

## FINANCIAL SECTOR ASSESSMENT PROGRAM

## MOLDOVA

## INSOLVENCY AND CREDITOR/DEBTOR REGIMES

REPORT ON THE OBSERVANCE  
OF STANDARDS AND CODES

DECEMBER 2014

This Detailed Assessment Report was prepared in the context of a joint World Bank-IMF Financial Sector Assessment Program mission in Moldova during February and March, 2014, and overseen by the Finance and Markets Global Practice, World Bank and the Monetary and Capital Markets Department, IMF. The note contains technical analysis and detailed information underpinning the FSAP assessment's findings and recommendations. Further information on the FSAP program can be found at [www.worldbank.org/fsap](http://www.worldbank.org/fsap).



THE WORLD BANK  
FINANCE & MARKETS GLOBAL PRACTICE

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## EXECUTIVE SUMMARY

The Moldovan authorities have made remarkable progress over the last decade in taking on board a broad range of reform related to the commercial law regime, including the laws pertaining to creditor protection and insolvency. There is room for further improvement, however. Moldovan laws recognize multiple forms of security over movable and immovable assets, and functional alternatives to security interests, however access to credit is still limited. Unsecured credit for businesses is practically non-existent in the financial practice. Loans are often over collateralized, reducing available credit and increasing the incentives for lenders to rely primarily on their collateral for repayment rather than to support restructuring efforts. The secured transactions regime requires improvement, importantly regarding the facilitation of important credit instruments over category of assets. Further, the enforcement of commercial claims is prone to abuse. When debtors experience financial distress and loans are nonperforming, the use of the kind of restructuring techniques which could support long-term business rehabilitation is limited. Creditors may agree to term extensions or they may resort to enforcement. They are unlikely to work cooperatively to rescue an enterprise, as a “rescue culture” has not yet been developed. The rules aimed at encouraging good corporate behavior at times of financial distress may be improved and obstacles on insolvency filing by creditors removed to ensure timely filing of insolvency proceedings. There are also certain risks to creditor rights, including through abuse of the process by other creditors, which may disincentive the use of the system. The insolvency regime is now much more modern, but it has implementation problems, and some aspects of the law may require strengthening, including the cumbersome criteria for initiating insolvency proceedings by creditors, the lack of rules that incentivize new lending to the business in insolvency, the rules regarding transaction avoidance, due process aspects and some other rules adversely affecting creditor rights, the law and practice concerning the use of encumbered assets and the decision-making process during insolvency especially in a restructuring context. These and other technical issues are delineated in the report. Most importantly, the institutional framework supporting creditor rights and insolvency is in need of urgent strengthening. The recommendations in this Report are presented with the hope that they will assist the authorities in their continuing efforts to enhance the country’s legal and regulatory framework for enterprise credit.

## I. INTRODUCTION

- 1 The World Bank<sup>1</sup> assessed the insolvency and creditor/debtor regimes ('**ICR**') of Moldova pursuant to the joint IMF/World Bank initiative on the observance of standards and codes ('**ROSC**'). The assessment has been undertaken on the basis of the World Bank's *Principles for Effective Insolvency and Creditor/Debtor Regimes* ('*the Principles*') prepared by the World Bank.<sup>2</sup>
- 2 The conclusions in this assessment are based on a review of the Constitution, legislation,<sup>3</sup> and other regulations and procedures relevant to bankruptcy, insolvency, the creation and enforcement of pledges and other security interests over immovable and movable property, and debt enforcement, as of February 2014. The assessment team also had access to various reports and memoranda prepared by the World Bank, the IMF, the IFC, and others. In addition to the review of legislation, regulations and related information, the conclusions in this assessment are based on meetings held by the ROSC team in February 2014 with a broad cross-section of local stakeholders, including office-holders of: (a) the Ministry of Economy (b) the Ministry of Justice; (c) the National Bank of Moldova (NBM); (d) the National Commission for Financial Markets (NCFM) (e) the Ministry of Finances; (f) the Chisinau Court of Appeal; (g) the Supreme Court of Justice (h) the Superior Counsel of Magistracy; (i) the Banks Association; (j) the Lawyer's Union; (k) the National Union of Insolvency Practitioners; (l) the Chambers of Commerce and Industry; (m) the American Chambers of Commerce; (n) Commercial banks; (o) the Chamber of State Registration; (r) the State Enterprise "Cadastru"; (s) the National Union of Bailiffs; (t) the Credit Bureau; (u) the Association of Professional Accountants and Auditors; (v) the Notary Union and (w) leasing and micro-finance organizations. The objective of these meetings was to review the effectiveness of the legal infrastructure supporting debtor/creditor relationships, credit risk management and resolution practices. The ROSC team expresses its gratitude for the excellent spirit of cooperation with which all its interlocutors received it, and in particular, for the support and assistance of the National Bank of Moldova.

## II. DESCRIPTION OF COUNTRY PRACTICE

### A. CREDITOR RIGHTS: CONTEXT AND LEGAL FRAMEWORK

- 3 **The financial sector in Moldova is of limited size (total assets represent around 75 percent of GDP) and not fully developed.** The banking sector is regulated and prudentially supervised by the National Bank of Moldova, while the non-banking financial sector (microfinance organizations, savings and loan associations, mortgage credit organizations and credit history bureaus, the insurance industry and private pension funds) is subject to a less intense degree of supervision by the National Commission for Financial Markets (NFCM). Financial leasing companies are entirely unregulated.<sup>4</sup>
- 4 **The Moldovan legal system underwent important changes in recent years, in the area of credit protection and insolvency, yet the regime still entails shortcomings.** A number of legal reforms

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<sup>1</sup> The team comprised of Dr. Irit Mevorach (Senior Counsel, World Bank, TTL), Leif M. Clark (Senior Consultant, World Bank) and Jose Garrido (Senior Counsel, World Bank), working together with Gladei & Partners (Chisinau).

<sup>2</sup> World Bank, *Principles for Effective Insolvency and Creditor/Debtor Regimes* (Revised version 2011), [http://www.worldbank.org/ifa/rosc\\_icr.html](http://www.worldbank.org/ifa/rosc_icr.html).

<sup>3</sup> Including, among others, the Civil, Civil Procedure, Enforcement and Fiscal Codes; and the Laws on Accounting; Pledge; Mortgage; Leasing; Cadastre; Bailiffs; Credit Bureaus; legislation related to Companies; Financial Institutions; Capital Markets; Insolvency; Organization of the Judiciary; Status of Judges; and Selection of Judges.

<sup>4</sup> See further Principle A1, Annex I.

have provided the country with a completely new commercial law regime, including basic laws for secured credit, enforcement of claims, and insolvency. The legislative panorama is complex, and is formed mostly of laws enacted or reformed in the last decade. Yet, the rapid succession of legal reforms has not been followed by a general assessment of the effectiveness of the reforms, the identification of gaps in the legal regime, and the interaction between the different pieces of legislation, and the need for integration of such regimes into the existing institutional framework.<sup>5</sup> Indeed, the assessment in this report has identified shortcomings in the secured transactions and enforcement regime, the restructuring and risk management practices and the insolvency framework. Most critically, the institutional framework supporting the creditor-debtor and insolvency regime suffers from severe constraints.<sup>6</sup>

- 5 **The laws recognize multiple forms of security over movable and immovable assets, and functional alternatives to security interests, such as financial leases. Yet, although the credit offer has diversified in recent years, access to credit is limited and unsecured credit for businesses is practically non-existent in the financial practice of Moldova.** Secured credit dominates the commercial and financial practice, although access to credit continues to be a major concern for Moldovan entrepreneurs, and especially, for Moldovan SMEs. Lending practices are based on low or very low loan-to-value ratios; and this translates into the inability of businesses to obtain enough credit based on the collateral that they are able to offer.<sup>7</sup> Access to credit continues to represent an obstacle for economic growth in Moldova. Indeed, access to finance remains quite limited: the banks' credits as of end-October 2013 amounted to approximately MDL 39.8 billion (approx. USD 3.1 billion), which only equals 37.7% of the GDP of Moldova. In addition, and despite a downward trend, interest rates in Moldova remain comparatively high: as of end-October 2013 the average interest rate for MDL credits extended for more than 12 months being 11.76%, comparing to 13.15% of the same period of 2012. For the foreign currency loans, the interest rate was 7.24% in October 2013 versus 7.64% in October 2012.<sup>8</sup>
- 6 **The Moldovan regime for secured transactions over immovable assets is based on sound and tested principles, similar to those of other civil law mortgage systems in Europe. However, the financial practice developed around the mortgage regime presents some less positive aspects.** The practice of financial institutions shows a strong preference for the mortgage as security interest and for real estate as collateral, which in turn evidences that the mortgage regime is predictable and reliable. Indeed, the mortgage regime is adequately supported by an efficient real estate registry. Yet, there are some concerns that the professionals performing the valuation of mortgaged assets may give a more favourable treatment to the interests of banks, resulting in valuations below market prices. Coupled with a practice of over-collateralizing loans, the result is a clear contraction in access to credit for enterprises and consumers.<sup>9</sup> In addition, access to credit may be further restricted by the operation of some of the rules of the Law on mortgage, such as the possibility that the mortgage

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<sup>5</sup> This includes attention to training of institutional players, and coordinating their work.

<sup>6</sup> See further Principle A1, Annex I.

<sup>7</sup> Though see also the observation in footnote 8 below.

<sup>8</sup> See further Principle A1, Annex I.

<sup>9</sup> The preference for secured over unsecured credit is at least partially a reflection of lenders' prudential concerns about safe lending practices, appropriate given the history of nonperforming loans held by banks. In addition, there has not yet developed a restructuring culture among either lenders or borrowers. Finally, a more disciplined repayment culture is still in development, with many borrowers said to exploit existing mechanisms to avoid repayment of debt, making the extension of unsecured credit by banks proportionately riskier.

creditor forbids the mortgagor to grant a subsequent mortgage on the same asset.<sup>10</sup> Another specific concern results from the measures implemented to protect buyers of apartments on plans. The solution to grant these creditors a privileged status in the insolvency of the construction company may create uncertainty in the position of the financial institutions that advance funds for the construction of buildings, securing their loans over the plot of land and the future building over it.<sup>11</sup>

- 7 **The secured transactions regime is largely in line with the international standard, although it requires improvement.<sup>12</sup> Critically, the implementation of the regime in practice deviates from international standards and economic actors do not take full advantage of the possibilities afforded by the legal framework.** The law does not go as far as adopting a functional concept of security interest that would cover all techniques performing the function of securing claims –such as, for example, financial leases. Importantly, the possibility of creating a security over a category of asset (including circulating assets) is contemplated in the law but is significantly undermined by non-uniform requirements and by misconceptions of lenders regarding the use of such type of pledges. Similarly, the concept of “enterprise pledge” suffers from unclear definitions and is not being used in practice.<sup>13</sup> Another deficiency in the law is the lack of provisions for acquisition financing, and the lack of rules for the pledge of funds in bank accounts and deposits. It is understood that some of these issues (as well as some of the issues related to the registry and enforcement systems mentioned in the subsequent paragraphs) will be addressed in the reform of the secured transactions regime.<sup>14</sup>
- 8 **The registry systems in Moldova offer a complex panorama. The positive assessment of the land registry (Cadastre) is in contrast to the challenges in the operation of the registry of pledges.** The land registry is efficient and economical. It offers a reliable system to transfer immovable assets and it supports a generally well-functioning mortgage regime. The regime for registering pledges over movable property, on the other hand, suffers from some notable deficiencies. The intervention of notaries (acting as gateway to the registry), although not adding a significant cost, might not always function effectively. It seems that the principle of transparency of the registry is not fully acknowledged by the notary system as it is understood that some notaries have imposed restrictions on access to the registry information.<sup>15</sup> Additional key problems include: (i) the possibility that the grantor of the pledge would deny access to information to potential searches; (ii) the existence of multiple registries for different types of assets without establishing the relationship between the

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<sup>10</sup> Indeed, it has been reported that banks regularly seek to bar second lien financing, further restricting the availability of credit to enterprises.

<sup>11</sup> See further Principle A2, Annex I.

<sup>12</sup> The Law on Pledge was amended, effective 8 November 2014. Some of the issues raised in the Report may have been addressed by those amendments. The new law is not reviewed in this report, which is based on the laws in force at the time of the mission. However, the Report indicates in footnotes some of the issues that may have been addressed in the new legislation

<sup>13</sup> It has been observed as well that the Pledge Law applies to a “universality of assets,” but is in other respects simply like other security interests on movable property, so that existing rules and definitions could make the enterprise pledge functional under the existing law, if practitioners and lenders adequately understood its function. It should be noted that amendments made to the Law on Pledge (enacted 8 November 2014) may have addressed this problem.

<sup>14</sup> See further Principle A3, Annex I.

<sup>15</sup> By the same token, it has been observed that notaries are the operators of this Registry, and because they are found everywhere throughout the country, the registration of interests in movables is quite accessible. Because notaries are operators, the Registry is also more reliable and less prone to operator error. Finally, by using the existing notary system, the cost of setting up a free-standing, newly staffed registry is avoided. Some key factors to improve the quality of the Pledge Registry include improving the organizational framework of the Pledge Registry’s operators, establishing clear criteria for liability of the operators of the Pledge Registry and more specific instructions to the operators of the Pledge Registry in respect to organizational framework for pledge registration, pledge de-registration, and providing information to third persons. It may also be helpful to redesign the Pledge Registry, to update the software, to make it easily searchable to the operators and to third-persons who have bought passive access to the Pledge Registry.

registry of pledge and the special registries, including the effect on priority of registering a general security interest that includes assets registered at the special registries; (iii) the uncertainty regarding the manner of registration of an enterprise pledge; (iv) the problems with the share registries<sup>16</sup> that severely constrain the use of pledges over shares.<sup>17</sup>

- 9 **The regime for the enforcement of commercial claims requires critical improvement.** Although most of the claims of lenders and suppliers can be enforced using a simplified ordinance procedure, instead of the slower and more cumbersome ordinary procedure, the ordinance procedure has not achieved its objective of providing a fast-track alternative for claims provided with an executive title. The use –and especially, the abuse– of defences in the ordinance procedure have transformed, in many cases, the ordinance procedure into a de facto preliminary phase of a full ordinary procedure. The result is that the time frame for enforcement may be extended if the creditor opts for the ordinance procedure. Both in ordinary procedures and in ordinance procedures, there seems to be ample room for delaying tactics by recalcitrant debtors and their legal advisors, and sanctions for abuse are rarely applied in practice.<sup>18</sup>
- 10 **The special rules for the enforcement of secured claims have been designed with the intention of fast-tracking the procedures.** However, recalcitrant debtors may still use objections and defences to delay the procedures. The general inadequacy of the enforcement procedures has prompted the legislator to introduce an out-of-court enforcement mechanism for mortgages. This procedure, based on a notarized agreement with an executive clause, has not been tested yet. Mortgage lenders are including executive clauses in the mortgage agreements, although it is too early to assess the enforcement practice. Past experiences with out-of-court enforcement of notarized agreements have been positive. The procedure to recover claims arising out of financial leases is very similar to the procedure to enforce secured claims, and does not provide lessors with a more robust and faster mechanism to recover possession of the leased asset.<sup>19</sup>
- 11 **The enforcement of the enterprise pledge, as other aspects of its regime, seems particularly confusing.** Specifically, the possibility of enforcing the pledge by a receivership or fiduciary administration, which is not suspended in the case of insolvency of the grantor of the enterprise pledge, is in contradiction with basic principles of the insolvency regime, based on the reorganization of viable enterprises and the liquidation of enterprises that are not viable, under the supervision of the court and in the benefit of all creditors.<sup>20</sup>

## **B. RISK MANAGEMENT AND CORPORATE WORKOUTS**

- 12 **A credit history bureau was established fairly recently in Moldova. However, significant concerns remain regarding the effectiveness of the Bureau.** First, only the commercial banks are obliged under the Law on Credit History Bureau to provide information to the Bureau. Non-bank lenders as well as non-financial creditors such as utilities currently do not participate in the system.

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<sup>16</sup> This problem (of the share registries) is described and assessed in the Corporate Governance Review of the Moldovan Banking Sector, The World Bank, April 2014.

<sup>17</sup> See further Principle A4, Annex I.

<sup>18</sup> See further Principle A5, Annex I. Note that as earlier observed, the pattern of dilatory tactics, unfortunately supported by less than diligent enforcement of sanctions on such conduct by the courts, has a tendency to discourage lenders from extending credit on an unsecured basis, when the collection of such debt faces such hurdles. There is a mistrust of both legal and financial institutions present in the country that unfortunately tends to perpetuate this sort of behavior, making it harder to encourage lending on anything other than a secured basis.

<sup>19</sup> See further Principle A5, Annex I.

<sup>20</sup> See further Principle A5, Annex I.

Second and reportedly, there is a concern that information provided by commercial banks is incomplete, and that not all banks provide information to the Credit Bureau.<sup>21</sup> Third, oversight of the information provided to the Bureau seems very limited. The supervision by the NCFM seems minimal and has thus far been confined to receiving reports from the Bureau on the evolution of the data. The NBM does not have access to the Bureau. It is understood that the NBM is in the process of establishing a Credit Registry which will enable the NBM to assess risk exposure and which will also be connected to the Credit Bureau. Fourth, the Law on CHB does not oblige lenders who make adverse credit decisions on the basis of a bad credit report to disclose this fact to the potential borrower.<sup>22</sup>

- 13 **Some useful mechanisms exist to incentivize the debtor's managers to act responsibly, and consider the interests of the creditors, but they can be improved.** The provisions do not provide a clear standard which inform corporate controllers of what is expected and required of them at time of financial distress, especially before insolvency becomes a fact. In particular, corporate decision makers are not sufficiently encouraged to properly consider the interests of the stakeholders as a whole, and take adequate actions to minimize harm and potentially rescue the business at an early stage, when the company is in financial distress.<sup>23</sup> Under the law, the debtor is obliged to file an insolvency petition within a specific period of time. Yet, the obligation arises only after the company becomes insolvent. Debtors are not obliged or sufficiently encouraged to consider restructuring possibilities, in or out-of-court, to negotiate with their creditors, to closely monitor their accounts etc., at times of financial distress. They are permitted to initiate accelerated restructuring proceeding, but there are no other obligations imposed on them in this respect.<sup>24</sup> In fact, debtors may be discouraged to initiate insolvency proceedings as they may be exposed to liability for fictitious insolvency, which arises whenever insolvency was not real and the debtor could have paid its debts. Another problem is that the existing provisions, which could provide some redress to creditors in cases of corporate controllers' misconduct, are hardly observed in practice.<sup>25</sup>
- 14 **The corporate workout framework is generally deficient.** There is limited use of out-of-court collective restructuring tools. While lenders are willing to reschedule problem loans with their own borrowers as an alternative to enforcement, other forms of restructuring are rarely considered, and collective action tools are almost never used. A rescue culture has yet to emerge. Specific problems in the framework include: (i) the limited access to timely, reliable and accurate information regarding businesses financial situation; (ii) the lack of experience and practice of debt restructuring techniques, such as debt-for-equity swaps; (iii) the lack of bridge lending to distressed business during a restructuring process. Indeed, NBM Regulation seems to discourage lending to entities in distress (100% provisions will be required if lending is provided to an insolvent borrower), at least in so far as the business has no collateral to secure the new finance; (iv) tax authorities do not play a facilitating role in promoting informal effective debt resolution and tax legislation and practice does not

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<sup>21</sup> It should be noted that, according to the NCFM, their own data reflects that all commercial banks in fact do provide this information, and that no facts and complaints to the contrary have been received by the NCFM.

<sup>22</sup> See further Principle B1, Annex I.

<sup>23</sup> They are also not yet accustomed to taking such interests into account as a part of their duties, nor are they accustomed to pursuing restructuring alternatives, which involves a level of trust of both the lending institutions and the legal structures that is not yet present among managers.

<sup>24</sup> Neither the Law on Joint-Stock Companies, nor the Law on Limited Liability Companies, nor the Civil Code contain any satisfactory set of rules or standards in this regard.

<sup>25</sup> See further Principle B2, Annex I.



encourage debt restructuring and workouts;<sup>26</sup> (v) Provisions in the insolvency law on avoidable transactions and on debtors' duties could discourage engagement in legitimate restructuring activities. In addition, there is a discernible level of mistrust among the various parties of one another and of the relevant institutions (especially the courts) that makes anything more than the most limited restructuring difficult to achieve.<sup>27</sup>

### C. LEGAL FRAMEWORK FOR INSOLVENCY

- 15 **The reform of the insolvency law represents an important effort in improving the insolvency framework significantly, but it requires close monitoring in terms of its application, and the consideration of some additional improvements going forward.** The introduction of a new insolvency law in 2012 has turned the Moldovan insolvency regime into a much more modern system. The law now specifies a variety of procedures, including simplified processes, both for bankruptcy and restructuring. It strengthened the process of reorganization, including by imposing a moratorium on both unsecured and secured creditors. It introduced some improvements to the rules governing assets sales and recognized the need to enhance creditor participation in the process. The law also established strict statutory periods for the various stages of the insolvency proceeding and ensured that appeals do not disrupt the insolvency proceedings. Similarly situated creditors receive similar treatment under the law and distribution follows a set of priorities based on pre acquired rights. Nonetheless, the assessment revealed certain issues with the law or its implementation, as detailed in the report. Key issues include:

- 15.1 **Due process.** Although the law imposes a duty for the debtor to collaborate and provide the insolvency representatives/court with all relevant information as required, practice shows that the quality of information provided is often poor. Administrators often need to rely on estimations and find it difficult to provide concrete and reliable information about the debtor's affairs. Experts are rarely hired in practice, exacerbating the unreliability of information provided. Due process has also been undermined in the process of facilitating the appeals procedure. Thus, some matters that affect creditor rights may not be subject to appeal under the law. There are also some complaints about the operation of the notification rules in practice. Indeed, publication through the Official Monitor might not be effective if it is not regularly checked by relevant parties. A list of insolvency cases may not be found on-line. Thus, the concern is that not all creditors will be aware of the insolvency process, in time to file their claims. In general, regardless the rules and statutory provisions, due process in the insolvency process is said to be seriously suffering in practice.<sup>28</sup>

- 15.2 **Access to the proceedings.** The law retained the cumbersome criteria for creditors' qualification to commence insolvency proceedings. It is required that a creditor present a copy of an irrevocable court judgment or arbitration award which is subject to execution. Obtaining such a judgment can be a lengthy and cumbersome process and that might curtail early filing for insolvency. Substantiating the state of insolvency may also be difficult. Issues also remain regarding the encouragement of early filing by debtors, as noted above (see Part B above).<sup>29</sup>

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<sup>26</sup> The taxing authorities note that tax treatment of the insolvency process aims at striking a balance between ensuring a fair tax treatment of taxpayers and protecting the tax base of the state by establishing limitations that are designed to prevent abuse and tax evasion schemes. They add their concern that implementation of such recommendations could be perceived to encourage tax evasion schemes and could lead to abuse on the part of some businesses. They urge caution going forward.

<sup>27</sup> See further Principles B3-B5, Annex I.

<sup>28</sup> See further Principle C2, Annex I.

<sup>29</sup> See further Principle C4, Annex I.

- 15.3 **Provisional measures and effect of commencement.** The new Insolvency Law provides a wide range of measures aimed at protecting the debtor's assets throughout the insolvency process, in line with the international standard. However, there is room for improvement. The accrual of interest for secured creditors is stopped throughout the moratorium period (except in the course of a restructuring) and there is no provision regarding post-petition payment of interest up to the value of the collateral. There seems to be some confusion among the users of the system with regard to the operation of the stay and the availability of relief from the stay for secured creditors. The relief provision is quite restrictive as the burden is on the creditor to prove loss and show that there is no alternative compensation. The administrator/liquidator is not required to show that the assets are necessary for a beneficial realization of the estate. The result may be the 'lock' of encumbered assets in the estate in circumstances where the assets are not necessary for a going concern sale or restructuring and could be realized by the secured creditors more promptly. It is also unclear whether a relief or other adequate protection measures are available for secured creditors in case a restructuring process is commenced.<sup>30</sup>
- 15.4 **Creditors' participation.** The Insolvency framework gives significant room for creditors' participation and includes detailed provisions on the role of the creditors' meeting and the creditors' committee. However, issues remain. The creditors' meeting seems able to control critical decisions in the process. For example, it will decide whether a restructuring strategy should be taken on board before it is submitted for court approval and before a plan can be considered through creditor classes. In addition, and reportedly, the creditors' meeting powers have been occasionally abused by creditors who have created fictitious claims and changed the balance of power in the meeting, and thus managed to cause the transfer of assets to affiliate entities. Generally, it is reported that certain creditors might block decisions that could be beneficial to the body of creditors. The creditors' committee plays an important role, yet it may be subject to insufficient oversight and take critical decisions, for example the emergency sale of the debtor's assets and the execution of major transactions, before the convening of the creditors' meeting and not always in the interest of the general body of creditors.<sup>31</sup>
- 15.5 **Disposition of assets.** The law prescribes useful rules regarding the use and sale of assets, yet ambiguities and issues remain. The system might lack sufficient flexibility, and secured creditors could block sales beneficial for the body of creditors, in particular going concern sales or the use of assets for planning a restructuring. The law seems to require the consent of the secured creditor for any use of encumbered assets (in addition to providing adequate protection) and regarding the manner of sale. Secured creditors may also block restructuring/going concern solutions at creditors' meeting or through the committee as the express consent of the creditors' meeting is required before a going concern sale or a restructuring may be pursued, and certain major transactions require the unanimous consent of the creditors' committee.<sup>32</sup>

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<sup>30</sup> See further Principle C5, Annex I.

<sup>31</sup> See further Principle C7, Annex I.

<sup>32</sup> See further Principle C8, Annex I.

- 15.6 **Post-petition/commencement borrowing.** Lenders are reluctant to provide new finance to distressed entities unless they are given sufficient security.<sup>33</sup> The law allows agreeing within a restructuring plan on the provision of priority to new lenders that may provide finance during the reorganization (exit finance), which is useful. Yet, it does not specify the conditions under which such lending may be obtained, and what priority may be given to such finance. Importantly, the law is silent with regard to conditions of obtaining new finance in the course of insolvency proceedings, during a restructuring process (before the implementation of a restructuring plan) and during bankruptcy. The reserve fund that should be maintained in order to ensure payment of administration expenses may not be sufficient for on-going operations if it is only based on the existing resources of the insolvency estate.<sup>34</sup>
- 15.7 **Avoidance of vulnerable transactions.** The provisions on avoidance of antecedent transactions entail certain shortcomings. The periods envisaged to avoid certain operations can be too long (3 years for a transaction at an undervalue), which could damage security of tenure in market operations. For other types of acts, the time to set aside the transactions might be too short (4 months for undue preferences or for the creation of security for previously unsecured loans), and there are some additional uncertainties, including with regard to transactions with related persons. Also, it seems that the provisions are not often used in practice, at least partly because administrators might lack the resources to pursue such actions. The provisions regarding transactions avoidance do not include a ‘safe harbor’ provision that would exclude transfers made in good faith pursuant to an out-of-court workout.<sup>35</sup>
- 15.8 **Priorities.** The law delineates a clear list of priorities, generally in line with international standards. Yet, it does not specify the priority afforded to new financiers. The solution to grant buyers of apartments on plans a privileged status in the insolvency of the construction company may create uncertainty in the position of the financial institutions that advance funds for the construction of buildings.<sup>36</sup>
- 15.9 **Claims resolution.** The Insolvency Law contains a coherent procedure for claims’ resolution which includes rules on notification, submission of claims, their verification and validation, as well as rules for challenging claims. The key problem is with the implementation of the process in practice and in particular the difficulty in tackling abuse of the process, i.e. the filing of fictitious claims.<sup>37</sup>
- 15.10 **Restructurings and settlements.** A key aim of the new insolvency law has been to improve the framework for business rescue by introducing a variety of measures that parties can utilize for this purpose. Thus far, though, there still seems to be obstacles and some structural as well as cultural constraints (some already noted above, e.g. lack of new funding, lack of flexibility in decision making, constraints on use of encumbered assets, lack of rescue culture, mistrust in the institutions and among the users of the system) that impede achieving this aim. It is important to closely monitor the extent to which the framework facilitates more restructurings

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<sup>33</sup> Note that existing NBM rules regarding provisioning for loans made to an entity to enable the restructuring process, discussed earlier, likely apply in this context as well.

<sup>34</sup> See further Principle C9, Annex I.

<sup>35</sup> See further Principle C11, Annex I.

<sup>36</sup> See further Principle C12, Annex I.

<sup>37</sup> See further Principle C13, Annex I.

going forward and to consider certain amendments and clarifications that could strengthen the system further. Issues for consideration include: (i) the uncertainty regarding the reaching of settlements during observation before claims have been validated. (ii) the restriction imposed on debtors that unsuccessfully object a creditor's insolvency petition, to request a restructuring (iii) the deadlines for presenting a report proposing a restructuring approach and for designing a plan. In view of the limited experience in the jurisdiction with plan formulation, the limited resources and the poor information received from debtors, some flexibility may be advisable. (iv) the structure of the voting rules may require clarification, as there are several ambiguities in the provisions.<sup>38</sup>

15.11 **Cross-border insolvency.** There are no provisions in the law aimed at facilitating cooperation in cross-border insolvencies, as well as facilitating access (by foreign representatives and creditors) to local proceedings, recognition of foreign proceedings and the granting of a range of relief in circumstances of cross-border insolvency, pursuant to uniform international standards, in particular the provisions of the UNCITRAL Model Law on Cross-Border Insolvency.<sup>39</sup>

15.12 **Enterprise groups.** The insolvency law does not provide rules regarding the treatment of enterprise groups in insolvency.<sup>40</sup>

#### **D. INSTITUTIONAL & REGULATORY FRAMEWORKS**

- 16 **The judiciary, structured to be independent from the other branches of government, in order to provide an impartial tribunal to enforce the rule of law, has been too dependent on self-regulation, resulting in a less than effective system to assure the integrity of the judiciary.** Moldova's laws regarding the judiciary are appropriately designed to maintain the independence of the judiciary from undue influence on the part of other branches of the government. Its Superior Council of Magistracy is responsible for the selection, evaluation, and discipline of judges, but is not perceived to be free from a protectionist tendency. The recent dissolution of the Economic Court (the specialized court charged with handling insolvency cases), in response to charges of corruption, did not lead to criminal penalties, and many of the former judges of that court now serve on the Courts of Appeal, continuing to hear insolvency cases. While their experience is no doubt a valuable asset that is worth preserving, the failure to more aggressively sanction wrongful conduct tends to undermine confidence in the judiciary. Recent proposed legislation designed to address this issue, including more specific criminal sanctions, a more robust screening process for new judges, and a more independent mechanism for consideration of complaints against judges all appear calculated to address this concern. Evaluation tools for the judiciary have also been revised, though they could be more finely attuned to the unique tasks and timelines associated with managing insolvency cases. Close monitoring of the effectiveness of these legislative and regulatory improvements will be essential.<sup>41</sup>
- 17 **The first instance courts that handle enforcement of judgment actions are too prone to entertain defences urged by debtors, and are too unwilling to make use of the tools available to them to prevent abusive litigation tactics in the enforcement of judgments.** The enforcement of judgments suffers from significant delays, due in part to the unlimited range of defences that are entertained by

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<sup>38</sup> See further Principle C14, Annex I.

<sup>39</sup> See further Principle C15, Annex I.

<sup>40</sup> See further Principles C16-C17, Annex I.

<sup>41</sup> See further Principles D1, D6, Annex I.

the first instance courts, as well as the apparent unwillingness of those courts to apply sanctions for bad faith and abusive filings. Judges could be greatly assisted by laws that would curtail defences in enforcement actions to those related to the fairness of the enforcement process itself, as well as by a bonding requirement for appeals. They would also benefit from better training to enhance the appreciation of the economic implications of enforcement in the commercial field.<sup>42</sup>

- 18 **The generalist Courts of Appeal to which insolvency cases are now assigned has resulted in many cases being assigned to judges with little or no experience with such cases.** Insolvency cases are unique in that they require of the judge not only knowledge of the law itself but also knowledge of the business aspects of such cases. Generalist judges have little or no experience managing such cases, and have insufficient skill and training in the economic issues that are central to the successful resolution of insolvency matters. As a result, they are often less aware of the implications of their decision-making on the economic course of the case, and are less adept at case management. This lack of skill sets and experience has reportedly resulted in poor management of deadlines, and a tendency to favour liquidations over restructuring.<sup>43</sup> Though the Supreme Court of Justice and the Superior Council of Magistracy have been pro-active in training the judges of the Courts of Appeal with regard to the details of the Insolvency Law itself, less attention has been paid to training in the skills necessary to efficiently manage insolvency proceedings, to supervise administrators, and to foster reorganization of viable enterprises. In addition, as a result of case assignment across a much broader number of generalist judges who must also handle numerous other types of matters, it is taking longer for judges to acquire the level of experience needed to refine their case management skills for the unique challenges such cases pose.<sup>44</sup>
- 19 **Although the Insolvency Law has placed most of the management of cases on the administrator and on the creditors (either through the Creditors' Committee or the Creditors' Meeting), judges still have responsibility to control the administrator and to monitor for abuse.** The Insolvency Law enacted in 2012 reduced the role of the judge in the administration of case. The reorganization of the courts further limited the effective role of the court by reducing the experience level of the judges assigned these cases. As a result, it is reported that judges are less effective at monitoring and controlling the conduct of administrators, and they have less of a role in policing the relationship between the players in the insolvency process. Still, the law affords judges at least the opportunity to supervise the administrators, who must submit quarterly reports to the court regarding the progress of cases. In addition, judges could be more proactive in policing poor quality lawyering. They could also play a more active role in monitoring for abuse in the system, insisting on honesty and integrity on the part of administrators, debtors, and creditors. A greater role in controlling the compensation of administrators might be appropriate.<sup>45</sup>
- 20 **Administrators have greater responsibilities under the new Insolvency Law, but it is uncertain whether they will have the needed skill set to perform those duties.** With the reduction in the management role for judges has come an increase in the responsibilities imposed on administrators. Unfortunately, there is still a perception that administrators are not adequately trained for their responsibilities. Many administrators lack the business skills to operate the business of the debtor enterprise, severely hampering the prospects for reorganization. There are also still reports that some

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<sup>42</sup> See further Principles D1, D5, Annex I.

<sup>43</sup> It has also been observed that the provisions of the Civil Procedure Code ought to be more closely attuned to the unique needs of the insolvency court process, including perhaps the development of special rules designed specifically for insolvency proceedings. For example, rules relating to notice, jurisdiction, venue, enforcement rights, status of judgments, and the like might be considered.

<sup>44</sup> See further Principles D2, D6, Annex I.

<sup>45</sup> See further Principles D6-D7, Annex I.

administrators are less than honest in their dealings, engaging in unethical or illegal behaviour. Legislation is in process that would place administrators under the supervision of the Ministry of Justice, and that ministry is expected to develop guidelines for eligibility, proper conduct, and training.<sup>46</sup> New training programs are to be implemented as well, though it is not known the extent to which those training programs will include business management. Judges have a responsibility to control administrators, but the law offers too few tools with which to fulfil that duty.<sup>47</sup>

### III. POLICY RECOMMENDATIONS

- 21 To best position Moldova's economy to sustain the needs of its citizens in the future and to enhance commercial competitiveness regionally and globally, the following policy recommendations are suggested to strengthen and modernize the country's legal, regulatory and institutional frameworks for creditor/debtor relationships:

#### *Creditor Rights Systems*

The legal framework for creditor rights can be reinforced. Some of the key issues to consider in this respect include:

- The design of training programs for lenders on secured transactions practice to promote taking full advantage of the possibilities that the law affords.<sup>48</sup> A better use of the pledge over inventory and receivables would increase access to finance for numerous businesses lacking real estate and fixed capital assets. - **Medium term.**
- Reform of the Civil Procedure Law's ordinance procedure, by introducing a limited list of admissible defences, focused on procedural issues relating to the enforcement process itself, instead of the current non-exclusive approach. – **Urgent.**
- Imposing more stringent requirements and supervision over the activity of professional valuers. - **Medium term.**
- Revisiting the rule that allows restricting the grant of a further mortgage/pledge over the same asset. - **Urgent.**<sup>49</sup>
- Making it clear in the law that generic descriptions are sufficient to cover all the assets belonging to a certain category, when creating a security interest over a body of movable assets. - **Medium term.**<sup>50</sup>
- Clarifying the concept of enterprise pledge by recognizing the possibility of creating a security interest over all the movable assets of the grantor and more clearly defining how registration is accomplished over all the movable assets. - **Medium term.**<sup>51</sup>

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<sup>46</sup> It has been observed that events in the insolvency process are not properly and promptly registered in the appropriate registries, making the registries less reliable as a result. This aspect of administrator duties ought to be incorporated in their training.

<sup>47</sup> See further Principle D8, Annex I.

<sup>48</sup> It is understood that guidelines on asset based lending are being developed. Adoption of such voluntary principles and the design of further training as mentioned above could indeed enhance the effective use of security interests in Moldova.

<sup>49</sup> It is understood that recently enacted legislation reforming the Law on pledge suggests allowing the prohibiting of subsequent movable pledges only when expressly foreseen by the law (not by contract). The new law has not been reviewed as part of this report.

<sup>50</sup> Recently enacted legislation reforming the Law on pledge is said to have addressed this issue (by allowing a general description of the category of assets pledged).

- Extending the scope of the Law on pledge to include rules for the pledge of bank accounts and deposits.- **Urgent**.<sup>52</sup>
- Ensuring that the grantor of a pledge cannot deny access to information to potential searchers of the registry.- **Medium term**.<sup>53</sup>
- Clarifying the relationship between the registries for specific types of assets and the general pledge registry.- **Medium term**.<sup>54</sup>
- Consideration should be given to extending the out-of-court enforcement regime available for mortgages, to pledges of movable assets. - **Medium term**.<sup>55</sup>

The secured transactions regime may transition at some stage to a more modern system by adopting a functional concept of security interest that would cover all techniques performing the function of securing claims –such as, for example, financial leases.<sup>56</sup>

### *Credit Risk Management Systems*

- The performance of the Credit Bureau can be improved by enhancing oversight over the operation, inclusiveness and accuracy of the information provided to the bureau. The reported plan to establish by the NBM a credit registry that will also be connected to the Credit Bureau, which had been promised three years ago, has not yet been set up. Its creation is likely to improve the credit information system considerably. The credit registry should be set up and launched **urgently**.<sup>57</sup>

Additionally:

- Efforts to broaden the range of the Credit Bureau's database by incorporating information from nonbank credit institutions should continue.
- Participation by non-financial repeat creditors such as utilities should also be considered.
- Lenders should be required to disclose to borrowers information on adverse credit decisions which materially rely on an adverse credit report.

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<sup>51</sup> It is understood that recently enacted legislation reforming the Law on pledge suggests clarifying that the enterprise pledge covers all movable assets.

<sup>52</sup> It is understood that recently enacted legislation reforming the Law on pledge suggests allowing the creation of pledges over bank accounts through control rather than possession. It also provides that the pledge should extend to the proceeds of the original asset, unless the parties agree otherwise.

<sup>53</sup> It is understood that recently enacted legislation reforming the Law on pledge suggests eliminating the grantor's option to deny access to the registry by third parties.

<sup>54</sup> It is understood that the recently enacted legislation reforming the Law on pledge does not opt for a decentralized system whereby registration of certain types of asset will take place in special registered properly linked to the registry of pledge. However, it suggests establishing a unified system for registration of pledges and maintaining the special registries for the purpose of registration of ownership. It is understood that the relationship between the special registries and the pledge registry will be addressed through further secondary legislation.

<sup>55</sup> It is understood that recently enacted legislation reforming the Law on pledge suggests introducing such out-of-court enforcement mechanism.

<sup>56</sup> It is understood that the recently enacted Amendment to the Law on Pledge (8 November 2014) may have addressed this concern.

<sup>57</sup> The National Bank of Moldova reports that implementation of a Credit Risk Registry within the NBM is an ongoing process, and that in August 2014, a public acquisition for purchasing IT solutions and associated implementation services was launched.

- **Medium term**
- The current mechanisms for the accountability of the debtor's management require some critical improvement; they should provide:
  - What reasonable steps directors, and other corporate controllers, may take at times of financial distress, namely when they knew or should have known that the business is facing financial difficulties and insolvency is imminent, but even before actual insolvency.
  - The law may also include 'safe harbor' provisions excluding liability for late filing in case of good faith negotiations or restructuring efforts and transactions or actions that may be taken by the debtor in this respect.
  - The law may also clarify that no liability of fictitious filing may arise in circumstances of good faith filing for restructuring.
  - Mechanisms for funding of actions under the provisions, e.g. through allowing administrators to assign such claims to third parties and creditors that may pursue such actions on behalf of the estate should be considered.
  - Clarifications regarding the circumstances where controlling shareholders may be liable, and restrictions on liability of professionals would also be of merit.
- **Medium term**
- Out-of-court Workout Guidelines should be developed, and the use of such guidelines should be encouraged, e.g. through central bank endorsement. In this respect, it is important to develop an enabling framework for workouts:
  - Tax authorities should be able to play a supporting role and meaningfully participate in the process.
  - In the course of a workout, new lending may be crucial and its provision should be encouraged by an enabling banking and insolvency legislation.
  - Explicit general regulation in the company laws regarding debt restructuring including through swaps may encourage the use of such practices.
  - More favorable tax treatment of debt resolution agreements could encourage workouts. Consideration should also be given to the development of a body of workout professionals.
  - Obligations under the Company and Accounting laws regarding financial reporting should be strictly enforced and monitored, and transparency and access to information strengthened.
  - Consideration should also be given to reassessing regulation and policies imposed on lenders that discourage the use of informal and formal insolvency proceedings.
  - Policies targeted at encouraging banks (and other lenders) to address distressed debts robustly and effectively should also be developed.
  - Consideration should also be given to reassessing loan classification rules in terms of their ability to encourage lending to distressed enterprises.

- **Medium term.**

### *Insolvency Law Framework*

- The new insolvency law has been enacted rather recently and more time is required to be able to test its effectiveness fully. Therefore, additional amendments to the law may be considered as a medium term measure. However, in addition to the specific issues, delineated below, it would be useful to establish monitoring mechanisms, e.g. by requiring the provision of information and data from insolvency representatives involved in insolvency cases and/or from the courts. Such information may usefully include data on the type of proceedings opened (whether liquidation or restructuring); what is initially requested by parties (i.e. whether restructuring is being sought); information about the availability of funding post-application or commencement of the proceedings, about decision making processes at the



creditors' meetings and the application of the timeframes, in particular when a restructuring or a going concern sale is sought.- **Urgent.**

- Further strengthening of the insolvency regime may be considered, to enhance its efficacy, by reinforcing various aspects of the framework, including the following:
  - The right of appeal may be expanded to all decisions that may affect substantive rights of creditors.
  - The engagement of experts may be encouraged through incentivising the granting of new finance to the insolvent business.
  - Mechanisms of notice and publicity of decisions and orders can be reinforced. Web-based publication of notices and court decisions should be available and it should be possible to search electronically whether a given entity is subject to insolvency proceedings. A more general publication of an insolvency petition filing may be made in a newspaper of general circulation.
  - The requirement to present a final court decision when a creditor petition for insolvency may be removed.
  - The law may specify a period of time after which a failure to pay a mature debt would allow the creditor to file a petition.
  - The interaction between the rules concerning the stay (moratorium) of actions by secured creditors and the rules concerning the use of encumbered assets may be clarified. During the duration of the stay, the liquidator should be able to consider a sale that best suits the interests of creditors as a whole, or use assets, including encumbered assets, for the continued operation of the business, while providing adequate protection to secured creditors.
  - The relief provisions may be reinforced and it should be clear that relief is available in a restructuring context too. The insolvency representative may be required to show that the suspension of enforcing rights against encumbered assets is necessary to the ability to maximize the value of the estate property for the benefit of all interested persons and that the secured claim of the creditor will be protected from decline in value or other loss during the period of the suspension.
  - (Over) secured creditors should have a right to payment of interest up to the value of the collateral.
  - The role of the creditors' meeting may be restricted to some extent, e.g. with regard to the approval of a restructuring approach prior to its consideration by creditor classes. The decisions of the committee, especially prior to the convening of the creditors' meeting, should be closely supervised.
  - Rules regarding obtaining new finance (post-petition/commencement) may be provided in the law, specifying the priority afforded to new financiers as either equivalent to administration expenses or as subject to 'super-priority' ahead of the administration expenses or even ahead of secured creditors coupled with measures for their adequate protection. Other means to encourage further lending may include the ability to grant a security for the repayment of the new finance including a security interest on an unencumbered asset, on after-acquired assets or a junior or lower priority security interests on an already encumbered asset of the estate, subject to adequate protection of existing secured creditors.
  - The transaction avoidance mechanisms can be strengthened, including by reassessing the time periods for attacking the different types of transactions, by providing clearer provisions regarding transactions with related persons and by excluding transfers made in good faith pursuant to an out-of-court workout from the avoidance provisions.
  - The secured creditor status afforded to investors in apartment buildings should be re-examined.
  - Consideration should be given to allowing administrators to petition the court for an injunction on the exercise of voting rights by a creditor, on a proper showing that there is a real danger the claim is fictitious.
  - The rules concerning approval of a restructuring plan should be clarified.<sup>58</sup> There should be sufficient time afforded to the development of restructuring strategies.

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<sup>58</sup> The procedural rules on reorganisation process should be improved and "finely attuned" to render reorganisation a real (workable) option to liquidation, which, as a matter of practice, is preferred today by creditors.

- Consideration should be given to allowing debtors to request a restructuring strategy even where it disputed its state of insolvency when responding to a creditor petition.
- Some aspects of the rules concerning settlements may be elucidated.
- A regime for cross-border insolvency may be introduced.
- A regime for enterprise groups in insolvency may be introduced.

- **Medium term**

#### *Institutional and Regulatory Frameworks*

The institutional framework is in urgent need of strengthening. Certain critical measures may be considered, including:

- The design of training programs for first instance judges on enforcement of judgments, encouraging judges to strictly enforce rules against frivolous and bad faith litigation – **Urgent.**
- The assignment of insolvency cases to designated members of the Courts of Appeal who are specially trained in the management of insolvency cases- **Urgent.**
- Enhancing the training of judges handling insolvency cases to include development of knowledge of economics, and specialized case management skills for insolvency cases – **Urgent.**
- Monitoring the new legislative initiatives for the discipline of judges to verify their effectiveness – **Medium term.**
- Implementing training, supervision, and evaluation protocols for administrators – **Urgent.**

## **IV. CONCLUDING REMARKS**

- 22 The implementation of the afore-mentioned recommendations would be an ambitious project, but would result in the creation of an insolvency and creditor/debtor system fitting within the contours of the current regime yet able effectively to channel debtor and creditors alike into a fair, wealth-creating and job-preserving collective forum consistent with some of the best international practices in this domain. Among the specific benefits which could be expected to flow from the adoption of the suggested reforms would be:
- 22.1 increased access to credit by Moldovan businesses, as improved legal structures, enhanced ability to take, register and enforce security with a clear priority outcome would increase the flow of credit;
  - 22.2 increased confidence in the Moldovan judicial, legal and regulatory systems;
  - 22.3 increased confidence in the ability of commercial banks to support Moldovan business; and
  - 22.4 increased growth, confidence and stability in the Moldovan economy.
- 23 The World Bank's Chisinau Office and the Bank's Global Initiative on Insolvency and Creditor/Debtor Regimes stand ready to assist the Moldovan authorities in implementation of the recommendations in this Report.

## ANNEX I: PRINCIPLE BY PRINCIPLE ASSESSMENT<sup>59</sup>

No.	PART A. LEGAL FRAMEWORK FOR CREDITOR RIGHTS	RATING
A1	Key Elements	MNO
A2	Security (Real Property)	LO
A3	Security (Movable Property)	MNO
A4	Registry Systems	MNO
A5	Commercial Enforcement Systems	MNO
	<b>PART B. RISK MANAGEMENT AND CORPORATE WORKOUT</b>	
B1	Credit Information Systems	MNO
B2	Director & Officer Accountability	MNO
B3	Enabling Legislative Framework	MNO
B4	Corporate Workout – Restructuring Procedures	MNO
B5	Regulation of Workout and Risk Management	MNO
	<b>PART C. LEGAL FRAMEWORK FOR INSOLVENCY</b>	
C1	Key Objectives and Policies	MNO
C2	<i>Due Process</i> : Notification and Information	LO
	<i>Commencement</i>	O
C3	Eligibility	
C4	Applicability and Accessibility	MNO
C5	Provisional Measures and Effects of Commencement	LO
	<i>Governance</i>	O
C6	Management	
C7	Creditors and the Creditors Committee	LO
	<i>Administration</i>	MNO
C8	Collection, Preservation, Administration and Disposition of Assets	
C9	Stabilizing and Sustaining Business Operations	MNO
C10	Treatment of Contractual Obligations	LO
C11	Avoidable Transactions	MNO
	<i>Claims and Claims Resolution</i>	LO
C12	Treatment of Stakeholder Rights & Priorities	
C13	Claims Filing and Resolution	LO
C14	<i>Reorganization Proceedings</i> Plan Formulation and Consideration Voting and Approval of Plan Implementation and Amendment Discharge and Binding Effects Plan Revocation and Case Closure	MNO
C15	International Considerations	MNO
	<i>Insolvency of Enterprise Groups</i>	
C16	<i>Insolvency of Domestic Enterprise Groups</i> Procedural Coordination Post-commencement Finance Substantive Consolidation Avoidance actions Insolvency Representative Reorganization Plans	NO

<sup>59</sup> The methodology applied in the ratings of compliance with the World Bank Principles is as follows. A Principle will be considered Observed (O) whenever all essential criteria are generally met without any significant deficiencies; Largely Observed (LO) whenever only minor shortcomings impede full observance of the Principle; Materially Non-Observed (MNO) whenever the legislation or practices derogate significantly from the Principle; and Non-Observed (NO) whenever there is no relevant legislation or whenever the latter or the practices are not at all consistent with the Principle.

C17	<b><i>Insolvency of International Enterprise Groups</i></b> Access to court and Recognition of Proceedings Cooperation involving courts Cooperation involving insolvency representatives Appointment of the insolvency representative Cross-border insolvency agreements	NO
	<b>PART D. IMPLEMENTATION: INSTITUTIONAL &amp; REGULATORY FRAMEWORKS</b>	
	<b><i>Institutional considerations</i></b>	MNO
D1	Role of Courts	
D2	Judicial Selection, Qualification, Training and Performance	MNO
D3	Court Organization	LO
D4	Transparency and Accountability	MNO
D5	Judicial Decision Making and Enforcement	LO
D6	Integrity of the System (Courts and Participants)	MNO
	<b><i>Regulatory considerations</i></b>	MNO
D7	Role of Regulatory or Supervisory Bodies	
D8	Competence and Integrity of Insolvency Representatives	MNO

	<b>PART A. LEGAL FRAMEWORK FOR CREDITOR RIGHTS</b>
<b>Principle A1</b>	<p><b>Key Elements</b></p> <p>A modern credit-based economy should facilitate broad access to credit at affordable rates through the widest possible range of credit products (secured and unsecured) inspired by a complete, integrated and harmonized commercial law system designed to promote:</p> <ul style="list-style-type: none"> <li>▪ reliable and affordable means for protecting credit and minimizing the risks of non-performance and default;</li> <li>▪ reliable procedures that enable credit providers and investors to more effectively assess, manage and resolve default risks and to promptly respond to a state of financial distress of an enterprise borrower;</li> <li>▪ affordable, transparent and reasonably predictable mechanisms to enforce unsecured and secured credit claims by means of individual action (e.g., enforcement and execution) or through collective action and proceedings (e.g., insolvency);</li> <li>▪ a unified policy vision governing credit access, credit protection, credit risk management and recovery, and insolvency through laws and regulations that are compatible procedurally and substantively.</li> </ul>
<b>Description</b>	<p>Moldova is a lower middle income economy in the Eastern Europe and Central Asia region.<sup>60</sup> As of 2012, the GDP of Moldova was estimated to amount to 7.25 billion US dollars.<sup>61</sup> The GNI per capita amounted to 2,070 US dollars in 2012.<sup>62</sup></p> <p>The economy of Moldova is based on the agricultural sector and food-processing industries. Moldova has a small domestic market characterized by limited competition and modest innovation. The vast majority of enterprises are small to medium sized.<sup>63</sup></p> <p>The financial sector is of limited size (total assets represent around 75 percent of GDP) and not fully developed. The banking sector is regulated and prudentially supervised by the National Bank of Moldova, while the non-banking financial sector (microfinance organizations, savings and loan associations, mortgage credit organizations and credit history bureaus) is subject to a less intense degree of supervision by the National Commission for Financial Markets (NCFM).<sup>64</sup> Financial leasing companies are entirely unregulated.</p> <p>Moldova declared its independence in 1991 and since then, the country has developed its</p>

<sup>60</sup> Under the World Bank country classification methodology, Moldova is classified as a lower-middle-income country and as an IDA country: see

<http://econ.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20421402~menuPK:64133156~pagePK:64133150~piPK:64133175~theSitePK:239419.00.html#Europe and Central Asia>

<sup>61</sup> Source, World Bank, 2012.

<sup>62</sup> Calculation of the GNI per capita made in accordance with the Atlas method (source, World Bank, 2012). The population of Moldova was estimated at 3.560 million in 2012. The Gini index as measured in 2010 was 33.00, which signals the presence of income inequalities, but not inequalities of the extreme level experienced in many developing countries (see <http://data.worldbank.org/indicator/SI.POV.GINI>).

<sup>63</sup> See PwC, Guide to doing business and investing in Moldova, available at [http://www.pwc.com/en\\_MD/md/Publications/Assets/Business\\_Guide\\_Moldova\\_2009.pdf](http://www.pwc.com/en_MD/md/Publications/Assets/Business_Guide_Moldova_2009.pdf), at page 6.

<sup>64</sup> As far as microfinance organizations, mortgage credit organizations (non-existing at the moment) and financial leasing companies are concerned, the NCFM is not vested with any enforcement powers, such organizations being entitled to establish their own standards in providing services (e.g. art. 9 of the Law on Microfinance Organizations). The NCFM's supervision in the field is resumed to receiving reports and examining petitions. In relation to credit bureaus, the NCFM is vested with powers to suspend or withdraw their license in case of non-compliance with the (general) requirements set out in the Law on licensing of entrepreneurial activity, as well as determine the standards of conducting their activity (as far security and confidentiality of the data is concerned). However, the supervision powers of the NCFM are limited (see Principle B1). On the other hand, savings and loan associations have a closed regime and a more thorough regulation, including a (limited) prudential supervision by the NCFM.

	<p>own national legal system, including in the areas analyzed in this report. The law of Moldova is based on the civil law tradition, as adopted in countries of the Soviet and post-Soviet periods, but some of the more recent laws also present influences from other legal systems.</p> <p>As a matter of national strategy, Moldova has pursued the establishment of close ties with the European Union, with the ultimate goal of full membership. On November 29, 2013, Moldova and the European Union initialed an Association Agreement to further strengthen political, economic and trade relations between the EU and the Republic of Moldova.<sup>65</sup> The Association Agreement, including the Deep and Comprehensive Free Trade Area (DCFTA), aims to deepen political and economic relations between Moldova and the EU, and to gradually integrate Moldova into the EU Internal Market. Reforms are foreseen in a number of key areas, including public governance, justice, law enforcement, economic recovery and growth and consumer protection, among other areas. The Agreement emphasizes the importance of good governance, a well-functioning market economy and sustainable development.<sup>66</sup> The Agreement also stresses the importance of improving the business environment, especially for small and medium enterprises.<sup>67</sup></p> <p>In the area of credit protection and insolvency, the Moldovan legal system has experienced important changes since independence. A number of legal reforms have provided the country with a completely new commercial law regime, including basic laws for secured credit, enforcement of claims, and insolvency. The legislative panorama is complex, and is formed mostly of laws enacted or reformed in the last decade. The main laws relevant for the area covered by this assessment include:</p> <ul style="list-style-type: none"> <li>-the Law on joint-stock companies (1997);</li> <li>-the Law on the immovable property cadastre (1998);</li> <li>-the Law on pledge (2001);</li> <li>-the Law on the activity of valuation (2002);</li> <li>-the Civil Code (2002)</li> <li>-the Civil Procedure Code (2003);</li> <li>-the Enforcement Code (2004);</li> <li>-the Law on leasing (2005);</li> <li>-the Law on limited liability companies (2007);</li> <li>-the Law on registries (2007);</li> <li>-the Law on mortgage (2008);</li> <li>-the Law on credit history bureaus (2008);</li> </ul>
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<sup>65</sup> See full text of the Association Agreement at

[http://www.eeas.europa.eu/moldova/assoagreement/assoagreement-2013\\_en.htm](http://www.eeas.europa.eu/moldova/assoagreement/assoagreement-2013_en.htm)

<sup>66</sup> Article 24.2 of the Association Agreement states that:

*“The Republic of Moldova shall strive to establish a functioning market economy and to gradually approximate its policies to the policies of the EU, in accordance with the guiding principles of sound macroeconomic and fiscal policies, including central bank independence and price stability, sound public finances and a sustainable balance of payments”.*

<sup>67</sup> Article 62 of the Association Agreement states that:

*“The Parties shall develop and strengthen their cooperation on industrial and enterprise policy, thereby improving the business environment for all economic operators, but with particular emphasis on small and medium sized enterprises (SMEs). Enhanced cooperation should improve the administrative and regulatory framework for both Republic of Moldova and EU businesses operating in the Republic of Moldova and the EU, and should be based on the EU’s SME and industrial policies, taking into account internationally recognised principles and practices in this field”.*

	<p>-the Law on bailiffs (2010); -the Insolvency Law (2012).<sup>68</sup></p> <p>Naturally, there are other laws that affect credit, such as the laws that regulate the activity and conduct of business of financial institutions; or the tax laws (see the Principles under part B of this report).</p> <p>The ensemble of laws mentioned before represents the foundations of commercial credit in Moldova. The laws recognize multiple forms of security over movable and immovable assets, and functional alternatives to security interests, such as financial leases (see Principles A2 and A3). Most of the security interests are registered (see Principle A4). In addition, the legal system provides the infrastructure for the operation of credit bureaus (see Principle B1) as an essential informational instrument in the process of adopting lending decisions.</p> <p>The law also provides mechanisms for the enforcement of unsecured and secured claims, through the use of different court procedures, including also the possibility of using Alternative Dispute Resolution techniques, and, in certain cases, even out-of-court enforcement (see Principle A5);</p> <p>Finally, the Moldovan legal system incorporates an insolvency regime with options for liquidation and reorganization of businesses (see Principles C1-C17).</p> <p>In particular, the insolvency regime has been the object of recent reforms. The previous insolvency law had received an overall score of “medium compliance” in the EBRD’s 2009 Assessment, due to a notable disparity between the quality of the law “on the books” and the effectiveness of the law as applied in practice.<sup>69</sup> Indeed, in accordance with the regulatory impact assessment of the Ministry of Economy regarding the draft Insolvency Law,<sup>70</sup> the Republic of Moldova has had a rather poor performance in implementing insolvency provisions, due to a series of inhibiting factors. By adopting the new Insolvency Law, the legislator sought to address these shortcomings (see Principle C1).</p> <p>Despite the numerous legislative reforms, Moldova is far from having become a developed, credit-based economy. Although the credit offer has diversified in recent years, thanks to a more robust growth of non-banking financial institutions and other types of credit providers, alongside banks, unsecured credit for businesses is practically non-existent in the financial practice of Moldova. Secured credit dominates the commercial and financial practice, although access to credit continues to be a major concern for Moldovan entrepreneurs, and especially, for Moldovan SMEs. Lending practices are based on low or very low loan-to-value ratios; and this translates into the inability of businesses to obtain enough credit based on the collateral that they are able to offer.<sup>71</sup> Access to credit continues to represent an obstacle for economic growth in Moldova. Indeed, access to finance remains quite limited: the banks’ credits as of end-October 2013 amounted to approximately MDL 39.8 billion (approx. USD 3.1 billion), which only equals 37.7% of the GDP of Moldova. In addition, and despite a downward trend, interest rates in Moldova remain comparatively high: as of end-October 2013 the average interest rate for MDL credits extended for more than 12 months being 11.76%, comparing to 13.15% of the same</p>
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<sup>68</sup> The current Insolvency Law (Law No 149, of 29.6.2012) already corresponds to a second generation of commercial law statutes in Moldova. As a matter of fact, the Insolvency Law 2012 is the successor of the former Insolvency Law No 623 of 14.11. 2001, in which there were clear and numerous influences of the German Insolvency Law (InsO) of 1994.

<sup>69</sup> See *Commercial Laws of Moldova. An Assessment by the EBRD*, March 2011, available at <http://www.ebrd.com/downloads/sector/legal/moldova.pdf>

<sup>70</sup> Analiza Impactului De Reglementare (AIR) Efectuata Pentru Proiectul Legii Insolvabilitatii In Redactie Noua (Impact Assessment of The Draft Insolvency Law, August, 15, 2011).

<sup>71</sup> Loan-To-Value ratios (LTV) result from comparing the value of the collateral with the amount that is borrowed by the grantor of the security. Thus, a LTV of 80% means that the loan represents 80% of the value of the collateral. LTVs of 50% or even 40% do not seem uncommon in Moldova (meaning that the borrower obtains financing for 40% or 50% of the value of the collateral).

	period of 2012. For the foreign currency loans, the interest rate was 7.24% in October 2013 versus 7.64% in October 2012. <sup>72</sup>
<b>Assessment</b>	<p><b>Materially Non-Observed</b></p> <p>Moldova has undertaken numerous legal reforms in the hope of attaining the objective of becoming a developed high-income economy. The law reform activity has been truly remarkable, with some of the current laws having been reformed within a few years from the time they were enacted.</p> <p>Unfortunately, the changes in economic policy, and the legal reforms, have not achieved a broader access to credit, at affordable rates, for Moldovan businesses. Interest rates continue to be high, and access to credit requires adequate collateral –unsecured credit is practically unavailable for businesses. In addition, as far as secured credit is concerned, the practice of financial institutions in Moldova is to over-secure their loans (a particular reason for this being the slow and deficient enforcement procedure). The Loan-To-Value ratios are low, which indicates that businesses may not be able to cover their financing needs with the resources they obtain against the value of the collateral they can offer to lenders.<sup>73</sup> In extreme cases, the over-collateralization of loans is a symptom of predatory lending practices on the part of financial institutions.</p> <p>The World Bank Enterprise Survey 2009 highlighted the importance of access to finance, perceived as the biggest constraint for growth by 39.1% of Moldovan entrepreneurs.<sup>74</sup> The issues experienced by Moldovan entrepreneurs in their access to finance may be fundamentally determined by economic factors outside the scope of this report, but the legal environment may also play a role in the financing restrictions that affect businesses, and especially SMEs. This report identifies shortcomings in the law of secured transactions (Principle A2, and, especially, Principles A3 and A4) and in the enforcement of secured and unsecured claims (Principle A5) that may have an influence on the perception of risk by both debtors and creditors and, ultimately, on access to credit. Likewise, the analysis of restructuring and risk management practices (Principles B1-B5), and the insolvency regime (Principles C1-C17) reveals important aspects that could be improved and that may be creating a negative impact on access to credit by entrepreneurs.</p> <p>Another important obstacle to economic growth is the corruption that seems to still persist in the public administration and judicial systems, and that has an impact on the correct functioning of the institutional framework (see Principles D1-D8). In fact, although access to credit used to be identified as the main problem by economic operators, according to the <i>Global Competitiveness Report</i>, in the latest edition of the report (2013-2014) corruption has overtaken access to finance as the main obstacle for doing business.<sup>75</sup></p> <p>The importance of the legal system in the development of a credit-based economy has been recognized by the Moldovan authorities, engaged in a continuing process of updates and reforms of the main commercial laws<sup>76</sup>. The reforms of the legal framework have been</p>

<sup>72</sup> Source: National Bank of Moldova, <http://www.bnm.org/>

<sup>73</sup> According to the World Bank Enterprise Survey 2009 (available at <http://www.enterprisesurveys.org/Data/ExploreEconomies/2009/moldova>), the value of collateral required for a loan would be 138.6 (which equals a Loan-To-Value ratio of 72). However, data obtained by this team by way of responses to questionnaires by financial institutions suggest that the current loan-to-value ratios are lower, with the enterprises obtaining less financial resources against the value of their collateral.

<sup>74</sup> See <http://www.enterprisesurveys.org/Data/ExploreEconomies/2009/moldova>

<sup>75</sup> See *Global Competitiveness Report (2013-2014)*, available at [http://www3.weforum.org/docs/WEF\\_GlobalCompetitivenessReport\\_2013-14.pdf](http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf), at page 278.

<sup>76</sup> According to the Doing Business report (2014), Moldova has a robust credit protection system (the score in the “strength of creditor legal rights” sub-indicator of “getting credit” is 9 out of 10). As for insolvency, the analysis of the “resolving insolvency” indicator estimates that a typical insolvency procedure lasts for 2.8 years, that the cost of the process is 9% of the insolvency estate, and that a



	<p>generally positive, signaling progress in the sophistication of the legal techniques and the availability of a variety of legal instruments for their use by businessmen and financial institutions. However, the reforms do not evidence the existence of a unified policy vision for the development of instruments of access to credit for businesses and the treatment of enterprise distress and failure. The different legal texts sometimes respond to different guiding principles and conflicting conceptions about the protection of credit and the role of the insolvency processes. One example could be the regulation of the enforcement of the enterprise pledge: according to the law on pledge (art. 30 of the Law on pledge – see Principle A5), the holder of an enterprise pledge can appoint a receiver or administrator to take possession of the debtor’s enterprise and manage that enterprise with the purpose of repaying the secured loan. The fact that the grantor of the enterprise pledge is declared insolvent does not conclude the administration by the secured creditor.<sup>77</sup> In those conditions, the goals of the Insolvency Law of achieving an efficient liquidation or reorganization of the debtor’s business would collide with the exercise of the rights of the creditor holding the enterprise charge.</p> <p>The example described above may be representative of a wider issue – the number and rapid succession of legal reforms have not been followed by a general assessment of the effectiveness of the reforms, the identification of gaps in the legal regime, and the interaction of the different pieces of legislation. The legislation on secured transactions is characterized by a number of different statutes with complex relationships and overlaps (see Principles A2-A4), and the relationship between the secured transactions regime and the insolvency regime is also marked by complexity. It is difficult to articulate a unitary policy vision when looking at the multiplicity of laws and an approach to law reform that appears to be conditioned by urgency and by the need to find solutions for specific problems. In some cases, it is possible to trace influences from different legal traditions and legal systems in the reforms, which may result in further compatibility problems among statutes regulating matters that are inextricably connected.</p> <p>This report offers the opportunity of performing an integral evaluation of the laws and institutions which shape the legal environment of credit in Moldova. The assessment sections pertaining to each Principle indicate, where applicable, the areas in which Moldovan law deviates from the international standard.</p>
<b>Comment</b>	<p>The recommendations included in the comment section of this report offer a full set of solutions to the areas analyzed in the ICR assessment. The recommendations are formulated on the basis of the international standard and represent tested approaches to the regulation of credit and insolvency, sustained by a unified policy vision.</p> <p>It is foreseen that full transition to a market economy will require a degree of reform of relevant laws. Although the law may not be a decisive factor in expanding access to credit and economic growth, it does play a role, and legal deficiencies and uncertainties may definitely hinder access to credit and slow economic growth.</p> <p>In any case, it would be appropriate to take stock of the reforms introduced in the last decade and approach future changes in a more targeted and systematic fashion. The importance of the problems in access to credit suggests the need for some changes in the legislation of secured credit; enforcement of claims; restructuring and insolvency (see Principles A2-A5; B1-B5; C1-C17). At the same time, reforms need to be properly assimilated by the legal and economic actors. The lack of unsecured credit and the overreliance on certain types of collateral suggest a need to modify risk management practices (see Principle B5) and the convenience of wider and deeper knowledge of the</p>

fully secured creditor would recover 32.8% of its claim. It is submitted that these data are not based on statistics and that the evaluation of the secured transaction laws is not based on a full assessment of all relevant aspects of those laws.

<sup>77</sup> Art. 30(5) of the Law of Pledge states that: “*Possession for administration ceases subject to the same conditions on which fiduciary administration ceases, except when possession ceases together with the satisfaction of the pledgee’s secured claim or when the pledgee waives the right of pledge, or when it notified of the exercise of the right to sell the pledged asset. The pledger’s bankruptcy does not terminate possession.*” See also Principle A5, C5 and C8 below.

	<p>possibilities afforded by the law.</p> <p>The concern about corruption, as expressed in surveys, studies and interviews, clearly suggests the need to strengthen the institutional framework (see Principles D1-D8).</p>
<b>Principle A2</b>	<p><b>Security (Immovable Property)</b></p> <p>One of the pillars of a modern credit economy is the ability to own and freely transfer ownership interests in land and land use rights, and to grant a security interest (such as a mortgage or charge) to credit providers with respect to such interests and rights as a means of gaining access to credit at more affordable prices. The typical hallmarks of a modern mortgage system include the following features:</p> <ul style="list-style-type: none"> <li>▪ Clearly defined rules and procedures for granting, by agreement or operation of law, security interests (mortgages, charges, etc.) in all types of interests in immovable assets;</li> <li>▪ Security interests related to any or all of a debtor's obligations to a creditor, present or future, and between all types of persons;</li> <li>▪ Clear rules of ownership and priority governing competing claims or interests in the same assets, eliminating or reducing priorities over security interests as much as possible;</li> <li>▪ Methods of notice, including a system of registry, which will sufficiently publicize the existence of security interests to creditors, purchasers, and the public generally at the lowest possible cost.</li> </ul>
<b>Description</b>	<p>The law of security over immovable property of Moldova is included in different statutes: there are rules regulating mortgages in the Civil Code, the law of pledge, and, naturally, in the law of mortgage itself. The Law on Pledge (Law No 449 of 30.07.2001) regulates the pledge over moveable and immovable assets. The mortgage is further regulated by the Law on mortgage (Law No 142 of 26.06.2008). The relationship of these three statutes can be explained in terms of the interaction between general law and special law: the Civil Code includes the basic legal institutions of contract and property, comprising the fundamentals of security rights over all asset types.<sup>78</sup> Moldovan law has adopted a general concept of security interest (<i>gaj</i> – see art. 454 of the Civil Code),<sup>79</sup> applicable to both movable and immovable assets. Indeed, a mortgage is defined as a pledge over immovable assets (see art. 455(3) of the Civil Code; and art. 4(2) of the Law on pledge). Finally, the law of mortgage contemplates specific rules, applicable only to security interests over immovable assets (<i>ipoteca</i>).</p> <p>The result is that the regime of mortgages in Moldova is composed of multiple layers of rules, all of which must be taken into account when analyzing and interpreting the legal issues presented in its application.</p> <p>The mortgage, as the security interest in immovable assets, remains the preferred collateral of Moldovan financial institutions. A mortgage is a pledge of real assets, defined as a real right based on which the creditor is entitled to request fulfillment of his claims, taking</p>

<sup>78</sup> It has been suggested by some in Moldova that both the separate pledge and mortgage laws could be repealed and both be incorporated into the Civil Code.

<sup>79</sup> In this regard, the use of the term “pledge” as a translation of “*gaj*” may be misleading, as “pledge” tends to be identified with a possessory security right over movable assets, whereas the concept, as used in the legislation of Moldova, refers to a general security right, possessory or non-possessory, over movable or immovable assets, but in practice in Moldova also tends to refer to possessory interests primarily, as the term “*gaj*” itself refers specifically to a possessory interest. Indeed, it has been observed by others that, instead of “*gaj*”, the proper term of “*ipoteca mobiliara*” should be used to refer to non-possessory interests in movable property, and that the term “*ipoteca*” as now used in the law for pledges of immovable property should properly be changed to “*ipoteca imobiliara*.” We continue to use the term “pledge” throughout this Report without further distinction for consistency with numerous official and unofficial documents and reports on the legal system of Moldova.

