The Insolvency Law of Central and Eastern Europe

Twelve Country Screenings of the New Member and Candidate Countries of the European Union and Russia: A Comparative Analysis

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IX. Romania

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1. Introduction

a) Historical Background

After the provisions of the Commercial Code of 1887 were revived following the end of the Ceausescu regime, now they are replaced by the new Law on Court Liquidation and Reorganisation.[469] This modern law is a result of a fundamental reform and pays much more attention to the recovery of solvency by means of reorganisation than it was the case under the Commercial Code. The provisions of the Commercial Code still apply to insolvency proceedings which were opened before the new Law has become effective (see Art. 131 JRBC).[470] Moreover, substantial changes were caused by the Government Order no. 38/2002 which was finally confirmed by the Parliament after further amendments were introduced.[471] A new version of the JRBC was published in November 2004,[472] which was, in its turn, replaced by a new regulation of July 2006.[473] This version of the JRBC of July 2006 and the Urgent Order on the Activities of Insolvency Administrators of November 2006[474] constitute the currently effective insolvency law.

b) Reform Objectives

The quality of the basic regulations on insolvency proceedings in Romania gradually achieved by numerous reforms is quite high as compared to the national regulations of other countries and the respective interna-

[469] Law no. 64/1995 as amended (hereinafter referred to as JRBC); replaced by the Law no. 85/2006 (hereinafter referred to as JRBC).

[470] Such interpretation of Art. 131 JRBC confirmed by the courts, see Judgment no. 321/98 (dec.com) of the Appellate Court Pitesti.

[471] Law no. 82/2003 on the Confirmation of the Order no. 38/2002 on the Amendment of the Law no. 64/1995 on Court Liquidation and Reorganisation.

[472] M. Of. no. 1066/2004.

[473] Law no. 85/2006, M. Of. no. 359/2006.

[474] Urgent Order of the Government no. 86/2006, M. Of. no. 944/2006.

tional standards. In particular, it concerns the comparison with the insolvency law of other new EU member states.[475] However, there is still an urgent need of reform as far as supplementary provisions and the institutional framework are concerned. E.g. the fees of attorneys-at-law conducting insolvency proceedings are very low, so that highly qualified lawyers are not interested to participate in such proceedings.

Since the insolvency judges, as a rule, prefer to appoint persons with qualification in microeconomics as insolvency administrators, there are still only few legal practitioners who participate in insolvency proceedings. Therefore, the legal discussion on insolvency law takes place almost exclusively in the academic circles and can not offer necessary solutions for the improvement of the proceedings in practice. However, the Urgent Order of the Government on the Activities of Insolvency Administrators of 2006, which contains the long expected detailed regulation of the professional activities of administrators, meant a substantial progress.

Specialisation of courts has not been achieved yet, but the simplified proceedings introduced by the Law no. 85/2006 for small cases have considerably improved the situation. However, the proceedings are still inefficient and lengthy in many cases, so that further reforms are needed. In this connection, the objectives are the improvement of normative and institutional components as well as development of information processing and of standards in this field. Significant progress has been achieved in so far as the insolvency judges were relieved from the duty to administer the debtor's assets. Thus, the JRBC, since the amendments of 2002 and 2003, follows the concept of the established laws of other EU member states which authorise the insolvency judge to exercise legal control over the proceeding, but relieve him from the participation in everyday business activities of the debtor. Finally, the Law no. 85/2006 introduced a new definition of the role of the judge in insolvency proceedings. His functions now concentrate on the legal control of the activities of the insolvency administrator or the liquidation administrator.

[475] According to the comparative legal assessment by EBRD of 2003 (Report on the Results of the Assessment of Insolvency Laws in Transition Countries, authors: Ronald Harmer and Neil Cooper), the Romanian law had the highest average level of correspondence with the respective international standards.

The power to administrate the insolvency estate generally has the administrator or the liquidation administrator; in certain cases, it is a duty of the debtor.

c) Transition-Related Problems and Practice

Due to substantial structural problems of the Romanian economy which accumulated after the revolution of 1989, it has soon become necessary to create an efficient instrument for restructuring, in particular, of the public sector which was not competitive in many areas. However, the law has solved this problem only partly. The JRBC[476] was a modern regulation based on similar Western European laws, but numerous special provisions were introduced at the same time in order to reduce the negative sociopolitical consequences of transition like in the most other transition countries.

