Above Purposes of the Bankruptcy Legislation in Romania During Financial Crisis

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Abstract: The financial blockage and the impossibility of paying one’s obligations to the partners and also to the State budget led many companies towards bankruptcy. Does the explanation come only from the worsening of the economic conditions? The objectives of the study were, in summary, to obtain current reliable information on the business community to analyze the legal consequences of insolvency.

Key-Words: legislation, policy, bankruptcy, reorganisation, insolvency, procedure, plan

1 The evolution of legislation referring to bankruptcy in Romania

The European Bank for Reconstruction and Development identifies three possible purposes of the legislation upon bankruptcy:
1. Policy of salvation – disposes restructuring and rehabilitating an enterprise for keeping the workplaces, paying the creditors, yielding profit and creating value;
2. Policy of the new start – allows a bankrupt but honest entrepreneur to restart his business, being exempted of the duties and obligations accumulated so far;
3. Policy of equity – promotes the equitable distribution of the bankrupt debtor’s wealth among the creditors of the same rank [2][15].

The legislation referring to bankruptcy in Romania is connected to the identification of its purpose from the standpoint of the public policies. The Romanian legislation as regards bankruptcy has known several substantial modifications during the period after 1989. The legal frame until the year 2002 was constituted by the Law 64/1995 upon the procedure of judicial reorganization and bankruptcy, with the subsequent modifications and completions, whereof the most important are: Law 99/1999, Law 82/2003 of approving OG 38/2002 and Law 149/2004 [7][8]. During the period 2002 – 2004, some modifications were brought by the OG 38/2002 (adopted through L82/2003), there following, in 2004, the Law 149 [9].

Law no. 85/2006 (“Law of insolvency”) transposes in internal legislation the Regulation of the Council of Europe no. 1346/2000 as regards the insolvency procedures [1]. The non-unitary practice of the courts of justice, the need for an increased efficiency of the procedure, the maturation of the business environment and the creditor’s protection are part of the arguments which categorically imposed modifications of the law 85/2006 [10][11]. Considering the necessity of remedying the deficient aspects of the normative frame in the field of insolvency, signaled by the jurisprudence of the Constitutional Court and of the courts of justice, as well as by the practice of the judicial administrators and of the official receivers/ liquidators, there was adopted the Emergency Ordinance of the Government no. 173/2008 for modifying and completing the Law of insolvency, which:
- regulates the procedure for designating the judicial administrator, by the creditors who hold the majority, through value, of the debts;
- clarifies the procedure of evaluating and enhancing the assets;
- ensures simplified measures for eliminating from the market the bankrupt companies, which do not possess sufficient funds for covering the costs afferent to the insolvency procedure;
- ensures a better protection of the debtor, opening the path towards reorganization [3][4].

Law 277/2009 contains very many modifications that have a positive impact upon the insolvency procedure unfolding:
- modification operated upon the art. 27 of the law, through the introduction of the paragraph 5, which expressly mentions that the debtor’s application will be emergently judged in the council chamber, within 5 days. This modification was necessary for avoiding the accentuation of the debtors’ insolvency state, through prolonging the cause solving;
- the minimum quantum of the debt, in order to introduce the creditor’s application, is of 30000 lei.
- the debtor’s application will be emergently judged within 5 days in the council chamber;
- the creditors may also vote by mail [12].
2 Problems of the judicial reorganization

According to the definition from the art. 3, paragraph 1, point 20 of the Law of Insolvency, the judicial reorganization is the procedure applied to the debtor, judicial person, aiming at paying off his debts, in compliance with a program of debt recovery, to the purpose of avoiding bankruptcy. The reorganization procedure supposes drawing up, approving, implementing and observing a reorganization plan that may stipulate, together or separately:

a) The debtor’s operational and/or financial restructuring;
b) Corporate restructuring through the modification of the social capital structure;
c) Activity limitation, through winding up goods from the debtor’s wealth [12][13].

The law of insolvency stipulates two categories of judicial reorganization:

- reorganization based on the partial capitalization of the debtor’s assets, in view of paying off the liabilities declared and accepted at the statement of assets and liabilities;
- reorganization based on an operational and/or financial recovery, having as consequence a debt satisfaction, at least to the share obtained in case of bankruptcy.

