”BABEŞ-BOLYAI” UNIVERSITY CLUJ-NAPOCA
FACULTY OF LAW

THE DEBTOR IN THE INSOLVENCY PROCEDURE

-PhD THESIS-

SUMMARY

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CONTENTS

AND OTHER COUNTRIES

Key words:

debtor, insolvency procedure, state of insolvency, state of difficulty, insolvency prevention, participants in the insolvency procedure, categories of debtors in the insolvency procedure, the final outcome of the debtor's actions, the period of time under suspicion, fraudulent documents/transfers, the debtor's reorganization

Syntheses of the Main Parts of the Ph. D Thesis

The PhD thesis entitled „The debtor in the insolvency procedure" approaches an important theme in the domain of the insolvency law, a domain of great interest in the current internal and international economic context, in which many participants in the economic life perform their activity threatened by the possibility of bankruptcy.

The present study, based on a varied local and foreign bibliography, starts from the premise that the debtor is the main participant in the insolvency procedure, since in this procedure the final decision concerning his situation is ruled and the debtor's property is the object of the procedure.

The purpose of this thesis is to present the situation of the debtor before the opening of the insolvency procedure, during the procedure and after the closing of the insolvency procedure, and the result of the research comes to the conclusion that *the law concerning the insolvency procedure offers the conscientious debtor the possibility to have an active role in the procedure and to decide on the way it evolves. The opening of the procedure does not mean that the debtor must have a passive and resigned attitude, even if to a certain extent his freedom of action is limited and the pursuit of his activity will be possible only under the supervision of the bodies that apply the procedure.*

The thesis consists of eight chapters and it is structured in two parts. The first part, having a more general feature, presents in four chapters, the delimitation of the concepts of „state of difficulty", „state of insolvency", „insolvency" and „ceasing of payments", the functions of the procedure and their impact on the debtor's situation, the historical evolution of the legal treatment applied to the debtor in difficulty and the new legal measures which are to prevent insolvency.

The special part has four chapters dealing with the categories of natural or legal persons that can be debtors in the insolvency procedure, the characterization of the relationship between the debtor and the rest of the participants in the

insolvency procedure, the analysis and censorship of the documents signed by the debtor before and after the closing of the procedure and, last but not least, with the presentation of the debtor's situation after the closing of the procedure.

In order to correctly identify and outline the subject to be analyzed, defining the related concepts is essential. The notion of „insolvency" is the central concept, based on which the legal construction of the insolvency procedure has been clarified, so that the analysis of this thesis begins with defining and outlining this notion.

Unlike the Commercial Code, the text of the Insolvency Law no longer uses the notion of „ceasing of payments" to define insolvency. It has been proved that the equivalence of the two notions is not very accurate, because, although they describe the same phenomenon, they are related to different perspectives. If insolvency, namely cash flow insolvency, defined as being unable to pay debts as they fall due, refers to the subjective way the debtor characterizes his economic status, the ceasing of payments is the objective expression of the state of insolvency, being at the same time the external manifestation of the preexistent inability to make payments.

According to Law no. 85/2006, as it was modified by Law no. 169/2010, insolvency can occur in two forms: presumed insolvency as being obvious – „when the debtor, 90 days after the payment day, has not paid his debt to the creditor" and imminent insolvency – „when it has been proved that the debtor will not be able to pay his debts as they fall due, based on the funds that are available".

The cash flow insolvency is also different from balance sheet insolvency, which is characterized by the debtor's liabilities exceeding debtor's assets.

Once Law no. 381/2009 concerning the introduction of the preventative concord and the ad-hoc mandate has been issued, a new concept of „state of difficulty" emerged and it also has to be differentiated from the „state of insolvency".

De lege lata, the state of difficulty is different from the state of insolvency, meaning that the company which is in difficulty can pay or is capable of paying its debts as they fall due. After having corroborated the legal definition of the corporation in difficulty with the explanation of the same concept offered by the European community legislation on state aid, adopted by the internal law, the state of difficulty is mainly characterized by losses, by a low turnover, excessive stock or overproduction, great debts and declining net assets. Moreover, from the point of

view of the legislation concerning state aid, the corporation in difficulty must be incapable of facing the situation based on its own resources or based on funds supplied by the owners/shareholders and in the short or medium term it must be likely to be in danger of going out of business. This supplementary condition is not found in Law no. 381/2009 and the company is encouraged to use the procedure as soon as possible, after having become aware and has accepted the existence of difficulties, because the source of the problems might by faulty management.

The present definition of the state of insolvency expressed in art. 3 point 1 in Law no. 85/2006 balances the funds that are available on the one hand, and the existing, liquid and matured debts, on the other hand. However, from the economic perspective, *the availability of funds* is ultimately the result of a deliberate *blocking of the same funds*. In order to have enough funds at the critical date of payment, in order to face the claim of the creditors to pay the debts as they fall due successfully, the debtor must restrain himself from the natural tendency to run these funds and to block them in the bank account in view of paying the creditors. Taking this aspect into consideration, *in order to remove the paradoxical request to block the available funds, which comes in contradiction with the essentially dynamic characteristic of the current account*, the thesis shows that *it is necessary to replace the present definition of insolvency with another one, which should give up the expression „available funds" and extend the method of comparison to the notion of „available assets", including the assets that can be immediately capitalized: the cash in hand, the matured claims for which there are writs of execution, the credit balance of the bank account, the credit reserves given by the banks under the form of payment facilities and credit account opening, as well as the facilities given by the suppliers allowing the modification of the maturity date or rescheduling payments.*

The main role of the insolvency law is to establish correct operating and treatment criteria concerning the insolvent debtor. From this perspective the insolvency procedure has the following functions:

- *the function of improving contracting*
- *the function of the economic analysis of the debtor's property*
- *the function of balancing conflicting interests*
- *the function of protection the rights of the participants in the legal procedure*

- *the function of preserving the debtor's asset and business value*
- *the function of compelling the debtor's administrators to assume responsibility for the state of insolvency.*

If the debtor cannot meet his current obligations, the contract which stipulates them gives the creditor certain prerogatives, such as the right to seize or to enforce the sale of the mortgaged assets or the right to open the insolvency procedure against the debtor. Having these rights, the creditor has a controlling position. Even if these rights are not necessarily put into practice, they belong to the creditor, who is in a more advantageous situation in the case of (re)negotiation with the debtor and, possibly with other persons that could be involved, such as the employees. Only when one or several of the parties that are involved do not want to negotiate and instead they take advantage of their right to open the insolvency procedure, does the debtor become its subject.

