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Alternatives to insolvency in European legal systems. How viable companies can overcome difficult times and save jobs, other businesses and even entire communities

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Abstract

The events that followed the recent low-point in the global economy have triggered worldwide economic, social and political disasters. The purpose of this paper is to present developments in European legal systems that not only aim primarily to help the business environment in its recovery from the downfall but also serve a dual purpose in establishing long-term legal support for financially distressed companies. The European international private sector regulations (Roma II – Regulation (EC) No 864/2007) state that the courts that are competent in judging disputes in matters of company law are those belonging to the jurisdiction in which the company in question has its COMI (Centre of Main Interests). Additionally, an intentional lack of common European regulations exists in the field of pre-insolvency. That is why a general description of regulations in different member states is considered to be important, even necessary. Supporting this situation is the known fact that cross-border business transactions are so prevalent in today's constantly growing international markets. This means that when one of the contracting partners is facing difficulties, the effects spill rapidly into other jurisdictions[1]. Increased awareness on creditor rights should therefore become a priority. Also important is this paper's brief look into the benefits introduced by these regulations, not only in regard to economic and legal aspects but also the social and political implications. This means that benefits brought to employees and business partners have not been neglected.

To draft such a composite list of regulations, different materials have been used. Treaties on safeguarding procedures have offered detailed insights into the role and purpose of these legal tools for turnaround management. Studies at the Bachelor's, Master's and Doctoral levels have provided for targeted analysis in certain areas of interest. Articles from periodical publications have served as starting points for interpreting the application methods of the legal provisions found in the official regulations of the analysed jurisdictions. Last but not least, the personal experience of the author, however brief it may be, has been taken into account. As a result of putting this information to good use, the similarities and differences in approaching the matter at hand in different European jurisdictions have come to light. Following this paper, certain principles can be outlined (pari passu, debtor in possession, stakeholder protection, etc.), which are common to all analysed jurisdictions. Furthermore, this paper represents a starting point for understanding the different ways these countries may approach solving these kinds of problems.

1. Bankruptcy's Historical background

Debt has been around ever since mankind discovered trade. Transitioning from ancient bartering to modern sales, the historical meaning of business has been to earn a living, provide for one's family and/or improve one's status (getting rich). As is well known, business situations are always unpredictable to a certain point. Because of this uncertain terrain and the natural appearance of debt, businessmen have looked for ways of minimising risk and loss. The Romans were the first to develop a legal system, in general. Of course, among the five main categories of rights of the Roman citizen, one is of par-

1 Lowitzsch, Jens: The insolvency Law of Central and Eastern Europe, published by Insol Europe and The Center for German, Croatian, European and Comparative law at the Institute for East European Studies, Free University of Berlin, p. 85

ticular interest: *ius comercii,*which gave a person the right to obtain and transmit property, become creditor and debtor and, as a consequence of this, to file a petition in court[2].

The term ‘bankruptcy’ originally derives from the Latin phrase *bancus ruptus,* which described a situation in which a business was unable to continue its activity. Because most of the businesses in ancient Rome were market-type stores, the literal act of breaking the bench (or table) on which the goods were displayed informed the public that the business was no longer able to function[3]. This was one of the first insolvency procedures, but its main goal was not to repay debt but to inform the general public of the situation. The creditors of that time had several ways of realising debt. In the beginning of the system, the debtor was considered to have guaranteed payment with his own body. If a debt was not paid, the body of the debtor was at the creditors’ disposal to do with as he pleased. Debtors were usually sold, but they were also killed or incarcerated in personal jails or were turned into slaves, either indefinitely or until the debt was considered paid[4]. Of course, this procedure was difficult at times because the state did not get involved in it. The creditor, therefore, had to be physically strong to overpower his debtor and force him to be sold or to work. As the legal system evolved, courts of law gained in power, while state representatives were introduced as participants in debt repayment procedures. Creditors had the possibility of petitioning the courts to force debtors to pay, and if the debtors still refused to pay, state representatives could cease their goods and sell them to repay the creditor.

Most of Europe has adopted and developed this primitive yet effective legal system, which is now one of the two main legal systems in the world. Time has not changed the core of the Romanist system, most of the principles of which are in use today. This is also true for the economic sector. People are still required to have a certain level of status to perform business (a certain age, capacity to understand what they are doing, etc.). Contracts and their content, which were developed then, are still in use today and, as we have seen, the methods for realising debt are basically the same.

As history unfolds, these methods become more complex in their attempts to optimise their goals. Sadly, ‘law’ is very subjective, having a purpose solely dependent on the people whom it is supposed to serve. In what follows, I intend to analyse legal developments in the modern field of pre-insolvency restructuring.

2. What is insolvency?

According to most dictionaries, insolvency is the situation in which a person or legal entity is unable to pay what he/she/it owes to other parties. The term is also accepted in reference to the situation in which the value of owned goods does not cover the amount owed to others. Both definitions focus on debt and the impossibility for it to be covered by the debtor at a given moment in time. This moment is defined by the maturing date of debt.

