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Restructuring Across Borders

Romania:

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Introduction

There is a single gateway insolvency procedure in Romania which leads to a judicial reorganisation (*reorganizare judiciară*) and/or a bankruptcy proceeding (*procedura reorganizării judiciare și a falimentului* or *faliment*). This procedure is commonly referred to as “insolvency proceedings” and is regulated by Law No. 85 of 25 June 2014 regarding insolvency proceedings, as amended (the **Insolvency Code**).

The Insolvency Code is generally pro-creditor, making an in-court restructuring more restrictive and allowing for more expedient liquidation procedures. It regulates pre-insolvency (the ad-hoc mandate and the composition) and insolvency proceedings and introduces special provisions regarding the insolvency of group companies in both national and cross-border proceedings.

The insolvency procedure is conducted under the supervision of a specially appointed insolvency judge (*judecător sindic*) as well as under the management of a certified insolvency practitioner (*practician în insolvență*). There are two measures available under the umbrella of insolvency proceedings: (i) judicial reorganisation (*reorganizare judiciară*); and (ii) bankruptcy (*faliment*). Where the debtor is subject to judicial reorganisation, the insolvency practitioner is referred to as the judicial administrator. Where the debtor is subject to bankruptcy proceedings, the insolvency practitioner is referred to as the liquidator.

A typical insolvency proceeding under Romanian law has three stages:

- (i) the observation period;
- (ii) judicial reorganisation; and
- (iii) bankruptcy.

This is referred to as a “general proceeding”, although it may sometimes comprise of only two stages:

- (i) the observation period followed by judicial reorganisation; or
- (ii) the observation period followed by bankruptcy.

In either of these scenarios, the observation period will not exceed 12 months from the date of the opening of insolvency proceedings. Notwithstanding this, in practice, the courts often greatly exceed this limit, due to the lack of a sanction in the law.

In certain cases (such as, for instance, when the insolvent company has no assets or when its director(s) cannot be found), a “simplified insolvency proceeding” is used. In this case, insolvency proceedings consist of two stages: (i) an optional observation period (which must not exceed 20 days); and (ii) bankruptcy.

The six principal restructuring and insolvency regimes under Romanian law are:

- insolvency proceedings (judicial reorganisation (*reorganizare judiciară*) and bankruptcy (*faliment*));
- ad-hoc mandate;
- composition (*concordat preventiv*);
- insolvency of individuals/natural persons (*insolvența persoanelor fizice*);
- statutory/out-of-court liquidation; and
- enforcement.



Judicial reorganisation (*reorganizare judiciară*) and bankruptcy (*faliment*)

Insolvency proceedings can be commenced either by a voluntary application by the debtor, or as a result of a contentious request submitted by a creditor, such creditor's claim being at a minimum, a claim which is: (i) certain; (ii) liquid (determinable in cash); (iii) due payable; and (iv) of at least RON40,000 (~EUR8,400, GBP7,100 or USD9,200) in value. This threshold of minimum value is applicable also to a voluntary application made by the debtor. Judicial reorganisation is not mandatory and represents a benefit granted to an insolvent debtor to enable it to restructure its finances and/or operations and to continue as a viable business. As the primary objective of insolvency proceedings is to remedy the debtor's financial difficulties, following the observation period, judicial reorganisation would normally be the first phase of the insolvency proceedings. However, a debtor may be placed straight into bankruptcy proceedings in certain circumstances.

Usually, upon the court's acceptance of the initiation of the proceedings and the appointment of a provisional judicial administrator, an observation period ensues, during which the creditors' table (a document listing the claims of individual creditors) is drafted. The observation period ends with the publication of the final creditors' table (published after the insolvency judge rules on any and all motions against the various creditors' claims).

Judicial reorganisation is a rehabilitative process which applies to a debtor (who in this case must be a legal person) experiencing financial difficulties. Its purpose is to assist the debtor to pay its debts according to a debt payment schedule under a rescue plan (*plan de reorganizare*). The rescue plan sets out the principles that will govern the restructuring of the debtor's activities, a mandatory part of the plan being the inclusion of a repayment schedule.