An insolvency procedure is indispensable from the social-economic point of view because it has the role to reduce the costs related to the negotiating process between the managers and the creditors of the debtor who is in a state of insolvency. The object of negotiation is related, on the one hand, to the control over the debtor's activity and property and, on the other hand, to the way in which the value of the assets will be distributed once the control has been established.

The insolvency procedure can be characterized as an extreme way to take over the debtor's control by the creditors, since, once the insolvency procedure has been opened, the control of the company is transferred from the shareholders to the creditors, who will exercise it through the „managers" of the insolvency procedure. The activity of the managers of the insolvency procedures is controlled, from a judicial point of view, by the bankruptcy judge, and from a commercial point of view, by the creditors' committee. In a broad sense, the opening of the insolvency procedure is a hostile takeover, since the control is transferred from the shareholders to the creditors.

The insolvency procedures, whether favourable to creditors or debtors, should meet the following cumulative conditions in order to ensure the balance in the negotiation between debtors and creditors:

- to allow the debtor to continue his activity during the period when the method of debt payment is decided and to ensure the control of the transition to the chosen solution;
- to allow the guidance of the decision makers, to make sure they choose the most efficient solution;
- to remove the arbitrary factors from the decision process
- to impose transparency and efficient control over the procedure
- to foresee a large variety of rehabilitation methods.

The different regulations of the collective procedures can become in the hands of the shareholders or of the creditors real instruments with the help of which the former try to maintain the control over the company in difficulty and the latter try to take it over. Taking everything into account, the moment when the petition for the opening of the procedure is registered becomes important. So, the difference between *strategic and non strategic insolvency* is made. We can talk about strategic insolvency when the petition for opening the reorganization procedure of the company is used as a management strategy in order to obtain „the infusion of funds" that is necesary to overcome the difficult situation or when the reorganizing plan of the debtor in difficulty is drawn up by the governing board of the company before the registration of the petition for opening the procedure, in view of meeting the claims of the creditors whose demands are anticipated in an acceptable manner. In order for this strategy to work, the managers of the corporation must establish beforehand a certain category of creditors to whom the reorganizing plan should address. The advantage of this *modus operandi* is that, under the protection and control of justice, the debtor in difficulty can impose a plan that, outside the procedure, the creditors would not have accepted.

The presentation of the historical evolution of the institution of bankruptcy both nationally and internationally, outlining the changes that have occured in the role of the debtor in the procedure is meant to determine a better understanding of the present regulation of the insolvency procedure and to legitimate the conclusions related to the status of the debtor in the procedure.

The research of this evolution proves that commercial law is, par excellence, the outcome of the effort of a certain social category, the traders, to create and to

adapt – from common law – legal regulations in order to encourage the exchange of products between individuals, outside of any national consideration. The genesis of the insitution of bankruptcy, as an insitution of commercial law that regulates the treatment of the situation of commercial indebtedness, has not denied the characteristic of the evolution of commercial law, being long and difficult. It was necessary to impose imperative economic and political principles in order to make sure that debtor's enforcement (in a broad sense) will no longer be the rule in this kind of situation.

The insolvency procedure, having the payment of the existing, liquid and matured claims as its purpose, has a long history, since it is not a creation of the moden age. Over time, the change in social mentalities and a different apporach of the economic phenomenon have influenced the legal regime of insolvency. However, a characteristic that has been perpetuated over time can be detected. *No matter what the political legislative policy was, the legislation of insolvency has always been forced to conciliate between the debtor's interests and the interests of the creditors. When a balance was reached, it was a precarious one, and the general evolution has come from overprotecting the creditors to the obstinate attempt to save the debtor's activity by any means.*

In the Roman private law, the insolvency procedure was restricted only to the bankruptcy procedure, being conceived as a special way of enforcement which was meant to liquidate the debtor's estate and to settle liabilities by paying the accumulated debts. It is to be noticed that in the Roman law no difference was made between traders and non-traders as far as the scope of this procedure is concerned. Even if, gradually, the debtor's enforcement has been replaced with the enforcement of his property, however, when the purpose of the insolvency procedure was put into practice through *venditio bonorum*, the debtor was dishonoured. The disreputable character of bankruptcy was outlined by the etymology of the word chosen to define the situation of the debtor in difficulty – originally, the romanian word „faliment", „falit" comes from „fallire" or „fallere" which in vulgar Latin means to fail, to deceive. The social perception was that the defaulter „failed to give satisfaction to his creditors (to pay) and he was not up to the expectations of those who had put their trust in him."

In medieval times, the principles of the Roman private law were very much extended and improved in order to be able to face the social realities of the age. Thus, a true *Medieval law of markets and fairs* emerged. The commercial expansion

of the cities in the North of Italy gave rise to a rich and varied casuistry concerning insolvency, so this domain has always been an interesting matter for law researchers. In this historical period the insolvency procedure was also applied to all debtors, irrespective of their existence as traders. It is true as well that in the Italian cities, almost all the inhabitants performed trading activities, so the opportunity of a different treatment was not an issue. The primitive and disreputable character of the procedure was maintained and defaulters were treated as criminals and sanctioned with dishonorable punishments or even the death penalty. A difference between the honest but unlucky debtor and the fraudulent debtor was made only when the Statutes of the Italian cities appeared. The importance of the debtor's subjective atittude concerning the state of insolvency was noticed. The death penalty or torture were used to punish only the defaulter who deliberately caused or worsened the state of insolvency, acting with the purpose of deceiving his own creditors. This difference of treatment must be seen as one of the first attempts, a shy one, to protect the debtor in insolvency.

The first legal regulation of the bankruptcy procedure as an insolvency treatment was adopted in 1673 in France, chap. XI in the commerce Ordinance issued by Louis XIV. The regulation method of the procedure was inspired by the ideas in the Italian law of that period of time, and, consequently, this first legal text does not make any difference between debtors as traders or non-traders either.

The Romanian Commercial Code in 1887, like the Italian one which inspired it, abolished the tradition of the Roman law and of the old Italian and French law, *establishing the professional character of the bankruptcy procedure*, brought under regulation in Book III of the Code. The text of art. 695 states that „the trader who has ceassed the payments for his commercial debts" is in a state of bankruptcy. Obviously, the procedure cannot be used for non-traders or for traders for the ceasing of payments concerning civil debts. In the Commercial Code the bankrupt disqualification is referred to as being put on a list of defaulters and under the form of interdictions and of decadence with a non-patrimonial character. Whether the effects of the bankrupt disqualification were extended or not, that depended on the subjective attitude of the defaulter and the Commercial Code did not give the satisfaction of rehabilitation to the defaulters who deliberately caused the entire situation.

