in order to take advantage of the statutory clauses that release the management of the duty to file for insolvency. *Confidentiality* A borrower should fully trust that information that is shared with its lender remains confidential. In many instances, lenders would in any case be bound by banking confidentiality rules. *Lender commitment during the Standstill* Lenders agree that, for a limited period (the Standstill), they are not to take any individual action or to improve their positions relative to each other in terms of repayment or by way of security. *Borrower commitment during the same period* Similarly, during the same period, the borrower is under the obligation to refrain from taking any actions that might affect the lender’s interest (such as the making of payments or the selling of business assets, unless the lender consents in writing to such course of action). *Full Disclosure* A borrower should constantly keep lender in the loop with the latest and most accurate financial and business data, should not hide information and should allow the lender and its advisors to have access to such information. *Fresh funding* A borrower should be prepared to require fresh funds to assist its business if needed. Fresh money would likely bring higher interest rates, or additional security given in

[245] A Romanian version of the CDRG is available online on the Romanian Ministry of Justice’s website, at http://www.just.ro/LinkClick.aspx?fileticket=y1UyvhqWNns%3D&tabid=36.

	the assets of the business or of the management or owners. *Restructuring plan supported by reliable, reasonable and viable estimates* A borrower should aim at preparing a realistic restructuring proposal, with the lender's assistance (as the case may be), as soon as practicable. A borrower should realize that successful negotiation sometimes necessitates giving in (conceding) on something. **Impairment and loan classification practices** Pursuant to the National Bank's Regulation No. 16 of 2012 on classification and prudential value adjustments, each credit institution must promulgate internal norms governing risk management, which must be approved by the institution's management bodies and approved by the National Bank (Article 3). Under these norms, each debtor (i.e. loan obligors outside the credit institution industry) is to be classified in one of five prudential categories (standard, watch, substandard, doubtful, and loss) (Article 16). A standard impairment coefficient applies to each category: (1) 0%; (2) 5%; (3) 20%; (4) 50%; and (5) 100%, respectively (Article 19). Three criteria are used to determine classification: financial performance, debt service, and judicial status (Article 19, read together with Annex 3, Table 2). Financial performance in turn is determined on the basis of quantitative (liquidity, solvency, profitability, and risk) and qualitative (management, shareholding, nature of guarantees including collateral, and market conditions) factors (Article 6). Where an exposure has been subject to a "replacement operation" (i.e. new exposure or amendment of existing exposure terms), financial performance must be assessed by reference to more stringent criteria on the basis of the latest available information (Article 6). By application of the 'contamination principle', a borrower holding multiple facilities is classified according to the weakest of them (Article 17). An exposure covered by a full collateral deposit with the same bank is not counted for these purposes (Article 17). In operationalizing these requirements, lenders must implement appropriate information management methods and procedures (Article 22). As of 1 January 2012, the Romanian banking sector has dropped Romanian accounting standards for international accounting and reporting standards (IFRS). Under the latter, each bank's portfolio is divided into 2 categories: 'significant' and 'non-significant', based on pre-defined criteria: > The bank shall first assess whether objective reasons do exist for impairment, individually for the significant financial assets, and then individually or collectively for the non-significant financial assets. If the bank satisfies itself that there is no objective proof of depreciation for a financial asset valued individually, irrespective whether it is significant or not, it includes the asset in a group of financial assets which have similar features of the credit risk and collectively values them for impairment purposes. The losses from depreciation recognized at group level represent an interim stage until losses from depreciation are stated at individual level so that promptly after an asset is found to be impaired at individual asset it shall be removed from the group. The depreciation is calculated as the difference between the book value of a financial asset and the updated value of the future estimated cash flows.[246] For the former category, impairment is individually determined on objective evidence of a pre-existing reason that would justify the impairment. If no such reason is present, the loan is classified in the 'non-significant' category and is

[246] Detail furnished by the National Bank of Romania.

	subject to collective impairment treatment (based on general risk assessment, including country and industry risk, etc.). Similarly, a non-significant loan subject to a specific individual impairment is to be transferred to the 'significant' category. Impairment is calculated against the net present value of the impaired asset's cash flow. **Debt restructuring techniques** Banks and financial institutions routinely employ workout techniques to reach amicable arrangements to reschedule debts. The most common technique for credit recovery and resolution of problem loans is debt rescheduling, asset sales to third parties and judicial and non-judicial foreclosure. Debtors frequently apply for rescheduling of their debt. Depending on the debtor's financial situation, the banks may require an increase in the registered capital; sale of assets that do not affect business activity; retention of dividends; and provision of additional collateral or guarantee. Structural changes in management, cost cutting measures or downsizing of workforce represent thorny issues that can make the process more difficult. The Board of Directors of the Romanian Banking Association ('**RBA**') issued a series of press releases in September 2009, at the conclusion of a meeting with the representatives of several business alliances in Romania. The press releases stated that debt restructuring represents a meaningful support for corporate borrowers facing financial distress and a viable alternative aimed at avoiding collateral foreclosure.[247] As a result, RBA issued a five-page document containing a non-exhaustive set of restructuring schemes and solutions concerning the distressed debt owed by small and medium size businesses in Romania.[248] The document notes that debt restructuring assumes transparency, honest co-operation and fair disclosure from borrowers with respect to their business and financial situation, in order to provide creditors with a genuine opportunity of assessing all the elements and risks associated with the contemplated turnaround. The document also underlines that a restructuring plan should be adequately documented as to several factors: (i) identification of new markets for goods or services; (ii) cutting down costs; (iii) maximization of sales; (iv) diversification of business or focusing on high profit-margin lines of business; (v) more significant involvement of shareholders; and (vi) enhancement of management performance.
Assessment	Non-performing loans ('**NPLs**')[249] have continued to climb over the last three years. The NPL ratio stood at 15.9% in March 2012, of which almost 99% was covered by total prudential provisions. By August 2012, the level had risen to 17.6%, a significant increase from 13.9% in August 2011. Over the same 12-month period, the overall proportion of debtors in default increased from 23.3% to 24.8%. Individual banks report significantly higher NPLs. The NPL level had climbed to 21% by the end of July 2013. As of 1 January 2012, the banking sector replaced Romanian accounting standards with international accounting and reporting standards ('IAS' and 'IFRS'). This move has brought about a one-off freeing up of a certain amount of capital. The

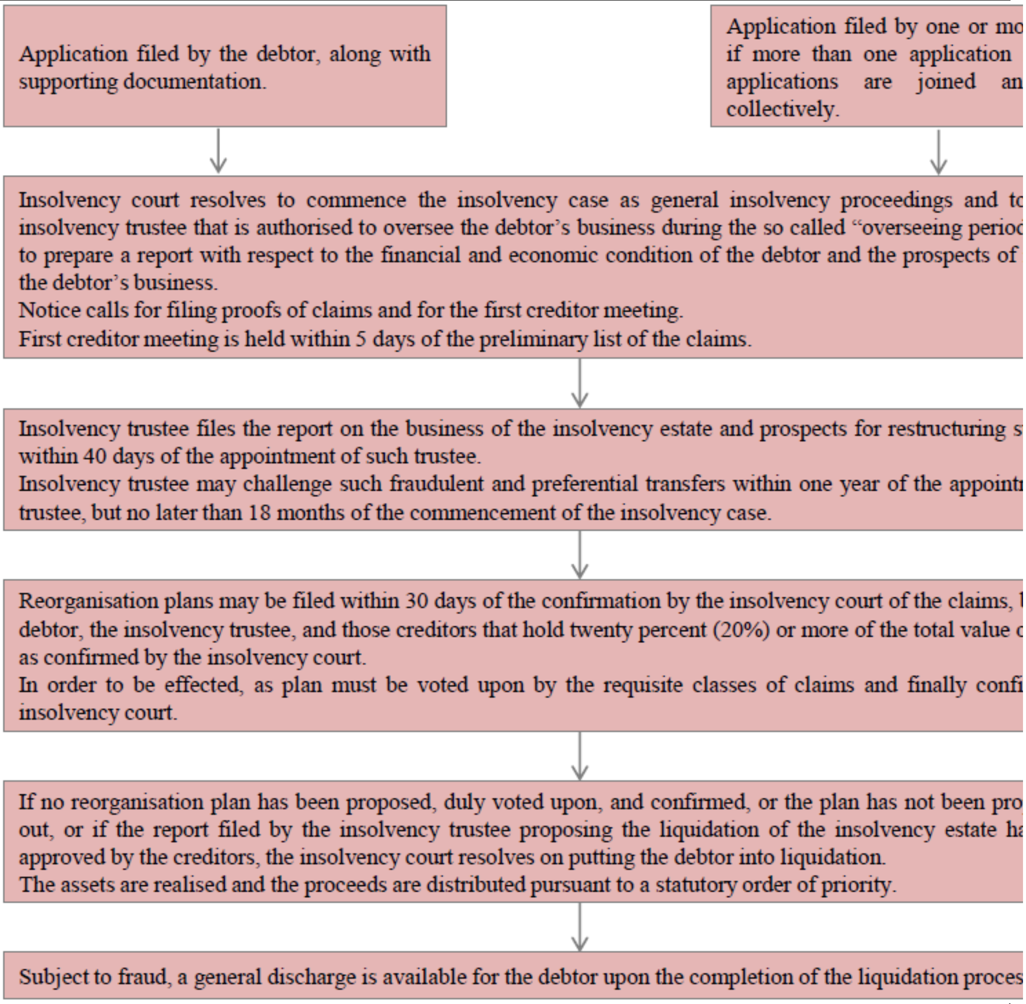
[247] *See* Romanian Banking Association, Press Releases (in Romanian) of 9, 10, and 29 September 2009, available at http://www.arb.ro/evenimente.php
[248] *See* Romanian Banking Association, Press Release of 29 September 2009 (in Romanian), available at http://www.arb.ro/admin/documents/ARB%20comunicat%20presa%20scheme%20restructurare.pdf
[249] Defined for present purposes as un-adjusted exposure of loans and interests overdue for more than 90 days and/or for which legal proceedings were initiated, as a percentage of total classified loans and interest related to non-bank loans.

	move to international standards has thus lowered provisioning requirements, and may also have improved bank's foreign exchange positions (primarily by selling euros held for net provisions in relation to impaired euro-denominated loans). The problem of excessive rescheduling appears to persist. Several banks in Romania appear to resort to routine rescheduling where default has occurred, without due effort to ascertain the underlying causes other than to obtain a perfunctory 'independent business review', which is regarded as a mere formality. At least one bank reports the remarkable fact that every single loan in its distress portfolio has seen at least one rescheduling. A very senior official of another bank indicated that, on the basis of their experience, evergreening is indeed occurring in the system. A senior official at another bank explicitly admitted that the bank would consider rescheduling not because it was particularly confident of the debtor's fundamental viability but precisely to avoid having to reclassify the loan. Such practices, if widespread, indicate that problems in the financial sector may go even deeper than is indicated by the high and rising headline NPL figures. The National Bank's regulations do not appear to limit the number of times a loan may be rescheduled prior to *mandatory* (as opposed to discretionary) downgrading. Nor do they provide minimum criteria by which lenders must assess distress scenarios prior to agreeing to a rescheduling. A code of good practice exists in relation to informal workouts but is not used by parties. In September 2010, Voluntary Guidelines on Out-of-Court Corporate Debt Restructuring were endorsed by the Ministries of Justice and Public Finance and the National Bank. The Guidelines are consistent with international best practice, providing principles governing good faith, confidentiality, disclosure, new funding, and the obligations of debtors and lenders. Unfortunately, there does not appear to have been a high uptake of these provisions. Financial institutions who would be their natural users report that the National Bank, while nominally having endorsed the Guidelines, appears entirely passive in respect of them, providing little or no encouragement for lenders to have resort to them in appropriate circumstances. The National Bank's position appears to be that it has no legal authority formally to issue, as opposed to "endorse", recommendations of the sort contained in the Guidelines, and no legal power to encourage lenders to have resort to them. However, other central banks, starting with the Bank of England's 'London Approach', have indeed issued such guidance and put regulatory weight behind their use. There is room for further dialogue here with the Romanian National Bank, whose active intervention could confer very significant value to the Guidelines, and thus, for the market.
Comment	Whether through amendment to NBR Regulation No. 11/2011 or otherwise, the National Bank should urgently consider providing further and specific binding guidance to address situations where a facility is impaired and/or subject to a replacement operation. Financial institutions proposing to enter into replacement operations should be required to make proportionate but meaningful enquiries regarding the underlying causes of distress, and to precondition their agreement to reschedule upon the debtor taking steps to address weaknesses in its management, strategy, and/or operations. The guidance should address the maximum number of times that a facility may be the subject of certain replacement operations before being eligible for mandatory downgrading. This should be coupled with enhanced monitoring by the National Bank to ensure real implementation of the policy guidelines and full compliance of financial institutions with the legal framework. The National Bank should take a leadership role, fully deploying its moral suasion to encourage financial institutions involved in multi-lender distress scenarios to make use of the Guidelines on Out-of-Court Corporate Debt Restructuring. It is

	unlikely that it requires additional statutory powers to do so, and the National Bank should study the practices of other regulatory authorities including the Bank of England in relation to the 'London Approach' and the Turkish Banking Regulation and Supervision Agency in relation to the 'Istanbul Approach'. In the unlikely event that further statutory powers are indeed required for the National Bank to act in this way, urgent consideration should be given to conferring such powers on it. The National Bank's involvement in a 'Bucharest Approach' could kick-start a flourishing restructuring practice in the country, to the significant advantage of all relevant stakeholders.
	PART C. LEGAL FRAMEWORK FOR INSOLVENCY
Principle C1	**Key Objectives and Policies** Though country approaches vary, effective insolvency systems should aim to: • Integrate with a country's broader legal and commercial systems. • Maximize the value of a debtor's assets and recoveries by creditors. • Strike a careful balance between liquidation and reorganization, allowing for easy conversion of proceedings from one procedure to another. • Provide for both the efficient liquidation of nonviable businesses and those where liquidation is likely to produce a greater return to creditors, and the reorganization of viable businesses. • Provide for equitable treatment of similarly situated creditors, including similarly situated foreign and domestic creditors. • Provide for timely, efficient and impartial resolution of insolvencies. • Prevent the improper use of the insolvency system. • Prevent the premature dismemberment of a debtor's assets by individual creditors seeking quick judgments. • Provide a transparent procedure that contains, and consistently applies, clear risk allocation rules and incentives for gathering and dispensing information. • Recognize existing creditor rights and respect the priority of claims with a predictable and established process. • Establish a framework for cross-border insolvencies, with recognition of foreign proceedings.
Description	*Introduction* The Romanian insolvency framework provides for a system that is court-based. There are forty-one county courts (in Romanian: *tribunale*) which have exclusive jurisdiction over insolvency cases commenced on debtors whose registered office is located in Romania. The regulatory framework is relatively new. In line with other European jurisdictions (Germany –*Vergleichsordnung*- or Spain –*Ley de Suspension de Pagos*-), as early as 1929 the country featured a collective composition procedure (*concordat preventiv*) that was –reportedly- hardly ever used. The 1929 Act was repealed in 1938 through and a then new system that was put in place and remained in force until 2006, when the Insolvency Act nr. 85/2006 of 5 of April, was enacted.

	In 2009, the Romanian Parliament passed Act No. 381/2009 on Schemes of Arrangement and Ad-Hoc Mandate to complete the system as it exists today. The 2014 Insolvency Code (we are advised) now embodies into one piece of legislation pre-insolvency alternative mechanisms (see **Principle B** above), the general rules applicable to the insolvency process, as well as the special rules applicable to credit institutions, insurance and re-insurance companies, and the regulation of cross border insolvency. It addresses some of the concerns raised in this assessment (deleinated below) regarding the insolvency framework. Detailed comments on the 2013 Draft Insolvency Law, the predecessor legislation which it is believed is in structure similar to the 2014 Insolvency Code, are provided in Annex II.[250] *Types of insolvency proceedings* The Insolvency Act (**IA**) provided for two types of insolvency proceedings: (i) a general insolvency proceeding; and (ii) a simplified procedure, a type of "fast-track" liquidation proceeding.[251] On paper, the Romanian insolvency system aimed to strike a balance between the restructuring and reorganization of viable insolvent debtors and the orderly liquidation of a maximized estate with no prospective of survival. In practice, however, liquidation was overly present and successful restructurings were very few. According to data collected by the National Association of Insolvency Practitioners of Romania (UNPIR), as of 31-12-2011, reorganizations were only 6% of the total number of cases (the rest being bankruptcies/liquidations). *General insolvency proceedings* The general insolvency proceedings contemplated two or three main stages (depending on the case), which begin with the commencement of the proceedings, continue with a 50 day observation period that may include the approval of a reorganization plan which leads to a successful reorganization or end with the liquidation of the debtor. The following scheme provides an overview of the general insolvency proceedings under the IA. *Outline of the general insolvency process*

[250] These comments were prepared in response to a request for input from the government, and have been incorporated into this Report in the interest of completeness.
[251] *See* Insolvency Act, Sections 3.1.1 and 3.1.2, for more details about the particularities of each of the two types of insolvency proceedings.

	 The liquidation of a business in insolvency was decided by the insolvency court upon motion of any party in interest or upon its own motion, and it occurs in any of the following circumstances (art. 107.1 IA): If no plan of reorganization was proposed, admitted, approved, or confirmed or approved; If the plan fails to deliver on its approved objectives; If the insolvency trustee recommends the liquidation and the creditors approve such proposal; or If the debtor has expressed its intent to liquidate under the fast-track liquidation proceedings. Once the general stage of the proceedings was converted into liquidation, the assets in the insolvency estate were to be sold, and the proceeds derived therefrom distributed to the creditors. The insolvency representative (trustee) (*lichidator*) was authorised to maintain custody over the property of the insolvency estate, to pursue and collect the claims of the insolvency estate against third-party debtors, and to sell off the property of the insolvency estate with a view to maximising the value of the proceeds.

	From a practical standpoint, it should be noted that the creditors typically waited about one year or longer until the liquidation process is finalised and they received some payment. *Outline of liquidation* Termination of the debtor's right to manage its business. ↓ Appointment of an insolvency trustee. ↓ Notification of creditors. ↓ Registration of the proofs of claim, assessment and confirmation of the claims. ↓ Carrying out liquidation and collection of proceeds. ↓ Distribution of proceeds generated by liquidation. ↓ Completion of the liquidation, discharge of the debtor and closure of the insolvency case. *The Simplified Procedure (fast-track liquidation proceedings)* Simplified liquidation proceedings were a relatively new addition to the insolvency framework. They were promoted mainly with a view to help clear the backlog of cases existing in insolvency courts, especially those involving: (a) certain categories of debtors (*e.g.*, sole traders; family unincorporated businesses; corporations that voluntarily resolve to liquidate outside the insolvency proceedings and the liquidation turns insolvent; debtors that file for liquidation; or those debtors that may not avail themselves of restructuring remedies due to their past insolvency history) arguably regarded as not suitable for restructuring their businesses (art. 1(2)(a)-(b) IA); and (b) debtors that are inactive, or completely emptied of assets, or whose management is clearly uncooperative insofar as transferring financial statements and other accounting documents to the insolvency trustee) (art. 1(2)(c) IA). Although fast-track liquidation was designed as a special, thus exceptional, procedure, in practice the exception became the rule and as there was little room left for pursuing general proceedings. From a procedural standpoint, an insolvency court could resolve to run fast-track liquidation proceedings either upon rendering the decision that commenced an insolvency case or in a later date which, in most cases, corresponded to the end of a 50 day observation period ensuring the commencement of the liquidation proceedings and the appointment of the insolvency trustee (art. 3. 25 IA).
Assessment	The Romanian Insolvency Act provided for a legal framework which was relatively comprehensive in terms of types of debtors and possible solutions to insolvency, and could be considered modern and relatively in line with best international practice. The IA included rules intended to prevent the improper use of the insolvency system

	by both debtors and creditors and to avoid the premature dismemberment of a debtor's assets by a comprehensive stay of actions. The law also included rules aimed at achieving transparency and to collect, process and disperse information to the relevant stakeholders. The Romanian system incorporated the Model Law for cross border insolvencies and the EU Regulations on Insolvency Proceedings, which are directly applicable in the country. Some 23,665 insolvency cases were commenced in 2012, ten per cent higher than the previous year. The ordinary procedure envisaged in the law consisted of two main stages: one common stage, purely instrumental, where assets and liabilities are determined and the information concerning the causes of insolvency and related responsibilities, and the possible exits to the business in distress is collected, processed and analysed; and a successive stage, which could consist of a reorganization or a liquidation of the business (or a succession of the two exists in the stated order). In order to save unnecessary costs and reduce the time of the proceedings, the law included a simplified procedure to liquidate the business where no rescue is possible. Although this fast-track liquidation is treated as exceptional, the reality of the Romanian insolvency practice has made it the most frequent case. The structure of the procedure and some of the main aspects of the regulation resemble some of the most influential insolvency systems in continental Europe, sharing some of their strengths as well as most of their weaknesses. Despite the modern and relatively adequate framework, results in practice were not satisfactory and there was left room for improvement of some elements of the law. The insolvency system was widely used, but it was perceived as too lengthy, costly and especially value destructive. Although the law tried to favour the rescue of the business, only a very low percentage of cases ended with the approval of a reorganization plan and an even lower number resulted in the successful execution of the plan. The overwhelming majority of files resulted in the piece-meal liquidation of the assets comprised in the insolvency estate. Businesses did not seem to regard insolvency proceedings as an adequate tool for resolving financial distress and creditors did not value the system as an effective debt collection mechanism, capable of offering a higher return than individual enforcement of their claims. Although some of the causes of this situation can be found in elements extraneous to the insolvency law, such as a lack of rescue culture, deficiencies of the institutional setting, inadequate regulation of other branches of the law (company law, tax law, etc.) or poor practice in key elements of the functioning of the market (low accounting standards, etc.), there are elements of the Insolvency Act that deserved to be amended to improve the system. The observation period (initial stage) lasts too long, and in practice may exceed by far the 50-days statutory period, keeping the business in insolvency for an unnecessarily long period of time and delaying the solution to the crisis. Arguably the most important problem of the system consists of the excessive duration of the observation period caused by contestations against the list of creditors, including the related appeals and, albeit less relevant in practice, by the strategic use of other procedural mechanisms. Each contestation entails one or more hearings, which constitute one of the main causes for the delay. Consideration ought to be given to eliminating the public hearings for the contestations against the list of creditors unless the judge is satisfied that the proof to be produced merits an oral hearing. Quite often, another delaying factor is failure of the judicial administrator to meet the 20-days deadline from the date the insolvency procedure was opened, to submit the report identifying the causes and circumstances triggering the insolvency and the responsible persons, and most importantly the proposal for continuing the general procedure or entering into the simplified one. The IA aimed – unsuccessfully – for the reorganization of the business and

	regulated in detail the conversion from rescue proceedings to the liquidation of the insolvent debtor. However, this conversion might yet be a bit cumbersome, especially concerning the elaboration of the list of creditors in the winding up of the business. The Romanian legal framework has recently undergone very significant changes: most importantly, the jurisdiction counts on a New Code of Civil Procedure and a new Civil Code, both of which interact significantly with the insolvency framework. Although the Insolvency Act integrates relatively well with the country's legal and commercial system, there is a need to harmonize and correlate the insolvency framework with the newly enacted laws.
Comment	Despite its relatively adequate legal framework, the Romanian insolvency system is not working well in practice. The system needed to undergo some significant changes in the law and improve the institutional setting. Making insolvency attractive for market participants is the only way to ensure the successful use of the system. In each of the **Principles** that follow (**C** and **D**) we provide with succinct suggestions to achieve this aim. As noted above, some of the issues raised in this assessment (regarding the insolvency framework) were addressed in the 2013 Draft Insolvency Law, to which detailed comments were provided (see Annex II). Since then, the Parliament has enacted the 2014 Insolvency Code, on 15 April 2014.
Principle C2	**Due Process: Notification and Information** Effectively protecting the rights of parties in interest in a proceeding requires that such parties have a right to be heard on and receive proper notice of matters that affect their rights, and that such parties be afforded access to information relevant to protecting their rights or interests and to efficiently resolving disputes. To achieve these objectives, the insolvency system should: **C2.1** Afford timely and proper notice to interested parties in a proceeding concerning matters that affect their rights. In insolvency case there should be procedures for appellate review that support timely, efficient and impartial resolution of disputed matters. As a general rule, appeals do not stay the insolvency case, although the court may have power to do so in limited specific cases. **C2.2** Require the debtor to disclose relevant information pertaining to its business and financial affairs in detail sufficient to enable the court, creditors and affected parties to reasonably evaluate the prospects for reorganization. It should also provide for independent comment on and analysis of that information. Provision should be made for the possible examination of directors, officers and other persons with knowledge of the debtor's financial position and business affairs, who may be compelled to give information to the court and insolvency representative and creditors' committee. **C2.3** Provide for the retention of professional experts to investigate, evaluate or develop information that is essential to key decision-making. Professional experts should act with integrity, impartiality and independence.
Description	*Procedural matters* The Insolvency Act provided for the mandatory publication of notices, court orders, reports and various other procedural acts that need to be notified to the participants in the Insolvency Bulletin (*Buletinul Procedurilor de Insolvență*), which is a issued

	by the National Office of the Romanian Trade Registry and available online on a subscription basis (art. 7.1 IA). As regards the participants residing abroad, the law maintains the general notice method under the rules developed in the New Code of Civil Procedure. The law contained several exceptions to the rule of publication in the Insolvency Bulletin, requiring that certain documents had to be notified in accordance to the general rules in the New Code of Civil Procedure: (i) the communication of procedural documents prior to the commencement of an insolvency case; and (ii) the notification of the commencement of an insolvency case. After the commencement of insolvency proceedings, the first communication and notification of documents to persons against whom certain actions were pursued in the insolvency case had to be done pursuant to the rules of New Code of Civil Procedure, as well as through publication in the Insolvency Bulletin. This was stated in art. 61, according to which "[F]ollowing the opening of the procedure, the insolvency representative shall send a notification to all the creditors mentioned in the list submitted by the debtor in accordance with art. 28 par. (1) let. c) or art. 32 par. (2), as the case may be, to the debtor and to the Trade Registry Office or the register of agricultural companies or other registers where the debtor is registered, as the case may be, in order to register the mention. (…)The notification (…) shall also be published, at the debtor's expense, in a widely-circulated newspaper and in the Insolvency Procedures Bulletin". An amendment provides for the publication of the opening of insolvency proceedings on the debtor's website (if it maintains one). In the event the debtor was a company traded on a regulated market, the syndic-judge was obligated to inform the National Securities Commission with regard to the ruling on the opening of the procedure. Following the principle that the insolvency system should provide for a streamlined and quick process to solve the debtor's distress (*principiul celerităţii*), the law included short procedural intervals. There were also instances where various motions in an insolvency case were resolved without notice and hearing, or on a very short notice. For similar reasons, the number of appellate reviews in insolvency cases was limited to one, which was to be brought before and solved by the appellate courts. In principle, the term for filing an appeal was seven days, which is less than half the number of days granted under the general rules of the New Code of Civil Procedure. An appeal against an insolvency court's order or ruling did not automatically stay the effects of the decision challenged. In contrast with the rules of New Code of Civil Procedure, the Insolvency Act did not even permit the appellate courts to stay, upon motion of a party in interest, the effects of an appealed order or ruling of the insolvency court, except in limited circumstances. The appellate court could stay the execution of the appealed decision when the latter consisted of: Ordering the commencement of an insolvency case upon an involuntary motion of a creditor that has been opposed unsuccessfully by the debtor; Ordering the commencement of a simplified (fast track) liquidation case; Ordering the commencement of liquidation; or Resolving on objections filed by parties in interest to plans of distribution of proceeds resulted from liquidation devised by insolvency trustee.

	Disclosure of Information by Debtor The Insolvency Act listed the financial information that the debtor needs to provide, including the balance sheets, a list of all assets, and profit and loss statements of the year prior to application (arts. 28 and 35 IA). In addition, the insolvency representative had the duty to prepare a report on the reasons that contributed to debtor's insolvency and the prospects of reorganizing its business (art. 20.b IA). Creditors had access to the information that the debtor had to provide according to the Insolvency Act, as well as to that concerning any proposed reorganization plan. There were no detailed provisions requiring independent comment and analysis of such information, except for the role assigned in Insolvency Act to court experts, which could be called upon to evaluate assets, verify whether the conditions stipulated by the plan for reorganization proceedings are met or to clarify any obscure points in disputes. As regards to the disclosure of business information, the debtor was obliged to fully cooperate with the administrator or liquidator (art. 44 IA). Failure of the management of a debtor in insolvency to timely assist and cooperate with the insolvency trustee, by wrongfully obstructing the disclosure or turning over to the insolvency trustee, or preventing the insolvency trustee from taking lawful possession of, the relevant corporate records constitutes a crime that was sanctionable by up to three year imprisonment or a criminal fine (art. 147 IA).
Assessment	The IA provided mechanisms aimed at the achievement of timely and effective notice of procedural decisions and events that may affect parties' rights. Although measures have been adopted (such as the mandatory publication of the opening of proceedings on the debtor's website), the system of publicity relied heavily on the Insolvency Bulletin, which is the focal point where notices are made available. Individual notifications were an exception. Reportedly, there was litigation by creditors alleging inadequate notification of the opening of the proceedings supporting their claim in general principles of procedural law. A reinforcement of the system of publicity might end this practice which delays and causes costs to the insolvency procedure. The pace desired of the procedure was sometimes unrealistic and affected the rights of the parties. In some cases, the intervals to challenge a decision or to carry out a procedural act were too short (*e.g.*, three days for contesting actions taken by the insolvency representative). There seem to also be instances where motions in an insolvency case were resolved without notice and with no hearing, or on a very short notice, insufficient for respondents to reasonably prepare their defence. In such cases, the respondents usually requested a continuance invoking due process considerations and –allegedly- courts were often reluctant to deny such requests. The obvious consequence is a delay in the timely resolution of the subject motion or action. The insolvency representative was obliged to deposit in the court and to publish every month a report of the activities carried out. This report was a valuable piece of information that the parties could use to monitor the development of the proceedings. Apparently, the publication of the report was sometimes unduly delayed. This left the parties with very little or no time to challenge some of the decisions included in the report, 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.

