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The Modes of Matching of Insolvency Proceedings in International Comparison

SUMMARY: National laws—according to the extent of the given crisis—differentiate between restructuring and insolvency proceedings. The various decisions made by the economic players are influenced not only by specific insolvency laws, but also by the framework itself, i.e. the interconnection of restructuring and liquidation procedures themselves. By examining a number of insolvency systems within the EU, this paper is intended to prove that certain regularities can be detected among the different modes of matching that lend themselves to categorisation. Some of the countries under review have two-tier procedural frameworks, where restructuring and involuntary liquidation procedures are completely independent of one another. Others have single-tier insolvency procedural frameworks, the main characteristic of which is that the decision to restructure is an indispensable element of the proceedings in every case. Furthermore, the paper points out the existence of a procedural framework that has not been identified in other relevant publications as yet and which the author has termed a 'standardising' insolvency procedure.

KEYWORDS: insolvency, bankruptcy, involuntary liquidation, insolvency procedural framework
JEL CODES: K12, K22, F23, F65

THE SCOPE AND METHODOLOGY OF THE RESEARCH

Countries typically decide on state (statutory) intervention related to insolvent debtors exiting the market on the basis of political structure and the system of economic objectives. As a result, various regulatory methods are available to manage a wide variety of insolvency-related situations. The bankruptcy regulations of different countries have one thing in common: they all have to satisfy statutory needs that correspond to the degree of payment difficulties. The procedures must allow companies still in the reversible phase of the crisis to restructure, and ensure that those facing unmanageable crises exit the market as efficiently as possible, generating the lowest possible losses. Based on the above, within the regulations of various countries, we can distinguish between restructuring and involuntary liquidation insolvency procedures. The objective of the former is to help the company stay afloat by facilitating the agreement between debtor and creditors as well as by restructuring operations, while the latter fundamentally involves the distribution of funds among creditors through the sale of assets and the collection of claims.

The specific manifestation of the types of procedures – according to the system of economic policy objectives and intervention levels of the given country – is extremely diverse. The interoperability between procedures – in other words, the modes of connection – could also vary. This study

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focuses on finding out whether there are regularities between the connection modes of restructuring and liquidation procedures despite national specificities, and whether the modes of matching can be classified into clearly distinguishable types.

As these differences gain practical significance in the case of cross-border insolvency procedures, the application area of Council Regulation (EC) No. 1346/2000 (on cross-border insolvency proceedings) merits special attention.

As I attempt to resolve the dilemma outlined above, I will present the insolvency systems of selected EU Member States by reviewing their respective restructuring and liquidation procedures, while trying to provide answers to the following questions.

- Which procedures have a restructuring purpose and which are aimed at liquidation?
- Who, and under what conditions, is entitled/obliged to open these procedures?
- Is restructuring or the decision made thereon a prerequisite of involuntary liquidation?
- Does unsuccessful restructuring automatically lead to involuntary liquidation?

Bearing in mind that the insolvency procedures of many countries include procedures that do not exclusively affect business associations, we wish to make it clear that this paper presents procedures ordered and supervised by the court[1] against business associations.

For the purposes of the research, the statistical population includes all Member States of the European Union. These data records are based on the method of partial data collection, and are aimed at examining the bankruptcy regulations of certain EU Member States based on the criteria specified above. The method most appropriate for the examination of bankruptcy regulations is the non-random selection procedure applied in representative surveys; more specifically, the focused selection method.[2] Keeping comparability and consequently, the requirements of categorisation in mind, I have selected countries whose legal regulations belong to the continental legal system. Geographical proximity and common historical past were also important selection criteria.

Accordingly, the research covered the bankruptcy regulations of the following six EU Member States: Germany, Austria, Italy, Slovakia, Romania and Hungary. *(See Chart 1)*

The comparability of national regulations is somewhat hindered by the fact that insolvency procedures have no standard, internationally accepted definition. In this section presenting the national insolvency regulations of European countries, the term 'bankruptcy' is used in accordance with the terms used during the translation, i.e. bankruptcy means liquidation proceedings. At the same time, the phrase 'bankruptcy regulation' is synonymous with the phrase 'insolvency regulation'.

COMPARATIVE REVIEW OF THE BANKRUPTCY REGULATIONS OF CERTAIN EU MEMBER STATES

The following section presents the legal provisions of the specified Member States according to the criteria described above.