Starting with the first decades of the 20th century, prestigious authors criticized the option of the Romanian lawgiver to restrain the practicability of the bankruptcy procedure to trading debtors and to commercial debts not paid. It has been shown that, on the one hand, not any commercial debt can cause the opening of the procedure, only an existing, a liquid and matured debt can do that and, on the other hand, that the differentiation between commercial and civil debts cannot be justified. Still, Law no. 64/1995, in its initial form and after having been republished in 1999 as well, maintains a restricted practicability domain of the reorganizing and legal liquidation procedure, renamed, after 1999, the legal reorganization and bankruptcy procedure. Consequently, art. 1 states that it is to be put into practice only in the case of „traders – natural persons and commercial companies – that can no longer handle their commercial debts".

In the judicial literature of the early 20th century, the necessity to extend the practicability of the insolvency procedure to non-trading debtors was explained. Besides the historical argument which proved that at its origins the institution of bankruptcy was not a specialized one, used only for traders, arguments related to economic reasons and which are relevant even today have been taken into consideration. Thus, it is important to mention that certain individuals like those who perform agricultural activities are not within the limit of practicability of the legislation of insolvency, and their activity is subject to hazard more than any other type of activities, but, according to the Commercial Code (art.5), it is not a commercial activity. This exclusion affects the general credit and not only the civil one, because the difficulties these individuals face create financial blockage at the microeconomic level. The regulation of the insolvency procedure as a collective procedure, which gives equal chances of recovery of the creditors' claims, for the creditors in the same preference category, serves as a guarantee of the commercial credit and the civil credit must benefit from it as well. It is undeniable that within the insolvency procedure the creditors have multiple ways to obtain the maximization of the debtor's estate which can be used to recover their debts. All these methods (the actions against legal documents performed in the time period under suspicion, the possibility to choose between maintaining or denouncing some contracts under execution) are much more effective than the Paulian action brought under regulation by the civil law. Assuming the exclusion of non-traders from the domain of practicability of the insolvency legislation, successive individual enforcements of the

non-trading debtor simply consume his estate in a useless way, while most of the creditors would not be given any satisfaction. Besides all these arguments expressed in the interwar doctrine hoping to modify the dispositions of the Commercial Code, we could add another one related to the legislative policy as it was mentioned in Law no. 64/1995, when it was passed. There is no justification for the non-trading debtor who performs economic activities to be deprived of the advantages that the insolvency procedure could offer him, such as the chance to have some time to reorganize his activity, while all judicial and extrajudicial claims on the debtor or his assets should lawfully be suspended.

Through the modification of Law no. 64/1995 by Law no. 149/2004 and afterwards by Law 249/2005, the Romanian lawgiver proved that he understood the necessity to consecrate the modern conception by extending the domain of practicability to non-traders too. If at the beginning the regulation had a restricted character, enumerating only agricultural corporations and the economic interest groups among non-traders, through the modification of art.1 based on Law no. 249/2005, the lawgiver added one more category of possible debtors which was generically defined in the following way: „any other legal person in private law who runs economic activities as well". So, the idea that both traders and non-traders could benefit from the advantages of the insolvency procedure was accepted, since the insolvency phenomenon does not affect only commercial relations, but economic relations in general. As far as the distinction between the commercial and civil character of debt is concerned, the lawgiver has abandoned it since 2002, when the modification given by G.E.O. no. 38/2002 related insolvency to all categories of existing, liquid and matured claims of the creditor.

Extending the group of possible debtors in the insolvency procedure is constant in the evolution of the legislation concerning this matter.

Noticing the fact that the restriction of the group of persons who can be debtors in the insolvency procedure is not beneficial from an economic point of view, the lawgiver has acted through several successive modifications, extending more and more the practicability domain of the insolvency law: thus, if based on G. O. no. 38/2002 the procedure is used only for some of the traders (companies, cooperative corporations, cooperative organizations – consumer cooperatives and craft cooperatives, traders, natural persons, acting individually or in family associations without legal personality), Law no. 149/2004 extended the practicability domain of

the law in the case of some non-traders too (agricultural corporations and economic interest groups); eventually Law no. 249/2005 also introduced into the group of possible debtors any other legal person of private law who runs economic activities. As a consequence of the adoption of Law no. 85/2006 the persons to whom the procedure is applied are the same, but they are differently grouped depending on the general or simplified character of the procedure. According to the contents of art.1, paragraph (2) some categories that include traders, natural persons acting individually and family associations can be debtors only in the simplified procedure.

The extension, even if it has not been finalized, is welcome because the bankruptcy procedure, whether through reorganization or bankruptcy, it represents „an instrument of eliminating the financial blockage", and the purpose is to recreate the mobility of the working capital. Or, for this beneficial effect to be felt at the macroeconomic level, the insolvency procedure must be available for as many economic agents as possible.

Law no. 64/1995, obeying the French model of the law passed on the 25th of January 1985, has settled the legal reorganizing procedure of the debtor in insolvency as an alternative to the bankruptcy procedure.

Unlike the laws of Latin origin, which gave special attention to credit protection by liquidating the debtor's estate in order to pay the debts, the laws influenced by the Anglo-Saxon orientation took the protection of the debtor into consideration, mainly trying to save his business. In the American legislation, one of the purposes of the procedure is the rehabilitation of the debtor by the discharge of his debts, allowing him to start new in economic relations.

At present, in the United States of America, the legislation that brings the domain of insolvency into regulation, has its source in The Bankruptcy Act, dating from 1898. The text of this law has been successively modified, since 1933 and 1934, during the economic crisis, until 1994. In 2001 a modification project was drawn up and it simplified the opening of the reorganizing procedure, encouraging in this way the use of this procedure whose purpose was to reschedule the payment of debts based on a viable plan. According to the American model, the insolvency legislation must meet the interests of both parties – the debtors and the creditors. If the competitive nature is eliminated and a legal order concerning the priority of debt payment is established, the insolvency procedure offers the frame and means that both the debtor and the creditors can use in order to obtain satisfactory financial

results. The existence of an appropriate legal frame in the domain of insolvency and its efficiency encourage investments in the economic market and it also ensures the recovery of funds that are necessary for investment. Far from being considered as a stigma of failure, insolvency is regarded as a common situation in the American society, being qualified even as a necessary experience. Statistics in the business field show that there are rare cases in which economic agents are successful or extend their activity on the market from their first attempts. Most of them will be in insolvency several times before they find their way to success. Under these conditions, the insolvency legislation offers the conscientious debtor a new chance in business and it also gives him the opportunity to learn from his own mistakes.

This orientation has been imposed at present in the French law as well and, as it has been shown, also in the Romanian law. Without bearing the connotation of infamous nature, the insolvency procedure is concieved as the chance given to the debtor that can be saved even if the attempt to relaunch his activity sometimes involves the sacrifice of the creditors' present interests, by settling the principle of the priority of the reorganization procedure.