Legal definitions, although they deviate slightly, are on the same track as these generally accepted ones. Differences appear because in legal situations, definitions must be more precise and include as much information as possible in as few words as possible. Insolvency, therefore, from a legal point of view, has

2 Prof.Dr. Doc. Vladimir Hanga, Lect. Dr.Mircea Dan Bocşan: ***Curs de dreptprivat roman***, Bucharest: Ed. Universul-Juridic 2006, p. 126-127

3 Bankruptcy, in http://en.wikipedia.org ;http://en.wikipedia.org/wiki/Bankruptcy, accessed 30th April 2011

4 Capitolul I Consideratiigenerale, in http://www.camera-executorilor-oradea.ro/, accessed 30th April 2011, 10:53

become the situation in which a legal entity petitions a court to enter a structured procedure (voluntary insolvency) or for another entity to be forced into such a procedure (involuntary insolvency). The trigger remains the financial distress of the debtor, while the meaning of the word changes in a legal environment, suggesting the procedure rather than the situation itself.

Because of the multitude of legal systems, insolvency has numerous meanings. Some are stated before the debtor situation arises (Romanist system), whilst others are handled case-by-case, using general reference (common-law systems). Romania describes insolvency in the 3rd paragraph (1st point) of its Insolvency Act. It states that '*insolvency* is the state of the debtors' patrimony which is characterised by the lack of funds to cover all certain, liquid and matured debt: a) insolvency is presumed to be obvious when the debtor, after 90 days have passed since the maturity date, has not paid his debt to his creditor; the presumption is relative; b) insolvency is imminent when it is proven that the debtor will not be able to pay his acquired matured debt with the funds available at the date of maturity[5]'. These definitions are the starting point of the procedure and represent the situation that is governed by the Act. Greece has opted for a more accessible and straightforward definition: "a company becomes insolvent when it has ceased payment and its indebtedness is such that it is unable to meet its commercial obligations as they fall due".

It is important to define insolvency because safeguarding procedures are aimed at cases in which a company is in financial distress but is still viable from an economic point of view. The difference between insolvency and financial distress defines the insolvency practitioner's purpose. Financial distress usually involves less aggressive actions towards the creditors and the debtor alike. In this case, the troubled company will be subject to reorganisation but will mostly keep the right to manage itself. In an insolvency procedure, however, every step a company takes must be in compliance with creditor demands or be subject to creditor approval. For the creditors, lighter actions mean smaller losses or better business collaboration with the debtor. It can be argued that smaller creditors are in a much less favourable position than heavier contenders in safeguarding procedures. The truth, however, is quite the opposite because the bigger creditors are called upon to renegotiate the terms of trade, whilst small creditors are either paid off or they have other means available for realising their debt. The undesirable situation of the small creditor is the exception to the described rule, in which a moratorium is granted. Nonetheless, this situation must be approved by a judge and requires proof of special conditions existing for the debtor. This is not an argument, therefore, against safeguarding procedures. Moreover, in an insolvency case, small creditors see their debt heavily reduced or even written off, whereas company preservation implies, from a legal point of view, the payment of all debt.

In sum, insolvency refers to the state of a company that is either about to go through a major restructuring of its activity or to close up shop. Either way, the procedure is time-consuming and leaves its mark on everyone involved, from creditors and shareholders up to the debtor and even down to the end-consumers.

5 Law 85/2006 on the insolvency procedure (main legal document used in the insolvency procedure in Romania).

3. Safeguarding procedures – a welcome compromise

During their entire existence, companies constantly repeat a cycle of growth, development, maturity and, most importantly, decline[6]. Risk assessment, crisis management, and continuous improvement methods have all been developed because of a need to ensure that companies would be prepared to handle uncertain times that most certainly lay ahead[7]. These tools alone, however, cannot ensure that a company is going to prevent it from failing. Be it economic circumstances, lack of interest or the bad will of the management, businesses often do not perform as expected. When this happens, insolvency procedures prove to be useful. They protect the debtor against unnecessary actions from the creditors but make sure that debts are paid as much as possible. It was during the Great Depression that insolvency proceedings proved to be necessary pieces of legislation. Without them, the chaos would have led towards even greater disaster. With that global crisis having been overcome, the business environment, along with its legal aspects, has continued to evolve.

As the world emerges from yet another widespread economic freefall, another procedure is rapidly gaining ground in the matter of helping out creditors and debtors alike. Procedures for safeguarding companies are becoming more appealing[8]because they enable creditors to get a better return rate and to negotiate terms for debt repayment and future business collaboration, whilst debtors can maintain control over the company and get another chance for their investments to be profitable. As for stakeholders, they stand to register the direct losses from a company's failure, but there are others who also have much to lose if there is no one to work for, no one to sell their products to and no one who will pay taxes on income. Employees, business partners and, lately, even the state recognise the need to keep a company going.