	Although the law created a general duty for the debtor to collaborate and provide the insolvency representatives/court with all relevant information as required, practice shows that the rule was not adequately complied with. Stakeholders complained that debtors concealed their financial standing as well as relevant documents with relative frequency, and the courts or insolvency trustees had no effective means of obtaining accurate information. The criminal sanction was, according to the users of the system, not sufficient to foster active participation by the debtor and its management.
Comment	Pursuant to the general system of publicity envisaged in the general procedural legislation, consideration could be given to including the reinforcement of the mechanisms of publicity of certain acts, especially the decision to open insolvency proceedings given the hard consequences envisaged for late filing of claims (see **Principle C13**): for example, it might be convenient to provide for the additional publication of the opening of insolvency in a national newspaper or in several local newspapers so long as the size of the case so justifies. To avoid unjustified costs or, conversely, insufficient publicity, the law could confer a certain degree of discretion to the court to decide which measures are necessary in a given situation. The ability of the parties to monitor the development of the proceedings and the performance of the insolvency representative would be improved if the time to challenge the acts included in the report of the insolvency representative started to count from the moment of publication in the Insolvency Bulletin. The law should operate with a view to strengthening the information and collaboration duties of the debtor. The law could make the sanctions envisaged in art. 44 of the IA more severe, so as to create a real effect on the debtor's behaviour; and it might be adequate to extend the liability of the debtor (and its directors) to the withholding and concealing of documents and information that are relevant to the development of the procedure and go beyond the list of documents included in art. 28 IA.[252] Finally, the legislator might want to consider the extension of certain terms to carry out acts or to challenge decisions that affect the rights of parties to the procedure. Sufficient time to prepare should be provided.
	Commencement
Principle C3	**Eligibility** The insolvency proceeding should apply to all enterprises or corporate entities, including state-owned enterprises.[253] Exceptions should be limited, clearly defined, and should be dealt with through a separate law or through special provisions in the Insolvency Act.
Description	*General insolvency proceedings* Pursuant to art. 1 IA the following types of debtors could be declared insolvent according to general insolvency proceedings: 1) Business associations (corporations or companies in their different kinds: *societăţi comerciale*);

[252] The 2013 Draft Insolvency Law contained a provision that created a presumption of liability for causing the insolvency of the debtor if a director failed to cooperate in submitting information to the judicial administrator.
[253] Ideally, the insolvency process should apply to SOEs, or alternatively, exceptions of SOEs should be clearly defined and based upon compelling state policy.

2) Cooperative enterprises (*societăţi cooperative*) and organizations of cooperative enterprises (*asociaţii cooperatiste*);

3) Farming enterprises (*societăţi agricole*);

4) Economic interest groups (*grupări de interes economic*); and

5) Any other entity with independent legal personality that pursued for-profit activities, even if this was not their main activity (such as foundations (*fundaţii*) and associations (*asociaţii*), acting mainly as incorporated charitable institutions).

Fast-track (simplified) liquidation proceedings

A simplified fast-track liquidation procedure targeted the debtors indicated above (*general insolvency proceedings*) when they (a) did not have any assets left in the estate; (b) they lacked articles of associations or accounting forms; (c) their managers were absent; or (d) their registered office no longer existed or it did not correspond with the one existing in the Trade Registry. Besides, other categories of debtors fell within the scope of this simplified procedure (art. 1.2 IA):

Sole traders;

Family unincorporated businesses;

Corporations whose shareholders voluntarily resolved to dissolve prior to the filing of an insolvency petition with the insolvency courts;

Debtors that either expressly and voluntarily filed for liquidation under the Insolvency Act or could not avail themselves of restructuring remedies under the law.

The business associations incorporated and active in Romania under the Companies Act of 1990 (as subsequently amended) (the "**Companies Act**")[254] and the Capital Markets Act of 2004 (as subsequently amended) (the "**Capital Markets Act**")[255], represented the vast majority of insolvency cases in Romania.

Foreign companies (provided they possess sufficient nexus with Romania, either via the presence of one or more local branches or sufficient assets) were subject to a separate set of rules under either the International Insolvency Act,[256] or the EC Insolvency Regulation.

State or municipality-owned companies could be declared insolvent in Romania. However, the law exempted from its scope certain entities that were wholly owned by the State or municipalities (*regii autonome*). The majority of such entities are involved in providing public utilities, but there are some that engage in other type of activity and they occupy a monopolistic position in the market. Even though such entities may be technically insolvent, the system allegedly applied the principle of continuity of public services and utilities to prevent the activity from ceasing. According to art. 151 IA, the legal framework governing the insolvency of such entities is to be provided by a special law. Thus far, no "special" law has been

[254] *See* Act No. 31 of 16 November 1990, published in Official Gazette of Romania No. 1066, dated 17 November 2004, as subsequently amended and restated.
[255] *See* Law No. 297 dated 28 June 2004, published in Official Gazette of Romania No. 571, dated 29 June 2004, as subsequently amended.
[256] *See* International Insolvency Act, Art. 2.

enacted to address the insolvency of the *regii autonome*. As a result, their liquidation could not be handled in the traditional sense of the term and they could only be wound up through the general provisions of the Company Act.[257]

Romanian law provides some treatment of municipal over-indebtedness. Government Emergency Ordinance No. 46/2013 on the financial crisis and insolvency of territorial-administrative units amends and supplements Articles 74 and 75 of the Law 273/2006 on Local Public Finance. Under this framework, a municipality may be presumed or proved to be in *financial crisis* or *insolvency*:

- A financial crisis is assumed if the municipality either falls into arrears for over 90 days on a payment obligation exceeding 15% of its budget (commercial disputes are exempted), or if it fails to pay its employees' salaries for more than 90 days. In such circumstances and upon the request of any interested person, the municipality's budget administrator must review the municipality's finances, and if crisis is confirmed, the local council bust be convened within 5 days, higher government authorities must be notified, and recovery procedures commenced. The crisis is presumed to be over where causes for the default on payment obligations are absent for 6 months, or on the other hand, where the municipality turns out to be insolvent; and,

- Insolvency is presumed where the municipality defaults for more than 120 days either on a payment obligation exceeding 50% of its budget (again except in circumstances of commercial dispute), or in paying its employees. Insolvency procedures may then be commenced at the behest of the budget administrator, other municipal body, creditors or the court. The insolvency process is similar to those applicable to commercial enterprises and involves institution of a recovery plan under which debts may be adjusted. The insolvency process ends when the criteria for insolvency are no longer met, though the implementation of the recovery plan may continue past this point.

Romania has enacted special insolvency rules to govern insolvent credit institutions, which envisage direct intervention and active oversight by the National Bank of Romania into the management and affairs of those credit institutions that become insolvent.[258] Only credit institutions with their main place of business in Romania, along with their branches from other EU Member States, are eligible for insolvency cases governed by the rules in Credit Institutions Insolvency Act.

Similarly, special insolvency rules were enacted to govern the insolvency of insurance companies.[259] The law contains special provisions that deal mainly with special measures that are to be taken to prevent the insolvency or restore the solvency of insurance companies (*i.e.*, re-establishment and special administration). The regulatory authority of insurance business in Romania (*i.e.*, the Insurance Supervision Commission) has the power to institute and supervise the above-mentioned measures. Insurance Insolvency Act does not apply to reinsurance companies.

Non-bank financial institutions, which represent a distinctive category of providers

[257] We are advised that the 2014 Insolvency Code now permits state owned enterprises (other than municipalities) to be debtors under the law.

[258] *See* Government Ordinance No. 10/2004 on insolvency of credit institutions ("Credit Institutions Insolvency Act"), which abrogated the former "bank insolvency" law set forth in Act No. 83/1998.

[259] *See* Act No. 503/2004 on financial recovery and insolvency of insurance undertakings (the "Insurance Insolvency Act"), which implements the provisions of Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganization and winding-up of insurance undertakings.

	of financial services in Romania that are *not allowed to take deposits* from the public, but whose operations are still exercised under a regulatory framework supervised by the National Bank of Romania, are nonetheless *ineligible* subjects for insolvency cases under Credit Institutions Insolvency Act. They were, consequently, qualified for ordinary proceedings under Insolvency Act.
Assessment	Under the Romanian IA, a general insolvency procedure was applicable to the vast majority of debtors that develop a commercial or professional activity in the market. The law was however not applicable to a type of State Owned Enterprise called *regii autonome*. The IA stated that the insolvency of these entities was to be regulated by a specific law, which had not yet been approved. The need to ensure continuation of a public service might not be enough (by itself) to justify the exclusion of the publicly owned entities from the general insolvency system. Amendments to the law to adapt the effects of insolvency on the management of the debtor activities and to executory and post-commencement contracts providing for ad hoc mechanisms to ensure the temporary rendering of public services would suffice. Municipal over-indebtedness is addressed by Articles 74 and 75 of the Law 273/2006 on Local Public Finance as recently amended and supplemented by Government Emergency Ordinance No. 46/2013. This framework enables recognition of either a *financial crisis* or the *insolvency* of a municipality, for the appointment of an administrator to manage the municipality's funds, and for the approval and implementation of a recovery plan. These provisions already have their first customer, in the form of the town of Aninoasa, for which an administrator has been appointed. The efficacy of the framework remains to be tested. Concerning the application of art.1 IA and the scope of the law as regards physical persons, the following could be taken into consideration: (i) there is a new Civil Code which has replaced the concept of "trader" with the broader one of "professionals", and the insolvency law should needed be amended in order to achieve consistency with the new concept;[260] (ii) that would constitute a good opportunity to decide whether the insolvency law should apply not only to "traders", in the sense of individuals performing commercial activities (a classic definition of Civil Law codified systems), but also to individuals developing professional activities not related to commerce (i.e., doctors, dentists, lawyers, etc.), which have borrowed excessively and have become insolvent thereby; (iii) it might also be a good occasion to ensure that *de facto* "traders" (those who professionally develop an activity in the market but which are not registered as such) are covered by the scope of the law.
Comment	In view of the assessment it was considered important to give consideration to the following measures: 1) Amending the law so as to allow for the insolvency of all SOEs, including *regii autonome*, ensuring that instruments are provided to ensure the temporary continuation of public services; 2) Amending the law in order to correlate the insolvency legislation with the new definitions included in the New Civil Code; 3) Define broadly the scope of the law concerning professionals active in the market, even if their activity is not limited to trade/commercial activities, so long as they seek profit.

[260] The 2013 Draft Insolvency Law in fact used the term "professional," consistent with the Civil Code.

	4) Provide for adequate regulation to ensure the application of the law to *de facto* sole entrepreneurs. 5) Closely monitor the performance of the insolvency framework in relation to municipal bankruptcies with a view to strengthening it further if and as necessary.
Principle C4	**Applicability and accessibility** **C4.1** Access to the system should be efficient and cost-effective. Both debtors and creditors should be entitled to apply for insolvency case. **C4.2** Commencement criteria and presumptions about insolvency should be clearly defined in the law. The preferred test to commence an insolvency proceeding should be the debtor's inability to pay debts as they mature, although insolvency may also exist where the debtor's liabilities exceed the value of its assets, provided that the value of assets and liabilities are measured on the basis of fair market values.[261] **C4.3** Debtors should have easy access to the insolvency system upon showing proof of basic criteria (insolvency or financial difficulty). **C4.4** Where the application for commencement of a proceeding is made by a creditor, the debtor should be entitled to prompt notice of the application, an opportunity to defend against the application, and a prompt decision by the court on the commencement of the case or the dismissal of the creditor's application.
Description	Under the IA, both the debtors and his creditors could petition for insolvency in court. A debtor's petition (labelled *voluntary petition*) was afforded -under the law- quicker resolution timing. *Debtor Access* According to the IA, the court issued its decision to open an insolvency case only if the debtor's petition complied with the requirements of article 27 (art. 32.1 IA). The debtor's had to offer sufficient proof of *insolvency,* whether *actual or imminent ("threatening")*. "Insolvency" was defined as the "absence of available monies to satisfy the debt which is certain, liquid, due and payable" (article 3(1) IA), and it was presumed to exist whenever "the debtor fails to settle its debt towards the creditor after a period of 90 days as of the due date", the presumption being "relative" (i.e., admitting proof to the contrary). A debtor was regarded as *imminently insolvent* under the IA "if it appeared that such debtor would be unable to pay its debts as they fell due with readily available funds". The IA provided that the court should base its reasoning on the insolvency of the debtor based on the following documents (art. 28 IA): The balance sheet and copies of accounting records; A complete list with all the assets of the debtor, including all the bank accounts as well as data from the public registries (*registrele de publicitate*) with respect to the debtor's property that is encumbered; A list with the names and addresses of the creditors, irrespective of the form, nature

[261] A single or dual approach may be adopted, although where only a single test is adopted it should be based on the liquidity approach for determining insolvency – that is, the debtor's inability to pay due debts.

	and state of their claims, showing the amount of each claim, the grounds for each claim and any privileges in relation thereto; The profit and loss account for the year prior to the registration of the petition; A list of the partners with unlimited liability, for partnerships and limited partnerships (if relevant to the debtor's type of business); A statement in which the debtor indicates its intention to file for insolvency or to reorganize its estate in accordance with a plan, by restructuring its business activities or liquidating its estate, in whole or in part, for the purpose of paying its debts; and An affidavit (*declaraţie pe proprie răspundere*) or a certificate released by the commercial registry in which the head office / registered office was situated indicating that the debtor had not been subject to an insolvency case within the last five years. If the insolvency court was able to determine that the debtor was "insolvent" based on the submitted financial documents (and the debtor's petition otherwise complies with Articles 28 and 30), the insolvency court was required to deliver a decision ordering the commencement of the insolvency case and instruct an insolvency trustee to notify such commencement in accordance with article 61 of IA. The law expressly provided a clear deadline by which the insolvency court had to render its decision to open an insolvency case on the basis of a petition that had been registered by the debtor: five days from the filing of the petition. In practice, such deadline was allegedly in all likelihood never met. The insolvent debtor had to lodge with the court a petition in order to be declared insolvent "within maximum 30 days as of the occurrence of insolvency" (art. 27.1 IA). There were exceptions to this: (i) if the debtor was engaged in good faith out-of-court negotiations for the restructuring of its debts, the deadline to file for insolvency consisted of five days as of the failure of such negotiations; (ii) there were special rules when the debtor became insolvent during the negotiations carried out within an ad-hoc mandate or scheme of arrangement proceedings, with a different treatment depending on whether there were "serious indications that negotiations may result in the conclusion of an out-of-court scheme of arrangement" or not. According to art. 143 IA, "The failure to file or the late filing, by the debtor, natural entity, or by the legal representative of the debtor, legal entity, of the petition for the opening of the procedure within a term which exceeds the term provided under art. 27 by more than six months shall constitute the offence of simple bankruptcy and shall be punished with imprisonment between three months to one year or with fine". *Creditor Access* Insofar as creditor access to the insolvency system was concerned, the IA seemed to be more restrictive. In general, creditor access could be divided into three components: The preliminary showing of creditor standing, which involves (a) Proof of debt that exceeds the minimum threshold, which varies depending on the nature of the debt: the minimal floor for all claims other than employee related

	claims was RON 45,000; for employee claims, the floor envisaged six average gross monthly salaries per creditor-employee (an average gross monthly salary represents a weighted value that is periodically made public by the National Commission of Statistics in Romania); and (b) Proof that the subject debt is certain, liquid, and has been due and payable for at least 90 days; If the debtor requested so and the insolvency court granted such motion, the need of posting a bond of up to 10 % of the creditor's alleged debt within five days of the ruling on such request, failing which would result in the dismissal of the creditor's case; and The showing of debtor's "insolvency" (which is presumed if the debtor fails to timely "object" to the creditor's petition). As for creditor-initiated petitions, the debtor was to be notified of the creditor's petition within 48 hours from its filing. The debtor could object to the petition within ten days from the receipt thereof (arts. 31 and 33 IA). The insolvency court was supposed to hold a hearing to resolve the debtor's objection, and only then would it determine whether the debtor was "insolvent" (if so, the court would grant the creditor's petition and commence the insolvency case; if not, the insolvency court would reject the creditor's petition) (art. 31.3, 5 and 6 IA). The law, however, failed to indicate a timeline for such hearing and in practice it was not unheard of for insolvency courts to postpone hearings and decision-making beyond what many would consider to be a reasonable period of time. In addition, creditors often complained that they did not have (nor were they provided with) sufficient financial information about the debtor to enable them to rebut any attempted showing of solvency made by the subject debtor. If a debtor challenged such allegations and the court, after examination, ruled that the debtor was insolvent, such debtor was in the position of forfeiting his ability to propose a restructuring plan. Such restriction obviously hampered a debtor's fair opportunity of defending an involuntary petition filed by a creditor before an insolvency court (art. 33.2 IA). Furthermore, it certainly placed a significant pressure on the debtor's management.
Assessment	Although the possibility to petition for insolvency proceedings existed for both debtors and creditors, access to insolvency for the latter was excessively limited and the procedure too slow under the IA. Creditors could only file for insolvency when they held a due and matured claim, unsatisfied for more than 90 days, with an amount of more than 45.000 RON. The period could be regarded as excessive and the quantitative limit would seem too high, capable of effectively curtailing the rights of smaller creditors.[262] There were widespread allegations of an unjustified asymmetry in the paths to declare insolvency between debtors and creditors. Apparently, a debtor petition was resolved within a few days (five if the law was respected, which does not seem to be the case), while the application of creditors could last months. The debtor could oppose the filing of the creditor, and the alleged tolerance of syndic judges with the

[262] On the other hand, if the threshold is too low, then creditors with very small claims could initiate insolvency proceedings, at considerable expense, when less expensive collection remedies are available that do not require commencing the collective remedy of an insolvency proceeding. It is a function of striking the right balance between limiting the collective remedy to only very large creditors and providing that remedy to virtually any creditor.

delaying tactics of debtors, which could successfully request several hearings, dampened the ability of creditors to efficiently resort to insolvency proceedings. Furthermore, there was a perception in the market that debtors used the filing of insolvency proceedings with the aim of paralyzing the seizure and execution of the assets by creditors. Creditors lacked sufficient means that would allow them to intervene in the court proceedings and contest the debtors filing when made in bad faith

In case of unsuccessful opposition to the declaration of insolvency by the debtor, on the other hand, reorganization of a viable business could be inadequately pre-empted. Following a creditor's petition for insolvency, the debtor could oppose and allege its solvency. If the judge resolved in favor of the creditor and opened insolvency proceedings, the debtor was not entitled to pursue the reorganization of the business. This measure seems unduly harsh (insolvency is a matter of fact that can be subject to different bona fide opinions) and, by pre-empting the solution to the crisis, it stripped both the debtor and its creditors of restructuring tools and could cause unjustified destruction of viable businesses.

The IA included a system of mandatory petition to open insolvency within 30 days from the moment the debtor became insolvent, which seems inspired by the German law. The failure to comply with this duty in six months could bring penal sanctions to the debtor and its management. The system could be improved as follows:

First, the fixation of the "(day of) occurrence of the insolvency" as *dies a quo* might in some cases be too stringent on the debtor/management, since it is not always clear when insolvency –as a fact- happens. This is particularly hard considering the brief period of time (only one month) that the debtor/manager has to file for insolvency. It might make more sense to provide some more time to petition, and to make the time count from the moment when the debtor/manager knew or should have known that the business was insolvent.

It does not seem to make much sense to make the sanction dependent on the non-compliance of the duty during six months. Unless duly justified, one day of default should suffice to trigger the sanction. Under the IA, there seemed to be an inherent contradiction in the timing of the rule.

The penal sanction might constitute an adequate incentive to foster good corporate governance (although, reportedly, this is not the case of the Romanian system), but once the default has occurred, the punishment does not benefit creditors. Personal liability of the defaulting debtor/managers would seem more effective.

Finally, the Romanian system of access to the proceedings suffers the abusive behavior of debtors, who are able to "play" with the insolvency regulation and the procedural mechanisms of case allocation to select the judge that they consider more fit to their own interests. Allegedly, the practice is as follows: one or more creditors file for insolvency; the debtor, instead of opposing or accepting the motion, petitions for his own insolvency, availing himself of the fact that, as stated above, the process to have the insolvency opened is much quicker when it is the debtor that files. Debtors know that there are few panels and sessions and they seem to be able to select the judge they prefer. This becomes an even more serious problem as debtors are –allegedly- also able to directly influence the selection of insolvency

	representatives (see, in more detail, including also the appointment of insolvency representatives **Principles D7 and D8**).[263]
Comment	In line with the assessment included in the paragraphs above, the law required improvement in several respects: Lowering of the amount of money necessary for creditors to file for the insolvency of their debtor. The current status of the law deprived small creditors of their right to use insolvency and causes them unjustified disadvantage in the market. By the same token, if the amount of debt is very small, there may be other more efficient means for recovery. A balance must be struck. Lowering of the period of time that the debt must be defaulted for creditors to file for insolvency of their debtors. Ninety days seems unnecessarily long and it gives the debtor too much time to manoeuvre in the shadow of insolvency, in a time that experience shows is most dangerous. Streamlining of the procedure for both paths to insolvency, by restricting appeals and limiting the need for hearings. Elimination of the restriction to access a reorganization procedure within insolvency in case the debtor unsuccessfully challenges the creditors' petition. An increase in the financial accounting duties by debtors would foster adequate corporate governance. This should be coupled with the re-profiling of the current duty to file for insolvency in the manner mentioned above. Measures ought to be adopted in order to prevent the debtor from manipulating the allocation of cases and cherry-picking the most suitable court. One possible measure could consist of limiting the debtor's ability to file for its own insolvency once s/he has been notified of a petition by a creditor. Otherwise, the rule should be that any additional motions regarding the opening of the insolvency proceeding should be joined with the first motion filed in this respect.[264] Providing access to creditors to court proceedings, when a bad faith debtor petitions for insolvency based on fictitious grounds, in order to be able to oppose the opening of the insolvency procedure.
Principle C5	**Provisional Measures and Effects of Commencement** **C5.1** When an application has been filed, but before the court has rendered a decision, provisional relief or measures should be granted when necessary to protect the debtor's assets and the interests of stakeholders, subject to affording appropriate notice to affected parties. **C5.2** The commencement of insolvency case should prohibit the unauthorized disposition of the debtor's assets and suspend actions by creditors to enforce their rights or remedies against the debtor or the debtor's assets. The injunctive relief (stay) should be as wide and all encompassing as possible, extending to an interest in assets used, occupied or in the possession of the debtor.

[263] It is reported that this issue has been addressed in the 2014 Insolvency Code. According to reports, the Code states that multiple petitions will be combined and considered together. In addition, the debtor's "home" has been moved within the previous six months, then the case is properly assigned to the judge in the location where the debtor had its business place six months before.
[264] We have been advised that measures have been taken to address this issue, in the 2014 Insolvency Code.

	C5.3 A stay of actions by secured creditors should be imposed in liquidation proceedings to enable higher recovery of assets by sale of the entire business or its productive units, and in reorganization proceedings where the collateral is needed for the reorganization. The stay should be of limited, specified duration, strike a proper balance between creditor protection and insolvency proceeding objectives, and provide for relief from the stay by application to the court based on clearly established grounds when the insolvency proceeding objectives or the protection of the secured creditor's interests in its collateral are not achieved. Exceptions to the general rule on a stay of enforcement actions should be limited and clearly defined.
Description	Under the Insolvency Act, a debtor's ability to make transfers, sales or other distributions of assets, and the creditor's ability to commence or continue enforcement actions against the debtor or its assets, was only restricted upon the formal commencement of an insolvency case. The filing did not bring about such effects. Although it was not the rule, an appeal against the decision to open insolvency proceedings could stay the effects of the declaration of insolvency, including the restrictions on transfers or the stay of enforcement actions. The formal commencement of an insolvency case caused the general automatic stay of all judicial and non-judicial actions against the debtor and its property, including enforcement proceedings, such as foreclosures, attachment of assets or earnings, etc. (art. 36 IA). The law was not explicit on the effect of commencement on arbitrations or other similar proceedings; however, it seems to be largely undisputed that they were stayed as well. The stay continued throughout the course of the insolvency proceedings. The holders of secured claims could apply to the insolvency court to lift the stay and authorize the insolvency trustee to liquidate the collateral with a view to satisfy the claims of the said secured creditor (art. 39 IA). Such a stay could be granted, only to the extent of the following: If any of the claims at stake were oversecured, the property was either not material for the success of a reorganization plan that has been proposed or, if the property was a part of a going concern, its removal from that going concern would not diminish the value of the remaining property; or There was no adequate protection for the secured property due to one or more of the following (art. 39 IA): "a reduction in the value of the secured property or the existence of a real danger that the value of the secured property will diminish"; "a reduction in the value of the secured part of a claim having an inferior ranking, as a result of the accrual of interest, additions and penalties of any kind to a secured claim of superior ranking"; or "the absence of insurance on the secured property against destruction or damage." In the latter case, the court could reject the request for relief if the insolvency trustee or debtor proposes to adopt measures for the appropriate protection of the secured claim, such as: "Making periodical payments in favor of the creditor to cover the reduction in the value of the secured property or the value of the secured part of a claim of inferior ranking"; "Making periodical payments in favor of the creditor to satisfy the interest, additions

	and penalties of any kind and for reducing the principal of the claim so that the value of the secured claim or the value of the secured part of a claim of inferior ranking would not diminish"; "Novating the obligation to guarantee by creating an additional personal guarantee or security interest or by substituting the secured object with another object." Prior to the 2009 amendments, the IA regarded rights created prior to the commencement of an insolvency case and not perfected in accordance with the various perfection requirements up to the date of commencement as not valid against the body of creditors and insolvency trustee. The effects were, for instance, that a mortgage created, yet not perfected prior to the commencement of an insolvency case were to result in the rendering of the claim secured by that mortgage as merely an unsecured claim.[265] The repealing in 2009 of the entire art. 50 in the Insolvency Act might indicate that such consequence was eliminated. It is questionable, however. The commencement of an insolvency case automatically stopped the accrual of interest, either contractual, statutory, or of other nature, to principal obligations owed by the debtor prior to the insolvency case opening. *See* Law 85/2006, art. 41(1)). However, a secured creditor was permitted to recover interest and other charges (called "accessories" in the law) in the event the property securing the claim was sold for an amount that exceeded the face amount of the creditor's claim, then the excess value was turned over to the creditor, up to the amount of accessories that have accrued, including accessories accrued after the opening of the proceeding. *See* Law 85/2006, art. 41(2).
Assessment	The Romanian insolvency system under the IA provided for a wide-encompassing stay of executions and foreclosures against the assets of the insolvent debtor, as well as mechanisms to adequately protect the legitimate interests of secured creditors. The law also included limitations to the powers of the debtor over the assets that form the insolvency state, once the case was opened. In this regard, the system was fundamentally in line with international standards. However, there remained room for improvement in the regulation of the effects of insolvency. The IA did not include a proper system of interim protection of the assets and the interests of creditors before the commencement of insolvency proceedings. The filing of a petition to open insolvency proceedings brought about no effects on the sphere of the debtor, who could continue to manage the business unrestrictedly. On average, the period that ranged from the creditor's petition to the formal opening of proceedings took months, particularly if the debtor tried to delay the process. Although the procedural legislation allowed judges to establish cautionary measures to protect the interest of creditors and prevent –amongst other practices- asset stripping of the insolvency estate, they were general procedural remedies, not conceived for this type of situations and were rarely adopted in practice. As a result, those debtors that sought to delay the declaration of insolvency enjoyed unrestricted powers to manage the business during such a risky and sensitive period. The possibility to use avoidance actions could not be regarded as a fully satisfactory solution due to its *ex post facto* nature and its limited scope. The elimination of art. 50 in the 2009 amendment to the IA gave rise to doubts concerning the efficacy of security interests created before but perfected after the

[265] *See* Insolvency Act (the version prior to the 2009 changes), Art. 50.