The reorientation of the legislative policy as far as insolvency at European level is concerned, meaning that the debtor is protected, outlines the idea that a new „human right" should be adopted – the right to go bankrupt, as a distinct right of the debtor. This benefit is a consequence of the ceasing of enforced legal proceedings according to art. 36 in Law no. 85/2006, which causes the customization of the obligational relationship between the creditor and the debtor by reducing the creditor's coercive force.

The methods of increased protection of the debtor in the insolvency procedure give the impression that there would be some kind of right not to pay your debts and that if certain debts are not paid, that does not bring dishonour, when taking the personal situation of the debtor into consideration. This comes from a certain logic which moots the classical terms of the obligational relationship. A continuous decrease in the force of duty and, on the other hand, a tendency to treat the consequences rather than the causes of insolvency have been noticed. This approach transforms the obligational relationship, from a relationship between individuals into a relationship between properties, in different words, a depersonalization of the obligational relationship occurs. Under these circumstances, it seems natural for the creditor to consider that it is his duty to take

the risk of ceasing of payments into consideration and to burden the credit conditions.

The special status of the insolvent debtor is to be considered as an autonomous legal subject, whose fate is determined by his economic weakness as opposed to the economic strength of the creditor. This way, the status of the insolvent debtor seems to be compliant with the fundamental human rights: the dignity of the human being, the respect for private life, the right to have a home and to work and to benefit from other livelihoods. The law ensures the primacy of the individual, forbids the violation of his dignity and guarantees respect for the human being from the first day of his life. The principle of dignity is in contradiction with the right of the creditor to have enforced control over the debtor's entire estate, invoking two essential rights, the right to have a decent home and to maintain the minimum living standards. In this context, property becomes a survival instrument.

The insolvency phenomenon guarantees a contradictory effect: the rights that can be invoked to defend human dignity are not property rights, they are extra property rights, but they are involved in financial matters and the result is that the individual is protected through his property. From a sociological perspective, property is given fundamental values, which allows it to be perceived as a way the individual continues to exist and not as a neutral mechanism to guarantee the claims of the third parties. In other words, through the occurence of fundamental rights, property becomes an instrument for survival and fight against poverty. It can no longer aim to meet the rights of the creditors as a collateral, because invoking the benefit of the fundamental rights the debtor is placed under its protection.

Giving priority to the imperative of social justice, the legal regulation insists on the consequences the debtor has to face. It is inconcievable that the individual's dignity be threatened by economic reasons, and the threat to the individual's dignity can be caused by depriving him of the goods that are necessary to live and work. This evolution can have an unwanted effect, the disappearance of the debtor's feeling of responsibility and the rigour of the creditor's demands concerning payment guarantees.

If until the modern age the purpose of the bankruptcy procedure was the payment of the debtor's debts as a consequence of the liquidation of the assets that were available, at present, at European level, the law of civil procedure is no longer limited to the regulation of treatment methods concerning the state of insolvency, it

settles procedures that apply to the debtor that is not in insolvency yet. As a consequence of the fact that insolvency has been anticipated, the debtor can benefit from an early legal intervention which will prevent its appearance. The advantage depends on the debtor's diligence who predicts that in the near future he will be in insolvency and decides to take immediate action to prevent the danger. This way, the rescue procedure is practicable in the case of the company in difficulty which, without being unable to pay at the date of the application, considers that it needs the help of justice to prevent the occurrence of the state of insolvency in the near future. The possibility of the company to resort to legal protection, before being unable to pay, is taken from the American law and it is capable of determining the governing boards to understand that the competent and timely use of the legal institutions of collective procedures can be a viable instrument for economic relaunch.

The insufficiency of personal funds, resorting to credits excessively and indebtedness are the origin of almost all bankruptcies. The company in difficulty, in desperate search for funds, is a vulnerable entity, a subordinate one, its behaviour being dictated by the refinancing banks, by the rest of the creditors, by the employees (through the Union) etc. And all these partners have their own policies, which rarely support the best interest of the company. For the debtor whose enterprise is in dificulty, but is a viable one, resorting to the prevention measures of insolvency is the ultimate means to keep or to regain legal and economic independence, since a debtor who is in the insolvency procedure, even when he has kept the right to manage his own estate, is a subordinate person, who is under the control and watch of the practitioner in insolvency, who is, in his turn, controlled by the bankrupcty judge (from a jurisdictional point of view) and by the creditors (from a managerial and commercial point of view).

The rescue of the company largely depends on *the early acknowledgement and the acceptance concerning financial difficulties*. Getting into the state of difficulty can have multiple causes: the difficulty to obtain the financial funds that are necessary to pay the debts and to continue the activity, outdated technical equipment from the point of view of technical efficiency, of energy consumption and the quality of the products and services offered to the market, the use of old technology and which imposes additional costs, the inefficient organization of work and production, faulty management etc.

Acknowledging the state of difficulty is equivalent to predicting the state of insolvency and that is based on the ability to recognize, when the time is right, the possibility of the occurrence of critical situations or the future evolution of the events and phenomena that will happen within the debtor entity and on the market, based on data known at present.

The prevention of the occurrence and development of the state of insolvency can be achieved by continuously watching and analysing the economic and financial situation of the debtor, based on some indicators offered by the financial situations of the company, especially the balance sheet, the profit and loss account and the explanatory notes, and also based on statistical indicators which can illustrate different aspects of the activity and the economic results of the debtor.

The warning concerning the crisis situation of the company may come from *external sources* (banks, external auditors) or from *internal sources* (accounting information, internal auditors or censors).

An important role in the prevention efforts of insolvency can be taken upon the authorities, by creating some organisms specialized in the early detection of insolvency, by creating an information system which could enable businessmen to obtain crisis management consulting and by implementing some programmes meant to detect financial difficulties as soon as possible. This kind of preoccupations are also expected from the employers' organizations, the traders' professional organizations, the professional organizations of the practitioners in insolvency, from the auditors, the expert accountants and assesors, even from the unions. It is also advisable that the businessmen use the information possibilities offered by the ECRIS system publicly accessible – the site noulportal.just.ro -, by the Bulletin of insolvency procedures and by the National Trade Register Office, which will allow them to identify the companies in difficulty and to orient their behavoiur to their best interest.

In Romanian Law the means of preventing insolvency are regulated by Law no. 381/2009, which applies exclusively to enterprises organized by legal persons, and *not to enterprises organized by natural persons* and they are divided into two distinct procedures: the ad hoc mandate and the preventative concord, which are both analysed in the thesis.