By applying for a safeguarding procedure, a company enters negotiations with business partners to obtain certain benefits, such as a stay on legal actions (moratorium) or reduction/rescheduling of debt payments. During these negotiations, the company is under the protection of the court and, in some cases, the creditors are not allowed to take action for realising their outstanding debt in any other way. In a typical insolvency procedure, the debtor is usually stripped of his right to manage the company, and all assets are being prospected for sale to satisfy debt.

Needless to say, a safeguarding procedure is preferred over insolvency because it gives the distressed company hope for the future whilst keeping its creditors at bay, even though they seek to satisfy their own outstanding debts. Most legal systems recognise the overwhelming benefits of voluntary settlements between arguing parties. The field of insolvency has caught up with this point of view by implementing safeguarding procedures.

4. Romania

In Romania, the legal procedures for safeguarding distressed companies were introduced in December 2009 through Law No. 381/2009 regarding the introduction of the preventive concordat and of the ad-

6 Verboncu, Ion: Solutii managerial pentrufirmeleaflate in dificultate, in Phoenix – revista de insolventa, No. 26, October-December 2008, p. 23

7 Rotaru, Anton: Aspecteprivindpreviziuneasiprevenireainsolventei, in Phoenix – revista de insolventa, No. 12, April-June 2005, p. 13

8 MunteanuSperanta: Concordatul preventive simandatul ad-hoc, in Phoenix – revista de insolventa, No. 32 April-June 2010, p. 12

hoc mandate. Inspired by French law, Romania has adopted two possibilities for saving financially troubled companies: the ad-hoc mandate and the preventive concordat. As a new feature in the field of Romanian company law, this act limits the obligation of the debtor to inform its current and future business partners about the difficulties the company is facing. According to the logic scheme of law No. 381/2009, certain basic rules have been introduced.

To start, the act limits access to these procedures to all but companies that are in financial difficulty but not yet insolvent. The judge is left to decide when preventive actions can be taken or when insolvency legislation (law No. 85/2006) is applicable. The aim of these procedures is to safeguard a troubled company through amiable negotiation or a concordat contract so that it can continue its activity, save jobs and cover its debt[9]. Courts are involved up to certain point, depending on the procedure chosen by the debtor, who is the only one who can ask for one of these.

Ad-hoc mandate is what its name implies: a mandate given to a specialist for the purpose of helping the company to overcome the difficult times it is going through. By means of a formal request, the debtor asks the judge to appoint an insolvency practitioner (IP) as a "delegate" (the person to whom the mandate is given). Although the court is petitioned, this is meant as a preponderantly out-of-court procedure, as will be explained below[10]. In the request, the debtor must include detailed reasons for entering this procedure, which the judge will analyse before granting permission to move forward. Once appointed, the IP will have 90 days to reach an agreement with the company's main creditors so that the debtor will be able to repay what he owes but also keep his business. For this, the IP can propose "complete or partial write-off of debt, rescheduling of payments, continuing or ceasing of ongoing contracts, reducing the number of employees as well as any other actions he or she sees fit". Negotiations can be held with all or part of the creditors (usually the most important ones) and will be kept secret. The procedure will only be registered in a special registry of the court, and all participants must maintain its confidential status. No other publicity about it is required. After the agreement with the main creditors is reached, the IP files a petition to the court asking the judge to ascertain that the ad-hoc mandate has ended. If an agreement cannot be reached in the 90-day period or if the IP or debtor see fit, either one of them can ask for the mandate to be put to a premature end.

In a preventive concordat procedure, the rules of engagement are similar to a full-scale restructuring of the company[11]. More complex than the ad-hoc mandate but more easily accessible than the judicial restructuring, a preventive concordat is used when the debtor is on the brink of insolvency and in need of serious turn-around management solutions but who is still viable, from an economic point of view.

Only the debtor is allowed to petition the court for a preventive concordat. In his request, the debtor must include the reasons for filing the petition, along with documents that support these reasons and show the debtor to be a company eligible for preventive concordat. The request also must include a personal statement that shows the company is not insolvent and has not been subject to an insolvency procedure in the last five years or benefited from a preventive concordat in the last three years. At the date of the approval, the judge nominates an IP in the case, who is called a "peacemaker", who can either be proposed by the debtor or chosen from the IP registry. The IP then must compose a list of all

9 Law No. 381/2009, article 2
10 Stanescu, A. O./Milos, S. M./Dumitru S./Milu O. D.: Procedurile de preventie a insolventei: concordatul preventive simandatul ad-hoc. Rreorganizareajudiciara, Bucharest: UniversulJuridic, 2010, p. 14
11 Piperea, Gh: LegeaConcordatului, Bucharest: Wolters Kluwer, 2010

known creditors and a list of eligible creditors (only the creditors who have undisputed outstanding debt are allowed to vote on the concordat contract). After this, a concordat contract proposal is drawn up by the debtor under the guidance of the IP. It is imperative to include an analysis of the economic situation of the debtor that is certified by an accountant, the cause for the financial distress and the action undertaken thus far to keep things going, and also the financial projection over the next six months. Legally, the proposal must also include three kinds of measures that the debtor is offering to undertake to save his business: 1) the restructuring of the debtors' activity (company structure, management changes, personnel cuts, etc.); 2) plans for a working capital increase (credits from banks, investments from stockholders or third parties, etc.); 3) delays or modification of debts (it can be proposed that certain creditors' debts are reduced, but by no more than 50% of their value). When the proposal is ready, it is presented to the eligible creditors alongside the list of all known creditors. This marks the end of the first stage in the procedure, which can take up to three or four months. Following this stage is the vote on the proposal. Creditors can vote by any means available to them (for example, by mail, email, or fax) as long as it can be established that the vote was delivered. When the IP considers it necessary, a creditor meeting can be held for the voting procedure.