	commencement of insolvency proceedings. This generated uncertainty and needed to be clarified. A security interest that is not perfected and which has no publicity (i.e., registration) can be valid and enforceable between the parties to the transactions (the debtor and the secured creditor) and, under certain circumstances, all those who knew of the existence of the security; but the insolvency representative occupies a legal position of a third party (since it acts in favour of creditors) and, therefore, the non-registered security interest should not be effective vis-à-vis the representative and the creditors collective in insolvency. Apart from violating general principles of private law, such modification might encourage preference transactions between debtors and unsecured creditors via creation of security interests that are to be perfected post insolvency commencement.
Comment	As noted above, the Insolvency Act required improvement regarding the regulation of insolvency-specific provisional relief measures that would protect the assets of the debtor and the interests of creditors during the time from the petition to open insolvency proceedings and the courts' decision to open the case. This relief could be granted by the court on a case by case basis, based on the evidence presented to it concerning the urgency of the measures. These measures ought to be adopted subject to affording appropriate notice to affected parties. It was noted that the 2013 Draft Insolvency Law contained an interim case by case stay on actions in the period after filing and before opening (see Annex II). It is also of essence for the improvement of Romanian insolvency system that the process leading to the declaration of insolvency be reduced in time, with special regard to the petition by creditors. See **Principled C1** and **C4**.
	Governance
Principle C6	**Management** **C6.1** In liquidation proceedings, management should be replaced by an insolvency representative with authority to administer the estate in the interest of creditors. Control of the estate should be surrendered immediately to the insolvency representative. In creditor-initiated filings, where circumstances warrant, an interim administrator with limited functions should be appointed to monitor the business to ensure that creditor interests are protected. **C6.2** There are typically three preferred approaches in reorganization proceedings: (i) exclusive control of the proceeding is entrusted to an independent insolvency representative; or (ii) governance responsibilities remain invested in management; or (iii) supervision of management is undertaken by an impartial and independent insolvency representative or supervisor. Under the second and third approaches, complete administration power should be shifted to the insolvency representative if management proves incompetent, negligent or has engaged in fraud or other misbehavior.
Description	*Management powers between filing and the commencement of insolvency proceedings* Until a case is formally commenced, a debtor retains an unrestricted power to manage its business. *Management powers after commencement of insolvency proceedings. The Special Administrator* The general rule under the IA was that a debtor lost its management powers upon

	commencement of insolvency proceedings – unless it expressed its intent to reorganize (art. 47.1 IA). The debtor that sought to reorganize retained limited powers to manage the business during the general insolvency case, meaning that it "may carry out any acts and operations, including using, selling and leasing of goods, and may make payments, if all these are part of its *ordinary course of business*." (art. 49 IA). Any transfers, payments, or operations that fell outside of the ordinary course of business required special approval by the creditors' committee and authorization from the insolvency trustee. Nevertheless, even where the debtor expressed its intent to reorganize, the insolvency court had the power to further restrict the debtor's limited management power during the course of the general phase of the proceedings by appointing an insolvency trustee and by vesting such trustee with the power to exercise all or part of the debtor's limited management powers. In practice, insolvency courts appointed an insolvency trustee upon the commencement of insolvency proceedings, even where the debtor had expressed its intent to reorganize, and often allocated to such trustee at least a portion of the debtor's limited management powers. The committee or creditors, any of the creditors or the insolvency trustee had the right to petition the court to deprive the debtor from its management powers during the proceedings (art. 47.5 IA). The management of the business and, more generally, of the interests of the debtor and its shareholders during insolvency was conferred upon the quite unique figure of the "special administrator" (in Romanian, *administrator special*) (art. 3.26 IA). The *special administrator* is the representative appointed by the general shareholders/associates meeting, "authorized to carry out for and on behalf of the debtor, the administration activities necessary during the procedure periods when the debtor is allowed to manage its activity and to act to the shareholders'/associates' best interest within the procedure, during the period when the debtor is withdrawn the right of administration".[266] The general legal entity's shareholders/members' meeting was convened by the judicial administrator or by the liquidator within 10 days as of the initiation of the procedure or as of the date the debtor was withdrawn the right to administrate its estate, as the case may be. If the meeting did not appoint a special administrator, the debtor was withdrawn the right of administration, unless it had been withdrawn previously. In the event that, later on, the associates/shareholders' meeting appointed a special administrator, the latter was to take over the procedure at the stage it was at the date of its appointment. *Management powers in Reorganization* According to art. 103, pending reorganization a debtor "conducts its business" under the supervision of an insolvency trustee (*administrator judiciar*). The insolvency representative was authorized by law to manage the debtor's business, while the management corporate bodies maintained only limited powers. The shareholders or other categories of business owners were prevented from interfering with the management of the debtor's business or its assets, except as otherwise provided in the reorganization plan or under the law (art. 103 IA). *Management powers after the commencement of Liquidation* Whatever management powers the debtor retained during general proceedings or reorganization, such powers terminated the moment either type of proceeding was

[266] In the 2014 Insolvency Code, we are advised that article 52 states that: "After the opening of the proceeding, the general meeting of shareholders/associates of the debtor shall, **at their expense**, shall appoint a special receiver."

	converted to liquidation (art. 47.4 IA). A similar removal of powers occurred in the event the insolvency court resolved to commence the fast track liquidation proceedings, either upon the very commencement of an insolvency case, or thereafter.
Assessment	The IA provided for the replacement of the debtor's management in liquidation by an insolvency representative with authority to administer the estate in the interest of creditors and for the transfer of immediate control over the estate to the latter. The IA also regulated the effects of the opening of insolvency over the management powers in the common and reorganization stages in line with international standards. The IA, however, departed from common standards by its rather peculiar figure of the "special administrator". Such a figure would make sense in liquidation, a stage in which the debtor has no saying in the management of the estate and the representation needed by shareholders is limited to the acts of defence within the procedure. But it is unclear how a special administrator can be an advantage when the debtor continues to run its own business: if the business' directors remain in place, it may be an unnecessary additional role; if they do not, it is unclear why the insolvency act should impose a system of business management in such rigid terms.[267]
Comment	Consideration could be given to limiting the "special administrator" to the cases of liquidation, leaving the management to the debtor's directors in other cases.
Principle C7	**Creditors and the Creditors' Committee** **C7.1** The role, rights and governance of creditors in proceedings should be clearly defined. Creditor interests should be safeguarded by appropriate means that enable creditors to effectively monitor and participate in insolvency case to ensure fairness and integrity, including by creation of a creditors' committee as a preferred mechanism, especially in cases involving numerous creditors. **C7.2** Where a committee is established, its duties and functions, and the rules for the committee's membership, quorum and voting, and the conduct of meetings should be specified by the law. It should be consulted on non-routine matters in the case and have the ability to be heard on key decisions in the proceeding. The committee should have the right to request relevant and necessary information from the debtor. It should serve as a conduit for processing and distributing that information to other creditors and for organizing creditors to decide on critical issues. In reorganization proceedings, creditors should be entitled to participate in the selection of the insolvency representative.
Description	Creditors were defined in the IA as "the natural or legal entity holding claims against the debtor's estate and who has expressly required the court for his claim to be registered in the final table of creditors or in the consolidated final table of creditors and who can provide evidence regarding his claims against the debtor's estate (…)" (art. 3.1 IA). A creditor recognized as such in the insolvency proceedings enjoyed (i) the right to be informed with respect to the advancement of the case and of the various stages and procedural steps in which creditors may act; (ii) the power to attend and vote in the creditors' assembly; (iii) the power to vote on a proposed reorganization plan; (iv) the power to share in distributions of proceeds deriving from the liquidation of

[267] We are advised that the 2014 Insolvency Code now clarifies that it is the owners of the enterprise, and not the estate, that pays the special administrator.

	assets in the debtor's estate, among other rights. The participation of creditors in insolvency could take place individually or through the collective bodies envisaged by the IA: the creditors' assembly and the creditors' committee. *Creditors' Assembly* Under the IA, the body that included all creditors admitted to the insolvency case was known as the creditors' assembly. The competences of the assembly were limited to the most important matters relating to the debtor's business and the insolvency estate, such as the voting on reorganization plans, or on various proposals advanced by an insolvency trustee with respect to the methods and strategy of selling the assets. After the commencement of insolvency proceedings, the trustee was obligated to summon all creditors identified in the list submitted by the debtor to the first creditors' assembly. The meeting was to be convened within 5 days of the deadline for the preparation of the preliminary list of claims by the insolvency trustee (which was within the maximum 60 days of the date of commencement of the insolvency case). As a general rule, the insolvency trustee, the creditors' committee or the creditors holding at least 30% of the total value of the claims had standing for convening a meeting of the creditors' assembly (art. 13 IA). Unless the IA required otherwise, the quorum to convene a meeting was satisfied by the presence of creditors representing at least 30% of the total value of the claims. Decisions were adopted by the majority of the percentage of claims present at the meeting (art. 15 IA). *The creditors' committee* After the preparation of the preliminary list of claims, the insolvency court could designate a committee of 3-5 creditors from amongst those holding the largest of the secured claims, the tax claims, and the general unsecured claims (art. 16.1 IA). If, due to the limited amount of creditors, the court did not regard as necessary to appoint a committee, its competences would be carried out by the creditors' assembly. Creditors themselves could elect a committee in the first assembly to replace the committee initially appointed by the court (if there was one). The creditors' committee was responsible, *inter alia*, for the following: To examine the debtor's business and advise on the prospects of such business and on any proposed plan of reorganization; To advise the creditors' assembly of the insolvency trustee's carrying out its duties, as well as to challenge the pre-insolvency fraudulent or preferential transactions entered into by the debtor.[268] To prosecute actions against the debtor's management in order to recover damages caused by such management's actions or omissions that caused the debtor to run insolvent.

[268] *See* Insolvency Act, Art. 17 para. (1).

	To scrutinize the insolvency trustee's work and to challenge the actions or measures taken by the insolvency trustee Members of creditors' committee were deemed fiduciaries of the creditors whose interests they represented. Accordingly, members of the committee had to abstain from voting any decision in which there was a potential conflict of interest between their individual interests and those of the creditors as a whole. Resolutions adopted or action pursued by a creditor committee could be challenged within five days of its adoption, before the meeting of creditors (art. 17.6 IA). *Equity Holders* Equity holders' standing in an insolvency case was extremely restricted. They were given the choice of appointing a special representative called "special administrator" (in Romanian, *administrator special*). If the shareholders were unable to appoint a special administrator, they forfeited their right of participating in an insolvency case and the debtor forfeited its power to continue running the business (art. 3.26 IA). The court could only appoint a special curator to defend the debtor's interests in any instances where the debtor had to appear in court for defending avoidance actions. A special administrator was authorized as a matter of law to represent the interests of the equity holders in an insolvency case after the insolvency court resolved to terminate a debtor's management powers. Although this solution seems to constitute an efficient way to offer protection to equity holders' interest in an insolvency case and also avoid unwarranted delays and procrastination in running the case, it only satisfied the latter objective. The special administrator by no means enjoyed a similar scope of powers as those conferred on creditors. Its responsibilities concerning the representation of the equity holders' interests were limited, and the most important include (art. 18.2 IA): Formulating a reorganization plan on behalf of the debtor; Acting as agent of a debtor in avoidance actions exercised under Insolvency Act; Formulating objections in a limited array of situations, such as against some actions taken by an insolvency trustee. Reportedly, the possibility under c) above could hardly be carried out effectively by parties in interest, or even the special administrator. Hence, the rule seemed to indicate that an objection to an insolvency trustee's actions could only be filed if those actions were identified in the reports that an insolvency trustee was bound to prepare and file on a monthly basis (art. 21.3 IA). Moreover, a party-opponent could only file an objection within three days of the date such report was filed with the court's relevant records, which might represent an unrealistic period (particularly if such period includes weekend days, where the court records are obviously not open to the public).
Assessment	Creditors under the IA were provided with mechanisms for individual participation in insolvency proceedings and the law established standard collegiate bodies to adequately channel the collective decisions of creditors. The IA did not seem to include a minimum number of days that have to elapse from the moment the assembly of creditors is convened and the moment it is celebrated. This would pave the way for fraudulent behaviour and the possibility to manipulate the assembly, since creditors may not have enough time to access the information,

	analyse it and vote according to a sound decision making process. However, stakeholders complained about the functioning of the committee of creditors, which is far from being effective in discharging its duties and responsibilities. Reportedly, members of the committee only sought their own interest –and not the interest of general creditors-; cases of undue collusion with the debtor were not rare; and certain members of the committee –especially the less sophisticated creditors- tended to behave with passivity. Of particular concern seems to be the situation whereby the petitioning creditor, who proposed the appointment of a certain insolvency representative, was also a member of the committee. This situation would seem to imperil the correct exercise of the committee's duty to control the activity of the insolvency representative. There were no rules or clear guidance in the IA for identifying situations of conflict of interests and the conditions under which the individual members ought to be required to disclose such conflicts and refrain from taking any vote or other action that would represent a breach of their fiduciary duties. For instance, many entities appeared on creditors' committees in several insolvency cases, of different value, some of which featured the same insolvency trustee, or had significant interests at stake in such cases as simple creditors. Depending on the potential values at stake in such separate cases, a member of a creditors' committee in one insolvency case could turn a blind eye on the manner in which the liquidator in that case discharged its duties if the creditor was interested in another insolvency case in which the value of its claim or their position was far more important for such creditor. The regulation of the functioning of the committee might be too rigid for an organ whose existence is based precisely in its ability to act swiftly and respond to the needs of the procedure. Finally, stakeholders complained generally about the manipulation of the regulation concerning contingent claims by insolvent debtors. For instance, the debtor who wanted to neutralize the main creditor could do it by filing a legal action against the latter right before petitioning for its own insolvency. During the procedure, and until and unless the contingency is solved, the main creditor would be deprived of the right to vote, amongst other rights.
Comment	In line with the assessment above, it was considered important to have regard to the following matters: The inclusion of a minimum period of time that must pass between the convening and the celebration of the meeting of creditors. The amendment of the regulation of the committee of creditors with a view to tackle its flaws: The establishment of a duty on the part of each member to act pursuing the interest of creditors as a collective, not its own individual interest, a breach of which could bring about personal liability; Adoption of measures to foster the participation in the committees, including, at least under certain circumstances, the provision of some sort of remuneration;

	Ensuring that all the relevant classes of creditors are represented in the committee;[269] Inclusion of rules that prevent conflict of interest, particularly concerning the relations between the members of the committee of creditors and the insolvency representatives they are mandated to control (the current general duty to abstain from voting does not seem to be working adequately); The meeting of the committee should take place as frequently as the nature and circumstances of the procedure demand. Meeting every month might be unnecessary, while sometimes it could be clearly insufficient to keep adequate pace with developments. A higher level of flexibility in the organizational issues of the committee would be advisable. The adoption of a regulation that prevents –or provides for solution to- the existence of conflicting duties between insolvency representatives and members of the committee of creditors acting simultaneously in several insolvency proceedings. Adoption of measures that prevent debtor's from using the regulation of contingent liabilities to manipulate the insolvency procedure. This could be done, for example, by enabling the creditor to participate in voting and other aspects of the proceeding on the basis of a contingently valued claim, or by allowing the judge some discretion as to the limits of contingent liabilities which have become disputed shortly before the opening of insolvency or in cases in which there is no *fumus boni iuris*.
	Administration
Principle C8	**Collection, Preservation, Administration and Disposition of Assets** **C8.1** The insolvency estate should include all the debtor's assets, including encumbered assets and assets obtained after the commencement of the case. Assets excluded from the insolvency estate should be strictly limited and clearly defined by the law. **C8.2** After the commencement of the insolvency case, the court or the insolvency representative should be allowed to take prompt measures to preserve and protect the insolvency estate and the debtor's business. The system for administering the insolvency estate should be flexible and transparent and enable disposal of assets efficiently and at the maximum values reasonably attainable. Where necessary, the system should allow assets to be sold free and clear of security interests, charges or other encumbrances, subject to preserving the priority of interests in the proceeds from the assets disposed. **C8.3** The rights and interests of a third party owner of assets should be protected where its assets are used during the insolvency case by the insolvency representative and/or the debtor in possession.
Description	Under the IA, once insolvency proceedings were commenced, an insolvency estate was created separately from the debtor's own assets and obligations, which consisted of all pre-insolvency property of the debtor as well as all assets and rights acquired by the insolvency estate after the initiation of the procedure. Property of the estate was considered to include any property that fell under the scope of assets

[269] We are advised that article 50(4) of the 2014 Insolvency Code now provides that the committee may have three to five members, consisting of the largest creditors by value, regardless whether secured, unsecured, or budgetary. This comment thus appears to have been addressed.

and rights that might be object of execution under the New Code of Civil Procedure (art. 3.2 IA).

After the declaration of insolvency, the debtor was required to transfer the management of the business/estate within the timeframe prescribed in the insolvency court's decision together with a list of transactions of the debtor since the commencement (art. 44 and 46.2. IA).

In addition, if the court resolved to liquidate the debtor's estate, the insolvency representative, acting as liquidator, was authorized and required to seal all the debtor's property (shops, warehouses, storehouses, offices, commercial correspondence, archives, data storing and processing devices, contracts, and any other movables), other than goods that had to be immediately converted to money to avoid material deterioration. During such operation, the trustee was also required to take necessary conservation measures. As soon as the sealing of the assets had been completed, the liquidator prepared a complete list of the assets in the debtor's estate. The list was required to indicate the approximate value and an expert appraisal had to be conducted for valuation. In practice, it was sometimes difficult to locate the assets if the debtor was uncooperative.

The next procedural step was the sale of the assets of the debtor, an operation that implied the observation of certain rules with respect to the method of sale (direct sale, with or without an identified purchaser, or public sale), and the nature of property to be sold.

(i) Under the Insolvency Act, property of the estate could be liquidated piece-meal or by means of a bulk sale/going concern (*ansamblu în stare de funcționare*) (arts.116-120 IA). Property could also be sold through both private and public sales (*i.e.*, auctions). As a rule, liquidators hired appraisers to conduct a valuation of the property, and such valuation included the estimated value for both individual items of property as well as the value of the business as a going concern. Based on such valuation, the insolvency representative prepared a report and advanced one or a combination of liquidation strategies (*i.e.*, a piecemeal liquidation for all property items, a sale of the business as a going concern, or a combination thereof). The law seemed to provide the insolvency representative with significant discretion to opt for private or public sales or to recommend different strategies. The liquidator's report had to be examined by the creditors' committee, which was to issue its opinion on the proposals. Only after the creditor committee reviewed the report could the liquidator go further and lay it before the creditors' assembly. Creditors decided with respect to the proposals in the report under the same general quorum and majority terms as any other creditors' meeting (*i.e.*, a minimum of 30% of the total value of claims against the insolvent estate must be present or validly represented, and at least a simple majority of such present or represented claims must approve the proposal). However, the creditors were only allowed to approve or reject the sale mechanism (public auction or direct negotiation) and there was no express provision allowing them to question the business or assets valuation.

(ii) Over the years, in practice certain liquidation techniques seem to have been favoured over others. For instance, private sales were initially favoured over public sales, but due to increased concerns over potential undervalue transfers and collusion between trustees

	and third-party buyers, public sales gained favour. The IA mandated that private bulk sales could only be proposed and direct negotiation authorized if the potential purchasers, payment terms and starting price were known, *i.e.* a trustee could not be given broad negotiation powers vis-à-vis such aspects. The starting negotiation price could not be lower than the value asserted in the expert valuation. The IA prescribed specific rules with respect to liquidation of real estate. An insolvency trustee could propose, and creditors could approve, that real estate be sold via a directly negotiated sale. In such a scenario, an opportunity had to be provided for an interested third party to come up within a certain timeframe and outbid the potential purchaser's purchase offer by advancing at least a minimum required surplus price (usually representing a percentage of the minimum negotiation price and called *pas de supraofertare*). Since 2009, disposal of real property in insolvent liquidations is subject to mandatory notarization (art. 120 (2) IA). According to article 121 IA, the proceeds of the sale of assets which were charged by security interests or any lien created in favor of creditors were to be distributed to the secured creditors including the entire principal, interest, additions and penalties of any kind, as well as the expenses, after covering the administrative costs. If the proceeds were insufficient to pay the secured claim in full, the creditors would have, for the balance, an unsecured debt, which would stand along with the other unsecured claims. If the proceeds exceeded the amounts of the secured claim, the balance was to be deposited in the account of the debtor's estate. A creditor holding a secured debt was then entitled to participate in any distribution of amounts made before the sale of the goods subject to his security. The amounts received from such distributions were deducted from the amounts the creditor would be entitled to receive from the proceeds of the sale of goods subject to his security, if this were necessary to prevent such a creditor to receive more than he would have received if the goods subject to his security had been sold before the distribution. A security interest created after commencement of the reorganization or the declaration of the debtor's liquidation was null, unless authorized by the insolvency court or in the reorganization plan. Under Romanian law, any property that is purchased in public auction or by any other legal mechanism, following the insolvency specific channels, will be transferred with a free and clear title.
Assessment	The opening of insolvency proceedings under the IA caused the formation of an estate that included all of the debtor assets, present and future, encumbered and unencumbered, leaving out only those that could not be subject to execution according to the procedural legislation. The regulation of the administration and liquidation of the assets in bankruptcy and reorganization was in line with international standards: the system of administration of the business was relatively flexible and early disposals were a possibility. The law also provided for different mechanisms of asset sales and allows for the sale free of security interests. The legal system of collection, preservation, administration and disposition provided a fundamentally correct set of rules. However, there is room for improvement in the legal design and implementation. 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 or a particularly good offer was received (out of the general activity of the business). Although a broad interpretation of art. 49 IA could be enough to found this type of urgent transactions, it would add legal certainty if express regulation were introduced. The transfer of the business as a going concern did not count on an adequate framework under the IA. There did not seem to be specific provisions to facilitate aggregated sales (such as efficient mechanisms to transfer contracts and debts) and the possibility to transfer the business (or business units) as a going concern in bankruptcy, allegedly, never materialized in practice. Liquidation seemed to have been conceived as a mere system of piece meal sale of the assets, offering no specific measures to foster the transfer of the business that would entail the preservation of value and jobs. Stakeholders complain about the delay and costs of the operations to liquidate the assets of the company, making the overall bankruptcy solution value destructive in the vast majority of cases. Practice shows that the protection of the estate is not always achieved, the administration of the business is deficient and value often destroyed, and the sale of assets does not often result in the attainment of market value. There is a divergence from the law and its adequate implementation.
Comment	In line with the above assessment it was deemed important to give consideration to the following issues: Including in the law the express possibility to sell assets to avoid damage or depreciation during the observation period. Including an express possibility for creditors to comment on the proposed sale of the business or assets in terms of their valuation Streamlining liquidation and amending the legal framework to foster aggregated sales seems to be key in a jurisdiction in which almost all businesses are wound up**.** In order to achieve an adequate level of implementation of the regulatory framework comprised in the insolvency and related procedural laws, improvements in the institutional setting must be pursued: more efficient court practice (see **Principles D1** to **D6**) and insolvency representatives (see **Principles D7** and **D8**) as well as streamlining of the general execution and enforcement systems (see **Principle A5**).
Principle C9	**Stabilizing and Sustaining Business Operations** **C9.1** The business should be permitted to operate in the ordinary course. Transactions that are not part of the debtor's ordinary business activities should be subject to court review. **C9.2** Subject to appropriate safeguards, the business should have access to commercially sound forms of financing, including on terms that afford a repayment priority under exceptional circumstances, to enable the debtor to meet its ongoing business needs.
Description	As indicated, during the general supervisory period under the IA, the debtor retained a limited power to manage its assets, which meant that it "may carry out any acts and operations, including using, selling and leasing of goods, and may make payments, if all these are part of its ordinary course of business", under the supervision of the insolvency trustee (art. 49.1 IA).

	In contrast, any transfers, payments, or operations that fell outside of the "ordinary course of business" always required special approval by the creditors' committee and authorization from the insolvency representative (art. 49.2 IA). Any proposed sale of property in which a security interest had been created had to observe the rules that allow the secured creditors to obtain adequate protection before such sale could be effected (art. 49.3 IA). The transactions pursued in violation of such rules were regarded as null and void (art.47 IA). As an attempt to encourage the financing of companies subject to reorganization, credits granted by banks to the debtor as well as the debts resulted from the continued operation of the debtor's business after the commencement of the procedure were entitled to third priority in repayment in liquidation proceedings, after administrative claims and claims related to employment (art. 123.3 IA). Furthermore, a later amendment ensured that a creditor that agreed to provide secured credit after the confirmation of a reorganization plan, as part of the agreement under the plan, and such credit was secured by property of the debtor's estate that had already been the subject of a senior security interest granted prior to the commencement of an insolvency case, benefited from a super-priority in liquidation and was preferred to the senior security creditor (art. 121.1.11 IA). Another provision in the IA provided a safeguard for the debtor to continue receiving utility services. No supplier of utilities was entitled to change, refuse or interrupt on a temporary basis the services to the debtor or his estate during the general insolvency phase of the case and, subject to adequate protection, in reorganization, if such debtor was regarded as captive (art. 38 IA).
Assessment	Post-commencement finance under the IA was hampered by an insufficiently protective legal framework. The insolvency law gave (third) priority rank to loans and commercial finance provided to the business after the commencement of bankruptcy proceedings; similarly, a later amendment ensured that a creditor providing secured credit after the confirmation of a reorganization plan, as part of the agreement under the plan, could benefit from a super-priority in liquidation. Yet, otherwise, post-commencement finance was hampered because such lending would be subordinated to the costs of the insolvency process itself as well as the claims held by the debtor's employees. Despite the rules to protect the financing of insolvent debtors, the legal environment under the IA did not seem to encourage access to funding for the business needs of the on-going debtor during the rescue process. The key barrier to providing fresh financing would seem to stem from a rather rigid position adopted by tax creditors, which often are important participants in an insolvency case due to their sizeable claims and senior ranking. Tax creditors are reluctant to accept write-offs of the tax debt and such position is grounded – allegedly- in the state-aid limitations. Allegedly, another important aspect might have been the absence of clear rules and guidance as to under what terms and conditions an individual or team of tax creditors would be allowed to vote in favour of a 'haircut' affecting the tax creditors. In addition, again allegedly, there were concerns expressed about the potential inquiries from the Romanian Court of Accounts with respect to the writing off of tax debt. Finally, the continuation of the business is jeopardized by the relatively frequent situations where the providers of utilities do not follow the mandatory legal prescriptions, terminate the contracts and cause the debtor to ultimately go out of business. Allegedly, neither the debtor, nor both the insolvency representative or the

	insolvency court, were able to force these companies into doing otherwise, despite the provisions in the law.
Comment	In view of the assessment, it was important to consider improving the situation of post-commencement creditor: Post-commencement funding should be facilitated, including through the availability in appropriate circumstances of super-priority for new finance.[270] The rules for provisioning and the general banking regulation should aim to strike a balance between the limitation of the risk of financial institutions and the need to rescue viable businesses (see **Principle B3**).[271] Tax regulations and the behaviour of tax authorities should adapt to the needs of the general economy and adopt decisions in insolvency proceedings based on objective cost-benefit analysis, as if it were a value-maximizing creditor. In accord with the jurisprudence of the European Court of Justice, Tax authorities (or, generally, public creditors) may adopt decisions based on objective, sound business analysis without violating State Aid prohibitions, even if they entail debt write offs or rescheduling. Insolvency rules affecting public creditors can and should be crafted to strike an appropriate balance between the competing public policies of revenue collection on the one hand and enterprise restructuring on the other. Measures should be adopted to ensure that companies that provide utilities necessary for the running of businesses comply with the rules of the Insolvency Act. Non-compliance should trigger liability and sanctions could be also foreseen.
Principle C10	**Treatment of Contractual Obligations** **C10.1** To achieve the objectives of insolvency case, the system should allow interference with the performance of contracts where both parties have not fully performed their obligations. Interference may imply continuation, rejection or assignment of contracts. **C10.2** To gain the benefit of contracts that have value, the insolvency representative should have the option of performing and assuming the obligations under those contracts. Contract provisions that provide for termination of a contract upon either an application for commencement, or the commencement of insolvency case, should be unenforceable subject to special exceptions. **C10.3** Where the contract constitutes a net burden to the estate, the insolvency representative should be entitled to reject or cancel the contract, subject to any consequences that may arise from rejection. **C10.4** Exceptions to the general rule of contract treatment in insolvency case should be limited, clearly defined and allowed only for compelling commercial, public or social interests, such as in the following cases: (i) upholding general setoff rights, subject to rules on avoidance; (ii) upholding automatic termination, netting and close out provisions contained in financial contracts; (iii) preventing continuation and assignment of contracts for irreplaceable and personal services where the law would not require acceptance of performance by another party; and (iv) establishing special rules for treating employment contracts and collective

[270] The 2013 Draft Insolvency Law made some improvements to the post-commencement finance regime (see Annex II), and we were advised that the 2104 Insolvency Code made further improvements.
[271] Subject to the applicable EU Regulation.

	bargaining agreements.
Description	*General considerations* The IA regulated the treatment of executory contracts, defining them as contracts under which both the debtor and its counterpart have not yet fully or substantially performed their respective obligations (art. 86.1). Where a contract constituted a net burden to the estate, and in order to enhance its value, the insolvency representative was entitled to reject the contract subject to any damages that might arise for its breach. In this respect, the trustee had to respond within 30 days to a request of the contractual counterparty whether s/he intended to accept or terminate the contract; otherwise the contract was deemed rejected and the counter party could file an action for damages (art. 86.1 and 2 IA). An exception to this provision was the sale of an immovable asset where the seller had retained the title until the full payment. In this case, the sale was considered to be executed and thus the contract could not be terminated (art. 86.4 IA). Although there was no specific regulation, it seems that, as a rule, any damages arising out of the non-performance of contractual agreements by the debtor after the commencement of the procedure would have to have been registered in the same manner as the rest of the claims and regarded as unsecured claims. The insolvency representative could accept the continuation of loan agreements and modify their provisions with the creditors' consent if they were beneficial to both debtor's estate and the creditors (art. 86.3 IA). If the debtor was a lessor of an immovable asset, s/he could not trigger the termination of the contract unless provided for in the lease agreement. However, the insolvency trustee could refuse to perform any ancillary services during the lease term. In this case, the lessee could choose to vacate the premises and bring a legal action or remain in the possession of the immovable and deduct the cost of the services owed by the lessor (art. 91 IA). According to the IA, if a contract provided for periodical payments by the debtor, the insolvency representative's decision to continue executing the contract did not create a duty to pay arrears accrued in a period prior to the opening of insolvency proceedings (art. 86.7 IA). For such arrears, statements of claims could be filed against the debtor. As for contracts concerning utilities, see art. 39 and above **Principle C9**. Under the IA, save for the exceptions relating to set-off, netting and close-out agreements and/or contractual clauses, ipso facto clauses were unenforceable (art. 86.1 IA). *Set-off* Under the IA, only the effects of the statutory set-off were expressly acknowledged. As a general rule, Romanian law regards statutory set-off (*compensaţie legală*) as an automatic mechanism operating solely with respect to pre-insolvency claims, and only to those which are (i) uncontested, (ii) due and (iii) liquidated.[272] The other two types of set-off (*i.e.*, contractual set-off and judicial set-off are allegedly legally permissible under a scenario excluding competing secured cross claims of other creditors against the same debtor outside an insolvency context.

[272] *See* New Civil Code, Arts. 1.616-1.623.