Naturally, these special provisions were applicable just to the areas of business in which the most insolvency proceedings would have been commenced if there were no exceptions under the law (this concerns especially the public sector during privatisation) or those areas of business where a special regulation was preferable for other social or economic reasons (this concerns especially banks and insurance companies). Only under the rule of the conservative-liberal Government since the end of 1996, the insolvency concept has gained wider political acceptance, so that the number of initiated proceedings significantly increased.[477] It could be observed only in the recent years that the insolvency proceedings are taking on the role of a regular procedure of market exit or discharge of debt. In 2005, 3,500 new cases of insolvency were registered, whereby the grey area, i.e. insolvent companies which

[476] Law no. 64/1995 on the Court Liquidation and Reorganisation.

[477] According to the data of the National Commission on Statistics (Comisia Nationala de Statistica), the rate of insolvency of small and middle-sized enterprises was 55% within the first three years in 2001. A sudden change of tendency can not be expected in the next future. See also the annual report of the Commission on Statistics "Activitatea agentilor comerciali" (Report on the Activities of Commercial Companies).

do not file the petition or delay the filing is estimated at 4,000 companies. Considering that there were 525,000 registered operating companies and the increase in the number of insolvencies as compared to the previous year amounted to 54% in 2006, Romania will probably take the first place in Europe as far as the increase of the number of insolvency cases is concerned.[478] The total number of companies which currently undergo insolvency proceedings is approx. 7,000; a comparably high increase is expected for 2007.[479]

2. Commencement of Insolvency Proceedings

a) Principles of Procedure and Legal Protection

The aim of the JRBC is defined as the regular proceeding for settlement of the debtor's debts whereby liquidation and reorganisation as methods generally have an equal status. However, a tendency towards a priority of reorganisation and prevention of liquidation can be observed in the JRBC. The Romanian lawmaker was generally interested in the prompt conduct of the proceeding; therefore, many terms for the performance of their duties by the judge and the administrator as well as terms for appeal are relatively short. As soon as the petition is submitted, the court appoints an administrator. The administrator i.a. analyses the financial situation of the debtor. He must do so within 30 days under the JRBC; this deadline is usually met. In simplified proceedings which can be introduced since the middle of 2006, this term is reduced to 15 days[480]

[478] Source: Institutul National de Statistica 2006; data presented at the conference "COFACE" in Cluj.

[479] The total number of operating enterprises is 700,000 (including suspended enterprises which have been not operating for up to three years); statistics of Eugen Ghiulea in Ziarul Financiar of 19 September 2006.

[480] For details see below.

Although the JRBC does not expressly regulate it, the courts[481] assume that all measures taken by the administrator must be controlled by the judge and the judge can annul the decisions of the administrator if he considers them to be defective or even illegal. In such cases, the court can act upon application by the parties or ex officio. If the results of the analysis of the financial situation of the debtor show that reorganisation is not possible, the judge appoints a liquidation administrator to administer the insolvency estate at the "second stage". An objection against the activities of the administrator can be submitted to the judge of the court of second instance (Romanian: tribunal). An appeal on points of law can be lodged against the decision of the insolvency judge with the Court of Appeal within 10 days; the judgment of the Court of Appeal is final. The above legal remedies lead to a substantial delay of proceedings in practice. On the one hand, it is attributable to the general interest of the debtor to exhaust the possibilities of appeal, i.a. in order to delay the proceedings. On the other hand, the actual duration of appellate proceedings is long. Theoretically, appeal and appeal on points of law are regulated by law as summary proceedings with short procedural terms, but, in practice, the courts have to conduct several hearings, so that the proceeding usually lasts almost one year. In the proceedings of appeal on points of law, the competent court, in deviation from the rules of civil procedure, cannot order the suspension of insolvency proceedings any more. However, the administrators are seldom willing to meet decisions in a proceeding where an appeal is pending.

b) Scope and Applicability

All commercial companies, cooperatives, associations of cooperatives, agricultural companies, economic associations as well as other legal entities under the civil law, if they perform commercial activities, further, sole proprietors and family enterprises can be subject to insolvency (§ 1 para. 1 of the Law no. 85/2006). By this positive definition of the scope of the JRBC, state institutions, municipalities etc. are excluded.

[481] See Tribunalul Suprem, col. Civ. (Collection of civil cases), Decizia civ. no. 2061/1995.