In order for the contract to go through, 2/3 of the creditors must approve of the proposal. The percentage refers to the value of the debt and not to the number of creditors. Even if the contract is voted for in the amount necessary for empowerment, the contract will take effect only after the judge has observed this following a petition from the IP. When less than 2/3 of the creditors approve the concordat, only once can another proposal be drawn up and presented after a period of 30 days. An approved concordat will have the following effects: all other debt-realisation procedures from the approving creditors will be suspended; the right to ask for other means of debt-realisation is suspended for the approving creditors; and all penalties, legal interest and other expenses linked to the approving creditors' outstanding debt are suspended. Ergo, the company can still be forced into an insolvency procedure by other creditors, which can also realise their debt by any means they see fit. If, however, more than 80% of the creditors approve of the contract, the judge can give a type-approval of the concordat. For the judge to be able to do this, the value of disputed outstanding debt must be under 20%. A type-approved concordat will suspend all ongoing debt realisation procedures, regardless of creditor type, and also the right to ask for such procedures. Moreover, during the unfolding of a type-approved concordat, the debtor company cannot be subject to an insolvency procedure. Because of these incursive actions of an approved or type-approved concordat, the period in which the debtor must achieve reorganisation is limited to 18 months (and can be extended by another six months in justified situations).

A preventive concordat comes to an end in three ways. When the judge finds, at the end of the 18-24 months, that the debtor has upheld his obligations, a decision is passed in which the concordat is deemed ended and the procedure closed. The debtor re-enters business as usual. If the debtor has not upheld his obligations by no fault of his own and this results in the failure of the reorganisation, the judge can pass a decision before the end of the term in which the concordat is deemed ended and the debtor will be wound up[12]. The third way of ending a concordat is by means of a petition to the court in which any person who proves interest can ask for the contract to be annulled for reasons stated in the

12 Stanescu, A. O./Milos, S. M./Dumitru S./Milu O. D.: Procedurile de preventie a insolventei: concordatul preventive simandatul ad-hoc. Rreorganizareajudiciara, Bucharest: UniversulJuridic, 2010, p. 49

concordat law. If such a petition is approved, the judge will order the concordat null and void and force the debtor into insolvency proceedings.

During both procedures, negotiation is the key. It has been proposed that these negotiations follow the twelve principles described in the '*Guide for Out-of-court Debt Restructuring for Companies*'. Although this guide is not a law, it can be a useful tool for reaching an agreement that would benefit both parties.

5. Greece

Since 2007, Greek companies have had legal procedures at their disposal through which the interests of a business, employer, creditor and stakeholder could be better served than in insolvency. The conciliation procedure, which is also a product of French and English influence, comes to offer ailing companies a way out of the red and into the black again without the negative side effects of insolvency.

Using provisions from both the ad-hoc mandate and the preventive concordat, "conciliation" is a means of reaching an agreement with important creditors enabling the company, in better conditions, to pay off all or part of its debt so that it may thrive again. Greece, however, has opted to empower the court more than France or even Romania has done. The judge not only oversees the procedure, but also has extensive powers and a final say in whether the debtors' application is approved. First, the debtor must submit a request that shows that the company is in financial distress but not in cessation of payment. Such information is represented by the financial situation report and the accounting documents. A plan for the companies' turnaround is also required. To stress further the social implication of the procedure, the debtor is also indebted to show why, from an employment point of view, it is of social importance. Upon analysis of these documents, the court will decide whether the debtor will be allowed to undergo conciliation. Legally, the court will check the information provided by the debtor and will look into the detailed financial situation and its past. If the court is not convinced of the information, it can order an expert to look into it or simply deny access to the procedure. Once the court is convinced, it will order the initiation of the procedure and appoint a conciliator.

Within a period of two months of his/her appointment, the conciliator must reach an agreement between the companies' creditors and the debtor. In justified situations, this period can be extended by an additional month. After reaching an agreement with the creditors, the conciliator will apply to the court for ratification within ten days. The court will again analyse the petition and look closely into four major fields. 1) Has the company entered cessation of payments? 2) Do the terms of the agreement safeguard the continuation of the company? 3) Have the interests of the dissenting creditors been compromised?4) Does the duration of the settlement exceed two years? If any one of those four is true, the judge might refuse to ratify the agreement[13]. If and when the judge agrees to ratify the agreement, a series of benefits are granted to the debtor. Among these benefits are a stay of any claims against the debtor, prohibition of restrictive measures and, in the first six months after the ratification, collective winding up claims. Together with the ratification decision, the judge will also relieve the conciliator of his/her duties.

