The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Romania: Restructuring & Insolvency

This country-specific Q&A provides an overview of the legal framework and key issues surrounding restructuring and insolvency in Romania.

This Q&A is part of the global guide to Restructuring & Insolvency.

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1. **What forms of security can be granted over immovable and movable property? What formalities are required and what is the impact if such formalities are not complied with?**

   Pursuant to Romanian insolvency legislation, secured receivables are those receivables accompanied by a preference right over the assets from the debtor's patrimony regardless of whether this is a main debtor or a third-party guarantor towards the creditor benefiting from the security. Retention title clauses, redemption pacts or receivable assignments concluded as securities are considered securities assimilated to mortgages. Preference rights imply the registration with the public registries (for

example, the land book of the immovable in the case if the immovable assets, the electronic archive of for security interests in movable property), except for pledge without dispossession. The sanction for the failure to fulfil the formality of registration with the public registries, when the law requires so, is the lack of enforceability of the security on third parties.

2. **What practical issues do secured creditors face in enforcing their security (e.g. timing issues, requirement for court involvement)?**

The insolvency procedure is a concurrent procedure, so that also secured creditors may recover their receivable only in the conditions of the insolvency law, any enforcement procedure existing at the moment of opening of the insolvency procedure being stayed *de jure*. Sometimes this may imply a longer time for the recovery of the receivables than in individual enforcement, but the insolvency legislation provides as remedy for certain situations in which the court of law may order the lifting of the above-mentioned stay and the immediate sale, in the same insolvency procedure, of the asset that is the object of the security, provided that the proceeding expenses are paid.

3. **What is the test for insolvency? Is there any obligation on directors or officers of the debtor to open insolvency procedures upon the debtor becoming distressed or insolvent? Are there any consequences for failure to do so?**

Any creditor having a certain, liquid and exigible receivable for more than 60 days and higher than Lei 40,000 may request the insolvency of a company. If these conditions are met, the law does not provide for other restrictions also in what regards the capacity of the creditor that may request the opening of a procedure of insolvency of a company. In the same situation the debtor also may request its own insolvency, and the directors must request the opening of an insolvency procedure in a term of maximum 6 months from the date when payments cease, and the sanction may be

even a criminal one, the failure to declare the insolvency in the legal term being possible to be considered, in certain condition, the crime of simple bankruptcy. There is, of course, also the risk of a civil liability for the failure to fulfil this obligation.

4. **What insolvency procedures are available in the jurisdiction? Does management continue to operate the business and/or is the debtor subject to supervision? What roles do the court and other stakeholders play? How long does the process usually take to complete?**

After the date of opening of the insolvency procedure, a period named the observation period follows, in which the official receiver analyses the legal and patrimony situation of the company for determining whether there are real perspectives to rescue the company based on a reorganization plan or if the company should enter into bankruptcy. The opening of a simplified procedure of bankruptcy may be ordered also directly if a series of conditions expressly provided by the law (lack of assets, absence of the reorganization chances) are met. At the same time, the bankruptcy procedure may be opened also as a result of the failure of a reorganization plan. From the date of opening of the insolvency procedure, the statutory management ceases to have powers and duties, and the company will be administered by a special administrator appointed by the shareholders (in exceptional situations and strictly provided by the law, the debtor's right of administration may be lifted, in which case the company will be administered by the official receiver). Nevertheless, even in the case in which the administration right is not lifted, the official receiver supervises the debtor's activity. The courts of law have under the law the power to exercise a legality control on the measures taken in the procedure. To this end, interested persons may address to syndic judges for the analysis of the legality of the challenged measures. At the same time, aspects relating to the opportunity of conclusion of certain deeds are under the opportunity control of the creditors summoned by the official receiver in the creditors' meeting. In terms of period, the law provides that the observation period may not be longer than one year, and if a reorganization plan is proposed, this may be performed for maximum three years, with the possibility to prolong it for another year with the creditors' consent. In what regards the bankruptcy, so if a reorganization plan is not proposed or the proposed plan fails, the law does not provide for a maximum term in

which the procedure must be completed. Thus, a bankruptcy procedure may take as long as necessary for the liquidation of all the assets and recovery of all receivables.