	<p>priority over other creditors, including the state, from the value of the mortgaged immovable assets, when the debtor fails to perform his mortgage-secured obligation.<sup>80</sup> <del>The mortgage must have a defined object in a specific real estate asset (art. 18 of the Law on Pledge).</del> The collateral is the real estate described in the mortgage agreement, with its accessions (see arts. 328, 329 and 463(3) of the Civil Code), but without its fruits (art. 299 of the Civil Code), unless the parties agree otherwise (see arts. 7(4) and 7(5) of the Law on mortgage).</p> <p>A mortgage may be consensual, arising out of contract -as is generally the case- or may arise by operation of law under certain circumstances -statutory or legal mortgage- (art. 6 of the Law on mortgage<sup>81</sup>). Legal mortgages are foreseen for tax claims and for judgment claims.<sup>82</sup></p> <p>By way of mortgage, one or several, current, future or conditional obligations may be secured (art. 4 and 5 of the Law on mortgage) over one or several immovable assets (art. 7 of the Law on mortgage). A mortgage can be granted in favor of any creditor.</p> <p>Mortgages require to be notarized and registered at the real estate registry (<i>cadastre</i> – see Principle A4). The mortgage agreement shall be executed in writing and authenticated by a licensed notary, and subject to registration as per legislation on the <i>cadastre</i> of immovable assets. Pursuant to the Law on mortgage, a mortgage becomes both valid and effective against third parties upon registration in the real estate registry (art. 15 of the Law on mortgage).</p> <p>The notary fees are calculated as a percentage of the value of the mortgaged asset, as estimated by the parties. Independent valuation of the immovable asset, with the purpose of determining the market value and the replacement value, is mandatory (see art. 8 of the Law on mortgage).<sup>83</sup> The activity of valuation is specifically regulated by law.<sup>84</sup> Notaries are free to charge their fees within the range of fees set by methodology approved by the law.<sup>85</sup> Notary fees range between 1.3% (where the mortgage value is below 20,000 MDL) and 0.1% (where the mortgage value is above 1,000,000 MDL the fee being 0.1%). An additional cost in the creation of a mortgage is the State duty. The state duty amounts to 0.1% of the value of the immovable asset as estimated by the parties.</p> <p>Once a mortgage is created, the asset remains in the ownership of the mortgagor (art. 7(9) of the Law on mortgage), but the mortgagor cannot dispose of the mortgaged property without the consent of the mortgagee (art. 26 of the Law on mortgage). If the mortgagee consents to the sale, the mortgage remains attached to the property and would be enforceable against the new owner, unless the mortgagee agrees to termination of the mortgage (art. 26(5) of the Law on mortgage).</p> <p>The assignment of the mortgage is possible only concurrently with the assignment of the secured loan. The assignment of the mortgage does not require the mortgagor's consent,</p>
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<sup>80</sup> See art. 3 of the Law on mortgage (Law No 142 of 26.06.2008).

<sup>81</sup> See also art. 466 of the Civil Code, which applies to all pledges (i. e. security interests).

<sup>82</sup> See art.6 (3) of the Law on mortgage, according to which, the grounds for the establishment of a legal mortgage are the following:

- a) Claims held by the state for amounts due under tax legislation; or*
- b) Claims resulting from court judgments, as established by law.*

See also art. 467 of the Civil Code. The Civil Code gives contractors the right to demand the creation of a mortgage over the plot where construction work is undertaken (art. 953 of the Civil Code).

<sup>83</sup> 'Replacement' value of a land plot cannot be determined, but the Law on mortgage provides no exception to this end.

<sup>84</sup> See Law on the activity of valuation (Law No. 989 of 18.04.2002).

<sup>85</sup> Law No. 271 of 27.06.2003 on the methodology of calculation of the payments for notary services

	<p>provided that the mortgagor had agreed to such possibility at the time of the execution of the mortgage agreement (art. 27 of the Law on mortgage).</p> <p>Priority between mortgages is established chronologically, based on the moment of registration (art. 18 of the Law on mortgage).</p> <p>The amounts of the secured claim that benefit from the priority of the mortgage are the principal, plus the “<i>payment of interest, charges, penalties, fines, reparation of damages, court expenses, and other expenses related to execution of the mortgage right, unless the parties agreed otherwise</i>” (art. 4(8) of the Law on mortgage). The registry system only records the value of the secured obligation (on the registry system, see Principle A4 below). The priority benefits the sums described above, up to the limits of the proceeds of the sale of the mortgaged asset (or the value of the asset, if another method of enforcement is used – see Principle A5). The law of Moldova recognizes the priority of mortgage creditors both outside insolvency and in insolvency processes (see Principle C12).</p> <p>The only uncertainty concerning the general principle of the priority of mortgage creditors is the recognition of a preferred creditor status in favor of buyers (or “investors”) in apartments, which gives such creditors a status of secured creditors in the event the developer is the subject of an insolvency proceeding.<sup>86</sup> This is a response to a specific problem which has arisen in the treatment of mortgages over construction plots. Typically, the financing bank may grant a loan to a construction company and obtain a mortgage over the plot of land where an apartment building is to be built. Under Moldovan law, the mortgage of the plot of land extends also to the constructions on it.<sup>87</sup> At the same time, there might be consumers who are buying their apartments off-plan – as their rights of ownership over the apartments can only exist once the building has been completed and its division recognized before the registry, the position of the apartment buyers is weak, especially in a potential insolvency of the building company, because normally the mortgage in favor of the financing bank would take priority over their advances, which would be ordinarily classified as unsecured claims. The lack of protection of apartment buyers has been tackled by the Moldovan legislator by adopting several measures, namely the introduction of provisions for the registration of future condominiums and the notarization and registration of “investment contracts” in the Cadastre<sup>88</sup>, and the reform of the ranking of claims in insolvency, according apartment buyers the protection of preferential creditors (see Principle C12). This has introduced, though, an element of uncertainty for the creditor financing the construction.</p> <p>The grantor of a mortgage has the possibility of granting a subsequent mortgage over the same asset –except when the secured lender prohibits the granting of a subsequent mortgage. When a prohibition is registered at the real estate registry, any subsequent mortgage shall be deemed void and any aggrieved person shall be entitled to claim damages.<sup>89</sup></p> <p>As stated before, mortgages will be ranked in the order they are registered. However, subordination of mortgages is allowed: several holders of mortgages over the same asset</p>
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<sup>86</sup> See art. 50(2) (c) of the Insolvency Law, which refers to “*creanțelor persoanelor fizice, născute din contracte de investire în construcția de locuințe*” (claims of natural persons, derived from an investment contract on a housing construction). This priority treatment seems independent of the registration of a mortgage in favor of such investors.

<sup>87</sup> The mortgage extends to the present and future buildings, including unfinished constructions, located on the mortgaged plot (see art. 7(4); art. 7(6); and art. 46 of the Law on mortgage). The law includes a special provision for mortgages over future and unfinished constructions (art. 48). It is possible to create a mortgage over a future construction, as long as the building is registered in the cadastre of immovable assets. The owner of the whole building may create a mortgage over each and all the future apartments –when ownership is transferred to the buyer, the parties to the mortgage agreement may agree on the cancellation of the mortgage or on introducing amendments to the mortgage contract, and the new owner being entitled to establish a new mortgage over such premises. See ACI Partners - EBRD, *Guide to taking mortgages in Moldova*, Chisinau, 2008, at pages 7-8.

<sup>88</sup> See articles 40<sup>4</sup>; 40<sup>5</sup> and 40<sup>6</sup> of the Law on Cadastre of Immovable Assets.

<sup>89</sup> See art. 17(3) of the Law on mortgage.

	<p>might agree to change the order of priority, through written agreement. Secured claims of a subsequent mortgagee shall be satisfied only after full satisfaction of the higher-ranking mortgagee. Priority in the proceeds of the sale of the mortgaged asset shall be retained by the creditor both inside and outside insolvency proceedings.<sup>90</sup></p> <p>The Supreme Court of Justice of Moldova has issued an interpretation of the law of pledge and the law of mortgage, in which the main concepts of the law are defined and some solutions are suggested for the practical problems that have so far been experienced in the application of the law.<sup>91</sup></p> <p>On the enforcement of mortgages, see Principle A5 below.</p> <p>As a potential alternative to mortgages, Moldovan law recognizes the possibility of using financial leases over real estate.<sup>92</sup> The concept of financial lease in Moldovan law – similarly to the concept of pledge- is general, and extends to leases over both movable and immovable assets. Financial leases are regulated in the Law on leasing (Law No. 59 of 28.4.2005). A lease can be classified as a financial lease only if at least one of the following conditions is fulfilled:</p> <ul style="list-style-type: none"> <li>- the risks and the benefits connected with the property of the asset being the subject of leasing, are transferred to the lessee at the moment of the conclusion of the agreement of leasing;</li> <li>- the amount of leasing payments constitutes at least 90 percent of original cost of the asset transferred in leasing;</li> <li>- the agreement of leasing directly provides transfer of the ownership of the asset to the lessee upon termination of the term of the leasing agreement;</li> <li>- the term of the leasing contract exceeds 75 percent of the term of the useful life of the asset.</li> </ul> <p>It is not easy for a financial lease over an immovable asset to exceed 75 percent of the useful life of the asset in leases of commercial, industrial or residential real estate.<sup>93</sup> Leases over agricultural land are expressly excluded from the scope of the leasing law (art. 4(2) of the Law on leasing). The other conditions, however, can be more easily applicable to transactions over immovable assets. The law also recognizes the possibility of lease-back transactions over immovable assets.</p>
<b>Assessment</b>	<p><b>Largely Observed</b></p> <p>The Moldovan regime for secured transactions over immovable assets is based on sound and tested principles, similar to those of other civil law systems in Europe.</p> <p>The practice of financial institutions shows a strong preference for the mortgage as security</p>

<sup>90</sup> Issues of the extent of priority are also addressed in the context of individual enforcement and insolvency processes: according to art. 146 of the Enforcement Code, *claims secured by pledge or mortgage over realized assets shall be paid with priority from the proceeds of the sale, before any other claims are satisfied*. At the same time, enforcements expenses are granted super-priority, following to be satisfied before all other claims (including of secured creditors). Inside insolvency proceedings, under art. 50 of the Insolvency Law, *creditors holding a right of pledge under an agreement or under the law with respect to property included in the debtor's estate shall have the right to preferential satisfaction of claims for the borrowed amount, interest on it, and attendant expenses out of the pledged property*. In addition, and according to art.132 of the Insolvency Law, the administrator is entitled to deduct from the proceeds of the sale of encumbered assets the costs associated with validation, maintenance, storage, evaluation and sale of the encumbered assets, in an amount that cannot exceed 10 percent of the value of encumbered assets (see Principle C12).

<sup>91</sup> *Hotărîrea Plenului Curții Supreme de Justiție cu privire la aplicarea unor prevederi ale legislației privind gajul și ipoteca* (March, 10th, 2014), available at [http://jurisprudenta.csj.md/db\\_hot\\_expl.php](http://jurisprudenta.csj.md/db_hot_expl.php)

<sup>92</sup> The Civil Code also seems to admit the possibility of using reservation of title to protect the position of sellers of immovable assets – see art. 500(3) of the Civil Code.

<sup>93</sup> See the definition of financial and operational leases under art. 4(1) of the Law on Leasing.

	<p>interest and for real estate as collateral, which in turn evidences that the mortgage regime is predictable and reliable than the legal regime of movable pledges. The mortgage regime is adequately supported by an efficient real estate registry (see Principle A4), though it has traditionally experienced a number of issues related to enforcement (see Principle A5).</p> <p>The financial practice developed around the mortgage regime presents some less positive aspects: in particular, there are some concerns that the professionals performing the valuation of mortgaged assets may give a more favorable treatment to the interests of banks, resulting in valuations below market prices.<sup>94</sup> Coupled with the practice of over-collateralizing loans (see Principles A1 and B5), the result is a clear contraction in access to credit for enterprises and consumers.<sup>95</sup> In some instances, access to credit may be further restricted by the operation of some of the rules of the Law on mortgage, such as the possibility that the mortgage creditor forbids the mortgagor to grant a subsequent mortgage on the same asset. It is clear that if there is a noticeable disproportion between the value of the property and the amount of the loan, the prohibition creates another barrier that prevents the owner of the asset from obtaining further financing.</p> <p>Another more specific concern results from the measures implemented to protect the so-called “investors” or buyers of apartments on plans. The solution to grant these creditors a privileged status in the insolvency of the construction company may create uncertainty in the position of the financial institutions that advance funds for the construction of buildings, securing their loans over the plot of land and the future building over it. In the end, the reforms may have the unintended consequences of reducing access to finance for construction business and, ultimately, reduce activity and supply in the housing market.</p>
<b>Comment</b>	<p>The mortgage regime performs a fundamental function in the economy and in the financial system of Moldova.</p> <p>Some technical improvements could be built into the existing system. The activity of professional valuers should be the object of more stringent requirements and supervision. There seems to be an initiative to regulate the profession of valuers in a more comprehensive way than in the current Law on the activity of valuation. This reform would increase the confidence of entrepreneurs and consumers in the system.</p> <p>The possibility of establishing a prohibition to grant a further mortgage over the same asset should be revisited. The current regime protects the rights of the first mortgage creditor: assuming a correct functioning of the enforcement regime and clear rules of priority between secured creditors, the first mortgage creditor should have sufficient mechanisms to preserve its priority against competing claimants. Prevention of that conflict by prohibiting a subsequent mortgage results in an unnecessary prejudice to the owner of the asset. However, it is important to bear in mind that the limitations of the current practice suggest that the elimination of the prohibition could have a very limited effect, since lending against a second mortgage seems at odds with the practices of financial institutions in Moldova.<sup>96</sup></p> <p>Finally, the protection of buyers of off-plan apartments in a condominium represents a laudable objective of the legislator. There are, however, alternative protection measures, which do not interfere with the essential certainty of mortgage transactions. In other systems, those protection measures have included the obligation of the construction company to establish separate accounts for the sums of money advanced by the buyers; and, especially, the existence of compulsory insurance that indemnifies the buyer in the case of lack of completion or delivery of the apartment. These measures are not disruptive</p>

<sup>94</sup> Occasionally, the problem may be the opposite: in instances of connected lending, valuation of real estate at higher levels than market prices have been reported.

<sup>95</sup> As noted above, lenders might indeed have prudential concerns in the face of fears of uncollectibility and given the history of nonperforming loans.

<sup>96</sup> Indeed, the local practice might change if the law itself were changed so as to permit borrowers to obtain second mortgages without the prior consent of the first lien holder.

	of mortgage credit.
<b>Principle A3</b>	<p><b>Security (Movable Property)</b></p> <p>A modern credit economy should broadly support all manner of modern forms of lending and credit transactions and structures, with respect to utilizing movable assets as a means of providing credit protection to reduce the costs of credit. A mature secured transactions system enables parties to grant a security interest in movable property, with the primary features that include:</p> <ul style="list-style-type: none"> <li>▪ Clearly defined rules and procedures to create, recognize, and enforce security interests over movable assets, arising by agreement or operation of law;</li> <li>▪ Allowance of security interests in all types of movable assets, whether tangible or intangible (e.g., equipment, inventory, bank accounts, securities, accounts receivables, goods in transit; intellectual property, and their proceeds, offspring and mutations); including present, after-acquired or future assets (including goods to be manufactured or acquired); wherever located and on a global basis; and based on both possessory and non-possessory interests;</li> <li>▪ Security interests related to any or all of a debtor's obligations to a creditor, present or future, and between all types of persons;</li> <li>▪ Methods of notice (including a system of registration) that will sufficiently publicize the existence of security interests to creditors, purchasers, and the public generally at the lowest possible cost; and</li> <li>▪ Clear rules of priority governing competing claims or interests in the same assets, eliminating or reducing priorities over security interests as much as possible.</li> </ul>
<b>Description</b>	<p>Moldovan law characterizes the “pledge” as a general category of security interest,<sup>97</sup> which includes a non-possessory security interest over immovable property (the mortgage <i>-ipoteka</i>, see art. 455(3) of the Civil Code; art. 4(2) of the Law on pledge; see Principle A2), and security interests over movable assets, possessory or non-possessory. As a matter of fact, the concept “pledge” (<i>gaj</i>) in Moldovan law tends to be identified with a non-possessory security interest over movable assets. The Law on pledge also recognizes a security interest over movable assets of a possessory nature, denominated “pawn” (<i>amanet</i> –art. 4(4) of the Law on pledge; art. 455 of the Civil Code).<sup>98</sup> The pawn can be useful in the creation of security interests over negotiable instruments and negotiable documents (see art. 22 of the Law on pledge; arts. 460 and 1127 of the Civil Code). The legislator has also used the concept of pawn to allow the use of cash (jubilee and commemorative coins only) and funds in bank accounts<sup>99</sup> as collateral (see art. 8 of the Law on pledge, as modified by the Law No. 33, of 06.05.2012).</p>

<sup>97</sup> The definition of pledge in the Law on pledge coincides with that of a security interest: “*Pledge is a real security on the basis of which a pledgee may levy execution upon the pledged asset, having priority to other creditors, including the state, in satisfying the secured claim*” (art. 1(1) of the Law on pledge). Pledges, and all security interests in the law of Moldova, are with recourse (see art. 76(3) of the Law on pledge).

<sup>98</sup> Under Moldovan law, in some other types of contractual relationships (see, e.g., Art. Art. 780, 865, 952 of the Civil Code), there is also a right of “retention” of the asset that is in the possession of the other party (see Art. 637 et seq. of the Civil Code). This is the case in transportation contracts (Art. 985 of the Civil Code) among others. The right of retention of the asset is a functional substitute of the pawn.

<sup>99</sup> In practice, though, pawn over funds in bank account is unrealistic, since funds on account have no physical expression, while pawn refers to tangible assets only.

	<p>Pledges may arise by agreement, as is generally the case, or by operation of law (art. 6(2) of the Law on pledge, which distinguishes between “conventional pledge” and “legal pledge”).<sup>100</sup> Legal pledges are foreseen for tax claims and for judgment claims.<sup>101</sup></p> <p>The object of a pledge can be any movable asset, including tangible assets and intangibles, any patrimonial right or money claim, and only excluding assets exempt from enforcement (art. 8(1) of the Law on pledge). Virtually all assets of businesses can be used as collateral in a pledge (equipment, vehicles, inventory, agricultural products, receivables, shares, intellectual property), and it is also possible to create a pledge over a body of assets (art. 24 of the Law on pledge) or even over all the assets of the enterprise (enterprise pledge – see art. 27 of the Law on pledge).<sup>102</sup> This reflects the principle that the object of the pledge may not be specific, as a pledge can also be created over a body of assets or over categories of assets (art. 457 of the Civil Code; cf. art 4(1) of the Law on pledge). A pledge can also be created over future assets (art. 11 of the Law on pledge), but in such a case the pledge does not encumber the property until the moment when the grantor acquires title in it.</p> <p>The pledge of an asset extends to the transformed asset and to commingled assets (art. 12 of the Law on pledge; art. 464 of the Civil Code), and to the insurance indemnity to be received in case of loss or damage of the asset (art. 9 of the Law on pledge; art. 465 of the Civil Code). However, a pledge extends to products, fruits, rents and the like only if the pledge agreement expressly includes them (see art. 10 of the Law on pledge).<sup>103</sup></p> <p>A pledge can be created in favor of any person, and it can secure any type of claim, including future or contingent claims, provided that such obligations are expressed in national or foreign currency, in monetary units of account or any combination thereof (art. 14 of the Law on pledge). Beside the principal, interests, expenses on levying enforcement and maintenance expenses of the pledged asset, which a pledge commonly secures under the law, parties to the pledge agreement may extend the pledge to cover also the penalties and damages caused by default or improper performance.<sup>104</sup></p> <p>The creation of a non-possessory pledge requires both an agreement and registration. Legal pledges do not require the existence of an agreement, but registration is essential for</p>
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<sup>100</sup> Legal pledge includes pledges for tax claims and pledges in favor of judgment creditors (art. 32 of the Law on pledge). The law also recognizes rights of retention and legal pawns, such as the pawn in favor of the lessor over the movable assets of the lessee located on the leased land (art. 918 of the Civil Code); the pawn in favor of the contractor or builder of a movable asset over the asset itself (art. 952 of the Civil Code); and the pawn in favor of the depositor, over the deposited goods (art. 1128 of the Civil Code).

<sup>101</sup> See art. 32 of the Law on pledge. Art. 33 of the Law refers to the pledge securing tax claims; and art. 34 to the legal pledge in favor of judgment creditors.

<sup>102</sup> According to art. 27 of the Law on pledge, the pledge of an enterprise as a property complex extends to all assets necessary for the enterprise operation or to a portion of its assets which would allow the buyer to ensure its operation as a going concern. Therefore, an enterprise pledge may, at least in theory, cover immovable assets and movable assets, with the sole link among all assets of being necessary for the continuing operation of the enterprise. A definition is also provided by the Civil Code: art. 455 (b) of the Civil Code defines the enterprise pledge as a “*pledge of an enterprise, which extends over its entire estate, including fixed and current assets, other assets and patrimonial rights reflected in the enterprise’s balance sheet, unless the law or contract provides otherwise*”. However, this definition contradicts other provisions that refer to the assets that are necessary for the economic activity of the enterprise, whereas the Civil Code seems to refer to all assets in the balance sheet of the enterprise, independently of the fact that those assets are used in the economic activity of the enterprise or not.

<sup>103</sup> A pledge extends to proceeds of the collateral, regardless the provisions of the pledge, by virtue of Article 24 of the Law on Pledge. See art. 24(3) of the Law on pledge.

<sup>104</sup> According to art. 14 (3) of the Law on pledge, the pledge secures the obligation per se, interest, expenses on levying execution, and maintenance expenses on the pledged asset. *The parties may establish under an agreement that the security should extend to the penalties and damage caused by default or improper performance.*



	<p>their creation.</p> <p>As a general rule, a pledge agreement does not need to be notarized (art. 13(2) of the Law on pledge). The pledge agreement shall be concluded in writing, as it is otherwise subject the sanction of nullity.<sup>105</sup> The Law on pledge provides only for a few basic elements to be included in the pledge agreement: identification of the parties, general or detailed description of the pledged asset, nature and maturity of the secured claim and its maximum value without interest and expenses, and the type of pledge (art. 13 of the Law on pledge). Loans secured by pledge and granted to consumers may require more detailed contents after the entry into force of the Law on Consumer Credit Agreements.<sup>106</sup> The right to revoke the loan transaction, in particular, may create problems and increase costs in the case of cancellation of pledges as a consequence of the cancellation of the consumer credit agreement.</p> <p>As with mortgages, Moldovan law recognizes the possibility of granting a subsequent pledge over the same asset –except when the secured lender prohibits the subsequent pledge. If the prohibition is registered, any subsequent pledge shall be deemed void and the grantor may have to indemnify the secured creditor for damages.<sup>107</sup></p> <p>The possessory pledge (pawn) arises upon the transmission of the possession of the asset to the creditor or to a third party. Non-possessory pledges are created upon registration in the appropriate registry (See art. 470 of the Civil Code; and art. 7 of the Law on pledge. On registration, see Principle A4).</p> <p>The law of Moldova recognizes the priority of security interests over movable assets.<sup>108</sup> Claims secured by a pledge enjoy priority outside insolvency and also in insolvency processes (see Principle C12). There are rules to solve the priority conflicts among security interests and also between secured creditors and other competing claims. As far as priority rules between non-possessory pledges are concerned, the general rule is that registration determines the ranking of priority. Claims with lower priority pledges shall only be satisfied following the full satisfaction of the claim with a higher priority pledge. In the case of non-possessory pledges (pawn), the moment of transmission of possession of the asset determines the ranking. There are no specific rules for the conflict between a non-possessory pledge and a possessory pledge.<sup>109</sup></p> <p>Once a pledge is created, the assets that form the collateral are subject to a right in rem in favor of the secured creditor. If a third person acquires the asset, it continues to be subject to the security interest (art. 59(1) of the law of pledge). However, the nature of the pledge over certain categories of assets (body of assets) requires not just that the grantor retains possession of the encumbered assets, but also that the grantor is able to sell the assets to third parties, in the ordinary course of business (see art. 24(2) of the Law on pledge; art. 459 of the Civil Code).<sup>110</sup> Consequently, a third party in good faith will acquire the asset</p>
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<sup>105</sup> Possessory pledges do not require an agreement in written form: see art. 20(2) of the Law on pledge. See also art. 468 of the Civil Code.

<sup>106</sup> See art. 10 of the Law on consumer credit agreements (Law No 202 of 12.07.2013), which entered into force in 06.03.2014. The law implements the EU Directive 2008/48/EC, on consumer credit agreements, but extends its scope to loans secured by pledge or mortgage. A problem that has been identified is the possibility that the right of the consumer to revoke the loan agreement within a short time window of 14 days may affect the creation of pledges.

<sup>107</sup> See art. 56 of the Law on pledge. See art; art. 480 of the Civil Code.

<sup>108</sup> In case of retention, there is a priority right over the security interest (see Art. 670 et seq of the Civil Code).

<sup>109</sup> Such conflict rules could be derived from the general principles and other rules set out in the Pledge Law, but they are not explicit.

<sup>110</sup> Admittedly, article 24(2) is not particularly clear, as it only states that: “*Pledge of a body [or universality] of assets continues in effect for, and extends, to a similar asset replacing the sold one in the course of day-to-day activities*”.

	<p>free from the security interest (art. 59(2) and (3) of the Law of pledge; art. 486 of the Civil Code). The Law contemplates specifically the permission to sell assets free of the pledge, except for the pawn (art. 60(1) of the Law on pledge). Insofar as the pledge over a body of assets is concerned, the law is not clear whether consent of the creditor is required for the sale, free of encumbrances, of its components within the ordinary course of business, the law stating that <i>“the pledger may dispose of its components by selling them in the course of its day-to-day commercial activities on the condition that the disposition does not reduce the value of the pledge”</i> (art. 60(2) of the Law on pledge). This provision might suggest the existence of an implied consent to sell assets with regard to certain types of pledges.<sup>111</sup></p> <p>Apart from the general regulation of security interests, it is possible to use certain functional alternatives. Moldovan law includes a comprehensive regulation of financial leases in the Law on leasing (Law No. 59, of 28.4.2005). According to the law, a transaction is classified as a financial lease if at least one of the following conditions is fulfilled:</p> <ul style="list-style-type: none"> <li>- the risks and the benefits connected with the property of the asset being the subject of leasing, are transferred to the lessee at the moment of the conclusion of the agreement of leasing;</li> <li>- the amount of leasing payments constitutes at least 90 percent of original cost of the asset transferred in leasing;</li> <li>- the agreement of leasing directly provides transfer of the ownership of the asset to the lessee leasing upon termination of the term of the leasing agreement;</li> <li>- the term of the leasing contract exceeds 75 percent of the term of the useful life of the asset.</li> </ul> <p>These requirements allow for an extensive use of financial leases as a technique to finance the acquisition of equipment and vehicles. Leasing contracts must have a duration of more than one year (art.7(3) of the Law on leasing). When a financial lease expires, the ownership of the asset is transferred to the lessee (art. 11 2 a) of the Law on leasing), or it may be acquired by the lessee at its residual value. Finally, there is also the possibility of concluding another lease over the same asset.</p> <p>The law regulates the different contractual relationships and the rights and obligations of the parties (including not only the lessor and the lessee, but also the supplier of the leased asset). The law also includes some provisions on enforcement. However, there is no provision for the registration of financial leases. From the regulatory point of view, the activity of leasing is entirely unregulated under Moldovan law: no authorization or license is required to operate in this business, and companies providing leasing services are not subject to any supervision or control.</p> <p>Retention of title is also possible under Moldovan law, as another functional alternative to the movable pledge. Under the general rule (art. 321 of Civil Code) the title in the movable assets shall pass onto the acquirer from the moment of transfer of possession, unless the law or contract provides otherwise. So, parties might agree that the seller shall remain the owner (titleholder) of the asset even after the asset is transferred into possession of the acquirer. However, retention of title cannot be registered, thus making it ineffective</p>
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<sup>111</sup> As an enterprise pledge applies to the universality of assets held by the debtor, the language of article 24(2) may be said to apply, such that the sale of assets subject to the enterprise pledge would be permitted as the pledge would continue in whatever proceeds were received from that sale.

	against a good-faith third party purchasing the asset from the acquirer or taking it as security interest. <sup>112</sup>
<b>Assessment</b>	<p><b>Materially Non-Observed</b></p> <p>The secured transactions regime included in the Law on pledge is largely in line with the international standard and the international best practices in this area. However, the Moldovan practice deviates from those standards, and economic actors do not take full advantage of the possibilities afforded by the legal framework. In addition, there are several technical issues in the legal design of secured transactions law that may explain, at least partially, why the law has not achieved its full potential in increasing access to credit for businesses. In addition to these issues, the secured transactions regime is affected by problems related to the registry system (Principle A4) and enforcement mechanisms (Principle A5).</p> <p>From a conceptual point of view, the law is based on a general concept of security interest (the pledge) which includes types of security interest as different as the pawn and the mortgage. In practice, the pledge is identified with the non-possessory security interest over movable assets, which represents the most important instrument to finance businesses. The law does not go as far as adopting a functional concept of security interest that would cover all techniques performing the function of securing claims –such as, for example, financial leases.</p> <p>The Law on pledge requires that a pledge be registered in order to be created,. In this regard, Moldovan law deviates from international standards which distinguish between creation and perfection (or third-party effectiveness), such that a pledge can be enforced against its grantor even if unperfected.<sup>113</sup></p> <p>Regarding the assets subject to pledge, the law states that a “<i>pledge is established with regard to a movable or immovable asset or a body<sup>114</sup> of movable or immovable assets</i>” (art. 4(1) of the Law on pledge). The definition could be interpreted as referring to creating a pledge over a group of immovable assets (as in an enterprise pledge). In practice, however, that type of security interest would be ineffective as against third parties, and the law itself underlines that “<i>object of mortgage can be one or several immovable assets, present of future, which can be individualized by separate cadastral numbers</i>” (art. 7(1) of the Law on mortgage).</p> <p>The concept of the “enterprise pledge” is also disputable: in theory, it covers all assets, movable or immovable, that are necessary for the continuing operation of an enterprise.<sup>115</sup> However, such a category does not fit with the recognized international standard, which has been built on the idea of security interests over categories of assets, including the possibility of a security interest over all the movable assets of the grantor.</p> <p>In addition, the “enterprise” concept, as interpreted in the Law, cannot operate without a description of the specific assets that are necessary for its operation, and that description requirement alone would defeat the objective of using generic categories of assets and of</p>

<sup>112</sup> Under art.305 of Civil Code the party having possession of the asset is deemed as the owner thereof, unless proven that he entered into possession for the other party

<sup>113</sup> Indeed, requiring both conditions to be met for the creation of a pledge, specifically, requiring the second condition – registration – makes the system more rigid. At the same time, it may be noted that there are fewer legal problems related to the creation of the pledge in practice in Moldova.

<sup>114</sup> The word might better be translated as “universality.” That term is in turn defined in Art 298 of the Civil Code.

<sup>115</sup> See art. 284 of the Civil Code, defining “patrimoniu” as all assets, without distinction between movable and immovable. A similar notion of “all assets” is used in the Insolvency Law.

	<p>avoiding cumbersome registration requirements. In the Moldovan practice, the enterprise pledge is very seldom used, as it raises complex legal questions for which there are no clear answers in the law.</p> <p>In addition, the problems experienced in the business environment may lead to a distrust of this type of security interest, as it can be easily abused in the context of predatory lending practices.</p> <p>Although the law allows for the creation of security interests over categories of assets, the terminology used may create difficulties in a proper understanding of the system – some of the provisions in the law give the impression that a pledge may be created over specific assets or over a collection of assets, but the idea that the assets may be part of a category in which individual assets continuously change does not seem to have been assimilated by the legal and financial practice of the country.<sup>116</sup> This partially explains the lack of success of the pledge over receivables or over inventory. It also explains the lack of use of the enterprise pledge, which also suffers from a poor definition and registration regime. The enterprise pledge can be interpreted as a sort of “floating” security right over all of the assets of the enterprise, including all immovable assets. In practice, it is unlikely that an enterprise can effectively attach a security interest over immovable assets (see Principle A4).</p> <p>Financial institutions have not assimilated the essential concepts of secured finance for commercial and industrial operations, where the financier provides much-needed liquidity to the businesses and businesses offer circulating assets (especially, inventory and receivables, and also proceeds) as collateral for the advances. As a matter of fact, pledges over movables in the Moldovan practice tend to be created over vehicles, machinery, and agricultural products. The pledge agreements tend to describe the pledge assets in detail. The approach of financial institutions reveals a fundamental lack of trust in the value of security interests over movable assets. The assumption is that movable assets will not be available to the creditor at the moment of initiation of an enforcement action. Some legal reforms, such as the decriminalization of the misappropriation or alienation of collateral in 2008, have not contributed to increase trust in the value of movable assets as collateral.<sup>117</sup></p> <p>Other technical defects in the law include the rule whereby it is possible to prevent access to the public to the registered security interest, with the resulting presumption that all assets belonging to the grantor are encumbered (art. 474 of the Civil Code -see the discussion of this problem in Principle A4). The problem of the revocation of consumer credit agreements, where there is a security interest included in those agreements, may become more or less serious, depending on the interpretation and approach taken by regulators and the courts.</p> <p>The possibility of establishing a prohibition to grant a subsequent pledge is another area of concern and is discouraging the use of assets as collateral. In practice, secured creditors are reported to abuse of the right to prohibit subsequent pledge, which is limiting the access to further credit or to refinancing on better commercial terms.</p> <p>Finally, another problem is the lack of provisions for acquisition financing: in the current system, it may happen that a financial institution has a security interest over all the equipment of a grantor and, absent a specific provision, if another party –typically, a</p>
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<sup>116</sup> This observation needs to be accompanied by a *caveat*. Art. 24(2) of the Law on Pledge arguably grants a security interest in the proceeds of collateral, in which case the concept of changing character would not in fact be beyond the apprehension of the law as written (though it might not be so understood by many of its users). The Law on Pledge was amended on 8 November 2014, and may have provided further clarification on this issue.

<sup>117</sup> In 2008, an Act of Parliament repealed that part of art. 251 of the Criminal Code, which had punished the wilful misappropriation or alienation of objects subject to a security interest.

	supplier- finances the acquisition of a piece of equipment, the security interest of the supplier would be subordinated to the previously registered general security interest in favor of the financial institution. This represents a decisive disincentive for acquisition financing.
<b>Comment</b>	<p>As stated in the assessment section, the gap between Moldovan law and the international standard in the regulation of secured transactions over movable assets is not particularly wide. However, the practice of banks in Moldova is at odds with the requirements of modern business financing.</p> <p>Training of bankers on secured transactions practice seems essential to ensure that both entrepreneurs and financial institutions take full advantage of the possibilities that the law affords. A better use of the pledge over inventory and receivables would increase access to finance for numerous businesses lacking real estate and fixed capital assets.<sup>118</sup></p> <p>Technical changes to the law would be necessary to increase certainty and reliability.</p> <p>The law may recognize the difference between creation of a security interest (by agreement between the parties) and perfection of a security interest (by registration, possession, or control). Perfection determines third-party effectiveness of a security interest.</p> <p>The concept of security interest (“pledge”) may be enlarged to cover all functional alternatives, such as financial leases.<sup>119</sup> This may benefit financial leases for purposes of registration (see Principle A4) and enforcement (see Principle A5).</p> <p>Importantly, the law should make it clear that generic descriptions are sufficient to cover all the assets belonging to a certain category:<sup>120</sup> a security interest over “products” should cover all products of the business, and it would not be necessary to indicate, for instance, that the security interests covers a specific quantity of wine from a particular vineyard, of a particular variety, and warehoused in specified premises. The same can be said about other assets that should be categorized, such as receivables. The inclusion in the law of examples of assets that can be covered by security interests may perform a useful function.</p> <p>Changes in the concept of enterprise pledge are necessary:<sup>121</sup> instead of defining the object of the pledge as the necessary immovable and movable assets for the operation of an enterprise, it would be more useful to recognize the possibility of creating a security interest over all the movable assets of the grantor.<sup>122</sup> This has the double advantage of avoiding the collision with the regime of security interests over immovable assets, and of detaching this general security interest over movables from the “enterprise” concept,</p>

<sup>118</sup> It is understood that guidelines on asset based lending are being developed. Adoption of such voluntary principles and the design of further training as mentioned above could indeed enhance the effective use of security interests in Moldova.

<sup>119</sup> The recently enacted Amendment to the Law on Pledge may have addressed this concern.

<sup>120</sup> It is understood that the recently enacted legislation reforming the Law on pledge suggests allowing a general description of the category of assets pledged.

<sup>121</sup> It is understood that the recently enacted legislation reforming the Law on pledge suggests clarifying that the enterprise pledge covers all movable assets.

<sup>122</sup> In fact, the Law on Pledge already contemplates an interest in the universality of assets of the debtor, making this a relatively simple modification. It is understood that the recently enacted legislation to reform the Pledge Law has also removed immovable property from its scope, so that an enterprise pledge would not purport to attach to immovable property without the additional step of obtaining a mortgage on such property.

	<p>thereby allowing its use by professionals or consumers, and not just entrepreneurs.</p> <p>It is also possible to extend the scope of the Law on pledge: currently, there are no rules for the pledge of funds in bank accounts and deposits<sup>123</sup> (in fact, art. 8 of the Law on pledge, as modified by the Law No. 33, of 06.03.2012, only allows to create a pawn over funds in bank accounts –thus requiring that the debtor is dispossessed of the funds in bank account<sup>124</sup>). In this regard, the incorporation of the notion of control as an alternative method of perfection of the security interest would be advisable. The law should also clarify that a security interest over proceeds extends to subsequent transformations of collateral.<sup>125</sup></p> <p>The rule allowing prohibiting the grant of a subsequent pledge should be revisited,<sup>126</sup> to ensure that the secured creditors do not abuse this rule and restrict the further use of the asset as collateral when it can secure additional credit. Unrestricted granting of subsequent pledges should, however, be accompanied by clear priority rules.</p> <p>The rules on priority under the Law on pledge may be further improved if the Law would indicate that the priority of security interests is decided in accordance with the time that the security interests are perfected (whether they are perfected by registration, by possession, or by control).<sup>127</sup> There can also be special rules specifying that some perfection methods take precedence (for instance, the priority of security interests over negotiable instruments is decided in favor of the creditor with possession over the creditor with a registered security interest; and a security interest perfected by control normally also prevails over a registered security interest. A security interest registered in a special registry is preferred over a security interest registered in the general secured transactions registry, etc. Specific guidance may be found in the recommendations of the UNCITRAL Secured Transactions Guide<sup>128</sup>).</p> <p>A question that is related to priority, but also to other aspects of the pledge law, is the issue of acquisition financing. Acquisition financing should be given recognition in the law, and that would require establishing an exception to the normal priority rules: in essence, an acquisition security interest should prevail over a previously registered security interest, if a notice is registered within a short period of time after the grantor receives possession of the asset.<sup>129</sup></p> <p>On the issue of the interaction between the consumer protection mechanisms in the Consumer Loan Agreements legislation and the secured transactions regime, it is too soon to assess the problems of the conflict, but it is likely that a practice will develop of not registering a security interest until the period for revocation has expired –and this will require that financial institutions adopt alternative measures to protect the sums advanced, if any, during the period previous to the withdrawal of the consumer.</p>
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<sup>123</sup> It is understood that the recently enacted legislation reforming the Law on pledge suggests allowing the creation of pledges over bank accounts through control rather than possession, and to provide that the pledge extends to the proceeds of the original asset, unless the parties agree otherwise.

<sup>124</sup> A very significant change, however, has been the introduction, for the pledge of money and bank accounts, however, of the possibility of enforcement by appropriation – see art. 66<sup>1</sup> of the Law on pledge, as amended by the Law No. 33, of 06.03.2012.

<sup>125</sup> Art. 24(2) already grants a continued interest in proceeds from the disposition of collateral. However, the statute could be further refined to make it clear that the interest would continue in further iterations of those proceeds. Thus, for example, inventory might become goods that might in turn, upon sale, become accounts receivable, which in turn might, upon collection, be used to purchase new inventory. The law should make it clear that the original security interest in inventory is not lost in these iterations, due to the operation of the law which provides for a continued interest in proceeds of collateral.

<sup>126</sup> It is understood that the recently enacted legislation reforming the Law on pledge suggests allowing prohibiting subsequent pledges only when expressly foreseen by the law (not by contract).

<sup>127</sup> The recently enacted legislation amending the Law on Pledge may have addressed this issue at Article 57(1), though it sets priority by time of creation rather than time of registration.

<sup>128</sup> Available at [https://www.uncitral.org/pdf/english/texts/security-lg/e/09-82670\\_Ebook-Guide\\_09-04-10English.pdf](https://www.uncitral.org/pdf/english/texts/security-lg/e/09-82670_Ebook-Guide_09-04-10English.pdf) (see p. 199).

<sup>129</sup> See the detailed suggestions included in Recommendations 178-202 of the UNCITRAL Secured Transactions Guide, cit.

<b>Principle A4</b>	<p><b>Registry Systems</b></p> <p>There should be an efficient, transparent, and cost-effective registration system with regard to property rights and security interests in the borrower's immovable assets. There should be an efficient, transparent and cost-effective means of providing notice of the possible existence of security interests in regard to the borrower's movable assets, with registration in most cases being the principal and strongly preferred method, with some exceptions. The registration system should be reasonably integrated, easily accessible and inexpensive with respect to recording requirements and searches of the registry, and should be secure.</p> <p><b>A4.1</b> <i>Land and mortgage registries.</i> Registries pertaining to land (or land use rights) and mortgages are typically established solely for recording of interests of this nature, although permanent fixtures and attachments to the land may be treated as being subject to recordation in the place of the underlying real property. Land and mortgage registries are typically established by jurisdiction, region or locale where the property is situated, and ideally should provide for integrated, computerized search features.</p> <p><b>A4.2</b> <i>Charge registries.</i> Registries pertaining to movable assets of enterprises should be integrated and established nationally with filings made on the basis of the enterprise or business name, ideally in a centralized, computerized registry situated in the jurisdiction or location where the enterprise or business entity has been incorporated or has its main place of registration.</p> <p><b>A4.3</b> <i>Specialized registries.</i> Special registries are beneficial in the case of certain kinds of assets, such as aircraft, vessels, vehicles, and certain types of intellectual property (e.g., trademarks, copyrights, etc.).</p>
<b>Description</b>	<p>Under the laws of Moldova, registration is the preferred method for the creation of security interests over both movable and immovable assets.</p> <p>There is a common legal framework for registration of security interests in various assets, represented by the Law on Registries (Law No 71 of 22.03.2007), which establishes certain common rules on the functioning of public and private registries of all types – including those where security interests are registered. Under the Law on Registries, a state register is deemed to be the only official source of data on the objects recorded in it, such data being considered accurate and reliable until proven otherwise (art. 6 of the Law on Registries; see art. 497 of the Civil Code, for the real estate registry).</p> <p><i>The real estate registry (Cadastru)</i></p> <p>Security interests in immovable assets must be recorded in the real estate registry, kept by the State Enterprise 'Cadastru' through its Territorial Cadastral Offices. The Cadastre is regulated by its own law, Law on Cadastre of Immovable Assets (Law No.1543, of 25.2.1998; see also art. 496 ff. of the Civil Code). The Cadastre performs the functions of a general real estate registry, including the registration of mortgages and other encumbrances over immovable assets. It is important to underline that registration of mortgages is an essential condition for their validity and perfection under the law of Moldova (see art. 499 of the Civil Code; art. 6(3) of the Law on pledge; art. 5 and art. 4 of the Law on Cadastre of Immovable Assets; see Principle A2).</p> <p>Registration of mortgages generally requires that a mortgage agreement is notarized. The exception to this rule is the treatment of the so-called legal or statutory mortgages, which do not require notarization. A legal mortgage may arise as a consequence of a judgment –</p>

	<p>which has direct access to the registry- or by the actions of the tax authority in the collection of its claims.<sup>130</sup></p> <p>Regular mortgages are registered by the cadastral registrars, upon the presentation of a paper application, accompanied by the notarized mortgage agreement and subject to payment of the applicable registration fee. The current fees for mortgage registration are set at MDL 83 (or approx. EUR 4.7) per a mortgaged immovable asset and MDL 40 (or approx. EUR 2.3) per agricultural land parcel.<sup>131</sup></p> <p>The mortgage registration application shall be filed with the territorial cadastral office where the immovable asset is located. Such cadastral office shall examine the registration application within seven days -only in exceptional cases the term may be extended up to forty days (art. 32 of the Law on Cadastre of Immovable Assets). Registration can be refused on limited grounds: for instance, when an attachment or other encumbrance that impedes the transfer of the immovable asset has been registered before the application is presented; or when the form or contents of the documents presented do not comply with the legal provisions regulating mortgages (art. 31 of the Law on Cadastre of Immovable Assets). The registrar, therefore, performs an examination of the legality of the documents presented for the registration of the mortgage (art. 28(3) of the Law on Cadastre of Immovable Assets). If the registrar refuses to register a mortgage, its decision can be challenged before the courts, as a matter of administrative law (art. 31(3) of the Law on Cadastre of Immovable Assets).</p> <p>Regardless of the length of the period for the examination of the application, a mortgage shall be deemed registered on the day the application was filed with the registry (art. 37 of the Law on Cadastre of Immovable Assets; art. 500 of the Civil Code). The contents of the registration of a mortgage is the following: data about the mortgage creditor and the object of mortgage, as well as the term of the mortgage, if it was set, the value of the claim covered by the mortgage or data on the manner and conditions of determining this value (art. 44(3) of the Law on Cadastre of Immovable Assets).</p> <p>The real estate registry does not only register mortgages. Other rights over immovable assets, such as leases of duration longer than three years, are also subject to mandatory registration (art. 43 of the Law on Cadastre of Immovable Assets).<sup>132</sup> The registry also records attachments, and prohibitions to transfer or to mortgage immovable assets. The initiation of enforcement procedures which object is an immovable asset is also recorded (art. 46 of the Law on Cadastre of Immovable Assets), and so is the initiation of an insolvency process of an owner of immovable assets, over all the immovable property recorded on its name at the registry.<sup>133</sup></p> <p>The registry records are kept both on paper and in electronic form. In case of discrepancies, the data manually recorded will prevail over the electronic records (art. 22(5) of the Law on Cadastre of Immovable Assets).</p> <p>The registry is transparent and public: any person may, without providing any justification, access the data stored at the real estate registry, including the information on mortgages and other encumbrances over any immovable asset (see art. 503 of the Civil Code). Disclosure to the public does not include the information on all the terms of the transaction which originates the mortgage or encumbrance over the immovable asset. Full access to</p>
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<sup>130</sup> Cf. arts. 26 and 28 of the Law on Cadastre of Immovable Assets. See generally, art. 6 of the Law on pledge, and, specifically for tax claims, art. 33 of the Law on pledge; and for judgment claims, art. 34 of the Law on pledge.

<sup>131</sup> All applicable fees for the registration of real rights are available at [http://cadastru.md/images/downloads/tarife\\_inregistrare\\_alte\\_drepturi.pdf](http://cadastru.md/images/downloads/tarife_inregistrare_alte_drepturi.pdf).

<sup>132</sup> See also art. 508 of the Civil Code.

<sup>133</sup> See art. 26 of the Insolvency Law; and art. 67(6) of the Law on pledge. See Principle C5.



	<p>those data is only provided to the parties to the agreement, to the courts, or to State agencies<sup>134</sup>.</p> <p>An extract from the real estate registry serves as confirmation of registration of rights over the immovable assets included in it, and is required by notaries for the purpose of concluding transactions over the immovable assets concerned<sup>135</sup>. In order to obtain an excerpt from the real estate registry evidencing all recorded encumbrances on the property, any interested person may apply to the territorial cadastral office where the immovable asset is located, with the option of requesting that the information be provided within regular terms<sup>136</sup> or by urgent service.<sup>137</sup> The procedure to obtain excerpts is perceived as being relatively easy, timely and cost-efficient.<sup>138</sup> For convenience, information from the registry may also be obtained on-line, by placing an order on the Cadastre official website.<sup>139</sup> Upon request, the Cadastre may grant access to legal entities to the central database of the immovable assets cadastre via internet, under a written agreement and subject to payment of monthly subscription fees, however the information retrieved from the database is not legally equivalent to the paper extracts from the registry signed by the registrar.</p> <p>Parties may demand rectification of the information included in the registry where it does not correspond with reality (art. 504 of the Civil Code). Cadastral Offices are liable when having caused prejudice to a holder of rights over an immovable asset by deteriorating or losing cadastral documents; for the issuance or preparation of documents containing errors occurred due to its own fault as well as errors made in the plans prepared by the Cadastre itself; and for entering, modifying, excluding an entry/record from the real estate registry with the violation of due procedure as well as unauthorized distribution and delivery of data from the Cadastre (arts. 47, 47<sup>1</sup> and 48 of the Law on Cadastre of Immovable Assets). To compensate parties which may have suffered damaged as result of the wrongful actions of the registrars, either by incorrect data entry or issue, or by unjustified refusal thereof, the law provides for the establishment of a guarantee fund (art. 49 of the Law on Cadastre of Immovable Assets). Except for the cases when the aggrieved party has contributed to the causing of damage (either by fraud or negligence), such party shall be entitled to compensation, provided a court has ruled a judgment in its favor (art. 50 of the Law on Cadastre of Immovable Assets). In any case, a person who acquires in good faith an immovable asset from a person who is incorrectly recorded in the real estate registry as the owner is protected and acquires the ownership of the asset (art. 51 of the Law on Cadastre of Immovable Assets).<sup>140</sup></p> <p><i>The registry of pledge</i></p> <p>Moldovan law contemplates a general registry for pledges, where pledges of movable assets are recorded, except for pledges of assets registered in the specialized registries (see below). As stated before (see Principles A2 and A3), the pledge represents the general</p>
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<sup>134</sup> See art. 6 of the Law on Cadastre of Immovable Assets.

<sup>135</sup> See article 36 of the Law on Cadastre of Immovable Assets; see art. 51 of the Law on Notary Activity (Law No. 1453, of 8.11.2002).

<sup>136</sup> The regular term for obtaining an excerpt from the real estate registry is of three working days. The full list of regular terms of service is available at [http://www.cadastru.md/images/downloads/termene\\_eliberare\\_info.pdf](http://www.cadastru.md/images/downloads/termene_eliberare_info.pdf).

<sup>137</sup> Urgent service regime allows for obtaining information from the registry within 1 working day. In such case, the regular service fee shall be multiplied by 5, representing the urgency coefficient corresponding to a higher cost of service.

<sup>138</sup> For instance, the fee for obtaining an excerpt from the real estate registry within regular service time is MDL 51 or approx. EUR 2.9. All fees are displayed on the State Cadastre Enterprise website, and are available at [http://www.cadastru.md/images/downloads/tarife\\_furnizare\\_info.pdf](http://www.cadastru.md/images/downloads/tarife_furnizare_info.pdf).

<sup>139</sup> Online orders may be filed at <https://www.cadastru.md/eservicii/webinfo-es/f?p=108:1:3847692503121070>.

<sup>140</sup> Presumably, this legal rule also applies to the acquisition of *real rights* over the asset.

	<p>security interest in Moldovan law, but it identifies more closely with a non-possessory security interest over movable assets, created by registration (art. 4(3) of the Law on pledge). In correspondence with the general nature of the pledge, there should be a registry for pledges of all types of movable assets. This role of a general secured transactions registry corresponds to the <i>registry of pledge over movable assets</i>, kept by the Ministry of Justice via its Legal Information Center (art. 37 of the Law on pledge). Under the Governmental Resolution on the Registry of Pledge over Movable Assets No. 849 of 27.06.2002, the registry of Pledge is a single computerized and manual information record system, which contains the database on registration of pledges over movable assets, registration of changes or corrections of pledge information, structured on persons and assets.</p> <p>In order to register a pledge over movable assets, it is necessary to file a paper registration application with a licensed notary having active access to the registry of pledge over movable assets (these notaries are the “operators” of the Registry),<sup>141</sup> attaching a copy of the identification document, and to pay the registration fee.<sup>142</sup> The application form must contain the following data (art. 39(2) of the Law on pledge):</p> <ul style="list-style-type: none"> <li>- identification information about the pledger and the pledgee (for a natural person – first and last name, home address, and identification document information; for a legal entity – full name, location, and registration information);</li> <li>- identification information about the pledge administrator, if appointed;</li> <li>- the pledger’s express consent to establish a pledge in favor of the creditor;</li> <li>- description of the pledged asset(s);</li> <li>- nature, amount, and due date of the obligation secured by the pledge, with its maximum amount without interest and expenses;</li> <li>- pledge type;</li> <li>- the prohibition, if agreed upon between the parties, of a subsequent pledge of the same asset(s);</li> <li>- date of the request; and</li> <li>- the signatures of the pledger and the pledgee (or their representatives)</li> </ul> <p>Each notary has an individualized access code. The notary shall upload the data from the application into the registry, will receive an automatic confirmation of the registration of the pledge and will deliver a signed and stamped copy to the pledger (i. e. the grantor of the security interest). The notary can only refuse to register the pledge if the information included in the form is incomplete (art. 39(4) of the Law on pledge). The refusal to register may be challenged in court (art. 44(5) of the Law on pledge).</p> <p>The process of registration will generate a unique registration number, which serves as proof of the pledge being registered. Upon registration, the pledge will be valid and effective against third parties (art. 6(3) of the Law on pledge). The priority of the pledge is determined by the moment of registration (see also Principle A3). The law states that from the moment of registration no one can claim ignorance of the contents of the registration (art. 44(3) of the Law on pledge). However, the Law states that the registration of a pledge does not institute a legal presumption of reliability (art. 44(1) of the Law on pledge).<sup>143</sup> On the other hand, the grantor and the secured creditor may not invoke inaccuracy of the information included in the registry of pledge against third parties who acted in good faith</p>
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<sup>141</sup> The law on Registries may expressly so identify notaries as the operators of this registry, to avoid confusion.

<sup>142</sup> See art. 40 of the Law on pledge. According to art. 3.8 of the Law on State Duty (Law No. 1216, of 03.12.1992) the state duty for the registration of pledges is MDL 36 or approx. EUR 2, whereas the search fee is MDL 9 or approx. EUR 0.5. However, the notary’s fees have to be added to have a sense of the total economic cost. The notary’s fee range between MDL 70 (approx. EUR 4) to MDL 150 (approx. EUR 8.3) for the registration of a pledge; and are set at around MDL 100 (approx. EUR 5.6) for a single search.

<sup>143</sup> Under art.471(1) of the Civil Code, on the other hand, the registration of a pledge does institute a legal presumption of reliability.

	<p>(art. 44(4) of the Law on pledge).</p> <p>An initial registration may be amended by agreement of the grantor and the secured creditor (art. 41 and art. 42 of the Law on pledge). The registration can also be cancelled in the cases specified in the law (art. 43 of the Law on pledge).</p> <p>For the purpose of performing searches (“passive access”), the registry of pledge over movable assets can be accessed either through a notary, who shall retrieve information from the registry and issue a written extract from that information; or directly, on the basis of a written subscription agreement with the Legal Information Center, and subject to the payment of a monthly subscription fee.<sup>144</sup> Generally, all the contents included in the registry are accessible. A grantor, however, may request a ban on third parties’ access to the registry information on its pledged assets, with the effect that it will be presumed that <i>all of the assets of the grantor are subject to pledge</i> (art. 46 of the Law on pledge; art. 474 of the Civil Code).</p> <p>The persons responsible for maintaining and keeping the registry of pledge are required to prevent unauthorized access to the data in the registry, including the illegal use of the data, its disclosure, its modification or its destruction.<sup>145</sup> The notaries are liable for damages caused in connection with the erroneous recording of pledges, and professional liability insurance would ordinarily cover the compensations.</p> <p><i>Specialized registries</i></p> <p>There are a small number of specialized registries for security interests over certain movable assets under Moldovan law.</p> <p>The law of pledge refers to the registration of mortgages in the Cadastre (which corresponds to a universally accepted distinction between movable assets and immovable assets), but it also refers to the following pledge of assets to be registered with their corresponding specialized registries (art. 7 of the Law on pledge; art. 470 of the Civil Code):</p> <ul style="list-style-type: none"> <li>- pledge of corporate securities – to be registered in the registry of corporate securities holders (shareholders’ registry or bondholders’ registry), kept by licensed private independent registrars or the issuers themselves;</li> <li>- pledge of government securities – in the registry of state securities holders, kept by the National Bank of Moldova;</li> <li>- pledge of intellectual property rights – in the registry of intellectual property, kept by the Agency of Intellectual Property (AGEPI).</li> </ul> <p>The Law does not include a coordination regime among the different registries: it merely states that pledged assets are registered in the relevant registries (art. 47 of the Law on pledge).<sup>146</sup></p>
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<sup>144</sup> See art. 45 of the Law on pledge. The notary shall deliver the signed certificate to the person requesting it within a maximum 24-hour period. Direct access, granted by the Ministry of Justice to interested parties (e.g., financial institutions) is on-line and in real time.

<sup>145</sup> On the liability of the Register, see art. 475 of the Civil Code.

<sup>146</sup> Art. 47 of the Law of pledge states that “*pledged items are registered in the registries envisaged by Article 7 in conformity with the legislation governing the operation of respective registries*”. The provision as written does not make clear whether the pledges of those assets have to be registered in the relevant registries; or if the assets themselves need to be registered in those registries; or both (for instance, a patent needs to be registered as such in the register of intellectual property before a pledge can be registered over it). Basically, the concept with respect to the creation of a Pledge Registry was that every pledge on any kind of movable asset (including ships, aircraft, securities, money, etc) should be registered there. The few exceptions have been admitted by the force of the specifics of those assets and, in case of corporate securities, by the then ongoing reform of securities market legislation.

	<p>The system of registration of company securities is based on the provisions of the Civil Code (see art. 164 of the Civil Code) and the capital market legislation (art.12 of the Law on capital market). There are also references to the pledge of shares in the company legislation (see art. 25 of the Law on Joint Stock Companies). The registry of corporate securities holders perform a similar function to a company's shareholder books, and therefore records the transfers of shares (and other securities, as the case maybe) and also the pledges and other encumbrances over shares. As art. 164 of the Civil Code states, "<i>The company issuing nominative shares and bonds shall keep the registry of shareholders and the registry of bondholders</i>". Companies with more than fifty shareholders or bondholders must outsource these registries to independent registrars (art. 164(2) of the Civil Code). It is important to note that these registries are fundamentally different from the other registries being considered under this Principle: one major difference is that these are private registries, whereas all the other registries are of public nature; the second difference, tied to the first one, is that these registries are not designed to be freely accessible by the public. The function of the registration of the pledge is, rather, to block the securities and impede transfer of the securities by the grantor of the pledge. The registration also facilitates the attachment and sale of the securities in case of default of the grantor. Pledges are noted in the registry as a "special rubric" in the entry in favor of a particular securities holder (art. 164(4) of the Civil Code).</p> <p>Apart from the specialized registries mentioned in the Law on pledge, there are other provisions for specialized registries where the pledge shall be filed<sup>147</sup> namely:</p> <ul style="list-style-type: none"> <li>- Pledges over motor vehicles – to be filed with the state registry of transportation;</li> <li>- Pledges over vessels – at the state registry of vessels;<sup>148</sup></li> <li>- Pledges over aircraft – at the air registry of the Republic of Moldova.<sup>149</sup></li> </ul> <p>A pledge over a motor vehicle –evidently, a movable asset- needs to be registered with the registry of pledge for its creation and perfection. However, it is also apparently required to file the information on the pledge at the state registry of transportation.</p> <p>A special case is the registration of the "enterprise pledge". According to the Civil Code, an enterprise pledge is registered with the notary at the place where the enterprise is located.<sup>150</sup> Although the Law on pledge does not explicitly deal with this issue, it implies that an enterprise pledge needs to be registered in all the relevant registries, taking into account the type of assets that would be included in the enterprise charge (immovable assets, vehicles, aircraft, intellectual property, etc. – see art. 29 of the Law on pledge).<sup>151</sup> In addition, the recent amendments to the Law on state registration of legal entities and</p>
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<sup>147</sup> Filing does not have the effect of registration, though, but merely the purpose of evidence. Registration in the Pledge Registry is required for legal efficacy of the pledge of these types of property.

<sup>148</sup> See Code of Maritime Commercial Navigation (Law No. 599, of 30.09.1999).

<sup>149</sup> See art. 7 of the Law on civil aviation (Law No. No.1237, of 09.07.1997).

<sup>150</sup> See art. 470 (2) b) of the Civil Code: "*enterprise pledge shall be recorded with the notary in whose jurisdiction the enterprise is seated*".

<sup>151</sup> Although the legal provisions are not clear, it might be that the Civil Code and the Law on pledge are regulating different aspects of the enterprise pledge: the Civil Code seems to regulate the creation and registration of the pledge; and the Law on pledge seems to be focused, rather, on the enforcement of the enterprise pledge. If the idea of the enterprise pledge is to establish a floating security interest over all of the assets of the enterprise, it would be logical to have a single registration, and then, after there is an event of default, the pledge would crystallize and the rights of the secured creditor would be protected by registration of the pledge in all the relevant registries, over all the different assets comprised in the enterprise pledge. However, art. 29 of the Law on pledge refers to the registration "of the enterprise pledge" in the different registries ("*The pledgee that intends to exercise its/his/her right of possession for administration shall notify of this fact by notice the pledger and, as the case may be, third party holding the pledged asset. The notice together with the evidence of the pledger notification shall be submitted to all registries, in which the enterprise pledge is registered. The notice shall be registered in the respective registry without delay*"). This is entirely contradictory with the provision in art. 470 (2) b) of the Civil Code whereby the enterprise pledge is registered with the notary, unless the conclusion is that a double registration is required (and in that case, the whole concept of the enterprise pledge would be superfluous).

	<p>individual entrepreneurs (art.19) require that enterprise pledge shall be also entered into (mentioned in) the companies' registry, at the request of "<i>the holders of registries where the pledge is registered</i>". In practice, and due to the lack of clarity of the law and other concurring factors, the use and registration of enterprise pledges has not developed.</p> <p>Third party access to the data contained in specialized registries is generally governed by rules similar to the ones applicable in respect to land and charge registries, as outlined above. Search fees of specialized registries tend to be higher than the ones applicable to the registry of pledge. For instance, an interested party may order a search in the registry of intellectual property, kept by the Agency of Intellectual Property (AGEPI)<sup>152</sup>: A documentary research of a party's patent portfolio (protected in the Republic of Moldova) shall be performed within 10 days of the request, against a fee of MDL 300 or approx. EUR 16, 8 whereas a documentary research of a legal entity's trademarks portfolio shall be performed within the same term against a fee of MDL 500 or approx. EUR 28. To obtain an extract from the state registry of vessels, the interested party shall pay a fee of 42 conventional units (MDL 840) or approx. EUR 47.<sup>153</sup></p>
<b>Assessment</b>	<p><b>Materially Non-Observed</b></p> <p>The registry systems in Moldova offer a complex panorama, which does not allow a simple general assessment. The positive assessment of the Cadastre is in stark contrast to the challenges experienced in the registry of pledge or the independent registries of corporate securities.</p> <p>The real estate registry enjoys a positive reputation among economic and legal operators. The registry is efficient and very economical. It offers a reliable system to transfer immovable assets and it supports a well-functioning mortgage regime. The registry is easily accessible at a very moderate cost. The only problems experienced in the area of the registration of security interests over immovable assets are those referred to future constructions and condominiums (see Principle A2). The system does include, in its current form, the possibility of registering future constructions,<sup>154</sup> and the possibility of registering investment contracts.<sup>155</sup> From the point of view of the registry regulation, the measures adopted go as far as it is feasible in this context –recognizing the fact, at the same time, that the problems evidenced in practice are broader than the registration aspect suggests, and there are defects in the protection of persons seeking to buy apartments off- plan.</p> <p>The assessment of the registry of pledge is not as positive. Although the registry seems inspired in some of the basic principles defining modern notice-based registries for secured transactions over movable assets, there are also significant deviations from that standard. Some of these deviations are, to a certain extent, understandable in a system which lacks trust in the behavior of the parties and of some institutions: this explains, for instance, why the notices require the signature of both grantor and secured creditor, why the notaries act like a gateway to the registry,<sup>156</sup> and why modifications of the registered notices require the agreement of the parties. Perhaps the most significant peculiarity of the regime is its</p>

<sup>152</sup> The intellectual property registry fees are available at <http://agepi.gov.md/en/services/fees.php>

<sup>153</sup> According to Annex No. 3 to the Government Resolution No. 11 of 29.09.2006.

<sup>154</sup> See art. 40<sup>5</sup> of the Law on Cadastre, as introduced by Law No. 163, of 09.07.2008. Future constructions, which according to design, are divided into isolated facilities (premises), are registered in the form of condominium at the request of the right holder (construction developer). Transactions with isolated facilities which are part of future constructions can be made only after the registration of the construction as a condominium.

<sup>155</sup> See art. 40<sup>6</sup> of the Law on Cadastre, as introduced by Law No. 279, of 07.12.2012. The party that ensures the construction of the immovable asset has the obligation to register construction investment contracts at the territorial cadastre offices within 15 calendar days from the date of their notary authentication. However, there is no right of ownership of the investor until after the acceptance of the construction.

<sup>156</sup> The law itself does not require notaries to act in this fashion, but it is reported that some do in practice.

organization: at the central level, the registry is very similar to other modern notice-based registries, in its structure and database; but the combination with the different entry points at the notary offices results in a system which deviates from international norms.

Time and cost considerations do not seem to represent a concern for the functioning of the registry. The registry is economical, and the intervention of notaries has not resulted in a significant cost increase, since the laws make clear that the control of the notary is limited to checking whether the application contains all the necessary items of information. However, in practice notaries often play an excessive gateway role. In addition, some notaries do not seem to have assimilated the principles of transparency that should inform the registry, with the result that access to the registry information by individuals is less than perfect. Financial institutions are not affected by the restrictions some notaries have imposed on access to the registry information, since they have their own access to the registry database (the so-called “passive access”).

There are also several rules that can be problematic in their application. Thus, the rule whereby the grantor is allowed to deny access to information to potential searchers of the registry (art. 46 of the Law on pledge) is contrary to the essential function that the registry performs, i.e. the provision of essential information over the existence of security interests granted by a particular person, and the setting of priority among competing security interests and other rights. The peculiarity goes further when the law introduces the presumption, when information is withheld, that all of the assets belonging to the grantor are subject to a pledge (art. 474 of the Civil Code). This presumption can be understood, roughly, as asking the searcher of the registry to assume the worst-case-scenario: if the grantor has denied access to the information included in the registry, the searcher should assume that there is a pledge over all the assets of the grantor. However, this presumption would only make sense if it refers to all the assets of the debtor that are not subject to registration in special registries, and if it is meant to affect the creditors with a second pledge over the assets of the grantor. The precision is important because, otherwise, if the presumption is taken literally, then the consequence is that third parties in good faith may be adversely impacted by a presumption where there is no information accessible to them (for instance, a person interested in acquiring a vehicle from a grantor who has denied access to the public to a pledge over its equipment and vehicles, should not suffer the impact of such pledge). However, this common-sense interpretation is at odds with the literal tenor of the rules. As a matter of fact, the rule (the presumption that all assets of the grantor who denies public access to the information are charged) is also applicable to the Cadastre (see art. 44(7) of the Law on Cadastre of Immovable Assets; see also art. 474 of the Civil Code). It is very difficult to imagine how this rule may operate in a real estate registry, affecting the acquisition of rights in real estate when the parties typically access the information on a particular immovable asset, and they would not be able to find any trace of a security interest over it. In those circumstances, extending the effects of a pledge by way of a presumption may be severely disruptive of the regime of circulation and transmission of rights over real estate.

There are other technical shortcomings in the regulation of the registry of pledge. The rule on the effects of registration (art. 44 of the Law on Pledge) is of a ‘negative’ nature, indicating what are *not* the effects of registration, rather than stating the fundamental effect of registration as making the security interest effective against third parties (see Principle A3) and, especially, evidencing priority among competing claimants by assigning a certain time to the perfection of the security interest. The priority question is independent from the fact that, as the article in the law correctly states, the registry does not prove that the pledge is valid, as that is a matter entirely under the scope of contract law.

Another important issue refers to the existence of multiple registries for different types of assets. Generally speaking, special registries can perform a useful function –normally, these registries are organized and structured by identification of the asset, rather than by identification of the grantor. Some perform the dual function of registering ownership (and transfers of ownership) as well as security interests over the registered assets. This is the

	<p>scheme frequently implemented for registries of intellectual property, vessels and aircraft. The high value of the registered assets also justifies a higher level of control (with corresponding higher costs) of the documentation presented to the registry, which is far more detailed than the information typically included in a registered notice at the general secured transactions registry. In any event, the Moldovan system has created only a few special registries, as exceptions to the general rule that all pledges are registered in the Pledge Registry, in circumstances where the nature of the asset (or in the case of shares, the nature of the regulation) requires separate exclusive registration..<sup>157</sup> Yet, the effect of registration of a universal security interest that includes an asset registered at a special registry (e.g. intellectual property) is unclear. Generally, it is not clear how enterprise pledges might be registered.. The lack of use of the enterprise pledge might be explained, at least partially, by the lack of clarity about the applicable registration regime.</p> <p>Finally, the system of registration of company securities poses severe problems, and is currently subject to strong criticism. The independent registries operate without a strict supervision, and have evidenced serious dysfunctions that affect not just the creation of pledges over securities, but the confidence in the respect of property rights over shares of companies, in general. The problems of the registries go beyond the scope of this assessment,<sup>158</sup> but it is important to note here that the deficiencies of the system of registration of company securities create disincentives for the use of company securities as collateral for legitimate financial transactions.<sup>159</sup></p>
<b>Comment</b>	<p>The registry system can be improved by the implementation of targeted reforms. Measures may be taken: (i) to ensure that the grantor of a pledge cannot deny access to information to potential searchers of the registry;<sup>160</sup> (ii) to enhance the relationship between the registries for specific types of assets and the general pledge registry. Especially, security interests over all the movable assets of a grantor (see Principle A3) require rules that determine the priority between those security interests and security interests registered in special registries. In general, registration in a special registry gives priority over security interests registered at the registry of pledge (this would be the relationship, for instance, between security interests registered at the intellectual property registry and security interests registered at the registry of pledge).<sup>161</sup> (iii) to address the general uncertainty regarding the manner of registration of an enterprise pledge.<sup>162</sup></p>

<sup>157</sup> The registration of the assets or pledges in the “notice” registers do not generally have the functions of either creation/transmission of an ownership right or the creation/perfection of a pledge. The only truly “special registries” are:

1. Registry for Immovable Assets: ownership is transmitted upon registration; mortgage is created/perfected upon registration in that Registry;
2. Pledge Registry: pledge is created / perfected upon registration of the pledge;
3. Registry of Intellectual Property: pledge is created/perfected upon registration of the pledge;
4. Shareholders’ registry: the pledge over shares is created/perfected upon registration of pledge over issued shares;
5. Registry of securities issued by the State: pledge is created upon registration of pledge over securities issued by the State.

<sup>158</sup> See Corporate Governance Review of the Moldovan Banking Sector, The World Bank, April 2014.

<sup>159</sup> A new Capital Markets Law was enacted in 2014 that may have addressed some of these issues.

<sup>160</sup> It is understood that recently enacted legislation reforming the Law on Pledge suggest eliminating the grantor’s option to deny access to the registry by third parties.