Debtors and creditors alike are bound to uphold the agreement as it has been ratified. Therefore, if a creditor is unsatisfied with how the debtor company has respected the relevant obligations, that credi-

13 Kastrinou, Alexandra: European corporate Insolvency Law: an analysis of the corporate rescue laws of France, Greece and the United Kingdome, in: https://lra.le.ac.uk , December 2009, http://hdl.handle.net/2381/9071

tor may petition the court and end the procedure. Additionally, dissenting creditors may petition the court to end the procedure in the case when it becomes apparent that the company is beyond saving and cannot rehabilitate itself through the implemented measures. When the plan is implemented and works as promised, the distressed company will see the procedure all the way through to its rejuvenation. This, however, is limited to a two-year period, after which the procedure must end.

By a unique mix of the ad-hoc mandate negotiator intervention, the preventive concordat stay on legal actions against the debtor, the binding power of a CVA (Company Voluntary Agreement) and a distinctive, more powerful role of the court, the conciliation procedure offers distressed companies in Greece a second chance.

6. France

It can be argued that debtors in France are in a fortunate situation. They have three procedures to choose from: ad-hoc mandate, conciliation and a procedure which resembles judicial reorganisation, which is invasive but more permissive then insolvency and allows the management to maintain control of the company ("procédure de sauveguard").

First among these, in the order of their appearance in the French insolvency law of 2005, is the ad-hoc mandate. Romanian legislation was inspired by this procedure and is similar to it, but notable differences exist. Like Romanian debtors, French ones have to petition the court to name a "mandate" that will negotiate an agreement with important creditors to save the company. In the French petition, however, the debtor must also include a reorganisation plan and specific measures he/she intends to implement to save the company. The President of the Court is responsible for the assessment of the petition and decides whether to grant access to the procedure or not, depending on the potential of the proposal. An even more important distinction from the Romanian procedure is the fact that there is no set time limit for the procedure. Depending on the negotiation skills of the "mandate" and the receptivity of the creditors, an agreement will provide for company rescue in due time. Otherwise, the financial difficulties of the company will mount up to a level that will bankrupt the debtor indefinitely. Practice has developed a way to avoid this type of situation. Debtors employ a negotiator prior to petitioning the court, and the court will be called upon only after an agreement with the creditors has been reached. In so doing, the time frame for the procedure in front of the judge is reduced to a period of 30 to 90 days. However, it should be noted that when acting in this manner, the protection of the court regarding confidentiality of the negotiation process is not applicable and that the creditors' liability for leaking information is heavily reduced. The remaining aspects of the procedure (the role of the court, binding power of the agreement, etc.) are identical to the Romanian counterpart of the procedure, which adopted the French provisions as guidelines.

Similar to an ad-hoc mandate, but clearly more powerful, is the conciliation procedure. It also relies on negotiations through a "conciliator" named by the court at the request of the debtor. The difference is that the judge will assess the capability of the conciliator and set certain provisions for him/her that must be upheld during his/her activity. Any person can be named a conciliator, providing they clearly have the skills necessary to turn the distressed company around. When filing for conciliation, the company must have financial difficulties that derive from any legal, financial or economic situations. A petition from a company that is in cessation of payment is also admissible, provided that cessation has not been entered more than 45 days prior to the petition. Also of great importance is the ratification proc-

ess of the agreement. Once the agreement is reached, the creditor can ask the President of the Court to ratify it. In this way, the agreement remains confidential but is still binding to all involved parties. If the debtor desires the agreement to be more powerful (for example, having opposability to third parties), the company can ask the court to pass a decision through which it grants a type-approval to the agreement. This, however, makes the agreement public as the court decision passes in public session.

Although conciliation implies a reorganisation plan, it does not quite have the full extent of a plan that would be presented after the debtor company has been deemed insolvent. For such a reorganisation outset, a distressed company can file for a procedure that has mild incursions in the business but also ensures creditor protection. With the suggestive title "safeguard procedure" (*procédure de sauveguarde*), this procedure resembles the Romanian preventive concordat, which it inspired and helped develop. It begins with a petition to the court by the debtor, in which detailed information about the financial state of the company is presented. This information should demonstrate a solvent situation. In addition, difficulties should be invoked that the company is not able to overcome unless protected by the court[14]. Accordingly, a plan is drafted by the debtor with the help of a court-appointed judicial administrator. Creditors still have to be consulted, but the voting procedure is undertaken only in two creditor committees. One is formed by the financial creditors (banks, financial credit institutions, etc., except for public financial institutions), and the other is represented by the suppliers. At least 2/3 of the creditors within these committees have to agree with the proposed plan or it will be rejected in court. All other creditors must be consulted separately, and if they disagree with the plan, it cannot be imposed on their outstanding debts. It is important to note that the creditors must support the reorganisation of the company. Provisions of this legal procedure indicate this important factor, for example, through the permission granted to a number of no more than five creditors to assist the judicial administrator in overseeing the companies' activity before and during the implementation of the plan. To protect ordinary creditor interests further, the judge will not approve the procedure if the debtor does not pay enough attention to these interests in the reorganisation plan. After the decision to implement the plan is passed by a judge who is convinced of the positive outcome of the reorganisation proposal, a moratorium is put into force during which no legal action can be taken against the debtor for any debt realisation. Of course, the involved parties (the debtor and the creditors who signed off on the reorganisation plan) must uphold their obligations; otherwise, they are liable for any damages caused by their actions. In the event the debtor faces difficulties again after implementing the plan to the extent that the company becomes insolvent, then the judge will order a judicial liquidation. If the plan is complied only in regard to non-financial provisions, then the judge may assess the situation and could be persuaded to keep the procedure going to help the company further[15]. Also worth mentioning is the fact that the reorganisation has no time limit. The only legal provision in regard to the length of the plan is when creditors, who are not on the committees, restructure their outstanding debt towards the company, in which case the plan cannot exceed 10 years and may not enforce debt restructuring.