The preventative concord was reintroduced in our legislation after almost 70 years by Law no. 381 on the 10 of December 2009.

According to Law no. 381/2009, the *preventative concord* is a contract between the debtor, on the one hand, and the creditors that have at least two thirds of the value of the claims that are accepted and indisputable, on the other hand. The debtor suggests a plan of recovery for his company and of claim coverage and the creditors accept to support the debtor's efforts to overcome the difficulty his business is in.

The law of the preventative concord settles a contractual and legal mechanism meant to give the honest debtor who is in financial difficulty the possibility to avoid insolvency. The debtor in question is a victim of an unfavourable combination of events, but he deserves protection, since his business is likely to recover, to the benefit of its employees, its creditors (including the state, for the budget claims), the local community and its own best interest.

Even if the law does not make any distinction, the target of this regulation is mainly represented by medium and large companies, for at least two reasons:

- their activity is difficult to reorient, due to the specialization implied by the size of the company;

- their disappearance as a consequence of bankruptcy can have unfavourable consequences for the entire social and economic environment in which they run their activities, starting with the employees (who risk losing their job), the local community (that loses the revenues from fees and taxes and will have to face the increase in the unemployment rate at local level), the Romanian state (that loses a tax payer and will have to bear the expenses of unemployment and professional retraining of the unemployed), suppliers etc. The creditors of these companies will have to seriously take into consideration the proposal of preventative concord coming from the debtor in question in order to avoid the unfavourable consequences of insolvency.

Failure or the impossibility of puting prevention procedures into practice can clear the way towards bankruptcy, an unwanted consequence both for the debtor and the creditors. Consequently, the law must encourage the debtors to initiate an insolvency procedure if insolvency can be predicted, in a reasonable way. The debtors who act in this way could benefit from facilities (fewer penalties, a more facile solution to the arguments with the creditors, the permission to suggest a reorganizing plan etc.), as an encouragement for having taken early action. We can notice that the Insolvency Law allows the debtor to suggest a reorganization plan

only if he has honestly acknowledged that he is in a state of insolvency, and the dishonest debtor or the one who has unrightfully objected to being in a state of insolvency is sanctioned with bankruptcy.

Avoiding insolvency by all means and postponing the final outcome are not ends in themselves. If the difficulties that the debtor faces are harsh, the debtor must request the opening of the insolvency procedure. To the extent in which the company is not viable, its liquidation must happen as soon as possible, before any other attempt of recovery. The debtor must be aware that the survival of the company is not always wanted. Under certain circumstances, the liquidation of the company is the best option because nothing can justify sacrificing the rights of the creditors, if the debtor's recovery is not possible. Going ahead with ruinous business can determine the responsibility, including the criminal responsibility, of those who are guilty for the occurrence of the state of insolvency or for deliberately worsening it. This kind of attitude can cause the insolvency of the debtor's counterparties or of the entire group which includes the debtor, and such a result must be avoided.

We should not forget that the primary purpose of the insolvency procedures is the payment of the debts. A subsequent purpose is to ensure the rapid elimination from the market of the debtor whose situation is compromised, with costs, as low as possible, and with restricted consequences for counterparties.

The special part of the thesis starts with the analysis of the categories of natural and legal persons that can be debtors in the insolvency procedure.

The debtor is the central figure in the insolvency procedure even if Law no. 85/2006 does not devote a separate section to him, as it does in the case of the rest of the participants in the procedure. From this perspective, *the analysis of the categories of natural and legal persons who can be debtors in the insolvency procedure is very important, their identification determining the scope of the procedure.* As proof of the importance of this subject, identifying the possible debtors in insolvency has always been in the attention of the lawgiver, being the object of several reforms of the insolvency law. The dynamism which characterizes our legislation, determined by the need to bring the internal law closer to the European norms, causes the appearance of new economic agents on the market and imposes

the research of their legal status in order to establish whether they can be included in one of the categories settled by Law no. 85/2006.

According to art. 3 point 5 in Law no. 85/2006 concerning the insolvency procedure, the debtor is that natural or legal person of private law, who belongs to one of the categories referred to in art.1, and whose property is in state of insolvency. According to art.1, paragraph (1) the general procedure is used in the case of the following categories of debtors who are in a state of insolvency or imminent insolvency:

1. companies;
2. cooperative societies;
3. cooperative organizations;
4. agricultural companies;
5. groups of economic interest;
6. any other legal person of private law who also runs economic activities.

The simplified procedure is applied in the case of the debtors who are in a state of insolvency and who are included in one of the following categories:

a) traders, natural persons, acting individually;

b) family associations;

c) debtors who belong to the categories referred to in paragraph (1) and meet one of the following conditions:

1. do not have any property;
2. the constituent documents or the accounting documents cannot be found;
3. the administrator cannot be found;
4. the premises no longer exist or do not correspond to the address in the commerce register;

d) debtors who belong to one of the categories referred to in paragraph (1), who have not shown the documents enumerated in art. 28, paragraph (1), letters a) - f) and h) within the time limit prescribed by law;

e) the companies that were dissolved before the registration of the claim for opening the procedure;

f) debtors who expressed their intention to go bankrupt in their introductory claim for opening the procedure or who are not entitled to benefit from the reorganization procedure referred to in the present law.

The thesis suggests the modification of art. 1, paragraph (2), meaning that the simplified procedure should be applied to the debtors who are in a state of insolvency or imminent insolvency and who are included in those categories.

The first chapter in the special part of the thesis devotes a section to each category of possible debtors both in the general procedure and the simplified procedure. Within the section devoted to companies the following are presented: the special situation of the company which is not registered in the commerce register or of the company which is registered, but without having obeyed legal provisions, of the simulated company and of the fictive one. This chapter identifies the legal persons who can be included in the category that is generically defined „any other legal person of private law who also runs economic activities" – associations, fundations, federations, the mutual fund organizations of the employees, the associations of pensioners, (professional) sports clubs, professional sports confederations, national sports federations, unions, union federations and confederations and their territorial unions. This part of the thesis also analyzes the special legal provisions that are applied to legal persons of public law, to banking and non-banking financial institutions in insolvency.

The simplified procedure is a rapid, simple and effective means, which is useful to the actors who participate in the insolvency procedure, for achieving the purpose of the law, meaning that creditors must be satisfied within the limits of the exploitation of the debtor's property. If the procedure is shortend and if the possibility of the reorganization of the debtor's activity is eliminated, with the consequence of his direct bankruptcy, that should not give the impression that the aim is to eliminate the economic agent, because the lawgiver pursues to ensure the celerity of the procedure and to limit the right of option for reorganzation to those situations in which reorganization is objectively possibile.