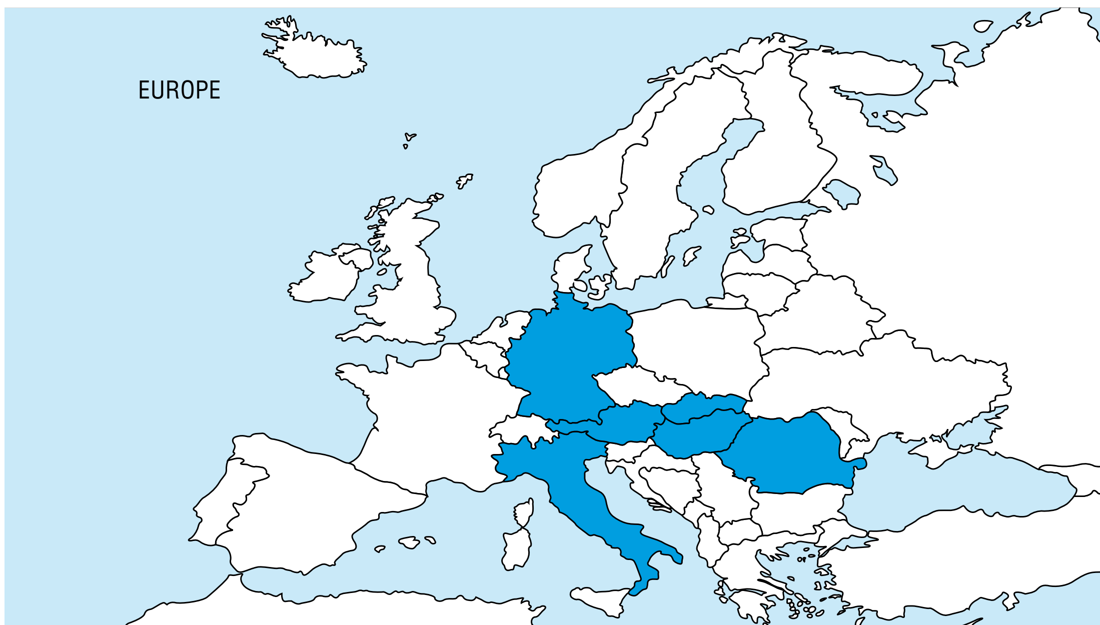
Germany

The new insolvency regulations *(Insolvenzordnung – InsO)* entered into force on 1 January 1999. (Bork, 2006) (A new insolvency act entered into force in 2012; however, familiarity with the earlier provisions is sufficient for understanding the problem presented in this paper.)

According to the provisions of the *Insolvenzordnung*, two procedural phases can be dis-

Chart 1

MEMBER STATES UNDER REVIEW



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tinguished within the insolvency framework procedure: a restructuring-oriented and a liquidation-oriented procedure. German insolvency law, therefore, applies a certain type of insolvency procedure, which can be opened by the debtor and the creditors alike. The procedure can be opened in the event that the business association in debt is unable to make payments due or its assets will not cover outstanding liabilities.

The debtor's application may already be submitted to the competent court in case of an impending insolvency (*drohende Zahlungsfähigkeit*). At the same time, German corporate law also sets out obligations for the debtor's executive officers: when the representatives of the company in debt perceive impending insolvency, they must submit an application to the competent court to open the procedure. In such cases, the legislation allows for the debtor's asset management, provided that the resolution that launches the procedure provides for it.

Proceedings may be opened voluntarily, as well as by the creditors, provided that the debtor is unable to satisfy its liabilities (*Zahlungsfähigkeit*) or if the liabilities exceed its assets (*Überschuldung*). In such cases, the debtor's right of disposal can be retained only if the creditor has given its consent to asset management. (Seidl, 2006) We must note, as a difference stemming from the person of the applicant, that for the procedure authorising the debtor's asset management, an insolvency administrator is appointed instead of a trustee in bankruptcy.

Similarly to several other European countries, authorities in Germany also reject an application to open proceedings if the debtor's assets are unlikely to cover the costs of the proceedings. (Smid, 2002) Simultaneously with the opening of proceedings, the court appoints an insolvency administrator.

Once the insolvency proceedings are launched, the insolvency administrator acquires the power to administer and dispose of the debtor's assets.

Following the opening of proceedings, the competent court convenes the creditors' meeting. Based on the regulation, the creditors' meeting has considerable influence over the procedure; its primary mandate is to take a position on how to proceed with the procedure. In every case, a decision is made on what the goal of the procedure should be: dissolution of the indebted company through winding-up or preservation of the company through restructuring. (Koch, 2008) The creditors' meeting may decide on the continued operation of the company or, if the perspective of restructuring is being preferred, it may instruct the administrator to prepare a restructuring plan.

The plan, which consists of a descriptive section and a restructuring section, is reviewed by the court in advance to ensure that any sections that may be unlawful or futile in terms of feasibility are excluded. After the stakeholders have expressed their position, the creditors decide on the approval of the plan. Upon the creditors' approval of the plan 'without reservations' and final confirmation by the court, a resolution is issued on the termination of the insolvency procedure. (Sándor Fónagy, 2006)

If no restructuring plan is submitted or decision-makers reject the plan, the insolvency administrator takes control of the indebted company's assets, and the sale of non-exempt assets commences. The proceeds are distributed on the basis of the asset distribution plan and in proportion to creditor claims. (Bork, 2006) After the conclusion of final asset distribution, the insolvency proceedings are officially closed.