Since the primary emphasis is on rescuing the debtor, the Insolvency Code allows for a lot of flexibility regarding the means of restructuring that can be chosen under the rescue plan (which is to be confirmed by the court, subsequent to its approval by the creditors' assembly). In practice, the most common rescue plans contemplate an operational and/or financial restructuring, as well as a decrease in assets and activities.

Either the debtor itself, or creditors (holding at least 20% of the claims registered in the final table of claims), or the judicial administrator may propose a rescue plan, no later than 30 days after a final table of creditors is published by the judicial administrator. The proposed plan is voted upon at a meeting of creditors. If the plan is approved by the creditors it will then need to be confirmed by the insolvency judge. The plan confirmed by the judge may be subject to subsequent changes provided that a voting and approval process is followed. Once a rescue plan is confirmed, no other plan can be proposed,

approved, voted upon or confirmed. A rescue plan, once implemented, can alter the rights of the creditors against the debtor. However, if the debtor subsequently enters into bankruptcy proceedings, the rights of the creditors listed under the final table of claims (ie prepared before the confirmation of the plan) are reinstated.

For the purpose of approving a rescue plan, the creditors who are entitled to vote on the rescue plan are divided into five different classes depending on the type of claim they hold. These classes are:

- (i) preference claims (ie claims benefiting from security, quasi security or any other legal privilege or preference);
- (ii) employee claims relating to wages;
- (iii) state budget claims (usually but not always limited to the claims of tax authorities);
- (iv) unsecured suppliers' claims without which the debtor's activity cannot continue and which cannot be replaced; and
- (v) other unsecured claims.

In order for a class to be deemed as having voted in favour of the rescue plan, a majority of votes (by value of claim) of the creditors composing such class is required. In case the plan is approved and confirmed, all creditors are bound by the plan, irrespective of their vote.

The insolvency judge will approve the rescue plan provided that the following conditions are cumulatively met:

- (i) at least half plus one of the classes of claims (or at least half of the classes, if there are an even number of classes) referred to above accepted the plan or are deemed to have accepted the plan, provided that at least one of the disadvantaged classes accepts the plan;
- (ii) creditors holding at least 30% of the total value of claims vote in favour of the rescue plan;
- (iii) each class with disadvantaged claims which has rejected the rescue plan will receive fair and equitable treatment under the plan (certain claims, including by way of example, claims which will be fully paid within 30 days from the confirmation of the rescue plan are not to be deemed as disadvantaged claims and accordingly, creditors holding such claims will be deemed as having accepted the rescue plan); and
- (iv) the plan complies with the formal conditions provided for under the Insolvency Code.

A class of claims will be disadvantaged if the rescue plan provides for at least one of the following amendments to be applied to any of the claims in that class: (i) a reduction in the value of the claim and/or its accessories (including interest and commissions); and/or (ii) a reduction of the security interests or a rescheduling of payments which disadvantages the creditor, without its consent.

A class will be deemed to have received fair and equitable treatment if the following cumulative conditions are met:

- (i) none of the classes of claims and none of the individual claims that reject the plan will receive less than what they would have received in the case of bankruptcy;
- (ii) no class or creditor will receive more than the amount which is owed cumulatively to that class or that creditor individually;
- (iii) if a disadvantaged category rejects the plan, no category of claims junior to that disadvantaged category shall receive more than what it would have received in the event of the debtor's bankruptcy; and
- (iv) the plan establishes the same treatment for each claim within the same class subject to the retention of any contractual preferences or priorities already existing, and the allowance of any express voluntary acceptance of less favourable terms by any claimant.





The decision of the insolvency judge to approve the rescue plan may be challenged by an interested creditor within seven days of the approval being communicated to that creditor. A creditor may challenge the rescue plan on the ground that it does not result in fair and equitable treatment for that creditor.