<sup>161</sup> It is understood that recently enacted legislation amending the Law on Pledge does not opt for a decentralized system whereby registration of certain types of asset will take place in special registered properly linked to the registry of pledge (and determining the priorities between registrations in the different registries). However, it suggests establishing a unified system for registration of pledges and to maintain the special registries for the purpose of registration of ownership. It is understood that the relationship between the special registries and the pledge registry will be addressed through further secondary legislation

	<p>In addition, the registry of pledge may transition at some stage to a more modern and efficient system. If a clear distinction between creation and perfection of security interests is introduced (see Principle A3), the proper function of the registry of pledge will be limited to the registration of notices with the effect of establishing third-party effectiveness and determining priority. When tied to a reform of the substantive law of secured transactions, a reformed registry of pledge should be able to register notices related to any security interests over movable assets. With a functional concept of security interest, the registry would also include the registration of notices of financial leases,<sup>163</sup> which would increase the legal protection of financial lessors.</p> <p>Otherwise, the institutional, organizational and legal framework of the Pledge Registry's operators could be improved. Rules on liability of the operators of the Pledge Registry may be put in place. Detailed instructions to the operators of the Pledge Registry in respect to pledge registration, pledge de-registration, providing information to third persons may be adopted. Rules on redesigning the Pledge Registry, on making it fully and easily searchable may be adopted.</p> <p>The registry could be fitted with an interface directly accessible through the Internet. Secured creditors should be able to submit notices directly through the registry interface – and to submit amendments to a registered notice, using electronic templates made available by the registry; and any interested parties should be able to perform searches accessing the system through the Internet. Security systems, based on identification codes and encryption, would provide the adequate level of security for the proper operation of the registry. The system can include the use of serial numbers for identifiable movable assets of high value (for instance, machinery and vehicles). The registry could be integrated with other registries performing different functions. This would increase the security and reliability of the registry system as a whole.</p> <p>As some of the peculiarities of the current system may have been justified, considering the existence of an environment of lack of integrity in many areas of commercial and financial activity, it will be important to reinforce the registry framework with proper supervision and with penalties and sanctions (e.g. through amendments of the Criminal Code) effectively enforced against the parties seeking to abuse the system.</p> <p>Finally, the system of registration of company securities needs to be comprehensively reformed. A unified registry, publicly run or under close public supervision, incorporating modern technologies should increase the confidence of market participants in the system, and would allow the commercial and financial sectors to realize the full potential of one of the best available types of collateral, namely securities issues by listed companies.</p>
<b>Principle A5</b>	<p><b>Commercial Enforcement Systems</b></p> <p><b>A5.1</b> <i>Enforcement of unsecured debt.</i> A functional credit system should be supported by mechanisms and procedures that provide for efficient, transparent, and reliable methods for satisfying creditors' rights by means of court proceedings or non-judicial dispute resolution procedures. To the extent possible, a country's legal system should provide for executive or abbreviated procedures for debt collection.<sup>164</sup></p> <p><b>A5.2</b> <i>Enforcement of secured debt.</i> Enforcement systems should provide efficient, cost-effective, transparent and reliable methods (including both non-judicial and</p>

<sup>162</sup> It is understood that recently enacted legislation reforming the Law on pledge suggests clarifying the notion of the enterprise pledge.

<sup>163</sup> The recently enacted amendment to the Law on Pledge may have addressed this issue at least in part.

<sup>164</sup> Enforcement in this principle aims primarily at the treatment with respect to proceedings to recover against corporate debtors. Where enforcement proceedings involve individuals or persons, reasonable exemptions may need to be adopted to allow individuals or persons to retain those assets indispensable to the subsistence of the debtor and his/her family. Any such exemptions should be clearly defined and narrowly tailored.



	judicial) for enforcing a security interest over assets. Enforcement proceedings should provide for prompt realization of the rights obtained in secured assets, designed to enable maximum recovery according to market-based asset values.
<b>Description</b>	<p>The enforcement system of Moldova is based on a plurality of legal texts: the fundamental rules are to be found in the Civil Procedure Code (Law No. 225, of 30.05.2003) and in the Enforcement Code (Law No. 443, of 24.12.2004),<sup>165</sup> but there are special procedural rules in other statutes (the Law on pledge; the Law on leasing; the Law on mortgage), and also laws that regulate important elements of the enforcement regime, such as the Law on bailiffs (Law No. 113, of 17.06.2010); the Law on the activity of valuation (Law No. 989, of 18.04.2002); and the Law on arbitration (Law No. 23, of 22.02.2008).</p> <p>The regime encompasses multiple procedural options, but their relevance and significance is practically restricted to the enforcement of secured claims. Enforcement of unsecured claims presents more difficulties, and is less significant in financial practice, since the use of security interests in loan relationships is absolutely prevalent (see Principle A1).</p> <p><i>Enforcement of unsecured debt</i></p> <p>In Moldova, enforcement of unsecured debt is generally done through the courts. Although there are possibilities of using alternative dispute resolution mechanisms, such as arbitration, the enforcement of arbitral awards falls within the competence of the courts as well (see art. 13 of the Law on arbitration).</p> <p>An unsecured creditor needs to obtain a court judgment to enforce the claim. Under the Civil Procedure Code, unsecured creditors have the option of using an ordinary procedure (so-called “contentious” procedure) or a simplified procedure (“ordinance” – <i>ordonanța</i>, or summary procedure).<sup>166</sup> Regardless of the monetary amounts claimed by creditors, the courts competent for these enforcement procedures are, in all cases, the first instance district courts (denominated “trial courts” – see art. 33 of the Civil Procedure Code).<sup>167</sup></p> <p>-An ordinary procedure is initiated by a lawsuit filed by the creditor in the court with jurisdiction over the place where the debtor has its domicile or its legal seat (art. 38 of the Civil Procedure Code). Prior to filing the lawsuit before the court, a creditor is required to notify the debtor regarding the claim, and summon the debtor to pay the debt within 7 days from the date of receiving the notice.<sup>168</sup> If the debtor fails to pay the debt within the prescribed term, the creditor may then initiate the lawsuit against the debtor in court. The creditor files the lawsuit accompanied by the documents confirming the outstanding debt, the payment receipt of the court fee (which is set at 3% of the amount claimed, capped to 50,000 MDL for legal entities and 25,000 for individual claimants), and the summon notice, where applicable. The procedure includes different phases: the initiation of the procedure (art. 160 ff. of the Civil Procedure Code); the adoption of provisional measures</p>

<sup>165</sup> The Enforcement Code includes all types of enforcement (even the enforcement of administrative fines and of criminal sanctions).

<sup>166</sup> The ordinance procedure concludes with a court order or “ordinance” (see art. 14(4) of the Civil Procedure Code), which is conceptually different from a full judgment (art. 14(2) of the Civil Procedure Code).

<sup>167</sup> On the court system of Moldova, see Principles D1-D7.

<sup>168</sup> According to art. 617 of the Civil Code, a notice to perform is unnecessary if: a) a time for performance is determined according to the calendar; b) an event must precede performance and an appropriate time for the performance is fixed in such a way that it can be calculated according to the calendar from the date of the event; c) the parties expressly agreed that the debtor shall be deemed in default, without observance of any formalities, upon expiry of the term within which he should have performed the obligation; d) the obligation, owing to its nature, may only be performed within a fixed term, and the debtor failed to perform within such a term; e) the debtor of a recurring obligation repeatedly refuses or neglects to effect performance; f) the obligation to refrain from an act is not being complied with; g) it is obvious that such notice will be useless; h) having regard to each party’s interests, good reasons justify the occurrence of default with immediate effect; i) the debtor has declared in writing that he refuses to perform the obligation.

	<p>(art. 174 ff. of the Civil Procedure Code); the preparation of the case of examination (art. 183 ff. of the Civil Procedure Code); the trial (art. 192 ff. of the Civil Procedure Code), which may include the provision of evidence, intervention of witnesses and specialists, and pleadings of the parties; and the judgment (art. 238 of the Civil Procedure Code). The judgment will indicate the amount that is owed to the creditor (art. 241 of the Civil Procedure Code). The creditor will be entitled to recover the claim and the costs of the legal action.<sup>169</sup></p> <p>Judgments are subject to appeal.<sup>170</sup> As a general rule, appeals suspend the enforcement of a judgment (art. 363 of the Civil Procedure Code). Appeal judgments are subject to a further appeal on points of law (cassation –see art. 423 ff. of the Civil Procedure Code). Even a firm judgment can be challenged through an extraordinary procedure (revision procedure: see art. 446 ff. of the Civil Procedure Code). In any case, a firm judgment serves as the basis for a writ of execution or executive title (<i>titlu executoriu</i>). It is also possible to obtain an executive title on the basis of a voluntary settlement (<i>tranzactie</i>) between the debtor and the creditor, endorsed through a court order. The debtor may decide to comply with the court order voluntarily. If that is not the case, the creditor shall resort to the bailiffs (<i>executori judecatoresti</i>), whose duty is to enforce the court documents and recover the debt, including through the forced sale of the debtor’s assets.</p> <p>In practice, the ordinary procedure is commonly perceived as being extremely slow and inefficient. Courts are reluctant to award damages to the creditor, in addition to the amounts claimed in the lawsuit.</p> <p>-A simplified or executive procedure (<i>procedura in ordonanta</i>)<sup>171</sup> is available when the creditor’s claim derives from a certain, liquid and matured debt, in the cases expressly provided for in the Civil Procedure Code, including, inter alia, the following:</p> <ul style="list-style-type: none"> <li>-the claim arises from a notarized juridical deed (transaction);</li> <li>-the claim results from a juridical deed concluded in a simple written form, unless the law provides otherwise;</li> <li>-the claim is based on the protest of unpaid bill of exchange, the refusal of acceptance or acceptance without date, legalized by a notary;</li> <li>-the claim results from acquisition of certain property on a loan basis or from leasing operations;</li> <li>-the claim concerns enforcement of pledge.<sup>172</sup></li> </ul> <p>Once the procedure is initiated, the court shall decide on issuing the ordinance within 5 days from the date the lawsuit is filed, and after examining the case on the merits, with no summoning of the parties for explanations, no judicial debates, and no minutes to be drafted.</p> <p>The ordinance procedure is generally faster and more economical than the ordinary procedure. In terms of the economic cost, the state duty for lodging a lawsuit in ordinance procedure is 50% of the fee prescribed by law for an ordinary procedure in civil action (see art. 3 of the Law on State duty)</p> <p>When an ordinance is issued, the court shall send to the debtor a copy thereof via registered</p>
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<sup>169</sup> Court costs comprise the state duty (see articles 83 and 84 of the Civil Procedure Code) and the expenditures related to the judicial proceedings (art. 82 of the Civil Procedure Code). The court can also order the party acting in bad faith to pay damages (art. 61 of the Civil Procedure Code). A party that loses a legal action bears its costs (art. 94 and art. 98(2) of the Civil Procedure Code). See also art. 37 of the Law on mortgage.

<sup>170</sup> See art. 15 of the Civil Procedure Code, which recognizes the right to appeal judicial decisions. See art. 357 ff. of the Civil Procedure Code.

<sup>171</sup> See chapter XXXV (arts. 344-354) of the Civil Procedure Code.

<sup>172</sup> See the complete list of cases in art. 345 of the Civil Procedure Code.

	<p>mail, and the debtor is entitled to file objections (<i>obiectii</i>) within 10 days from receiving the ordinance (art. 352 of the Civil Procedure Code). There is no limited list of objections that the debtor can use to challenge the ordinance.</p> <p>If objections are filed, the court shall then examine them, ex officio, within 5 days and will issue an order, either dismissing the debtor's objections or admitting the objections and canceling the ordinance. The court order which dismisses the objections is subject to appeal on points of law (<i>recurs</i>). The appeal has to be filed within 10 days of the receipt of the court order.</p> <p>If the debtor does not object to the ordinance, the court shall issue the ordinance to the creditor (art. 354 of the Civil Procedure Code). The ordinance has the same legal value as an execution writ.</p> <p>The major inconvenience of the ordinance procedure is that frequently ordinances are successfully challenged by the debtor, who may file objections and allege any real or fictitious facts to convince the court that there is a substantive dispute in the case. In that situation, the court will cancel the ordinance, without appeal, and will direct the creditor to the ordinary (contentious) procedure, where there are appropriate available mechanisms to debate and ascertain the disputed facts or points of law.<sup>173</sup> The easiness with which ordinances are cancelled has contributed to the perception among creditors that the ordinance procedure is a waste of time and effort.</p> <p>-Moldovan law allows the use of alternative dispute resolution mechanisms, such as arbitration and mediation. According to the Law on Arbitration (Law No. 23, of 22.02.2008), the parties have the right to refer for arbitration any dispute on commercial matters, in conformity with an arbitration clause stipulated by them in the contract or by way of an arbitration agreement. The parties may elect between <i>ad hoc</i> arbitration and institutionalized arbitration, which shall be carried out according to the rules of the permanent arbitration institution.<sup>174</sup> If an arbitral award is not executed voluntarily (or is contested and appealed), the creditor may request the court of appeal (Circuit commercial court) for a writ of execution (see articles 482-486 of the Civil Procedure Code), which may then be submitted to a bailiff for enforcement, under general terms (see art. 35 of the Civil Procedure Code). Parties to arbitration may seek to challenge the award before the courts, by way of an annulment action (articles 477-481 of the Civil Procedure Code).</p> <p>Apart from arbitration, the parties may resort to mediation by concluding a mediation convention with a certified mediator. A mediation procedure will cease when the parties reach an agreement; when no agreement has been reached within three months from the date mediation was accepted; or when the parties renounce the procedure. In the case a compromise has been reached, the parties shall sign an agreement of conciliation, which is not an enforcement document by itself, but can be enforced with the assistance of the court.</p> <p>Once the creditor has a firm judgment in an ordinary procedure, a firm ordinance in a simplified procedure, or a firm arbitral award, the enforcement of the claims is continued, in all cases, in the same way: the creditor initiates an enforcement procedure (see art. 60 of the Enforcement Code), in which the bailiffs take a leading role.</p> <p>Bailiffs are organized according to Law No. 113, of 17.06.2010. Bailiffs are private professionals who perform public functions, as auxiliaries of the courts (court enforcement officers). Bailiffs are independent (art. 7 of the Enforcement Code), and have territorial competence to undertake enforcement actions (art. 30 of the Enforcement Code).</p>
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<sup>173</sup> In those ordinary procedures that are originated in a failed simplified ordinance procedure, the court fee paid in the first procedure can be set off against part of the court fee due in the ordinary procedure (see art. 348(4) of the Civil Procedure Code).

<sup>174</sup> The most known arbitral forum is the International Commercial Arbitration Court of the Moldovan Chamber of Commerce and Industry.

	<p>Once a bailiff receives the relevant enforcement document (the judgment or the ordinance, in the case of the enforcement of unsecured claims), the bailiff shall proceed without delay to take the necessary steps for enforcement (art. 60 of the Enforcement Code). The bailiff can take the following measures:</p> <ul style="list-style-type: none"> <li>a) seize the debtor's funds or assets;</li> <li>b) forbid the debtor to perform certain acts;</li> <li>c) forbid other persons to transfer debtor's assets or to perform other actions.</li> </ul> <p>At the same time, the bailiff must provide the debtor with the opportunity of paying the debt voluntarily.<sup>175</sup> If the debtor fails to perform its obligations within the prescribed term, the bailiff shall continue the enforcement procedure by seizing the debtor's assets. Under the Enforcement Code, any asset or body of assets of the debtor may be subject to enforcement,<sup>176</sup> excluding the debtor's exempt assets as defined by law, when the debtor is a natural person.<sup>177</sup> Seizure of assets must proceed according to the following order, indicated in the Civil Procedure Code (art. 176(1)<sup>178</sup>):</p> <ul style="list-style-type: none"> <li>a) in the first place –property which is not directly involved in the production activity of the debtor: securities, monies (in local and foreign currencies, including cash), passenger vehicles, objects of design in the offices and other property;</li> <li>b) in second place –finished products (goods) and other tangible assets that are not directly involved and not intended for direct use in manufacture;</li> <li>c) in third place –immovable property, as well as raw materials, machinery, tools, equipment, and other fixed assets intended for direct use in manufacture;</li> <li>d) in fourth place– assets transferred to other persons.</li> </ul> <p>The bailiff, therefore, can seize the debtor's money in cash and the balance of the debtor's bank accounts; seek sequestration of the borrower's assets for their forced sale or administration; or the removal from the debtor of any assets indicated in the enforcement document; and convey the possession of those assets to the creditor.</p>
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<sup>175</sup> According to art. 60 of the Enforcement Code, before resorting to enforcement measures, the bailiff shall invite the debtor to perform voluntarily the obligations evidenced in the writ of execution, within 15 days from receipt of the bailiff's notice. The bailiff shall convey to the debtor a schedule of expenses (with commencement and archiving fees only), together with the copy of the commencement order of enforcement proceedings. If the debtor refuses to perform the obligations voluntarily, he or she shall bear in full the expenses of enforcement proceeding, including the bailiff's fee.

<sup>176</sup> See art. 88 of the Enforcement Code.

<sup>177</sup> For exempt assets, see art. 89 of the Enforcement Code. These include items such as minimum pieces of clothing, furniture, linens; all children's assets; icons and family portraits, wedding rings; orders, medals, other distinguishing awards; items (including books) required for the debtor's profession; special transportation means for the disabled, handicapped and sick, including any items needed for their care; minimum food amounts and fuel. Art. 110 of the Enforcement Code sets out a list of patrimonial rights and money claims upon which enforcement may not be levied upon:

- a) *monies payable in connection to work trips, transfer, hiring or secondment to a job in another city;*
- b) *allowances payable to mothers with many children and single mothers;*
- c) *subsistence payments;*
- d) *indemnity paid at childbirth and monthly allowance payable for raising a child under 3 years old;*
- e) *death indemnity and death grant;*
- f) *pay increases for work in heavy or harmful circumstances;*
- g) *allowances for release from employment;*
- h) *allowances for persons who have suffered damages from Chernobyl Nuclear Power Plant;*
- i) *survivor's pension established to the parent or guardian (curator) for the children;*
- j) *nominal compensations.*

<sup>178</sup> See also art. 74 of the Enforcement Code, which lists the different actions that the bailiff may initiate to seize the debtor's assets (see art. 88 ff. of the Enforcement Code).

	<p>In general, all of the actions of the bailiff are subject to challenge by aggrieved parties (art. 9 and art. 161 ff. of the Enforcement Code): The parties to enforcement proceedings, including other participants and third parties who allege an injury of their legitimate rights, have 15 days to challenge the bailiff's act or action (art. 161<sup>1</sup> of the Enforcement Code). Regarding the seizure order, however, if that order has not been challenged within 7 days from its communication, the bailiff has the duty to commence the sale of the seized assets (art. 126 of the Enforcement Code).</p> <p>One of the most important –and most contentious- issues with respect to the enforcement process is the evaluation of the assets for their sale. When evaluation presents difficulties; or when there is a disagreement between the creditor and the debtor on the evaluation, the bailiff will resort to a professional evaluator, whose expenses will be borne by the party who disagreed with the bailiff's evaluation. If neither party challenges the evaluation carried out by the bailiff, it will be presumed that the price established by the bailiff is accurate and final. The value of the assets will be included in the seizure minutes or, if the intervention of a valuation expert was necessary, in a valuation report (see art. 132 of the Enforcement Code).</p> <p>The bailiff can arrange the sale of the assets either by public auction or, in the case of movable assets, also through a specialized commercial organization, under a commission contract, for a fee (art. 143 of the Enforcement Code). If the sale is conducted through a commercial organization, the commission fee shall be determined by an agreement between the bailiff and the commissioner (art. 143(4) of the Enforcement Code), and shall be payable from the proceeds of the sale of the assets. Reevaluation of the assets shall be carried out with the participation of the bailiff, the debtor and creditor being also notified on the date, time and place of reevaluation. When the debtor or creditor fails to show up for the reevaluation, the bailiff shall notify them on the newly established price (art.143(3) of the Enforcement Code).</p> <p>The sale by auction represents, however, the general rule in the Moldovan practice. If the sale is conducted by means of an auction (art. 125 of the Enforcement Code), the bailiff must publish an announcement in a regional or national newspaper or in the Official Gazette of the Republic of Moldova, containing all the information laid out in art. 129(2) of the Enforcement Code. The auction will take place at least 15 days after the announcement is published and will be conducted by the bailiff. Notably, within at least 5 days before the auction takes place, the law allows the debtor to sell the seized assets, at a price which must not be inferior to the value indicated in the seizure order or in the evaluation report, and provided that all the proceeds from the sale are directly transferred to the bailiff's account (art. 125(5) of the Enforcement Code). As stated before, the initial price for the auction is set according to the minutes regarding asset seizure or to the evaluation report (art. 132 of the Enforcement Code).</p> <p>When the debtor has no unencumbered assets or such assets do not suffice to discharge the enforced debt, the bailiff may also sell the pledged assets (art.100(1) of the Enforcement Code). In such cases, the bailiff shall notify the secured creditor, who is entitled to join the enforcement proceeding, when having its own writ of execution, or inform the bailiff on the amount of secured debt, when not yet obtained the writ of execution. In the latter case, the bailiff shall keep the sale proceeds equaling the secured debt in his/her account until the secured creditor obtains and presents the writ of enforcement. In practice, abuses from bailiffs were reported, where the bailiffs refuse to convey the asset into the possession of the secured creditor even though there does not appear to be value in excess of the secured creditor's claim.</p> <p>If only one participant has registered for the auction; if none of the participants offers the initial price; or if any of the other reasons laid out in art. 139 of the Enforcement Code is applicable, the bailiff shall declare the auction as not having taken place. The failure of the</p>
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	<p>first auction entitles the creditor to appropriate the assets at the auction price (art. 139(3) of the Enforcement Code).<sup>179</sup> Secured creditors have a preferential right to take the assets subject to a security interest. If no creditor decides to take the assets, the bailiff shall organize a second auction and reduce the bidding price. According to art. 140 of the Enforcement Code, the reduction may not exceed 20% of the initial price in the first auction; and no more than 10% of that price in the case of immovable assets.</p> <p>If the second auction fails, the creditor is entitled to appropriate the assets at the price established in the last auction (art. 140(3) of the Enforcement Code).</p> <p>The creditor, the debtor and/or the persons that participated at the auction can litigate the auction results within a period of 15 days from the date of auction performance (art. 142 of the Enforcement Code).</p> <p>The Enforcement Code provides for specific timeframes for the conduct of public auctions. However, the law recognizes the possibility of challenging the enforcement process and the documents on which enforcement is based (see art. 161 ff. of the Enforcement Code). When the bailiff's protocol on seizure of assets is challenged, the sale shall be suspended until a final judgment is issued by court.<sup>180</sup></p> <p>Once a sale of assets belonging to the debtor is concluded by any of the methods described above, enforcement expenses are to be deducted from the proceeds, and then the priority of secured claims is recognized, before the unsecured claim can be satisfied (art. 144 of the Enforcement Code). If the proceeds of the enforcement action are insufficient to settle all the creditors' claims, the proceeds will be distributed proportionally between the creditors belonging to the same class.<sup>181</sup></p> <p><i>Enforcement of secured debt</i></p> <p>Enforcement procedures of secured debt are extremely important in Moldova, due to the extensive use of secured credit in loans to enterprises (see Principle A1).<sup>182</sup> Enforcement procedures for secured claims present many similarities, independently of the type of the collateral. Yet, a recent reform (March 2013) has introduced the option of using out-of-court enforcement for mortgages, thereby differentiating the regime for the enforcement of mortgages from the general regime applicable to the enforcement of secured credit.</p> <p>In general, secured creditors can enforce their claims by means of an ordinary procedure or by means of an ordinance procedure. Since 2013, the option of using out-of-court enforcement is available to mortgage creditors only, where an agreement between the creditor and the grantor, authenticated by a notary allows it. The agreement between the secured creditor and the grantor can be reached at any point in time.<sup>183</sup></p> <p><i>a) Enforcement of pledges</i></p>
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<sup>179</sup> See judgment of the Constitutional Court of 06.02.2014, on the constitutionality of the transfer of an immovable asset by the bailiff to the creditor, in lieu of payment, after a failed auction (judgment available at <http://www.constcourt.md/print.php?l=en&idc=7&id=523>). The Court underlined that the option of the creditor to take the asset on the account of the claim represents a part of the sale procedure, which facilitates the enforcement proceeding, with the creditor's will, without affecting the debtor's rights, by avoiding the occurrence of the circumstances that would make the enforcement difficult or impossible.

<sup>180</sup> See art. 126 of the Enforcement Code.

<sup>181</sup> See art. 145 of the Enforcement Code.

<sup>182</sup> Indeed, the statistical data, unofficially collected by the bailiffs, show that most of the enforcement actions refer to secured claims, which is consistent with the prevalence of secured credit in financial practice.

<sup>183</sup> In theory, it is possible that the grantor of the mortgage and the secured creditor agree on the enforcement mechanism even after the debtor's default, although this is unlikely to happen in practice.

	<p>As a general rule, a creditor may enforce its pledge by selling the pledged assets independently, by selling the pledged assets under judicial supervision, or by taking the pledged assets into possession for administration (art. 61(2) of the Law on pledge; art. 487 of the Civil Code).</p> <p>Before resorting to the courts, a secured creditor must send a signed enforcement notice (<i>notificare</i>) to the grantor of the pledge (art. 67 of the Law on pledge). The notice shall specify the amount of the secured claim, the grounds for the initiation of the enforcement action, the enforcement right the secured creditor intends to exercise, and the description of the pledged asset(s). The notice will also summon the grantor of the pledge to surrender the possession of the pledged asset(s) within the deadline set by the pledgee (art. 67(4) of the Law on pledge). The deadline set by the secured creditor for the transfer of possession of the pledged asset(s) shall be of at least ten days for movable assets, and ten days for asset taken into possession for administration, from the notice registration date (art. 67(5) of the Law on pledge). The secured creditor must also communicate a warning (<i>preaviz</i>) to the registry, containing the same information (art. 67(2) and (3) of the Law on pledge).</p> <p>The grantor of the pledge may transfer the possession of the assets to the secured creditor voluntarily (see arts. 69 and 70 of the Law on pledge; see art. 490 of the Civil Code). However, if the creditor's request for transfer of possession is not met within the stated term in the notice, the creditor can resort to the court to request a forced transfer of possession (arts. 69 and 71 of the Law of pledge; art. 490 of the Civil Code).</p> <p>The law includes a special procedure for the forced transfer of possession. The court examines the application without citation of the parties and bases its decision on the documents produced from which the secured obligation and the right of pledge result, the amount of the secured claim, the secured creditor's notification of the exercise of the right of pledge, and the registration of the warning in the respective registry (art. 71(2) of the Law on pledge). The court shall decide on the immediate forced transfer of possession of the pledged assets within three days since the creditor's application is filed. The court shall forward its decision on the transfer to the parties within 3 business days (see art. 71(4) of the Law on pledge). The grantor of the pledge can appeal against the order to transfer the possession of the pledged assets, but the appeal does not suspend the transfer (art. 72 of the Law on pledge). The bailiff will enforce the order to transfer the possession of the pledged assets to the secured creditor.<sup>184</sup></p> <p>Once the assets are in the possession of the secured creditor, the creditor can administer the assets until their sale (art. 69(3) of the Law on pledge).</p> <p>As stated before, the creditor may have opted for administration of the asset as the method to recover its claim. Generally, however, the creditor will seek the sale of the pledged assets to satisfy the claim with the proceeds of the sale.</p> <p>Sale of the pledged assets may be done with or without judicial supervision. The law lists a number of cases in which the sale requires judicial supervision (art. 79(6) of the Law on pledge):</p> <ul style="list-style-type: none"> <li>- Where the approval or permission of a person, which is necessary for the validity of the concluded pledge agreement, is missing;</li> <li>- Where the pledged assets are of historic, artistic, or cultural value;</li> <li>- Where the grantor of the pledge is missing and its location is unidentifiable.</li> </ul> <p>The law establishes that the creditor may opt for any of the following methods of sale: sale</p>
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<sup>184</sup> Bailiffs can be assisted by the police in their enforcement actions – see art. 75(8) of the Law on pledge.

	<p>by direct negotiations; sale by tender; or sale by public auction (art. 75(1) of the Law on pledge; art. 491 of the Civil Code). Independently of the method used, the secured creditor must sell the pledged assets without any unjustified delays, at a reasonable commercial price, and in the best interests of the grantor of the pledge (art. 75(2) of the Law on pledge).</p> <p>Regarding the sale by tender, the law indicates that the secured creditor must announce the tender through mass media or by invitations. The tender announcement shall include adequate information to allow an interested person to make an offer within the announced deadline and at the announced location (art. 75(5) of the Law on pledge). The secured creditor shall accept the largest offer, except when the conditions accompanying the offer would make it less favorable than a smaller offer; or when the offered price is not commercially reasonable (art. 75(6) of the Law on pledge).</p> <p>Sale by public auction requires that the secured creditor issue a sale notice specifying the date, time, and location of the auction. The notice must be communicated to the grantor of the pledge, to any third party in possession of the asset (including a fiduciary administrator), to all other creditors with registered pledges over the same assets, and to any interested party (cf. art. 75(7) of the Law on pledge). Public auctions are commonly used for the sale of immovable assets and of high-value movable assets. In practice, the effectiveness of auctions commonly depends on the secured creditor's engagement in the process: it is often the case that secured creditors need to search for potential buyers for the collateral. As creditors generally need to advance the enforcement expenses (see art. 36 of the Enforcement Code), bailiffs usually coordinate with them to decide important aspects of the auction, such as the specific newspaper where the announcement of the auction will be published; the use of additional methods to advertise the auction; the location to hold the auction, and other details.</p> <p>Even in the cases where it is not compulsory, secured creditors tend to prefer to sell pledged assets by public auction under judicial supervision (art. 79 of the Law on pledge; art. 492 of the Civil Code). The sale under judicial supervision provides better protection for the secured creditor against potential claims for damages based on irregularities or breach of duties.</p> <p>In the sale of pledged assets under judicial supervision, the court appoints a person that will sell the pledged asset, determines the conditions and goals of the sale, specifies whether the sale may be carried out by direct negotiations, tender, or public auction, and, as the case may be, sets the price following the expert evaluation of the pledged assets (art. 79(1) of the Law of pledge). The appointed person must inform interested parties, at their request, about the actions to be undertaken for the sale of the pledged assets (art. 79(3) of the Law on pledge).</p> <p>In a sale of pledged collateral, the acquirer takes the asset free of charges and encumbrances (art. 77 of the Law on pledge). Once the pledged assets are sold by any of the methods described above, the proceeds of the sale will be distributed in the following order (art. 76 of the Law on pledge; art. 493 of the Civil Code):</p> <ul style="list-style-type: none"> <li>- Costs of enforcement<sup>185</sup>;</li> <li>- Claims of creditors with priority over the enforcing pledge creditor;</li> <li>- Claims of the enforcing pledge creditor;</li> <li>- Claims of junior creditors.</li> </ul> <p>After satisfying all claims, the remaining proceeds, if any, will be transferred to the grantor of the pledge.</p>
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<sup>185</sup> Creditors generally need to advance the funds to pay for the costs of enforcement, and they will recover the advance after the sale of the collateral (see art. 36 of the Enforcement Code).



	<p><i>b) Enforcement of the enterprise pledge</i></p> <p>A creditor with an enterprise pledge may choose to enforce its claim over the enterprise's assets by taking those assets into possession for fiduciary administration –receivership-, following the delivery of the appropriate notice to the grantor and, if applicable, to the third parties in possession of the enterprise assets (art. 29 of the Law on pledge). The secured creditor will also register the notice of administration in all the registries where the enterprise pledge has been recorded (see Principle A4).</p> <p>The administrator can be the secured creditor or a person appointed by the secured creditor (art. 30(1) of the Law on pledge). The Law establishes the powers and duties of the administrator, who will manage the assets included in the enterprise pledge, collecting the receivables generated by them, but also operating the enterprise as a going concern (art. 31(1) and (2) of the Law on pledge). The actions of the fiduciary administrator must be aimed at maximum recovery of the secured creditor's claims, but also of the other creditors' claims (art. 31(3) of the Law on pledge). There is very little experience in the application of these provisions.</p> <p>The fiduciary administration will terminate when the secured claim is satisfied in full; when the secured creditor waives its rights, or when the secured creditor submits a notice of enforcement by sale. The law states that the insolvency of the debtor will not terminate the fiduciary administration (art. 30(5) of the Law on pledge).</p> <p><i>c) Enforcement of mortgages</i></p> <p>The enforcement of mortgages is covered by the special rules included in the Law on mortgage, complemented by the general rules in the Law on pledge.</p> <p>In order to initiate the enforcement of a mortgage, the creditor must:</p> <ul style="list-style-type: none"> <li>- Send to the mortgagor and, as the case may be, to the debtor a notification showing the intention to enforce the mortgage according to contract;<sup>186</sup></li> <li>- Register with the real estate registry an information letter concerning the execution of the mortgage right (see art. 31(1) of the Law on mortgage).</li> </ul> <p>During the term indicated in the notification and the information letter (not less than 20 days),<sup>187</sup> the debtor has the right to pay the outstanding amount or to cure in any other way the default, as provided for in the notification and information letter (art. 31(5) of the Law on mortgage).</p>
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<sup>186</sup> The contents of the notification are the following (art. 31(3) of the Law on mortgage):

- a) grounds for enforcing the mortgage right;
- b) amount of mortgage-secured claim and obligation;
- c) the intention of the mortgagee to exercise its mortgage rights;
- d) indication of the term upon whose expiry, the mortgagee will execute their mortgage right, and which shall not be less than 20 calendar days as of the registration of the information letter;
- e) determination of the object of the mortgage;
- f) mortgagee's request to transfer the mortgaged immovable asset into its possession;
- g) amount of arrears, including interest, fees and any other costs and expenses to be paid in order for the enforcement procedure to be discontinued, or actions to be taken by the debtor to cure his failure to adequately perform his obligations; and
- h) mortgagee's signature.

<sup>187</sup> See art. 67(5) of the Law on pledge.

	<p>If the debtor does not act on the notice, the mortgage creditor will have the option of using an ordinary procedure or an ordinance procedure (art. 33 of the Law on mortgage)<sup>188</sup>. Challenges to the judgment, ordinance or court order will not suspend enforcement of the mortgage (see art. 33(4) of the Law on mortgage). Objections against the judgment or the ordinance ordering the enforcement of the rights of the mortgage creditor can be based on the following grounds:</p> <ul style="list-style-type: none"> <li>a. the formalities to initiate the enforcement of the mortgage have not been observed by the mortgage creditor;</li> <li>b. the notification and/or the information letter contain untrue data;</li> <li>c. There has been voluntary performance of the claim by the debtor within the time and on the conditions set forth in the notification and information letter.</li> </ul> <p>These objections are specific to mortgage enforcement, and they do not exclude the allegation of any other objections that would be applicable under general procedural law. If the ordinance is cancelled, the mortgage creditor may be able to pursue enforcement through an ordinary action.</p> <p>The methods to enforce the mortgage are similar to the applicable methods for the enforcement of pledges. A mortgages may be enforced through the following methods (art. 30 of the Law on mortgage):</p> <ul style="list-style-type: none"> <li>- sale of mortgaged immovable asset by the mortgagee, or by any person authorized by the mortgagee, to a third party;</li> <li>- sale of the mortgaged immovable asset under the supervision of a court of law;</li> <li>- acquisition of the mortgaged immovable by the mortgagee;</li> <li>- taking of the mortgaged immovable asset in mortgagee's possession, with a view to its administration.</li> </ul> <p>The sale of the mortgaged asset may be conducted as the result of an agreement between the mortgagor and the mortgage creditor, or after a judgment or an ordinance (arts. 32 and 34 of the Law on mortgage).</p> <p>The mortgagee shall conduct the sale of the property without undue delay, on commercially reasonable terms and price taking into account the interests of the mortgagor (art. 34(2) of the Law on mortgage). The mortgagee may choose the method by which the mortgaged asset is to be sold: tender offer, direct negotiations or public auction carried out in accordance with effective legislation (art. 34(3) of the Law on mortgage). The mortgagee is entitled to ask a court of law that the mortgaged asset is sold under the supervision of the latter (art. 34(4) of the Law on mortgage). A court-supervised sale is mandatory in the following cases (art. 34(5) of the Law on mortgage; art. 79(6) of the Law on pledge):</p> <ul style="list-style-type: none"> <li>- when the mortgage agreement did not include the required consents by concerned persons;</li> <li>- when the mortgaged asset is of historic, artistic or cultural value;</li> <li>- when the mortgagor is missing and cannot be found; or</li> <li>- when the mortgagee intends to acquire the mortgaged asset.<sup>189</sup></li> </ul>
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<sup>188</sup> It is unclear whether the special procedure to request the transfer of possession of the pledged assets of the Law on pledge (art. 71 of the Law on pledge) is applicable. A special rule in article 71 suggests that the procedure is also designed for the enforcement of mortgages: Art. 71(5) of the Law on pledge states that, “*in its decision on enforced transfer of real estate, the court shall decide on the forced eviction of individuals and removal of assets from such real estate*”. However, art. 33 of the Law on mortgage does not mention this alternative.

<sup>189</sup> Therefore, if the mortgagee wants to acquire the mortgaged asset, it can require that the sale be supervised by the court and then bid or express interest as any other purchaser (see also art. 35(2) of the Law on mortgage). This acquisition should be distinguished from the inclusion of a clause in the mortgage agreement according to which ownership of the mortgaged asset is to pass

	<p>In a court-supervised sale, the court will generally appoint a specialized company to conduct the sale.</p> <p>The Law on mortgage and related laws were amended in 2013 with the objective of simplifying the enforcement procedure by introducing out-of-court enforcement for the cases in which the notarized mortgage agreement contains an “executive clause” or “executive formula” (<i>investire cu formula executoire</i><sup>190</sup>). When this clause is included in the agreement, the secured creditor is able to enforce the mortgage without an ordinary or even an ordinance judicial procedure. The secured creditor must comply with some basic formalities in order to initiate the enforcement of the notarized mortgage agreement with an executive formula (see art. 34(6) c) of the Law on mortgage<sup>191</sup>). With the accompanying documents, the secured creditor can initiate enforcement with the assistance of the bailiff (art. 60 (1<sup>1</sup>) of the Enforcement Code). The grantor of the mortgage can only challenge the enforcement action based on a limited number of grounds allowed by the law (namely, those listed above under the court enforcement of mortgages: -that the formalities to initiate the enforcement of the mortgage have not been observed by the mortgage creditor; -that the notification and/or the information letter contain untrue data; -that there has been voluntary performance of the claim by the debtor within the time and on the conditions set forth in the notification and information letter).<sup>192</sup> If the notarial formula is successfully challenged and is cancelled, the secured creditor will still have the right to initiate an ordinary procedure or an ordinance procedure for the enforcement of the mortgage.</p> <p>In case of mortgage enforcement based on the notarial formula, the creditor is bound to sell the asset through public auction only, unless the mortgagor has agreed to the sale of the mortgaged asset through any other method allowed by law.</p> <p><i>d) Enforcement of pawns</i></p> <p>Enforcement of claims secured by pawns follows similar rules to the enforcement of pledges. The difference in pawns is that the creditor is already in possession of the pledged asset, so the creditor only needs an order to sell the assets. Enforcement may be different depending on the assets subject to pawn:</p> <ul style="list-style-type: none"> <li>-in the case of the pawn of money or bank accounts, the creditor may enforce the pawn by appropriation (see art. 66<sup>1</sup> of the Law on pledge, as amended by the Law No. 33, of 06.03.2012).</li> <li>-in the case of a pawn over shares, the law explicitly states that the transfer of shares must</li> </ul>
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automatically to the secured creditor upon default, which is prohibited by law (art. 11(5) of the Law on mortgage). The situation must also be distinguished from the case in which, after default, the parties agree to extinguish the claim in exchange for the transfer of ownership of the mortgaged asset to the secured creditor.

<sup>190</sup> See art. 33<sup>1</sup> of the Law on mortgage.

<sup>191</sup> The provision reads as follows: “*In the event of enforcement on the basis of a mortgage agreement endowed with an executory endorsement/force, on the basis of the original of the mortgage agreement endowed with an executory endorsement/force, which contains a provision on the right of the mortgagee to the exercise of the mortgage right on the basis of the executory endorsement made by the notary; a copy of the bank lending agreement or loan agreement that confirms the fact that the time has expired for the payment of arrears, with attached excerpts from bank documents confirming the debtor's arrears as of the date of expiry of the time period indicated in the notification and warning; as well as copies of the notification and warning sent to the debtor in accordance with the requirements of Article 32, and declarations for which the creditor is personally liable to the effect that there is no litigation under way in connection with the mortgage agreement endowed with an executory endorsement/force whose execution is being required and that the period for the payment of arrears has expired*”.

<sup>192</sup> See art. 33(2) in connection with art. 33<sup>1</sup>(3) of the Law on mortgage. There is a fundamental difference between the rules applicable to the enforcement of mortgages through the ordinance procedure and the enforcement based on an executive clause in a notarized agreement: while article 33(2) merely mentions the objections that are specifically applicable to mortgages, article 33<sup>1</sup>(3) makes clear that *only those objections* listed in article 33(2) are applicable in a challenge against the enforcement of a notarized agreement with an executive clause.

	<p>be done subject to the applicable contract and company law rules (art. 66 of the Law on pledge).</p> <p><i>e) Enforcement of claims of financial lessors</i></p> <p>Enforcement of claims arising out of a leasing contract is done in accordance with the provisions of the Law on leasing. The law includes some provisions regarding the protection of the rights of the lessor. In this regard, the law grants the lessor the same treatment as any other owner of an asset, for the protection of its rights, including in the case of the insolvency of the lessee (art. 16 of the Law on leasing). The lessor can claim the asset when the lessee: (i) does not pay the lease installments for more than 30 calendar days from the due date; (ii) does not return the asset as foreseen in the contract; (iii) uses the asset in essential breach of the contract or contrary to its intended purpose; or (iv) limits the lessor's access to the leased asset (see art. 17(2) of the Law on leasing). The lessor has the right to use the ordinance procedure (art. 19(3) of the Law on leasing). For the judicial ordinance procedure, the lessor needs to produce a request, together with the leasing contract, a notification claiming the asset (which must have been received by the lessee at least one month before the initiation of the procedure). The law also specifies that the lessee will bear the costs of the procedure and the expenses of returning the asset. In addition, the lessee will have to pay penalties for the delay in returning the asset, apart from the penalties established in the contract itself.<sup>193</sup></p>
<b>Assessment</b>	<p><b>Materially Non-Observed</b></p> <p>Enforcement of commercial claims represents one of the areas of Moldovan law that is clearly in need of improvement. The defects in the enforcement regime may be partially responsible for serious consequences in the economic system: when enforcement mechanisms are weak and slow, the natural trend of financial institutions is to restrict the flow of credit. This manifests itself in risk aversion in the selection of projects to be financed, and also in over-collateralization in the loans that are granted to businesses. Both phenomena seem to be pervasive in the Moldovan practice. As a matter of fact, over-collateralization is frequently based on a track record of credit recovery at the courts, and it reflects, at least in part, the expectations about the difficulty and duration of enforcement procedures.</p> <p>Currently, the operation of the enforcement regime in practice is fraught with difficulties.</p> <p>Indeed, most of the claims of lenders and suppliers can be enforced using the ordinance procedure, instead of the slower and more cumbersome ordinary procedure. However, the ordinance procedure has not achieved its objective of providing a fast-track alternative for claims provided with an executive title. The use –and especially, the abuse– of defenses in the ordinance procedure have transformed, in many cases, the ordinance procedure into a <i>de facto</i> preliminary phase of a full ordinary procedure. Ironically, the result is that the time frame for enforcement may be <i>extended</i> if the creditor opts for the ordinance procedure.</p> <p>Both in ordinary procedures and in ordinance procedures, recalcitrant debtors and their legal advisors seem to frequently employ various delaying tactics. Indeed, there are instruments in the procedural legislation to punish these abuses: the Civil Procedure Code enunciates a general duty of good faith for litigants, and it expressly mentions that “<i>Any abuse of these rights with a view of delaying the process or misleading the court shall be restrained by the court</i>” (art. 61 of the Civil Procedure Code). The Civil Procedure Code allows judges to impose procedural sanctions (see art. 10 of the Civil Procedure Code). However, it seems that in practice judges do not use their ability to control the process and</p>

<sup>193</sup> Penalties are set by law at the double of the amounts that would correspond to the relevant time period, according to the leasing contract (see art. 19(6) of the Law on leasing).

	<p>to protect it from abuse and very rarely impose the sanctions. Similarly, it is also possible for the court to impose fines on the parties who have committed procedural violations (art. 161 of the Civil Procedure Code), but it seems that the application of this provision is also extraordinary.</p> <p>Enforcement of secured claims is of paramount importance in the Moldovan system, due to the extensive use of security interest by financial creditors (see Principle A1). The special rules for the enforcement of secured claims have been designed with the intention of fast-tracking the procedures. The time frames for the procedure to transfer possession of the pledged assets are extremely short, although it is by no means clear that these time frames are always observed in practice. Another positive trait of these procedures is that they take into account, to a certain extent, the risk of depreciation of assets to speed up the procedure (see art.71(3) of the Law on pledge). Finally, the fact that appeals in the enforcement of secured claims do not always suspend the enforcement actions, as opposed to the regulation of general procedures, also represents an advantage.</p> <p>It is not clear, however, that the enforcement procedures for secured claims achieve their objectives: recalcitrant debtors may still use objections and defenses to delay the procedures, and they may even use counter-claims against the enforcing creditors (based, for instance, on the lack of consideration of the interests of the grantor in the sale of the asset).</p> <p>The general inadequacy of the enforcement procedures has prompted the legislature to introduce an out-of-court enforcement mechanism for mortgages. This procedure, based on a notarized agreement with an executive clause, has not been tested yet. Mortgage lenders are including executive clauses in the mortgage agreements, although it is too early to assess the enforcement practice. Past experiences with out-of-court enforcement of notarized agreements have been positive.</p> <p>The enforcement of the enterprise pledge, as other aspects of its regime, seems particularly confusing. Specifically, the possibility of enforcing the pledge by a receivership or fiduciary administration, which is not suspended in the case of insolvency of the grantor of the enterprise pledge, is in contradiction with basic principles of the insolvency regime, based on the reorganization of viable enterprises and the liquidation of enterprises that are not viable, under the supervision of the court and for the benefit of all creditors.</p> <p>The procedure to recover claims arising out of financial leases is very similar to the procedure to enforce secured claims, and does not provide lessors with a more robust and faster mechanism to recover possession of the leased asset.</p> <p>Lastly, it is important to underline that the efficiency of an enforcement regime is based on the quality of the institutional framework. In this regard, the considerations included in this report on the role and status of the judiciary (see Principles D1-D6) are fully applicable – with the added concern of the lack of expertise of trial judges in commercial matters.</p> <p>Regarding the bailiffs and their function in the enforcement regime, it is fair to observe that, since their “privatization”, bailiffs seem to have increased their efficiency. Bailiffs have the correct incentives to increase the efficiency of the enforcement procedures, since their remuneration is variable (a percentage of 3% to 5% of the amounts recovered<sup>194</sup>). However, there are instances of conflicts of interest and unethical behavior on the part of bailiffs. There is also anecdotal evidence of bad practices in the conduct of auctions, attributable to the undue influence of third parties, or to collusion among participants. And there are reports of bailiffs refusing to release assets to secured creditors, even when the chance of recovering value in excess of the secured claims is slim, out of a desire to earn a</p>
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<sup>194</sup> See art. 38 of the Enforcement Code.

	commission on the sale (see Principle D6).
<b>Comment</b>	<p>There are still possibilities of further simplification of the enforcement procedures under Moldovan law. Reforms of the civil procedure law should target the ordinance procedure, given the fact that most commercial and financial claims can be enforced through this procedure. In this regard, the regulation of defenses and objections could benefit from the introduction of a limited list of admissible defenses, instead of the current non-exclusive approach. The regime of appeals in the ordinance procedure and in the enforcement phase should eliminate all possibilities of suspending enforcement, moving to a redress system in which the defendant is able to claim damages after the claim has been enforced. Additional protection measures, such as bonds posted by enforcing creditors, may be adopted if needed, but without stopping enforcement of the claim. It is important that judges apply the provisions that target abuse of process and impose sanctions for bad faith litigation.</p> <p>Although the ordinance procedure should continue to represent the backbone of enforcement of commercial claims in Moldova, a comprehensive reform of the secured transactions regime would probably benefit from other improvements of the enforcement regime. Although it is too early to assess the effectiveness of the new out-of-court enforcement mechanism for mortgages, if the system proves successful, the Moldovan authorities could consider the possibility of extending that regime to pledges of movable assets.<sup>195</sup> As a matter of fact, speed of enforcement is even more important for security interests over movable assets than for mortgages, due to the higher risks of depreciation and loss of the collateral. Out-of-court enforcement of pledges could provide a much needed impulse to the use of these security interests in Moldovan practice. Naturally, it is crucial that an out-of-court enforcement mechanism is backed by the intervention of the bailiffs and the intervention of the courts, if required, but without creating opportunities for abusing the mechanism and turning an out-of-court mechanism into a full judicial enforcement procedure. At the same time, the position of grantors will be protected by the possibility of claiming damages for irregularities in enforcement. Courts should also be vigilant of abuses committed by creditors and impose penalties for improper enforcement of pledges.</p> <p>The system could also be applied to the enforcement of claims arising out of financial leases: in a unitary approach to secured transactions, there is no difference between security interests over movable assets and any other technique with the function of protecting the position of the financier, such as financial leases. If a non-unitary approach is preserved, it would be necessary to introduce a special summary procedure to recover possession of the asset, and/or claim the balance owed under the leasing contract.</p> <p>The manner of enforcement of the enterprise pledge should be clarified.<sup>196</sup></p> <p>The importance of improving the enforcement regime of secured claims cannot be exaggerated: it is essential that creditors recover their claims within a reasonable time after default. The efficiency of the enforcement regime has a direct impact on access to credit and also on the cost of credit to enterprises.</p> <p>The enforcement regime would also benefit from the adoption of the recommendations to reinforce the judicial structure that are included in this report (see Principles D1-D6). The regulation of bailiffs could be improved: a draft reform law on bailiffs, presented in January 2014, has the objective of strengthening the institutional and functional capacities of the Disciplinary Board of Bailiffs and Licensing Commission, improving the process of admission to the profession of bailiff. The draft law seeks to increase the accountability of bailiffs by reinforcing the supervisory and sanctioning regime. The introduction of this reform could increase the transparency and reliability of enforcement practice in Moldova.</p>

<sup>195</sup> Draft legislation reforming the Law on pledge suggests introducing such out-of-court enforcement mechanism.

<sup>196</sup> Draft legislation reforming the Law on pledge suggests introducing amendments to the concept of the enterprise pledge, which will be a pledge over the movable assets and will follow the ordinary procedure for enforcement.

	<b>PART B. RISK MANAGEMENT AND CORPORATE WORKOUT</b>
<b>Principle B1</b>	<p><b>Credit Information Systems</b></p> <p>A modern credit-based economy requires access to complete, accurate and reliable information concerning borrowers' payment histories. Key features of a credit information system should address the following:</p> <p><b>B1.1</b> <i>Legal framework.</i> The legal environment should not impede and, ideally should provide the framework for, the creation and operation of effective credit information systems. Libel and similar laws have the potential of constraining good faith reporting by credit information systems. While the accuracy of information reported is an important value, credit information systems should be afforded legal protection sufficient to encourage their activities without eliminating incentives to maintain high levels of accuracy.</p> <p><b>B1.2</b> <i>Operations.</i> Permissible uses of information from credit information systems should be clearly circumscribed, especially regarding information about individuals. Measures should be employed to safeguard information contained in the credit information system. Incentives should exist to maintain the integrity of the database. The legal system should create incentives for credit information services to collect and maintain a broad range of information on a significant part of the population.</p> <p><b>B1.3</b> <i>Public policy.</i> Legal controls on the type of information collected and distributed by credit information systems can be used to advance public policies. Legal controls on the type of information collected and distributed by credit information systems may be used to combat certain types of societal discrimination, such as discrimination based on race, gender, national origin, marital status, political affiliation, or union membership. There may be public policy reasons to restrict the ability of credit information services to report negative information beyond a certain period of time, e.g., five or seven years.</p> <p><b>B1.4</b> <i>Privacy.</i> Subjects of information in credit information systems should be made aware of the existence of such systems and, in particular, should be notified when information from such systems is used to make adverse decisions about them. Subjects of information in credit information systems should be able to access information maintained in the credit information service about them. Subjects of information in credit information systems should be able to dispute inaccurate or incomplete information and mechanisms should exist to have such disputes investigated and have errors corrected.</p> <p><b>B1.5</b> <i>Enforcement/Supervision.</i> One benefit of the establishment of a credit information system is to permit regulators to assess an institution's risk exposure, thus giving the institution the tools and incentives to do it itself. Enforcement systems should provide efficient, inexpensive, transparent and predictable methods for resolving disputes concerning the operation of credit information systems. Both non-judicial and judicial enforcement methods should be considered. Sanctions for violations of laws regulating credit information systems should be sufficiently stringent to encourage compliance but not so stringent as to discourage operations of such systems.</p>
<b>Description</b>	<i>Overview</i>

	<p>Presently there is one Credit History Bureau in operation in Moldova, the I.M. “Biroul de Credit” S.R.L.<sup>197</sup> The Bureau received its license in 2010 and became operational in 2011. It is operating pursuant to the Law on Credit History Bureaus, 2008 which has entered into force in 2009 (the Law on CHB).<sup>198</sup> The credit bureau was established as a private entity (limited liability company).<sup>199</sup> It is licensed and prudentially supervised by the National Commission of the Financial Market (NCFM).</p> <p>Pursuant to the Law on CHB, the activity of the Credit Bureau shall include services for establishing, processing and storing credit histories, as well as credit history submissions, and other related services.<sup>200</sup></p> <p><i>Type of information; completeness of the information</i></p> <p>Commercial banks are required under the Law on CBH to provide all the information they have about all the debtors who consented to have the given information shared, to at least one credit history bureau.<sup>201</sup> It is understood, that banks are required by the NBM to demand such consent as a condition for granting a loan. Banks are also encouraged to utilize the Credit Bureau through National Bank of Moldova (NBM) Regulations which impose more stringent provisions requirements in case the bank does not consult the Credit Bureau.</p> <p>Other non-bank institutions may be sources of information under the Law on CBH. These may include insurance companies, leasing companies, loan and savings associations and micro-financing organizations.<sup>202</sup> Currently, the participation of non-bank institutions is not obligatory, though, but rather optional based on an agreement between the institution and the Credit Bureau.<sup>203</sup> There are also no mechanisms (e.g. requirements of supervisory authorities) for incentivizing these institutions to utilize the Credit Bureau. In practice, it is currently only the commercial banks that provide information and utilize the information available in the Credit Bureau. A draft law with proposed amendments to the Law on CHB would make participation by other institutions beyond commercial banks, as resources of information, obligatory. The Credit Bureau is also in the process of establishing agreements with additional non-bank users.</p> <p>As aforementioned, commercial banks provide information on their borrowers to the extent that borrowers consented to have the given information shared. Credit history information is provided both for natural and legal entities. The data provided should include, inter alia, information on the credit history subject, information about the requested credit, information about the credit granted and about the method of repayment.<sup>204</sup> The credit history may include positive and negative information, including information about insolvency proceedings, to the extent known to the credit history provider, namely the bank. Should a credit history subject<sup>205</sup> refuse to grant permission to a source of credit history formation to provide a Credit Bureau with any information, the</p>
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<sup>197</sup> See the Biroul de Credit’s website: <http://www.creditbureau.md/>.

<sup>198</sup> The Law on Credit History Bureaus No. 122 of 29.05.2008; entered into force on 01.03.2009.

<sup>199</sup> Its founders are 14 commercial banks and 2 leasing companies.

<sup>200</sup> Art. 2 of the Law on CHB.

<sup>201</sup> Art. 6(2) of the Law on CHB.

<sup>202</sup> Art. 2 of the Law on CHB.

<sup>203</sup> Art. 6(1) of the Law on CHB.

<sup>204</sup> Art. 5 of the Law on CHB.

<sup>205</sup> Subject of credit history is any individual or legal entity being granted a credit, based on the loan agreement, and in respect of whom a credit history shall be formed.



	<p>Credit bureau should receive the information about the subject together with a standard notice: “Consent not granted”.<sup>206</sup> The Credit Bureau currently has credit histories in its database with regard to about 185,300 individuals (about 1000 of which are entrepreneurs) and about 10,500 legal entities. The total adult population in Moldova is 2,347,397. There are 164,566 legal entities registered in Moldova but reportedly the number of active entities is much lower.<sup>207</sup></p> <p>The Credit Bureau may access non-confidential data from the population registry, the companies’ registrar and the individual entrepreneurs’ registrar for the purpose of checking the credit information.<sup>208</sup> However, the Law on CBH does not provide for the Credit Bureau’s access to other open public registers or the possibility of a data exchange between the Credit Bureau’s databases and such public registers (e.g. the Pledge register, the <i>cadastru</i>, and the register of Intellectual Property). The draft law with proposed amendments to the Law on CHB includes provisions on access to such registries.</p> <p>Market participants express concern about the reliability of the information provided by the Credit Bureau. Access to the information for users is also considered relatively expensive.<sup>209</sup> Some stakeholders report minimal interest in using the Credit Bureau as they mistrust the completeness of the information. Concern has been expressed that banks may be selective in the information they provide. Additionally, reportedly only the large banks report information while smaller lenders do not. Currently, there is no mechanism to scrutinize the completeness of the information provided. The NCFM shall review the operations of the Credit Bureau and shall respond to requests for review or complaints by sources or subjects (see below). Yet, it is doubtful that such review could track gaps in information provided to the Bureau. The fact that the Credit Bureau only receives information from commercial banks, and not from any other institutions, is another source for concern and complaint by participants.</p> <p>The NBM is currently in the process of establishing a Credit Registry. The intention is that the Credit Registry, after it is established, will be connected to the Credit Bureau. The NBM will then be able to compare the information provided to the Bureau with the data in the Credit Registry.</p> <p><i>Access to information, safeguards and controls</i></p> <p>The Credit Bureau provides credit reports to its users based upon an information services delivery agreement signed between the Credit Bureau and the user, and upon request.<sup>210</sup> The agreement also sets the cost of the information services rendered by the Credit Bureau.<sup>211</sup></p> <p>Subjects (regarding which a credit history is made) are entitled to receive the reports on their credit history from the Credit Bureau where their records are kept. The first request is free of charge, while any other requests during the same year shall be charged (it is understood that thus far this service was provided for free). A credit history subject is not obliged to state the reasons underlying its request and is entitled to receive all information collected in accordance with the law, including regarding the sources that have delivered</p>
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<sup>206</sup> Art. 6(5) of the Law on CHB.

<sup>207</sup> Source: Credit Bureau.

<sup>208</sup> Art. 11 of the Law on CHB.

<sup>209</sup> According to the Credit Bureau, for commercial banks the price derives from the number of monthly reports and ranges between 26-40 MDL per report (excluding VAT). For non banks the minimum monthly subscription is 1350 MDL (excluding VAT) which includes the provision of 30 credit reports; and 45 MDL (excluding VAT) for each additional credit report.

<sup>210</sup> Art. 7 of the Law on CHB.

<sup>211</sup> Art. 9 of the Law on CHB.

	<p>such information and users who have requested and received information regarding its personal credit history.<sup>212</sup></p> <p>The exchange of credit history information between the Credit Bureau and its sources is protected under the law, which specifies that the Credit Bureau and its users are obliged to ensure the confidentiality of data received from the lenders, and to ensure the protection of that information.<sup>213</sup></p> <p>The Credit Bureau must be licensed by the NCFM, for the purposes of ensuring security of credit history processing and storage.<sup>214</sup> The Credit Bureau must ensure the protection and storage of credit history data for 7 years after the last date of changes in the debtor's information.<sup>215</sup></p> <p>As mentioned above, a credit history file may be established in relation to a legal entity or an individual only when the data subject has provided the prior consent in this respect. To protect the privacy of credit history subjects, the law provides that use of credit history data by authorized users is allowed for the sole purpose of assessing risks when providing a credit to the subject and/or for managing a current credit account.<sup>216</sup></p> <p>Procedures and standards of credit history data collection, storing, processing, submission and deletion are established by the NCFM. The NCFM is vested with the power to regulate and supervise the activity of credit bureaus, draft normative acts of procedural character regulating the relations and processes occurring between credit history sources, users, subjects and bureaus and verify the credit bureaus' compliance with the legislation. The NCFM shall also ensure that credit bureaus are not subject to controls more than once a year, except situations in which requests and complaints are filed by credit history sources, subjects or bureaus themselves.<sup>217</sup></p> <p>To date, no active inspection of the Credit Bureau took place by the NCFM. Reportedly no complaints have been submitted thus far. Off-site supervision takes place by way of receiving some reports from the Credit Bureau on the evolution of the database.</p> <p>Subjects on which records are kept in the Bureau are entitled to challenge, in part or in full, any information included in their credit history by filing with the Credit Bureau (where the credit history is stored<sup>218</sup>) a request for amendments and/or additions to the credit history. Within 30 calendar days from the date a request was filed, the Credit Bureau has to run additional check-ups on the credit history data, requesting this information from the credit history sources. A specific note on this is entered into the credit history of the subject while verifications are being carried out. Should the information laid out in the credit history subject's request prove true, the Credit Bureau shall make amendments to the challenged part of the credit history and inform the subject on the outcome of its request (which in case of refusal, shall be justified).<sup>219</sup></p> <p>In case of disputes, the credit history subject may petition the NCFM and/or the court. When the Credit Bureau and/or any of its officers are in violation of the law, they shall be</p>
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<sup>212</sup> Art. 10 of the Law on CHB.

<sup>213</sup> Art. 9 of the Law on CHB.

<sup>214</sup> Art. 12 of the Law on CHB.

<sup>215</sup> Art. 8 of the Law on CHB.

<sup>216</sup> Art. 4 of the Law on CHB.

<sup>217</sup> Art. 15 of the Law on CHB.

<sup>218</sup> As mentioned above, currently there is only one such Bureau.

<sup>219</sup> Art. 10 of the Law on CHB.

	<p>held liable in accordance with the provisions of civil, administrative and tort legislation. Specifically, when having identified a violation, the NCFM shall issue a mandatory ordinance indicating a time frame for remediation. Should such a prescription be disregarded, the NCFM shall issue a decision, which depending on the particular violation may impose administrative fine, the license suspension or even the license withdrawal.<sup>220</sup></p>
<b>Assessment</b>	<p><b>Materially Non-Observed</b></p> <p>A credit history bureau was established fairly recently in Moldova. It operates as a private entity, is supervised by the NCFM, and receives its information from bank lenders. However, significant concerns remain regarding the effectiveness of the Bureau. Indeed, there are several critical limitations of the Bureau and the legal framework supporting it.</p> <p>First, only the commercial banks are obliged under the Law on CHB to provide information to the Bureau. Indeed, banks are also incentivized to use the Bureau by NBM Regulation. However, non-bank lenders as well as non-financial creditors such as utilities currently do not participate in the system. Non-bank lenders may participate if they enter into an agreement with the Bureau and reportedly efforts are underway to enter into such agreements with some of the non-bank lenders (as noted above, a draft law also proposes to make participation by leasing companies and microfinance institutions obligatory<sup>221</sup>).</p> <p>Second and reportedly, there is a concern that information provided by commercial banks is incomplete, and that not all banks provide information to the Credit Bureau. Apparently some small banks do not provide such information.<sup>222</sup></p> <p>Third, oversight of the information provided to the Bureau seems very limited. The NCFM which is the designated supervisory authority has not to date conducted any inspection of the Bureau. Its supervision is minimal and has thus far been confined to receiving reports from the Bureau on the evolution of the data. The NBM does not have access to the Bureau. It is understood that the NBM is in the process of establishing a Credit Registry which will enable the NBM to assess risk exposure and which will also be connected to the Credit Bureau.</p> <p>Fourth, the Law on CHB does not oblige lenders who make adverse credit decisions on the basis of a bad credit report to disclose this fact to the potential borrower.</p>
<b>Comment</b>	<p>Given that the Credit Bureau is presently the only provider of credit history services, vigilant oversight of the Credit Bureau and the data provided to it is advisable. The reported plan to establish by the NBM a credit registry that will also be connected to the Credit Bureau is likely to improve the credit information system considerably and should be taken on board. Efforts to broaden the range of the Credit Bureau's database by incorporating information from nonbank credit institutions should continue. Such expansion would help micro and small enterprise establish a credit history. Participation by non-financial repeat creditors such as utilities should also be considered. Lenders should also be required to disclose to borrowers information on adverse credit decisions which materially rely on an adverse credit report.</p>
<b>Principle B2</b>	<p><b>Director and Officer Accountability</b></p> <p>Laws governing director and officer liability for decisions detrimental to creditors made when an enterprise is in financial distress or insolvent should promote responsible corporate behavior while fostering reasonable risk taking. At a minimum, standards should hold</p>

<sup>220</sup> Art. 17 of the Law on CHB.

<sup>221</sup> See also Report No ACS4414-B, Republic of Moldova, Enterprise Access to Finance, Background Note, June 2013.

<sup>222</sup> The NCFM reports that its own data reflects that all commercial banks provide this information, and that no facts and complaints to the contrary have been received by the NCFM.

	management accountable for harm to creditors resulting from willful, reckless or grossly negligent conduct. <sup>223</sup>
<b>Description</b>	<p><b>Overview</b></p> <p>The Insolvency Law contains several provisions designed to sanction corporate decision makers for decisions and actions considered to be detrimental to creditors. In addition, the Insolvency Law contains provisions regarding the disqualification of directors/officers. The officer/director liability provisions in the Insolvency Law are bolstered by other pieces of legislation, which impose criminal and administrative sanctions for certain acts and decisions.<sup>224</sup> The Joint Stock Company (JSC) Law too contains a provision regarding the obligation of company officers in relation to causing insolvency.<sup>225</sup></p> <p>In general, these provisions can be divided into two categories:</p> <ul style="list-style-type: none"> <li>• provisions designed to encourage responsible decision-making concerning the decision to file an insolvency petition; and</li> <li>• provisions designed to sanction specific decisions or acts that are considered to be harmful to the debtor or its creditors.</li> </ul> <p>These two categories of provisions addressing the liability of officers and directors for irresponsible and/or improper corporate behavior are discussed in greater detail below.</p> <p><b>Liability for failing to file insolvency proceeding</b></p> <p>The Insolvency Law requires insolvent debtors to file an insolvency petition immediately and no later than 30 calendar days after the occurrence of the state of insolvency.<sup>226</sup> Debtors must also file insolvency proceeding within the above period of time in the event that the satisfaction of claims of one or more creditors might result in the inability to pay the debts of other creditors when they are due.<sup>227</sup> A failure to file within the specified time period results in liability to creditors ('subsidiary liability') for all obligations that occurred after the end of the time period. Liability may be invoked by the insolvency administrator/liquidator during the insolvency process.<sup>228</sup> It also qualifies as a criminal liability, though thus far the Criminal Code has not been amended to include provisions to this effect.</p> <p>Reportedly, this provision is rarely invoked in practice. Market participants observe that it is often unclear at what time the grounds for insolvency have emerged. There is often lack of resources and funds available to support the initiation of proceedings against directors.</p> <p>The Insolvency Law also permits non-insolvent debtors to file for the special procedure of accelerated restructuring, if they are experiencing financial difficulties.<sup>229</sup> Yet, a debtor has</p>

<sup>223</sup> This principle addresses only accountabilities of directors and officers in the period when a company is facing an imminent risk of insolvency. General principles for corporate governance and officer and director liability to its shareholders are dealt with under the OECD Principles for Corporate Governance.

<sup>224</sup> Art. 288 of the Contravention Code provide that any breach of the insolvency law is punishable by a fine of 40 to 50 conventional units (MDL 800 to 1000 or approx. EUR 45 to 56). The Criminal Code might be invoked, for instance, where the debtor caused damages through a deception, alienation, substitution or concealment of goods (art. 196 and 251 of the Criminal Code). See also below, the criminal offences of intentional and fictitious insolvency.

<sup>225</sup> Art. 74(2)(a) of the JSC law.

<sup>226</sup> Art. 14(1), (3) of the Insolvency Law. The grounds for instituting insolvency proceeding are delineated in art. 10.

<sup>227</sup> Art. 14(2)(a) of the Insolvency Law. Filing is also obligatory if within winding down procedures carried under a different law, it becomes apparent that the debtor cannot fully satisfy the claims of its creditors.

<sup>228</sup> Art. 248 of the Insolvency Law.

<sup>229</sup> Art. 219 (see Principle C4 and C14).

	<p>a right rather than an obligation to act at times of imminent (and before actual) insolvency, and the right is limited to the filing of accelerated restructuring.</p> <p><b>Harmful decisions/Acts</b></p> <p><i>Liability for intentional and fictitious insolvency; liability for causing insolvency</i></p> <p>Directors and officers may be liable for intentional (deliberate) or fictitious insolvency. Under the Insolvency Law, insolvency is deemed intentional, when occurring at the fault of the debtors' controllers (see further below on corporate controllers' liability). The responsible decision makers shall be liable (they will bear 'subsidiary liability') toward creditors in an amount in which debtor's assets are insufficient to discharge the creditors' claims.<sup>230</sup></p> <p>Decision makers are also liable for damages caused to the creditors due to filing for insolvency, when the debtor filed for insolvency while having real possibilities to discharge in full the creditors' claims ('fictitious' insolvency).<sup>231</sup></p> <p>Fictitious or intentional insolvency may also lead to criminal charges under the Criminal Code.<sup>232</sup></p> <p>Article 248 specifies that at the request of the insolvency administrator/liquidator, the court may order that part of the debtor's indebtedness be discharged by the directors and key executive officers who caused the debtor's insolvency by the taking of one of the following actions:</p> <ul style="list-style-type: none"> <li>a) use of the debtor's property or borrowings in personal interest;</li> <li>b) carrying out a commercial activity in personal interest under the debtor's coverage;</li> <li>c) fictitious increase of debtors' liabilities and/or stripping or hiding part of the debtor's assets;</li> <li>d) purchase of funds to the debtor at inflated prices;</li> <li>e) fictitious or unlawful accounting, contributing to the disappearance of accounting documents, incorporation documents or stamp;</li> <li>f) ordering the debtor to continue an activity that clearly leads him to insolvency;</li> <li>g) ordering, in the month precedent the payment stoppage, payments to be made preferentially to a creditor while damaging the other creditors;</li> <li>h) failure to apply for insolvency within 30 days after occurrence of the insolvency grounds; (see above)</li> <li>i) committing other actions that have damaged the property of the debtor.</li> </ul>
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<sup>230</sup> Art. 15(1) of the Insolvency Law.

<sup>231</sup> Art. 15(2) of the Insolvency Law.

<sup>232</sup> Pursuant to art. 252 of the Criminal Code intentional insolvency that causes large-scale damage to the creditor shall be punished by a fine in the amount of 300 to 600 conventional units (MDL 6 000 - MDL 12 000 or approx. EUR 320 - EUR 640) or by imprisonment for up to 2 years, in both cases with the deprivation of the right to hold certain positions or to practice certain activities for up to 5 years. The same action committed by two or more persons causing damage on an especially large scale shall be punished by a fine in the amount of 500 to 1000 conventional units (MDL 10 000 - MDL 20 000 or approx. EUR 535 - EUR 1070) or by imprisonment for up to 3 years, in both cases with the deprivation of the right to hold certain positions or to practice certain activities for up to 5 years. Pursuant to art. 253, fictitious insolvency that causes large-scale damage to the creditor shall be punished by a fine in the amount of 300 to 600 conventional units (MDL 6 000 - MDL 12 000 or approx. EUR 320 - EUR 640) or by imprisonment for up to 3 years, in both cases with the deprivation of the right to hold certain positions or to practice certain activities for up to 5 years. The same action committed by two or more persons causing damage on an especially large scale shall be punished by a fine in the amount of 500 to 1000 conventional units (MDL 10 000 - MDL 20 000 or approx. EUR 535 - EUR 1070) or by imprisonment for up to 4 years, in both cases with the deprivation of the right to hold certain positions or to practice certain activities for up to 5 years. See also art. 74(1) of the JSC law which provides that officers shall be liable for the damage caused to the company in conformity with this law, criminal, administrative and labor legislation; and art. 74(2)(a) which provides that the company officers shall bear proprietary and other liabilities envisioned in the legislation in the event that they caused deliberate bankruptcy of the company.

