,,COLOCVIILE JURIDICE ALE BĂNCII NAŢIONALE A ROMÂNIEI"- EDIŢIA A VI-A

„INSTRUMENTE JURIDICE DE RESTRUCTURARE ŞI RELANSARE A COMPANIILOR DIN ROMÂNIA"

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AN OVERVIEW OF THE LEGAL FRAMEWORK FOR DEBT RESTRUCTURING IN ROMANIA

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Introduction

DEBT RESTRUCTURING MECHANISMS

Court supervised

- Court reorganizations (CR);
- Schemes of Arrangement (SOA)

Informal / Quasi-informal

- *Ad-hoc* mandates
- Workouts

Court Supervised

Main Players

Reorganization Plans Act No. 85/2006	Schemes of Arrangement with Creditors Act No. 381/2009
• Corporate Debtor (limited DIP) • Creditors • Judicial Administrator (licensed insolvency practitioner) • Court (insolvency judge)	• Corporate Debtor • Creditors • Conciliator (licensed insolvency practitioner) • Court (insolvency judge)

Eligibility Requirements

insolvent debtors or debtors that face **impending insolvency,** which are subject of an insolvency case **pending** in court (debtors and judicial administrators required to express early intent of reorganization, subject to forfeiture of right to propose plan)

Within maximum 30 days (or shorter, if court so decides) of the date of final list of claims

Reorganization Plan (Act No. 85/2006 – **Insolvency Act**)

debtors facing financial distress, yet **NOT INSOLVENT**

debtor files petition for commencement of SOA case and proposes provisional conciliator

Within 30 days of court appointment, conciliator prepares (together with debtor) list of creditors and draft SOA

Schemes of Arrangement with Creditors (Act No. 381/2009 – **SOA Act**)

Eligible Proponents

Schemes of Arrangement with Creditors

Debtors only

- The **Debtor** via the Special Administrator
- The **Judicial Administrator**
- One or more **creditors** holding minimum 20% of the value of claims as stated in the final list of claims

Reorganization plans

Additional Eligibility Requirements

Reorganization Plans (Act No 85/2006)	Schemes of Arrangement with Creditors (Act No 381/2009)
Similarities	
Minimum 5 years after *completion* of a prior insolvency case must accrue before a new insolvency case of same debtor is eligible for restructuring	Minimum 5 years after *commencement* of a prior insolvency case must accrue before same debtor may propose a SOA
A debtor convicted by final ruling 5 years prior to commencement of the insolvency case for such crimes as **forgery** or **crimes** punished under **Competition Act** No. 21/1996 *may not* propose a plan	A debtor (either itself or its directors, shareholders/members/silent partners (?)) convicted by final ruling 5 years prior to commencement of the SOA case for such crimes as: **bankruptcy fraud**, **fraudulent mismanagement**, **breach of trust**, **false pretenses**, **embezzlement**, **perjury**, **forgery** or **crimes** punished under **Competition Act** No. 21/1996 *may not* propose a SOA
A debtor whose directors, officers and/or shareholders have been convicted by final ruling 5 years prior to commencement of insolvency case for such crimes as: **bankruptcy fraud**, **fraudulent mismanagement**, **breach of trust**, **false pretenses**, **embezzlement**, **perjury**, **forgery** or **crimes** punished under **Competition Act** No. 21/1996 *may not* propose a plan	

Additional Eligibility Requirements

Reorganization Plans (Law 85/2006)	Schemes of Arrangement with Creditors (Law 381/2009)
Distinctions	
N/A	A debtor whose directors or officers, 5 years prior to commencement of the SOA case, have been held liable on a "creation or deepening insolvency" cause of action under the terms of Act No. 85/2006 *may not* propose a SOA
N/A	A debtor with tax record under GO no. 75/2001
N/A	A debtor convicted by final ruling for so-called "economic crimes" (*e.g.*, money laundering, tax evasion, Ponzi schemes) *may not* propose a SOA
N/A	Minimum 3 years after confirmation of a prior SOA by court must accrue before a proposal for a SOA by same debtor may be filed