Austria

The statutes regarding insolvency in Austria were primarily laid down in the bankruptcy act *(Konkursordnung – KO)* and the restructuring (or composition) act *(Ausgleichsordnung – AO)*. (Konency, 2008) In essence, Austria distinguishes between two insolvency procedures: the composition (or 'arrangement') procedure and the liquidation procedure.

Opening the composition procedure is warranted in case of the debtor's impending (foreseeable) insolvency, existing insolvency or indebtedness. The legal definition of insolvency and indebtedness, however, is somewhat vague. The fundamental goal of the procedure is to restructure the indebted company primarily through a waiver of claims. Only the debtor business association itself is authorised to request the opening of the procedure. The application also includes an admissible composition proposal. A composition trustee is appointed by the court for the duration of the composition procedure.

During the procedure, the debtor is not deprived of its right of disposal over the assets; at the same time, however, such right of disposal is limited by the fact that certain actions require the approval of the composition trustee. At the meeting held within 90 days of the commencement of the proceedings, the debtor company has to make a commitment to settle the statutory minimum quota, namely 40 per cent of creditors' claims, within two years. (Jergitsch, 2006)

In contrast with the composition procedure described above, the liquidation procedure is fundamentally a winding-up type procedure which, however, also carries certain restructuring features, given that restructuring efforts take priority in Austrian insolvency regulations. Debtors and creditors are both entitled to initiate the proceedings if they are able to prove that the debtor is insolvent or indebted. Based on the application, the court appoints and continuously supervises a trustee in bankruptcy. We should emphasise, nevertheless, that such proceedings are commenced in Austria only in case the

liquidation assets cover at least the cost of the proceedings.

During the liquidation procedure, there is an option of restructuring in the context of compulsory composition *(Zwangausgleichsverfahren)*, provided that it is approved by the majority of creditors attending the officially designated composition meeting and the sum of the approving creditors' claims amounts to at least three quarters of total claims. In such cases, the debtor makes a commitment – after fully satisfying preferential creditors[3] – to settle at least 20 per cent of its debts within two years. If the deadline undertaken to partially settle creditor claims exceeds two years, the satisfaction quota must reach 30 per cent. (Konency, 2008) Upon the court's confirmation of the compulsory composition or settlement, the debtor is exempted from the remaining debts over and above the quota.

During the liquidation procedure, the trustee in bankruptcy collects outstanding debts and disposes the debtor's property on the open market. The procedure can be closed once evidence of the completion of the final asset distribution has been provided to the court. This means each creditor receives an equal quota of their claims. As we have seen, the restructuring procedure is not a prerequisite of the liquidation procedure, and the liquidation procedure is not launched automatically in the event of an unsuccessful restructuring.

Italy

The arrangement with creditors *(concordato preventio)* is a procedure intended to serve restructuring. Only the debtor is entitled to initiate the procedure before the court establishes the fact of insolvency, provided that the debtor can present evidence of an emergency that jeopardises its existence and operation. The debtor is required to attach to its petition a plan to restore solvency (*piano di risanamento*), as well as an expert opinion certifying the plan's feasibility.[4] The debtor submitting the documentation required for the conclusion of the arrangement may retain control over the company's assets and may continue business activities; however, the court appoints a responsible trustee to supervise operations and financial processes.

Thanks to statutory reforms, the debtor's proposal could open up possibilities for arrangements by providing alternatives in the form of the assignment of claims or the transfer of financial assets or business shares to creditors. If certain conditions are in place, a tax arrangement may also be proposed at the same time.

The creditors vote on approving the restructuring plan and the composition proposal. (Creditors that are insured have no voting rights as it is a standing requirement that their claims be satisfied in full). A proposal is considered approved if 51 per cent of creditors with voting rights vote in favour. While the approval of the payment moratorium and the opening of the composition proceeding is subject to court authorisation, the restructuring plan is only submitted for court review if decided so by creditors. In case the creditors do not approve the restructuring plan and the composition proposal, the court commences liquidation immediately. (Orrick, 2010)

Involuntary liquidation (*fallimento*) is a legal procedure during which the debtor is deprived of the right of disposal over its total assets. The procedure begins with the declaration of insolvency by the court, and both the debtor and the creditors are entitled to submit applications to open proceedings. A company is declared insolvent if it becomes unable to settle its outstanding debts.

A temporary liquidity problem which can be remedied in the short-term may not be a ground for submitting the application.

Debtors cannot be wound up if the capital invested into corporate assets is less than EUR 300 thousand or if annual sales revenue in respect of the last three years is below EUR 200 thousand. The insolvency of insurance companies, banks and investment firms is handled in a different procedure (*liquidatione coatta amministrativa*), as is the restoration of the economic balance of major distressed corporations (*l'amministrazione straordinaria delle grandi imprese in crisi*).[5]

After the declaration of insolvency, the debtor's so-called 'working assets' are sold – with the right of disposal assumed by the appointed insolvency practitioner – , and proceeds are subsequently distributed among creditors according to the order of satisfaction. After these matters have been settled, the liquidation proceedings can be closed. (Upon approval by the court, the company may continue operations in a significantly restricted manner if this contributes to the success of liquidation).