5. **How do creditors and other stakeholders rank on an insolvency of a debtor? Do any stakeholders enjoy particular priority (e.g. employees, pension liabilities)? Could the claims of any class of creditor be subordinated (e.g. equitable subordination)?**

The order of reimbursement of the creditors is strictly provided by the law. Thus, if amounts of money resulted from the sale of an asset that is the object of a mortgage are distributed to the creditors, the payment order is the following: i) the procedure expenses, including the sale fees, the costs that have been paid in advance for the preservation of the asset, the insolvency practitioner's fee, ii) the secured creditors' receivables arisen during the insolvency procedure, iii) secured creditors' receivables. If amounts obtained from the sale of assets that are free of any encumbrances are distributed, the order of payment of the receivables is the following: i) procedure fees and expenses, including the expenses necessary for the preservation and administration of the assets from the debtor's estate for continuation of business ii) the receivables deriving from financing granted in the insolvency period iii) salary receivables iv) the receivables arisen from the continuation of the debtor's activity, after the date of opening of the insolvency procedure v) budgetary receivables vi) unsecured receivables vii) subordinated receivables.

6. **Can a debtor's pre-insolvency transactions be challenged? If so, by whom, when and on what grounds? What is the effect of a successful challenge and how are the rights of third parties impacted?**

Yes, official receivers or the liquidators may file with syndic judges claims for the annulment of the debtors' fraudulent deeds or operations, concluded to the detriment of the creditors' rights, at the latest in the last 2 years prior to the opening of the insolvency procedure, and namely:

a) free transfer deeds
b) operations performed in 6 months prior to insolvency, in which the what the debtor offers obviously exceeds what this receives
c) deeds concluded with all the involved parties' intention to prevent the creditors from pursuing certain assets or to impair the creditors' rights
d) deeds for the transfer of the ownership to a creditor for the payment of a prior debt or to its benefit, performed in the 6 months prior to the opening of the procedure, if the amount that the creditor could use in case of the debtor's bankruptcy is lower than the value of the transfer deed
e) establishing of a security for a receivable that was an unsecured receivable in the 6 months prior to the opening of the procedure
f) anticipated payments of the debts made in the 6 months prior to the opening of the procedure, if their maturity was established for a date that would be prior to the opening of the procedure
g) transfer deeds or assuming of obligations performed by the debtor in a period of 2 years prior to the procedure opening date with the intention to hide/delay the insolvency state or to defraud a creditor.

Deeds that the debtor has concluded in the 2 years prior to the opening of the insolvency procedure with certain persons who could hold in a way or another a position of control of the debtor may be also annulled. Nevertheless, the law institutes also exceptions, the deeds of transfer with patrimonial character concluded by the debtor in the normal course of its current business or the deeds concluded in good faith by the debtor in the insolvency prevention procedure, such as the arrangement with creditors or the ad-hoc mandate, not being possible to be annulled. If such a claim is allowed, the third party acquiring the asset will have to return the asset, and, if the asset no longer exists, this will have to return its value. Nevertheless, the acquiring third party acting in good faith who has returned to the debtor's estate the asset or the value of the asset that has been transferred to it by the debtor will have against the debtor a receivable equal to the paid price, to which value may be added by the possible investments that the third party has made – this amount may be further registered with the lists of receivables and will participate in distributions of amounts. But, if this third person has acted in bad faith, then it will only have a right of claim equal to only the price paid, and this will be considered a subordinated receivable.

7. **What form of stay or moratorium applies in insolvency proceedings against the continuation of legal proceedings or the enforcement of creditors' claims? Does that stay or moratorium have extraterritorial effect? In what circumstances may creditors benefit from any exceptions to such stay or moratorium?**

In certain conditions, during the conducting of the insolvency prevention proceedings, which we shall describe herein below in the next item, a provisional stay of enforcements is possible. At the same time, from the opening date of the insolvency procedure, all individual enforcement proceedings shall be stayed *de jure*. Practically, all creditors may enforce their receivables only in the insolvency procedure, without the creditors' headquarters or other aspects relating to territoriality having any relevance. In certain conditions, creditors having a mortgage right may request the lifting of such stay and the immediate sale of the asset that is the object of their security, but in the insolvency procedure as well and provided that the procedure expenses have been paid.