Mandatory Provisions

Reorganization Plans (Act No 85/2006)	SOAs (Act No 381/2009)
• identification of unimpaired classes of claims; • the treatment of impaired classes of claims(legal rights against the debtor are being changed under the reorganization plan); • if and to what extent the debtor and/or its owners with unlimited liability are discharged from their respective liabilities; • what is proposed to be received or retained by holders of all classes of claims on account of their claims, as compared to the estimated value that would be received as of the effective date of the plan *via liquidation*; • indication of recovery prospects for debtor and calendar for payments of claims under the plan.	• operational reorganization measures • financial restructuring proposals • undertaking to repay no less than 50% of accepted and uncontested debt, except for tax debt (where 100% satisfaction is expected, unless tax authorities expressly agree otherwise, and subject to applicable state aid rules); • confirmation of provisional conciliator and fees;

-Additional Features-

Reorganization Plans (Act No. 85/2006)	SOAs (Act No. 381/2009)
Distinctions	
Duration of Implementation	
• Maximum 3 years (except for more favorable terms in credit or leasing facilities)	• Maximum 18 months
Extension	
• maximum 1 year • 18 months after plan confirmation • upon proposal of judicial administrator approved by 2/3 of then outstanding claims in value	• maximum 6 months • at the end of proposed SOA • upon proposal of conciliator approved in creditor assembly by a majority of claims that are subject to the SOA

-Additional Features-

Reorganization Plans (Law 85/2006)	SOAs (Law 381/2009)
Fiscal Claims	
Fiscal claims are *not* eligible for debt-for-equity swaps under a plan	• impairment of fiscal claims is permitted only subject to observance of applicable state aid rules • consent of tax authorities is required, which may be actual or constructive (if response delayed by more than 30 days)

Acceptance Requirements

Reorganization Plans (Law 85/2006)	SOAs (Law 381/2009)
• must be voted on within 20-30 days after publication in Insolvency Bulletin	• SOA proposal must be voted on within maximum 30 calendar days as of date of receipt of proposal

• votes by classes of claims, counted by claim value
• separate classes of claims:
  • secured claims;
  • employee wages claims;
  • fiscal claims;
  • general unsecured claims of suppliers of strategic weight for debtor's business
  • the rest of the general unsecured claims.
• a plan <u>is regarded accepted</u> by a class of claims if creditors holding a <u>majority in amount</u> of the allowed claims of such class held by creditors vote for the plan
	• The SOA proposal is regarded as accepted if creditors holding <u>2/3</u> of the allowed and undisputed claims in value approve the proposal
	• if required majority not met, debtor is entitled to propose a new SOA after 30 days

Voting Limitations

Reorganization Plans (Law 85/2006)	SOAs (Act No.381/2009)
• Creditors that, directly or indirectly, control, are controlled, or are under common control with the Debtor may vote only to the extent they were to receive or retain under the plan less that what they would have received *via liquidation* as of the effective date of the plan; • It is not clear under the statute or as court practice whether the equity holders are currently entitled to vote on a plan	The following categories of related-party creditors are actually disenfranchised and not counting in the vote • entities whose equity holders or directors are closely related with the equity holders or directors of the debtor; • entities controlled or managed by the debtor, its equity holders or directors, or their close relatives; • entities that, either themselves, or their respective equity holders or directors have been convicted by final ruling 5 years prior to commencement of the SOA case for such crimes as: bankruptcy fraud, fraudulent mismanagement, breach of trust, false pretenses, embezzlement, perjury, forgery or crimes punished under Competition Act No. 21/1996 ; • entities with tax record under GO no. 75/2001

Consequences of acceptance

Reorganization Plans (Law 85/2006)	SOAs (Act No.381/2009)
• Prerequisite for confirmation of plan by insolvency judge	• Accepting creditors are automatically estopped from further pursuing enforcement of their claims • Statute of limitations is tolled for causes of actions regarding the accepting creditors' claims • Interest, default interest, and penalties on the accepting creditors' claims are automatically prevented from further accruing

Confirmation requirements by insolvency judge

Reorganization Plans (Law 85/2006)	SOAs (Act No.381/2009)
• acceptance by majority of classes of claims, provided at least one of the accepting classes is impaired • if only 2 classes, plan should be accepted by class with largest value of claims • each rejecting class of claims that is impaired under the plan is treated *fairly and equitably* thereunder • claims fully paid within 30 days as of the confirmation of the plan or in compliance with the credit or leasing agreements they derive from are deemed unimpaired and are considered to have accepted the plan • the plan is compliant with the rules that law mandates for its mandatory provisions	• eligible debtor • value of disallowed or disputed claims *not* in excess of 20% of the total value of claims • SOA approved by creditors holding minimum 80% of the total value of claims • the arrangement will be enforceable against fiscal creditors subject to observance of applicable state aid rules and clearance from government agency

Confirmation requirements – cont'd.