Slovakia

The interview conducted with insolvency expert *Dr. Ladislav Baráth* was extremely helpful in gaining an understanding of the prevailing procedural framework in Slovakia.

The act on bankruptcy and restructuring (7/2005) that entered into force on 1 January 2006 established a new solution in the field of insolvency law. The previous legislation, passed in 1991, was heavily criticised for the rigidity of procedures, the overly strong position granted to courts and insolvency experts and the excessive length of the procedures.

In the interest of managing payment difficulties, the debtor has the option to open a (restructuring procedure) *(Restrukturalizacné)*. Executive officers have a statutory obligation to prevent the insolvency of business associations. If impending insolvency is clearly unavoidable, without undue delay, the debtor has to submit to the competent court an application for the opening of proceedings. In case of failure to comply with this obligation, the head of the debtor company assumes liability for damages towards the creditors and the company's owners.

Creditors also have the option to initiate liquidation proceedings *(Konkurzné konanie)*. In accordance with Slovakian legislation, a company will be deemed insolvent if it becomes more than 30 days delinquent in settling a debt towards any given creditor. The starting date of the procedure is the date of publication in the *Obchodny vestník*. (Orsula, 2007) Similarly to the regulations described above, proceedings against debtors with no assets cannot be opened on Slovakia either.

Shortly after the commencement of proceedings (and only then), the debtor may request the insolvency administrator appointed by the court to prepare an expert opinion on the company's restructuring options and, in case the administrator subsequently determines such options exist, to prepare a restructuring plan. The proposal can be submitted to the court only if creditors stand to gain a better position through restructuring than through liquidation.

Simultaneously with the start of the restructuring phase of the proceedings – which begins with disclosure – , the liquidation procedure in progress is suspended. Within 90 days of the start of the restructuring procedure, the insolvency administrator submits the restructuring plan to the meeting of creditors for approval. For justified reasons, the 90-day deadline can be extended by an additional 60 days. (Orsula, 2007) In case the deadline is passed without results, the court decides, without delay, on whether to continue the proceedings or not.

During the course of liquidation, the

insolvency administrator sells all of the company's non-exempt assets by way of public tender, and distributes the proceeds according to creditor satisfaction categories.

Romania

The interview conducted with *Rolland Szabo* insolvency expert was a great help in processing and gaining an understanding of the insolvency procedures currently in force in Romania.

The new insolvency act *(JRBC)* was introduced in 2004 and was substantially amended in 2006. The new regulation places greater emphasis on restructuring procedures aimed at restoring company solvency.

The debtor and creditors are both entitled to initiate an insolvency procedure provided that the case meets the criteria of 'significant indebtedness' or 'direct liquidity deficit'. During the examination of insolvency, Romanian courts apply mathematical formulas to compare assets and liabilities. The fact that the opening of proceedings requires evidence of the existence of conditions represents a grave problem in law application, as in Romania creditors may not be able to prove the debtor's lack of liquidity easily. The minimum value of claims required to open proceedings is RON 10 thousand (approximately EUR 3,000).

Shortly after the filing of the application, the competent court appoints an asset manager who has 30 days to review the debtor's financial situation. Based on the results, the asset manager prepares a plan for the subsequent phases of the procedure. If analysis results show that the restructuring of the debtor is not possible, the judge appoints a liquidation asset manager and automatically launches liquidation, which represents the second stage of the procedure. At this point, emphasis shifts initially to the protection of the assets (i.e. the enforcement of claims), and subsequently to the sale of the assets.

If the plan prepared demonstrates that there is a realistic chance of restructuring, the creditors' meeting decides on whether to approve this plan. As a statutory requirement, the plan should ensure fair treatment to all creditor groups[6]; in other words, neither creditor group can get lower satisfaction in the case of restructuring than during liquidation. In the case of each group, approval requires the consent of the majority of creditors. Approval must also be confirmed by the competent court. (Borman, 2007)

If creditors reject the contents of the plan or the debtor fails to perform the tasks undertaken as per the requirements, liquidation begins automatically. Once liquidation has begun, the restructuring procedure cannot be repeated.

Romania, therefore, applies a type of insolvency procedure where, as a rule, liquidation is preceded by the examination of restructuring prerequisites. Liquidation only goes ahead in the event restructuring is unsuccessful for any reason.

Hungary

In Hungary, the new amendment to the bankruptcy act entered into force[7] on 1 September 2009 , bringing about changes – among many other things – in the matching of insolvency procedures. While until 2009, restructuring and liquidation procedures were completely separated, after the enactment of the aforementioned act the relationship between the procedures became somewhat closer.