	Netting Netting was described in the IA as a bilateral set-off (*operaţiune de compensare bilaterală*) and was defined as: (i) any agreement, or particular term in an eligible financial agreement, concluded between two parties, providing for the netting of certain payments, or the performance of certain obligations, or a performance of present or future rights, derived from or in connection with an eligible financial agreement (a netting master agreement); (ii) any netting master agreement concluded between two parties, providing for netting between two or more netting master agreements (master-master netting agreement); or (iii) any guarantee agreement that is granted subsequently to or is in connection with a netting master agreement (the guarantee agreement being defined as any agreement or guarantee instrument of a netting agreement or of an eligible financial agreement, including pledges, guarantee letters, personal guarantees and other similar agreements).[273] Netting operations involve the performance, in relation to an eligible financial agreement, of one of the following operations: (i) the termination of an eligible financial agreement, the acceleration of any payment, the fulfilment of an obligation, or the realisation of any right derived from an eligible financial agreement, based on a netting agreement; (ii) the calculation or the estimation of a set-off value, market value, liquidation value or replacement value of any of the obligations or rights above; (iii) the conversion into one currency of any of the above; or (iv) the set-off, in order to obtain a net amount (off-set), of any values calculated above and converted into one currency, as mentioned above. The Financial Collateral Law instituted exceptional rules with respect to financial collateral agreements and their respective financial collateral within an insolvency context. These exceptions are as follows: The commencement of an insolvency case involving a collateral provider does not stay the enforcement by the collateral taker of the financial collateral;[274] A financial collateral agreement continues to apply as provided there under irrespective of the commencement of an insolvency case with respect to the collateral provider;[275] A netting clause associated with a financial collateral agreement applies as provided there under irrespective of the commencement of an insolvency case with respect to the collateral provider;[276] Subject to any relevant contractual stipulations in that regard, the enforcement of financial collateral needs no prior notification, court or insolvency trustee approval, lapse of time, or requisite method of sale (such as a public sale).[277] The IA expressly acknowledged that any transfer, fulfilment of an obligation, exercise of a right, act, or fact based upon eligible financial agreements, as well as any netting agreements, was valid, binding and enforceable against an insolvent contracting party or an insolvent guarantor of a contracting party, and constituted valid grounds for the registration of the receivables as filing of a proof of claim with the insolvency procedures. The only obligation derived from a netting agreement recognised by Insolvency Act was the commitment to perform the net obligation

[273] *See* International Insolvency Act, Art. 1.33.
[274] Financial Collateral Law, Art. 6 (5).
[275] Financial Collateral Law, Art. 10.
[276] Financial Collateral Law, Art. 9 para. (1).
[277] Financial Collateral Law, Art. 6 para. 3(d) and Art. 9 para. (2).

	derived under the netting agreement to the other contractual party and its corresponding right (to receive the net claim) (art. 51.2 IA). The IA protected the contracting parties to a netting agreement by stating that no attribution granted by the law to a person or entity in the application of insolvency procedures would obstruct the termination of the eligible financial agreement and/or the acceleration of the fulfilment of the payment obligations or the performance of a right based on one or more eligible financial agreements, having as a basis a netting agreement, such powers being limited to the net amount resulting from the application of the netting agreement (art. 51.4 IA).
Assessment	The regulation of contracts under the IA was generally in accord with best international standards: it set the general rule for continuation of executory contracts after insolvency is declared; interference with performance was allowed when the contract was onerous for the estate and the interference was regulated in its procedural aspects; ipso facto clauses were legally treated as generally void; and a number of exceptions were foreseen in areas where interests other than the full body of creditors needed to be taken into account (i.e., financial contracts). The law, however, leaves some relevant elements without express regulation: On the one hand, there is no specific determination of the nature of the claim of the counterparty to a disclaimed contract. The wording of Article 86 para. (2) in the IA was misleading and consequently the interpretation on the part of the courts was inconsistent; On the other hand, there is no express recognition of the insolvency representative's ability to assign contracts. Although both aspects might be adequately regulated by the systematic interpretation of the insolvency law and the application of general civil law, legal certainty would be increased by the inclusion of rules in the insolvency law.
Comment	In light of the above assessment it was considered important to amend the insolvency law to include the following:[278] 1) The express conferral upon the insolvency representative of the possibility to assign executory contracts to third parties; and, 2) A rule that establishes the nature of the claims for damages against the estate following a decision by the insolvency representatives to terminate the contract, and whether such claims can be pursued against the debtor after closing of the procedure.
Principle C11	**Avoidable Transactions** **C11.1** After the commencement of an insolvency proceeding, transactions by the debtor that are not consistent with the debtor's ordinary course of business or engaged in as part of an approved administration should be avoided (cancelled), with narrow exceptions protecting parties who lacked notice. **C11.2** Certain transactions prior to the application for or the date of commencement of the insolvency proceeding should be avoidable (cancelable),

[278] See Annex II, though, commenting on the 2013 Draft Insolvency Law, which had introduced new provisions on on-going contracts.

	including fraudulent and preferential transfers made when the enterprise was insolvent or that rendered the enterprise insolvent. **C11.3** The suspect period, during which payments are presumed to be preferential and may be set aside, should be reasonably short in respect to general creditors to avoid disrupting normal commercial and credit relations, but may be longer in the case of gifts or where the person receiving the transfer is closely related to the debtor or its owners.
Description	*Transactions Falling outside the ordinary course of business* During the general supervisory period, the debtor under the IA retained a limited power to manage its goods, which meant that it "may carry out any acts and operations, including using, selling and leasing of goods, and may make payments, if all these are part of its ordinary course of business", under the supervision of the insolvency trustee (art. 49.1 IA). In contrast, any transfers, payments, or operations that fall outside of the "ordinary course of business" always required special approval by the creditors' committee and authorization from the insolvency trustee (art. 49.2 IA). As a consequence, all transactions executed in violation of such rules were regarded as null and void (art. 47.1 IA). *Avoidable transactions* The IA set forth several suspect periods that ran backwards from the moment where insolvency case was formally commenced (arts. 79 and 80 IA). An insolvency trustee or, in case the latter did not act, the creditors' committee, could challenge the following categories of acts occurred prior to the opening of the insolvency proceedings by means of an avoidance action (art. 80): 1) Donations (gifts) granted during the three years preceding the opening of the insolvency case (other than sponsorship granted for charitable purposes); 2) Transactions at an undervalue entered into during the three years preceding the commencement of the insolvency case; 3) Transactions intended to isolate a specific asset of the debtor from other creditors, executed during the three years preceding the commencement of the insolvency proceeding; 4) Preferences, i.e., the transfer of ownership rights to a specific creditor made in order to discharge a previous debt due to such creditor, if made during the 120 day period preceding the commencement of the proceeding, provided that the amount that such creditor would have obtained in a liquidation of the debtor would have been lower than the value of such transfer; 5) The creation or perfection of security in favour of an unsecured claim, during the 120 day period preceding the opening of the insolvency case; 6) Prepayments of debts made within 120 days preceding the commencement of the insolvency case, if the due date of such debts would have occurred at a date after the commencement of the proceedings; and 7) Transfers or undertaking obligations made or incurred by the debtor during the two years preceding the opening of the insolvency proceedings with the intention to conceal the insolvency or delay the onset of the insolvency case or to defraud persons or entities who were creditors on the date of transfer (in case

	of transactions with derivative financial instruments, including the close out of a netting contract concluded on the basis of an eligible financial contract), or who became creditors at a subsequent date. Under Insolvency Act, there seemed to be two types of transactions that could be challenged as fraudulent: (i) actual fraudulent transactions (art. 79), and (ii) constructive (or reputed) fraudulent transactions (art. 80 IA). The difference, although confusing, would seem to lie in the fact that, *actual fraudulent transactions* required specific proof that the debtor intended to hinder, delay or defraud creditors by concluding a particular transaction and, on the other hand, *reputed fraudulent transactions* would require proof that the debtor did not receive equivalent value or fair consideration in return for the transfer or obligation assumed by the debtor or that a preference took place, within various timeframes prior to the commencement of the insolvency case, or, in general, that one of the situations included in art. 80.1 took place. A first set of preference occurred under the IA where, within a certain timeframe (considered suspect for solvency purposes) prior to the commencement of insolvency case, a debtor made transfers or advances payments, or created security interests for unsecured debts, to the benefit of individual creditors. Such transfers were regarded as favouring one creditor over the others, particularly where assessing the amount that the preferred creditor would have received in a liquidation context. Related party dealings were also viewed as preference under Insolvency Act and were susceptible of being avoided as such, if prejudicial to the creditors and closed in a relevant suspect period. Such transactions were viewed as favouring the related parties over the general body of creditors.[279] *Exceptions* Transactions, transfers or payments performed in the ordinary course of debtor's business could not be avoided under the avoidance powers of the IA (art. 82 IA).[280] The IA expressly declared that any transfer, fulfilment of an obligation, exercise of a right, act, or fact based upon eligible financial agreements, as well as any netting agreements, was valid, binding and enforceable against an insolvent contracting party or an insolvent guarantor of a contracting party, and constituted valid grounds for the registration of the receivables as filing of a proof of claim with the insolvency procedures. In addition, with the sole exception of proving the fraudulent intention of the debtor, no insolvency trustee or court of law could hinder, request the avoidance of, or decide the termination of transactions with financial derivate instruments, including the performance of a netting agreement, based on an eligible financial agreement (art. 51.5 IA). *Time and Consequences of avoidance* An avoidance action under the IA had to be commenced within one year of the

[279] *See* Insolvency Act, Art. 80 para. (2) (identifying the transfers or obligations incurred in relation to *inter alia* the following entities: (i) a general partner or a shareholder holding at least twenty percent (20%) of the share capital or the voting rights of the debtor; (ii) a director or officer of the debtor; or (iii) any other person holding a dominant position in respect of the debtor or its business. With respect to the last type of entities, the law is not clear as to whether "dominant position" is related to equity control solely or it envisages some other type of control; it is unclear, thus, whether a transaction with a bank, as creditor, may fall under the scope of the related party preferences.

[280] Jurisprudence is, however, unclear as to what constitutes the "normal course of business" in the insolvency context, yet it is likely that the courts would consider such factors as the nature of the transactions or the payments made by the debtor during the suspect period as compared to those that ordinarily occurred before such suspect period, as well as the similarity of the debtor's practices with those in the same industry.

	deadline envisaged for the insolvency trustee to issue a report on the debtor's financial situation and the causes of insolvency, but no later than 16 months of the official commencement of the case (art. 81.1 IA). If fraudulent transactions or payments were successfully challenged, then they were rescinded retroactively (as if they never occurred), and the parties to such transactions, or beneficiaries of such payments, were under a legal duty to return the property to the insolvency estate, or the adequate value of such property at the time of the transfer if the property was no longer in their possession. In addition, bad faith third parties shall be liable for damages (which, in cases of monetary obligations, are translated into interest). If a security interest were successfully challenged, it was unenforceable and where security had been enforced, such enforcement could be undone to the effect that the holder of the security was under a duty to return to the insolvency estate the value of the collateral as at the moment of the foreclosure. A bona fide acquirer for value had a claim of an equal value of the property against the debtor (art. 83.2 IA). A bona fide transferee with free title was also required to return the property or the difference in value by which he was enriched. In the event of bad faith, the entire value of the property as well as any proceeds needed to be returned to debtor's estate, while the transferee forfeited its right to have a claim registered against the debtor's estate. It is unclear whether a fraud-based general *actio pauliana* was also available during the insolvency proceedings.
Assessment	In line with best international standards, the IA provided for the avoidance/nullity of the transactions carried out by the debtor after the commencement of insolvency that are not consistent with the debtor's ordinary course of business or engaged in as part of an approved administration. The law also included a detailed regulation that provided for the annulment of certain pre-insolvency transactions that damaged the business or conferred undue preferences. The system regulated expressly a number of possible transactions and the suspect period rightly discriminated between different types of avoidable actions. The system, however, did not seem to be widely used in practice, and, reportedly, the value recovered for the estate through this mechanism was generally low. The periods envisaged to avoid certain operations could be too long (i.e., 3 years for a simple transaction at an undervalue), damaging security of tenure in market operations; while the time to set aside other transactions might be too short (120 days for undue preferences or for the creation of security for previously unsecured loans). The brevity of the period existing to avoid actions which, by their nature, are bound to take place often on the verge of insolvency, poses a particular risk to the system: a debtor, in collusion with a creditor, could strategically delay the declaration of insolvency precisely to ensure that a particular operation is out of the reach of the remedy. Although it is true that the law envisages a specific remedy to prevent this type of behavior (art. 85.4 IA), it is also true that, allegedly, in practice the remedy did not seem to be working adequately. The regulation concerning the need to prove fraud and the presumptions of fraud is far from clear. Art. 79 IA established the general rule that –proven- fraudulent transactions could be avoided if they took place within the three years preceding insolvency. Art. 80.1 provided a list of cases which could be avoided, and which

	correspond with the type of operations that, normally, involve some type of fraud or unjust preference. The problem would seem to lie with art. 85, which stated that "If conditions under art. 79 and 80 are observed, relative presumption of fraud is established to the detriment of creditors". It makes little sense to include as a presumption of fraud the general clause of art. 79, which did not provide any acts that could trigger a presumption: the conjunct reading of art. 85.3 and 79 made little –if no- interpretative sense. If it had made reference to art. 80 alone, the sense would have been clear, meaning that, provided that the facts included in the list of art. 80 were proven the fraud would be presumed (*iuris tantum*). This should be clarified. The law did not regulate the nature of the claim that the *bona fide* counterpart to an avoided transaction would have against the debtor. It was also difficult to share the adequacy of the sanction imposed on the counterpart to a fraudulent transaction according to which the latter should lose all possibility to claim against the debtor. Although it seems correct to prevent the non bona fide counterpart to keep a claim that would harm the interests of other creditors, once – and only if- all creditors been satisfied, the non bona fide creditor should keep its right to compensate what s/he returned to the state or the debtor, also part of the fraud, would be given an unjustified windfall. Finally, the IA did not clarify (and it seems to be an unsolved problem in academia and court practice) whether general remedies of the law to avoid fraudulent transactions apply in case of insolvency (*actio pauliana*). An express solution of this problem would help improve the system by increasing legal certainty. In any case, and in order to avoid disrupting the results of the insolvency case, the actions based on general law should be conducted before the insolvency judge, within the insolvency procedure. The contrary would cause a particular creditor (the plaintiff creditor) to receive satisfaction outside insolvency, with the subsequent harm to the rest of the debtor's creditors.
Comment	In view of the assessment it seemed critical to consider several improvement to the legislation:[281] 1) A reduction in the period of time that the avoidable transactions can reach back in order not to disrupt legal certainty in the market; 2) An enhancement in the period for the cases to which the current law assigns 120 days, so that the current delays in the opening of proceedings does not cause the avoidance action to be of little use; 3) The Law should clarify the joint interpretation of arts. 79, 80 and 85.3 IA, so as to create a sound, clear system of presumptions of fraud. 4) The express regulation of the nature of the counterclaim of the other party to the transaction when bad faith has not been proven; 5) The removal of the cancellation of the claim of the counterparty in bad faith and its absolute subordination with respect to all creditors. 6) To include specific regulation as to the possibility to carry out actions against the debtor for fraudulent transactions based on general law (*actio pauliana*), which are filed before the insolvency judge, and with a preferential *locus standi* assigned to the insolvency representative (or keeping the same rules existing for insolvency based avoidance actions). In international practice, the use of general

[281] See the improvements in this regard in the 2013 Draft Insolvency Law (Annex II).

	law avoidance actions is often allowed, but rarely used: because insolvency based avoidance actions enjoy presumptions of fraud (and are, therefore, more likely to succeed), the use of general law based actions is limited to the situations in which the term of the insolvency actions has expired.
	Claims and Claims Resolution Procedures
Principle C12	**Treatment of Stakeholder Rights and Priorities** **C12.1** The rights of creditors and priorities of claims established prior to insolvency proceeding under commercial or other applicable laws should be upheld in an insolvency proceeding to preserve the legitimate expectations of creditors and encourage greater predictability in commercial relationships. Deviations from this general rule should occur only where necessary to promote other compelling policies, such as the policy supporting reorganization or to maximize the insolvency estate's value. Rules of priority should enable creditors to manage credit efficiently consistent with the following additional principles: **C12.2** The priority of secured creditors in their collateral should be upheld and, absent the secured creditor's consent, its interest in the collateral should not be subordinated to other priorities granted in the course of the insolvency proceeding. Distributions to secured creditors should be made as promptly as possible. **C12.3** Following distributions to secured creditors from their collateral and payment of claims related to costs and expenses of administration, proceeds available for distribution should be distributed *pari passu* to the remaining general unsecured creditors,[282] unless there are compelling reasons to justify giving priority status to a particular class of claims. Public interests generally should not be given precedence over private rights. The number of priority classes should be kept to a minimum. **C12.4** Workers are a vital part of an enterprise, and careful consideration should be given to balancing the rights of employees with those of other creditors. **C12.5** In liquidation, equity interests or the owners of the business are not entitled to a distribution of the proceeds of assets until the creditors have been fully repaid. The same rule should apply in reorganization, although limited exceptions may be made under carefully stated circumstances that respect rules of fairness that entitle equity interests to retain a stake in the enterprise.
Description	*Ranking of claims outside insolvency under commercial or other applicable laws* The New Code of Civil Procedure incorporates rules concerning the distribution of proceeds resulting out of an execution process. Pursuant to Article 864 para(1), the (unsecured) claims are to be paid in the following order: (i) Fees, stamps and any other expenses related to the procedure, including legal fees, and including expenses required for the conservation and administration of goods, as well as any other payments made for the mutual benefit of all creditors that join the execution process; (ii) Claims arising from employment, social security, healthcare, damages for wrongful death and personal injury;

[282] Subject to any inter-creditor agreements and contractual subordination provisions or where equitable subordination of a creditors claim may be appropriate.

	(iii) Claims based on obligations of support, allowances for minors or periodical amounts for ensuring livelihood; (iv) Budgetary claims; (v) Claims representing loans (and guarantees) granted by the state; (vi) Claims for damages caused to public property; (vii) Claims representing bank loans, as well as claims resulting from delivery of goods, services, or performance of works, including rents; (ix) Claims representing fines and similar penalties imposed by the state or local municipalities; (x) Other unsecured claims. Article 866 provides that a creditor holding a secured interest, or lien in property that is sold, shall be entitled to participate in the distribution of the sale proceeds in order to satisfy their claims prior to the claims provided Article 864 para (1) letter ”c” – *i.e.*, item (ii) above *Ranking of claims in insolvency* According to the Insolvency Act, the proceeds resulted from realising secured assets in an insolvency case were to be distributed as follows (arts. 121 et seq): (1) Taxes, stamp duties and other expenses incurred by the sale of such assets; (2) Secured claims incurred by the debtor’s estate after the commencement of the insolvency case (for the satisfaction of the principal amount and the interest, penalties and any other costs thereto); (3) Secured claims incurred by the debtor’s estate prior to the commencement of the insolvency case (for the satisfaction of the principal amount and the interest, penalties and any other costs thereto) (art. 121.1 IA). If the proceeds are insufficient to fully repay the secured debt, such creditors will be treated as unsecured for the remaining part of the debt and will be satisfied *pari passu* with unsecured claims of a similar nature (art. 121.2 IA). On the other hand, any excess is to be used for the benefit of the unsecured creditors. A secured creditor is entitled to take part in the distribution of any proceeds made prior to the realisation of the asset securing its claim, provided that any amounts received will be subsequently subtracted from the proceeds of realisation of the secured asset. (4) Costs of administration and legal fees, including relevant insolvency representative, expert and legal fees incurred on behalf of the insolvency estate; (5) Claims arising from employment; (6) Claims that arise after the commencement of the insolvency case from extension of credit by banks, commercial supplies or rentals; (7) Budgetary claims (including social security, healthcare, and social welfare mandatory contributions);

	(8) Claims for debts to spouse or children of individual debtors for court ordered support; (9) Costs representing support of individual debtors and their family; (10) Claims which arise before the declaration of debtor's insolvency from credit extended by banks, commercial supplies or rentals; (11) General unsecured claims; and (12) Subordinated claims, including (a) loans extended to a corporate debtor by any of its shareholders that holds at least ten percent (10 %) of the voting rights in such entity, and (b) claims relating to gifts or promises of gifts. The claims in the same class of priority were to be satisfied *pari passu* and the claims in junior classes were only to be paid after the full satisfaction of the claims in any senior class.[283]
Assessment	The regulation concerning the treatment of stakeholders and the system of priorities exhibited parts that are fundamentally in line with best international practice: the IA included a clear list of priorities, which to a certain extent respected the pre-insolvency entitlements (with particular regard to the correct treatment of secured creditors) and equity holders were not entitled to a distribution of the proceeds of assets until the creditors had been fully repaid. There were, however, elements that could be improved. The Romanian legal framework includes two different systems of ranking of claims depending on whether the debtor is in formal insolvency or not. Although there are some coincidences, the material content of both hierarchical rankings is disparate. Given the relatively scarce use of insolvency law, it seems possible to conclude that a number of debtors who are in fact insolvent never access the procedure. This would create the possibility of forum shopping by stakeholders, who might be interested in keeping the insolvent debtor in the realm of individual enforcement. One of the classes enjoying higher ranking in the order of priorities is the class of claims derived from labour contracts/relationships. While, due to the nature of the worker's relationship with the debtor, many jurisdictions include this type of priority, experience shows that when there is no limit in the priority, the rule may cause substantive damage to the rest of creditors, make it difficult to rescue the business and increase the cost of lending in the long term, which, in the end, might be defeating the initial purpose of the protective measure. In the case of Romania, the main problem posed by the hierarchy included in the IA is the preference of labor claims over post-commencement financing (of any kind). This could end up jeopardizing the efforts to rescue the business during insolvency. The concession of a high priority to the budgetary claims would seem to be unjustified. There is no convincing reason why public interests should be given preference over private rights. In general, the IA included a high number of classes of creditors with priority. Priorities create an exception to the pre-insolvency entitlements bargained for the debtor and third parties in the market which must be limited and correspond with

[283] These priorities were readjusted in the 2013 Draft Insolvency Law, and were further revised, we are advised, in the 2014 Insolvency Code.

	reasonable policy decisions. In the case of the IA, the excess in tiers of priority and the lack of foreseeable justification to the policy decisions make the system relatively inadequate. For example, it seems difficult to understand the rationale for prioritizing pre-insolvency claims arising from credit extended by banks.
Comment	Consideration could be given to adopting the following legislative amendments: 1) Correlating the ranking of priorities inside and outside insolvency, so as to avoid inadequate strategic behaviour by creditors. 2) The inclusion of a limitation to the priority afforded to labor claims, so as to ensure that they do not jeopardize the satisfaction of all other creditors. In any case, and with the possible exception of a limited amount considered necessary to grant the satisfaction of the urgent needs of the workers, the claims derived from labor law should not be granted priority over post-commencement credits. The reason is clear: post-commencement credit should enjoy priority because it is supposed to maximize the value of the estate and, therefore, to improve the position of all creditors, including labor creditors. 3) The removal (or the limitation) of the priority of budgetary claims. 4) The reduction of the number of priorities, so that the pre-insolvency entitlements are respected to a higher degree and legal certainty in the market is protected.
Principle C13	**Claims Resolution Procedures** Procedures for notifying creditors and permitting them to file claims should be cost effective, efficient and timely. While there must be a rigorous system of examining claims to ensure validity and resolve disputes, the delays inherent in resolving disputed claims should not be permitted to delay insolvency case.
Description	Under the IA, creditors that held pre-insolvency claims, other than the debtor's employees, needed to file for recognition within 45 days of the date of the formal commencement of insolvency proceedings (art. 62 IA). All claims that arose after the commencement of insolvency, either during the observation period, pending reorganization, or after the commencement of liquidation, need not to have been registered with the table of claims and were to be paid according to their terms as they fell due (art. 64.6 IA). A similar requirement was applicable where the insolvency court decided to apply a summary (fast-track) liquidation case or to convert the reorganization into liquidation. In these cases, the claims that arose after the commencement of the insolvency case were to be filed within 45 days of the date that marked the conversion of the case to liquidation by the insolvency court. Failure to file on time brought about the creditor's impossibility to participate in the insolvency case and to benefit from the rights and powers that are available to the creditors under the Insolvency Act, such as: voting in the creditors' assembly, acting in the creditors' committee, voting on a proposed plan of reorganization, and participating in the distribution of proceeds derived from the liquidation of assets in the insolvency estate (art. 76 IA). Furthermore, creditors that failed to timely file proofs of claim were not able to pursue their claims against the debtor outside the insolvency case either during or after the finalisation of such case, even if the insolvency case concluded after a successful restructuring plan (art. 76.1 IA).

	In principle, this rigorous rule was softened by the possibility given to the creditor to avoid the consequences of the delay by asking the court for permission to file a proof after the statutory deadline based on procedural flaws (e.g., that such creditor had not been notified or had been notified of the commencement of the insolvency case at a later date). Proofs for all pre-insolvency claims, except for claims of the debtor's employees but including any contingent, disputed and non-liquidated claims, had to be filed in order to undergo a verification process by the insolvency trustee (art. 66.1 IA). The insolvency trustee was required to verify, within 20 days (10 days in case of a fast-track liquidation case) counting from the expiration of the 45 day period established for registering the proofs of claims, all proofs of claim duly filed, except for those that were documented in instruments that were statutorily regarded under Romanian law as final, binding, and enforceable against the debtor at the time of the commencement of the insolvency case (*titluri executorii*) (art. 62 IA) [284]. The claims reflected in final court decisions, arbitration awards, and documents that Romanian law afforded similar treatment (such as documents issued by tax authorities claiming uncontested tax dues; negotiable instruments; secured transactions or documents that memorialise finance agreements executed by banks or other credit and non-banking financial institutions; or notary instruments that memorialize conveyances of mortgages or other interest in realty, or obligations to pay undisputed and liquidated debts) were registered as such by the insolvency trustee with the preliminary list of claims. The IA instituted a (rebuttable) presumption that all claims for which proofs of claim have been duly filed are true and accurate unless and until their existence, extent, or other element related to them has been contested by any of the debtor, the insolvency representative or creditor (Art. 66.3 IA). Creditors could contest the claims as reflected in the preliminary list of claims prepared by the insolvency representative within 5 days of the date of publication of that list in the Insolvency Bulletin (art. 73 IA). The court, after a hearing, had to decide upon all oppositions simultaneously and to allow the final versions of the creditors' claims, which were to be so reflected under a final list of claims to be prepared also by the insolvency trustee (art. 74 IA). The value of claims reflected in the final list represented the rights that the holder of such claims had in the insolvency proceeding insofar as participation in the case, voting and participation in the distribution of liquidation proceeds. Under International Insolvency Act, foreign creditors enjoy the same rights as Romanian creditors with respect to their participation in Romanian insolvency cases including inter alia proving claims.[285]
Assessment	The Romanian insolvency legislation included a procedure for the formation of the list of creditors that corresponds in general terms with international standards. A correct application of the said norms could afford a cost effective, efficient and timely system of determination of claims. However, despite the overall adequacy of the model, its application seems to be far from satisfactory, the main problems being the following:

[284] The deadline for verifying proofs of claim is only fifteen (15) days where the proceedings are fast track liquidation proceedings.
[285] *See* International Insolvency Act, Art. 14 (1).

	The law envisaged a system to solve contestations against the list of creditors drafted by the insolvency representative that seemed difficult to execute: all contestations had to be solved by the judge in one single decision, even if different evidence and allegations were made for each claim. The practice showed that this mechanism was not working properly. The most significant delays in the insolvency proceedings were to be found in the formation of the definitive list of creditors, with hearings that lasted for months. The time limit for the registration of petition for admission of claims was 45 days "as of the opening of the procedure". But the system of notification was not always efficient and not all creditors were notified. It would be more convenient and afford a better protection of the interests of creditors to establish that the *dies a quo* of the 45 day period be the date of publication in the Insolvency Bulletin or in the newspaper, whatever happens last. The period of time provided to file a contestation against the list of claims (five days) was likely too short to prepare a well-grounded opposition.
Comment	In view of the assessment it was recommended to consider to allow for a rigorous examination of claims that achieves the accuracy of the list of creditors and to avoid the delaying of the insolvency procedure caused by the disputes over claims. The contestations against the list of creditors should be solved by means of hearings only so long as the evidence presented so demands. In other cases, the decision of the contestation should be based on the written documents submitted. The limitation of oral proofs could streamline the procedure and limit the duration of the observation period (or else the time of the reorganization/bankruptcy that is to be conducted with interim claims in the list –ex art. 73.3-). Consideration could be given to start counting the 45 day period to file the claims from the moment of publication of the opening of insolvency proceedings in the Insolvency Bulletin or in the newspaper, whichever of the two happens later. It would be more proportionate with the rights of creditors if the right to contest against the list of creditors was extended a few days. Finally, consideration could be given to simplifying the procedure for elaborating the list of claims when the procedure changes from reorganization to bankruptcy.
Principle C14	**Reorganization Proceedings** **C14.1** The system should promote quick and easy access to the proceeding, assure timely and efficient administration of the proceeding, afford sufficient protection for all those involved in the proceeding, provide a structure that encourages fair negotiation of a commercial plan, and provide for approval of the plan by an appropriate majority of creditors. Key features and principles of a modern reorganization proceeding include the following: **C14.2** Plan Formulation and Consideration. A flexible approach for developing a plan consistent with fundamental requirements designed to promote fairness and prevent commercial abuse. **C14.3** Plan Voting and Approval. For voting purposes, classes of creditors may be provided with voting rights weighted according to the amount of a creditor's claim. Claims and voting rights of insiders should be subject to special scrutiny and treated in a manner that will ensure fairness. Plan approval should be based on clear criteria

	aimed at achieving fairness among similar creditors, recognition of relative priorities and majority acceptance, while offering opposing creditors or classes a dividend equal to or greater than they would likely receive in a liquidation proceeding. Where court confirmation is required, the court should normally defer to the decision of the creditors based on a majority vote. Failure to approve a plan within the stated time period, or any extended periods, is typically grounds for placing the debtor into a liquidation proceeding. **C14.4** Plan Implementation and Amendment. Effective implementation of the plan should be independently supervised. A plan should be capable of amendment (by vote of the creditors) if it is in the interests of the creditors. Where a debtor fails or is incapable of implementing the plan, this should be grounds for terminating the plan and liquidating the insolvency estate. **C14.5** Discharge and Binding Effects. The system should provide for plan effects to be binding with respect to forgiveness, cancellation or alteration of debts. The effect of approval of the plan by a majority vote should bind all creditors, including dissenting minorities. **C14.6** Plan Revocation and Closure. Where approval of the plan has been procured by fraud, the plan should be reconsidered or set aside. Upon consummation and completion of the plan, provision should be made to swiftly close the proceedings and enable the enterprise to carry on its business under normal conditions and governance.
Description	**Overview** There were two separate court restructuring mechanisms in Romania which could apply independently of each other: (a) Schemes of arrangement, which were governed by Act No.381/2009 on Schemes of Arrangement and Ad-Hoc Mandates ("**SAM**");[286] and (b) Court reorganizations, which were a part of the general Insolvency Act. **Schemes of arrangement** A SCHA represented a contractual mechanism whereby a debtor and its creditors negotiated and executed, under the supervision of an insolvency practitioner (conciliator), a plan of debt settlement and business restructuring. SAM introduced the concept of "*Ad-hoc Mandate*", according to which a debtor entered into confidential negotiations with one or more of its creditors for the restructuring of existing debts, with a view to overcome its financial distress. As opposed to a scheme of arrangement, the Ad-hoc Mandate represented a quasi-judicial mechanism consisting of a less robust procedure whereby the debtor could negotiate with individual creditors the settlement of their debt. On the other hand, the scheme of arrangement presumed the involvement of a certain majority of creditors and the organization of a recovery plan. The aim of SAM was to offer new mechanisms designed to facilitate the recovery of a debtor under financial distress by providing a greater span of options. More exactly, it conferred legal entities sustaining financial difficulties additional legal leeway to satisfy creditors by restructuring debts (within the framework of a

[286] Published in the Official Gazette of Romania No. 870 dated 14 December 2009.

recovery plan – as with a scheme of arrangements), aiming at the safeguard of the debtor's activity.