There is important to mention that in the Romanian legislation no legal provisions exist that should automatically launch bankruptcy, as in other European countries. The reorganization/bankruptcy procedure in Romania may start either through the application addressed by the debtor himself, in insolvency, or by the creditors, under the following conditions:

- the creditors have not been paid for at least 30 days;
- the tradesman’s debts, come from labor or civil relations, are greater than six average wages on economy, settled according to the law;
- the tradesman’s debts, come from commercial relations, exceed the amount of 30000 lei.

According to the art. 103, following the confirmation of a reorganization plan, the debtor will run the activity under the supervision of a judicial administrator and in compliance with the confirmed plan, until the syndic judge will dispose for good reasons either closing the insolvency procedure and taking measures for reinserting the debtor in the commercial activity or ceasing the reorganization and passing to bankruptcy [14]. Along the reorganization, the debtor will be guided by the special administrator, under the supervision of the judicial administrator. The shareholders, the associates and the members with limited liability have no right to intervene in managing the activities or in administering the debtor’s wealth, with the exception and in the limit of the cases which are expressly and limitedly stipulated by the law and in the reorganization plan.

If the debtor does not comply with the plan or the activity development brings losses to his wealth, the judicial administrator, the committee of the creditors or any of the creditors, as well as the special administrator may solicit at any time from the syndic judge to approve the entrance within bankruptcy (art. 105). The debtor, through the special administrator or, according to the case, the judicial administrator, will have to submit, every trimester, to the committee of the creditors, reports upon the financial situation of the debtor’s wealth.

The syndic judge will decide, through judgment or, according to the case, through closing, under the conditions of the art. 32, the entrance into bankruptcy, in the following cases (art. 107):

A. a) The debtor declared his intention to enter into simplified procedure;
b) The debtor did not declare his intention of reorganization or, at the creditor’s request for opening the procedure, he contested being in insolvency, and the contestation was rejected by the syndic judge;
c) None of the other entitled lawful subjects submitted a reorganization plan, under the conditions stipulated at art. 94, or none of the submitted plans was accepted and confirmed.

B. The debtor declared his intention of reorganization, but he did not submit a reorganization plan or the plan he proposed was not accepted and confirmed.

C. The payment liabilities and the other undertaken tasks are not fulfilled under the conditions stipulated through the confirmed plan or running the debtor’s activity during the reorganization brings losses to his wealth.

D. The judicial administrator’s report was approved, suggesting, according to the case, the debtor’s entrance into bankruptcy, according to the art. 54 paragraph (5) or to the art. 60 paragraph (3) [5].

The content of the plan consists in information about the debtor, his management, his significant shareholders, the situation of the cash-flow, the debt paying program, the real possibilities for recovery and stipulates one or more of the several options:

- debtor’s operational or financial restructuring;
- debtor’s corporative restructuring through the modification of the social capital structure and/or activity limitation through winding up goods of the debtor’s wealth (partial liquidation).

The achievement period is of 3 years, with the possibility of prolongation for one more year, at the judicial administrator’s recommendation, if:

- the recommendation is given within at most 18 months since the date of the confirmation;
- the prolongation of the execution term is accepted through the vote of at least two thirds of the creditors forming the statement of assets and liabilities.

The reorganization plan is a writ of execution.
The plan confirmation stands for an irrevocable modification of the debts, according to the payment program. Although in the Law no. 85/2006 the plan modification possibility is not expressly stipulated, the doctrine admits this possibility.

During the period of reorganization, the business unfolds in the usual manner, however with the following limits:
- the juridical acts of current administration, inclusively the payments, are affected by the debtor, under the judicial administrator’s control, or by the judicial administrator, if the debtor was deprived of the administration right through the sentence of opening the insolvency procedure;
- the juridical acts of disposition end under the conditions settled through the reorganization plans or with the preceding assent of the syndic judge or of the Committee of the Creditors [12].