For the debtors who are natural persons, acting individually, and family associations, the simplified procedure is the only practicable insolvency procedure, due to the fact that the legal form in which the activity has been organized does not objectively allow its reorganization. For the rest of the categories of debtors referred to in art. 1, paragraph (1) in law, the simplified procedure is an alternative to the general procedure, its practicability depending on the actual situation of the debtor. So, the following conclusion can be drawn: the group of the categories of debtors to whom the simplified procedure is applied, is larger than the one of those to whom

the general procedure is applied, because it includes, apart from the debtors who can exclusively be subject to the simplified procedure, the categories of debtors that would normally be subject to the general procedure, but who meet the conditions especially referred to in paragraph (2) of art.1. at the same time.

Another theme that is tackled in the second part of the thesis – chapter VI – concerns the relationships between the participants in the insolvency procedure which is an element of utmost importance because without it the procedure cannot be oriented towards the aim in question. The complexity of these legal relationships depends on the characteristics of the insolvency procedure which tends to include an unlimited number of processes, which are all related to the procedure.

Unfortunately, the law concerning the insolvency procedure still does not contain a complete regulation of the relationships between the participants and the effect of the lacunae, rather numerous and important, is made worse by the one of the contradictory rules which cannot be in tune and the one of the indecipherable phrases which generate presuppositions and interpretations that are so divergent that they question even the uniformity of jurisprudence itself, which is a necessity of the state of justice.

In this situation, the mission of the participants in the procedure is not facilitated, it can dangerously generate too many personal interpretation, and that happens because arguments that could be supported by clear and uninterpretable texts and that could be used to reject an adverse opinion are rarely found.

In order to illustrate the diversity of the legal relationship that can exist between the debtor and the rest of the participants in the procedure, the thesis analyzes a few situations found in practice (the representation of the debtor by the special administrator, the relationship between the debtor and the creditors before and after the opening of the procedure). A general characteristic is to be noticed, the fact that the existent relationship between the debtor and the creditors before the opening the procedure undergoes a major transformation after this moment on. The initial relationship will be influenced, in the first place, by the conflict of interests which occurs between the debtor and the creditors, on the one hand, and between the creditors, on the other hand. In the debtor-creditor relationship , as a bipartite one, external factors will intervene – for example, the interference of the bodies that apply the procedure. The exercise of the creditor’s rights will be limited and

restricted by the competitive and egalitarian characteristic of the insolvency procedure. The creditor will be obliged to obey the rules of the collective legal seizure and will have to accept the priority order of the claims.

Starting with the date of the opening of the procedure, the debtor no longer has a legal representative, since the mandate of the social administrator ends. Law no. 85/2006 introduces the special administrator as a participant in the procedure, as a representative designated by the general assembly of shareholders/associates of the debtor – legal person. He has to draw up the administration documents which are necessary during the procedure, when the debtor is allowed to manage his activity and he has to represent the interests of the shareholders/associates of the debtor in the procedure, during the time when the debtor was taken the right of management.

By making it possible to designate the special administrator, the aim was to change the debtor's faulty management before the opening of the procedure with a manager who was specialized in crisis situations. Unlike the judicial administrator who will administer the debtor's situation in order to achieve the purpose of the procedure – debt payment – the special administrator will act by taking the debtor's interest and the interests of the associates/shareholders into consideration.

The insolvency procedure is a special procedure of enforcement, and that is why its administration presupposes the pre-existence of some valid obligational relationships bewteen the debtor and the creditors. The principle according to which all traders who assumed certain responsibilities by taking part in legal relationships are to carry them into effect at the payment date, is related to the way a certain stable and profitable economic activity takes place. The mutual credit belongs to the domain of commercial operations, so if a certain obligation is not fulfilled, that harms both the creditor of that obligation and his commercial partners. Involving a trader in complex and continuous relationships with various suppliers, on the one hand, and with the clients, on the other hand, is allowed by the good functioning of the collection and payment mechanism between them. Each participant in this circuit is credited by his business partners who trust him to pay his debts at the payment date and to do this willingly. Consequently, the inability to pay the overdue debts is a major incident whose negative effects are not limited to the bipartite relationship, but they might affect the activity of several traders, who are bound by the sequence of their operations.

If the debtor does not fulfil his assumed obligation, the creditor has several legal ways to gain advantage from his claims and to exercise his rights. For the creditor who has an existing, liquid and matured claim whose quantum exceeds the minimum value imposed by Law no. 85/2006, resorting to the insolvency procedure can be an advantageous solution, considering what are the effects of the opening of the procedure, its celerity and the fact that each creditor has several means he might use to control the way in which the purpose of the procedure is achieved – the coverage of his claim. Furthermore, unlike the procedure of enforcement regulated by the Code of Civil Procedure, the insolvency procedure prefigures the possibility to restore some of the debtor's estate, increasing the creditor's chances to be paid.

Not all the debtor's creditors are entitled to participate in the insolvency procedure. The creditors who have not registered their claim in due time cannot use the procedure. Moreover, the creditors whose claims are contested might not be able to use the procedure if the bankruptcy judge does not decide that the claim can be provisionally registered. Even in this case, the creditors in question cannot fully benefit from the rights they could have as participants in the procedure and their rights guaranteed by the provisional regitration are precarious and conditioned by the acceptance or rejection of the claim.

Some creditors stay outside the procedure – the creditors with claims posterior to the opening of the procedure are paid according to the payment date, if their claim comes from „current operations" and not as a result of some installment payments in the execution of a certain plan or as the result of a liquidation, as it happens in the case of the creditors who are participants in the procedure.

The creditors who are entitled to participate in the procedure have the quality of participants in the procedure, and as such they interact with the debitor through an organized collectivity which is the assembly or the committee of the creditors, or individually, in egalitarian conditions. The insolvency procedure is a collective procedure since it involves a collectivity. The main rights of the creditors – the opportunity control over managerial decisions, the election of the judicial administrator/liquidator, the vote for the reorganization plan – are indeed exercised in a collective and organized way, in the assembly of the creditors or, depending on the situation, in the committee.