Thus, the Romanian JRBC is limited to the business entities; insolvency of physical persons e.g. in the form of consumer insolvency like in Germany is not possible.[482] In addition, the JRBC is still far from the principle of uniform proceedings for all economic operators which was a model concept for the previous regulation under the Code of Civil Procedure and included a number of special regulations for different areas of business.

On the one hand, special regulations apply to enterprises under privatisation as well as to the so-called "autonomously managed enterprises" (regiile autonome). Both business forms were not within the scope of the JRBC, like other enterprises with the state as majority shareholder.[483] While enterprises under privatisation which were "on the verge of insolvency" were realised at a reduced price or even transferred as a gift including additional payments by the state or were wound up according to the privatisation law, the autonomously managed enterprises were generally excluded from insolvency proceedings. It was explained by the important function for the provision of basic requirements. Indeed, this were, as a rule, municipal public utilities (public transport, water supply, heating and garbage disposal).

In addition, the Romanian legislator follows the international standards introducing special regulations for certain business areas. It concerns i.a. the insolvency of banks,[484] to which a special observation procedure applies in the case of financial distress according to the Law on Banks[485] (Art. 66-68).[486] Special regulations on observation proce-

[482] According to the information of the Ministry of Justice, new regulations are not to be expected in the foreseeable future.

[483] This are, in particular, enterprises "of special national importance"; it often concerns armament factories and strategic suppliers.

[484] Law no. 83/1998 on the Insolvency of Banks, which was often amended as a consequence of numerous bank collapses in the end of the 1990s, e.g. by the Urgent Orders no. 19/1999, no. 138/2001 and the Law no. 597/2002.

[485] Law on Banks no. 58/1998.

[486] For further details see *I. Turcu*, Insolvenţa comercială, reorganizarea judiciară şi falimentul (Commercial insolvency, court reorganisation and liquidation), Bukarest 2000, p. 339 et seq.; on the insolvency proceeding against the "Banca Dacia Felix" see Judgment no. 3865/1998 of the Supreme Court, Chamber for Commercial Disputes.

dure and winding-up apply to insurance companies.[487] The provisions of the JRBC can only be applied supplementary.

c) Grounds for Opening Insolvency Proceedings

The JRBC contains a positive definition of insolvency which previously has been limited to the classical criterion of illiquidity. The new version of the Law of 2006 introduces the criterion of over-indebtedness as a ground for opening the proceeding (§ 3 JRBC). It is defined as the so-called " imminent illiquidity" which is established if the debtor will not be able to satisfy the claims with his assets when the claims become due. The JRBC stipulates that sufficient evidence for these pre-condictions must be produced; however, no case law on rules of procedure on the determination by the court and on the practical aspects of evidence has been established yet. Considering the usual procedure in Romanian courts, a mathematical formula for the comparison of assets and liabilities will be applied. Whether it would be possible to apply a broader perspective and to include other aspects of the enterprise value, e.g. valuation of the enterprise by experts, in this procedure, cannot be predicted.

A further ground for opening the proceedings is a factual stop of payment by the debtor. This trigger is explained in the JRBC in so far as the debtor must establish that he cannot satisfy due claims with the funds he possesses. Obviously, the criterion is illiquidity whereby a sufficient probability that this situation will soon emerge is accepted by the courts. However, the new JRBC still does not contain a provision with a clear instruction how the creditor can prove the illiquidity of the debtor.

d) Persons Entitled and Persons Obliged to File the Petition

The filing of the insolvency petition is governed by Chapter 3, Section 1 JRBC. The debtor is entitled to file the petition. The liability of the debtor

[487] Law no. 32/2000 on Insurance Companies and their Observation.

under civil law was extended and concerns the early petition with a fraudulent intention as well as the delayed petition. In addition, the liability of members of management bodies of the debtor was extended and concerns use of funds of the insolvent enterprise for personal purposes, conducting private transactions under the name of the insolvent enterprise, causing insolvency by an act for the private benefit, violation of rules of bookkeeping,[488] destroying of documents and other offences (§ 138 JRBC). Every person holding a due and enforceable claim against the debtor is entitled to file the insolvency petition. The minimal amount of the claim sufficient for the entitlement to file is Lei 10,000 (approx. EUR 3,000) according to § 3 no. 12 JRBC. If employees file the petition against the employer, the sufficient amount of claim should be equal to 6 average wages; the resulting absolute amount is also approx. EUR 3,000. Further, it should be noted that the claim in question must be a claim from commercial interaction according to the established case law. The claim has arisen from commercial interaction if it was a commercial interaction according to the objective character of the transaction or according to the subjective view of the party obliged to perform (see § 4 of the Commercial Code (Codul Comerc). It is not required that the claimant who files the petition is a merchant. The right of the commercial chambers to file the petition was abolished by the amendment of 2006.