Reorganization Plans (Law 85/2006)	SOAs (Act No.381/2009)

• *Fair and equitable* treatment of rejecting classes:
  • any rejecting claim or class of claims should receive or retain under the plan on account of such claim **property** of value that is no less than amount that such holder would so receive or retain if the debtor were liquidated (on such date);
  • no claim or class of claims should receive or retain under the plan on account of such claim **property** of value that is more than the amount of the claim, as confirmed by the bankruptcy court after the filing of proofs of claim and verification thereof by the judicial administrator; and
  • no class of claims that are junior to an impaired class of claims rejecting the plan should receive or retain under the plan on account of such claim **property** of value in excess of the amount that holders of such claims would so receive or retain if the debtor were liquidated (on such date)	

Consequences of confirmation

Reorganization Plans (Law 85/2006)	SOAs (Act No.381/2009)
• plan is binding against all creditors, including rejecting creditors (cram down) • plan constitutes an absolute novation of old claims (conversion to liquidation does not result in revival of old claims) • creditors are free to pursue co-debtors and guarantors for entire value of claim	• SOA is binding against all creditors, including unknown or rejecting creditors (cram down); • creditors are automatically estopped from further pursuing enforcement of their claims pending the implementation of the SOA • subject to granting adequate protection, Court may order a moratorium on rejecting creditors of *maximum 18 months*, pending which interest, default interest, and penalties to the such creditors' claims may be prevented from further accruing • pending the implementation of SOA no insolvency case may be commenced • creditors may pursue co-debtors and guarantors under SOA terms • old claims not changed until SOA is implemented successfully