The legislation offers the possibility of succeeding to the business through the conversion of the debt into control shares of the insolvent debtor, in which sense the reorganization plan may stipulate:

a) issuing securities by the debtor in favor of the creditor, whose debt is this way converted, with the latter’s assent, or the modification of the debtor’s constitutive acts, even without his assent, if the following conditions are cumulatively fulfilled:
- the plan proposed by the debtor offers a more reduced recovery of his debts;
- in case of bankruptcy, the debtor’s members or associates/shareholders are to have nothing of the distributions;
- the debtor’s members or associates/shareholders refuse to participate in the plan proposed by the creditors.

b) The offer of succeeding to the business consists in the shareholders’ offer, as payment, of the debts that the debtor can no longer pay off, of their own shares.

c) Hostile succeeding to the business, in which case the debtor’s control is taken over by the creditors, through the conversion of the debts into actions, with the adequate modification of the constitutive acts.

3 Results in judicial reorganization

The advantages resulted following the researches carried out as well following the consultation of the companies having confronted themselves with such a situation are:
- the insolvency procedure is a solution for the debtors as, ever since the date of its opening, the rise of the liabilities is stopped and the assets of the companies are conserved, due to the most important effect of the procedure, which is the interdiction upon the interest flow, delay penalty and increase at not guaranteed debts;
- the debt recovery by the debtor is done with the exemption of the stamp taxes;
- all judicial and extra-judicial actions launched upon the debtor are stopped;
- the maintenance within the business circuit of the honest debtor, in a repairable financial situation (the debtor has the possibility to continue his activity, however complying with the conditions established through the reorganization plan);
- recovering debts, to a higher extent than in the case of bankruptcy;
- maintaining the working places, at least for part of the employees;
- in the relation with the debtor within the judicial reorganization procedure, the suppliers should not be affected.

At the same time, several disadvantages were identified, where of the most important are:
- the confirming procedure of the reorganization plan proves to be particularly complex;
- real inconveniences for the creditor: suspending the individual pursuits against the debtor, freezing the debt at its nominal value during the procedure opening;
- the practice shows that the debtors with reduced turnover and with limited assets have no real reorganization chances.
- situations existed wherein a creditor introduced the procedure opening application, and the debtor, being solvent and not wanting to enter the procedure, until the first peremptory date, paid off his debt. If the creditor’s position is considered, there has to be very well known whether the procedure is efficient to this purpose, as a solvent debtor will never accept to enter this procedure and will obviously pay off promptly the back debt. (the treasury exposure, already submitted to pressure, because of the lack of cashing and of liquidities). Of course, the purpose of instituting the insolvency procedure is mainly to increase the recovery chances of the companies through the application of a valid reorganization plan, which should allow the company to leave this procedure and to follow up its activity through paying off all debts.
- inflexibility of the contractual partners. A company within reorganization no longer benefits from the support of the contractual partners, who count many times in increasing the recovery chances;
- the procedure is public, which leads to the creation of a negative situation upon the company: you are labeled - “you are in reorganization” – which, in the opinion of many companies, means bankruptcy.

A third important problem in analyzing the legal frame referring to insolvency and bankruptcy is the choice between the liquidation process and the judicial reorganization process. This choice may be based on different priorities of economic policy. Finally, there is important to ensure an equilibrium between protecting
the creditors’ interests and encouraging reorganization, which is beneficial especially for the employees.

The tendency on European and generally international plane is to modify the legislation referring to bankruptcy, in the sense of encouraging the process of judicial reorganization. In Romania, the submitted modifications seem to inscribe in a diametrically opposite direction, which is encouraging creditors. The explanation for this process however comes from the experience of our country so far, which shows that the practice of judicial reorganization has not been a successful solution in too many cases, often transforming in a real barrier to leaving the marked, disadvantaging this way both the creditors and the completion of the structural reforms [12].

According to the last legislative modifications brought by L149/2004, the maximal period for executing the plan of judicial reorganization, in case it was approved, was reduced from three to only two years. At the same time, a greater control upon the liquidators and administrators is ensured, in order to avoid their abuses and non-economic behavior.