8. **What restructuring and rescue procedures are available in the jurisdiction, what are the entry requirements and how is a restructuring plan approved and implemented? Does management continue to operate the business and/or is the debtor subject to supervision? What roles do the court and other stakeholders play?**

Romanian legislation provides for the possibility of initiation of insolvency prevention proceedings that may lead to understandings with the creditors in a regulated framework, and we are referring here to the procedure of the arrangement with creditors and of the ad-hoc mandate. In the procedure of the arrangement with creditors practically an agreement is concluded by and between the debtor and the creditors having at least 75% of the value of the accepted and uncontested receivables. This agreement must be homologated by the syndic judge. In other words, besides an insolvency procedure, the debtor proposes a plan for recovery and

collection of the receivables of those creditors, and these accept to support the debtor's efforts to overcome the difficulty this is in. Nonetheless, although there is a legislative framework for such a restructuring proceeding outside insolvency, most of the companies would rather resort directly to the judicial reorganization procedure.

However, the most frequent proceeding is the formal and judicial means in front of the court of law of recovery of companies in insolvency. To this end, Romanian legislation regulates judicial reorganization, based on a plan that may be proposed by the debtor, the creditors or the official receiver, voted by the creditors and confirmed by the judge. In principle, any company against which a general insolvency procedure has been opened may enter into a judicial reorganization procedure, provided that this has not been subject to an insolvency procedure in an interval of 5 years prior to the opening of the insolvency procedure. To be admitted, a reorganization plan must be viable, voted by at least half of the classes of creditors, and the creditors accepting the plan must own at least 30% of the total value of the receivables admitted in the final table. The reorganization procedure, after a plan is confirmed, is usually managed by the debtor by the special administrator, under the supervision of the official receiver. Exceptionally, companies may be managed also by official receivers in certain conditions provided by the law, but such situations are rare. Syndic judges exercise a legality control when certain disputable matters are referred to them by the interested persons, and, in the absence of filed claims, the court receives periodically the activity reports containing the ordered measures and the stage of execution of the reorganization plan. Further, also in the reorganization period the creditors' meeting exercises an opportunity control on the concrete measures adopted for the implementation of the plan.

9. Can a debtor in restructuring proceedings obtain new financing and are any special priorities afforded to such financing (if available)?

A company in insolvency may take an emergency credit in the observation period to preserve the assets, with the creditors' consent or even with the syndic judge's consent. Afterwards, in the reorganization period financings may be obtained, the condition being that such financings are provided by the reorganization plan. Both

forms of financing obtained by the company in the insolvency are returned with priority, the law instituting in fact a super priority in this case.

10. Can a restructuring proceeding release claims against non-debtor parties (e.g. guarantees granted by parent entities, claims against directors of the debtor), and, if so, in what circumstances?

By the reorganization plan, creditors may waive certain rights of claim they have against the debtor, the condition being that the plan provide for such a thing expressly, and such creditors manifest their consent to this end. Transactions with the creditors' approval and the syndic judge's approval may be also concluded.

11. Is it common for creditor committees to be formed in restructuring proceedings and what powers or responsibilities to they have? Are they permitted to retain advisers and, if so, how are they funded?

In most of the insolvency proceedings a creditors' committee formed of 3 or 5 creditors is appointed, with a structure that would be representative for as many classes of creditors as possible. The powers and duties of the creditors' committee are the following: i) to analyse the debtor's situation and to make recommendations to the creditors' meeting with regard to the continuation of the debtor's activity and to the proposed reorganization plans; ii) to negotiate the appointment conditions with the official receiver or with the judicial liquidator who wants to be appointed by the creditors in the file; iii) to take note of the reports prepared by the official receiver or by the judicial liquidator, to analyse them and, if the case, to challenge them iv) to prepare reports, which to present to the creditors' meeting regarding the measures taken by the official receiver or by the judicial liquidator and their effects and to propose, justifiably, also other measures; v) to request the lifting of the debtor's right of administration; vi) to introduce claims for the annulment of fraudulent deeds or operations to the creditors' detriment, if such claims have not been filed by the official

receiver or by the judicial liquidator. Usually, the creditors' committee does not appoint its own advisors, but this may appoint them with the consent of the creditors' committee.