3. Institutional Framework

a) Courts

Unlike Germany, insolvency proceedings are within the subject-matter jurisdiction of the ordinary courts of second instance (tribunal) in Roma-

[488] This extensive formulation was examined by the Constitutional Court which ruled that the norm is constitutional (Ruling no. 82/2007).

nia. The court president appoints at least one insolvency judge (judecatorul-sindic), who generally conducts the proceeding independently. Proper venue is determined by the domicile of the debtor or, for legal entities, location of the debtor according to the Commercial Register.

By the amendment of 2006, the courts were finally relieved from the duty to administer the insolvency estate. The powers of the court are now restricted to the legal control over the activities of the administrator and to the decisions on applications of other parties to proceedings. The duty of the court to make decisions concerning the debtor's property (e.g. the question if and what immovable property of the debtor should be alienated) was abolished.

b) Administrator

For the administration of the insolvent enterprise, the insolvency judge appoints an insolvency administrator (administrator judiciar) or a liquidation administrator (lichidator) who generally have the same functions. This can be physical persons or legal entities. If a legal entity participates in insolvency proceedings as administrator, the majority of shares of this company must be held by physical persons who have the qualification prescribed by law and insolvency administration must be its only business.[489] The pre-conditions and rules concerning the activities of administrators are governed by the Urgent Order of the Government.[490] Apart from the conduct of the insolvency proceeding in the narrow sense, the administrator also participates in the voluntary liquidation procedure and in the observation procedure for insolvency prevention. The major functions of the administrator under the JRBC are examination of the financial situation of the debtor, evaluation of the debtor's actions and clarification whether these actions caused the insolvency, tracing of the debtor's documentation, if the debtor does not hand it over, preparation of the reorganisation plan, control over administration of the debtor's

[489] In addition, such business as consulting on funding is allowed.

[490] O.U.G. 86/2006 on the Activities of the Insolvency Administrators, M. Of. no. 944/2006.

property, management of the debtor's business in general or in part, calling of creditors' meetings and other meetings, application for annulment of debtor's transactions conducted to damage creditors, immediate notification of the insolvency judge if the debtor's assets are insufficient for covering the costs of the proceeding, valuation and collection of the debtor's claims and notification of the insolvency judge on all issues on which he is authorised to decide.

The major qualification requirement under the JRBC is that the administrator must be a qualified auditor. If a legal entity is appointed as administrator, the physical persons representing the legal entity in the proceeding must fulfil this requirement. After a period of legal uncertainty, the above mentioned Urgent Order of the Government safeguards the professional qualification, availability and remuneration of administrators and liquidation administrators, so that it can now be hoped that the original "narrow pass" of the proceeding will not be problematic in the future.

The Urgent Order on the Activities of Administrators contains an extensive list of disciplinary measures against administrators in the case of breach of duty; additionally, there are provisions regulating criminal liability. Civil liability is based on general rules, whereby the possibility of adhesion proceedings in connection with criminal or disciplinary proceedings is convenient. In addition, a person is only admitted to take the position of an administrator if he has insured his liability for damages to property. The duty of the administrator to insure his liability was introduced already by the amendment of 2003.[491] If the administrator caused damages, each party to proceedings can apply to the insolvency judge who is authorised to decide in the matter.

The amount of remuneration is determined by simple majority of the creditors' meeting. Hereby, especially the complexity of the proceeding (according to the financial volume and other criteria, e.g. the number of employees of the debtor) is to be considered.