But since the majority of the creditors have a passive attitude, even an ignorant one, the assembly of the creditors is inefficient. The existence of the

assembly is not justified, not even from the perspective of the fact that the formalities related to the convocation and the meeting of the assembly are slow and can affect the celerity principle of the procedure. That is why the thesis suggests *de lege ferenda that the committee of the creditors stay in the centre of the decision-making process, an organism consisting of a smaller number of representatives of the creditors – approved persons who can efficienlty control the managerial decision under the aspect of opportunity and who can actually represent the interests of all categories of creditors. This committee that would overtake the tasks of the creditors' assembly must be representative, meaning that it should be organized in such a manner that the way it is composed should reflect the weight of the claims registered. Furthermore, the way the committee of creditors is formed should be regulated in detail (because the assembly of creditors, unlike the assembly of the associates/shareholders, exists as a collective entity only as a participant in the insolvency procedure) and the voting system within the committee must be reconsidered, by designating a majority that should be related both to the value of the claim and to the number of creditors.*

The penultimate chapter of the thesis deals with the fate of the debtor's business relationships, defined as the economic transactions the debtor has with different partners. The situation of the debtor's documents is brought under regulation in art. 86, Law no. 85/2006, related to the fate of certain contracts in execution and in art. 79, 80 concerning the unenforceable effects of some of the debtor's contracts. Art. 49 is also important, because it draws the limits and states the validity conditions of the documents signed by the debtor after the opening of the insolvency procedure.

At the date of the opening of the procedure, the contracts in progress are considered to be upheld, but, later, when taking the maximization principle of the debtor's property into consideration, the law gives the judicial administrator/liquidator the right to opt between maintaining or denouncing those contracts. The stated goal of the adoption of the right of option is to make sure that the debtor's property increases. This implies balancing the financial advantages offered by the solution of denouncing the contracts and the economic consequences of having pursued the contract in question. The solution given by the judicial administrator/liquidator will have to be oriented towards the variant which brings extra value to the debtor's

property and will also have to consider the debtor’s real possibilty to meet his assumed obligations in those contracts. In addition to assessing the economic profitability of that contract, the practitioner must make an assessment of the effects of the contract termination and the prospect of potential claims from contractors whose contract was terminated and which may suffer damage from the contract termination.

Thus, Article 79 states that "the judicial administrator/ liquidator may introduce to the bankruptcy- judge petitions to cancel fraudulent acts concluded by the debtor to the detriment of creditors' rights, in the 3 years preceding the opening of proceedings", and Article 80 lists exhaustively the legal operations that can be annulled, including the derogations in the three-year period. Article 80 lists practically several categories of legal acts that are presumed to be fraudulent, as they have the effect of decreasing the debtor’s property which harms creditors by restricting their overall collateral pledge.

Depending on the nature of the act or transaction concerned and the seriousness of its consequences for creditors, the period of time under suspicion is 120 days, a year or three years before the opening of insolvency proceedings. The effectiveness of the period of time under suspicion is closely correlated with the time that has elapsed between the date of the fraudulent transaction and the opening of the proceedings. To provide more opportunities for successfully restoring the debtor’s property, the legislator also foresaw the possibility to annul contracts which are subsequent acts to those Articles 79-80 refer to. In this respect, the Law of insolvency proceedings resemble the principles of common law approach, where the cancellation of the subsequent acts is a result of nullity. According to Article 84 the action for annulment of the subsequent acts in order to be passed, the plaintiff must prove the fulfilment of two conditions: a) the sub-acquirer has not paid the corresponding value of the property and b) he knew or should have known that the initial transfer is likely to be cancelled. If the sub-acquirer is husband or close family relative to the debtor, he is presumed to have known this fact.

The reason of the period of time under suspicion is that the documents signed during this period are presumed fraudulent to the detriment of creditors, that’s why an action for annulment may be promoted to restore the debtor's assets and to put the creditors in position of equal contest when recovering debts from the debtor's

property representing general collateral. In this context, the texts of Articles 79 and 80 are an expression of the principle of maximizing the debtor's assets, essential for achieving the purpose of the procedure which is to settle liabilities of the insolvent debtor.

Most contemporary authors argue that the Paulian action, which is similar to the action stated by Articles 79-80, is an action declaring the contracts unenforceable. This study embraces *this view stating that* declaring the contracts unenforceable *is not an aim in itself, but the means by which creditors can repair the caused damage. Therefore the action to "annul" fraudulent acts also has the nature of an action for compensation, the claims of creditors will be satisfied from the asset value which is the subject of the fraudulent transaction. The legal basis of action is founded on the debtor's fraudulent conduct, which falls under the illicit behaviour and must be punished. Given the particular features of insolvency proceedings, the action for annulment of fraudulent documents is a means of asserting the principle of maximizing the debtor's assets in order to achieve the purpose of the procedure - paying outstanding debts. The need to ensure equal treatment for all creditors urges the annulment irrespective of the subjective attitude of a third party contractor. Also all creditors will benefit form the action admission, the action being pursued in the collective process. Concerning the creditors participating in the proceedings, the fraudulent document concluded by the debtor is considered non-existent. The asset recovered will be pursued and exploited by them in the proceedings as part of their overall collateral.*

The last chapter of the thesis addresses the hypothesis of the survival of the debtor after the closing of the insolvency procedure as a result of the execution of the reorganization plan. The stated purpose of insolvency proceedings is the debtor's liability coverage, and the law states that one of the procedures that can achieve this goal is reorganization. To benefit from the reorganization it is absolutely necessary for the debtor not to remain passive and seek the opening of insolvency proceedings in time, and if he has not done it, he has to admit the insolvency state and not to contest in an unsubstantiated way the petition made by the creditor.

The survival chances of the debtor - legal person, after the closing of the procedure depend largely on the rapid reaction of the governing boards of the debtor. In the context of preventive procedures regulation, the debtor may apply to

an insolvency specialist practitioner, before reaching a state of insolvency to overcome the state of difficulty.

Even if the call to preventive procedures was not successful, the debtor is not denied the opportunity to manifest the intention of reorganizing. Also the rights of creditors, who have previously participated in extrajudicial negotiations with the debtor during the procedure of ad-hoc mandate and of preventative concord, are being protected after the opening of insolvency proceedings by that the agreements reached in those proceedings can not be annulled [article 80 paragraph (1^1)]. Protection is not an absolute one, to operate it is required to meet several conditions: the documents must be concluded in good faith in the execution of an agreement with creditors; the agreement is the result of extrajudicial negotiations to restructure the debtor's debts, with the following limitation: the agreement to have been likely to lead reasonably to the debtor's financial recovery and not to have as aim the harm and/or discrimination of creditors.

The debtor has the right to request the opening of the proceeding and to mention the intention of reorganization in the petition. Law no. 85/2006 requires the parties who are interested to submit a reorganization plan to manifest this intention as soon as possible in the procedure, indicating the premises on which they take into consideration to submit the plan, so the receiver can evaluate the chances of the debtor's reorganization based on evidence - article 28 letter h) article 31 paragraph (1). d). Therefore, the debtor is able to submit along with all the documents required by law a draft of the plan or even the plan to convince creditors that the strategy adopted is effective and adaptable and that the debtor has the ability and resources to implement this strategy. The success of the debtor's approach depends on the objective analysis and understanding of key economic factors affecting the economic environment in which the debtor operates, on the internal assessment of potential recovery of the debtor and on identifying the options at his disposal.