Pursuant to the legal regulations currently in force[8], during restructuring, i.e. bankruptcy procedures, *"the debtor is granted a stay of payment with a view to seeking an arrangement with creditors, and attempts to enter into*

a composition arrangement with creditors" [Bankruptcy Act[9], Section 1 (2)]. Liquidation proceedings are *"proceedings aimed to provide satisfaction, as laid down in this Act, to the creditors of an insolvent debtor upon its winding-up without succession"*.

Only the head of the indebted business association can initiate the bankruptcy proceedings, and this requires the consent of the main body of the indebted business association.

The indebted business association may not apply for bankruptcy proceedings if there are bankruptcy proceedings against it already in progress, or a request for liquidation has been submitted against it or a resolution of first instance has been made regarding liquidation. The statute also sets out strict conditions for subsequent bankruptcy filings.

The application to open liquidation proceedings may be submitted both by the indebted business association and the creditors. The determination of insolvency and the ordering of liquidation are subject to fixed conditions, which include various insolvency causes related to liquidity shortage and indebtedness.

If the bankruptcy proceeding has been commenced but no bankruptcy arrangement is reached, pursuant to effective regulation, the competent court determines the debtor's insolvency ex officio, whereby the liquidation procedure is launched automatically.[10] This is the most significant difference – in respect of the subject matter of this paper – compared to the previous amendment to the bankruptcy act.

Under the previous legislation, in case the bankruptcy procedure is unsuccessful, the business association will not necessarily be wound up if the creditors do not consent to the payment moratorium or if the bankruptcy procedure proves to be unsuccessful after the granting of the moratorium. According to Section 21 (2) of the Bankruptcy Act that was in force prior to 1 September 2009, *"if no composition has been reached by the parties or if it has not been approved or it fails to comply with the provisions of the law"*, the competent court shall – without any further consequences[11] – terminate the bankruptcy proceedings.

At this point, therefore, one of the creditors must submit a separate application to the competent court to continue the liquidation proceedings. Accordingly, there was at least a one or two-month interval between the two procedures when the indebted business association was able to continue normal operations – without external supervision – , which is likely to have had a negative impact on the satisfaction of creditor claims in the context of already deteriorating financial management. It stands to reason that there was a reason – in other words financial difficulties – why bankruptcy proceedings were initiated.

Reaching an arrangement with creditors and consequently, the elimination of the insolvency of the indebted business association is also a possibility during the liquidation procedure. In case the arrangement is in line with the conditions set out in the statutory provisions, the competent court approves the arrangement and decides on the termination of the liquidation procedure.

CATEGORISATION OF THE LINKS BETWEEN PROCEDURE TYPES

Based on the procedural frameworks presented above it can be established that the restructuring and liquidation proceedings can relate to one another in a variety of ways. In Germany, a decision on restructuring is always a pre-condition of the procedure, and involuntary liquidation is only launched when restructuring was unsuccessful, or if the parties concerned have resolved to carry out liquidation in place of restructuring. Considering that in Germany restructuring

and involuntary liquidation have been regulated under the same procedure, instead of referring to separate proceedings we should talk about phases of the same proceeding.

In Austria, however, the composition procedure with the purpose of restructuring and bankruptcy proceedings with the purpose of liquidation have been regulated in separate pieces of legislation. There are actually no links between the two: *Augleichsverfahren* is not a precondition of *Konkursverfahren* and involuntary liquidation is not launched even if restructuring was unsuccessful. At the same time – possibly due to the mutual independence of these proceedings in the first place – an involuntary liquidation also entails an escape route for the debtor through the possibility of compulsory composition.

Hungarian regulations in effect before 1 September 2009 were similar to the Austrian system in that an unsuccessful restructuring did not necessarily lead to involuntary liquidation, and the restructuring phase was not a compulsory part of the process before involuntary liquidation. In addition, the bankruptcy act entailed the possibility of composition with the creditors under the involuntary liquidation proceeding which, however, remained in effect in the amended regulation. After the effective date of the amendment, the only change that occurred with regard to the links between the various procedural frameworks, is that the party entitled to involuntary liquidation does not have to file a separate application for involuntary liquidation in case of an unsuccessful restructuring as the procedure commences automatically.

In Slovakia a different solution seems to have taken shape. That is because in Slovakia, there is a restructuring phase inserted in the 'quasi' involuntary liquidation proceeding, for it is possible to decide on restructuring even after the involuntary liquidation has been launched, for the duration of which the involuntary liquidation is suspended. If the reconstruction is successful, the procedure is terminated, while the previously suspended procedure continues in case of an unsuccessful restructuring.

It is obvious that there are several solutions – in line with the system of objectives of the insolvency regulations established by the given country – to harmonise the restructuring and liquidation proceedings. When searching for regularities, it is of primary importance to concentrate on the extreme manifestations of possible links.

German regulations appear to demonstrate the closest matches. Certain pieces of academic literature on the subject refer to these types of insolvency models as single-tier or standardised procedures. *Péter Bodnár Miskolczi* – who also cites the German model as an example when analysing standardised procedures – says that one of the characterising features of standardised procedures is that "*they adapt well to specific circumstances; you can always activate the phase of the procedure that is best suited to the possibilities of the debtor company*". In these procedural frameworks companies that are in a reversible crisis are never liquidated, nor is a 'time gap' created after unsuccessful restructuring but before liquidation is started. (Miskolczi Bodnár Péter, 2005, page 260) The same terminology is used by *Gábor Török*, who also relies on the German model in an article written in 2006.