The court within which the debtor's head office was located (*Tribunalul*) had jurisdiction to resolve matters in connection with SAM (art. 5).

Scope of SAM. Categories of debtors

SAM seemed to be applicable to all categories of debtors, leaving aside only certain special entities from the financial sector (credit institutions, insurance companies and other companies regulated under specific financial markets rules)[287], or those companies that are wholly / partially owned by the Romanian State [288].

Requirements for filing for a scheme of arrangement

Any debtor that was an entity with separate legal personality that underwent financial difficulties could initiate a scheme of arrangement, unless any one of the following conditions applied (art. 13 SAM):

1) The debtor is insolvent, as such term is defined under the IA;
2) The debtor was criminally convicted for economic crimes by means of a final court decision;
3) An insolvency case has been commenced against the debtor less than five years before the date of a scheme of arrangement proposal;
4) The debtor availed itself from a scheme of arrangement less than three years before the date of the proposal;
5) Less than five years before the commencement of a scheme of arrangement, the debtor and/or its limited liability shareholders/members, or its directors, have been convicted for fraudulent insolvency, fraudulent management, breach of trust, fraud, embezzlement, perjury, forgery, or crimes sanctioned under Competition Act No. 21/1996, by means of a final court decision;
6) Less than five years before the commencement of a scheme of arrangement, the members of the management/supervisory bodies of the debtor incurred liability under the IA by contributing to the debtor's insolvency;
7) The debtor is registered in the tax offence record.[289]

The assessment of the debtor's financial position

A debtor that underwent financial difficulties was defined as any "legal entity whose management and economic potential are undergoing a negative dynamic, but which meets or is capable of meeting its obligations as they fall due" (art. 3b SAM).

SAM appeared to apply to good-faith debtors although it did not provide any sanctions for bad-faith debtors that filed for a scheme of arrangement solely with a

[287] *See*, *e.g.*, pertinent sections addressing restructuring mechanisms in Credit Institutions Act; (ii) Act No. 503/2004 concerning the financial recovery and insolvency of Insurance Companies.
[288] Although the above issues are not yet clarified, in 2007 the Romanian Government issued a report, as part of the legislative process, with respect to an initial form of the draft SAM ("**Government Report of 2007**"), whereby it took the view that the above mentioned categories of debtors are to be excluded from the application of the SAM.
[289] *See* Government Emergency Ordinance No. 75/2001 on organization and functioning of the tax offence record, recast, as amended.

	view to postponing the commencement of an ordinary insolvency procedure. In practice, a sanction for bad-faith debtors that wished to delay the commencement of an ordinary insolvency procedure may be the forfeiture of such debtors' right to apply for reorganization under the IA and their immediate liquidation. SAM set a number of rules which were to be taken into consideration by a debtor when assessing the opportunity to pursue a scheme of arrangement: 1) The debtor must be convinced that it is able to propose a plan according to which a restructuring of 50% of the aggregate value of the claims is achieved (art. 21.2 SAM); 2) The proposal has a high potential to be accepted by creditors representing at least two thirds of the total value of allowed and non-disputed claims;[290] 3) The scheme of arrangement has chances to be confirmed by the court through a so called "homologation test" (*i.e.*, to become binding for all creditors, including those which opposed the scheme of arrangement, or unknown creditors). The homologation test entails the approval of a plan by creditors representing 80% of the aggregate value of claims, while the value of contested claims should not exceed 20% of the aggregate value of claims (art. 28 SAM). *Stages of a scheme of arrangement* Under SAM, an insolvency court was less involved in the supervision and voting of a scheme than in an ordinary insolvency case under the IA. Accordingly, a scheme of arrangement was regarded -at least theoretically- as a simplified reorganization process. An insolvency court maintained, however, jurisdiction with respect to certain points concerning the scheme of arrangement process, although all court hearings related to requests arising from the latter procedure were handled *in camera*, with urgency and priority. The entire procedure was supervised and presumed a direct and constant involvement of a conciliator proposed by the debtor and confirmed by the creditors. The request for opening the procedure could be introduced only by a debtor under threat of insolvency but which was not insolvent, as provided by IA (art. 20.1 SAM). Creditors were not eligible for commencing a scheme of arrangement. During a scheme of arrangement, a debtor continued to carry out its activity in the ordinary course of business under the supervision of a conciliator. A scheme of arrangement involved the preparation of a list of creditors, which included all known creditors including those with claims that are contested (art. 20 SAM). A conciliator and the debtor could submit a proposal, which, if accepted by the majority of creditors, would lead to the execution of a scheme of arrangement involving such creditors.[291] A debtor could request in court the homologation of the

[290] The SOA proposal is considered adopted upon the vote of creditors representing two thirds of the aggregate value of accepted and non-challenged receivables, as per Art. 24 para. (5) from SAM.

[291] A SOA proposal must be accepted by creditors representing two thirds of the total value of accepted and non-contested claims. Nevertheless, the votes attached to the claims of the following categories of creditors will not be counted in:

- legal entities with at least one shareholder with limited liability or director which are related up to the 4th degree with the debtor's shareholders with limited liability or directors;

	scheme of arrangement in order to make such agreement valid and binding as to all creditors, including dissenting and unknown creditors. Similar to the procedure under the Insolvency Act, the commencement of a scheme of arrangement could generate effects with respect to a debtor, its assets and liabilities, such as a stay of the payments, stay on accrual of penalties, interest or any other expenses in connection with claims, as well as suspension on enforcement procedures started by creditors. SAM did not set a time frame for the submission in court of the scheme of arrangement request. Accordingly, a good-faith debtor could carry out its own assessment of its financial position and the date for commencing a scheme. It should, however, be noted that the beginning of the procedure was not compatible with the existence of insolvency. Moreover, it was recommendable for a debtor that insolvency not occur before homologation of the scheme of arrangement (for up to such date the creditors would have been entitled to begin an ordinary insolvency case against the debtor). From an abstract perspective, a debtor could obtain the acknowledgement of a scheme of arrangement and its homologation within four to five months of the commencement of the reorganization procedure. Such streamlined course was possible due to existence under SAM of relatively short procedural intervals. Also, court hearings related to requests arising from the SCHA were, in practice, supposed to be handled with urgency and priority (art. 15 SAM). Nonetheless, in practice the above time estimate could obviously be different due to inevitable procedural delays. Under SAM, duration of a scheme of arrangement was limited to a maximum of eighteen months. However, the court could grant an extension of six more months (art. 21, art. 34 SAM). A proposal consisted of a *recovery plan*, comprising the following detailed information: The analytical situation of the debtor’s assets and liabilities, certified by an expert accountant, or audited by an auditor, if case; The reasons for the existing financial difficulties as well as the measures taken by the debtor in order to overcome such difficulties until the date of submission of the offer; The financial–accounting evolution prognosis for the next six (6) months. A recovery plan must identify *inter alia* the following measures (art. 21 SAM): The recovery of a debtor by means of management restructuring, change of functional structure, reduction of personnel or any other necessary measures; Solutions for solving the financial distress, *e.g.*, via increasing the share capital,

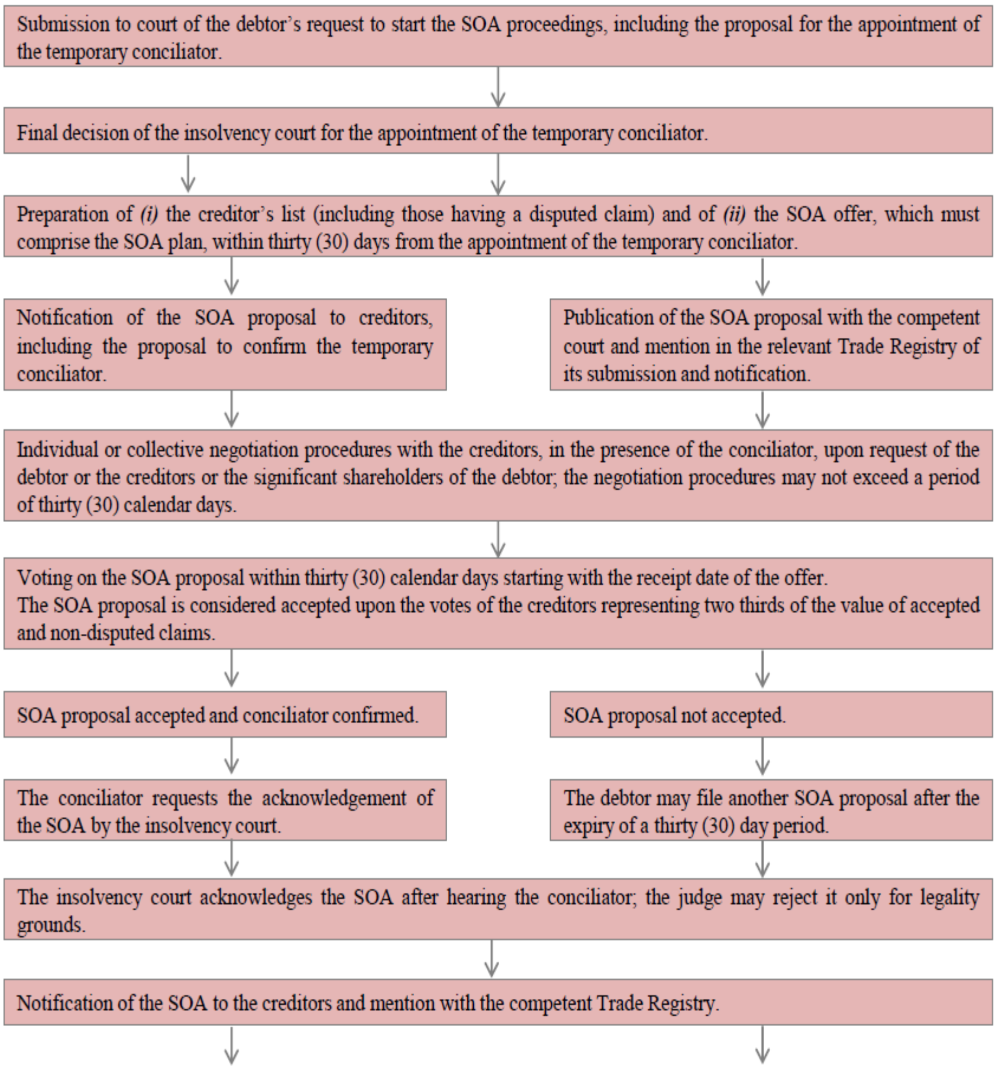
- legal entities where the debtor or its shareholders with limited liability or directors, or their relatives up to the 4th degree hold the position of limited liability shareholders or directors;
- legal entities whose limited liability shareholders or directors have been convicted for fraudulent insolvency, fraudulent management, breach of trust, fraud , embezzlement, perjury, offences regarding forgery or crimes sanctioned under Competition Act No. 21/1996, by means of a final court decision given within the last five (5) years before the beginning of the SOA;
- creditors which are registered with the tax offence record, according to Government Emergency Ordinance No. 75/2001 regarding the organization and functioning of the tax offence record.

bank loans, bond issuance, or any other type financing; establishing or closing down secondary offices, disposition of assets, and/or granting of security;

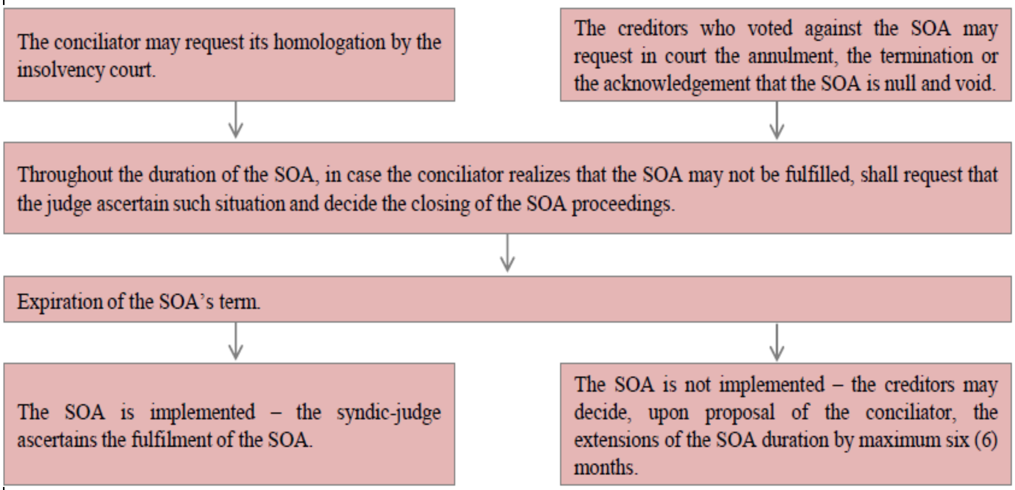
An estimate of the size of the claims that was expected to be satisfied as a result of the proposed measures, which could not go below 50%; in this respect, the debtor could suggest measures such as: deferred payments, partial/total cancellation of the principal of the claims or of their accrued interest, stay on penalties, set-offs, novations; as concerns measures with respect to tax liabilities, state aid rules had to be observed;[292]

The maximum term for paying off the claims allowed in the SCHA, which could not exceed eighteen (18) months, started with the conclusion date of this agreement.

Outline of a scheme of arrangement (SOA)



[292] The approval of National Agency for Fiscal Administration must be requested and obtained within thirty (30) days. Should this Agency not respond within this deadline, its approval shall be presumed.



Effects / Consequences of the scheme of arrangement

One important effect of a scheme of arrangement resided in the retention of a debtor's right to manage its business, even though under the supervision of a conciliator and, indirectly, of the creditors.

Based on the proposal, the debtor could request court approval for staying the creditor actions pending completion of the process (*i.e.*, until the proposal is either published or rejected) (art. 22 SAM).

All enforcement proceedings previously started by the consenting creditors were automatically suspended; Stay of accrual of interest, penalties or other expenses related to claims belonging to consenting creditors. The communication of the decision on the acknowledgement of the scheme of arrangement automatically resulted in the stay of accrual of penalties, interest or on any other expenses in connection with claims of consenting creditors.

Upon homologation of the plan, there came into effect a general stay of individual enforcement proceedings commenced by dissenting creditors. All enforcement proceedings started against the debtor (including those pertaining to unknown creditors) were automatically suspended, in case the conciliator requested and the insolvency court homologated the scheme of arrangement (art. 28 SAM). Stay of accrual of interest, penalties or other expenses related to claims of dissenting creditors. Upon the request of a conciliator and subject to debtor's providing adequate security, a debtor could also obtain a stay of the accrual of interest, penalties as well as any related expense, for claims of dissenting creditors (and including claims of unknown creditors). Such stay was valid for a maximum period of eighteen (18) months. As soon as the SOA was homologated, the creditors' right to begin the insolvency procedure against the debtor was stayed (art. 29 SAM). Accordingly, it appears that until the homologation of the scheme of arrangement was decided, involuntary insolvency case could be commenced against the debtor.

The scheme of arrangement also was binding for creditors - State authorities, but only if legal provisions with respect to state aid were observed and approval from the relevant Interministry Commission was obtained.

To the extent a scheme was successfully implemented, the insolvency court issued an order confirming the completion of the plan. The debt restructuring arranged under the agreement was consolidated as of the date of the court decision. If before the expiry of the term, the conciliator considered that the scheme of arrangement would not be successful, the insolvency court would issue an order attesting to such conclusion and commanding the ending of the procedure.

Creditor rights within the scheme of arrangement

The conciliator was required to deliver reports to creditors on the debtor's activity throughout the procedure, which the creditors had to approve (art. 16 and 18 SAM).

Any creditor obtaining an enforceable title against the debtor during the scheme of arrangement could file a request with the insolvency court to join in the scheme or could realize its claims by any other permitted means (art. 30 SAM).

Creditors that voted against the proposal could request the annulment of the scheme within fifteen days from the publication date of the approved plan in the relevant Trade Registry. Along with its claims, a claimant could also request, and the insolvency court could grant, the stay of the scheme of arrangement.

Creditors could request in court the termination of the scheme of arrangement and damages, in case the debtor failed to fulfil its main contractual obligations, as set out in the scheme of arrangement. SAM regarded the following actions as proof of breach of the main contractual obligations:

- the debtor preference of some creditors to the detriment of others;
- the concealment of debtor's assets pending completion of the scheme of arrangement;
- the making of payments without adequate justification.

Upon the filing of a termination request, the scheme of arrangement was automatically stayed.

Upon the commencement of a scheme of arrangement the insolvency court appointed the temporary conciliator proposed by the debtor. Further, the insolvency court was responsible for acknowledging the SOA (but it did not have the power to assess the feasibility of the SOA proposal) and the observance of legal requirements provided under SAM. Nevertheless, SAM was silent with respect to identifying such requirements. Accordingly, we may only assume such requirements to be as follows: (i) debtor's eligibility for SOA (*e.g.*, the debtor could not be in a situation, which precludes him from accessing the SOA, as provided under Section […]); and (ii) the observance of the SOA procedure. While SAM did not identify the financial position of a debtor as a factor to be examined in conjunction with the procedure of acknowledging the SOA, such financial position represented, however, a part of the test upon the request of homologation of the SOA.

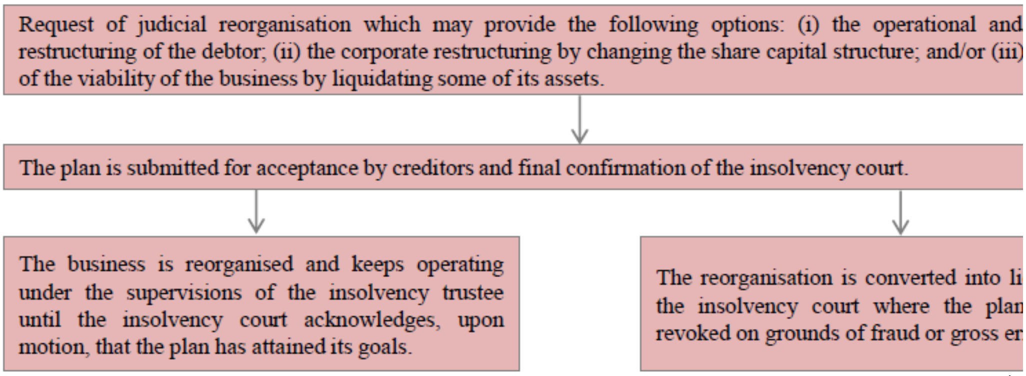
Court reorganizations

Under the IA, court reorganization was a mechanism that sought the rescue of a business undergoing insolvency proceedings by means of a reorganization plan (*plan de reorganizare*). A reorganization plan could provide the following options: (i) the operational and/or financial restructuring of the debtor; (ii) the corporate restructuring of the debtor by amending the share capital structure; and/or (iii) the enhancement of the viability of the business by liquidating part of its assets (art. 3.20 IA).

After its formulation, a plan needed a positive vote of the creditors and a final confirmation by the insolvency court (arts. 11.1 and 15.3 IA). A reorganization plan could only extend over a period of three years, with a possible extension of an additional year if 2/3 of creditors so approved (art. 95.3 IA).

During the reorganization period, a debtor was authorised to manage its business under the supervision of an insolvency representative and pursuant to the reorganization plan, until the insolvency court was in a position to acknowledge that either (i) the objectives contemplated in the plan had been attained, and the debtor had resumed its normal business and emerged from distress, or (ii) the reorganization plan had failed and the debtor should be liquidated.

Outline of court reorganization



Plan Formulation and Consideration

A debtor could propose its reorganization plan upon filing the voluntary petition (art. 28.1 IA). A debtor could also express its interest in reorganising at the court hearing that must decide the opening of an involuntary proceeding. As stated above (see **Principle C4**), the debtor that unsuccessfully challenged an involuntary petition waived its right to file a reorganization plan (art. 33.4 IA). Regardless of whether the petition was voluntary or involuntary, a debtor might not benefit from the restructuring remedies if it had been subject to an insolvency case in the preceding five years (art. 30 IA).

The insolvency representative could file a reorganization plan, if such possibility stemmed from the analysis and conclusions of his report (art. 94.1 IA).

Creditors that held twenty per cent (20%) or more of the total value of the claims filed and confirmed by the insolvency court could also propose a reorganization plan, so long as they indicated their intention to file a plan prior to the voting in the creditors' assembly concerning the insolvency representative's report (art. 33.4 IA).

Irrespective of the identity or nature of the proponent, a reorganization plan could be filed by any eligible person within thirty days from the date of confirmation by the insolvency court of the list of claims (art. 94.1 IA).

Approval of the plan

	A reorganization plan under the IA was voted upon by separate classes of claims, as follows (art. 100.3 IA) [293]: 1) Secured claims; 2) Labour claims; 3) Budgetary claims (i.e., debts owed to public institutions, namely, any of the national, local or special destination budgets in Romania, irrespective of their nature: taxes, excises, duties, imposts, fines, penalties, contributions to social security, healthcare or similar public funds, etc.; 4) Claims (usually general unsecured claims) of those of the commercial suppliers that are germane to the debtor's business and cannot be easily replaced (the list of this type of creditors will be drafted by the insolvency representative) (art. 100.3.c and 96 IA); 5) All other unsecured claims (regarded as preferred and general under the order of distribution in liquidation). In addition, creditors who directly or indirectly controlled, were controlled or were under a joint control with the debtor, as per the capital market legislation, could attend the meeting and vote on the plan only if such plan offered less than they would obtain in case of bankruptcy [294.] The IA apparently excluded equity holders and members from voting on a restructuring plan. A plan was regarded as accepted by a class of claims if an absolute majority of all existing claims in that class voted in favour of the plan (art. 100 IA). The confirmation of the plan constituted a multi-test scrutiny of the plan approved by creditors made by the insolvency court. In order for a plan to be eligible for confirmation, the following requirements had to be met: 1) Voting requirements (art. 101 IA): (a) at least half of the classes of claims that vote on the plan must accept the plan or be regarded as having accepted the plan; provided, however, that, if only two classes of claims vote on the plan, the plan needs only to be accepted by that class which has the higher value of the claims; and (b) at least one of the impaired classes of claims accepts the plan. 2) Fair and equitable treatment: The law imposes an additional set of conditions relating to those classes of claims that are regarded under the law as being impaired. A claim is impaired if the plan alters the legal and contractual rights to which such claim entitles the creditor (*e.g.*, by reducing the value of the claim or by altering any security interests or guarantees thereto) (art. 3.21 IA). The law requires that each impaired class of claims that rejects the plan should be treated *fairly and equitably* under the plan. In order to pass the fair and equitable treatment test, the plan had to address the following issues:

[293] The law is not entirely clear as to whether the plan may include additional classes of claims. However, reportedly, it is likely that courts would regard the list of voting classes as an exhaustive list.
[294] *See* Insolvency Act*,* Art. 100(5).The concept of "control" has the meaning ascribed in Art. 2 (1) 16.b) and 27 of the Capital Markets Act No. 297/2004, in conjunction with other terms of art, such as "close links" and "participation".

	(i) Any class of claims that rejects the plan, as well as any claim that rejects the plan, should receive or retain under the plan on account of such claim property of a value that is no less than the amount that such holder would so receive or retain if the debtor were liquidated (presumably on such date); (ii) No class of claims and no claims should receive or retain under the plan on account of such claim property of a value that is more than the amount of the claim, as included in the final list of claims confirmed by the insolvency court ; and, (iii) No class of claims that are junior to an impaired class of claims (pursuant to the ranking stipulated under Art. 100 (3) of the Insolvency Act) that rejects the plan should receive or retain under the plan on account of such claim property of a value in excess of the amount that holders of such claims would so receive or retain if the debtor were liquidated (presumably on such date). *Implementation* Following the confirmation of the reorganization plan, the debtor exercised his right to manage its business under the supervision of an insolvency representative (*administrator judiciar*) (art. 103 IA). The partners and shareholders with limited liability could not interfere with management. The debtor was obliged to implement any structural changes provided in the plan without any delay. Every three months, the debtor or the insolvency representative had to submit reports to the insolvency court about the financial status of the debtor. The creditors' committee had to be convened at the end of each period of three months to hear the report and the financial statement (art. 106). The insolvency representative also had to submit a statement on the expenses incurred in the running of the business. *Effects* Under the IA, when the plan was confirmed and entered into force, the debtor's activity was reorganized accordingly and the claims and rights of the creditors and other affected parties were modified in accordance with the plan. Against co-debtors and guarantors of the debtor, the creditors preserved, however, their actions for the entire value of their claim, even if such creditors voted in favour of the plan (art. 102 IA). If the case subsequently converted to liquidation, the value of the claims, as reflected under the plan, had to be maintained and listed accordingly in the tables of claims. *Revocation* Based upon evidence that the relevant provisions of the plan had been followed and fully carried out, the court closed the insolvency case. If the debtor failed to comply with the plan or losses were incurred, the insolvency representative, the creditors' committee, the special administrator, or any of the creditors could request the court to open the liquidation stage. The application did not suspend the continued operation of the debtor's business activities until the judge decided the application. If the court approved the application, the claims modified in accordance with the reorganization plan remained final (art. 105 IA).
Assessment	

	The legal framework for reorganization included in the Romanian IA was apt to allow for quick and easy access to the proceeding, included the mechanisms to foster an efficient administration of the proceeding while affording sufficient protection to the stakeholders involved and provided a procedural structure that could support adequate negotiation of a plan. The regulation of the reorganization plan allowed for a wide array of possible restructuring measures and could be said to constitute an adequate framework to reach business rescue. However, practice showed that rescue of businesses was only seldom achieved and that the vast majority of insolvency proceedings ended in (piece meal) liquidation (see **Principle C1**). The IA's reorganization system was not given sufficient use. Although generally apt, the legal model presented some problems. Paradigmatically, the system envisaged in the law for creditors to approve a reorganization plan was complicated and allegedly allowed for abuses in practice. Creditor approval and court confirmation of the plan had to comply with rigid rules concerning majorities inside each class, a minimum aggregation of classes, acceptance by impaired creditors, and it had to have passed the test of "fairness and equitability". Stakeholders complained that this system was abused in practice, sometimes by means of collusion between the debtor and certain categories of creditors. It was possible for a very low percentage of the total amount of claims to imposed a plan on the rest. As stated in **Principle C4**, the restriction of the possibility to access a reorganization procedure to the debtor that unsuccessfully opposes a creditor's petition to open insolvency proceedings, unnecessarily restricts the chances of business rescue and may end up causing harm to creditors (in case the business was a sound and viable business capable of rescue; it cannot be forgotten that the framework for bulk sales in insolvency is untested). The procedure introduced in the reform of 2009 (Schemes of Arrangement and Ad Hoc Mandate) has not been used in the market: according to the statistics of the National Institute of the Magistracy (*INM*), in 2010 and 2011 only 70 scheme of arrangement proceedings were opened altogether for the entire country. There seems to be little awareness of the existence of the alternative procedures. Generally, those stakeholders who knew of its existence did not seem to regard it as an effective way to alleviate the troubled – but not insolvent – business. The natural stakeholders to use this sort of procedure, financial institutions, normally refused to resort to it because the law provided for the suspension of the accrual of interests of secured loans, which made the procedure much less attractive than the general insolvency proceedings. The requirements to access the procedure are considered too strict (the types of debtors that are eligible to use the procedure are restricted). Debtors seemed also reluctant to use the procedure, possibly due to sociological factors: it is common in countries with no rescue culture, in which insolvency still carries social and economic stigma, that actors in the market are reluctant to use legal mechanisms which are related to insolvency procedures and prefer to use informal negotiations to try to solve their problems. But, above all, the main problem of the schemes of arrangement is the clearly excessive majority required to approve a restructuring plan: 80% of the aggregated value of the debtor's claims.[295] For a further detailed analysis of the schemes of arrangement in Romania, see the discussion under **Principle B3**.

[295] We are advised that the 2014 Insolvency Code contains the equivalent of the scheme of arrangement, renamed preventive concordat, and that the percentage to approve has been reduced to 75%.