12. **How are existing contracts treated in restructuring and insolvency processes? Are the parties obliged to continue to perform their obligations? Will termination, retention of title and set-off provisions in these contracts remain enforceable? Is there any an ability for either party to disclaim the contract?**

When the insolvency procedure is opened, the ongoing agreements to which a debtor is a party are maintained, any contractual clauses of termination of the ongoing agreements, of forfeiture of the term or declaration of anticipated exigibility for the reason of opening of the procedure being null. For maximizing the debtor's estate, the official receiver is the one entitled to appraise if an ongoing agreement should be maintained or terminated, which right may be exercised in a term of 3 months from the insolvency procedure opening date – nonetheless, an agreement executed essentially may not be terminated, there always being the risk of payment of indemnities. The same term applies also to the co-contracting party for the exercise of its right to notify the official receiver for pronouncing on the maintaining or termination of an agreement, in the absence of an answer in a term of 30 days the agreement being considered terminated. The insolvency law provides for a series of special rules applicable to certain categories of ongoing agreements: credit agreement, employment agreement, lease agreement, a series of variants of the sale-purchase agreement, a distinct situation being that of the leasing and utility supplier agreements and, at the same time, termination and set-off of receivables may be applied, and if an agreement is not terminated, the parties will execute their assumed obligations. The opening of an insolvency procedure does not affect the right of a creditor to invoke the set-off of its receivable with the one of the debtor on him, when the legal conditions are met. The reorganization plan may provide both for the sale of assets and the sale of business, the condition being that the sale is made in the conditions approved by the creditors. At the same time, under the law, the assets sold in the insolvency procedure are purchased by the buyer free of any encumbrances, such as privileges, mortgages, pledges or retention rights, seizures of any kind, except for the precautionary

measures ordered in the criminal trial for special confiscation and/or extended confiscation. As an exception from the general provisions, mortgages shall be deregistered only under the sale deed signed by the official receiver/judicial liquidator, no express agreement on the secured creditor's part being necessary to this end. There is the possibility to release a mortgage without the creditors' consent only in the conditions in which the reorganization plan is approved by the vote on classes and is confirmed by the syndic judge subsequently or by the sale of the asset according to a sale regulation approved by the creditors. Adjudication on the account of the receivable and pre-package sale are possible, but they are not frequent in practice.

13. What conditions apply to the sale of assets/the entire business in a restructuring or insolvency process? Does the purchaser acquire the assets "free and clear" of claims and liabilities? Can security be released without creditor consent? Is credit bidding permitted? Are pre-packaged sales possible?

When the insolvency procedure is opened, the ongoing agreements to which a debtor is a party are maintained, any contractual clauses of termination of the ongoing agreements, of forfeiture of the term or declaration of anticipated exigibility for the reason of opening of the procedure being null. For maximizing the debtor's estate, the official receiver is the one entitled to appraise if an ongoing agreement should be maintained or terminated, which right may be exercised in a term of 3 months from the insolvency procedure opening date – nonetheless, an agreement executed essentially may not be terminated, there always being the risk of payment of indemnities. The same term applies also to the co-contracting party for the exercise of its right to notify the official receiver for pronouncing on the maintaining or termination of an agreement, in the absence of an answer in a term of 30 days the agreement being considered terminated. The insolvency law provides for a series of special rules applicable to certain categories of ongoing agreements: credit agreement, employment agreement, lease agreement, a series of variants of the sale-purchase agreement, a distinct situation being that of the leasing and utility supplier agreements and, at the same time, termination and set-off of receivables may be applied, and if an agreement is not terminated, the parties will execute their assumed obligations. The opening of an insolvency procedure does not affect the right of a creditor to invoke the set-off of its

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14. What duties and liabilities should directors and officers be mindful of when managing a distressed debtor? What are the consequences of breach of duty? Is there any scope for other parties (e.g. director, partner, shareholder, lender) to incur liability for the debts of an insolvent debtor?

Any person who has contributed to the occurrence, creation or development of the state of insolvency of a company by the commission of certain deed expressly provided by the insolvency law may be held liable civilly by being obliged by the syndic judge to cover a part of or even all the liabilities of the insolvent company, without exceeding the damage caused by such deed. Thus, the liability for a company becoming insolvent is not limited only to the members of the company's management bodies, but it may be entailed against any person proven to have committed at least one of the deeds that the law indicates as causing insolvency. Obviously, in certain situations and for certain deeds, the law institutes even criminal liability.

15. **Do restructuring or insolvency proceedings have the effect of releasing directors and other stakeholders from liability for previous actions and decisions?**

Once an insolvency procedure completed, no claim for tort liability may be filed against the bodies who have managed the company before insolvency.