Other pieces of academic literature use the terminology of single input procedures to describe these types of procedural frameworks. That is because these types of procedures may start one way, and "whether they are followed by restructuring or liquidation is decided in the course of the procedure" (Andrea Csőke, 2008). In the concept[12] of the amendment of the act on insolvency proceedings, the Public Funds Office of the Minister of State refers

to these procedural frameworks as single procedure models. According to the concept, one of the characterising features of the single procedure model is that restructuring is the first phase of the proceeding, which may be petitioned or launched ex officio. The creditor's meeting is a prerequisite of the proceedings, irrespective of how they are launched. At the meeting creditors can decide how they wish to proceed with the procedure; in other words, the future of the debtor business association depends on the creditors' resolution.

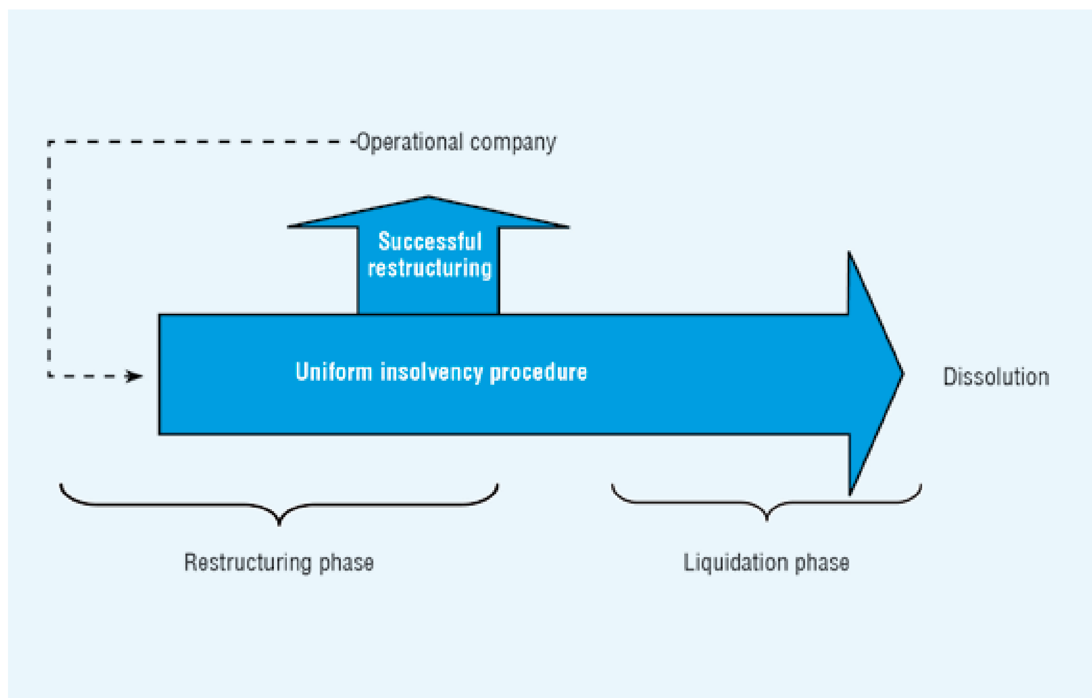
Such procedures are also distinguished in international literature and are simply called '*single procedures*'. (Porzycki, 2010)

Although the terms can be different, the various pieces of academic literature consider the same elements as the unique features of closely matching procedures. *Chart 2* illustrates the standardised insolvency procedure

The other extreme point of the 'strength' of matching is the unrelated restructuring and liquidation procedure. Of the regulations presented, this type of procedure exists in the former Hungarian and the Austrian system. Péter Miskolczi Bodnár refers to these types of insolvency frameworks as two-tier procedures. In his view, it is a basic feature of this type of procedure that *"there is no direct connection between the two procedures; the restructuring procedure is not a prerequisite to the liquidation procedure, and the failure of the restructuring procedure does not automatically trigger a liquidation procedure".* (Miskolczi Bodnár Péter, 2005, page 257) Stemming from the procedures' independence, it may well happen that a failed restructuring does not necessarily result in dissolution and likewise, it may happen that a 'still salvable' company is not restructured because the liquidation had