Bankruptcy represents a collective judicial winding-up procedure. Whenever:

- (i) the debtor has expressed its intention to enter into simplified insolvency proceedings;
- (ii) the debtor has not expressed an intention to reorganise;
- (iii) a rescue plan has not been proposed (or where it has been proposed, the confirmation set out above has not been obtained);
- (iv) the rehabilitation of the debtor is no longer possible because the obligations undertaken under the rescue plan have not been fulfilled;
- (v) a proposal of the judicial administrator to initiate bankruptcy proceedings has been approved; or
- (vi) at anytime during the observation period or during reorganisation of the debtor or after fulfilment of the payment obligations set out in the rescue plan, a creditor holding a claim exceeding RON40,000 which has been current, certain, liquid and due for more than 60 days (for requests submitted during the observation period, such term being calculated as of the date when it was recognised by the judicial administrator/insolvency judge), requires the opening of bankruptcy, the court may order the opening of bankruptcy proceedings. For clarification purposes, claims are deemed current if they are born after the opening of the general proceedings (either observation period or direct bankruptcy in simplified form) in which case, they are not registered into the table of creditors, but are to be paid immediately.

Since usually the main owner of current receivables, born after the initiation of an insolvency proceeding, is the State through the tax authority (Tax Authority) (tax liabilities continuing to accrue over time), the State/Tax Authority is the most likely creditor to initiate bankruptcy by using this route. Due to the delays and administrative requirements caused by the equal treatment of creditors principle, the actual rate of recovery by the State through this route has been found to be very low. Accordingly, by an Emergency Ordinance no. 88/2018 (**Emergency Ordinance**), the State proposed permitting a creditor of a current claim exceeding the threshold of RON 40,000 and due for more than 60 days to start a separate enforcement procedure for this amount against the debtor, hence jeopardising the chances of recovery of other creditors and paralysing the hierarchy of the creditor classes. As the Emergency Ordinance is an executive order, it is currently in force pending parliamentary approval (this process of parliamentary approval is ongoing). Interestingly, the version of the Emergency Ordinance approved by the Senate (one of the two chambers of the Romanian parliament) is a substantially amended draft of the Emergency Ordinance and thus, there is a likelihood that the Emergency Ordinance as finally approved and adopted by the Romanian parliament might be substantially different from the ordinance currently in force.

The main purpose of bankruptcy is to realise and distribute the debtor's estate to its creditors in order to satisfy its debts to the greatest extent possible. The final effect of the bankruptcy procedure consists of the deregistration of the debtor from the relevant trade register or other register where it is registered (ie where the debtor is a corporate entity it will be dissolved).

Ad-hoc mandate

This procedure, and the composition procedure discussed below, both apply to companies which are encountering financial difficulties but are not yet insolvent.

A debtor encountering financial difficulties is described by the Insolvency Code as a debtor which is able to cover its outstanding debts, but has little cash available in the short term and/or a high degree of indebtedness in the long term which may affect the performance of its contractual obligations (a **distressed company**).

The ad-hoc mandate is a confidential procedure initiated by a distressed company in which an ad-hoc attorney (*mandatar ad-hoc*) negotiates with the creditors in order to reach an agreement with one or more of them to resolve the distressed company's difficulties. The ad-hoc attorney is appointed by the court, following a request by the distressed company. The procedure must be kept confidential by all parties (including the court). The aim is to reach an agreement between the distressed company and one or more of its creditors within 90 days of the date on which the ad-hoc attorney is appointed. The negotiations may cover the partial or total release of debt, debt rescheduling, personnel dismissals, termination of certain agreements or other similar measures.

The granting of an ad-hoc mandate will not result in any suspension of enforcement proceedings, will not affect the accrual of interest and will not prevent the creditors from initiating insolvency proceedings against the distressed company (provided that the conditions for opening insolvency proceedings are met). Moreover, the distressed company will continue to operate as usual and its directors will maintain the right to manage the distressed company.

Although the ad-hoc attorney is appointed by the court (at the distressed company's request) to negotiate with the creditors, the ad-hoc attorney does not have any formal powers and his or her actions will not bind the creditors without their consent. However, the debtor will benefit from the protections provided for in an ad-hoc mandate agreement but only with respect to the creditors that have signed such an agreement.

The ad-hoc mandate procedure has the advantage of being flexible and confidential, but its impact may be limited in practice since a distressed company could instead simply appoint a consultant to negotiate with its creditors without invoking the court's assistance through the ad-hoc mandate procedure. Perhaps attributable to the ad-hoc mandate procedure's limited impact, we are not aware of any case law on the procedure, despite it being available as an option for more than ten years.