	<p>Reportedly, these provisions are rarely invoked in practice. There is often lack of resources and funds available to support the initiation of proceedings against directors. Imposition of criminal sanctions is even rarer.</p> <p><i>Disqualifications provisions and other sanctions</i></p> <p>When the debtor's director or officer is found to have deliberately or negligently contributed to the insolvency, such party can be deprived through a court judgment on termination of insolvency proceedings (<i>ex officio</i>) of the rights:</p> <ul style="list-style-type: none"> <li>(i) to be elected or appointed to a public function or continue holding public office;</li> <li>(ii) to act as administrator/liquidator in insolvency proceedings;</li> <li>(iii) to be a member of a governing or control body in a company or a savings and loan association.<sup>233</sup></li> </ul> <p>The period of disqualification may be between 12 months and five years.<sup>234</sup></p> <p>Reportedly, courts are very reluctant to take advantage of the <i>ex officio</i> disqualification provisions.</p> <p><b>Extension of liability to corporate controllers and other persons bearing responsibility</b></p> <p>Liability for failing to file insolvency proceedings on time extends to persons who according to the law have the right to represent the debtor and shareholders with unlimited liability.<sup>235</sup></p> <p>Liability for intentional and fictitious insolvency may extend to shareholders, members of the debtor's executive body, or other persons having the right to give instructions or being capable by other means to influence the debtor.<sup>236</sup> Members of a debtor's governing bodies include the managers of companies, members of executive bodies, members of boards responsible for supervision and accountants.<sup>237</sup></p> <p>Liability under article 248 (for causing insolvency; see above) may extend to the members of the debtor's governing body (see definition above) as well as to any other person who contributed to the debtor's insolvency through the performance of the delineated actions. However, article 248 also refers to the failure to file insolvency proceedings on time (that, as noted above, is narrower in terms of the persons who may be liable under the provision), and it is not clear which of the provisions prevail.</p> <p>It is thus possible under the law that persons beyond the appointed directors, including controlling shareholders and persons with actual influence on management, would be liable for harm caused to creditors as a result of various types of misconduct. However, the interplay between articles 14 and 248 is unclear. Article 14 (on late filing) refers to a more limited range of persons who may be liable (shareholders with unlimited liability and representatives of the debtor), while article 248 is wider (any person may be liable). Yet, article 248 also includes failure to file (under article 14) as one of the reasons for liability.</p>
<b>Assessment</b>	<b>Materially Non-Observed</b>

<sup>233</sup> Art. 227 of the Insolvency Law.

<sup>234</sup> Art. 228 of the Insolvency Law.

<sup>235</sup> Art. 14(4) of the Insolvency Law. The article also refers to the debtor's appointed liquidator.

<sup>236</sup> Art. 15 of the Insolvency Law.

<sup>237</sup> Art. 247 of the Insolvency Law. It also includes liquidators and members of liquidation commissions.

	<p>Some useful mechanisms exist to incentivize the debtor's managers to act responsibly, and consider the interests of the creditors, but they can be improved.</p> <p>The Insolvency Law requires debtors to file a petition within 30 days of the occurrence of the state of insolvency. It also permits non-insolvent debtors to file for accelerated restructuring if they are experiencing financial difficulties. Other provisions impose liability on directors and other corporate controllers for committing various fraudulent acts and for causing insolvency. Liability may also be based on intentional or fictitious insolvency. In addition, there are criminal and administrative sanctions which may be imposed on directors and other corporate controllers, as well as disqualification provisions.</p> <p>The key problem, however, is that the provisions do not provide a clear standard that informs corporate controllers of what is expected and required of them at time of financial distress, and even before insolvency becomes a fact. In particular, corporate decision makers are not sufficiently encouraged to properly consider the interests of the stakeholders as a whole, and take adequate actions to minimize harm and potentially rescue the business at an early stage, when the company is in financial distress. Indeed, they are also not yet accustomed to taking such interests into account as a part of their duties, nor are they accustomed to pursuing restructuring alternatives, which involves a level of trust of both the lending institutions and the legal structures that is not yet present among managers.</p> <p>Under the law, the debtor is obliged to file an insolvency petition within a specific period of time. Yet, the obligation arises only after the company becomes insolvent. Debtors are not obliged or sufficiently encouraged to consider restructuring possibilities, in or out-of-court, to negotiate with their creditors, to closely monitor their accounts etc., at times of financial distress. They are permitted to initiate accelerated restructuring proceeding, but there are no other obligations imposed on them in this respect. In fact, debtors may be discouraged to initiate insolvency proceedings as they may be exposed to liability for fictitious insolvency, which arises whenever insolvency was not real and the debtor could have paid its debts. The interplay between article 15 of the Insolvency Law regarding fictitious insolvency and the accelerated restructuring process is not sufficiently clear.</p> <p>Furthermore, the provisions of debtors' duties do not include 'safe harbor' provisions regarding transactions and actions that may be taken in the course of out-of-court restructuring efforts and good faith negotiations with creditors, including where the debtor was already insolvent. Thus, debtors may be liable for a failure to initiate insolvency proceeding on time, even though they were engaged in negotiations or a workout.</p> <p>Liability is extended to persons beyond the appointed directors which is an important feature of the law. Indeed, other persons, including de facto and 'shadow' directors may be those responsible for harm caused to creditors. There is some ambiguity in the law, though, as different provisions regarding debtor liability refer to different type of persons even though there is a cross-reference between the provisions. The extension of liability to any person who contributed to the debtor's insolvency including accountants, in circumstances of actions less serious than fraud, merit caution, though, especially as professional advisers may act at arm's length and merely provide an advice.</p> <p>Another problem is that the existing provisions, which could provide some redress to creditors in cases of corporate controllers' misconduct, are hardly observed in practice. Courts are reluctant to raise allegations <i>ex officio</i>. Administrators and liquidators often lack the resources to investigate misconduct which occurred prior to the commencement of the proceeding and to pursue such allegations. The law does not explicitly create mechanisms for the funding of proceedings to hold directors liable. There are also no explicit provisions on post-commencement financing (see Principle C9) which could provide additional means for pursuing such actions in appropriate cases.</p>
<b>Comment</b>	<p>The current mechanisms aimed at encouraging good corporate behavior at time of financial distress may be improved by providing with clarity what reasonable steps directors, and other corporate controllers, may take at times of financial distress, namely when they knew or should have known that the business is facing financial difficulties and</p>

	<p>insolvency is imminent, but even before actual insolvency.</p> <p>Such steps may include consideration of restructuring in or out of court, close monitoring of accounts, negotiations with creditors etc. The UNCITRAL Legislative Guide Part IV which is dedicated to the topic of directors' obligations in the period approaching insolvency<sup>238</sup> can provide further details on policy options. The law may specify such steps in 'positive terms' (e.g. the requirement to closely monitor accounts), rather than only negatively indicate the unaccepted behavior (e.g. misusing of company assets).</p> <p>The law may also include 'safe harbor' provisions excluding liability for late filing in case of good faith negotiations or restructuring efforts and transactions or actions that may be taken by the debtor in this respect. It may also clarify that no liability of fictitious filing may arise in circumstances of good faith filing for restructuring.</p> <p>Mechanisms for funding of actions under the provisions, e.g. through allowing administrators to assign such claims to third parties and creditors that may pursue such actions on behalf of the estate and through the facilitation of post commencement finance (see Principle C9), may encourage more robust use of the provisions.</p> <p>Clarifications regarding the circumstances where controlling shareholders may be liable, and restrictions on liability of professionals would also be of merit.</p>
<b>Principle B3</b>	<p><b>Enabling Legislative Framework</b></p> <p>Corporate workouts and restructurings should be supported by an enabling environment that encourages participants to engage in consensual arrangements designed to restore an enterprise to financial viability. An environment that enables debt and enterprise restructuring includes laws and procedures that:</p> <p><b>B3.1</b> Require disclosure of or ensure access to timely, reliable and accurate financial information on the distressed enterprise;</p> <p><b>B3.2</b> Encourage lending to, investment in or recapitalization of viable financially distressed enterprises;</p> <p><b>B3.3</b> Flexibly accommodate a broad range of restructuring activities, involving asset sales, discounted debt sales, debt write-offs, debt reschedulings, debt and enterprise restructurings, and exchange offerings (debt-to-debt and debt-to-equity exchanges);</p> <p><b>B3.4</b> Provide favorable or neutral tax treatment with respect to losses or write-offs that are necessary to achieve a debt restructuring based on the real market value of the assets subject to the transaction;</p> <p><b>B3.5</b> Address regulatory impediments that may affect enterprise reorganizations.</p> <p><b>B3.6</b> Give creditors reliable recourse to enforcement as outlined in Section A and to liquidation and/or reorganization proceedings as outlined in Section C of these Principles.</p>
<b>Description</b>	<p><i>Financial information</i></p> <p>Accounting and financial reporting is primarily regulated by the Accounting Law 2007,<sup>239</sup> to which references are made in other legislation including the Joint Stock Company (JSC) Law,<sup>240</sup> and the Law on Financial Institutions.<sup>241</sup> The Accounting Law specifies how</p>

<sup>238</sup> See <http://uncitral.org/pdf/english/texts/insolven/Leg-Guide-Insol-Part4-ebook-E.pdf>.

<sup>239</sup> Law No. 113-XVI, 2007, as amended (most recent amendment brought by the Law No 324 of 23.12.13, effective from 1 January 2014).

<sup>240</sup> Law No 1134 of 02.04.1997.



	<p>individual entrepreneurs and entities (whether limited liability entities, unlimited entities or JSCs<sup>242</sup>) should maintain their accounting books and records and also specifies the financial reporting standards that should be used in the preparation of financial statements.<sup>243</sup></p> <p>Pursuant to the Accounting Law, farmers, individual entrepreneurs, until their registration as VAT payers, as well as natural persons providing professional services as determined by the instruction of the Ministry of Finances, are required to organize and keep accounting according to the simple entry accounting system and are not required to submit financial statements.<sup>244</sup></p> <p>Entities of a certain size (no more than 9 employees, sale income not exceeding MDL 3 million and a total asset value of assets not exceeding MDL 3 million) are required to apply a simplified double-entry accounting and financial reporting. Larger entities are required to apply full double-entry accounting and submission of full financial statements.</p> <p>The full double-entry regime also applies to the following type of entities:</p> <ul style="list-style-type: none"> <li>- entities owed by a legal person (which is not an SME) shareholder holding more than 35% of the shares</li> <li>- trust companies</li> <li>- entities importing excisable goods</li> <li>- microfinance institutions, savings and loan associations and other participants of the non-banking financial market</li> <li>- currency exchange points and pawnshops</li> <li>- entities from the gambling sector</li> <li>- Public institutions and entities of public interest.<sup>245</sup></li> </ul> <p>Entities which are entitled to use the simple entry accounting system may choose to use the double entry accounting system, and entities entitled to submit simplified financial statements may submit full financial statements.<sup>246</sup></p> <p>Limited liability companies' executive bodies are required to prepare and present to shareholders annual reports on the company's activity,<sup>247</sup> while executive bodies of joint-stock companies shall report quarterly to the board or to shareholders meeting (when the board was not established) on the company's activity.<sup>248</sup></p> <p>Auditing is primarily regulated by the Law on Auditing Activity,<sup>249</sup> which is closely but not fully aligned with the EU's Statutory Audit Directive and other normative acts. The Law stipulates that statutory auditors must use International Standards on Auditing (ISAs) as issued by the International Auditing and Assurance Standards Board (IAASB). The Law on Auditing Activity requires all public interest entities annual financial situations to be</p>
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<sup>241</sup> Law No 550-XIII, 1995 as amended (recently by Law No 164 of 11.07.2012, Law No 31 of 7.03.13, Law No 324 of 23.12.13).

<sup>242</sup> A Joint Stock Company (JSC) is a company with a minimum share capital of MDL 20,000. Only JSCs can have their shares listed in a stock exchange.

<sup>243</sup> See Moldova Accounting and Auditing Report on the Observance of Standards and Codes (ROSC), 2013.

<sup>244</sup> Art. 15 of the Accounting Law.

<sup>245</sup> There are 45 public interest entities in Moldova. The Law on Accounting (art. 3) defines Public Interest Entities as entities with significant importance to the public due to its area of activity and includes financial institutions, investment funds, insurance companies, non-state pension funds and commercial companies listed on a stock exchange.

<sup>246</sup> Art. 15 of the Accounting Law.

<sup>247</sup> Art. 75 of the Law on Limited Liability Companies.

<sup>248</sup> Art. 70 of the Law on Joint Stock Companies.

<sup>249</sup> Law No. 61 on Auditing Activity, effective from January 1, 2008.

	<p>statutory audited, as well as other entities in accordance with the actual legislation conditions. Thus, in accordance with the Law on JSCs the statutory audit is made to some joint stock companies as well. Also, according to the Law on state enterprises, the statutory audit is made to some state enterprises.<sup>250</sup> Other joint-stock companies and limited liability companies are required to elect a statutory audit committee (or individual statutory auditor), which should serve as a control tool for the benefit of shareholders.<sup>251</sup></p> <p>Companies listed on the stock exchange (there are 11 such entities in Moldova) are subject to stringent disclosure requirements pursuant to NCFM Regulation. Such entities must publish their annual and quarterly reports, and ensure that such reports remain accessible to the public for at least 5 years. Annual reports shall contain inter alia annual financial statements, audit reports and management's report.<sup>252</sup></p> <p>As noted in the Moldova Accounting and Auditing Report on the Observance of Standards and Codes (ROSC) prepared by the World Bank in 2013, the Moldovan government has implemented accounting and auditing reforms consistent with good international practices and the European Union <i>acquis communautaire</i>. These include an adoption of new accounting law and a new auditing law; the requirement that public interest entities prepare financial statements in accordance with IFRS<sup>253</sup> (with effect from 2012); the ongoing development of a new set of National Accounting Standards (NAS) to align them more closely with IFRS and the EU directives that regulates the accounting and financial reporting, and new mechanisms to improve oversight over auditors activities. However, the Auditing and Accounting ROSC notes that implementation of these reforms has been hampered by major capacity and resource constraint.</p> <p>The above reform included the establishment of a Financial Statements' Information Service (- the Public Registry)<sup>254</sup> for the collection and public availability of financial statements. According to the Law on Accounting,<sup>255</sup> all public interest entities are required within 120 days and all other entities within 90 days to file their financial statements, together with any required audit reports on them, with the Public Registry. In addition, entities that are statutorily obliged to have an audit of their financial statements are also required to make these audited financial statements available to the public on their own websites.<sup>256</sup> Entities that do not comply with these filing requirements may be subject to fines. However, the Service still remains non-operational and does not have an official website. It currently only collects financial statements without actually publishing them. Transparency is also hampered by lack of enforcement of the requirement that companies subject to statutory audit publish financial statements on corporate websites. Only a limited number of financial statements are actually available on official company websites.</p> <p>Otherwise, third parties have a rather limited access to information on the debtor's state of affairs. Such access is limited to the following sources:</p> <ul style="list-style-type: none"> <li>• notification to creditors, through publication in mass-media, about reduction of</li> </ul>
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<sup>250</sup> Art. 2(2) and 89 of the JSC Law (JSCs which has more than 50 shareholders; or has a share capital of more than 500,000 MDL (approximately USD 41,000); or has its shares listed on the stock exchange; or entities of certain type including commercial banks, insurance companies, investment funds and private pension funds.

<sup>251</sup> Limited liability companies may engage (or when the shareholder's number exceeds 15 are obliged to engage) one or more statutory auditors (*cenזורi*), to produce a management control report which shall be presented to the general meeting of shareholders.

<sup>252</sup> Art. 118 et seq of the Law on Capital Market.

<sup>253</sup> International accounting and reporting standards.

<sup>254</sup> Established under the National Statistics Bureau.

<sup>255</sup> Art. 11 of the Law on Accounting 2008.

<sup>256</sup> Art. 40 of the Accounting Law.

	<p>the share capital;</p> <ul style="list-style-type: none"> <li>individual and public notification to creditors on initiation of reorganization<sup>257</sup> and voluntary liquidation<sup>258</sup> of the company.</li> </ul> <p>Holders of the corporate bonds issued by joint-stock companies also enjoy the right to request from the company corporate, financial and other documents expressly listed in the law.<sup>259</sup> Other creditors, including banks and non-banking lenders, gain access to financial and other information of the company pursuant to contractual arrangements.</p> <p>Market participants report the perception that financial statements are often tax driven, and banks seldom place much weight on them in making lending decisions. Reportedly, particularly reports of small entities tend to be poor and incomplete. The Auditing and Accounting ROSC also notes that the quality of financial statements is uneven. It found that the financial statements of banks are generally of a good quality. However, those of non-banks, as submitted to the Public Registry, were found to be significantly lacking in quality.</p> <p><i>Lending to and recapitalization of distressed enterprises; other restructuring activities</i></p> <p>Restructuring by way of acquisition of holdings in distressed businesses by lenders, or debt-equity swaps are not expressly regulated, although NBM Regulation allows the acquisition of equity in exchange for debt repayment subject to certain conditions, without the prior permission of the NBM.<sup>260</sup> Government Regulation on Preparing the Process of Conversion into Shares of Debts to the State,<sup>261</sup> does explicitly regulated debt-for-equity swaps both within and outside insolvency proceedings in relation to debts to public local budget.</p> <p>As described below (see Principle B4), a distressed enterprise may file for an accelerated (in court) restructuring process. However, there are no explicit provisions regarding new lending to distressed enterprises under the insolvency framework including in the course of such restructuring process (see also Principle C9). The insolvency law does provide for various restructuring measures that may be proposed in a restructuring plan, including postponing or rescheduling payments of debts, partial or total extinguishment of some debts or their interest rates only, delay penalties through compensation, confusion, total or partial remission of debts, novation, debt-for-equity swaps or shares to bonds swap, and any other legal instruments of extinguishing debts.<sup>262</sup></p> <p>Practice shows that lenders are highly reluctant to extend financing to financially distressed enterprises. From the prudential supervision perspective, any renegotiation of the terms of a bank credit would downgrade the exposure and require an increase in loan loss provisions.<sup>263</sup> Moreover, under NBM Regulation, 100% provisions will be required if lending is provided to an insolvent borrower. NBM regulation also encourages the taking of securities over the business' assets when granting credit (see also Principle A1 on the use of secured credit), yet such free assets are often unavailable at times of financial</p>
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<sup>257</sup> Art. 72 of Civil Code

<sup>258</sup> Art. 91 of Civil Code

<sup>259</sup> Art. 92 of the Law on Joint Stock Companies

<sup>260</sup> NBM Regulation on Banks' Equity Investments into Capital of Legal Entities (approved by NBM Regulations No. 81 of 09.04.1998).

<sup>261</sup> No. 95 of 31.01.2005.

<sup>262</sup> Art. 222 of the Insolvency Law.

<sup>263</sup> NBM Regulations on Assets and Conditional Commitments Classification (approved by NBM Resolution No 231/2011).

	<p>distress.</p> <p>Reportedly, there seems to be no actual practice of engaging in debt-for-equity swaps in the course of debt resolution of distressed enterprises. Lenders report reluctance to hold shares in entities even temporarily since the capital market is weak. Lenders also express concern of becoming directly involved in companies' management and control.</p> <p><i>Tax treatment</i></p> <p>Where a lender writes off uncertain or disputed debts not covered by reserves, the written-off amount is not deductible for tax purposes. Financial institutions (banks) can deduct allocations to the loan loss provisions (risk fund) as per the amounts provided by the NBM Regulation on Assets and Conditional Commitments Classification.<sup>264</sup> Loan provisions of micro-finance organizations are deducted in the amounts set forth by NCFM Regulations on Classification of Loans and Interests Accrued by Micro-Finance Organizations.<sup>265</sup></p> <p>A debt write-off is regarded as income by the debtor for tax purposes.<sup>266</sup> And, the general tax regime applies to any disposal of assets in a restructuring or debt resolution context.</p> <p>In the event of reorganization<sup>267</sup> of enterprises by merger (fusion or absorption) or dismantling (division and separation), the Tax Code<sup>268</sup> establishes that for tax treatment purposes a series of related transactions shall be treated as one transaction and where the reorganization is determined by the State Tax Service as unqualified, such reorganization shall be treated as sale of the enterprise as a going concern. In case the reorganization is classified as qualified,<sup>269</sup> the tax law provides that redistribution (transfer) of the enterprise's property among the parties to the reorganization shall be tax-free.<sup>270</sup> Yet, any compensation received by any person (including any party to the reorganization), which does not consist of an equity interest in a party to the reorganization shall be treated as payment to the recipient. Further, if any qualified reorganization of an equity interest in a party to the reorganization is distributed to any shareholder of a party to the reorganization, such distribution shall be received by such shareholder tax-free.</p> <p><i>Other impediments to workouts</i></p> <p>Tax authorities seem unable to meaningfully engage in collective informal restructuring workouts of distressed taxpayers. They report not to be able to write off debts or even reschedule tax debts.</p> <p>The insolvency law does not exempt good faith transactions entered into in the course of</p>
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<sup>264</sup> Art. 31 of the Tax Code.

<sup>265</sup> Approved by NCFM Resolution No 11/1 of 14.03.2012, effective from 30.3.2012.

<sup>266</sup> Art. 18 of the Tax Code.

<sup>267</sup> The Tax Code differentiates between qualified and non-qualified reorganization (as determined by the State Tax Service), where qualified reorganization is defined as a partial or total reorganization of an enterprise according to a restructuring plan of its business activity, which does not aim at or result in tax evasion of any company or its shareholder.

<sup>268</sup> Art. 59 of the Tax Code.

<sup>269</sup> According to art. 59 para (1) of the Tax Code, any non-qualified reorganization of an enterprise shall be deemed as a sale of such enterprise and of all of its assets.

<sup>270</sup> Under Art. 59 of the Tax Code, parties to the reorganization are: (i) acquiring entity, which acquires equity interest in (or assets of) another entity; (ii) acquired entity the equity interest in which, or the assets of which, are acquired; (iii) any entity created as result of reorganization; (iv) the entity, equity interest in which (or assets of which) have been acquired from another in the process of reorganization.

	<p>workout negotiations from the avoidable transactions provisions. According to Art. 104 of the Insolvency Law, avoidable transactions include gratuitous, preferential, undervalued and fictitious transactions. Consequently, it is possible that an arrangement agreed upon by the creditors outside and before the commencement of an insolvency process may later be declared void when the debtor faces insolvency proceeding, thus discouraging creditors from investing efforts in a corporate workout.<sup>271</sup></p> <p>The insolvency law also requires that debtors initiate insolvency proceedings within 30 calendar days from the time the business has become insolvent. Any other person may be liable for causing insolvency apparently including for the reason of not filing for insolvency on time. There is no exemption concerning engagement in workouts at times of financial distress (see Principle B2). Failure to comply with the above duty may also result in criminal allegations.</p> <p><i>Recourse to enforcement and formal insolvency</i></p> <p>In spite of the availability of enforcement procedures, such procedures tend to be lengthy and limited in their effectiveness, often due to debtors taking advantage of several ways to delay the enforcement of claims (see Principle A5). Nonetheless, creditors tend to resort to enforcement (usually of immovable collateral) rather than engage in collective workouts. A “rescue culture” has not yet been instilled in either creditors or debtors, nor is it promoted by public authorities (see further Principles B4 and B5). The formal insolvency framework is also reportedly often abused, e.g. exploited by debtors to avoid debt repayment or by creditors using the process to take control over businesses or assets, rather than used for an effective liquidation or a reorganization of viable businesses (see further Principles C1 and C14).</p>
<b>Assessment</b>	<p><b>Materially Non-Observed</b></p> <p>The Auditing and Accounting ROSC, which noted the major improvements brought in the auditing and accounting framework in Moldova (mentioned above), also identified critical gaps in the framework, especially in terms of effective implementation of recent reform which still remain work in progress. Indeed, access to timely, reliable and accurate information regarding businesses financial situation seems limited. Lenders rarely rely on borrowers’ financial reports. Especially small entities’ reports tend to be of a poor quality and may contain false information.</p> <p>While debt-for-equity swaps in the course of distressed debt resolution may occur under general legal principles and NBM Regulation permits debt repayment in exchange for shares without prior NBM permission, such type of debt restructuring is not frequently employed in the jurisdiction. Banks are reluctant to hold shares in companies, as the market for shares is weak and as they fear being directly involved in companies. The lack of experience and practice of debt restructuring is also linked to the absence of rescue and workout culture.</p> <p>Lending to distressed enterprises is not encouraged in regulations or supervisory policies, and is rarely occurring in practice. In fact, NBM Regulations seem to discourage lending to entities in distress, at least in so far as the business has no collateral to secure the new finance.</p>

<sup>271</sup> In case of conversion of restructuring into bankruptcy, however, according to art. 115 of the Insolvency Law, transactions envisaged by the restructuring plan made in between the date of confirmation of the restructuring plan and the date of commencement of bankruptcy proceedings shall not be void, except for reasons of legality.

	<p>Tax legislation and practice does not encourage debt restructuring and workouts. Tax law treats a written down element of a loan as income for the debtor, and may not permit a lender engaged in a write-down to claim that element as a loss for tax purposes. This could discourage engagement in workouts. There are also no specific rules regarding the tax treatment of sale of distressed assets/liabilities that could encourage restructurings. Also, reportedly, tax authorities appear unable to meaningfully participate in workouts, as tax debt may not be written off or even rescheduled. Tax authorities do not play a facilitating role in promoting informal effective debt resolution and rescues.</p> <p>Provisions in the insolvency law on avoidable transactions and on debtors' duties could discourage engagement in legitimate restructuring activities. For example, preferential repayment terms or securities provided in relation to new loans granted to distressed entities may be reversed in subsequent insolvency proceedings. Debtors might also fear breaching the duty to file for insolvency proceedings (although reportedly these provisions are rarely invoked in practice).</p> <p>Generally, a rescue culture has not been developed in the jurisdiction, and creditors tend to resort to individual enforcement instead of attempting to support businesses and engage in collective workout negotiations.</p>
<b>Comment</b>	<p>The obligations under the Moldovan company and accounting laws regarding financial reporting should be strictly enforced and monitored. Publication of reports by the Public Registry should be accelerated. Consideration should be given to implementation of the recommendations of the 2013 A&amp;A ROSC.</p> <p>Consideration should be given to the development of a framework for workouts and the encouragement of using such a framework (see further Principle B4). In this respect, it is important that tax authorities will be able to play a supporting role and meaningfully participate in the process. In the course of a workout, new lending may be crucial and its provision should be encouraged by an enabling banking and insolvency legislation. Explicit general regulation in the company laws regarding debt restructuring including through swaps may encourage the use of such practices. More favorable tax treatment of debt resolution agreements could encourage workouts. Consideration should also be given to the development of a body of workout professionals. There is a need to promote confidence of finance providers that companies in distress can effectively address the situation and develop a sustainable business strategy.</p> <p>Other aspects of the framework may require enhancement to ensure that they support an out-of-court workout regime, including the rules regarding directors' liability (see Principle B2) and the provisions on avoidance of transactions in insolvency (see Principle C11).</p>
<b>Principle B4</b>	<p><b>Informal Workout Procedures</b></p> <p><b>B4.1</b> An informal workout process may work better if it enables creditors and debtors to use informal techniques, such as voluntary negotiation or mediation or informal dispute resolution. While a reliable method for timely resolution of inter-creditor differences is important, the financial supervisor should play a facilitating role consistent with its regulatory duties as opposed to actively participating in the resolution of inter-creditor differences.</p> <p><b>B4.2</b> Where the informal procedure relies on a formal reorganization, the formal proceeding should be able to quickly process the informal, pre-negotiated</p>

	<p>agreement.</p> <p><b>B4.3</b> In the context of a systemic crisis, or where levels of corporate insolvency have reached systemic levels, informal rules and procedures may need to be supplemented by interim framework enhancement measures to address the special needs and circumstances encountered with a view to encouraging restructuring. Such measures are typically of an interim nature designed to cover the crisis and resolution period, without undermining the conventional proceedings and systems.</p>
<b>Description</b>	<p><i>Informal techniques for dispute resolution</i></p> <p>Creditors and debtors may, theoretically, under the Moldovan legal regime, engage in consensual arrangements aimed at restoring the viability of financially distressed enterprises, provided such an arrangement is agreed upon before the company becomes insolvent. Mediation or arbitration may (theoretically) be utilized for this purpose.<sup>272</sup> As noted above (Principle B2 and B3), when the grounds for insolvency arise (see also Principle C4), the debtor is obliged to initiate insolvency proceedings, and failure to do so may result in personal liability and potential criminal proceedings. For this reason, even the conclusion of a standstill agreement among creditors (i.e. an agreement that creditors will not enforce their claims against the debtors' assets during the workout negotiations), at the time when the company was already insolvent, may prove to be ineffective, although such an arrangement is yet to be tested in practice.</p> <p>As noted above (see Principle A5), Moldovan law recognizes the importance of alternative dispute mechanisms. However, mediation or arbitration have not been used in practice to assist in collective workouts. Reportedly, the mediation law, albeit the effort taken to modernize it, had remained almost a dead letter, and is not being frequently used in practice. The arbitration law too is not often used and not considered as a well-functioning law.</p> <p>A workout culture has not been developed in the jurisdiction. The financial supervisors (NBM, NCFM) have not yet played a role in encouraging such a regime. The financial supervisors have not issued guidelines, regulations or instructions that favor the use of negotiations or informal procedures for debt restructuring. In fact, as noted above, prudential regulation tends to encourage over-collateralization, the resort to individual enforcement against collateral and restraint from lending to distressed businesses. Informal workout guidelines have not been endorsed by the Moldovan authorities (see further Principle B5). No measures have been undertaken to promote the use of mediation in the context of distressed businesses debt resolution. Lack of trust in debtor business plans is also reported, as well as an absence of an inter-creditor negotiation culture in circumstances of debtors' financial distress.</p> <p><i>Formal reorganization to support informal pre-negotiated agreements</i></p> <p>The Insolvency Law 2012 is more targeted now towards business rescue, and provides wider variety of procedures in this respect.<sup>273</sup></p> <p>In particular, the "accelerated restructuring" proceedings<sup>274</sup> may potentially serve as a process for giving formal and binding effect to informal negotiations and agreements. Indeed, the accelerated restructuring process' purpose is to maintain the viability of an</p>

<sup>272</sup> See Law on Mediation No 134 of 14.06.2007; Law on Arbitration No 23 of 22.02.2008.

<sup>273</sup> Though as noted below, there are important improvements that ought to be made to make actual reorganization a reality.

<sup>274</sup> Arts. 218-225 of the Insolvency Law.

	<p>enterprise and thus ensure continuity of business operations, preserve jobs and repay debts through a plan.<sup>275</sup> Debtors are eligible to initiate such proceedings when they are experiencing financial difficulties.<sup>276</sup></p> <p>The key steps and aspects of the <i>accelerated restructuring</i> process are as follows:<sup>277</sup></p> <ul style="list-style-type: none"> <li>• An application by the debtor which must be well grounded and include an inventory of the debtor's property and a draft accelerated restructuring plan (see further Principle C4).</li> <li>• The plan may provide for various measures of financial recovery and restructuring, such as: postponing or rescheduling payments of debts, partial or total extinguishment of some debts or their interest rates only, delay penalties through compensation, total or partial remission of debts, novation, debt to equity swap or shares to bonds swap, and any other legal instruments of extinguishing debts.<sup>278</sup></li> <li>• Such a petition will stop any other insolvency petitions initiated by creditors.</li> <li>• The court must rule on the petition within 3 business days from its initiation.</li> <li>• An interim administrator will be appointed to supervise the debtor during an observation period.</li> <li>• Measures for preserving the estate shall be imposed (see Principle C5).</li> <li>• The court shall make an order regarding the holding of a meeting to validate creditors' claims and a meeting to vote on the plan.</li> <li>• The administrator must give notice to all creditors (appearing on the list presented by the debtor) within 5 business days from their appointment; notice should also be published containing details about conditions and time periods concerning responses to the petition, claims validation and meetings to vote on the plan. The deadline for the registration of a request for the recognition of claims must not exceed 30 calendar days from the day of publication of the notice.</li> <li>• The administrator must submit to the court a report, prior to the meeting in which creditors would vote on the plan, indicating the viability of the plan and the prospects of restructuring.</li> <li>• Voting on the plan should be carried on by the creditors' meeting. Creditors shall be divided into separate classes for the purpose of voting on a plan (according to the same division applied in a regular restructuring process; see Principle C14).</li> <li>• Voting rules are the same as those applied in the general restructuring process. There are measures to bind dissenting creditors and dissenting classes (including secured creditors and the budgetary claims who are in separate classes) (see Principle C14).</li> <li>• Immediately or within 5 days of the adoption of the plan by the creditors' meeting, the court should make a decision on the plan approval, the termination of the restructuring process and the transition to plan implementation.</li> <li>• If the plan is not approved, the court may issue a decision to simultaneously initiate bankruptcy proceedings if it is established that the debtor is insolvent. If the court does not issue bankruptcy proceeding at the time of disapproving the plan, any creditor may file a new bankruptcy petition.</li> <li>• After the plan approval, the debtor continues to manage the business, under the</li> </ul>
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<sup>275</sup> Art. 218 of the Insolvency Law.

<sup>276</sup> Art. 2 of the Insolvency Law defines an enterprise in financial distress as an enterprise whose managerial and economic viability potential is in dynamic decline, but whose owner is nonetheless performing or capable of performing matures obligations. A debtor who is already subject to insolvency proceedings or underwent accelerated restructuring proceedings in the past 5 years is not eligible to file for accelerated restructuring proceedings (art 219 of the Insolvency Law). The law also provides for a restructuring process which follows the initiation of insolvency proceedings (see Principle C14).

<sup>277</sup> See arts. 220-226 of the Insolvency Law.

<sup>278</sup> Art. 222 of the Insolvency Law.



	<p>supervision of an insolvency administrator.</p> <ul style="list-style-type: none"> <li>• A moratorium of actions by both secured and unsecured creditors is imposed and remains in operation throughout the restructuring process (art. 184; see Principle C5).</li> <li>• Failure of the debtor to implement the plan can result in creditors filing insolvency petition without the need to prove grounds of insolvency.</li> </ul> <p>Another available procedure for reaching agreement among the parties within the confines of the insolvency legislation is the settlement process.<sup>279</sup> At any stage of examination of insolvency proceedings, parties may conclude a settlement (<i>tranzactie</i>), which can accommodate a broad range of restructuring activities, including the measures described above, i.e. such settlement may contain provisions on claim extinguishment by compensation, complete or partial remission of debt, etc., when such provisions do not infringe the rights of other creditors, whose claims were validated.</p> <p>The <i>settlement</i> process entails:</p> <ul style="list-style-type: none"> <li>• The initiation of insolvency proceedings by the debtor or a creditor.<sup>280</sup> A settlement may be reached at any stage of the process.</li> <li>• The agreement of the debtor through either its executive body (if the settlement is reached during the observation period while it is still managing its business under supervision of an administrator) or through the administrator/liquidator if the settlement is concluded within the insolvency process.</li> <li>• A decision to conclude a settlement taken at the creditors' meeting: a simple majority consent of unsecured creditors whose claims were validated in accordance with the register of claims and a unanimous consent of all the secured creditors.</li> <li>• Third parties right to participate in the conclusion of the settlement, in the event that they assume the rights and responsibilities of the debtor under the terms of the settlement.</li> <li>• When the settlement provides for repayment in installments or a deferred payment, or full or partial forgiveness of a debtor's debt, creditors who have tax (budgetary) claims, i.e. the Ministry of Finances, State Tax Inspectorate, etc., are bound to accept the conditions of the settlement.</li> <li>• The conditions of the settlement shall not be less favorable to creditors who voted against the settlement or did not participate in the settlement, compared to the other creditors.</li> <li>• A request for the settlement's approval submitted by the debtor and the administrator/liquidator within 5-10 days of the settlement's conclusion</li> <li>• Court confirmation; which may be granted only after satisfaction of personal injuries, wrongful death claims, claims for the payment of employees' wages and remuneration for copyright.</li> <li>• The approval of the settlement terminates the proceedings.</li> <li>• It is binding upon all the participants concerned as of the day of issuing the order confirming the settlement.</li> <li>• In case of refusal to approve the settlement, the court shall issue a decision to resume the insolvency process</li> </ul> <p>There is no framework for the regulation of workouts at times of systemic crisis.</p>
<b>Assessment</b>	<b>Materially Non-Observed</b>

<sup>279</sup> Arts. 162-174 of the Insolvency Law.

<sup>280</sup> Or other parties indicated in the law (see Principle C4).

	<p>A workout culture has not yet been created in the jurisdiction. Mediation, arbitration or other dispute resolution techniques are rarely used for the purpose of resolving distressed debt situations. The Moldova authorities have not taken measures to encourage the use of mediators for collective workouts purposes, nor did they endorse and encouraged the use of workout guidelines.</p> <p>The Insolvency Law provides more flexibility and nuance in terms of insolvency procedures, compared with the previous framework (before the entry into force of the Insolvency Law in 2013). Indeed, the new law has greater potential to accommodate informal pre-negotiated agreements, primarily through the expedited restructuring procedure, including by providing means to bind dissenting creditors and to stay individual enforcement of claims. Thus, it may be possible to conclude an informal “pre-pack” reorganization plan for a distressed enterprise and subsequently approve the plan in court, making the plan binding on all the debtors’ creditors, through the procedure for plan approval. The availability of such a procedure has the potential to encourage pre-insolvency arrangements and may facilitate their prompt recognition in court. More time is required to be able to assess the efficacy of the new law in this respect. There is no specific indication in the law regarding the treatment of informal agreements after the initiation of a formal restructuring process. Although aimed to provide a quick measure for restructuring of distressed but viable enterprises, the accelerated restructuring procedure does require various mandatory procedural steps that may not be sufficiently conducive to the smooth conclusion of a prepackaged plan/informal pre-negotiated agreement.<sup>281</sup> Other aspects of this process are further analyzed in Principle 14 below.</p> <p>The settlement process too, available in the insolvency law, might be used for giving effect to a pre-negotiated settlement and override potential opposition, in particular by tax authorities (since their consent for a settlement is not required, see Principle C14). However, it requires the consent of all the secured creditors, thus it may, as a practical matter, require the exclusion of some encumbered assets which may be necessary for the proposed plan (secured creditors may also insist on new accelerated payment terms or higher interest rates as a condition to approving the settlement). It also requires payment in full to employees and other preferred creditors that may make it difficult to conclude the settlement. Furthermore, this procedure too does not indicate how a pre-negotiated agreement would be considered, following the initiation of insolvency proceedings. The law is specifically unclear on how a settlement would be concluded during the observation period when the meeting of creditors has not been yet convened i.e. creditors have not been yet validated. Although the Insolvency Law states that the settlement may be concluded at any given stage of the insolvency proceeding, which may include the observation period, it requires that the decision on concluding such settlement be adopted by the meeting of creditors with the simple majority consent of unsecured creditors whose claims were validated. This requires a validation process in a validation meeting. It is also unclear if a going concern sale may be affected through a settlement process, which may often be the envisaged solution under a pre-package plan. There is also some ambiguity regarding the effect of the settlement and whether it will be binding on all creditors affected by the plan as the relevant provision specifically refers to participating creditors (see further Principle C14).</p> <p>More generally, the absence of an established rescue and an inter-creditor negotiation culture casts doubt on the efficacy of these procedures as means for engaging in and supporting informally negotiated agreements. Furthermore, the absence of guidelines for the informal stage of the negotiations or any other clear workout framework makes it difficult to develop a workout culture.</p>
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<sup>281</sup> See also Principle D8, discussing shortcomings in the capacity of administrators in being able to accurately evaluate restructuring potential, due to insufficient training and experience.

	<p>Indeed, thus far, practice shows that the insolvency framework is mainly used for liquidations and often debtors and creditors resort to insolvency only when the debtor is in such a state that a rescue is no longer an option. Lenders' preference seems to be the individual enforcement of their debt rather than the engagement in collective workouts and the giving of support to businesses which demonstrate long term viability.</p> <p>In addition, there is a discernible level of mistrust among the various parties of one another and of the relevant institutions (especially the courts) that makes anything more than the most limited restructuring difficult to achieve.</p> <p>As noted above (see Principle B4), other aspects of the Moldovan regime seem to impede the development of a thriving workout culture, importantly the tax treatment of debt workout, the lack of meaningful participation by tax authorities in workouts and NBM policies that tend to discourage lending to distressed enterprises.</p>
<b>Comment</b>	<p>Consideration should be given to developing a clear framework for workouts (see further Principle B5). The financial supervisor should play a facilitating role consistent with its regulatory duties in this respect. A body of workout mediators may be developed.</p> <p>The operation of the new insolvency law should be closely monitored to see whether an effective practice of supporting informal pre-negotiated agreements develops, or whether further inducement and clarifications in the law are required. It is important that where the conclusion of an agreement relies on a formal proceeding, such proceeding can provide a quick response in a way that would not undermine the pre-insolvency agreement. In this regard, consideration may be given to providing greater clarity regarding the manner of processing and giving effect to pre-insolvency agreements during either the formal restructuring or the settlement process, including the treatment of new finance that may have been provided under the pre-negotiated contract.</p>
<b>Principle B5</b>	<p><b>Regulation of Workout and Risk Management Practices</b></p> <p><b>B5.1</b> A country's financial sector (possibly with the informal endorsement and assistance of the central bank, finance ministry or bankers' association) should promote the development of a code of conduct on a voluntary, consensual procedure for dealing with cases of corporate financial difficulty in which banks and other financial institutions have a significant exposure, especially in markets where corporate insolvency has reached systemic levels.</p> <p><b>B5.2</b> In addition, good risk management practices should be encouraged by regulators of financial institutions and supported by norms that facilitate effective internal procedures and practices that support prompt and efficient recovery and resolution of non-performing loans and distressed assets.</p>
<b>Description</b>	<p><i>A code of conduct on voluntary consensual procedure</i></p> <p>Such a code (a workout framework) has not yet been developed in Moldova.</p> <p>With the exception of bilateral debt rescheduling between a bank or a non-banking lender and its customer, there is no practice of informal (collective) workouts in the jurisdiction.</p> <p><i>Risk management practices</i></p> <p>The banking sector in Moldova is regulated and supervised by the NBM, that has attempted</p>

	<p>to strengthen the regulatory framework since 2008, though many concerns remain as delineated in detail in the IMF-World Bank, Detailed Assessment of Observance of the Basel Core Principles for Effective Banking Supervision.<sup>282</sup></p> <p>Non-bank financial institutions (except leasing companies) are supervised by the NCFM.<sup>283</sup> The capacity of the NCFM to supervise the saving and credit associations, and monitor the remaining entities has been strengthened. However, microfinance institutions only have to report their financial data to the NCFM, which lacks the legal power and capacity to monitor them in more breadth and depth. Leasing entities do not have to provide any information, and are thus not supervised.<sup>284</sup></p> <p>The Moldovan Law on Financial Institutions provides that banks should observe requirements concerning internal control systems.<sup>285</sup> Relevant Regulations<sup>286</sup> further provide that the bank's board is responsible for approving adequate internal control systems and ensuring periodical revision (art. 13), while the bank's executive body is responsible for the organization and implementation of the internal control systems so approved (art. 14). Article 15 of the Regulation further stipulates that the evaluation of internal control system adequacy is to be carried out by an internal audit department, which must be independent, and shall report to the board of the bank. Finally, article 30 regarding procedures of risk management provides that banks should have in place procedures to manage and control its activity risks, which include, inter alia, credit risk, country risk and operational risk.</p> <p>Under article 32 of the Law on Financial Institutions, as amended by the Law No 164 of 11.07.2012, the provision of credit shall be performed in accordance with the internal regulations of the bank, which do not contravene the law and include at least the conditions of providing credits, powers, obligations and organization of the internal unit vested with managing operations concerning provision of credit (the credit committee), as well as the method of taking decisions on granting credit, crediting limits and credit guarantees. Banks shall ensure that credit applicants prove credibility in terms of credit repayment, which can be secured by pledge of movable assets, mortgage, bank guarantee, surety, and other means provided by law or contract. For this purpose, the bank is entitled to request submission by the applicants of reports, documents and information relating to the applicant's financial situation and credit activity, of the person who is a personal guarantee, necessary to assess their creditworthiness and credibility, to undertake, within the limits of the law, other measures purported at verifying the accuracy of information submitted, as well as audit the proper use of credit provided.</p> <p>Pursuant to NBM Resolution No. 153 of 25.12.1997 on approving the Regulation on the crediting activity of banks operating in the Republic of Moldova, sound and prudent management of crediting activity of banks requires the establishment and maintenance of organizational structures and crediting policy, as well as risk assessment, monitoring and control procedures, which are aimed at protecting the assets of the bank and obtain profit, taking into account at the same time the security of customer deposits. Banks are required to adopt general crediting policies and instructions, which shall contain inter alia details on:</p>
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<sup>282</sup> Republic of Moldova, Basel Core Principles for Effective Banking Supervision, IMF-World Bank, Detailed Assessment of Observance, 2014; "The Basel Core Principles Assessment 2014", paras. 7, 19 and pp. 26, 31. See also Republic of Moldova, Enterprise Access to Finance Background Report, June 2013, paras. 8, 40, 42.

<sup>283</sup> Non-bank financial institutions in Moldova are still small and underdeveloped. See The Basel Core Principles Assessment 2014", para. 26.

<sup>284</sup> See Republic of Moldova, Enterprise Access to Finance Background Report, June 2013, para. 68.

<sup>285</sup> Art. 28(2)(i) of the Law on Financial Institutions (No 550-XIII, 1995).

<sup>286</sup> Regulation on Internal Control Systems within Banks, approved by Decision of the Administrative Council of the National Bank of Moldova (Official Monitor of the Republic of Moldova, No.98-99/368, June 15, 2010).

(i) internal procedures of assessing the debtor's credibility; (ii) risk management of verification; (iii) limits of credit; (iv) collateral or other type of security interest; (v) price; (vi) authorizations; (vii) problematic loans and their collections; (viii) formation of reserves; (ix) description of analytic methods on assessing credibility of clients; etc.

Furthermore, general crediting policies must establish rules for systemic review of the loan portfolio, to enable their objective classification, in the following manner:

- loans with expired repayment term, credits on which interest is not accrued;
- delinquent loans (with legal violations);
- credits wherefrom interest is not collected under the contract;
- credits deemed as problematic;
- credits which terms and conditions were modified by reducing interest or the amount of credit, by postponement of interest payment, restructuring, modification of repayment terms, etc;
- credits transferred in whole or in part to other lending institutions as a result of sale, participation or exchange of assets;
- credits obtained from other institutions as a result of purchase, participation or exchange of assets;
- credit bonds or other potential liabilities.

As per the NBM Resolution No. 231 of 27.10.2011 on approving the Regulation on Assets and Conditional Commitments Classification, banks are bound to calculate provisions for asset/conditional commitment classifications and classify assets and conditional commitments at least quarterly on the last day of the reporting period.

Pursuant to articles 13-17 of the Regulation, assets or conditional commitments are to be classified into one of five categories (in descending order of quality): "Standard"; "Supervised"; "Substandard"; "Doubtful (uncertain)"; and "Compromised (losses)". According to article 27, banks are required to create the required provisions by applying the following impairment coefficients to each classification category as follows: (1) Standard – 2%; (ii) Supervised – 5%; (iii) Substandard – 30%; (iv) Doubtful – 60%; (v) Compromised (Losses) – 100%. Under article 28, banks are required to have internal policies and procedures of credit risk management, and these include identification, monitoring and evaluation of the bank's risk profile in order to maintain an appropriate and controlled credit risk environment.

The criteria used to determine classification are provided generally in article 9, and specifically in relation to each category in articles 13-17. Article 9 provides that in its assessment, the bank shall take into account (at minimum) the following factors: (a) the current financial situation of the counterparty assessed based on its capacity to honor its commitments; (b) the contractual term's compliance; (c) the counterparty's ability to pay based on its financial history and future estimations of its funds flow; (d) current trading value of the pledged object and its "liquidity degree" in the Moldovan markets; (e) the business environment of the counterparty, and its position within its economic sector; (f) the credit history of the counterparty in relation to obligations assumed under credit contracts; (g) business plan compliance and "technical-economic argument (including further modifications and completions)"; (h) financial situation and the ability of the guarantor or insurer to pay; and (i) any other factors that may affect compliance.

The Regulations also include special rules on classification, including where there has been extension or renegotiation. In the case of extension, article 30(1) provides that assets which on extension date are classified as "standard" or "supervised" may not be classified above the "supervised" category, and for assets that are "substandard" or "doubtful (uncertain)", not above the classification category on extension date. In the case of renegotiation, article 30(2) provides that assets which are on extension date classified as "standard" or "supervised" may not be classified above "substandard", and for assets that are "substandard" or "doubtful (uncertain)", and not above the classification category on renegotiation date, provided that interest calculated on the renegotiation date is paid within

	<p>3 months after renegotiation. Article 30(2) further provides that regular payment of interest and principal (at least monthly) may be taken to upgrade the classification of an asset or conditional commitment, but not above the “supervised” category. Other specific rules include the requirement that, for loans and conditional commitments to grant funds in the future to a non-bank debtor whose debt exceeds 8 times its own capital, such assets may not be classified above the “supervised” category (art. 35).<sup>287</sup></p> <p>As noted above, amendments to the Accounting Law have introduced mandatory implementation of IFRS for all public entities. Under the latter, each bank’s portfolio is divided into two categories: “significant” and “non-significant” based on pre-defined criteria. When introducing IFRS, the NBM adopted good practice and continues to require additional supervisory provisions to take account of expected future losses. Pursuant to article 7 of the above Regulation on approving the Regulation on Assets and Conditional Commitments Classification when the amount of reserves for assets and conditional commitments losses calculated under the Regulation, is higher than the value of reserves for losses from impairment of the same assets and provisions for losses on the same conditional commitments, created under IFRS, the Tier I capital shall be reduced with that amount.</p> <p>Banks in Moldova have implemented internal control practices. However, as noted in the Basel Core Principles Assessment 2014, practice within banks is variable and the quality of implementation is often very poor.<sup>288</sup></p> <p>Furthermore, active management of distressed portfolios appears to be minimal. The main techniques for credit recovery and resolution of problem loans are debt rescheduling and judicial foreclosure. Banks’ widespread experience, though, is of prolonged recovery periods lasting years when attempting to foreclose or execute collateral, which encourages a tendency to reschedule. The predicament is further exacerbated by the NBM regulation that requires all lending to be collateralized unless the borrower can demonstrate enhanced creditworthiness that in itself promotes poor underwriting and credit practices, leading to a more likely incidence of non-performing loans (NPLs).<sup>289</sup> In practice, banks heavily rely on the volume and the quality of the collateral instead of the borrowers’ ability to repay the loan.<sup>290</sup></p> <p>There is little focus on inspection of the business prospect and its fundamental viability with a view of rescuing it and supporting it, including by providing additional lending in the interim. Banking regulation also disincentivise lending to businesses in distress as well as the use of the insolvency framework by lenders, since lending to an insolvent entity would require 100% provisioning. Reliance on financial statements, credit history and repayment capacity is also limited. Indeed, as noted above (Principle B3) debtor’s financial statements are often unreliable. Reportedly, there is also lack of trust on the ability (and sometimes the honest intentions) of debtors to turnaround their business and present a viable plan for rescue. Credit information on debtors is also, to some extent, lacking due to</p>
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<sup>287</sup> In relation to non-bank financial institutions, the NCFM has issued “Financial Prudential Norms”, approved by Resolution No.17/8 dated 30 April 2008, that apply to “savings and credit institutions”, pursuant to its power to establish such norms under article 8 of the Law on the National Commission for Financial Markets. According to art. 27 of the Financial Prudential Norms, any loan provided and the related interest will be classified in one of five prudential categories, mirroring the categories for classification of bank assets or conditional commitments: (a) standard; (b) supervised; (c) substandard; (d) doubtful; and (e) compromised. According to art. 28 of the Financial Prudential Norms, an impairment coefficient will be applied to the loan balance and interest in each category as follows (save that no co-efficient will be applied to interest in the “standard” category): (a) 1%; (b) 10%; (c) 30%; (d) 75%; (e) 100%.

<sup>288</sup> The Basel Core Principles Assessment 2014”, para. 13.

<sup>289</sup> The sector wide average rate of NPLs, at 11.6 percent at the end of 2013, is trending down since 2013 but disguises a wide variation in individual bank portfolios. See The Basel Core Principles Assessment 2014.

<sup>290</sup> See The Basel Core Principles Assessment 2014.

	the limitations of the creditor information system (see Principle B1). The law aimed at encouraging good corporate behavior and incentivizing debtors to resolve their debts early, in coordination with their creditors, is also deficient and poorly observed (see Principle B2).
<b>Assessment</b>	<p><b>Materially Non-Observed</b></p> <p>An informal workout regime has not been developed in Moldova. There is no code of good practice or workout guidelines available and no experience of multi-creditor negotiation on the restructuring of enterprises in financial distress.</p> <p>The culture of risk management in Moldova is generally poor. The supervision of non-bank financial institution, in particular the micro- finance organization and leasing companies is either poor or in the case of leasing entities, lacking. Both these institutions play an increasingly important role in providing financial services and, therefore, strengthening their supervision is important.</p> <p>Risk management practices by banks tend to focus on assessment of the value of the collateral rather than on a meaningful inspection of the prospect and viability of the business. The problem exacerbates due to limitations in the creditor information system, the often poor quality of financial information provided by debtors, the general mistrust between debtors and creditors at times of financial distress and deficiencies in the law and practice of ensuring good corporate behavior at times approaching insolvency. Some aspects of prudential regulation has also discouraged lending to distressed businesses and the use of the insolvency framework by lenders, and had driven banks to concentrate on secured lending only and on collateral enforcement or debt rescheduling at times of distress.</p>
<b>Comment</b>	<p>Workouts as means of restructuring of a distressed business entail some important advantages. Essentially, they offer an opportunity for directors of financially troubled companies to reorganize their affairs without the need for court involvement. They allow for the continuation of the business, they are flexible, confidential and can avoid damaging the debtor's reputation. Workouts may also be less costly and speedier than formal proceedings, not constrained by the procedural timelines and administrative formality of court proceedings. By using workouts the change in management may be avoided, and the substantive rights of the stakeholders may remain relatively unaffected.</p> <p>A workout regime may be facilitated by endorsing a code of conduct or guidelines regarding voluntary, consensual procedure for dealing with cases of corporate financial difficulty. Consideration should be given to the development of such a framework, informed by principles developed in other jurisdictions (see e.g. the 'London Approach' and the 'Istanbul Approach'). INSOL International developed similar principles which reflect an international approach to the conduct of workouts (a <i>Statement of Principles for a Global Approach to Multi-Creditor Workouts</i>). The main objectives of such guidelines would be to avoid liquidating viable corporations, to minimize losses to banks and other creditors and to provide financial support for surviving businesses.<sup>291</sup> Such guidelines may include the concept of a standstill period which suspends enforcement by creditors and prohibits the debtor from prejudicing creditors; the appointment of representative</p>

<sup>291</sup> It is common that an enterprise engaged in workout negotiations needs ongoing sources of working capital in order to continue on as a going concern. As the purpose of workout negotiations is usually to preserve going concern value, guidelines often include provisions by which an existing lender either permits ongoing finance to be put in place, perhaps with the grant of an additional security interest, or provides that ongoing financing itself.

	<p>committees and advisors; the disclosure of information; the submission of proposals for resolving the financial difficulties and the provision of additional funding.<sup>292</sup> Thus, principles may base their application on a few recommended conditions, which all parties involved in a negotiation would need to follow in order to each a successful workout. Endorsement of such principles by relevant authorities could help in kick-starting a restructuring practice in the country to the significant advantage of all relevant stakeholders.</p> <p>Consideration should also be given to reassessing regulation and policies imposed on lenders that discourage the use of informal and formal insolvency proceedings. Policies targeted at encouraging banks (and other lenders) to address distressed debts robustly and effectively should also be developed. In this respect, focus should be on enforcing a regime whereby lenders would be obliged to make proportionate but meaningful enquiries regarding the underlying causes of distress and in the adequate circumstances engage in negotiations and workouts aimed at rescuing the business.</p> <p>The supervision of non-bank financial institutions should be strengthened.</p>
	<b>PART C. LEGAL FRAMEWORK FOR INSOLVENCY</b>
<b>Principle C1</b>	<p><b>Key Objectives and Policies</b></p> <p>Though country approaches vary, effective insolvency systems should aim to:</p> <ul style="list-style-type: none"> <li>(i) Integrate with a country's broader legal and commercial systems.</li> <li>(ii) Maximize the value of a firm's assets and recoveries by creditors.</li> <li>(iii) Provide for both the efficient liquidation of nonviable businesses and those where liquidation is likely to produce a greater return to creditors, and the reorganization of viable businesses.</li> <li>(iv) Strike a careful balance between liquidation and reorganization, allowing for easy conversion of proceedings from one procedure to another.</li> <li>(v) Provide for equitable treatment of similarly situated creditors, including similarly situated foreign and domestic creditors.</li> <li>(vi) Provide for timely, efficient and impartial resolution of insolvencies.</li> <li>(vii) Prevent the improper use of the insolvency system.</li> <li>(viii) Prevent the premature dismemberment of a debtor's assets by individual creditors seeking quick judgments.</li> <li>(ix) Provide a transparent procedure that contains, and consistently applies, clear risk allocation rules and incentives for gathering and dispensing information.</li> <li>(x) Recognize existing creditor rights and respect the priority of claims with a predictable and established process.</li> <li>(xi) Establish a framework for cross-border insolvencies, with recognition of foreign proceedings.</li> <li>(xii)</li> </ul>
<b>Description</b>	<p><i>The insolvency reform in Moldova and its integration with the broad commercial system</i></p> <p>Moldova's authorities took on board the task of modernizing the insolvency framework,<sup>293</sup> to bring it in line with international best practice, through the enactment of the new Insolvency Law, No. 149 of 29.06.2012 which came into force in March 2013. In this</p>

<sup>292</sup> It is common that a workout will require a capital restructure, in order to provide the debtor with the necessary financing to meet its ongoing cash flow needs.

<sup>293</sup> In particular, the Insolvency Law, Act No. 632-XV of 14 November 2001. The law was largely based on the German model.



	<p>respect, it was considered important to support a functional market economy through the provision of effective mechanisms that would ensure the exit of non-viable businesses from the market.<sup>294</sup></p> <p>The insolvency reform is one aspect of a broader initiative of the Moldovan Government aimed at improving the business regulatory environment in Moldova. Indeed, since 2004, Moldova has engaged in several significant re-assessments of its laws pertaining to entrepreneurial activities, under the auspices of a program called “Guillotine”.<sup>295</sup></p> <p>As was noted above, various other aspects of the regime pertaining to creditor-debtor relationship and insolvency have been reformed or are in the process of reform, including the establishment of the credit bureau (see Principle B1), the reforms of accounting and auditing laws (see Principle B3) and the reform of the Bailiff system (see Principle A5). The reform of the insolvency framework also entails improvement of the institutional framework supporting insolvency both with respect to judges and to administrators (see further Part D of the report).</p> <p>The reform of the insolvency law was undertaken under a Memorandum of Economic and Financial Policies concluded with the International Monetary fund (IMF) (01.02.2010) with the aim of amending the insolvency law in order to facilitate the restructuring of viable businesses.<sup>296</sup> More specifically, the reform aimed to provide for and facilitate:<sup>297</sup></p> <ul style="list-style-type: none"> <li>• The maximization of return to creditors, shareholders, employees, and other interested parties. The debtor company may be reorganized, sold or liquidated. The most efficient procedure should be selected in the relevant circumstances.</li> <li>• The rehabilitation of viable businesses and the liquidation of non-viable entities.</li> <li>• A simple and predictable prioritization of claims which protects the rights of secured creditors.</li> </ul> <p>A key deficiency which was identified in the existing regime was the tendency of favoring liquidations. Several other deficiencies were noted, including:</p> <ul style="list-style-type: none"> <li>• The fact that the legal system was not fully consolidated and there were obstacles for the smooth implementation of legal proceedings.</li> <li>• A key issue in this respect was the negative perception of the legal framework and the lack of sufficient professional expertise and resources.</li> <li>• Legislation seemed ambiguous.</li> <li>• The fact that the insolvency framework was applicable to the private sector only.</li> <li>• It was noted that the insolvency framework did not deal with the reality of enterprises operating artificially, but avoiding the insolvency system. It seemed that this had contributed to the absence of a fiscal discipline in Moldova.<sup>298</sup></li> </ul> <p>Accordingly, the reform of the insolvency framework took on board the task of addressing the shortcomings in the system, and in particular:<sup>299</sup></p>
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<sup>294</sup> See Informative Note on the Draft new edition of the Insolvency Law (NOTĂ INFORMATIVĂ la proiectul Legii insolabilității în redacție nouă) (“Informative Note”).

<sup>295</sup> Which had several stages: Guillotine I (2004), Guillotine II (2006), Guillotine II+ (2010). The program is scheduled to continue as Guillotine III.  
See: <https://docs.google.com/folderview?id=0B4JFMwOnufTLOWExZGNhNTctNjM5Yy00MTc3LWJlNzMtYWY2NzQ0OWMxNmE3>

<sup>296</sup> *Analiza Impactului de Reglementare (AIR) efectuată pentru proiectul legii insolabilității în redacție nouă* (Impact Assessment of the draft new edition of the insolvency law, August, 15, 2011).

<sup>297</sup> See Informative Note.

<sup>298</sup> See Informative Note.

	<ul style="list-style-type: none"> <li>• To ensure unitary and consist application of the insolvency framework.</li> <li>• To provide balanced solutions which on the one hand would make the process more efficient, and on the other hand would ensure due process.</li> <li>• To simplify the process of appeals in the course of insolvency proceedings.</li> <li>• To improve the rules on notification and information to creditors.</li> <li>• To increase creditors' involvement and control over the process.</li> <li>• To restructure the judiciary and make it more efficient.</li> <li>• To improve insolvency professionals' competency by imposing rules regarding competency, performance evaluation, and training.</li> <li>• To ensure that insolvency professionals can fulfill their role by introducing means for funding their activities.</li> <li>• To enhance the judicial reorganization proceedings, by strengthening the professionals and the judiciary, and allowing more intervention on their part to restore trust in the judicial reorganizations.</li> <li>• Provide tailored-made proceedings including simplified versions of bankruptcy and reorganizations.</li> </ul> <p><i>Facilitating reorganizations, striking a balance between liquidation and reorganization, easy conversion between proceedings and maximization of value</i></p> <p>The Insolvency Law includes a general insolvency procedure, whereby the debtor enters either a restructuring or a bankruptcy proceeding, after a period of "observation"<sup>300</sup> during which the debtor may remain in management under the supervision of a provisional administrator, and following the opening of general insolvency proceeding, to consider the economic situation of the debtor and to validate claims.<sup>301</sup> In addition to the traditional liquidation and reorganization procedures, the new law has introduced "tailored" procedures- the simplified bankruptcy and accelerated restructuring, which are meant to respond to debtors' unique state of affairs.</p> <p>Thus, the following procedures are now available under the insolvency law:</p> <ul style="list-style-type: none"> <li>• <a href="#">Restructuring</a> – a procedure aimed at the repayment of the debtor's debts but also at its economic and financial revival, through an application of a restructuring plan; (see Principle C14).</li> <li>• <a href="#">Accelerated Restructuring</a> – a speedier restructuring procedure. The procedure aims to allow the debtor's recovery, through the application of a plan, as soon as it experiences financial difficulties (see Principle C14; see also Principle B4 regarding the possible use of this process to give effect to "pre-packaged" plans).</li> <li>• <a href="#">Bankruptcy</a> – a procedure aimed at the liquidation of the debtor's assets to cover its liabilities in a collective manner;</li> <li>• <a href="#">Simplified Bankruptcy</a> (available for specific type of debtors<sup>302</sup>) – a speedier bankruptcy procedure whereby the debtor enters directly into bankruptcy proceedings after a period of observation or following the institution (commencement) of insolvency proceedings (see Principle C4).</li> <li>• In addition, at any given stage of the insolvency proceeding, the debtor may conclude a <a href="#">settlement</a> with its creditors, based on a prescribed procedure (entailing a unanimous agreement of the secured creditors and a majority consent of the unsecured creditors) (see Principles B4 and C14).</li> </ul>
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<sup>299</sup> See Informative Note.

<sup>300</sup> 60 days which may be extended to 75 days. Observation may be skipped where the debtor declares insolvency and the intention to go through restructuring (see art. 21(6)).

<sup>301</sup> Of no more than 100 days. Art. 114 of the Insolvency Law.

<sup>302</sup> See Principle C3.

	<p>The insolvency law also contemplates mechanisms for the conversion of proceedings from restructuring to bankruptcy and vice versa, to ensure the continuation and consistency of the process and avoid any gaps. When a debtor engaged in restructuring proceedings does not fulfill its payment obligations and other duties undertaken under the restructuring plan or when the debtor's business carried out in accordance with the restructuring plan causes losses to the insolvency estate, restructuring may convert into bankruptcy proceedings.<sup>303</sup> If a restructuring process had commenced but no plan was presented or approved within the time frame the process is converted to bankruptcy.<sup>304</sup></p> <p>In case the debtor has not undergone a restructuring proceeding, but within bankruptcy it has been ascertained that the debtor's solvency can be restored, the liquidator may convene (<i>ex officio</i> or at the request of creditors or the debtor's representative) a creditors' meetings to decide on terminating the bankruptcy proceedings and on shifting to restructuring.<sup>305</sup></p> <p>Despite the attempt to encourage effective access and use of the insolvency framework, the Insolvency Law has maintained the particularly restrictive requirement that creditors must obtain an irrevocable court judgment ascertaining their claim before being eligible to file for the debtor's insolvency.<sup>306</sup> The requirement was included in order to combat abuse of process by creditors. The law further aims to protect creditors' interests by obliging the debtor to file for insolvency within 30 calendar days from the day when the company has become insolvent as well as in the event that the satisfaction of claims of one or more creditors might result in the inability to pay the debts of other creditors when they are due. There are also provisions aimed to tackle intentional and fictitious filing by debtors. However, the structure and implementation of the liability provisions do not seem to have encouraged early filing (see Principle B2). Practice also shows that restructuring proceedings are still largely absent.</p> <p>The insolvency law introduced several improvements to the process of asset sales in the course of the bankruptcy procedure. The estate may be disposed via an auction, a competitive bidding or through direct negotiation. Unlike the previous law, which provided that assets must be taken three times to auctions without the possibility of price reduction, the current law allows initiating repeat auctions based on a reduced price. In addition, assets not disposed of during the first auction are proposed to the creditors as debt repayment at the prices stipulated for the second auction. The law also governs the procedure and the conduct of the auction, the bidding and the direct negotiations filling in gaps in the legislation in this respect (arts. 119-128), and it allows for a sale of the entire enterprises (art. 129). There are no explicit rules, though, regarding the ongoing funding of such a process, especially where operation as a going concern is required prior to a sale, e.g. through rules regarding post commencement finance (see Principle C9).</p> <p>Secured creditors have a large degree of control over the process of the use and the sale of encumbered assets (see art. 130). They may also have the option to acquire the assets as repayment of their debt (art. 131(10)). The law also imposes a time limit for the insolvency representative's attempt to sell encumbered assets (3 months), after which the assets are to be returned to the secured creditors (for individual enforcement of claims), pursuant to a prescribed procedure (art. 131(9)).</p>
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<sup>303</sup> See art. 217(1). The creditors' committee or any creditor may file a new insolvency petition and seek the commencement of bankruptcy proceedings and the liquidation of the estate. No proof of the debtor's insolvency is required.

<sup>304</sup> Art. 204(8) of the Insolvency Law.

<sup>305</sup> Pursuant to art. 139 of the Insolvency Law, conversion of bankruptcy into restructuring proceedings shall occur when essential circumstances are ascertained based mainly on financial analysis data, which shows the prospect of restoring the debtor's solvency.

<sup>306</sup> Art. 20 para (2) c) of the Insolvency Law. Pursuant to art. 254 of the Civil Code, an irrevocable judgment is a judgment issued by a first instance court, after the expiry of appeal term; or issued by the court of appeal after expiry of the appeal on points of law (cassation) term; or a judgment issued by the cassation court, after examining the appeal on points of law.

	<p><i>Prevention of premature dismemberment of a debtor's assets</i></p> <p>To prevent premature dismemberment of the debtor's asset, the insolvency law provides for the prohibition of individual enforcement of claims by unsecured creditors throughout the insolvency proceedings, and by secured creditors – for 180 days from the commencement of the insolvency proceeding, with an extension of such prohibition only in the case of the debtor's restructuring.<sup>307</sup> Interim measures (during the observation period) for the prevention of the dismemberment of a debtor's assets are also available. The law also provides for means for relief to secured creditors from the moratorium. There seems to be a degree of uncertainty regarding the circumstances where such relief may be granted, and whether the relief is available in a restructuring context (see Principle C5).</p> <p><i>Timely, efficient and impartial resolution of insolvencies</i></p> <p>The law also sets strict time frames for the fulfillment of various obligations and procedural steps throughout the process, including regarding the hearing of appeals.<sup>308</sup> The process was further simplified by requiring that the insolvency court should send to the appellate court only the documents associated with the particular matter rather than the whole file and by restricting the right of appeal (appeal is allowed only regarding specific decisions as specified in the law). Indeed, a key critique of the old regime has been the excessive duration of insolvency proceedings,<sup>309</sup> in particular due to: (i) the absence of time limitations; (ii) the numerous appeals; and (iii) the large number of cases pending.</p> <p><i>Equitable treatment of creditors and recognition of existing creditor rights</i></p> <p>The law aims to ensure equitable treatment of creditors and the respect of creditors' pre-entitlements. The insolvency estate is distributed according to the creditors' ranks (classes) laid out in the law. Secured creditors' claims should be satisfied first out of the pledged property. Unsecured creditors are divided into six different classes, stipulated in the statute. Employee wages and public interests are given higher priority. Where the assets are insufficient to satisfy all the claims of a class, the proceeds are distributed <i>pari passu</i> amongst the creditors in that class.<sup>310</sup> The accrual of interest for secured creditors is stopped throughout the moratorium period, though, and there is no provision regarding post-petition payment of interest up to the value of the collateral (see further Principle C12). The insolvency law does not distinguish between domestic and foreign creditors for the purpose of the distribution of the estate, although foreign creditors may experience several limitations, e.g. when the law provides as a form of notification publication in the Official Monitor, the administrator is not obliged to undertake any other measures to ensure foreign creditors have been notified (see Principle C2).</p> <p><i>A transparent procedure and problems of improper use of the insolvency system</i></p> <p>The Insolvency Law provides for the active participation of creditors throughout the</p>
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<sup>307</sup> Art. 81 of the Insolvency Law.

<sup>308</sup> E.g., the term for examining commencement of insolvency proceedings by the court is 75 days; the maximum duration of the general insolvency procedure is set at 160 days from commencement (may be extended to 175); the general duration of bankruptcy proceedings – up to 2 years from commencement; the maximum duration of the implementation of a restructuring plan is limited to 3 years and in the case of entities deemed vital to the national economy, 5 years.

<sup>309</sup> See *Analiza Impactului de Reglementare (AIR) efectuată pentru proiectul legii insolabilității în redacție nouă* (Impact Assessment of the draft insolvency law, August, 15, 2011).

<sup>310</sup> Art. 43 of the Insolvency Law.

	<p>insolvency process via the creditors' meetings and the creditors' committee (see Principle C7). The law has also attempted to reduce the management role of the court in the course of insolvency. Thus, the insolvency court is no longer vested with managerial attributions, exercising instead supervision and control of the activity of the insolvency administrator/liquidator and the creditors. It seems, though, that the insolvency court's supervisory role might now be overly limited, especially in view of the continuing problem of abuse of the insolvency system by creditors and debtors (see Principle D2).</p> <p>Indeed, the improper use of the insolvency system was a key driver of the reform. Yet, the problem of abuse seems to persist. Certain types of abuse are reportedly common: (i) Misuse of insolvency proceedings to obtain the dissolution of dormant legal entities, by fictitiously creating a debt, and through the insolvent entity then pursuing claims against third parties without paying court fees (under the law, insolvent companies may postpone payment of court filing fees until after the case is tried).<sup>311</sup> In practice, it is reported that there are numerous cases where insolvent companies abuse their right to postpone payment of court fees and file debt collection lawsuits (sometimes of very large amounts) on behalf of creditors who would otherwise be required to pay court fees in general order.<sup>312</sup> (ii) Misuse of the insolvency process to take control over companies or their assets. The scheme consists of the creation of a false claim, including through off-shore companies, apparently through submission to provincial (or foreign) courts willing to enforce the falsified claim. A court may then declare a company bankrupt or a fictitious creditor may join an existing insolvency case. Since there is an official court document it is difficult to question its validity. The creditor can then attempt to take control over the process and eventually the business or its assets including through shifting assets to related entities. Fraudulent 'raider attacks' on financial institutions and companies seem to be a general and widespread problem in Moldova and they seem to be possible due to the absence of rule of law and corruption.<sup>313</sup> (iii) There is also a degree of concern about abuse by debtors who reportedly sometimes use the insolvency system to stop creditors from pursuing their claims or to suspend the calculation of interest and penalties, by filing for insolvency.</p> <p><i>Cross-border insolvency</i></p> <p>The insolvency law does not establish a comprehensive framework for dealing with cross-border insolvencies (see Principle C15).</p>
<b>Assessment</b>	<p><b>Materially Non-Observed</b></p> <p>The reform of the insolvency law represents an important effort in improving the insolvency framework. It introduced a variety of procedures, including simplified processes, both for bankruptcy and restructuring. It strengthened the process of reorganization, including by imposing a moratorium on both unsecured and secured creditors. It introduced some improvements to the rules governing assets sales and recognized the need to ensure greater participation by creditors. The law also established strict statutory periods for the various stages of the insolvency proceeding and recognized the need to enhance creditor participation in the process. Similarly situated creditors receive similar treatment under the law and distribution follows a set of priorities based on pre</p>

<sup>311</sup> There is an attempt to resolve this problem through a reform of the dissolution procedure (see Draft Law on Dissolution of Companies, 2013). It is envisaged that such reform would encourage businesses to use the dissolution procedure laid out in the Civil Code, without having to resort (from a cost-benefit perspective) to the insolvency proceeding. It seems that the problem, though, is with the application of the law by the courts who allow the use of companies to pursue claims in this way.