Passing nevertheless over the proper juridical regulations, present or future, there is important to emphasize that, through liquidation, the non-competitive tradesmen are removed from the market, traders who, because of the conjecture or of their own managerial deficiencies, do not manage to develop a lucrative activity. Liquidation always plays the part of purging the market economy and of fluidizing trade, which, in the current stage of our country, as well as in the future perspective, are not only necessary, but also indispensable to the proper development of market economy. Under these conditions, the role of the liquidation must be correctly understood and must be delimitated from any negative connotations attributed within our society.

4 Failure causes in judicial reorganization

According to the statistics of the National Union of the Liquidators from Romania, during the years 2007-2008, in less than 10% of the insolvency cases, a reorganization plan was confirmed. The cases in which the judicial reorganization was a success, finalized through the debtor’s reintegration in the economic circuit, were less than 1.5% [6]. In table 1 is presented the number of acts of procedure issued by the courts and insolvency practitioners published in Bulletin Insolvency Proceedings Consequently: citations, communications, court ruling (sentences, conclusion and decisions), reports and other acts of procedure [17]. There is necessary to study the concrete causes that led to the apparition of such results, to the purpose of identifying solutions for substantiating the decision as regards instituting or not the insolvency state. The causes of a failed reorganization procedure are:
- the creditors’ reticence to support the debtor’s activity, because of the trust loss in his capacity to manage and recover his business;
- the debtors’ difficulty to obtain funds/credits once they declared their state of insolvency;
- some dishonest and unfair debtors’ practice to derogate the application of the insolvency procedure to the purpose of hiding the available assets and funds;
- the tendency of deeming the insolvency procedure as final instrument, of eliminating the debtor from the market, even at the risk of not satisfying the debts.

At the same time, for a correct, equilateral approach, the following may be mentioned as premises of a successful reorganization:
- coming to a compromise between the debtor and his creditors, through a valid reorganization plan;
- appreciating the business risk to a just value.

The law of insolvency offers the debtor the necessary mechanisms for obtaining a successful reorganization, if the state of insolvency is declared in good time and the debtor acts in good faith. The cases wherein it occurs are:
- the debtor does not comply with the reorganization plan;
- from the unfolding of the debtor’s activities, there ensues that losses occur in his patrimony;
- the term for achieving the reorganization plan expired.

Table 2 contains monthly evolution of reorganization plans in the period 2007-2010 published in Bulletin Insolvency Proceedings. It is observed throughout the period analyzed the small number of reorganization plans in all documents published in Bulletin Insolvency Proceedings [17].

The failure in executing the reorganization plan is sanctioned with the opening of the bankruptcy procedure. In order to settle which is the path to follow in recovering a debt, a preliminary analysis of the debtor’s patrimony and activity is necessary. In the case of the guaranteed debts, the recovery chances are very high. The debts entailing discussions are the chirographic ones. In their case, the insolvency procedure will be resorted to, if following a preceding verification of the debtor’s patrimony and activity, there

<table>
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<tr>
<th>Year</th>
<th>Number of acts of procedure published in Bulletin Insolvency Proceedings</th>
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<tr>
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<tr>
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is noted that he has sufficient reserves, so that these categories of debts should be completely covered, too. Likewise, this procedure must be resorted to in the case in which, following a preceding verification, there is noted that the debtor is not only in payment incapacity, but he neither possesses assets nor has means for maximizing his wealth, therefore his recovery chances are inexistent. As regards resorting to the enforcement procedure, a preceding analysis of the debtor’s patrimony is also necessary here, during which, if assets are noted to exist, this means should be applied.

5 Conclusion
Although the Romanian legislation ensures the frame for fulfilling all these three purposes of economic policy, the experience has proved so far that the bankruptcy practice in Romania has been rather concentrated on the policy of salvation, especially as regards the fate of the State enterprises which had entered into insolvency.

During the financial crisis, bankruptcy laws have negative effects on the economic environment. It is rather a manifestation of the principle of equity separate from the data presented.

References:
[7] Law 64/1995
[12] Law 25/2010
[16] www.unipr.ro (The National Union of the Profession Insolvency in Romania).