[491] The new provision (Art. 17 para. 43 and 44) obliges the administrator to submit documents on liability insurance, which covers damages caused deliberately and by gross negligence, before appointment. The amount of insurance must correspond to the risks of the respective proceeding. However, the JRBC does not determine the amounts of insurance.

c) Creditors' Meeting and Creditors' Committee

Regulation on the creditors' meeting, creditors' committee and creditors' representative was originally contained in a relatively short section of the Law, which was substantially extended in the effective JRBC (see Chapter 1, Section 3). The creditors' meeting is generally comprised of all creditors of the debtor; however, the employees as creditors of claims for wages are represented by two deputies. Until 1999, the insolvency judge had to call the creditors' meeting; under the effective JRBC, the administrator has this function. The major functions of the creditors' meeting are:

- analysis of the overall situation of the debtor,
- analysis of measures to be taken by the insolvency judge or the administrator and control of their success,
- proposal of other measures with grounds and
- voting on the reorganisation plan.

Irrespective of the appointment of an administrator by the court, the first creditors' meeting can elect another administrator by simple majority of the claims. However, the insolvency judge can reject his appointment. Against this court order, an appeal on points of law can be lodged within 10 days.

In addition, the creditors' committee of three to five members is elected at the first creditors' meeting. If no majority can be found for any candidates, the insolvency judge can determine the members. The creditors' committee has the following functions:

- support of the insolvency judge in performance of his functions,
- decision on the right of the debtor to retain the management functions in his business if the reorganisation plan is rejected or not decided upon,
- taking necessary measures for avoidance of antecedent transactions of the debtor,
- decision on the alienation of perishable or endangered goods,
- hearing with the insolvency judge upon approval of the reorganisation plan and
- amendment of powers of attorney of the administrator.

The creditors' committee can appoint a creditors' representative whose major function is protection of creditors' interests in cooperation with the insolvency judge.

4. Insolvency Proceedings

a) Simplified Insolvency Proceeding

In the new version of JRBC of 2006, simplified insolvency proceeding was introduced in addition to other measures serving the acceleration of the proceeding.[492] The simplified proceeding can be opened in relation to a limited category of debtors the proceedings against which can be expected to have a small or at least limited volume. This concerns, in particular, sole proprietors and family companies.[493] Other legal entities can be subject to simplified proceedings if: (1) the legal entity has no assets, (2) memorandum of association or the books cannot be found, (3) the legal entity has no location or the location does not correspond to the Commercial Register or (4) the director cannot be found. Additionally, the simplified proceedings are applicable to debtors who applied for this proceeding if they have no possibility to conduct the reorganisation proceeding.

The differences in comparison to a regular proceeding are:

- a shorter stage of procedure before commencement, since the proceeding either is immediately commenced or there is a stage of the so-called observation not exceeding 60 days, if the pre-conditions of the applicability of the simplified proceeding must be examined. This concerns especially legal entities which generally would undergo a

[492] The pre-conditions of the proceeding are laid down in Art. 1 JRBC.

[493] This is a specific legal form for economic activities which are performed jointly by members of one family. It is similar to the partnership under the Civil Code.

regular insolvency proceeding under usual circumstances and only the specific circumstances of which lead to the applicability of simplified proceedings.[494]
- shorter procedural terms, e.g. for the examination of claims 15 days instead of 30.

b) Effect of Commencing the Insolvency Proceeding

The commencement has certain effects for protection of debtor's property:
- all court and out-of-court proceedings concerning claims against the debtor's property and execution proceedings against the debtor's property are suspended, the running of time for purposes of limitation is interrupted, also in relation to all state levies;
- the debtor and his representatives are not allowed to alienate parts of the debtor's property without approval of the insolvency judge; contracts which are concluded in violation of this rule are null and void ergo omnes;
- the debtor is not allowed to establish new personal securities or securities in rem; establishment of securities in violation of this rule is null and void.

Under the JRBC, the administrator is authorised to decide whether a contract concluded by the debtor, but not or only partly performed should be performed or terminated. The administrator must inform the other contract party about his decision within 30 days upon commencement.

aa) Protective and Provisional Measures

Further measures for the protection of the debtor's property are applicable if the inventory made by the administrator at the beginning of the proceeding shows that reorganisation of the debtor is not possible and

[494] It is applicable to legal entities addressed in Art. 1 para. 2 c) and d) JRBC to which simplified proceeding is applicable under certain circumstances which are not contained in the Commercial Register.

the liquidation proceeding must be commenced. In this case, the debtor is not entitled to dispose of his property, the administrator is authorised to seize the office, commercial correspondence and movable property of the debtor. Only such legal acts of the debtor which can have only positive effect on the rights of creditors (e.g. legal acts which lead to the interruption of the running of time for purposes of limitation of the debtor's claims) are considered to be valid by the courts.[495]

bb) Employment Relationships

Due to the structural problems of the Romanian economy and the rising political acceptance of insolvency proceedings also as a method of restructuring the public sector, the issue of treatment of employment relationships in the case of insolvency is of great importance. According to the general provisions of the JRBC, the administrator can generally decide whether the employment contract should be continued or terminated, whereby he has to inform the employee about his decision within 30 days. If the employment relationship should be continued, a notification of the employee is not required.