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14 Cork, Rod/Santoni, Marc: Restructuring and insolvency procedures , France: Restructuring and insolvency procedures , in: http://www.iflr.com,http://www.iflr.com/Article/2166556/Channel/193438/France-Restructuring-and-insolvency-procedures.html ; accessed on 28.05.2011; 10:29

15 Feugére, Bernard: Survey of the "Safeguard" Law of July 26, 2005, Applicable as of January 1, 2006, in: http://www.avrio.net, 12. Junne 2007, http://www.avrio.net/1619.0.html?&no_cache=1&tx_ttnews[tt_news]=47&tx_ttnews[backPid]=5&cHash=793c061729; accessed on 28.05.2011, 10:25

With more possibilities to choose from, distressed companies in France have the necessary tools to overcome financial obstacles and remain on the market. Additionally, the French procedures represent a very well-established balance between the predominant consensual character of the common-law system and the rigorous legal formalism of traditional Romanist-type legal frameworks. It is no coincidence that the French safeguarding procedures have represented model legislation pieces for countries like Romania and Greece.

7. United Kingdom

Being a common-law system, the British safeguard procedures rely even more on negotiation than the Romanist system jurisdictions. This means that courts in England have a more practical approach towards analysing whether a company should obtain support in its recovery process. Implicitly, a judge has a broader spectrum of motives that could persuade him/her to allow a company to enter safeguarding procedures. As mentioned before, however, the law must provide a guarantee, at minimum, that equity of any sort must prevail over the interests of single entities. The following present a summary of the legal provisions for safeguarding procedures in the UK.

Company Voluntary Agreements (CVAs) are among the most permissive tools for safeguarding troubled companies in Europe. A CVA is an agreement between the debtor company and its creditors, which states that the latter will support the debtor in its struggle to overcome financial difficulties[16]. On a contractual basis, the creditors agree to reduce their outstanding debt towards the company, grant moratorium, reschedule payments, etc. Being a contract, the CVA is negotiated and is binding *inter alia*, although it is subject to creditor votes because it is a means for debt realisation. The procedure thus begins with the management of the company drafting a plan for reorganising their debts with the help of an IP. The IP will then submit a petition to the court in which he/she will ask for the CVA procedure to be initiated. The IP will also submit a report that will include the IP opinion on whether the procedure is, in fact, suitable for safeguarding the company. If the court approves, a creditors' meeting is called by the IP, during which the creditors will vote on the proposal or negotiate other terms for it. When 75% or more of the outstanding debt value present at the meeting agrees with the proposal, it will bind all creditors (even those who did not have notice of the meeting or were unknown at the time the meeting was called). Creditors will vote individually but only as a whole. They will not be divided into classes or committees. Every creditor will have to uphold the plan's provisions, except for the preferential creditors (floating and fixed charge holders) and those not eligible to vote. Non-fulfilment of contracted obligations will result in liability for damages. No legal boundaries exist in regard to time limits, level of payment, restrictions for certain types of companies, etc. Also of importance is the fact that the judge may grant a moratorium even against creditor will, although this is possible only for small businesses as defined by the Insolvency Act 200. CVAs end either with complete fulfilment of the plan, in which case the creditors have been paid accordingly, or with company failure to comply with the provisions of the agreement. After this, the company can enter into administration or judicial liquidation. Either way, the debtor is considered insolvent.