Failure of the proceedings

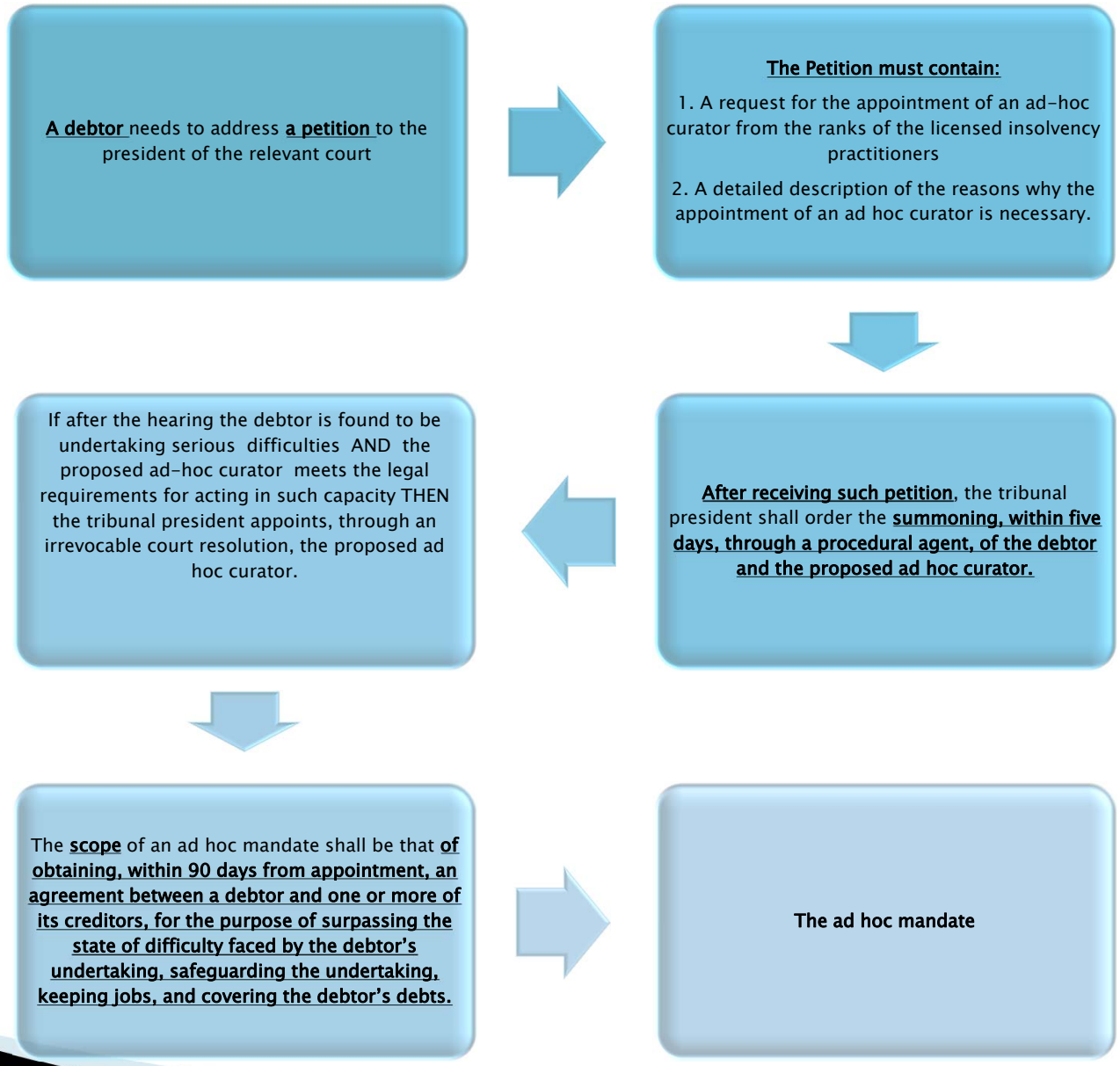
Reorganization Plan (Law 85/2006)	SOAs (Law 381/2009)
Distinctions	
If no plan is confirmed and the deadline for the proposal of a plan expires insolvency judge shall order conversion of case to liquidation Conversion is currently one way (no conversion available from liquidation to reorganization)	If the majority required for the acceptance of a plan is not met, then the debtor has the right to initiate a new procedure after a minimum of 30 days .
	If material breach of the obligations undertaken under a SOA the creditors have the right to commence termination action.
	Conciliator can petition insolvency judge to declare the failure of proceedings if terms of SOA may not be met

Conclusions

- Debtors for whom insolvency is impending may choose either to file for court reorganization or a scheme of arrangement
- Schemes of arrangement are more difficult to attain if structure and magnitude of claims are very diversified
- Unknown creditors will probably raise *due process* defects in the SOA Act to protect their interests

Informal/Quasi-Informal

Ad-hoc mandates (SOA Act)



Workouts

Corporate Debt Restructuring Guidelines (2010) Purpose

- Providing a roadmap for a more flexible and efficient procedure than court proceedings
- Flexibility and efficiency are obtained through:
  - reducing pressure on courts
  - assisting business community to develop confidence in the fairness, transparency and accountability of insolvency and restructuring proceedings
  - shorter resolution times and higher recovery rates

Categories of workouts

- *bilateral negotiations* between a debtor and his creditor, leading to payment rescheduling and/or debt forgiveness
- *multilateral negotiations* between a debtor and his major creditors, leading to debt rescheduling, debt forgiveness or granting of other incentives, as agreed by the parties
- *collective negotiations* amongst the major creditors of a debtor, leading to determining the manner for providing the debtor with financial support, the distribution of the risks among the creditors, as well as a commitment of the creditors on *not* commencing or continuing legal proceedings against the debtor and its assets, in view of recovery of the debt

Principles of Workouts

Principle 1: Workouts are a concession and not a right

- Should only be commenced only where there is hope of solving problems and achieving long-term viability.
- May prove a valuable aid into avoiding insolvency procedures but it is essential that all parties negotiate towards a fair settlement.
- Any restructuring of a debtor's obligations to its principal creditors, including its bank, shall not be regarded as a right.
- The debtor may not be forced to negotiate