Additionally, the JRBC refers to other legal provisions in the case of termination of the employment contract in connection with insolvency.[496] Therefore, it is controversial whether this provision of the JRBC itself constitutes the legal ground for termination of employment contracts - the case law on this issue is contradictory[497] - or merely refers to the general provisions on termination of employment contracts under the labour law. The detailed amendments of 2002 and 2003 and the new version of the JRBC of 2006 did not clarify this point.

[495] See only the judgment of the Court of Appeal Craiova no. 10 of 27 January 1999, including discussion on judgments of other courts.

[496] This is a reference to special provisions of the labour law (the new version of the Labour Code no. 53/2003 and other special laws).

[497] For further details of the discussion see N. Tăndăreanu, Procedura reorganizării judiciare (The court reorganisation proceeding), ed. All Beck 2000, pp. 144 et seq.

c) Rescission and Invalidity

Apart from the power to decide on termination of not performed contracts, the administrator is entitled to apply to the court in order to rescind the contracts concluded by the debtor if these contracts are detrimental to creditors and the debtor entered into these contracts deliberately in order to cause damage to creditors; this regulation of the JRBC is similar to the regulation in the German Law on Rescission. Other transactions which can be rescinded are gratuitous transactions to the benefit of third persons concluded within three years prior to the commencement, transactions for inequivalent consideration concluded within three years prior to the commencement and all transactions aimed at asset stripping. In addition, all transactions concluded within the last 120 days prior to commencement can be rescinded if the consideration on the part of the debtor exceeds the amount which the creditor would have obtained in the case of insolvency. The list of grounds for rescission is contained in § 80 JRBC.

The beneficiary of the transaction must be informed of the application for rescission. The movable property of the debtor transferred to the beneficiary in performance of the transaction must be returned to the insolvency estate; if the return is not possible, a compensation must be paid. In most cases, problems arising in this context concern the evidence if transactions can be rescinded only under certain pre-conditions. Facilitation of production of evidence is not provided for by the JRBC. The administrator must submit the application to the court within 18 months following the commencement. If the administrator is not willing to apply, the creditors' meeting can submit the application if the simple majority votes for application. The JRBC contains a special rule on adjustment of loan agreements (§ 81 para. 3).

Different transactions with persons closely connected to the debtor can also be rescinded if they were concluded within 3 years prior to the commencement. This are transactions with partners or shareholders of the creditor who holds at least 20% of the debtor's shares, with directors, members of the board of directors and members of the supervisory board of the debtor as well as other transactions with persons dominating the debtor's enterprise or his business.

d) Reorganisation

A plan of the further procedure must be prepared following the commencement. The plan can regulate reorganisation or (partly) liquidation of the debtor or a combination of these two proceedings. The reorganisation must be conducted on the basis of a plan; the approval of the plan is a pre-condition for the commencement of this procedure (§§ 94 et seq., 103 et seq. for reorganisation proceedings). The JRBC reflects the wish of the legislator to give priority to the reorganisation before the piece-meal liquidation of the insolvent enterprise. Therefore, the examination of the pre-conditions of reorganisation always precede the liquidation proceeding. The regulation of reorganisation proceedings is clearly differentiated from liquidation proceedings. The regulation of this issue in the new version of JRBC of 2006 was aimed at creating transparent and detailed rules and this aim was achieved.

The JRBC regulates in detail who is entitled to propose a plan to the creditors' meeting. Apart from the debtor, who needs the consent of the creditors' meeting in this case, the administrator and one or several creditors holding at least 20% of the debtor's shares are entitled. Debtors against whom insolvency proceedings have been conducted within the last five years prior to commencement and debtors convicted of certain crimes against property are expressly excluded. The reorganisation plan must be approved by the creditors' meeting and confirmed by the insolvency judge. According to the JRBC, 4 creditors' groups must be established first who vote on the plan separately:

- secured creditors,
- public creditors,
- suppliers of electricity, water etc. and
- creditors of other not secured claims.