Comment	In view of the above assessment of the practice of affecting reorganization plans, it was considered that the following improvements may be made to the reorganization framework:[296] 1) The introduction of a mandatory global majority of creditors to approve a plan, disregarding the different classes of creditors. That way, a minimum global representation could be achieved and current abusive practices would be staved off. The necessary global amount should not be too high to constitute an excessive hurdle to the approval of the plan. 2) Removing the restriction of the possibility to access a reorganization procedure to the debtor that unsuccessfully opposes a creditor's petition to open insolvency proceedings. This sanction could be left for the cases in which there was objective proof of fraudulent behavior by the debtor. 3) Regarding the schemes of arrangement, consideration ought to be given to overhaul the approach given to the procedure: restrictions as to the debtors that may use the procedure should be softened; the accrual of interests for secured loans should be permitted up to the value of the security, in line with the solution adopted by the IA; and, especially, the percentage of claims needed to confirm the plan must be lowered substantially. For further recommendations concerning the legislative framework of schemes of arrangement and ad hoc mandate, see **Principle B3**.
Principle C15	**International Considerations** Insolvency case may have international aspects, and a country's legal system should establish clear rules pertaining to jurisdiction, recognition of foreign judgments, cooperation among courts in different countries and choice of law. Key factors to effective handling of cross-border matters typically include: • A clear and speedy process for obtaining recognition of foreign insolvency case; • Relief to be granted upon recognition of foreign insolvency case; • Foreign insolvency representatives to have access to courts and other relevant authorities; • Courts and insolvency representatives to cooperate in international insolvency case; • Nondiscrimination between foreign and domestic creditors.
Description	Cross border insolvency in Romania has two different sets of applicable rules: on the one hand, as a member of the European Union, the EU Insolvency Regulations 1346/2000 rule the proceedings involving debtors with the centre of main interests in a EU member state; on the other hand, Romania enacted in 2003 the International Insolvency Act (IIA), which governs international insolvencies that do not fall within the scope of EC Insolvency Regulation. The IIA was adopted with a view to

[296] We have been advised that some of the above concerns have been dealt with in the 2014 Insolvency Code.

	implement in the Romanian legal framework the principles developed under the UNCITRAL Model Law on Cross-Border Insolvency of 1997. The 2013 Draft Insolvency Code incorporates the provisions regarding cross-border insolvency in title III. The cross-border insolvency provisions are aimed at determining the law applicable to the private international law relations on insolvency and establishes conditions for the competent authorities in Romania to request/give assistance in respect of insolvency case opened on the Romanian / foreign territory. As a general rule, the law applicable to cross-border insolvency issues is the law applicable to the place where the debtor has its center of main interests, which is understood as the main headquarters of a legal entity; in the case of sole entrepreneurs and professional individuals, the law applicable will be that of the professional domicile. The provisions are applicable where legal assistance is required in Romania by a foreign court or by a foreign representative, in respect of a foreign insolvency case. Such cases may occur when the insolvency case started abroad and its recognition in Romania is required (for example, because the debtor has assets located in Romania). In such cases, the foreign representative has the right to petition directly the Romanian courts and bring before them a recognition petition for the foreign procedure, by also submitting several documents in order to prove the commencement of the procedure abroad. If the Romanian courts recognize the foreign procedure, no further petitions and appeals may be brought before the court, and if they have already been started, such proceedings shall be suspended. Furthermore, the right to charge or dispose in any way of the debtor's assets will be suspended. Any subsequent agreement failing to comply with these rules will be null and void. The provisions also apply to cases where legal assistance is required in a foreign state, in respect of an insolvency case started in Romania (following the previous example, because the debtor has assets located abroad). The Romanian representative (the individual or legal person appointed as insolvency representative within a Romanian insolvency procedure) is authorized to act in a foreign jurisdiction, as delegate of the insolvency case opened in Romania, and must comply with the provisions of the applicable foreign law. The cross-border insolvency provisions regulate cases where a Romanian insolvency procedure and foreign insolvency proceedings against the same debtor are carried out simultaneously. In this particular case, recognition of the foreign procedure cannot prevent the filing of a local action under Romanian Insolvency Act, or the registration of a proof of claim there under. After recognition of a foreign procedure, the procedure governed by Romanian Insolvency Act may be opened against the same debtor only if the debtor is headquartered in Romania. The effects of the procedure provided by Romanian Insolvency Act are limited only to the debtor's assets located in Romania. The recognition of a foreign procedure represents, unless proven otherwise, an assumption of the debtor's state of insolvency, which may, in turn, prompt the commencement of insolvency case under the Romanian Insolvency Act.
Assessment	In Romania, the legal framework for cross-border insolvency is fundamentally in accord with best international standards. The framework provided for the EU based cross-border issues (EU Regulations) and for general private international insolvency law matters (Model Law-based legislation) provides for clear rules pertaining to jurisdiction, recognition of foreign judgments, cooperation among courts in different countries and choice of law, and its adequate implementation would bring along an efficient and fair system. Nevertheless, the adequate

	functioning of cross-border issues requires a high technical level of the judiciary and the insolvency representatives, as well as an open mind and a correct understanding of the reasons for the system to exist. In cross-border issues, a good legal framework can be rendered useless by a narrow understating of its rules and a –widespread in all jurisdictions- tendency to protect what might seem to be the national interest. The transposition of the Model Law to the insolvency legislation gives some hints that the legislator itself might have had in mind the possible risks of the model to the "national interest", by, for example, incorporating the "public policy" exception in a broader way than the Model Law (eliminating the need for a "manifest" contradiction with the basic principles of the national system), or by allowing for positive conflicts of jurisdiction whenever the "headquarters" were believed to be located in Romania. Reportedly, international insolvencies remain an area insufficiently developed and reported in Romania, and the application of the law is still far from being stable and certain.
Comment	The correct application of cross-border rules demands certain circumstances and attitudes that might be absent in some members of the judiciary. Specific programmes of capacity building in international insolvency issues and the control of the relevant bodies of the judiciary over the performance of judges in this regard could contribute to the correct implementation of the already adequate legal framework.
Principle C16	**Insolvency of Domestic Enterprise Groups** **C16.1 Procedural Coordination.** The system should specify that the administration of insolvency case with respect to two or more enterprise group members may be coordinated for procedural purposes. The scope and extent of the procedural coordination should be specified by the court. **C16.2 Post-commencement Finance.** The system should permit an enterprise group member subject to insolvency case to provide or facilitate post-commencement finance or other kind of financial assistance to other enterprises in the group which are also subject to insolvency case. The system should specify the priority accorded to such post-commencement finance. **C16.3 Substantive Consolidation**. The insolvency system should respect the separate legal identity of each of the enterprise group members. When substantive consolidation is contemplated, it should be restricted to circumstances where: (i) assets or liabilities of the enterprise group members are intermingled to such an extent that the ownership of assets and responsibility for liabilities cannot be identified without disproportionate expense or delay; or (ii) the enterprise group members are engaged in a fraudulent scheme or activity with no legitimate business purpose. The court should be able to exclude specific claims and assets from an order of consolidation. In the event of substantive consolidation, the system should contemplate an adequate treatment of secured transactions, priorities, creditor meetings, and avoidance actions. The system should specify that a substantive consolidation order would cause the assets and liabilities of the consolidated enterprises to be treated as if they were part of a single estate; extinguish debts and claims as amongst the relevant enterprises; and cause claims against the relevant enterprises to be treated as if they were against a single insolvency estate. **C16.4 Avoidance actions**.[297] The system should authorize the court considering whether to set aside a transaction that took place among enterprise group members,

[297] See Principle C 11.

	or between any of them and a related person, to take into account the specific circumstances of the transaction. **C16.5 Insolvency Representative**. The system should permit a single or the same insolvency representative to be appointed with respect to two or more enterprise group members, and should include provisions addressing situations involving conflicts of interest. Where there are different insolvency representatives for different enterprise group members, the system should allow insolvency representatives to communicate directly and to cooperate to the maximum extent possible. **C16.6 Reorganization Plans**. The system should permit coordinated reorganization plans to be proposed in insolvency proceedings with respect to two or more enterprise group members. The system should allow enterprise group members not subject to insolvency proceedings to voluntarily participate in a reorganization plan of other group members subject to insolvency proceedings.
Description	In Romania, the issue of group insolvency has been subject of some academic discussions but has not received legislative treatment (until recently, see footnote within the comment section below regarding the 2014 Insolvency Code). Allegedly, it seemed that the dominant view was that members of a group of companies are independent entities with corporate legal separation and their insolvency should be, accordingly, addressed individually, on a case-by-case basis, in order to offer adequate protection to each of their respective group of creditors. As such, if one or more of the corporate members of an enterprise group were to file insolvency in Romania, they would be the subject of separate insolvency cases and most likely the Romanian insolvency courts will be reluctant to order a substantive or procedural consolidation of such cases. The only possible exception to the above scenario might have occurred by piercing the corporate veil of the subject insolvent corporate members, which can be achieved only in accordance with the provisions of art. 237^1 paras. (3) and (4) of the Company Act (applicable outside an insolvency case). Although serving the same purpose, it remained, however, unclear whether the insolvency courts would be willing to extend the application of such rules in an insolvency case.
Assessment	The Romanian IA did not include the specific regulation of the insolvency of corporate groups. There were no legal provisions that envisage the possibility to coordinate the insolvency procedures of two or more group members. There was no regulation as to the joint petition for insolvency, or the joint development of connected procedures; no mention as to the possibility to coordinate reorganization plans or to appoint one single practitioner for several insolvencies of group members. The coordination that could be achieved by means of the application of general procedural legislation would seem inadequate. Reportedly, there is no practice of this type of coordination between insolvency proceedings. The IA did not provide specific regulation of intra-group post-commencement finance. On the face of it, the IA did not expressly forbid the flow of credit between insolvent group members. Yet, there is considerable uncertainty in this respect due to the weak system of priority for post-commencement debts (see Principle C12) and the lack of experience and practice in situations of the kind. General civil company and civil law might provide a tool to make members of enterprise groups accountable if the necessary circumstances are met, but there are no cases in practice. Express regulation might be desirable.

Comment	In view of the assessment it was important to consider amending the insolvency legislation in order to accommodate efficient rules for the insolvency of functionally-related companies within the same corporate group. The rules should provide a framework to allow for a streamlined coordination of procedures, intra-group financing and combined rescue solutions. In case it is considered adequate to include express regulation of substantive consolidation, it ought to be done in a way that respects separate legal personality, and be based on the intermingling of assets and liabilities of insolvent debtors so as to make them unidentifiable (or only at an unbearable cost) and/or the existence of a fraudulent scheme.[298]
Principle C17	**Insolvency of International Enterprise Groups** **C17.1. Access to court and Recognition of Proceedings.** In the context of the insolvency of enterprise group members, the system should provide foreign representatives and creditors with access to the court, and for the recognition of foreign insolvency case, if necessary. **C17.2. Cooperation involving courts.** The system should allow the national court to cooperate to the maximum possible extent with foreign courts or foreign representatives, either directly or through the local insolvency representative. The system should permit the national court to communicate directly with, or to request information or assistance directly from, foreign courts or representatives. **C17.3. Cooperation involving insolvency representatives.** The system should allow insolvency representatives appointed to administer proceedings with respect to an enterprise group member to communicate directly and to cooperate to the maximum extent possible with foreign courts and with foreign insolvency representatives in order to facilitate coordination of the proceedings. **C17.4. Appointment of the insolvency representative.** The system should allow, in specific circumstances, for the appointment of a single or the same insolvency representative for enterprise group members in different States. In such cases, the system should include measures
Description	Under the insolvency code, there were no specific rules that address the possibility of running parallel but coordinated insolvency proceedings with respect to two or several members of a corporate group. The applicable legislation (International Insolvency Act and EU Insolvency Regulations) refers to each debtor individually and provides little assistance as to the possibility to achieve coordination and joint solutions to the insolvency of international group of companies. It should be noted that court practice in Romania derived from the application of both International Insolvency Act and EC Insolvency Regulation is very limited.
Assessment	The Romanian insolvency framework did not provide specific regulation for the insolvency of corporate groups with international elements. Although there were modern rules in line with best international standards that regulate the recognition of foreign proceedings and foreign insolvency representatives and which provide for mechanisms of cooperation within procedures, they did not refer to corporate groups

[298] The 2013 Draft Insolvency Law contained new provisions addressed to the management of groups of related enterprises in insolvency. The 2014 Insolvency Code likely carried these changes forward. These changes (in draft form) permitted procedural consolidation of groups of companies, and their joint administration in some respects. See Annex II.

	(but rather, to assets/establishments existing in a country other than the one where the debtor has its COMI/headquarters and, therefore, the main insolvency proceedings have been declared). In that state of the law, and with the lack of experience (reportedly, there has not been any case regarding international corporate groups in Romania), it would seem doubtful that the cooperation between judges and insolvency representatives of Romania and the foreign jurisdiction could be achieved without legal obstacle; furthermore, it seemed difficult that one same representative would be appointed for several corporate entities belonging to the same group.
Comment	It was recommended to consider enhancing the current regulation of cross border insolvency issues to incorporate specific aspects which arise in the insolvency of corporate groups: the law should provide legal instruments that ensure the streamlined collaboration of insolvency courts and representatives of insolvent debtors with proceedings open in different jurisdictions; and, allow for the possibility of the appointment of the same person/entity to manage the procedures of different debtors within the same group. Different policy options may be found in the newly approved Part III of the UNCITRAL Legislative Guide, on the Insolvency of Enterprise Groups.
	PART D. IMPLEMENTATION: INSTITUTIONAL & REGULATORY FRAMEWORKS
Principle D1	**Role of Courts** **D1.1** Independence, Impartiality and Effectiveness. The system should guarantee the independence of the judiciary. Judicial decisions should be impartial. Courts should act in a competent manner and effectively. **D1.2** Role of Courts in Insolvency case. Insolvency case should be overseen and impartially disposed of by an independent court and assigned, where practical, to judges with specialized insolvency expertise. Non-judicial institutions playing judicial roles in insolvency case should be subject to the same principles and standards applied to the judiciary. **D1.3** Jurisdiction of the Insolvency Court. The court's jurisdiction should be defined and clear with respect to insolvency case and matters arising in the conduct of these proceedings. **D1.4** Exercise of Judgment by the Court in Insolvency case. The court should have sufficient supervisory powers to efficiently render decisions in proceedings in line with the legislation without inappropriately assuming a governance or business administration role for the debtor, which would typically be assigned to the management or the insolvency representative. **D1.5** Role of Courts in Commercial Enforcement Proceedings. The general court system must include components that effectively enforce the rights of both secured and unsecured creditors outside of insolvency cases. If possible, these components should be staffed by specialists in commercial matters. Alternatively, specialized administrative agencies with that expertise may be established.
Description	**D1.1** The judicial system in Romania follows the rule of law. Justice is exclusive, impartial and equal for all. The Romanian court system consists of the Romanian Supreme Court (in Romanian, "*Înalta Curte de Casaţie şi Justiţie*"), Courts of Appeal (in Romanian, "*Curte de Apel*"), Tribunals (in Romanian, "*Tribunale*"), specialised Tribunals (in Romanian, "*Tribunale specializate*"), military Courts, and Courts of general jurisdiction (in Romanian, "*Judecătorie*"). The Romanian judicial system includes the Constitutional Court, acting independently of any other public

	authority as the highest protector of the Romanian Constitution's supremacy. The procedural rules applicable in Romanian courts comply with the general principles of European procedural law, namely the principles of independence, impartiality and effectiveness. The Romanian Constitution provides in Article 124 that justice is exclusive, impartial and equal for all and judges are independent and must observe the rule of law. The national judges' impartiality and independence is protected by the Superior Council of Magistracy ("*Consiliul Superior al Magistraturii*"), amongst whose main responsibilities is the protection of judges' professional reputation against any action that purports or may have the effect of hindering independence and impartiality in the administration of justice. The principle of effectiveness is indirectly provided by article 21 of the Romanian Constitution, which provides for a right to a fair trial and ruling within a reasonable amount of time, so as to effectively solve the disputes at issue. Effectiveness should also be achieved through the application of the principle of timely resolution of cases (in Romanian, *celeritate*), which implies that cases brought before the court should be resolved as fast as possible and that procedures must be designed having time-efficiency as one of the main goals. More specifically, Romanian Insolvency Act No. 85/2006 provides in its Article 5 that all participants in an insolvency case must ensure that the case is dealt with in a timely fashion. **D1.2** After the recent reform in the Romanian judicial system, jurisdiction to hear disputes regarding civil and commercial activities is no longer split based upon the nature of the dispute (civil or commercial, respectively). Nonetheless, in insolvency or SOA cases specialised insolvency judges (in Romanian, "*Judecători Sindici*") are assigned to assess such cases. The *judecători sindici* exercise their responsibilities as *Tribunal* judges and no other non-judiciary institutions are involved in the process. The legal principles and the national legislation on judicial proceedings, namely Act No. 304/2004 on judiciary and the Internal Regulation on the operation of Romanian Courts, equally apply to the insolvency judges. **D1.3** Insolvency cases and almost all matters related to them are subject to a special jurisdiction; they follow a special procedure, and are heard by a specialised insolvency judge. The Insolvency Act instituted both subject matter and the personal jurisdiction rules. Both SOAs and insolvency cases (including all relevant stages such as general supervisory period, reorganization, and liquidation) fell in the subject matter jurisdiction of insolvency judges. Venue in such cases was governed by straightforward rules, in that the *tribunal* operating in the area where an eligible debtor's main office is located had exclusive jurisdiction to hear an insolvency case in relation to such debtor. Tribunals have jurisdiction to deal with insolvency cases as trial courts and insolvency judges are allocated the cases on a random basis. Randomization occurs by using a computerised system so as to protect the impartiality of justice according to Article 53 of Act No. 304/2004 on judiciary. **D1.4** Under the Insolvency Act, the insolvency court (acting through a one-person panel consisting of an insolvency judge) enjoyed sole jurisdictional power in the proceedings, whilst the management and administration responsibilities were to be carried out by debtors and insolvency trustees appointed on the case. Insolvency courts have general subject matter jurisdiction regarding almost all actions arising from or in relation to an insolvency case.

	Article 11 of Insolvency Act establishes the fundamental responsibilities of an insolvency court in a non-exhaustive manner, including: • Declaring the commencement of an insolvency case and resolving on setting its course either as general or fast-track liquidation proceedings; • Hearing both the debtor's opposition to the creditors' insolvency petitions, and the creditors' opposition to the insolvency court's order commencing an insolvency case; • Confirming the insolvency trustee appointed by the creditors' assembly (either as *administrator judiciar* or *lichidator*); • Ruling upon all objections to the actions and omissions of an insolvency trustee; • Hearing petitions for annulment of the resolutions that are passed by the creditors' assembly; • Ordering the closing of an insolvency case. An insolvency case requires the participation of specialised professionals, certified insolvency practitioners, appointed as insolvency trustees (and acting in various stages of the case in two distinct positions, *i.e.*, as *administrator judiciar* and/or *lichidator*). Insolvency Act, Art. 3. 27, defined an *administrator judiciar* as an insolvency practitioner participating in an insolvency case during both the general supervisory and reorganization phases, and fulfilling mostly management and administrative responsibilities. A *lichidator* was an insolvency practitioner responsible for running the debtor's activity in liquidation, both in the general and fast track proceedings of an insolvency case.[299] **D1.5** The decisions rendered by insolvency courts under the IA were, according to Article 12 of Insolvency Act, final and self-executory. Nonetheless, they could be appealed before appellate courts (in this case, the *Curți de apel*). The Romanian legislature has developed a legal framework for enforcing the rights of both secured ("*creditori garantați*") and unsecured creditors ("*creditori chirografari*") outside insolvency cases. Enforcement is the responsibility of the enforcement officers (which, as indicated above, at **Principle A5**, may be authorized to act as either judicial enforcement officers or fiscal enforcement officers). Both the judicial and fiscal enforcement officer systems in Romania constitute auxiliary systems, independent of, but interacting with, the national court system, according to Act No. 188/2000 on judicial enforcement officers and Code of Fiscal Procedure.
Assessment	The Romanian Constitution, laws and practices provide for the independence and impartiality of the judiciary. The Constitution also institutes a right to a fair trial with a timely verdict resolving the matters at issue between the parties. In the insolvency domain in particular, the Insolvency Act obligates all participants in an insolvency case to ensure that it is dealt with in a timely manner.

[299] Based on a review of the 2013 Draft Insolvency Law, this structure appears to have been carried forward.

	There is a separate jurisdiction for insolvency matters, with specially assigned judges operating pursuant to a specialised procedure. The existence of insolvency judges (syndic judges) is a positive element of the Romanian judicial system. Notwithstanding this, the expected benefits of insolvency specialization have not fully materialized yet due to several remaining weaknesses. First, there are no specialized insolvency tribunals or sections covering most of the country but, rather, some judges with exclusive competence on insolvency within a few civil and commercial tribunals; and only in a reduced number of jurisdictions (14 such judges in Bucharest, and a lower number in four additional jurisdictions). Second, previous experience on insolvency and related matters is not required for being appointed as a syndic judge. Third, there are no specialized insolvency sections at the courts of appeals, and at appeal level many times insolvency cases are not assigned to judges with previous experience as syndic judges.
Comment	Consideration should be given to enhancing the efficacy of the specialised insolvency judicature through extending it to regions currently lacking it but where need is demonstrated; and by ensuring that appellate tribunals hearing insolvency matters have at least one judge with directly relevant prior insolvency expertise. On expertise in insolvency matters as a precondition to appointment as an insolvency judge, see **Principle D2**, below.
Principle D2	**Judicial Selection, Qualification, Training and Performance** **D2.1** Judicial Selection and Appointment. Adequate and objective criteria should govern the process for selection and appointment of judges. **D2.2** Judicial Training. Judicial education and training should be provided to judges. **D2.3** Judicial Performance. Procedures should be adopted to ensure the competence of the judiciary and efficiency in the performance of court proceedings. These procedures serve as a basis for evaluating court efficiency and for improving the administration of the process.
Description	**D2.1** The status of Romanian judges and the functioning of the courts are regulated by Act No. 304/2004 on judiciary, Act No. 303/2004 on the status of magistrates (judges and prosecutors) and the Internal Regulation on the operation of Romanian Courts. All Romanian judges enjoy an equal status regardless of specialization or work experience. In order to be eligible for a judicial career an individual must fulfil the following requirements: • Exclusive Romanian citizenship, domicile in Romania and full legal capacity; • Law degree and proven substantial experience and professional training in the judicial field; • Good reputation and absence of any criminal convictions; • Excellent facility with the Romanian language; • Medical fitness for carrying out a legal profession and its particular duties;

	• Post-graduate degree from the National Institute of Magistracy (in Romanian,"*Institutul Naţional al Magistraturii*"). All judges are appointed to office by the President of Romania and they may not be transferred from one court to another without their consent in accordance with the principle of irremovability, which is guaranteed by the Constitution. Pursuant to Articles 5 to 8 of the Internal Regulation on the operation of Romanian Courts, judges have a series of responsibilities while exercising their profession and they are also subject to certain restrictions and incompatibilities. **D2.2** One of the objective criteria for the appointment of judges is the graduation from the National Institute of Magistracy, which is an essential prerequisite for being appointed as a judge. This national institution represents a post-graduate training facility designed for individuals pursuing a magistrate career. The Institute provides initial training for judges and prosecutors to be, as well as continuous professional training for the magistrates in office. Admission to the Institute is based on academic and psychological examination and provides every year a limited number of eligible seats. **D2.3** A system of assessment of judges' professional performance exists and is currently governed by Regulation of 4 October 2007 on the assessment of professional performance of judges and prosecutors, as subsequently amended and modified.
Assessment	The Romanian system of selection and appointment of judges seems to be transparent and reasonably adequate. The Superior Council of Magistrates (SCM) is the representative body of the judiciary with competencies in selection, appointment and promotion of judges. The National Institute of Magistracy, an institution under the supervision of the SCM, oversees the training of judges before and after their appointment. The National School of Clerks performs similar roles with respect to judicial officials. In theory, there are two ways to become a judge: (1) undertaking the two-year National Institute of Magistracy course and passing the final examination; or, (2) applying directly for a judicial position open to lawyers with five years of experience, and passing the required exam. In practice, the latter way seems to be somewhat exceptional, and in the recent past most appointments would have been made using the first selection mechanism. As a consequence, the majority of newly appointed judges do not have practical experience with real life business transactions, commercial disputes, enterprise insolvency and financial distress, etcetera. Besides, the judicial school does not provide any courses on basic elements of accounting, finance and economics to future judges. Users of the judicial system express concern about the lack of sufficient understanding of many judges with respect to complex commercial transactions and insolvency procedures. Particularly in commercial and insolvency cases, judges seem to require more financial and business training.
Comment	Concerted efforts are required to recruit to the specialist insolvency bench individuals with appropriate expertise in commercial legal matters, particularly insolvency. The National Institute of Magistracy should consider ways of strengthening its

	course offering to cover basic elements of accounting, finance and economics.
Principle D3	**Court Organization** The court should be organized so that all interested parties – including the attorneys, insolvency representative, debtor, creditors, public and media – are dealt with fairly, timely, objectively and as part of an efficient, transparent system. Implicit in that structure are firm and recognized lines of authority, clear allocation of tasks and responsibilities, and orderly operations in the courtroom and case management.
Description	The Romanian legal system is based on the principle of equality: all entities are legally equal with no privileges or discrimination on grounds of nationality, religion, ethnicity, gender, sexual orientation or any other discriminatory criteria. All entities are entitled to an effective and fair trial judged by an independent and impartial panel/judge. All hearings are public, except for certain cases provided by law, and decisions are rendered publicly. Within Tribunals and Courts of Appeal, special insolvency compartments are being constituted pursuant to Articles 35 paragraph 2, and 36 paragraph 3 of Act No. 304/2004 on judiciary organization. In light of Insolvency Act No. 85/2006 the entities responsible for procedural aspects of the insolvency case are: the courts, the specialised insolvency judge ("*judecător sindic*"), the insolvency trustee (acting as judicial administrator or liquidator). Its task is to ensure the efficient realization of the operations and procedures imposed by law as well as the full exercise of the rights and obligations of the participants to insolvency cases. All judicial proceedings must respect the principle of contradictory (or adverseness) which implies active participation of the litigation parties in the development of the judgment, both for proving and supporting their arguments, as well as for combating the claims of the adverse party and to express their views on the decision the court may choose to rule. The insolvency trustee acts as a representative of the rights of both secured ("*creditori garantați*") and unsecured creditors ("*creditori chirografari*") in insolvency cases. As opposed to the general rules for organizing the panels, cases of insolvency and insolvency are heard before a single judge, the specialised insolvency court ("*Judecător Sindic*"). Hearings take place before a single judge both on first grounds and on grounds of appeal.
Assessment	The efficiency of courts and judges that deal with commercial and insolvency cases is not fully satisfactory. In particular, cases take too long to be resolved and the terms contemplated in the law are rarely met. Several issues should be addressed to enhance the effectiveness of the mentioned courts. First, many courts and judges have to deal with an excessive number of cases. As regards insolvency cases, the workload of most syndic judges is significant. Approximately 2,000 new insolvency cases have been filed per year after the global financial crisis, representing almost 11 per cent of the total civil and commercial caseload of the Romanian judiciary. And, as of mid-2012, some 3.400 insolvency cases were pending in the courts. In Bucharest, each syndic judge opened

	approximately 400 new insolvency procedures in 2011. Furthermore, these numbers do not reflect all the additional contentious cases (incidents) that arise in the course of insolvency procedures and should be dealt with before the syndic judge of the main proceeding. Second, a system based on hearings for almost all petitions and procedural steps overloads the courts and judges, and contributes to delay in the resolution of cases. For example, a typical insolvency procedure demands a hearing every 3 months, plus separate hearings in each incident, making the total number of hearings very difficult to manage. It is estimated that each syndic judge has to conduct thousands of hearings per year. Due to the insufficient number of clerks and courtrooms, a court session is scheduled every two weeks and approximately 120 hearings must be conducted in each session. Third, judges cannot devote all their time and efforts to jurisdictional activities because the law requires them to perform many administrative tasks.
Comment	Consideration should be given to increasing the number of judges in currently overburdened insolvency tribunals, as well as the number of courtrooms and clerks. Simplification of the procedure and elimination of hearings at many procedural steps would be needed to improving judicial effectiveness. To the extent practicable, administrative tasks currently performed by judges should be assigned to non-judicial officials in order to make better use of the courts human resources.
Principle D4	**Transparency and Accountability** An insolvency and creditor rights system should be based upon transparency and accountability. Rules should ensure ready access to relevant court records, court hearings, debtor and financial data and other public information.
Description	Act No. 304/2004 on judiciary organization provides regulations and instructions aimed at providing transparency of the judiciary. Pursuant to Article 116, all Courts benefit from special auxiliary compartments with their main area of activity focused around gathering, conserving and providing information. These compartments are: • The registry ("*Grefă*"); • The Record bureau ("*Registratură*"); • The Archive; • The Information and Public Relations Bureau; • The library; All hearings and decisions of the court are public except for certain cases provided by law. Most courts benefit from an official website where court decisions, hearing schedules and other related information, are being published: http://portal.just.ro/ All court hearings are, according to Article 13 Act No. 304/2004 on judiciary organization, recorded on audio or video platforms, or steno-graphed. The registrar

	or the stenographic specialist must record all arguments put forward, questions, statements of everyone present in the court room. Upon request, the parties may receive a copy of the recorded data. In light of Article 116 of Act No. 304/2004 on judiciary organization, the Information and Public Relations Bureau maintains communication between the court and the media so as to guarantee the transparency of the judiciary. The chairman of this compartment can be either a judge appointed by the President of the court or a journalism graduate elected by contest.
Assessment	The case law is far from being transparent as only very few court decisions are publicly available based on obscure selection criteria (see further Principle **D5**). This leads to inconsistencies in the application and interpretation of the law by the judges as well as by insolvency professionals and law practitioners generally.
Comment	Accountability of judges for discretionary rulings and gross mistakes in their judgments should be regulated, as to improve the awareness of the judges on their role in the judicial system.
Principle D5	**Judicial Decision Making and Enforcement of Orders** **D5.1** Judicial Decision Making. Judicial decision making should encourage consensual resolution among parties where possible and otherwise undertake timely adjudication of issues with a view to reinforcing predictability in the system through consistent application of the law. **D5.2** Enforcement of Orders. The court must have clear authority and effective methods of enforcing its judgments. **D5.3** Creating a Body of Jurisprudence. A body of jurisprudence should be developed by means of consistent publication of important and novel judicial decisions, especially by higher courts, using publication methods that are conventional and electronic (where possible).
Description	**D5.1** Consensual resolution methods are discussed above at **Principle B4**. **D5.2** Article 12 of the Insolvency Act No. 85/2006 stated that decisions of the specialised judge were final and enforceable. They could only be separately appealed. The system of enforcement of court decisions is separated from the court, according to Act No. 188/2000 regarding the activity of judicial enforcement officers. One of their main responsibilities is implementing the procedure of forced execution of court decisions. As a general principle of law, court decisions are mandatory and their recipients must comply with the judgement voluntarily. If they fail to do so the procedure of forced execution can be initiated by a creditor. **D5.3** Romanian courts, namely the Romanian Supreme Court ("*Înalta Curte de Casaţie şi Justiţie*"), Courts of Appeal ("*Curte de Apel*"), Tribunals and Courts of general jurisdiction ("*Judecătorie*"), publish a selection of the decisions they render on their public portal: http://portal.just.ro/. This selection is made by the courts themselves and does not include the integral texts of the decisions. Moreover, there