Principle 2: Good faith

- Shall take place in good faith with the objective of finding a constructive solution
- The objective is the mutual benefit of all parties involved

Principles of Workouts

Principle 3: Coordinated approach

- A coordinated approach serves the best interests of all parties
- The creditors may facilitate coordination by selecting a coordination committee
- The appointment of professional advisers to advise and assist the committee and the *relevant creditors* should be considered for more complex cases.
- The *relevant creditors* may form a coordination committee authorized to negotiate with the debtor

Principle 4: Leading negotiations with the debtor

- Coordinators do not usually have the capacity to commit the *relevant creditors* to any particular course of action, their role being to facilitate the negotiation process, making sure that all members of the coordination committee get the necessary information.
- Each of the *relevant creditors has the possibility to make* its own assessment and reach its own decision regarding any proposal it receives from the debtor.

Principles of Workouts

Principle 5: Standstill period. Other concession granted by the relevant creditors

- During the *standstill period*, the debtor shall provide the *relevant creditors* and their professional advisers with full access to all relevant information relating to its assets, liabilities, business and prospects.
- A standstill is a concession and not a right
- ***The standstill time should be limited to the period of time required to generate the restructuring plan (Principle 11)***
- *Relevant creditors* should be prepared to co-operate with the debtor and with each other to give sufficient, though limited, time for the debtor to prepare proposals for the resolution of its financial difficulties (a "standstill period").

Principle 6: Priority for fresh funds

- *During the standstill or restructuring process additional funds may be required*
- *Usually new funds have priority.*
- *Priority can be achieved through:*

- Creation of new security interests or personal guarantee
- New priority via contractual subordination of claims
- Capital investment

Principles of Workouts

Principle 7: Creditors refrain from action during Standstill

- The *relevant creditors* shall refrain from or continue enforcement of their claims against the debtor or reduce their exposure to the debtor, the commencement of the insolvency proceedings being included

Principle 8: The debtor's commitment to the creditors during the Standstill

- The debtor undertakes to refrain from any actions that might adversely affect the prospective return to *relevant creditors*, either collectively or individually, as compared to their positions at the Standstill Date.

Principle 9: Full disclosure by the debtor during the Standstill

- The debtor shall provide all the *relevant creditors* and their professional advisers with full access to all relevant information relating to its assets, liabilities, business and prospects.
- ***The debtor must give full access to information*** necessary to the creditors for a proper evaluation of his proposals

Principles of Workouts

Principle 10: Confidentiality of information

- The information relating to the assets, liabilities, business and prospects of the debtor and any proposals for the resolution of its difficulties shall be considered confidential information, unless already publicly available.
- Information shall be treated with full confidentiality

Principle 11 : Restructuring plan

- The debtor shall prepare a restructuring proposal based on a business plan that addresses operational and financial issues
- The business plan shall be reasonable and should not serve as a way to delay insolvency.
- The guide provides minimum requirements as to the contents of the plan.

Principle 12: Proposals are in line with legal entitlements

- The proposals for the resolution of the debtor's financial difficulties shall take into account the creditors' individual legal entitlements and their relative positions at the standstill date, according to the priority of the claims in insolvency proceedings

Workouts vs. Insolvency

Workouts:

- A) do not seek to vary the entitlements or bind non-consenting creditors
- B) are consensual and do not threaten or compromise legal rights
- C) are more flexible and may be achieved in a shorter period of time and with a lower risk to reputation
- D) may create premises for preventing the debtor from defaulting and filing for insolvency
- E) allow a more favorable context for obtaining additional financing
- F) proceedings do not lead to automatic stay of court and out-of-court proceedings against the debtor's patrimony;
- G) cannot be applied to all debtors

Workouts vs. Pre-Insolvency Procedures

Workouts:

- a) allow for the calculation and recovery of the interest afferent to the creditors' claims;
- b) allow for a quicker approval of a court restructuring plan;
- c) do not lead to automatic stay of court and out-of-court proceedings against the debtor's estate.

Conclusions

- CDRGs should be further publicized and statistical data collected about workouts
- CDRGs could be used in an *ad-hoc mandate* scenario
- Further legislative and regulatory changes may be required in order to further encourage workouts

Thank You!

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