The plan is approved if more than a half of the existing creditors' groups vote for the plan; each group decides by simple majority. An additional pre-condition is that other creditors' groups must receive fair treatment under the reorganisation plan. They are treated fairly if no dissenting creditors' group obtains less in the case of reorganisation than in the case of liqudation, no creditors' group obtains more under the plan than the total amount of their claims and no creditors' group obtains nothing under the plan.

As possible methods, i.a. forbearance, payment by installment, debt forgiveness, debt-to-equity-swaps, conversion of securities and takeover of property are regulated, whereby the measures can be aimed at reorganisation as well as at liquidation.

If the reorganisation plan is not approved or not properly implemented, the liquidation proceeding is commenced automatically. If the inventory of the debtor's property shows that reorganisation is not possible and the court order on adjudication and on the commencement of the liquidation proceeding is issued, the insolvency judge appoints a liquidation administrator to conduct further proceedings. The same applies if the reorganisation plan was proposed, but not approved or if the reorganisation proceeding is commenced, but reorganisation proves to be impossible. If the liquidation proceeding is once commenced, the reorganisation proceeding cannot be repeated. The duration of the reorganisation proceeding must not exceed three years; the insolvency judge can order that an administrator should exercise control over the business of the debtor.

After the agreement has been fulfilled in full, the court issues an order on the fulfilment of the agreement upon application of the debtor, the administrator or other person who is obliged to fulfil the agreement. When the court order becomes final, it constitutes the legal basis for deletion of all entries in registers and books and for the revival of the powers of the debtor to dispose of and to manage his property. As compared to the insolvency laws of many other countries, the quality of the Romanian JRBC is quite high. The legislator succeeded in creating a realistic scenario of reorganisation in the JRBC. Fortunately, he resisted the temptation to set unrealistic goals, e.g. satisfaction of all claims in full or a fixed proportion for satisfaction of claims.

e) Status of Secured Creditors

The status of secured creditors is diminished by the provision that the administrator is entitled to apply to the court for declaring all securities in rem agreed upon within 120 days before the commencement null and void. However, secured creditors generally receive preferential treatment under the JRBC. Their position in the creditors' meeting is better than that of non secured creditors. While the latter decide by

simple majority based on the amount of claims, all secured creditors must vote for a measure (e.g. reorganisation plan) if it should be approved.

Additionally, there are special provisions on satisfaction of secured creditors. They are satisfied from the proceeds of the sale of collateral less realisation and administration costs. Secured claims are satisfied after the costs of proceedings, claims from loans taken during the reorganisation proceeding, claims from employment contracts of the last six months prior to the commencement and claims for state levies and taxes in the fifth priority. If the payment is lower than the amount of claim, the remaining amount becomes a general insolvency claim.

In this connection, the debate conducted by the courts and in the literature on the scope of protection of good faith based on the newly introduced land register system is not irrelevant. However, the great importance of rights in rem as securities for the bank credit system led to the support of the opinion on the wide scope of protection by the courts. According to recent court decisions, an effective good faith acquisition must be also possible if the disposing party has no substantive power of disposition in relation to the transferred real estate.[498]

Finally, it should be noted that short terms characteristic of the JRBC in general are to be observed also in connection with securities. E.g. objections of a secured creditor against the realisation of real estate must be submitted within 10 days.

f) Realisation of Debtor's Property

In general, it should be noted that the provisions of the JRBC on realisation of debtor's property are partly contradictory and unclear, so that they cause difficulties in practice. The realisation of the debtor's property begins when the registration of creditors' claims by the administrator under the supervision of the insolvency judge is completed. The administrator can decide independently whether he realises the debtor's property en bloc or as individual objects. The JRBC merely stipulates

[498] See also E. Chelaru, Circulatia juridicã a terenurilor (Legal transactions concerning real estate), Bukarest 1999, pp. 402 et seq.

that the kind of realisation must be necessary or reasonable. According to the interpretation of this provision by the most courts, realisation of units as parts of property is also possible. The JRBC regulates the sale en bloc in detail: a plan of realisation must be prepared in cooperation with the insolvency judge and external experts where the necessity or reasonability of the sale en bloc is proven; the plan must be approved by the creditors' meeting and the insolvency judge. For the approval by the creditors' meeting, simple majority of non-secured claims and votes of all secured creditors are required. Under the JRBC, there are 11 categories of claims, whereby the costs of the proceeding and of administration and realisation of property rank first and certain claims of partners or shareholders of the insolvent company[499] rank last (§ 108 no. 1-11 JRBC).