<sup>312</sup> See also *Analiza Impactului de Reglementare (AIR) efectuată pentru proiectul legii insolabilității în redacție nouă* (Impact Assessment of the new edition of the insolvency law, August, 15, 2011).

<sup>313</sup> See Corporate Governance Review of the Moldovan Banking Sector, April 2014.

	<p>acquired rights.</p> <p>Indeed, the new law has been enacted recently and more time is required to be able to test the extent of its effectiveness. Observations and reports of participants may have been to some extent mixed in terms of reference to the regime before and after the enactment of the new law. Yet, overall, thus far, it seems that the framework is still not functioning well and international best practice is not yet observed. Undoubtedly, it would be useful as an urgent measure to establish mechanisms for closely monitoring the application of the law to ascertain whether over time it accomplishes its aims. In the medium term, consideration should be given to improve the framework further in certain specific areas.</p> <p>The law retained the cumbersome criteria for creditors' qualification to commence insolvency proceedings (as analyzed further in Principle C4) and did not introduce major improvements to the regime governing debtors' duties and liabilities regarding filing of insolvency proceedings (see Principle B2). Thus, timely filing can be curtailed, and indeed creditors continue to prefer individual enforcement. Tax authorities could in theory take the role of detecting financial distress early, yet reportedly they refrain from initiating insolvency proceedings (or engage in debt workout) at that stage. Debtors can now open accelerated restructuring proceedings when they are in financial difficulties. However, it is understood that they often prefer to avoid the insolvency system, though at the same time there are also concerns of abuse by debtors who misuse the system in a variety of ways, including as a means to avoid payment of debts.</p> <p>Reportedly, there is a tendency to attempt to separate assets from the insolvency estate (e.g. by claiming ownership, see Principle C8) or insist on piecemeal liquidation, rather than support going concern sales or reorganizations of businesses (see further Principles C7, C8 and C14). The rules regarding the use of encumbered assets and the rules concerning the role and decision making processes at the creditors' committee and the creditors' meeting may restrict the ability of administrators to maximizing the value of the estate for the benefit of the creditors as a whole (see further Principles C5, C7 and C8). There is also lack of available funding for on-going operations during insolvency and indeed lack of explicit rules on post commencement finance which could have encouraged such lending (see further Principle C9). Other aspects of the law present certain uncertainties or require improvement.</p> <p>Reportedly, thus far, deadlines are often not complied with, mainly due to heavy overload of the courts, poor observance of deadlines by judges and the fact that Courts of Appeal that took over the insolvency cases after the dissolution of Economic Courts have insufficient experience and expertise in insolvency (see further Principle D1). At the same time, the rigidity of some of the timeframes may present constraints on the ability to achieve restructurings (see further Principle C14).</p> <p>Additionally, in the process of simplifying the appeal process, rights of stakeholders have been curtailed, as the incidences where an appeal may be allowed have been significantly restricted. The simplification of the appeal process by sending to the appellate court only the documents associated with the particular matter rather than the whole file seems to operate well ensuring that appeal do not stop the insolvency process (see further Principle C2), although it has been reported that, after the Supreme Court of Justice complained that the file sent to them was incomplete, some first instance courts have taken to forwarding the entire file when there is an appeal.<sup>314</sup></p> <p>There are no clear statistics regarding the number of restructuring proceedings opened every year and how the reform influenced the balance between liquidation and restructuring. Yet, reportedly, the tendency of using the system as means for debt</p>
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<sup>314</sup> See Principle D3.

	<p>enforcement and liquidation continues. As noted earlier, a rescue culture has not yet been developed in the jurisdiction (see Principle B3). The main recovery mechanisms of distressed debts are rescheduling and judicial foreclosure, and to the extent that the insolvency framework is utilized, it is mostly for liquidation purposes. Market participants express mistrust in the system and report incidences of its abuse.</p> <p>The system does not seem to tackle abuse in a robust manner and the problem of improper use of the insolvency framework seems to persist. The institutional backdrop is significant, in terms of shaping the implementation of the framework. The lack of sufficient specialization in insolvency was indeed noted by the authorities already in relation to the previous insolvency framework.<sup>315</sup> The problem applies both to the judiciary and to insolvency professionals. As noted above, the dissolution of the economic court and the transfer of insolvency cases to the general Courts of Appeal introduced significant challenges in this respect. This aspect of the framework is discussed more fully with respect to the Principles in section D below (see Principles D1-D8).</p>
<b>Comment</b>	<p>The Moldovan insolvency framework was recently reformed and more time is required for absorbing the changes fully. The reform had significantly modernized the insolvency system. However, consideration should be given to the tackling of specific deficiencies in the system and the law, while monitoring the new regime's effectiveness in view of its intended goals. Particular consideration may be given to the simplification of the rules regarding commencement of insolvency proceedings; the strengthening of due process (notification and information); the introduction of provisions in the law that could incentivize the grant of new finance during the process; the practice and the law regarding the application of the moratorium on enforcement, the use of encumbered assets, the decision making process regarding going concern sales and restructurings and the avoidance of transactions. In the occasion, the inclusion of modern rules regarding cross-border insolvency and the insolvency of enterprise groups should also be considered, as well as the improvement of certain other specific aspects of the law, to ensure that creditors are adequately protected during the process, and improve the law's comprehensiveness. These issues will be analyzed in more detail below.</p> <p>The Supreme Court of Justice seems to play an expansive role in setting the rules for standardization of judicial decision making. The Court issues guidelines on new legislation designed to routinize the interpretation of the law.<sup>316</sup> While welcome, there is a temptation for the Court to engage in "judicial legislation" using this technique by, for example, advising courts to accept for hearing appeals regarding matters that are otherwise non-appealable according to the law. Some caution is warranted in this area. The Supreme Court of Justice may have an important role to play, though, in clarifying uncertainties in the law, for example the time frame of the application of the moratorium on actions by secured creditors (in light of confusion expressed by participants regarding the starting date) or the powers of administrators to operate the business as a going concern after commencement and during bankruptcy (see further analysis below and see Principles D3 and D5). Indeed, the problem of complying with time frames and maximizing the potential of the process within the time allowed exacerbates since as reported the key players lack sufficient knowledge and understanding of various aspects of the framework.</p> <p>As aforementioned, it is crucial to ensure the robust implementation of the law, evaluating the extent to which provisions available in the law are utilized in practice in appropriate circumstances. The effectiveness of time frames in the law should also be examined. While deadlines should be met and delays avoided (which reportedly is not the case in practice), there are certain points in the process, in particular regarding the preparation of a restructuring strategy (see Principle C14) where discretion to extend deadlines may be</p>

<sup>315</sup> See *Analiza Impactului de Reglementare (AIR) efectuată pentru proiectul legii insolabilității în redacție nouă* (Impact Assessment of the draft insolvency law, August, 15, 2011).

<sup>316</sup> See Supreme Court of Justice Resolution On Effectiveness of the Insolvency Law in Judiciary Practice (No. 2, March 24, 2014).

	<p>reasonable. Such developments also require the acceleration of reform efforts targeted at improving the specialization, skills and integrity of insolvency professionals and the judiciary (see further analysis below- Principles D1 and D8). A skilful and trusted judiciary and body of professionals is essential to the promotion of an effective use of the insolvency framework in the manner described above.</p> <p>Concrete monitoring mechanisms may be established to ensure that the effectiveness of the law going forward can be evaluated appropriately, including by requiring the provision of information and data from insolvency representatives involved in insolvency cases and/or from the courts. Such information may usefully include data on the type of proceedings opened (whether liquidation or restructuring); what is initially requested by parties (i.e. whether restructuring is being sought); information about the availability of funding post-application or commencement of the proceedings, about decision making processes at the creditors' meetings and the application of the timeframes, in particular when a restructuring is sought (see further on these matters in the assessment below, in particular C7, C9, C14).</p>
<b>Principle C2</b>	<p><b>Due Process: Notification and Information</b></p> <p>Effectively protecting the rights of parties in interest in a proceeding requires that such parties have a right to be heard on and receive proper notice of matters that affect their rights, and that such parties be afforded access to information relevant to protecting their rights or interests and to efficiently resolving disputes. To achieve these objectives, the insolvency system should:</p> <p><b>C2.1</b> Afford timely and proper notice to interested parties in a proceeding concerning matters that affect their rights. In insolvency proceedings there should be procedures for appellate review that support timely, efficient and impartial resolution of disputed matters. As a general rule, appeals do not stay insolvency proceedings, although the court may have power to do so in specific cases.</p> <p><b>C2.2</b> Require the debtor to disclose relevant information pertaining to its business and financial affairs in detail sufficient to enable the court, creditors and affected parties to reasonably evaluate the prospects for reorganization. It should also provide for independent comment on and analysis of that information. Provision should be made for the possible examination of directors, officers and other persons with knowledge of the debtor's financial position and business affairs, who may be compelled to give information to the court and insolvency representative and creditors' committee.</p> <p><b>C2.3</b> Provide for the retention of professional experts to investigate, evaluate or develop information that is essential to key decision-making. Professional experts should act with integrity, impartiality and independence.</p>
<b>Description</b>	<p><i>Notification and information</i></p> <p>Due process and fair administrative procedures are recognized aspects of the Moldovan legal system, enshrined in the Moldovan Constitution through the concept of access to justice (art. 20).<sup>317</sup></p> <p>An insolvency case is considered a 'non-contentious procedure'. Thus, the Civil Procedure Rules pertaining to <i>ex parte</i> proceedings apply.<sup>318</sup> Contentious issues (legal disputes) arising in the context of insolvency are dealt with in separate trials,<sup>319</sup> and notification and</p>

<sup>317</sup> See also art. 5 of the Civil Procedure Code.

<sup>318</sup> Art. 6(2) of the Insolvency Law.

<sup>319</sup> See art. 5(2) of the Insolvency Law .



	<p>rights to be heard are confined in such cases to the parties to the dispute, pursuant to the Civil Procedure Code.<sup>320</sup> The law does not provide any further guidance on the type of disputes, arising in the context of insolvency, which may be subject to separate trials.</p> <p>Prior to filing an insolvency application, creditors must notify the debtor about the intention to file. Such notification is deemed fulfilled where prior to the filing the debtor was informed by the creditor, or a bailiff, or in cases explicitly specified in the tax code, by the relevant authorities, regarding the non-fulfillment of the obligation or the submission for execution of a writ or another equivalent document specified in the Execution Code.<sup>321</sup> Within 2 business days after accepting a creditor petition for consideration, the insolvency court must <i>ex officio</i> send a copy of the application to the debtor.<sup>322</sup> The debtor must submit his defense within 10 calendar days from the date of receipt of the petition.</p> <p>Creditors should receive notifications on the filing of an insolvency petition. The interim administrator is obliged to send such notification to all known creditors (based on the list submitted by the debtor) within 10 business days from their appointment.<sup>323</sup> Creditors must submit a response to the insolvency petition within 30 calendar days from the date of receipt of the notification.<sup>324</sup></p> <p>The debtor's defense and/or other creditors' objections to the commencement of the insolvency procedure shall be resolved by the court in a public hearing, where the interim administrator shall deliver his or her report on the debtor's state of insolvency. The court will then determine (following a period of observation of up to 60 business days which may be extended by 15 business days) whether to open insolvency proceedings or terminate the process.<sup>325</sup></p> <p>All known creditors shall receive individual notification (by the insolvency representative) about the commencement of insolvency proceedings, inviting them to submit claims (see further on the claims resolution process in the analysis of Principle C13).<sup>326</sup> The decision to commence the proceedings is also posted by the court in its location.<sup>327</sup> The interim administrator must also notify all public registries, relevant authorities, banks, storage houses and offices of the debtor about interim measures imposed during the observation period.<sup>328</sup> The interim administrator must also inform all relevant authorities, registries and banks in which the debtor has an account about the commencement of insolvency proceedings.<sup>329</sup></p> <p>The administrator/liquidator is responsible for convening creditors meeting. A notice of a meeting (which should be sent within 5 days from the decision to convene the meeting) must include the agenda and all relevant information and materials. The meeting shall not convene before 7 days after sending the information (and not later than 15 days after such notice).<sup>330</sup> The report which the insolvency administrator prepares after the commencement</p>
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<sup>320</sup> Art. 6 of the Insolvency Law.

<sup>321</sup> Art. 19 of the Insolvency Law.

<sup>322</sup> Art. 28(1) of the Insolvency Law.

<sup>323</sup> Art. 21 of the Insolvency Law.

<sup>324</sup> Art. 28(6) of the Insolvency Law.

<sup>325</sup> Accelerated restructuring or simplified bankruptcy may also be opened (see arts. 28(7) and 30 of the Insolvency Law).

<sup>326</sup> Art. 35(4) of the Insolvency Law.

<sup>327</sup> Art. 35(2) of the Insolvency Law.

<sup>328</sup> Art. 26 of the Insolvency Law.

<sup>329</sup> Art. 35 of the Insolvency Law.

<sup>330</sup> See art. 55 of the Insolvency Law.

	<p>of the proceedings (within a period of no more than 100 days) and in which he recommends whether to restructure or liquidate the business must be available for inspection, presented to court, and the debtor should be informed about the report.<sup>331</sup> The administrator is required to notify all parties about the submission of a restructuring plan (at the time when it is submitted and no later than 5 days from its submission).<sup>332</sup></p> <p>Except where otherwise provided in the law, the insolvency interim administrator or the administrator/liquidator (depending on the stage and type of the process) is the party responsible to notify and communicate information to relevant parties.<sup>333</sup> Notification and communication of information should be made by registered mail or in the cases expressly provided for in the law,<sup>334</sup> by publication in the Official Monitor. Such notification or publication is considered received within 3 business days from the date of notification/publication. The operative part of the insolvency court decisions should be published in the Official Monitor in cases specified in the law. The court may also decide to publish operative parts of decisions by additional publication methods, such as publication in local newspapers in the area where the debtor has its registered address or where the offices of most creditors are concentrated, publication in the internet or through another electronic system. The Insolvency Law also requires that the insolvency court maintains a register of insolvent debtors and display it on its website.<sup>335</sup> Yet, only 2 out of the 5 Courts of Appeal have thus far made available the public registers of insolvent debtors on their website.<sup>336</sup></p> <p>There are no specific notification methods applicable to foreign creditors. Thus, when the law provides, for example, as a form of notification, publication in the Official Monitor, the administrator is not obliged to undertake any other measures to ensure that foreign creditors have been notified. Reportedly, administrators sometimes do not comply with the obligation to send registered letters when creditors are foreign.</p> <p><i>Appeals</i></p> <p>A special concern under the previous insolvency regime had been the numerous appeals that were submitted during the insolvency process, which coupled with lack of clear timeframes in the law, resulted in significant delays of the insolvency process. The new law significantly constrains the possibility to delay the process through appeals, primarily by limiting the matters that may be the subject of appeal. It also imposes strict time frames regarding the various stages of the process, as noted above (Principle C1).</p> <p>The Insolvency Law provides that the insolvency court's judgments and orders may be appealed within 15 calendar days from their issuance. The appeal should be examined within 60 days from the day it is registered with the appellate court (i.e. the Supreme Court of Justice).<sup>337</sup> The appeal shall not commonly suspend enforcement of the judgment or order issued by the insolvency court, unless the appellate court imposes a stay on</p>
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<sup>331</sup> Art. 114 of the Insolvency Law.

<sup>332</sup> Art. 199 of the Insolvency Law.

<sup>333</sup> Art. 6 of the Insolvency Law.

<sup>334</sup> For instance, when the debtor refuses to convey its stamp within the observation period, the provisional insolvency administrator shall suspend it by publishing a notice in this regard in the Official Gazette (and use his or her stamp instead, which would have the same legal effects).

<sup>335</sup> Art. 7 of the Insolvency Law.

<sup>336</sup> See the register kept by Balti Court of Appeals: <http://cab.justice.md/?menu=147&lang=ro> (238 entries) and Comrat Court of Appeals: <http://caco.justice.md/?menu=157&lang=ro> (66 entries).

<sup>337</sup> The Court of Appeal is the first instance court for insolvency cases (see Principle D1).

	<p>enforcement (based on a reasoned request). In addition, only the documents relevant to the appeal should be submitted to the appellate court<sup>338</sup> (under the old regime the entire dossier was submitted, resulting in a halt of the insolvency proceedings<sup>339</sup>). An appeal is allowed only in instances specifically mentioned in the Insolvency Law.<sup>340</sup> A particular concern has arisen in this respect in practice, as it was noted that parties may be deprived under the law of due process since the law does not allow an appeal on important matters of substance affecting creditors' rights, including decisions regarding the separation of property from the insolvency estate (pursuant to art. 48).<sup>341</sup></p> <p><i>Disclosure of information</i></p> <p>The Insolvency Law lists the financial information that the debtor needs to provide at the time of filing an insolvency petition, which includes the balance sheet and a list of all assets and liabilities (arts. 16 and 17 of the Insolvency Law; see further Principle C4). In cases where the debtor cannot obtain in due time all the required documents, his petition may be accepted for consideration, while the rest of the documents may be provided thereafter. In addition, the insolvency representative has the duty to prepare a report on the debtor's economic situation, verifying the grounds for insolvency (art. 25(5) of the Insolvency Law) and within 100 days, the representative must prepare and present to the creditors' committee a report specifying the prospect of reorganization (art. 114 of the Insolvency Law).</p> <p>As a general principle,<sup>342</sup> participants in insolvency proceedings must fulfil their duties and the requirements under the law in a timely manner. Pursuant to article 27(3) of the Insolvency Law, the debtor must convey to the interim administrator within 3 business days from the administrator's request, all required information on its business and assets, as well as relevant business and accounting documents (including the company's stamp), which shall be retained by the interim insolvency administrator for information and assessment purposes. A breach of the duty results in civil and criminal sanctions (hardly invoked in practice though). The administrator is allowed in the absence of cooperation to obtain the information on the expense of the debtor.</p> <p>Additional duties are imposed on the debtor who must provide explanations and present information to facilitate the decision on the commencement of insolvency proceedings (art. 83 of the Insolvency Law). Throughout the insolvency process, the debtor has the duty to appear in court hearings and creditors' meetings, and to present information as required. The debtor or his officers may not be allowed to leave the country (based on a court order) if there is evidence of lack of collaboration and hiding of information. Other measures may be imposed.<sup>343</sup></p> <p><i>Retention of experts</i></p> <p>The administrator/liquidator may, pursuant to article 68 of the Insolvency Law hire experts (on a competitive basis, unless otherwise agreed with the meeting or committee of</p>
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<sup>338</sup> Art. 8(4) of the Insolvency Law.

<sup>339</sup> Art. 20 of the Insolvency Law No 623 of 14.11.2001 (repealed).

<sup>340</sup> Art. 8(1) of the Insolvency Law.

<sup>341</sup> See also Supreme Court of Justice Resolution On Effectiveness of the Insolvency Law in Judiciary Practice (No. 2, March 24, 2014), para. 3.7, which suggest including additional issues as matters subject to appeal (including decisions pursuant to art. 48). Yet, see the comments on this method of affecting changes in the law (beyond mere clarifications) in Principle C1 above (Comment).

<sup>342</sup> Art. 4(2) of the Insolvency Law.

<sup>343</sup> Art. 84 of the Insolvency Law.

	<p>creditors), provided an approval of the committee of creditors has been received. When experts have been retained by the administrator/liquidator without the consent of creditors, all incurred expenses shall be borne by the administrator/liquidator.</p> <p>Reportedly, experts are rarely hired in practice, largely due to absence of funding resources.</p>
<b>Assessment</b>	<p><b>Largely Observed</b></p> <p>The law sets clear provisions regarding notification and information that should be provided to all relevant parties in a timely manner. The notion of due process is entrenched in the law, and there are measures for hearing parties in the relevant circumstances. The simplification of the appeal process by sending to the appellate court the documents associated with the particular matter rather than the whole file seems to operate well, ensuring that appeals do not stop the insolvency process although it has been reported that, after the Supreme Court of Justice complained that the file sent to them was incomplete, some first instance courts have taken to forwarding the entire file when there is an appeal.<sup>344</sup> There are strict requirements imposed on debtors who must cooperate with the insolvency professional, the creditors and the court, and provide all relevant information. The insolvency professional may also be assisted by experts in the preparation of information relevant to key decision making.</p> <p>Some issues remain, though. Although the law imposes a duty for the debtor to collaborate and provide the insolvency representatives/court with all relevant information as required, practice shows that the quality of information provided is often very poor. This significantly undermines the ability of the administrator, the court and the creditors to adequately assess the financial situation of the debtor. The poor level of adequate cooperation in terms of provision of reliable information has also created mistrust in debtors and their ability to propose viable restructuring strategies. Administrators often need to rely on estimations and find it difficult to provide concrete and reliable information about the debtor's affairs. Experts are rarely hired in practice, exacerbating the unreliability of information provided.</p> <p>Due process has also been undermined in the process of facilitating the appeals procedure. Thus, some matters that affect creditor rights may not be subject to appeal under the law. The denial of the right to appeal (to the Supreme Court of Justice) is of particular concern where the Courts of Appeal (dealing with insolvency cases) still to a large extent lack sufficient expertise (see Principle D3).</p> <p>There are also some complaints about the operation of the notification rules in practice. Reportedly, creditors often claim that they do not receive notification about key stages in the process. Indeed, publication through the Official Monitor might not be effective if it is not regularly checked by relevant parties.<sup>345</sup> A list of insolvency cases may not be found on-line either. Thus, the concern is that not all creditors will be aware of the insolvency process, in time to file their claims (see also Principle D3).</p> <p>There also seems to be some inconsistency in the law when it refers to number of days when stating time-frames, as the law sometimes refer to 'days' without specifying if it is calendar or business days.</p>

<sup>344</sup> See Principle D3.

<sup>345</sup> This source is not available online and is expensive on paper-base (see also Principle D3).

<b>Comment</b>	<p>Consideration should be given to expanding the right of appeal to all decisions that may affect substantive rights of creditors. The concern that appeals will delay the insolvency process has been largely resolved by the introduction of the rule regarding the transfer to the appellate court of the specific documents that are relevant to the appeal, rather than the entire dossier.</p> <p>Clarification may be required of the type of disputes that require a separate trial, evaluating the effectiveness of the process in this respect.</p> <p>Further, consideration could be given to reinforcing the mechanisms of publicity of decisions and orders, especially the decision to open insolvency proceedings and the invitation to file claims by creditors. The noticing procedures might be substantially enhanced where web-based publication of notices and court decisions available. It ought also to be possible to search electronically whether a given entity is subject to insolvency proceedings. In addition, it might be appropriate if more general publication of an insolvency petition filing were made in a newspaper of general circulation. These possibilities are envisaged in the law, but may need to be enforced more robustly. Where the debtor has known foreign creditors, it should be ensured that they receive individual notification of relevant key stages of the process.</p> <p>Other aspects of the framework require examination to promote the provision of adequate information, importantly regarding the provision of new finance following an insolvency application (see Principle C9), that could encourage the engagement of experts.</p>
	<b><i>Commencement</i></b>
<b>Principle C3</b>	<p><b>Eligibility</b></p> <p>The insolvency proceeding should apply to all enterprises or corporate entities, including state-owned enterprises.<sup>346</sup> Exceptions should be limited, clearly defined, and should be dealt with through a separate law or through special provisions in the insolvency law.</p>
<b>Description</b>	<p>The Moldovan Insolvency Law applies to all legal entities regardless of their ownership type (private or state-owned) or legal organization form; to individual entrepreneurs, including patent holders; to insurance companies; investment funds; trust companies; and non-profit organizations, registered in the Republic of Moldova.<sup>347</sup></p> <p>Thus, any debtor who applies for an insolvency proceeding or against whom an application is submitted must be an entrepreneur. Eligibility is also subject to registration. Insolvency proceedings may not be applied with regard to natural persons (individuals) who are not engaged in business activities and are not registered in one of the legal organization forms set out by Moldovan Law (including the legal form of “individual entrepreneur” or “patent holder”).<sup>348</sup> Foreign entities doing business in Moldova must register as a branch or a subsidiary;<sup>349</sup> if the branch or subsidiary is registered it will be eligible as a debtor under the Insolvency Law.</p>

<sup>346</sup> Ideally, the insolvency process should apply to SOEs, or alternatively, exceptions of SOEs should be clearly defined and based upon compelling state policy.

<sup>347</sup> Art. 1 of the Insolvency Law.

<sup>348</sup> Registration of individual entrepreneurs is carried out in accordance with the Law on state registration of legal entities and individual entrepreneurs No. 220 of 19.10.2007, whereas no state registration system is provided for persons engaging in economic activity under a patent (art. 3 para (3) of the Law on entrepreneurial patent No 93 of 15.07.1998; the latter are recorded with the relevant authority to issue the patent and when necessary, authorization of functioning). Failure to register is deemed as illegal entrepreneurial activity under art. 263 of the Contravention Code is punishable by a fine of 10 to 35 conventional units (MDL 200 to MDL 700). When illegal carrying out of entrepreneurial activity results in large scale profit, such activity is punishable under the Criminal Code (art. 241) with fine up to 2000 conventional units (MDL 20 000 or approx. EUR 1100) or up to 200 hours of community service work

<sup>349</sup> According to art.19 para.(2) and (3) of the Law on Investments in Entrepreneurial Activity No.81 of March 18, 2004, “branches of non-resident enterprises, their associations and international organizations, established on the territory of the Republic of Moldova,

	<p>The Insolvency Law includes certain specific provisions with regard to the insolvency of agricultural enterprises<sup>350</sup>, farmers<sup>351</sup>, insurance companies<sup>352</sup>, professional financial market participants<sup>353</sup> and savings and loan associations.<sup>354</sup></p> <p>The Insolvency Law does not apply to banks (i.e. deposit-taking financial institutions). Bank insolvency is regulated by the Law on Financial Institutions. The state, territorial administrative units and legal entities of public law are not subject to the Insolvency Law.<sup>355</sup></p> <p><i>Simplified bankruptcy</i></p> <p>Certain types of insolvent debtors are eligible for the special procedure of simplified bankruptcy:<sup>356</sup></p> <ul style="list-style-type: none"> <li>• Individual entrepreneurs, farmers and patent owners.</li> <li>• Legal entities with no assets or assets which are insufficient to cover the costs of the proceedings (and no creditor or third party willing to cover the costs).</li> <li>• Commercial firms and nonprofit organizations that have been dissolved prior to the filing of the insolvency petition.</li> <li>• Debtors who do not have the right to undertake a restructuring process (the scope of this criterion is unclear and not further explained in the law).</li> </ul>
<b>Assessment</b>	<p><b>Observed</b></p> <p>The general insolvency proceedings, which include both liquidation and restructuring processes, apply to any legal entity as well as to individual entrepreneurs duly registered in Moldova. State-owned enterprises are subject to the Insolvency Law. The law provides certain specific rules applicable to specific type of entities, as well as a simplified bankruptcy process which can be utilized with regard to certain categories of debtors. Exclusion from the general application of the insolvency framework is strictly limited to banks (which are separately regulated by the Law on Financial Institutions) and to state, counties and municipal entities. This approach is in line with international standards.<sup>357</sup></p>
<b>Principle C4</b>	<p><b>Applicability and accessibility</b></p> <p><b>C4.1</b> Access to the system should be efficient and cost-effective. Both debtors and creditors should be entitled to apply for insolvency proceedings.</p>

shall acquire the status of enterprise starting with the day of their registration. Representative offices of nonresident enterprises shall be registered on the territory of the Republic of Moldova in compliance with current legislation, shall not have status of juridical company and shall not have the right to carry out business activity.”

<sup>350</sup> Chapter VIII of the Insolvency Law.

<sup>351</sup> Chapter IX of the Insolvency Law.

<sup>352</sup> Chapter X of the Insolvency Law.

<sup>353</sup> Chapter XI of the Insolvency Law.

<sup>354</sup> Chapter XII of the Insolvency Law.

<sup>355</sup> Art. 1 of the Insolvency Law. Pursuant to art.110 of the Constitution and the Law on administrative organization no.764/2001, Territorial administrative Units are the counties (raioane), cities/towns (orase), and villages (sate). Further, under art.111 of Constitution and special laws, UTA Gagauzia (settlements in southern part of the country) and Transnistria (the settlements on the left bank of Nistru River) enjoy a ‘special autonomy regime’.

<sup>356</sup> Art. 134 of the Insolvency Law.

<sup>357</sup> Note that an assessment of the regime for individual persons’ bankruptcy is outside the scope of this report.

	<p><b>C4.2</b> Commencement criteria and presumptions about insolvency should be clearly defined in the law. The preferred test to commence an insolvency proceeding should be the debtor's inability to pay debts as they mature, although insolvency may also exist where the debtor's liabilities exceed the value of its assets, provided that the value of assets and liabilities are measured on the basis of fair market values.<sup>358</sup></p> <p><b>C4.3</b> Debtors should have easy access to the insolvency system upon showing proof of basic criteria (insolvency or financial difficulty).</p> <p><b>C4.4</b> Where the application for commencement of a proceeding is made by a creditor, the debtor should be entitled to prompt notice of the application, an opportunity to defend against the application, and a prompt decision by the court on the commencement of the case or the dismissal of the creditor's application.</p>
<b>Description</b>	<p><i>Overview</i></p> <p>Under the Insolvency Law, insolvency proceedings may commence on the basis of an introductory application (the insolvency petition), which may be submitted either by creditors or the debtor, or other parties as provided in the law.<sup>359</sup> When the debtor is a legal entity, the application should be submitted on the debtor's behalf by its executive body, a legal representative, members with unlimited liability or by a liquidator.<sup>360</sup></p> <p><i>Debtor access</i></p> <p>A debtor may submit an insolvency petition 'if a threat of its insolvency exists and it is possible to assume that it will be unable to fulfill its monetary obligations'.<sup>361</sup> However, upon filing he will need to establish a state of insolvency (see below).</p> <p>A debtor may also file the special 'accelerated restructuring' proceedings when he is 'experiencing financial difficulties'.<sup>362</sup> An enterprise in a difficult financial position is 'an enterprise whose managerial and economic viability potential is in dynamic decline, but the owner of which is nonetheless fulfilling or capable of fulfilling obligations subject to fulfillment'.<sup>363</sup> The application should delineate its grounds, and should include all the information and documents that debtors are obliged to provide in any application for insolvency (see below). Debtors are deprived of the right to apply for accelerated restructuring if at some point during the preceding 5 years they were subject to an accelerated restructuring process or if they are subject to insolvency proceedings at the time the petition is filed.<sup>364</sup></p>

<sup>358</sup> A single or dual approach may be adopted, although where only a single test is adopted it should be based on the liquidity approach for determining insolvency – that is, the debtor's inability to pay due debts.

<sup>359</sup> Arts. 9 and 12 of the Insolvency Law. For instance, article 245 provides that the National Commission for Financial Markets (the regulator of the non-banking financial sector) is entitled to submit an insolvency petition regarding savings and loan associations.

<sup>360</sup> Pursuant to art. 138 of the Insolvency Law, if the assets of a debtor who is in the process of voluntary or compulsory dissolution are insufficient to satisfy creditors' claims, its liquidation shall be carried out in accordance with the insolvency law within the framework of the simplified bankruptcy proceedings.

<sup>361</sup> Art. 13 of the Insolvency Law.

<sup>362</sup> Art. 218 of the Insolvency Law.

<sup>363</sup> Art. 2 of the Insolvency Law.

<sup>364</sup> Art. 219 of the Insolvency Law.

	<p>Debtors are obliged to initiate insolvency proceedings immediately and not later than 30 calendar days from the emergence of grounds for insolvency.<sup>365</sup> Grounds of insolvency exist either when the debtor is unable to pay its debts (regarded as ‘general grounds’) or where its liabilities exceed the assets. The latter scenario is regarded as special grounds and it specifically refers to the debtor ‘extreme debt’ where in the case of a legal entity the liability is limited to its property. It requires an assessment of the property on a going concern basis if possible.<sup>366</sup></p> <p>The following shall be taken into account when determining the state of insolvency:</p> <ul style="list-style-type: none"> <li>• The extent of the debtor’s obligations including with regard to the delivery of assets, provision of services and performance of work.</li> <li>• Any damages owed by the debtor.</li> <li>• The amount of budgetary obligations.</li> </ul> <p>Late fees, other financial sanctions and any obligations to shareholders shall not be taken into account.<sup>367</sup></p> <p>A debtor’s application must include:<sup>368</sup></p> <ul style="list-style-type: none"> <li>• The debtor’s fiscal code and bank account details.</li> <li>• The amount of creditors’ claims and amounts of interest and late fees.</li> <li>• A substantiation of creditors’ claims and their due dates, indicating which claims relate to personal injuries and damages for wrongful death and which relate to payment to employees.</li> <li>• The amount of budgetary claims.</li> <li>• A substantiation of the grounds for insolvency.</li> <li>• Information concerning lawsuits against the debtor and writs of execution against the debtors’ assets.</li> <li>• Information regarding the debtor’s assets and liabilities.</li> <li>• A nomination of an administrator/liquidator.</li> <li>• Where applicable, a substantiated request to initiate restructuring proceedings.</li> </ul> <p>The following documents should be attached to the petition:<sup>369</sup></p> <ul style="list-style-type: none"> <li>• The debtor’s charter or acquisition agreement.</li> <li>• A list of the debtor’s members.</li> <li>• The balance sheet.</li> <li>• Evidence of the composition of the debtor’s assets where he is a natural person.</li> <li>• Information from public registries regarding the debtor’s assets, including pledged assets.</li> <li>• A list of the debtors’ creditors and debtors with identification details.</li> <li>• Proof of notification to the debtor’s owner (an absence of which shall not prevent the acceptance for consideration of the petition).</li> </ul> <p>Debtors must also file insolvency proceeding within the above period of time in the event that the satisfaction of claims of one or more creditors might result in the inability to pay the debts of other creditors when they are due.<sup>370</sup> A failure to file within the specified time period results in liability to creditors (‘subsidiary liability’) for all obligations that occurred</p>
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<sup>365</sup> Art. 14 of the Insolvency Law.

<sup>366</sup> Art. 10 of the Insolvency Law.

<sup>367</sup> Art. 11 of the Insolvency Law.

<sup>368</sup> Art. 16 of the Insolvency Law.

<sup>369</sup> Art. 17 of the Insolvency Law.

<sup>370</sup> Art. 14(2)(a) of the Insolvency Law. Filing is also obligatory if within winding down procedures carried under a different law, it becomes apparent that the debtor cannot fully satisfy the claims of its creditors.



	<p>after the end of the time period. Liability may be invoked by the insolvency administrator/liquidator during the insolvency process.<sup>371</sup> It also qualifies as a criminal liability, though thus far the Criminal Code has not been amended to include provisions to this effect.</p> <p>If a debtor files even though it had a ‘realistic ability’ to fully satisfy creditors’ claims, he may be liable for ‘fictitious insolvency’. The debtor’s controllers may also be liable for ‘deliberate’ insolvency, i.e. if the insolvency is based on their ‘fault’.<sup>372</sup> At the request of the insolvency administrator/liquidator, the court may order that part of the debtor’s indebtedness be discharged by the directors and key executive officers who caused the debtor’s insolvency.<sup>373</sup> There also disqualification provisions. Reportedly, the provisions regarding debtor obligations and liabilities are rarely invoked in practice, even though some report that incidences of abuse by debtors do occur.</p> <p>Market participants report that it is often unclear at what time the grounds for insolvency have emerged. There is often lack of resources and funds available to support the initiation of proceedings against debtors. These provisions were analyzed in more detail in Principle B2 above.</p> <p>The Insolvency Law sets strict timeframes for ruling upon insolvency petitions. A debtor’s application of accelerated restructuring which meets the requirements prescribed in article 219 (see above) shall be ruled upon within 3 business days. The court shall initiate the accelerated restructuring proceeding, appoint an interim administrator, apply safeguard measures and set times for claims validation and for voting on a restructuring plan (see further on this process in the analysis of Principle C14).</p> <p>The debtor (general) insolvency petition (as well as his response to a creditor’s petition) may include a request either to open restructuring proceedings or to liquidate. In such a case, the court is required to deliver a decision, within 10 business days, on the institution of insolvency proceedings (the ‘observation’ procedure will not apply). Otherwise, the normal process, which starts with an observation period, will apply (see below, under creditor access).</p> <p><i>Creditor access</i></p> <p>A creditor may file an insolvency petition if he has a legitimate interest in the initiation of such proceeding and if he can substantiate his claims and the grounds for instituting insolvency proceedings. A creditor may not initiate such proceedings where the debtor is subject to restructuring proceeding, except where the claim arose after the initiation of those proceedings (the operation of this exception is not specified in the law).<sup>374</sup> Creditors’ insolvency petitions will be dismissed if they were filed after an accelerated restructuring process has been initiated.<sup>375</sup></p> <p>Prior to filing, the creditor must notify the debtor about the intention to file. Such notification is deemed fulfilled where prior to the filing the debtor was informed by the creditor, or a bailiff, or in cases explicitly specified in the tax code, by the relevant</p>
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<sup>371</sup> Art. 248 of the Insolvency Law.

<sup>372</sup> Art. 15 of the Insolvency Law.

<sup>373</sup> Art. 248 of the Insolvency Law.

<sup>374</sup> Art. 18 of the Insolvency Law.

<sup>375</sup> Art. 219 of the Insolvency Law.

	<p>authorities, regarding the non-fulfillment of the obligation or the submission for execution of a writ or another equivalent document specified in the Execution Code.<sup>376</sup></p> <p>A deliberate filing by creditors for the purpose of damaging the debtor's reputation may result in imposing liability for the damages incurred to the debtor.<sup>377</sup></p> <p>The creditor will need to establish the debtor's state of insolvency, based on the grounds for insolvency as described above. In addition, the petition by the creditor shall contain:<sup>378</sup></p> <ul style="list-style-type: none"> <li>• Details of the creditor and debtor verified by an extract from the public registry.</li> <li>• The creditor's claim including interest and late fees.</li> <li>• Substantiation of the claims and their due dates.</li> <li>• Other evidence to support the claim.</li> <li>• Nomination of administrator/liquidator.</li> <li>• Other information that the creditor deems necessary.</li> </ul> <p>The creditor should also attach to the petition:</p> <ul style="list-style-type: none"> <li>• Documents evidencing the debt to the creditor and the grounds for instituting the proceedings; and any other documents on which the petition is based.</li> <li>• Evidence of the preliminary notification to the debtor.</li> <li>• A copy of an irrevocable court (or arbitration/or empowered authority) judgment which is subject to execution.</li> </ul> <p>Obtaining such a judgment could be a lengthy and cumbersome process (see Principle A5).</p> <p>The court shall issue a ruling on the creditor's petition within 3 days from filing. The court should then order the observation of the debtor through the appointment of an interim administrator and shall take interim measures to preserve its assets and consider the creditors' claims (see further Principles C8 and C13).</p> <p>Within 2 business days from the date such order is issued, the court shall send to the debtor a copy of the application. The debtor must submit his response to the petition, in which he must either dispute or acknowledge the state of insolvency, within 10 business days from receipt. When the debtor disputes the state of insolvency and his objection is found to be ungrounded, the debtor loses his right to request a restructuring procedure.<sup>379</sup></p> <p>The observation period may take up to 60 business days (with possible - up to 15 business days - extension).<sup>380</sup> After observation, the court will issue a decision on the commencement of insolvency proceedings or its termination. The court may either open general insolvency proceedings or simplified bankruptcy proceedings (see below).<sup>381</sup> The general insolvency proceedings will result in a set of consequences with regard to the debtor's management and assets (see Principles C6 and C8).</p> <p>The administrator shall prepare and present to the creditors a report on the debtor's economic situation within 100 days from the initiation of the general insolvency proceedings, and will propose whether to liquidate or restructure the business. The creditors' meeting will take a decision on the proposal. If they do not approve the first</p>
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<sup>376</sup> Art. 19 of the Insolvency Law.

<sup>377</sup> Art. 33 of the Insolvency Law.

<sup>378</sup> Art. 20 of the Insolvency Law.

<sup>379</sup> Art. 28 of the Insolvency Law.

<sup>380</sup> See arts. 23-29 of the Insolvency Law.

<sup>381</sup> Art. 30 of the Insolvency Law. As explained above, the court may also order the opening of accelerated restructuring, based on an application of the debtor.

	<p>proposal of the administrator (e.g. to restructure), the other type of proceedings will be commenced without a need for an additional vote. If the creditors approved a restructuring strategy, their decision will be subject to court approval within 5 days. If the court approves the decision, it should establish a time for the submission of a plan which should not exceed 30 days. Failure to submit a plan on time will result in the initiation of bankruptcy proceedings. If the creditors meeting approved the proposal to liquidate the business, the court shall initiate bankruptcy proceeding.<sup>382</sup></p> <p>Reportedly, there are incidences of abusive filing for the purpose of stripping the business' assets and transferring them to affiliate entities. The scheme involves the creation of fictitious claims against the debtor, through a court in a different area in the country. The claim is then presented to the insolvency court and an insolvency proceeding is commenced. The scheme may be initiated later in the process whereby creditors will join the proceedings by submitting (fictitious) claims. Then, through decisions of the creditors' committee or the creditors' meeting the abusive sale of the debtors' assets may be affected.</p> <p><i>Simplified bankruptcy</i></p> <p>An insolvency petition of either the debtor or a creditor may result in the initiation of simplified bankruptcy proceedings. Such proceedings may be commenced in cases of insolvent debtors of specific types:<sup>383</sup></p> <ul style="list-style-type: none"> <li>• Individual entrepreneurs, farmers and patent owners.</li> <li>• Legal entities with no assets or assets which are insufficient to cover the costs of the proceedings (and no creditor or third party willing to cover the costs).</li> <li>• Commercial firms and nonprofit organizations that have been dissolved prior to the filing of the insolvency petition.</li> <li>• Debtors who do not have the right to undertake a restructuring process (the scope of this criterion is unclear and not further explained in the law).</li> </ul> <p>If a debtor falls into one of the above categories, the court may, at the time of commencing the insolvency proceedings, initiated simplified bankruptcy proceedings and dissolve the debtor. In addition, and pursuant to article 136 of the Insolvency Law, individual entrepreneurs may be declared insolvent (at the request of the debtor or a creditor) when failing to pay a debt that is due related either to its business or personal activities. Following such declaration the debtor is obliged to file an insolvency petition within 30 calendar days.<sup>384</sup></p>
<b>Assessment</b>	<p><b>Materially Non-Observed</b></p> <p>Both debtors and creditors are entitled under the Insolvency Law to submit an insolvency petition. In principle, petitions are based on establishing grounds of insolvency, except that debtors may also file an accelerated restructuring petition when they are experiencing financial difficulties. For certain types of debtors a simplified bankruptcy process is also available. There are specific requirements regarding notifications and concrete timeframes that ensure timely commencement of the process after the application.</p> <p>The law may be strengthened, though, to facilitate and promote timely access to the insolvency proceedings in the appropriate circumstances. The commencement requirements imposed on creditors are excessive. The requirement to present final court decision about the debtor's debt significantly delays the right of the creditor to initiate proceedings.</p>

<sup>382</sup> See art. 114 of the Insolvency Law.

<sup>383</sup> Art. 134 of the Insolvency Law.

<sup>384</sup> And art. 14(4) will apply (see above on the debtor's duty to file an insolvency petition).

	<p>Creditors may not attempt to initiate insolvency proceedings if they are obliged to take such cumbersome preliminary steps. This obligation may drive creditors to enforce their debt on an individual basis, a tendency that already exists in the jurisdiction. Even if creditors will still be willing to utilize the insolvency framework, the need to attempt an execution outside the system first is likely to mean that the insolvency petition will be filed at a late stage and that may impede the rescue of the business, even if it was viable. Substantiating the state of insolvency may also be difficult, and the requirements in this respect entail a degree of uncertainty, as the law does not specify any period of time after which a failure to pay a mature debt would allow the creditor to file a petition.</p> <p>Debtors are able to file a petition early if they chose the accelerated restructuring path. However, they are not obliged to file a petition or take any other measures at times of experiencing financial difficulties. They are only obliged to file a petition after they are already in a state of insolvency. At such time, a rescue may no longer be a viable possibility. It may also be unclear to debtors whether they are in a state of insolvency. A better approach would focus on debtor's knowledge that insolvency is imminent. The law refers to being under the threat of insolvency only in the context of debtors' right to file. Furthermore, when the debtor is in such a threat, a better method to resolve the financial difficulties might in some cases be to engage in informal workout negotiations. Yet, the current provisions may discourage such actions as debtors may be exposed to liability for late filing or for fictitious filing (if it will be possible to show that they had a realistic ability to fully satisfy the claims). Thus, the provisions regarding debtors' duties and obligation regarding filing for insolvency and behavior at times of financial difficulties may require improvement (see also Principle B2). The law should ensure that, on the one hand, debtors are encouraged to use the insolvency framework at an early stage, even before actual insolvency. On the other hand, the law should also allow debtors to take other steps to minimize harm to creditors at times of distress, e.g. by way of engaging in good faith out-of-court restructuring negotiations.</p> <p>The restriction imposed on debtors that unsuccessfully object a creditor's insolvency petition, to request a restructuring may be counter-productive to the goal of ensuring easy and timely access to the process. Insolvency is a matter of fact that can be subject to different bona fide opinions. A debtor may consider that he is not yet insolvent and that the business can be rescued. If the state of insolvency is established, the debtor may still be able to present a plan and the proceedings could have moved directly to commencement (avoiding observation), to the benefit of the general body of creditors.</p>
<b>Comment</b>	<p>It is critical to allow timely access to the insolvency system, especially as one of the key goals of the new Insolvency Law has been to promote rescues of viable business. Entering the system too late, and not engaging in pre-insolvency rescue attempts, may seriously constrain the success of such a strategy.</p> <p>Creditors, especially those with a large claim, are usually in a good position to be aware of the debtor's financial situation and initiate an insolvency process. The law should usefully remove the requirement that creditors have to present a final court judgment to be able to file a petition, since such a requirement significantly delays, and also discourages, filing. Although this requirement was originally introduced to prevent abuses of the insolvency system, practice has shown that maintenance of such test is counterproductive, and there are other means to deal with creditor abuse (see art. 33 of the Insolvency Law). The law may also include a presumption that if the debtor fails to repay a mature debt within a period of time (e.g. 30 days), and the debt is not subjected to a legitimate dispute, the debtor is not able to pay its debts (and grounds of insolvency may be established).</p> <p>The law may usefully clarify what steps the debtor should take at times approaching insolvency which may include both out of court negotiations and the use of the insolvency framework, even before actual insolvency, if this would best promote the interests of the stakeholders as a whole (see also Principle B2). The restriction imposed on debtors who</p>

	<p>unsuccessfully opposed a creditor's petition, that they cannot request a restructuring may also be reexamined.</p> <p>Other aspects of the system require strengthening to ensure robust and proper application of the relevant provisions. In particular, the capacity and skills of both the judiciary and the insolvency professionals require reinforcement (see Principles D3, D5 and D8).</p>
<b>Principle C5</b>	<p><b>Provisional Measures and Effects of Commencement</b></p> <p><b>C5.1</b> When an application has been filed, but before the court has rendered a decision, provisional relief or measures should be granted when necessary to protect the debtor's assets and the interests of stakeholders, subject to affording appropriate notice to affected parties.</p> <p><b>C5.2</b> The commencement of insolvency proceedings should prohibit the unauthorized disposition of the debtor's assets and suspend actions by creditors to enforce their rights or remedies against the debtor or the debtor's assets. The injunctive relief (stay) should be as wide and all encompassing as possible, extending to an interest in assets used, occupied or in the possession of the debtor.</p> <p><b>C5.3</b> A stay of actions by secured creditors should be imposed in liquidation proceedings to enable higher recovery of assets by sale of the entire business or its productive units, and in reorganization proceedings where the collateral is needed for the reorganization. The stay should be of limited, specified duration, strike a proper balance between creditor protection and insolvency proceeding objectives, and provide for relief from the stay by application to the court based on clearly established grounds when the insolvency proceeding objectives or the protection of the secured creditor's interests in its collateral are not achieved. Exceptions to the general rule on a stay of enforcement actions should be limited and clearly defined.</p>
<b>Description</b>	<p><i>Interim measures during the observation period</i></p> <p>Following an application for commencement of insolvency proceedings, the debtor is subject to an observation period of up to 60 business days (which when necessary can be extended by up to another 15 business days), before insolvency proceedings are being initiated.<sup>385</sup></p> <p>The Insolvency Law prohibits individual actions by creditors for satisfaction of their claims from the time the insolvency petition is accepted for consideration (art. 53). During the observation period, the insolvency court shall take all necessary measures in order to protect the debtor's assets. In this respect, the court may apply interim measures under the Civil Procedure Code.<sup>386</sup> Additionally, the insolvency law requires that the court take the following measures:<sup>387</sup></p> <p>(a) appoint an interim insolvency administrator; the debtor may only take decisions concerning the management of its property (throughout the observation period) with the administrator's prior approval;</p>

<sup>385</sup> Arts. 23 and 30 of the Insolvency Law.

<sup>386</sup> Under art. 175 of the Civil Procedure Code, the court may authorize the following provisional measures: (i) seizure of the debtor's assets and monies, including in the custody of third parties; (ii) prohibit the debtor from committing certain acts; (iii) prohibit third parties from conveying assets to the debtor or in other way performing their obligations; (iv) suspend the sale of seized property in case an application for lifting the seizure has been filed; (v) suspend enforcement based on an enforceable document, when challenged by the debtor in court.

<sup>387</sup> Art. 24 of the Insolvency Law.

	<p>(b) remove the debtor from management of its assets in circumstances where either the creditors or the administrators make a justified request to this effect or <i>ex officio</i>;</p> <p>(c) order the seizure of the debtor's assets and his commercial correspondence;</p> <p>(d) suspend all individual creditors' actions, enforcement of claims against the debtor's assets and the running of time limitations on requesting the enforcement of claims against the debtor;</p> <p>(e) impose a stay on disposition of assets by the debtor; or allow disposition only with the express consent of the interim administrator.</p> <p>The provisional measures shall remain valid until commencement of insolvency proceedings or rejection of the application, or when the court confirms a settlement.</p> <p>When the aforementioned measures are deemed insufficient, the court may order that the debtor or its representatives are brought in (including forcefully) for a hearing.</p> <p>Based on a reasoned request, the court may lift any of the provisional measures,<sup>388</sup> except for the appointment of the interim administrator.</p> <p>The court also may, upon the reasoned request of the debtor, suspend the accrual of interest, increases or penalties of any kind, and any other type of expenses related to the pre-observation claims.<sup>389</sup></p> <p>To ensure that all dealings with the debtor's assets are ceased and the debtor's correspondence and other communications are handed over to the interim administrator, the administrator must make relevant notifications regarding the application of the interim measures to the public registers,<sup>390</sup> banks, territorial cadastral offices, customs authorities, post offices, railway stations, ports and customs warehouses and other storage places in the area where the debtor has its registered office, branch or representative. Concurrently, but no later than 10 business days after his appointment, the interim administrator shall notify all creditors recorded in the debtor's accounting documents to file their claims, when certain and due, against the debtor's estate and respond to the insolvency petition (see further on the notifications and on the claim resolution process in Principles C2 and C13 respectively).</p> <p>The above mentioned interim measures (specified in article 24), also apply after the initiation of the accelerated restructuring proceedings.<sup>391</sup></p> <p><i>Effect of commencement of insolvency proceedings</i></p> <p>Following the period of observation, insolvency proceedings may commence (unless the petition is rejected or the proceedings terminated).<sup>392</sup> Pursuant to article 74 of the Insolvency Law, the commencement of insolvency proceedings shall have the following effects:</p> <ul style="list-style-type: none"> <li>• the debtor's right to manage and dispose of its assets included in the insolvency</li> </ul>
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<sup>388</sup> Art. 24 para (7) of the Insolvency Law.

<sup>389</sup> Art. 24(5) of the Insolvency Law.

<sup>390</sup> State Register of Legal Entities, State Register of Individual Entrepreneurs (both kept by the State Registration Chamber); Register of Immovable Assets (kept by State Enterprise Cadastre); Register of Pledge over Movable Assets (kept by the Ministry of Justice); State Register on Transport; Register of the debtor's subdivisions and bank accounts (State Tax Inspectorate); State Register of Copyright, Trademarks and Invention Patents (AGEPI); Registers of corporate securities held by independent registrars; etc.

<sup>391</sup> Art. 220(3) of the Insolvency Law.

<sup>392</sup> Art. 30 of the Insolvency Law.

	<p>estate terminate; an administrator (or a liquidator in a simplified bankruptcy) takes over the management of the debtor;</p> <ul style="list-style-type: none"> <li>• any act of disposition of the debtor over an asset included in the insolvency estate performed after commencement of insolvency is void;</li> <li>• the insolvency court shall issue orders to all financial institutions where the debtor has accounts not to allow dispositions without the permission of the administrator/liquidator;<sup>393</sup></li> </ul> <p>Article 75 stipulates the following additional effects of commencement:</p> <ul style="list-style-type: none"> <li>• the activity of the debtor's governing bodies shall be suspended;</li> <li>• payments to and from the debtor shall be made only through the "accumulation" bank account managed by the administrator/liquidator;</li> <li>• any guarantee relating to performance of an obligation shall be granted only by the administrator/liquidator, with the prior authorization of the creditors' meeting or committee;</li> <li>• seizures of the debtor's estate and other provisional measures or interdictions placed by other courts or relevant bodies against the debtor/administrator/liquidator to manage and sell the insolvency estate shall be void and shall be applied exclusively by the insolvency court;</li> <li>• the debtor's shareholders shall not be entitled to seek the distribution of the debtor's estate in connection with their shareholding.</li> <li>• redemption or re-purchase by the debtor of shares, or payment of the value of the shares is prohibited;</li> <li>• payment of dividends, other payments related to securities, payments on shares and profit sharing among the debtor's shareholders are prohibited;</li> <li>• the administrator/liquidator may prohibit third parties who rent, lease, borrow, store or use the debtor's asset in any other fashion, from carrying out such transactions;</li> <li>• the accrual of penalties, interests and other payments on the creditor claims, as well accrual of payments (interest, commitment fee, risk fund and penalties) on loans granted by the Ministry of Finances, and payment on the amounts used from public budget to execute state guarantees, shall be suspended.</li> </ul> <p><i>The moratorium</i></p> <p>Pursuant to article 81, a moratorium on pursuing claims against the debtor is imposed following the commencement of insolvency proceedings. Thus, unsecured creditors may not enforce individually their claims against the debtor throughout the insolvency procedure.<sup>394</sup></p> <p>The stay over the use of encumbered assets is limited to 180 days from the commencement of insolvency proceedings. The stay expires after 180 days and there are no measures for extension of the stay.</p> <p>However, if restructuring proceedings are commenced, another moratorium is imposed on all claims, immediately after the commencement of the proceedings, and remains in effect throughout the restructuring process.<sup>395</sup> The accrual of interest on secured claims is not suspended during the restructuring process.<sup>396</sup></p>
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<sup>393</sup> In case of non-compliance, such financial institutions shall be held accountable for all damages caused and shall pay a judicial fine of 10% from the amounts disposed.

<sup>394</sup> Certain post-petition claims (execution of obligations of the insolvency estate that are not based on acts of the administrator/liquidator) are also suspended, for 180 days.

<sup>395</sup> Arts. 81(3) and 184 of the Insolvency Law.

	<p>Employees' claims for wages, alimony and child support, as well as for damages for personal injuries and wrongful death are excluded from the restructuring moratorium. Claims with regard to monetary and tax obligations that have come due after the initiation of the restructuring process are also excluded from the stay (art. 184).</p> <p><i>Relief from the moratorium</i></p> <p>Secured creditors may seek relief from the moratorium before the expiration of the 180 days period. They must file a petition and prove that they are suffering losses as the result of diminishing value of the encumbered assets and that there is no possibility of receiving compensation for the loss during the bankruptcy process or in the event that a restructuring plan was not approved.<sup>397</sup> It is not clear whether the relief from the moratorium is available during the restructuring process.<sup>398</sup></p> <p><i>A ban on repossession of encumbered assets during a sale process</i></p> <p>Article 81(5) provides that the use of encumbered assets in cases specified in sub sections (3) and (4) of article 81 (referring to the 180 stay of secured creditors' actions and the relief from the stay) shall be made pursuant to the procedure established in articles 130-132. Pursuant to article 130 of the Insolvency law, following the decision to initiate insolvency proceedings or bankruptcy proceedings the administrator/liquidator assumes possession of all assets including encumbered assets. No creditor can request the possession of their collateral during the time that the administrator/liquidator attempts to realize the assets, except in the circumstances provided for under the section concerning the use and sale of encumbered assets.</p> <p>The use or the sale<sup>399</sup> of the encumbered assets requires the consent of the secured creditor. The secured creditor may also notify the administrator/liquidator that he intends to use the property in which case the administrator/liquidator will need to take action accordingly, i.e. to use or sell the property in the manner as requested. The administrator/liquidator can oppose the conditions only were they are in conflict with the law.<sup>400</sup> In case the administrator/liquidator fails to sell encumbered assets within 3 months, he should return the asset to the secured creditor subject to a prescribed procedure.</p> <p>The interaction between the moratorium provision and the sales process is not sufficiently clear. However, it appears that throughout the period of the moratorium only the liquidator/administrator may initiate a sale of assets, while if the secured creditor obtains relief from the stay, he can initiate the sale process, but only through the administrator. In any event, the consent of the secured creditor for a sale and regarding the manner of sale is required.</p> <p>The administrator/liquidator may attempt to make other uses of the encumbered assets, if he receives the consent of the secured creditors and provides compensation for losses (art. 133).</p>
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<sup>396</sup> Art. 184(2) of the Insolvency Law.

<sup>397</sup> Art 81(4) of the Insolvency Law.

<sup>398</sup> See art. 184 of the Insolvency Law.

<sup>399</sup> The law seems to refer to use/realization/capitalization (*valorifica*) of assets. We understand the provisions as referring to a use which includes realization of assets.

<sup>400</sup> See arts. 130, 131 and 133 of the Insolvency Law.



<b>Assessment</b>	<p><b>Largely Observed</b></p> <p>The new Insolvency Law provides a wide range of measures aimed at protecting the debtor's assets throughout the insolvency process. From the time of filing of the insolvency petition, and throughout the period of observation, interim measures are imposed, including the suspension of individual creditors' actions.</p> <p>The formal commencement of the insolvency case brings about additional measures and causes a general stay on all individual actions against the debtor and its property. The stay applies to both secured and unsecured claims, though it is limited in time with regard to the stay on actions by secured creditors (180 days). Secured creditors may seek relief before the expiration of the duration of the stay based on showing loss and no possibility for compensation. The stay on enforcement of unsecured claims applies throughout the insolvency procedure. If restructuring proceedings are commenced, another stay is employed, and actions by both secured and unsecured are stayed throughout the process. In bankruptcy (liquidation), the stay of actions by secured creditors supposedly continues until the expiration of the stay duration.</p> <p>Other attachment of the debtor's property and other measures imposed on the debtor's property or on its use by the administrator/liquidator property are void. The administrator/liquidator can also prohibit (subject to providing notice) other transactions related to the debtor's assets. There are also measures intended to limit the extent to which the debtor can deal with assets of the estate, including during the observation period. After commencement, the debtor can no longer manage the company and deal with its assets.</p> <p>These measures are generally in line with international standards, but there is room for improvement. The accrual of interest for secured creditors is stopped throughout the moratorium period (except in the course of a restructuring) and there is no provision regarding post-petition payment of interest up to the value of the collateral (i.e. where the creditor is over secured). This can adversely affect secured creditors' rights and may discourage the use of the insolvency framework by secured creditors.</p> <p>There seems to be a significant degree of confusion among the users of the system with regard to the operation of the stay and the grounds for relief from the stay that may be obtained by secured creditors. Participants in the process seem to believe that during the stay, a relief is either unavailable or not practicable in practice. It is thought that it is impossible to prove the pre-conditions for obtaining such relief. Indeed, under the relief provision, the burden is on the creditor to prove loss and show that there is no alternative compensation. The administrator/liquidator is not required to show that the assets are necessary for a beneficial realization of the estate. The result may be the 'lock' of encumbered assets in the estate in circumstances where the assets are not necessary for a going concern sale or restructuring and could be realized by the secured creditors more promptly.<sup>401</sup> There is also some confusion about the duration of the stay. Major users believe that the stay starts at the time of filing for insolvency, while the Insolvency Law refers to the 'institution' of the insolvency proceedings as the relevant date, which according to the definitions in article 2 occurs after the period of observation.<sup>402</sup> Thus, the 180 days stay is in addition to the interim stay which is imposed during the observation period.</p>
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<sup>401</sup> Under the Pledge Law and the Mortgage Law, secured creditors are obliged to maximize returns as is commercially reasonable and return a surplus to the estate.

<sup>402</sup> See also s 30, 34 and 114.

	<p>It is also unclear whether a relief or other adequate protection measures are available for secured creditors in case a restructuring process is commenced since a relief is not mentioned in article 184 (the moratorium in restructuring). If there is no such available relief then the result is an uneven protection in the two processes which may lead secured creditors to prefer liquidations and disapprove a restructuring strategy. At the same time, the moratorium during restructuring excludes, <i>inter alia</i>, employees' claims for wages (without distinguishing between pre and post-insolvency claims). This limitation imposed on the restructuring moratorium undermines its effectiveness as means for ensuring that all pre-insolvency claims are dealt with collectively rather than pursued on an individual basis, and that the debtor is given the necessary breathing space to design the restructuring plan (see also Principle C14).</p> <p>The actual operation of the moratorium on secured creditors' actions after the commencement of insolvency proceedings and during bankruptcy is not entirely clear. In parallel to the operation of the moratorium, the rule regarding banning repossession in the course of encumbered assets' realization seems to apply. It should be clarified, though, whether article 131(3), that allows a secured creditor to notify the administrator/liquidator about its intention to use the assets, and article 131(9), that allows repossession after 3 months of a sale process both yield to article 81(3) and (4) (that imposes the moratorium on enforcement by secured creditors), i.e. whether during the moratorium, and subject to obtaining relief, the secured creditor cannot repossesses the assets or notify that it intends to use the assets and require their sale.</p> <p>The ability of the moratorium to achieve the goals of insolvency- i.e. maximize realization for the benefit of the creditors as a whole or stabilizing the business and allowing its eventual restructuring- may also be undermined by the interaction of the moratorium provisions with article 133. Thus, the consent of the secured creditor is required for any other use of the property. Consent is also required for any sale of encumbered asset (art. 130(4)). The consent of the creditor seems conclusive, and in the absence of possible scrutiny and discretion of the court, the administrator/liquidator's actions could be constrained and his ability to realize asset values undermined.</p> <p>Finally, as noted earlier (Principle A5), the enforcement regime of the "enterprise pledge" might be in conflict with the insolvency framework and its goals. Thus, it appears that the enforcement of such a pledge by receivership or fiduciary administration is not suspended in the case of insolvency of the grantor of the enterprise pledge. This is in contradiction with basic principles of the insolvency regime, based on the reorganization of viable enterprises and the liquidation of enterprises that are not viable, under the supervision of the court and in the benefit of all creditors. That type of pledge, though, is very seldom used, as it raises complex legal questions for which there are no clear answers in the law (see Principle A3).</p>
<b>Comment</b>	<p>Consideration should be given to clarifying the interaction between the rules concerning the stay of actions by secured creditors and the rules concerning the use of encumbered assets. The moratorium on actions by secured creditors should enable higher recoveries and the achievement of the insolvency objectives. During the duration of the stay, the liquidator should be able to consider a sale that best suits the interests of creditors as a whole, or use assets for the continued operation of the business, while providing adequate protection to secured creditors (see also Principle C8).</p> <p>Throughout the duration of the stay, also in a restructuring context, possible relief from the stay should be meaningfully available for the secured creditor. In this respect, the insolvency representative should be required to show that the suspension of enforcing rights against encumbered assets is necessary to the ability to maximize the value of the estate property for the benefit of all interested persons and that the secured claim of the creditor will be protected from decline in value or other loss during the period of the suspension.</p> <p>Consideration should be given to ensuring that secured creditors have a right to payment of</p>

	<p>interest up to the value of the collateral.</p> <p>The exclusion of the employees from the restructuring stay may be reexamined.</p> <p>The law should ensure that enforcement of an enterprise pledge by receivership or fiduciary administration is suspended in the case of insolvency of the grantor of the enterprise pledge.<sup>403</sup></p>
	<b><i>Governance</i></b>
<b>Principle C6</b>	<p><b>Management</b></p> <p><b>C6.1</b> In liquidation proceedings, management should be replaced by an insolvency representative with authority to administer the estate in the interest of creditors. Control of the estate should be surrendered immediately to the insolvency representative. In creditor-initiated filings, where circumstances warrant, an interim administrator with limited functions should be appointed to monitor the business to ensure that creditor interests are protected.</p> <p><b>C6.2</b> There are typically three preferred approaches in reorganization proceedings: (i) exclusive control of the proceeding is entrusted to an independent insolvency representative; or (ii) governance responsibilities remain invested in management; or (iii) supervision of management is undertaken by an impartial and independent insolvency representative or supervisor. Under the second and third approaches, complete administration power should be shifted to the insolvency representative if management proves incompetent, negligent or has engaged in fraud or other misbehavior.</p>
<b>Description</b>	<p>The rules regarding the management of the insolvency process, under the Moldovan insolvency framework, differ depending on the type of proceedings and the stage of the process.</p> <p><i>Management powers during the observation period</i></p> <p>During the observation period which may take place after an insolvency petition is filed, an interim administrator is appointed.<sup>404</sup> The debtor may continue managing its affairs in the ordinary course of business under the supervision of the interim administrator. Other activities, outside the normal course of business, require the approval of both the interim administrator and the court.</p> <p>The debtor may lose its management powers in this period following a reasoned request of the interim administrator or the creditors or following an <i>ex officio</i> decision of the court.<sup>405</sup></p> <p>When the debtor expresses in its insolvency petition (or in a response to a creditor's petition) its intent to liquidate or restructure its business, the court shall, within no later than 10 business days, commence insolvency proceedings.<sup>406</sup> In such a case, the debtor shall not be subject to the observation period.</p> <p><i>Management powers after commencement of insolvency proceedings</i></p>

<sup>403</sup> It is understood that it is intended to address this issue in the forthcoming reform of the Law of pledge. The enterprise pledge will apply to movable assets only and will follow the ordinary enforcement regime. Enforcement of an enterprise pledge by receivership or fiduciary administration is not contemplated.

<sup>404</sup> Art. 21(6) of the Insolvency Law.

<sup>405</sup> Art. 24 of the Insolvency Law.

<sup>406</sup> Arts. 21(6) and 28(4) of the Insolvency Law.

	<p>After the commencement of insolvency proceedings, the court appoints an administrator (and if necessary a creditors' committee).<sup>407</sup> The debtor's management powers terminate and are transferred to the administrator. Any transaction entered into by the debtor after the commencement of the insolvency proceedings is deemed invalid, and all the activities of the debtor's executive bodies are suspended.<sup>408</sup></p> <p>The powers of the administrator terminate when a liquidator is appointed in bankruptcy proceedings. The same insolvency representative may be appointed for the position of interim administrator, liquidator in simplified bankruptcy, administrator in insolvency and liquidator in bankruptcy.<sup>409</sup></p> <p><i>Simplified bankruptcy</i></p> <p>When the debtor meets the criteria set forth in the law (see Principle C4), the court may initiate simplified bankruptcy proceedings following a period of observation.<sup>410</sup> In such a case, the debtor's management powers terminate and a liquidator is appointed. Within 5 business days from the court decision, the debtor/interim administrator shall transfer the management of the insolvency estate to the liquidator, including hand over the s of incorporation of the company, minutes of the general meetings of shareholders, documents which evidence for the company's rights over its assets; company registers and internal documents; stamp; accounting documents; the preliminary schedule of claims; etc.</p> <p><i>Management powers during bankruptcy</i></p> <p>After the commencement of insolvency proceedings, the court may resolve to initiate bankruptcy proceedings. In such a case, a liquidator will be appointed with the primary purpose of liquidating the assets of the company within the most appropriate time period.<sup>411</sup> The debtor will have no management powers. The liquidator may act only with the express consent of the creditors' committee or depending on the circumstances, the creditors' meeting.<sup>412</sup></p> <p><i>Management powers during restructuring</i></p> <p>A restructuring proceeding may be initiated following the commencement of insolvency proceedings (or through conversion of bankruptcy to restructuring). It is implied that an administrator will preside over the restructuring process until the approval of a plan.</p> <p>The creditors' meeting will appoint an administrator (subject to court approval) at the time that it adopts a restructuring plan. The administrator will be responsible for the carrying out of the plan.<sup>413</sup> Following the entry into force of the court's decision to approve a restructuring plan, the debtor's management powers may be restored, depending on and in accordance with the terms of the plan. In any event, the management will operate under the supervision of the administrator (or if the debtor does not manage the business, the administrator will control the plan implementation), until the court rules on either the</p>
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<sup>407</sup> Art. 34 of the Insolvency Law.

<sup>408</sup> Arts. 74 and 75 of the Insolvency Law.

<sup>409</sup> Art. 63 of the Insolvency Law.

<sup>410</sup> Art. 134 of the Insolvency Law.

<sup>411</sup> Art. 115 of the Insolvency Law (and arts. 63-72).

<sup>412</sup> Art. 117 of the Insolvency Law.

<sup>413</sup> Art. 186 of the Insolvency Law.

	<p>termination of the restructuring process and restoration of the business operations, or the conversion of restructuring into bankruptcy.<sup>414</sup> Pursuant to article 186 of the Insolvency Law, the administrator is entitled to request the dismissal of the debtor's executive body as well as the revocation or invalidation of any act concluded or performed by the debtor.</p> <p><i>Management powers during accelerated restructuring</i></p> <p>In case of accelerated restructuring, before the creditors can meet and vote on the restructuring plan, the insolvency court shall place the debtor under observation and appoint an interim administrator, which shall supervise the debtor's management. When confirming a restructuring plan, the creditors' meeting appoints an administrator (subject to court approval). The debtor may manage the business in accordance with the plan, under the supervision of the administrator.<sup>415</sup></p>
<b>Assessment</b>	<p><b>Observed</b></p> <p>The Moldovan Insolvency Law provides for the replacement of the debtor's management in bankruptcy by an insolvency representative (a liquidator) with authority to administer the estate in the interest of creditors, and for the transfer of immediate control over the estate to the latter. There are also rules regarding interim observation of a debtor before the commencement of the proceedings, to monitor the business and ensure that creditors' interests are protected. The Moldovan system also regulates the effects of the opening of insolvency over the management powers in the restructuring stages, including through supervision of management during the carrying out of a restructuring plan, in line with international standards.</p>
<b>Principle C7</b>	<p><b>Creditors and the Creditors' Committee</b></p> <p><b>C7.1</b> The role, rights and governance of creditors in proceedings should be clearly defined. Creditor interests should be safeguarded by appropriate means that enable creditors to effectively monitor and participate in insolvency proceedings to ensure fairness and integrity, including by creation of a creditors' committee as a preferred mechanism, especially in cases involving numerous creditors.</p> <p><b>C7.2</b> Where a committee is established, its duties and functions, and the rules for the committee's membership, quorum and voting, and the conduct of meetings should be specified by the law. It should be consulted on non-routine matters in the case and have the ability to be heard on key decisions in the proceeding. The committee should have the right to request relevant and necessary information from the debtor. It should serve as a conduit for processing and distributing that information to other creditors and for organizing creditors to decide on critical issues. In reorganization proceedings, creditors should be entitled to participate in the selection of the insolvency representative.</p>
<b>Description</b>	<p><i>The role, rights and governance of creditors in insolvency proceedings</i></p> <p>The new Insolvency Law recognizes the importance of creditor participation in the insolvency process. Pursuant to article 153, in the course of the insolvency proceedings the interests of all creditors shall be represented by the creditor's meeting and the creditors' committee. The law also contains rules ensuring that creditors receive the information that serve as the basis for the participation in the process (see Principle C2).</p>

<sup>414</sup> Art. 210 of the Insolvency Law.