Expressing the reorganization intention has important consequences: the debtor preserves the right of administration during the observation period and will be able to continue the current activities and to make payments to known creditors, confined to the usual exercise of current activity under the supervision of the judiciary administrator. Prompt and honest response of the debtor paralyzes the control transfer of the debtor's activity to creditors.

Although previous negotiations with creditors have not completed in an agreement, in the procedure, the chances of the debtor to reorganize and survive the insolvency state are supported by some provisions in the law regarding the insolvency proceedings. The debtor will get a respite, because the opening of insolvency proceedings results in the suspension of all judicial or administrative actions and enforcement measures for the recovery of debts and prohibits the commencement, enforcement or appeal of actions and judgments, judicial or administrative, against a debtor for the collection of a claim that arose prior to the filing of the bankruptcy petition – automatic stay effect. The automatic stay also prohibits collection actions and proceedings directed toward property of the bankruptcy estate itself.. Also accessories to claims such as interest, penalties or any other expenses will not be calculated after the opening of the procedure. The debtor may seek the recovery of debts from his debtors through legal actions brought to justice by the judicial administrator and which are exempt from taxes. The judicial administrator is able to maintain the contracts that are in progress for the benefit of the debtor and that support the implementation of the reorganization plan and also has the role to terminate unfavourable contracts. In order not to block access to any source of funding, the opening of the general procedure does not prevent the debtor from participating in public procurement procedures. There is also the encouragement of potential investors to finance the reorganization plan by prioritizing to the distribution of the funds obtained from the sale of assets affected by guarantees in favour of the creditors that provide financing to the debtor. To overcome the reluctance of financial institutions, reticence connected with the rescheduling of the reorganization plan of the claims resulting from contracts of bank loan or other long-term contracts involving the development of investment exceed the time that can be allocated to execute a plan of reorganization, the law expressly provides the possibility of paying a portion of the claim during the execution of the reorganization plan, the difference being paid after the debtor comes back into the economic circuit, following the successful execution of the plan, or bankruptcy, if the procedure failed reorganization.

Any provider of services - electricity, gas, water, telephone service or others alike - is not allowed in the observation and reorganization period, to change, deny or temporarily discontinue such service to the debtor or the debtor’s estate, if he is a consumer captive according to the law.

In the reorganization plan the debtor may eliminate certain debts, provided that principle of fair and equitable treatment is obeyed. After the closing of the debtor's reorganization procedure, those creditors can not claim the debtor who is reintegrated in the economic activity the payment of prior debts. The solution to save a company by sacrificing the rights of some business partners is perfectly justified if we take into consider that anyway those creditors would have not received anything in case of bankruptcy.

For the creditors, supporting the reorganization plan has some advantages. Under the current real estate market conditions, it is likely for the debtor's assets to be sold beneath the value of the creditors' claims, and, in case of bankruptcy, the creditors to be forced to recover only partially or not at all the claim, especially when the claims are unsecured. The claim of the investor who finances the activity of the debtor during the reorganization proceedings receives priority in case of distribution of the proceeds, after the costs of the procedure and wage claims and before the state claims. Supporting business partners who need help contributes to the maintenance of a functional business environment and the loyalty of these partners. Under these circumstances, there is an urgent need to change perceptions of the phenomenon of reorganization, the transformation of the mentality of both economic agents - companies, financial institutions, and especially the state institutions – which, in strict terms and conditions imposed by the Romanian law of insolvency proceedings, should support honest reorganization plans proposed to save the standstill business. The liquidation of debtor's estate, although sometimes it is the fastest way of recovering the amounts owed by the debtor (according to the budget and secured creditors), does not always meet the function of economic evaluation of the debtor property of the insolvency law procedure. The aim of the insolvency proceedings that involves the choice of that procedure that will determine the coverage of the debtor's liabilities as much as possible can not be ignored.

Paradoxically, the legislator granted the creditors the possibility to take control the debtor if the associates/shareholders have no interest in continuing the activity and to suggest themselves a reorganization plan. A hypothesis has been created, at least theoretically, according to which the company, a legal entity, can survive in the interest of creditors and to achieve the purpose of the procedure.

The debtor is discharged of debts as a result of closing insolvency proceeding. As a result of bankruptcy proceedings closing, the debtor legal person is

removed from the trade register of commerce. He will not be pursued for the debts unpaid in the procedure because he has no legal personality. When a reorganization plan is confirmed, the debtor legal entity is discharged of the difference between the obligations he had before the confirmation of the plan and those assumed in the plan. The law states that through the sentence confirming the plan, the creditors' claims and rights are modified as provided in the plan and, in case the reorganization plan fails and the bankruptcy procedure is opened, the confirmed plan will be considered irrevocable and executory. If the payment schedule provides that certain payments will continue after the execution of the plan, after the closing of the reorganization procedure, these payments will continue according to the contracts in which they are stipulated. If the reorganization plan is executed successfully, in the sentence closing the procedure all necessary measures for the debtor's reintegration in business will be adopted. It is possible for the debtor to be totally transformed in the reorganization both concerning shareholder structure and organization and management, but if the resumption of the commercial activity brings back losses and the debtor gets back to insolvent status in less than five years from the closing procedure, he will not be able to opt again for reorganization.

The law governing insolvency proceedings also establishes the situation in which the debtor is passive, absent, uninterested and acts in bad faith. In this case, if creditors holding at least 20% of all claims registered do not propose a definitive plan, the debtor goes bankrupt and his assets will be liquidated. The debtor will lose the right to conduct business, direct and normal consequence of his attitude and state he is in, the judicial administrator taking control of the debtor's business. The way in which the judicial administrator runs the business is controlled by the creditors, who decide the management decisions and opportunities taken by the judicial administrator.

The law regarding insolvency proceedings seeks a balanced approach to the situation of the insolvent debtor. Without favouring him to the detriment of creditors, who suffer damage as a result of a debtor's inability to meet the debts, the insolvency procedure gives the debtor of good faith, all the necessary means to save his business as long as it is proved viable.

The economic literature considers that bankruptcy is a phenomenon compatible with economic development in a global economy. Thus, a low survival rate of business agents is not necessarily a cause of concern. Because of the

increasing global competition, governing boards and businesses shareholders are forced to react much more quickly and in a much more flexible way to market reality.

In this context, bankruptcy should be seen as an opportunity and is, essentially, a consequence of constant and necessary business renewal.