Chart 2

UNIFORM INSOLVENCY PROCEDURE



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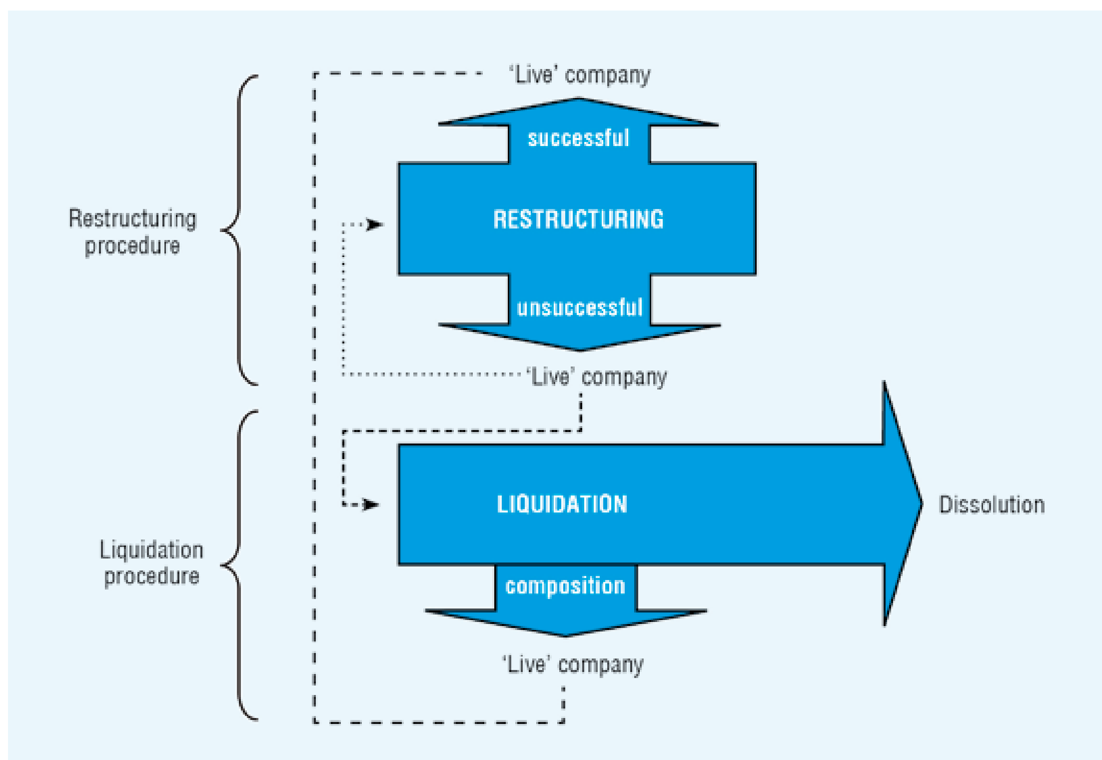
been launched before restructuring could be started.

There are several different terms used to describe the procedural connection framework called by Péter Miskolczi Bodnár a two-tier procedure. In a 2006 article, *László Juhász* referred to the Hungarian regulation in force at the time as 'double input'.[13] (Juhász László, 2006) In the aforementioned legislative concept, the Public Funds Office of the Minister of State following the analogy of the 'single procedure model' uses the term 'double procedure model' to describe that two separate procedures can be launched to resolve insolvency. A restructuring procedure eliminates insolvency through reorganisation – and keeping the debtor afloat – , while during liquidation, the same is achieved by removing the debtor from the economy. *Chart 3* – which describes independent procedures – demonstrates that frameworks other than the standardised insolvency procedures have multiple layers and are much more complex.

The Slovakian, Italian and the current Hungarian (in effect after 1 September 2009) systems cannot be included in any of the extreme cases presented thus far, because they carry some of the characteristics of the standardised and some of the characteristics of the two-tier systems alike. In Hungary, liquidation may be launched prior to restructuring, while the failure of restructuring automatically results in liquidation. The same procedural framework is used in Italy as well. The system in Slovakia is different in that after the commencement of a liquidation type procedure, for a short period of time, the debtor still has an opportunity to restructure its company.

Chart 3

MODEL OF THE TWO INSOLVENCY PROCEDURE



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A shared feature therefore is that the decision on restructuring is not a compulsory prerequisite of the process, but there are shared points of contact between the procedures. It is perhaps more fortunate to term these systems – which are unreferenced by relevant literature – as 'standardising' procedures.

The standardisation of the connection of the procedures outlined above is summarised in *Table 1*.

The following question may arise, in particular, when using the term two-tier insolvency procedure: is it true that under the jurisdictions with independent procedures there is always a separate restructuring type and liquidation type procedure, meaning that there are always two tiers only? That is because there can be certain legal solutions, under which there can be multiple co-existing restructuring or liquidation procedures.

France should be highlighted as an example here, where there are different types of insolvency procedures available in addition to the strictly defined court ordered insolvency procedures, which only require marginal supervision by the courts, but nonetheless are recognised under the law. The warning procedure is initiated as a consequence of factual findings by an auditor, and only reaches the courts if the continuity of operation is not ensured by the main body despite calls to do so. In the case of the so-called *'ad-hoc assignment'*, the court assigns an agent based on the petition of the parties concerned – specifying the precise objective and the duration of the specific case – to manage the problem situation. The amicable settlement procedure should be considered a form of unofficial restructuring which is also managed by a court-appointed agent, the so-called arbiter. Beyond this, strictly speaking, the reconstruction procedure fulfils the role of the restructuring procedure, whereas the involuntary liquidation procedure fulfils the role of the liquidation procedure.[15]

CONCLUSIONS

We can observe regularities in the matching of restructuring and liquidation procedures within the insolvency proceedings of certain countries, and we can set up procedural framework groups based on the presented characteristics. Invariably, the systems applied in the countries under review can be classified as a one-tier, a standardising or a two-tier system.