<sup>415</sup> Art. 225 of the Insolvency Law.

	<p>The law has attempted to reduce the role of the court in the administration of insolvency by giving greater control over the process to the creditors and divesting the court of managerial attributions (see also Principle D1). Pursuant to article 54, the creditors' meeting has certain executive powers. Thus, the creditors' meeting may take decisions on the termination of the debtor's activity and its liquidation; approve restructuring plans; establish and oversee the creditors' committee; propose measures to restrict the debtor's activities and management; oversee the administrator/liquidator activities; take decisions regarding major transactions and on dates and forms of sale of the debtor's assets; approve the interim and final distribution of the assets; decide when to convene creditors' meetings; take decisions on other matters as specified in the insolvency law, e.g. a decision whether to sell the enterprise as a whole (art. 129) and whether to approve a restructuring strategy (art. 114(5)(a)).</p> <p>The creditors' meeting is to be convened whenever necessary as well as in the cases explicitly mentioned in the law. Creditors that have filed claims for validation shall be invited to the court hearings on validation, which shall take place at the day set by the court judgment on commencement of insolvency (see also Principle C13). Not later than 30 days from the validation hearings, the reporting creditors' meeting (<i>adunarea de raportare</i>) shall be held, where the creditors having voting rights shall decide, based on the administrator's report, on the type of insolvency proceedings which will be initiated (bankruptcy or restructuring).</p> <p>Creditors' meetings may be convened by the administrator/liquidator. They may also be convened following a request of the creditors' committee or of holders of more than 10% of the value of claims or by a ruling of the court (art. 55). If the administrator/liquidator fails to convene the creditors' meeting within 5 days after receiving a request to hold such a meeting, or if he refuses to convene the meeting, the aggrieved party has the right to convene the meeting or contest the administrator/liquidator's decision in court.</p> <p>At the creditors' meeting, where decisions are taken with regard to realization<sup>416</sup> of the debtor's assets that are unencumbered, only the unsecured creditors have voting rights. Decisions regarding the use of encumbered assets are taken by the secured creditors only. All other decisions are voted by both the secured and unsecured creditors. Unsecured creditors of the lower group (which include insiders' loans, see Principle C12) are not entitled to vote (art. 57(1)).</p> <p>It seems that for quorum purposes of the relevant group of creditors, the law requires a participation of a simple majority of the creditors with voting rights, which hold at least 50% of the total value of claims where a decision concerns both secured and unsecured creditors, and 50% of the value of claims of the relevant group of creditors in cases of decisions that concern one of the groups (art. 57(3)). There is some confusion in this respect, though, as the quorum provision (in art. 57(3)) does not entirely match the scenarios it refers to (described in art. 57(1) and (2)). Decisions at the meeting shall be taken by a simple majority of votes of creditors with voting rights present at the meeting provided that they hold more than 50% of the total amount of claims with voting rights represented at the meeting (i.e. majority by number and value; art. 57(10)). There are rules regarding repeat meetings in case of lack of quorum.</p> <p><i>The creditors' committee</i></p>
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<sup>416</sup> The law seems to refer in this respect to either use/realization/capitalization (*valorifica*) of assets. We understand it to mean a use which includes asset realization.

	<p>After the commencement of insolvency proceedings and until the first creditors' meeting is convened, the court may form a creditors' committee.<sup>417</sup> Its size will depend on the number of creditors according to the preliminary register of claims. The creditors' committee may consist of 3 or 5 creditors, representing the largest secured or unsecured creditors (reportedly, the practice is to include both types of creditors in the committee). Or, it may not be formed at all if the number of creditors is relatively small. If the court decides not to form a committee, the latter's powers shall be exercised by the creditors' meeting or by a representative appointed by the meeting or, in the relevant circumstances, by the court.<sup>418</sup></p> <p>The committee should appoint a chair, who will organize and preside over the meetings and inform the creditors' meetings and the court about the committee's activities. At the first creditors' meeting it should be decided whether to retain the committee formed by the court or form a different committee. In case it is decided to form a new committee, the creditors' meeting should elect 3 or 5 creditors (natural persons, excluding insiders, creditors in a conflict of interest position and incompetent persons<sup>419</sup>), representing secured or unsecured claims from among the first 10 creditors in terms of claim value among each group of creditors that volunteered or among a third of the persons who were voted for by the creditors' meeting. In the absence of sufficient majority vote for the new candidates,<sup>420</sup> the court appointed committee will be retained. The administrator or the creditors' committee may request the court to order the change in the makeup of the committee to ensure that all classes of creditors are represented at all stages of the procedure. The creditors' committee may resolve to make changes in the formation of the committee including its dissolution at any stage of the process.</p> <p>The creditors' committee is accountable to the creditors' meeting and is supervised by the court. At the time between creditors' meetings, the creditors' committee has the duty to represent the creditors' interests, to adopt decisions on urgent matters concerning the insolvency proceeding, to oversee the administrator/liquidator's activity, to execute decisions of the creditors' meeting and orders of the court. The law expressly states that the creditors' committee does not represent the debtor. It may only assist the administrator/liquidator in managing the debtor, and take decisions within its express powers.</p> <p>Unless the creditors' meeting resolves otherwise, the creditors' committee has the following powers:<sup>421</sup></p> <ul style="list-style-type: none"> <li>a) analyze the debtor's situation and make recommendations to the creditors' meeting on the continuance of the debtor's activity and the restructuring plans proposed;</li> <li>b) negotiate the terms of appointment with the administrator/liquidator proposed by the creditors and make recommendations regarding their appointment;</li> <li>c) examine the administrator/liquidator's reports;</li> <li>d) prepare reports on the actions taken by the administrator/liquidator and their effects, submit them to the creditors' meeting and propose other actions;</li> <li>e) request lifting the debtor's management rights;</li> <li>f) request the administrator/liquidator to initiate proceedings regarding the avoidance of detrimental transactions;</li> <li>g) request the administrator/liquidator or the court to convene the creditors' meeting,</li> </ul>
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<sup>417</sup> Art. 60 of the Insolvency Law.

<sup>418</sup> Article 60(3) of the Insolvency Law.

<sup>419</sup> Or persons that committed crimes concerning property (art. 60(7) of the Insolvency Law).

<sup>420</sup> Each voting right entitles a creditor to a vote on the election of creditors' committee members. All votes (of a creditor) may be given to one candidate or may be divided between a number of candidates (art. 60(8) of the Insolvency Law).

<sup>421</sup> Art. 61 of the Insolvency Law.

	<p>approve the agenda and participate in the meetings and decide on other matters in connection with calling and holding the creditors' meeting;</p> <ul style="list-style-type: none"> <li>h) approve the estimate value of the assets of the insolvency estate;</li> <li>i) take decisions on the interim distribution of the insolvency estate and the establishment of reserve funds needed to cover future expenses of the insolvency proceedings;</li> <li>j) approve the wages of the debtor's employees;</li> <li>k) approve balance sheets;</li> <li>l) approve actions required for continuation of the insolvency proceeding;</li> <li>m) take decisions on the opening, transformation or liquidation of branches and representative offices of the debtor and appoint their managers;</li> <li>n) approve budgeted expenditures;</li> <li>o) establish a list of confidential data and approve ways to protect such information;</li> <li>p) take decisions regarding the debtor's participation in creation of the other entities, and the manner and source of funding such activities;</li> <li>q) take decisions regarding large-scale transactions within its competence;<sup>422</sup></li> <li>r) take decisions regarding other matters as authorized by the law or through creditors' meetings' resolutions.</li> </ul> <p>The law does not distinguish (in terms of the committee's powers) between the court appointed creditors' committee (convened before the first meeting of the creditors) and the creditors' appointed committee. Thus, it is possible for the court appointed creditors' committee to approve a sale of assets on an emergency basis prior to the convening of the creditors' meeting. Reportedly, such actions were allowed in practice, and a provisional creditors' committee appointed by the court managed in this way to abusively decide to sell the debtor's assets. Before the first creditors' meeting could be convened, the transaction examined, and an annulment sought,<sup>423</sup> the assets would likely have already been resold in a series of (allegedly fraudulent) chain transactions. It was usually difficult to unwind the transactions because the ultimate transferee was not aware of the fraudulent nature of the prior transfers, and so could claim a good faith defense.<sup>424</sup> Indeed, members of a creditors' committee may bear liability for breach of duties and harm caused to secured or unsecured creditors (art. 61(7)). Reportedly, this measure has not been applied in practice.</p> <p>The creditors' committee is to meet monthly, at the initiative of its chairman, at the request of the insolvency administrator/liquidator, or as appropriate, at the request of at least 2 members, and whenever necessary. Meetings are held in the presence of the administrator/liquidator. The creditors' committee has a quorum if a majority of members participate. Each member of the committee has one vote, which is not transferable to another member or to a third party. Decisions of the committee shall be taken by majority of votes of members present<sup>425</sup> at the meeting.<sup>426</sup> In case of a draw, the chairman's vote shall be decisive.</p> <p>The members of the creditors' committee may be paid by the creditors and may receive compensation based on performance. They may be reimbursed from the debtor's estate for expenses related to the exercise of their powers, approved by the creditors' meeting (art.</p>
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<sup>422</sup> See Principle C9.

<sup>423</sup> Pursuant to art. 54 of the Insolvency Law, the creditors' meeting can verify the legality and reasonability of the decisions taken by the committee and where appropriate, decide to annul or suspend their decision.

<sup>424</sup> Under Art. 331 of the Civil Code, an acquirer in good faith shall obtain ownership over a movable property even if the person who disposed of it is was not its owner.

<sup>425</sup> Even if not expressly prohibited, participation by correspondence in creditors' committee meetings is probably prohibited since the law refers to being 'present' rather than 'participate'. Participation at the creditors' meeting, on the other hand, may be by presence, correspondence (*in absentia*) or in a mixed form, except for the validation and the reporting meetings which cannot be held *in absentia*.

<sup>426</sup> Art. 62 of the Insolvency Law.



	61(6)).
<b>Assessment</b>	<p><b>Largely Observed</b></p> <p>The Insolvency framework was designed to provide significant room for creditors' participation in the insolvency process. Under the law, the interests of the creditors are represented through the creditors' meeting and a creditors committee. The creditors' meeting has certain executive powers, and the committee assists the meeting and represents creditors in between meetings. The committee also makes decisions on urgent matters. The law usefully delineates in detail the powers and functions of the creditors' meeting and the creditors' committee and provides rules regarding quorum, voting and conduct of meetings. As such, the rules are fundamentally in line with international standards. However, critical issues remain, especially with regard to the functions of the meeting and the committee in practice.</p> <p>The creditors' meeting seems able to control critical decisions regarding the objectives of the process. For example, it will decide whether a restructuring strategy should be taken on board before it is submitted for court approval. Thus, even if the administrator considers that such course of action will be in the best interests of the stakeholders as a whole, the strategy might be blocked e.g. by a secured creditor with a large claim. The law does prescribe rules for approving restructuring plans through separate meetings of creditors, taking account of the different interests they hold, and includes 'cramdown' provisions which allow the binding of dissenting classes (see Principle C14). However, before such a process may take place, the creditors' meeting has to approve the initiation of a restructuring process. The ability to nullify decisions of the creditors' meeting is limited to circumstances of unlawfulness or noncompliance with the prescribed procedure (including regarding notification, quorum, voting). The problem of blocking restructurings seems a real one in a jurisdiction like Moldova where secured creditors are usually motivated not to support the rescue of businesses and are motivated instead by a desire to separate and enforce assets individually. It is also unclear how the rules relating to asset realization (art. 57, 129) correspond with the rules regarding voting on plans. A plan may entail a sale of the business. It is not clear if in such a case it would be possible that a majority of classes agree on the plan outvoting the secured creditors or whether the procedure for deciding on asset realization should also take place (see also Principle C14).</p> <p>Generally and reportedly, creditors with specific interests, in particular secured creditors with large claims, have managed to block proposed solutions which have been viewed as beneficial for the general body of creditors, through the decision making process in the creditors' meeting. In addition, and reportedly, the creditors' meeting powers have been occasionally abused by creditors who have created fictitious claims and changed the balance of power in the meeting, and thus managed to transfer assets to affiliate entities. Market participants express some general concern that the insolvency court's supervisory role might have become overly limited, especially in view of the persisting problem of abuse of the insolvency system (see also Principle D1, D3).</p> <p>The creditors' committee plays an important role, yet it may be subject to insufficient oversight. It seems that the committee can take critical decisions, for example the emergency sale of the debtor's assets and the execution of major transactions, before the convening of the creditors' meeting, reportedly not subject to meaningful court scrutiny.<sup>427</sup></p> <p>Thus, in the process of removing the court from performing an excessive managerial role, the balance between the roles of the court, the insolvency representative, the debtor and</p>

<sup>427</sup> At the same time, the provision which allows the court to perform the creditors' committee's duties in certain circumstances (see art. 60(3) is problematic. As a practical matter, the court cannot be expected to perform those duties, however, as they are incompatible with the role of the judge (see Principle D3).

	<p>creditors may have tilted rather strongly in favor of the creditors through their representative bodies. Creditors' interests too may be adversely affected as a result. A small number of creditors (i.e. the committee) may take critical decisions on behalf of the general body of creditors without sufficient oversight. The creditors' meeting ability to pass decisions and pursue the insolvency objectives may be constrained by lack of support of certain creditors with specific interests and may be influenced by creditors who created fictitious claims.</p> <p>There is also lack of clarity regarding the rights of secured creditors where their claim is not equivalent to the collateral. Thus, it seems that unsecured creditors have no 'say' (no voting rights) regarding the realization of encumbered assets (under art. 57) even where the assets' value is much higher than the value of the secured creditor claim.</p>
<b>Comment</b>	<p>The manner in which the creditor committee and creditor meeting perform their roles should be subject to close monitoring. There may be room for some degree of re-balancing of the roles of major 'players', i.e. the court, the insolvency representative, the creditor and the debtor. Indeed, the court may not actively participate in managerial decision-making and its role is rightly limited to that of a supervisor (as envisaged by the Insolvency Law). It is commendable to ensure sufficient oversight of the insolvency representative's activities, by the creditors, as well as allow the representative to benefit from the creditors insight and expertise. And, it is important that the creditors meaningfully participate in the process. However, bearing in mind that the administrator/liquidator is a representative of the interests of the creditors as a whole, and in view of the practice of blocking solutions that could benefit the body of creditors, it may be considered to allow more flexibility in decision making to the liquidator/administrator. Such approach would also require, though, taking on board to improve the administrators' skills and address integrity issues (see Principle D8). The court too should retain sufficient discretion as a supervisor and arbiter, ensuring that a proper balance is struck between the interests of different groups of stakeholders, that the process is not abused and that a small group of creditors does not make critical decisions that will affect the stakeholders as a whole.</p> <p>In particular, consideration may be given to facilitating access to the general restructuring process by ensuring that a group of creditors cannot block this process before there is a chance to vote on a plan by the different creditor classes according to the procedure provided in the law (see Principle C14). Thus, at the stage when the report is presented, at the reporting meeting, creditors may be heard and consulted with but may not be allowed to block the restructuring route.</p> <p>It should also be clarified that the rules regarding asset realization (voting by the meeting) yield to the rules regarding approval of a restructuring plans (see Principle C14).</p> <p>Decisions of the creditors' committee appointed by the court before the convening of the creditors meeting should be closely supervised.</p> <p>Achieving the proper balance between the relevant actors also requires strengthening of the institutional framework (see Principle D1). A trustworthy judiciary that is not overburdened, and skilful professionals, can ensure that discretion is not exploited and is employed appropriately. Other aspects of the framework affect the ability to control abuse in the creditors' meeting, i.e. the claims validation process (see Principle C13) and the notifications and oversight of the sale process (see Principle C8).</p> <p>The quorum rules require refinement since they may not precisely match to the scenarios they describe.</p>
	<b>Administration</b>
<b>Principle C8</b>	<b>Collection, Preservation, Administration and Disposition of Assets</b>
	<b>C8.1</b> The insolvency estate should include all the debtor's assets, including encumbered assets and assets obtained after the commencement of the case. Assets excluded

	<p>from the insolvency estate should be strictly limited and clearly defined by the law.</p> <p><b>C8.2</b> After the commencement of the insolvency proceedings, the court or the insolvency representative should be allowed to take prompt measures to preserve and protect the insolvency estate and the debtor's business. The system for administering the insolvency estate should be flexible and transparent and enable disposal of assets efficiently and at the maximum values reasonably attainable. Where necessary, the system should allow assets to be sold free and clear of security interests, charges or other encumbrances, subject to preserving the priority of interests in the proceeds from the assets disposed.</p> <p><b>C8.3</b> The rights and interests of a third party owner of assets should be protected where its assets are used during the insolvency proceedings by the insolvency representative and/or the debtor in possession.</p>
<b>Description</b>	<p><i>The insolvency estate</i></p> <p>Once insolvency proceedings are commenced, an 'insolvency estate' is created. The estate consists of all pre-insolvency property of the debtor as well as all assets and rights acquired by the insolvency estate after the initiation of the procedure.<sup>428</sup></p> <p><i>Preservation of the estate</i></p> <p>As noted above, the commencement of insolvency proceedings (following the period of observation) results in a series of effects aimed at preserving the debtor's assets and at allowing maximizing realizations. Such measures include the appointment of an administrator/liquidator and the imposition of a stay on enforcement of claims (limited in time regarding secured claims in cases where restructuring proceedings were not commenced).<sup>429</sup> During observation, interim measures are imposed in order to protect the debtor's assets (see Principle C5).</p> <p>Once insolvency proceedings have commenced, the administrator (or in simplified bankruptcy, the liquidator) takes over the possession and management of the insolvency estate (and is allowed to take possession forcibly).<sup>430</sup> Based on the judgment on the commencement of insolvency proceedings, or where appropriate, a court order, the administrator/liquidator shall enforce the mandatory conveyance of all assets belonging to the insolvency estate held by the debtor or third parties, including by the issue of orders<sup>431</sup> to enter, retain, lift, release, evict, install, seal or seize assets that should be included in the insolvency estate.<sup>432</sup> All assets shall then be inventoried and stored either by the debtor (when the committee or meeting of creditors consents) or through a third party under a storage agreement.<sup>433</sup></p> <p>Reportedly, throughout the insolvency process, creditors often attempt to separate encumbered assets from the insolvency estate, e.g. by invoking provisions which are actually aimed at the protection of ownership rights (see below- third party rights over assets). There seems to be a significant degree of confusion regarding the nature of the rights of secured creditors in this respect.</p>

<sup>428</sup> Art. 39 of the Insolvency Law.

<sup>429</sup> Though see also the confusion regarding the operation and enforcement of the enterprise pledge (Principles A1, A5 and C5).

<sup>430</sup> Art. 107 of the Insolvency Law.

<sup>431</sup> Such orders shall be equivalent to acts issued by bailiffs and shall be fully enforceable.

<sup>432</sup> Art. 107 of the Insolvency Law

<sup>433</sup> Art. 109 of the Insolvency Law.

*Use and disposal of assets*

During the observation period, the interim administrator is obliged to take measures to dispose of perishable goods or assets that are likely to depreciate in value, in order to preserve the maximum value for the insolvency estate.<sup>434</sup> After the commencement of insolvency proceedings, the administrator/liquidator must arrange the sale of property that might be otherwise damaged or depreciated or where storage entail unreasonable expense.<sup>435</sup>

If the court resolves to liquidate the insolvency estate, bankruptcy proceedings are commenced. The appointed liquidator is obliged to dispose of the assets without delay, in the most advantageous terms and the most appropriate time frame, and only with the express consent of the creditors' committee or creditors' meeting.<sup>436</sup> The maximum time period for disposition and liquidation of the insolvency estate is 2 years from the time the bankruptcy process has commenced.

In order to evaluate the insolvency estate, the liquidator may retain an appraiser on behalf of the debtor or with the consent of the committee of creditors, use his own appraiser. The assets shall be appraised both in aggregate and individually, to ensure a sale that is based on the highest value reasonably attainable.<sup>437</sup> Before proceeding to sale, the liquidator shall deliver to the committee or meeting of creditors a report on the appraisal of assets and the realization method suggested. The creditors are entitled to decide on the initial price and the sale of assets in bulk or individually, as well as the preferred method of sale. Within the liquidation period, the administrator is also allowed to utilize (*valorifica*) some assets on a competitive basis by transferring them in management, lease, rent, usufruct, trust management and other forms of transfer of use and/or possession rights in assets.<sup>438</sup>

The insolvency law introduced several improvements to the process of asset sales in the course of the bankruptcy procedure. The estate may be disposed via an auction, a competitive bidding or through direct negotiation. Unlike the previous Law, which provided that the assets must be taken three times to auctions without the possibility of price reduction, the current law allows initiating repeat auctions based on a reduced price. In addition, assets not disposed of during the first auction are proposed to the creditors as debt repayment at the prices stipulated for the second auction. The law also governs the procedure and the conduct of the auction, the bidding and the direct negotiations, filling in gaps in the legislation in this respect (arts. 119-128).

Article 129 also envisions sales as a going concern (after the institution of insolvency proceedings, in bankruptcy or in a restructuring context). Such manner of sale requires the express consent of the creditors' meeting or the creditors' committee.<sup>439</sup> The provision includes rules regarding the transfer of rights and assets (unless non-transferable), including labor agreements. There is ambiguity regarding the assumption of liabilities. The

<sup>434</sup> Art. 27(6) of the Insolvency Law.

<sup>435</sup> Art. 109(8) and (9) of the Insolvency Law.

<sup>436</sup> When such consent is not granted, the liquidator shall be liable for any damages caused by disposal/alienation of the insolvency estate (art. 117(2) of the Insolvency Law).

<sup>437</sup> Art. 117 of the Insolvency Law.

<sup>438</sup> Art. 117(15).

<sup>439</sup> It seems that in a restructuring, the approval at the meeting will be according to the rules regarding plan approval (see art. 57(5)).

	<p>Insolvency law excludes from the transferred enterprise the creditors' claims that are included in the final register of claims.<sup>440</sup> Under the general rules of the Civil Code, however, the buyer and seller are jointly and severally liable for the seller's obligations. A going concern sale may require a period of operation of the business by the liquidator/administrator prior to the sale. Presumably, such course of action is permitted (not only in restructuring) through inference from article 66 that allows a liquidator/administrator to manage the debtor and its estate, but there is some ambiguity here too.</p> <p>The use (realization) of encumbered assets during liquidation- as well as following the initiation of insolvency proceedings- is subject to a prescribed procedure (arts. 130-133 of the Insolvency Law). Secured creditors cannot take possession of encumbered assets during the period that the liquidator/administrator attempt to sell the assets, and must turn over such assets to the liquidator/administrator.<sup>441</sup> The secured creditor may establish the manner of sale of the encumbered asset in the agreement with the debtor in which case that method should be used during the sale in the insolvency process.<sup>442</sup> In the absence of such agreement, the liquidator/administrator is required to sell the assets in a reasonably commercial way and with the consent of the secured creditor (under the supervision of the court). The method, means, place, price and time of the sale shall be established by the secured creditor and depending on the circumstances, by the court, and in compliance with appropriate commercial rules. The secured creditor can choose from the variety of reasonable means of sale e.g. auction, direct negotiations, competitive bidding etc. The liquidator/administrator is required to begin and complete the procedure of using encumbered assets within a reasonable period of time.</p> <p>A secured creditor who intends to use the encumbered asset must inform the liquidator/administrator, indicating the conditions and procedure for the use or sale of property and, after an appraisal of the property, the sale price. The liquidator/administrator may then oppose to follow the conditions but only in the event that the conditions are in conflict with the law. It is not clear what 'conflict with the law' would mean in this respect, and to what extent the liquidator/administrator can argue that a particular method of sale – which is different than the one prescribed by the secured credit- would be beneficial to the general body of creditors and therefore should be followed, or that more time is required to be able to sell the business as a going concern to an investor. It might be inferred from the obligation imposed on the administrator to attempt to maximize returns of creditors' claims,<sup>443</sup> that this objective should be the leading criterion, but the law is ambiguous.</p> <p>If the liquidator/administrator is the one initiating the sale, he must notify the secured creditor, including about the proposed method of sale. The secured creditor has the right to propose a more favorable manner of using the asset. The debtor, secured creditor, unsecured creditors and the liquidator/administrator may file a petition and object to the sale of assets, yet the criteria for such objection and for a decision to approve or modification of the sale method, time etc. are not clear (art 131(6)).</p> <p>Secured creditors also have the option to acquire the collateral as repayment of their debt pursuant to a prescribed procedure (art. 131(10)). This is apparently an agreement to accept property in satisfaction of the creditor's claim. The law also imposes a time limit for the liquidator's attempt to sell the encumbered assets (3 months), after which the assets should be returned to the secured creditors (art. 131(9)). The creditor need to submit a request for the transfer of property, to which the liquidator/administrator may oppose, in which case</p>
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<sup>440</sup> Art. 129(3).

<sup>441</sup> Art. 130(1)-(3) of the Insolvency Law.

<sup>442</sup> Art. 130(4) of the Insolvency Law.

<sup>443</sup> Art. 68 of the Insolvency Law.

	<p>the creditor will need to file a petition to court.</p> <p>All assets disposed of by the insolvency administrator/liquidator within the exercise of his powers shall be deemed transferred free of any charges, such as mortgage, pledge, liens, etc., and shall be deemed to include a warranty against hidden defects.<sup>444</sup> Secured creditors shall preserve, though, their priority rights in the proceeds of such disposal. If the proceeds do not cover the claim, the balance is regarded as unsecured (art. 131(11)). Any surplus remaining after satisfaction of the secured debt becomes part of the insolvency estate for the satisfaction of the unsecured claims.</p> <p>The liquidator/administrator also has the right to make other uses of the encumbered assets which are required for the debtor's estate, but only if the secured creditor agrees and if the liquidator/administrator provides compensation for losses in the value of the property if it is reduced as a result of the use.<sup>445</sup></p> <p>The execution of any major transaction (i.e. a transaction or several interconnected transactions executed directly or indirectly with respect to property the value of which constitutes more than 10% of the total value of the estate) by the liquidator/administrator requires the unanimous consent of the creditors' committee if it concerns property constituting 10%-50% of the estate value. Otherwise, it requires a decision of the creditors' meeting.<sup>446</sup> If the creditors' committee was not formed, other major transactions may be executed with the consent of the creditors' meeting (see also Principle C9).</p> <p>In case of an approved restructuring, realization of assets shall be carried out in accordance with the restructuring plan by the debtor, under the supervision or management of the administrator. Secured creditors are not entitled during the restructuring period to enforce their rights in the debtor's encumbered assets for the entire period of the moratorium. There is no clear mentioning of measures for relief from the (restructuring) stay (i.e. in art. 184) or compensation for losses as a result of using encumbered assets (see Principle C5). There is a general provision that allows parties to request the suspension of use and distribution of assets in case such use causes loss to the debtor's estate. The administrator can oppose such a request and show that loss will result from the suspension.<sup>447</sup> The plan may include provisions on the sale of the business as a going concern free of any encumbrances.<sup>448</sup></p> <p>Market participants report considerable delays in the process of asset realization and uncertainty regarding the criteria for repossession by secured creditors of the encumbered assets, either under the moratorium provision or under the sale process. Additionally and reportedly, the sale process might be abused. As noted above, creditors, possibly in collaboration with the debtor, may create fictitious claims to effect a sale and a transfer of assets to affiliate parties. Notification of a sale process may not reach potential investors. It is also reported that going concern sales are rarely done in practice.</p> <p><i>Collection of assets from third parties</i></p> <p>The Insolvency Law has introduced a new concept of enforcement through "garnishment" (<i>poprire</i>),<sup>449</sup> which is a procedure whereby the administrator/liquidator enforces (i) cash and funds on accounts, in local or foreign currency, securities, other intangible movable assets which are owed to the debtor or are held on its behalf by a third party or that will</p>
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<sup>444</sup> Art. 117 of the Insolvency Law

<sup>445</sup> Art. 133 of the Insolvency Law.

<sup>446</sup> See Principle C7 on the decision making process in the creditors' meeting.

<sup>447</sup> Art. 196 of the Insolvency Law.

<sup>448</sup> Art. 190 of the Insolvency Law.

<sup>449</sup> Art. 126 of the Insolvency Law.

	<p>become owed in the future based on existing relationship, (ii) movable assets of the debtor held by a third party on behalf of the debtor, and (iii) term or conditional claims, which would be able to be enforced only upon maturity or fulfillment of the condition.</p> <p><i>Third party rights over assets</i></p> <p>Assets held by the debtor in joint ownership with third parties shall be included temporarily in the insolvency estate, regardless of the agreements between such parties and the debtor.<sup>450</sup> As for assets held in the joint ownership with spouses, such assets shall be divided by the insolvency court according to Civil Code rules.<sup>451</sup></p> <p>Under Art. 48 of the Insolvency Law, any person who based on a real or personal right can prove that an asset may not be included in the insolvency estate, may submit to the administrator/liquidator a request (or to court if the administrator/liquidator rejects the request) to separate the asset from the insolvency estate or to divide the estate held in joint ownership with the debtor. The law does not specify criteria for determining if a request is justified or not. Reportedly, this ambiguity in the law has given rise to uncertainty and objections to actions taken by administrator/liquidator including with regard to the use of encumbered assets, as noted above.</p>
<b>Assessment</b>	<p><b>Materially Non-Observed</b></p> <p>The Moldovan Insolvency Law contains provisions on the formation of the insolvency estate and its preservation, from the early stage of the filing of the proceedings and during the various other stages of the process. There are also rules concerning the use and sale of assets, and there are rules that allow selling assets during the observation and insolvency period in case they are at risk of depreciation or damage. There are procedures regarding the method and conduct of sale of assets, including by means of a sale of the enterprise as a whole. The framework allows assets to be sold free and clear of security interests, charges or other encumbrances, subject to preserving the priority of interests in the proceeds from the assets disposed (although there is an ambiguity created by the code of Civil Procedure regarding the liability of the buyer for the obligations of the seller as was noted above). These rules are generally in line with international standards.</p> <p>However, ambiguities remain, and much needs to be done in order to achieve adequate implementation. The system of use and sale of assets might lack sufficient flexibility. Secured creditor may prescribe the manner of sale of encumbered assets through the agreement with the debtor, or through notification to the administrator/liquidation. In circumstances where the administrator/liquidator is able to oppose to the secured creditors' proposals, the law is ambiguous regarding the applicable criteria which should guide the administrator/liquidator and the court in such circumstances. In the process, rights of secured creditors may be adversely affected, as the uncertainty in the law may cause delays in realization of encumbered assets. Alternatively, equity that might otherwise be available for unsecured creditors may be lost as a result of the secured creditor's insisting on disposition of the asset on its terms. There is also uncertainty regarding the scope and application of the provisions allowing secured creditors to seek relief from the moratorium (see Principle C5).</p> <p>For a sale of the enterprise as a whole to take place, a period of administration of the business as a going concern may be necessary (see also Principle C9). However, any use of</p>

<sup>450</sup> Art. 39(2) of the Insolvency Law. In case of disputes between the co-owners of property included in the insolvency estate, division of such property shall be carried out in a separate process by the insolvency court examining the insolvency case. The debtor shall be held liable only for its share of the joint property.

<sup>451</sup> The debtor shall be held liable only for its share of the joint property.

	<p>encumbered assets in this respect might require the consent of secured creditors (art. 133). Their consent will also be required with regard to the manner of asset realization (pursuant to art. 130 (4)). Thus, the secured creditors might block going concern sales that may be beneficial for the creditors as a whole or curtail an attempt to operate the business pending the design of a restructuring strategy. Blocking such sales might also be possible through voting in the creditors' meeting or the creditors' committee. The express consent of the creditor meeting or committee is required for a going concern sale to take place (Article 129). Decisions of the creditors' meeting which relate to the use of encumbered assets require the separate vote of the secured creditors (art. 57). It is not clear whether a going concern sale that involves encumbered assets would require the vote of both secured and unsecured creditors or only the vote of the secured creditors, but even in a joint vote, secured creditors may be able to stop a decision regarding a going concern sale. Some major transactions will require the unanimous consent of the creditor committee (see Principle C9). Thus, as a practical matter, without the secured creditor's support, such sales might not be possible (see also Principle C7). Reportedly, secured creditors are often able to block decisions otherwise perceived beneficial for the creditors as a whole.</p> <p>There is also some ambiguity regarding the authority of the liquidator to operate the business for the purpose of selling it as a going concern, and regarding the composition of the transferred enterprise. It is also difficult in practice to continue the operations in the absence of funding. As discussed below (see Principle C9), the law does not contain rules that encourage the provision of new finance. As noted earlier (see Principle B3), lenders are also very hesitant to provide such finance, and banking regulations actually work to discourage such financing. Creditors also attempt to separate assets from the insolvency estate, and confuse ownership rights with security rights in this respect.</p> <p>It is reported that going concern sales are rare. Indeed, no culture of buying distressed entities has been developed and reportedly the market for business is generally limited. Liquidation seems to have been conceived as a mere system of piece meal sale of the assets, offering no specific measures to foster the transfer of the business that would entail the preservation of going concern value or jobs. Stakeholders complain about the delay and costs of the liquidation process, making the overall bankruptcy solution value destructive in the vast majority of cases. There is also no culture of attempting going concern sales prior to the initiation of insolvency proceedings and giving them prompt effect after commencement of the formal process, although this sort of solution might be possible under the accelerated restructuring process (see Principle B4). Reportedly, potential buyers are likely to face problems related to hidden liabilities including to the tax authorities. As noted earlier, financial information provided by debtors is often lacking and misleading.</p> <p>Abuse of the insolvency process also seems to persist. Reportedly, creditors create fictitious claims, may control the creditor meeting, and then are able to give effect to sales that will result in the transfer of assets to related affiliates. The application of the auction process seems to require strengthening. It appears that the notice about the auction might not reach relevant investors or potential purchasers (See Principle D4). Indeed, notice about the auction may be published in the Official Monitor only.<sup>452</sup> The lack of a robust notification system is generally problematic. As noted earlier (Principle C2), creditors may not be aware of the opening of insolvency proceeding and thus will not take part in the process. As a result, conceivably, a minority of creditors could decide on the disposition of an insolvency estate (see also Principle D3, D4). Also, reportedly, sometimes creditors are able to circumvent the auction process altogether by insisting on directly negotiating with specific buyers.</p>
<b>Comment</b>	The law should facilitate the beneficial use of the estate in the interest of the general body

<sup>452</sup> Depending on the circumstances, other methods may be used.



	<p>of creditors. The insolvency estate should include all the debtor's assets, including encumbered assets. Disposition of the estate should be efficient. The administrator may be given the power to dispose of or make other use of encumbered assets in a manner which will benefit the creditors as a whole and subject to providing adequate protection to secured creditors. Where assets are not required for a going concern sale or for a restructuring, assets may be repossessed by secured creditors who may enforce their claims against the collateral. The extent to which the process delineated in articles 130-132 and in the provisions regarding the role and manner of voting at the creditors' meeting (see Principle C7) can achieve these principles should be closely monitored. It seems that an efficient process that facilitates beneficial solutions for the body of creditors has not yet emerged.</p> <p>The framework for going concern sales may be improved, by ensuring that the administrator/liquidator has authority and flexibility to take such course of action subject to court supervision. The extent to which going concern sales take place in practice, going forward, should be closely monitored. Various aspects of the law may require improvement in this respect, i.e. the rules regarding post commencement finance (see Principle C9) and voting at and oversight of the creditors' meeting and the creditors' committee (see Principle C7). Consideration should be given to making robust methods of notifications about sales of assets, compulsory or to utilize the optional additional notice mechanisms on a regular basis (see Principle C2, D3). The institutional framework requires strengthening to ensure vigorous implementation of the sale process and the ability to resolve complicated commercial scenarios which require reaching delicate balances between interests of relevant parties.</p>
<b>Principle C9</b>	<p><b>Stabilizing and Sustaining Business Operations.</b></p> <p><b>C9.1</b> The business should be permitted to operate in the ordinary course. Transactions that are not part of the debtor's ordinary business activities should be subject to court review.</p> <p><b>C9.2</b> Subject to appropriate safeguards, the business should have access to commercially sound forms of financing, including on terms that afford a repayment priority under exceptional circumstances, to enable the debtor to meet its ongoing business needs.</p>
<b>Description</b>	<p><i>Operation of the business during the insolvency process</i></p> <p>During the observation period<sup>453</sup> and following the commencement of insolvency proceedings, the management of the debtor's business may continue in the ordinary course of business, either under the supervision or management of the administrator (see also Principle C6).</p> <p>The creditors, through the creditors' meeting, have significant degree of control with regard to the management of the debtor during the insolvency process. Thus, the creditors' meeting has the power to take decisions on the termination or limitation of the debtor's business activity and to exercise oversight of the activities of the administrator/liquidator including with regard to entering into major activities and with regard to the sale of assets (see Principles C6 and C8).<sup>454</sup></p> <p>Major transactions, i.e. transactions (single or a number of inter-connected transactions) that concern assets which constitute more than 10% of the total value of the debtor's assets, and that do not take place while engaging in current activities, require the consent of the creditors' meeting. The unanimous approval of the creditors' committee is required if the</p>

<sup>453</sup> Art. 23 of the Insolvency Law.

<sup>454</sup> See arts. 54 of the Insolvency Law.

	<p>transaction relates to assets constituting more than 10% and less than 50% of the total value of the assets. If a creditors' committee is not formed, such decisions will be taken by the creditor meeting. The court may give other directions regarding major transactions. If the meeting has not taken a decision with regard to a major transaction, the court may, at the request of the debtor or unsecured creditors holding 20% of the total value of claims, and after hearing the administrator/liquidator, suspend the major transaction and convene the creditors' meeting instructing it to make a decision regarding the transaction.<sup>455</sup></p> <p>Pursuant to articles 89-103, following the institution of insolvency proceedings, the administrator/liquidator has wide discretion regarding performance or termination of contracts entered into before the commencement of insolvency proceedings as further discussed in the analysis of Principle C10.</p> <p>In this respect, the Insolvency Law provides a safeguard for the debtor to continue receiving utility services. No supplier of important public utilities (e.g. gas, water, telephone services) is entitled to terminate such services after the filing of an insolvency petition. Pre-insolvency debts are regarded as unsecured claims, and post-insolvency services will be paid during the course of insolvency, bankruptcy or restructuring. Termination or interruption of the services is allowed only if the insolvency representative does not pay for current services.<sup>456</sup></p> <p><i>Insolvency process and bankruptcy</i></p> <p>In case bankruptcy proceedings are commenced (the general bankruptcy or the simplified procedure), a liquidator is appointed. The bankruptcy procedure is geared towards the liquidation of the assets in a collective manner (see Principle C8).<sup>457</sup> It is not clear if the continuation of the business and its operation in the ordinary course is possible. However, it can be inferred that the liquidator can take such course of action, as he is given the general power to manage the company (art. 66 of the Insolvency Law refers to both administrators and liquidators in this respect). This conclusion is particularly logical since the law contemplates a possible transition from bankruptcy to a restructuring process if it is found during bankruptcy proceedings that the business is viable (see Principle C1 and C14).</p> <p>The administrator (during the general insolvency process) and the liquidator in bankruptcy are given the breathing space to make decisions on how to use the debtor's assets to maximize realizations, including encumbered assets, as a moratorium on enforcement applies (art. 81). The actions by secured creditors are suspended for 180 days, although there is an additional procedure which suspends possession during general insolvency and bankruptcy (s 130-132; see Principle C5). The administrator/liquidator has possession over all assets during such times if he attempts to sell the assets, but the secured creditors' consent is required for a sale to take place (art. 130(4)). The consent of the secured creditor is also required if the liquidator/administrator wishes to make any other use of the encumbered assets (art. 133). After 3 months of attempting to sell the assets, there is a procedure for the return of encumbered assets to the possession of secured creditors for the purpose of individual enforcement (see Principle C8).</p> <p><i>Restructuring</i></p> <p>In case of restructuring, the manner in which the business operations will continue is laid out in the restructuring plan, which may reshape the size and operation of the business. During the restructuring process the debtor is given the breathing space to consider a plan</p>
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<sup>455</sup> Art. 69 of the Insolvency Law.

<sup>456</sup> Arts. 23(4) and 97 of the Insolvency Law.

<sup>457</sup> It is not clear if such a sale may take place in the course of simplified bankruptcy/ accelerated restructuring. Article 129 on the 'sale of an enterprise' refers to: an insolvency process, bankruptcy proceedings or restructuring.

	<p>and go through a plan approval process, as a stay on actions both by secured and unsecured creditors is employed (art. 184; though it is subject to exceptions, see Principle C5). There is some uncertainty regarding the possibility to seek relief from the moratorium by secured creditor after the initiation of restructuring proceedings.</p> <p>If the court approves the plan, the debtor is reinstated with the management rights in compliance with the restructure plan, under the supervision or the management of the insolvency administrator. Such supervised management continues until the court rules on either the termination of the restructuring procedure and the adoption of all measures to restore the economic operations of the debtor, or on the termination of the plan implementation process and the conversion of the process into bankruptcy. Throughout the supervised management during the process of plan implementation, the approval of the administrator is to be sought for any non-routine operations.<sup>458</sup> Shareholders are prohibited from interfering in the debtor's management (art. 210).</p> <p><i>Post-petition/commencement financing</i></p> <p>The administrator/liquidator may be allowed to enter into transactions with lenders for the purpose of obtaining finance for the operation of the business; as such activity may be considered to be within their general powers to manage the company and enter into transactions (see above).</p> <p>There are no specific provisions regarding the terms and conditions for obtaining such finance, e.g. regarding notice to existing creditors or whether the administrator/liquidator may grant the lender a security for the fulfillment of the loan agreement. The priority which may be granted to new finance is not defined in the law.<sup>459</sup> It might be considered an administration expense which is paid before the other unsecured creditors (see the discussion in Principle C12), but it is not explicitly specified in the law. The law also contemplates the creation of a reserve fund for the payment of administration expenses, yet it seems to rely on the existing resources of the insolvency estate.<sup>460</sup></p> <p>The law does mention that a restructuring plan may include provisions regarding priority for payment of loan agreements entered into by the debtor or an acquiring company during the period of supervision, i.e. during the implementation of the plan, as well payment of administration expenses that were suspended during the supervision period. Such payment obligations require the consent of the administrator and shall not exceed the value of the debtor's assets (art. 213). The need for such finance during the implementation of the plan is also envisaged in article 190 that provides that a restructuring plan must indicate the relevant measures involved in the application of the plan, for example, regarding obtaining financing to implement the plan and the sources for generating such funds, including by way of borrowing from either members or lenders or through the sale of the debtors' assets.</p> <p>There is no practice in Moldova of obtaining new finance in the course of insolvency proceedings. As noted above, lenders are reluctant to provide new finance to distressed entities (see Principle B5).</p>
<b>Assessment</b>	<b>Materially Non-Observed</b>

<sup>458</sup> According to article 212, the restructuring plan may provide that during the debtor's supervision, some of its contracts or the contracts of the acquiring company shall become valid only after the administrator's approval. In case of large-scale transactions or transactions entailing a conflict of interest, the debtor shall seek the approval of the committee or meeting of creditors.

<sup>459</sup> See art. 43 of the Insolvency Law which specifies the priorities between creditors.

<sup>460</sup> See art. 43(5) and Principle C12.

	<p>The Insolvency Law seems to envision the use of the restructuring proceeding (either the accelerated restructuring or the general restructuring process) for the purpose of stabilizing and sustaining the debtors' business operations, in order to restore it and allow its continuation. A sale of the entire enterprise may also take place through restructuring. The bankruptcy process seems to focus on liquidation and piecemeal sale of the asset, although the law does contemplate the sale of the business as a whole during such a process, and also the possible conversion of the proceedings from bankruptcy to a restructuring process. The insolvency representative has general powers to manage the debtor's estate, including taking decisions regarding the performance of contracts and the sale of assets. However, the ability of administrators/liquidators to make decisions on the manner of use of assets is restricted by the rules concerning the use of encumbered assets and the rules concerning the power of the creditors' committee and creditors' meeting (see Principle C7, C8).</p> <p>The possibility to operate the business as a going concern in the ordinary course of business may largely depend on obtaining additional finance to fund such operations. However, and in general, lenders are reluctant to provide such finance to distressed entities unless they are given sufficient security. The law allows agreeing within a restructuring plan on the provision of priority to new lenders that may provide finance during the reorganization (exit finance). Yet, it does not specify the conditions under which such lending may be obtained, and what priority may be given to such finance (e.g. can they be paid before administration expenses).</p> <p>Importantly, the law is silent with regard to conditions of obtaining new finance in the course of insolvency proceedings, during a restructuring process (before the implementation of a restructuring plan) and during bankruptcy. The rules on priorities do not mention the priority provided to new finance, although such finance might be regarded as costs of the proceedings that thus may receive priority at least over other unsecured creditors. The reserve fund that should be maintained in order to ensure payment of administration expenses may not be sufficient for on-going operations if it is only based on the existing resources of the insolvency estate.</p> <p>Encouraging lenders to provide new finance may be crucial at all stages of the proceedings, since the filing of the petition, during observation, the general insolvency process and in the course of either restructuring or bankruptcy. In bankruptcy, the continuation of the business operation may allow a beneficial sale as a going concern. It may also allow the restoration of the business to viability and the conversion of the process to restructuring. Yet, without sufficient measures that would support operation during insolvency, the business is likely to be liquidated piecemeal. If the business was viable, or had viable units, or could have been sold as a whole, such outcome would not represent the optimal insolvency resolution.</p> <p>The practice shows that lenders are reluctant to provide new finance to insolvent or distressed enterprises. The reason seems to be multiple. It was noted before that lenders do not, as a matter of practice, focus on support of businesses long term, but rather on enforcement of their claims against encumbered assets. Prudential regulation also requires 100% provisioning for lending to insolvent clients (see Principle B5). The lack of clear rules within the insolvency legislation regarding new lending throughout the insolvency process could further suspend the development of a lending environment supportive of business recovery.</p>
<b>Comment</b>	<p>Consideration should be given to clarifying and specifying rules regarding the obtaining of new finance after applying for insolvency and at the different stages of the process. To encourage the granting of such finance, rules regarding priority over existing creditors could be specified. The law may clearly specify that new finance is given equal priority as the costs of the proceedings. Alternatively, the law may offer 'super-priority' to such finance ahead of the administration expenses or even ahead of secured creditors coupled with measures for their adequate protection. Other means to encourage further lending may include the ability to grant a security for the repayment of the new finance including a security interest on an unencumbered asset, on after-acquired assets or a junior or lower</p>

	<p>priority security interests on an already encumbered asset of the estate, subject to adequate protection of existing secured creditors.</p> <p>Consideration should also be given to reassessing loan classification rules in terms of their ability to encourage lending to distressed enterprises.</p>
<b>Principle C10</b>	<p><b>Treatment of Contractual Obligations</b><sup>461</sup></p> <p><b>C10.1</b> To achieve the objectives of insolvency proceedings, the system should allow interference with the performance of contracts where both parties have not fully performed their obligations. Interference may imply continuation, rejection or assignment of contracts.</p> <p><b>C10.2</b> To gain the benefit of contracts that have value, the insolvency representative should have the option of performing and assuming the obligations under those contracts. Contract provisions that provide for termination of a contract upon either an application for commencement, or the commencement of insolvency proceedings, should be unenforceable subject to special exceptions.</p> <p><b>C10.3</b> Where the contract constitutes a net burden to the estate, the insolvency representative should be entitled to reject or cancel the contract, subject to any consequences that may arise from rejection.</p> <p><b>C10.4</b> Exceptions to the general rule of contract treatment in insolvency proceedings should be limited, clearly defined and allowed only for compelling commercial, public or social interests, such as in the following cases: (i) upholding general setoff rights, subject to rules on avoidance; (ii) upholding automatic termination, netting and close out provisions contained in financial contracts; (iii) preventing continuation and assignment of contracts for irreplaceable and personal services where the law would not require acceptance of performance by another party; and (iv) establishing special rules for treating employment contracts and collective bargaining agreements.</p>
<b>Description</b>	<p><i>Assumption or rejection of contracts and obligations</i></p> <p>Under the Moldovan Insolvency Law, the insolvency representative (the liquidator or administrator) may assume contracts which are still executory, by performing the debtor's obligations or demanding their performance by the other party.<sup>462</sup> Damages stemming from the pre-insolvency unperformed obligations are deemed provable unsecured claims.<sup>463</sup></p> <p>The insolvency representative is also entitled to reject a contract, in which case the creditor may submit an (unsecured) claim for damages as a result of nonperformance of the debtor's obligations. In this respect, the insolvency representative must respond immediately to a request of a contractual counter-party whether s/he intends to accept or terminate the contract; otherwise, if the insolvency representative has not demanded performance, he/she will lose the right to assume the contract and demand performance.<sup>464</sup></p> <p>With regard to immovable property's leasing and rental contracts, the Insolvency Law (art. 90) specifically stipulates that such contracts remain in force after the commencement of the insolvency proceeding. Such contracts may be terminated by the</p>

<sup>461</sup> Treatment of contracts typically also includes leases.

<sup>462</sup> Art. 89(1) of the Insolvency Law.

<sup>463</sup> Art. 52(4) of the Insolvency Law.

<sup>464</sup> Art.89(2) of the Insolvency Law.

	<p>administrator/liquidator regardless of their term, subject to observance of the civil law rules on termination.<sup>465</sup> The other party may request (as an unsecured creditor) compensation of damages caused by such early termination. In case the administrator/liquidator disposes of an immovable asset subject to leasing/rental agreement, the buyer may terminate the contracts, subject to observing the rules of termination. The law also specifies that lease or rent contracts under which the debtor is a lessee or tenant may not be terminated by the other party because an insolvency petition was filed or due to the worsening of the debtor's financial state.<sup>466</sup> The Insolvency Representative is also not bound by any instructions given by the debtor regarding its property or by a power of attorney issued regarding the debtor's assets, which shall terminate upon commencement of the proceedings. Continued performance of the mandate is required (until the transactions is assumed by the administrator/liquidator) if its postponement might lead to damage to the debtor's assets.<sup>467</sup></p> <p>Any agreement which excludes or limits the administrator/liquidator's right to assume or reject contracts or which enable the other party to terminate such contracts due to the debtor's insolvency, are null and void.<sup>468</sup></p> <p><i>Exceptions and special rules</i></p> <p><i>Set-off</i></p> <p>The administrator/liquidator shall respect creditors' rights under the law or a contract to set-off claims. Set-off is allowed only with regard to pre-insolvency creditors' claims which have matured and had become unconditional prior to the institution of insolvency proceedings. Set-off is allowed even if the debtor's claim has not matured prior to the institution of insolvency proceedings.<sup>469</sup> Reportedly, in practice the set-off technique is rarely used.</p> <p><i>Individual employment contracts and collective labor agreements</i></p> <p>Individual employment agreements can be terminated in accordance with the general rules and conditions set forth by the Labor Code for extrajudicial liquidation and reorganization.<sup>470</sup></p> <p>When the debtor enterprise is sold as a going concern or is acquired in accordance with a restructuring plan, employees shall not be dismissed.<sup>471</sup> Article 129(5) specifically stipulates that if the enterprise is sold, all existing employees agreements must remain in force and the buyer shall assume the rights and responsibilities under the contracts.</p> <p>The insolvency representative and the employees' representative body must pursue the amendment of measures in collective labor agreements which negatively affect the debtor's estate, through reaching a mutual agreement, e.g. by way of mediation. Collective bargaining agreements may be terminated by either party, subject to two months' notice, even if the agreement provides for a longer term.<sup>472</sup></p>
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<sup>465</sup> According to Art. 905 of the Civil Code, either party may request termination of the contract of lease, by giving 3 months' notice for immovable assets and 1 month notice for movable assets. The same shall be applicable in case of rent.

<sup>466</sup> Art. 91 of the Insolvency Law.

<sup>467</sup> Arts. 92 and 93 of the Insolvency Law.

<sup>468</sup> Art. 94 of the Insolvency Law.

<sup>469</sup> Art. 82 of the Insolvency Law.

<sup>470</sup> Art. 88 of the Labor Code.

<sup>471</sup> Art. 95 of the Insolvency Law.

<sup>472</sup> Art. 96 of the Insolvency Law.

	<p><i>Insurance agreements</i></p> <p>Pre-insolvency insurance premiums must be paid in full by the debtor if the insurance agreement is to remain in effect. The premiums will be classified as administration expenses.</p> <p><i>Securities agreements</i></p> <p>Pursuant to articles 100 and 101 of the Insolvency Law, certain types of executory securities agreements and purchase and sale agreement entailing the transfer of securities quoted on the commodity, security exchange or on another market as of a certain date or within a certain period, shall be terminated and settled (paid to the debtor if it is a credit or by the debtor as a provable debt) when insolvency commences.</p> <p><i>Utilities</i></p> <p>The Insolvency Law does not allow the termination or interruption in the provision of significant utility services after filing an insolvency petition (see Principle C9).</p>
<b>Assessment</b>	<p><b>Largely Observed</b></p> <p>The regulation of contracts in insolvency is generally in accord with best international standards: it sets the general rule for continuation of executory contracts after insolvency is declared; interference (by the insolvency representative) with performance is allowed and the interference is regulated in its procedural aspects; <i>ipso facto</i> clauses are unenforceable; and a number of special rules are foreseen i.e., the respect of a general right of set-off.</p> <p>One main observation is concerned with the implementation of the rules in practice. Reportedly, insolvency representatives are able to continue contracts only with the consent of the other parties. This could be a result of a misconception of parties' rights under the insolvency framework.</p> <p>The law is also somewhat unclear where it does not specify a time period within which the insolvency representative is required to make a decision to continue or reject a contract. It only requires a prompt response in case the counterparty requests a decision.</p> <p>There is no express recognition of the insolvency representative's ability to assign contracts.</p>
<b>Comment</b>	<p>The Insolvency Law may usefully include a time period during which the insolvency must make a decision to continue or reject a contract. It should also require the representative to give notice to the counterparty regarding the decision and regarding their right to submit a claim.</p> <p>Consideration could be given to including in the Insolvency Law an express conferral upon the insolvency representative of the possibility to assign executory contracts to third parties.</p>
<b>Principle C11</b>	<p><b>Avoidable Transactions</b></p> <p><b>C11.1</b> After the commencement of an insolvency proceeding, transactions by the debtor that are not consistent with the debtor's ordinary course of business or engaged in as part of an approved administration should be avoided (cancelled), with narrow exceptions protecting parties who lacked notice.</p>

	<p><b>C11.2</b> Certain transactions prior to the application for or the date of commencement of the insolvency proceeding should be avoidable (cancelable), including fraudulent and preferential transfers made when the enterprise was insolvent or that rendered the enterprise insolvent.</p> <p><b>C11.3</b> The suspect period, during which payments are presumed to be preferential and may be set aside, should be reasonably short in respect to general creditors to avoid disrupting normal commercial and credit relations, but may be longer in the case of gifts or where the person receiving the transfer is closely related to the debtor or its owners.</p>
<b>Description</b>	<p><i>Avoidable post-commencement transactions</i></p> <p>As noted above (Principle C6), during the observation period which may take place after an insolvency petition is filed, an interim administrator is appointed. The debtor may continue managing its affairs in the ordinary course of business under the supervision of the interim administrator. Other activities, outside the normal course of business, require the approval of both the interim administrator and the court. The court shall impose a ban on any transfer of property by the debtor (unless approved by the administrator). Pursuant to article 104(g), any transaction entered into by the debtor after the filing of insolvency petition, including the provision of securities may be avoided by the insolvency representative (during any of the stages of the insolvency process), if it affected the debtor's property.</p> <p>Pursuant to article 116(4), any transfer, or performance of any obligation, or exercise of any right or act or deed, except for acts authorized by the liquidator or court, made by the debtor or the administrator after commencement of bankruptcy proceeding shall be deemed void. In case of conversion from restructuring to bankruptcy, all gratuitous transactions, as well as all other transactions, except for those allowed by the restructuring plan, performed between the date of confirmation of the restructuring plan and the date of commencement of bankruptcy proceedings shall be void.</p> <p><i>Avoidable pre-insolvency transactions</i></p> <p>The insolvency representative, at any stage of the process (observation, insolvency proceedings, bankruptcy or restructuring), may seek to cancel the following categories of acts occurred prior to the opening of the insolvency proceedings by means of an avoidance action, if they affect the debtor's property (art. 104):</p> <ul style="list-style-type: none"> <li>• Fictitious and fraudulent transactions entered into during the three years preceding the opening of the insolvency case, that affect creditors' rights;</li> <li>• Gratuitous transfers made by the debtor granted during the three years preceding the opening of the insolvency case (other than payment related to moral obligations and proportionate sponsorship granted for charitable purposes);</li> <li>• Transactions at an undervalue entered into during the three years preceding the commencement of the insolvency case;</li> <li>• Preferences, i.e., the transfer of ownership rights to a specific creditor made in order to discharge a previous debt due to such creditor or give him a benefit, if made during the four months preceding the commencement of the proceeding, and if it results in increasing the amount the creditor would have received in a liquidation;</li> <li>• Preferences made during the four months preceding the commencement of the proceeding, provided that the creditor did not have a right to receive the property or that execution of an obligation to the creditor did not come due at the time of the transaction;</li> <li>• The grant, during the four months preceding the commencement of the proceeding, of a security (pledge, mortgage or another guarantee) for no</li> </ul>



	<p>consideration, with respect to an unsecured debt or with respect to a shareholder claim; where such claims have not matured at the time of commencement of insolvency proceedings.</p> <p>In addition, the administrator/liquidator as well as any creditor may seek to annul the registration of a statutory pledge registered by unsecured creditors 4 month prior the commencement of insolvency proceedings.<sup>473</sup></p> <p><i>Avoidable transactions with related parties</i></p> <p>The insolvency representative, at any stage of the process, may seek to cancel transactions entered into by the debtor during the 24 months prior to the opening of the insolvency proceedings, by means of an avoidance action, if the transactions were harmful to creditors and if they were entered into with the following categories of parties (art. 105):</p> <ul style="list-style-type: none"> <li>• Partners or stakeholder holding at least 20% of the capital of a limited or general partnership;</li> <li>• Shareholders holding at least 20% of the share capital of a joint stock or limited liability company;</li> <li>• Founders of debtor individual entrepreneur or farmer's enterprise, members of debtor's executive bodies and directors, liquidators and members of liquidation committees, accountants;</li> <li>• Co-owners of a joint indivisible asset;<sup>474</sup></li> </ul> <p>Transactions made through public auction may not be avoided (art. 105(2)).</p> <p><i>Consequences of avoidance</i></p> <p>Pursuant to article 106 of the Insolvency Law, parties to cancelled transactions must return the acquired property to the insolvency estate or reimburse the estate (of its value at the time of the transfer) if the property no longer exists. Such a party will have the right to submit an unsecured claim with respect to the returned property or the reimbursed amount, provided that it acted in good faith at the time of the transaction.</p>
<b>Assessment</b>	<p><b>Materially Non-Observed</b></p> <p>In line with best international standards, the Insolvency Law provides for the avoidance/nullity of the transactions carried out by the debtor after the filing of insolvency that are not consistent with the debtor's ordinary course of business or engaged in as part of an approved administration.</p> <p>The law also includes a detailed regulation that provides for the annulment of certain pre-insolvency transactions that affected the debtor's property or conferred undue preferences. The system regulates expressly a number of possible transactions and the suspect period rightly discriminates between different types of avoidable actions. There are also specific additional provisions concerning transactions with related parties.</p> <p>The system, however, does not seem to be widely used in practice. Reportedly, insolvency</p>

<sup>473</sup> Art. 80 of the Insolvency Law.

<sup>474</sup> The provision also refers to persons to which art. 63(3) of the Insolvency Law applies, but this seems to be a mistake in the drafting.

	<p>representatives lack the resources to pursue such actions. The structure of the provisions also requires some critical improvement.</p> <p>The periods envisaged to avoid certain operations can be too long (i.e., 3 years for a transaction at an undervalue), damaging security of tenure in market operations thereby, especially as the law does not provide for explicit ‘defenses’ e.g. based on commercial reasonableness of the transactions. It is also unclear why with regard to transactions with related parties the time period is shorter (2 years). The interaction of article 105 (transactions with related parties) with article 104 is unclear.</p> <p>For other types of acts, the time to set aside the transactions might be too short (4 months for undue preferences or for the creation of security for previously unsecured loans). The brevity of the period existing to avoid actions which, by their nature, are bound to take place often on the verge of insolvency, poses a particular risk to the system: a debtor, in collusion with a creditor, could strategically delay the declaration of insolvency precisely to ensure that a particular operation is out of the reach of the remedy.</p> <p>The scope of the first type of transaction (fictitious/unlawful) is somewhat vague. It should clearly include transactions intended to defeat, delay or hinder the ability of creditors to collect claims whether the effect of the transactions was to put assets beyond the reach of creditors or potential creditors or to otherwise prejudice the interests of creditors.</p> <p>The law is quite deficient with regard to the treatment of transactions with related parties. The relevant provision refers to a rather limited list of persons who may be regarded as related to the debtor. The provision might not catch, for example, transactions with indirect controlling shareholders or with close family members, which could result in stripping the debtor of its assets. The conditions that should be fulfilled under the provision are also ambiguous. The provision refers to transactions generally. It does not include any presumptions to facilitate proving that a transaction was harmful to creditors.</p> <p>The provisions do not mention whether the debtor should be insolvent at the time of any of the voidable transaction (or likely to become insolvent as a result of the transaction). Only with regard to transactions with related parties, it is specifically required that the interests of creditors will be infringed.</p> <p>In terms of the consequences of avoiding a transaction, although it seems correct to prevent the non bona fide counterpart to keep a claim that would harm the interests of other creditors, once –and only if– all creditors been satisfied, the non bona fide creditor should keep its right to compensate what s/he returned to the estate or the debtor.</p> <p>The provisions regarding transactions avoidance do not include a ‘safe harbor’ provision that would exclude transfers made in good faith pursuant to an out-of-court workout (see also Principle B3).</p>
<b>Comment</b>	<p>Consideration may be given to amending the law so as to include the following measures:</p> <ol style="list-style-type: none"> <li>1) A reduction in the period of time that the avoidable undervalued transactions can reach back in order not to disrupt legal certainty in the market;</li> <li>2) An enhancement of the suspect period for the cases to which the current law assigns 4 months, so that delays in the opening of proceedings does not cause the avoidance action to be of little use;</li> <li>3) Clarification that gratuitous, undervalued transactions and preferences may be avoided if they took place at a time when the debtor was insolvent or as a result of which the debtor became insolvent;</li> </ol>

	<p>4) Clarify the scope of the avoidable fictitious transaction to include transactions intended to defeat, delay or hinder the ability of creditors to collect claims whether the effect of the transactions was to put assets beyond the reach of creditors or potential creditors or to otherwise prejudice the interests of creditors.</p> <p>5) The Law should provide clearer provisions regarding transactions with related parties, expanding the type of related parties that will be caught under the provision. The list should include companies and individuals who were able to influence the debtor, as well as close family of such individuals. The provision may also usefully include a presumption regarding harm caused to the interests of creditors in cases of certain type of transactions (and regarding the fact of insolvency). The enhancement of the provision regarding transactions with related parties is particularly important in light of reported widespread abuse in Moldova, including attempts to strip companies of assets through transfers to affiliates.</p> <p>6) The removal of the implied cancellation of the claim of the counterparty in bad faith and its absolute subordination with respect to all creditors.</p> <p>Consideration may also be given to including a ‘safe harbor’ provision that would exclude transfers made in good faith pursuant to an out-of-court workout.</p> <p>The law may specify mechanisms for the funding of avoidance proceedings as well as encourage the provision of additional finance in case the estate lacks sufficient resources (see Principle C9).</p>
	<b><i>Claims and Claims Resolution Procedures</i></b>
<b>Principle C12</b>	<p><b>Treatment of Stakeholder Rights and Priorities</b></p> <p><b>C12.1</b> The rights of creditors and priorities of claims established prior to insolvency proceeding under commercial or other applicable laws should be upheld in an insolvency proceeding to preserve the legitimate expectations of creditors and encourage greater predictability in commercial relationships. Deviations from this general rule should occur only where necessary to promote other compelling policies, such as the policy supporting reorganization or to maximize the insolvency estate’s value. Rules of priority should enable creditors to manage credit efficiently consistent with the following additional principles:</p> <p><b>C12.2</b> The priority of secured creditors in their collateral should be upheld and, absent the secured creditor’s consent, its interest in the collateral should not be subordinated to other priorities granted in the course of the insolvency proceeding. Distributions to secured creditors should be made as promptly as possible.</p> <p><b>C12.3</b> Following distributions to secured creditors from their collateral and payment of claims related to costs and expenses of administration, proceeds available for distribution should be distributed <i>pari passu</i> to the remaining general unsecured creditors,<sup>475</sup> unless there are compelling reasons to justify giving priority status to a particular class of claims. Public interests generally should not be given precedence over private rights. The number of priority classes should be kept to a minimum.</p> <p><b>C12.4</b> Workers are a vital part of an enterprise, and careful consideration should be given to balancing the rights of employees with those of other creditors.</p>

<sup>475</sup> Subject to any intercreditor agreements and contractual subordination provisions or where equitable subordination of a creditors claim may be appropriate.

	<p><b>C12.5</b> In liquidation, equity interests or the owners of the business are not entitled to a distribution of the proceeds of assets until the creditors have been fully repaid. The same rule should apply in reorganization, although limited exceptions may be made under carefully stated circumstances that respect rules of fairness that entitle equity interests to retain a stake in the enterprise.</p>
<b>Description</b>	<p><i>Secured creditors</i></p> <p>Secured creditors are defined in the law as creditors with pre-insolvency claims that are secured by security interests over the debtor's assets (art. 2 of the Insolvency Law). Article 50 further specifies which creditors will be considered secured creditors for the purpose of the insolvency law, and includes (i) creditors holding an asset or a title to secure their rights; (ii) creditors having a retention right;<sup>476</sup> and (iii) individual creditors having claims arising out of contracts of investment in residential apartments.<sup>477</sup> The secured creditors are entitled to recover their claims (including interest and expenses) from the encumbered assets. If the secured creditors waive their right to satisfy their claim from the encumbered assets, or if their claim cannot be fully discharged from the collateral, they are regarded unsecured with respect to the relevant part of their claim (arts. 51 and 153(4)).</p> <p>Costs associated with the realization of the assets (including maintenance, storage, entering into possession, evaluating and sale and any relevant fees and taxes) are deducted from the proceeds of sale. Yet, the costs may not exceed 10% of the asset value (art. 132(1)). The law does not specify how the remainder of such expenses will be paid for (in case it exceeds 10%) but presumably the rest is regarded expenses of the proceedings, to be covered before unsecured claimed (see below). The remainder is distributed to the secured creditors in the order of priorities between them. Any surplus is then included in the insolvency estate for distribution among the unsecured creditors (see below the order of priority among unsecured creditors).</p> <p>A settlement between the debtor and the creditors may be reached at any stage during the insolvency process, but requires the consent of the secured creditors (unanimous consent). A restructuring plan, though, may be approved by majority voting in each class, including the secured creditors' class (arts. 201-204). There are also 'cram down' provisions (applicable in restructurings) that allow binding dissenting classes, including the class of the secured creditors. Secured creditors rights should not be infringed under a plan, unless the plan specifies how the secured creditor right is being impaired (art. 193). The plan must indicate the equivalent protection that would be given to the secured creditor in case there is a change or a discharge of the collateral (these issues are discussed in Principle C14).</p> <p><i>Administration expenses</i></p> <p>Pursuant to article 43 of the Insolvency Law, the cost of the proceedings should be paid first, out of the estate.</p> <p>Article 52 specifies the expenses and obligations of the proceedings:</p> <ul style="list-style-type: none"> <li>• Court expenses.</li> </ul>

<sup>476</sup> Under the Civil Code, a person who is bound to deliver or return an asset may retain it in cases provided by law. Pursuant to article 637(323) of the Civil Code, retention may secure a claim, which although not linked directly to the asset in question, is based on an obligation between the parties. Pursuant to article 639 of the Civil Code, the right of retention is effective against third parties and no registration or notification is required. The right of retention shall not be effective where the creditor has commenced enforcement procedures against the debtor. The right of retention ceases where the debtor offers an alternative sufficient security, or where the sum claimed has been deposited. Deprivation of possession contrary to the will of the possessor does not extinguish the right of retention; the party who is the holder of this right may claim the property, subject to the period of limitation provisions.

<sup>477</sup> Outside insolvency, these claims are not afforded a priority and are regarded as unsecured claims (see also Principle A2).