Composition (*concordat preventiv*)

The composition proceeding (*concordat preventiv*) is an agreement concluded between the distressed company and its creditors who hold at least 75% by value of the accepted and undisputed debts of the distressed company. Under the composition procedure, these creditors and the distressed company agree on a plan to restructure the distressed company's business and to repay its debts. It is a pre-emptive measure and a company cannot file an application for composition if it is in a state of insolvency (ie lacking liquidity to pay due receivables).

A distressed company wishing to benefit from a *concordat preventiv* must ask the court to appoint an insolvency practitioner to assume the role of a "conciliator". Within 30 days of the appointment of the conciliator, the distressed company and the conciliator must prepare the concordat offer (consisting of a draft composition agreement and a draft restructuring plan) and the list of creditors. This concordat/composition offer must then be: (i) included in a special public register held by the court; (ii) sent to each creditor through accepted means of service including electronic mail; and (iii) referred to (ie its existence must be noted) in the trade register. The distressed debtor and its creditors must subsequently negotiate and agree the content of the restructuring plan within a maximum of 60 days (calculated from the day on which the concordat offer is communicated to the creditors).

The distressed company may also ask the court to temporarily suspend any enforcement proceedings while the *concordat* offer is being analysed by the creditors. This temporary suspension, if approved by the court, will expire once the composition offer is accepted or rejected by the creditors. In broad terms, the court is likely to suspend enforcement proceedings where such a suspension is necessary for the debtor company to either: (i) preserve a right, which if lost could negatively affect the *concordat* offer; or (ii) prevent imminent and irremediable damage to the company's chances of restructuring. Each case is decided on its own merit, based on the specific facts of the case. A party affected by such a suspension may appeal the decision to temporarily suspend enforcement proceedings within five days of: (i) the court's decision (if the parties were summoned to the court hearing); or (ii) the communication of the court's decision to the party (if the parties were not summoned to the court hearing).

The composition agreement must be approved by creditors holding 75% by value of the total amount of the distressed company's accepted and undisputed debts. After the agreement is approved by the creditors, its compliance with the applicable legal requirements will be verified by the court. The approved and verified agreement will then be sent by the conciliator to the creditors and will be published in the trade register.

The court will verify and acknowledge the creditor approved composition agreement if:

- (i) the value of disputed and/or litigious debts does not exceed 25% of the total amount of the distressed company's debts; and
- (ii) the agreement has been approved by the creditors holding at least 75% of the total value of the distressed company's accepted and undisputed debts.

The accrual of interest, penalties or other expenses incurred in connection with the claims of the creditors signing the agreement will be suspended only if the relevant creditors consent in writing to such suspension, and their consent is mentioned in the composition.

By acknowledging the composition agreement, the court will cause all enforcement measures taken by the creditors (who entered into the composition agreement) against the distressed company to be suspended. Moreover, at the request of the conciliator and, if the debtor company offers guarantees to the creditors who have not approved the concordat/composition agreement, the court may force the creditors who have not approved the composition agreement to accept a rescheduling of their debts for a period not exceeding 18 months from their contractual maturity, during which period, no interest or other expenses will accrue. The rescheduling of debts is not applicable to qualified financial contracts, or netting under qualified financial contracts, or netting arrangements.

While a court-acknowledged composition agreement is being implemented, insolvency proceedings against the distressed company may not be commenced. However, because a company cannot apply for a composition agreement if it is in a state of insolvency, it is not possible for a company to apply for such a procedure in order to avoid insolvency proceedings. Dissenting creditors may request the annulment of the composition agreement on grounds of absolute nullity (*motive de nulitate absoluta*), provided that they apply for such annulment within six months of the date that the court formally acknowledged the composition agreement.

The composition agreement must include a recovery plan addressing at a minimum: (i) the proposed measures for restructuring the debtor's activity (eg restructuring the management, amendment of the financial structure, staff reduction or other similar measures); and (ii) the different options that could enable the debtor to overcome its financial difficulties, such as a debt to equity swap, provision of shareholder loans or bank loans etc. The financings entered into during the implementation of the composition will be granted priority repayment status (after any procedural expenses).