Procedural frameworks where restructuring procedures are entirely independent of liquidation procedures – in other words, where restructuring is not a pre-condition of

Table 1

STANDARDISATION OF THE BANKRUPTCY REGULATION OF VARIOUS COUNTRIES

Name of procedural framework	Name of applying country
Uniform insolvency procedure	Germany Romania
'Standardising' procedure	Slovakia Italy Hungary at present
Two-tier insolvency proceedings	Austria Hungary previously[14]

Source: own editing

liquidation and liquidation does not commence automatically in case of a failed attempt at restructuring – can be considered two-tier insolvency procedures. The frameworks where the procedure invariably begins with a decision on restructuring and the failure of restructuring automatically results in a liquidation procedure are considered to be standardised insolvency procedures. For the purposes of this paper, the term 'standardising procedures' has been introduced to signify the procedural framework situated between the two frameworks described above, where the failure of restructuring automatically leads to liquidation in every case, even though restructuring is not a pre-condition of liquidation.

Pointing out the difference in matching has particular significance because, as Hungary's example clearly illustrates, the transition to a given matching form greatly impacts the viability of certain insolvency procedures. Following the transition from a two-tier scheme to the standardising procedural framework in 2009, the number of bankruptcy proceedings increased considerably. Previously, the number of applications for bankruptcy proceedings per year was around 20;[16] by contrast, it is currently around 100, which appears to suggest that economic players prefer the more predictable procedural framework.

The practical significance of the question answered in this study lies in the fact that, during the application of Council Regulation (EC) No. 1346/2000 on cross-border insolvency proceedings, the insolvency procedures of several Member States – with different systems of matching – may meet one another, and setting up the relevant categories plays a crucial role in mapping the behaviour of such encounters.

Notes

[1] Including cases where a public administration or judicial authority is engaged in conducting and supervising insolvency procedures in the given Member State.

[2] The statistical names were used based on the paper entitled Statisztikai módszerek a gazdasági elemzésben (Statistical methods in economic analysis) (Györgyné Kerékgyártó – György Mundruczó, 1999).

[3] Preferential claims are claims against bankruptcy assets which take preference over bankruptcy creditors. Such claims are, for instance, costs related to the bankruptcy procedure, the costs of maintaining the bankruptcy assets, the claims related to the actions of the trustee in bankruptcy, wages arising after the commencement of bankruptcy proceedings, public debts.

[4] Az olasz jogrendszer áttekintő bemutatása – különös tekintettel a társaságokat érintő rendelkezésekre (A comprehensive presentation of the Italian legal system with special regard to provisions related to business associations), Studio Legale, May 2006 (academic literature without an author) http://www.itd.hu/resource.aspx?ResourceID=it_reszletes_ismerteto

[5] Az olasz jogrendszer áttekintő bemutatása – különös tekintettel a társaságokat érintő rendelkezésekre (A comprehensive presentation of the Italian legal system with special regard to provisions related to business associations), Studio Legale, May 2006 (academic literature without an author) http://www.itd.hu/resource.aspx?ResourceID=it_reszletes_ismerteto

[6] Romanian regulation distinguishes between 4 creditor groups.

[7] The new regulation is applicable to procedures launched on the basis of applications received by the competent courts after 1 September 2009.

[8] The article was written in June 2012.

[9] Act XLIX of 1991 on Bankruptcy Proceedings and Liquidation Proceedings as amended from time to time.

[10] Pursuant to Section 21/B of the Bankruptcy Act, "if no composition is arranged, or if the arrangement fails to comply with the relevant regulations, the court shall dismiss the bankruptcy proceedings and shall consequently declare the debtor insolvent ex officio in the liquidation proceedings governed under Chapter III".

[11] Exception to this is the case where the competent court orders the continuation of the liquidation which has been suspended due to a bankruptcy procedure.

[12] The concept of the act on insolvency proceedings (academic literature without an author) http://www.meh.hu/szolgaltatasok/kodifikacio/fizeteskeptelensegi

[13] http://pp.ajk.pte.hu/HPDOC/csodvegleges2006.aug.doc

[14] Proceedings opened before 1 September 2009.

[15] http://ec.europa.eu/civiljustice/bankruptcy_fra_hu.htm

[16] In 2003 19, in 2004 22, in 2005 23, in 2006 19, in 2007 19 and in 2008 10 applications for bankruptcy proceedings were submitted to the competent county courts. (Data collection by the author.)

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