	<ul style="list-style-type: none"> <li>• Remuneration and expenses of the interim administrator/administrator/liquidator.</li> <li>• Other payments made by the interim administrator/administrator/liquidator related to the management, use and distribution of the estate.</li> <li>• Obligations under contracts entered into in the course of the proceedings.</li> <li>• Obligations based on unjust enrichment of the debtor's estate.</li> </ul> <p>A reserve should be created for the payment of the administration expenses (art. 43(5)).</p> <p>As noted above, costs associated with the realization of the assets are deducted from the proceeds of sale. Yet, the costs may not exceed 10% of the asset value (art. 132(1)), and the remainder is likely regarded an expense of the proceedings to be distributed before the unsecured claims.</p> <p>In restructuring, administration expenses must be paid according to their terms, unless the interested parties agreed otherwise (art. 208(5)). A settlement may be approved by the court only if the estate claims have been satisfied in full (art. 167).</p> <p><i>Unsecured creditors</i></p> <p>After the payment of the cost of the proceedings, the unsecured claims (pre-insolvency claims, not secured by a pledge) should be satisfied in the following order:</p> <ol style="list-style-type: none"> <li>1. Claims related to personal injuries and wrongful death claims.</li> <li>2. Employees' wages and remuneration for copyrights.</li> <li>3. Ministry of Finances loans; government loans; taxes and other budgetary claims.</li> <li>4. Claims for restitution of debt to state material reserve.</li> <li>5. Other unsecured claims.</li> <li>6. Lower priority unsecured claims, which should be paid in the following order: <ul style="list-style-type: none"> <li>• Post-insolvency interest on unsecured claims.</li> <li>• Fines, late fees and other sanctions on non-payment.</li> <li>• Claims related to gifts.</li> <li>• Related party loans.</li> <li>• Wages of the founder entrepreneur or the entity's members of the governing bodies.</li> </ul> </li> </ol> <p>A class of lower priority should not be paid before a higher priority class is paid in full (art. 43(3)).</p> <p>A settlement between the debtor and the creditors may be reached at any stage during the insolvency process, if a majority in value of the unsecured creditors agrees to the settlement and those who disagree do not receive a less favorable treatment than those who agreed. A restructuring plan should be approved by majority voting in separate classes- secured, the government/budgetary claims/the unsecured creditors (excluding the lowest priority group)/the lowest priority group. There are 'cram down' provisions that allow binding dissenting classes (see further Principle C14).</p> <p><i>Employees</i></p> <p>As aforementioned, employees' wages, along with remuneration payable under copyright agreements, are considered unsecured creditors (unless they have obtained a security against the debtor's assets), yet they are given a relatively high priority among the unsecured creditors (second, after claims related to personal injuries and wrongful death claims which are usually small or nonexistent).</p> <p>In case a settlement is reached between the debtor and its creditors, it may not be approved unless the employees' claims for wages have been satisfied in full (art. 167). A</p>
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	<p>restructuring plan must show how the employees' claims will be fulfilled within 6 months from the start of the restructuring process (see Principle C5 and C14).</p> <p><i>Public interests</i></p> <p>As aforementioned, budgetary and other public authorities' claims are regarded unsecured (unless the relevant authority has a security against an asset of the debtor) but are ranked quite high among the unsecured creditors (third and fourth ranking), after personal injuries/wrongful death claims, employees' wages claims and remuneration for copyright, and before of the rest of the unsecured creditors.</p> <p>A settlement may contain partial or full debt forgiveness, rescheduling etc. of budgetary and related claims, and the budgetary creditors are obliged to agree to such a settlement for the purpose of restoring the debtor's solvency (art. 165(4); see Principle C14).</p> <p>In restructuring, the budgetary (and related claims) creditors vote as a separate class, and are subject to the same voting and cramdown rules imposed on the other classes of creditors (see Principle C14).</p> <p><i>Equity interests and related parties' loans</i></p> <p>As mentioned earlier (see Principle C5), once insolvency proceedings have commenced, payment of dividends, other payments relating to securities, profit-sharing among the debtor's shareholders are prohibited.</p> <p>As indicated in the list above, related parties' (including shareholders) loans are considered unsecured claims of the lowest ranking.</p> <p>Equity holders receive a portion of the estate only if there is a surplus after claims of all creditors have been satisfied in full (art. 159(3)).</p> <p>In restructuring, creditors who control or are under the control of the debtor or are controlled by the same entity as the debtor can vote on a plan only if they will receive under the plan less than they would have received in bankruptcy. Otherwise, the plan may impose different payment terms. However, no class that rejected the plan and no claim that rejected the plan shall receive less than in bankruptcy and if a class is impaired, any lower ranking class shall not receive more than it would receive in bankruptcy.</p>
<b>Assessment</b>	<p><b>Largely Observed</b></p> <p>The law clearly prescribes the ranking of claims between unsecured creditors. It includes provisions for the payment of the costs of the proceedings out of the debtor's estate and from encumbered assets (regarding costs associated with realization) and before the unsecured creditors. The priority of secured creditors in their collateral is upheld. Proceeds and assets available for distribution among the unsecured creditors are distributed <i>pari passu</i>, subject to certain priority ranking given mainly to public authorities and to workers. Any excess from realization of encumbered assets is to be used for the benefit of the unsecured creditors. Claims of related parties and other claims regarding penalties, fines etc. are given a lower priority. The scheme for restructuring generally takes account of different interests of different stakeholders and allows cram down of dissenting creditors, to be able to achieve the goal of reorganization, subject to safeguards. This framework is generally in line with international standards, yet there is room for improvement in the structure of the law and in its implementation.</p> <p>As noted earlier (see Principle A2), the measures implemented to protect the so-called "investors" or buyers of apartments on plans are problematic. The solution to grant these creditors a privileged status in the insolvency of the construction company may create (and</p>

	<p>reportedly has created) uncertainty in the position of the financial institutions that advance funds for the construction of buildings, securing their loans over the plot of land and the future building over it. It may also create uncertainty and unexpected results in the course of a restructuring whereby all secured creditors are supposed to be in the same category and receive equal treatment under the plan (see Principle C14).</p> <p>There has been some confusion in practice regarding the right and nature of secured creditors, specifically in circumstances where creditors held collateral in assets of third parties in relation to their claim against the debtor. The status of such a creditor in the debtor's insolvency has been questioned (i.e. whether they are secured or unsecured). The law does stipulate, though, that creditors with no security interests on the debtor's assets are regarded as unsecured creditors. Indeed, such creditors may pursue their collateral (where such exists) against third parties' mortgagors/pledgors. If the creditor receives payment outside the insolvency process as a consequence of enforcing the collateral, the mortgagor/pledgor would become a creditor of the debtor (and in case of partial payment, the original creditor's claims should be reduced by the amount he received with regard to the claim).<sup>478</sup> Confusion has also arisen regarding the ability of secured creditors to separate assets from the estate (see Principle C8).</p> <p>The <i>pari passu</i> rule which normally applies to all unsecured creditors is subject to a number of exceptions, in the form of priorities. One of the classes enjoying higher ranking in the order of priorities is the class of claims derived from labor contracts. While, due to the nature of the worker's relationship with the debtor, many jurisdictions include this type of priority, experience shows that when there is no limit in the priority, the rule may cause damage to the rest of creditors, make it difficult to rescue the business and increase the cost of lending in the long term, which, in the end, might be beating the initial purpose of the protective measure. The concession of a high priority to the budgetary claims may also be unjustified.</p> <p>The provision specifying priorities in distribution (or any other provision for that matter) does not address the possibility of obtaining new finance for the purpose of business continuation. It may be implied that such finance will be considered administration expenses, but this requires greater clarity especially in the absence of practice of providing such finance and the need for incentives in this regard (see Principle C9).</p> <p>As noted in other parts of this report, creditor rights are also generally at risk in practice. It is reported that fictitious claims could be created for the purpose of intervening in or initiating an insolvency process, putting at risk the rights of existing creditors by changing the balance of power at creditors' meetings, and using the insolvency proceeding to take control over the debtors' assets, selling assets to related affiliates.</p> <p>The right to appeal on some major decisions, e.g. concerning the separation of assets from the estate, has been curtailed. This raises specific concern in view of the persisting incidences of abuse, and the confusion regarding creditors' rights (see also Principles C2 and C8).</p>
<b>Comment</b>	<p>Alternative measures for protecting investors in apartment buildings could be considered (see Principle A2).</p> <p>Consideration may be given to reexamining the priorities within the unsecured list of claims.</p> <p>Other aspects of the framework that have important effect on creditors' rights should be refined or their implementation strengthened, including due process aspects (specifically appeal issues, see Principle C2), aspects of the settlement and restructuring processes (see</p>

<sup>478</sup> See also art. 142 of the Insolvency Law.

	Principle C14), the rules and processes of asset realization (see Principle C7, C8), the treatment of post commencement finance (see Principle C9), the rules regarding avoidance of detrimental transactions (C11), the claims validation process to avoid abuse (see Principle C13) in conjunction with the strengthening of the institutional framework as further discuss in Part D.
<b>Principle C13</b>	<b>Claims Resolution Procedures</b> Procedures for notifying creditors and permitting them to file claims should be cost effective, efficient and timely. While there must be a rigorous system of examining claims to ensure validity and resolve disputes, the delays inherent in resolving disputed claims should not be permitted to delay insolvency proceedings.
<b>Description</b>	<p><i>The procedure for claim resolution</i></p> <p>The Moldovan Insolvency Law establishes a procedure for the processing and resolution of pre-insolvency claims which is comprised of three stages:</p> <ol style="list-style-type: none"> <li>1. <b>A compilation of a preliminary register:</b> based on the information in the debtor's accounts as well as in petitions of creditors for recognition of claims, the interim administrator needs to produce a preliminary register of claims during the observation period (art. 29 of the Insolvency Law). The interim administrator must notify all known creditors (based on the above information) within 10 business days from the day of his/her appointment inviting them to submit claims (art. 26). The creditors must submit claims within 30 calendar days from the receipt of notification (on the notification rules see Principle C2).</li> </ol> <p>Claims should be presented in writing and should be recorded in a register (art. 140). They should contain details about the creditor, its location, the amount of the debt, the grounds for the claims and information about preferential rights and pledges. A claim should be accompanied by relevant supporting documents (art. 141).</p> <p>The interim administrator must examine and verify the claims within 15 business days (depending on the circumstances, the deadline may be extended by up to another 15 days). In this respect, the administrator is obliged to perform a detailed investigation to establish the legitimacy, exact amount and order of priority of each claim. For this purpose, the administrator may request explanations and documents from the debtor (art. 142).</p> <p>The register should be submitted to court and delivered to the debtor and to all creditors included in the register or whose claims were rejected (indicating the reason for rejection). The register should include both the amount and the nature (type) of claims (i.e. whether secured<sup>479</sup>, unsecured or conditional). Claims that are confirmed and included in the preliminary registry are presumed to be valid and correct and they may not be appealed (until they become final- see para. 2). However, they do not entail voting rights and they are valid only until the time of their confirmation and approval during the insolvency proceedings or simplified bankruptcy (art. 29). The preliminary register is used <i>inter alia</i> for the formation of the committee and oversight of decisions during the observation period.</p> <ol style="list-style-type: none"> <li>2. <b>Final register:</b> the second stage follows the institution of insolvency proceedings (or simplified bankruptcy). The creditors should be notified (by the administrator/liquidator) about the decision to institute the proceedings. The notice</li> </ol>

<sup>479</sup> Including order of priority and the security document (art. 143(2) of the Insolvency Law).



	<p>must specify the maximum period for recognition of claims in the final registry, which must not exceed 45 calendar days from the date of instituting the proceedings. The notice must also invite secured creditors to specify their claims regarding encumbered assets (art. 34).</p> <p>Claims submission and claim verification should follow the same procedure as noted above (specified in arts. 140-141). Claims included in the preliminary register on the basis of creditors' written requests shall not require further confirmation (art. 140(4)).</p> <p>Upon commencement, all un-matured and conditional claims become due (interest being calculated until the due date of the claim) and unconditional. Claims concerning periodic performance are calculated with respect to the unperformed obligation (art. 45). Claims should include relevant interest and penalties calculated up to the date of the initiation of the proceedings. Unliquidated claims shall be calculated by the administrator/liquidator and included in the register based on nominal value at the time of initiation of the proceedings (art. 141).</p> <p>The period of examination of the claims, compilation of the final registry and its submission must not exceed 15 business days (though art. 142 allows extension by up to 15 days). The notice should also specify the date of the claims validation hearing which must take place within 30 calendar days (art. 34).</p> <p>The administrator/liquidator must present the final registry upon the expiration of the deadline for claim verification.</p> <p>The register will be available for inspection and the debtor or creditors may file objections (to the insolvency court) with respect to claims (arts. 110, 143 and 144).</p> <p>A creditor whose claim is challenged may bring proof and exercise any other rights to counter the challenge. If a claim is based, however, on an enforcement writ or a judgment decision, or a final arbitral decision, the burden of proof shall lie with the objecting party (art. 144(6)).</p> <p>If a claim was not challenged at least 3 business days prior to the validation hearing or if an objection has been rejected, the claim shall be considered validated (art. 143). Until the court rules on the objection, the claim may be regarded as provisionally allowed and thus entitle the creditor to participate and vote in meetings (but not to receive distributions). If during the review of the objection the court establishes that the objection entails a legal dispute it will be removed from the register and the creditor shall have the right to initiate a separate process to validate the claim (art. 144).</p> <p>The final register of claims shall be considered for approval at the claims validation session. Objections should be considered at that session or at a special session. The judge shall indicate next to each claim whether it is validated or whether a claim is subject to objection (art. 143(7)). Such entries by the judge are regarded as final court ruling.</p> <p>The inclusion of a validated claim in the final register entitles the creditor to: (i) participate and vote in creditors' meetings; (ii) be appointed as a member in the creditors' committee; (iii) and vote on a restructuring plan; (iv) receive communications and notifications regarding the insolvency procedure; (v) participate in the distribution of the estate based on a restructuring plan or in liquidation (art. 53(3)).</p> <p>As a result of the review of a challenge, the insolvency court shall issue an order which may in turn be appealed. An irrevocable court order on the granting or</p>
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	<p>rejection of an appeal accompanied by the validation of a claim shall be binding upon the administrator/liquidator and all of the creditors. The order shall serve as grounds for making corrections in the final register of claims or the consolidated register of claims without convening a special meeting to validate claims.</p> <p>3. <b>Consolidated register:</b> following a review of all the objections regarding claims included in the final register, the administrator/liquidator must immediately register with the court the consolidated final register of claims. The consolidated register includes all claims recognized in the final register, as well claims based on the conclusion of objections regarding the final register (art. 143(9)). This table is the basis for the compilation of the final distribution list.</p> <p>A failure to file a claim on time deprives the creditor of rights of participation, voting, nomination of liquidator/administrator, filing claims against the debtor, and distribution rights, unless the rules on notification were violated. In exceptional circumstances a creditor may be able to show that the reason for the late submission was related to the creditor identity or the object of the claim, in which case he will not be deprived of the above rights, but he will need to pay the expenses of the validation procedure (art. 145). The provision also mentions inadequate notification as one of the exceptions (art. 145(2), although it also mentions it as a situation where the creditor's rights are not deprived (art. 145(1), thus the provision is ambiguous on this point.</p> <p><i>Accelerated restructuring</i></p> <p>When accelerated restructuring is initiated (see delineation of the procedure in the analysis of Principle C14), the administrator shall establish a time for the claims validation session. Within 5 business days from his appointment, the administrator should notify all known creditors about the initiation of the proceedings and invite them to submit claims within 30 calendar days. The time period for claim validation is 7 business days, and within an additional 7 business days the claim validation session should take place (art. 220).</p> <p>All claims shall be subject to verification by the administrator and validation by the court according to the same procedure described above (art. 221 which refers to arts. 140-144), subject to the following specific procedure:</p> <ul style="list-style-type: none"> <li>- Claims included in the claim register which are based on the debtor accounts and not confirmed by creditors' requests as well as claims filed after the set deadline shall be treated provisionally as part of the insolvency estate and taken into account in the drafting of the restructuring plan by creating a reserve for such claims (art. 221(2)).</li> <li>- Objections to claims must be submitted in writing no later than two days prior to the holding of a meeting to vote on an accelerated restructuring plan (art. 221(3)).</li> <li>- The court must approve claims at a validation session and review objections. The court may provisionally include challenged claims in the register and entitle the creditors to vote on the plan.</li> </ul>
<b>Assessment</b>	<p><b>Largely Observed</b></p> <p>The Insolvency Law contains a coherent procedure for claims' resolution which includes rules on notification, submission of claims, their verification and validation, as well as rules for challenging claims. The rules establish strict time frames for all the stages of the process. At the same time, all claims require rigorous verification including by way of investigation and seeking information from the debtor. Where required, the administrator may seek an extension of the deadline (though for a specific period of time) to verify claims.</p>

	<p>The key problem is with the implementation of the process in practice and in particular the difficulty in tackling abuse of the process, i.e. the filing of fictitious claims (see Principle C1). It is reported that administrators, and subsequently, the court would usually accept claims at face value when compiling the preliminary and final register, at least partly due to lack of means to prove that the claim is not real, even where the claim is considered suspicious. Indeed, appeals by other creditors regarding claims appearing in the register only take place later in the process, after a final register is submitted. By that time, a creditor committee is established and various decisions may be taken in the interim. Additionally, even if a claim is challenged it may be accepted by the court as provisional and entitle the creditor to vote in a creditors' meeting.</p>
<b>Comment</b>	<p>Attention should be given to strengthening the manner of implementation of the claims resolution process in order to find and object to fictitious claims. This requires reinforcement of the administrators/liquidators' competence ensuring that they are capable of closely examine claims that might be fictitious (see Principle D8). Insolvency representatives should make full use of their investigative powers to identify doubtful claims. It may also be considered to allow the administrator to petition the court for an injunction on the exercise of voting rights by a creditor, on a proper showing that there is a real danger the claim is fictitious.</p>
<b>Principle C14</b>	<p><b>Reorganization Proceedings</b></p> <p><b>C14.1</b> The system should promote quick and easy access to the proceeding, assure timely and efficient administration of the proceeding, afford sufficient protection for all those involved in the proceeding, provide a structure that encourages fair negotiation of a commercial plan, and provide for approval of the plan by an appropriate majority of creditors. Key features and principles of a modern reorganization proceeding include the following:</p> <p><b>C14.2</b> Plan Formulation and Consideration. A flexible approach for developing a plan consistent with fundamental requirements designed to promote fairness and prevent commercial abuse.</p> <p><b>C14.3</b> Plan Voting and Approval. For voting purposes, classes of creditors may be provided with voting rights weighted according to the amount of a creditor's claim. Claims and voting rights of insiders should be subject to special scrutiny and treated in a manner that will ensure fairness. Plan approval should be based on clear criteria aimed at achieving fairness among similar creditors, recognition of relative priorities and majority acceptance, while offering opposing creditors or classes a dividend equal to or greater than they would likely receive in a liquidation proceeding. Where court confirmation is required, the court should normally defer to the decision of the creditors based on a majority vote. Failure to approve a plan within the stated time period, or any extended periods, is typically grounds for placing the debtor into a liquidation proceeding.</p> <p><b>C14.4</b> Plan Implementation and Amendment. Effective implementation of the plan should be independently supervised. A plan should be capable of amendment (by vote of the creditors) if it is in the interests of the creditors. Where a debtor fails or is incapable of implementing the plan, this should be grounds for terminating the plan and liquidating the insolvency estate.</p> <p><b>C14.5</b> Discharge and Binding Effects. The system should provide for plan effects to be binding with respect to forgiveness, cancellation or alteration of debts. The effect of approval of the plan by a majority vote should bind all creditors, including dissenting minorities.</p>

	<p><b>C14.6</b> Plan Revocation and Closure. Where approval of the plan has been procured by fraud, the plan should be reconsidered or set aside. Upon consummation and completion of the plan, provision should be made to swiftly close the proceedings and enable the enterprise to carry on its business under normal conditions and governance.</p>
<b>Description</b>	<p><i>Overview</i></p> <p>Under the Moldovan insolvency framework, reorganization may be achieved through the general restructuring process, pursuant to Chapter VI of the Insolvency Law. Additionally, restructuring may be accomplished through the special accelerated restructuring process or through a settlement (these procedures are also discussed earlier as measures for giving effect to informal workouts; Principle B4).</p> <p><i>The key stages of the process and access to the proceedings</i></p> <p><i>Restructuring proceedings</i></p> <p>Access to the general restructuring process requires fulfilling the general requirements for filing an insolvency petition (see Principle C4). Where the debtor files a petition to initiate insolvency proceedings (or in a response to a creditors' petition) he may include in the petition a declaration of intention to restructure the business, in which case the court may commence the insolvency proceedings, and skip the observation period. The court may require the debtor to submit a restructuring plan (art. 21(6); the decision should be made within 10 business days). In the absence of such a restructuring petition by the debtor, the court will make a decision whether to accept an insolvency case for consideration (promptly and no later than 3 days; art. 21). The following additional steps will take place:</p> <ul style="list-style-type: none"> <li>• An observation period will commence (arts. 21(5) and 23), under the supervision of an interim administrator.</li> <li>• At the end of the observation period (which may last for up to 60 business days with possible extension of up to additional 15 business days), the court will make a decision regarding the commencement of insolvency proceedings (art. 30).</li> <li>• During a period of up to 100 days, the general insolvency process will take place (art. 114). An administrator will be appointed (art. 74). The administrator should prepare and present a report to the creditors' meeting with regard to the debtor's economic conditions. The report should indicate whether there is a real possibility of preserving the debtor's enterprise. The administrator must make a recommendation regarding the preferred solution for the debtor. If it is proposed to opt for restructuring, the report must clarify whether the plan should be proposed by the debtor, or by both the debtor and the administrator, or only by the administrator, or by the administrator in collaboration with one or several creditors.</li> <li>• The creditors' meeting will decide whether to approve the restructuring strategy proposed by the administrator (art. 114).</li> <li>• If the creditors' meeting approves the restructuring strategy, the court, within 5 days from the report meeting, should decide whether to initiate restructuring proceedings (art. 114).</li> <li>• The court shall establish a time frame, which should not exceed 30 days from the day of the judgment, for the presentation of a restructuring plan (art. 114).</li> <li>• Creditors' rights to institute insolvency proceedings will be suspended (art. 18(3)).</li> <li>• A moratorium of actions by both secured and unsecured creditors will be imposed and will remain in operation throughout the restructuring process. The payment to employees and payment of tax debts due after the initiation of the restructuring process is not suspended following the initiation of restructuring proceedings (art.</li> </ul>

	<p>184).</p> <ul style="list-style-type: none"> <li>Proposals of restructuring plans should be submitted. A failure to submit restructuring plans within the deadline established at the report meeting will result in the transformation of the proceedings into bankruptcy (art. 188).</li> <li>Within 5 days from the deadline for plans submission, the administrator should call a creditors' meeting.</li> <li>The creditors' meeting will review the plans (art. 199).</li> <li>Parties who proposed a plan may propose changes to the plan (art. 200).</li> <li>Voting on the plan should be carried on by the creditors' meeting. Creditors shall be divided into separate classes for the purpose of voting on a plan (arts. 201-203).</li> <li>The creditors' meeting shall also elect an administrator at the same time that it adopts the restructuring plan (art. 186).</li> <li>The court will reach a decision whether to approve the plan (art. 204) (see further below on the plan approval process).</li> <li>If the plan as adopted by the creditors' meeting is not presented for approval by the court within 4 months from the initiation of the restructuring process, or if no plan was approved by the court and the deadline for presenting plans has expired, the court shall make a decision on the immediate initiation of bankruptcy proceedings (art. 204(8)).</li> <li>If a plan is approved, the restructuring process will be terminated and the plan implementation process will commence (art. 206).</li> <li>The debtor will resume his management powers and operate under the supervision of an administrator (art. 210).</li> <li>The time period for the implementation of a restructuring plan may not exceed 3 years from the date of its approval. A debtor shall have the right to complete the implementation of a restructuring plan ahead of schedule. In the event that a debtor is of vital importance to the national economy, the restructuring period may be extended by up to 2 years (art. 190).</li> <li>Supervision may be terminated if the claims were satisfied or guaranteed or the time period for plan implementation expired (art. 215). The court may terminate the implementation process and transform the process into bankruptcy in certain circumstances (see further below on implementation of a plan and the termination of the process).</li> </ul> <p>Restructuring proceedings may also follow a period of bankruptcy proceedings. Thus, if in the course of a bankruptcy process it has been ascertained that the debtor's solvency can be restored, the liquidator may convene (<i>ex officio</i> or at the request of creditors or the debtor's representative) a creditors' meetings to decide on the termination of the bankruptcy proceedings and its conversion to restructuring.<sup>480</sup></p> <p>The debtor is not allowed to request a restructuring if he unsuccessfully opposed an insolvency petition submitted by a creditor (see Principle C4).</p> <p><i>Accelerated restructuring</i></p> <p>A debtor in financial distress may apply to commence accelerated restructuring proceedings. The application must be grounded and include an inventory of the debtor's property and a draft accelerated restructuring plan. Debtors may not file an accelerated restructuring petition if during the previous 5 years they were under such proceedings or if they are (at the time of filing) subject to insolvency proceedings (arts. 16 and 219).</p>
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<sup>480</sup> Pursuant to art. 139 of the Insolvency Law, conversion of bankruptcy into restructuring proceedings shall occur when essential circumstances are ascertained based mainly on financial analysis data, which shows the prospect of restoring the debtor's solvency.

	<p>The following steps and consequences will then ensue:<sup>481</sup></p> <ul style="list-style-type: none"> <li>• The petition will stop any other insolvency petitions initiated by creditors.</li> <li>• The court must rule on the petition within 3 business days from its initiation.</li> <li>• An interim administrator will be appointed to supervise the debtor during an observation period.</li> <li>• Measures for preserving the estate may be imposed (see Principle C5).</li> <li>• The court shall make an order regarding the holding of a meeting to validate creditors' claims and a meeting to vote on the plan.</li> <li>• The administrator must give notice to all creditors (appearing on the list presented by the debtor) within 5 business days from his appointment; notice should also be published containing details about conditions and time periods concerning responses to the petition, claims validation and meetings to vote on the plan. The deadline for responses and the registration of a request for the recognition of claims must not exceed 30 calendar days from the day of publication of the notice.</li> <li>• The administrator must submit to the court a report, prior to the meeting in which creditors would vote on the plan, indicating the viability of the plan and the prospects of restructuring.</li> <li>• Voting on the plan should be carried on by the creditors' meeting. Creditors shall be divided into separate classes for the purpose of voting on a plan (the same voting rules regarding a regular restructuring process would apply).</li> <li>• Within 5 days of the adoption of the plan by the creditors' meeting, the court should make a decision on the plan approval, the termination of the restructuring process and the transition to plan implementation.</li> <li>• If the plan is not approved, the court may issue a decision on the initiation of bankruptcy proceedings if it is established that the debtor is insolvent. If no such order is granted, creditors may commence new insolvency petitions.</li> <li>• After the plan approval, the debtor will continue to manage the business, under the supervision of an insolvency administrator.</li> <li>• A moratorium of actions by both secured and unsecured creditors will be imposed and will remain in operation throughout the restructuring process. The payment to employees and payment of tax (fiscal) debts due after the initiation of the restructuring process is not suspended following the initiation of accelerated proceedings (art. 184).</li> <li>• Failure of the debtor to implement the plan can result in creditors filing insolvency petition without the need to prove grounds of insolvency.</li> </ul> <p><i>A settlement</i></p> <p>The parties to an insolvency process (the debtor and the creditors) are allowed to reach a settlement at any stage of the process. The process include:</p> <ul style="list-style-type: none"> <li>• The initiation of insolvency proceedings (see Principle C4 on the commencement criteria).</li> <li>• The agreement of the debtor through either its executive body (if the settlement is reached during the observation period while it is still managing its business under supervision of an administrator) or through the administrator/liquidator if the settlement is concluded within the insolvency process.</li> <li>• A decision to conclude a settlement taken at the creditors' meeting (see below the process for approving a settlement).</li> <li>• Third parties have the right to participate in the conclusion of the settlement, in</li> </ul>
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<sup>481</sup> See arts. 220-226 of the Insolvency Law.

	<p>the event that they assume the rights and responsibilities of the debtor under the terms of the settlement.</p> <ul style="list-style-type: none"> <li>• A request for the settlement's approval submitted by the debtor and the administrator/liquidator within 5-10 date of the settlement's conclusion.</li> <li>• Court confirmation.</li> <li>• The approval of the settlement terminates the proceedings.</li> <li>• In case of refusal to approve the settlement, the court shall issue a decision to resume the insolvency process.</li> </ul> <p>Although the law states that a settlement may be concluded at any given stage of the insolvency proceeding, which may include the observation period, it requires that the decision on concluding such a settlement shall be adopted by the meeting of creditors with the simple majority consent of unsecured creditors whose claims were validated. This requires a validation process in a validation meeting (see further Principle B4).</p> <p><i>Plan formulation</i></p> <p><i>Restructuring</i></p> <p>The following parties may propose a restructuring plan:<sup>482</sup></p> <ul style="list-style-type: none"> <li>• The debtor<sup>483</sup> may submit a plan together with the insolvency petition or with his response to creditors' petition, or through a separate application to the insolvency court, but no later than the deadline establish by the creditors' meeting for submitting proposal;</li> <li>• The insolvency administrator may propose a restructuring plan at the request of the meeting or committee of creditors, or on its own initiative, from the moment of his appointment and until the deadline decided upon at the reporting creditors' meeting. Creditors, creditors' committee, employees' representatives and the debtor may participate in the formulation of the plan.</li> <li>• The central government or local authorities may propose a plan in case of insolvency of an enterprise of a vital importance to the national economy.</li> </ul> <p>If several parties have expressed the intention to submit a plan, the court will establish a deadline for the submission of the plans in a manner that will allow the voting on all the plans at the same creditors' meeting.<sup>484</sup></p> <p>The restructuring plan shall comprise two parts: descriptive and organizational. The descriptive part should provide a background regarding the measures taken since the initiation of the insolvency proceeding and the expected impact of the plan. The organizational part should provide information on the manner in which the plan will affect creditors' claims and their status.</p> <p>Article 190 delineates in detail the structure and content of a plan. The plan should include:</p> <ul style="list-style-type: none"> <li>• An indication of the prospect of business recovery.</li> <li>• The plan for the repayment of claims, including the amount which will be repaid and the timeframe for payment. Payment must not be later than one month prior to the end of the period established for the debtor's restructuring. Payment of first</li> </ul>
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<sup>482</sup> Art. 188 of the Insolvency Law.

<sup>483</sup> A debtor who within the past 3 years prior to the submission of commencement applications has been the subject of insolvency proceeding or any debtor whose managers or members have a criminal record may not propose a restructuring plan.

<sup>484</sup> In which case the deadline for submitting plans may be extended by no more than 30 days.

	<p>and second ranking claims (personal injuries and wrongful death claims; employees' wages; remuneration for copyright) must take place within 6 months from the commencement of the restructuring process.</p> <ul style="list-style-type: none"> <li>• An indication of which classes will be impaired and which classes will not be impaired and how impaired classes will be treated.</li> <li>• A comparison of the proposed payment under the plan and what would have been received in bankruptcy.</li> <li>• Any restrictions imposed on the debtor's right to manage the business.</li> <li>• Specification of the economic plan including proposed changes in production and operation processes.</li> <li>• An indication of the financing that may be obtained for the plan implementation.</li> <li>• Specification of the manner of use of the assets and whether the business will be sold as a whole.</li> <li>• The discharge of charges on encumbered assets and the protection to the secured creditor in such an event.</li> <li>• Any proposed extensions of payment and their deadlines, changes in interest rates etc.</li> <li>• Measures to recapitalize the debtor.</li> <li>• Settlement of claims through netting, merger, debt forgiveness, novation, swaps, or any other means for debt discharge.</li> </ul> <p>When the plan foresees different treatment of creditors within the implementation period, the creditors shall be divided into the following classes:<sup>485</sup></p> <ul style="list-style-type: none"> <li>• Secured creditors;</li> <li>• Budgetary creditors (third and fourth priority claims).<sup>486</sup></li> <li>• Unsecured creditors, except for claims of the lower rank.<sup>487</sup></li> <li>• Unsecured creditors of the lower rank.<sup>488</sup></li> </ul> <p>Within each class, all creditors shall enjoy equal rights, unless the class unanimously agreed to receive different treatment (art. 192). Secured creditors' rights to enforce the collateral shall not be infringed, unless the restructuring plan provides otherwise. Indeed, a restructuring plan may impair secured creditors' rights in which case a clear specification of the amount that will be paid and the conditions of payment should be included in the proposed plan (art. 193). Another provision (art. 190) requires, though, that in case of a proposed impairment the plan would specify the equivalent protection that will be provided to the secured creditors (art. 190).</p> <p><i>Accelerated restructuring</i></p> <p>Pursuant to art. 222 of the Insolvency Law, a debtor's accelerated restructuring plan must include details concerning:</p> <ul style="list-style-type: none"> <li>• The assets and liabilities and the reasons for the financial situation.</li> <li>• The plan for the repayment of the claims.</li> <li>• Details about claims satisfaction and impairment including the manner in which the claims will be satisfied (e.g. by rescheduling, partial satisfaction etc.).</li> </ul>
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<sup>485</sup> See art. 191 of the Insolvency Law.

<sup>486</sup> Claims on loans granted by the Ministry of Finances, internal and external loans granted under government guarantees, taxes and other mandatory payments and claims for repayment of debt to state material reserves (art. 43 of the Insolvency Law).

<sup>487</sup> Interest rates on unsecured claims accruing after the commencement of insolvency proceedings, fines, late fees and other financial sanctions, claims concerning free services, related parties claims and debtor's executive body wages claims.

<sup>488</sup> Ibid.



	<p>Creditors will be divided into the same classes as in a general restructuring (see above).</p> <p><i>Settlements</i></p> <p>Similar to the other restructuring processes, a settlement may accommodate a broad range of restructuring activities.</p> <p>Pursuant to art. 165 of the Insolvency Law, a settlement must contain:</p> <ul style="list-style-type: none"> <li>• The procedure for the fulfillment of validated claims</li> <li>• Details on the manner of repayment (e.g. by netting, merger, debt forgiveness etc.)</li> </ul> <p><i>Plan voting and approval</i></p> <p><i>Restructuring</i></p> <p>The administrator shall publish in the Official Monitor or a relevant local newspaper a notice on convening the creditors' meeting and voting on the plan. Pursuant to article 200 of the Insolvency Law, the meeting of creditors in which creditors vote on the plan may not take place before the meeting of validation of claims, as only validated creditors are entitled to vote on the plan.</p> <p>Parties who have submitted a plan may make amendments to the plan. If there are several different plans proposed, the one proposed by the administrator takes precedence and shall be put to vote first, and if it is approved, the plan proposed by the debtor is considered rejected (art. 200).</p> <p>Creditors vote on the restructuring plan by class. Creditors who directly or indirectly control, are controlled or are under common control with the debtor may participate at the meeting of creditors, yet they can exercise their voting rights only when the restructuring plan grants them less than they would have received in bankruptcy. The plan shall be deemed accepted by a class of creditors when voted by the majority of creditors holding more than half the value of claims of that class (i.e. majority in number and value). In case a majority has not been reached within a class, the plan will still be deemed accepted by the class if the following conditions are met:<sup>489</sup></p> <ul style="list-style-type: none"> <li>• The class who voted against the plan is not in a less favorable position by the adoption of the plan compared with its situation in the absence of a plan.</li> <li>• The majority of classes accepted the plan.</li> </ul> <p>A plan accepted by the creditors is subject to the confirmation of the court.<sup>490</sup> The insolvency court will approve the plan only if the following requirements are met:</p> <ul style="list-style-type: none"> <li>• At least half plus one of the classes of creditors accepted the plan or are considered to have adopted the plan.</li> <li>• If there are only two classes of creditors, the plan shall be deemed accepted if the class with the highest aggregate value of claims has accepted the plan.</li> <li>• If the plan provides for a proper and fair treatment of the claims of the classes who voted against the plan and whose claims are impaired.</li> </ul> <p>Article 204 provides that a proper and fair treatment means that the following conditions are met:</p> <ul style="list-style-type: none"> <li>• No class and no claim who voted against the plan shall receive less than it would</li> </ul>
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<sup>489</sup> Art. 203 of the Insolvency Law. This is a "cramdown" feature, designed to deal with holdout creditors.

<sup>490</sup> Art. 204 of the Insolvency Law. The court will also refuse to approve a plan if it contains false information, if the conditions regarding the content of the plan and the procedure for its implementation were not met, if the debtor clearly has sufficient means to cover the debts in full or if remuneration and other payments related to the administrator activities (including other retained experts) were not paid or measures for their payment contemplated in the plan (Article 205).

	<p>receive in bankruptcy;</p> <ul style="list-style-type: none"> <li>• No class and no claim of a class shall receive more than the value of their claim;</li> <li>• When an impaired class rejected the plan, no class of a lower rank (than the claims of the class who voted against the plan) shall receive more than it would receive in bankruptcy.</li> </ul> <p>Administration expenses must be paid according to their terms, unless the interested parties agreed otherwise (art. 208(5)).</p> <p>The plan should provide a program for payment of the first and second priority claims (personal injuries, wrongful death claims, employees' wages, and remuneration for copyright) within 6 months from the day the restructuring process commences (art. 190).</p> <p>As mentioned above, if within 4 months from the date of commencement of the restructuring proceeding, the insolvency court does not receive a restructuring plan duly accepted by the meeting of creditors or if no plan has been confirmed by the meeting and the term for submitting the plan has elapsed, the insolvency court shall immediately resolve on commencing bankruptcy proceedings against the debtor.</p> <p><i>Accelerated restructuring</i></p> <p>As aforementioned, the debtor has the right to submit a proposal of accelerated restructuring plan. The voting and approval rules are the same as those applied in the general restructuring.</p> <p><i>Settlements</i></p> <p>A settlement must be approved by the debtor through his governing bodies (if the settlement is reached during the observation period while it is still managing its business under supervision of an administrator) or, if the settlement is concluded within the insolvency process, through the administrator/liquidator (art. 162(3)).</p> <p>It should also be adopted by the creditors' meeting. Adoption entails approval of the settlement by a simple majority of the total number of votes of the unsecured creditors and a unanimous consent of all the secured creditors (art. 162(2)).</p> <p>Creditors who voted against the plan or who did not participate in the vote shall not receive a less favorable treatment than those who voted in favor of the plan (art. 165(5)).</p> <p>Budgetary and other government debts (third and fourth priorities under article 43) may be impaired by the settlement but may not reject it (they are obliged to sign on the settlement) (art. 165(3)).</p> <p>The settlement is subject to the confirmation of the court. A settlement may be approved by the court only if the estate claims and claims of first and second priorities (personal injuries, wrongful death claims, employees' wages and remuneration for copyright) have been satisfied in full (art. 167).</p> <p><i>Implementation of the plan, amendments, revocation and closure</i></p> <p><i>Restructuring</i></p> <p>After a plan is approved by the court and becomes irrevocable, the debtor management</p>
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	<p>rights are restored, and during the period of plan implementation the debtor will manage the business, under the supervision or control of the insolvency administrator.<sup>491</sup> The creditors' committee and the insolvency court shall continue monitoring the debtor, taking into consideration the terms of the restructuring plan which may limit or extend the administrator's or creditors' supervision. For instance, the restructuring plan may provide that during the plan implementation, certain transactions entered into by the debtor or transactions made by an acquiring company shall be valid only subject to the administrator's consent. Further, in case of large-scale transactions or transactions entailing a conflict of interest, the debtor shall seek the approval of the committee or the creditors' meeting. Finally, when the debts of the insolvency estate that emerged after the commencement of the restructuring proceedings exceed 20% of the value of assets, all subsequent transactions shall be concluded only with the approval of the creditors' committee.<sup>492</sup> The administrator or the debtor's representative in charge shall deliver to the committee of creditors a quarterly report on the debtor's financial situation and the prospects of achieving the goals of the restructuring plan.<sup>493</sup></p> <p>The plan may include provisions regarding priority for payment of loan agreements entered into by the debtor or by an acquiring company during the period of supervision (i.e. during the implementation of the plan), as well payment of administration expenses that were suspended during the supervision period. Such payment obligations require the consent of the administrator and shall not exceed the value of the debtor's assets. Suppliers of utilities may not suspend services if the debtor is a dependent customer (art. 213).</p> <p>The implementation of the plan must not take more than 3 years and in the case of entities deemed vital to the national economy, 5 years. The debtor's supervision will be terminated if claims have been satisfied or secured or if the time period for termination has expired (art. 215).</p> <p>If in the process of implementing the plan, the debtor does not comply with its terms or if the plan is not implemented, the creditors' committee or any of the creditors may file a new insolvency petition for the institution of a bankruptcy process. It is not required in such a case to prove the debtor's insolvency (art. 217).</p> <p>In case of failure to implement a plan and the initiation of bankruptcy proceedings, the restructuring plan shall be deemed revoked and the creditors whose claims have been satisfied during the implementation of the restructuring plan must return what they have received, except for the amounts paid to the estate creditors (administration expenses) and to the first and second ranking creditors (personal injuries, wrongful death claims and employees' wages). Deferred claims or claims to be paid in installments under the plan are reinstated (art. 217).</p> <p>The approval of a plan prohibits the possibility of proposing, reviewing, voting on or approving another plan (art. 204(7)).</p> <p><i>Accelerated restructuring</i></p> <p>After an accelerated restructuring plan is approved, the debtor management powers are restored. An administrator is appointed to supervise the debtor. The same rules regarding the consequences of approval of a general restructuring plan and the supervision of a plan apply in this context (art. 225(4)).</p> <p>In case of failure to implement an accelerated restructuring plan or where the debtor</p>
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<sup>491</sup> Art. 210 of the Insolvency Law.

<sup>492</sup> Art. 212 of the Insolvency Law.

<sup>493</sup> Art. 211 of the Insolvency Law.

	<p>violates any of its condition, any creditor has the right to file a petition without the need to prove insolvency (art. 226).</p> <p><i>Settlements</i></p> <p>Approval of a settlement by the court terminates the insolvency process and the stay on creditors' actions is lifted. The debtor's management rights are restored. The debtor or a third party is required to take immediate action to begin the fulfillment of creditors' claims (art. 168).</p> <p>If a settlement is not approved by the court, the parties may conclude a different settlement (art. 170).</p> <p>A settlement approved by the court may be revoked through an application of unsecured creditors on the basis of a failure by the debtor to abide by the plan terms or where it committed a significant violation of its conditions that led to infringement of unsecured creditors' rights holding one-fourth of the unsecured claims (art. 172).</p> <p>If the ruling confirming a settlement is revoked, the insolvency process is resumed (art. 171). Claims subject to installment or deferred payment are reinstated. Payments made under the settlement are not reimbursed, unless paid on unfair terms. The debtor cannot request return of payment to estate creditors and the claims of first and second priority ranks (personal injuries, wrongful death claims and employees' wages).</p> <p>Any creditor may initiate a new insolvency process in circumstances where the debtor (or a third party) fails to comply with the terms of the settlement (art. 174). In such a case, the conditions of the settlement will determine the amount of creditors' claims with respect to which a settlement was concluded.</p> <p><i>Binding effect</i></p> <p>Following the approval of a restructuring plan (or an accelerated restructuring plan) the claims and rights of creditors and other interested parties are modified in accordance with the plan (art. 208). As mentioned above, the plan is binding on dissenting creditors within each class and the plan may be "crammed down" on dissenting classes, in accordance with the plan approval process. If bankruptcy proceedings are initiated as a result of a failure of a restructuring plan or in the event of compulsory enforcement action, the plan is considered final and binding (art. 208(3)). Provisions for non-fulfillment or deference of any unsecured debt will not be binding upon those creditors affected by a significant violation by the debtor of the plan terms, namely a failure to fulfill a claim that has become due after receiving notification and extension of payment of up to 15 days (art. 209).</p> <p>From the date an accelerated restructuring plan is approved, all claims that arose prior to the plan approval and not included in the plan are discharged (art. 225(3)). There is no equivalent provision concerning general restructuring plans, yet it seems that the intention is that the same rule will apply.</p> <p>A settlement which was confirmed by the court is binding upon all of the participants concerned at the time of issuing the decision confirming the settlement (art. 162(6)). A unilateral refusal to carry out a settlement that has entered into force shall not be permitted (art. 162(7)). It is not clear whether the provision means that only those creditors who participated in the voting are bound by the plan. Article 165(7) seems to suggest that dissenting creditors as well as creditors who did not participate in the voting may be bought out by creditors who approved the settlement, yet there is some uncertainty in the provisions.</p>
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<p><b>Assessment</b></p>	<p><b>Materially Non-Observed</b></p> <p>A key aim of the new insolvency law has been to improve the framework for business rescue by introducing a variety of measures that parties can utilize for this purpose. Thus far, though, there still seems to be obstacles and some structural as well as cultural constraints that impeded achieving this aim. It is important to closely monitor the extent to which the framework facilitates more restructurings going forward and to consider certain amendments and clarifications that could strengthen the system.</p> <p>The accelerated restructuring proceeding is particularly innovative in that it is based on the debtor being in a state of financial distress rather than already in insolvency. It also provides for an expedited administration of the proceedings. As such, the process may also be conducive to pre insolvency negotiations towards business rescue. However, the law does not specify how an informal agreement might be processed through the restructuring proceedings (see Principle B4). To the extent that the restructuring effort is commenced after filing, it is important that the debtor indeed files early and receives the support of other parties. Reportedly, debtors often access the process too late, and generally prefer to avoid it. Lenders tend to focus on enforcement of secured claims and separation of assets in insolvency. The law lacks sufficient means to encourage debtors to act responsibly at times of financial distress (see Principles B2 and C2). There is little experience thus far with the implementation of this procedure to be able to confirm its effectiveness; in particular whether the short deadlines it entails are realistic, in the absence of a considerable pre-insolvency period of negotiation. Close monitoring is advisable.</p> <p>The settlement process too may be conducive to reaching beneficial resolutions. It is flexible in the sense that it can be concluded at any stage of the proceedings, though there is some uncertainty regarding the reaching of settlements during observation before claims have been validated. The settlement process allows the ‘cramdown’ of budgetary claims (and other government debt- see third and fourth priorities under art. 43; Principle C12), as they are bound to accept the conditions of the settlement when it provides for repayment in installments or a deferred payment, or full or partial forgiveness of a debtor’s debt. The settlement requires the consent of all secured creditors, though, thus it might, as a practical matter, require the dismemberment of the encumbered assets and thus make it difficult to agree on restructuring programs that could enable a settlement. The requirement that creditors who voted against the plan or who did not participate in the vote shall not receive a less favorable treatment than those who voted in favor of the plan may not ensure that dissenting unsecured creditors’ interests (that are bound by the settlement) are adequately protected i.e. that they will receive at least the amount they would receive in bankruptcy. It is not clear whether secured creditors are also entitled to vote as unsecured creditors with regard to a part of their claim that is not covered by the security. There is also some ambiguity regarding the effect of the settlement and whether it will be binding on all creditors affected by the plan as the relevant provision specifically refers to participating creditors.</p> <p>The general restructuring proceedings entail certain deficiencies. Such proceedings may commence quite late in the process, after a period of observation, another period of claim validation and investigation of the business and possibly also a period of bankruptcy. Indeed, if a debtor declares in its petition the intention to restructure the business, the observation period can be avoided. In this respect, the restriction imposed on debtors that unsuccessfully object a creditor’s insolvency petition, to request a restructuring may be counter-productive. Insolvency is a matter of fact that can be subject to different bona fide opinions. A debtor may consider that he is not yet insolvent and that the business can be rescued. If the state of insolvency is established, the debtor may still be able to present a plan and the proceedings could have moved directly to commencement (avoiding observation), to the benefit of the general body of creditors.</p> <p>The initiation of restructuring proceeding also requires a proposal of a rescue strategy by the administrator/liquidator and its approval by the creditors’ meeting. To reach the point where such approval is granted and restructuring proceedings may commence, the administrator/liquidator may need to operate the business as a going concern for a while, in a way that could be conducive to the general body of creditors. The business may not</p>
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	<p>generate sufficient funds and new finance may be required. However, as aforementioned (see Principle C9), new lending is hardly ever obtained in practice, and the law does not provide sufficient measures to encourage such post-filing/commencement finance.</p> <p>Considering the limited resources and the various actions that administrators are required to take after the commencement of the proceedings, they may not be able to come up with a viable restructuring strategy within the designated period of time (up to and sometimes less than 100 days). There are no provisions allowing extension of that deadline. Indeed, reportedly, administrators struggle to take on all required measures and actions as well as design a restructuring strategy within the assigned timeframe (see also Principle D5). The problem seems to exacerbate as often the financial information that administrators receive from the debtor is very poor, and financial experts may not be engaged in the absence of sufficient resources (see also Principle C2).</p> <p>Even if the administrator manages to propose such a strategy, it is subject to the creditors' meeting approval, and in the event of rejection, only bankruptcy may be considered. As mentioned earlier, secured creditors tend to attempt to separate assets rather than support the business' continuation. Reportedly, they tend to block decisions at creditors' meetings regarding proposed restructuring strategies. Reportedly, there are also incidences of abuse by creditors, who utilize the insolvency process to transfer assets to affiliates, by creating fictitious claims and controlling the creditors' meeting, curtailing any attempt at an honest restructuring.</p> <p>Further, as was noted earlier, the application of the stay of actions by secured creditors may lack mechanisms of relief and adequate protection during restructurings (there is at least some uncertainty in this respect), which may discourage the use of this process and the approval of a restructuring strategy (see Principle C5).</p> <p>Finally, even if the creditors approve the restructuring strategy, the court may give parties no more than 30 days to submit a proposal (only when multiple parties intend to propose a plan the court may extend the time by no more than 30 days), and failure to submit a proposal on time results in the loss of the right to present a plan. In view of the limited experience in the jurisdiction of designing a restructuring strategy, such an approach seems too harsh, and the time deadlines might be too short.</p> <p>The law usefully delineates in detail rules regarding plan formulation, approval, implementation and conversion of restructuring to bankruptcy (applicable to both accelerated and general restructuring). However, there are some uncertainties in the law. Though a plan is impliedly made binding on all creditors (including creditors who failed to vote or to file a claim, or who voted no), neither Articles 208 nor 209 make that binding effect express. Greater certainty in this regard would be desirable.</p> <p>The process contemplates termination of restructuring and the possibility to convert it into bankruptcy by any creditor in the event of failure to comply with a plan condition, without requiring that the failure would be substantial(see article 217). This may result in interruptions to plan implementation in circumstances where a minor default could have been resolved.<sup>494</sup></p> <p>The rule that payments in the course of restructuring shall be returned in case of failure to implement a plan and consequent initiation of bankruptcy proceedings (article 217(4)), seems unworkable. It means that the creditors could not safely apply plan payments they receive to the debt owed until the plan had been completed. It is also inconsistent with the binding effect of the plan under article 208(3).</p> <p>There is some lack of flexibility in the rules, whereby the law does not contemplate the</p>
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<sup>494</sup> The Insolvency Law could be improved with a rule to the effect that the creditor claiming a default should have to prove that he sent a notice and opportunity to cure to the default and that a period of at least 15 days expired (or any other period stipulated in the reminder) without a cure. In this way, minor defaults could be easily rectified, and the debtor would have a strong incentive to cure the default promptly. See a similar rule in article 209 of the Insolvency Law.

	<p>possibility that errors in the plan may require correction after its approval.</p> <p>The structure of the voting rules seems to require clarification. Article 204 allows a plan to be approved if a majority of the classes have adopted the plan or are considered to have adopted the plan. It is not clear what ‘considered to have adopted the plan’ means. It may refer to the possibility to regard a class as approving a plan even in the absence of majority, pursuant to article 203. Yet, that would result in a circular analysis, since article 203 allows considering a class as adopting the plan only if a majority of the classes approved it. Article 204 is also ambiguous where it refers to classes ‘in a less favorable position’ and to ‘a lower class not receiving more than it would have received in the event of bankruptcy’.</p> <p>What the provision seems to say (but it may require clarification) is that if a class of creditors has voted against the plan, that class shall receive under the plan full recognition of its ranking under the insolvency law and the distribution to that class under the plan should conform to that ranking.</p> <p>Additionally, the law does not exclude from the voting process creditors whose claims are not affected by the plan. There is also no mentioning of how rights of ‘under-secured’ creditors are treated, and whether they are entitled to vote in the unsecured creditors’ meeting regarding the unsecured part of their claim. The formulation of classes is rigid, and issues may arise, for example where there are different types of secured creditors within the secured creditors’ class, in particular if the inclusion of “investors” in apartment building in the list of secured creditors is retained.</p> <p>The treatment of employees’ claims is unclear. The law seems to exclude the employees’ claims from the moratorium, without distinguishing between pre and post insolvency claims. In addition, it is required to show in the plan how employees’ claims will be fulfilled within 6 months from the start of the process. It is not clear if employees are given a similar treatment as administration expenses, or whether they are voting in the classes and treated as unsecured creditors. If they are voting on the plan as unsecured creditors and their rights may be impaired, then the law is unclear regarding the protection of their interests in this process. Employees are not specified as a class in article 191 to which the proper and fair treatment test refers (see art. 204), even though they are higher in priority than the general unsecured creditors in the hierarchy of satisfaction of debts (pursuant to art. 43).</p> <p>The law is also ambiguous regarding the interaction between the voting rules applicable to plans (described above), and voting rules applicable to voting in meetings regarding the use of assets (Article 57, 129, described in Principle C7) which allow, for example, that only secured creditors will vote on decisions regarding the use of encumbered assets. It should be made clear that the rules regarding voting on decisions regarding the use of assets yield to the voting rules regarding the approval of restructuring plans.</p> <p>There is also some uncertainty regarding the rights of estate creditors (<i>i.e.</i>, creditors whose claims arose during the insolvency proceeding), especially following approval of a plan. More precise provisions regulating those rights would remove uncertainty.</p> <p>The provision regarding new finance for a plan implementation does not specify the conditions and priority which might be given in such circumstances (see Principle C9).</p>
<b>Comment</b>	<p>The new Insolvency Law should be commended for putting much emphasis on business rescue. Testing its actual effectiveness would require further close monitoring, especially in view of persisting concerns raised by participants. Various aspects of the framework may be improved going forward, in order to make the reorganization process an effective option for viable businesses. The law should ensure that debtors have proper incentives to commence proceedings at an early stage and that creditors have easy access to the system (see also Principles B2, C2 and C4), that thereafter business continuation is feasible (see Principle C9) including by allowing beneficial and flexible uses of the debtors’ assets (see Principle C8) and that secured creditors’ rights are sufficiently protected during restructurings (see Principle C5 and C12).</p> <p>Additionally, consideration may be given to facilitating access to the general restructuring process. For example, restructuring plan proposals may be developed and voted on without the need for an additional prior vote on a restructuring strategy by the creditors’ meeting.</p>

	<p>Similar to the accelerated restructuring process, the creditors may consider the administrator report but vote on plans through the designated classes (see also Principle C7). Consideration should also be given to allowing some leeway and discretion at the points in the process where a restructuring strategy and a restructuring plan are proposed (in terms of deadlines) and in allowing debtors to request a restructuring strategy even where it disputed its state of insolvency when responding to a creditor petition (see also Principle D1).</p> <p>Consideration should also be given to clarifying the rules concerning voting, approval and implementation of restructuring plans and settlements. Specifically, the effect of plans and settlements approval may be elucidated, as well as the manner of reaching a settlement during the observation period. The rules should also ensure that dissenting unsecured creditors will not receive less in a settlement than in liquidation. Additional refinement of the restructuring voting rules may be considered along the lines of the assessment above, and the formulation of classes should be monitored to identify problems in practice. The reference in article 204 to classes that are considered to have adopted the plan may be removed (and it may be explicitly clarified that more than half of the classes should adopt the plan <i>other than</i> by virtue of article 203). Further, the position of employees in restructuring could be usefully clarified, as well as the treatment of an unsecured element of secured creditors' claims. A general clarification is also advisable regarding the interaction between the voting rules applicable to plans and voting rules applicable to voting in meetings regarding the use of assets.</p> <p>Consideration should also be given to post-plan approval issues, including clarifying how technical errors can be easily corrected, revising the rules regarding curing defaults, clarifying the rights of estate creditors, and clarifying that a confirmed plan is binding not just on the debtor but also on creditors.</p> <p>Finally, the institutional framework needs strengthening, as will be further analyzed below (see Principles D1-8). A reorganization process requires making delicate decisions concerning interests of different groups of stakeholders. In particular, in a regime which historically is geared towards liquidations and separation of assets, where large creditors attempt to block restructurings, and where abuse of process persist, a robust supervision of the process is critical.<sup>495</sup></p>
<b>Principle C15</b>	<p><b>International Considerations</b></p> <p>Insolvency proceedings may have international aspects, and a country's legal system should establish clear rules pertaining to jurisdiction, recognition of foreign judgments, cooperation among courts in different countries and choice of law. Key factors to effective handling of cross-border matters typically include:</p> <ul style="list-style-type: none"> <li>(i) A clear and speedy process for obtaining recognition of foreign insolvency proceedings;</li> <li>(ii) Relief to be granted upon recognition of foreign insolvency proceedings;</li> <li>(iii) Foreign insolvency representatives to have access to courts and other relevant authorities;</li> <li>(iv) Courts and insolvency representatives to cooperate in international insolvency proceedings;</li> <li>(v) Nondiscrimination between foreign and domestic creditors.</li> </ul>
<b>Description</b>	<p>Pursuant to article 252 of the Insolvency Law, if an insolvency proceeding has commenced in another state against a debtor which has assets in the territory of the Republic of Moldova, the enforcement of acts regarding such assets may be initiated only when there is a bilateral agreement on cross-border insolvency between the respective state and the Republic of Moldova. The Republic of Moldova does not have, however, any bilateral or</p>

<sup>495</sup> In addition, simpler proceedings might be designed for small and medium sized enterprises, focused solely on restructuring and repayment. It would be reserved to cases with a small number of creditors, and a small amount of assets and claims.



	<p>multilateral cross-border insolvency treaty with any other jurisdiction.</p> <p>Foreign creditors may participate in local insolvency proceedings. The Insolvency Law does not distinguish between the treatment of domestic and foreign creditors. However, foreign creditors may experience difficulties in terms of participation and due process. Thus, when the law provides as a form of notification publication in the Official Monitor, the administrator is not obliged to undertake any other measures to ensure that foreign creditors have been notified (see Principle C2).</p> <p>Commencing domestic insolvency proceedings against a Moldovan debtor by foreign creditors is also rather cumbersome, as they are required to obtain first an irrevocable national court judgment on recognition of the foreign court judgment or arbitral award,<sup>496</sup> issued in the jurisdiction governing the contractual relationship of the parties. Specifically, under Moldovan law,<sup>497</sup> foreign court judgments and arbitral awards, including settlements, are recognized and executed (as matter of law) in Moldova,<sup>498</sup> when so provided by an international treaty Moldova is party to,<sup>499</sup> or on the basis of the principle of reciprocity regarding the effects of foreign court judgment. An application for recognition of a foreign court judgment or arbitral award shall be examined in a public hearing, the debtor and the Ministry of Justice being given legal notice on the place, date and time of the proceedings. The grounds for refusing recognition refer to reasons of validity and legality and are expressly laid out in the law.<sup>500</sup></p> <p>Moldova did not implement the provisions of the UNCITRAL Model Law on Cross-Border Insolvency, neither by adopting a separate act nor by integrating cross-border insolvency mechanisms in its current insolvency laws. General provisions governing recognition and enforcement of foreign court judgments or arbitral awards shall be applicable to foreign creditors participating in Moldovan insolvency procedures.</p>
<b>Assessment</b>	<p><b>Materially Non-Observed</b></p> <p>Notwithstanding that in recent years Moldova has put greater emphasis on cross-border financial linkages; it did not take on board to modernize its insolvency framework in terms of the international considerations.</p> <p>The insolvency law only contemplates the specific circumstance where proceedings were opened abroad and assets of the foreign debtor are located in Moldova. In such circumstances enforcement of claims against such assets will be allowed only where a bilateral treaty exist, and currently there are no such treaties to which Moldova is a party.</p> <p>There are no provisions in the law aimed to more generally facilitate cooperation in cross-border insolvencies, as well as facilitate access (by foreign representatives and creditors) to local proceedings, recognition of foreign proceedings and the granting of a range of relief in circumstances of cross-border insolvency, pursuant to uniform international standards, in particular the provisions of the UNCITRAL Model Law on Cross-Border Insolvency.</p>
<b>Comment</b>	<p>Consideration should be given to adopting the UNCITRAL Model Law on Cross-Border Insolvency, or comparable provisions to facilitate cooperation and recognition of judgments</p>

<sup>496</sup> Art. 20 of the Insolvency Law.

<sup>497</sup> Art. 467 of the Civil Procedure Code.

<sup>498</sup> Foreign court decisions concerning provisional measures or provisional enforcement may not be enforced in Moldova.

<sup>499</sup> Subject to compliance with the New York Convention of 10 June 1958 on the Recognition of Enforcement of Foreign Arbitral Awards, an arbitral award obtained in an arbitration proceeding will be enforced by the courts in the Republic of Moldova without re-examination or re-litigation of the matters thereby adjudicated.

<sup>500</sup> Art. 471 of the Civil Procedure Code.

	in the context of cross-border insolvencies. The inclusion of such procedures would signal to investors that collective proceedings can be resolved efficiently and on a level playing field as among foreign and domestic creditors.
<b>Principle C16</b>	<p><b>Insolvency of Domestic Enterprise Groups</b></p> <p><b>C16.1.</b> Procedural Coordination. The system should specify that the administration of insolvency proceedings with respect to two or more enterprise group members may be coordinated for procedural purposes. The scope and extent of the procedural coordination should be specified by the court.</p> <p><b>C16.2.</b> Post-commencement Finance. The system should permit an enterprise group member subject to insolvency proceedings to provide or facilitate post-commencement finance or other kind of financial assistance to other enterprises in the group which are also subject to insolvency proceedings. The system should specify the priority accorded to such post-commencement finance.</p> <p><b>C16.3.</b> Substantive Consolidation. The insolvency system should respect the separate legal identity of each of the enterprise group members. When substantive consolidation is contemplated, it should be restricted to circumstances where: (i) assets or liabilities of the enterprise group members are intermingled to such an extent that the ownership of assets and responsibility for liabilities cannot be identified without disproportionate expense or delay; or (ii) the enterprise group members are engaged in a fraudulent scheme or activity with no legitimate business purpose. The court should be able to exclude specific claims and assets from an order of consolidation. In the event of substantive consolidation, the system should contemplate an adequate treatment of secured transactions, priorities, creditor meetings, and avoidance actions. The system should specify that a substantive consolidation order would cause the assets and liabilities of the consolidated enterprises to be treated as if they were part of a single estate; extinguish debts and claims as amongst the relevant enterprises; and cause claims against the relevant enterprises to be treated as if they were against a single insolvency estate.</p> <p><b>C16.4.</b> Avoidance actions<sup>501</sup>. The system should authorise the court considering whether to set aside a transaction that took place among enterprise group members, or between any of them and a related person, to take into account the specific circumstances of the transaction.</p> <p><b>C16.5.</b> Insolvency Representative. The system should permit a single or the same insolvency representative to be appointed with respect to two or more enterprise group members, and should include provisions addressing situations involving conflicts of interest. Where there are different insolvency representatives for different enterprise group members, the system should allow insolvency representatives to communicate directly and to cooperate to the maximum extent possible.</p> <p><b>C16.6.</b> Reorganization Plans. The system should permit coordinated reorganization plans to be proposed in insolvency proceedings with respect to two or more enterprise group members. The system should allow enterprise group members not subject to insolvency proceedings to voluntarily participate in a reorganization plan of other group members subject to insolvency proceedings.</p>
<b>Description</b>	The Moldovan law does not regulate the insolvency of enterprise groups.

<sup>501</sup> See Principle C11.

	<p>Members of a group of companies are regarded as independent entities with corporate legal separation, and their insolvency should be, accordingly, addressed individually, on a case-by-case basis. As such, if one or more of the corporate members of an enterprise group were to file insolvency in Moldova, they would probably be the subject of separate insolvency cases and most likely the Moldovan insolvency courts will be reluctant to order a substantive or procedural consolidation of such cases.</p>
<b>Assessment</b>	<p><b>Non-Observed</b></p> <p>The Moldovan Insolvency legislation does not include specific regulation of the insolvency of corporate groups. There are no legal provisions that envisage the possibility to coordinate the insolvency procedures of two or more group members. There is no regulation as to the joint petition for insolvency, or the joint development of connected procedures; no mention as to the possibility to coordinate reorganization plans or to appoint one single practitioner for several insolvencies of group members. Reportedly, there is no practice of this type of coordination between insolvency proceedings of group members.</p> <p>The insolvency legislation does not provide specific regulation of intra-group post-commencement finance. There is generally considerable uncertainty in this respect due to the weak system of priority for post-commencement debts (see Principles C9 and C12) and the lack of experience and practice in situations of the kind.</p>
<b>Comment</b>	<p>Consideration may be given to amending the insolvency legislation in order to accommodate efficient rules for the insolvency of functionally-related companies within the same corporate group. The rules should provide a framework to allow for a streamlined coordination of procedures, intra-group financing and combined rescue solutions. In case it is considered adequate to include express regulation of substantive consolidation, it ought to be done in a way that respects separate legal personality, and be based on the intermingling of assets and liabilities of insolvent debtors so as to make them unidentifiable (or only at an unbearable cost) and/or the existence of a fraudulent scheme.</p>
<b>Principle C17</b>	<p><b>Insolvency of International Enterprise Groups</b></p> <p><b>C17.1.</b> Access to court and Recognition of Proceedings. In the context of the insolvency of enterprise group members, the system should provide foreign representatives and creditors with access to the court, and for the recognition of foreign insolvency proceedings, if necessary.</p> <p><b>C17.2.</b> Cooperation involving courts. The system should allow the national court to cooperate to the maximum possible extent with foreign courts or foreign representatives, either directly or through the local insolvency representative. The system should permit the national court to communicate directly with, or to request information or assistance directly from, foreign courts or representatives.</p> <p><b>C17.3.</b> Cooperation involving insolvency representatives. The system should allow insolvency representatives appointed to administer proceedings with respect to an enterprise group member to communicate directly and to cooperate to the maximum extent possible with foreign courts and with foreign insolvency representatives in order to facilitate coordination of the proceedings.</p> <p><b>C17.4.</b> Appointment of the insolvency representative. The system should allow, in specific circumstances, for the appointment of a single or the same insolvency representative for enterprise group members in different States. In such cases, the system should include measures addressing situations involving conflicts of interest.</p>

	<p><b>C17.5.</b> Cross-border insolvency agreements. The system should permit insolvency representatives and other parties in interest to enter into cross-border insolvency agreements involving two or more enterprise group members in different States in order to facilitate coordination of the proceedings. The system should allow the courts to approve or implement such agreements.</p>
<b>Description</b>	<p>As noted above, there are no explicit adequate rules regarding insolvency with international elements. There are also no explicit provisions regarding the insolvency of enterprise groups, domestic or international.</p>
<b>Assessment</b>	<p><b>Non-Observed</b></p> <p>The Moldovan insolvency framework does not provide specific regulation for the insolvency of corporate groups with international elements.</p> <p>In the current state of the law, and with the lack of experience (reportedly, there has not been any case regarding international corporate groups in Moldova), it would seem doubtful that the cooperation between judges and insolvency representatives of Moldova and foreign jurisdictions could be achieved without legal obstacle; furthermore, it seems difficult that one same representative would be appointed for several corporate entities belonging to the same international group.</p>
<b>Comment</b>	<p>Consideration could be given to incorporating rules with regard to the insolvency of international enterprise groups; in this respect: the law should provide legal instruments that ensure the streamlined collaboration of insolvency courts and representatives of insolvent debtors with proceedings opened in different jurisdictions; and, allow for the possibility of the appointment of the same person/entity to manage the procedures of different debtors within the same group. Different policy options may be found in the UNCITRAL's Legislative Guide on Insolvency Law, Part III.</p>
	<p><b>PART D. IMPLEMENTATION: INSTITUTIONAL &amp; REGULATORY FRAMEWORKS</b></p>
<b>Principle D1</b>	<p><b>Role of Courts</b></p> <p><b>D1.1</b> Independence, Impartiality and Effectiveness. The system should guarantee the independence of the judiciary. Judicial decisions should be impartial. Courts should act in a competent manner and effectively.</p> <p><b>D1.2</b> Role of Courts in Insolvency Proceedings. Insolvency proceedings should be overseen and impartially disposed of by an independent court and assigned, where practical, to judges with specialized insolvency expertise. Non-judicial institutions playing judicial roles in insolvency proceedings should be subject to the same principles and standards applied to the judiciary.</p> <p><b>D1.3</b> Jurisdiction of the Insolvency Court. The court's jurisdiction should be defined and clear with respect to insolvency proceedings and matters arising in the conduct of these proceedings.</p> <p><b>D1.4</b> Exercise of Judgment by the Court in Insolvency Proceedings. The court should have sufficient supervisory powers to efficiently render decisions in proceedings in line with the legislation without inappropriately assuming a governance or business administration role for the debtor, which would typically be assigned to the management or the insolvency representative.</p> <p><b>D1.5</b> Role of Courts in Commercial Enforcement Proceedings. The general court system must include components that effectively enforce the rights of both secured and</p>

	unsecured creditors outside of insolvency proceedings. If possible, these components should be staffed by specialists in commercial matters. Alternatively, specialized administrative agencies with that expertise may be established.
<b>Description</b>	<p><i>Overview</i></p> <p>In general, the structure of the judicial regime is consistent with modern standards, The law creates an independent judiciary, and assigns to them functions consistent with the role of judges in managing disputes. With regard to the judicial system for managing insolvency proceedings, a major reorganization of the court system for handling these cases occurred in 2012, resulting in the dissolution of the Economic Court, and re-assigning all insolvency cases to judges of the Courts of Appeal.<sup>502</sup> This has resulted in a loss of specialization. In addition, the Courts of Appeal sit as first instance judges for insolvency matters, but continue to act as second instance courts of cassation for other matters, creating a potential case management problem. Despite these changes, and despite further legislative actions being pursued, there continues to be a skeptical perception about the honesty of the judiciary.<sup>503</sup> Enforcement of judgments has now been removed from under the umbrella of the courts themselves, and is managed by private bailiffs, whose conduct may still come under judicial review by the filing of pleadings.</p> <p><i>Independence, Impartiality and Effectiveness</i></p> <p>Judicial independence, impartiality and the rule of law are embedded in Chapter IX of the Constitution. The Constitution also requires third parties to comply with judicial decisions and to cooperate with courts in the administration of justice and enforcement of court decisions. In addition, article 20 of the Constitution guarantees every person the right to be heard by a competent court. Article 6 of the Constitution guarantees separation of powers among the three branches of government (legislative, executive and judicial). The courts are essentially self-governing, via the Superior Council of Magistracy, which manages the selection, evaluation and discipline of judges.<sup>504</sup></p> <p>In accordance with article 115 of the Constitution, Law No 514-XIII of 16 July 1995 on Organization of Judiciary<sup>505</sup> lays out the structure of the judicial system in the Republic of Moldova. In Title I, it obligates the courts to administer justice so as to protect the rights and fundamental freedoms of citizens and legal organization.<sup>506</sup> Article 13 of the Law on Organization of Judiciary states that any interference in the process of court examination is forbidden and any attempt of exercising pressure on judiciary shall be punishable in accordance with administrative or criminal laws.</p> <p><i>Impartiality</i> is required of the judiciary by provisions of the Civil Procedure Code rules. Also, Articles 6 and 8 of Law No 514-XIII of 16 July 1995 guaranty equality before the law and access to the courts.<sup>507</sup> If breached, disciplinary procedures can be brought against the judge.<sup>508</sup> In practice, though, the common perception is that complaints against the judicial misconduct either have not caused initiation of disciplinary proceedings, or that the sanctions imposed have been too soft. That perception was reflected in the comments of a</p>

<sup>502</sup> See Law No 29 of 06.03.2012, effective as of 13.03.2012. See also art. 335 of the Code of Civil Procedure.

<sup>503</sup> See generally Global Competitiveness Report (2013-2014), available at [http://www3.weforum.org/docs/WEF\\_GlobalCompetitivenessReport\\_2013-14.pdf](http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf), at page 278.

<sup>504</sup> See Law No. 514 (16 July 1995), Law on the Organization of the Judiciary, art. 24.

<sup>505</sup> Law No 514 of 16 July 1995.

<sup>506</sup> Law No 514 of 16 July 1995, art. 4.

<sup>507</sup> Law No 514 of 16 July 1995, arts. 6, 8

<sup>508</sup> See Law 544-XIII of 20 July 1995. art. 23.

	<p>number of different stakeholders during interviews as well. Recent amendments (and proposed amendments) to relevant laws reflect an effort on the part of the government to be responsive to these concerns, and an acknowledgment that the concerns have some validity. These include: (i) the draft law (Parliamentary draft No. 625 of 2013) on disciplinary liability of judges and (ii) the draft law (Parliamentary draft No. 624 of 2013) amending the Law on Status of Judges, the Law on Superior Council of Magistracy and providing for extended confiscation and sanctions for illicit enrichment, to be included in the Criminal Code. The laws are aimed at discouraging judges' lack of impartiality and corruption.</p> <p><i>Competence and effectiveness</i> of the courts was one of the goals sought to be attained by the Strategy of Reform in Justice Sector (2011-2016), launched by the Ministry of Justice with the intention of promoting the impartiality, independence, competence and effectiveness of the judiciary. Following on that strategy, a number of laws have been drafted. Some have been passed, while others are still in the process of consideration by the Parliament. For example, Law No. 328 of 23 December 2013 on salaries of judges was enacted effective 21 January 2014 (providing salaries equal to average salaries per economy multiplied by 3-5, depending on hierarchy of court and experience in service). The Strategy also calls for strengthening of institutions, increasing salary incentives and sanctioning more rigorously misconduct of the judiciary.</p> <p><i>Role of Courts in Insolvency Proceedings</i></p> <p>The Insolvency Law vests in the court the competence to rule on applications to commence insolvency proceedings, to generally supervise the work of the administrator or liquidator, and to try, within the insolvency proceeding, all disputes related to the insolvency estate.<sup>509</sup> Until March 2012, insolvency cases were assigned to judges of a specialized economic court of second instance (Economic Court of Appeal). Upon dissolution of the Economic Court of Appeal, the competence to examine insolvency cases has since been vested in the generalist courts of appeal (5 territorial courts of appeal).<sup>510</sup> Despite the serious concerns and allegations that led to the dissolution of the Economic Court, most of its judges were transferred to the generalist courts of appeal.</p> <p>Article 15 of the Law on Organization of Judiciary authorizes specialized courts. In addition, article 18(2) permits specialized panels within a court to consider cases connected to certain matters. However, the law does not expressly allow the President of the court to designate a specific judge or judges to hear specific kinds of cases, such as insolvency cases. It was reported that such designation would require legislative authorization. Some individual judges have developed expertise in insolvency matters. However, there is no longer a specialized insolvency panel of judges or specialized insolvency courts. Judges are assigned on a random basis, using an automatic computerized system, and it is prohibited that a judge receives a specific case by designation. This results in generalist judges being tasked with handling insolvency cases that might require a greater degree of specialized expertise that might other matters.</p> <p>The Supreme Court of Justice, in the interest of furthering a competent and uniform application of the insolvency law by the Courts of Appeal, has issued guidelines regarding the interpretation of the law.<sup>511</sup> While such guidance is consistent with that court's rulemaking authority, and forms an important part in the process of normalizing decision-making in the lower courts, there is always the risk that the rules might go further, and function essentially as judicial amendments. Some stakeholders have expressed concern</p>
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<sup>509</sup> Art. 5 of the Insolvency Law.

<sup>510</sup> A training session was held on 10-13 December 2013, administered by the National Institute of Justice as part of a project supported by EBRD with financial assistance from Czech Government. Reportedly, the training session on commercial insolvency was attended by 50 judges from the courts of appeal.