The term for the payment of the claims included in the composition agreement is 24 months as of the date that the court's decision to recognise the *concordat* becomes enforceable, though it can be extended by another 12 months. Within the first year, the debtor must pay at least 20% of the value of the composition creditors' claims.



Voluntary liquidation

The voluntary liquidation procedure provided for under the Romanian Company Law No. 31 of 16 November 1990, as republished and subsequently amended (the **Company Law**), does not necessarily relate to insolvent companies and therefore does not fall under the Original Regulation or the Recast Regulation (as defined below). This procedure is implemented by the company's shareholders passing a resolution for the dissolution of the company. In certain cases (eg if the company's share capital has fallen below the minimum required threshold and has not been replenished or if other legal requirements are not met), any interested party (including the Office for Trade Register) may file a petition for the dissolution of the company. In such case, if the criteria for insolvency are met, the court appoints a liquidator who will undertake the liquidation of the assets.

The shareholders' resolution relating to the dissolution is filed with the trade register and published in the *Official Gazette*. Within 30 days from the publication in the *Official Gazette*, the creditors or any other interested parties are allowed to file a complaint objecting to the process. Subsequent to the expiry of this time period, and provided that no complaint is filed (or that such complaint is finally rejected in court) the dissolution is commenced.

Upon the initiation of the voluntary liquidation procedure, the company's shareholders at a general meeting will appoint a liquidator who must prepare an inventory of the company's assets (as well as a balance sheet setting out the company's assets and liabilities).

The company's final balance sheet will be submitted to the trade register and published in the *Official Gazette*, if the company is organised as a joint stock company, or on the website of the trade register, if the company is organised as a limited liability company. The liquidator will then file an application for de-registration of the company from the trade register and the company will be dissolved.

Case law indicates that, if the liquidation of a company's assets is initiated as a result of voluntary liquidation proceedings and a court decision on the opening of the insolvency proceedings is concurrently issued, the provisions of the Insolvency Code on the liquidation of assets will be applicable since the interests of the company's creditors must prevail over the shareholders' interests (ie the company will be subject to insolvency proceedings). If the company is in a state of insolvency, the liquidator must request the opening of the insolvency proceedings; and the creditors are also able to ask for the commencement of such proceedings.

The procedure for the dissolution of a company through a voluntary liquidation is relatively simple. However, in practice it is often time-consuming due to the time it takes the Tax Authority to perform the investigations they are required to make with a view to having a company wound up (in the absence of which the final balance sheet cannot be submitted to the relevant trade register office).



Natural persons insolvency

The Romanian law regulating the insolvency of individuals/natural persons was adopted in 2015 (Law 151/2015 regarding insolvency of individuals, hereinafter **Law 151**), however it only entered into force starting on 1 January 2018, due to administrative and organisational shortcomings. Even after its entry into force, there have been very few cases as individuals are rather wary of using such a method to restructure their personal debt. Accordingly, the following considerations are mostly theoretical, and have not been derived from case-law or sanctioned by the courts.

The Law 151 provides three forms for the restructuring of a personal debt – one administrative and two judicial (ie involving the intervention of an insolvency judge).

These forms are:

- (i) insolvency based on a repayment plan;
- (ii) insolvency through asset liquidation; and
- (iii) simplified insolvency.

The first procedure is an administrative procedure, which is run by an insolvency commission (the **Commission**), a quasi-jurisdictional body formed at the level of each county. An insolvent debtor for the purposes of this procedure is an individual that has not paid any of his/her creditors for at least 90 days. As a pre-requisite, an insolvent debtor should notify the Commission 30 days before the actual application for this procedure. Once the application is filed, the Commission analyses it and if the conditions are met appoints a judicial administrator from the list of approved administrators.

The judicial administrator notifies the creditors and drafts a table of creditors based on their statements of claims. Within 30 days of notifying the creditors, the judicial administrator drafts a repayment plan and notifies it to the creditors, who may approve it with at least 55% of the claims and at least 30% of the secured claims. The repayment plan may span a maximum of five years and contain measures such as sale of receivables held by the debtor, sale of assets, increase of income by professional reorientation, etc. Upon its completion, the debtor may request the competent court to issue a decision of clearing all residual debts (which were not covered by the plan).