16. **Will a local court recognise concurrent foreign restructuring or insolvency proceedings over a local debtor? What is the process and test for achieving such recognition? Has the UNCITRAL Model Law on Cross Border Insolvency been adopted or is it under consideration in your country?**

Yes, there is the possibility to have a foreign decision recognized, if certain conditions provided by the law are met, and, in essence, there must be a reorganization procedure pending before the courts of law of the foreign state and reciprocity in what regards the effects of the foreign decisions between Romania and the state of the court that has delivered the decision. The foreign procedure will be recognized as a main foreign procedure if this is conducted in a foreign state in which the debtor has the centre of its main interests or as a secondary foreign procedure if this is conducted in a foreign state in which the debtor has a registered office. The Romanian law has adopted very many provisions from the UNCITRAL rules.

17. **Can debtors incorporated elsewhere enter into restructuring or insolvency proceedings in the jurisdiction?**

Companies may resort to the insolvency procedures regulated in Romania, but only if they have their headquarters here. If otherwise, the insolvency procedure opened in Romania will be subordinated to the insolvency procedure opened in the state where their headquarters are.

18. How are groups of companies treated on the restructuring or insolvency of one of more members of that group? Is there scope for cooperation between office holders?

Regulation in the area of insolvency of groups of companies is based on rules providing for the “consolidation” of the insolvency procedures opened against the members and provisions regarding their “coordination”. Consolidation implies that all the procedures opened against the companies that are part of a group be reunited in front of one court and the same insolvency practitioner be appointed to administer the group’s insolvency procedure. The second component implies the regulation of mechanisms of cooperation and coordination of the insolvency procedures initiated against members of the group of companies. The insolvency law encourages communication of information and it even obliges insolvency practitioners to cooperate as much as possible based on a protocol for the integrated performance of the economic, legal and operational activities at the group’s level, as well as by the granting of the right to participate in the creditors’ meetings or the creditors’ committees of any of the group members. Thus, these measures may lead to the improvement of the economic decisions made in the insolvency proceedings and to the avoidance of making of contradictory decisions at the level of the group of companies.

19. Is it a debtor or creditor friendly jurisdiction?

Romanian jurisdiction is a balanced one. The purpose of the insolvency law is to institute a collective procedure to cover the distressed debtor’s liabilities, obviously by relating to its capacity to fulfil its obligations by the assets at its disposal, and with the granting, when possible of the chance of recovery. Thus, on the one hand, the Romanian legislation in the matter of insolvency grants the debtor the necessary protection for recovery, and, at the same time, it institutes for creditors certain rights allowing them to participate in the decision-making process with regard to the aspects related to opportunity. At the same time, for guaranteeing the conducting of a legal and balanced procedure, the law institutes clear mechanisms by which the court of law controls the legality of the measures taken either by the debtor or the creditors or by

the official receiver or judicial liquidator.

20. Do sociopolitical factors give additional influence to certain stakeholders in restructurings or insolvencies in the jurisdiction (e.g. pressure around employees or pensions)? What role does the state play in relation to a distressed business (e.g. availability of state support)?

In principle, the state offers protection to employees, there being a special fund that may be accessed for the payment of salary receivables. At the same time, there is also a certain determinable tendency on the state's part to create a certain legislative framework slightly favouring budgetary creditors – quite relatively recently there have been amendments that have caused confusions regarding the possibility for budgetary creditors to execute their receivables individually, separately from the insolvency procedure.

21. What are the greatest barriers to efficient and effective restructurings and insolvencies in the jurisdiction? Are there any proposals for reform to counter any such barriers?

At present, the main barrier in what regards the reorganization chances is quite the companies' managements that, most of the times, either resort too late to a restructuring procedure and in many cases even after having tried their own recovery measures, but which, unfortunately, in many situations, do nothing else but create financial imbalances at the company's level, such as, for example, financing of long-term investments with short-term liquidities or over-indebtedness of the company. Another important aspect is relating to taxation, reduction of the receivables by the reorganization plan generates new tax obligations and, at the same time, there are serious restrictions regarding the purchase of the budgetary receivables, as only the par value price is accepted. Currently, there are no clear intentions with regard to the amendment of the insolvency legislation, there being only certain discussions regarding the European directive proposal on increasing the chances for reorganization

of companies.