<sup>511</sup> See Supreme Court of Justice Resolution On Effectiveness of the Insolvency Law in Judiciary Practice (No. 2, March 24, 2014).

	<p>that these guidelines might in fact stray into judicial legislation.</p> <p><i>Jurisdiction</i></p> <p>As noted, the Insolvency Law is clear in granting sufficient jurisdiction over both insolvency matters and matters directly related to the insolvency.<sup>512</sup> With regard to territorial competence (or venue), the placement of insolvency cases is the same as for other cases, as provided by the Civil Procedure Code. Thus, an insolvency case with regard to a legal entity can be filed with the court (i) where the registered address is located or, alternatively, (ii) where the management body is located,<sup>513</sup> or even (iii) where the debtor's assets are located, the same venue rule as applies to the placement of an ordinary lawsuit.<sup>514</sup></p> <p><i>Exercise of Judgment by the Court in Insolvency Proceedings.</i></p> <p>The Insolvency Law<sup>515</sup> vests the courts that preside over such cases with power to exercise <i>judicial control</i> over the actions of the interim administrator, and the insolvency administrator/liquidator. The law expressly provides that the court is not to exercise managerial control over the proceedings,<sup>516</sup> these being exercised by the interim administrator, the insolvency administrator/liquidator, or the debtor if the right to continue to manage its affairs was not removed. That said, the court does have the power to exercise at least some administrative control. There is <i>de facto</i> administrative power present, for example, with the ability to supervise the conduct of administrators/liquidators, and to remove them if necessary. The court also has the power to establish the powers of an administrator/liquidator, to review reports by the administrator/liquidator, and to rule on objections by interested parties with regard to the steps the administrator/liquidator may be proposing.<sup>517</sup></p> <p><i>Exercise of Judgment by the Court in Commercial Enforcement Proceedings</i></p> <p>Both secured and unsecured claims are generally enforced by means of a judgment, obtained by instituting a civil action before a first instance court.<sup>518</sup> A nonjudicial "ordinance" procedure is also available, but it is reported that such actions are often challenged by debtors who raise substantive issues, sometimes on fictitious facts. The court, in such circumstances, is prone to cancel the ordinance, forcing the creditor to initiate an ordinary (contentious) proceeding, which is slower and more cumbersome. The assertion of defenses is so pervasive that, as a practical matter, ordinance actions are de facto the preliminary phase of an ordinary proceeding. The Civil Procedure Code affords tools to judges with which to sanction abuse.<sup>519</sup> However, sanctions are rarely applied. See Principle A5.</p> <p>Enforcement of judgments is assigned to bailiffs, who are, since 2010, private operators.<sup>520</sup></p> <p>The decisions of bailiffs regarding the distribution of proceeds are subject to court review,</p>
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<sup>512</sup> Art. 5 of the Insolvency Law.

<sup>513</sup> Art. 38(2) of the Civil Procedure Code.

<sup>514</sup> Art. 39(2) of the Civil Procedure Code.

<sup>515</sup> Art. 5(6) of the Insolvency Law.

<sup>516</sup> Art. 5(7) of the Insolvency Law.

<sup>517</sup> Art. 5(5) of the Insolvency Law.

<sup>518</sup> See Act No. 155/2012, amending the Code of Civil Procedure. An expedited procedure, not involving the courts is also available. See Principle A5.

<sup>519</sup> See Art. 61 of the Civil Procedure Code. See also Art. 10, 161 of the Civil Procedure Code.

<sup>520</sup> See discussion in Principle D6.

	<p>but only on legal, not commercial, grounds. At that point, issues may be raised regarding whether all the requirements of the law were followed with regard to the conduct of the sale, and at that point, issues regarding initial price and subsequent discounting, appraisal, and distribution may be raised. In addition, upon sale of assets that are subject to state registration, the minutes on sale of assets issued by the bailiff are subject to court review and confirmation.<sup>521</sup> If the court does not confirm the sale (due to the fact that the procedure has not been observed), the bailiff is obligated to conduct a new auction.</p>
<b>Assessment</b>	<p><b>Materially Non Observed</b></p> <p>The legal structure for the judiciary in Moldova is generally designed to insure impartiality and freedom from pressure from other branches of government. Recent strides have been made as well to insure a level of compensation designed to encourage highly qualified position to both seek the position and to remain in the position for a long time. The judicial branch is largely self-regulated, relying on its Superior Council of Magistracy to apply disciplinary rules and procedures, and its Supreme Court of Justice to issue guidance with regard to the proper interpretation and application of statutes.</p> <p>There is, however, a general lack of confidence in the judiciary that tends to undermine parties' willingness to rely on systems that require judicial involvement, including insolvency law. A number of factors appear to contribute to this lack of confidence.</p> <p>First, a number of stakeholders complain that judges are not sufficiently knowledgeable about the insolvency law and the insolvency process. The Guidelines recently issued by the Supreme Court of Justice may certainly assist the courts in interpreting the application of some of the law's provisions. However, the Guidelines do not offer guidance regarding evaluating factual issues relevant to matters critical to the insolvency process. The Superior Council of Magistracy also put on a training program to acquaint judges with the law. These steps will educate the courts on the provisions of the law, but no training appears to have been offered regarding the actual insolvency process itself and the judges' role in that process.<sup>522</sup> This lack of practical training leaves judges less capable of identifying cases of abuse and acting forcefully against such actions (see also Principle C7).</p> <p>Second, some stakeholders complain that the insolvency process takes too long, and blame the judges for not enforcing deadlines (though some other stakeholders say that the deadlines themselves are not realistic). Some of the delays reported may occur less often in the future as the effect of judicial training takes hold. However, some delay seems to be attributed to the reorganization of the judicial assignment of insolvency cases to the generalist Courts of Appeal, whose judges are less familiar with the insolvency process, and who are likely to be less adept at the specialized case management skills that such cases often require. In addition, other cases place demands on their time that may not be compatible with the needs of insolvency cases. Finally, judges gain less experiential benefit when they may see only a few such cases per year at most.</p> <p>Third, some stakeholders report that there are still substantial integrity issues in the judiciary. Some of these reports are historical, but some report that problems still persist. Some steps have been taken to address the issue, and it is too soon to know whether changes to the rules for the discipline of judges will have the desired effect. On the one</p>

<sup>521</sup> Article 136 of the Enforcement Code.

<sup>522</sup> The Guidelines do explain that the judge is not to play an administrative or managerial role in the proceeding, as that task is assigned to the insolvency administrator. See Supreme Court of Justice Resolution On Effectiveness of the Insolvency Law in Judiciary Practice (No. 2, March 24, 2014). However, critical decisions at various stages of the proceeding require familiarity with the impact of those rulings on the direction of the insolvency process.



	<p>hand, stricter rules regarding judges' obligation to report improprieties they may observe among their colleagues, to submit to polygraph testing, and to be subject to criminal sanctions are now in place, though their installation is too recent to know whether they will be effective. On the other hand, much of the responsibility for enforcing the rules lies still within the judiciary (primarily in the Council of Magistracy). A proposed law on discipline that sets up independent panels to review and evaluate complaints about judges will likely help to introduce some independence into judicial discipline, but the proposed draft still calls for the Superior Council of Magistracy to act as a level of appeal from discipline decisions, and its deliberations will not be public, as the law is now proposed. Thus, at the end of the day, it remains to be seen whether the greater level of transparency and independence will be enough to address the integrity issue.</p> <p>As noted above, the venue of insolvency cases follows the Code of Civil Procedure, which gives three alternatives for venue: (i) where the registered address is located or, alternatively, (ii) where the management body is located<sup>523</sup>, or even (iii) where the debtor's assets are located. In collective actions such as insolvency, the venue rules can place an insolvency case in a location that differs from what creditors might have expected, and so create opportunities for mischief. A clearer, simpler rule for insolvency cases would be preferred.</p> <p>The Supreme Court of Justice issues guidelines on new legislation designed to routinize the interpretation of the law<sup>524</sup> (such guidelines are currently under development for the new insolvency law). While welcome and perhaps even necessary (in order to assure a uniform application of the law in the courts), there is a temptation for the Court to engage in "judicial legislation." For example, current guidelines advise lower courts to accept appeals regarding matters that are otherwise non-appealable according to the law. Some caution is warranted in this area.</p> <p>With regard to the enforcement of judgments outside the insolvency realms, there are still wide reports that courts are all too willing to entertain challenges to enforcement actions, thus interfering with bailiffs' ability to sell assets to satisfy judgments. Courts are also perceived as inefficient with regard to enforcement actions, mostly with regard to their willingness to delay the resolution of matters. The courts are perceived to lack sufficient familiarity with the economics of commercial matters, such that they fail to appreciate the impact of repeated delays in the enforcement process.</p>
<b>Comment</b>	<p>Although an independent judiciary is essential to the efficient and effective insolvency and creditor/debtor regime, so also is a judiciary in which the public has confidence. There is a lack of confidence in the judiciary in Moldova today.</p> <p>Part of this is attributable to the fact of delay in getting matters resolved in the judicial system. Once liability for indebtedness has been established, enforcement should be swift and relatively inexpensive. When enforcement becomes itself heavily litigated, collection costs grow, imposing a de facto tax on the extension of credit, often in the form of creditors demanding more collateral than would otherwise be necessary, to offset the collection costs imposed by such delays (see Principle A5). Steps should accordingly be taken to narrow the range of challenges to enforcement that are permissible. In addition, the challenge process itself should be summary rather than plenary, in most cases.<sup>525</sup> Judges must be</p>

<sup>523</sup> Art. 38(2) of the Civil Procedure Code.

<sup>524</sup> See art. 2(e), art. 16(d) of the Law on the Supreme Court of Justice; art. 17 of the Code of Civil Proceedings.

<sup>525</sup> The efficacy and reliability of the bailiff process is itself a subject of separate discussion. If bailiffs perform in a fashion that deprives parties of fundamental rights, then access and recourse to the courts, along with effective relief in that forum, is needed. However, much of the litigation appears to be primarily motivated by a debtor's desire to delay the process.

	<p>guided to be stricter at the enforcement stage, and to make use of the tools already available to them under the Civil Procedure Code.<sup>526</sup></p> <p>Similar issues arise in the insolvency realm. On the one hand, judges need to be trained to be aware of the adverse impact that delay can have both on achieving realization value and on arriving at a restructuring. On the other hand, judges need to have the flexibility to relax deadlines that may not be realistic. In this regard, consideration should be given to introducing a certain limited amount of judicial discretion into key decision points in the insolvency law. Of course, for such discretion to be properly exercised, judges must have training not only in the law but also some minimal training in business.</p> <p>Judges must also have the requisite authority to intervene in the interests of justice when it becomes apparent that the insolvency process is being abused by one or more parties. This is especially important with regard to the problem of fictitious claims, which can be used to skew the process and allow a party to strip assets from the estate (see also Principle C7).</p> <p>Judges are less likely to attract confidence with regard to their management of insolvency cases if they are perceived as lacking the knowledge and experience to handle such cases. This is especially the case with regard to restructuring matters. As noted, training in business and accounting for judges is recommended. However, experience also plays an important role in developing a judiciary equal to the task. In this regard, strong consideration should be given to creating a specialized judiciary, even if the specialization is achieved only by designating certain members of the Courts of Appeal to receive the major insolvency matters.<sup>527</sup></p> <p>With regard to venue, it would be advisable to consider adopting a simpler, clearer rule for setting the correct venue for insolvency cases, such as the location of the management, or the head office, or the place of registration. So long as one location is selected, creditors can more readily anticipate where an insolvency proceeding would be filed.</p>
<b>Principle D2</b>	<p><b>Judicial Selection, Qualification, Training and Performance</b></p> <p><b>D2.1</b> Judicial Selection and Appointment. Adequate and objective criteria should govern the process for selection and appointment of judges.</p> <p><b>D2.2</b> Judicial Training. Judicial education and training should be provided to judges.</p> <p><b>D2.3</b> Judicial Performance. Procedures should be adopted to ensure the competence of the judiciary and efficiency in the performance of court proceedings. These procedures serve as a basis for evaluating court efficiency and for improving the administration of the process.</p>
<b>Description</b>	<i>Overview</i>

<sup>526</sup> For example, judges could make greater use of the “good faith” requirement in the Civil Procedure Code to police dilatory actions by debtors. “Any abuse of these rights with a view of delaying the process or misleading the court shall be restrained by the court” Art. 61 of the Code of Civil Procedure.

<sup>527</sup> The Strategy of Reform in Justice Sector (2011-2016) and the Action Plan for the implementation of this Strategy (action 1.3.3) provides to carry out a study and to make recommendations on the need for specialization of judges in specific cases. Such a study was produced by the Legal Resources Centre from Moldova and is expected to be implemented.

	<p>There are laws that regulate the selection, training and evaluation of judges in Moldova. For the most part, judges are selected, trained and evaluated by their fellow judges,<sup>528</sup> by means of the Superior Council of Magistracy and the Supreme Court of Justice.</p> <p><i>Judicial Selection</i></p> <p>In general, the law<sup>529</sup> sets appropriate qualification standards, including that applicants hold a law license, have a clean criminal record, and have graduated from the National Institute of Justice or have 5 years' experience in the legal profession. Candidates are required to pass an exam before the Graduation Commission of the National Institute of Justice. Judges with 6 years' experience are eligible to sit on the courts of appeal; judges with 10 years' experience may sit on the Supreme Court of Justice. A more recent law<sup>530</sup> requires that the selection of judges be based on clear, transparent, objective and merit-oriented criteria. A recent amendment to the Law on the Status of Judges now requires that all judges seeking appointment must submit to a polygraph test.<sup>531</sup></p> <p>Judges are evaluated prior to their transfer to other courts, and prior to their selection as chairman or deputy. Evaluation is based on points obtained by the candidate,<sup>532</sup> with 70 (out of 100) points considered passing.</p> <p><i>Appointment</i></p> <p>Appointment of judges<sup>533</sup> in courts of first instance and courts of appeal is officially done by the President of the Republic of Moldova, but as a practical matter, at the proposal of the Superior Council of Magistracy. The selected candidates are initially appointed for a term of 5 years. After the expiry of the 5 years term, the judges are appointed until reaching the age of 65 years. When there is evidence that the candidate is incompatible with the position, that he/she infringed the laws or if the procedure of his/her selection or promotion has been infringed, the President may decline the appointment of the judge proposed by the Superior Council of Magistracy. However, if the Superior Council of Magistracy re-proposes the candidate because of new circumstances favorable to the candidate, the President must issue a decree appointing the candidate.</p> <p>The judges of the Supreme Court of Justice are appointed by the Parliament, at the proposal of the Superior Council of Magistracy.</p> <p>Judicial training is a part of evaluation of the quality of judge's activity.<sup>534</sup> The judges are required to present written confirmation regarding their participation in programs and courses (at the National Institute of Justice or elsewhere). 40 hours of training per year earns 5 points. An extra point is earned for each additional 8 hours, up to an additional 5 points in total. Failure to obtain 40 hours minimum results in a 1 point reduction for each 8 hours of training not obtained.</p>
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<sup>528</sup> For example, the Selection Committee for judges includes 4 judges (from courts of all levels) and 3 representatives of the civil society (art. 3 of Law No 154 of 05.07.2012). The Evaluation Committee is also comprised mainly of judges (5 judges and 2 representatives of the civil society, art. 15 of the same Law).

<sup>529</sup> Art. 6 of the Law on Status of Judges

<sup>530</sup> Law No.154 of 05.07.2012 on Selection, Evaluation of Performance and Career of Judges

<sup>531</sup> Article 6(1)(g) of the Law on Status of Judges (amendment effective February 24, 2014).

<sup>532</sup> Resolution of the Superior Council of Magistracy No. 211/8 of 05.03.2013 on approval of the Regulations on Criteria of Selection, Promotion and Transfer of Judges.

<sup>533</sup> Article 11 of the Law on Status of Judges.

<sup>534</sup> Section 10.4 of the Resolution of the Superior Council of Magistracy No. 212/8 of 05.03.2013 approving Regulations on Evaluation Criteria, Indicators and Process of Evaluation of Judges

	<p>Judges can select their training courses. The training may be organized by the National Institute of Justice (which selects experts from different areas of expertise to train judges and candidate judges) or by other institutions. Specialized training in insolvency and commercial law is available, but judges are free to choose what courses they take. A seminar on insolvency law conducted in the fall of 2013 was very heavily attended, however.</p> <p><i>Evaluation</i></p> <p>Judges are evaluated by the Evaluation Committee of the Superior Council of Magistracy.</p> <p>(1) The efficiency of judges' activity is assessed based on the following criteria: the rate of cases solved, case examination in reasonable terms,<sup>535</sup> observing the time limits for writing motivated judgment (including based on notices from Judicial Inspection based on complaints from litigant parties), complying with other duties, and knowledge and application of ICT.</p> <p>(2) The quality of judges' activity is assessed based on the following criteria: the rate of judgments maintained by the higher court and the rate of quashed decisions related to the number of appealed decisions (data presented from the Integrated Case Management Program); clearness and quality of reasoning of judgments, organizing professional activity (including the politeness and good organization of process, which may be also checked by random listening of 5 records of court hearings), training of judges.</p> <p>Statistics are kept on how cases are progressing and how quickly they are closed. There does not appear to be a distinction made between ordinary civil matters and insolvency matters, however, with the result that generalist judges who handle many insolvency matters may appear to have a lower disposition rate for their dockets.</p> <p>Judges are also evaluated in the sense that they are required to obtain regular continuing education and training, for which they accumulate points, which are in turn used to consider elevation to a higher position. The judges are evaluated ordinarily once every 3 years or on certain occasions as provided by law (upon appointing until pension age limit, upon evaluation of candidates for positions of chairmen and deputy chairmen of courts, upon transfer to other courts, upon being graded as insufficiently qualified).</p>
<b>Assessment</b>	<p>Materially Non-Observed</p> <p>Judges select other judges. They also train other judges, discipline other judges, and manage other judges. On the positive side, these are characteristics of an independent judiciary. On the negative side, however, a perception has been created that the judiciary is not as attentive or strict with regard to integrity issues as it could or should be.</p> <p>There are efforts being made to address these concerns. Recently enacted legislation now requires new applicants to submit to polygraph testing. However, there has been no change to the rule that judges select other judges. In many countries, judicial selection includes some input from stakeholders (usually respected members of the legal community). Such an approach tends to make the selection process more transparent and trustworthy.</p>

<sup>535</sup> See article 192 of the Civil Procedure Code, ("the criteria for determining of reasonable term are: the complexity of case, conduct of participants, conduct of court and of relevant authorities, importance of case for the interested person. The court shall ensure that the reasonable term is observed").

	<p>Training is an important feature in the judicial system, and it is valued in an appropriate way. The training of judges appears to be focused primarily on giving judges familiarity with legislation, and how it should be interpreted. Training does not appear to include training in judicial management of cases, or judicial supervision of court officers. Insolvency is an area in which training in these skills is very important. In addition, there does not appear to be any training being given in economics, business, or accounting, though these are areas of knowledge that are important for insolvency judges to be familiar with.</p> <p>The evaluation of judges is deemed important enough for the Superior Council of Magistracy to have a standing Evaluation Committee, whose task is to monitor judicial performance on a number of scales. Using a point system, they monitor continuing education obligations, disposition rates, quality of decision-making, appellate reversal rates, and judicial demeanor. In general, these evaluation standards are an appropriate and helpful tool for managing an efficient court process. In addition, the president of the court has the opportunity to informally evaluate the performance of judges in that court. The law on the discipline of judges permits disciplinary proceedings to be instituted for violations with regard to matters that are the subject of the evaluation process. While the tools are available, however, disciplinary proceedings appear rarely to be instituted internally.</p> <p>It is worth noting that, with regard to disposition rates, the perception is that insufficient weight is given to insolvency cases, with the result that judges who handle such cases may be unfairly penalized because of the length of time it often takes to resolve such cases. In addition, the data collection system does not differentiate between bankruptcies and reorganizations, or their relative size. As a result, it cannot give an accurate picture of the work load of judges, which can vary dramatically depending on these factors.</p>
<b>Comment</b>	<p>The judiciary is to be commended for its efforts at promoting continuing education for its judges, and for setting up the mechanisms for ongoing evaluation of its court system and judges. Further integration of evaluation results into court management and case assignment would make the evaluation procedure more useful in practice. A more granular approach to data collection with regard to insolvency cases is also recommended in order to make the evaluation results more accurate.</p> <p>With regard to training, an expansion of subject matter to include both case management techniques and subjects such as accounting, business, and economics tailored to the needs of judges handling insolvency cases would contribute to the development of a judiciary better able to manage insolvency cases efficiently, and with more effective outcomes.</p> <p>Judicial selection would be enhanced with the intentional involvement of members of the legal community, who might serve on selection panels for the purpose of vetting candidates. They are likely to bring to bear their “real world” experience to the process, and their involvement would enhance the perception of the integrity of the judiciary.</p>
<b>Principle D3</b>	<p><b>Court Organization</b></p> <p>The court should be organized so that all interested parties—including the attorneys, insolvency representative, debtor, creditors, public and media—are dealt with fairly, timely, objectively and as part of an efficient, transparent system. Implicit in that structure are firm and recognized lines of authority, clear allocation of tasks and responsibilities, and orderly operations in the courtroom and case management.</p>
<b>Description</b>	<p>Court proceedings are required to be conducted publicly and with access for public and media. An electronic record of all proceedings is made, and copies of that record can be ordered.</p>

	<p>The insolvency courts (courts of appeal as courts of first instance and Supreme Court of Justice for filed appeals) have reformed their system of management of cases. The list of debtors in insolvency proceedings prior to March 2012 (indicating the debtor's name, the name of the interim administrator/insolvency administrator, judge examining the case, date of commencing of insolvency procedure) was formerly available on the web-site of the Economic Court of Appeal. Today, however, although a public electronic search system for civil cases is in place and publicly available on the courts' websites, the public register for insolvency debtors are not available from all the courts (see also Principle C2).</p> <p>Publication of some of the insolvency court judgments and orders is done according to the Insolvency Law in the Official Monitor, but this source is not available online and is expensive on paper-base,<sup>536</sup> so it is hardly possible to check regularly for new insolvency cases. This raises concerns that not all creditors (as the insolvency administrator will send notifications only to "known" creditors) will be aware of the insolvency process in time to file their claims.<sup>537</sup> Add the fact that a list of insolvency cases may not be found online, and the possibility arises that other, sometimes majority, creditors may not be aware that an insolvency proceeding is even taking place. Conceivably, a minority of creditors could decide on the disposition of an insolvency estate.</p> <p>Based on Article 10 of the Law on Organization of Judiciary and the Resolution of the Superior Council of Magistracy No.472/21 of 18.12.2008 on the Manner of Publication of Court Decisions on Web-Sites, all court decisions are to be published online. This should include the decisions rendered in insolvency cases.</p> <p>By and large, the attorneys, insolvency representative, debtor, creditors are dealt with fairly and objectively in court proceedings, though there have been reports of favoritism toward administrators in some cases, and animosity toward banks in some cases. In addition, reports persist regarding a lack of integrity in the judicial process, despite significant efforts to lay these concerns to rest.<sup>538</sup></p> <p>As for timing and efficiency, article 8 of the Insolvency Law provides that the appeals to judgments and orders of the insolvency court shall be examined within 60 days and only copies of the materials related to the examination of the appeal shall be sent to higher court. In practice, it has been reported that, in some circumstances, after complaints by the Supreme Court of Justice that it received insufficient materials, some courts of appeal have simply sent the whole insolvency dossier to the Supreme Court of Justice, effectively bringing the insolvency case to a halt.</p> <p>There has been considerable confusion regarding what matters might be subject to appeal and what matters are not. The general rule with regard to the insolvency law is that the statute specifies which matters may be appealed; if no specification is made, then that matter cannot be appealed. There have been a number of cases in which parties have complained that the lack of an opportunity for appellate review has deprived them of a fundamental right. In response, the Supreme Court of Justice interpreted the right of</p>
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<sup>536</sup> A single edition costs between €3 and €5, expensive by standards of the Moldovan economy.

<sup>537</sup> The provisional administrator, during the observation period, sends a notice to known creditors regarding the deadline to file claims, for purposes of preparing the preliminary table, using information gleaned from the debtor's records and filings. See arts. 26(2), 29(2) of the Insolvency Law; see also arts. 17(f), 27(3), 35(4) of the Insolvency Law. Further notice is given by posting at the court, and by publication in the Official Monitor. Publication notice does not occur until after the court has ordered the opening of the proceeding. See arts. 6-7, 35(1) of the Insolvency Law.

<sup>538</sup> It is also reported that some complaints regarding the judiciary are actually expressions of dissatisfaction regarding an adverse ruling, and it is reported that in some cases, persons file complaints regarding the judge when the more appropriate response would be to lodge an appeal on the merits.

	<p>appellate review more expansively for some kinds of matters, on grounds that such was required by larger principles of law.<sup>539</sup></p> <p>In general, the process of appellate review is straightforward and predictable, with clear directives on the role of the appellate courts.</p> <p>The insolvency law assigns specific roles to the court, the insolvency administrator, and the general assembly of creditors. The creditors' committee acts on behalf of the creditors' meeting between sessions of the creditors' meeting, but its decisions may be countermanded by the creditors' meeting. Its role is primarily that of monitor, though it may also be asked to assist the court as well, and may petition for a wide variety of relief, including petitioning for the sale of assets prior to the calling of the creditors' meeting.<sup>540</sup> If the committee is not formed, then the law contemplates that the court may take on some of those duties, as appropriate. It is not practical for the court to in fact perform those duties as they are incompatible with the judicial role.<sup>541</sup> (See also Principle C7).</p>
<b>Assessment</b>	<p><b>Largely Observed</b></p> <p>In general, the court structure is logical and straightforward. However, questions about what matters are and are not the proper subject of appeal ought to be resolved. In this regard, it is worth observing that the rationale for limited appeal of certain matters – namely, removing impediments to the efficient administration of insolvency proceedings – is already achievable by virtue of the fact that an appeal of a particular decision does not stop the rest of the insolvency process. In addition, an appeal does not even stay the decision in question unless the appellate court decides to issue a stay. As a general proposition, appellate review tends to afford due process to affected parties, and give greater transparency and trustworthiness to the process (see also Principle C2).</p> <p>The noticing procedures might be substantially enhanced where web-based publication of notices and court decisions available. It ought also to be possible to search electronically whether a given entity is subject to insolvency proceedings. In addition, it might be appropriate if more general publication of an insolvency petition filing were made in a newspaper of general circulation (see also Principle C2).</p>
<b>Comment</b>	<p>The guidelines issued by the Supreme Court of Justice are an indication of a larger issue, having to do with matching up the proper role of appellate review with the need to prevent unnecessary delays in case administration the result of appeals. It is recognized that previous amendment was made to the insolvency law in order to reduce the number of appeals, in the belief that excessive appeals delayed the administration of cases.<sup>542</sup> However, if participants are unable to appeal issues that affect their substantive rights, a serious due process issue can be raised (see Principle C2). It may be appropriate to convene a study commission of judges, academics, practitioners, and members of the Ministry of Economics to examine this issue, with a view to proposing technical amendments to the insolvency law that would reconcile these competing interests.</p>

<sup>539</sup> See, e.g. Supreme Court of Justice Resolution On Effectiveness of the Insolvency Law in Judiciary Practice (No. 2, March 24, 2014), at ¶ 3.8.

<sup>540</sup> See art. 61-62 of the Insolvency Law.

<sup>541</sup> See art. 61(4)(a)-(r) of the Insolvency Law.

<sup>542</sup> In fact, one of the principle causes for those delays, according to stakeholders, was that the entire court file had to be transmitted to the Court of Appeal, effectively halting any further action at the first instance level. Now, it is understood that, on appeal, only the materials directly relevant to the appeal are transmitted to the appellate court, rather than the entire file. See art. 8(4) of the Insolvency Law. However, in practice, first instance courts may still be sending the entire file to the Supreme Court of Justice, as the latter court complained that in some instances the materials they were furnished were incomplete.

	As the court system has already made strides to maximize its use of electronic database systems for case reporting, it is logical to consider expanding that system to include a database for insolvency debtors. Web-based publication of notices and decisions in insolvency cases is advisable as well, in the interests of reducing costs for all concerned and enhancing the transparency of the system. Using other means of publication, such as general circulation newspapers, is also advisable.
<b>Principle D4</b>	<b>Transparency and Accountability</b> An insolvency and creditor rights system should be based upon transparency and accountability. Rules should ensure ready access to relevant court records, court hearings, debtor and financial data and other public information.
<b>Description</b>	<p>The administration of the judicial system is reliant on hard-copy records. Participants to the insolvency cases have equal rights of access to the court file, which contains the initial application on commencing insolvency and all subsequent documents, including court orders on interim measures, reports of interim administrator, court judgment on commencement of insolvency proceeding and call for creditors to file their claims for validation, minutes of creditors' meetings and creditors' committee meetings, minutes of court hearings etc.</p> <p>Rules on access to court file differ between courts. In the Chisinau Court of Appeal there is a public list of phone numbers of the judge assistants, where the court file may be ordered by any participant to the case to get acquainted with the filed documents, while in the Supreme Court of Justice access to the court file is granted based on a prior 1 day application.</p> <p>Participants to insolvency case have the right to audio record the court hearings, and to request and obtain copies of court's audio records of the hearings.<sup>543</sup> Media and public have no access to court file, but have the right to attend the court hearings. Media and public are not allowed to record the court hearings, unless taking photos, or recordings of any type are expressly allowed by the judge and only upon opening of hearings and pronouncement of the court decision.</p>
<b>Assessment</b>	<b>Materially Non-Observed</b> As noted under Principle D3, the lack of an electronic database is a major impediment to the ability of parties to monitor a case. This is an especially difficult issue for creditors who do not reside locally, especially foreign creditors. The fact that court records are in hard copy creates a further impediment, because parties must be physically present to review the file. In addition, hard copy file retention creates delays in processing and exposes records to the possibility loss, damage, or theft. <p>The limited right of access to court files by the public and the media is difficult to justify, given that the proceedings are supposed to be public. Proceedings that are fully public are less likely to be plagued by questions about impropriety. In addition, public information about assets may enhance their marketability to third party buyers.<sup>544</sup></p>
<b>Comment</b>	Implementation of an electronic database for insolvency cases should be given strong consideration. While it is recognized that certain privacy considerations might come into play, accommodations can be made for these concerns. A more transparent access to insolvency cases and their handling would likely enhance public respect for the process and may enhance market participation in the disposition of estate assets as well (especially with

<sup>543</sup> See art. 18 of the Code of Civil Procedure. Private recordings of proceedings are admissible as evidence in other proceedings.

<sup>544</sup> By the same token, it is appreciated that some commercial information ought to remain private, in order to prevent giving an improper advantage to competitors. Rules can be developed to address this concern, and courts can also be given the authority to restrict access to information in appropriate circumstances.



	regard to the possibility of attracting post-proceeding financing and interest in investing in or purchasing enterprises as going concerns).
<b>Principle D5</b>	<p><b>Judicial Decision Making and Enforcement of Orders</b></p> <p><b>D5.1</b> Judicial Decision Making. Judicial decision making should encourage consensual resolution among parties where possible and otherwise undertake timely adjudication of issues with a view to reinforcing predictability in the system through consistent application of the law.</p> <p><b>D5.2</b> Enforcement of Orders. The court must have clear authority and effective methods of enforcing its judgments.</p> <p><b>D5.3</b> Creating a Body of Jurisprudence. A body of jurisprudence should be developed by means of consistent publication of important and novel judicial decisions, especially by higher courts, using publication methods that are conventional and electronic (where possible).</p>
<b>Description</b>	<p>The insolvency proceeding is deemed as a special type of court proceeding that is largely non-contentious in scope.<sup>545</sup> However, when ruling on various issues, the court would require the participants to voice their position on the issue in question.</p> <p>Both the Code of Civil Procedure and the Insolvency Law set out circumstances in which motivated decisions are to be prepared. The guidelines recently promulgated by the Supreme Court of Justice also give specific guidance regarding when such decisions are to be prepared. Rulings are published in the Official Monitor but the motivated decision is not. Judges have the option of publishing decisions on the judicial website, but are not obligated to do so. Thus, other judges and parties are not assured of having the benefit of guidance regarding how and why matters have been resolved as they have been.</p> <p>Courts are expected to speak through decisions rendered on disputes brought by the parties in insolvency proceedings, and are directed to avoid interposing their own will on such proceedings in an <i>ex parte</i> fashion.<sup>546</sup> By the same token, judges are expected to exercise some supervision over the conduct of administrators. Many of the decisions rendered by the court involve having to make judgment calls about the direction in which a case should proceed.<sup>547</sup></p> <p>Consensual resolution among the parties is possible, including through agreements between the parties on a settlement or the design of a restructuring plan agreed by creditor classes and presented to court for confirmation (please refer to Principle C14 for details).</p> <p>Predictability and timely resolution of disputes are achieved through setting out in the law clear procedural steps to be followed and time limits for the resolution of disputes. The law also sets the overall maximum time permitted for bankruptcy and restructuring proceedings, respectively. However, it is reported that, in practice, procedural terms are largely not observed. Various explanations have been suggested, including court overload, or delays on the part of debtor's representatives, creditors or the insolvency administrator or liquidator. For example, under Article 56(5) of the Insolvency Law, the court has to</p>

<sup>545</sup> The court has jurisdiction to rule on contentious matters, however, which are treated as discrete disputes. See art. 5(2) of the Insolvency Law.

<sup>546</sup> See Supreme Court of Justice Resolution On Effectiveness of the Insolvency Law in Judiciary Practice (No. 2, March 24, 2014) at 1.3.

<sup>547</sup> For example, whether to open a proceeding, whether to leave the debtor in management, whether to approve the creditor's choice of administrator, whether to approve a compensation arrangement proposed by the administrator, whether to approve a particular sale procedure proposed by the administrator, whether to allow a claim that might be alleged to be fictitious, whether to grant relief from the moratorium to a secured creditor. This is but a sampling.

	<p>confirm the list of creditors participating in the creditors' meeting within 2 business days from the day the list was filed with the court. In practice, it is reported that this term has almost never been observed, especially in summer when judges may be away on holiday.<sup>548</sup> It is also reported that administrators often seek delays due to their inability to timely obtain a sale of assets, causing delay to secured creditors.<sup>549</sup> On the other hand, it is also reported that creditors attempt to interfere with or undermine the administrator's management of the case. In either event, there appears to be a lack of adequate judicial supervision to prevent these sorts of activities.</p> <p>Enforceability of final court orders and judgments is one of the foundational principles of the court system in Moldova. Court judgments and orders are expected to be executed or obeyed by the persons to whom they refer. A system of private bailiffs is in place to enforce court orders and judgments (see Principle A5).<sup>550</sup> However, it is reported that the actual enforcement of judgments suffers from significant delays the result of judges being too willing to entertain even frivolous defenses, undermining the principle of prompt enforcement.</p> <p>The insolvency court is allowed to order all the interim measures provided for by the Civil Procedure Code and those additionally referred to in the Insolvency Law (please refer to Principle C5 for details). In the event of a conflict, the Insolvency Law controls.</p> <p>The Supreme Court of Justice traditionally guides the body of jurisprudence. The Supreme Court of Justice is empowered to generalize the judicial practice and to issue guiding explanatory decisions in different areas of law, which have recommendation (non-binding) character for all the courts.<sup>551</sup></p> <p>Also, the Supreme Court of Justice may issue, <i>ex officio</i>, 'recommendations' on application of laws on certain particular issues (such as manner of summoning by court, manner of application of the legal provisions referring to jurisdiction of specific lawsuits) and, upon request, 'consultative notices' on the manner of law enforcement by courts. Such acts are ordinarily published on the official web-site of the Supreme Court of Justice.</p> <p>Moreover, all the decisions of the Supreme Court of Justice on individual cases shall be and are published on the day of issuance (as a rule) on the official web-site of the court.</p> <p>Recently a thematic search engine has been launched on the web-site of the Supreme Court of Justice which allows the search through Supreme Court of Justice decisions according to key-words. This tool will also contribute to a uniform body of jurisprudence.</p> <p>Thus far, the courts of appeal are still lagging behind in publication of court decisions on an official website.</p>
<b>Assessment</b>	<b>Largely Observed</b>

<sup>548</sup> Insolvency cases assigned to a particular judge are not permitted to be heard by another judge in such circumstances.

<sup>549</sup> Reports in this regard may have been with respect to cases under prior law, but stakeholders express concern that the practice is likely to continue even under the current insolvency law. Some stakeholders maintain that at least some courts have been too willing to grant these requests for continuances, but again it is less than clear whether these complaints relate to practice under the prior court system as opposed to currently.

<sup>550</sup> The private bailiff system is a relatively new innovation (2010), replacing the public bailiff system. See Art. 7, Enforcement Code, Law No. 113, of 6 June 2010.

<sup>551</sup> See the guidelines on the enforcement of the insolvency law noted above (Supreme Court of Justice Resolution On Effectiveness of the Insolvency Law in Judiciary Practice (No. 2, March 24, 2014)); available on the Court's website: [http://jurisprudenta.csj.md/search\\_hot\\_expl.php?id=134](http://jurisprudenta.csj.md/search_hot_expl.php?id=134).

	<p>Delays in the enforcement of civil judgments in favor of creditors are reportedly widespread. Some of this may be attributable to the lack of limitations on the defenses that should be permitted to the enforcement of an otherwise final judgment. But judges are unwilling to more forcibly enforce rules against abusive practices by recalcitrant defendants at the enforcement stage. The result, overall, is that creditors are inclined not to trust that their judgments will be enforced efficiently, causing them to increase the cost of credit to their borrowers, and to ration the credit available by demanding significant collateral as a condition to lending (see Principle A5).</p> <p>While it is reported that there are delays in the insolvency system, most of these delays appear to occur in the liquidation context when administrators seek more time to sell assets. Reportedly, the courts have been too willing to grant these extensions, without placing performance conditions on those extensions. On the other hand, discretion might be limited regarding the grant of additional time in the circumstance where it is most justified – when an administrator is attempting to develop a plan of restructuring.<sup>552</sup> (See also Principle C14)</p> <p>Few stakeholders reported delays in the issuance of motivated decisions when such decisions are called for in the law. The law is still relatively untested, however, so it is not clear whether this might become a problem or not in the future. The fact that cases are assigned to generalist courts that also have other cases to manage suggests that this could become a problem in the future.</p> <p>Publication of decisions on the judicial website apparently occurs with insufficient frequency at the court of appeal level, and is not occurring at all at the first instance level, even though other non-insolvency first instance decisions are being published, pursuant to the Code of Civil Procedure.</p>
<b>Comment</b>	<p>Enforceability of civil judgments requires attention. The defenses that can be raised at the enforcement stage should be substantially limited, and appeals should not result in the automatic stay of enforcement, absent the posting of a cash bond of a value equal to the amount of the judgment, plus costs of defense to the appeal. Judges should also be trained and encouraged to apply the provisions of the Civil Procedure Code to target abuse and to impose sanctions on bad faith litigation tactics (see also Principle A5).</p> <p>Closer attention needs to be given to the practice of continuances in the liquidation context. By the same token, courts may need greater flexibility in according administrators realistic time to develop restructuring plans. Insolvency court decisions need to be published on a publicly accessible website.<sup>553</sup></p>
<b>Principle D6</b>	<b>Integrity of the System</b>

<sup>552</sup> The administrator has maximum 100 days (or the court may establish a shorter timeframe) to suggest whether a restructuring is possible. The deadline for submitting a plan may not exceed 30 days from the date of the vote at the reporting meeting to proceed with a restructuring. See art. 114(7) of the Insolvency Law. In a complicated case involving multiple initiatives and negotiations by different constituents, the court may extend the deadline for a plan submission by no more than 30 days (art. 188(5)).

<sup>553</sup> There may be privacy issues with regard the publication of such decisions, which may be difficult to reconcile with the need for transparency. See the Law on Commercial Secrets No 171 (06 July 1994) and the Law on Personal Data Protection No 133 (08 July 2011). By way of example, in January 2014 the National Center on Personal Data Protection (NCPDP) accused the Supreme Court of Justice (SCJ) of breach of violation of personal data protection rules by means of publication of court judgments, including in cases of secret hearings, cases involving children, etc. See NCPDP Decision, available at <http://www.datepersonale.md/file/decizia%20csj/Decizie%20Centru%20-%20CSJ.PDF>. The SCJ responded in a public statement, noting the need to observe publicity and transparency principles enshrined in the Constitution, the national laws and the ECHR. See SCJ Statement here: <http://despre.csj.md/index.php/despre-curtea-suprema-de-justitie/mass-media-si-relatiile-cu-publicul/183-comunicat-de-presa-cu-privire-la-publicarea-deciziilor-judecatoresti>. By the same token, the Supreme Court of Justice has on occasion redacted certain opinions to hide the identity of parties or avoid the disclosure of sensitive information. It would be helpful if clear rules were established stipulating when a limitation of public access to otherwise public information is permissible (or required).

	<p><b>D6.1</b> Integrity of the Court. The system should guarantee security of tenure and adequate remuneration of judges, and personal security for judicial officers and court buildings. Court operations and decisions should be based on firm rules and regulations to avoid corruption and undue influence.</p> <p><b>D6.2</b> Conflict of Interest and Bias. The court must be free of conflicts of interest, bias and lapses in judicial ethics, objectivity and impartiality.</p> <p><b>D6.3</b> Integrity of Participants. Persons involved in a proceeding must be subject to rules and court orders designed to prevent fraud, other illegal activity and abuse of the insolvency and creditor rights system. In addition, the court must be vested with appropriate powers to enforce its orders and address matters of improper or illegal activity by parties or persons appearing before the court with respect to court proceedings.</p>
<b>Description</b>	<p>Judges enjoy security of tenure in the Republic of Moldova. Judges were paid at levels that are specific for the public sector and that were well below salaries in private sector.<sup>554</sup> Salaries of judges increase upon length of service and judges' permissible retirement age is lower than for other employees (at 51 years old for judges, comparing with the general pension age of 62 years old for men and 57 years old for women). The length of service of judges is set to rise gradually to 25 years by 2020 (the current length of service for 2014 is 22 years).<sup>555</sup></p> <p>A position in the judiciary is commonly perceived to carry considerable prestige, however it can prove challenging to attract candidates for the judiciary in light of the disparity between private reward and the judges remuneration. Although not a trend, still more cases emerge when judges decide to leave the judiciary to return to private practice, in particular to become attorneys at law.</p> <p>Reportedly, in light of recent reforms which have put considerable pressure on the judiciary, but also due in part to certain amendments to the Law on status of judges (which have significantly decreased the amount of indemnity judges receive in case of resignation or retirement), an increasing number of judges leaving the bench appears to be taking place.<sup>556</sup></p> <p>According to the law,<sup>557</sup> (i) criminal investigations against a judge may be commenced only by the Prosecutor General, and are subject to the approval of the Superior Council of Magistracy (except for corruption cases – where the approval of the Superior Council of Magistracy is not sought) and (ii) the judge may not be retained, arrested, searched without</p>

<sup>554</sup> See Law No. 328 (23 December 2013). The new law was enacted on 21 January 2014 and sets judicial salaries to be equal to average salaries per the national economy, multiplied by a factor of from 3 to 5, depending on hierarchy of court and experience in service. This yields a salary of between €700 and €1170. The law also provides for gradual phase-in, beginning at up to 80% of that amount in 2014, 90% in 2015, and 100% in 2016. The average monthly salary per the national economy for 2014 is 4225 lei (€234). Prior to passage, the monthly salaries of judges were in the range of 4200-8800 lei (€233-€500). Additionally, judges obtain increases in salaries for positions of courts' chairmen and deputy chairmen; bonuses on different occasions (not more than 30% of the annual salary of the judge) and a lump-sum yearly bonus in the amount of a monthly salary.

There is no official statistic for how much legal professionals earn in private sector. However, there are statistics per branches of the economy. So, average monthly salaries in 2013 ranged between 7200 lei in the financial sector (€400) and 2800 lei in agriculture sector (€155).

<sup>555</sup> Law No. 56 of 09.06.2011 on Amending and Supplementing Certain Legal Acts.

<sup>556</sup> As of April 2014, more than 40 judges are reported to have submitted their resignations. It is reported that as many as 60 judicial vacancies are expected throughout the country (though not all are due to voluntary resignations).

<sup>557</sup> Article 19 of the Law on Status of Judges.

	<p>the approval of the Superior Council of Magistracy, except for manifest crimes (discovered when committed). This concept extends to the judge's home, office, vehicles and telecommunication means, correspondence, personal assets and documents. Under a package of draft laws<sup>558</sup> pursuant to the Strategy of Reform of Justice, a campaign of scrutinizing the integrity of the judges, monitoring the efficiency of judges' activity, conflicts of interest and properties of judges and of "cleaning" the judicial system is set to take place in parallel with the increase in judges' salaries. Concurrently with salary incentives, it is the intention of the reform that judges should be sanctioned more strictly for acts of corruption, including with possibility to impose <i>extended confiscation</i> in cases of criminal conviction, upon assets obtained 5 years prior to sentencing and to assets given away to other persons if the judge was in relations similar to family relations with such persons or to other persons if they knew or should have known of the illegal source of the property. Illicit enrichment is another offense to be introduced in the Criminal Code, aiming to monitor whether the person owns assets that exceed substantially his/her revenues. The communication of judges with participants is also to be forbidden. The judges will be checked at polygraph (lie detector) on entry into the profession.<sup>559</sup></p> <p>According to the law,<sup>560</sup> the judge may not operate any activity related to his/her position duties in cases there is a conflict between his/her interests and the public interest of justice administration, except for the cases where the conflict of interests was brought to the attention of the court chairman or was communicated to the Superior Council of Magistracy. The judge is obliged to declare his/her abstention from hearing a case and the participants have the right to request that a judge be removed from the examination of a case if there are doubts that he/she will remain objective and impartial. Another panel of judges hears the abstention or the removal request.</p> <p>An ethical code of behavior for judges was approved by the Superior Council of Magistracy in 2007. Judges are subject to disciplinary sanctions for violating these rules, although such sanctions are reported to be rarely applied. Complaints on judges' misconduct are made to the Superior Council of Magistracy, which may issue disciplinary sanctions against the judge and may even propose their dismissal to the bodies that appointed them. A special law regulates the disciplinary procedure against judges.<sup>561</sup></p> <p>The judges have limited powers to prevent or stop parties' misconduct or abuses in the court trials, and commonly refrain from sanctioning irresponsible behavior of litigation parties or other participants. Quite often unsatisfied litigation parties report disciplinary issues with their attorneys-at-law, yet it is uncommon that courts report such professional misconduct.<sup>562</sup> The insolvency administrators are scrutinized from the point of view of legality of their actions rather than from appropriateness thereof. Overall, there is a common perception that the courts are not vested with appropriate powers to address</p>
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<sup>558</sup> The first reading held on 14 November 2013, the second reading held of 23 December 2013.

<sup>559</sup> See Government Resolution no. 829 of October 28, 2013 (containing the draft law). The law was ultimately adopted in February of 2014.

<sup>560</sup> Article 8 of the Law on Status of Judges.

<sup>561</sup> Law No. 950 of 19.07.1996 on the Disciplinary Committee and Disciplinary Liability of Judges. The law was superseded by the Law on Disciplinary Accountability of Judges, Law No. 178 of 25 July 2014 (effective 1 January 2015). ~~The major revision to this law is currently under consideration by the Parliament.~~ The new law greatly improves the mechanism for judicial discipline by introducing an independent "first instance" review panel whose membership includes non-judges. The results of their deliberations are to be public, another improvement.

<sup>562</sup> The judges rarely use the power to refer improper or unethical conduct to licensing or supervisory authorities. The Bar's Commission for Ethics and Discipline is quite powerful and is allowed to suspend or withdraw an attorney's license to practice. Under the Strategy of Reform of Justice, the professions related to justice (including insolvency administrators, bailiffs and mediators) are also to be reformed to further strengthen the disciplinary authority of their professional bodies.

	<p>matters of improper, abusive or illegal conduct by parties or persons appearing before judges in court proceedings.<sup>563</sup></p> <p>The bailiffs system was reformed in 2010, when the public bailiff system was transformed into a private one. Since then, the enforcement procedure has become faster, but more expensive. Equally, the bailiffs have become very commercially oriented and apply the Enforcement Code more aggressively (see Principle A5). For example, the law provides a few cases when an interim measure applied by a bailiff should be annulled, such as when there is proof that another creditor (for example a bank which repossessed an asset for sale) has already sold the asset to a buyer, and the enforcement proceeds have already been paid to satisfy both the creditor and other creditors' claims. It is reported that, in some cases, the asset to be sold by the bank was worth a small percentage of the bank's debt, such that no other creditor would receive anything from the proceeds of the sale of asset, yet the bailiff refuses to annul his interim measure over the asset.</p> <p>Bailiffs charge a set fee plus a sliding percentage for enforcement action. For example if a bailiff enforces a writ on transfer into possession of the corporate creditor of an asset (for sale, when enforcing mortgage) worth say €300,000, a bailiff will charge 4000 MDL (222 Euro) +1% of the asset value. In such a case, a bailiff will earn €3,222 for a single enforcement action.</p> <p>The disciplinary procedure for bailiffs is the responsibility of the Disciplinary College, under the Ministry of Justice.<sup>564</sup> Bailiffs may be sanctioned only in certain cases, for: (i) not respecting professional secrets; (ii) having other paid activities; (iii) <i>serious</i> infringement of law; (iv) committing acts which are against honor, professional probity, or morals; (v) systematic delays and negligence in performing enforcement actions; (vi) willful refusal to execute enforcement actions, which resulted in infringing of the rights of participants to enforcement procedure; (v) infringing the Ethics Code; (vi) disobeying the decisions of the professional unions of bailiffs; (vii) ungrounded absence from office for more than 2 working days from the office; (viii) professional incapacity of the bailiff, measured by whether the court annuls 10% of overall enforcement cases or 20% of enforcement cases in a year.</p>
<b>Assessment</b>	<p><b>Materially Non-Observed</b></p> <p>The integrity of the judiciary in Moldova has been the subject of high profile news coverage over the last few years, and perceptions regarding the integrity and ethics of judges remain clouded. The Strategy of Reform of Justice, the national campaign to scrutinize the integrity of judges, monitoring their efficiency, preventing conflicts of interest, increasing the range of criminal conduct applicable to judges, adding enforcement measures such as the ability to confiscate properties of judges, is a welcome effort to "clean up" the judicial system. Complementing these measures with salary rises is also both welcome and sensible. It is too early to know whether these measures will have the desired effect, of course, though they seem to be well-designed in the main. By the same token, however, some of these changes seem recently to have contributed to an exodus of judges from the bench. It remains to be seen whether a proper balance has been struck between enhancing prestige and compensation on the one hand, and tightening the disciplinary</p>

<sup>563</sup> Judges rarely issue sanctions against either parties or their counsel, though they have the authority to do so. *See* Civil Procedure Code, arts. 61,196. Article 61 of the Civil Procedure Code states when abuse on the part of a party is aimed at causing delay in the process or is designed to mislead the court, the court is permitted to issue a sanction in the form of damages payable to the affected party by the offending party. The court must find that the offending party filed clearly ungrounded requests to challenge a writing, or ungrounded requests for to continue or postpone process or ungrounded jurisdictional challenges in an effort to transfer the case to another court, and the like. No fines are provided in such cases.

<sup>564</sup> The College is made up of 9 members: 3 appointed by the National Union of Bailiffs, 3 by the Ministry of Justice; 1 judge appointed by the Superior Council of Magistracy; 1 academic, and 1 representative of civil society.

	<p>structure on the other.</p> <p>Interestingly, the judges themselves are a necessary part of bringing integrity to the rest of the judicial enforcement system, including the insolvency regime. Judges are currently unwilling to use the measures they have at their disposal to demand good quality representation by attorneys. Experience in other countries demonstrates that judges can have a powerful role in raising the quality of legal representation simply by using the tools at their disposal to enforce standards.</p> <p>A similar observation applies to the judges' role in managing insolvency matters. Even though an administrator's actions might be within the bounds of the law, they might not be advisable from the standpoint of the best interests of creditors. The insolvency administrators tend to be scrutinized from the point of view of legality of their actions rather than from appropriateness thereof in terms of maximizing estate value.</p> <p>The privatization of the bailiff system has resulted in a considerable cost savings to the state. The compensation scheme for bailiffs is rational, with a sliding percentage scale that reduces the percentage with the amount of recovery. The amount of the charges appears to be reasonable. However, there are reports that bailiffs are too heavily motivated by the need to earn a commission, causing them to engage in conduct that is antithetical to an efficient disposition of assets to satisfy creditors. There are also still reports of collusive behavior among participants and undue influence by third parties, as well as toleration for conflicts of interest and unethical conduct among the corps of bailiffs (see Principle A5).</p>
<b>Comment</b>	<p>The Strategy of Reform of Justice campaign has generated a number of positive improvements in the regulation and structure of the judiciary that seems well designed to enhance the integrity of the judiciary. As these changes are very recent, it remains to be seen whether they will achieve their intended objectives. A real commitment to the enforcement of these new laws is essential if insolvency and creditor/debtor regimes are to function properly. By the same token, close attention needs to be given to monitoring the impacts of these changes, to assure the proper balance has been struck.</p> <p>Judges who are assigned insolvency cases should receive appropriate training in business-related issues, such as accounting. They should also receive a sufficiently regular number of insolvency case assignments to develop the practical experience and expertise required to properly manage insolvency matters. A more specialized insolvency bench is an efficient way to achieve this goal.</p> <p>Judges have a duty to manage the professionals who appear before them in a way that encourages a high degree of professionalism and ethical conduct. A part of the training of judges should focus on teaching the techniques judges can and should use to fulfill that duty. This skill set, properly developed, can have strong positive impacts on the performance of all the officers who perform in the court system, including administrators, lawyers, and bailiffs.</p> <p>There are bodies already constituted with the duty to promulgate proper standards of ethical conduct for administrators, lawyers and bailiffs. The role of these bodies should be strengthened.<sup>565</sup> In addition, closer monitoring of bailiff conduct, auction results, and costs</p>

<sup>565</sup> Legislation was pending in the Parliament regarding the training, licensing, disciplining, and supervision of administrators. The proposed legislation would give the Ministry of Justice an enhanced role in this regard. Lawyers are already subject to a rigorous professional discipline scheme. The Law on Bailiffs regulates licensing and disciplinary proceedings and authorizes the creation of a union of bailiffs, with 3 territorial offices and specifies their duties, and creates an auditing committee. Bailiffs are regulated by the Ministry of Justice.

	would aid policymakers in deciding what next steps might be needed to improve the efficiency and integrity of the system. Draft legislation aimed at improving the supervisory and sanctioning regime for the Disciplinary Board of Bailiffs and Licensing Commission would be welcomed in this regard.
<b>Principle D7</b>	<b>Role of Regulatory or Supervisory Bodies</b> The bodies responsible for regulating or supervising insolvency representatives should: <ul style="list-style-type: none"> <li>- Be independent of individual representatives;</li> <li>- Set standards that reflect the requirements of the legislation and public expectations of fairness, impartiality, transparency and accountability; and,</li> <li>- Have appropriate powers and resources to enable them to discharge their functions, duties and responsibilities effectively.</li> </ul>
<b>Description</b>	<p>To some extent, supervision of insolvency representatives is rendered by the insolvency court. However, the courts have no authority to set standards for insolvency representatives. The courts will just cancel the actions of the insolvency administrator when found illegal. The court has limited powers and resources to know whether insolvency representatives are properly discharging their functions, duties and responsibilities effectively. It also has few tools at its disposal to compel proper performance. It is true that if the insolvency representative has failed to comply with its duties or if the dismissed insolvency administrator has failed to submit a report for its period of activity, or has failed to return the assets and the documents in his possession related to the insolvency procedure, the court, after a warning, may apply a judicial fine of up to MDL 30000 to be paid to the public budget. This is a relatively small fine, considering the costs that might be imposed on the insolvency estate as a result of poor performance. The court is allowed to initiate dismissal <i>ex officio</i>, but it will rarely do so as the court needs to remain impartial. The court would rather dismiss an administrator upon the requests of creditors' committee or creditors' meeting.</p> <p>The insolvency representatives are licensed by the Licensing Chamber. The license is issued based on a certificate of training as administrator. The persons authorized as administrators are included in a list of administrators and liquidators, held by the courts. After obtaining the training certificate, no other supervisory body is empowered to effectively supervise the insolvency administrators.</p> <p>According to a legislative initiative of the Ministry of Justice,<sup>566</sup> administrators are to be supervised by the Ministry of Justice (as are the bailiffs currently). The draft law on authorized administrators provides for creation of a Commission for ethics and training of administrators, which will be allowed to issue resolutions on disciplinary sanctions to administrators. A code of ethics will further be approved for the insolvency representatives in order to supervise compliance by the administrators with principles of impartiality, independence, and avoidance of conflicts of interests. The Commission is intended to cooperate actively with the Commission on authorization of administrators and discipline under the Ministry of Justice when disciplinary cases are examined, and breaches are to lead to suspension or withdrawal of the authorization.</p> <p>Draft legislation was presented in January 2014 with a view to strengthen the institutional and functional capacities of the Disciplinary Board of Bailiffs and Licensing Commission, improving the process of admission to the profession of bailiff. The draft law seeks to increase the accountability of bailiffs by reinforcing the supervisory and sanctioning regime.</p>
<b>Assessment</b>	<b>Materially Non-Observed</b>

<sup>566</sup> The legislation was pending before Parliament as of the date of this Report.



	<p>Judicial supervision of insolvency administrators is called for in the insolvency law, but its actual implementation is reported to be deficient. To the extent that this supervision is the result of dishonesty, changes in the law relating to the discipline of both judges and administrators can be expected to have a positive impact.</p> <p>There are other structural impediments to supervision, however. For example, a judge has relatively little discretion in affecting the compensation of administrators who may not be performing at an acceptable level. When a judge has some input into the compensation of a professional, their impact on the performance of that professional can be significant. Similarly, if judges were afforded a broader range of sanctions between the relatively modest judicial fine and the relatively draconian dismissal of the administrator, they might be able to supervise administrator conduct more effectively. Finally, though it is important that judges not become the managers of the insolvency process, judges ought to be able to call for periodic in-court status conferences in cases that are not moving expeditiously and to assure cases are being managed effectively.<sup>567</sup> Without these sorts of tools, it is impractical to expect judges to be able to monitor or supervise their administrators in any meaningful way.</p> <p>Proposed legislation to regulate the licensing and discipline of administrators under the auspices of the Ministry of Justice appears to be well-designed, and so likely to achieve an enhanced degree of competence and integrity among administrators. It will not be known if the mechanisms proposed will be effective until they are put into practice and evaluated.</p> <p>The privatization of the bailiff system has substantially improved its speed. However, integrity issues continue to be raised among various stakeholders, suggesting that closer monitoring, supervision, and sanctioning authority (as well as better licensing and regulation for admission) are still essential.</p>
<b>Comment</b>	<p>Judges should be afforded additional tools with which to monitor and supervise administrators. Some of these tools may already be available in the Code of Civil Procedure, and could be employed with no additional legislation required (though guidance from the Supreme Court of Justice would be in order). Judicial training should include proper training in how and when to use these techniques.</p> <p>Proposed legislation to more closely license and regulate administrators should, if passed, be promptly and thoroughly implemented, and the efficacy of the new law should be evaluated after the first year of the law's implementation.</p> <p>Proposed legislation to strengthen the supervisory and sanctioning regime for bailiffs, and for monitoring their behavior is welcomed. Integrity issues must be weeded out of the system is to be truly trustworthy.</p>
<b>Principle D8</b>	<p><b>Competence and Integrity of Insolvency Representatives</b></p> <p>The system should ensure that:</p> <ul style="list-style-type: none"> <li>- Criteria as to who may be an insolvency representative should be objective, clearly established and publicly available;</li> <li>- Insolvency representatives be competent to undertake the work to which they are appointed and to exercise the powers given to them;</li> </ul>

<sup>567</sup> The Insolvency Law already requires administrators to file quarterly reports with the court, giving the court a potential tool with which to exercise effective supervision. A status conference would require the administrator to be confronted with the court's questions regarding the report and the progress of the case.

	<ul style="list-style-type: none"> <li>- Insolvency representatives act with integrity, impartiality and independence; and</li> <li>- Insolvency representatives, where acting as managers, be held to director and officer standards of accountability, and be subject to removal for incompetence, negligence, fraud or other wrongful conduct.<sup>568</sup></li> </ul>
<b>Description</b>	<p>The current qualification criteria for the licensing of insolvency administrators are contained in the Order of the Licensing Chamber No 54 of 29 August 2006 on the Requirements for Licensing and the List of Documents Appended to the Requests on Issuance of Licenses for the Insolvency Administrators Activity. The criteria for licensing set out there are: (a) performance of the licensed activity in compliance with the Moldovan laws; (b) licensee a Moldovan citizen, domiciled in the country; (c) licensee has no past criminal convictions; (d) licensee has graduated from university in any of the administrative, legal, financial-economic or technical areas; (e) licensee has five years' experience in one of the administrative, legal, financial-economic or technical areas; (f) licensee compliance with regulatory criteria in banking, insurance and securities areas if the debtor is a participant of those markets. Significantly, there is no specific requirement for training in the task of administering an insolvency proceeding, or in the specifics of insolvency law, accounting, or business management.</p> <p>As pointed in Principle D7, insolvency administrators are not effectively regulated by a supervisory body. However, legislation has been proposed to address this issue.</p> <p>Insolvency administrators seem to function most commonly as liquidators. Stakeholders have expressed some frustration with the way in which liquidations are accomplished, however, with many complaining about excessive delay. On the other hand, it is also reported that the liquidation process is often frustrated by secured creditors who are uncooperative in the process and attempt to undermine attempts to maximize realization values with the intent of recovering collateral for their own benefit (realizing the upside value for themselves, at the expense of other creditors). In some cases, it is also reported that debtors themselves attempt to subvert the process, in an effort to divert property to related entities. It is difficult to parse from these competing reports what the truth on the ground actually is, with regard to the manner in which administrators are performing their task as liquidators.</p> <p>The administrator and the liquidator are obliged to perform their tasks impartially, and to avoid conflicts of interest. They are obliged from the date of their appointment and throughout the course of the whole process to inform the court and the creditors' committee about any incompatibility provided by the law and about any conflicts of interest that arise after their appointment.<sup>569</sup> Conflicts of interest are decided ultimately by the court.</p> <p>Administrators have a number of important duties, including the duty to evaluate whether a company has a prospect of reorganization, the duty to evaluate claims to assure they are valid, and the duty to realize value for the benefit of all creditors. They are hampered in their ability to effectively perform these functions by a number of factors. Not all judges have the economic knowledge to adjust deadlines to meet these needs, and often view the process as principally a matter of liquidation, not reorganization. It is reported that some creditors are motivated to retrieve their collateral as quickly as possible to maximize return for themselves, and so use their leverage to frustrate attempts at restructuring. Creditors are also reported to oppose the sale of assets, preferring to control that process themselves. The time frame for evaluating reorganization prospects is in some cases too short, in light of the lack of trustworthiness of information debtors provide to administrators. In addition, administrators often lack the financial resources to aggressively pursue potential causes of</p>

<sup>568</sup> See Principle B2.

<sup>569</sup> Art. 63(5) of the Insolvency Law.

	<p>action for the benefit of the creditor body, such as actions against culpable officers, directors or control persons (see Principle B2).</p> <p>Time deadlines and the lack of resources with which to pay professionals also affects the ability of administrators to closely examine claims, and to ferret out those claims that are fictitious. Due to the ambiguous origins and motives with regard to these kinds of claims, some administrators prefer not to investigate too closely.</p> <p>Administrators are required to submit periodic reports (at least once per quarter) on the manner in which they performed their duties, as well as justification of the expenses of their management of the proceeding. These reports are submitted to the court. The creditors' committee and/or creditors holding at least 25% of the validated claims may also request the status reports at any time. Upon completion of duties, administrators and liquidators are expected to submit a final report to the creditors' meeting reflecting the final status of the insolvency estate and the sources and uses of cash in the accounts.</p> <p>According to the law<sup>570</sup> the administrator/liquidator is obliged to indemnify all the participants of the insolvency proceeding for damage caused by breaches of the administrator's duties. The administrator is to be held liable according to civil, administrative or criminal law. If due to the actions of the administrator/liquidator, a claim may not be fully satisfied, the administrator is obliged to pay damages to the creditors of the insolvency estate. The liability is excluded only in the case where upon claim arising, the administrator could not foresee that the insolvency estate would be insufficient for satisfaction of the claim or if he/she acted with the approval of the creditors' committee or creditors' meeting.</p> <p>With regard to this liability, administrators are required to carry insurance coverage. This insurance is in the nature of professional insurance if the administrator is sued for damages arising from his failure to discharge his duties in a proper manner (a species of malpractice insurance). However, there is no indemnity bonding requirement,<sup>571</sup> as is found in some other countries.</p> <p>Enforcement of the laws on managerial liability remains rather ineffective. This may be due to various factors, including court reluctance or hesitance to enforce the above (especially criminal law) provisions effectively and poor expertise on the part of the court with regard to corporate governance matters. See also Principle B2.</p> <p>The remuneration for administrators is set by the law, and consists of a fixed fee (comparable to what an executive of the company would be paid) and an incentive (success) fee (capped at 5% of the assets to be distributed). The success fee is earned by the administrator not only in case of sale of the asset by the administrator, but also when the asset is transferred into the ownership of the secured creditor, or when parties reach a settlement.</p> <p>Compensation of interim administrators is controlled by the court, but the fee for the administrator and liquidator is negotiated either with the creditors' committee or the creditors' meeting. The incentive fee is paid at the expense of the creditors, and may be withheld by the administrator to assure its payment upon final distribution. The executives of the company may be called upon to pay the fixed fee in the event that the assets of the debtor prove to be insufficient, but it does not appear that this provision is much used. It is reported that the fee paid in practice is often less than the fee negotiated. It is also reported</p>
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<sup>570</sup> Art. 73 of the Insolvency Law.

<sup>571</sup> An indemnity bond has direct beneficiaries in the event of misfeasance on the part of the indemnified party. The failure of the party to discharge his or her duties gives rise to the beneficial right of recovery. A professional liability policy, on the other hand, provides to the professional, as the insured, a source of funds with which to respond to a suit for damages caused by an alleged breach. It is the administrator, and not the creditors, who is the direct beneficiary of such a policy.

	<p>that administrators are less motivated to pursue restructurings because of uncertainty in their being paid. Some suggest that administrators delay the insolvency process in order to enhance their prospect for payment. There have been allegations that some administrators accept or solicit improper payments.</p> <p>Some insolvency administrators have been subjected to criminal charges recently. There is a perception among some stakeholders, however, that enforcement has not been as rigorous as it might be. .</p> <p>The insolvency administrator may be dismissed at the request of creditors' committee, of creditors' meeting or <i>ex officio</i> by the court, only for a due cause, including when the administrator: (a) does not meet performance indicators; (b) fails to comply with his/her legal duties; (c) breaches the law; (d) has a conflict of interests with a party in the process; (e) falls within the scope of the incompatibility provisions and/or restrictions provided for by law; or (f) suffers his or her own insolvency (notably, the insolvency administrators act as individual entrepreneurs). A newly appointed administrator is authorized by law to bring actions in court against any previous administrator/liquidator for damages caused to the insolvency estate or to the creditors.</p>
<b>Assessment</b>	<p><b>Materially Non-Observed</b></p> <p>Moldova's law specifies basic qualifications for appointment of an insolvency administrator, and requires that such persons have integrity, independence, and impartiality. However, the law does not expressly require knowledge of relevant commercial law or experience in commercial or business matters as such. There is no current specific requirement that the administrator have knowledge of accounting or of business management, skills that are essential if an administrator is to perform the tasks set in the insolvency law.<sup>572</sup></p> <p>By way of example, the insolvency law stipulates that the administrator (or the interim administrator, the functional equivalent of the administrator, during the observation period) may take over the management of the business. If the debtor is an operating business whose value is best preserved by staying in operation, the administrator must have the skill set to operate a business and to understand its financial documents, as well as the ability to evaluate whether it has the prospect to be restructured. If the administrator (or interim administrator) lacks these skills, then the only practical option available will be a shutdown of the business, meaning that reorganization potential and going concern value will be lost, simply because the administrator lacks the ability to realize on those potentials.</p> <p>For another example, it is the administrator who must make a report to the creditors' meeting regarding the debtor's prospects for reorganization. Unless the administrator is competent to review and evaluate financial statements, to understand business operations, and to correctly gauge the marketplace, the administrator's report will not be useful to the creditors' meeting. It will certainly not be persuasive. Indeed, it is likely that an administrator lacking the necessary skills set will never recommend restructuring, because recommending liquidation is a safe alternative (even if it is less likely to generate as much money for creditors). The proposed legislation on administrators includes a mentoring program, which could aid in addressing this lack of skill, provided that those with such skills are identified and are engaged in the mentoring program. In addition, as previously noted administrators' educational background and ongoing training should include developing competence in the area of business administration and accounting.</p> <p>Conflicting reports regarding the reasons why the insolvency system works less effectively</p>

<sup>572</sup> See art. 66 of the Insolvency Law.

	<p>than it might, make it more difficult to develop effective solutions for improving the system. There does not currently appear to be in place adequate tools for objective evaluation of administrators' performance. Better data collection on case performance would be desirable in this regard, and would enable supervisory authorities to more closely monitor administrators with a view to improving their effectiveness. Closer monitoring would also likely enhance greater integrity in the profession.</p> <p>The law adequately demands impartiality on the part of the administrator and requires the administrator to disclose any conflicts of interest, either prior to his or her appointment or during the course of the administration. The sanction for such a conflict of interest, when it arises, is also appropriate – the administrator may be removed by the court, either on motion of a creditor or the committee, or on the court's own initiative. In addition, the law lays out clear rules for how transactions that may have been made with a third party are affected in the event of a conflict of interest, with a view to preserving transactions which are valuable to the estate, with the approval of the creditors, and with a view to protecting the interests of third parties who are not culpable.<sup>573</sup></p> <p>The law adequately specifies other grounds under which an administrator may be removed.<sup>574</sup> However, one of the bases for removal is failure to perform in accordance with established performance standards. The law itself does not set out what those standards are, nor does it indicate what body has the job of applying and enforcing those standards.<sup>575</sup> As earlier noted, without adequate monitoring and better data collection, it is not practically possible to enforce performance standards.</p> <p>While there are clearly some very highly qualified administrators in Moldova, it is also recognized that the quality of the profession is uneven. A principle complaint is that many lack the requisite skills to perform the task properly. This generates multiple problems – delays, mistakes in judgment, even excess cost. It is reported that there are still integrity issues in the profession, and this sort of problem can be related to a lack of competence as well. Of course, administrators without the proper skills are not capable of accurately identifying debtors that are viable candidates for reorganization, much less capable of leading such a restructuring effort, as the law directs. Nor are they apparently capable of closely examine claims that might be fictitious, an important gate-keeping function that only administrators are in the position to perform (see also Principle C13).<sup>576</sup></p> <p>The compensation scheme for administrators could benefit from closer scrutiny by the court, and by greater transparency as well. Administrator behavior is also shaped by a lack of certainty regarding whether they will be compensated, a situation that, left unaddressed, can create an unhealthy climate for self-dealing. At the least, it can discourage administrators from risking reorganization as an option. Also, in the event that a proceeding has been initiated using a fictitious claim as a vehicle, the asserted claimholder might dominate the creditor class to the point that they could also dictate administrator compensation – or the lack thereof – creating perverse incentives.</p>
<b>Comment</b>	<p>Improving the competence and integrity of administrators should be a high priority for Moldova, as these officers are so central to the successful operation of the insolvency law. Administrators must be properly licensed, and licensing should hinge on proper training, which should include specific training in accounting, business evaluation and restructuring</p>

<sup>573</sup> See art. 69 of the Insolvency Law.

<sup>574</sup> See art. 71(1) of the Insolvency Law.

<sup>575</sup> See art. 71(1)(a) of the Insolvency Law.

<sup>576</sup> It is reported that fictitious claims are used as a device to take a company's assets using the insolvency system. It is also reported that some administrators and judges may collude in this activity.

	<p>skills, and some forensic skills, in addition to knowledge of the law itself.</p> <p>A closer examination of the compensation mechanisms for administrators should be undertaken. Consideration should be given to a more routinized mechanism for compensation, relying less on negotiation with interested parties, and more on set standards, overseen by the courts.</p>
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