In case an application for insolvency based on a repayment plan is rejected by the Commission, or the plan is rejected by the creditors or it fails after its implementation, the debtor can apply directly to the insolvency judge to open the insolvency through asset liquidation. On receipt of such an application, the court appoints a liquidator from a list of judicial administrators and liquidators, who will notify the creditors and, based upon a valuation of the enforceable assets (the valuation of enforceable assets excludes personal assets which are necessary for the minimum subsistence of the debtor and his/her family) held by the debtor draft a distribution plan. The assets are sold according to the various provisions regulating the procedure of enforcement. Upon the sale of all enforceable assets (which exclude assets for the immediate survival of the debtor and his/her family), the procedure is closed and the debtor can ask the court to clear all residual debt, uncovered by the sold assets.

The simplified procedure may be employed when:
(i) the maximum amount of debt is ten times the statutory minimum wage in Romania; (ii) the debtor does not have any enforceable assets; and (iii) the debtor exceeds the legal retirement age, or has lost at least half of his/her work capacity. In this case, the debtor may submit an application to the Commission, which, if certain conditions are met, submits an application to the court. If the court approves the petition, the Commission notifies the debtor that for three years following the date of such notification by the Commission, he/she should: (i) pay current debts (debts incurred after the initiation of the procedure) as they become due; (ii) abstain from borrowing monies; and (iii) provide an annual account of his/her estate (this is to ensure that any windfall events such as an inheritance or a lottery win are captured). Upon the expiry of the prescribed three year period, the debtor can apply to the court for the erasure of the residual debt.

Enforcement

Enforcement is the general procedure which may be initiated by an individual creditor for the purpose of enforcing its rights (either secured or unsecured) against a debtor. Due to its individual nature, enforcement is the complete opposite of insolvency proceedings given that only the creditor or creditors who have initiated the enforcement benefit from the realisation of assets. Clearly, it may happen that two or more creditors pursue the same assets; this, however, represents an exceptional situation and does not constitute a collective proceeding. In such a case, the enforcement officer shall distribute the proceeds of any forced sale according to the hierarchy of preference provided for in the Civil Procedure Code.

The directors of the company maintain their right to manage the company, thus making it susceptible to an increase in its financial liabilities, and no insolvency officeholder is appointed to control the business.

The rule is that the enforcement procedure is automatically stayed if the company or any creditor files for insolvency after the enforcement has commenced, in order to respect the principle of equal treatment of creditors. Nevertheless, if certain conditions are met, any creditor of a current claim may start the enforcement also during insolvency, as shown above.

European Insolvency Regulation

The EU Regulation on Insolvency Proceedings 2015 (Regulation (EU) 2015/848) (the **Recast Regulation**) applies to all proceedings opened on or after 26 June 2017. Its predecessor, the EC Regulation on Insolvency Proceedings 2000 (Regulation (EC) 1346/2000) (the **Original Regulation**) continues to apply to all proceedings opened before 26 June 2017. One of the key changes in the Recast Regulation is that it brings into scope certain pre-insolvency “rescue” proceedings and these are now listed alongside the traditional insolvency procedures in Annex A to the Recast Regulation. The Recast Regulation retains the split between main and secondary/territorial proceedings, but secondary proceedings are no longer restricted to a separate list of winding-up proceedings – secondary proceedings can now be any of those listed in Annex A. By contrast, the Original Regulation listed main proceedings in Annex A and secondary proceedings (which were confined to terminal proceedings) in Annex B.

Of the above restructuring and insolvency regimes, judicial reorganisation and bankruptcy proceedings were available as main proceedings under the Original Regulation and only bankruptcy proceedings were available as secondary proceedings under the Original Regulation. Under the Recast Regulation, insolvency proceedings, judicial reorganisation, bankruptcy proceedings and *concordat preventiv* are listed in Annex A.

Key contacts

This factsheet has been prepared with the assistance of Alexandru Stănoiu at Radu Tărăcilă Pădurari Retevoescu SCA. Due to the general nature of its contents, it should not be relied or acted upon in any specific situation without appropriate legal advice. If you require advice on any of the matters raised in this document, please call any of our partners or your usual contact at Allen & Overy.

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