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16 Baird, Ken/Sharp, Anne/Cromwell, Victoria: England & Wales, in: Getting the Deal Trough – Restructuring and Insolvency 2010, London: Law Business Research, 2010, p. 103

Another method for reorganisation under English law is a Scheme of Arrangements[17]. This procedure provides for methods of debt restructuring through a negotiation with one or more creditors, classes of creditors or all of them, in the interest of reaching an agreement that will ensure the continuity of the debtor company as a going concern. Although this sounds like a CVA, the major difference can be observed in the voting procedure. The creditors vote after being compartmentalised into classes. No fixed number of classes is set by the law, but case-law[18] states that a class of creditors includes those whose interests are not too dissimilar from each other so they can be consulted as a group. Each group of creditors will have its own creditor meeting. After all meetings have been held, votes of approval must rise to or exceed 75% of all outstanding debt. The role of the court is to first grant permission to hold the creditor meetings and then, after these are held and the proposal has been approved by the creditors, to sanction the scheme. Upon sanctioning the scheme, the court verifies its legality and gives approval for the scheme to be registered in the Registrar of Companies. Only after this registration does the scheme become effective and legally binding. It must be noted that scheme creditors are bound by the provisions of the approved scheme, all other creditors still have all legal means at their disposal for realising their debt. Benefits of a Scheme of Arrangements, as opposed to other procedures, include the possibility of the company to undertake the procedure on its own without interference from an IP, flexibility in regard to choosing which creditors to approach in negotiations and stability due to the court's involvement in sanctioning the scheme. (Out-of-court restructurings or even CVAs could be annulled or bypassed on the grounds of legal regulatory aspects not having been respected. This is not the case with a Scheme of Arrangements because the court also verifies these aspects of the procedure).

One procedure that is, in fact, post-insolvency, can be taken into account when it comes to safeguarding troubled companies. Administration is actually a tool for realising debt and quite often ends with judicial liquidation. When it is combined with a pre-packed sale of the company as a going concern, it presents itself as a means to protect stakeholder interests and also granting sufficient protection to creditors[19]. A pre-pack sale is an agreement to sell the company as a whole and is negotiated prior to filing the petition for insolvency. Immediately after entering the administration, the company is sold. It is clear that the company needs to be insolvent, but the end result is actually its preservation, along with jobs and obligations to suppliers and customers. Although criticised because it handles the debt realisation procedure too loosely and because the fairness of the whole undertaking relies on the integrity of the judicial administrator and management, the pre-pack sale procedure could still be viewed as a possible safeguarding procedure. The courts seem to agree, as shown in the case of *DKLL Solicitors v Her Majesty Revenue and Customs,* in which the court mentioned that it can take into account not only the interests of the creditors but also those of the stakeholders. Accordingly, the court approved of the pre-packed sale because it appeared to be the only way to save the jobs of employees (approx. 50) and was likely to result in the minimum possible disruption for DKLL's clients[20]. The judgment shows that the emphasis on

17 Tayler, Paul: FSA Process guide to decision making on Schemes of Arrangement for insurance firms, in: http://www.fsa.gov.uk, July 2007 http://www.fsa.gov.uk/pages/Library/Other_publications/Miscellaneous/2007/schemes_arrangement.shtml

18 *Sovereign Life Assurance Company v. Dodd*: a class is composed of "those persons whose rights are not so dissimilar as to make it impossible for the creditors to consult together with a view to their common interest"

19 Bo Xie, *Developments in UK insolvency Law: The incomplete Agenda in Regulating Pre-packaged Administration*, presentation during the "Insol Europe Academic Forum Conference", Milan, 1st.April.2011

20 Blake Lapthorn's insolvency and Business Recovery: Can a majority creditor with a prior winding up petition defeat a pre-pack administraton sale?, in: http://www.bllaw.co.uk,http://www.bllaw.co.uk/services_for_businesses/insolvency_and_recovery/news/21_september_2007.aspx ; accessed on 30.05.2011, 10:21

protecting creditors in insolvency cases is shifting towards rescuing companies as a going concern with heavy regard to the interests of stakeholders.

Legal provisions of the Insolvency Act 2002 state that administration is based on the principle of saving the company as a going concern. Because this procedure is aimed at companies that are already insolvent, it does not present itself as an alternative to insolvency. I opted, therefore, not to present it as such, even though scientific literature describes it as a means of safeguarding financially troubled companies.

8. Why is safeguarding important?

Up to this point, the discussion has focused only on the debtor and the creditors, such a show the debtor obtains benefits granted by law, how a business can be saved, what is to be made of creditors and their outstanding debt, etc. The question here is: “Why?” Why save a company whose future is uncertain? Why grant benefits to a debtor who could not sustain a business on the market? Is not the whole point of a free economy to balance itself through supply and demand, ergo, the rise and fall of enterprise?

First of all, it is crucial to note that safeguarding procedures should only apply to good-faith debtors. Good-faith debtors are companies that do not abuse these proceedings and use them as means of postponing dissolution of company assets so that these assets may be sold of and the transactions covered up while the shareholders reap the benefits. Here it is important that each of the safeguarding procedures presented is set off by a petition to the court in which the debtor provides details about why the company is in difficulty and why it is worth saving. This is where the difference between good- and bad-faith debtors will ensure that these procedures are not abused.

Secondly, even if we accept that companies should only last for as long as there is a demand for their product, no enterprise should be dissolved chaotically. Legal provisions in this matter are of great importance because they provide for equity through such institutions as the *pari passu* principle for capital distribution or priority of creditors. Following these provisions leads to a minimum of justice for both debtor and creditors.