	is no information on whether the decisions have been executed or if they are taken on appeal to a higher court. Aside from this electronic database, law reviews of case law are available to the public. These digests are issued by private entities and constitute private initiatives of judges, former judges or judicial experts. At present, these are the only sources of reported case law.
Assessment	Predictability of the judicial system is currently affected by frequently inconsistent interpretation of the law by different courts and judges. The formal mechanism for unifying judicial interpretation of the law ("recourse in the interest of the law" before the High Court of Justice of Romania) does not seem to be an effective method for resolving this problem: only a limited number of decisions on limited issues have been issued in the mentioned recourse. Creating a complete body of jurisprudence, easily accessible, could contribute to eliminate many incoherent judicial decisions. The current means of publication of judicial precedents, however, would not allow access to all judicial decisions; in many cases the full text of the motivation of judicial decisions is not published, and search criteria by subject matter is not feasible.
Comment	Consideration should be given to ensuring that all reasoned judicial decisions are published. Consideration should also be given, by institutions responsible for advocacy and magistracy training, to encourage courts to request, and lawyer advocates to cite, judgments of courts in previous cases addressing matters material to those in dispute in the present case. Even where previous jurisprudence is not 'binding' on courts, it can be relevant to the court's reasoning by indicating how fellow judges might have resolved similar issues. This could enhance the degree of uniformity of judicial decision-making and thus the predictability of commercial litigation.
Principle D6	**Integrity of the System** **D6.1** Integrity of the Court. The system should guarantee security of tenure and adequate remuneration of judges, and personal security for judicial officers and court buildings. Court operations and decisions should be based on firm rules and regulations to avoid corruption and undue influence. **D6.2** Conflict of Interest and Bias. The court must be free of conflicts of interest, bias and lapses in judicial ethics, objectivity and impartiality. **D6.3** Integrity of Participants. Persons involved in a proceeding must be subject to rules and court orders designed to prevent fraud, other illegal activity and abuse of the insolvency and creditor rights system. In addition, the court must be vested with appropriate powers to enforce its orders and address matters of improper or illegal activity by parties or persons appearing before the court with respect to court proceedings.
Description	**D6.1** The legal framework for the Romanian judicial system provides a series of mechanisms aimed at guaranteeing the security of the courts. In respect to the security of tenure, Article 2, paragraphs (1) and (2) of Act No. 303/2004 on the status of judges and prosecutors acknowledges the principle of immovability. Judges are appointed by the president of the State and are irremovable. They can be

	transferred, delegated or promoted only with their consent and the procedure of suspension or dismissal is strictly regulated by law. Furthermore, suspensions and dismissals are supervised by the Superior Council of Magistracy ("*Consiliul Superior al Magistraturii*"). In its last paragraph, the same article states that any natural or legal person, organisation, authority or institution must respect the independence of judges. Pursuant to Title III of Act No. 303/2004 on the status of judges and prosecutors, judges are subjected to rights and obligations in accordance to the complexity of their responsibilities and aiming at guaranteeing their independence and impartiality. As such, Article 74 regulates the issue of remuneration of judges which is to be established following certain criteria imposed by law: the status of the court, the title and position of the judge, the experience in the field, and others. Remuneration of judges cannot be diminished or suspended unless specified by law and they benefit of 35 paid free working days and a substantial pension after retirement. A judge, even following resignation, cannot be held responsible for an opinion expressed during tenure or for any decision rendered by the court unless it is a case of disciplinary offense as defined by law. Article 94 of Act No. 303/2004 on the status of judges and prosecutors states that judges can be held responsible, criminally, disciplinary or civilly. They can be preventively detained or arrested only with the prior consent of the Superior Council of Magistracy ("*Consiliul Superior al Magistraturii*"). The sanctions in case of disciplinary offense may range from official warning or reduction of salary to suspension or even removal. **D6.2** In order to preserve the objectivity and impartiality of judges and to prevent conflicts of interest, the Romanian Procedural Codes (both Civil and Criminal) offer two mechanisms: abstention ("*Abţinerea*") and recusal ("*Recuzarea*"). Abstention represents the situation in which a judge conscious of the fact that his objectivity is liable to be hindered due to specific reasons provided by law, requires his withdrawal from trial. Pursuant to Article 25 of the Civil Procedural Code, the judge who is aware of the existence of a reason for abstention is obliged to immediately ask the withdrawal from trial. In a case of recusal the parties, or one of them, require the removal of one or more judges from judgement based on certain grounds of incompatibility provided by law. The grounds for recusal or abstention are identical and are expressly provided by law.
Assessment	
Principle D7	**Role of Regulatory or Supervisory Bodies** The bodies responsible for regulating or supervising insolvency representatives should: - Be independent of individual representatives; - Set standards that reflect the requirements of the legislation and public expectations of fairness, impartiality, transparency and accountability; and, - Have appropriate powers and resources to enable them to discharge their

	functions, duties and responsibilities effectively.
Description	Under Romanian law, insolvency practitioners benefit from special legislation and an independent supervisory body, the National Union of Romanian Insolvency Practitioners ("*Uniunea Naţională a Practicienilor în Insolvenţă din România*"). The legislative framework includes the Emergency Ordinance ("*Ordonanţă de Urgenţă*") No. 86/2006 on organising the profession of insolvency practitioner, the Insolvency Practitioners` Code of Conduct and the Regulation on organising and exercising the profession of insolvency practitioner (herein after referred to as "the Regulation"). Pursuant to Chapter I of the Regulation and Chapter VI of the Emergency Ordinance ("*Ordonanţă de Urgenţă*") No. 86/2006 on organising the profession of insolvency practitioner, the Union is a public legal entity, autonomous, having a personal patrimony, freedom of decision, self-regulatory competencies and responsibilities of supervision and disciplinary control. Membership of the Union is a prerequisite for practising in this profession and all active members must be registered on the public Register of the Union ("*Tabloul UNPIR*"). The Union imposes upon its members a Code of Conduct having the following core principles: 1) Independence in practice of the profession; 2) Moral integrity, honesty and fairness; 3) Respect for professional secrecy; 4) Avoidance of conflicts of interest and duty; 5) Fair competition; 6) Non-competitive practice; 7) Respect of the rule of law; 8) Professional competency in terms of academic and practical preparation. Insolvency practitioners are liable towards the Union for ethical misconduct. In case of non-compliance to the rules of this profession acknowledged by the Code of Conduct and the complementary legislation, the Disciplinary Council of the Union is responsible for analysing the facts and applying the necessary sanctions. Pursuant to Article 74 of the Emergency Ordinance No. 86/2006 on organising the profession of insolvency practitioner, as amended most recently in November 2012, the possible sanctions for disciplinary offense may be: (i) Written warning; (ii) Suspension from exercising this profession for a period of time ranging from 3 months to one year; (iii) Monetary sanctions which are redirected to the budget of the union; (iv) Permanent exclusion from the Union which would render the exercise of this profession impossible permanently.

	The Union has recently been conferred with the power to set up and operate the National Training Institute of Insolvency Practitioners (Law No. 222 of November 2012). The law provides for the creation of a liquidation fund financed by 20% of the fees received by the Office of the Trade Register for registration transactions. The fund, administered by the Union, covers no-asset cases. In general, insolvency practitioners are permitted to charge fees on a fixed or success basis, or on a combination of the two. The court sets a fee for the initial observation period, which may be amended at the first creditors' meeting. The fee level is set by reference to factors such as debtor size and complexity, the risk of labour conflict, and the extent and complexity of any disputes.
Assessment	The insolvency profession is self-regulated, with statute vesting supervisory and regulatory powers in a body called the National Union of Romanian Insolvency Practitioners. Membership of the Union is mandatory for all insolvency practitioners. The Union promulgates a Code of Conduct under which practitioners must act with independence, integrity, honest, fairness, and respect for professional confidentiality, and must avoid conflicts of interest and duty. The Code specifies the standards to be met by practitioners (see below at **Principle D8**). The governing statute stipulates a disciplinary process regarding possible professional offences and provides for a range of sanctions, including written warnings, fines, suspension, and permanent exclusion from the profession.
Comment	On the deficiencies of the regulatory framework in practice, see below at **Principle D8**.
Principle D8	**Competence and Integrity of Insolvency Representatives** The system should ensure that: - Criteria as to who may be an insolvency representative should be objective, clearly established and publicly available; - Insolvency representatives be competent to undertake the work to which they are appointed and to exercise the powers given to them; - Insolvency representatives act with integrity, impartiality and independence; and - Insolvency representatives, where acting as managers, be held to director and officer standards of accountability, and be subject to removal for incompetence, negligence, fraud or other wrongful conduct.[300]
Description	Chapter III of the Emergency Ordinance No. 86/2006 on organising the profession of insolvency practitioners regulates the possibility of becoming an insolvency practitioner. A candidate to join the profession must meet three criteria: 1. They must have a Bachelor in Law or Economic Science and experience in that field of minimum 3 years since graduation; 2. They must not be subjected to the 'indignity cases' provided under Articles 25

[300] *See* Principle B2.

<table>
<tr><td></td><td>to 27 (effectively, conviction for a crime of intent or an interdiction on practising as an insolvency practitioner);

3. They must have passed the admission exam set by the Union for becoming an insolvency practitioner.

There is also a 2-year internship requirement, though individuals with at least 10 years legal or economic professional experience are exempt (Law No. 222 of November 2012).

This profession is incompatible with:

(a) A remunerated profession other than the ones expressly permitted by law;

(b) Activities which hinder human dignity, the independence of this profession or the social morale;

(c) Lack of legal capacity of a natural person;

(d) Being a Judicial enforcement officer or Notary Public.

In light of their responsibilities, the judicial administrator and liquidator can be assimilated, in terms of responsibilities, to company managers.

The Insolvency representatives, namely the judicial administrator and the liquidator are both appointed by the Court.[301] As such, they are responsible for effectively complying with the rule of law and acting with impartiality. Insolvency Act No. 85/2006 provides remedies for contesting actions taken by insolvency practitioners. Pursuant to articles 21, paragraph 2, and article 22, paragraphs 1 to 4, any interested party may challenge the decisions of the judicial administrator which can further result in the specialised judge having the possibility to apply sanctions such as:

- A judicial fine in account of the judicial administrator;

- Replacement of the judicial administrator;

- Obligation to repair the damage caused by the judicial administrator.

Furthermore, both Insolvency Act and Company Act institute liability for criminal misconduct of insolvency practitioners.</td></tr>
<tr><td>Assessment</td><td>Notwithstanding what on paper is a generally adequate legal and regulatory framework for the insolvency profession, there is widespread dissatisfaction with its operation in practice. There are frequent allegations, including in the public domain, of collusion between debtors (and/or creditors) and insolvency practitioners, which are said to enable commencement of insolvency proceedings in districts less accessible to some or most other creditors, and under which the debtor's management may 'tunnel' or strip assets out of the debtor's estate without risking real accountability.</td></tr>
<tr><td>Comment</td><td>Urgent consideration should be given to strengthening the Code of Conduct</td></tr>
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[301] We are advised that 2014 Insolvency Code now provides that, in the event the debtor has proposed a candidate as judicial administrator, and the creditors then propose a different candidate, the court should select the candidate proposed by the creditors.

	applicable to insolvency practitioners to enforce their duties of independence and impartiality. Courts should also be encouraged to refuse to commence or continue insolvency proceedings unless convinced with compelling evidence that their district is objectively best suited to handle the case, depending upon the nature and location of the debtor's assets, affairs, and creditors. The creditors' committee should be better enabled to approach the court with jurisdiction over the case if it has reason to believe that the insolvency practitioner is engaged in misfeasance or nonfeasance, and should also be provided better access to a low-cost professional complaints procedure facilitated by but independent from the Union.[302] In this respect, it is paramount that all creditors and the debtor have access to complete and comprehensive information regarding the administrator's decisions and activities and to the accounting records of the debtor during the periods of observation, reorganization and liquidation, to be able to effectively challenge his/her decisions. Consideration should also be given to the manner in which insolvency practitioners are appointed and compensated and how this affects the subsequent control of their decision throughout the insolvency process.

[302] We are advised that the 2014 Insolvency Code contains a provision, at article 84, which permits the syndic judge to impose all or part of the liabilities of the debtor on the special administrator, if it can be shown that the actions of the special administrator during the proceeding have caused injury or loss to the creditors.

Annex II: Supplemental Note to the Report on Observance of Standards & Code, Romania

Analysis of Romania Draft Law[1] on Pre-Insolvency and Insolvency Proceedings

N.B. This note is based on a desk review of the English translation of the New Insolvency Code as submitted to the Insolvency and Creditor/Debtor Rights Team at the World Bank in draft form as of September 13, 2013, together with the Law as amended and enacted by Emergency Decree, an English translation of which was furnished to the team on October 17, 2013. The analysis in this note is strictly based on the comparison of the provisions with the international standards for insolvency regimes, and does not fully take into account local legal and business culture in Romania.

I. Executive Summary

A translated copy of the draft law on Pre-insolvency and Insolvency Proceedings (amending the existing insolvency legislation of Romania) was provided to the Insolvency and Creditor Rights (ICR) team for review and comment, with a view to comparing the proposed revisions with international standards for insolvency regimes. An English translation of the draft law as further amended and enacted by Emergency Decree was also provided for further review and comment.[2] Those additional comments are incorporated in this Analysis.

As a general observation, the revisions have been built into the pre-existing structure of the Romanian insolvency law as enacted in the Insolvency Act of 2006, and as later amended. Major proposed revisions included the incorporation into the law itself of a revised scheme for dealing with pre-insolvency financial distress, the addition of new chapters for the insolvency of groups of companies, for credit institutions and for insurance companies, the incorporation into the proposed Code of the chapter on cross-border insolvency issues, and new chapters laying out rules for the coordination of the insolvency of groups of companies, and for international private law relations with respect to the insolvency of credit institutions and insurance companies. In addition, many of the revisions directly addressed issues that were highlighted in the preliminary drafts of the Report on the Observance of Standards and Codes.[3]

In general, it can be stated that many of the proposed revisions made address problems that had earlier been highlighted by the World Bank ICR team, and bring the Romanian insolvency law into closer alignment with international standards. There were a number of areas, however, that still required further consideration. Key issues included further attention to due process considerations, especially as they applied to the amount of time allowed for completing significant tasks, a reexamination of the priority

[1] We are aware that the law as enacted by the Emergency Decree was later stricken down by the Constitutional Court. However, we are advised that the basic structure of that draft formed the basis for the law that was later submitted to Parliament, and ultimately enacted on 15 April 2014. We have been advised that the new law includes additional amendments and improvements. As of the date of this Note, the ICR team had not reviewed that law. The analysis contained in this Note is thus confined to the draft as it was enacted by Emergency Decree in 2013. For ease of reference, that draft is referred to in this Note as "the draft law."

[2] The English translation of the amended new Code was received by the team on October 17, 2013.

[3] At the request of the Romanian Ministry of Justice, the ICR team prepared and delivered an initial draft of the Report on Observance of Standards and Codes (ROSC) on Insolvency and Creditor/Debtor Regimes in Romania.

scheme, especially as it affected bondholders both in the context of liquidation and reorganization, a rethinking of the methodology for claims allowance (in order to reduce the time spent in the observation period), an enhanced scheme of protection for post-opening lending, further refinement of the voting procedures for reorganizations, and further consideration of the fee structure for insolvency practitioners, which in some cases could cause cases to incur significant additional expense.

II. Detailed Discussion

1. Triggering liability in insolvency (Principle B2)

The draft law was apparently not amended to address the recommendation in the draft ROSC regarding director and officer accountability. *See* **Articles 169-173.** Importantly, the draft law should clarify the liability of *de facto* and 'shadow' managers as well as those acting *de jure*; it may further provide appropriate mechanisms for the funding of actions under these provisions; and clarify that lenders and professional advisors acting in good faith and at arm's length from the debtor are not intended to become subject to liability. To comply with international standards, consideration may be given to putting more focus on civil liability for mismanagement in order to protect the legitimate interests of creditors and other stakeholders on the one hand, and not adversely affecting successful reorganizations or discouraging participation in the management of companies and the taking of business risks, on the other hand.

2. Informal Workout Procedures (Principle B4)

Title I of the draft law incorporated pre-insolvency remedies (preventive concordat and ad hoc mandate), formerly contained in a separate law.[4] There was a definition of "debtor undergoing financial distress" to define who should be eligible to use the procedures. *See* **Article 23(1).** This qualification had the positive value of preventing debtors from using the procedure simply to restructure debt for their own private gain without any real need for the remedy. It also, however, had the negative effect of requiring the syndic judge to determine what constituted "undergoing financial distress." The phrase is not defined in the statute. In addition, it was formerly the case that credit institutions and insurance companies were not eligible to use these remedies, and presumably that remained the intention. However, the definition of "debtor" was sufficiently broad as to include these institutions, and they were not expressly excluded in **Article 16.** For clarification, they should be listed as a type of debtor not permitted to use these provisions.

The draft ROSC noted that the preventive concordat (scheme of arrangement) remedy appeared to be underused in practice and attributed that to, among other things, the suspension of interest on claims during the procedure, and the high percentage required to make the concordat binding on dissenting creditors. There was also a concern raised about the amount of time the procedure would take.

The new provision for the suspension of interest was ambiguous. *See* **Article 29(2).** As translated, it read that, as of the time of the decision is ascertained by the syndic judge, "the lapse of interests, penalties and of any other expenses in connection with the claims is lawfully suspended as regards the creditors signing it …". Assuming this meant that interest was suspended upon court approval of the concordat, creditors were placed at a disadvantage because they had to bargain for interest payments. A preferred solution is

[4] Law No. 381/2009 on Schemes of Arrangement and Ad-Hoc Mandates.

that interest accrue and be payable unless the concordat, by agreement, provides for its reduction or suspension.

The procedure for preventive concordat contemplated two levels of approval, the first being a consensual agreement, achieved by a 2/3rd majority vote, which was not binding on dissenting creditors, *see* **Article 29,** and the second being an homologation of the agreement by the syndic judge, requiring a 90% supermajority, *see* **Article 30**.[5] As a practical matter, there was little point of a two-thirds percentage to approve the concordat if the remaining third were not bound unless a higher percentage was achieved. And there was little point in setting a higher percentage that was in most cases unachievable anyway. What is more, dissenting creditors were not likely to be motivated to negotiate, because they had little fear that a homologation could be achieved in any event, given the high bar.

It makes more sense to simply set the overall approval percentage at an appropriate and more achievable supermajority (65% to 75%), and to then make the approved concordat binding on dissenters once it is approved by the court without necessity of further hearing. In addition, the term of a binding procedure should be the same (the draft law provides for two different terms – 24 months and 18 months). The draft law extended the term of concordats to 24 months. There should be no separate term for concordats that bind dissenters. All concordats should be binding on dissenters. Consideration should be given to simply combining Articles 29 and 30 into a single Article, governing a single procedure.

There were clearer deadlines for negotiating a concordat that impose a 60 day deadline (with the possibility of one extension). **Article 26(2).** These deadlines help expedite the process and make it more usable.

The draft ROSC referred to the unwillingness of budgetary creditors to participate in the concordat process. It was believed that budgetary entities were unsure of their authority to enter into such negotiations, or to agree to a compromise of their claims, because agreements to reduce a budgetary liability might be seen as impermissible state aid. The draft ROSC suggested that the preventive concordat regime might include a proviso expressly authorizing budgetary entities to participate actively in negotiations. The draft law, however, did not contain such an authorization. Instead, it contained a new private creditor test designed to avoid a finding of state aid. However, in the context of the preventive concordat, this test could create a new problem. The draft law as written permitted the court to homologate the preventive concordat over the objection of not only dissenting creditors but also budgetary creditors, *so long as the private creditor test is achieved.* **Article 24(2)(3), 30(5).** This created the potential that debtors might use the preventive concordat process expressly for the purpose of writing down budgetary claims without the consent of budgetary creditors. A better solution might be to consider permitting an extension of time beyond the period of the concordat in order to pay these types of claims.

Even if the problem with budgetary creditors were addressed, the preventive concordat process was seriously undermined by the very high threshold (90%) required for making a concordat binding on dissenting creditors. Because the concordat ought to be binding on dissenting creditors so long as it is approved by the required majority, the term in **Article 30(4)** should correspond to the new term of the plan – 24 months.

[5] The draft law reviewed by the ICR team had an 80% supermajority vote as the threshold for homologation. The law as most recently amended increased that percentage to 90%.

3. *Due Process; Time Lines (Principle C2)*

The draft law attempted to address concerns about appropriate notice to affected parties throughout the process. The specific use of the Insolvency Proceedings Bulletin as a means for notice was a welcome clarification. So also was the provision for a standard format for notice to be established by the Ministry of Justice, as well as the proviso that the Proceedings Bulletin be available in an electronic format (hopefully accessible via the Internet). No specific provision has been made to address the concern regarding more particular notice in other more generally circulated publications (such as local or national newspapers). At least in larger cases, such additional notice may be appropriate, though its value needs always to be balanced against its additional cost. It is noted that the notice to creditors following the opening of a proceeding was, in the draft law, required to be published not only in the Bulletin, but also in a largely circulated newspaper, at the expense of the debtor. **Article 99(3).**

Due process involves not only fair opportunity to receive notification, but also a fair opportunity to act on that notification. It was noted in the draft ROSC that many deadlines were so short that parties routinely requested extensions of time, on due process grounds and the courts felt obligated to grant those requests. That, in turn, resulted in converting what was intended to be a speedy process into a very slow process. A number of the revisions in the draft law sought to address these issues by extending the time allowed for various actions throughout the proposed Code to 7 days. A seven day deadline for responding may be too short to allow for realistic participation in a hearing or meeting, especially if the insolvency proceeding involves creditors spread throughout the country. However, ten calendar days would work.

Of special concern was **Article 48(1),** which provided for the calling of the Creditors Meeting on just 5 days notice. This seems too short, unless the Insolvency Proceedings Bulletin is published on weekends.[6] Shortened notice has a number of adverse consequences. First, it leads to complaints of lack of due process, which have the effect of delaying the resolution of the proceeding. Second, it may have the unintended effect of giving a relatively small group of creditors (or even just one creditor) significant power to make important decisions in the case– including the decision regarding who should be retained as judicial administrator, and how much that administrator should be paid. The quorum for a Creditor Meeting was set at 30%. While that number is likely low enough to assure that a Creditors Meeting will actually occur, the same percentage, coupled with short notice, could lead to unilateral action by a small group of creditors (or even one creditor).[7] Serious consideration should be given to increasing the period of notice in Article 48(1).[8]

A number of provisions measured the time for response from the date of receipt of a document. For example, **Article 62(4)** (as translated) required a valuator to respond to a letter within 5 days following

[6] It is understood that the Labour Code would prohibit the publication of the Bulletin on weekends.

[7] The commentator appreciates that provision was made for voting and participation by proxy. Five days is still a very short time frame. It must be remembered that while all the creditors will be familiar with the debtor, they are less likely to familiar with one another. A proxy system of participation can have the unintended consequence of ceding control of the case to one or two large creditors, or even to an entity interested in acquiring and bundling claims. Real participation, especially at the crucial stages of the first assemblage and consideration of a plan or a liquidation proposal, is preferable.

[8] If the notice period is extended to, say, 10 business days, then the law could also contain a recitation that such notice, properly given, satisfies due process. This would help to alleviate a concern raised in the ROSC regarding numerous complaints of inadequate notice under the former law.

receipt. It is not clear from the draft law itself when a document would be deemed "received" (other laws, such as the Civil Procedure Code might provide that answer). Optimally, either the concept of receipt should be defined in **Article 5,** or another standard (such as date of sending and a specified method) should be used. As an additional note, the 5 day period for responding, set out in Article 62(4), appears to be too short. Seven business days might be more reasonable. Of course, if the time for response is measured from the date the document or pleading is *sent,* then the issue becomes whether enough time is allowed from date of sending to date of likely receipt to date of response. For example, if a document to which a response is due is sent by mail, and if the time for response does not allow for the likely time it would take such a document to reach the affected party, then, as a practical matter, the party responding would still be deprived of due process, because it would not have a reasonable opportunity to respond before action is taken.

Article 67 required the debtor to furnish a significant amount of information in written form, including the debtor's financial statements, complete assets lists, a creditors list (with addresses, claim amount, and preferential rights, if any), a listing of payments and transfers over a four month period prior to filing, a profit and loss statement for the previous year, a list of owners and affiliated entities, a statement of what actions the debtor intends to take to pursue reorganization, a notarized affidavit stating whether the debtor has been in reorganization proceedings within the previous five years, and another stating whether managers have been sentenced for certain wrongful acts within that period, and a listing of "indispensable creditors." *See* **Article 134.** All of the foregoing had to be submitted within 10 days of the opening of the proceeding (former law required these materials in 5 days). This is a short time frame for such detailed materials.[9] The penalty for failing to file by the stated deadline was that the debtor was precluded from seeking a reorganization. Article 67 did not permit any extension of time for cause. The power to grant a limited extension of time would make practical sense, and would likely *increase* compliance with the substantive disclosure duties.

By the same token, if the debtor failed to furnish information sanctions were available, such as taking away the right to pursue a reorganization plan. These are positive changes. Criminal penalties were also available, but have apparently not been effective in the past.

There were no notice provisions with respect to **Article 78**, though there should have been. This article permitted a privileged creditor to obtain relief from the moratorium on creditor actions under certain circumstances. No provision was made to notify the debtor, creditors, the creditors committee, or the creditors' meeting of this action, even though the standard for relief included the contention that the encumbered asset is not needed for the reorganization. The asset in question would be sold pursuant to Articles 154-158, but those articles govern the sale process, not whether the sale should occur in the first place.

A similar concern is raised with respect to **Article 87(4)**. This new provision explicitly authorized the debtor to obtain financing during the observation period to conduct its daily activities, a welcome new

[9] The debtor was given (at least theoretically) an additional 30 days to prepare these materials before filing the petition, as **Article 66(1)** obligates a debtor to file a petition not later than 30 days from "the occurrence of insolvency." For smaller debtors this time frame would be adequate, but for the likelihood that their records are unlikely to be well organized. For larger debtors, the time frame is likely to be a challenge because their records are so voluminous. It was noted in the ROSC that debtors may not realize they are insolvent until after they have been insolvent for a period of time, further shortening the time to file (and to prepare these materials).

addition to the law. It is acknowledged that giving incentives to lenders to extend this sort of credit to debtors in insolvency proceedings is vital in order to assure that a debtor has sufficient liquidity to make use of the reorganization process. At the same time, however, the creditor body needs to be involved in the financing process as well, because such financing is likely to encumber assets of the debtor such that creditors might not recover anything in the event of a later liquidation. The appropriate calculus of risk should not be accomplished unilaterally. Creditors need to participate in the decision. The Article, as written, however required only the approval of those creditors whose own privilege rights would be adversely affected. The creditors ought to be notified in advance of such financing, and should have a say in whether such financing should in fact be granted, and, if so, on what terms.

4. Eligibility (Principle C3)

The draft law apparently required professionals who are registered as traders to undergo the simplified proceeding (essentially an expedited liquidation). **Article 32(2)(a).** If this was the case, then further consideration should be given as to why liquidation should be their only option. Many small to medium sized enterprises are capable of restructuring given the opportunity. Forcing them into liquidation proceedings is not consistent with the principle of restoring troubled enterprises to financial health.

Article 38 was less than clear regarding whether the specific debtors listed in subparagraph (2) were intended to be *qualified* for a simplified proceeding, or are *required* to pursue a simplified proceeding. Other provisions in the law suggestted that subparagraph (2) is an authorization rather than a requirement, but this article could be clarified to make that explicit if that was the intention.

It is clear that state-owned enterprises (*regii autonome*) qualified as debtors under the draft law. *See* **Article 3.** However, the definition of debtor in **Article 5** simply said that a debtor is an individual or entity that may be subject to the Insolvency Code. Article 38 then referred back to Article 5. This circularity made the law ambiguous. The law should specifically state whether these entities are debtors under the Insolvency Code. In addition, the circumstances of state-owned enterprises are such that a separate chapter might be devised for them, as was done for other specialized entities.

The draft law incorporated the specialized provisions handling the insolvency of credit institutions and insurance companies. There was, unfortunately, no specialized procedure for managing the insolvency of non-bank financial institutions, which are still under the regulatory supervision of the National Bank of Romania.

5. Applicability and Accessibility (Principle C4)

Concerns that had been raised in the draft ROSC regarding access were partially addressed in the draft law. For example, a creditor needed only remain unpaid for 60 days, rather than 90, to qualify as a petitioning creditor. **Article 5(20).** However, the threshold amount was only reduced from 45,000 RON to 40,000 RON, disqualifying smaller creditors from initiating proceedings. **Article 5(70).** By the same token, having the same threshold for debtors (as the draft law specified) does not produce balance – it qualifies entities with relatively low debt (perhaps even consumers) for insolvency. The threshold for debtors should not be set with a view to parity. It should be set with a view to disqualifying debtors deemed “too small” to justify the expense of the insolvency process. There is nothing inherently wrong with the threshold, but it should be set for the right reasons.