Creditors of claims for wages or salary are privileged in relation to other creditors. These privileges are laid down not only in the JRBC, but also in the Labour Code and in the effective nation-wide collective wage agreement for the period from 2007 to 2010. These claims are to be satisfied after the costs of the proceeding and before all other not secured claims.

g) International Insolvency Law

The basic provisions of the international insolvency law are contained in the Law on the Regulation of International Private Law in the Field of Insolvency.[500] This law regulates the applicable law and international jurisdiction as well as the issue under what pre-conditions the Romanian authorities provide assistance if the insolvency proceeding was opened in Romania and in a foreign state.

The Romanian courts within subject-matter jurisdiction of which are insolvency proceedings according to national rules of procedure are competent in respect of cooperation with foreign insolvency courts. Foreign court decisions are recognised if they do not violate the ordre public. In addition, provisions of the Law on the Regulation of Interna-

[499] Ibid.

[500] Law no. 637/2002, M. Of. no. 931/2002.

tional Private Law[501] are applicable to the recognition of foreign court decisions. According to these provisions, the foreign insolvency administrator is entitled to file the petition for opening the proceedings or to participate in the proceedings opened in Romania.

From 1 January 2007 when Romania joined the European Union, the Councill Regulation no. 1346/2000 on insolvency proceedings is being applicable in relation to other EU member states. In contrast to the rules of official service for domestic participants of proceedings, important documents are to be served to foreign participants of proceedings according to the general rules of the Code of Civil Procedure.

h) Criminal Offences in Connection with Bankruptcy

The new version of the JRBC regulates some aspects of criminal liability (§§ 143 et seq.). Such criminal offences as criminal concealment or delay of insolvency for more than 6 months and different acts detrimental to creditors are addressed in these provisions. In addition, a special form of embezzlement at the cost of the insolvency administrator was introduced. Giving notice of non-existent claims and refuse of the debtor to submit documentation requested by the court, the creditors' committee or the insolvency administrator are further criminal offences. Finally, fraudulent bankruptcy is punishable by imprisonment from 6 months to 5 years. Certain criminal offences against property are regulated as personal qualifications in the JRBC: e.g. the insolvency administrator who commits general criminal offences against property in connection with his professional activities is punishable by imprisonment up to 15 years, if serios consequences arise, even up to 20 years. General criminal offences against property are applicable if the elements of crime are established.

[501] Law no. 105/1992, M. Of. no. 245/1992.

5. Summary and Perspectives

The Law no. 64/1995 prepared a modern legal basis for the insolvency proceeding. After numerous amendments, there is a general expectation connected with the new version of the Law of 2006 that the new regulations, in contrast to the previous regulations which were continuously changing, will be of lasting value and contribute to legal stability and certainty. Positive aspects of the new law are the regulation of reorganisation proceedings, which has a model character as compared to the laws of other Eastern European transition states, and abolishing of certain "near passes" of proceedings, e.g. of the extensive formal requirements concerning official service under the Code of Civil Procedure which were replaced by a publication in a special edition of the Commercial Register.

By the new law, it probably can be achieved that insolvency proceedings become a regular proceeding of market exit or reorganisation, after numerous special proceedings have been applicable in the course of transition, especially in connection with privatisation. The delegation of powers in connection with administration of debtor's property from the judge to the administrator will substantially lower the burden on the court and facilitate the proceedings. Stronger position of the creditors contributes to the balance of interests in the proceedings which have previously been substantially pro-debtor.

The new Law on the Regulation of International Private Law in the Field of Insolvency finally regulates international insolvency law in detail and considers the interests of all parties. In correspondence with the pragmatic international approach, Romania, on the one hand, does not restrict recognition of the results of foreign insolvency proceedings and, on the other hand, makes possible territorial proceedings concerning the assets situated in Romania.

Summing up, it can be concluded that the current law with short procedural terms and other rules supporting acceleration constitutes a good basis for efficient insolvency proceedings.