Perhaps the most important beneficiaries of these procedures, however, are the stakeholders. A stakeholder is a natural or legal person who shares the risks of the debtor going bankrupt. The troubled company is not an isolated entity. It communicates with the surrounding environment. Every enterprise relies on a good supply chain and delivery system. Production companies need raw materials from which to craft the final product, which in turn needs to reach end consumers. Companies who provide services also need supplies, whatever their trade may be. The point is that before they are suppliers, these companies are, first of all, consumers who ensure the wellbeing of their business partners, the stakeholders. Employees are also affected by the actions of their employer. Developments in macroeconomy and legislation over the past few years indicate that an increasing number of state representatives understand that it is better to save a company than to dissolve it. I believe that each group of stakeholders deserves undivided attention.

Among the first to be negatively affected in case a company is dissolved are the employees. Although they are usually favoured creditors and are paid prior to ordinary ones, their interests exceed the simple recovery of outstanding debt. They seek to have a constant source of income rather than one single

down payment, even if that payment covers benefits lost during the insolvency process (such as medical insurance, pension plans, uncollected leave days, etc.). Maintaining workplaces must be a priority in any legal system. From a micro-economic point of view, a lucrative activity is the primary method of existence in a civilised society, by means of which people can secure necessities for their existence and pleasure and find a sense of purpose by contributing to society. Macro-economically, a paid worker represents a source of income as opposed to an unemployed person who is on the dole and therefore represents costs. Labour regulations provide for adequate protection of the workforce, but these often do not apply to insolvent companies. Therefore, it is commendable that in the interest of preserving a suitable working environment, the company as a whole is supported in reorganising its activity.

Suppliers are persons or companies whose lucrative activity is to provide the means necessary for the once-thriving company to conduct its business. Such means can be raw materials, services, products delivered to retailers, etc. When the beneficiary of these goods is facing financial difficulties, it means that the company will soon be unable to pay for its supplies. As such, the creditors in these cases will also face financial difficulties because of capital shortage. The suppliers to the first debtor, then, will not be able to pay their own suppliers and become debtors of their own. A vicious circle can be foreseen. By successfully applying safeguarding procedures, the business environment, which relies on the interaction between enterprises, may be kept from spinning out of control with devastating effects.

The main source of income for a country is taxes collected from its citizens. Companies usually contribute higher amounts than do individuals. By accepting short-term losses in the form of debt forgiveness, the state can obtain long-term benefits if the company is kept running. Future income of the company will be subject to taxation, whilst winding it up will terminate such a perspective and quite often ends, in any case, with a reduced debt recovery.

Shareholders must also be taken into account as persons of interest in weighing the pros and cons of safeguarding as opposed to liquidation. Indirectly, poor or absent regulations which protect the shareholders might affect the entire business community. Shareholders are investors who risk their capital in the interest of increasing their asset base. Regarding this, rescuing a company from being wound-up brings new hope in achieving these goals. Safeguarding procedures represent a means of drawing entrepreneurs into investing within the borders of one country or another. Naturally, they will favour the jurisdiction that, in the inevitable event of facing financial trouble, will provide the best protection for their investment.

A different type of stakeholders are business partners that are not suppliers but still depend on the troubled company. An example of this may be retailers that sell mainly the goods of the debtor (companies on the receiving end of the supply chain). In case there is no one to deliver these goods, these companies will no longer have something to offer to their customers. Although this scenario might seem different due to a variety of factors, it has the same outcome as the case of the debtor suppliers.

Safeguarding procedures, even when one of the stakeholders can be saved, should be favoured as opposed to insolvency. When more stakeholders are involved, it becomes imperative that these procedures will not be discarded without proper analysis of their benefits and possible positive outcomes in comparison to a winding-up procedure. A safeguarding procedure should clearly occupy a well-deserved, prioritised place among the legal means of realising debt, if only because of the benefits they bring for company stakeholders.

9. Conclusions

Liquidity shortages, economic or financial distress, and hard times in general are part of a company's existence. Every manager expects and prepares for turbulence of this sort. Sadly, not all difficulties can be overcome using only management tools. Be it the fault of the company administrator or external influences, a business will, at some point, need to bend or even change the rules of the game to survive.

Safeguarding procedures aim to do just that. They are legal provisions that can be a very effective management tool. Although companies must accept certain obligations and modifications to their decision-making process when entering safeguarding procedures (creditors' input is usually to be taken into account for important actions involving the normal activity of the company or the reorganisation of it, with the alternative being insolvency), these outweigh the immediate and long-term accompanying benefits. Moreover, the return rate of debt in actual insolvency proceedings leaves much to be desired. When considering the fact that judicial reorganisation, which is usually an insolvency procedure, manages to turnaround less than 2% of (Romanian) insolvent companies that use it, the importance of "pre-emptive strikes" becomes even more evident.

Also, when taking into account the social and macro-economic benefits of rescuing companies rather than dissolving them, safeguarding procedures especially appear as a win-win-win situation (company-creditors-stakeholders).

One can only hope that the safeguarding of companies becomes a rule and that the legal procedures for this will take their rightful place as a first choice for distressed business reorganisation.