In addition, the standard for a qualifying creditor required that the debt be undisputed, liquid and enforceable, as did prior law. **Article 5(20).** This fails to address a concern that debtors might sue the creditor solely to make the debt "disputed" and thus no longer eligible to bring the petition. A rule that bars a debtor from suing a creditor once it files a petition might curtail some abuse.

There was also potential for abuse by creditors, in that a petitioning creditor could withdraw its petition if it were paid on its claim before the court ruled on it. **Article 72(5).** This might have had the unwelcome effect of encouraging creditors to bring actions even against solvent debtors in order to collect their claims. This made the draft law a perhaps too-ready a device for debt collection, using the *in terrorem* impact of the threat of a proceeding in order to collect on the debt. Principle C4.4 suggests that, in the face of a creditor petition, the debtor ought to be able to receive a "prompt decision *by the court* on … the dismissal of the creditor's application." The Principle does *not*, however, serve to encourage the filing of insolvency proceedings solely for their efficacy in obtaining payment.[10] Article 72(5) may be modified, or in the alternative, debtors should have the opportunity to seek damages from creditors who misuse this provision.

In answer to the concern raised regarding abuse by debtors' filing petitions deemed favorable to them, the draft law stated that the correct location for a proceeding was where the debtor had its main seat for the 6 month period preceding the filing of a request. The main seat is the debtor's place of registration. Later changes of the debtor's seat would not change the court location. **Article 41.**

The standard for filing appeals was tightened, as well as the requirement that the Appeal Court rule promptly. **Article 43.** Of special importance was the provision that appeals did not automatically suspend the proceedings before the syndic judge. **Article 43(4).**

It appears that consolidation of creditor petitions with debtor petitions was permitted by the draft law, provided the debtor filed first. **Article 66(7).** This was a good change from prior practice. Similarly, there was no longer a requirement that a contested creditor petition in which the debtor's opposition is overruled must be a liquidation proceeding. It could qualify as a general proceeding, meaning that reorganization remained a viable alternative. **Article 72.**

Debtors were required to furnish extensive financial information even if it was the creditor who submitted the petition. **Article 74.** This responded to one concern raised in the ROSC with regard to Principle C4.

Another issue raised in the draft ROSC with regard to Principle C4 was not been addressed, however. The draft law still required that a debtor file a petition within "30 days from the occurrence of insolvency" (as translated). **Article 65(b)**. The term was defined in **Article 5(29)** as the failure to pay *a creditor* for more than 60 days …". If the business were large, then even a temporary interruption in cash flow resulting in the nonpayment of a single creditor would trigger the necessity to file within just 30 days. The decision to file must be made by senior management, but the instance of debt default might only be known in the accounts payable department. While it is adequate that the *creditor* be able to file upon non-payment (as the Insolvency Code now provides), it may not be sensible for such a sensitive trigger to be applied to *debtors,* especially with such drastic consequences for the estate's managers. *See* **Article 337(1)**. The

[10] There are a number of reasons why this is important. Creditors with frivolous claims – or even creditors with no claims – could extract payment from debtors using the Code as a threat. Even disputed claims might end up being paid solely because of this credible threat. Solvent enterprises with reputations to preserve might find themselves the target of this sort of tactic.

draft ROSC suggested having the 30 day period run from the time that management with responsibility to file a petition knew or should in the exercise of reasonable diligence have known that an event of insolvency had occurred. That seems a more logical solution.

On a closely related point, the provisions for pre-insolvency remedies were included in the draft law. Those provisions included a regularized process for *ad hoc* negotiation, as well as a more formalized workout procedure (discussed above). But the old provision in Article 65(2) allowing for an exclusion from the debtor's obligation to initiate an insolvency proceeding in the event of "out of the court good faith negotiations aimed at restructuring its debts" appearred to overlap with these provisions. It may be appropriate to keep this additional provision, but it might give greater clarity to the process if this provision were deleted, leaving the pre-insolvency provisions as the sole exception. This would have the positive effect of encouraging the use of the pre-insolvency procedures, which are more transparent and predictable. *See* **Articles 10-37**.

6. Provisional Measures and Effects of Commencement (Principle C5)

The draft law included the ability to seek a new limited stay on executions in the period between the filing of a petition and the opening of the proceeding. In **Article 70(5)** the creditor who filed the petition could ask the syndic judge to enjoin the sale of estate assets or rights which were considered the essence of the estate (as translated), as well as measures for the conservation of such assets. In **Article 68(10)**, the debtor could ask the syndic judge to suspend any forced execution procedures against the debtor's assets while the petition was pending. These provisions are responsive to a concern raised in this regard in the draft ROSC.

The draft law restricted the stay in new ways, though. For example, **Article 75(4)** allowed the holders of claims that arose after the opening of a procedure to enforce their execution rights if their claim remained unpaid for 90 days or more. **Article 75(5)** was also amended, striking the language that required execution bodies to deliver the proceeds of completed executions to the estate's bank account. The effect would be to permit those execution bodies to deliver those proceeds instead directly to the creditor. Thirdly, **Article 75(7)** added a new sentence that appeared to be more general in application and scope than the rest of that paragraph. It added that the enforcement of liens was not stayed, and that, with respect to current enforcement proceedings, the judicial administrator or liquidator "takes the procedure from the stage that it is in." (as translated). This provision could be read to have permitted general lien claimants to enforce their liens free of any stay.[11]

As a general observation, a stay or moratorium on creditor collection activity should be broad rather than narrow, as the purpose of the stay (especially in the reorganization context) is to prevent the dismemberment of the estate by creditors with privileges or with executions. There should also be a procedure to permit creditors to obtain relief from such a stay, and that procedure should be easily accessible. As originally drafted Articles 75 and 78 fulfilled these functions.

The draft law permitted creditors to claim assets out of the estate, regardless the disruption that might cause in the restructuring effort. A better approach might have been to revise **Article 78** to make it easier

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[11] The author acknowledges that there may be a miscommunication due to translation here. "Lien" in English could (and often does) refer to consensually granted rights to collect on assets to satisfy a claim, as well as a judicially imposed remedy for the satisfaction of a claim.

for post-opening creditors to seek special relief. In this way, the court would be alerted to the fact that the debtor was not paying its current debts. What is more, the debtor or the judicial administrator would have the same information at the same time. Finally, creditors with liens should be required to show that the property in question is not needed for a restructuring before simply take assets out of the estate.

Article 88 rendered unregistered security interests and writs unenforceable against creditors absent appropriate notification prior to the opening of the proceeding. It might be appropriate to look at sale procedures to assure that this Article is enforced in that context. Thus, for example, a creditor holding an unregistered security interest or writ should not be treated as a privileged creditor under **Article 159(3)**, nor should it be allowed to continue to assert its privilege against the new buyer after the property is sold in the proceeding**.**

7. Management of the Procedure (Principle C6)

The provisions in the draft law with regard to management of the procedure included revised procedures relating to the compensation of the judicial administrator. Cost of administration and supervision of those costs is a necessary component of management of the insolvency proceeding. On the one hand, fair compensation for insolvency practitioners is essential if qualified persons are to be attracted to perform the task effectively. On the other hand, appropriate measures need to be taken to assure that such persons are not being overcompensated, or are not abusing their position in order to enhance their compensation.[12] The draft ROSC noted a number of ways in which this could happen, including the presence of a large creditor on the creditor's committee who also may have a large claim in another case in which the same judicial administrator might be serving (or might wish to serve). Again, large creditors may initiate an insolvency proceeding with a view to hiring a particular judicial administrator. Also, a judicial administrator may be tempted to extract a fee from creditors as the price of proceeding with the case where the estate lacks assets to pay the fee. *See* **Article 39(4).**

Article 57 of the draft law addressed the selection of the judicial administrator or liquidator, and that entity's fee. It provided that the fee would be negotiated at the creditors' meeting. If a creditor holding 50% of the debt wished to independently select someone, and to negotiate a fee, then that became the fee payable to the administrator, save in the circumstance that there was no longer cash in the debtor's account. *See* **Article 39(4).** The fee enjoyed a first priority in **Article 161**. Taken together, a large creditor could select an administrator of its choosing, at a substantial fee, and have the substantive equivalent of a receivership. Requiring that the fee be subject to an independent standard and independent review would tend to help counteract such possibilities. The draft ROSC noted that the role of the special administrator role was hard to justify, especially where the debtor's management is retained and the business continues to operate. Consideration should be given to removing this provision.

The draft law contained a provision, at **Article 81(3),** which stated that a debtor who had an audiovisual license as part of its business (presumably a broadcaster) had its license suspended from the opening of a proceeding until confirmation of a plan. The provision went on to state that the license could be reinstated at confirmation only on terms acceptable to the National Audiovisual Council with respect to the type of programming it may be permitted to broadcast. It was not known what purpose this narrow

[12] A similar observation should be made regarding concordat administrators, who negotiate their fees with the debtor, and who may be paid a flat monthly sum as well as a success fee. For many cases, this sort of fee structure is simply too heavy to bear, and may not be appropriate to either the risks or the amount in controversy.

new provision was intended to serve, but the impact of the provision was clear. The broadcaster in such a situation would not be able to reorganize because it would not be able to continue in business during the observation period. What is more, the restriction of its programming service as a condition to confirmation would likely have impaired the ability of the debtor to structure an acceptable plan with creditors, who would not know whether the broadcaster could continue as an economically viable entity. In short, the provision would have had the effect of making reorganization a practical impossibility for broadcasters. This was a highly unusual provision to find in an insolvency law that was otherwise designed to apply to as broad a spectrum of debtors as possible, and such targeted provisions are inconsistent with international standards for insolvency laws.[13]

8. Creditor Participation (Principle C7)

The provision permitting the allowance of costs to members of the creditors' committee in the draft law was welcome. As this was an expense associated with the due administration of the case, it made sense that the priority for these expenses be on a par with other expenses of administration, rather than being relegated to a second tier in terms of payment. *See* **Article 161(2).**

Provision for conflicts of interest on the creditors' committee were also an appropriate addition. **Article 51(5).** So also were provisions that allowed creditors' meetings to occur as needed. Creditors' committees needed to enjoy similar flexibility.

In terms of the plan, the amendment of **Article 132(1)(c)** to include the requirement that the debtor furnish the creditors with information necessary to decide on a plan made very good sense, as this information is essential to their being able to evaluate the feasibility of a debtor's proposal.

At least 50% of the total creditor body of claims was required in order to confirm a plan. **Article 139(1)(a)** imposed this requirement. However, the total body of creditor claims includes claims that are secured by collateral. The interests of secured creditors and unsecured creditors might not always coincide at this stage. Some consideration might be given to applying this percentage only to claims that do not enjoy a privilege in the context of **Article 139(1)**.

9. Collection, Preservation, Administration and Disposition of Assets (Principle C8)

Article 75(6) addressed the extent to which the debtor or the judicial administrator might have access to funds in bank accounts in which a lender might claim a privilege. In brief, neither the debtor nor the judicial administrator had any such access without the consent of the lender. There may be cases where such a creditor could be offered replacement collateral, in which case the court might authorize the use of such monies over the objection of the lender. However, the law made no such provision.

A debtor that wished to engage in activity that was outside its ordinary course was required to obtain the advance approval of the creditors' meeting. This was a new provision which made sense. *See* **Article 87(2).**

Article 131(2)-(3) gave the judicial administrator the ability to complete the sale of an asset that was subject to a contract for sale prior to filing, and to assure that appropriate security was given to protect the

[13] The Constitutional Court struck down the Emergency Decree, we are told, in large part because of this provision.

interests of creditors who might have a privilege with respect to the asset. The procedure appeared to be consistent with international standards.

Article 39(6) allowed the judicial administrator to liquidate assets in the event there were insufficient assets to cover the expenses of the procedure, and to do so without notice to or permission from the creditors. The draft ROSC did mention emergency sales, but in the context of damage or depreciation to the asset in the observation period, not to assure payment of case expenses. If there are insufficient assets to pay the judicial administrator, the judicial administrator should not have the unilateral right to liquidate assets to pay himself, without notice to creditors. This provision should be modified to require the judicial administrator to bring the matter to the creditors' committee. It may well be that creditors would prefer a different course of action.

The draft law also clarified that, if the creditors' meeting failed to agree on a method of sale of assets, the default method that would be authorized would be a public auction. *See* **Article 156(2).** This is a helpful provision which is likely to speed up the disposition of assets in liquidation.

10. Stabilizing and Sustaining Business Operations (Principle C9)

The draft law added a new provision for the extension of post-opening financing to assure the debtor had sufficient access to credit to continue to be able to function. **Article 87(4)** offered a "priority" of repayment under **Article 159(1)(2)**, in the form of a right of recovery from the sale of assets of the estate. However, this "priority" is actually accorded only to the extent the post-commencement lender was granted a privilege (*i.e.*, a security interest) attaching to the property. There was no independent priority for any claim of such a creditor that might remain following the sale of encumbered assets. An argument could be made that such a deficiency claim should fall into the first category of priority as an "expense[] necessary for conservation and administration of the assets of the debtor's estate …" but best practices suggest that the law should make the priority explicit, both by reference in **Article 87(4)** and by cross reference in **Article 161(1)**. Any post-petition debt incurred under Article 87(4) should have a first priority ahead of all other claims (including expenses of administration), to the extent not satisfied by collateral, and this priority should be spelled out in a new indent (1). This priority should be applicable in both liquidation and reorganization proceedings.

A post-opening lender should also be entitled to assurances that its priority claim will be honored regardless whether the case concludes with a plan or with liquidation. The draft law does not grant such a specific priority in Article 161, nor does it explicitly require this priority be honored in a reorganization plan. *See* **Articles 132-140.** This last point is especially important, as post-financing lenders are not "creditors" within the meaning of the law. A provision should be included in **Article 133** to require that first priority claims under **Article 161** be paid in full as a condition to the approval of a plan, unless such creditors agree otherwise. These claims include the various professionals and administrators in the case, but should also specifically include any deficiency owed to a post-petition lender after resort to its collateral.

Measures were added to address assurance that utilities would not be terminated during the insolvency proceeding. **Article 77(2).** This addressed a concern raised in the draft ROSC.

11. Treatment of Contractual Obligations (Principle C10)

The draft law in **Article 123(10)** allowed for the assignment of contracts to third parties. It also created new rules for the treatment of a counterparty's claim in the event of the termination of a financial lease. The provisions are consistent with international practice.

Provision was also made for claims arising from the decision to terminate an ongoing contract in **Article 123(4).** However, the provision left some questions unanswered, because in **Article 123(9)**, in case the contract continued during the observation period, the counterparty was only paid on a current basis for obligations arising during the observation period. Any unpaid amounts incurred before the opening of the proceeding were apparently treated as ordinary unsecured claims. Claims arising from termination of the contract, on the other hand, had a priority immediately below labor claims and above claims of budgetary creditors. **Articles 123(4), 161(4).** It is possible for there to be overlap between these two claims, creating confusion over priorities. **Article 123(4)** should be clarified to apply only to obligations that accrue after the opening of the proceeding.

The circumstances and extent to which the judicial administrator could terminate employment contracts was clarified in the recent amendments, simplifying the procedure to be followed. The change would appear to be calculated to ease the burden on the judicial administrator, without substantially punishing employees.

12. Avoidable Transactions (Principle C11)

Time frames for avoidance actions were modified in **Article 117**. These deadlines are more realistic and in line with international expectations. The presumption of fraud was applied to avoidable transactions set out in **Article 117(2).** These circumstances are similar to so-called "badges of fraud" found in common law jurisdictions, which are also treated as presumptively fraudulent. Importantly, the draft law also excluded transfers made in good faith pursuant to an out of court workout. More generally, good faith transferees were given a claim to recover their investment (including any increase in value). The claim enjoyed a priority below labor claims and above budgetary and unsecured claims. **Articles 120(2), 161(4).** By the same token, bad faith transferees only recovered their consideration paid, and had a subordinated claim below that of unsecured creditors. **Article 161(10).**

A new provision adding transfers to spouses and other relations was appropriate as well, as individuals are qualified to be debtors. There was also added a provision that allowed a creditor that held more than 50% of the creditor claims to bring certain avoidance actions. *See* **Article 118(3)**.

It does not appear that any action was taken to address the availability of paulianic actions in the insolvency process. The draft ROSC had suggested that such actions should be available, to the exclusion of creditors bringing such actions outside insolvency, and that they should be tried before the syndic judge.

13. Treatment of Stakeholder Rights and Priorities (Principle C12)

The draft law created priorities in **Article 161**. Labor claims were ranked below the costs of administration. However, there was no cap on these claims, either in terms of amount, or in terms of number of days. An appropriate balance should be struck between equality of distribution on the one hand and honoring an important public or social policy on the other.

An amendment to **Article 161(9)** created very serious difficulties. Added to "unsecured creditors" was the phrase "including bondholders." However, *above* this priority was a priority for a large group of unsecured creditors, including bank claims, trade claims, and essential claims. This meant that most of the unsecured claims in insolvency would have to be paid in full *before* the bondholder claims received anything, effectively subordinating the bond debt. The difficulty of a priority for classifying bondholders in a class below other unsecured creditors has already been noted, but bears repeating here. Such a priority scheme could have a serious adverse impact on the willingness of bond issuers to issue bonds in Romania. If bonds are issued, they are likely to call for a higher rate of interest or rate of return, and bond issuers may also insist on collateral to secure the issue. This would seriously cripple the availability of inexpensive credit for Romania's industries.

In addition, the priority accorded to post-filing financing in Articles 87, 159, and 161 needs to be reconsidered, as it is not clear that such financing in fact has a priority consistent with the need to incentivize such lending. Ideally, any deficiency after the resort to privilege should enjoy a priority at least *parri passu* with other administrative expense obligations, fees, stamp taxes, and the like in **Article 161(1)**. Furthermore, it should be clarified that these priorities apply in reorganization cases as well as in liquidation proceedings.

14. Claims Resolution Procedures (Principle C13)

Claims procedures must be efficient and timely. The reorganization process cannot commence until the final list of creditors is established. Thus, delay in the claims process leads to delay in the reorganization process (or the liquidation process, for that matter).

Article 100 of the draft law set time limits for the submission of claims, and for their review and verification by the judicial administrator. The claims had to be filed within 45 days of the opening of the proceeding, and the claimholders had to have at least 10 days' notice from the syndic judge of that deadline. **Article 100(1).** Once claims were filed, the judicial administrator then had 20 days to review all the claims and their documentation and to publish a preliminary list of claims. Documentation of claims was required. **Article 111. Article 106(a)** required the judicial administrator to "initiate verification of every proof of debt and of the documents submitted" and was obligated to "conduct a thorough investigation in order to establish the validity, exact amount and priority of each claim." All of the deadlines could be moved by the syndic judge as much as 30 days. In addition, **Article 111** permitted any party to file oppositions to claims and preferential rights in the preliminary table of claims. They had 7 days[14] in which to file oppositions, and the claimholder had 10 days to file a defense. The syndic judge then issued a single order to resolve all the claims at once. This time frame is not consistent with the apparent obligation of the judicial administrator to publish the *final* list of claims just 15 days from the publication of the preliminary list of claims.[15] *See* **Article 100(1)(d).**

The short and sometimes inconsistent time periods prescribed by the law are likely not feasible even in the abstract, particularly in large and complex insolvency cases. In practice, the volume of cases makes adherence to this schedule highly unlikely. The law obligates the judicial administrator or the court to give creditors only 10 days' notice of the deadline to file claims. That is a very short time to gather

[14] See comment earlier regarding due process concerns. If seven days is seven *business* days then it is probably sufficient.
[15] These procedures apply generally. If the case were to be converted to a bankruptcy proceeding then **Article 146** also applied. That article worked much more smoothly.

documentation, prepare a proper claim, and assure its delivery in time. It was recommended in the draft ROSC that creditors be given more time to prepare their properly documented claims, perhaps by having the 45 day period run from the date of notification, rather than from the date of filing.

Moreover, the draft law did not provide any sanctions for failure to observe these time periods. Lack of penalties for delay may undermine the intended objective of speeding up the insolvency proceedings. In this regard, consideration should be given to extending the time periods to a more reasonable length but also including penalties for delay, in order to facilitate an efficient resolution of insolvency cases. In addition, requiring a single ruling on all claims, as is required in **Article 111(6),** places the syndic judge in a difficult position, because a dispute over a single claim would delay the entire claims process.

Further, the preliminary draft of the ROSC indicated that the observation period took too long and delayed the insolvency process. One primary reason for such delay is likely to be the disconnect between the time frames specified in Article 100, the significant duty imposed by Article 106, and the different timelines set out in Article 111. The meeting of creditors cannot even be convened until the creditor list is finalized.

A solution might be to relax somewhat the requirement of strict verification through thorough investigation (which is both time-consuming and costly). Stricter requirements for documentation of claims, together with a provision that permits the administrator to simply not list a claim that lacks adequate document support, could also speed up the process and reduce the cost. In this regard, **Article 111** permitted creditors and debtors to have a greater role in assuring the accuracy and legitimacy of claims as well, raising their own objections to what they believe to be unfounded claims. There may be other solutions as well, such as permitting estimation of disputed claims for purposes of consideration of the proposed plan. In all events, shortening the length of time it takes to resolve the claims of creditors so that the plan process can go forward expeditiously is essential.

It was noted in the ROSC that the penalty for failing to file a claim seemed unnecessarily harsh. The creditor was barred from pursuing the debtor or its guarantors, even after the closing of the case. This provision, found in **Article 114(1)** of the draft law, appeared not to have been changed.

The draft law clarified that budgetary claims were not excluded simply because the fiscal inspection report was not completed until after the opening of the proceeding. *See* **Article 102(1).** This sensibly permitted such claimants to participate in distribution, without being penalized by the procedures they are constrained to follow.

15. Reorganization Proceedings (Principle C14)

The reorganization process has earlier been discussed in terms of a minimum level of participation. Here, voting issues are considered.

A new provision in the draft law which treated claims that are paid in full within 30 days as having accepted the plan, unless they vote against the plan, seemed a little ambiguous. First, if payment equals acceptance, the vote of creditors in this class ought to not even be considered. Second, there was no express class for this group of claims provided in **Article 138**, so their only apparent value was in helping the debtor achieve the 30% threshold. The subparagraph should be clarified.

As has been noted earlier, the voting procedures were strongly affected by the required classes in Article 138, together with the minimum affirmative classes needed to achieve approval. For example, if there were five classes in a case, then the majority (by amount of creditors in the class) voting yes would result in a "yes" class vote for that class. Three class votes resulted in approval of the plan, provided also that the total of creditors voting "yes" (by amount) was at least 50% of the total amount of debts owed. One of these classes consisted of "indispensable creditors," a subclass of unsecured creditors. *See* **Article 138.** This created the possibility of alliances, to the detriment of creditors in the "unsecured" class. As bondholders would be in the unsecured class, the possibility of confirmation over their objection was high, unless the amount of the bond debt in total exceeded 50% of the whole indebtedness. On the other hand, a privileged creditor holding a very large claim (such as might a bank) would need only an alliance with one other creditor group – perhaps the indispensable creditors – to obtain confirmation and the sheer size of the privileged class might exceed 50% of the total claims in the case. A closer examination of how the classes are defined, and what percentage it takes to carry a class (and whether that percentage should be of those voting or of those who fit in that class) is warranted to assure that the voting process fairly reflects and balances the different constituencies in cases.

The 50% global rule in the draft law required either a high percentage of participation by creditors in general, or in the alternative, would be satisfied in many cases by a few creditors holding very large claims. Whether the 50% rule is useful for curbing abuse or encouraging participation may depend less on the rule itself, however, and more on the actual practice in Romania.

The draft law provided that the term for a plan was one year. If the debtor found that it needed more time, the debtor could, under the draft law, ask the creditors for extensions, but in no event could the plan be extended beyond four years from the date of plan approval. *See* **Article 133(3).** This meant that the debtor could not *propose* a plan that was *intended* to go beyond one year. This limitation interfered with a debtor's ability to develop a practical plan for resolving its financial difficulties. Some kinds of creditors (such as bondholders or bank creditors holding privileges) might be likely to have claims which are sufficiently large that they could not be repaid within one year. There was provision for claims with a longer maturity to agree to repayment over the original term of their agreement, but this provision failed to address the need to restructure obligations over a different time frame in some cases. Further, as restructuring of such debt was required to be consensual on the part of the creditor, a "hold-out" problem was created, limiting the possibilities for restructuring, and giving undue leverage to creditors with longer term obligations. If creditors agreed on special terms that exceed one year, it ought to be possible for such plans to be approved.

By the same token, there might be some creditors whose status is such that they should be excluded from the possibility of having their claims extended over their objection. Many laws contain special provisions for such creditors. For example, some laws provide separate treatment for claims of taxing authorities, or for social claims. *See, e.g.,* **Article 133(5)(k)** (limiting the right to issue securities to budgetary claims in a plan). It is possible to make such special exceptions in the law, while still providing the needed flexibility to sensibly resolve the debtor's overall financial distress.

A helpful provision allowed for enhanced recoveries as a result of the cancellation of fraudulent acts or operations under **Article 117** post confirmation. *See* **Article 140(2).**

The duties of a special receiver managing the debtor post-confirmation could be further specified. Alternatively, this role could be eliminated as unnecessary.

Article 143(3) was viewed as problematic. It permitted a post-filing creditor who remained unpaid for 30 days to call a default and to seek the liquidation of the debtor. It is not uncommon in credit relationships that payment within 30 days is considered prompt payment. Failure to make one payment promptly appears to be too harsh a rule. It is suggested that a more sensible term might be 60 days.

Article 175 called for the judicial administrator to report on whether the plan was fulfilled. However, if the reorganized entity were an operating company, continuing the judicial administrator in place while also leaving in place the special administrator appeared to be unnecessary. It might be prudent to consider using one or the other, but not both.

It is not clear how **Article 175(3)** would have functioned in practice. It stated that "the assets may be distributed to the creditors … based on a proposal of the creditor" subject to priorities. This might refer to a right of a given creditor to "buy out" the position of other creditors. Or it may have been intended as an independent remedy for a creditor. The statute does not explain what conditions had to obtain, whether there had to be a default, or whether creditors had to agree to this. The provision should be clarified.

16. International Considerations (Principle C15)

The draft law included a cross-border insolvency regime that closely tracks the UNCITRAL Model Law. The chapter was formerly enacted as a separate law.[16]

17. Insolvency of Domestic Enterprise Groups (Principle 16)

The draft law included provisions addressing Enterprise Groups as was recommended in the preliminary draft of the ROSC. The provisions are largely in line with international standards. However, consideration may be given to including a provision regarding the circumstances where substantive consolidation may be allowed (confining this tool to rare circumstances of fraud or where the assets and debts of the entities were intermingled, in accordance with international standards). The restriction in **Article 188** on the appointment of the same judicial administrator (which is limited to circumstances where the creditors that hold at least 50% of the claims are the same for each member of the group) may be unnecessary and counterproductive. The appointment of the same administrator could minimize costs and facilitate coordinated group-wide solutions in any case where the group was integrated even if each group member had different creditors. There is no risk of "lifting the corporate veil" by joining the proceedings in this way, since the judicial administration will have to treat each company as a separate entity.

Article 201 contained an automatic subordination provision that was not based on mismanagement, bad faith or an agreement with the related company lender. Such a provision may deter intra-group lending, depriving the group of flexibility and hampering liquidity needs. Meanwhile, **Article 202**, which

[16] *See* International Insolvency Act (2003), adopting the UNCITRAL Model Law on Cross Border Insolvency.

permitted post-filing financing for the benefit of continued operations, ought to be strengthened consistent with comments above regarding Articles 87, 159 and 161.

It may also be considered to include a provision regarding the avoidance of vulnerable pre-insolvency intra group transactions, authorizing the court to take into account in this context the specific circumstances of the transaction (including the degree of group inter-dependence), in accordance with international standards.

18. Court Organization (Principle D3)

The draft law attempted to reduce the judge's work load and to streamline cases. Thus, the draft law removed the syndic judge from many administrative tasks (including presiding over the creditors' meeting). Most tasks were relegated to the judicial administrator (or liquidator in the case of a bankruptcy). In addition, the mandatory hearing every 120 days was replaced with an administrative procedure. **Article 59(3).** It is suggested, though, that this change does not save judges much work as they still must prepare the reviews regarding the status of the proceeding. It might be more appropriate for the judicial administrator to prepare such reviews, as the judicial administrator has more direct knowledge of the progress of the case than does the syndic judge.

It is a significant saving that the draft law provided that judges have hearings only when there is an opposition filed. **Article 59(4-7).**

19. Competence and Integrity of Insolvency Representatives (Principle D8)

The draft law required that judicial administrators and liquidators be selected from licensed insolvency practitioners. However, the Code did not itself elaborate on why these persons are qualified. If there were an independent process for training and testing this body of professionals, or a system of licensure, it would be helpful to advert to that in the law. If the organization from which insolvency practitioners is a mere trade association, with no formal licensure, training or qualification requirements, then the potential for both abuse of and damage to the system is real.

It has been noted earlier that compensation of judicial administrators appears to lack sufficient independent review. Under the draft law, contractual arrangements could be made with a large creditor or a small group of large creditors that might involve compensation at rates that are too high for the debtor to afford. The law also allowed the judicial administrator to sell assets without notice in the event there were insufficient funds to pay for the insolvency procedure, with notice only to the creditors committee if one had been appointed and only to the syndic judge if one had not been appointed. *See* **Article 39(6).** It is entirely possible that some estates would be completely consumed by expenses of professionals. Stricter controls on compensation would seem to be in order.

A similar observation can be raised with regard to the temporary concordat administrator, who under the draft law negotiated a fee with the *debtor,* a fee that might include a set monthly amount and in addition a success fee. It is true that the creditors' meeting was afforded the chance to review this fee, but they are not in a good position to disagree. The court officially appoints the temporary administrator but it is not clear whether the court could review or criticize the fee arrangement. While professionals should certainly be incentivized, the overall arrangement as laid out in the preventive concordat opens the door for very rich compensation arrangements with relatively little supervision.